Citizens Cannot Stand for it Anymore: How the United States’ Environmental Actions in Afghanistan and Iraq Go Unchecked by Individuals and Non-Governmental Organizations

Wynne P. Kelly∗
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Abstract

As the U.S. government’s reach and responsibilities expand, it remains unclear exactly what, if any, input the general populations of Afghanistan, Iraq, or the United States have on government actions. The environmental needs of the two States have concerned the world enough that the United Nations Environment Program ("UNEP") has published a detailed post-conflict report on Afghanistan ("Afghanistan PCA") and a “Desk Study” of the environment in Iraq ("Iraq Desk Study"). There are four basic ways that citizens can attempt either to enjoin U.S. government environmental action abroad or compel the government to adhere to established regulations and agreements: (1) private citizen or NGO suit under U.S. federal law; (2) private citizen or NGO suit under international law or one seeking to compel compliance with a treaty or agreement that the United States is party to; (3) suit by a non-U.S. national against the United States under a recognized treaty or against a U.S. corporation under ATCA; or (4) a qui tam action alleging fraudulent or illegal action by a party that costs the United States financially.
COMMENT

CITIZENS CANNOT STAND FOR IT ANYMORE: HOW THE UNITED STATES' ENVIRONMENTAL ACTIONS IN AFGHANISTAN AND IRAQ GO UNCHECKED BY INDIVIDUALS AND NON-GOVERNMENTAL ORGANIZATIONS

Wynne P. Kelly*

“This land is your land & this land is my land—sure—but the world is run by those that never listen to music anyway.”1

INTRODUCTION

Recent developments in U.S. foreign policy2 have resurrected issues not seen since the occupations of Germany and Japan immediately after World War II.3 The role of occupier4 is

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one that, while not novel in U.S. history, remains uncomfortable. As the U.S. government's reach and responsibilities expand, it remains unclear exactly what, if any, input the general populations of Afghanistan, Iraq, or the United States have on government actions. One integral issue that has not dominated the discourse thus far is the protection of the environments of Afghanistan and Iraq.

Part I of this Comment will discuss the history of international environmental legislation and treaty-making. Part I will also examine the particular environmental concerns present in Afghanistan and Iraq. Part II will recount the United States' response to international environmental actions, both in the diplomatic and domestic arenas, and the procedural bars to individuals and Non-Governmental Organizations ("NGOs") bringing actions to protect the environments of Afghanistan and Iraq. Part


6. See Scheffer, supra note 4, at 846 (stating increased responsibilities of United Kingdom and United States as occupying forces and further stating that other contributing Nations may be exempt from liability while United Kingdom and United States retain total responsibility); see also S.C. Res. 1483, supra note 4 (clarifying status of Iraq and previous U.N. Security Council Resolutions and declaring forces of United Kingdom and United States as occupying ones); Geneva II, supra note 4; Geneva IV, supra note 4.


8. See BLACK'S LAW DICTIONARY 555 (7th ed. 1999) (defining "environmental effect" as "natural or artificial disturbance of the physical, chemical, or biological components that make up the environment").
II will specifically examine the judicial and executive responses in the United States to international environmental concerns affecting the United States and its government agencies abroad. Part III will discuss possible avenues for both private citizens and NGOs to attempt to watch over corporate and governmental actions affecting the environments in both Afghanistan and Iraq.

I. HISTORICAL PERSPECTIVES ON THE ENVIRONMENTAL PLIGHTS OF AFGHANISTAN AND IRAQ, AND CITIZENS' INABILITY TO GAIN ACCESS TO U.S. COURTS FOR ENVIRONMENTAL HARM ABROAD

A. A Brief History of U.S. Involvement in International Environmental Regulation

Until relatively recently, the responsibility of environmental regulation and protection rested with individual States. As more factors and indicators demonstrated the transnational impact of environmental issues, however, their importance in international diplomacy and negotiation greatly increased.


The number of regulations and treaties dealing primarily with the environment expanded exponentially. Countries have also become more cognizant of the impact of war and military conflict on the environments of Nations embroiled in battle and sought to address the issue of how to limit the environmental destructiveness of battle.


12. See PERCIVAL ET AL., supra note 10, at 1033 (noting rise in awareness of international environmental issues and agreements); see also Sharma, supra note 9, at 1222-24 (noting increase in international environmental agreements).

13. See Sharma, supra note 9, at 1223-26 (noting increase in international regulation particularly since 1945); see also Andrew Bove, A Study of the Financial Mechanism of the Montreal Protocol On Substances That Deplete the Ozone Layer, 9 ENVTL. LAW. 399 (2003) (noting relative success of Montreal Protocol which required funds from developed countries to go to developing countries to assist them in achieving compliance).


15. See, e.g., Laura Thoms, A Comparative Analysis of International Regimes on Ozone and Climate Change with Implications for Regime Change, 41 COLUM. J. TRANSNAT’L L. 795, 797 (2003) (noting significance of U.S. departure from Kyoto Protocol as United States is largest emitter of greenhouse gases); Eileen Claussen, Climate Change: Present and Future, 27 ECOL. L.Q. 1373, 1378 (2001) (noting United States responsible for 25% of greenhouse gases while making up less than 5% of global population).

United States in its support of such treaties leads to their ineffectiveness in both overall effect and lack of enforcement authority.  

The administrations of Presidents Nixon and Clinton,

environmental concern in the United States came out of a spurt of public willingness to "undergo sacrifices to promote the public good"); see also James G. Pope, Republican Moments: The Role of Direct Popular Power in the American Constitutional Order, 139 U. Pa. L. Rev. 287, 292 (1990). Professor Lazarus also notes the current Bush administration has taken steps similar to the Reagan administration which "undertook a series of widely publicized changes in the direction of national environmental policy that drew the condemnation of environmentalists, the protest of leaders in the opposing political party, and the attention of the national news media." Lazarus, supra, at 1006-07; see also Thoms, supra note 15, at 825-30 (noting combination of industrial lobbying, Congressional reticence to allow developing world an edge, and new Bush administration's ties to oil equaled drastic cutback in U.S. support for Kyoto Protocol).  

17. See Joseph DiMento, International Environmental Law: A Global Assessment, [2003] 33 Envtl. L. Rep. (Envtl. L. Inst.) 10,387 (noting ineffectiveness of Basel Convention, Kyoto Protocol, and Montreal Protocol due to either lack of U.S. participation or failure to ratify domestically); see also Desai, supra note 10, at 256-81 (advocating new vision of international environmental institutions as current views and implementation of agreements have not been effective enough). Further, by not participating in many international environmental agreements, the United States virtually renders moot many of these accords due to its accounting for such a huge percentage of the regulated wastes and pollution. See DiMento, supra, at 10,387 (discussing need for U.S. participation for achievement of environmental treaty goals); see also Anita Margrethe Halvorsen, Climate Change Treaties - New Developments at the Buenos Aires Conference, 1998 Colo. J. Int'l Envtl. L. & Pol'y 1, 20-21 (1998) (opining that without U.S. participation in Kyoto Protocol, agreement will be ineffective due to large proportion of U.S. emissions).  


respectively, set the high-water marks for U.S. environmental regulation and activism. Nixon signed into law the most sweeping U.S. environmental legislation, including the creation of the Environmental Protection Agency ("EPA"), the Clean Air Act, and the National Environmental Policy Act ("NEPA").

President Clinton participated in the most aggressive international diplomacy relating to the environment, seeking environmental analysis of trade agreements and negotiating with other States to pass the Kyoto Protocol.

The establishment of EPA during the Nixon administration led to a vast expansion of both federal regulation and enforcement powers regarding the U.S. environment, but also resulted in uncertainty over what entity holds ultimate responsibility for the environment's protection. While Congressional will con-


21. See Lazarus, supra note 16, at 1006-07, 1026-27 (noting both President Nixon's initial pro-environmental legislation, such as National Environmental Policy Act ("NEPA"), formation of Environmental Protection Agency ("EPA"), and Clean Air Act Amendments of 1970, and his backing away from environmental issues at end of presidency); see also Lynch, supra note 19, at 221 (noting Nixon's sincere concern for U.S. environmental issues).

22. See James Salzman, Seattle's Legal Legacy and Environmental Reviews of Trade Agreements, 31 ENVTL. L. 501, 503 (2001) (noting President Clinton's issuance of Executive Order 13,141 which committed United States to review trade agreements for environmental concerns); see also Lazarus, supra note 16, at 1006 (noting current administration's reversal of Clinton environmental agreements); David W. Floren, Antarctic Mining Regimes: An Appreciation of the Attainable, 16 J. ENVTL. L. & LITIG. 467, 500 n.209 (2001) (noting United States under President Clinton began to show sustained commitment to strengthening international environmental law, for example, by negotiating strenuously both in United States and abroad for Kyoto Protocol).


24. See D'Arcy, supra note 23, at 296-98 (highlighting EPA's mandated role of enforcing environmental regulations but Congressional obligation to create effective legislation); see also Joseph D. Jacobson, Safeguarding National Security Through Public Release of Environmental Information: Moving the Debate to the Next Level, 9 ENVTL. LAW. 327, 381-83 (noting environmental hazard information controlled by EPA but access limited by Department of Defense and Attorney General); Joel Stroud, Beyond Title Search: Attorneys Must Consider Environmental Regulations, 25 N.C. CENT. L. J. 182, 187 (2003) (acknowl-
tros when Congress explicitly states its intentions in a body of law, an agency (such as EPA) possesses more power when the enabling legislation is ambiguous and that agency's interpretation of the statute is given great deference. This deference is not dispositive, though, and has recently been weakened in the environmental context. Further, statutory interpretation and expansion in the international environmental context has been severely limited by *Lujan v. Defenders of Wildlife*, where the U.S. Supreme Court held that individuals must demonstrate particularized harm to gain standing to enforce environmental statutes abroad. EPA does, however, have bilateral cooperative programs with other national and regional environmental agencies to attempt to further common goals of environmental protection; it notably does not with Afghanistan or Iraq.

edging EPA's role in administering environmental regulations but noting responsibilities it shares with Fish and Wildlife Service of the Department of the Interior, National Fisheries Service of the Department of Commerce, Army Corps of Engineers, and Department of Agriculture).


26. See *Chevron*, 467 U.S. at 843-44 (holding that gap in Congressional intent can and should be filled by agency to which promulgation and enforcement of regulations has been charged); see also Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 897 (2004) (discussing cases where *Chevron* deference deemed appropriate when Congress is silent and agency seeks to fill gap in legislation).


29. See *Lujan*, 504 U.S. at 558-62 (noting "someday intentions" of plaintiffs to revisit areas at issue did not constitute particularized harm satisfactory to establish standing); see also Hon. C. Ashley Royal, U.S.D.J., M.D. Ga., *Constitutional Civil Rights*, 55 MERCER L. REV. 1131, 1132 (2004) (discussing application of particularized and concrete harm requirement expressed in *Lujan* to lower court cases).

While historically a leader in conservation efforts, the United States has been conspicuously absent from some of the most recent international environmental agreements. This lack of participation, coupled with a U.S. trend of restricting citizen access to U.S. courts for international environmental concerns, does not bode well for citizen oversight of the Afghan and Iraqi environments.

B. Environmental Concerns Particular to Afghanistan and Iraq That Must Be Addressed

The arid Middle East region is particularly sensitive to dra-
matic environmental fluctuations and water shortages. In both Afghanistan and Iraq, regional and individual concerns exist. Iraq’s need for water has forced it to trade oil (its most valuable resource) for water rights to the Euphrates and Tigris. Afghanistan also suffers from water shortage issues. The presence of


36. See Ben Boer, The Rise of Environmental Law in the Asian Region, 32 U. Rich. L. Rev. 1503, 1514-16 (1999) (noting Afghanistan’s entry into South Asian Association for Regional Cooperation whose environmental wing, South Asian Cooperative Environment Program, addresses particularized issues); see also Afghan Governor, French Official Discuss Green Issues, B.B.C. Mon. S. Asia, Sept. 9, 2004 (reporting on meeting between former French environment minister and governor of Balkh Province in Afghanistan regarding environmental progress and remaining issues in region). But see Seymour M. Hersh, ANNALS OF NATIONAL SECURITY: The Other War, New Yorker, Apr. 12, 2004, at 40 (noting breakdown in political structure of Afghanistan and lack of centralized control that leads to violence, insecurity, and reticence of foreign aid agencies to invest and expand in Nation).


39. See, e.g., Ali Azimi & David McCauley, Afghanistan’s Environment in Transition
foreign nationals in the two States\textsuperscript{40} strains the already depleted resources of the environments\textsuperscript{41} and highlights the lack of international environmental law applicable to military or peacekeeping forces.\textsuperscript{42}

These military forces\textsuperscript{43} and peacekeepers call international attention to the existing delicate environmental situation in these two countries, as armed conflict has been a nearly ever-present hardship for the past twenty years.\textsuperscript{44} Afghanistan’s people have experienced a constant state of war since the Soviet in-


\textsuperscript{43} See, e.g., Lt. Col. Richard A. Phelps, USAF, \textit{Environmental Law for Overseas Installations}, 40 A.F. L. Rev. 49 (1996) (noting differences between “environmental law” applicable to U.S. Air Force military installations abroad and U.S. regulation); Maj. Richard M. Whitaker, USA, \textit{Environmental Aspects of Overseas Operations}, 1995-APR Army Law. 27 (1995) (noting environmental law issues facing U.S. Army operations both in U.S. and abroad). However, these policies and their enforcement are beyond the purview of this Comment. In the case of U.S. military involvement in the conflicts, there are well-established environmental policies dictated by the several branches intended to govern military installations and actions. See Whitaker, supra, at 27 (alluding to various military regulations regarding environmental protection); see also Phelps, supra, at 49 (discussing military’s environmental regulations’ prospective application abroad).

vasion of 1979\textsuperscript{45} and civil war coupled with undeclared internal violence have affected the daily lives of Afghans for over two decades.\textsuperscript{46}

Similarly, Iraqis suffered through the bloody Iran-Iraq War in the 1980s,\textsuperscript{47} the first Persian Gulf War\textsuperscript{48} in 1991, economic sanctions after that war in the 1990s,\textsuperscript{49} and the most recent conflict with a U.S. and British-led force to oust Saddam Hussein in 2003.\textsuperscript{50} In each of these conflicts affecting the two Nations, envi-

\textit{Regime}, 5 Wash. U. J.L. & Pol’y 129, 134 (2001) (noting more than 2.5 million refugees have fled war-torn areas of both Afghanistan and Iraq as a result of recent conflicts).


ronmental effects were, and continue to be, felt by both the lands and the people inhabiting them.\footnote{51}

The environmental needs of the two States have concerned the world enough that the United Nations Environment Program ("UNEP") has published a detailed post-conflict report on Afghanistan\footnote{52} ("Afghanistan PCA") and a "Desk Study" of the environment in Iraq ("Iraq Desk Study").\footnote{53} The Afghanistan PCA offers an overview of the Nation's ecology and topography and how these have been affected by both natural and human-created disturbances.\footnote{54} It also highlights the resources present in Afghanistan and those in need of protection.\footnote{55} Finally, the Afghanistan PCA details the various governing bodies with environ-

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\textit{Tyranny with Justice: Alternatives to War in the Confrontation with Iraq,} 7 J. GENDER RACE \\& JUST. 1, 11-40 (2003) (detailing effects of tyrannical regime, Iran-Iraq War, sanctions, and then-impending Second Gulf War war on Iraqi people).

\footnote{51} See Andrew C.S. Efaw, \textit{United States Refusal to Ban Landmines: The Intersection Between Tactics, Strategy, Policy, and International Law}, 159 MIL. L. REV. 87, 89-94 (1999) (noting severe effects of landmine usage on environments of Afghanistan and Iraq including destruction of endangered species); see also Cohan, supra note 35, at 481 (noting effects of war and weaponry on all aspects of environment); Bruch & Pendergrass, \textit{supra} note 42, at 855 (noting need for specific laws protecting environment in peace and war). Mr. Cohan details the effects of such materiel as oil-burning ships sunk during World War II and uranium-depleted rounds used during both Gulf Wars and their effect on the citizenry after the cessation of armed conflict. See Cohan, \textit{supra} note 35, at 481 (discussing harmful effects of various weaponry).


\footnote{54} See Afghanistan PCA, \textit{supra} note 52, at 6-47 (outlining natural environment of Afghanistan, urban environmental issues and other human-made effects on environment); see also Azimi & McCauley, \textit{supra} note 39, at 9-13 (outlining most imminent needs of Afghan environment due to lack of conservation and naturally occurring reduction of resources).

\footnote{55} See Afghanistan PCA, \textit{supra} note 52, at 48-73 (noting findings on status of Afghan natural resources, particularly water, wetlands, forest, and woodland areas in need of protection); see also Azimi & McCauley, \textit{supra} note 39, at 9-13 (noting specific actions required to ensure safe and abundant drinking water and conservation of forests).
mental responsibilities in the country, applicable international law, and offers recommendations for how best to protect the Afghan environment. The United States has no clear role or responsibilities specifically enumerated in the Afghanistan PCA, nor is it called upon to monitor its own government personnel, military, or corporate contractors in the country.

The Iraq Desk Study is an attempt to identify and address environmental issues present in that State quickly, rather than wait for UNEP's full Post-Conflict Assessment that will detail specific concerns and recommendations in a similar fashion to the Afghanistan PCA. While its scope and accuracy is limited by UNEP personnel's inability to be on the ground in Iraq during the most recent conflict, it highlights how Iraq's recent surge in development coupled with ongoing military conflict have placed a large amount of stress on the environment and infrastructure. Due to political uncertainty in Iraq, it is also un-

56. See Afghanistan PCA, supra note 52, at 92-139 (detailing current bodies regulating Afghan government, status of applicable international law, and recommending detailed environmental management scheme); see also Carlotta Gall, THREATS AND RESPONSES: KABUL; War-Scarred Afghanistan in Environmental Crisis, N.Y. TIMES, Jan. 30, 2003, at A1 (reporting U.N. concern regarding Afghan environment and need for immediate support to stabilize and protect it).

57. See Afghanistan PCA, supra note 52, at 92-95, 99-100, 104-13 (noting status of Afghan environmental legislation, advocating international involvement, but not outlining specific instructions for foreign entities present in Afghanistan); see also Azimi & McCauley, supra note 39, at 11-16 (noting need for protection of water and other areas to safeguard Afghan environment).

58. See Iraq Desk Study, supra note 53, at 6-7 (noting past experience dictates quick response may be critical to preserving environment in post-conflict setting where early identification of heavily polluted areas can help in immediate clean-up and facilitate rehabilitation of infrastructure); see generally Afghanistan PCA, supra note 52, at 15-199 (providing detailed outline of Afghan history, topography, environmental needs, and advocating course of action to best conserve resources of country).


60. See Iraq Desk Study, supra note 53, at 6-7, 13-15 (noting how population growth, urban expansion, and long history of military conflict have caused dire conditions in country); see also Ronald C. Santopadre, Deterioration of Limits on the Use of Force and its Perils: A Rejection of the Kosovo Precedent, 18 ST. JOHN'S J. LEGAL COMMENT. 369, 405 n.198 (2003) (lamenting detrimental effects of depleted uranium shells used in both Persian Gulf Wars).

61. See, e.g., Robin Wright & Mike Allen, Bush to Detail Transition Monday in First of Several Iraq Speeches, WASH. POST, May 20, 2004, at A18 (quoting U.S. president attempt-
clear what role foreign Nations, particularly the United Kingdom and the United States, will be expected to play in the environmental context. It is also uncertain how foreign entities present in the region might cause environmental damage that affects neighboring Nations (particularly when dealing with water issues) and cause greater diplomatic and environmental harm to Iraq. What is certain, though, is that the Iraqi environment has suffered extreme strain from both international conflict and internal oppression.

II. JUDICIAL AND EXECUTIVE RESPONSES BY THE UNITED STATES TO CITIZEN SUITS IN RESPONSE TO GOVERNMENTAL ACTIONS DETRIMENTAL TO FOREIGN ENVIRONMENTS

A. Procedural and Statutory Bars to Environmental Suits Against the United States and Its Agencies

1. The United States' Sovereign Immunity

It is well settled that the U.S. government is immune to suits for damages unless it explicitly waives its sovereign immunity.
Environmental legislation, however, has usually contained language indicating an explicit waiver of sovereign immunity in the context of coercive actions for monetary damages and an injunction for prospective behavior. Some international law, including the U.N. Convention on the Law of the Sea, contains a possible waiver of individual States' sovereign immunity in very specific instances, such as damage caused by military aircraft.

The general trend, however, in both the U.S. Congress and U.S. courts is to expand rather than contract the scope of sovereign immunity for both the U.S. government and non-U.S. governments. Some scholars, however, have argued that sovereign of its sovereign immunity must be stated in language of statute unequivocally); United States v. Williams, 514 U.S. 527, 531 (1995) (holding that waiver of sovereign immunity by federal government must be unambiguous and any ambiguity in language of statute interpreted in favor of sovereign); City of Jacksonville v. Dep't of the Navy, 348 F.3d 1307, 1314-15 (11th Cir. 2003) (holding that Clean Air Act's citizen suit provisions do not expose federal government to punitive damages as no explicit waiver of sovereign immunity made in that regard). But see Maj. Cotell, USA, 1999-JUN ARMY LAW. 40 (1999) (noting that U.S. States incorrectly assume they cannot regulate federal installations under Clean Air Act when sovereign immunity invoked and believe their only recourse is to withhold permits); Randall S. Abate & Carolyn H. Cogswell, Sovereign Immunity and Citizen Enforcement of Federal Environmental Laws: A Proposal for a New Synthesis, 15 VA. ENVTL. L.J. 1, 12-16 (construing United States Dept. of Energy v. Ohio, 503 U.S. 607 (1992)) (noting lower courts's reticence to apply Ohio Court's decision to prevent punitive damages under environmental actions due to sovereign immunity).


68. See, e.g., Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1604-1606 (2004) (granting immunity to all non-U.S. States, agencies, and officers); 18 U.S.C. § 2337 (1) & (2) (2002) (stating no action shall accrue against United States, its agencies or officers, or foreign States or its agencies and officers under its provisions); Macharia v. United States, 334 F.3d 61, 64 (D.C. Cir. 2003) (holding claims of violation of Kenyan Constitution barred due to sovereign immunity as no claim of violation of customary
immunity should be the exception rather than the rule, particularly in the international context.69

The Foreign Sovereign Immunities Act ("FSIA") contains specific carve-out exceptions that allow for suits for extraterritorial actions committed by non-U.S. States and their agents if those actions affect the United States.70 The immunity granted by FSIA is usually not extended to corporations acting as State agents or to State actors under the Alien Tort Claims Act ("ATCA") or Alien Tort Statute ("ATS").71

2. The Presumption Against Extraterritorial Application of U.S. Law

The longstanding default rule in U.S. law is that federal statutes apply only to actions occurring in the United States and do not have extraterritorial application.72 The U.S. Supreme Court international law alleged); Rosner v. United States, 231 F. Supp. 2d 1202, 1204 (S.D. Fla. 2002) (holding claim of violation of international law violations against United States not valid as Congress has not explicitly waived sovereign immunity).


72. See, e.g., EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) (noting that it is long-standing principle of U.S. law that Congressional legislation does not apply extraterritorially unless stated and purpose of this default interpretation is to prevent unintended conflicts with other Nations' laws (quoting McCulloch v. Sociedad Na-
has demonstrated a willingness to expand this doctrine (much like that of sovereign immunity) and restrict the prospective scope of U.S. law abroad.\footnote{73} These restrictions are also problematic with the ATCA, as one cannot sue the United States unless it has specifically waived sovereign immunity.\footnote{74}

The U.S. Supreme Court's recent decision in \textit{Sosa v. Alvarez-Machain}\footnote{75} makes clear that any tort committed by the United States or its agents on non-U.S. soil is not actionable in a U.S. court.\footnote{76} The Court left open, however, the ability of Congress to


\footnote{74. \textit{See Alien Tort Claims Act, 28 U.S.C. § 1350 (2000)} (granting right of action for non-U.S. citizens in U.S. courts for torts committed in violation of U.S. treaty or international law); see also Tzeutschler, supra note 71, at 376-77 (discussing ATCA's provisions effect on extraterritoriality concerns).}


confer a right of action upon non-U.S. citizens through appropriate legislation.\textsuperscript{77} The decision weakens ATCA as Justice Souter’s opinion confines the types of suits allowed under ATCA to piracy, assaults on diplomats or prevention of safe conduct, and torture.\textsuperscript{78} The ability of a non-U.S. citizen to sue a U.S. corporation or to sue for egregious violations of international law remains unclear.\textsuperscript{79} Afghan and Iraqi citizens affected by U.S. government or corporate environmental malfeasance might also gain access to U.S. courts should the United States become party to an international environmental treaty by relying on the \textit{Charming Betsy} doctrine.\textsuperscript{80} \textit{Murray v. The Schooner Charming Betsy}, decided in 1804, gave Justice Marshall the opportunity to establish that U.S. law should always be interpreted to conform to international law and treaties.\textsuperscript{81} Thus, an international environmental treaty craft-

\textsuperscript{77} See \textit{Sosa}, 124 S. Ct. at 1249-51 (discussing ATCA’s nature as grant of jurisdiction not right of action and necessity of legislation granting such cause of action before non-U.S. citizens may bring extraterritorial case in U.S. courts); \textit{see also} Patrick D. Curran, \textit{Universalism, Relativism, and Private Enforcement of Customary International Law}, 5 CHI. J. INT’L L. 311, 314 (2004) (discussing U.S. cases where courts held ATCA as purely jurisdictional statute not granting cause of action).

\textsuperscript{78} See \textit{Sosa}, 124 S. Ct. at 1250-54 (holding rights of action under ATCA limited to piracy, diplomatic infringement, and torture); \textit{see also} Hudson, supra note 75, at 3 (analyzing holding of \textit{Sosa} and commenting that holding restricted possibility of rights of action but left open torture and ability to sue U.S. corpsinations).

\textsuperscript{79} See Hudson, supra note 75, at 3 (discussing viability of suits against corporations unclear in wake of \textit{Sosa} decision and potential for expansion of actionable offenses under Alien Tort Statute (“ATS”)); \textit{see also} Thomas M. Keck, \textit{Supreme Court splits: Conservative Justices Often Disagree}, MILWAUKEE J. SENTINEL, Aug. 8, 2004, at J5 (commenting on \textit{Sosa} decision and concurrences and noting Court’s holding that Congressional enabling legislation not required for action under some violations of international law).


\textsuperscript{81} See \textit{Charming Betsy}, 6 U.S. at 118 (holding that U.S. law should be interpreted to coalesce with international law if at all possible); \textit{see also} Detlev F. Vagts, \textit{The United States and Its Treaties: Observance and Breach}, 95 AM. J. INT’L L. 313, 322-25 (2001) (noting long history of \textit{Charming Betsy} doctrine, its application in various case law, and recent expan-
ing a private right of action for citizens might supercede any U.S. legal impediments to suing for environmental harm done by either the U.S. government or U.S. corporations.  

B. Brief History of Environmental Legislation in the United States and Its Application Both Domestically and Internationally

After the various comprehensive environmental legislation packages passed in the 1970's, it remained unclear what role the private citizenry or NGOs played in their enforcement. Similarly, as the United States increased its participation in international environmental agreements, it was also not understood if any private right to sue or enforce existed.

82. See Koh, supra note 80, at 44-46 (discussing application of Charming Betsy doctrine in U.S. history as default rule acknowledging U.S. law should be interpreted as comporting to international law); see also Kevin P. Cummins, Trade Secrets: How the Charming Betsy Canon May Do More to Weaken U.S. Environmental Laws Than the WTO's Trade Rules, 12 FORDHAM ENVTL. L.J. 141, 195 n.232 (2000) (reviewing Charming Betsy doctrine's historical application and modification by courts and quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 114 (1987) which memorializes doctrine).


84. See Marissa A. Pagnani, Environmental NGOs and the Fate of the Traditional Nation-State, 15 GEO. INT'L ENVTL. L. REV. 791, 800 (2003) (noting refusal by States to allow NGOs at bargaining table when discussing international environmental issues); see also Charles Qiong Wu, A Unified Forum? The New Arbitration Rules for Environmental Disputes Under the Permanent Court of Arbitration, 3 CHI. J. INT'L L. 263, 264 (2002) (noting importance of NGO involvement in international environmental controversies but long standing tenet of international law that only State actors can participate in process); Peggy Rodgers Kalas, International Environmental Dispute Resolution and the Need for Access By Non-State Entities, 12 COLO. J. INT'L ENVTL. L. & POL'Y 191, 195 (2001) (urging NGOs be given greater latitude to bring environmental suits).


Further, as discussed above, the track record of U.S. diplomacy in the realm of international environmental affairs is spotty at best. There are four basic ways that citizens can attempt either to enjoin U.S. government environmental action abroad or compel the government to adhere to established regulations and agreements: (1) private citizen or NGO suit under U.S. federal law; \(88\) (2) private citizen or NGO suit under international law\(89\) or one seeking to compel compliance with a treaty\(90\) or agreement that the United States is party to; (3) suit by a non-U.S. national\(91\) against the United States under a recognized treaty or against a U.S. corporation under ATCA; or (4) a qui tam\(92\) action

\[\text{actions and funding abroad even when harm is specific); see also Wu, supra note 84, at 264 (noting traditional bar of non-States, i.e., individuals or NGOs from bringing international environmental actions).}\]

\[\text{87. See Blomquist, supra note 32, at 495 (reciting U.S. failures to ratify or sign prominent international environmental legislation); see also Henkin, supra note 32, at 208 (highlighting U.S. absence from environmental treaties, notably Kyoto Protocol); Lazarus, supra note 16, at 1000 (calling to attention recent reversals in environmental policy by current Bush administration).}\]

\[\text{88. See Mary Elliott Rolle, Unraveling Accountability: Contesting Legal and Procedural Barriers in International Toxic Tort Cases, 15 GEO. INT’L ENV’T L. REV. 135, 138-42 (2003) (pointing out domestic legislation in place in most developed countries including United States and evidentiary and procedural barriers to successful claims); see also Barton H. Thompson, Jr., Constitutionalizing the Environment: The History and Future of Montana’s Environmental Provisions, 64 MONT. L. REV. 157, 185 (2003) (discussing that without valid citizen suits and implementing legislation there remains limited recourse for private citizens to ensure environmental protection).}\]

\[\text{89. See Kenneth F. McCallion, International Environmental Justice: Rights and Remedies, 26 HASTINGS INT’L & COMP. L. REV. 427, 433 (2003) (noting International Court of Justice’s (“ICJ”) jurisdiction over international environmental issues but inability for private citizens or NGOs to gain access or standing as only recognized States may bring actions in front of this tribunal); see also Blomquist, supra note 32, at 495 (noting U.S. failure to ratify international environmental treaties which might be basis for enforcement actions).}\]

\[\text{90. See Henry W. McGee, Jr. & Timothy W. Woolsey, Transboundary Dispute Resolution as a Process and Access to Justice for Private Litigants: Commentaries on Cesare Romano’s The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach (2000), 20 UCLA J. ENV’T. L. & POL’Y 109, 116 (2002) (discussing that while non-State parties are not often granted standing, number of international bodies that do give standing to non-State parties has increased). But see Ehrmann, supra note 18, at 378 (noting U.S. failure to join, sign, or enforce various environmental treaties).}\]

\[\text{91. See Kalas, supra note 84, at 195 (noting non-U.S. citizens have attempted to bring suit for international environmental issues but are usually denied standing); see also Rolle, supra note 88 at 138-40 (noting procedural and other non-substantive barriers used to block international environmental suits).}\]

alleging fraudulent or illegal action by a party that costs the United States financially.

1. Private Rights of Action Under Established U.S. Federal Law

Several pieces of environmental legislation seemingly grant wide-sweeping standing, including the Endangered Species Act and Clean Water Act. In fact, Congress explicitly enumerated three types of rights of action available to private citizens under its environmental legislation: (1) "private attorney general" suits; (2) "deadline suits" mandating that officials perform their duties; and (3) judicial review suits which seek judgment on the legality of agency actions.

In international actions brought by U.S. citizens, each method has been used, but none with any great degree of success at achieving the goal of environmental protection. The
requirement of a particularized harm traceable to alleged action of defendant and redressability in response to a favorable decision strictly enumerated in \textit{Lujan},\textsuperscript{98} makes these types of cases\textsuperscript{99} unlikely to be favored by anyone seeking to protect the environments of Afghanistan and Iraq.\textsuperscript{100}

Further, before the stringent standing requirements enumerated by \textit{Lujan}, the Court had articulated in \textit{Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation} that citizens must demonstrate that the harm caused was ongoing and not simply a past injury.\textsuperscript{101} In that instance, however, the U.S. Congress had re-

\textsuperscript{98} See \textit{Salzman, supra} note 22, at 503 (noting much-heralded Executive Order 13,141 never actually enforced when trade agreements failed to contain environmental assessment). A case involving U.S. Naval actions in international waters that sought both prospective relief, to enjoin the use of sonar devices in a particular context, and clarification of the legality of the actions and the Navy's compliance efforts met with mixed results. See \textit{Nat. Resources Def. Council Inc. v. U.S. Dept. of Navy}, 2002 WL 32095131, at *7-*16 (C.D. Cal. 2002) (order granting partial summary judgment). The Court held that plaintiffs did have standing, but that the program in question was subject to neither NEPA or EPA review. \textit{See id. at} *7-*16, 23.


\textsuperscript{101} \textit{See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation}, 484 U.S. 49, 51 (1987) (vacating and remanding case as no good-faith allegation of ongoing harm alleged in proceedings below); \textit{see also} \textit{Stubbs, supra} note 98, at 84-86 (noting Court's decision in \textit{Gwaltney} resulted in uncertainty over when an environmental injury was "ongoing" as opposed to "past" and ambiguity caused both sides to see holding as favorable).
sponded by altering the Clean Air Act to specifically give private citizens a right of action against any person, business, or government entity.102

A few academics have suggested a somewhat more novel approach at circumventing these bars to citizens gaining standing in environmental actions; they advocate interpreting the U.S. Constitution's equitable grants103 of rights of action as providing current standing for harm done to future generations.104 However, this strategy has met with little success.105

2. Private Rights of Action Seeking U.S. Government Mandated Compliance with International Agreements and Treaties

The Respondent in the seminal Lujan case unsuccessfully raised the question of whether a private citizen could seek enforcement of a treaty to which the United States is a party by U.S. officials,106 but to no avail. The issue for any party seeking en-


103. See U.S. CONST. art. III, § 2 (providing that "judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority. . .").


enforcement of an international environmental treaty is first whether it is self-effectuating,\textsuperscript{107} and, if not, whether Congress has granted a specific right of action for private citizens under its terms.\textsuperscript{108}

Thus, the standing issue becomes virtually identical to that discussed above. Namely, does Congress grant a specific right of action and does the instant plaintiff have the necessary particularized harm and injury-in-fact?\textsuperscript{109} The only difference here is that the source of the law will have a broader scope as it is an instrument of international law and not U.S. law, making it more useful in the Afghan-Iraqi context. This distinction might prove useful in aiding a potential plaintiff in circumventing the sovereign immunity\textsuperscript{110} and extraterritoriality issues.\textsuperscript{111}


Several avenues exist by which non-U.S. nationals could, at


\textsuperscript{108} See \textit{Rauscher}, 119 U.S. at 418 (noting implications in U.S. of ratified treaties); see also Lujan, 504 U.S. at 555 (noting no private right of action created and particularized harm required under Endangered Species Act).

\textsuperscript{109} See generally \textit{Laidlaw}, 528 U.S. at 167 (noting that when instant plaintiff has demonstrated injury that is traceable and redressable, Article III standing requirements are satisfied); see also \textit{Lujan}, 504 U.S. at 555 (holding no standing for injury to environment when plaintiff herself has no demonstrable injury-in-fact).


\textsuperscript{111} See \textit{EEOC v. Arabian American Oil Co.}, 499 U.S. 244, 248 (1991) (noting that it is long-standing principle of U.S. law that Congressional legislation does not apply outside of United States unless explicitly stated and purpose of this interpretation is to avoid unintended conflicts with other Nations' laws (quoting \textit{McCulloch v. Sociedad Nacional de Marineros de Honduras}, 372 U.S. 10, 20-22 (1963))); see also William S. Dodge, \textit{Understanding the Presumption Against Extraterritoriality}, 16 \textit{Berkeley J. Int'l L.} 85, 85-88 (1998) (noting rise in application by U.S. Supreme Court of extraterritoriality principle, even to legislation that Congress seemingly intended to have application outside of United States).
least theoretically, seek either an injunction or compensation for environmental damage done by U.S. government contractors or corporations in Afghanistan or Iraq.\textsuperscript{112} The most promising method seems to be actions against U.S. corporations contracted by the government through ATCA.\textsuperscript{113}

ATCA\textsuperscript{114} has been an underutilized right of action that dates back to the Judiciary Act of 1789.\textsuperscript{115} Plaintiffs must satisfy three elements for a successful ATCA claim: "(1) they are aliens, (2) they are suing for a tort, and (3) the tort violates the 'law of Nations.'"\textsuperscript{116} The third element is what makes environmental claims under the ATCA most difficult as there is no clear international or customary law directly preserving the right to a healthy environment.\textsuperscript{117}

\textsuperscript{112} See Alien Tort Claims Act, 28 U.S.C. § 1350 (2000) (granting right of action for non-U.S. citizens in U.S. courts for torts committed in violation of U.S. treaty or international law); see also Kalas, supra note 84, at 195 (noting non-U.S. citizens have attempted to bring suit for international environmental issues but are usually denied standing).


\textsuperscript{114} See 28 U.S.C. § 1350 (2000) (providing that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of [N]ations or a treaty of the United States.")


\textsuperscript{116} See Bridgeman, supra note 113, at 5, n.21 (noting that Second, Fifth, Ninth Circuits have affirmed dual nature of ATCA as granting both jurisdiction and substantive cause of action); see also Kadic v. Karadzic, 70 F.3d 292, 298 (2d Cir. 1995) (holding 28 U.S.C. § 1350 grants federal subject matter jurisdiction when three elements: (1) alien sues; (2) for tort; and (3) committed in violation of law of Nations; are satisfied); Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362, 366 (E.D. La. 1997) (noting current view of § 1350 is that it grants federal cause of action and federal forum), aff'd 197 F.3d 161 (5th Cir. 1999); In re Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467, 1475-76 (9th Cir. 1994) (noting § 1350 does not require action "arise under" law of Nations but violation must be of norm that is specific, universal, and obligatory).

\textsuperscript{117} See Beanal, 969 F. Supp. at 383 (holding treaties cited by plaintiffs inadequate
The "right to a healthy environment,"\textsuperscript{118} while recognized as important to human growth and development,\textsuperscript{119} has not been codified by the United Nations nor has it been part of a treaty implemented by the United States.\textsuperscript{120} Further, the few international environmental agreements\textsuperscript{121} that have received any widespread support require each Nation to implement valid legislation, as the treaties and agreements are not self-executing.\textsuperscript{122}
In fact, one of the most frustrating aspects of international law is the uncertainty of what is widely accepted transnationally and what is not. Thus, even if the premise that a healthy environment is a right guaranteed to all, the question of how to implement protections of that right both nationally and internationally persists.

Another hurdle the plaintiff must face is the political question issue. The Supreme Court has held that if the issue
before a court is a political one that is constitutionally committed to another branch, or is not justiciable because of potential embarrassment and lack of respect or deference given to another branch, that court does not have jurisdiction.\(^{127}\) Further, if the issue is deemed one of foreign relations between the United States and another country, it is considered a political question reserved for the executive and legislative branches.\(^{128}\) Commentators have argued that aspects of environmental law are political questions best left to the legislature and beyond the scope of judicial interpretation.\(^{129}\)

The ATCA is commonly used as a basis for civil actions against U.S. companies for torts committed abroad.\(^{130}\) It is not

\(^{127}\) See Gilligan v. Morgan, 413 U.S. 1 (1973) (holding complaint alleging improper training given to National Guard is clear example of type of issue reserved for other branches of government than judiciary, as any decision would be political and advisory in nature); see also Vieth v. Jubelirer, No. 02-1580, 2004 U.S. LEXIS 3233, at *21-*22 (Apr. 28, 2004) (citing Baker v. Carr, 369 U.S. 186 (1962)) (enumerating Baker six-prong test for determination if issue is political one). The six-prong test is:

1. a textually demonstrable constitutional commitment of the issue to a coordinate political department; or
2. a lack of judicially discoverable and manageable standards for resolving it; or
3. the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
4. the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or
5. an unusual need for unquestioning adherence to a political decision already made; or
6. the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

\(^{128}\) See First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 766 (1972) (quoting Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918)) (holding that foreign relations of U.S. government is constitutionally solely within purview of legislature and executive and beyond scope of judicial review); see also Peary v. Strahan, 205 U.S. 257, 265 (1907) (holding determination of who is sovereign of non-U.S. Nation, either de jure or de facto, is for legislative and executive and beyond scope of judicial review).


\(^{130}\) See, e.g., Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345, 1358-59 (S.D. Fla.}
entirely settled, however, how close the corporation's allegedly tortious actions must be to a State's actions or program. This case could determine what extraterritorial application ATCA has and what law must be broken for a valid suit against the U.S. government and its agents, an extremely relevant holding for suits in the international environmental context.

C. Using Qui Tam Actions To Gain Standing for Private Citizens or NGOs in the Environmental Context

Whether a qui tam action satisfies the Article III standing
requirements for private citizens was once at issue in the courts, but is now settled after U.S. Supreme Court stated that standing was satisfied by FCA claims in Vermont Agency of Natural Resources v. United States ex rel. Stevens. In fact, in Lujan, the Court took pains to differentiate the situation there from the right of action granted to private citizens under FCA. However, the plaintiff's grounds for standing changed from the previous rationale of the "bounty" being the concrete interest, to the plaintiff standing as an "assignee" of the penalty collected by the government.

135. See Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000) (holding that private citizen bringing qui tam action, the "relator," under the FCA satisfies Article III standing requirements). But see Eric S. Askanase, Qui Tam and the False Claims Act: Criminal Punishment in Civil Disguise, 70 DEF. COUNS. J. 472, 473-74 (2003) (calling for reexamination of qui tam doctrine and outlining proposed rationale for why it fails to satisfy Article III requirements). There is also disagreement over whether the Article II Appointments Clause, see U.S. CONST. art. II, § 2, and the "Take Care" obligation of the Executive allow qui tam suits. See id. at § 3 (stating "he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed. . ."). The Supreme Court of the United States left the issue open. See Vermont Agency, 529 U.S. at 778 n.8 (choosing not to decide issue of whether qui tam actions violate Article II provisions). But see United States ex rel. Stone v. Rockwell Int'l Corp, 282 F.3d 787, 804-07 (10th Cir. 2002) (holding FCA does not violate Article II); Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 752-53 (5th Cir. 2001) (holding that using same strain of analysis on Article II objections as used on Article III objections will find qui tam actions valid).

136. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 571-74 (1992) (holding plaintiffs did not have right of action because no concrete injury existed when hardship claimed was loss of endangered species that plaintiffs did not have immediate concrete intention of visiting again). Further, the plaintiffs were suing as both individuals and as an NGO. See id. at 556, 568-74 (denying both individual and associational standing).

137. Lujan, 504 U.S. at 572-73 (distinguishing plaintiffs' claims in instant action from qui tam case where Congress has provided not only right of action but also cash benefit and thus concrete interest).

138. See Vermont Agency, 529 U.S. at 773 (holding citizen relator in qui tam suit derives right of action under legal theory that assignee possesses same rights as principal); see also Robin Kundis Craig, Will Separation of Powers Challenges "Take Care" of Environmental Citizen Suits? Article II, Injury-in-Fact, Private "Enforcers," and Lessons From Qui Tam Litigation, 72 U. COLO. L. REV. 93, 146-48 (2001) (describing Vermont Agency Court's analogy of qui tam relator to assignee of claim and holding that relator did not have particularized harm but did have standing as assignee).
ernment under FCA.\(^\text{139}\)

FCA expressly prohibits suits based upon knowledge publicly disclosed,\(^\text{140}\) though this prohibition was softened with the 1986 Amendments to the Act.\(^\text{141}\) As it became evident that more relators would be allowed standing to bring qui tam actions under FCA,\(^\text{142}\) the number of suits brought drastically increased. As this threat gained momentum, valid qui tam actions were also used to force settlements with corporations,\(^\text{143}\) a potentially use-

\(^{139}\) See *Vermont Agency*, 529 U.S. at 773 (noting that potential financial gain or "bounty" creates particularized, concrete interest for individual when Congress grants remuneration under FCA); see also Craig, *supra* note 138, at 147-55 (discussing nuanced holding of *Vermont Agency* in that qui tam relator is not deemed to have sufficient particularized harm for standing but injury to U.S. government is sufficient when relator is serving as assignee of United States).

\(^{140}\) See 31 U.S.C. § 3730(e)(4)-(A)-(B) (2000) (holding no Court has subject matter jurisdiction over publicly disclosed allegations unless person bringing action is "original source"); see also United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh, 186 F.3d 376, 383 (3d Cir. 1999) (holding relator's claim barred as based upon information publicly disclosed); United States ex rel. Aflatooni v. Kitsap Physicians, 163 F.3d 516, 522-23 (9th Cir. 1999) (holding portions of qui tam relator's case that are public knowledge cannot be brought under FCA); Joel M. Androphy & Mark A. Correro, *Whistleblower and Federal Qui Tam Litigation—Suing the Corporation for Fraud*, 45 S. Tex. L. Rev. 23, 55-58 (2003) (highlighting fact that published cases and public hearings can bar qui tam actions in future); Emily R. D. Pruisner, *The Extent of a Corporation's Ability to Constitute an Original Source Under the False Claims Act—Minnesota Ass'n of Nurse Anesthetists v. Allina Health System Corp.*, 87 Minn. L. Rev. 1247, 1257-59 (2003) (discussing historical bar on suits brought when information alleged has been publicized).

\(^{141}\) See 31 U.S.C. § 3730 (as amended 1986) (allowing for broader range of actions to be brought by private citizens); see also H.R. Rep. No. 99-960, at 17-18 (1986) (noting need for amendments to FCA to combat fraud in United States); Pruisner, *supra* note 140, at 1254-55 (recalling Congressional reaction to lack of FCA claims in wake of rise in fraud as impetus for Amendment to FCA relaxing "public disclosure" bar); Richard A. Bales, *A Constitutional Defense of Qui Tam*, 2001 Wis. L. Rev. 381, 390 (2001) (examining how rise in government contract abuse, e.g., reports of government purchases of "$400 hammers and $600 toilet seats," was impetus for Congressional relaxation of FCA requirements).

\(^{142}\) See Bales, *supra* note 141, at 390 (noting large increase in number of qui tam actions brought under FCA after 1986 amendments to FCA); see also Sandra Sugawara, *Blowing the Whistle Gets Louder; Increase in Fraud Suits Stirs Legal Community*, Wash. Post, Mar. 19, 1999, at F1 (reporting rise in qui tam actions against corporations); Bill Rankin, *False Claims Act Encourages Whistle-blowers to Come Forward*, Atlanta J. & Const., July 11, 1998, at B2 (noting suit brought against hospital under FCA reflective of Congressional intent to encourage citizens to bring claims against those defrauding U.S. government).

ful tool in the environmental context, as plaintiffs can press for environmental concessions in a settlement.\textsuperscript{144}

Qui tam suits historically have been attempted in order to gain standing for enforcement of environmental regulations.\textsuperscript{145} Most environmental laws, however, left superfluous the round-about method of citizens using FCA to enforce them.\textsuperscript{146} Further, if an environmental law provides for only criminal penalties and fines, it is unclear if a qui tam relator has standing in that context.\textsuperscript{147}

One avenue for possible qui tam suits in Afghanistan and


\textsuperscript{146} See, e.g., David Ashley Bagwell, Hazardous and Noxious Substances, 62 TUL. L. REV. 433, 458 (1988) (describing historical usage of qui tam actions to enforce Rivers and Harbors Act of 1899 (“Refuse Act”), 33 U.S.C. § 407 (1982), but that Supreme Court of United States’s decision in California v. Sierra Club, 451 U.S. 287 (1981), ended viability of this type of suit because Court held no implied right of action existed); Park, supra note 145, at 1064-65 (discussing reduction in usage of qui tam suits in environmental regulation context); Bucy, supra note 92, at 76 (reporting underutilization of qui tam suits in environmental context).

\textsuperscript{147} See Confiscation Cases, 74 U.S. (7 Wall.) 454, 19 L.Ed. 196 (1868) (holding no standing for private citizen as qui tam relator attempting to recover portion of fine); see also Bass Angler Sportsman Society v. United States Steel Corp., 324 F. Supp. 412, 415 (S.D. Ala. 1971) (holding claim of qui tam action to enforce environmental law carrying only criminal penalty not valid as there is no private right of standing either express or implied and citizen cannot share in monies collected as result of fine), aff’d sub nom. Bass Anglers Sportsman Soc. of America, Inc. v. Koppers Co., 447 F.2d 1304 (5th Cir. 1971).
Iraq that unfortunately has arisen is the alleged fraud committed by the Halliburton Company, a U.S. government contractor, in Iraq specifically.\textsuperscript{148} The company has also received contracts for work in Afghanistan.\textsuperscript{149} A qui tam suit alleging fraud by Halliburton against the U.S. government would be extremely difficult, due to the requirements that the relator have specific knowledge. It is also required that the knowledge come from published or public hearings\textsuperscript{150} and if criminal charges are brought against the company, the qui tam action is withdrawn.\textsuperscript{151}


\textsuperscript{150} See 31 U.S.C. § 3730(e)(4)(A)-(B) (2000) (holding no Court has subject matter jurisdiction over publicly disclosed allegations unless person bringing action is “original source”); \textit{see also} United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh, 186 F.3d 376, 383 (3d Cir. 1999) (holding relator’s claim barred as based upon information publicly disclosed); United States ex rel. Aflatooni v. Kitsap Physicians, 163 F.3d 516, 522-23 (9th Cir. 1999) (holding portions of qui tam relator’s case that are public knowledge cannot be brought under FCA); Androphy & Correro, \textit{supra} note 140, at 55-58 (noting traditional bar against qui tam suits brought when allegations have been published or part of public hearings); Pruisner, \textit{supra} note 140, at 1257-59 (noting historical prohibition against qui tam suits that contain any publicized facts or allegations).

\textsuperscript{151} \textit{See Confiscation Cases}, 74 U.S. at 74 (holding no qui tam action available when alleged monies owed government are result of criminal penalties); \textit{see also} Bass Angler Sportsman Soc., 324 F. Supp. at 415 (holding qui tam action seeking remuneration for violation of environmental statute containing criminal fines invalid); Ivanovich & Hedges, \textit{supra} note 148 (noting criminal investigation into Halliburton gasoline pricing); Gold & Cooper, \textit{supra} note 148 (noting Pentagon investigation into possible criminal charges against Halliburton).
III. CREATIVE METHODS TO GAIN STANDING IN THE INTERNATIONAL ENVIRONMENTAL SCENARIO

A. Possible Private Actions for Citizens and NGOs To Protect the Environment of Afghanistan

1. U.S. Citizen and NGO Suits Brought Under Existing U.S. Law

The most difficult bar to U.S. citizens and NGOs bringing suits protecting the Afghan environment under existing U.S. law is the standing requirement laid out in *Lujan v. Defenders of Wildlife.*\(^{152}\) The particularized harm, redressability, and traceability elements that must be satisfied for a private environmental suit to be valid make it difficult for a U.S. citizen to have standing for actions abroad.\(^{153}\) Thus, it is difficult to imagine that even if Congress responded to calls for legislation granting citizen rights of action for environmental damage in Afghanistan,\(^{154}\) a U.S. plaintiff could satisfy the threshold standing requirement.\(^{155}\)

2. Suits by Afghan Nationals for Environmental Harms Committed by U.S. Government or Its Agencies Under ATCA

Suits by Afghan citizens against U.S. government entities or corporations under ATCA for environmental harm have a better chance of success than suits by U.S. nationals.\(^{156}\) It is much more likely that such a plaintiff would satisfy the standing requirements that bar many suits brought by U.S. citizens and

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152. *See supra* notes 97-100 and accompanying text (discussing difficulty for private citizen or NGO to satisfy standing requirements of *Lujan* that demand particularized harm for plaintiff).

153. *See supra* notes 97-100 and accompanying text (analyzing difficulty of satisfying three pronged requirements for standing when alleged harm is abroad).

154. *See supra* notes 95-99 and accompanying text (discussing Congressional response to *Gwaltney* case with Clean Air Act Amendments of 1990 which gave general grant of citizen suit to facilitate enforcement and holding of *Lujan* requires three-pronged standing requirement be met by plaintiff even in light of generalized Congressional grant of standing).

155. *See supra* notes 97-100 and accompanying text (noting difficulty of plaintiff to satisfy standing requirements for citizen suit as any plaintiff must satisfy three-pronged requirement of particularized harm or injury, traceability or causation inquiry, and redressability of harm by potential favorable ruling to have standing to sue even in light of generalized grant of citizen right of action by Congress).

156. *See supra* notes 108-17 and accompanying text (discussing both attempted and proposed usage of ATCA as litigation weapon for environmental harm caused by U.S. government, citizens, or corporations).
NGOs. It is already apparent that environmental harm has been done in Afghanistan. In fact, one commentator has suggested that U.S. military actions in the country have already violated existing international law and inordinately damaged the Afghan environment. Should a U.S. court apply a liberal interpretation of the Geneva Protocols and Hague Conventions (to both of which the United States is a party), they would be deemed existing international law and treaties to which the United States is a party, satisfying the third and most difficult prong of an ATCA claim. The failure of such an action, however, is likely in the wake of the Supreme Court’s decision in Sosa v. Alvarez-Machain.

3. Use of Qui Tam Actions To Gain Standing for Afghan Environmental Actions

The use of qui tam actions in the environmental context is not without historical basis. The standing inquiry is not as difficult as the one outlined in Lujan as the Court there distinguished the qui tam relator’s status from that of a plaintiff bring-
ing right of action under generalized Congressional grant.  However, FCA's grant of a right of action is limited to a narrow set of circumstances where the plaintiff has specific knowledge of fraudulent behavior by the defendant.

The revelation of possible fraudulent transactions by the Halliburton Company and its subsidiaries has at least raised the possibility of an FCA claim being brought by someone with knowledge of harm done to the Afghan environment. A successful claim would require a very narrow set of potential plaintiffs with specific knowledge. Thus, the probability of both such a plaintiff existing and the claim being successful as to environmental harm is extremely low.

B. Potentially Valid Claims for Citizens and NGOs To Enforce Environmental Protection of Iraq or Attempt To Recoup Damages for Harm Done

1. Existing U.S. Law As Basis for U.S. Citizen or NGO Suits

The same difficulties for establishing valid standing in an environmental suit under existing U.S. environmental law thwart potential U.S. citizen and NGO plaintiffs in the Iraqi context as the Afghan one. The difference, however, is that the status of

165. See supra note 136 and accompanying text (noting Supreme Court's differentiation of qui tam action from standing analysis applied to plaintiffs in that case).
166. See supra notes 92, 138-41 and accompanying text (noting that FCA grants right of action to any person bringing suit alleging defrauding of U.S. government as long as certain substantive and procedural criteria are met).
167. See supra notes 150-51 and accompanying text (discussing that FCA claims are limited to individuals who have specific knowledge of fraud that has not been published and when criminal charges have not been brought against defendant by U.S. government).
168. See supra notes 148-49 and accompanying text (reporting allegations of fraud against Halliburton for actions specific to Iraq, but also noting Halliburton's presence in Afghanistan).
169. See supra notes 150-51 and accompanying text (stating that FCA claims are limited to those individuals who have specific knowledge of fraudulent activities that have not been published nor have criminal charges been brought against defendant by U.S. government).
170. See supra notes 145-46 and accompanying text (noting historical usage of qui tam relator actions brought under FCA to enforce environmental statutes but recent difficulty in bringing such claims).
171. See discussion supra Part III.A.1 (noting difficulties of plaintiffs to gain standing in international environmental suit, especially after Lujan decision).
U.S. forces as occupiers\(^{172}\) brings with it certain responsibilities. Thus, U.S. citizens could sue to enforce these duties, as they presumably are actionable U.S. law.\(^{173}\)

2. ATCA As Basis for Suit by Iraqi Citizens To Protect Environment

As discussed above,\(^{174}\) ATCA is an attractive avenue for non-U.S. plaintiffs to bring suit in U.S. courts for harms committed abroad.\(^{175}\) The recently rediscovered\(^{176}\) grant of a right of action is difficult in the environmental context because of the requirement that the tort committed violate the law of Nations or treaty of the United States.\(^{177}\)

The declaration of U.S. forces in Iraq as occupying ones, and the concurrent international law obligations that status carries,\(^{178}\) could provide the necessary "law of Nations" critical for a successful ATCA claim.\(^{179}\) The environmental duties that occupying forces must fulfill\(^{180}\) create potentially actionable suits should they be transgressed. An Iraqi citizen would thus have a valid ATCA claim and would presumably have a particularized injury that would stand up to any standing scrutiny.

\(^{172}\) See supra notes 4, 38, 62, 124 and accompanying text (noting specific obligations of U.S. in Iraq after UN Security Council Res. 1483 that declared it an occupying force).

\(^{173}\) See supra notes 107-08 and accompanying text (noting that valid treaties implemented by legislation become part of U.S. law as well).

\(^{174}\) See discussion supra Part III.A.2 (outlining possible successful ATCA claim in environmental context brought by Afghan citizen).

\(^{175}\) See supra notes 113-32 and accompanying text (discussing possible applications of ATCA by non-U.S. citizens in U.S. courts to environmental torts committed abroad).

\(^{176}\) See supra note 115 and accompanying text (noting history of ATCA dates back to Judiciary Act of 1789 but only relatively recently has it come back into vogue as popular cause of action).

\(^{177}\) See supra notes 114-25 and accompanying text (discussing difficulty of environmental law claims under ATCA due to lack of widely held international environmental law and U.S. withdrawal from several environmental treaties).

\(^{178}\) See supra notes 4, 38, 62, 124 and accompanying text (noting specific obligations of U.S. in Iraq after UN Security Council Res. 1483 that declared it an occupying force).

\(^{179}\) See supra notes 114-25 and accompanying text (discussing difficulty of environmental law claims under ATCA due to third prong requirement of alleged tortious action violating law of Nations or U.S. treaty).

\(^{180}\) See supra notes 4, 38 and accompanying text (noting environmental obligations of occupying forces to occupied Nation including preservation of resources and protection of drinkable water).
3. Qui Tam Actions Potentially Brought by Citizens Containing Knowledge of Fraud

The FCA grant of rights of action requires a specific set of circumstances for the plaintiff to have standing to sue. While the qui tam relator is able to withstand the standing inquiry called for in *Lujan,* the limitations on the availability of the knowledge of the specific fraud and the prohibition of its publication or the commencement of a criminal action by the government make it persist as a difficult case to make.

The possibility of extensive fraud by U.S. government contractors and agencies was highlighted by the allegations against the Halliburton Company. The publication of these allegations and pursuit of criminal charges against the company basically prohibit a valid qui tam action arising out of the same facts. A similar set of circumstances with either Halliburton or another contractor in Iraq might provide a viable FCA claim, or at least force a settlement in which the plaintiff could dictate favorable terms including restoration of any environmental damage. Thus, a person with specific knowledge of fraudulent actions by a U.S. entity in Iraq with environmental ramifications could not only stop the harm, but recoup some of the monies of which the entity bilked the U.S. government.

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181. See discussion *supra* Part III.A.3 (outlining requisite knowledge plaintiff must possess and substantive and procedural guidelines that must be followed for successful FCA claim).

182. See *supra* notes 135-41 (noting specific right of action granted by FCA different than generalized grant provided in many U.S. statutes and that role of qui tam relator is one of "assignee" of potential recovery of financial recuperation and thus has particularized interest).

183. See *supra* notes 150-51 and accompanying text (discussing fact that FCA claims are limited to individuals who have specific knowledge of fraud that has not been published and when criminal charges have not been brought against the defendant by the U.S. government).

184. See *supra* notes 148-49 and accompanying text (noting allegations of fraud against Halliburton for actions specific to Iraq, but also noting Halliburton's presence in Afghanistan).

185. See *supra* notes 148-51 and accompanying text (noting prohibition against bringing FCA claim based upon facts published or part of public hearings and fact that allegations against Halliburton are widely known).

186. See *supra* notes 143-44 and accompanying text (recalling that some large settlements received from corporations when plaintiffs sued for environmental harm under FCA).

187. See *supra* notes 92-101 and accompanying text (advocating use of FCA in environmental context and discussing FCA's grant standing and portion of recovered monies to any individual bringing claim that party defrauded U.S. government).
CONCLUSION

The protection of the Afghan and Iraqi environments is an issue that has not received much attention in recent months, but one that is fundamental to the successful implementation of democracy, market economy, and a viable infrastructure. Unfortunately, the status of U.S. law allows actions by U.S. government agencies, contractors, and U.S. corporations to go unchecked by citizens and NGOs, unless very narrow exceptions are met. Hopefully, the Congress and U.S. courts will respond and allow watchful citizens to ensure respect for and protection of the environments of Afghanistan and Iraq.