The Burger Court Opinion Writing Database

TVA v. Hill
437 U.S. 153 (1978)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

October 25, 1977

Re: No. 76-1701 - TVA v. Hill

Dear Lewis:

I do not fully agree with your memorandum and I would prefer to shift the emphasis. I question your note 4 on page 4. An Appropriations Act is an "Act of Congress" and I would rely entirely on the Appropriations Act of Congress enacted subsequent to the "Snail Darter Act" as amending the latter; I would "footnote" the fact that Congress showed full awareness of the conflict between the "Snail Darter Act" and the action it was taking.

I would skim over the Senate Committee Report or remarks on the Floor, such as that of Senator Tunney.

The "rabbit" capacity of the perch species to launch a new species "in even numbered years" shows how absurd it would be to ignore the positive Act of Congress in Appropriations Acts, subsequent to the "Snail Darter Act."

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

4/13/78

Dear Lewis

The printing presses broke down for 4 hours today hence you may not have seen the Third Draft when you wrote your latest "brief" note - one which confirms the doctrine that June should be abolished!

But please don't describe Quotes from the RECORD as plagiarizing!!!

Relax!

Warm

WEB

This, I submit plagiarize from the public domain. You can really be serious

WEB

ited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species and may include additional areas for reasonable population expansion." 50 CFR § 402.02, 43 Fed. Reg. 874.

76-1701
TVA v. Hill

Supreme Court of the United States
Washington, D. C. 20543

76-1701

CHAMBERS OF
THE CHIEF JUSTICE

T.V.A. v Hill
(CJ changed his vote!)

May 3, 1978

MEMORANDUM TO THE CONFERENCE

Enclosed is the Final Assignment Sheet.

I have decided to come down on the side of separation of powers and serve notice on Congress that it should take care of its own "chestnuts." Accordingly I will take the case myself, even though my bid to "join 8" to affirm failed to get 8.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 2, 1978

MEMORANDUM TO THE CONFERENCE:

Re: 76-1701 Tennessee Valley Authority v. Hill

I am enclosing a Wang draft in the above case, which has been completed under some handicaps this week. I anticipate some modification before it is in final format, but nothing that will bear on the essence of the holding.

Regards,

WEB

P.S. I am giving some thought to a footnote treatment of the business of having the Government of the United States "speak with one voice." I have refrained from saying that Congress was trying to "speak with a forked tongue" or other colorful figures of speech. But I do think it is an odd business when we are confronted increasingly with divided arguments within the same Government. However, this will have nothing to do with the merits, and I will be back to you later.

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: JUN 2 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1701

Tennessee Valley Authority, Petitioner, *v.* Hiram G. Hill, Jr., et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May —, 1978]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented in this case whether the Endangered Species Act of 1973 requires a federal court to enjoin the operation of a completed dam when, pursuant to authority vested in him by Act of Congress, the Secretary of the Interior has determined that operation of the project would eradicate an endangered species.

I

The Little Tennessee River originates in the mountains of northern Georgia and flows through the national forest lands of North Carolina into Tennessee, where it converges with the Big Tennessee River near Knoxville. The lower 33 miles of the Little Tennessee takes the river's clear, free-flowing waters through an area of great natural beauty. Among other environmental amenities, this stretch of river is said to contain abundant trout. Considerable historical importance attaches to the areas immediately adjacent to this portion of the Little Tennessee's banks. To the south of the river's edge lies Fort Loudon, established in 1756 as England's southwestern outpost in the French and Indian War. Nearby are also the ancient

Brenner 77

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 4, 1978

MEMORANDUM TO THE CONFERENCE:

Re: 76-1701 Tennessee Valley Authority v. Hill

I circulated the partially printed and partially Wang-drafted version of an opinion, as is usual this time of the year, so you could see the "direction" of my opinion in this "sticky case."

On the weekend I felt up to giving it a more or less final "honing" and that draft is at the Print Ship.

I venture to suggest you will spare yourself needless labor if you defer consideration until the first full print draft is ready--possibly late Monday.

Regards,

WEB

To: Mr. Justice Brennan
Mr. Justice Stewart

1st DRAFT

SUPREME COURT OF THE UNITED STATES.

No. 76–1701

Tennessee Valley Authority, Petitioner, *v.* Hiram G. Hill, Jr., et al. } On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 9, 1978

Re: 76-1701 TVA v. Hill

MEMORANDUM TO THE CONFERENCE:

Enclosed is a second print draft of the above opinion with an errata sheet to facilitate your reading.

We had some discussion about some observations from the Court on the intra-governmental conflict and the need to have the U.S. speak with one voice. If there is a general disposition to treat this, I'll put my hand to it. It should be unanimous or not at all.

Regards,

WEB

ERRATA FOR 2d PRINTED DRAFT OF TVA v. HILL, No. 76-1701

Page 2 Note 4, last line; "augument" to "augment."

Page 4 Line 2; capitalize "U" in University
Line 3; "Entier" to "Etnier."

Page 12 12 lines from bottom; insert "court" before "agreed."

Page 17 Line 1; "even" to "ever."

Page 19 Line 6, "clear" to "clean."

Page 21 Footnote 22 should start on page 22.

Page 23 Note 23, 2d line from bottom; insert "judicial" bet
"the" and "function."

Page 27 Line 1; delete "is."

Page 28 Note 28, line 4; "hence" to "here."

Page 29 Line 10; delete "Cite)".

Page 34 Line 6; "Unieted" to "United."
Line 12; "on" to "of."
Last line; "absured" to "absured."

Page 35 Line 2; "flaunt" to "flout."

CHANGES AS MARKED:

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

2nd DRAFT

Recirculated: JUN 9 1978

SUPREME COURT OF THE UNITED STATES

No. 76-1701

Tennessee Valley Authority, Petitioner, v. Hiram G. Hill, Jr., et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May —, 1978]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The questions presented in this case are (a) whether the Endangered Species Act of 1973 requires a court to enjoin the operation of a virtually completed federal dam—which had been authorized prior to 1973—when, pursuant to authority invested in him by Congress, the Secretary of the Interior has determined that operation of the dam would eradicate an endangered species; and (b) whether continued congressional appropriations for the dam after 1973 constituted an implied repeal of the Endangered Species Act, at least as to the particular dam.

I

The Little Tennessee River originates in the mountains of northern Georgia and flows through the national forest lands of North Carolina into Tennessee, where it converges with the Big Tennessee River near Knoxville. The lower 33 miles of the Little Tennessee takes the river's clear, free-flowing waters through an area of great natural beauty. Among other environmental amenities, this stretch of river is said to contain abundant trout. Considerable historical importance attaches to the areas immediately adjacent to this portion of the Little

CHANGES AS MARKED: 2, 3, 4, 6, 7, 8, 10
23, 24, 27, 34, 35

STYLISTIC CHANGES throughout

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

3rd DRAFT

Recirculated: JUN 13 1978

SUPREME COURT OF THE UNITED STATES

No. 76-1701

Tennessee Valley Authority, Petitioner, *v.* Hiram G. Hill, Jr., et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May —, 1978]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The questions presented in this case are (a) whether the Endangered Species Act of 1973 requires a court to enjoin the operation of a virtually completed federal dam—which had been authorized prior to 1973—when, pursuant to authority invested in him by Congress, the Secretary of the Interior has determined that operation of the dam would eradicate an endangered species; and (b) whether continued congressional appropriations for the dam after 1973 constituted an implied repeal of the Endangered Species Act, at least as to the particular dam.

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The Little Tennessee River originates in the mountains of northern Georgia and flows through the national forest lands of North Carolina into Tennessee, where it converges with the Big Tennessee River near Knoxville. The lower 33 miles of the Little Tennessee takes the river's clear, free-flowing waters through an area of great natural beauty. Among other environmental amenities, this stretch of river is said to contain abundant trout. Considerable historical importance attaches to the areas immediately adjacent to this portion of the Little

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 19, 1978

Re: Case Held for No. 76-1701 - TVA v. Hill

MEMORANDUM TO THE CONFERENCE

No. 77-919 - British American Commodity Options Corp. v. The Commodity Futures Trading Commission (I will vote to DENY)

Petitioner applied for registration with respondent as a "commodity trading advisor" pursuant to the Commodity Exchange Act, 7 U.S.C. § 1 et seq. (1976). Under the Act, the Commission may "deny" or "refuse" registration on various grounds set forth in §§ 6n(6), 6n(7) and 12a(2). In this case the Commission instituted administrative proceedings under §§ 6n(7) and 12a(2) of the Act to determine whether registration should be denied. It appears that the Commission was concerned that petitioner's president and sole stockholder had been the subject of two SEC consent decrees and had been barred from certain activities in the securities industry as a result of various alleged violations of the securities laws; the Commission also charged that petitioner had been cheating, defrauding and deceiving purchasers and prospective purchasers of commodity options. Section 12a(2)(C) provides that "pending final determination" of such matters, "registration shall not be granted." Accordingly, respondent refused to grant petitioner registration. Nonetheless, respondent continued its business, maintaining, inter alia, that it was not a "commodity trading advisor" within the meaning of the Act.

Acting pursuant to § 13a-1 of the Act, the Commission proceeded to district court, where it sought a preliminary injunction against petitioner's continued operation without registration. Judge Gagliardi found that petitioner was a commodity trading advisor, but refused to grant the requested injunction. While agreeing that the Commission had made out a

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 13, 1977

RE: No. 76-1701 Tennessee Valley Authority v. Hiram G. Hill, Jr. et al.

Dear Potter:

Please join me in the dissenting opinion you have prepared in the above.

Sincerely,

Bill

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 27, 1977

MEMORANDUM FOR THE CONFERENCE

RE: No. 76-1701, TENNESSEE VALLEY AUTHORITY v. HILL

I am still firmly of the view that we should deny this petition. In any event the wealth of writing surely proves that a summary disposition is most inappropriate. If any of us commands a court for that, I'll be writing something myself.

I simply cannot agree with Lewis that Section 7 of the Endangered Species Act, 16 U.S.C. § 1536 (Supp. V, 1975), was not meant to apply to projects "duly authorized and under construction" (Powell op. at 1) at the time an endangered species or a threat to its "critical habitat" is discovered. Section 7 states:

> "All * * * Federal departments and agencies shall * * * utilize their authorities in furtherance of the purposes of this chapter * * * by taking action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of * * * endangered species and threatened species or result in the destruction or modification of the habitat of such species which is determined * * * to be critical." (emphasis added).

The language of Section 7 is mandatory -- all Federal

agencies shall insure that their actions do not jeopardize endangered species. Moreover, if Congress had intended to make compliance mandatory only when a project was in the planning stage, the logical conclusion of Lewis' position, it could easily have limited the reach of the Section 7 to agency action relating to authorization and funding of a project. Indeed, this is precisely what Congress did do in the National Environmental Policy Act, 83 Stat. 853, 42 U.S.C. §§ 4332(2)(A), (C). Congress did not choose this course with respect to Section 7, however, but made the Section apply to actions "authorized, funded, or carried out" by a Federal agency.

Nor do I think that Section 7 is ambiguous as to whether it was intended to apply retroactively to require abandonment of projects authorized prior to the Act or prior to the time a species was put on the endangered list. Section 10(b)(1) of the Act,[1/] 16 U.S.C. § 1539(b)(1) (Supp. V, 1975), shows conclusively that

---

[1/] "(b)(1) If any person enters into a contract with respect to a species of fish or wildlife or plant before the date of the publication in the Federal Register of notice of consideration of that species as an endangered species and the subsequent listing of that species as an endangered species pursuant to section 1533 of this title will cause undue economic hardship to such person under the contract, the Secretary, in order to minimize such hardship, may exempt such person from the application of section 1538(a) * * *."

Congress understood the substantive provisions of the Act to apply retroactively because it carved out a limited "hardship" exemption from retroactive application of the Act to private contracts otherwise prohibited under Section 9 of the Act,[2/] 16 U.S.C. § 1538 (Supp. V, 1975). Section 9, like Section 7, makes no reference whatsoever to whether it is intended to apply retroactively. There is nothing in the Act, therefore, that would either require or justify a conclusion that Section 7 can be distinguished from Section 9 with respect to retroactivity.

Thus, the structure of the Act unquestionably shows that Congress well knew that the Endangered Species Act could affect ongoing activities whenever a new species was added to the endangered list. Congress was also aware that this could create hardship and provided for it by creating an express exemption where private parties were involved. No such exemption appears for federal agencies, however, and I see no warrant for creating one under the guise of equitable doctrine or statutory interpretation.

[2/] Section 9 prohibits the import and export of endangered species, their capture within the United States or on the high seas, and their delivery, receipt, sale or transportation in interstate commerce.

Indeed, the maxim expressio unius est exclusio alterius suggests that the implication of any such exemption would be an improper exercise of judicial power.

Finally, Lewis appears to find some comfort for his views on Section 7 in the Department of the Interior's proposed rules under the Endangered Species Act, since he quotes 42 Fed. Reg. 4869 to the effect that "The Act is not intended to 'bring about the waste that can occur if an advanced project is halted.'" (Op. at 4.) With all respect, the quote is taken out of context and, in context, supports a contrary view. The complete quotation is as follows:

> "Neither FWS [Federal Wildlife Service] nor NMFS [National Marine Fisheries Service] intends that section 7 [of the Act] bring about the waste that can occur if an advanced project is halted. The proposed regulations would clearly limit application of section 7 to cases where Federal involvement or control remains and in itself could jeopardize the continued existence of a listed species or modify or destroy its critical habitat. That the proposal would not exempt advanced projects where such Federal involvement or control remains simply reflects the belief of the FWS and the NMFS that their role under section 7 is limited to providing biological advice and assistance, not in determining if a project may continue. The affected agency must decide whether the degree of completion and extent of public funding of particular projects justify an action that may be otherwise inconsistent with section 7." 42 Fed. Reg. 4869 (1977).

It is doubtful that the quoted material has anything to do

with whether a project may continue. Rather it deals only with the subject of an agency's obligation to consult with FWS and NMFS, the agents of the Secretary of the Interior, under the first part of Section 7[3/] which is not relevant to this litigation. But assuming that the quoted language does have broader scope, it is clear that the Tellico project, being a wholly federal project, is one that is not exempted since "Federal involvement or control remains and in itself could jeopardize the continued existence" of the snail darter.[4/]

Interestingly, the regulations promulgated by the Secretary of the Interior in 42 Fed. Reg. 4868-4872 put Tellico squarely under Section 7 of the Act:

> "Section 7 applies to all activities or programs where Federal involvement or control remains which in itself could jeopardize the continued existence of a listed species or modify or destroy its critical habitat." 50 C.F.R. § 17.92 (1977).

[3/] "All other Federal departments * * *, in consultation with and with the assistance of the Secretary [of the Interior] * * *."

[4/] The last sentence of the quoted language can be read as indicating that agencies have some power to go forward with projects under construction despite the Act. The language need not be read this way, however. Instead it may reflect the wholly reasonable assumption that an agency would go back to Congress for authorization to proceed if such a decision were made. The latter is an assumption we should make here. Cf. infra at 6-7.

If Section 7 is indeed "ambiguous" (Powell op. at 4), our normal practice would be to defer to the administrative regulations concerning coverage, especially where, as here, these regulations are contemporaneous with the Act. Udall v. Tallman, 380 U.S. 1, 16 (1965); Unemployment Comm'n v. Aragon, 329 U.S. 143, 153-154 (1946).

As to the alternative ground suggested in Bill Rehnquist's per curiam opinion (Op. at 6 n.2), Lewis' concurring opinion (Op. at 4; but see op. at 4 n.4 (semble)), and the Chief Justice's memorandum of October 25 -- that the appropriations acts for the Tellico Dam project somehow modify the Endangered Species Act -- there is no precedent for such wanton repeal by implication. Nor can the impertinence of the proposed theory be hidden by using the subsequent appropriations acts as mere evidence of what "Congress obviously intended" or as a ground for exercising equitable discretion.

Our cases are very clear. It is a "cardinal rule * * * that repeals by implication are not favored." Morton v. Mancari, 417 U.S. 535, 549 (1974); Universal Interpretative Shuttle Corp. v. Washington Metropolitan Area Transit Commission, 393 U.S. 186, 193 (1968); Posadas v. National City Bank, 296 U.S. 497, 503 (1936); United

States v. Langston, 118 U.S. 389, 393 (1886); Wood v. United States, 16 Pet. 342, 363 (1842). The only justification for repeal is that a later Act of Congress is irreconcilable with an earlier one. Morton v. Mancari, supra, 417 U.S., at 550; Georgia v. Pennsylvania R. Co., 324 U.S. 439, 456-457 (1945); United States v. Langston, supra, 118 U.S., at 393. Even so, the "intention of the legislature to repeal 'must be clear and manifest.'" United States v. Borden Co., 308 U.S. 188, 198 (1939), quoting Red Rock v. Henry, 106 U.S. 596, 602 (1882). This court is "not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each as effective." Morton v. Mancari, supra, 417 U.S., at 551 (emphasis added); accord, e.g., General Motors Acceptance Corp. v. United States, 286 U.S. 49, 61-62 (1932); United States v. Tynen, 11 Wall. 88, 92 (1870).

The lengths to which this Court has gone to reconcile seemingly contradictory statutes is exemplified by United States v. Langston, supra. There Langston was serving as United States Minister Resident and Consul General to

Haiti under acts establishing his salary at $7500 per year. In the Diplomatic and Consular Appropriations Act of July 1, 1882, however, only $5,000 was appropriated for Langston's salary. The same Act mandated the Secretary of State to make estimates of the amount that should be paid to persons of Langston's rank. In the Secretary's report for 1883 and 1884, only $5,000 was estimated for Langston's salary and this amount was set in the appropriations acts for the fiscal years ending in 1884 and 1885. In addition, the Consular and Diplomatic Appropriation Bill (not a mere report, as here) of 1884 contained the following express language: "the foregoing appropriations * * * shall, after June 30, 1884, be the salary of each officer respectively, and all acts or parts of acts inconsistent or in conflict therewith, or which allow a larger salary to any officer * * * shall be, and hereby are, repealed." Langston was paid only $5,000 in each fiscal year after 1882 and sued for the additional $2,500 per year for the period June 30, 1882 to July 24, 1885. Notwithstanding all the language in the appropriations acts, the Court held that the original statute authorizing $7,500 per year still controlled. To reach this result, the Court had to indulge in the

speculative presumption that Congress simply neglected to appropriate the full amount of money to which Langston was entitled. See 118 U.S., at 393-394.

Under the well-settled law set out above, the public works appropriations for the Tellico Dam cannot be construed to be a repeal of the Endangered Species Act. It is important to look at precisely what was said in the TVA's position papers which were presented at the hearings before the appropriations committees:

> "We are doing our best to conserve the darter while completing the project. * * * In the spring of 1975 TVA biologists initiated a conservation program which includes transplantation of this fish to the Hiwassee and other rivers. They have been assisted in this program by nationally recognized consultants * * *. As part of our conservation effort, we have transplanted over 770 snail darters to the Hiwassee and Nolichucky Rivers to date. The fish appear to be doing very well in this new habitat."

> "We are doing our best to preserve the snail darter, and the results to date have been very encouraging. We cannot guarantee that the transplant will ultimately be a success. In any event, however, we believe the Tellico project must be completed on schedule. Project costs have risen by millions of dollars as a result of earlier delays." Hearings on Public Works for Water and Power Development and Energy Research Appropriation Bill, 1977 before a Subcomm. of the Comm. on Appropriations of the House of Representatives, 94th Cong., 2d Sess., pt. 5, at 261-262 (1976) (emphasis added).

Identical language can be found in the TVA's Senate testimony. See Hearings on Public Works for Water and Power Development and Energy Research Appropriations for Fiscal Year 1977 before a Subcomm. of the Senate Comm. on Appropriations, 94th Cong., 2d Sess., pt. 4, at 3099 (1976).

The most natural reading of this testimony, I submit, is that TVA was asking Congress to allow it to proceed simultaneously with both its attempts to save the snail darter and completion of the Tellico project in order that the substantial costs of construction delay could be avoided. The justification for this was obviously that the efforts to save the snail darter were "very encouraging" and therefore it was unlikely that the pending litigation would effect the completion of the dam whatever its outcome. In this context, the Senate Report's direction to complete the Tellico project "as promptly as possible in the public interest," S. Rep. No. 94-960, 94th Cong., 2d Sess. 96 (1976), does not need to be read as a command to the TVA to flout the Endangered Species Act. It can be read simply as an acquiescence in TVA's apparently reasonable interim solution to the snail darter problem. Given the case law set out above, it is

unquestionably our obligation to read the Senate Report in this way since this is the only way to carry out our primary duty to reconcile the Endangered Species Act and the subsequent appropriations.

Moreover, even if there were not a controlling rule of statutory construction in the field, it is not reasonable to read the Senate Report as stating the views of the Congress as a whole. One need only ask what recourse a congressman had if, notwithstanding language in the Report with which he disagreed, he did agree that the attempts to save the snail darter should proceed in parallel with the completion of the Tellico project. Certainly he would not vote against the appropriations act, which after all has no express language in it which tells TVA to flout the Endangered Species Act -- and, indeed, no language at all bearing on the instant case. Nor is it reasonable to suppose that the President would have vetoed the appropriations act simply because of language in a report that nowhere appeared in the language of the bill.

Finally, were we to hold the Senate Report sufficient to defeat the Endangered Species Act, we would subject every statute passed by Congress to endless uncertainty. Any appropriations committee could nullify any statute it

unquestionably our obligation to read the Senate Report in this way since this is the only way to carry out our primary duty to reconcile the Endangered Species Act and the subsequent appropriations.

Moreover, even if there were not a controlling rule of statutory construction in the field, it is not reasonable to read the Senate Report as stating the views of the Congress as a whole. One need only ask what recourse a congressman had if, notwithstanding language in the Report with which he disagreed, he did agree that the attempts to save the snail darter should proceed in parallel with the completion of the Tellico project. Certainly he would not vote against the appropriations act, which after all has no express language in it which tells TVA to flout the Endangered Species Act -- and, indeed, no language at all bearing on the instant case. Nor is it reasonable to suppose that the President would have vetoed the appropriations act simply because of language in a report that nowhere appeared in the language of the bill.

Finally, were we to hold the Senate Report sufficient to defeat the Endangered Species Act, we would subject every statute passed by Congress to endless uncertainty. Any appropriations committee could nullify any statute it

chose at any time simply by inserting language into the voluminous reports and hearings that accompany any appropriations bill. Yet unless the language relied on as a repealer is in the text of the repealing act, how do we know it even came to the attention of anyone outside a very narrow committee? Indeed the novel theory of statutory construction proposed in the opinions of Bill and Lewis appears all the more novel when it is realized that substantive legislation via the appropriations process is out of order under the Rules of the House.[5/] Thus, were an appropriations committee in the House to attempt to put into the text of an appropriations act a directive like that inserted in the committee report here, all would immediately realize that the directive was out of order and in all likelihood the directive would be stricken from the bill.

W.J.B., Jr.

[5/] House Rule XXI provides "no appropriation shall be reported in any general appropriation bill, * * * Nor shall any provision in any such bill or amendment thereto changing existing law be in order." Pet. App. 17A. See Environmental Defense Fund v. Froehlke, 473 F.2d 346, 354 (CA8 1972).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 5, 1978

RE: No. 76-1701 Tennessee Valley Authority v. Hill

Dear Chief:

I think this is an excellent opinion and I am happy to join it.

Sincerely,

Bill

The Chief Justice

cc: The Conference

Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: Mr. Justice Stewart

Circulated: OCT 12 1977

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

TENNESSEE VALLEY AUTHORITY *v.* HIRAM G. HILL, JR., ET AL.

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

No. 76-1701. Decided October —, 1977

MR. JUSTICE STEWART, dissenting.

The Endangered Species Act of 1973, 16 U. S. C. § 1536, provides:

> "All . . . Federal departments and agencies *shall* . . . [take] . . . action necessary to *insure* that actions authorized, funded or carried out by them *do not* . . . *result in the destruction or modification* of [the critical] habitat of [endangered] species . . . ." (Emphasis supplied.)

Both the District Court and the Court of Appeals held that this mandatory language means exactly what it says. The Court today accepts this construction of the statute, proceeding on the premise that the Act "is a substantive prohibition against designated federal actions which may threaten the critical habitat of an endangered species." *Ante*, at —.

It is undisputed that the completion of TVA's Tellico Dam Project will destroy or substantially modify the habitat of the snail darter, an endangered species. It follows that the federal law removes from the TVA any discretion to decide to complete the Project.* The TVA, in short, is without power to balance the value of preserving its investment against the value of preserving the snail darter. That balance has already been struck by Congress. Yet the Court holds that a district court, invested by Congress with the explicit duty to enforce the Act's requirements, may strike

*The Court also correctly holds that Congress' continuing appropriations for the TVA Project have not implicitly repealed the Act *pro tanto* or created an exemption for the Project.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

76-1701

May 4, 1978

Memorandum to the Conference

The attached clipping from yesterday's Washington Star may be of interest, if you have not already seen it.

P.S.

P.S.

Brennan 77

Panel OKs Bill Allowing Harm To 'Endangered Species'

United Press International

A Senate subcommittee has unanimously approved a bill that would allow for construction of major federal projects even though they harm "endangered species" such as the celebrated fish known as the "snail darter."

The darter, a tiny member of the perch family, is at the center of an environmental controversy in which a federal court has enjoined the Tennessee Valley Authority from continuing construction of its Tellico Dam because the dam would destroy the fish's habitat and wipe out the species.

Under the Endangered Species Act, certain "critical habitat" are designated for species, and federal agencies are forbidden from taking action that would harm the area.

The snail darter case is before the Supreme Court, and the legislation approved yesterday by the resource protection subcommittee is designed to meet that conflict and several others.

The full Environment Committee plans to vote on the bill Friday. The House has no such legislation under consideration.

attach

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 5, 1978

Re: No. 76-1701, TVA v. Hill

Dear Chief,

I am glad to join your opinion for the Court -- upon the assumption that the first twelve footnotes when they are forthcoming will present no difficulties.

Sincerely yours,

P.S.
1.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 5, 1978

Re: No. 76-1701, TVA v. Hill

Dear Chief,

Please forgive the wool-gathering error in my earlier note. I have, of course, already seen the first twelve footnotes and they present no difficulties whatsoever.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 9, 1978

No. 76-1701, TVA v. Hill

Dear Chief,

I would just as soon not embark in this case on observations from the Court on the need to have the United States speak with one voice.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

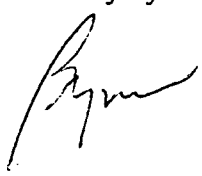
April 21, 1978

Re: 76-1701 - Tennessee Valley Authority
v. Hill

Dear Chief,

My vote is to affirm in this case.

Sincerely yours,



The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 10, 1978

Re: 76-1701 - TVA v. Hill

Dear Chief,

I would not attempt to address in this case the situation where different government agencies present conflicting views in this Court. In light of the current statutory pattern, it is a difficult subject.

Sincerely yours,

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

October 13, 1977

No. 76-1701, Tennessee Valley Authority v. Hiram G. Hill, Jr.

Dear Potter:

Please join me in your dissent.

Sincerely,

T.M.

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 5, 1978

Re: No. 76-1701 - TVA v. Hill

Dear Chief:

Please join me.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

October 26, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 76-1701 - TVA v. Hill

I am no more prepared now to act summarily on this case than I was at the time of our Conference during the week of September 26. As a consequence, my preferred vote would be to grant "plaino," as John Harlan used to say, but at the same time stay the Court of Appeals' injunction pending argument and disposition here.

The several opinions in circulation, however, clearly indicate that no one else is of this mind. With the Court split evenly, a vote on my part merely to grant would create nothing but confusion. Unless some other solution is forthcoming, I shall therefore join Lewis in his concurrence, for it seems to me that much is to be said for the proposition that the interim appropriations were significant and indicative of congressional intent.

HAB.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 9, 1978

Re: No. 76-1701 - TVA v. Hill

Dear Lewis:

If you will permit me to do so, I would like to have you add my name to your opinion in dissent.

Sincerely,

HAB

Mr. Justice Powell

cc: The Conference

October 13, 1977

No. 76-1701 TVA v. Hill

Dear Chief, Byron, Harry and Bill:

I address this letter to the four of you whom I joined - according to my notes - in favor of a Per Curiam reversal of the above case.

As my view of the case is somewhat different from Bill Rehnquist's, I have prepared a draft PC opinion. I have discussed this with Bill, and he suggests that I send it to each of you.

Bill is making some changes in his draft, responding in part to Potter's dissent. But he thinks (subject to more careful consideration) that he could join my draft if you should prefer the theory that I suggest.

Sincerely,

The Chief Justice
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Rehnquist

lfp/ss

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

TENNESSEE VALLEY AUTHORITY *v.* HIRAM G. HILL, JR., ET AL.

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

No. 76–1701. Decided October —, 1977

MR. JUSTICE POWELL, concurring.

Although I concur in the result of the *Per Curiam* opinion, I reach this result by a different line of analysis. In my view, the statute in question does not apply to projects that are substantially completed.

I

In March 1976, the Tennessee Valley Authority informed the House and Senate Appropriations Committees of the Tellico Project's threat to the snail darter [1] and the lawsuit seeking to enjoin completion of the Project. TVA advised both committees that it was engaged in efforts to preserve the snail darters by relocating them in similar rivers elsewhere in Tennessee. It stated, also, that the success of those efforts could not be guaranteed. Hearings on Public Works for Water and Power Development and Energy Research Appropriation Bill, 1977 before a Subcommittee of the House Committee on Appropriations, 94th Cong., 2d Sess., Pt. 5, 260–262; Hearings on Public Works for Water and Power Development and Energy Research Appropriations for Fiscal Year 1977 before a Subcommittee of the Senate Appropriations Committee, 94th Cong., 2d Sess., Pt. 4, 3096–3099. An opponent of the Project

[1] Darters, of which the snail darter is one species, are members of the perch family. There are about 130 known species of darters, 85 to 90 of which are found in Tennessee. Eleven species of darters may be found in the Little Tennessee River. New species are discovered in Tennessee at the rate of about one a year. Eight to 10 new ones have been discovered in the last five years, 12 in the last 10 years. Petition for Certiorari, at 3 n. 1.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 5 JUN 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1701

Tennessee Valley Authority, Petitioner, *v.* Hiram G. Hill, Jr., et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May —, 1978]

MR. JUSTICE POWELL, dissenting.

In my view § 7 of the Endangered Species Act, 16 U. S. C. (Supp. V) § 1536 (the Act), cannot reasonably be interpreted as applying to a project that is substantially completed when its threat to an endangered species is discovered. The Court today adopts a contrary interpretation, reflecting seriously on the good judgment of Congress. The Tellico Dam and Reservoir Project (Tellico Project), serving important public purposes, was duly authorized by Congress in 1966, and has received annual appropriations totaling $110 million. Tr. of Oral Arg. 19. This project, substantially completed,[1] is now to be terminated by court injunction because the planned impoundment of water may endanger a recently discovered species of small perch that are largely indistinguishable from a number of other species of the perch family.

If it were clear from the language of the Act and its legislative history that Congress intended to authorize this bizarre result, this Court would be compelled to enforce it. It is not our province to rectify policy or political judgments by the Legislative Branch, however egregiously they may disserve

[1] Attorney General Bell advised us at oral argument that the dam had been completed, that all that remains is to "close the gate," and to complete the construction of "some roads and bridges." The "dam itself is finished. All the landscaping has been done. . . . It is completed." Tr. of Oral Arg., at 18.

5,8,10,12,13,15

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

2nd DRAFT

Circulated: _____

Recirculated: 8 JUN

SUPREME COURT OF THE UNITED STATES

No. 76-1701

Tennessee Valley Authority, Petitioner, *v.* Hiram G. Hill, Jr., et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May —, 1978]

MR. JUSTICE POWELL, dissenting.

The Court today holds that § 7 of the Endangered Species Act requires a federal court, for the purpose of protecting an endangered species or its habitat, to enjoin permanently the operation of any federal project, whether completed or substantially completed. This decision casts a long shadow over the operation of even the most important projects, serving vital needs of society and national defense, whenever it is determined that continued operation would threaten extinction of an endangered species or its habitat. This result is said to be required by the "plain intent of Congress" as well as by the language of the statute.

In my view § 7 cannot reasonably be interpreted as applying to a project that is completed or substantially completed [1] when its threat to an endangered species is discovered. Nor can I believe that Congress could have intended this Act to produce the "absurd result"—in the words of the District Court—of this case. If it were clear from the language of the Act and its legislative history that Congress intended to authorize this result, this Court would be compelled to enforce

[1] Attorney General Bell advised us at oral argument that the dam had been completed, that all that remains is to "close the gate," and to complete the construction of "some roads and bridges." The "dam itself is finished. All the landscaping has been done. . . . It is completed." Tr. of Oral Arg. 18.

June 12, 1978

No. 76-1701 TVA v. Hill

Dear Chief:

I am glad to note from the second draft of your opinion (circulated June 9) that at least you agree with a small portion of my dissent.

Your footnote 7, p. 4, is lifted verbatim from my foonote 3, p. 3, except you have deleted two sentences. While my pride of authorship is gratified by having this included in the Court opinion, I wonder if it would not be appropriate to give me a credit.

You also borrowed my note 13 (p. 9), incorporating it as the second paragraph of your note 8 (p. 4). But in this instance the prose is from a secondary authority, and is not my own.

Sincerely,

The Chief Justice

lfp/ss

1, 18

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

3rd DRAFT

Recirculated: 12 JUN 1978

SUPREME COURT OF THE UNITED STATES

No. 76-1701

Tennessee Valley Authority, Petitioner, *v.* Hiram G. Hill, Jr., et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May —, 1978]

MR. JUSTICE POWELL, with whom MR. JUSTICE BLACKMUN joins, dissenting.

The Court today holds that § 7 of the Endangered Species Act requires a federal court, for the purpose of protecting an endangered species or its habitat, to enjoin permanently the operation of any federal project, whether completed or substantially completed. This decision casts a long shadow over the operation of even the most important projects, serving vital needs of society and national defense, whenever it is determined that continued operation would threaten extinction of an endangered species or its habitat. This result is said to be required by the "plain intent of Congress" as well as by the language of the statute.

In my view § 7 cannot reasonably be interpreted as applying to a project that is completed or substantially completed [1] when its threat to an endangered species is discovered. Nor can I believe that Congress could have intended this Act to produce the "absurd result"—in the words of the District Court—of this case. If it were clear from the language of the Act and its legislative history that Congress intended to authorize this result, this Court would be compelled to enforce

[1] Attorney General Bell advised us at oral argument that the dam had been completed, that all that remains is to "close the gate," and to complete the construction of "some roads and bridges." The "dam itself is finished. All the landscaping has been done. . . . It is completed." Tr. of Oral Arg. 18.

June 13, 1978

76-1701 TVA v. Hill

Dear Chief:

This refers to my letter to you of yesterday about the duplication of footnotes.

If this case is to come down on Thursday, we will have to put the printer to the trouble of at least changing yours or mine. Normally, there would be no question about my deferring to the Chief Justice. But I must say that this is the first time in my experience here when another Chambers lifted verbatim language that I had written in an opinion previously circulated. As your opinion for the Court will precede my dissent in the U.S. Reports, a reader will think - contrary to the fact - that I plagiarized yours.

I assume that one of your clerks, unfamiliar with the practice, took this liberty.

As this is not a matter of substantive consequence, I am going ahead and revising my notes as indicated herewith. But I do raise this private flag of gentle protest.

Sincerely,

The Chief Justice

lfp/ss

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnqui

Circulated: OCT 5 19

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

TENNESSEE VALLEY AUTHORITY *v.* HIRAM G. HILL, JR., ET AL.

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

No. 76-1701. Decided October —, 1977

PER CURIAM.

The District Court for the Eastern District of Tennessee denied on equitable grounds respondents' prayer that it enjoin petitioner Tennessee Valley Authority from completing the Tellico Dam and Reservoir Project. The District Court found that the contemplated completion of the Project would jeopardize the continued existence of the snail darter, a small three-inch fish which has been declared endangered under the Endangered Species Act of 1973, 16 U. S. C. § 1531 *et seq.*, but held that consideration of traditional equitable principles militated against issuing an injunction. On respondents' appeal, the Court of Appeals for the Sixth Circuit ordered that an injunction issue, holding that once it is shown that the TVA's contemplated action violated the Act such relief should issue automatically. We think that the District Court possessed equitable discretion to deny an injunction and that its discretion was exercised within permissible bounds in this case.

The Tellico Project was initially approved by Congress in October of 1966 as a multipurpose, water resource and regional economic development project. The Project was planned to stimulate shoreline and industrial development, create new job opportunities, and generally improve economic conditions in "an area characterized by underutilization of human resources and outmigration of young people." Hearings before a Subcommittee of the House Committee on Appropriations, 94th Cong., 2d Sess., at 261.

In August of 1973, when the Tellico Project was already half completed, a new species of fish known as the snail darter was

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: OCT 13 1977

76-456

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

TENNESSEE VALLEY AUTHORITY *v.* HIRAM G. HILL, JR., ET AL.

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

No. 76-1701. Decided October —, 1977

PER CURIAM.

The District Court for the Eastern District of Tennessee denied on equitable grounds respondents' prayer that it enjoin petitioner Tennessee Valley Authority from completing the Tellico Dam and Reservoir Project. The District Court found that the contemplated completion of the Project would jeopardize the continued existence of the snail darter, a small three-inch fish which has been declared endangered under the Endangered Species Act of 1973, 16 U. S. C. § 1531 *et seq.*, but held that consideration of traditional equitable principles militated against issuing an injunction. On respondents' appeal, the Court of Appeals for the Sixth Circuit ordered that an injunction issue, holding that once it is shown that the TVA's contemplated action violated the Act such relief should issue automatically. We think that the District Court possessed equitable discretion to deny an injunction and that its discretion was exercised within permissible bounds in this case.

The Tellico Project was initially approved by Congress in October of 1966 as a multipurpose, water resource and regional economic development project. The Project was planned to stimulate shoreline and industrial development, create new job opportunities, and generally improve economic conditions in "an area characterized by underutilization of human resources and outmigration of young people." Hearings before a Subcommittee of the House Committee on Appropriations, 94th Cong., 2d Sess., at 261.

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Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

No. 76-1701 TVA v. Hill

From: Mr. Justice Rehnquist

Circulated: JUN 8 1978

Recirculated: _____

MR. JUSTICE REHNQUIST, dissenting.

In the light of my Brother Powell's dissenting opinion, I am far less convinced than is the Court that the Endangered Species Act of 1973 was intended to prohibit the completion of the Tellico Dam. But the very difficulty and doubtfulness of the correct answer to this legal question convinces me that the Act did not prohibit the District Court from refusing, in the exercise of its traditional equitable powers, to enjoin petitioner from completing the Dam. Section 11(g)(1) of the Act, 16 U.S.C. § 1540(g)(1), merely provides that "any person may commence a civil suit on his own behalf to enjoin any person, including the United States and any other governmental

Q.3

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: JUN 12 1978

Recirculated: _____

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-1701

Tennessee Valley Authority, Petitioner, *v.* Hiram G. Hill, Jr., et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June —, 1978]

MR. JUSTICE REHNQUIST, dissenting.

In the light of my Brother POWELL's dissenting opinion, I am far less convinced than is the Court that the Endangered Species Act of 1973, 16 U. S. C. § 1531 *et seq.*, was intended to prohibit the completion of the Tellico Dam. But the very difficulty and doubtfulness of the correct answer to this legal question convinces me that the Act did *not* prohibit the District Court from refusing, in the exercise of its traditional equitable powers, to enjoin petitioner from completing the Dam. Section 11 (g)(1) of the Act, 16 U. S. C. § 1540 (g)(1), merely provides that "any person may commence a civil suit on his own behalf to enjoin any person, including the United States and any other governmental instrumentality or agency, who is alleged to be in violation of any provision of this chapter." It also grants the district courts "jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision."

This Court had occasion in *Hecht Co.* v. *Bowles,* 321 U. S. 321 (1944), to construe language in an Act of Congress that lent far greater support to a conclusion that Congress intended an injunction to issue as a matter of right than does the language just quoted. There the Emergency Price Control Act of 1942 provided that:

> ". . . Upon a showing by the Administrator that [a] person has engaged or is about to engage in any [acts or

Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: OCT 20 1977

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

TENNESSEE VALLEY AUTHORITY *v.* HIRAM G. HILL, JR., ET AL.

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

No. 76-1701. Decided October —, 1977

MR. JUSTICE STEVENS, dissenting.

While I join MR. JUSTICE STEWART's dissenting opinion, I add a word to emphasize the extraordinary character of the Court's summary action in this case.

The petition for certiorari filed by the Acting Solicitor General[1] argued that the case presented two questions of sufficient importance to merit our consideration.[2] The Court deems neither question worthy of its attention. Instead, it boldly courts the risk of error by acting summarily on an entirely different ground.[3]

That ground involves a policy determination that, in my view, a court should not make. Perhaps it is somewhat odd for Congress to place such a high value on the preservation of the snail darter. But it is even more odd for this Court to place a higher value on the investment in the Tellico Dam and Reservoir Project than on the proper allocation of decisional

[1] The Solicitor General, having joined in the judgment which the Court summarily reverses today, is disqualified.

[2] The only questions presented by the petition are these:

"1. Whether, when a species is listed under the Endangered Species Act of 1973, a federal water project that is substantially finished may be completed and used despite its adverse effects on the species if Congress, with full knowledge of such effects, continues to approve the project by appropriating funds necessary for its completion.

"2. Whether the Endangered Species Act applies to a project substantially completed at the time of its enactment."

[3] The Government did not have the temerity to ask for a summary reversal of the Court of Appeals' judgment, or indeed, to make a separate argument for reversal on the ground adopted by the Court.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 5, 1978

Re: 76-1701 - Tennessee Valley Authority v. Hill

Dear Chief:

Please join me.

Respectfully,

John

The Chief Justice

Copies to the Conference