SUPREME COURT OF THE UNITED STATES

No. 90–1424

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, PETITIONER *v.* DEFENDERS OF WILDLIFE ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 12, 1992]

JUSTICE STEVENS, concurring in the judgment.

Because I am not persuaded that Congress intended the consultation requirement in §7(a)(2) of the Endangered Species Act of 1973 (ESA), 16 U. S. C. §1536(a)(2), to apply to activities in foreign countries, I concur in the judgment of reversal. I do not, however, agree with the Court's conclusion that respondents lack standing because the threatened injury to their interest in protecting the environment and studying endangered species is not "imminent." Nor do I agree with the plurality's additional conclusion that respondents' injury is not "redressable" in this litigation.

In my opinion a person who has visited the critical habitat of an endangered species, has a professional interest in preserving the species and its habitat, and intends to revisit them in the future has standing to challenge agency action that threatens their destruction. Congress has found that a wide variety of endangered species of fish, wildlife, and plants are of "aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U. S. C. §1531(a)(3). Given that finding, we have no license to demean the importance of the interest that particular individuals may have in observing any species or its habitat, whether those individuals are motivated by aesthetic enjoyment, an interest in professional research, or an economic interest in preservation of the species. Indeed, this

Court has often held that injuries to such interests are sufficient to confer standing,[1] and the Court reiterates that holding today. See *ante*, at 6.

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[1]See, *e.g.* . *Sierra Club* v. *Morton*, 405 U. S. 727, 734 (1972); *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U. S. 669, 686–687 (1973); *Japan Whaling Assn.* v. *American Cetacean Society*, 478 U. S. 221, 230–231, n. 4 (1986).

The Court nevertheless concludes that respondents have not suffered "injury in fact" because they have not shown that the harm to the endangered species will produce "imminent" injury to them. See *ante*, at 7–8. I disagree. An injury to an individual's interest in studying or enjoying a species and its natural habitat occurs when someone (whether it be the government or a private party) takes action that harms that species and habitat. In my judgment, therefore, the "imminence" of such an injury should be measured by the timing and likelihood of the threatened environmental harm, rather than—as the Court seems to suggest, *ante*, at 8–9, and n. 2—by the time that might elapse between the present and the time when the individuals would visit the area if no such injury should occur.

To understand why this approach is correct and consistent with our precedent, it is necessary to consider the purpose of the standing doctrine. Concerned about "the proper—and properly limited—role of the courts in a democratic society," we have long held that "Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party." *Warth* v. *Seldin*, 422 U. S. 490, 498–499 (1975). The plaintiff must have a "personal stake in the outcome" sufficient to "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). For that reason, "[a]bstract injury is not enough. It must be alleged that the plaintiff `has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct. . . . The injury or threat of injury must be both `real and immediate,' not `conjectural,' or `hypothetical.'" *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974) (quoting *Golden* v. *Zwickler*, 394 U. S. 103, 109–110 (1969)).

Consequently, we have denied standing to plaintiffs whose likelihood of suffering any concrete adverse effect from the challenged action was speculative. See, *e.g.*, *Whitmore* v. *Arkansas*, 495 U. S. 149, 158–159 (1990); *Los Angeles* v. *Lyons*, 461 U. S. 95, 105 (1983); *O'Shea*, 414 U. S., at 497. In this case, however, the likelihood that respondents will be injured by the destruction of the endangered species is not speculative. If respondents are genuinely interested in the preservation of the endangered species and intend to study or observe these animals in the future, their injury will occur as soon as the animals are destroyed. Thus the only potential source of "speculation" in this case is whether respondents' intent to study or observe the animals is genuine.[2] In my view, Joyce Kelly and Amy Skillbred

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[2]As we recognized in *Sierra Club* v. *Morton*, 405 U. S., at 735, the impact of changes in the aesthetics or ecology of a particular area does "not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use [the area,] and for whom the aesthetic and recreational values of the area will be lessened . . . ." Thus, respondents would not be injured by the challenged projects if they had not visited the sites or studied the threatened species and habitat. But, as discussed above, respondents did visit the sites; moreover, they have expressed an intent to do so again. This intent to revisit the area is significant evidence tending to confirm the genuine character of respondents' interest, but I am not at all sure that an intent to revisit would be indispensable in every case. The interest that confers standing in a case of this kind is comparable, though by no means equivalent, to the interest in a relationship among family members that can be immediately harmed by the death of an absent member, regardless of when, if ever, a family reunion is planned to occur. Thus, if the facts of this

have introduced sufficient evidence to negate petitioner's contention that their claims of injury are "speculative" or "conjectural." As JUSTICE BLACKMUN explains, *post*, at 3, a reasonable finder of fact could conclude, from their past visits, their professional backgrounds, and their affidavits and deposition testimony, that Ms. Kelly and Ms. Skillbred will return to the project sites and, consequently, will be injured by the destruction of the endangered species and critical habitat.

The plurality also concludes that respondents' injuries are not redressable in this litigation for two reasons. First, respondents have sought only a declaratory judgment that the Secretary of the Interior's regulation interpreting §7(a)(2) to require consultation only for agency actions in the United States or on the high seas is invalid and an injunction requiring him to promulgate a new regulation requiring consultation for agency actions abroad as well. But, the plurality opines, even if respondents succeed and a new regulation is promulgated, there is no guarantee that federal agencies that are not parties to this case will actually consult with the Secretary. See *Ante*, at 12–14. Furthermore, the plurality continues, respondents have not demonstrated that federal agencies can influence the behavior of the foreign governments where the affected projects are located. Thus, even if the agencies consult with the Secretary and terminate funding for foreign projects, the foreign governments might nonetheless pursue the projects and jeopardize the endangered species. See *Ante*, at 15. Neither of these reasons is persuasive.

We must presume that if this Court holds that §7(a)(2) requires consultation, all affected agencies would

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case had shown repeated and regular visits by the respondents, cf. *ante*, at 1–2 (Opinion of KENNEDY, J.), proof of an intent to revisit might well be superfluous.

abide by that interpretation and engage in the requisite consultations. Certainly the Executive Branch cannot be heard to argue that an authoritative construction of the governing statute by this Court may simply be ignored by any agency head. Moreover, if Congress has required consultation between agencies, we must presume that such consultation will have a serious purpose that is likely to produce tangible results. As JUSTICE BLACKMUN explains, *post*, at 10–12, it is not mere speculation to think that foreign governments, when faced with the threatened withdrawal of United States assistance, will modify their projects to mitigate the harm to endangered species.

Although I believe that respondents have standing, I nevertheless concur in the judgment of reversal because I am persuaded that the Government is correct in its submission that §7(a)(2) does not apply to activities in foreign countries. As with all questions of statutory construction, the question whether a statute applies extraterritorially is one of congressional intent. *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 284–285 (1949). We normally assume that "Congress is primarily concerned with domestic conditions," *id.*, at 285, and therefore presume that "`legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC* v. *Arabian American Oil Co.*, 499 U. S. ___ (1991) (quoting *Foley Bros.*, 336 U. S., at 285).

Section 7(a)(2) provides, in relevant part:

> "Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior or Commerce, as appropriate[3]], insure

[3]The ESA defines "Secretary" to mean "the Secretary of the Interior or the Secretary of Commerce as

> that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an `agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. . . .'' 16 U. S. C. §1536(a)(2).

Nothing in this text indicates that the section applies in foreign countries.[4] Indeed, the only geographic

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program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970." 16 U. S. C. §1532(15). As a general matter, "marine species are under the jurisdiction of the Secretary of Commerce and all other species are under the jurisdiction of the Secretary of the Interior." 51 Fed. Reg. 19926 (1986) (preamble to final regulations governing interagency consultation promulgated by the Fish and Wildlife Service and the National Marine Fisheries Service on behalf of the Secretary of the Interior and the Secretary of Commerce).

[4]Respondents point out that the duties in §7(a)(2) are phrased in broad, inclusive language: "Each Federal agency" shall consult with the Secretary and insure that "any action" does not jeopardize "any endangered or threatened species" or destroy or adversely modify the "habitat of such species." See Brief for Respondents 36; 16 U. S. C. §1536(a)(2). The Court of Appeals correctly recognized, however, that such inclusive language, by itself, is not sufficient to overcome the presumption against the extraterritorial application of statutes. 911 F. 2d 117, 122 (CA8 1990); see also *Foley Bros., Inc.* v. *Filardo*,

reference in the section is in the "critical habitat" clause,[5] which mentions "affected States." The Secretary of the Interior and the Secretary of Commerce have consistently taken the position that they need not designate critical habitat in foreign countries. See 42 Fed. Reg. 4869 (1977) (initial regulations of the Fish and Wildlife Service and the National Marine Fisheries Service on behalf of the Secretary of Interior and the Secretary of Commerce). Consequently, neither Secretary interprets §7(a)(2) to require federal agencies to engage in consultations to insure that their actions in foreign countries will not adversely affect the critical habitat of endangered or threatened species.

That interpretation is sound, and, in fact, the Court of Appeals did not question it.[6] There is, moreover,

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336 U. S. 281, 282, 287–288 (1949) (statute requiring an eight-hour day provision in ```[e]very contract made to which the United States . . . is a party''' is inapplicable to contracts for work performed in foreign countries).

[5]Section 7(a)(2) has two clauses which require federal agencies to consult with the Secretary to insure that their actions (1) do not jeopardize threatened or endangered species (the "endangered species clause"), and (2) are not likely to destroy or adversely affect the habitat of such species (the "critical habitat clause").

[6]Instead, the Court of Appeals concluded that the endangered species clause and the critical habitat clause are "severable," at least with respect to their "geographical scope," so that the former clause applies extraterritorially even if the latter does not. 911 F. 2d, at 125. Under this interpretation, federal agencies must consult with the Secretary to insure that their actions in foreign countries are not likely to threaten any endangered species, but they need not consult to insure that their actions are not likely to

no indication that Congress intended to give a different geographic scope to the two clauses in §7(a)(2). To the contrary, Congress recognized that one of the "major causes" of extinction of endangered species is the "destruction of natural habitat." S. Rep. No. 93–307, p. 2 (1973); see also, H. Rep. No. 93–412, p. 2 (1973); *TVA* v. *Hill*, 437 U. S. 153, 179 (1978). It would thus be illogical to conclude that Congress required federal agencies to avoid jeopardy to endangered species abroad, but not destruction of critical habitat abroad.

The lack of an express indication that the consultation requirement applies extraterritorially is particularly significant because other sections of the ESA expressly deal with the problem of protecting endangered species abroad. Section 8, for example, authorizes the President to provide assistance to "any foreign country (with its consent) . . . in the development and management of programs in that country which [are] . . . necessary or useful for the conservation of any endangered species or threatened species listed by the Secretary pursuant to section 1533 of this title." 16 U. S. C. §1537(a). It also directs the Secretary of Interior, "through the Secretary of State," to "encourage" foreign countries to conserve fish and wildlife and to enter into bilateral or multilateral agreements. §1537(b). Section 9 makes it unlawful to import endangered species into (or export them from) the United States or to otherwise traffic in endangered species "in interstate or foreign commerce." §§1538(a)(1)(A), (E), (F). Congress thus obviously thought about endangered species abroad and devised specific sections of the

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destroy the critical habitats of these species. I cannot subscribe to the Court of Appeals' strained interpretation, for there is no indication that Congress intended to give such vastly different scope to the two clauses in §7(a)(2).

ESA to protect them. In this context, the absence of any explicit statement that the consultation requirement is applicable to agency actions in foreign countries suggests that Congress did not intend that §7(a)(2) apply extraterritorially.

Finally, the general purpose of the ESA does not evince a congressional intent that the consultation requirement be applicable to federal agency actions abroad. The congressional findings explaining the need for the ESA emphasize that "various species of fish, wildlife, and plants *in the United States* have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation," and that these species "are of aesthetic, ecological, educational, historical, recreational, and scientific value to the *Nation and its people*." §§1531(1), (3) (emphasis added). The lack of similar findings about the harm caused by development in other countries suggests that Congress was primarily concerned with balancing development and conservation goals in this country.[7]

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[7]Of course, Congress also found that "the 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, pursuant to [several international agreements],'' and that "encouraging the States . . . to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments . . . ." 16 U. S. C. §§1531(4), (5). The Court of Appeals read these findings as indicative of a congressional intent to make §7(a)(2)'s consultation requirement applicable to agency action abroad. See 911 F. 2d, at 122–123. I am not persuaded, however, that such a broad congressional intent can be gleaned from these findings. Instead, I think the findings indicate a more

In short, a reading of the entire statute persuades me that Congress did not intend the consultation requirement in §7(a)(2) to apply to activities in foreign countries. Accordingly, notwithstanding my disagreement with the Court's disposition of the standing question, I concur in its judgment.

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narrow congressional intent that the United States abide by its international commitments.