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.
A snail darter, an endangered three-inch fish that has halted construction of a TVA dam.

**Mishap Kills 98 Snail Darters**

**Insecticide Suspected in Mysterious Deaths**

*By James Branscome*

KNOXVILLE, Tenn., Oct. 26 — An estimated one-third of all known snail darters, an endangered three-inch fish that has halted construction of a $116 million Tennessee Valley Authority dam, were killed Tuesday in a freak accident that experts suspect may have involved contamination of a fish net with an insecticide.

Ninety-eight of the estimated total population of 200 darters died a mysterious death Tuesday night as the TVA, bowing to a Fish and Wildlife Service order, was transferring some of the controversial fish back to their breeding ground in shallow water above the Tellico Dam.

The Fish and Wildlife Service had insisted the darters would become extinct unless the TVA moved them upriver to their breeding grounds. This had to be done manually because the fish can't fight the current created by the still unclosed dam gates on the Middle Tennessee River. The dam has been halted, pending Supreme Court review of the case, by a Sixth U.S. Circuit Court of Appeals order that accused the TVA of violating the Endangered Species Act.

Although TVA personnel made no claim that they love the snail darter, and their public information office sports a sign reading "Snail Darters Cause Cancer," no environmentalists or others have claimed foul play was involved in the kill.

The suspected cause of death is Rotenone — a natural insecticide favored even by organic gardeners — which apparently had contaminated a net or a boat supplied by the Fish and Wildlife Service to the TVA for the transfer.

Fish and Wildlife Service expert Hal Eales, who supervised the transfer, was still attempting today to learn if the boat and net had been contaminated while it was on loan to agency personnel in Panama City, Fla.

Dr. Thomas Ripley, director of TVA's Division of Forestry, Fisheries and Wildlife, said the fish began dying after the net was used to transfer them from styrofoam tank to another.

Jack Chance, chief of special projects under Ripley, said, "We've transplanted them several times before, but we've never lost any unless somebody stepped on one or something."

Ripley said he would venture no firm guess on the cause of the accident until the fish are examined by a federal laboratory in Columbia, Mo. Ripley agreed with other TVA experts, however, that Rotenone — "a suffocant that blocks the ability of gill-equipped organisms to breathe" — was suspected of causing the kill.

The Fish and Wildlife Service has disputed TVA claims that the endangered fish, a snail-eating member of the perch family, can survive in waters other than that of the still-unflooded Middle Tennessee River.

Asked why precautions were not taken to examine the net and boat for contaminants, Ripley said, "The chances of something like this are so damn remote, no one would think of it."
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, 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.

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 73/ 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

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, 296 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 Holichucky 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).

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
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.  

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).
MEMORANDUM FOR MR. JUSTICE POWELL

FROM: Bob Comfort
RE: Mr. Justice Brennan's Memo in TVA v. Hill, No. 76-1701

As you know, I'm inclined to agree with the position expressed in this memo. I will not belabor that point.

As to Justice Brennan's comments on the Interior Department regs (p. 4 of his memo), I think he misreads those regs. The point of the passage quoted at p. 4 is that the agency involved -- here the TVA -- must make the final decision whether "the degree of completion and extent of public funding of particular projects justify an action that may otherwise be inconsistent with section 7." The plain import of that phrase is that substantial completion justifies deviation from the literal bonds of section 7. I do not understand Justice Brennan's statement (pp. 4-5) that it "is doubtful that the quoted material has anything to do with whether a project may continue." His suggestion that it deals only with the duty to consult is belied by the last sentence of that passage, quoted above. Senator Tunney's comment, also cited in your concurrence, is to the same effect. (Justice Brennan waffles on this point in footnote 4, p. 5 of his memo.)

It also seems unfair to lump you into the implied repeal category. Your concurrence seems quite clear in denying the validity of such an approach. Still, the addition of a sentence or two could make it even plainer, I suppose.
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,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, 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..." 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 73/ 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).

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 affect 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
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. 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).
Darters, of which the常见
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.
Eight to ten new ones have
been discovered in the last
give years, twelve in the
last ten years. Eleven
species of darters are found
in the Little Tennessee River.
New species are discovered
in Tennessee at a rate
of about four a year. Besides
for Arkansas as of 19.1.
TVA

VS.

HILL

<table>
<thead>
<tr>
<th>HOLD FOR</th>
<th>CERT.</th>
<th>JURISDICTIONAL STATEMENT</th>
<th>MERITS</th>
<th>MOTION</th>
<th>ABSENT</th>
<th>NOT VOTING</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>G</td>
<td>D</td>
<td>N</td>
<td>POST</td>
<td>DIS</td>
<td>AFF</td>
</tr>
<tr>
<td>Burger, Ch. J</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Brennan, J</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Stewart, J</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>White, J</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Marshall, J</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Blackmun, J</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Powell, J</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rehnquist, J</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Stevens, J</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
TENNESSEE VALLEY AUTHORITY

vs.

HILL

Record requested and received. Also motion of Eastern Bank of Cherokee Indians for leave to file a brief, as amicus curiae.

<table>
<thead>
<tr>
<th>JURISDICTIONAL STATEMENT</th>
<th>MOTION</th>
<th>ABSENT</th>
<th>NOT VOTING</th>
</tr>
</thead>
<tbody>
<tr>
<td>HOLD FOR CERT.</td>
<td>G</td>
<td>D</td>
<td>N</td>
</tr>
<tr>
<td>Burger, Ch. J.</td>
<td>🟢</td>
<td>🟢</td>
<td>🟢</td>
</tr>
<tr>
<td>Brennan, J.</td>
<td>🟢</td>
<td>🟢</td>
<td>🟢</td>
</tr>
<tr>
<td>Stewart, J.</td>
<td>🟢</td>
<td>🟢</td>
<td>🟢</td>
</tr>
<tr>
<td>White, J.</td>
<td>🟢</td>
<td>🟢</td>
<td>🟢</td>
</tr>
<tr>
<td>Marshall, J.</td>
<td>🟢</td>
<td>🟢</td>
<td>🟢</td>
</tr>
<tr>
<td>Blackmun, J.</td>
<td>🟢</td>
<td>🟢</td>
<td>🟢</td>
</tr>
<tr>
<td>Powell, J.</td>
<td>🟢</td>
<td>🟢</td>
<td>🟢</td>
</tr>
<tr>
<td>Rehnquist, J.</td>
<td>🟢</td>
<td>🟢</td>
<td>🟢</td>
</tr>
<tr>
<td>Stevens, J.</td>
<td>🟢</td>
<td>🟢</td>
<td>🟢</td>
</tr>
</tbody>
</table>