Environmental Law—The Marine Mammal Protection Act and United States v. Mitchell: Disregarding the Moratorium?

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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 main-
tain a stable ecosystem.4 A recent interpretation of the MMPA, how-
ever, 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 court7 found him in violation of a

(1976).
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 ENVTL. AFF. 792 (1972). For mammals covered by the MMPA
see Hearings on Marine Mammals Before the Subcomm. on Fisheries and Wildlife Con-
servation 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-
(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
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 John-
son, Seafloor’s owner, obtained a Bahamian work permit for Mitchell. Mitchell was

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National Marine Fishery Service regulation promulgated under the MMPA. The Fifth Circuit 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. Accordingly, the court found the MMPA regulation void as overly broad.

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

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 Seafoor, a foreign facility, would not be granted a display permit. 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. Mitchell testified that he understood the NMFS warning of illegality, but acted on advice of counsel.


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


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

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


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 ENV'T'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, whereas "herd managers" would allow takings where the government determined that the species would not be adversely affected. The Marine Mammal Protection Act emerged, imposing a moratorium on takings, which

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.\textsuperscript{24} With a few exceptions,\textsuperscript{25} the moratorium calls for a complete cessation of taking marine mammals and a ban on the animals' importation into the United States.\textsuperscript{26} The MMPA contains prohibitions which forbid acts of taking, possession, or importation.\textsuperscript{27} Heavy penalties are imposed for violating any MMPA provision.\textsuperscript{28}

In an early case interpreting the Act, a district court in \textit{Fouke Co. v. Mandel},\textsuperscript{29} held that the MMPA preempted a Maryland statute prohibiting importation of seal products.\textsuperscript{30} But the court cited the moratorium waiver provision as evidence that importing marine mammals may be legal.\textsuperscript{31} The court concluded that Congress intended to permit takings and importation when it furthered "efficient text of S. 2871 as an amendment. \textit{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), \textit{reprinted in} [1972] \textit{U.S. Code Cong.} & \textit{Ad. News} 4187. The Conference Compromise Bill passed the House and Senate, 118 \textit{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.

\textsuperscript{24} The Secretary (see note 27 \textit{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, \textit{id.} § 1373; and issuing permits to authorize takings, \textit{id.} at § 1374. Agency hearings are required at each stage of the process. \textit{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. \textit{See generally} Gaines & Schmidt, \textit{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. \textit{See} text accompanying notes 36 & 37 \textit{infra}.

\textsuperscript{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).

\textsuperscript{26} 16 U.S.C. § 1371(a) (1976).

\textsuperscript{27} 16 U.S.C. § 1372 (1976).

\textsuperscript{28} 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). \textit{See generally} Gaines & Schmidt, \textit{supra} note 2, at 50,097.

\textsuperscript{29} 386 F. Supp. 1341 (D. Md. 1974).

\textsuperscript{30} \textit{Id.} at 1358.

\textsuperscript{31} \textit{Id.} at 1357-58. Use of term "herd management" denotes resource production, not protection.
and effective herd management."  

In Committee for Humane Legislation v. Richardson, 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. The court invalidated the Commerce Secretary's quota for taking dolphin incident to tuna fishing operations. In Animal Welfare Institute v. Kreps, the same court struck down a moratorium waiver allowing importation of South African seals. Again the animals' interests were of foremost importance. None of these cases decided whether the MMPA applies extraterritorially.

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.


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).

United States v. Mitchell\(^\text{39}\) 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.\(^\text{40}\) It was conceded that United States authority over its citizens may apply extraterritorially if Congress so intends.\(^\text{41}\) The court, however, found no geographical scope in the moratorium provision,\(^\text{42}\) and held that the prohibitions


\(^{40}\) Mitchell, 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." Mitchell, 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." Mitchell, 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. Mitchell, 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\textsuperscript{43} and the high seas.\textsuperscript{44} The decision presumed that conservation statutes are based on sovereign control over natural resources,\textsuperscript{45} and therefore, only in-

\textsuperscript{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 51 infra.

\textsuperscript{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 Yokohama constitute high seas." \textit{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).

\textsuperscript{45} 553 F.2d at 1002. Thus, the \textit{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." \textit{Id.} See United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources 1803 (XVII) reprinted in 2 \textsc{International Legal Materials} 223-26; \textsc{Restatement (Second) of Foreign Relations Law} § 17 (1965). See generally \textsc{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.
International 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 ENV'TL 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, Nafliger & 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").


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


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. Use of the term “high seas” in the prohibitions without explanation was faulty legislative drafting.

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. These animals may be lawfully imported into the United States or sold in another country. This result con-
licts with Congressional intent since United States nationals may now endanger marine mammals in the worldwide environments.  

Recently, United States and several other nations 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. Under the Mitchell rationale of sovereign control, the MMPA would not apply in these large ocean areas, which contain substantial marine mammal populations.

55. Mitchell exported the captured dolphin to Great Britain. 553 F.2d at 997.
56. See notes 19 and 47 supra.
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 marine 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. Researchers can take marine mammals in foreign waters for use in experiments otherwise prohibited in the United States. Scientists may move to foreign countries to avoid long delays in research permit approval. Only adequate conservation measures by other nations can prevent depletion of marine mammals by Americans.

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.


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