

2014

## The National Historic Preservation Act: Preserving History, Impacting Foreign Relations?

Mark P. Nevitt

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### Recommended Citation

Mark P. Nevitt, *The National Historic Preservation Act: Preserving History, Impacting Foreign Relations?*, 32 BERKELEY J. INT'L LAW. (2014).

Available at: <http://scholarship.law.berkeley.edu/bjil/vol32/iss2/7>

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# The National Historic Preservation Act: Preserving History, Impacting Foreign Relations?

Mark P. Nevitt\*

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## INTRODUCTION

Japanese Prime Minister Shinzo Abe, the highest political leader in Japan, shook his head in disbelief.<sup>1</sup> His tenure as Prime Minister had been tense, partly due to the ongoing question of a replacement airfield for the U.S. Marines in Futenma.<sup>2</sup> A predecessor, Yukio Hatoyama, also suffered political fallout stemming from his reversal of a public promise to find a replacement location for the U.S. Marine Corps Air Station.<sup>3</sup> Prior to the Hatoyama administration, the Japanese government had selected a new location for the Marine Air Station, a remote area far removed from the busy city of Okinawa in Henoko. Moving to Henoko was intended to be a “win-win” for both Japan and the United States as it would alleviate the environmental concerns and urban encroachment that plagued the Futenma Air Station’s operations while complying with United States’ military operational requirements.<sup>4</sup> Yet Japan will not be moving the Marines from Futenma to Henoko anytime soon. The National Historic Preservation Act (NHPA), enacted in 1966 with the goal of preserving the “cultural foundations of the [n]ation . . . in order to give a sense of orientation to the American people,”<sup>5</sup> effectively stopped Japan’s proposed movement of the Marines to Henoko.

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1. Uncertainty about the future of the Marine base continues to this day. See Travis Tritten, *Lack of Solid Plan Holds Up Marines’ Move from Okinawa, McCain Says*, STARS AND STRIPES, Aug. 22, 2013. Prime Minister Shinzo Abe has been the Prime Minister of Japan since December 2012 and also served as Prime Minister from September 2006 to September 2007. See PRIME MINISTER OF JAPAN AND HIS CABINET, [http://www.kantei.go.jp/foreign/96\\_abe/meibo/daijin/index\\_e.html](http://www.kantei.go.jp/foreign/96_abe/meibo/daijin/index_e.html). Junichiro Koizumi was Prime Minister from 2001–2006 when the *Dugong* litigation first began. *Id.* Prime Minister Abe recently backed the move of the Marines off Okinawa to a less crowded area; see Martin Fackler, *Japan Leader Backs Move of U.S. Base on Okinawa*, N.Y. TIMES, Mar. 22, 2013, at A4.

2. See, e.g., Tritten, *supra* note 1.

3. There were eight Prime Ministers of Japan since the beginning of the *Dugong* litigation. The question of “where to place the American Marines at Futenma?” has affected each Prime Minister in some capacity over the past ten years.

4. *Dugong v. Gates* (“*Dugong I*”), 543 F. Supp. 2d 1082, 1098 (N.D. Cal. 2008) (stating that the court “acknowledges that Japan has ultimate responsibility for selecting the location of the replacement facility, and that Japan’s site selection was driven by its own concerns for environmental, engineering, political and cost factors”) (emphasis added). Japan’s decision to move was made after intense negotiations with U.S. officials who sought assurances that the new location met its military operational requirements. A variety of United States-Japan groups have assisted in making recommendations on the location of military bases in Japan over the past twenty years. They include the bilateral Security Consultative Committee (SCC), the Special Action Committee on Okinawa (SACO), and the bilateral Futenma Implementations Group (FIG), a committee under the supervision of the SCC. See *Dugong v. Rumsfeld* (“*Dugong I*”), No. C 03-4350 MHP, 2005 U.S. Dist. LEXIS 3123, at \*2–3 (N.D. Cal. Mar. 2, 2005). This case, decided in 2005, later changed the named Defendant from Donald Rumsfeld to Robert Gates to reflect the change in the Secretary of Defense. To avoid confusion, this Article will use the shorthand “*Dugong I*” to refer to the 2005 federal court decision, “*Dugong I*” to refer to the final 2008 decision, and “*Dugong* rulings” or “*Dugong*” litigation to refer to both decisions.

5. 16 U.S.C. § 470(b)(2) (2010).

Many Japanese citizens and American environmentalists were incensed as the new Henoko location included the habitat for the dugong, a species of marine mammal listed as a protected “natural monument” on the Japanese Register of Cultural Properties.<sup>6</sup> Lacking a judicial remedy in Japan, they turned to U.S. law with success—the NHPA.<sup>7</sup> when used in conjunction with the Administrative Procedures Act (APA). authorizes a lawsuit against federal agencies to include the Department of Defense (DoD) in a U.S. federal court.<sup>8</sup> Following several years of litigation, the court ruled in favor of the plaintiffs, requiring the DoD to account for the effect of the move on the dugong and effectively thwarting Japan’s decision to move the Marines to the new location at Henoko.<sup>9</sup>

In *Dugong v. Rumsfeld (Dugong I)* in 2005 and *Dugong v. Gates (Dugong II)* in 2008, a U.S. district court interpreted the NHPA to protect a wild animal outside the United States in another sovereign territory, calling into question Japan’s decision to move a U.S. military installation from one part of Japan to another.<sup>10</sup> In the *Dugong* rulings, the court applied the litigants’ innovative use of the NHPA’s extraterritorial provision<sup>11</sup> to protect foreign cultural and historical properties as defined by the foreign sovereign’s law. This application went beyond the traditional scope of the NHPA.<sup>12</sup> While the precedent is limited to a single federal district, it downplays broader prudential foreign policy concerns that have traditionally constrained the judiciary in such areas, most recently reaffirmed in *Kiobel v. Royal Dutch Petroleum Co.* by the U.S. Supreme Court.<sup>13</sup> The NHPA now no longer functions solely as a domestic preservation statute of limited scope and jurisdiction. In light of the *Dugong*

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6. *Dugong II*, 543 F. Supp. 2d at 1084. The Japanese citizens who were party to the U.S. lawsuit were unable to bring a lawsuit to protect the dugong in Japanese court as the Japanese legal system lacked a citizen suit provision and a clear judicial enforcement mechanism. See also Mitsuhiro A. Takahashi, *Okinawa Dugong v. Rumsfeld: Extraterritorial Operation of the U.S. Military and Wildlife Protection Under the National Historic Preservation Act*, 28 ENVIRONS ENVTL. L. & POL’Y J. 181, 190 (2004); Bob Egelko, *Imperiled Mammal Threatened by Plan for Okinawa Base, Court in S.F. Hears Activists Advocate Applying U.S. Law*, S.F. CHRON., Aug. 5, 2004, at B4.

7. *Dugong II*, 543 F. Supp. 2d at 1082.

8. *Id.*

9. The Okinawa dugong was listed as one of the ten plaintiffs in the lawsuit. The other plaintiffs included three individual Japanese citizens and six American and Japanese environmental associations. While the court did not find standing for the Okinawa dugong, as it failed to meet the “person” definition under the Administrative Procedures Act, the case was decided with the Okinawa dugong as the named plaintiff. *Id.* at 1083. An animal was first recognized with standing to sue in *Palila v. Hawaii Dept. of Land and Natural Resources*, 639 F.2d 495 (9th Cir. 1981). But see *Cetacean Community v. Bush*, 386 F.3d 1169, 1178 (9th Cir. 2004) (declining to expand the definition of person to include animals such as whales, porpoises, and dolphins).

10. *Dugong II*, 543 F. Supp. 2d at 1082; *Dugong I*, 2005 U.S. Dist. LEXIS 3123, at \*18.

11. The National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915 (codified as amended at 16 U.S.C. §§ 470–470x-6 (2012)).

12. The World Heritage Convention’s obligations were incorporated into the NHPA in 1980 at 16 U.S.C. § 470a-2.

13. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

rulings, the NHPA impacts broader foreign relations and national security and must be addressed. Two novel issues are discussed in this Article.

First, this Article asserts the *Dugong* rulings were wrongly decided. The rulings ignore the NHPA's scope, the larger context of American historic preservation law, and weighty foreign policy concerns most recently reaffirmed in *Kiobel*. The judicial branch should exercise caution in deciphering the NHPA's application overseas as these federal actions impact sensitive foreign relations.

Relatedly, the NHPA may take on increased importance in environmental litigation overseas as the *Dugong* rulings apply the extraterritorial provision of the NHPA in contrast to judicial enforcement of other U.S. statutes protecting the environment.<sup>14</sup> Courts have been reluctant to construe U.S. laws to provide environmental protections overseas.<sup>15</sup> And the Supreme Court's decision in *Kiobel* held that there is a presumption against extraterritorial application of the Alien Tort Statute (ATS) on claims stemming from wrongful corporate environmental practices.<sup>16</sup>

Second, this Article argues that the choice for inclusion of the World Heritage Convention's (WHC) treaty obligations within the NHPA in 1980 and the *Dugong* rulings together result in a potential magnification of the NHPA's impact on overseas federal activities as the NHPA's jurisdiction and scope are seemingly expanded.<sup>17</sup> This legal expansion defies practical layperson expectations of the NHPA's scope and raises the specter of further uncertain domestic legal rulings that broadly construe the NHPA and potentially affect foreign relations. For example, if an animal can be protected overseas via the NHPA, can such an interpretation of the NHPA be used to protect living animals domestically? If the NHPA is not solely a domestic preservation statute, then it is truly an exceptional U.S. environmental statute<sup>18</sup> that applies within another sovereign's jurisdiction.<sup>19</sup>

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14. See Jonathan Remy Nash, *The Curious Legal Landscape of the Extraterritoriality of U.S. Environmental Laws*, 50 VA. J. INT'L L. 997, 1004–10 (2010) (describing the numerous U.S. domestic environmental laws that lack an extraterritorial provision).

15. See, e.g., *Arc Ecology v. U.S. Dep't of the Air Force*, 411 F.3d 1092 (9th Cir. 2005) (holding that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) had no extraterritorial effect).

16. *Kiobel*, 133 S. Ct. at 1659. *Kiobel* has similarities with both *Dugong* decisions: both addressed U.S. federal court jurisdiction in matters in another sovereign. *Dugong II*, 543 F. Supp. 2d 1082 (N.D. Cal. 2008); *Dugong I*, No. C 03-4350 MHP, 2005 U.S. Dist. LEXIS 3123 (N.D. Cal. Mar. 2, 2005).

17. *Dugong II*, 543 F. Supp. 2d at 1082.

18. This Article uses the term "environmental statutes" broadly to encompass the array of U.S. laws that provide for protection of the environment and its natural resources. These include, for example, the major environmental statutes (e.g. the Clean Water Act, 33 U.S.C. §§ 1251–1387, and the Clean Air Act, 42 U.S.C. §§ 7401–7626) and natural resource statutes (e.g. the Sikes Act, 16 U.S.C. § 670, and the Antiquities Act, 16 U.S.C. §§ 431–433).

19. *But see* *Env'tl. Def. Fund, Inc. v. Massey*, 986 F.2d 528 (D.C. Cir. 1993) (holding that the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4347, applied to a federal action in Antarctica). The court, however, did distinguish Antarctica—a landmass without a sovereign—from

Due to the uncertain outcomes of U.S. law and larger foreign relations concerns discussed in *Kiobel*, this Article contends that Congress should clarify the proper scope and jurisdiction of the NHPA.<sup>20</sup> Congress should re-anchor the NHPA in its proper place as the statutory successor of the American historic preservation movement and it should be clarified to minimize any unforeseeable impacts on foreign relations overseas. How could this statute, associated with the protection of domestic physical historic properties, with origins in the larger U.S. historic preservation movement, be utilized to protect a wild animal in Japan? And what are the practical consequences of such a determination for the scope of the NHPA on future environmental enforcement matters both at home and overseas? These questions will be explored below.

Part I provides an overview of both the NHPA's history and the 1972 WHC,<sup>21</sup> an international convention that protects properties of cultural and natural heritage. Part II discusses the NHPA's extraterritorial application by including an analysis of *Dugong I* and *Dugong II*. Part III addresses the extraterritorial application of the NHPA, contrasting the NHPA with the more limited reach of other environmental statutes as construed by the courts. Part IV addresses the broader foreign relations concerns of the NHPA's extraterritorial application. Part V offers concrete recommendations for Congress to clarify the scope and jurisdiction of the NHPA.

## I.

### OVERVIEW OF THE NATIONAL HISTORIC PRESERVATION ACT AND THE WORLD HERITAGE CONVENTION

The NHPA<sup>22</sup> is primarily intended to preserve the historic physical properties within the United States.<sup>23</sup> Since its inception, it has played a critical role in preserving numerous historical properties in the United States. Today, over 88,000 properties are on the U.S. National Historic Register, whose origins date from 1935.<sup>24</sup> This section provides an overview of American preservation law leading to the passage of the NHPA and its 1980 WHC implementing amendments.

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other sovereign nations. *Id.* at 529. After *Dugong I* and *II*, the NHPA, as applied overseas, appears to be more powerful than when applied domestically, protecting properties that are beyond what is customarily protected in the United States.

20. *Kiobel*, 133 S. Ct. at 1659.

21. Convention Concerning the Protection of the World Cultural and Natural Heritage art. 2–3, Nov. 16, 1972, 27 U.S.T. 37 [hereinafter WHC].

22. 16 U.S.C. §§ 470–470x-6 (2012).

23. See generally Carol Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 474–76 (1981) (providing a comprehensive background on the preservation movement in the United States).

24. See generally *Nat'l Reg. of Hist. Places*, NATIONAL PARK SERVICE, <http://www.nps.gov/nr/research/index.htm>. (last visited Mar. 6, 2014) (providing an up-to-date list of the number of historic places on the National Register).

*A. American Historic Preservation Law: A Deliberate, Evolutionary Progression*

The NHPA was signed into law in 1966;<sup>25</sup> it is “the key federal law that establishes a federal policy for the preservation of cultural and historic resources in the United States.”<sup>26</sup> The NHPA is the statutory and evolutionary extension of earlier citizen-derived private and public historic preservation efforts. According to one scholar, Professor Carol Rose, there have been three phases of historic preservation: (1) preservation for “inspiration” where places, such as Civil War battlefields, convey a sense of community; (2) preservation for “architectural merit” which included the preservation of larger historic districts; and (3) preservation for community. The enactment of the NHPA falls within the third phase of America’s historic preservation movement.<sup>27</sup>

The U.S. historic preservation movement’s origins are fondly associated with the efforts of a determined group of women to save George Washington’s home in Mount Vernon, Virginia in the face of governmental apathy.<sup>28</sup> In the mid-nineteenth century, the group raised an extraordinary \$200,000 in a grassroots fundraising campaign.<sup>29</sup> Today, the Mount Vernon Ladies’ Association is the oldest national historic preservation organization in the United States and continues to own and operate Mount Vernon.<sup>30</sup>

Interest in historic preservation increased following the Civil War when the United States Congress and local organizations acted to protect the sites of historic battlefields. For example, in the late nineteenth century, the federal government sought to condemn a property for the creation of a national battlefield monument at Gettysburg.<sup>31</sup> Then, judicial protection of preservation

25. See, e.g., JULIA H. MILLER, A LAYPERSON’S GUIDE TO HISTORIC PRESERVATION LAW (2004). This guide provides a good overview of the NHPA’s purpose and background.

26. *Id.* at 3. While the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4375 (2012), and Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303 (2011), also protect historic resources, they will not be the subjects of this Article, largely because they lack an express extraterritorial basis.

27. Cf. Rose, *supra* note 23, at 481–82, 484, 488 (stating that the passage of the NHPA reflected the third phase of historic preservation that “builds on elements of the past”).

28. *Id.* at 482.

29. See THE MOUNT VERNON LADIES’ ASS’N: A BRIEF HISTORY, <http://www.mountvernon.org/visit-his-estate/general-information/about-mount-vernon/mvla/history> (last visited Mar. 3, 2014).

30. See *id.* (providing an overview of the Mount Vernon Ladies Association history and present-day involvement and educational efforts).

31. Rose, *supra* note 23, at 482.

By the act of [C]ongress approved August 1, 1888 (chapter 728), entitled “An act to authorize condemnation of land for sites of public buildings and for other purposes,” it is provided “that in every case in which the [S]ecretary of the [T]reasury, or any other officer of the government, has been or hereafter shall be authorized to procure real estate for the erection of a public building or for any other public uses, he shall be and hereby is authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the government to do so.”

efforts began in earnest. *United States v. Gettysburg Electric Railway Co.* was filed in response to an effort to block railway operations on the Gettysburg Battlefield.<sup>32</sup> In ruling that a physical place—including its surroundings and landscape—may be protected by Congress, the Court held that the use of eminent domain for historic preservation is a public use.<sup>33</sup> *Gettysburg Electric* marked the first time the Supreme Court upheld Congress's powers to act to preserve an important historic site.<sup>34</sup> In *Gettysburg Electric*, the Court stated:

Can it be that the government is without power to preserve the *land*, and properly mark out the various *sites* upon which this struggle took place? Can it not erect the *monuments* provided for by these acts of Congress, or even take possession of the field of battle, in the name and for the benefit of all the citizens of the country, for the present and for the future? Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted congress by the constitution for the purpose of protecting and preserving the whole country.<sup>35</sup>

Thus began judicial efforts to promote preservation efforts on home soil.

Historic preservation efforts were further energized under President Theodore Roosevelt with the signing of the Antiquities Act in 1906.<sup>36</sup> The Antiquities Act prohibits the excavation or destruction of antiquities from public lands without a permit from the Secretary of Interior and authorizes the President to declare lands owned or controlled by the federal government as “national monuments,” thereby preserving them for future generations.<sup>37</sup> Like *Gettysburg Electric*,<sup>38</sup> the Act focuses on the protection of physical, tangible structures and objects stating:

[t]he President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic *landmarks*, historic and prehistoric *structures*, and other *objects* of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments.<sup>39</sup>

There are penalties for the appropriation of any “ruin,” “monument,” or “object of antiquity.”<sup>40</sup> While these terms are not specifically defined within the

United States v. Gettysburg Elec. R. Co., 160 U.S. 668 (1896).

32. *Gettysburg Elec.*, 160 U.S. at 668 (emphasis added).

33. *Id.* at 680-83 (emphasis added).

34. See J. Peter Byrne, *Hallowed Ground: The Gettysburg Battlefield in Historic Preservation Law*, 22 TUL. ENVTL. L.J. 203, 210 (2009).

35. *Gettysburg Elec.*, 160 U.S. at 682 (emphasis added).

36. The Antiquities Act, 16 U.S.C. §§ 431-433 (2012). The Antiquities Act was passed in response to vandalism at a historic Casa Grande ruin in Arizona as well as in response to renewed attempts to preserve Mount Vernon. Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage*, 28 NEW ENG. L. REV. 63, 67 (1993).

37. 16 U.S.C. §§ 431-432. Permits for “the excavation of archaeological sites, and the gathering of objects of antiquity upon the lands under their respective jurisdictions may be granted by the Secretaries of the Interior, Agriculture, and War.” 16 U.S.C. § 432.

38. See *Gettysburg Elec.*, 160 U.S. at 682.

39. 16 U.S.C. § 431 (emphasis added on “landmarks,” “structures,” and “objects”).

40. 16 U.S.C. § 433.

Antiquities Act, they are all physical properties. The Antiquities Act is a success story in its effective preservation of national treasures and is widely used by the President today for preservation efforts. Indeed, President Obama recently designated five new properties as national monuments pursuant to his authority under the Antiquities Act.<sup>41</sup>

Following the passage of the Antiquities Act, the National Park Service was founded in 1916<sup>42</sup> and the Historic Sites Act was signed into law in 1935.<sup>43</sup> These developments focus on the preservation of physical properties including sites, buildings, and objects like the Antiquities Act and *Gettysburg Electric* before it.<sup>44</sup> The Historic Sites Act predates the NHPA's modern National Register. The Act states, "it is hereby declared that it is a national policy to preserve for public use historic *sites, buildings, and objects* of national significance for the inspiration and benefit of the people of the United States."<sup>45</sup> Under the Historic Sites Act, the Secretary of the Interior, through the National Park Service, is authorized to "restore, reconstruct, rehabilitate, preserve, and maintain historic or prehistoric *sites, buildings, objects, and properties* of national historical or archaeological significance and, where deemed desirable, establish and maintain museums in connection therewith."<sup>46</sup> Thus, early preservation efforts focused exclusively on tangible, physical properties.

Following World War II, President Truman signed the National Trust for Historic Preservation Act in 1949, establishing a corporation to facilitate public participation in the preservation of sites, buildings, and objects of national significance or interest, with the express purpose "to receive donations of *sites, buildings, and objects* significant in American history and culture, to preserve and administer them for public benefit."<sup>47</sup> Today, there are twenty-seven sites designated as National Trust Historic Sites—most are buildings of historical importance, including President Lincoln's Cottage in Washington, D.C. and the Touro Synagogue in Newport, Rhode Island.<sup>48</sup> Eleven years later, President Eisenhower signed the Archaeological and Historic Preservation Act into law, which borrowed language from earlier historic preservation laws with the purpose of preserving "historic American sites, buildings, objects, and antiquities of national significance."<sup>49</sup>

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41. See Press Release, The White House, President Obama Designates Five New National Monuments (Mar. 25, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/03/25/president-obama-designates-five-new-national-monuments>.

42. See The National Park Service Organic Act, 16 U.S.C. § 1 (2012).

43. 16 U.S.C. §§ 461–67 (2012).

44. 16 U.S.C. § 461; see 16 U.S.C. §§ 431–433; *United States v. Gettysburg Elec. R. Co.*, 160 U.S. 668, 682 (1896).

45. 16 U.S.C. § 461 (emphasis added).

46. 16 U.S.C. § 462(f) (emphasis added).

47. 16 U.S.C. § 468 (2012).

48. See NATIONAL TRUST FOR HISTORIC PRESERVATION, <http://www.preservationnation.org/travel-and-sites/sites/> (last visited Mar. 8, 2014).

49. 16 U.S.C. § 469 (2012).

B. *The National Historic Preservation Act Is Enacted: A Culmination of Earlier Preservation Efforts*

The origin of the NHPA is traceable to the administration of President Lyndon Johnson and the beautification program administered by the First Lady, Lady Bird Johnson.<sup>50</sup> This culminated with the passage of the NHPA in 1966. Additionally, a 1965 U.S. Conference of Mayors Report, *With Heritage So Rich*, focused on local and predominantly urban desires of major U.S. cities to preserve historic buildings within historic districts.<sup>51</sup> Indeed, it was the destruction of physical places by the federal highway regime that spurred congressional action with the signing of the NHPA just one year after the publication of *With Heritage So Rich*. The report recommended the creation of a comprehensive national historic preservation program and, shortly thereafter, the NHPA was enacted into law.<sup>52</sup>

The NHPA's purpose is to "give a sense of orientation to the American people,"<sup>53</sup> reflecting preservationists' desire not to feel lost within an urban environment and the importance of distinctive architectural qualities to afford a "sense of place."<sup>54</sup> The NHPA accomplished this, in part, by providing a public review and comment period prior to funding a federal activity that may impact property on or eligible for inclusion on the National Register.<sup>55</sup> Executive Order 11,593 directs that the federal government "shall provide leadership in preserving, restoring and maintaining the historic and cultural environment of the Nation."<sup>56</sup>

The NHPA has three major components that affect federal activities: (1) a "Section 106" procedural review to ensure federal agencies consider the effects of activities on historic properties; (2) the continuation of a National Register of Historic Places (derived from the earlier Historic Sites Act) that is routinely updated via the Secretary of Interior; and (3) a "Section 110" requirement for federal agencies to locate, inventory, and nominate properties that are within its control to the National Register.<sup>57</sup>

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50. THOMAS F. KING, CULTURAL RESOURCE LAWS & PRACTICE (3d ed. 2008).

51. Rose, *supra* note 23, at 489.

52. KING, *supra* note 50, at 18. The conservation protections within Section 4(f) of the Department of Transportation Act were also enacted by the same Congress.

53. 16 U.S.C. § 470(b)(2) (2012).

54. Rose, *supra* note 23, at 489–90.

55. 16 U.S.C. § 470f; Rose, *supra* note 23, at 526.

56. Exec. Order No. 11,593, 36 Fed. Reg. 8921 (May 13, 1971), *reprinted as amended in* 16 U.S.C. § 470 (2012).

57. MILLER, *supra* note 25, at 5.

1. *Section 106 Review Process and NHPA's Relationship with the National Environmental Policy Act*

First, the NHPA includes “National Environmental Policy Act (NEPA)-like”<sup>58</sup> procedural requirements commonly known as the “Section 106” review process.<sup>59</sup> This is similar to the detailed environmental impact statements and assessments required by NEPA.<sup>60</sup> The Section 106 process is the regulatory heart of the NHPA and analogous to the NEPA’s procedural environmental impact statement (EIS) requirement whereby DoD, as a federal agency, must comply with NEPA’s requirements.<sup>61</sup> Similarly, the NHPA requires federal agencies to take into account a project’s effects on historic properties listed in, or eligible for listing in, the National Register of Historic Places prior to funding, licensing, or otherwise proceeding with projects.<sup>62</sup> It states:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any *district, site, building, structure, or object* that is included in or eligible for inclusion in the National Register.<sup>63</sup>

These five classifications of properties (district, site, building, structure, or object) are repeated throughout the NHPA statutory scheme and are mirrored in the definition of “historic properties” within the NHPA.<sup>64</sup> The NHPA builds upon the “sites, buildings, and objects” language found in the Historic Sites Act adding “district” and “structure” to its definition of historic properties.<sup>65</sup> While *property* is not specifically defined in the NHPA, *historic property* or *historic resource* is defined as follows: “[h]istoric property or historic resource means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register, including artifacts, records, and material remains related to such a property or resource.”<sup>66</sup> The language of the NHPA continues to emphasize physical property.

This provision effectively directs all federal agencies, including the DoD to make an independent determination whether properties listed or eligible for

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58. The National Environmental Policy Act (NEPA), 16 U.S.C. §§ 4321, 4331, 4335, 4343 (2012).

59. 16 U.S.C. § 470f. Section 106 refers to the relevant provision within the NHPA statutory construct. It does not have any relation to the actual statutory citation within Title 16 (i.e. Section 106 does not equate to 16 U.S.C. § 106).

60. The National Environmental Policy Act (NEPA), 16 U.S.C. §§ 4321–4375 (2012).

61. MILLER, *supra* note 25, at 5.

62. 16 U.S.C. § 470f.

63. *Id.* (emphasis added to show the five types of properties that the NHPA protects).

64. 16 U.S.C. § 470w(5).

65. 16 U.S.C. §§ 431–33 (2012). Arguably, it only added “district” to the historic preservation lexicon as “structure” was protected pursuant to The Antiquities Act.

66. 16 U.S.C. § 470w(5).

listing in the National Register will be adversely affected prior to the initiation of a federal “undertaking.”<sup>67</sup> If a proposal appears to affect a property listed on the National Register, the Advisory Council on Historic Preservation—an independent federal agency—is given the opportunity to provide further comment.<sup>68</sup>

The NHPA is fundamentally procedural in nature. “While Section 106 is an effective tool in focusing attention on federal agency actions affecting historic resources, it does not prevent federal agencies from taking actions that ultimately harm historic resources.”<sup>69</sup> The NHPA requires that the relevant federal agency identify historic resources and explore alternative measures to mitigate or avoid the harm the project would have on the buildings.<sup>70</sup> But the NHPA does not ultimately prevent the demolition of a property on the National Register, though the federal agency must properly “take into account” the effect of this action on the historic property.<sup>71</sup>

## 2. Section 101: The Evolution of the U.S. National Register

Second, Section 101 of the NHPA authorizes the expansion and maintenance of the National Register of Historic Places.<sup>72</sup> The National Register was established under the Historic Sites Act in 1935<sup>73</sup> and was effectively expanded by the passage of the NHPA.<sup>74</sup> Similar to the Section 106 provision, the National Register designates the properties eligible for placement within the NHPA as, “*districts, sites, buildings, structures, and objects* significant in American history, architecture, archeology, and culture.”<sup>75</sup> The National Register is limited to five categories of historic properties (districts, sites, buildings, structures, or objects).<sup>76</sup> The National Register authorizes the

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67. MILLER, *supra* note 25, at 5. Undertaking is defined broadly in the NHPA: “Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including —

- A. those carried out by or on behalf of the agency;
- B. those carried out with Federal financial assistance;
- C. those requiring a Federal permit license, or approval; and
- D. those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.” 16 U.S.C. § 470(w)(7).

68. MILLER, *supra* note 25, at 5.

69. *Id.* at 6 (emphasis added).

70. *Id.*

71. 16 U.S.C. § 470f.

72. 16 U.S.C. § 470a(a)(1)(A).

73. MILLER, *supra* note 25, at 2.

74. National Historic Sites Act of 1935, 16 U.S.C. §§ 461–467 (2012); *see also* MILLER, *supra* note 25, at 2.

75. 16 U.S.C. § 470a(a)(1)(A) (emphasis added).

76. The regulation specifies eligible properties as follows:

National Register criteria for evaluation. The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites,

Secretary of the Interior to add historic properties “and objects significant in American history, architecture, archeology, engineering and culture.”<sup>77</sup>

In assessing the five categories of historic properties (districts, sites, buildings, structures, and objects), the National Register utilizes the following definitions. A *district* is defined as a “geographically definable area, urban or rural, possessing a significant concentration, linkage or continuity of sites, buildings structures, or objects united by past events or aesthetically by plan or physical development. A district may also comprise individual elements separated geographically but linked by association or history.”<sup>78</sup> An example is the Georgetown Historic District in Washington, D.C.<sup>79</sup>

A *site* is the “location of a significant event, a prehistoric or historic occupation or activity, or a building or structure, whether standing, ruined, or vanished, where the location itself maintains historical or archeological value regardless of the value of the existing structure.”<sup>80</sup> A regulatory example of sites listed on the National Register is the Mud Springs Pony Express Station Site in Dalton, Nebraska.<sup>81</sup>

A *building* is defined as “a structure created to shelter any form of human activity, such as a house, barn, church, hotel or similar structure. Building may refer to a historically related complex such as a courthouse and jail or a house and barn.”<sup>82</sup> Examples of buildings on the National Register include the Molly Brown House in Denver, Colorado and the Fairtosh Plantation in Durham, North Carolina.<sup>83</sup>

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buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and

- (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or
- (b) that are associated with the lives of persons significant in our past; or
- (c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
- (d) that have yielded, or may be likely to yield, information important in prehistory or history.

Criteria considerations. Ordinarily cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years shall not be considered eligible for the National Register.

36 C.F.R. § 60.4 (2012).

77. 36 C.F.R. § 60.1.

78. 36 C.F.R. § 60.3(d).

79. *Id.*

80. 36 C.F.R. § 60.3(l).

81. *Id.*

82. 36 C.F.R. § 60.3(a).

83. *Id.*

A *structure* is defined as a “work made up of interdependent and interrelated parts of a definite pattern of organization. Constructed by man, it is often an engineering project large in scale.”<sup>84</sup> An example of a structure on the National Register is the Old Point Loma Lighthouse in San Diego, California.<sup>85</sup>

Lastly, the regulatory definition of *object* is of particular significance as it took on central importance in the *Dugong* rulings. “Object,” too, is addressed in prior preservation statutes like the Antiquities Act and the Historic Sites Act.<sup>86</sup> Object is defined under NHPA regulations as a “material thing of functional, aesthetic, cultural, historical or scientific value that may be, by nature or design, movable yet related to a specific setting or environment.”<sup>87</sup> While an object may be movable and seemingly expands the traditional definition of properties, it still must be a “material thing.”<sup>88</sup> And the examples of protected “objects” within federal regulations are instructive: they are all of a physical nature. Indeed, the regulatory examples provided are the Adams Memorial in Rock Creek Cemetery in Washington, D.C., the Sumpter Gold Dredge in Oregon, and the Delta Queen Steamboat in Cincinnati, Ohio.<sup>89</sup>

Clearly, there is a high degree of care in categorizing properties of historic value on the National Register. Today, more than 88,000 properties are currently on the National Register and it is continuously updated.<sup>90</sup> Nevertheless, the properties all share one commonality: they are all physical or tangible in nature. And living animals are completely absent from the U.S. National Register. This is perhaps not surprising, as animals and living organisms are afforded legal protections pursuant to the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA), as discussed in greater detail below.

### 3. Section 110: Historic Properties Within Federal Control

Lastly, the NHPA places special requirements on each federal agency regarding the management of historic properties within its ownership or control.<sup>91</sup> Each agency is required to utilize historic properties under its control

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84. 36 C.F.R. § 60.3(p).

85. *Id.*

86. *See, e.g.*, 16 U.S.C. § 432 (2012).

87. 36 C.F.R. § 60.3(j).

88. *Id.*

89. *See id.*

90. *See generally National Registry of Historic Places: Research*, NATIONAL PARK SERVICE, <http://www.nps.gov/nr/research/index.htm> (last visited Mar. 6, 2014) (providing an up-to-date list of the number of historic places on the National Register). A searchable database of properties listed on the National Register is available at <http://nrhp.focus.nps.gov/natreghome.do?searchtype=natreghome> (last visited Mar. 6, 2014).

91. 16 U.S.C. § 470h-2(a)(1)–(2) (2008). This is commonly referred to as the Section 110 process. “The heads of all Federal agencies shall assume responsibility for the preservation of historic properties which are owned or controlled by such agency.” *Id.*

“to the maximum extent feasible”<sup>92</sup> and identify, evaluate, and nominate potential properties to the National Register via the Secretary of Interior.<sup>93</sup>

The table below demonstrates the gradual evolution of historic preservation law and its applicability.

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92. *Id.*

93. *Id.* Under the NHPA statutory construct, there are express exemption clauses that could apply to a DoD “undertaking.” For example, compliance with the NHPA may be waived in the event of a “major national disaster” or “imminent threat to the national security.” 16 U.S.C. § 470h-2(j). The full text reads, “The Secretary shall promulgate regulations under which the requirements of this section may be waived in whole or in part in the event of a major natural disaster or an imminent threat to the national security.” *Id.* It appears that there has not been widespread use of these exemption clauses.

Table 1

Statute/Case	Applicability	Extraterritorial Application?
Gettysburg Electric (1896)	Monuments and lands (“field of battle”) <sup>94</sup>	No
Antiquities Act (1906)	Historic <i>landmarks</i> , historic and prehistoric <i>structures</i> , and other <i>objects</i>	No
Historic Sites Act (1935)	Historic or prehistoric <i>sites</i> , <i>buildings</i> , <i>objects</i> , and properties of national historical or archaeological significance	No
National Trust for Historic Preservation Act (1949)	<i>Sites, buildings and objects</i> significant in American history and culture	No
NHPA—original text (1966)	<i>District, site, building, structure, or object</i> included in or eligible for inclusion in the National Register	No
NHPA—present day with 1980 amendments (discussed <i>infra</i> )	<i>District, site, building, structure, or object</i> included in or eligible for inclusion in the National Register and property on the applicable country’s equivalent of the National Register	Yes <sup>95</sup>

C. *The World Heritage Convention and the NHPA’s 1980 Implementing Amendment*

In 1972, six years following the signing of the NHPA, the United States led the world’s efforts to sign the WHC.<sup>96</sup> The United States became the first ratifying state in 1973,<sup>97</sup> and the WHC entered into force in 1975.<sup>98</sup> Today, the WHC is a success story as it has been ratified by more than 190 nations.<sup>99</sup>

94. United States v. Gettysburg Elec. R. Co., 160 U.S. 668 (1896).

95. 16 U.S.C. § 470a-2; *Dugong II*, 543 F. Supp. 2d 1082 (N.D. Cal. 2008).

96. The full title is, “Convention Concerning the Protection of the World Cultural and Natural Heritage.” WHC, *supra* note 21.

97. The Convention entered into force in 1975. See generally Emily Monteith, Comment, *Lost*

The WHC's purpose is to promote the "identification, protection, and preservation, of cultural and natural heritage around the world considered to be of outstanding value to humanity."<sup>100</sup> It provides that "certain natural and cultural sites can be designated as *world heritages* and conserved for future generations."<sup>101</sup> It does this primarily through the creation of the World Heritage List that provides for a variety of incentives and disincentives for individual nations to protect historical properties, a system referred to by one scholar as "compliance pull."<sup>102</sup> While the public may know, generally, that there are certain protections afforded to World Heritage Sites, the actual process and jurisdiction to regulate under the WHC is less well known.<sup>103</sup> It is the responsibility of each state party to the WHC to identify properties situated in its territory for inclusion on the World Heritage List and then take steps to protect and report on the condition of protected properties.<sup>104</sup>

The WHC protects properties of a "natural and cultural heritage."<sup>105</sup> The WHC defines cultural heritage in Article 1; it is similar to the NHPA's focus on physical, tangible properties. It reads:

- (a) *monuments*: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
- (b) *groups of buildings*: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
- (c) *sites*: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.<sup>106</sup>

Similar to other U.S. statutes, the WHC also protects natural heritage properties, once again not expressly including animals as part of its

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*in Translation: Discerning the International Equivalent of the National Register of Historic Places*, 59 DEPAUL L. REV. 1017, 1020–24 (2010) (describing the U.S. involvement and leadership role in the WHC's ratification).

98. UNESCO WORLD HERITAGE CENTER, STATE PARTIES, AND RATIFICATION STATUS, available at <http://whc.unesco.org/en/statesparties> (last visited Mar. 6, 2014) (providing an up-to-date listing of the 190 parties to the WHC).

99. *Id.*

100. WHC, *supra* note 21, pmb1.

101. EDITH BROWN WEISS ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1117 (2d ed. 2007) (emphasis added).

102. Edward J. Goodwin, *The World Heritage Convention, the Environment, and Compliance*, 20 COLO. J. INT'L ENVTL. L. & POL'Y 157, 161 (2009).

103. *Id.*

104. WHC, *supra* note 21, at art. 3.

105. *Id.*, arts. 1, 2.

106. *Id.*, art. 1.

definition.<sup>107</sup> Natural heritage properties are defined in Article 2 with the following considered “natural heritage”:

- (a) *natural features* consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;
- (b) *geological and physiographical formations* and precisely delineated areas which constitute the *habitat of threatened species of animals and plants* of outstanding universal value from the point of view of science or conservation;
- (c) *natural sites* or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.<sup>108</sup>

Article 2 protects features, formations, areas, and sites. While there is an acknowledgement that the *habitat* of “threatened species of animals and plants of outstanding universal value” are subject to WHC protection, the WHC does not protect animals as such.<sup>109</sup> Indeed, while animals would be the unquestioned beneficiaries of having their habitats protected, the WHC does not specifically afford protections to living animals. For example, under Article 2, the WHC only protects the “geological and physiological formations” and “precisely delineated areas,”<sup>110</sup> which constitute the habitat of threatened species of animals.<sup>111</sup>

Animals are excluded under the WHC’s Operational Guidelines, which provide guidance on the WHC’s practical implementation; properties of a “moveable heritage” are not protected.<sup>112</sup> Even properties that are immovable, but may eventually be movable will not be considered for protection under the WHC.<sup>113</sup> Not surprisingly, as of this writing, the dugong is not on the World Heritage List and there are no living animals or objects currently on the World Heritage List.<sup>114</sup> There are numerous natural sites that are protected by the WHC that include the habitats of animals of enormous interest. To use one example, the Great Barrier Reef is on the World Heritage List, and it includes the habitats of animals including the dugong and sea turtles.<sup>115</sup> It also includes a great variety of coral, shellfish, and sea life. All of these natural characteristics are important factors in determining the Great Barrier Reef’s inclusion in

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107. *Id.*

108. *Id.*, art. 2 (emphasis added).

109. *Id.*

110. *Id.*

111. *Id.*

112. UN Educ. Scientific & Cultural Org. (UNESCO), OPERATIONAL GUIDELINES FOR THE IMPLEMENTATION OF THE WORLD HERITAGE CONVENTION, WHC 11/01, *available at* <http://whc.unesco.org/archive/opguide12-en.pdf> [hereinafter OPERATIONAL GUIDELINES] (last visited Mar. 8, 2014); *cf.* Goodwin, *supra* note 102, at 162 (highlighting that the WHC Operational Guidelines serve as a “compliance pull” mechanism for state parties).

113. OPERATIONAL GUIDELINES, *supra* note 112, at 14.

114. *Id.*

115. *Great Barrier Reef, World Heritage List*, UNESCO, *available at* <http://whc.unesco.org/en/list/154> (last visited Mar. 6, 2014).

accordance with the WHC and its Operational Guidelines. But the sea turtle and dugong are not protected under the WHC *wherever* they exist and in Henoko Bay. They merely benefit from its protections when inhabiting the Great Barrier Reef and similarly protected natural properties.

Under Article 3 of the WHC, each party is to identify and delineate the different properties meeting the definition of cultural and natural heritage.<sup>116</sup> Article 4 provides that it is the duty of each state party “[to ensure] the identification, protection, conservation, presentation, and transmission to future generations of the cultural and natural heritage referred to in [A]rticles 1 and 2 and situated on its territory.”<sup>117</sup>

Lastly, under Article 5, each state party “shall endeavor to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage.”<sup>118</sup> This language is particularly important, as it highlights the WHC’s status as a non-self-executing treaty, requiring that Congress adopt implementing language within federal law to formally implement the WHC’s treaty requirements.

Similar to the NHPA, within the United States, the Secretary of Interior has the special role of periodically nominating properties of international significance for placement on the World Heritage List.<sup>119</sup> Once a property is identified as meeting the Article 1 and 2 definitions of cultural and natural heritage, each party has obligations to protect that site, and the site can be nominated to the World Heritage List.<sup>120</sup> Scholars have argued that there are certain political, tourism, and financial assistance benefits from the inclusion of sites on the World Heritage List.<sup>121</sup>

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116. WHC, *supra* note 21, at art. 3.

117. *Id.*, art. 4.

118. *Id.*, art. 5(d). While there is a paucity of judicial opinions interpreting whether the general obligations set forth in Articles 4 and 5 amount to a prescriptive legal obligation for states, at least one national court in Australia has stated the Convention imposes a legal duty to protect sites on the World Heritage List. *See* WEISS ET AL., *supra* note 101, at 1121 (quoting the majority opinion from the Australian High Court in *Australia v. The State of Tasmania* upholding Australia’s legal duty to protect the Western Tasmania Wilderness National Park, a site on the World Heritage List).

119. 16 U.S.C. § 470a-1(b) (2012). The full text of the provision reads as follows:

The Secretary of the Interior shall periodically nominate properties he determines are of international significance to the World Heritage Committee on behalf of the United States. No property may be so nominated unless it has previously been determined to be of national significance. Each such nomination shall include evidence of such legal protections as may be necessary to ensure preservation of the property and its environment (including restrictive covenants, easements, or other forms of protection). Before making any such nomination, the Secretary shall notify the Committee on Natural Resources of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate.

*Id.*

120. *See* Goodwin, *supra* note 102, at 163. The terms “World Heritage List” and “World Heritage Site” are used synonymously.

121. *See id.* at 167–71.

Like the NHPA's National Register, the WHC is a "living treaty" and properties are continually added to and deleted from the World Heritage List. As of this writing, there are 981 properties on the World Heritage List that are considered to have outstanding universal value in accordance with the WHC guidelines. This includes twenty-one World Heritage properties in the United States and seventeen in Japan.<sup>122</sup> Of the 981 properties, 759 are classified as "cultural," 193 are classified as "natural," and twenty-nine are classified as "mixed cultural/natural."<sup>123</sup> For example, in the United States there are twenty-one World Heritage Sites including the Statute of Liberty and Yosemite National Park. Papahōnaumokuākea National Monument in Hawaii is the most recent U.S. addition in 2010.<sup>124</sup> As a living animal does not clearly fit into the definition of a property of cultural or natural heritage, none of the properties on the World Heritage List are wild animals.

There are seventeen protected World Heritage Sites in Japan.<sup>125</sup> The seventeen sites include the Buddhist Monuments in Horyū-ji and the Ogasawara Islands.<sup>126</sup> Absent from the World Heritage List are wild animals, and the dugong is not a World Heritage Site, nor is the dugong's habitat on the World Heritage List.<sup>127</sup>

*D. The Merger of the WHC and the NHPA: Implementing Statutory Language Within the NHPA Muddies the Waters*

In 1980, five years after the WHC entered into force, Congress amended U.S. law to address its treaty obligations, using the NHPA as its implementing statutory vehicle. By implementing language from the WHC into the NHPA, the NHPA is the only U.S. natural resource or environmental statute<sup>128</sup> with a

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122. Current U.S. properties include Yosemite National Park, Monticello and the University of Virginia in Charlottesville, and Chaco (Pueblo) Culture. For an updated list, see *United States of America, The States Parties*, UNESCO, available at <http://whc.unesco.org/en/statesparties/us> (last visited Mar. 6, 2014).

123. *Id.*

124. *Id.* Of the twenty-one sites in the United States, eight are cultural properties (e.g. the Statue of Liberty), twelve are natural properties (e.g. Yosemite) and one is a mixed cultural/natural (Papahōnaumokuākea National Monument).

125. *Japan, The States Parties*, UNESCO, <http://whc.unesco.org/en/statesparties/jp> (last visited Mar. 6, 2014).

126. *Id.* Of the seventeen Japanese World Heritage Sites, thirteen are cultural properties and four are natural properties. The natural properties do include the habitats of endangered species, but Henoko Bay is not a World Heritage Site. *Id.*

127. *Id.*

128. This Article uses the term "natural resource" or "environmental" here to reflect the numerous U.S. laws that could be construed to provide environmental protections. As such, it includes obvious environmental examples such as NEPA and the Clean Water Act, but also natural resource statutes to include the Sikes Act and the Antiquities Act. See Sikes Act, 16 U.S.C. §§ 670–670o (2012); Antiquities Act, 16 U.S.C. §§ 431–433 (2012).

jurisdictional provision construed by a federal court to apply in another sovereign nation.<sup>129</sup> The WHC's implementing amendment to the NHPA states:

[p]rior to the approval of any Federal undertaking outside the United States which may directly and adversely affect a property which is on the World Heritage List or on the applicable country's *equivalent of the National Register*, the head of a Federal agency having direct or indirect jurisdiction over such undertaking shall take into account the effect of the undertaking on *such property* for purposes of avoiding or mitigating any adverse effects.<sup>130</sup>

This implementing language mirrors the NHPA's domestic "NEPA-like" review process with the requirement that a federal agency must account for a proposed undertaking's effects on properties on the World Heritage List *or* the applicable country's equivalent National Register.<sup>131</sup> Unfortunately, there is no substantive legislative history for this provision to discern Congress's intent with respect to the true scope of this implementing provision.<sup>132</sup> The key terms are "equivalent of the National Register" and "such property." These terms require federal agencies to "take into account" the proposed undertakings effects on both the World Heritage List properties and the National Register equivalent law of the host nation.<sup>133</sup> But there is little additional guidance on how, precisely, this extraterritorial provision should be construed and practically applied.<sup>134</sup> Section 110 of the NHPA established federal agency responsibilities and Section 101(g) requires the Secretary of the Interior to promulgate guidelines for federal agency responsibilities under the Act. The Secretary of the Interior did so in 1998, but made clear that these guidelines, oddly, had "no regulatory effect" and were merely issued to meet the Section 110 requirements.<sup>135</sup> Hence, there is an absence of clarifying legislative history or binding administrative regulations and guidance associated with these 1980 amendments. This extraterritorial provision of the NHPA was largely unnoticed

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129. See *Dugong II*, 543 F. Supp. 2d 1082 (N.D. Cal. 2008). As discussed *infra*, Part III.B, the ESA and the MMPA have been interpreted to apply outside the United States to include the high seas, but neither has been interpreted to apply in another sovereign nation, thus invoking larger foreign policy concerns.

130. *Id.* at 1088 (emphasis added).

131. See *id.*

132. H.R. Rep. No. 96-1457, at 16-17 (1980). The House Report concerning the 1980 amendment merely restates the existing condition with no additional Congressional discussion.

133. 16 U.S.C. § 470(a)(2).

134. In 1998, eighteen years after the WHC implementing language was passed, the U.S. Secretary of the Interior provided additional guidance to federal agencies on how to apply the NHPA overseas that was of little assistance. This guidance stated, "the agency's preservation program should ensure that, when carrying out work in other countries, the agency will consider the effects of such actions on historic properties, including World Heritage Sites and properties that are eligible for inclusion in the host country's equivalent of the National Register." The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act, 63 Fed. Reg. 20,496, 20,503 (Apr. 24, 1998) (noting that "[e]fforts to identify and consider effects on historic properties in other countries should be carried out in consultation with the host country's historic preservation authorities, with affected communities and groups, and with relevant professional organizations").

135. See 63 Fed. Reg. 20496-20508, 20496 (Apr. 24, 1998).

and effectively lay dormant for twenty-five years until a lawsuit was filed to protect the dugong.<sup>136</sup>

Table 2 summarizes the scope of the NHPA, the WHC, and the WHC's implementing language within the NHPA, displaying surprising results.

Table 2

Statute or Treaty	Applicability	Provides Protection for Living Animals and Objects?
NHPA (1966: pre-WHC and 1980 amendments)	District, site, building, structure, or object	No <sup>137</sup>
World Heritage Convention (ratified in 1975)	Monuments, groups of buildings, features, areas, formations and sites	No? <sup>138</sup>
NHPA (to include 1980 WHC amendments)	District, site, building, structure, or object and "the applicable country's equivalent of the National Register" <sup>139</sup>	Yes? <sup>140</sup>

## II.

### THE NHPA'S EXTRATERRITORIAL APPLICATION IN PRACTICE

#### A. Background: The Marines in Japan, Japanese Cultural Properties Law, and the Absence of Japanese Judicial Remedies

The United States has a long history of military activities in Japan dating back to World War II.<sup>141</sup> For example, the island of Okinawa, located 1,000

136. See *Dugong I*, No. C 03-4350 MHP, 2005 U.S. Dist. LEXIS 3123 (N.D. Cal. Mar. 2, 2005).

137. Not as practically applied. Living animals are absent from the National Register. *But see* King Decl. ¶¶ 9–10, *Dugong I*, No. C 03-4350 MHP, 2005 U.S. Dist. LEXIS 3123 (N.D. Cal. Mar. 2, 2005) (asserting that while living animals are not on the National Register this is not, by itself dispositive, and the NHPA could still protect living animals).

138. See WHC, *supra* note 21, at art. 2. While a WHC natural property does not include a wild animal under the definition of the WHC and its Operational Guidelines, the property may include the *habitat of threatened species of animals and plants* of outstanding universal value from the point of view of science or conservation. *Id.* at art. 2(b).

139. 16 U.S.C. § 470a-2.

140. See *Dugong I*, 2005 U.S. Dist. LEXIS 3123; *Dugong II*, 543 F. Supp. 2d 1082, 1084 (N.D. Cal. 2008), discussed *infra* part II.

141. For a good overview of the military background and issues discussed herein, see

miles southwest of Tokyo, was the site of a major military battle with over 200,000 casualties in World War II and is today home to thousands of American servicemen. The United States ceded administrative control of Okinawa to Japan in 1972 and Japan has full responsibility and authority today “for the exercise of any and all powers of administration, legislation, and jurisdiction [of Okinawa].”<sup>142</sup>

Yet the DoD operates a number of military bases on Okinawa to this day, including the Marine Corps’ Futenma Air Station. This air station is completely surrounded by urban development. Japan faces the continual threat of North Korean provocations, including repeated missile launches in the Sea of Japan and nuclear tests.<sup>143</sup>

To address several concerns related to the U.S. military presence in Okinawa, a joint United States-Japan Special Action Committee on Okinawa was created to explore alternative sites for Futenma. This was due, in part, to protests by Okinawan residents against the U.S. military presence.<sup>144</sup> As part of the selection process, the United States would establish operational parameters for any replacement facility, but Japan would, “select the ultimate site of the [replacement air station] and fund and carry out its construction.”<sup>145</sup>

While the DoD would oversee the construction to ensure that its operational requirements were met and operate the facility on a day-to-day basis once built, the new air station would be placed in the sovereign territory of Japan in a location ultimately selected by the Japanese government.<sup>146</sup>

The United States and the central Japanese government focused on building a sea-based facility off the shores of Henoko, an area rich in marine ecology and the habitat of the dugong, a marine mammal protected under the Japanese Law

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Takahashi, *supra* note 6.

142. *Dugong II*, 543 F. Supp. 2d at 1084; *see also* Laura Jensen Schoenbaum, Comment, *The Okinawa Dugong and the Creative Application of U.S. Extraterritorial Environmental Law*, 44 TEX. INT’L L.J. 457, 461 (2009).

143. *See Dugong II*, 543 F. Supp. 2d at 1085. Since the *Dugong* litigation, the national security situation with North Korea has been tense. Kim Jong-un, the new Supreme Leader of North Korea, has routinely conducted rocket tests within range of Japan and has been suspected of conducting nuclear tests. *See, e.g.*, David Sanger and Choe Sang-Hun, *North Korea Confirms it Conducted Third Nuclear Test*, N.Y. TIMES, Feb. 12, 2013, at A1.

144. *Dugong II*, 543 F. Supp. 2d at 1085. This joint committee, entitled the Special Action Committee on Okinawa (SACO), issued a report in 1996 with recommendations to ease the burden on the people of Okinawa and thereby strengthen the Japan-United States alliance. It specifically recommended that the United States return twenty-one percent of its land back to Japan. One part of the land return was the Marine Corps’ Futenma Air Station located in central Okinawa.

145. *See id.* For a more detailed analysis, *see SACO Final Report on Futenma Air Station*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN, <http://www.mofa.go.jp/region/n-america/us/security/96saco2.html> (Dec. 2, 1996) (providing an overview of the SACO’s recommendations to include a history of deliberations). This lengthy process of the United States and Japan working to find a solution for the replacement air station was politically and diplomatically sensitive.

146. *Dugong II*, 543 F. Supp. 2d at 1085.

on Cultural Property.<sup>147</sup> The dugong has significant meaning in Japanese culture and small populations of dugongs inhabit the shallow waters of Henoko Bay.<sup>148</sup> After several years of negotiations, a “Roadmap for Re-alignment Implementation” was signed between the United States and Japan, with the plan to move Futenma Air Station to Henoko Bay. Many local Okinawans welcomed the recommendation as the Futenma Air Station is a source of noise pollution and there is a constant threat of aircraft-related mishaps.<sup>149</sup>

Japan’s Cultural Properties Protection Law (*Bunkazai hogohō*) is comprehensive and includes broad protections for a wide range of properties like wild animals.<sup>150</sup> It includes both protections seen in U.S. domestic law within the ESA or the MMPA, and more expansive protections not contemplated by the MMPA, the ESA, or the NHPA.<sup>151</sup> For example, the “monuments” definition of Japanese protected cultural properties within Japanese law includes a diverse mixture of property types including “man-made and natural sites as well as plants and animals.”<sup>152</sup> The “monument” definition in the WHC—the underlying basis for the *Dugong* lawsuits—defines monument to include tangible, physical properties, among them architectural works, sculptures, and paintings.<sup>153</sup> So, the Japanese definition of monument includes properties that are more expansive than what is found in the WHC. For other categories of protection (e.g. “intangible folk cultural properties”), there is simply no U.S. equivalent in any federal statute. In Japan, the dugong is protected as a “natural monument” and is listed on the Japanese Register of Cultural Properties.<sup>154</sup> There is no mention of “monument” within the NHPA<sup>155</sup> and “monument” in

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147. *Id.* at 1084.

148. *Id.*

149. *See* Takahashi, *supra* note 6, at 187.

150. *See* Bunkazai Hogohō [Law for the Protection of Cultural Properties] C. Civ. 214, art. 1 (2007) (Japan.); *see also* Barbara Thornbury, *The Cultural Properties Protection Law and Japan’s Folk Performing Arts*, 53 *ASIAN FOLKLORE STUDIES*, 211, 211–25 (1994) (discussing Japan’s Cultural Property Law as it relates to intangible cultural properties).

151. For example, the Japanese Cultural Properties Protection Law provides protections for intangible folk cultural properties.

152. Thornbury, *supra* note 150, at 212 n.2.

153. The full definition of “monument” under the WHC includes architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature inscriptions, cave dwellings and combinations of features, which are of outstanding value from the point of view of history, art or science. *See* WHC, *supra* note 21, at art. 1.

154. *Dugong II*, 543 F. Supp. 2d 1082, 1084 (N.D. Cal. 2008).

155. *See* The Antiquities Act, 16 U.S.C. §§ 431–433 (2012). The Antiquities Act does provide protections for national monuments, but this is limited to lands owned by the United States and has no applicability in the case of the dugong:

The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with proper care and management of the objects to be protected.

the WHC applies to cultural heritage properties without reference to wild animals.<sup>156</sup> While the United States does list the dugong as an endangered species pursuant to the ESA, as discussed *infra*, Part III.B, the ESA could not be used to protect the dugong in Japan.<sup>157</sup> These differences between Japanese and U.S. domestic law highlight the inherent difficulty of applying the domestic law of one nation within another nation's territory. This is only exacerbated when international treaty obligations overlap.

As the plans progressed to move the Marines away from Futenma, Japanese citizens were concerned about the impact of the move from Futenma to Henoko on the dugong. They turned to the Japanese courts for redress. However, Japanese litigants lacked standing to bring a suit in Japanese courts challenging the Japanese government's decision to move the Marine Air Station to Henoko, as Japanese domestic environmental law provided no such legal remedy.<sup>158</sup>

The lack of a judicial remedy available from Japanese environmental and administrative law made U.S. courts the last resort for judicial intervention by all concerned parties in both Japan and the United States.<sup>159</sup> While the NHPA lacks a specific citizen suit provision within its statutory scheme, Japanese citizens were able to join with U.S. environmental groups to seek judicial review of the DoD's "agency action" pursuant to the APA when the litigants—to include Japanese citizens—jointly filed suit in the U.S. District Court for the Northern District of California.<sup>160</sup>

The Japanese litigants sought redress in a U.S. federal court, highlighting the power of the NHPA when used in conjunction with the APA for judicial redress.<sup>161</sup> The district court issued two opinions in 2005 and 2008, both times addressing the challenge under the NHPA and the APA and embracing an expansive view of the NHPA's extraterritorial application.<sup>162</sup>

### B. *Dugong v. Rumsfeld (Dugong I)*

In 2005, the court in *Dugong I* rejected a motion to dismiss filed by the U.S. government.<sup>163</sup> In *Dugong I*, the court ruled the Futenma relocation

16 U.S.C. § 431.

156. WHC, *supra* note 21, at art. 1.

157. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581–82 (1992) (addressing the extraterritorial limits of the ESA to not apply in foreign countries).

158. Takahashi, *supra* note 6, at 190.

159. Cf. Bob Egelko, Imperiled Mammal Threatened by Plan for Okinawa Base Court in S.F. Hears Activists Advocate Applying U.S. Law, THE S. F. CHRONICLE, Aug. 5, 2004 at B4.

160. *Dugong II*, 543 F. Supp. 2d at 1089.

161. The APA authorizes judicial review of agency actions "for which there is no other adequate remedy in court." 5 U.S.C. § 704 (2012). As the NHPA lacks a citizen suit provision within the statutory scheme, the APA was the only vehicle to bring litigation in asserting that the federal agency (DoD) had improperly applied the NHPA.

162. As discussed in footnote 4, "Dugong rulings" will be used generally to refer to the rulings in *Dugong I* and *Dugong II*.

163. *Dugong I*, No. C 03-4350 MHP, 2005 U.S. Dist. LEXIS 3123, at \*67 (N.D. Cal. Mar. 2,

qualified as a “federal undertaking” within the meaning of the NHPA, and it permitted the plaintiffs’ challenge to continue for three reasons.<sup>164</sup>

First, the court ruled Japan’s Law for the Protection of Cultural Properties was the equivalent of the U.S. National Register within the meaning of Section 402 of the NHPA.<sup>165</sup> In dismissing the government’s argument that the Japanese law was not the equivalent to the U.S. National Register, the court noted the presence of animals on the World Heritage List would have strongly indicated Congress’s intent to protect wild animals, but the absence of animals on the World Heritage List was not, by itself, dispositive.<sup>166</sup> The court stated:

[A]n interpretation of [Section 402] requiring that the foreign list be identical to the American one would . . . contradict the international aspect of the section. To require that foreign lists include only those types of resources which are of cultural significance in the United States would defy the basic proposition that just as cultures vary, so too will their equivalent legislative efforts to preserve their culture.<sup>167</sup>

The court dismissed the more limited approach that the NHPA applies to reasonably related or intersecting properties jointly protected by the U.S. and Japanese registers. Under Japanese law, there is some overlap with the types of properties covered under the NHPA. For example, both Japanese and American laws cover tangible structures, ancient sites, and traditional buildings. But the Japanese Law for the Protection of Cultural Properties’ Register—determined to be “equivalent of” the U.S. National Register—has a more expansive protection of properties including physical sites and locations (e.g. ancient sites and places of scenic beauty), intangible properties (e.g. music, manners and customs, and folk performing arts and techniques), as well as physical properties that are similar to what can be protected under the U.S. National Registry.<sup>168</sup> The court effectively read the NHPA’s extraterritorial provision to protect all Japanese protected properties as defined by Japanese law, regardless of their overlap and nexus to U.S. properties.

Second, the court in *Dugong I* specifically ruled that the dugong could be protected as a “property” within the NHPA statutory scheme.<sup>169</sup> While noting that the dugong is a wild animal not within the traditional U.S. “property” definition as understood by the NHPA, the court stated that there is little precedent whether a “living thing can constitute a property eligible for the U.S. National Register.”<sup>170</sup>

The court relied upon another district court case, *Hatmaker v. Georgia Department of Transportation*, where the court held that an oak tree was at least

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2005).

164. *Id.* at \*40.

165. 16 U.S.C. § 470a-2.

166. *Dugong I*, 2005 U.S. Dist. LEXIS 3123, at \*26.

167. *Id.* at \*22.

168. Schoenbaum, *supra* note 142.

169. *Dugong I*, 2005 U.S. Dist. LEXIS 3123, at \*27.

170. *Id.* at \*33.

potentially eligible for inclusion on the National Register.<sup>171</sup> *Hatmaker* stands out as a unique case holding that the National Register could feasibly include protections for a living object.<sup>172</sup> The court said the dugong, like an oak tree, may fall under the NHPA's definition of *object*—a “material thing of functional, aesthetic, cultural, historical, or scientific value that may be, by nature of design, movable yet related to a specific setting or environment.”<sup>173</sup> Yet *objects* have been protected in American preservation law since the Antiquities Act. While the NHPA added *districts* to its five protected property categories in 1966, *objects* have been identified as a protected property in three prior historic preservation statutes: The Antiquities Act, Historic Sites Act, and National Trust for Historic Preservation Act.

Third, the court addressed the government's concerns related to broader foreign policy considerations found in the act of state doctrine.<sup>174</sup> The act of state doctrine was first articulated in *Underhill v. Hernandez* in 1897.<sup>175</sup> In *Underhill*, a U.S. citizen brought an action to recover damages against General Hernandez, a Venezuelan military officer, when Hernandez refused Underhill's request to leave the country.<sup>176</sup> Hernandez was a member of the “Crespo government,” the former government of Venezuela as recognized by the United States. In dismissing Underhill's claim the Supreme Court famously stated, “[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of another, done within its own territory.”<sup>177</sup> *Underhill* signified the emergence of the act of state doctrine in American jurisprudence when deciphering whether the judiciary should rule upon another sovereign's acts, a practice that has only been reaffirmed.<sup>178</sup>

In modern jurisprudence, the act of state doctrine bars an action “only if: (1) there is an official act of a foreign sovereign performed within its own territory; and (2) the relief sought or the defense interposed [in the action would require] a court in the United States to declare invalid the [foreign sovereign's] official act.”<sup>179</sup> In making this argument in *Dugong I*, the government asserted that the case should be dismissed on prudential grounds, as it would interfere with the conduct of foreign policy by the Executive and Congress.<sup>180</sup>

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171. *Id.*

172. *Hatmaker v. Ga. Dep't of Transp.*, 973 F. Supp. 1058, 1069–70 (1997).

173. *Id.* (quoting 36 C.F.R. § 60.3(j)).

174. *See Dugong I*, 2005 U.S. Dist. LEXIS 3123, at \*62–68.

175. *Underhill v. Hernandez*, 168 U.S. 250 (1897).

176. *Id.*

177. *Id.* at 252.

178. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (expanding the act of state doctrine to other sovereign acts of nations that likely violated international law).

179. *Dugong I*, 2005 U.S. Dist. LEXIS 3123, at \*65 (quoting *Credit Suisse v. U.S. Dist. Court for Cent. Dist. of Cal.*, 130 F.3d 1342, 1346 (9th Cir. 1997)).

180. *Id.*

The court disagreed: it ruled the government was not entitled to summary judgment as the act of state doctrine “relies on the conclusion that the challenged activities are exclusively those of foreign governmental bodies” and the record before the court did not currently describe an official act within the meaning of the act of state doctrine.<sup>181</sup> The actual scope of the act of state doctrine as applied by the court would have to be left for the subsequent ruling in *Dugong II*.

### C. *Dugong v. Gates (Dugong II)*

Three years later, in *Dugong II*, the court denied the government’s motion for summary judgment again, ruling that the DoD failed to comply with the requirements under the NHPA’s extraterritorial provision. The case is in abeyance until further information is provided to determine the effects of the Henoko move on the dugong. The federal district court’s rulings have not been appealed and there does not appear to be a clear roadmap for the Marines to leave Futenma.<sup>182</sup> In doing so, the court reaffirmed the Japanese Cultural Registry as the equivalent to the U.S. National Register within the meaning of the 1980 NHPA amendment, thereby requiring the DoD to account for the impact of the federal undertaking, the movement of the base from Futenma to Henoko, on the dugong.

The most significant aspect of the court’s decision was its ruling dismissing broader foreign policy concerns. The court specifically dismissed the government’s contention that a federal court should not question the validity of a sovereign act taken by Japan pursuant to the act of state doctrine.<sup>183</sup> It acknowledged Japan is ultimately responsible for selecting Futenma as the new location of the air base and stated, “Japan’s site selection was driven by its own concerns for environmental, engineering, political, and cost factors.”<sup>184</sup>

In limiting the ruling to what it *could* rule upon, the court ignored larger prudential concerns that resonate from a narrow ruling focusing on an agency action. The court stated that it was not invalidating Japan’s decision to relocate the Marines; it was only requiring the DoD to comply with Section 402 of the NHPA and take into account its actions on the dugong pursuant to the APA and Section 402 of the NHPA.<sup>185</sup>

The court dismissed the government’s contention that a federal court should not apply the NHPA overseas in a way that creates a “substantial

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181. *Id.* at \*67.

182. See Eric Talmadge, *Futenma Shift Puts U.S. in Limbo Between Okinawa, Tokyo*, JAPAN TIMES (Feb. 25, 2014), <http://www.japantimes.co.jp/news/2014/02/25/national/futenma-shift-puts-u-s-in-limbo-between-okinawa-tokyo/#.UxtN8-ewLgI>.

183. *Dugong II*, 543 F. Supp. 2d 1082, 1097 (N.D. Cal. 2008).

184. *Id.* at 1098. The court did limit its ruling to the federal agency action subject to the NHPA and APA. *Id.* at 1099.

185. *Id.* at 1112.

likelihood that treaty relations will be affected.”<sup>186</sup> The government argued that requiring the DoD to take into account its action on the dugong would be inconsistent with Japan’s judgment on how to protect its own cultural resources, undermining the “carefully negotiated allocation of sovereign responsibilities.”<sup>187</sup> Yet Japanese law did not protect the dugong, so it would be inconsistent with Japanese law to apply U.S. law to potentially protect the dugong.

The court did not truly address this important foreign relations argument in a straightforward manner. It noted that while these are “important and valid concerns” they only serve to “delineate and give contour to meaning and scope of the substantive requirement to take into account.”<sup>188</sup> So, while acknowledging its importance, the court ultimately gave little deference to the act of state doctrine.<sup>189</sup>

This opinion effectively stopped the planned move of the Marines from Futenma to Henoko in its tracks. The political fallout was intense and its effects are felt at Futenma to this day.<sup>190</sup> While the court specifically asserted that it was not invalidating a sovereign act, the decision-making process was a complex one, and one where the government of Japan would select and fund the ultimate site.<sup>191</sup> While it is difficult to measure the precise political impact on the court’s undoing of the Japanese decision, it is clear the political fallout from the failure to find a new location for the Marines was powerful, affecting both United States-Japanese relations and Japanese domestic politics.<sup>192</sup> Further, litigation continues in the case today and the Marines are still at Futenma. The matter of the dugong and the Marines is far from resolved.

The *Dugong* plaintiffs may assert that the DoD should have followed the Section 402 process from the very beginning, carefully taking into account any future action on the dugong. But the statutes that do clearly protect the dugong domestically—the MMPA and the ESA—do not clearly apply within another

186. *Id.* at 1099. The court recognized that these are “valid and important concerns” but they only serve to “give contour to the meaning and scope of substantive obligations.” *Id.*

187. *Id.*

188. *Id.* at 1100.

189. *Id.*

190. *See, e.g.*, Greg Jaffe & Emily Heil, *U.S. Agrees to Move 9,000 Marines Off Okinawa*, THE WASH. POST (Apr. 27, 2012), [http://www.washingtonpost.com/world/national-security/us-comes-to-agreement-with-japan-to-move-9000-marines-off-okinawa/2012/04/26/gIQA1seKkT\\_story.html](http://www.washingtonpost.com/world/national-security/us-comes-to-agreement-with-japan-to-move-9000-marines-off-okinawa/2012/04/26/gIQA1seKkT_story.html) (reporting that the United States and Japan had potentially reached an agreement to move Marines off of Okinawan bases “in a bid to remove a persistent irritant in the relationship between the two allies”).

191. *Dugong II*, 543 F. Supp. 2d at 1085.

192. Miyume Tanji, *U.S. Court Rules in Okinawa Dugong Case: Implications for U.S. Military Bases Overseas*, CRITICAL ASIAN STUDIES, 475, 483 (2008), available at [http://www.biologicaldiversity.org/species/mammals/Okinawa\\_dugong/pdfs/Dugong\\_CAS.pdf](http://www.biologicaldiversity.org/species/mammals/Okinawa_dugong/pdfs/Dugong_CAS.pdf); *cf.* Chico Harlin, *U.S. Hopes to Sidestep Futenma Impasse in Moving Okinawa Marines to Guam*, THE WASH. POST, (Feb. 8, 2012) (noting that a series of Japanese prime ministers have been unsuccessful in gathering support to move the Marines from Okinawa to Henoko).

sovereign nation's territory. Further, in light of the importance of this move, the DoD was careful to comply with all applicable Overseas Environmental Baseline Guidance Document (OEBGD) standards and overseas environmental standards. As a federal agency, the DoD complies with the NHPA's substantive provisions. But the court's opinion caught the DoD off guard as the NHPA has never been construed to apply to protect a wild animal, domestically, or extraterritorially. As the NHPA has never been construed to apply in such a manner in its forty years of existence and in the twenty-five years since the WHC amendments, it was not unreasonable for the DoD not to spend resources in complying with an unforeseen requirement.<sup>193</sup> As the court failed to breathe life into the longstanding act of state doctrine in *Dugong* litigation, the state of the law and the NHPA's scope and jurisdiction is increasingly unclear and unfastened from its original roots in the broader American historic preservation tradition.

The application of the amended NHPA led to an extraterritorial application of the NHPA, as perhaps contemplated by the statute, but with results for the state action of Japan. This is unlike any use of the NHPA to date, and the court's interpretation in *Dugong* calls the amendments to the NHPA to the forefront as an anomaly in the application of U.S. law extraterritorially.

### III.

#### THE EXTRATERRITORIAL APPLICATION OF OTHER U.S. ENVIRONMENTAL STATUTES

A presumption exists against the extraterritorial application of U.S. statutes.<sup>194</sup> This presumption serves an important purpose, "protect[ing] against unintended clashes between our laws and those of other nations which could result in international discord."<sup>195</sup> Courts have consistently held that most major U.S. environmental statutes, including the NEPA, the Clean Water Act, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and the Clean Air Act (CAA), do not apply extraterritorially within

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193. U.S. DEP'T OF DEF., DIR. 6050.16, DOD POLICY FOR ESTABLISHING AND IMPLEMENTING ENVIRONMENTAL STANDARDS AT OVERSEAS INSTALLATIONS (Sept. 20, 1991). Further, the U.N.'s comprehensive Dugong Status Report published by the United Nations did not list the NHPA as a possible vehicle to protect the dugong. It did, however, mention the ESA and the MMPA, which do not apply in a sovereign nation. U.N. Env'tl. Programme [UNEP], Div. of Early Warning & Assessment [DEWA], *Dugong Status Report and Action Plans for Countries and Territories*, U.N. Doc. UNEP/DEWA/RS.02-1 (2002) (compiled by Helene Marsh) [hereinafter *Dugong Status Report*].

194. *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991); *see also* *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949) (reiterating the long-standing principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States).

195. *EEOC v. Arabian*, 499 U.S. at 248; *see also* *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007) ("United States law governs domestically but does not rule the world.").

the sovereign territory of another nation.<sup>196</sup> This is particularly significant for U.S. military activities overseas as the DoD is by far the largest federal agency with a foreign presence overseas.

*A. The NHPA and the NEPA Should Be Applied in a Similar Manner,  
Consistent with Existing Laws and Regulations.*

The NHPA and the NEPA share much in common: both are procedural environmental statutes that apply specifically to federal agency actions. The NEPA is the basic national charter for the protection of the natural environment and the NHPA is its rough equivalent for the protection of historic properties. The two work hand in hand. Federal NEPA regulations state that the act should be integrated “with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.”<sup>197</sup> The NHPA’s governing regulations mirror the same concept: federal agencies are “encouraged to coordinate compliance with Section 106 . . . with any steps taken to meet the requirements of the NEPA.”<sup>198</sup>

Contrast, however, the NHPA and the NEPA litigation when applied extraterritorially. In *NEPA Coalition of Japan v. Aspin*, an environmental group asserted that the DoD must comply with NEPA obligations when drafting an environmental impact statement affecting military installation activities in Japan. In a tightly worded opinion, the D.C. District Court explicitly ruled that the NEPA did not apply to military activities abroad, focusing on the act of state concerns first articulated in *Underhill*.<sup>199</sup> It focused on the potential impairment of another nation’s sovereignty<sup>200</sup> and emphasized that “DoD operations in Japan are governed by complex and long standing treaty arrangements.”<sup>201</sup>

Moreover, “[b]y requiring the DoD to prepare [environmental impact statements], the court would risk intruding upon a long standing treaty relationship.”<sup>202</sup> The court held that the U.S. installations do not exist in a “lawless vacuum” but instead operate under the agreements reached between the two sovereigns.<sup>203</sup> While balancing the interests of U.S. foreign policy and preparing an EIS, the court in *Aspin* sided with U.S. foreign policy interests. In doing so, it relied upon *Committee for Nuclear Responsibility v. Seaborg*,

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196. See, e.g., *Arc Ecology v. United States Dep’t of the Air Force*, 411 F.3d 1092 (9th Cir. 2005) (holding that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) had no extraterritorial effect).

197. 40 C.F.R. § 1500.2(c) (2013).

198. 36 C.F.R. § 800.8(a)(1) (2013).

199. *NEPA Coalition v. Aspin*, 837 F. Supp. 466 (D.D.C. 1993).

200. *Id.* at 467.

201. *Id.*

202. *Id.*

203. *Id.* at 468.

stating, “NEPA requirements must give way when [the] government [makes] assertions of harm to national security and foreign policy.”<sup>204</sup>

*Environmental Defense Fund v. Massey* also addressed the extraterritorial application of the NEPA.<sup>205</sup> While *Environmental Defense Fund* did require an EIS outside the United States for a National Science Foundation (NSF) project in Antarctica, the court did not specifically address the extraterritorial application.<sup>206</sup> The case is easily distinguishable from the *Dugong* rulings because the conduct sought to be regulated occurred primarily, if not exclusively, in the United States, and the alleged extraterritorial effect of the statute occurred in Antarctica, a continent without a true sovereign.<sup>207</sup>

Yet, unlike the NEPA, the NHPA does have an express extraterritorial provision, although its precise scope and jurisdiction are unclear in the absence of affirmative Congressional intent. Further, prudential foreign relations concerns exist in regards to all statutes when determining how they function overseas. Despite such similarities, the court in the *Dugong* rulings treated the NHPA without the same level of deference to the United States’ broader foreign policy concerns.

#### B. The MMPA and the ESA Protect the Dugong Domestically.

The *Dugong* rulings did not discuss U.S. domestic statutes that *do* expressly apply to wild animals. Indeed, the NHPA has not been the statutory mechanism to protect the dugong within the United States,<sup>208</sup> or does the WHC provide for an express protection of a living animal. Instead, the Convention on International Trade in Endangered Species (CITES) most clearly governs this area of domestic law as applied via treaty obligations.<sup>209</sup>

##### 1. The MMPA

The MMPA clearly prohibits the unlawful taking of the dugong within the United States; it expressly protects the dugong as well as seven other marine mammals.<sup>210</sup> Under the statute, it is unlawful “for any person, vessel, or

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204. *Id.* (quoting *Comm. for Nuclear Responsibility v. Seaborg*, 463 F.2d 796, 798 (D.C.Cir.1971)). The court concludes by stating, “We determine that the presumption against extraterritoriality not only is applicable, but particularly applies in this case because there are clear foreign policy and treaty concerns involving a security relationship between the United States and a sovereign power.” *Id.* at 468.

205. *Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 528–29 (D.C. Cir. 1993).

206. *Id.*

207. *Id.*

208. “The dugong would not—and could not—be protected under U.S. historic preservation law.” Motion to Dismiss at 12, *Dugong I*, No. C 03-4350 MHP, 2005 U.S. Dist. LEXIS 3123 (N.D. Cal. Mar. 2, 2005).

209. See, e.g., WEISS ET AL., *supra* note 101, at 819.

210. 50 C.F.R. § 18.3 (2009). Also listed are the polar bear, sea otter, walrus, West Indian manatee, Amazonian manatee, West African manatee, and Marine otter. As defined within the

conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas.”<sup>211</sup> It is also unlawful “to take any marine mammal in waters or on lands under the jurisdiction of the United States.”<sup>212</sup> Thus, the MMPA’s jurisdiction extends to the “high seas” and to “waters under the jurisdiction of the United States.”<sup>213</sup> While the statute does not provide for an explicit definition of high seas, it has not been construed to apply in another nation’s sovereign territory.<sup>214</sup> Consequently, the term “waters under the jurisdiction of the United States” is defined as: “(A) the territorial sea of the United States; (B) the waters included within a zone, contiguous to the territorial sea of the United States, of which the inner boundary is a line coterminous with the seaward boundary of each coastal State, and the other boundary is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.”<sup>215</sup>

## 2. *The ESA*

The ESA, too, clearly prohibits the unlawful taking of the dugong as applied domestically. The dugong is currently on the endangered species list administered by the Fish and Wildlife Administration (FWS).<sup>216</sup> The ESA was signed in 1973 with the finding that “various species of fish, wildlife, and plants in the United States have been rendered extinct as a result of economic growth and development not tempered by adequate concern and conservation.”<sup>217</sup> The ESA’s purpose is to conserve endangered species and threatened species and the ecosystems upon which they depend.<sup>218</sup> The international obligations under the

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MMPA, “take” means to harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect, or kill any marine mammal, including, without limitation, any of the following: The collection of dead animals or parts thereof; the restraint or detention of a marine mammal, no matter how temporary; tagging a marine mammal; or the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in the disturbing or molesting of a marine mammal. *Id.*

211. 50 C.F.R. § 18.11(a).

212. 50 C.F.R. § 18.11(b).

213. 16 U.S.C. § 1372(a)(1). “It is unlawful for (1) for any person subject to the jurisdiction of the United States or any vessel or other conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas.” *Id.*

214. For a discussion of why “high seas” needs to be further defined by Congress in both the ESA and the MMPA, see generally Keith Gibel, *Defined by the Law of the Sea, “High Seas” in the Marine Mammal Protection Act and the Endangered Species Act*, 54 NAV. L. REV. 1 (2007).

215. 16 U.S.C. § 1362 (15)(A)–(B). There is also a provision that defines jurisdiction of the United States in reference to an agreement between the United States and the Soviet Union, but it is not relevant to our discussion here. See § 1362 (15)(C).

216. The scientific name is the *dugong dugon* and the common name is *dugong*. The U.S. Fish and Wildlife Service regularly updates the list of threatened and endangered species and description on the dugong can be found at [http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?spcode=A033](http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?spcod e=A033) (last visited Mar. 18, 2014).

217. 16 U.S.C. § 1531(a)(1) (2012).

218. 16 U.S.C. § 1531(b).

CITES treaty are implemented via the ESA.<sup>219</sup> The ESA specifically protects listed “species,” defined as “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature”<sup>220</sup> as well as “designated critical habitats.”<sup>221</sup> Each federal agency, including the DoD, must ensure that agency action “does not jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary.”<sup>222</sup>

Under Section 9 of the ESA, it is unlawful for any person subject to the jurisdiction of the United States to “take any such species within the United States or the territorial sea of the United States” or to “take any such species on the high seas.”<sup>223</sup> Both “high seas” and “territorial sea” remain undefined within the ESA statutory construct.<sup>224</sup> However, Congress made clear in its legislative history when discussing the ESA’s jurisdictional reach that it did not intend for the Section 9 “take” prohibitions to apply within another sovereign’s territory.<sup>225</sup> It reiterated the same concern when amending the ESA in 1982, stating that “critical habitat provisions of the act only apply to areas within the jurisdiction of the United States and that the designation of critical habitat in foreign countries or on the high seas would be inappropriate.”<sup>226</sup>

While the ESA has been interpreted to apply on the high seas<sup>227</sup> and the MMPA<sup>228</sup> has been interpreted to apply outside U.S. territory, neither statute

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219. 16 U.S.C. § 1531(a)(4)(F). CITES prohibits the international trade of certain threatened species listed within an appendix to the treaty. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 27 U.N.T.S. 243 (entered into force July 1, 1975).

220. 16 U.S.C. § 1532(16).

221. 50 C.F.R. §§ 17.94–17.96 (2012).

222. 16 U.S.C. § 1536(a)(2) (2012).

223. 16 U.S.C. § 1538(a)(B)–(C) (2012). “Take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

224. Nash, *supra* note 14, at 997-1005.

225. Gibel, *supra* note 214, at 24 (quoting the legislative House report that the ESA “did not make illegal such actions if performed entirely with [*sic*] one or more foreign countries”); H.R. Rep. No. 93-740 (1973), reprinted in 1973 U.S.C.C.A.N. 3001.

226. H.R. Rep. No. 97-567 (1982), reprinted in 1982 U.S.C.C.A.N. 2807; see also Gibel, *supra* note 214, at 25.

227. See *Lujan v. Defenders of the Wildlife*, 504 U.S. 555, 582 (1992). While the majority opinion did not specifically rule on the extraterritorial reach of the ESA, Justice Stevens agreed with the Government, relying upon the *Foley* doctrine that the ESA “does not apply to activities in foreign countries.” *Id.* at 585 (Stevens, J., concurring); see also *Defenders of Wildlife v. Lujan*, 911 F.2d 117, 123 (8th Cir. 1990). While the ESA discusses the “high seas” and likely applies outside of the United States, it does not reach into another sovereign nation’s territory. Although one court found extraterritorial application of the ESA when U.S. foreign actions have significant environmental impacts within the United States, the case was subsequently overturned for a lack of standing. See generally Gibel, *supra* note 214, at 54 (discussing the application of the ESA and the MMPA on the high seas).

228. 16 U.S.C. § 1372(a) (2012) (as amended). The MMPA defines “marine mammal” as any

has been construed to apply in the sovereign territory of another nation. Fundamentally, the NHPA applies to “historic preservation” while the ESA and the MMPA apply specifically to “endangered species” and “marine mammals” respectively. Further, the foundational question, “What statute could protect the dugong?” was discussed in 2002 and prior to *Dugong I* and *Dugong II* when the United Nations issued an extensive 172-page report on the dugong’s threatened status in the world. The report specifically addressed the potential protections afforded by law, discussing the ESA and the NEPA as plausible statutory vehicles to protect the dugong, but did not mention the NHPA.<sup>229</sup> In effect, the NHPA is creatively utilized to protect an animal clearly protected by both the ESA and the MMPA.<sup>230</sup>

The following table synthesizes the various protections afforded to the dugong in the United States and Japan based upon the four statutes introduced above. The surprising outcome is delineated below.

Table 3

Statute	Applies to Dugong in United States?	Applies to Dugong in Another Sovereign Nation?
NEPA	Yes	No <sup>231</sup>
ESA	Yes <sup>232</sup>	No <sup>233</sup>
MMPA	Yes <sup>234</sup>	No <sup>235</sup>
NHPA	No <sup>236</sup>	Yes? <sup>237</sup>

mammal that “is morphologically adapted to the marine environment,” such as manatees, whales and dugongs. *Id.* § 1362(6); see also Donald C. Baur, W. Robert Irvin & Darren R. Misenko, *Symposium: Changing Tides in Ocean Management: Putting ‘Protection’ into Marine Protected Areas*, 28 VT. L. REV. 497, 549 (2004).

229. *Dugong Status Report*, *supra* note 193, at 45.

230. For example, the ESA states, “the purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions.” 16 U.S.C. § 1351(b). The MMPA states that “marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem.” 16 U.S.C. § 1361(6).

231. *NEPA Coalition v. Aspin*, 837 F. Supp. 466, 466–68 (D.D.C. 1993).

232. See *Endangered Species*, U.S. FISH AND WILDLIFE SERVICE, <http://www.fws.gov/endangered/> (last visited Aug. 25, 2013).

233. *Lujan v. Defenders of the Wildlife*, 504 U.S. 555, 585 (1992).

234. “The term ‘marine mammal’ means any mammal morphologically adapted to the marine environment . . . [to include the dugong].” 16 U.S.C. § 1362(6); 50 C.F.R. § 18.3.

235. 16 U.S.C. § 1372(a)(1); *United States v. Mitchell*, 553 F.2d 996 (5th Cir. 1977).

236. The dugong is not listed on the U.S. National Register of Historic Places. Outside the

C. *Other U.S. Environmental Statutes' Extraterritorial Application*

Other foundational American environmental laws, including the Clean Water Act, the Resource Conservation and Recovery Act (RCRA), and the Safe Drinking Water Act, have not been held to apply in another sovereign,<sup>238</sup> but the NHPA is the only environmental law statute that has been held to apply within the territory of another sovereign nation.<sup>239</sup>

The extraterritorial application of two additional environmental statutes, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Clean Air Act (CAA) have unique provisions affecting their jurisdictional reach and are discussed in greater detail below. CERCLA empowers foreign claimants to assert claims against monies in the CERCLA Superfund, but only if recovery is authorized by a “treaty or executive agreement between the United States and the foreign country involved, or if the Secretary of State, in consultation with the Attorney General and other appropriate officials, certifies that such country provides a comparable remedy for United States claimants.”<sup>240</sup> However, CERCLA claims from foreign litigants in another nation’s territory have proven unsuccessful. For example, in *Arc Ecology v. United States Department of the Air Force* the court expressly rejected CERCLA’s application in a foreign nation, denying a claim by Filipino litigants seeking to apply CERCLA’s protections to two former U.S. military bases in the Philippines.<sup>241</sup> In doing so, the court focused on the presumption against applying U.S. laws extraterritorially. It examined CERCLA’s purpose, legislative history, and scope to determine that Congress did not provide “clear evidence” to apply CERCLA extraterritorially.<sup>242</sup>

Lastly, the CAA authorizes the Environmental Protection Agency Administrator to mitigate air pollution problems in a foreign nation caused by domestic U.S. emissions only if “the Administrator determines [the country] has given the United States essentially the same rights with respect to the prevention or control of air pollution occurring in that country as is given that country by this section.”<sup>243</sup> Nonetheless, it appears that the United States has been reluctant

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*Dugong* rulings, no court has held the dugong to be a “historic property” within the meaning of the NHPA.

237. *Dugong II*, 543 F. Supp. 2d 1082, 1082 (N.D. Cal. 2008).

238. See generally Nash, *supra* note 14, at 997–1019 (2010) (providing an overview of American environmental law as applied extraterritorially).

239. See *Env'tl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 528 (D.C. Cir. 1993) (holding that NEPA was applied to a federal action in Antarctica). The court took pains to highlight the unique nature of Antarctica and its status as a non-sovereign entity. *Id.*

240. See CERCLA, 42 U.S.C. § 9611(l)(4) (2012).

241. *Arc Ecology v. U.S. Dep't of the Air Force*, 294 F. Supp. 2d 1152 (N.D. Cal. 2003), *aff'd*, 411 F.3d 1092 (9th Cir. 2005).

242. *Id.*

243. See Clean Air Act, 42 U.S.C. § 7415(c) (2012).

to pursue judicial obligations concerning the extraterritorial application of this provision, and no case has applied it in such a manner.<sup>244</sup>

#### IV.

##### THE NHPA'S FUTURE EXTRATERRITORIAL APPLICATION AND THE POTENTIAL IMPACT ON FOREIGN RELATIONS

This brief analysis of the extraterritorial application of U.S. environmental laws demonstrates that the presumptions against extraterritoriality and broader foreign relations concerns have been critical considerations for judicial rulings limiting U.S. legal reach in a sovereign territory. Yet, the NHPA has an express extraterritorial provision that must be deciphered, albeit without any clear direction from Congress. Congressional legislation applies only within the territorial jurisdiction of the United States—this is commonly referred to as the “Foley doctrine.”<sup>245</sup> The Foley doctrine states that the judiciary is ill-equipped to resolve such complex political and foreign policy matters and that the court should not find an extraterritorial application in the absence of a clearly expressed congressional purpose.<sup>246</sup> While the NHPA clearly applies abroad via the 1980 WHC implementing amendments, minimal case law outside the *Dugong* litigation exists regarding proper construction of statutes that have clear extraterritorial provisions.

The judiciary’s historical reluctance to weigh in on matters implicating broader foreign relations concerns is further magnified by the weighty national security risks at issue in the *Dugong* litigation, considering that the DoD conducts the bulk of U.S. federal agency actions overseas. Absent clear evidence of Congressional intent behind the scope of the 1980 WHC implementing amendments to the NHPA, courts should exercise discretion consistent with the Foley doctrine and *Kiobel*, discussed below, and not hunt or infer congressional purpose and intent in *how* the NHPA applies overseas where none clearly exists.

##### A. *The NHPA: A Singular Environmental Statute in Jurisdiction and Scope*

The court’s interpretation of the NHPA provisions highlights the unsettled scope and jurisdiction of the 1980 WHC amendments to the NHPA. The uncertainty has potentially significant consequences for the planning of U.S. activities overseas. Indeed, the holding in the *Dugong* litigation creates further unpredictability regarding the practical scope and jurisdiction of the NHPA and illustrates the curious magnifying power of the NHPA when applied overseas.

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244. See Nash, *supra* note 14.

245. Foley Bros. v. Filardo, 336 U.S. 281, 285–86 (1949).

246. *Id.*

1. *Jurisdiction: The NHPA Is a Singular U.S. Statute with Worldwide Jurisdiction That Can Protect the Environment*

Today, the NHPA stands out as the singular U.S. statute that affords worldwide environmental protections in another sovereign.<sup>247</sup> While Executive Orders state that the U.S. military must abide by environmental obligations overseas, they do not independently allow for judicially enforceable causes of action in a U.S. court. The NHPA is truly a unique environmental statute in this regard. From a jurisdictional perspective, *Dugong II* interprets the 1980 amendments to the NHPA to include the allowance for a cause of action in another nation's sovereign territory.

2. *Scope: The NHPA's Practical Application Now Remains Uncertain with Broader National Security Implications*

Beyond the uncertain jurisdiction of the NHPA is the unpredictability regarding the substantive interpretations of the statute. This unpredictability could encompass an element of another nation's equivalent National Register to include wild animals under the NHPA's protections. The *Dugong* rulings' broad interpretation of the NHPA's "equivalent of the National Register" effectively widens the United States' obligations prior to a federal agency undertaking a project abroad.

The *Dugong* rulings expanded the extraterritorial application of the National Register beyond both the NHPA's traditional protection of strictly physical, tangible, historic properties and the underlying purpose of the NHPA. The holding also went beyond the WHC's protection of natural and cultural properties. And the court interpreted the NHPA language as providing protections of "properties" that neither the NHPA nor the WHC could independently provide.<sup>248</sup>

Practically, the World Heritage List and U.S. National Register have not been utilized to afford protections to living organisms. Indeed, culturally significant American animals that would appear to be logical candidates for inclusion on the National Register are absent. For example, neither the iconic American bald eagle nor Colorado bison is included on the National Register. Also absent are living objects, including the California Redwoods and the

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247. As discussed earlier, this Article uses the general term "environmental statute" to include the broad array of environmental legislation (e.g., the Clean Water Act, the Clean Air Act and natural resources statutes (e.g., Sikes Act)). While *Blue Water Fishermen's Ass'n v. Nat'l Marine Fisheries Servs.*, 158 F. Supp. 2d 118 (D. Mass 2001) did uphold the extraterritorial reach of the Magnuson-Stevens Act in federal waters beyond the United States 200 nautical mile Exclusive Economic Zone (EEZ), it did not specifically hold that the Magnuson-Stevens Fishery Conservation and Management Act applied in another nation's sovereign territory.

248. The court noted that the United States could, in theory, protect living objects pursuant to the NHPA, quoting a case, *Hatmaker v. Georgia Dep't of Transp.*, which suggested a living tree that had cultural meaning to Native Americans *could* be listed on the National Register. *Dugong v. Rumsfeld* ("*Dugong I*"), No. C 03-4350 MHP, 2005 U.S. Dist. LEXIS 3123, at \*33 (N.D. Cal. Mar. 2, 2005) (emphasis added).

General Sherman tree at Sequoia National Park. In total, the eighty-year old U.S. National Register contains over 88,000 properties. None are wild organisms or living objects.<sup>249</sup>

The WHC clearly protects natural features, such as geological and physical formations and natural sites or areas of outstanding universal value<sup>250</sup> under its “natural heritage” provision. The statute does not clearly provide for the protection of wild animals. The WHC contains a definition of “monument” that could protect the *habitats* of living animals, but it is less expansive than Japan’s definition under the Law of Cultural Property. Overall, there are 981 properties on the World Heritage List; the dugong is not among them and none are wild animals.<sup>251</sup>

In sum, neither the NHPA nor the WHC has clear provisions that protect wild animals. Nor do they provide protections for the broad expanse of properties envisioned by individual nations’ cultural and historic domestic laws. Moreover, the courts have not broadened the interpretation and application of the statutes.<sup>252</sup> Yet, somehow, the sum is greater than the individual parts. The combination of the WHC implementing provision via the NHPA adds up to a result—as construed by the *Dugong* rulings—more expansive than what each treaty or statute individually calls for.

*B. The NHPA Derives from Preservation Statutes Addressing Physical Properties and Has Gradually Evolved from Earlier American Historic Preservation Efforts*

As discussed in Part I, the NHPA and its 1980 amendments cannot be examined in a vacuum; their plain language is clearly derivative of earlier preservation efforts rooted in *Gettysburg*, the Antiquities Act, the Historic Sites Act, and the National Trust for Historic Preservation Act. Indeed, the NHPA’s modern National Register originated from the 1935 Historic Sites Act.<sup>253</sup>

Hence, the NHPA is properly viewed as the natural, gradual outgrowth that developed organically within larger historic preservation goals. While the scope of protected properties under U.S. historical preservation law has systematically expanded from singular sites, buildings, objects, and structures to encapsulate historic districts and historical landscapes, it is still rooted in specific, physical categories without including that which may be of historical or cultural value.<sup>254</sup>

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249. *Nat’l Register of Historic Places*, NATIONAL PARK SERVICE, <http://www.nps.gov/nr/> (last visited Mar. 8, 2014).

250. WHC, *supra* note 21, at art. 2.

251. *World Heritage List*, UNESCO, <http://whc.unesco.org/en/list> (last visited Mar. 8, 2014) (listing the 981 properties currently protected under the World Heritage List).

252. *Dugong I*, 2005 U.S. Dist. LEXIS 3123, at \*26.

253. The Historic Sites Act registry became the National Historic Landmark program. This was integrated into the NHPA’s National Registry in 1966.

254. See Sherry Hutt, Caroline Meredith Blanco, Walter E. Stern & Stan N. Harris, *CULTURAL PROPERTY LAW: A PRACTITIONER’S GUIDE TO THE MANAGEMENT, PROTECTION, AND*

And none of the historic preservation statutes clearly provide for the protections of living animals. Moreover, the definition of historic property was not specifically expanded in 1980 to address additional properties. Accordingly, the NHPA is best seen nested within Professor Rose's "third phase of [American] historic preservation"<sup>255</sup> with the earlier phases having clear, traceable roots in efforts by the Mount Vernon Ladies Association and the Supreme Court's opinion in *Gettysburg*.

Indeed, it is impossible to decouple the NHPA's provisions addressing the protection of historic properties from the earlier historic preservation efforts and laws. The evolutionary sequencing is unmistakable: the Antiquities Act—the first comprehensive federal historic preservation act—preserved landmarks, structures, and objects.<sup>256</sup> The Historic Sites Act preserved sites, buildings, and objects with a provision for physical structures.<sup>257</sup> The National Register was established under the Historic Sites Act and later fully integrated into the NHPA.<sup>258</sup> The NHPA built upon these prior statutes by merely adding districts to the maturing definition of historic properties. The WHC's implementing language was added in 1980, fourteen years after the NHPA's passage without further defining "foreign historic properties" or "foreign undertakings" in regulation or law.

When the NHPA was drafted in 1966, and during its subsequent amendments, there was no discussion or apparent thought to its impact on foreign relations. If additional courts were to follow the approach seen in *Dugong I* and *II*, we would now be entering a new "fourth phase" of historic preservation, in Professor Rose's lexicon, whereby the NHPA has worldwide applicability to include the protection of wild animals and all the historic preservation laws of every state party to the WHC. If so, this phase would be brought forward by the judicial branch, unlike the other phases, which were legislated and initiated through both citizen activism and the legislative process. As the U.S. military is involved with innumerable, broadly defined federal "undertakings" every year, what are the practical foreign relations and national security consequences of such an expansive view? The answer is explored in detail below.

*C. The NHPA Should Be Applied in a Manner that Fully Takes into Account Prudential Foreign Relations Concerns*

While the ATS lacks an express extraterritorial provision, it shares commonalities with the NHPA and other environmental statutes as a plausible statutory vehicle to litigate environmental claims in sovereign nations. While it remains unclear whether the NHPA will be used extensively to litigate

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PRESERVATION OF HERITAGE RESOURCES 2 (2004).

255. Rose, *supra* note 23, at 489.

256. 16 U.S.C. §§ 431–33.

257. 16 U.S.C. §§ 461–67.

258. 16 U.S.C. § 464(b).

environmental claims overseas, the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.* reinforces important foreign policy concerns that should apply to a case brought under the NHPA.

1. *The Alien Tort Statute, Kiobel, and "Weighty Concerns"*

The ATS has received much attention as a possible vehicle to address environmental claims overseas.<sup>259</sup> The Supreme Court recently held that the presumption against extraterritoriality applies to claims under the ATS. Once again, it focused on important foreign policy concerns similar to those raised in resolving environmental litigation discussed in Part III. The statute, passed in 1789 as part of the Judiciary Act, provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."<sup>260</sup>

Its utility as a potential vehicle to resolve environmental claims was renewed following *Filartiga v. Pena-Irala*.<sup>261</sup> *Filartiga* opened U.S. courts to address human rights abuses, and it seemed plausible that the ATS could similarly be used to resolve environmental harms abroad.<sup>262</sup> While the ATS had been invoked only twice in the 18th century and sparingly before *Filartiga*, its potential ability to address overseas environmental claims has increased in the past twenty-five years.<sup>263</sup> Several environmental cases have been recently brought under the ATS, seeking redress for claims originating in other nations.<sup>264</sup> However, despite a flurry of lawsuits, these claims have been largely unsuccessful,<sup>265</sup> and the Supreme Court narrowed the statute's application in *Sosa v. Alvarez-Machain* in 2004.<sup>266</sup>

In *Kiobel*, Nigerian nationals filed suit in federal court alleging that non-U.S. corporations committed violations of the law of nations in Nigeria.<sup>267</sup> Chief Justice Roberts, writing for the majority in *Kiobel*, rejected the assertion that the ATS applies extraterritorially, emphasizing the "weighty concerns" and "serious foreign policy consequences" underlying the presumption against extraterritoriality.<sup>268</sup> The Court reinforced this longstanding presumption, guarding against serious foreign policy consequences and highlighting the

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259. See, e.g., *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999).

260. 28 U.S.C. § 1350 (2012).

261. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

262. For a general guide to environmental claims and the Alien Tort Statute, see Kathleen Jawger, *Environmental Claims Under the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 519 (2010).

263. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). See also *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999).

264. See, e.g., *Beanal*, 197 F.3d at 161.

265. *Id.*

266. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004).

267. *Kiobel*, 133 S. Ct. at 1662.

268. *Id.* at 1668–69.

importance of judicial caution in such arenas.<sup>269</sup> Applying U.S. law “does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign.”<sup>270</sup>

*Kiobel* relied heavily upon *EEOC v. Arabian Oil Co.*, a case holding that Title VII of the Civil Rights Act does not apply extraterritorially to regulate the employment practices of United States firms that employ American citizens abroad.<sup>271</sup> The Court explained in *Kiobel*, “For us to run interference in . . . a delicate field of international relations there must be present the affirmative intention of Congress clearly expressed.”<sup>272</sup>

However, unlike the ATS, the NHPA does have a clear provision that applies extraterritorially.<sup>273</sup> Litigants may assert that the existence of an extraterritorial provision within the NHPA should obviate the need to address the weighty foreign policy concerns enunciated in *Kiobel* and similar cases limiting the reach of U.S. statutes abroad. Yet, the same prudential foreign policy concerns exist in determining *how* to properly interpret and apply the NHPA in another sovereign nation. Moreover, the NHPA lacks clear congressional “affirmative intention”<sup>274</sup> in *how* to interpret the extraterritorial provision abroad. An expansive view of its application in another sovereign without further Congressional instruction would ignore such concerns.

## 2. Comity and Act of State

*Kiobel*’s concurring opinion, written by Justice Breyer, re-emphasized the importance of judicial comity when determining a U.S. statute’s impact on foreign relations. Comity is a principle of legal reciprocity that ensures courtesies and respect among political entities, such as nations, states, or courts of different jurisdictions.<sup>275</sup> Justice Breyer was wary of adjudicating a case originating in Nigeria in light of the executive branch’s view of the case’s potential impact on foreign policy.<sup>276</sup> He stated, “Adjudicating any such claim

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269. *Id.* at 1664–66 (asserting that “the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do”).

270. *Id.* at 1667.

271. *EEOC v. Arabian Oil Co.*, 499 U.S. 244 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* *Landgraf v. USI Film Products*, 511 U.S. 244, 251 (1994).

272. *Kiobel*, 133 S. Ct. at 1664 (quoting *Arabian Oil*, 499 U.S. at 248).

273. 16 U.S.C. § 470a-2.

274. *See Arabian Oil*, 499 U.S. at 248.

275. BLACK’S LAW DICTIONARY 261 (7th ed. 1999). Further, the Second Circuit in *Kiobel* stated, “Unilaterally recognizing new norms of customary international law—that is, norms that have not been universally accepted by the rest of the civilized world—would potentially create friction in our relations with foreign nations and, therefore, would contravene the international comity the statute was enacted to promote.” *Kiobel v. Royal Dutch Pet. Co.*, 621 F.3d 111, 140–41 (2d Cir. 2010).

276. *Kiobel*, 133 S. Ct. at 1670–78 (Breyer, J., concurring).

must, in my view, also be consistent with those notions of *comity* that lead each nation to respect the sovereign rights of other nations by limiting the reach of its own laws and its enforcement.”<sup>277</sup> Breyer desired to minimize international friction in the Court’s ruling, specifically restating his opinion in a prior ATS decision, *Sosa v. Alvarez-Machain*,<sup>278</sup> to find jurisdiction outside the United States only when “distinct American interests are at issue” with consideration to the “limiting principles such as exhaustion, *forum non conveniens*, and comity.”<sup>279</sup>

Clearly, the NHPA’s extraterritorial provision applies within another sovereign.<sup>280</sup> Nevertheless, the important foreign relations concerns should not be dismissed by a U.S. court in considering the statute’s applicability and scope, particularly when another nation lacks a reciprocal judicial remedy. Accordingly, in light of the weighty foreign policy concerns addressed in *Kiobel*, future judicial applications of the NHPA’s extraterritorial provision should be limited and nuanced in scope, and courts should exercise appropriate caution when taking into account any decision of another sovereign.<sup>281</sup>

The “act of state” doctrine prevents U.S. courts from questioning the validity of a foreign country’s acts within its borders, reflecting a strong sentiment that the judicial judgment on the validity of foreign acts may hinder the conduct of foreign affairs.<sup>282</sup> Diplomacy often involves complex, multifaceted negotiations between two sovereigns. This is particularly true with military operations and undertakings overseas in light of the political importance of such moves; seldom is such a decision made unilaterally by a nation. Moving the Marines from Futenma involved intense and lengthy negotiations between the United States and Japan. Japan made the ultimate decision, which was informed by U.S. “operational parameters.”<sup>283</sup> The consequences of *Dugong II* suggest that an act of another sovereign can be effectively invalidated if the United States is intimately involved in the decision-making process. *Kiobel* reinforces the importance of judicial restraint when such decisions impact foreign relations.<sup>284</sup>

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277. *Id.* at 1671 (Breyer, J., concurring) (emphasis added).

278. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 (2004).

279. *Kiobel*, 133 S. Ct. at 1674 (Breyer, J., concurring) (quoting *Sosa*, 542 U.S. at 733 n.21).

280. 16 U.S.C. § 470a-2.

281. *See Kiobel*, 133 S. Ct. at 1661.

282. Under the modern interpretation of the act of state doctrine, it may be invoked only when there is an “official act of a foreign sovereign performed within its own territory,” and “the relief sought or the defense interposed [in the action would require] a court in the United States to declare invalid the [foreign sovereign’s] official act.” *W. S. Kirkpatrick & Co., Inc. v. Env’tl. Tectonics Corp., Int’l*, 493 U.S. 400, 405 (1990).

283. *Dugong II*, 543 F. Supp. 2d 1082, 1085 (N.D. Cal. 2008).

284. *Kiobel*, 133 S. Ct. at 1664 (“The presumption against extraterritorial application helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.”) (quoting *EEOC v. Arabian Oil Co.*, 499 U.S. 244, 248 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in Landgraf v. USI Film Products*, 511 U.S. 244, 251 (1994)).

3. *Forum Non Conveniens, Treaty Obligations, and the Failure of Japanese Judicial Remedies*

In civil procedure, the doctrine of *forum non conveniens* (Latin for “inconvenient court”) states that a forum may be divested of jurisdiction if the action should be instituted in another forum where the action could originally have been brought.<sup>285</sup> In tort law, American courts are perceived to be more generous to plaintiffs than the law in most foreign jurisdictions, making U.S. courts a preferred forum for foreign litigants in cases against U.S. companies. The common law doctrine of *forum non conveniens* ensures that the court is properly balancing convenience against the choice of forum. The court must first determine whether an alternative forum exists.<sup>286</sup> In the *Dugong* decisions, *forum non conveniens* was not clearly implicated as Japan lacked a clear judicial forum to hear the litigants’ claims. Paradoxically, because Japanese law did not provide a legal remedy, the doctrine of *forum non conveniens* could not be invoked. Nevertheless, future judicial inquiries into the extraterritorial application of the NHPA should carefully examine other, competing forums for redress to ensure the U.S. court is the proper forum to hear such a claim.

The 1980 NHPA amendments as expressed in the *Dugong* decisions may have broader national security implications than the NHPA’s intended purpose.<sup>287</sup> As discussed earlier, Japan’s domestic environmental laws are

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285. BLACK’S LAW DICTIONARY 665 (7th ed. 1999).

286. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 n.22 (1981).

287. The statute itself specifies the NHPA’s purpose as follows: Congress finds and declares that—

1. the spirit and direction of the Nation are founded upon and reflected in its historic heritage;
2. the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;
3. historic properties significant to the Nation’s heritage are being lost or substantially altered, often inadvertently, with increasing frequency;
4. the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans;
5. in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation;
6. the increased knowledge of our historic resources, the establishment of better means of identifying and administering them, and the encouragement of their preservation will improve the planning and execution of Federal and federally assisted projects and will assist economic growth and development; and
7. although the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by

inadequate to protect the dugong since Japanese administrative rules do not allow for a citizen suit that would protect the dugong. Thus, the Japanese litigants were forced to join the U.S. environmental groups pursuant to U.S. law.<sup>288</sup> Further, Japanese law does not allow for any judicially enforceable redress from its political leaders' decision, and the Japanese plaintiffs lacked an avenue to bring a lawsuit.<sup>289</sup> In the *Dugong* rulings, is the judiciary undermining Japan's law and wishes, and the executive branch's foreign affairs power in ruling in this area?<sup>290</sup>

Lastly, Japan and the United States signed a bilateral Status of Forces Agreement (SOFA) in 1960 that governs United States-Japanese military relations.<sup>291</sup> The SOFA regulates the sending state's (United States) military's actions in the host nation (Japan).<sup>292</sup> But outside the SOFA, the United States has not signed an additional international agreement outside the WHC or the SOFA to specifically abide by Japan's Law on Cultural Property. And this has not been integrated into the existing SOFA framework.

*D. The NHPA's Practical Foreign Relations and National Security Consequences for Future Actions Overseas*

Today, the NHPA stands alone as the only statute protecting historic properties, natural or cultural resources, or the human environment that has been held to apply in another sovereign's territory. The outer bounds to what the NHPA can protect overseas and where it can protect it are unclear after the *Dugong* rulings. If U.S. courts determine that another nation's historic or cultural property laws are the "equivalent of" the U.S. National Register, anything that the foreign nation deems to be of importance would be governed by the NHPA's protections, even within the foreign nation's sovereign territory.

*1. The U.S. Military's Pacific Re-Balancing*

The U.S. DoD is the single largest employer in the world with 3.3 million people, operating hundreds of federal facilities within the United States and

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private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

16 U.S.C. § 470(b) (2012).

288. Takahashi, *supra* note 6, at 197.

289. *Id.* at 190.

290. The present-day fallout from the failure to find a replacement location has incensed many local Okinawans. Okinawans have grown increasingly concerned about the future of the Marine base in their home city, with some Okinawans threatening secession due, in part, to the intransigence surrounding this issue. Martin Fackler, *In Okinawa, Talk of Break from Japan Turns Serious*, N.Y. TIMES, July 6, 2013, at A6.

291. Treaty of Mutual Cooperation and Security of 1960, 11 U.S.T. 1633-35, and the Status of Forces Agreement ("SOFA"), 3 U.S.T. 3342-62 [hereinafter U.S.-Japan SOFA].

292. *Id.*

across the world with U.S. military personnel in 150 countries.<sup>293</sup> Military base openings and closures are fluid in nature, giving rise to numerous federal undertakings within the meaning of the NHPA, which are also reviewable agency actions within the meaning of the APA and therefore challengeable in federal court. Applying the court's logic in the *Dugong II* ruling, a thorough understanding of each nation's equivalent of the National Register and accompanying historic and cultural preservation laws is essential before any federal undertaking occurs overseas.

The U.S. National Register focuses on the protection of five types of "historic properties." Yet, other nations' cultural and historic preservation laws often include protections well beyond what was envisioned in the U.S. National Register, including archeological sites, landscapes, animals, plants, people, documents, and social institutions. Rather than applying the NHPA strictly in accordance with the U.S. law, the NHPA may now protect "properties" as they are independently defined by each nation's historic preservation statute.

This is significant. Many nations' National Registers go well beyond the five categories of property that are included in the U.S. National Register.<sup>294</sup> Once it can be determined that an individual foreign nation's Register is equivalent to the U.S. National Register, the legal key can now effectively "unlock the door" to the full menu of protections afforded by the foreign nation's domestic statute. Once this door is opened, the NHPA can protect properties that it has not traditionally protected domestically.

This is particularly important as the United States military shifts forces to the Pacific theater in light of continuing national security threats from North Korea and a broader movement of forces from Afghanistan and the Middle East to Australia, among others.<sup>295</sup> Such shifts will inevitably trigger requirements as innumerable federal undertakings within the meaning of the NHPA will be sure to follow.<sup>296</sup> As the *Dugong* rulings are the only examples addressing the contours of what constitutes foreign undertaking under the NHPA, considerable uncertainty remains.<sup>297</sup>

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293. For a list of U.S. personnel serving overseas, see *U.S. Military Personnel by Country*, CNN.COM, <http://www.cnn.com/interactive/2012/04/us/table.military.troops> (last visited Mar. 8, 2014).

294. See, e.g., Monteith, *supra* note 97, at 1034–39 (discussing the requisite laws and national registers in Egypt and France while noting that Canada, Denmark, and Australia have more expansive national registers).

295. See, e.g., Elisabeth Bulmiller, *U.S. Pivots Eastward to Address Uneasy Allies*, N.Y. TIMES, Oct. 24, 2011, at A4.

296. Undertaking means "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval." 36 C.F.R. § 800.16(y) (2013). As discussed in Part I, the NHPA lacks specific guidance for a foreign undertaking. *Supra*, Part I.

297. See, e.g., *Dugong I*, No. C 03-4350 MHP, 2005 U.S. Dist. LEXIS 3123, at \*41 (N.D. Cal. Mar. 2, 2005). This raises several additional questions: How should the definition of undertaking be applied in another country? What is the "equivalent of the National Register" within these 150

At the time of this writing, the U.S. military is operating around the world with plans to withdraw from Afghanistan, establish a more permanent presence in Australia, and maintain a strong presence in South Korea.<sup>298</sup> With a focus on the Pacific theater, the DoD will undertake many federal actions that could be litigated in the Ninth Circuit or California's federal district courts (perhaps even the same court that ruled on the *Dugong* litigation). Some of these nations have expansive National Registers that go well beyond the NHPA's protections.<sup>299</sup> The discussion below provides a snapshot of three nations' historic and cultural preservation laws, demonstrating the spectrum of properties that *could* be protected by the NHPA.

## 2. Practical Examples: South Korea, Australia, and Afghanistan

The U.S. military has had a strong presence in South Korea since the conclusion of the Korean War. Today, over 30,000 U.S. military personnel in the country work at over forty active military sites.<sup>300</sup> The military threat is real; North Korea has recently conducted three nuclear tests and routinely threatens South Korea and the United States with a preemptive attack.<sup>301</sup> The Korean Cultural Heritage Protection Act is similar to the Japanese Law on Cultural Property in that it protects a broad category of cultural heritage, including tangible and intangible works, folklore resources, historic sites, plants, and animals.<sup>302</sup> While Korean law shares similar goals with the NHPA, properties and works it protects are considerably larger than what the NHPA affords. For example, the Korean law protects plants, animals, and intangible cultural works including dance and music.<sup>303</sup>

Consider a fact pattern similar to that in the *Dugong* litigation, whereby the Korean government works closely with the U.S. government to transfer or relocate a U.S. base in Korea due to an emerging national security threat with North Korea. Perhaps not surprisingly, this involves intense diplomatic negotiations between the two countries. The United States does not conduct an NHPA federal undertaking analysis to encompass impacts on all Korean historic

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countries? What do these laws protect?

298. See, e.g., Laris Karklis, *U.S. Military Expansion in Southeast Asia*, WASH. POST, Mar. 25, 2012, [http://www.washingtonpost.com/world/national-security/2012/03/25/gIQASFQXaS\\_graphic.html](http://www.washingtonpost.com/world/national-security/2012/03/25/gIQASFQXaS_graphic.html) (last visited Mar. 8, 2014).

299. See Ingrid Borstrom, Note, *The Cultural Significance of Wildlife: Using the National Historic Preservation Act to Protect Iconic Species*, 12 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 147, 158–59 (2006).

300. DEP'T OF DEF. BASE STRUCTURE REPORT, available at <http://www.acq.osd.mil/ie/download/bsr/BSR2012Baseline.pdf> (last visited Jul 5, 2013).

301. See, e.g., *In Focus: North Korea's Nuclear Threats*, N.Y. TIMES, Apr. 16, 2013, <http://www.nytimes.com/interactive/2013/04/12/world/asia/north-korea-questions.html>.

302. Cultural Heritage Protection Act, Act. No. 961, Jan. 10, 1962, art. 2, as amended up to Act No. 10000, Feb. 4, 2010 (S. Kor.), available at <http://www.wipo.int/edocs/lexdocs/laws/en/kr/kr117en.pdf>.

303. *Id.*

cultural properties, as this is not a specific legal requirement of the United States-Korean Mutual Defense Agreement and Revised Agreements. The United States does, however, otherwise fully comply with the Korean Cultural Protection Act. An outside group challenges the lack of impact analysis, pursuant to the NHPA and the APA. Despite challenges from the Department of Justice, a federal court hears the case in light of the *Dugong* ruling, delaying the relocation for several years and impacting United States-Korea foreign relations. Meanwhile, the threat from North Korea continues.

Critics may assert that the United States should simply take into account its actions with respect to the broadly defined Korean cultural heritage well prior to a federal undertaking. But there is no evidence that that is how Congress intended the NHPA to apply. To borrow Justice Breyer's language in *Kiobel*, there is no "affirmative intention" concerning how this provision should be applied in Japan. Nor are there implementing regulations or guidance to this effect. The ATS and other environmental statutes have not been held to apply in sovereign territories, and *Kiobel* reiterated the importance of deferring such decisions to the political branches in the absence of clear direction.<sup>304</sup> While the NHPA does implement the WHC treaty obligations, protecting each and every property within each nation's historic preservation law is not contemplated by the WHC; only World Heritage listed properties are afforded concrete protections.

In the above example, not only are similar foreign policy "weighty concerns" present as those articulated in *Kiobel*, there are also additional national security problems that the NHPA could feasibly impact. In Korea, the United States has had forces in place for sixty years following the cessation of hostilities after the Korean War in 1953. Missile tests and the threat of military attack are a reality on the Korean Peninsula.

An additional example: the United States, as part of its broader "Pacific Pivot" strategy, is spending a significant amount of money and sending U.S. Marines to Australia.<sup>305</sup> Inevitably, there will be significant U.S.-funded infrastructure changes that would constitute a federal undertaking, triggering the NHPA Section 106 process. And Australia's "Register of the National Estate" covers both cultural and natural resources to include wildlife, recognizing that "cultural values are linked closely to plant and animal populations."<sup>306</sup> After the *Dugong* litigation, any undertaking must be careful to take into account its impact on Australia's wildlife, which the WHC does not protect.

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304. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013).

305. See Donna Mills, *Obama Announces Expanded U.S. Military Presence in Australia*, ARMED FORCES PRESS SERVICE, Nov. 16, 2011, <http://www.defense.gov/News/NewsArticle.aspx?ID=66098>; see also Craig Whitlock, *U.S., Australia to Broaden Military Ties Amid Pentagon Pivot to SE Asia*, WASH. POST, Mar. 26, 2012.

306. Borstrom, *supra* note 299, at 162–63 (stating that other countries, including Denmark and Canada, have National Registers that provide protection for animals).

Lastly, consider the potential and uncertain impact of the NHPA in present-day Afghanistan where the U.S. military is aggressively drawing down. Afghanistan does have a “Law on the Protection of Cultural and Historical Properties” although it is not so broadly defined as to include wild animals.<sup>307</sup> It does, however, provide for the protection of historical and cultural properties that are broadly defined to include any moveable or immovable product of mankind that has an outstanding historical, scientific, artistic, and cultural value.<sup>308</sup> Within the law, there is a procedure whereby the Afghanistan Institute of Archaeology registers protected properties as well as penalties for failing to comply with the law. And similar to Japanese law, Afghan law lacks procedural undertaking mechanisms analogous to the NHPA or the NEPA, whereby a governmental agency—from the United States or Afghanistan—is required to take into account its actions on the protected properties. And there is not a judicial redress provision within the Afghan law to challenge an agency action. Yet, after the *Dugong* litigation, the United States must be cognizant of actions during the drawdown that may trigger an undertaking within the meaning of the NHPA and affect Afghanistan cultural and historical property.

Korea, Australia, and Afghanistan are but three practical examples of how different nations that broadly provide domestic protections for historic and cultural properties could affect the way in which the NHPA applies extraterritorially. While it is beyond the scope of this Article to address each nation’s historic and cultural property laws, a proper understanding of each and every one may be required whenever a federal undertaking could feasibly take place.

## V.

### CONGRESS SHOULD ACT TO CLARIFY THE NHPA’S JURISDICTION AND SCOPE

The *Dugong* rulings are the only court opinions that directly address the scope and jurisdiction of the 1980 WHC amendments. In light of the increased uncertainty and potential foreign policy and national security concerns as briefly outlined above, Congress should take proactive steps to clarify the Act’s scope and jurisdiction as applied overseas. Such action is particularly important as the DoD has numerous future undertakings throughout the world and a plausible venue will be the same Northern District of California federal district court that decided both *Dugong I* and *II*.

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307. Law on Protection of Historical and Cultural Properties, 2004 (Afg.), available at <http://www.wipo.int/edocs/lexdocs/laws/en/af/af008en.pdf>. Under art. 3, historical and cultural properties are defined as:

1. Any product of mankind, movable or immovable, which has an outstanding historical, scientific, artistic and cultural value and is at least one hundred years old.
2. The objects which are less than one hundred years old, but which because of their scientific, artistic and cultural value, should be recognized as worthy of being protected.

308. *Id.*

In light of the weighty foreign policy concerns articulated in *Kiobel* and the lack of explicit Congressional intent, the 1980 NHPA amendments should be clarified. A Congressional amendment to the NHPA is preferable, although new federal regulations that refine the definition and applicability of “undertaking” and add a new definition of “foreign historic properties” would also suffice. This would serve to re-anchor the NHPA to its original purpose and intent within the broader U.S. historic preservation law tradition. Congress can and should do so while fully complying with the WHC’s treaty obligations. If it desires to protect living animals such as the dugong in another sovereign’s territory, it should do so via statutory clarification in the ESA<sup>309</sup> or the MMPA,<sup>310</sup> the two statutes that unquestionably provide for the protection of living animals domestically. Doing so would successfully mirror and align the ESA’s and the MMPA’s extraterritorial scope and application with its domestic scope and application.

*A. The Definition of “Undertaking” Should Be Clarified to Properly Distinguish Domestic from Foreign Undertakings*

Much of the confusion stems from the definition of “historic properties” and “undertaking” when applied to federal activities abroad. As a baseline, the statutory and regulatory definitions for an undertaking do not neatly correspond and there is no definition of an “undertaking” outside the United States that would serve to clarify the scope of the 1980 WHC amendments.

“Undertaking” is defined within the NHPA as:

[A] project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including —

- A. those carried out by or on behalf of the agency;
- B. those carried out with Federal financial assistance;
- C. those requiring a Federal permit license, or approval; and
- D. those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.<sup>311</sup>

Within federal regulations, undertaking is defined as: “a project, activity, or program, funded in whole or in part under the direct or indirect jurisdiction of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.”<sup>312</sup>

The NHPA lists four examples of projects, activities, or programs that may qualify as an undertaking while regulations expand the list to include those “requiring a [f]ederal permit, license, or approval.”<sup>313</sup> Textually, it appears that under both the statute and accompanying regulations, some funding “in whole or

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309. 16 U.S.C. §§ 1531–1544 (2012).

310. Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027 (codified as amended in scattered sections of 16 U.S.C.).

311. 16 U.S.C. § 470w(7) (2012).

312. 36 C.F.R. § 800.16(y) (2013).

313. *Id.*

in part”<sup>314</sup> is necessary to qualify as an undertaking. However, the federal regulations appear to raise the bar on what may qualify as an undertaking, limiting the definition to funded projects, activities, or programs requiring a “permit, license, or approval” under the jurisdiction of a federal agency.

This definitional misalignment has already been a source of domestic litigation.<sup>315</sup> The problem is only exacerbated when applied overseas as the NHPA lacks a special provision or definition that applies to foreign undertakings. For example, what if a foreign nation has the ultimate approval authority of a federal project and administers the permits and licensing? Would this impact the “undertaking” analysis? A clear understanding of what is an “undertaking” is crucial to answer any questions regarding the applicability of the WHC provision of the NHPA.

Today, one plausible meaning of the term could mean *any* project requiring *any* federal financial assistance. As overseas military and federal activities are by their nature continually supported by federal assistance, this definition is ill suited to apply to activities overseas. In light of foreign relations concerns, there should be an additional definition of an “undertaking outside the United States.” This new definition would serve an important purpose in light of the weighty foreign relations concerns discussed earlier. It should address the unique nature of overseas activities, specifically delineating what role a host nation’s approval has in determining whether or not an undertaking has occurred within the meaning of the NHPA.

*B. Congress Should Clarify the Terms “Foreign Historic Property,”  
“Equivalent of the National Register,” and “Eligible For”*

There is virtually no legislative history surrounding the NHPA’s critical 1980 WHC implementing provision. Congress should take steps to amend the NHPA to clearly define “foreign historic property” and “equivalent of the National Register” to ensure that the legislation is properly implemented and understood. A new provision could be incorporated within the NHPA statutory scheme at 16 U.S.C. § 470a-2(1) to clarify the scope of the statute. Possible amended language could read:

Section 402 does not expand the definition of “property” or “historic property” as set forth in both the NHPA and World Heritage Convention. As such, when applying another nation’s domestic law, the definition of “property” should be interpreted to apply to “historic property” as set forth in the NHPA and “properties” as set forth in Articles 1 and 2 of the World Heritage Convention. This provision does not expand additional protections to properties not afforded protection by the World Heritage Convention or the NHPA.

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314. *Id.*

315. *See Nat’l Mining Ass’n v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003) (ruling that Congress intended to impose the Section 106 process on state-agency generated undertakings made pursuant to delegated federal authority).

This would have the practical effect of securing the NHPA to its rightful place nested within the larger historic preservation order. Further, establishing statutory bright lines will greatly facilitate future overseas planning by all U.S. agencies while fully respecting the prudential sovereignty considerations of other nations.

Alternatively, if Congress desires to specifically protect a broad array of properties, including wild animals within another sovereign's territory, it should do so by refining the definition of "high seas" within the ESA and the MMPA or "waters under the jurisdiction of the United States" within the MMPA. Clearly, both the ESA and the MMPA *could* protect wild animals domestically. And the FWS already lists the dugong as an endangered species. But the MMPA's and the ESA's jurisdiction falls short of that provided by the NHPA.<sup>316</sup> As such, there is a clear disconnect between the domestic and extraterritorial application of the NHPA, the ESA, and the MMPA as currently applied. Any protection of a wild animal overseas should be aligned with the domestic statute offering similar protections. And this protection of wild animals most properly resides within the ESA or the MMPA, not the NHPA.<sup>317</sup>

To clarify the jurisdictional scope and reach of the NHPA, Congress could follow what it did with the ESA: amend the Act to prohibit the designation of a critical habitat on any lands owned or controlled by the DoD.<sup>318</sup> The DoD is still required to prevent the extinction and harm to endangered species, but there are no specific mandates under the ESA that affect DoD activities in foreign nations.<sup>319</sup> In regards to the NHPA, a similar provision could be inserted to ensure that the DoD is required to meet the WHC's obligations.

"Equivalent to" is another term not addressed within the NHPA or federal regulations—yet this term is also critical. If future interpretations follow the *Dugong* rulings, "equivalent to" could be read as a magnification of the scope of the NHPA and the WHC when applied abroad, thus protecting overseas properties that the NHPA has not protected domestically. In light of the foreign relations and national security concerns discussed above, Congress or the Interior Department should address the precise limits and applicability of the "equivalent to" phrase.

Section 106 requires federal agencies to take into account the effect of the undertaking on any property that is included in or is *eligible for* inclusion in the

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316. *Dugong, Species Profile*, U.S. FISH AND WILDLIFE SERVICE, <http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?spcode=A033> (listing the dugong as an endangered species) (last visited Mar 8, 2014).

317. Unfortunately, this is unlikely to occur. The ESA and the MMPA mark their fortieth anniversary next year, and their jurisdictional reach has not yet been expanded to apply within another nation's territory. The ESA currently protects the dugong within the "high seas" and the "territorial seas" of the United States, but the definitions of these key jurisdictional terms have not yet been expanded to another nation's territory.

318. 16 U.S.C. § 1533(3)(B)(i) (2012).

319. *Id.* § 1533(3)(B)(iii); Schoenbaum, *supra* note 142, at 465.

National Register.<sup>320</sup> Clarifying this language would have the additional benefit of ensuring that the overseas application of Section 402 does not exceedingly impact the NHPA's domestic application. There are far more places that have been considered eligible for the purposes of Section 106 review than there are places listed on the Register.<sup>321</sup> When reconciling Section 106 with Section 402, some commentators have asserted that a wild animal residing in the United States could be a contributing element to a habitat's cultural significance and would "likely be protected by virtue of the National Register eligibility of the habitat."<sup>322</sup> The extraterritorial application of the NHPA may influence its domestic application, but the NHPA's origins are as a domestic historic preservation statute. Congress should clarify exactly what properties are "eligible for" inclusion domestically, which should define the overarching scope of the NHPA, at home and abroad.

Lastly, the federal regulations implementing the NHPA provide for specified National Register criteria for evaluation that are difficult to translate overseas, including the following: "The quality of *significance* in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess *integrity* of location, design, setting, materials, workmanship, feeling, and association . . ."<sup>323</sup> This criterion is designed specifically to modify the five tangible resources (districts, sites, buildings, structures, and objects) that may not exist or have minimal correlation to another nation's National Register. These guidelines effectively set forth two prongs—significance and integrity—that serve as the baseline for evaluating the importance of the five potential properties. Unfortunately, we are only left with dictionary definitions of these two terms, as "significance" and "integrity" are not defined in any relevant statute or regulation. The problem is exacerbated when attempting to translate the U.S. criteria in a foreign nation. Moreover the process is inherently subjective: what has enormous integrity and significance in the United States may have very little in another nation. And the inquiry is culturally and contextually dependent. Congress should act to address this incongruity and provide clear direction.

*C. The NHPA Should Have a National Security Exemption Provision,  
Similar to Existing Language in U.S. Environmental Statutes*

While many environmental statutes have a national security exemption embedded within the statutory scheme, the NHPA does not.<sup>324</sup> Federal

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320. 16 U.S.C. § 470f. (2012).

321. King Decl. ¶ 17, *Dugong I*, No. C 03-4350 MHP, 2005 U.S. Dist. LEXIS 3123 (N.D. Cal. Mar. 2, 2005).

322. *Id.* ¶ 10.

323. 36 C.F.R. § 60.4 (2013).

324. For example, exemptions for activities in the "paramount interest of the United States," including national security, are provided in the Clean Air Act (42 U.S.C. § 7418(b)), the Clean Water Act (33 U.S.C. § 1323(a)), the Noise Control Act (42 U.S.C. § 4903), the Solid Waste

regulations implementing the NHPA allow the Secretary of the Interior to promulgate regulations “in the event of a major natural disaster or an imminent threat to the national security.”<sup>325</sup> Yet, these responsibilities are limited to waiving the Section 110 requirements and do not affect the Section 106 federal undertaking process.<sup>326</sup> NHPA regulations also allow for federal agency officials to develop procedures “for taking historic properties into account during operations which respond to a disaster or emergency . . . or which respond to other immediate threats to life or property.”<sup>327</sup> But these procedures are designed for domestic emergencies (e.g. natural disasters) without any clear applicability to the NHPA’s overseas application. The President, too, lacks the authority to declare an emergency in another sovereign nation.

In light of the uncertainty surrounding the NHPA’s future application overseas, Congress should follow the model of major environmental statutes, such as the Clean Water Act and Clean Air Act, and provide an express national security exemption provision.<sup>328</sup> The ESA authorizes a special committee to grant an exemption in the interest of national security.<sup>329</sup> And the Clean Water Act authorizes the President to “exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such requirement if he determines it to be in the paramount interest of the United States to do so.”<sup>330</sup> Yet, the Clean Water Act and Clean Air Act have been largely limited in their application domestically, with constrained foreign relations and national security concerns. The NHPA has the potential for a worldwide jurisdiction that applies to federal undertakings in sovereign nations. As the NHPA has already impacted foreign relations, a built-in national security exemption provision would be a prudent step to mitigate any potential national security impacts affecting federal undertakings overseas.

Critics may assert that there are already too many built-in exemptions to environmental and natural resource laws and Congress should not restrict

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Disposal Act (42 U.S.C. § 6961(a)), and the Safe Drinking Water Act (42 U.S.C. § 300(j)(6)). There is a specific national security exemption within the CERCLA (42 U.S.C. § 9620(j)).

325. 36 C.F.R. § 78.1.

326. *Id.* The full text reads:

Section 110 of the National Historic Preservation Act of 1966, as amended (“Act”), sets forth certain responsibilities of Federal agencies in carrying out the purposes of the National Historic Preservation Act of 1966. Sub section 110(j) authorizes the Secretary of the Interior to promulgate regulations under which the requirements in section 110 may be waived in whole or in part in the event of a major natural disaster or an imminent threat to the national security. Waiver of responsibilities under section 110 does not affect an agency’s section 106 responsibilities for taking into account the effects of emergency activities on properties included in or eligible for the National Register of Historic Places and for affording the Advisory Council on Historic Preservation an opportunity to comment on such activities.

327. 36 C.F.R. § 800.12(a).

328. 33 U.S.C. § 1323(a) (2012) (allowing for an exemption when it is in the “paramount interest” of the United States).

329. 16 U.S.C. § 1536(j).

330. 33 U.S.C. § 1323(a).

compliance with them.<sup>331</sup> Yet, the exemption process should be at the highest levels of government and be time limited. Existing exemptions within environmental statutes are not often granted.<sup>332</sup> It merely provides a clear process and executive branch flexibility. One scholar in analyzing national security exemptions, has found that the exemption under the RCRA has been granted only once and there has never been an exemption under the CERCLA.<sup>333</sup> Indeed, simply because an exemption is available, it will not necessarily be widely granted or sought. It does, however, provide for flexibility by communicating Congress's intent, allowing the executive branch to weigh in, and creating a procedure that may alleviate the need for judicial intervention. The NHPA should mirror its sister environmental statutes and have this built-in flexibility.

#### CONCLUSION

In 2010, Prime Minister Hotoyama resigned from his position as Prime Minister of Japan after serving less than a year. Not surprisingly, the question of "What to do with the Marines at Futenma?" plagued his administration from the onset. This issue has only exacerbated tensions between the United States and Japan that continue to this day, and there is no clear resolution in sight. In addition, as of this writing, a group of vocal Okinawans has urged secession from mainland Japan due, in part, to the intransigence over the Marine base at Futenma.<sup>334</sup>

The NHPA's jurisdictional reach and substantive application have transformed from its earlier beginnings based in the larger American historic preservation movement. With the *Dugong* rulings, the NHPA can no longer be safely classified as a historic preservation statute that protects physical properties within the United States. While it is unclear what this court's ruling will mean for future military operations and its impact on foreign affairs, the statute is now effectively adrift and no longer anchored to its roots in American historic preservation law. As the United States undertakes activities in Korea, Japan, Australia, and elsewhere, it must be keenly aware of the NHPA's extraterritorial application and potential practical application.

In effect, the court's interpretation of the NHPA has amplified the power of this statute well beyond its stated purpose and intent, creating uncertainty about its future application overseas. Congress should take steps to clarify the NHPA

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331. See Hope Babcock, *National Security and Environmental Laws: A Clear and Present Danger?*, 25 VA. ENVTL. L.J. 105 (2007).

332. See David Bearden, CONG. RESEARCH SERV. (CRS), RS22149, Exemptions From Environmental Law for the Department of Defense: Background and Issues For Congress (updated May 15, 2007).

333. See Stephen Dycus, *Osama's Submarine: National Security and Environmental Protection After 9/11*, 30 WM. & MARY ENVTL. L. & POL'Y REV. 1, 49 (2005).

334. See Martin Fackler, *Japan Leader Backs Move of U.S. Base on Okinawa*, N.Y. TIMES, Mar. 22, 2013, at A4.

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application and re-anchor the statute. Absent Congressional intervention, the NHPA must be viewed as not merely a historic preservation statute but one that also impacts foreign relations.