MARINE MAMMAL PROTECTION ACT AND *UNITED STATES v. MITCHELL*: DISREGARDING THE MORATORIUM?

The Marine Mammal Protection Act of 1972 (MMPA)[1] was an ambitious attempt by Congress to "protect, conserve and preserve the marine mammals of the world."[2] No nation had previously enacted such strong legislation in favor of marine mammals.[3] Congress found that such species, facing extinction, must be restored to maintain a stable ecosystem.[4] A recent interpretation of the MMPA, however, limits these animals' protection from their greatest threat: man.

In *United States v. Mitchell*,[5] an American was convicted under the MMPA of illegally taking dolphins without a permit in the territorial waters of the Bahamas.[6] The trial court[7] found him in violation of a

1. Act of Oct. 21, 1972, Pub. L. No. 92-522, 86 Stat. 1027, 16 U.S.C. §§ 1361-1407 (1976).

2. 118 CONG. REC. 25252 (1972) (remarks of Sen. Hollings). "Public concern over the plight of marine mammals and a complementary public interest in their unique characteristics generated a broadly based movement to grant them special legislative protection going far beyond existing wildlife management and endangered species protection laws." Gaines & Schmidt, *Wildlife Population Management under the Marine Mammal Protection Act of 1972*, 6 E.L.R. 50096, 50096 (1972) [hereinafter cited as Gaines & Schmidt]. *See generally* Herrington & Regenstein, *The Plight of Ocean Mammals*, 1 ENVT'L AFF. 792 (1972). For mammals covered by the MMPA see *Hearings on Marine Mammals Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 92d Cong., 1st Sess. 57-63 (1971) [hereinafter cited as *House Hearings*]. For the current status of marine mammals, see Dep't of Commerce, Status Report on Mammals, 42 Fed. Reg. 38,981-39,030 (1977); Dep't of Interior, Report on Marine Mammals, 40 Fed. Reg. 36,582-99 (1975).

3. "The committee considers that the adoption of this bill will place the United States in a position of world leadership in protection and conservation of marine mammals." S. REP. No. 863, 92d Cong., 2d Sess. 11 (1972).

4. 16 U.S.C. § 1361(2) (1976).

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

6. Seafloor Aquarium, a marine attraction in Nassau, Bahamas, employed Jerry Mitchell to capture dolphin for eventual export to Great Britain. George Curtis Johnson, Seafloor's owner, obtained a Bahamian work permit for Mitchell. Mitchell was

National Marine Fishery Service regulation promulgated under the MMPA.[8] The Fifth Circuit[9] reversed the conviction, holding that Congress did not intend to hold a United States citizen accountable under the MMPA if the person is acting within foreign territorial waters.[10] Accordingly, the court found the MMPA regulation void as overly broad.[11]

The federal government employs several approaches in wildlife protection.[12] Federal law, for example, imposes penalties for transporting wildlife taken in violation of state, national, or foreign law.[13] Moreover, certain federal legislation designed to improve the environment indirectly promotes wildlife conservation.[14]

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convicted of taking 15 dolphin in Bahamian waters from May to August, 1974, and sentenced to 90 days incarceration and one year's probation. *Id.* at 999.

Charles Fuss, chief of law enforcement for the National Marine Fisheries Service (NMFS) warned Mitchell in 1973 that the MMPA prohibited American citizens from capturing marine mammals anywhere. He also stated that Seafloor, a foreign facility, would not be granted a display permit. *Id.* at 998. A second NMFS agent told Mitchell that he could apply for a permit but not until a Marine Mammal Commission was appointed. Although Mitchell's lawyer advised him that operations in Bahamian waters would be legal, Mitchell subsequently received letters from the NMFS cautioning him against taking or importing mammals during the MMPA moratorium. *Id. See* text accompanying note 26 *infra* for a decription of the moratorium. Mitchell testified that he understood the NMFS warning of illegality, but acted on advice of counsel. *Id.*

7. United States v. Mitchell, 6 E.L.R. 20683 (S.D. Fla. 1976) (order denying motion to dismiss).

8. By 50 C.F.R. § 216.11(c) (1977), it is unlawful for any person subject to the jurisdiction of the United States to take any marine mammal during the moratorium. *See* text accompanying note 26 *infra*. Violation of this regulation is a crime pursuant to 16 U.S.C. § 1375.

9. 553 F.2d 996 (5th Cir. 1977).

10. *Id.* at 1005. *See* notes 40-46 and accompanying text *infra*.

11. *Id.*

A court may set aside agency action in excess of statutory jurisdiction, authority or limitations, under § 10 of the Administrative Procedure Act, 5 U.S.C. § 706(2)(c) (1976). *Accord*, Zuber v. Allen, 396 U.S. 168, 186 (1969).

12. *See generally* A. REITZE, ENVIRONMENTAL PLANNING: LAW OF LAND & RESOURCES ch. 10, 1-33, ch. 18, 1-44 (1974) [hereinafter cited as A. REITZE]; Guilbert, *Wildlife Preservation under Federal Law*, in FEDERAL ENVIRONMENTAL LAW, at 550-94 (1974); Dickens, *The Law and Endangered Species of Wildlife*, 9 GONZAGA L. REV. 57 (1973); Coggins & Hensley, *Constitutional Limits on Federal Power to Protect and Manage Wildlife: Is the Endangered Species Act Endangered?* 61 IOWA L. REV. 1099, 1108-22 (1976).

13. The Lacey Act of 1900, 18 U.S.C. § 43 (1976). *See* A. REITZE, *supra* note 12, at ch. 10, 2 (1974).

14. Fish & Wildlife Coordination Act, 16 U.S.C. §§ 661-667e (1976) (directs fed-

The most effective laws name species to be given special protection under federal statutes[15] and international agreements.[16] Species en-

eral agencies involved in water resource development to protect wildlife); Anadromous Fish Conservation Act, 16 U.S.C. §§ 757a-757f (1976) (conserves anadromous fish resources and protects from water resource development). *See, e.g.*, Udall v. FPC, 387 U.S. 428, 438 (1970) (Supreme Court invalidated a license to build a hydroelectric dam; wildlife conservation not explored); Estuarine Areas Act, 16 U.S.C. §§ 1221-1226 (1976) (protects estuaries for their wildlife and recreational potential) *Id.* at 1222(a)(1); The Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. §§ 1431-1434, 33 U.S.C. §§ 1401-1444 (1976) (authorizes marine sanctuaries for conservation and ecological stability and regulates dumping of material in ocean waters); The National Environmental Protection Act of 1969, 42 U.S.C. §§ 4321-4347 (1976) (protects wildlife habitat by upgrading the environment). For a discussion of federal law protecting wildlife see Guilbert, *Wildlife Preservation under Federal Law*, in FEDERAL ENVIRONMENTAL LAW 550 (1974).

15. *See, e.g.*, The Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d (1976); The Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C. §§ 1331-1340 (1976). *See also* The Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1976) (comprehensive legislation protecting all endangered species and their habitats).

Reluctance by Congress to enact legislation regarding specific species is attributed to uncertain constitutional authority. Dickens, *The Law and Endangered Species of Wildlife*, 9 GONZAGA L. REV. 57, 66 (1973). The MMPA was enacted by Congress under the commerce power. U.S. CONST. art. II § 8 cl. 3; 16 U.S.C. § 1361(5) (1976) commerce clause gives Congress broad powers. Because of MMPA's close connection with commerce it is not vulnerable to constitutional attack. *Cf.* Kleppe v. New Mexico, 426 U.S. 529 (1976) (Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331-1340 (1976), constitutional under the Property Clause); Missouri v. Holland, 252 U.S. 416 (1920) (Convention for Protection of Migratory Birds constitutional under the treaty power). *See generally* Soper, *The Constitutional Framework of Environmental Law*, in FEDERAL ENVIRONMENTAL LAW 20 (1974); Coggins & Hensley, *Constitutional Limits on Federal Power to Protect and Manage Wildlife: Is the Endangered Species Act Endangered?*, 61 IOWA L. REV. 1099 (1976).

16. *See, e.g.*, The Convention for the Protection of Migratory Birds, Aug. 16, 1916, United States-Great Britain, 39 Stat. 1702, T.S. No. 628; The Convention for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, United States-Mexico, 50 Stat. 1311, T.S. No. 1311; The Convention for Protection of Migratory Birds, March 4, 1972, United States-Japan, [1974] 25 U.S.T. 3329, T.I.A.S. No. 7990 (treaties enforced by the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-711 (1976)). *See generally* Comment, *The Migratory Bird Treaty: Another Feather in the Environmentalist's Cap*, 19 S.D. L. REV. 307 (1974).

Additionally, the Interim Convention on Conservation of North Pacific Fur Seals, Feb. 9, 1957, [1957] 8 U.S.T. 2283, T.I.A.S. No. 3948 (enforced by the Fur Seal Act of 1966, 16 U.S.C. § 1151-1187 (1976)), prohibits pelagic sealing (taking at sea) off the Pribiloff Islands of Alaska. For a report on U.S. management of fur seals in the Pribiloff Islands, see *House Hearings*, *supra* note 2, at 272-90. *See generally* Thompson, *Marine Mammals*, in A. REITZ, ENVIRONMENTAL PLANNING: LAW OF LAND AND RESOURCES ch. 18, 12-16 (1974) [hereinafter cited as Thompson]. Although the MMPA does not abrogate the North Pacific Fur Seal Convention it calls for a reeval-

dangering conduct is made unlawful by a list of prohibited acts.[17] Violators are subject to civil or criminal penalties under such legislation.

Recent congressional legislation has focused specifically on marine mammals.[18] Due to public concern over diminishing populations and inhumane treatment,[19] Congress sought measures of protection.[20] Two basic plans were proposed: "Protectionists" favored an

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uation of the Convention. 16 U.S.C. §§ 1383, 1378(b)(1) (1976). Subsequently the Convention was amended to implement a "sustainable yield" management policy. 1976 Protocol Amending the Interim Convention on Conservation of North Pacific Fur Seals, art. VI, [1976] 27 U.S.T. 3371, T.I.A.S. No. 8368. However, a "sustainable yield" program is inconsistent with MMPA policy to maintain marine mammals at an "optimum sustainable population." 16 U.S.C. § 1361(2) (1976). *See generally* Gaines & Schmidt, *supra* note 2, at 50096-50014.

The International Convention for the Regulation of Whaling (IWC) Dec. 2, 1946, was established to guarantee optimal levels of whale stocks. 62 Stat. 1716 T.I.A.S. No. 1849, (enforced by the Whaling Convention Act of 1949, 16 U.S.C. §§ 916(a)-(c) (1976)). For a discussion of the failure of the Convention to protect whales, see Scarff, *The International Management of Whales, Dolphins and Porpoises: An Interdisciplinary Assessment (Part One)*, 6 ECOLOGY L. Q. 326, 352-427 (1977). For suggestions of modifications of the I.W.C., see *id.* at 618-34. *See also* The Convention of International Trade in Endangered Species of Wild Fauna and Flora, [1976] 27 U.S.T. 1087, T.I.A.S. No. 8249 (convention to protect earth's endangered species, implemented by the Endangered Species Act of 1973, 16 U.S.C. § 1531(a)(4)(f) (1976)); Agreement on the Conservation of Polar Bears, Nov. 15, 1973, [1976] 27 U.S.T. 3918, T.I.A.S. No. 8409 (Treaty between the United States, Canada, Denmark, Norway and the U.S.S.R. for the protection of polar bears).

17. Specific prohibition sections in direct wildlife protection acts are: Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 (1976); Free-Roaming Horses and Burros Act of 1971, 16 U.S.C. § 1338 (1976); Endangered Species Act of 1973, 16 U.S.C. § 1538 (1976).

18. Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1407 (1976). Under the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1976), some marine mammals are included in the Fish and Wildlife Service's Endangered and Threatened Wildlife List. 50 C.F.R. § 17.11 (1977).

19. "The Congress finds that certain species and population stocks of marine mammals are or may be in danger of extinction or depletion as a result of man's activities." 16 U.S.C. § 1361(1) (1976). The American public was outraged by television documentaries reporting the slaughter of baby harp seals and the extinction of whale species. Coggins, *Legal Protection for Marine Mammals: An Overview of Innovative Resource Conservation Legislation*, 6 ENVT'L L. 1, 14 (1975) [hereinafter cited as Coggins].

20. Twenty-eight different legislative concepts were introduced by more than 100 members of the House. 118 *Cong. Rec.* 7687 (1972). For proposed legislation considered in the Senate, see *Ocean Mammal Protection: Hearings on S. 685, S. 1315, S. 2579, S. 2639, S. 2871, S. 3112, & S. 3161 Before the Subcomm. on Ocean and Atmosphere of the Senate Comm. on Commerce*, 92d Cong., 2d Sess. (1972) [hereinafter cited as *Senate Hearings*]. For the legislative history of the MMPA, see Thompson, *supra*

absolute ban on taking any marine mammal,[21] whereas "herd managers" would allow takings where the government determined that the species would not be adversely affected.[22] The Marine Mammal Protection Act emerged,[23] imposing a moratorium on takings, which

note 16, at ch. 18 at 19-20; Coggins, *supra* note 19, at 14-17; Gaines & Schmidt, *supra* note 2, at 50103-08.

21. The Harris-Pryor Bills, H.R. 6554, 92d Cong., 1st Sess. (1971) and S. 1315, 92d Cong., 1st Sess. (1971), specifically aimed at the North Pacific Fur Seal Convention, would absolutely prohibit any taking or importation of marine mammals and would abrogate all international treaties allowing such takings. Twenty-six Senators and 100 Representatives joined newspapers and environmental groups in supporting the bills. 118 *Cong. Rec.* 4,853 (1972) (remarks of Sen. Humphrey); *id.* at 7685 (1972) (remarks of environmentalists). After the Subcommittee rejected the bill a compromise bill was introduced in the Senate, S. 2579, 92d Cong. 2nd Sess. (1972), to continue the North Pacific Fur Seal treaty if a new treaty could not be negotiated. *See* 117 *Cong. Rec.* 33271-73 (1972).

22. Proponents of the Pelly-Anderson Bill, H.R. 10420, 92d Cong., 1st Sess. (1971), believed certain marine mammal populations were healthy enough to withstand continued taking. 117 *Cong. Rec.* 22805-08 (1971). H.R. 10420 would prohibit any United States citizen from taking a marine mammal without a permit. H.R. REP. NO. 707, 92d Cong., 1st Sess. 6, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4144. After scientific study, the Secretaries of Interior and Commerce may allow limited takings or refrain from issuing a permit, thereby creating a de facto moratorium. However, foreign marine mammal imports could continue. *Id.* at 4157-58. The Nixon Administration, hunting groups, the fur industry, and certain wildlife groups supported H.R. 10420. Thompson, *supra* note 16, at 18-19; 117 *Cong. Rec.* 44953 (1971).

23. The House Subcommittee on Fisheries and Wildlife Conservation reported favorably on H.R. 10420 and rejected bills providing for a flat ban on taking marine mammals. *See* note 21 *supra*. The subcommittee cited seal over-population problems occurring on the British Farne Islands after a 20 year total ban on killing. *House Hearings*, *supra* note 2, at 361-62.

Protectionists blocked passage of H.R. 10420 at the end of the first session of the 92nd Congress. 117 *Cong. Rec.* 44, 947-61 (1971). During the second session, H.R. 10420 was amended to provide a five-year moratorium during which no marine mammal could be taken or imported. 118 *Cong. Rec.* 7700-04 (1972). H.R. 10420, as amended, passed the House by an overwhelming majority. *Id.* at 7684-7716.

After holding hearings, the Senate Subcommittee on Ocean and Atmosphere compromised between the management and protectionist positions by approving an amended version of S. 2871. *See Senate Hearings*, note 20 *supra*. As reported, the bill contained a 15-year moratorium which could be waived after extensive administrative and public review. 118 *Cong. Rec.* 25, 246-52 (1972). Takings would be by permit only. *See* S. REP. NO. 863, 92d Cong., 2d Sess. (1972). Originally S. 2871 was introduced as a protectionist bill calling for a 10-year total ban, 117 *Cong. Rec.* 41783-88 (1971) (remarks of Sen. Williams). "Protectionists" unsuccessfully attempted to amend S. 2871 on the Senate floor to ban administrative waivers of the moratorium for five years. 118 *Cong. Rec.* 25,272-89 (1972). However, an indefinite moratorium was substituted for the fifteen year period. S. 2871 passed in June of 1972. 118 *Cong. Rec.* 25247-25300, 25422-40 (1972). The Senate passed H.R. 10420 after inserting the

may be waived to maintain species at their optimum sustainable populations.[24]

With a few exceptions,[25] the moratorium calls for a complete cessation of taking marine mammals and a ban on the animals' importation into the United States.[26] The MMPA contains prohibitions which forbid acts of taking, possession, or importation.[27] Heavy penalties are imposed for violating any MMPA provision.[28]

In an early case interpreting the Act, a district court in *Fouke Co. v. Mandel*,[29] held that the MMPA preempted a Maryland statute prohibiting importation of seal products.[30] But the court cited the moratorium waiver provision as evidence that importing marine mammals may be legal.[31] The court concluded that Congress intended to permit takings and importation when it furthered "efficient

text of S. 2871 as an amendment. *Id.* at 2544. A Joint Conference Committee resolved conflicts between the two Houses in favor of the Senate Amendment (S. 2871). Conf. Rep. No. 1488, 92d Cong., 2d Sess. (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4187. The Conference Compromise Bill passed the House and Senate, 118 *Cong. Rec.* 34637-43 & 34900-01 (1972), and became known as the Marine Mammal Protection Act of 1972, signed by President Nixon on Oct. 21, 1972.

24. The Secretary (*see* note 27 *infra* for division of authority under MMPA between Secretaries of Commerce and Interior) may allow takings and imports of marine mammals or products by waiving the moratorium for a species, 16 U.S.C. § 1371(a)(3)(A) (1976), prescribing governing regulations, *id.* § 1373; and issuing permits to authorize takings, *id,* at § 1374. Agency hearings are required at each stage of the process. *Id.* §§ 1373(d), 1374(d)(2). Any waiver must be approved by the Marine Mammal Commission and a committee of scientific advisors established by the MMPA. *See generally* Gaines & Schmidt, *supra* note 2, at 50,099. Because of such strong controls there has only been one waiver, a limited taking of Alaska walrus. 50 C.F.R. § 18.94 (1977). An importation waiver for South Africa seals was invalidated by a court. *See* text accompanying notes 36 & 37 *infra.*

25. 16 U.S.C. § 1371(b) (exemption for Alaskan natives); § 1371(a)(1) (scientific research and public display); § 1371(a)(2) (statutory waiver of moratorium allowing taking of marine mammals incident to the course of commercial fishing).

26. 16 U.S.C. § 1371(a) (1976).

27. 16 U.S.C. § 1372 (1976).

Authority is split between the Secretary of Commerce (whales, dolphins, porpoises, seals and sea lions) and the Secretary of the Interior (walruses, polar bear, dugongs and manatees). *See generally* Gaines & Schmidt, *supra* note 2, at 50,097.

28. 16 U.S.C. §§ 1375, 1376 (1976) (fines up to $20,000 and imprisonment of up to one year).

29. 386 F. Supp. 1341 (D. Md. 1974).

30. *Id.* at 1358.

31. *Id.* at 1357-58. Use of term "herd management" denotes resource production, not protection.

and effective herd management."[32]

In *Committee for Humane Legislation v. Richardson*,[33] the District of Columbia Circuit declared that the purpose of the MMPA is not to balance the animals' interests against those of commercial interests, but rather to provide marine mammals with extensive protection.[34] The court invalidated the Commerce Secretary's quota for taking dolphin incident to tuna fishing operations.[35] In *Animal Welfare Institute v. Kreps*,[36] the same court struck down a moratorium waiver allowing importation of South African seals.[37] Again the animals' interests were of foremost importance. None of these cases decided whether the MMPA applies extraterritorially.[38]

32. *Id.* at 1358. The Maryland statute was also preempted by the North Pacific Fur Seal Act. *Id.* at 1355. A state may adopt laws protecting marine mammals if the Secretary determines that the law is consistent with the MMPA. 16 U.S.C. § 1379(a)(2) (1976). In *Fouke v. Mandel*, Maryland made no attempt to get approval from the Secretary of Commerce. 386 F. Supp. at 1360.

33. 540 F.2d 1141 (D.C. Cir. 1976), *aff'g* 414 F. Supp. 297 (D. D.C. 1976).

34. 540 F.2d at 1148. *See* 118 CONG. REC. 7687 (1972) (remarks of Rep. Garmatz) ("this legislation is designed to do exactly what its title implies—provide badly needed protection for mammals").

35. 540 F.2d at 1150. A general permit allowing incidental catches of dolphin during commercial fishing operations using the purse-seine method was inconsistent with MMPA. *See generally* Nafziger & Armstrong, *Porpoise Tuna Controversy: Management of Marine Resources after* Committee for Humane Resources v. Richardson, 7 ENV. L. 223 (1977) [hereinafter cited as Nafziger & Armstrong]. For *Richardson's* impact on fishing industry technology, see Comment, 14 URBAN L. ANN. 263 (1977).

36. 561 F.2d 1002 (D.C. Cir. 1977).

37. *Id.* After the District Court denied standing, the Court of Appeals reversed, ruling that the waiver of the moratorium, 41 Fed. Reg. 7510-12, 7537-40 (1976), violated 16 U.S.C. § 1372(b)(2) (1976), since some seals were still nursing when killed. For a discussion of prior attempts by the Fouke Co. to import South African seals, see Gaines & Schmidt, *supra* note 2, 50108. Recently the American Fur Industry filed suit seeking a declaration that § 1372(b)(2) (prohibiting importation of any marine mammal while nursing, or less than eight months old) is unconstitutional as a violation of due process. The district Court held on summary judgment that § 1372(b)(2) is constitutional. Globe Fur Dyeing, Inc. v. United States, No. 78-0693 (D.D.C. Nov. 15, 1978).

38. Some courts have applied environmental laws extra-territorially. *See* Sierra Club v. Coleman, 405 F. Supp. 53 (D.D.C. 1975), 421 F. Supp. 63 (D.D.C. 1976) (Federal Highway Commission failed to file a sufficient environmental impact statement before building a road from Panama to Colombia); Environmental Defense Fund v. A.I.D., 6 E.L.R. 20121 (D.D.C. 1975) (A.I.D. failed to prepare a proper environmental impact staement for its international pesticide program). *See generally* Robinson, *Extra-territorial Environmental Protection Obligations of Foreign Affairs Agencies, The Unfulfilled Mandate of NEPA*, 7 NYU J. INT. L. & POL. 257-70 (1974); Note, *The Extra-territorial Scope of NEPA's Environmental Impact Statement Require-*

United States v. Mitchell[39] was the first case to address the issue. The Fifth Circuit held that the MMPA does not extend to Americans taking marine mammals in foreign waters.[40] It was conceded that United States authority over its citizens may apply extraterritorially if Congress so intends.[41] The court, however, found no geographical scope in the moratorium provision,[42] and held that the prohibitions

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ment, 74 MICH. L. REV. 349 (1975). For extraterritorial application of state environmental law, see Skiriotes v. Florida, 313 U.S. 69 (1941); Felton v. Hodges, 374 F.2d 337 (5th Cir. 1967).

39. 553 F.2d 996 (5th Cir. 1977), *rev'g* 6 E.L.R. 20683 (S.D. Fla. 1976).

40. 553 F.2d at 1005.

41. "The Supreme Court has held repeatedly that the legislative authority of the United States over its citizens extends to conduct by Americans on the high seas and even within the territory of sovereigns." 553 F.2d at 1001. *Accord*, Steele v. Bulova Watch, 344 U.S. 280 (1952) (U.S. citizens in Mexico are subject to U.S. trademark regulation); Foley Bros. v. Filardo, 336 U.S. 281 (1949) (U.S. employers in Iran may be subject to U.S. labor laws if Congress so intends); Vermilya-Brown Co. v. Connell, 335 U.S. 377 (1948) (U.S. citizens in Bermuda are subject to the Fair Labor Standards Act); Skiriotes v. Florida, 313 U.S. 69 (1940) (U.S. citizens in the Gulf of Mexico are subject to Florida sponge protection laws); Blackmer v. United States, 284 U.S. 421 (1932) (U.S. citizens in France subject to U.S. contempt power); Cook v. Tait, 265 U.S. 47 (1934) (U.S. citizens in Mexico subject to federal income tax laws); United States v. Bowman, 260 U.S. 94 (1922) (U.S. citizen on the high seas and in Brazil liable for fraud against the Federal government).

The question in these cases is not whether Congress has the authority to extend the law extraterritorially, but whether it so intended. In determining the intent behind the MMPA the *Mitchell* court applied a rule of statutory construction, holding that where a limitation of the Act's application to a strictly territorial jurisdiction would "curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home . . . the locus of the law shall include the high seas and foreign countries." 553 F.2d at 1002, citing United States v. Bowman, 260 U.S. 94, 98 (1922). The *Mitchell* court ruled that conservation legislation does not compel application to other territory. *See* note 45 *infra*. When a law does not compel extraterritorial effect, a presumption arises against such application. United States v. Bowman, 260 U.S. 94, 98 (1922); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES 38 (1965) (Reporter's Note 1). To overcome such a presumption, a clear expression of Congressional intent must be shown. *Accord*, Steele v. Bulova Watch, 344 U.S. 280, 285 (1952); Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949). Judge Wisdom in *Mitchell* felt that restricting the territorial scope of the Act would not greatly curtail the scope and usefulness of the statute in violation of *Bowman*. 553 F.2d at 1003. *But see* notes 53-63 and accompanying text *infra*. For a discussion of the conflict of laws approach to the extraterritorial application of U.S. environmental law, see Note, *Extraterritorial Application of United States Laws: A Conflict of Laws Approach*, 28 STAN. L. REV. 1005, 1022-24, 1035-36 (1976).

42. 553 F.2d at 1002. The *Mitchell* court concluded that the legislative intent behind the moratorium was simply to deny the secretary authority to issue permits except in certain circumstances. *Id.*

restrict MMPA coverage to United States waters[43] and the high seas.[44] The decision presumed that conservation statutes are based on sovereign control over natural resources,[45] and therefore, only in-

43. 553 F.2d at 1004-05. "It is unlawful for any person or vessel or other conveyance to take any marine mammal in waters or on land under the Jurisdiction of the United States." 16 U.S.C. § 1372(a)(2)(A) (1976). For purposes of the MMPA, U.S. waters now include the 200-mile fishing zone. *Id.* § 1362(15). *See* note 57 *infra.*

44. 553 F.2d at 1004-05. "[I]t is unlawful: (1) for any person subject to the Jurisdiction of the United States . . . to take any marine mammal on the high seas." 16 U.S.C. § 1372(a)(1) (1976). Although there was substantial dispute over the reach of "High Seas" it was agreed at trial that for purposes of MMPA, high seas exclude the territorial waters of sovereign states, 553 F.2d at 1005 n.15. The dispute arises because there is an international and domestic meaning to the term. Internationally, high seas are all parts of the sea that are not included in the territorial sea or in the internal waters of a State. Convention of the High Seas [1962] 13 U.S.T. 2312, T.I.A.S. 5200 (1962). The international definition is only used when the United States is concerned with its jurisdiction and sovereignty in relation to another state. The domestic definition, that high seas means waters seaward of the low water line, was developed by Justice Story in DeLovio v. Boit, 7 Fed. Cas. 418, 427 (Cir. Ct. D. Mass. 1815). The United States took jurisdiction over a murder on a United States ship in a Japanese harbor and stated "the term 'high seas' includes waters on the sea coast without the boundaries of the low water mark; and the waters of the port of Yokahama constitute high seas." *In re* Ross, 140 U.S. 453, 471 (1890). Likewise, a vessel anchored in the harbor of South Vietnam was determined to be on the high seas. United States v. Ross, 439 F.2d 1355, 1357 (9th Cir. 1971). *Accord*, United States v. Flores, 289 U.S. 137 (1932); U.S. v. Rodgers, 150 U.S. 249 (1893); Nixon v. United States, 352 F.2d 601 (5th Cir. 1965). *See* Death on High Seas Act, 42 U.S.C. § 716 (1970) (. . . on the high seas beyond a marine league from the shore of any state, or the District of Columbia, or territories of the United States); Protection of Sea Otters on High Seas Act, 16 U.S.C. § 1171 (1970) (unlawful . . . to engage in taking of sea otters on the high seas beyond the territorial waters of the United States).

45. 553 F.2d at 1002. Thus, the *Mitchell* Court created a new presumption of legislative intent: "When Congress considers environmental legislation it presumably recognizes the authority of other sovereigns to protect or exploit their own resources." *Id. See United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources* 1803 (XVII) *reprinted in* 2 INTERNATIONAL LEGAL MATERIALS 223-26; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 17 (1965). *See generally* Taft, *3rd U.N. Law of the Sea Conference, Major Unresolved Fisheries Issues*, 14 COLUM. J. TRANSNAT. L. 112, 114-17 (1975). The Supreme Court has held that the high seas are international waters not subject to the dominion of any single nation. United States v. Alaska, 422 U.S. 184 (1975). Thus the United States has no jurisdictional control over resources in the high seas. Since the MMPA does control the actions of United States citizens on the high seas, jurisdiction must be based on the nationality of the citizen rather than subject matter control over the animals.

Applying the MMPA extraterritorially would not prevent foreign nations from utilizing marine mammals as resources. They would only be prevented from employing Americans without U.S. permission. For the possibility of granting permits to U.S. citizens in such instances, see note 50 *infra.*

ternational agreements may extend the scope of the MMPA.[46]

The Fifth Circuit, however, failed to properly construe legislative intent.[47] The moratorium on takings of marine mammals by United States citizens remains in effect unless waived.[48] No one may take a marine mammal without a permit during the moratorium.[49] The MMPA expressly applies to the worldwide marine environment and to foreign governments,[50] and National Marine Fisheries Service reg-

46. "The traditional method of resolving such differences is through negotiation and agreement rather than through the imposition of one particular choice by a state's imposing its law extraterritorially." 553 F.2d at 1002. *Contra*, Steele v. Bulova Watch, 344 U.S. 280 (1952) (a U.S. company relied on the Lanham Act, 15 U.S.C. §§ 1115-1127 (1976), to prevent patent infringements by a U.S. citizen in Mexico although a purpose of the statute was to provide rights and remedies through treaties and conventions respecting trademarks).

For a discussion of the failure of international agreements to protect marine mammals, see *Thompson*, *supra* note 16, at 18; Herrington & Regenstein, *The Plight of Ocean Mammals*, 1 ENVT'L AFF. 792 (1972).

47. The moratorium's geographic scope should be unlimited: "The purpose of this legislation is to prohibit the harassing, catching and killing of marine mammals by U.S. citizens or within the jurisdiction of the United States unless taken under the authority of a permit issued by an agency of the executive branch." H.R. REP. No. 767, 92d Cong., 1st Sess. (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4144. *Accord*, S. REP. No. 863, 92d Cong., 2d Sess. 1 (1972). The *Mitchell* court found no legislative intent prohibiting the extraterritorial killing of, for example, Canadian baby harp seals. 553 F.2d at 1004. Judge Wisdom did not look very closely: "To remove any doubt of the controversy in this bill S. 2871 . . . . This is a complete prohibition against the killing of baby seals." 118 CONG. REC. 25268 (1972) (remarks of Sen. Hollings). *Accord*, Nafziger & Armstrong, *supra* note 35, at 271 ("The Act contemplates its application to all persons, vessels and conveyances subject to United States jurisdiction, which would include nationals or boats with sufficient American ties, wherever situated").

Permits are issued by the National Marine Fisheries Service to allow takings in foreign waters. 47 Fed. Reg. 33786 (1977) (Hudson Bay, Canada); 43 Fed. Reg. 42776 (1978) (Greenland).

48. 16 U.S.C. § 1371(a) (1976); *see* Coggins, *supra* note 19, at 24-25.

49. 16 U.S.C. §§ 1371, 1374 (1976). "With the single exception of Eskimos and Alaskan natives, no U.S. citizen will be permitted to capture, harass or kill a marine mammal without . . . permission." 117 CONG. REC. 44951 (1971) (remarks of Rep. Dingell).

50. "Marine mammals have proven themselves to be resources of great international significance . . . , it is the sense of Congress that they should be protected and encouraged to develop to the greatest extent feasible . . . and that the primary objective should be to maintain the health of the marine ecosystem." 16 U.S.C. § 1361(6) (1976).

"Today I call up for Senate Consideration S. 2871, the bill to protect, conserve and preserve the marine mammals of the world, specifically those under the jurisdiction of the United States as well as those which are now being taken by the citizens of other

ulations reflect the MMPA's unlimited geographic reach.[51] Use of the term "high seas" in the prohibitions without explanation was faulty legislative drafting.[52]

The *Mitchell* court creates a new exception to the MMPA moratorium. United States citizens may take marine mammals in foreign waters with impunity provided they obtain the consent of the accommodating government.[53] These animals may be lawfully imported into the United States[54] or sold in another country.[55] This result con-

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nations in international and territorial waters. 118 CONG. REC. 25252 (1972) (remarks of Sen. Hollings).

The MMPA applies to foreign governments: No marine mammals may be imported into the U.S. unless the program for taking marine mammals in the country of origin is consistent with the Act. 16 U.S.C. § 1371(a)(3)(A) (1976). The MMPA also imposes a ban on the importation of all fish and products taken in violation of the Act. *Id.* § 1371(a)(2). *See generally* Nafziger & Armstrong, *supra* note 35 at 273. Foreign display facilities may apply for a permit to take marine mammals in U.S. waters. A permit will be granted only after adequate assurances of care and maintenance of the animal. *See* 42 Fed. Reg. 58581 (1977) (government policy statement on foreign display facilities). The dolphins caught by defendant Mitchell were exported to Great Britain. Since the United States issues permits to foreign facilities to take mammals in American waters and issues permits to domestic display facilities to take mammals in foreign waters, a British display institution should be allowed to apply for a permit to employ an American to take a marine mammal in foreign waters. *See* note 47 *supra*.

51. 50 C.F.R. § 216.11(c) (1977). *See* note 8 *supra*.

The National Marine Fishery Service hailed Mitchell's conviction: "The successful prosecution of these individuals reinforces NMFS's interpretation of the Act, to the effect that U.S. citizens are subject to the provisions of the Act, regardless of the geographic location of their marine mammal activities, and regardless of such activities under a foreign state's law." Dep't of Commerce, *Status of Marine Mammals*, 42 Fed. Reg. 38981, 38988 (1977).

52. *See* Nafziger & Armstrong, *supra* note 35, at 224. All bills considered by Congress utilized the same standard prohibition using the term High Seas. Nowhere in the statute is it defined. A recommendation to define "High Seas" as waters seaward of the territorial sea of the United States went unheeded. U.S. DEP'T OF COMMERCE, PROPOSED AMENDMENTS OF H.R. 10420 *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4170-71. A rule of statutory construction holds that the intention of an Act will prevail over the literal sense of its terms. Thus limited words in one part of an Act may be expanded by general words in another part if the general words more nearly express the Congressional intent. 2A C. SANDS, SUTHERLAND ON STATUTORY CONSTRUCTION § 47.07, 82 (4th Ed. 1973). The moratorium is descirbed as a complete cessation. *See* note 26 *supra*; Gaines & Schmidt, *supra* note 2, at 50098.

53. "The basic purpose of the moratorium, prohibitions and permit system therefore appears to be protection of marine mammals only within the territory of the United States and on the High Seas." 553 F.2d at 1003.

54. Regarding importation, the prohibitions state: "It is unlawful to import into the United States (1) any marine mammal which was taken in violation of this sub-

flicts with Congressional intent since United States nationals may now endanger marine mammals in the worldwide environments.[56]

Recently, United States and several other nations[57] have established fishery zones extending up to 200 miles from the territorial sea. Nations claim exclusive management over resources, including marine mammals, in these areas.[58] Under the *Mitchell* rationale of sovereign control,[59] the MMPA would not apply in these large ocean areas, which contain substantial marine mammal populations.[60]

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chapter." 16 U.S.C. § 1372(c)(1)(A) (1976). A U.S. citizen taking mammals in foreign waters does not violate the Act; therefore the animal or its products may be imported. However, prohibitions remain against importation of pregnant or nursing mammals, §§ 1372(b)(1), (2), mammals taken from a depleted species, § 1372(b)(3), or mammals taken in an inhumane manner, § 1372(b)(4).

55. Mitchell exported the captured dolphin to Great Britain. 553 F.2d at 997.

56. *See* notes 19 and 47 *supra.*

57. Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-1882 (1976). Congress enacted this legislation to conserve all fishery resources within a 200-mile area adjacent to the territorial sea in advance of a United Nations Third Law of the Sea Conference treaty allowing nations to create such "economic zones." Additionally, many nations are extending their territorial seas, areas in which they may claim complete sovereignty, from three to twelve miles offshore. Informal Composite Negotiating Text U.N. DOC. A/CONF. 62/WP 10, Art. 3 July 15, 1977, repeated at 16 I.L.M. 1108, 1121 (1977) [hereinafter cited as I.C.N.T.]; *see* H.R. REP. NO. 445, 94th Cong., 28 (1975) *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 593, 601. ("A consensus is evidently emerging . . . that new international law should recognize an extension of all nations' territorial waters from three to twelve miles offshore, with coastal states allowed to establish an 'economic zone' of jurisdiction extending at least 200 miles offshore").

58. MMPA defines waters under the Jurisdiction of the United States as including the 200-mile zone, 16 U.S.C. § 1362(15) (1976). According to the informal Negotiating Composite Text drafted at the Third United Nations Law of the Sea Conference in New York 1977, nations will exercise substantial rights in such areas: "In the exclusive economic zone, the coastal state has: (a) Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or not living of the sea bed, and subsoil . . ." I.C.N.T., *supra* note 57, at Art. 56(1)(a), 1135. The United States has recognized the right of nations to establish economic zones. *See, e.g.*, Fisheries Agreement Between United States of America and Mexico. — U.S.I. —, T.I.A.S. 8853. Control over marime mammals is as complete in the economic zone as in territorial waters.

59. *See* note 45 *supra.* "When Congress considers environmental legislation it presumably recognizes the authority of other sovereigns to protect and exploit their own resources." 553 F.2d at 1002.

60. An argument can be made that, for purposes of the MMPA, high seas do not reach 200-mile economic zones. The *Mitchell* Court states: "Each sovereign may regulate the exploitation of natural resources within its territory." 553 F.2d 1002. Economic zones have both the attributes of traditional high seas (freedom of navigation) and territorial seas (sovereignty over living resources). The United States considers

Additionally, United States corporate activity in foreign nations is beyond the reach of the MMPA.[61] Researchers can take marine mammals in foreign waters for use in experiments otherwise prohibited in the United States.[62] Scientists may move to foreign countries to avoid long delays in research permit approval.[63] Only adequate conservation measures by other nations can prevent depletion of marine mammals by Americans.

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its 200-mile conservation zone as high seas. The term "high seas" means all waters beyond the territorial sea of the United States and beyond any nation's territorial sea. 16 U.S.C. § 1802(13) (1976). Congress so defined high seas because of a fear that other nations would see its action as an unwarranted exercise of sovereignty and a breach of good faith negotiations at the Third Law of the Sea Conference.

The latest negotiating text of the United Nations Third Law of the Sea Conference describes high seas as "all ports of the sea that are not included in the exclusive economic, in the territorial sea, or in internal waters of a state." I.C.N.T., *supra* note 57, at Art. 86, 1144. However, all nations are given the rights of navigation and overflight, which are traditional high seas rights. I.C.N.T., *supra* note 57, at Art. 58, 1135. For a discussion of whether the exclusive economic zone proposed at the Third Law of the Sea Conference is high seas, see Fleischer, *The Right to a 200-Mile Exclusive Economic Zone or Special Fishery Zone*, 14 SAN DIEGO L. REV. 548, 552-70 (1977); Oxman, *The Third United Nations Conference on the Law of the Sea, The 1977 New York Session*, 72 AM. J. OF INT. L. 57, 67-72 (1978). Such large areas of sea beyond the coverage of the MMPA would create a huge loophole. Most marine mammal species exist within 200 miles of coast. Scarff, *The International Management of Whales, Dolphins and Porpoises: An Interdisciplinary Assessment (Part Two)* 6 ECOLOGY L.Q. 575, 613 (1977). For worldwide distributions of marine mammals, see Dep't of Commerce, Status of Marine Mammals, 42 Fed. Reg. 38,981, 38,993-39,026 (1977). Dep't of Interior Report on Marine Mammals, 40 Fed. Reg. 36,582, 36,588-36,596 (1975).

61. American corporations may operate in foreign nations and produce marine mammal products immune from United States control. *Cf.* Steele v. Bulova Watch, 344 U.S. 280 (1952) (American citizen manufacturing watches in Mexico found subject to the Lanham Act, prohibiting trademark infringement); Branch v. Federal Trade Commission, 141 F.2d 131 (1944) (Congress prevents unfair trade practices in foreign commerce.)

For a conflict of laws approach to the extraterritorial application of United States law, see Note, *Extraterritorial Application of United States Laws: A Conflict of Laws Approach*, 28 STAN. L. REV. 1005 (1976).

62. Under the MMPA, a United States citizen working for an academic institution, a display institution or a foreign government performing research activities or capturing animals for display, may be in violation of the Act, even though within the law of the local jurisdiction. *Marine Mammal Protection Oversight Hearings before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the Comm. on Merchant Marine Fisheries*, 94th Cong., 1st Sess. 160, 162 (1976).

63. For problems in time delays for permit approval, see *id.* at 293-304. For a report on enforcement problems in administering the MMPA, see *id.* at 252-67. For a discussion of 1976 enforcement activity, see Dep't of Commerce, Status of Marine Mammals, 42 Fed. Reg. 38981, 38987-88 (1977).

The MMPA imposes a moratorium upon destructive acts of Americans. The moratorium concept is a novel and necessary approach to wildlife protection. The federal government no longer considers marine mammals natural resources subject to ownership and exploitation. The United States cannot condone unregulated takings by its citizens anywhere in the marine environment. Congress must amend the MMPA to clarify the Act's unlimited reach.

Robert F. Cohn