**CleanLaw Episode 92**
The Endangered Species Act at 50: Potent Statute, Risky Future
January 8, 2024

Intro:

Welcome to CleanLaw, from the Environmental and Energy Law Program at Harvard Law School. The Endangered Species Act, which turned 50 years old on December 28th, 2023, has been described as one of the most potent environmental law statutes ever enacted. In this episode, Harvard Law Professor Richard Lazarus and Andy Mergen, director of the Harvard Law Emmett Environmental Law and Policy Clinic, discussed the initial bipartisan support for the act, the Supreme Court cases that shaped its implementation, and the success of the law in protecting numerous species. They also talk about how the Endangered Species Act could be improved and the risks that it may face in the future. We hope you enjoy this podcast.

Andrew Mergen:

Hi, I'm Andrew Mergen. I'm the faculty director of the Emmett Environmental Law and Policy Clinic at Harvard Law School, and I'm joined today by Harvard Law Professor Richard Lazarus. It's a very exciting day. We're going to talk about the Endangered Species Act, which turned 50 years old on December 28th. It was signed by President Nixon on December 28th, 1973, and the act has been described as one of the most potent environmental law statutes ever enacted, often described as the pitbull of environmental laws. We are going to talk a little bit about the act in the courts, whether it's been a success, and what the future might hold for this incredibly important statute. I want to start by asking Professor Lazarus to situate the act historically in this moment of profound environmental lawmaking in the 1970s. So I'm going to turn it over to you, Richard.

Richard Lazarus:

Yeah, absolutely. It's great to be here with you, Andy, to talk about this statute. The Endangered Species Act is really just an extraordinary law, as Andy said. Here's what Richard Nixon said when he signed it into the law: "Nothing is more priceless and more worthy of preservation than the rich array of animal life with which our country has been blessed." Actually then not realizing it includes more than animal life. So the Endangered Species Act, as Andy said, 1973, it was one of about 20 extremely demanding environmental laws, both natural resource preservation and management, pollution control, which Congress enacted during the 1970s. They were really demanding laws. They were aspirational laws and they had complete bipartisan support. The average vote in the Senate for those laws in the 1970s was 76 to five, and the vote in the House was 331 to 30. The Endangered Species Act was no different.

The vote in the Senate, unanimous. The vote in the House was 355 in favor, four against, and 78 not voting. Now I should say at the time when it passed, I don't think it had a lot of publicity. I took a look at the New York Times on basically December 28th and 29th of 1973, and there's a front-page article about "Richard Nixon signs manpower law," it's a job training law, and you have to go past the front page to the next jump page to the very last paragraph of that article, and there's one sentence which says, "He also signed this endangered species law." So it didn't get a lot of legs, although at the time, it was obviously a huge statute. Like most of the environmental laws that passed in the 1970s though, it's a mistake to view it in isolation. There were decades of things that happened before then which led to the statute's passage.

It was really the bald eagle, threats to the bald eagle, threatened extinction of the bald eagle, which led Congress in 1940 to pass the Bald Eagle and Golden Eagle Protection Act. Then obviously you have Silent Spring, Rachel Carson's classic book in 1962, which talks about the danger to species of pesticides, and that helps lead a political movement which results in the Endangered Species Preservation Act of 1966. Stewart Udall, a famed conservationist, at the time the Secretary of the Interior, really championed that law. Then in 1973, as part of that whole upsurge of statutes and interests in the 1970s, you see the Endangered Species Act get passed. Interesting, December 28th, 1973, that's just a few months after the United States signed the international treaty, the CITES Treaty, the Convention for International Trade and Endangered Species, which really the Endangered Species Act was our domestic ratification of the law.

Richard Nixon, this odd champion of it, at the time he signed it, I don't think he had a whole lot of interest in it. This is the midst of Watergate. He signed the thing December 28th, 1973, just about a month and a half before he does the Saturday Night Massacre where he fires Archibald Cox from the Harvard Law School who's the special prosecutor. Just a few weeks before December 28th he famously says, "I'm not a crook." So, he signed the law. I don't think it was foremost in his mind when he did it and probably had no idea what it was going to lead to and, in fact, was no longer president of the United States pretty soon after its enactment.

Andrew Mergen:

Your point about the incredible bipartisan support for this initiative, it's so interesting because controversy has followed the Endangered Species Act since its enactment, and many very important court cases surrounding it. But maybe it's worth just taking a second and talking about what the act does, and I think to my mind, as somebody who litigated a lot of Endangered Species Act ...

Richard Lazarus:

Well, that's right. I just want to point that out. You buried the lede by introducing me. You're probably one of the nation's foremost experts in the Endangered Species Act. I don't know how many cases you yourself litigated, but deputy head and then head of the Appellate Section Environmental Division [Appellate Section of the Environment & Natural Resources Division at the United States Department of Justice] you probably supervised almost all the Endangered Species Act litigation over the past 30 years. So, I don't imagine there's someone who knows it better than you do.

Andrew Mergen:

Well, it's true that from about 2000 to when I left DOJ and came to Harvard at the end of 2023, I supervised all of the Endangered Species Act litigation in the Courts of Appeals. There is a lot of litigation around the Endangered Species Act. But I want to center that litigation around, I think the foremost meaningful parts of the statute, which are Sections 4, 7, 9, and 10. Section 4, I'm just going to take them in order, is the provision that creates the listing requirements. It explains how an animal becomes listed as endangered, meaning that it is in danger of becoming extinct or threatened, meaning that it is in danger of becoming endangered. The remarkable thing about this process, there's basically five statutory criteria which look at the threats to the animal, look at the existing legal regimes and whether they're sufficient to preserve the species.

And if there are significant threats and the existing legal regime is not up to the task, then the animals can go on the list. One thing that I think is remarkable about Section 4 is that any citizen can petition to have an animal placed on the list, and that's been very important in terms of the history of litigation

around the Endangered Species Act, because many, many petitions have been filed by scientists, by individuals, by conservation groups to get animals on the list. It's a remarkably, I think, wonderful thing that the law recognizes the ability of individuals to come together and say to the agency, "Take stock of this plant or animal and its conservation status."

The downside of this is it can create a tremendous amount of work for the agency in terms of sorting through these petitions. As we'll talk about a little bit later, Congress has not always given the agency the resources to take on that task. Section 4 is a source of considerable litigation with regard to the listing of species, whether they should be listed or have been listed in error. Section 4, I should note, also deals with critical habitat and when actions are occurring on critical habitat, the same consultation process must occur.

Section 7 is the nexus between the status of that species as endangered or threatened and the role of the federal government in its conservation. Just to simplify somewhat, Section 7 says when you need the government's authorization or permission to do something, and there is endangered species present, the agency giving you permission for instance, a permit from say, the Corps of Engineers or authorization to harvest timber in a national forest from the Forest Service, if there is an endangered species present and the action may affect that species, then there's a consultation requirement by which the action agency, the agency with authority to approve, the Forest Service, talks to the wildlife agency, the agency with responsibility for the species.

Interestingly, two agencies manage and administer the Endangered Species Act, the Fish and Wildlife Service within the Department of Interior, and the National Ocean and Atmospheric Administration within the Department of Commerce. So, two different cabinet agencies have responsibility for endangered species. The Commerce Department historically has always dealt with marine fish, marine species in general, whereas the Fish and Wildlife Service deals with terrestrial plants and animals and freshwater fish. There's some difficult issues about whether a fish is freshwater or not in the case of salmon and the like, but the responsibilities are divided between these agencies. Section 7 says, "If you're going to affect an endangered species, the agency authorizing the activity must consult with the wildlife agency and they must come up with more or less a plan for the action." To simplify somewhat, there may be alternatives to the proposed action or mitigation for the action which enhances the conservation of the species and prevents it from being jeopardized with extinction. This provision, Section 7, is frequently litigated, and it is probably one of the most controversial aspects of the statute because it means that federal agencies may be in the business of regulating private land and private property.

Section 9 is the provision of the act that I think most people think about. The person on the street who thinks about the Endangered Species Act, what they know about the act is that you cannot kill, you cannot hunt an endangered species. Section 9 is the prohibitions on the take of those species. As we'll talk about shortly, that definition, that word, take, encompasses more than just the deliberate killing of a species. Then Section 10 is where we find the flexibility in the act. It's the possibility of getting permits and authorizations for private landowners and private entities to take actions that may affect endangered species. So that's where we find some flexibility in the act and a planning process for large-scale activities that might occur or affect endangered species or their critical habitat. Now, Richard has done a great job of explaining the bipartisan support, but we didn't have to wait long for a big controversy to reach the Supreme Court involving the Endangered Species Act. I want to turn it over to you, Richard, to talk about the act in the Supreme Court.

Richard Lazarus:

Yeah. So the Supreme Court over the last 50 years decided in about four meaningful cases, but there are two that are blockbusters. I mean, actually blockbusters. One was TVA v. Hill, that involves Section 7 of the statute. The other was Babbitt v. Sweet Home, decided in 1995, involving Section 9 of the statute. So, let me tell you about each of those and then I'll talk a little bit about the other two. So TVA v. Hill was the first one, and it remains environmental law's most significant, at least for the Endangered Species Act, Supreme Court ruling. So, this pitted the snail darter against the federal government. The federal government wanted in Tennessee to complete a very large water project, and that meant completing a major dam with enormous support from both Democrats and Republicans in the Congress and also of course, back in Tennessee. A lot of farmers were very upset about this dam. Environmentalists were upset about the dam, because of the flooding that would happen and they brought a series of lawsuits to try to prevent the dam from being completed.

Then just before the dam was basically about to just begin operation, it was largely constructed at this point, they discovered that there was a subspecies of a snail darter whose habitat was in the area that would be destroyed by the operation of the dam. So they brought an Endangered Species Act claim saying, "Wait, federal government, we're looking at Section 7." Section 7 of the Endangered Species Act says the federal government is barred from doing anything likely to jeopardize the continued existence of an endangered species. Here it is. It's endangered, and the Department of the Interior agrees it's an endangered species. Well, the Department of Interior actually was gung-ho about the Endangered Species Act, but this dam was being operated by the Tennessee Valley Authority, which is a federal agency. They were not so gung-ho, and they have independent litigating authority in the lower courts, not in the US Supreme Court.

So, a lawsuit was brought by the farmers and by environmentalists. Their lawyer at the time was a very young academic named Zyg Plater, since for many decades, a wonderful, wonderful law professor at Boston College School of Law. They brought the lawsuit and lo and behold, the Sixth Circuit Court of Appeals agreed with the environmentalists that the Endangered Species Act was being violated and it required an injunction to stop the dam. The dam was just about done, to stop the dam from operating. Well, people were outraged. What could this be, that could stop this thing? The little snail darter on the one side and this incredibly important economic project people claimed on the other side, but the Sixth Circuit said, "That's what the law says. The federal government can't do anything likely to jeopardize continued existence of species. It's undeniable. It will jeopardize the snail darter."

Congress passed laws to say, "We'll move the snail darter, we'll take it to another place." People said that made no difference. So TVA sought Supreme Court review in the case and the Department of the Interior was less excited about that because it seemed that they actually probably thought that the environmental claims were right in the case. At that point, TVA, though no longer had independent litigating authority, went up to the Solicitor General of the United States. The Solicitor General of the United States, I would say with the strong counsel of the Attorney General Griffin Bell at the time, who thought this was outrageous and crazy, he said he'd resign if they didn't seek Supreme Court Review in this case on behalf of TVA. So the Solicitor General's office did, and they filed a petition in the case, and the Supreme Court when they first saw the case, their intuition based on the petition for certiorari, jurisdictional, and the brief and opposition, this is crazy.

They were going to summarily reverse in favor of the Tennessee Valley Authority until a couple justices, mostly Justice Stevens said, "No, no, no, you can't do that. This requires full plenary review," and he was going to write a really angry dissent from summary reversal. So finally the others said, "Okay, okay,

settle down, John. We'll hear the case on the merits." They heard the case on the merits, and they actually affirmed. When they actually read the briefs, looked at the statute, didn't just think about it impulsively based on their instinct this must be crazy, actually, that's what the statute says. So they actually six to three, they affirmed. They ruled in favor, we say, of the snail darter and the farms and environmentalists. They said the dam cannot be completed. It was written by none other than Chief Justice Warren Berger, a conservative justice, and obviously the chief on the court. Huge victory.

It worked out very nicely. People thought, "All right. We're going to amend the Endangered Species Act. This is crazy." If you look actually at the papers of the justices when they talked about it, even the ones in the majority, one of them, Justice Marshall said, "This is a stupid statute," but that's what it says. So, big win for environmentalists. Section 7 means what it says. Automatic injunction, you can't balance the equities away. Congress has done that. The dam can't get completed. People thought, "Well, obviously it's immediately going to amend the law," and they didn't. They didn't amend the law, they didn't change it. They did create a new provision which allowed folks to actually decide to exempt a project from the Section 7. We call that the God Squad. The God Squad actually met after Congress met, and they decided not to exempt the Tennessee Water Project.

So, it was a real wake-up call. It was a wake-up call to several things, I think. One, a wake-up call to the Endangered Species Act. Two, that actually, it was a serious law. It was a serious law that had some very important overriding purposes and it made people think harder about these things than before. It was also one that is famous in the world of Supreme Court advocacy because Griffin Bell, the Attorney General, insisted on arguing the case himself in the United States Supreme Court. To try to make his point, he actually brought into the courtroom a prop, which you don't do. He brought into the courtroom a jar full of water with a snail darter in it. The justices were, let's say, not impressed by his effort. Justice John Paul Stevens, in a wonderful colloquy with the Attorney General said basically, "Is that a snail darter?"

He said, "Yes, it is." He said, "Are you trying to suggest by his presence here that some species are more important than others?" Stevens said, "Isn't that exactly the policy question that Congress said we can't address? Congress has answered that question for us." So a huge case, huge win, and a really great moment for the Endangered Species Act, and for Supreme Court advocacy. The next case before the Court was in 1995, and that's Babbitt v. Sweet Home. Wonderfully, it involves actually a different provision to statute and that is Section 9, rather than Section 7. That's the provision, as Andy explained, which makes it unlawful to take an endangered species. Actually at the time, by regulation it was extended to threatened species as well. The question in the case was whether the Department of Interior had validly construed that statutory provision when it propagated regulation, which said the take prohibition extends to the modification of habitat that would actually kill or injure an individual endangered or threatened species.

The United States Supreme Court, in an opinion written by John Paul Stevens, also six to three, upheld the Interior's interpretation of the law, to say it applied to the modification of habitat which actually killed or injured a species. Huge decision. Obviously, one which made the statute far more controversial because as Andy explained, Section 9 applies not just to the government like Section 7. Section 9 applies to individual behavior and that means to a landowner's use of their own private land, which is a habitat for endangered species. If they take some action which with their land, they modify their land in some way that would actually kill or injure an individual species, that's a violation of the law. That's potentially a crime under federal law. Land use regulation is often the third rail of environmental law. People don't think, a lot of justices and judges don't think, policymakers don't think the federal government should be in the business of land use regulation. Making Section 9 apply to private land and private landowners'

modification of their own property because it would injure an endangered threatened species, those are fighting words, when it happened.

Fascinating opinion, six to three, Justices Kennedy and O'Connor joined it. Ironically here, I think one reason why it was upheld by the Court was the Reagan administration had narrowed the Department of Interior regulation to say the modification of the land had to actually kill or physically injure the species. Environmentalists were upset about that at the time. I think that probably saved the statute in the Supreme Court. It's not clear to me you would've had Justice O'Connor and Justice Kennedy sign onto that if it had actually been narrowed by the Reagan administration. So, huge case., TVA v. Hill built up Section 7. Babbitt basically built up Section 9.

Andrew Mergen:

One thing that I think is really interesting about the Sweet Home-Babbitt decision is that Justice Scalia dissents and his dissent hits on a lot of issues that have persisted in the administrative law space. For instance, here is a statute that is both civil and criminal and what role should deference to the agency play in that circumstance when principles of statutory construction like rule of lenity also apply in criminal law. Would you say that the Scalia dissent has had a strong afterlife?

Richard Lazarus:

Oh, absolutely. It was an interesting issue at the time. Justice O'Connor asked the first question, and the oral argument in Babbitt was all about the criminal dimension of the law. She was very concerned about that. There are arguments made in the case about how there should not be Chevron deference to Interior's interpretation because the regulation in question had a criminal as well as civil dimension. Justice Stevens deals with that in a footnote in the case and he simply says, "Look, a rule of lenity doesn't have any play here, because any ambiguity can be solved by the regulation itself, and the regulation itself provides clarity here. So, it doesn't affect whether you defer to the agency's interpretation of the language because any problem with due process and the rest can be satisfied by the regulation itself."

He gives it the back of the hand. As you and I know, most recently in a case involving the Clean Water Act, Sackett v. US Environmental Protection Agency, in which the Court very narrowly defined the Clean Water Act jurisdiction, they addressed that issue of the rural entity and they very much go the other way in the case and they completely ignore Babbitt. They ignore the fact the Court has already addressed the issue before. So Justice Scalia's opinion, the same opinion in Babbitt has had legs, and in fact, I think it's not clear to me, either TVA v. Hill or Babbitt v. Sweet Home, if they were decided ab initio in the first instance by the Supreme Court today, they would be decided the same way. That does not suggest they're going to overrule the cases. They were both questions of statutory construction. Supreme Court doesn't intend to overrule questions of statutory construction which were settled, but I don't think they decide it the same way.

The other part of Scalia's dissent which is very telling is that he says, "Look, yes, the statute says take is prohibited," and the statute defines take to mean injure, harass in any kind of way. So it defines this traditional common law term, take, and defines it in the statute in a very expansive way. But you can't ignore the fact that it used the word take in the first instance, and the word take had a traditional, settled common law meaning, which was only direct injury.

So he resists the idea that a statutory jurisdictional term like take, which has a settled common law meaning, can be just completely ignored by the fact that it's defined in a more expansive way later on by the statute. So, he dissents. He doesn't have the votes. Of course, that is the issue in Sackett. In the

Sackett case, the Supreme Court ruled that the term navigable waters, which is a term of art with a very narrow meaning, the fact that Congress defined it more expansively in the statutory language defined navigable waters being waters of the United States wasn't enough to take away that traditional meaning.

For decades, the courts had said it was, including the United States Supreme Court in a case called, decided in I think 1983, unanimously. But it no longer was, and that was Scalia's view. It was Scalia's view in Babbitt he lost. It was Scalia's view in Sackett v. the EPA, he was no longer there, but those who would revere him, they carried his ideas and they ruled against the broader definition of Clean Water Act just the way Scalia I'm sure would've wanted, and wanted to happen in the Babbitt case.

Andrew Mergen:

It's so interesting that sometimes in these dissents, a towering justice like Scalia and so greatly influence the track of environmental law from the dissenter's position. I want to ask you about one other aspect of the Sackett decision, which I think you and I would agree, this is a podcast about the ESA, but none of us are through working through our grief in Sackett, which is just a profoundly terrible environmental law decision. You've written very eloquently about that. But at the time that Sweet Home is decided, a resounding win for the Endangered Species Act by Justice Stevens, who I think is underappreciated as a great environmental law justice, at that same time, there's a lot of controversy about the Commerce Clause, and were there are any limiting principles or whether you can do anything you want provision. With conservatives saying, "There have to be limits, this has gone too far."

We have the Sweet Home-Babbitt decision in the view of conservatives asserting the federal government into land use. At that point, we see a number of challenges to the Endangered Species Act arguing that Congress lacked the authority to enact the statute in some of its broader applications because it has no commerce nexus. Some of these species are confined to a single space. No one has ever engaged in a trade in cave invertebrates that are protected by the statute, and we saw a very concerted effort to take down the statute under the Commerce Clause with challenges being filed in the 11th Circuit and the Fourth Circuit and the DC Circuit and the Ninth Circuit. All of those challenges were rejected, but do you think we're out of the woods yet?

Richard Lazarus:

No, we're not out of the woods. Here's what's so fascinating. At the same time the Supreme Court is deciding the Babbitt case, which as I mentioned before is decided in 1995, at that same time, the Supreme Court decides a case called Lopez, where the Court ruled for the first time in like 60 years that a federal statute passed by Congress is invalid because Congress lacked the authority under the Commerce Clause to enact that law. It was a law that prevented the possession of a gun within a certain number of feet of public schools. The Court looked at that law and they said, "We don't think you have that authority. We think you don't have that authority because for Congress to have Commerce Clause authority, they have to be regulating economic activity which substantially affects interstate commerce. We don't think that Congress, in this gun law, was regulating economic activity substantially affecting interstate commerce."

It's a big problem, guns near schools, but it's not economic activity. It's not substantially affecting interstate commerce. It's not the fact that crime affects interstate commerce. It's whether this particular activity they had, and there are no Congressional findings about that, and it's not clearly economic activity that they're regulating. As soon as the Supreme Court announced that decision, five to four, as soon as they did, all of this environmental communities said, "Uh-oh." Two things we knew were

immediately at risk. Section 404 of the Clean Water Act in dealing with wetlands, and Section 9 of the Endangered Species Act, because we knew they both involve land use, that both those statutes, like most environmental statutes, are not written in terms of regulation of economic activity. They're written in terms of their objectives, which is pollution control, natural resource preservation. Just as in Lopez case, Congress had made no findings in those statutes about how they were regulating economic activity and about how there were substantial effects to interstate commerce.

So, we immediately knew in 1995 that those two parts of two major laws were vulnerable. One, navigable waters, and Section 4 of the Clean Water Act. Second, the take provision under Section 9 of the Endangered Species Act. Since 1995, we've waited and fought against that other shoe dropping. For the Clean Water Act, it dropped. It took a long time, but one of the justifications for the Supreme Court in the Sackett case in ruling navigable waters should not mean this broad, expansive view, as it would raise serious Commerce Clause questions about Congress' authority. That's relying on Lopez. For the Endangered Species Act, which I think many of us thought was more vulnerable than the Clean Water Act, because after all, the Clean Water Act does regulate channels of commerce among other things, and water, the Endangered Species Act seemed more vulnerable. Why? Because the beauty of the law is it's not concerned about economic activity. It's concerned about species, whether or not they have an economic value.

That's the fabulous thing about this law. It's not an anthropocentric law. It's a biocentric law. It's a law which recognizes the responsibility that humankind has to all species on our planet. So it's not a law which is saying, "This is really important for the economy." No, it's a law that's saying, "This is important for our spirit, this is important for who we are. This is important in terms of respect for future generations and the planet on which we live." So when the Supreme Court said to have Congress have authority, it's got to be about commerce, it's got to be an economic activity, it's got to be about regulating economic activity, you go, "Well, yeah, we can make that work. We can try to make all those species seem like they have that relationship, but it's not how the statute is written and it's not actually the motivation behind the statute."

So, you knew there might be a problem. A remarkable thing is since Lopez, as you know because you litigated most of these cases, the Endangered Species Act has been challenged again and again and again under the Lopez framework, has amplified by the Morrison case, and in every single one of those cases... How many circuits is it now?

Andrew Mergen:

It's over a half dozen.

Richard Lazarus:

Over a half dozen circuits. Every single circuit has reached the same conclusion. That is it's valid under the Commerce Clause, under what is called the aggregation theory. Even if some individual species like some subterranean insect somewhere or beetle somewhere has no relation to the economy, but the species as a whole, which is what Congress is talking about, the endangered species as a whole, they do. Most of the activity is, in fact, economic. So, you can actually regulate some subset which isn't, and aggregate them all together.

Every circuit that's addressed the issue has upheld the statute. There have been significant dissents in several of those cases, but because in the absence of circuit conflict, the Supreme Court has again and again and again denied review. To show that it's on the minds of the justices though, and I remember the moment, there was a major Commerce Clause case which involved whether or not a federal

narcotics law violated the Commerce Clause, exceeding Congress' authority in the case, and the Court ultimately upheld the statute, in a case called Raich. If you go to the oral argument in the case when one of the attorneys was making the argument, defending the law, Justice Scalia said, "Well, you couldn't say that about the Endangered Species Act."

He brought up the Endangered Species Act, in a federal narcotics case being argued in front of the United States Supreme Court. It showed he was drawing that connection. I don't know why they haven't yet taken the case. I don't think they should take the case. I think it's settled law, but we're worried.

Andrew Mergen:

Furthering the worry would be the concurrence by Justice Thomas in Sackett, right where he raises these issues.

Richard Lazarus:

I wouldn't say he raised the issue, I would say he put a bullseye on the Endangered Species Act. So in the Sackett case just decided, a case involving the Clean Water Act, a majority opinion written by Justice Alito, Justice Thomas wrote a separate concurrent opinion, joined I believe by Justice Gorsuch, and it basically says, one, we go much further in limiting the Clean Water Act than the majority has done. We aren't seeing anything in it which says they won't do it in a future case. Two, by the way, let's talk about the Commerce Clause. We think that the Court has gone out of bounds on broad, expansive notions of the Commerce Clause, and the single best example of how far the Court has gone in over-interpreting Congress' authority is environmental law. The one statute they then focus on is the Endangered Species Act. It's an invitation.

Andrew Mergen:

When I read that concurrence, it just sent waves of concern and frustration, having been involved in defending the constitutionality of the statute for so long. I want to move on from this particular issue and maybe get your thoughts on it, a hopeful note, which is that in the course of defending the constitutionality of the statute in numerous circuits, we found again and again "conservative justices," justices whose valence trends conservative, affirming the act, holding the act constitutional, that would be Judge Henderson in the DC Circuit, Judge Carnes in the 11th-

Richard Lazarus:

Judge Wilkinson, Judge Wilkinson.

Andrew Mergen:

And Judge Wilkinson. In the case that I argued, the Gibbs case, the red wolf case, in a split there between him and Judge Luttig, now retired, who dissented, and said that the act was plainly unconstitutional in its application in that case. I think this goes to where we started a little bit ago, a broad bipartisan support for the statute, in that we find again and again, conservative justices looking at this statute and saying, "Yes, it is constitutional." To be sure, there are folks like Justice Thomas and his concurrence in Sackett that are very troubling. Extremely troubling that Justice Gorsuch joins that concurrence, but it does seem like that there is broad support for the statute.

Richard Lazarus:

Well, I think it's not a fait accompli the Court will grant review in the case. During the Trump administration, one of the most recent Court of Appeals decisions upholding the statute, the Trump administration filed a brief in opposition, a very strong brief in opposition against the Court granting review at the request of the landowners in the case. You didn't see Chief Justice Roberts vote or dissent from denial of cert, and he dissented in one of those cases. He didn't dissent on the merits. He dissented on whether the DC Circuit should grant en banc in the case. They failed repeatedly, and Justice Thomas has been on the Court for a long time and they haven't had the votes necessary.

It sounds to me like right now, they may have two votes to do it. We don't know about the Chief Justice, whether he thinks in the absence of circuit conflict, now they should grant. He has in the past. He had several opportunities to do so. We don't know about Justice Kavanaugh on that issue. We don't know about Justice Barrett on it, either. It takes four votes to grant review in the case. So undoubtedly, Justices Thomas and Gorsuch concurring is a shot across the bow. It's an invitation, not that one was needed, to file more cert petitions in the case. If the Court grants review, it's not obvious to me they will necessarily say the statute's unconstitutional, but I prefer if they don't.

Andrew Mergen:

Yeah. Let's transition a little bit to whether we think the act, to reflect on its 50-year anniversary, has it been a success? Professor Adler, prominent environmental law professor, said that the goal of the statute is to conserve species, to recover species. By that metric, the act is not a success. In particular, he highlights the failure of the act with regard to incentivizing private property owners to do more for species and the like. You've been teaching in the space. You told me earlier today that your first appearance in Court had to do with the ESA, so what do you think?

Richard Lazarus:

Yeah, my first case, it was really fun to think about it. My first case was actually involving the California condor. Fresh out of law school. Friends of the Earth actually was challenging the Department of Interior's effort to save the condor for the captive propagation program. They thought the captive propagation program would wreck the condor, it would no longer be really a wild animal, and they'd rather see it go extinct. Representing the government, we took the opposite position. I'm very glad we did. We prevailed, and we actually now do have still condors now in the wild. I'm a big fan of Jonathan Adler. He's a law professor at Case Western School. He's more conservative than most environmental academics. A really important voice, a distinguished voice, and one that lends balance to the academy. With that said, I think he's wrong on this one. I think the Endangered Species Act is not a failure.

The bald eagle, the American alligator, the peregrine falcon, the whooping crane, humpback whales, the Southern sea otter, I mean, there are a lot of really important species which, in fact, have not gone extinct, which I think would've without the statute. That's where I think he's also measuring the statute incorrectly. Because he says the success of the statute depends upon how many species are fully recovered. That's the wrong question. The right question is how many species otherwise would've gone extinct? Not that they're necessarily fully recovered, but would've gone extinct.

There, I think the statute has been enormously successful because I think there would've been dozens and dozens, if not hundreds of species that might've gone extinct, fully extinct absent that statute. I also think it's unfair to the statute because to the extent that there've been lapses in it, sometimes it's because of the failure of Congress to authorize and appropriate the funds necessary for the statute to

work. Administrations, at times, who have basically not made it a priority to implement the statute. That's not the statute's fault. That'd be political fault.

Andrew Mergen:

Yeah. I just want to pick up on a couple of things because I agree with you, and I spent 33 years litigating the Endangered Species Act. As my colleagues who are still at the Department of Justice can attest, litigation in this space is often very frustrating. There are bad cases, there are bad outcomes, but I think by any measure, we ought to understand we should step back at this 50th anniversary and say congrats to that Congress, congrats to President Nixon. This is really a powerful statute. I think of a couple of things too.

You mentioned the bald eagle. We're on the Harvard campus right now and we could walk upstairs and possibly catch a glimpse of a peregrine falcon here in Cambridge. That is just extraordinary. It's extraordinary to be able to see a condor in the wild. I think of the reintroduction of the wolves in Yellowstone, work done by our colleague, Alice Thurston, when she was at the Justice Department, an incredible symbolic value to restore this animal to the landscape. We've seen how important that's been. So really, really important. Looking at the next 50 years, what do you think that holds for the statute and what would you tell folks about how it could be improved?

Richard Lazarus:

Yeah, there's no question it could be improved, but this is a problem that has paralyzed environmental law in general. That is we don't have a functional Congress. I mean, Congress has not amended in any significant way a substantive environmental statute since 1990. It hasn't amended the Clean Water Act... What? Since 1987, the Superfund law since 1984. There've been little its and bits, but no doubt the statute can be improved. I can give a few examples. Whether we can ever have a functioning Congress that will do it is a different question, and whether the agency can do it by regulation, by interpreting old language, that's increasingly up in air, given the Supreme Court's recent decision in West Virginia v. EPA, which has limited the ability of agencies to interpret ambiguous statutory language if it's a really significant rule. But let me tell you the ways it clearly could be approved.

One is it's obviously not ideal to have a law designed to protect species triggered only when they're threatened and endangered. So, it's only an endangered threatened species that is covered by Section 7 and Section 9. Well, that's a little late in the system to only have it come in so far when it's such a dire emergency. Much better to spot the problem earlier, which the statute could allow to be done, and actually deal with it before it's an endangered or threatened species, rather than have it be triggered when it's an endangered or threatened species. The other thing is it probably makes more sense to focus often on ecosystems and not focus necessarily on individual species. The problem is also an ecosystem problem. Individual species don't live in isolation for the ecosystem. Often it's a more programmatic problem. The other problem the statute has is it often deals with action rather than inaction, so a take of a species is barred by Section 9.

But often the biggest problem that species face is the lack of action to preserve their habitat, whether it's formerly designated critical or not. The statute doesn't deal with inaction, it deals with action. That can create perverse incentives. So farmers, ranchers, others who own private property, which is habitat for species, they have no incentive to actually maintain that habitat. Because if they maintain that habitat in an affirmative way, which might be good for them and good for the species, they may trigger Section 9 by their action, and then find themselves with a problem. In fact, they may want the species to die or go away and go someplace else, so it doesn't affect their use of the land. So you need to have

ways to actually have the statute provide incentives for private landowners to actually maintain the habitat, not view the statute as a threat to economic viability.

Many of these ranches and farmers, they believe in the Endangered Species Act. They believe in species preservation. It was no happenstance that just O'Connor grew up on a ranch and she believed strongly, obviously, in the Endangered Species Act. People who live on the land and work the land, they care for those species. They coexist with those species. But the way the statute is written, too often it appears to pit their economic interests against the species. That's not necessary. The statute could be improved in that way.

In fact, you can do more under the statute right now than is sometimes done under Section 4 of the statute. Provide those farmers and those ranchers with those incentives, to create safe harbor plans which allow things maybe not to be listed formally as endangered or threatened species, or to create some exceptions under Section 10 for takes of the species, or to Section 4 to allow those things to happen. I think the statute could use an overhaul. More can be done by regulation too, but I think people are worried if you open up the statute, who knows what would happen with the current Congress.

Andrew Mergen:

Yeah, I agree. I think your point, and I agree with you also about what a great voice Jonathan Adler is in the space in his calling attention to private property owners, where half of the species are on private property is really important. There are probably other incentives like in the Farm Bill and the like that could be utilized to do more for species' habitat. Your point about the dysfunctional Congress speaks for itself, and I guess I would say to our listeners, if you care about these issues, urge Congress to give Fish and Wildlife Service, to give NOAA more money to do more. There's so much that they can do, but there's so many demands on them and you need the funds to do it. As you've noted, administrations often don't even ask for the money they need because of all of the dysfunction that we're seeing right now in terms of getting a budget.

But this statute, if we go back 50 years, we know that it's important to Americans, and you can demand more I think from our Congress. The one other thing I would say about people who manage lands in this country that are increasingly, rightly a very important part of the future of our endangered and threatened species are the tribal nations. When the wolves were put back onto the landscape in the greater Yellowstone ecosystem, the Nez Perce tribe played an important role in that. We now see with the California condor the Northern California tribes playing an important part in the reestablishment of those populations, and that is a plus and a really important part of the future of the act.

Richard Lazarus:

It's a striking law, one worth celebrating. I look forward to returning 50 years from now, Andy, and we'll talk about the 100th anniversary of the Endangered Species Act.

Andrew Mergen:

Yes, it's been great talking to you, Richard. Thanks so much.

Richard Lazarus:

Thank you.