

“Spraying First and Asking Questions Later”¹:

Congressional Efforts to Mitigate the Harmful Environmental, Health, and Economic Impacts of U.S.-Sponsored Coca Fumigation in Colombia

*Sheridan Pauker**

This Comment evaluates a set of conditions enacted by the United States Congress in a 2002 appropriations act to mitigate the harmful impacts of U.S.-sponsored aerial pesticide spraying of coca plants in Colombia. It finds that the conditions are somewhat novel in that they explicitly apply U.S. environmental law to joint U.S.-Colombian activities taking place in Colombia. The State Department’s compliance with Congress’s conditions, however, is the subject of criticism. Yet, this Comment finds that the adequacy of this compliance is unlikely to be subject to judicial review. For this reason, lack of an explicit enforcement mechanism in the statute greatly weakens its potential to mitigate the human health, environmental, and human rights impacts of the spraying program.

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1. Senator Patrick Leahy, Comment upon receipt of the State Department determination and report on the fumigation program (Sept. 5, 2002), *available at* <http://www.senate.gov/~leahy/press/200209/090502a.html>.

* J.D. Candidate, University of California at Berkeley School of Law (Boalt Hall), 2004; A.B. Harvard College, 1996. I am grateful to Professor Bradley Karkkainen, Tim Rieser, Martin Wagner, Marcello Mollo, Scott Pasternak, and Anna Cederstav for their helpful contributions to this Comment. I am also indebted to Margo Hasselman, Andrea Ruiz-Esquide, Liwen Mah, Jessica Owley, and the staff of ELQ for their excellent editorial assistance.

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INTRODUCTION

Congress appropriated up to \$660 million in the 2002 fiscal year for the Andean Counterdrug Initiative (ACI),² a program developed by the George W. Bush administration to expand ongoing U.S.-sponsored counternarcotics efforts throughout the Andean nations of South America.³ The ACI includes the aerial spraying of pesticides on over 120,000 hectares of land⁴ to destroy illegal coca crops. In Colombia, this

2. Foreign Operations, Export Financing, and Related Programs Appropriations Act (FOAA), 2002, Pub. L. No. 107-115, 115 Stat. 2118, 2130-31 (2002).

3. Press Release, International Information Programs, U.S. Department of State, Bush Budget Includes \$731 Million for Andean Counterdrug Initiative (Apr. 9, 2001), available at <http://usinfo.state.gov/regional/ar/colombia/andean9.htm>.

4. SEC'Y OF STATE, A REPORT TO CONGRESS ON UNITED STATES POLICY TOWARDS COLOMBIA AND OTHER RELATED ISSUES (Feb. 3, 2003), available at <http://www.state.gov/p/wha/rls/rpt/17140.htm>; LISA HAUGAARD, LATIN AM. WORKING GROUP,

program involves chemicals paid for by the United States, manufactured and mixed in Colombia, and sprayed by American aircraft.⁵ The fumigation program has aroused vociferous complaints and reports of negative health effects, damage to downwind legal crops, and human rights impacts on indigenous communities.⁶

In response to the outcry against the aerial spraying program, Congress sought to mitigate the harmful environmental, health, and social impacts on Colombian communities. Under the leadership of Senators Patrick Leahy (D-VT) and Russ Feingold (D-WI),⁷ Congress enacted a set of conditions on the appropriation for the Colombian coca fumigation program in the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 2002 (FOAA or "the Act").⁸ Unfortunately, Congress's effort fell short of its potential because the FOAA does not include an explicit enforcement mechanism. The Act requires the State Department to report to Congress that the health, environmental, and social conditions have been met.⁹ Yet, enforcement of the law is hampered because congressional reporting requirements generally are not subject to judicial review in U.S. courts.¹⁰

BLUNT INSTRUMENT: THE UNITED STATES' PUNITIVE FUMIGATION PROGRAM IN COLOMBIA (2002), available at <http://www.lawg.org/docs/LAWGFumigationReport.pdf>.

5. U.S. DEP'T OF STATE, REPORT ON ISSUES RELATED TO THE AERIAL ERADICATION OF ILLICIT COCA IN COLOMBIA § 2 (Sept. 4, 2002) [hereinafter STATE DEP'T REPORT], available at <http://www.state.gov/g/inl/rls/rpt/aeiccc/>; *Colombia Decision to Strengthen Drug Herbicide Challenged*, DOW JONES INT'L NEWS, Feb. 27, 2003.

6. See *infra* § I(C); STATE DEP'T REPORT, *supra* note 5, § 7.

7. 147 CONG. REC. S10,924, 10,938-39 (daily ed. Oct. 24, 2001) (amendment by Sen. Feingold); *id.* at S10,942 (comments of Senator Wellstone on conditions added by Senator Leahy); Christopher Marquis, *U.S. Law Imperils Colombia Coca Spraying*, N.Y. TIMES, July 11, 2002, at A10.

8. 115 Stat. at 2131. The FOAA conditions only applied to coca fumigation in Colombia (despite the fact that the ACI includes assistance to other Andean nations for narcotics control generally). *Id.*; see also STATE DEP'T. REPORT, § 1, A REPORT TO CONGRESS ON UNITED STATES POLICY TOWARDS COLOMBIA AND OTHER RELATED ISSUES; *supra* note 4.

9. *Id.*

10. See *infra*, § III(B). This paper focuses on the reviewability of the State Department's report in U.S. federal court, and does not evaluate the potential for litigation in state, foreign or international tribunals. It should be noted, however, that litigation over the aerial coca fumigation program has gone forward in Colombia. On June 25, 2003, the Superior Administrative Court of Cundinamarca, Colombia ruled that the fumigation violates rights to a healthy environment, security, and public health under the Colombian constitution. The court ordered a suspension of the spraying until studies of health and ecological impacts have been conducted. Colombian President Alvaro Uribe has reportedly disregarded this order and continued the spraying program. Dr. Neil Pyper, *Colombia - Court Suspends Aerial Coca Eradication in Colombia*, WORLD MARKETS RESEARCH CENTRE, July 27, 2003, available at 2003 WL 58434465; Yadira Ferrer, *Colombia: Uribe Defies Court on Drug Crop Fumigation*, INTER PRESS SERVICE, July 15, 2003, available at 2003 WL 6916183; Press Release, Earthjustice, *Colombian Court Orders the Suspension of Coca Spraying* (June 26, 2003), available at <http://www.earthjustice.org/news/display.html?ID=620>.

This Comment briefly examines the background of U.S.-sponsored aerial fumigation of coca in Colombia, describes the statutory provision attempting to redress the effects of this program, and evaluates initial compliance by the State Department. It then points out that the FOAA takes the somewhat unusual step of explicitly applying U.S. environmental law to U.S. actions in the territory of another sovereign nation. Finally, the piece critically examines the overall effectiveness of the FOAA conditions, particularly in light of potential barriers to judicial review. It concludes that while program critics have raised troubling questions as to the adequacy of the State Department's compliance with Congress's conditions, on balance it appears unlikely that the State Department's actions are reviewable in court. For this reason, lack of a formal enforcement mechanism weakened the statute's potential. At a minimum, however, the enactment provided some degree of accountability to concerned representatives in Congress, thereby giving the public a limited means of asserting political pressure with regard to this grave foreign policy concern.

I. HISTORICAL AND FACTUAL CONTEXT

A. *United States Coca Eradication Efforts in Colombia*

The United States has provided financial and military support to the Government of Colombia through various federal and international counternarcotics programs since the late 1970s.¹¹ The State Department justifies this policy through its assessment that ninety percent of the world's cocaine is produced, processed or transported through Colombia.¹² The stated goals of U.S. counternarcotics efforts in Colombia include elimination of opium poppy and coca production; fortification of the Colombian government's capacity to disrupt drug trafficking; destruction of the cocaine and heroin processing industries; and implementation of alternative development programs to encourage narcotics growers to produce legal crops instead.¹³ A recent thrust in the

11. Press Release, Scott Miller, International Information Programs, U.S. Dep't of State, State Dept. Official Examines Evolution of U.S. Policy Toward Colombia (Oct. 9, 2002), available at <http://usinfo.state.gov/regional/ar/colombia/02100904.htm>; USFUMIGATION.ORG, CHRONOLOGY, available at <http://www.usfumigation.org/JelsmaChronology/JelsmaChron.htm> (last updated Oct. 2000).

12. Press Release, U.S. Dep't of State, State Dept. on U.S. Counternarcotics Goals in Colombia (Aug. 14, 2002), available at <http://usinfo.state.gov/regional/ar/colombia/02081402.htm>. According to the State Department, ninety percent of the cocaine entering the United States is produced in or passes through Colombia. In 2000, there were 50,000 drug-related deaths and \$160 billion in economic losses in the U.S. due to illicit drug use. REPORT TO CONGRESS ON UNITED STATES POLICY TOWARDS COLOMBIA AND OTHER RELATED ISSUES, *supra* note 4.

13. Press Release, U.S. Dep't of State, *supra* note 12.

history of U.S. foreign policy in Colombia has been substantial financial and administrative support of "Plan Colombia," a \$7.5 billion program initiated by former Colombian President Andres Pastrana, which was aimed, in part, at fighting the narcotics industry.¹⁴ The "Andean Counterdrug Initiative" (ACI) was developed by the George W. Bush administration to "sustain and expand on Plan Colombia programs."¹⁵ The ACI sought to reduce Colombian coca production by thirty percent between January 2000 and December 2002.¹⁶

Aerial spraying of herbicides to destroy coca plants is a significant component of these efforts.¹⁷ Aerial fumigation in Colombia began in the late 1970s with the spraying of paraquat on cannabis, and has continued with the spraying of glyphosate on opium poppies and coca.¹⁸ To advance this program, the U.S. provides the Colombian government with training, "contractor support," financial assistance, and technical and scientific advice.¹⁹

B. *Herbicide Mixture Used in Fumigation*

The herbicide mixture sprayed aerially in Colombia contains 55% water, 44% of a formulation of the herbicide glyphosate, and 1% Cosmo-Flux 411F, a surfactant.²⁰ Glyphosate is the most common pesticide in the

14. U.S. DEP'T OF STATE, UNITED STATES SUPPORT FOR PLAN COLOMBIA, available at http://www.state.gov/www/regions/wha/colombia/fs_000328_plancolombia.html (last updated Mar. 28, 2000). The U.S. appropriated \$1.3 billion for Plan Colombia. U.S. DEP'T OF STATE, PLAN COLOMBIA, available at <http://www.state.gov/p/wha/rls/fs/2001/1042.htm> (last updated Mar. 14, 2001); see also S. REP. NO. 107-58 (2001) (describing history and purpose of Plan Colombia and Andean Counterdrug Initiative); Juan Forero, *No Crops Spared in Colombia's Coca War*, N.Y. TIMES, Jan. 31, 2001, at A1.

15. Press Release, International Information Programs, U.S. Department of State, Bush Budget Includes \$731 Million for Andean Counterdrug Initiative (Apr. 9, 2001), available at <http://usinfo.state.gov/regional/ar/peru/budget09.htm>. The Andean Counterdrug Initiative also increased U.S. counternarcotics assistance to countries other than Colombia and increased funding for social and economic programs in the Andean region. *Id.*

16. *Id.*

17. Press Release, U.S. Dep't of State, *supra* note 12.

18. USFUMIGATION.ORG, *supra* note 11.

19. OFFICE OF PESTICIDE PROGRAMS, U.S. EPA, DETAILS OF THE CONSULTATION FOR DEPARTMENT OF STATE USE OF PESTICIDE FOR COCA ERADICATION PROGRAM IN COLOMBIA § 4(VI) (2002) [hereinafter EPA REPORT], Executive Summary. In addition to U.S. military personnel, up to 400 U.S. civilian contractors provide support to Plan Colombia. SEC'Y OF STATE, A REPORT TO CONGRESS ON UNITED STATES POLICY TOWARDS COLOMBIA AND OTHER RELATED ISSUES, *supra* note 4 (U.S. civilian contractors employed by the U.S. government "are engaged in programs that include alternative development, narcotics interdiction and eradication, law enforcement, institutional strengthening, judicial reform, human rights, humanitarian assistance for displaced persons, local governance, anti-corruption, conflict management and peace promotion, the rehabilitation of child soldiers, and preservation of the environment.").

20. STATE DEP'T REPORT, *supra* note 5, § 2.

This Comment briefly examines the background of U.S.-sponsored aerial fumigation of coca in Colombia, describes the statutory provision attempting to redress the effects of this program, and evaluates initial compliance by the State Department. It then points out that the FOAA takes the somewhat unusual step of explicitly applying U.S. environmental law to U.S. actions in the territory of another sovereign nation. Finally, the piece critically examines the overall effectiveness of the FOAA conditions, particularly in light of potential barriers to judicial review. It concludes that while program critics have raised troubling questions as to the adequacy of the State Department's compliance with Congress's conditions, on balance it appears unlikely that the State Department's actions are reviewable in court. For this reason, lack of a formal enforcement mechanism weakened the statute's potential. At a minimum, however, the enactment provided some degree of accountability to concerned representatives in Congress, thereby giving the public a limited means of asserting political pressure with regard to this grave foreign policy concern.

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11. Press Release, Scott Miller, International Information Programs, U.S. Dep't of State, State Dept. Official Examines Evolution of U.S. Policy Toward Colombia (Oct. 9, 2002), available at <http://usinfo.state.gov/regional/ar/colombia/02100904.htm>; USFUMIGATION.ORG, CHRONOLOGY, available at <http://www.usfumigation.org/JelsmaChronology/JelsmaChron.htm> (last updated Oct. 2000).

12. Press Release, U.S. Dep't of State, State Dept. on U.S. Counternarcotics Goals in Colombia (Aug. 14, 2002), available at <http://usinfo.state.gov/regional/ar/colombia/02081402.htm>. According to the State Department, ninety percent of the cocaine entering the United States is produced in or passes through Colombia. In 2000, there were 50,000 drug-related deaths and \$160 billion in economic losses in the U.S. due to illicit drug use. REPORT TO CONGRESS ON UNITED STATES POLICY TOWARDS COLOMBIA AND OTHER RELATED ISSUES, *supra* note 4.

13. Press Release, U.S. Dep't of State, *supra* note 12.

people.³² According to Nancy Sanchez, the department's coordinator of human rights, "[i]n the children, above all, there are ill effects on their skin."³³ On October 9, 2002, the Colombian Ombudsman Office, the government's institution responsible for the promotion of human rights,³⁴ reported ongoing complaints of health impacts attributed to fumigation, including respiratory, gastrointestinal and skin problems.³⁵ The aerial fumigation in Colombia has even impacted U.S. citizens: the late Senator Paul Wellstone stated on the Floor of the Senate that he personally had been sprayed with glyphosate while visiting Colombia.³⁶

In addition, numerous reports have described damage to legal crops from the aerial spraying.³⁷ This has included harm to food plots, including bananas, beans, plantains and yucca,³⁸ as well as chicken and fish farms.³⁹ The Colombian Ombudsman received over 6,500 claims for damage to food crops between late 2001 and October, 2002.⁴⁰ This collateral harm from fumigation can be particularly difficult to avoid, since farmers often hide coca among legal crops such as bananas.⁴¹ This impact becomes especially detrimental because harm to food crops can cause malnutrition and other health problems by creating food scarcity.⁴² Medicinal plants used by indigenous communities also have been destroyed.⁴³ Ironically,

32. 147 CONG. REC. S10,924, 10,941 (daily ed. Oct. 24, 2001) (comments of Senator Wellstone).

33. Forero, *supra* note 14.

34. DEFENSORIA DEL PUEBLO, WHO WE ARE (2002), available at http://www.defensoria.org.co/base_level2.php?Pageinfo=antecedentes§ion=howeare.

35. See Latin America Working Group, *supra* note 29.

36. 147 CONG. REC. S10,941, 10,942 (comments of Senator Wellstone).

37. See, e.g., Letter from Donald Brenneis et al. to Congress (Oct. 9, 2002), available at <http://www.amazonalliance.org/scientific/anthro.pdf>; DEFENSORIA DEL PUEBLO, HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW IN THE CONTEXT OF THE ARMED CONFLICT AND THE AERIAL SPRAYING OF COCA PLANTS IN THE DEPARTMENT OF PUTAMAYO (2002); see also 147 CONG. REC. at H4517 (reciting Letter from Colombian Senator Rafael Ordúz to U.S. Congress (July 23, 2001)); *Planet Earth 2025: 10 Billion Served? 1995 Semiannual Survey: Chronological Summary Environmental Events In Latin America, 1995*, 6 COLO. J. INT'L. ENVTL. L. & POL'Y 367, 390-91 (1995) [hereinafter *Planet Earth 2025*].

38. See, e.g., Cesar Garcia, *U.N. Calls for International Monitors Controls on Spraying Drug Crops*, ASSOCIATED PRESS, July 24, 2001 (quoting Klaus Nyholm, UN counternarcotics representative to Colombia and Ecuador); Forero, *supra* note 14.

39. JEREMY BIGWOOD, MINISTERIO DEL AMBIENTE OF ECUADOR, A BRIEF OVERVIEW OF THE SCIENTIFIC LITERATURE REGARDING REPORTED DELETERIOUS EFFECTS OF GLYPHOSATE FORMULATIONS ON AQUATIC AND SOIL BIOTA 2, Mar. 6, 2002, available at <http://www.usfumigation.org/Literature/Scientific%20Papers/ReviewRoundup.pdf>; see also Latin America Working Group, *supra* note 29.

40. Latin America Working Group, *supra* note 29.

41. Forero, *supra* note 14.

42. Brenneis et al., *supra* note 37 at 1.

43. *Id.* at 3 n.4 (referring to photo documentation by Indigenous Organization of the Putumayo Zone).

the spraying also is allegedly destroying alternative crops planted as part of counternarcotics crop substitution programs.⁴⁴

Ecological harm from fumigation is a substantial concern. There have been accounts of damage from spraying to fish and other aquatic life, fauna and nontarget flora, insects, and soil composition and function.⁴⁵ The EPA reports potential toxicity to non-target plants from spray drift.⁴⁶ Additionally, the destruction of natural habitat and tropical ecosystems could harm native species. Researchers believe that tropical ecosystems are less able to regenerate than temperate ecosystems.⁴⁷ Glyphosate can also damage tropical soil ecology, further eroding the functioning native ecosystems.⁴⁸ Furthermore, aerial and manual crop eradication programs can lead to deforestation by driving farmers to cultivate new areas.⁴⁹

The aerial coca eradication program also creates significant social and cultural impacts in Colombia. For example, coca fumigation reportedly has prompted local farmers to abandon their homes.⁵⁰ Anthropologists warn that fumigation can displace indigenous communities, leading to social disruption and cultural dislocation.⁵¹ Local, regional, and national indigenous organizations in Colombia have criticized the aerial spraying, proposing crop substitution and manual eradication as alternatives.⁵² The Colombian Ombudsman has denounced glyphosate fumigation, warning of internal displacement of families and impacts on coffee farming.⁵³

44. Letter from Rachel Massey & Jim Oldham, Institute for Science and Interdisciplinary Studies, to Congress in response to State Department Report 12 n.42 (Sept. 19, 2002), available at <http://www.amazonalliance.org/scientific/maold.pdf>; Latin America Working Group, *supra* note 29.

45. BIGWOOD, *supra* note 39, at 2, 5; *Planet Earth 2025*, *supra* note 37, at 390.

46. EPA REPORT, *supra* note 19, Executive Summary, §2(VIII). Drift occurs when the pesticide spray reaches non-target areas. *See id.*

47. Massey & Oldham, *supra* note 44, at 8.

48. *Id.* (discussing BIGWOOD, *supra* note 39).

49. William C. Moorhouse, Note, *The National Environmental Policy Act, U.S. Counter-Narcotic Policies in Colombia, and Whether Recent Aid Should Require an Environmental Impact Statement*, 26 SUFFOLK TRANSNAT'L L. REV. 133, 144 n.49 (2002); Mark A. Drumbl, *International Human Rights, International Humanitarian Law, and Environmental Security: Can the International Criminal Court Bridge the Gaps?*, 6 ILSA J. INT'L & COMP. L. 305, 337 n.133 (2000) (citing Alvaro Jose Rodriguez).

50. 147 CONG. REC. H4517 (2001) (reading Letter from Colombian Senator Rafael Orduz to U.S. Congress (July 23, 2001)); Forero, *supra* note 14; Latin America Working Group, *supra* note 29.

51. *Id.* at 2.

52. *Id.* at 3.

53. Press Release, Defensoria del Pueblo, The Ombudsman Insists on Suspension of Glyphosate Fumigation in Caldas (2002), available at http://www.defensoria.org.co/base_level2.php?Pageinfo=base_noti§ion=news¬i=B.

II. STATUTORY CONDITIONS ON U.S.-SPONSORED COCA FUMIGATION IN COLOMBIA

A. *The Foreign Operations Appropriations Act of 2002*

To address the environmental and health consequences of U.S.-sponsored aerial spraying of herbicides in Colombia, Congress included a provision in Title II of the FOAA.⁵⁴ The Act, which made appropriations for foreign operations for the fiscal year ending September 30, 2002, included an allocation of up to \$660 million for the Andean Counterdrug Initiative.⁵⁵ The Colombian coca fumigation provision placed conditions on the use of funds appropriated by the Act to procure chemicals for aerial fumigation of coca plants. First, the Secretary of State was required to consult with the EPA Administrator, the Secretary of the Department of Agriculture (USDA), and “if appropriate,” the Director of the Centers for Disease Control and Prevention (CDC). Next, the Secretary was required to report to the House and Senate Committees on Appropriations as to whether the following conditions had been satisfied:

- (1) aerial coca fumigation is being carried out in accordance with regulatory controls required by the [EPA] as labeled for use in the United States, and after consultation with the Colombian Government to ensure that the fumigation is in accordance with Colombian laws;
- (2) the chemicals used in the aerial fumigation of coca, in the manner in which they are being applied, do not pose unreasonable risks or adverse effects to humans or the environment; and
- (3) procedures are available to evaluate claims of local citizens that their health was harmed or their legal agricultural crops were damaged by such aerial coca fumigation, and to provide fair compensation for meritorious claims.⁵⁶

54. Pub. L. No. 107-115, 115 Stat. 2118 (2002).

55. 115 Stat. at 2130.

56. 115 Stat. at 2131.

Finally, the provision stipulated that funds appropriated for the aerial coca spraying would not be available six months after enactment unless “alternative development programs have been developed, in consultation with communities and local authorities in the departments⁵⁷ in which such aerial coca fumigation is planned, and in the departments in which such aerial coca fumigation has been conducted such programs are being implemented”⁵⁸

Written legislative history on the 2002 aerial spraying conditions is relatively scarce. The House-Senate Conference Report on the 2002 foreign operations appropriations explained that the Conference committee adopted a version of a Senate amendment requiring the State Department consultation, determination and report to Congress.⁵⁹ Explaining the provision for evaluating claims of and compensating Colombian citizens, the Conference report stated that the managers of the appropriations bill were “concerned with the lack of effective procedures for evaluating claims of local citizens that their health was harmed or their licit agricultural crops were damaged” by the fumigation, and that “new procedures for handling claims have been put in place.”⁶⁰ The managers also expressed concern that coca eradication in some areas had taken place before alternative development programs had been put in place, and that some farmers in those areas already had re-planted coca. The Conference agreement included the Senate language requiring these alternative development programs “to ensure that farmers whose coca is eradicated have alternative sources of income, access to markets and social services.”⁶¹

For fiscal year 2003, Congress re-enacted the conditions on aerial coca eradication in a slightly different form.⁶² The Senate Appropriations Committee report re-introducing the provisions for 2003 stated that the Committee was concerned that “large areas are sprayed in proximity to people’s homes and food crops,” a practice that “varies significantly from the manner of use of herbicides in the United States.”⁶³ The report expressed the Committee’s concern that monitoring and enforcement of

57. “Departments” are Colombian Provinces. *America’s Heroin Crisis, Colombian Heroin and How We Can Improve Plan Colombia: Hearing Before the House Comm. on Government Reform, 107th Cong.* (2002) (testimony of Adam Isacson, Senior Associate, Center for International Policy).

58. 115 Stat. at 2131.

59. H.R. CONF. REP. NO. 107-345 (2001); *see also* S. REP. NO. 107-58 (2001).

60. H.R. CONF. REP. NO. 107-345.

61. *Id.*

62. Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 11, 173-74 (2003). This Comment does not analyze the legal implications of the 2003 Appropriations for the Andean Counterdrug Initiative.

63. S. REP. NO. 107-219 (2002).

compliance with Colombian and U.S. laws and regulations may not meet U.S. standards.⁶⁴ The report concluded, “[t]he Committee needs to be satisfied that, based on objective scientific analysis and other factors, the aerial spraying does not pose unreasonable risks or adverse effects to humans or the environment, and that effective monitoring and enforcement mechanisms exist to ensure its proper use.”⁶⁵

B. State Department Report Pursuant to FOAA Conditions

1. Summary

On September 4, 2002, the State Department delivered its report to Congress on the aerial drug eradication program in Colombia, pursuant to the FOAA.⁶⁶ The report certified that the State Department consulted with both the EPA and the USDA, and attached their responses.⁶⁷ It stated that the glyphosate formulation used to spray coca “is used in accordance with the EPA label instructions for non-agricultural use,” and that the spraying is in accordance with Colombian law.⁶⁸

In response to the condition requiring that the spraying not create unreasonable risks or adverse effects for humans or the environment, the report included the USDA’s assessment that this requirement was met.⁶⁹ The report acknowledged, however, that the EPA found that the glyphosate formulation could be acutely toxic to the eyes.⁷⁰ Because the State Department had not yet completed toxicological tests on the spray mixture, the EPA could not thoroughly evaluate its toxicity.⁷¹ The EPA therefore recommended that until further testing had been completed, the State Department use an alternative glyphosate product “with lower potential for acute toxicity.”⁷² The EPA’s response is discussed in detail below. Despite the EPA’s recommendation, the State Department has continued spraying the higher toxicity product “[u]ntil a lower toxicity glyphosate formulation could be made available for use in Colombia.”⁷³ The report details procedures to minimize health risks and mentions the

64. *Id.*

65. *Id.*

66. STATE DEP’T REPORT, *supra* note 5.

67. *Id.* § 1.

68. *Id.*

69. STATE DEP’T REPORT, *supra* note 5, § 5.

70. *Id.* § 1.

71. *Id.*

72. *Id.*

73. *Id.* The FOAA placed the burden on the State Department, not EPA, to certify that the conditions were being met. EPA merely played a consultative role.

State Department's intention to switch to a new, lower-toxicity product that has just been approved for use in Colombia, as soon as it is available.⁷⁴ Based on these considerations, the State Department concluded that spraying poses no unreasonable or adverse risks.

Next, the State Department report certified that the Government of Colombia, with funding and assistance from the United States, maintains procedures to evaluate local citizens' meritorious claims for damage from the spraying to licit crops.⁷⁵ The report stated that local Colombian representatives are receiving complaints, which are being investigated by Colombian entities and the U.S. Embassy.⁷⁶ Out of one thousand complaints originally received by August 2002, damages for the one claim found to be meritorious were still being calculated.⁷⁷ Finally, the report stated that international organizations, U.S. agencies and Colombian government entities had implemented or planned alternative development programs in every department in which spraying took place.⁷⁸

2. EPA Consultation Report

The EPA's consultation report comprised four sections: 1) a comparison between the use of glyphosate in Colombia and its use in the U.S., 2) an assessment of the human health risks caused by the spraying, 3) a review of glyphosate "incident reports" with reference to aerial spraying, and 4) an ecological risk assessment.⁷⁹

In the first section, the EPA stated that glyphosate is the most widely used herbicide in the U.S., and one of the safest.⁸⁰ The report found that use in Colombia is consistent with "parameters listed on U.S. labels."⁸¹ The EPA determined that the spraying of glyphosate on Colombian coca most closely resembled aerial application of the pesticide on U.S. forestry sites,⁸² except that "[g]lyphosate is typically applied to forestry sites using helicopters at air speeds of 50-70 knots (about 60-80 miles per hour). Application to forestry sites by fixed wing aircraft, if practiced at all, is

74. *Id.* The new glyphosate product was registered with the EPA for non-agricultural use in July 2002. *Id.*

75. STATE DEP'T REPORT, *supra* note 5, § 7.

76. *Id.*

77. *Id.*

78. STATE DEP'T REPORT, *supra* note 5, § 8.

79. EPA REPORT, *supra* note 19.

80. *Id.* § 1. Total global use of glyphosate estimated at 350 to 360 million pounds per year; of which 100 million pounds are used in the U.S. and between four and five million pounds are used in Colombia. *Id.*

81. *Id.*, Executive Summary.

82. *Id.* § 1.

extremely rare.”⁸³ The report acknowledged that application in Colombia is done at higher speeds, with fixed wing aircrafts and from a greater altitude than is typical for U.S. forestry sites.⁸⁴

The EPA’s Human Health Risk Assessment found that Cosmo-Flux 411F and glyphosate were “not highly toxic by oral or dermal routes” but might “cause mild eye and skin irritation.”⁸⁵ The Assessment hypothesized that dietary exposure was limited and therefore did not to pose a significant risk.⁸⁶ The report predicted dermal and inhalation exposure to individuals mixing the herbicide, to those pruning or pulling treated coca leaves after spraying and potentially to bystanders.⁸⁷ EPA assumed that spraying would not take place when people were present, and therefore the agency did not assess risks from glyphosate being directly sprayed.⁸⁸ The report examined incident reports from poppy rather than coca eradication programs, noting that the data did not conclusively indicate that spraying was responsible for the reported health problems.⁸⁹ However, the report cautioned against drawing generalized conclusions from the poppy data, given the lack of information provided to the EPA on the herbicide mixture sprayed on poppy, geographical differences, and differences in application rates.⁹⁰

The EPA’s review of reports of adverse health effects of glyphosate determined that glyphosate is generally less toxic than other pesticides, but may not be so for children under the age of six.⁹¹ Most illnesses caused by glyphosate were associated with direct handling, rather than spray, spill, drift, or residue.⁹² In the EPA’s analysis, a field report from El Tablon, Colombia yielded insufficient information to conclude that an aerial poppy eradication program caused skin, eye, and respiratory irritation and headaches.⁹³ Yet again, this report was based on spraying of poppy, rather than coca.⁹⁴

Finally, in its ecological risk assessment, the EPA found a risk of phytotoxicity to non-target plants, potential offsite exposure from spray

83. *Id.*

84. *Id.*, Executive Summary.

85. *Id.* § 2.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*, § 3 (noting that the data on children were based on a small sample size).

92. *Id.*

93. *Id.*

94. *Id.*

drift, possible secondary risk to animals due to loss of habitat, and a potential for surface water contamination.⁹⁵

3. *State Department's Response to the EPA Report*

In addition to discussing plans to switch to a lower toxicity herbicide formulation (mentioned above), the State Department promised to forward toxicity tests to the EPA and congressional committees once completed.⁹⁶ In response to concerns raised in the EPA report over the risk of spray drift, the State Department argued that the EPA's determinations were less valid because they were based on computer models. By contrast, in "ground truth verification missions,"⁹⁷ USDA scientists and the Colombian Environmental Auditor found evidence of spray drift to be rare and that "it is most often in trace amounts that have no observable adverse consequences on non-target plants" where it occurs.⁹⁸

4. *Colombian Procedure for Handling Citizen Complaints*

The State Department report stated that the Government of Colombia had maintained a process by which Colombians may have sought compensation for harm to legal crops or human health since inception of the aerial spraying program, and that the process was improved in October, 2001.⁹⁹ The report stated that the U.S. Embassy in Bogotá was working with the Colombian National Directorate of Dangerous Drugs (DNE) and Colombian National Police in this compensation process.¹⁰⁰ The report certified that "[c]omplaints [were] being received, logged, investigated, verified, and compensation was being allocated to cases with merit."¹⁰¹ Yet, most of the claims of harm to Colombian citizen's licit crops "[were] ruled out by an initial check of flight records establishing that spraying did not take place near the site of the claimed harm."¹⁰² If it was determined that there was no spraying in the area where harm was claimed, the complaint is dismissed.¹⁰³ In fact, at the time of the report, not one citizen had been compensated for

95. *Id.* § 4.

96. *Id.*

97. These missions are described in STATE DEP'T REPORT, *supra* note 5, § 2.

98. *Id.* § 4.

99. *Id.* § 7 (reprinting Colombia's National Drug Council Resolution No. 0017 of 2001). For example, the report stated that newspaper and radio announcements aired in spray zones informed citizens of their rights.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*, § 7.

damages.¹⁰⁴ The report stated that to receive compensation, “[t]he evidence must ‘clearly establish’ that any harm was due to spraying. Required proof included certification . . . that there was spraying in the area; copies of flight logs; reports on the field visits; and ‘other relevant evidence.’”¹⁰⁵ “Other relevant evidence” was not defined in the report.

The Colombian agency charged with administration of this program had received more than one thousand complaints by late August 2002, but eight hundred were dismissed based on evidence that spraying did not take place in the complainant’s vicinity during the date of the complaint.¹⁰⁶ Of the remaining complaints, 220 were awaiting field verification and fourteen had been verified. In the sole instance in which the agency has agreed to pay damages, those damages were still “being estimated.”¹⁰⁷

5. *Alternative Development*

The State Department certified that in all but one of the departments in Colombia where aerial fumigation is taking place, Colombian, U.S. and international agencies have developed and implemented alternative development programs.¹⁰⁸ In Antioquia, for example, where 1,620 acres of coca were sprayed in February 2002, an alternative development program is under negotiation; spraying has ceased pending its implementation.¹⁰⁹ The report does not describe these programs. Nor does it discuss the economic options set forth as alternatives to coca farmers.

C. *Evaluation of State Department Report*

Detailed critiques of the State Department report demonstrate public doubt as to the adequacy of the agency’s compliance with the FOAA conditions. On September 30, 2002, a group of scientists and advocacy organizations jointly released to Congress six reviews of the State Department report. They asserted that the report did not satisfy the conditions of the appropriations act because it failed to adequately address potential impacts to human health and the environment and

104. *See id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*, § 8.

109. *Id.*

failed to prove that the eradication program is safe.¹¹⁰ Among other things, these critiques pointed out that the report failed fully to assess the toxicity of the herbicide mixture, and the assessment of human exposure was problematic because it assumed compliance with safety protocols.¹¹¹ Furthermore, the report failed to consider health, economic and cultural impacts to indigenous peoples displaced by the spraying.¹¹² In terms of environmental impacts, critics maintained that the State Department ignored and downplayed many of the concerns raised by the EPA, such as indications that up to 300,000 acres of tropical forest could be damaged through spray drift.¹¹³ Moreover, the EPA analysis of potential ecological impacts may be flawed because the agency has little experience with tropical ecosystems, its tests are based solely on North American data, and none of its studies are based on the actual herbicide mixture being used in Colombia.¹¹⁴ Other critics pointed out that the State Department did not analyze impacts of continual relocation of coca fields resulting from eradication, such as deforestation.¹¹⁵ Finally, they questioned whether the spray compensation program was in compliance with the FOAA, given that out of one thousand claims, the Government of Colombia dismissed eight hundred, and that the only claim determined to have merits has not been paid.¹¹⁶ This section will briefly evaluate whether the State Department satisfied the FOAA conditions.

Condition (1) of the FOAA required the State Department to report to Congress that "aerial coca fumigation is being carried out in accordance with regulatory controls required by the [EPA] as labeled for use in the United States, and after consultation with the Colombian Government to ensure that the fumigation is in accordance with

110. Press Release, Amazon Alliance, Scientists Challenge Claims of U.S. State Department that Aerial Eradication in Colombia is Safe for Humans and Environment (Sept. 30, 2002), available at <http://www.amazonalliance.org/scientific/press.pdf>.

111. Letter from Dr. Ted Schettler, Science Director of the Boston Medical Center Science and Health Network, to Congress 4-5, Sept. 18, 2002, available at <http://www.amazonalliance.org/scientific/scientific1.htm> (arguing that safety procedures, such as wearing long-sleeved clothing, are often not followed by mixers, loaders and applicators of the herbicide).

112. *Id.* (citing Janet Chernela, Chair of the Committee for Human Rights, American Anthropological Association).

113. *Id.* (citing Massey & Oldham, *supra* note 44; Cederstav, *supra* note 25). In addition the EPA analysis fails to examine risks to plant species unique to Colombia or to endangered species. *Id.* (citing comments of Ivette Perfecto, University of Michigan, available at <http://www.amazonalliance.org/scientific/pv.pdf>).

114. *Id.* (citing Massey and Oldham, *supra* note 44) (noting that EPA itself stated that it had insufficient data to evaluate the ecological impacts adequately).

115. *Id.* (citing Cederstav, *supra* note 25).

116. *Id.* (citing Lisa Haugaard, Latin America Working Group).

Colombian laws.”¹¹⁷ To this end, the State Department reported that the glyphosate formulation is being used in Colombia in accordance with EPA label instructions for *non-agricultural* use.¹¹⁸ One of the adverse impacts that Congress sought to abate, however, was harm to licit crops.¹¹⁹ If the spraying has the potential to harm legal crops through spray drift or other migration, then it should be carried out in accordance with regulations for agricultural use.¹²⁰ The State Department reports that the aerial spray mixture is applied to coca in Colombia at a rate of 2.53 gallons per acre.¹²¹ This is within the allowable parameter of 2-10 pounds of glyphosate active ingredient per acre for non-agricultural use,¹²² yet it is significantly higher than the allowable rate of one pound, or one quart, per acre for agricultural use up to two weeks before harvest.¹²³ This amount is higher still than the actual average rate of application (less than 0.75 pounds of glyphosate per acre).¹²⁴ By using standards for non-agricultural, forestry-based use of herbicides, which are significantly looser than those for agricultural uses, it appears that the EPA and the State Department are not in compliance with the statute, nor are they carrying out congressional intent.

Condition (2) requires the State Department to demonstrate that “the chemicals used in the aerial fumigation of coca, in the manner in which they are being applied, do not pose unreasonable risks or adverse effects to humans or the environment.”¹²⁵ The USDA response states, with a mere scintilla of documentation, that “the risks involved with using glyphosate with commercially available adjuvants for narcotics eradication are minimal.”¹²⁶ The EPA’s response, on the other hand, also seems insufficient. Its risk assessment fails to provide essential information, such as “a comprehensive toxicological evaluation of the components separately and in their final formulation.”¹²⁷ Furthermore, the EPA used studies of the effects of glyphosate application in forestry sites, which are based on application by helicopter, whereas the U.S.-

117. Pub. L. No. 107-115, 115 Stat. 2118, 2130 (2002).

118. STATE DEP’T REPORT, *supra* note 4, § 1.

119. See 115 Stat. at 2130; H.R. CONF. REP. NO. 107-345 (2001); see also S. REP. NO. 107-219 (2002).

120. See, e.g., Schettler, *supra* note 111, at 2 (“Given that the aerial spray campaigns in Colombia occur in agricultural areas, EPA’s choice of reference point [forestry and rights-of-way] is inappropriate.”).

121. STATE DEP’T REPORT, *supra* note 5, § 2.

122. EPA REPORT, *supra* note 19, § 1.

123. *Id.*

124. *Id.*; see also Cederstav, *supra* note 25.

125. FOAA, Pub. L. No. 107-115, 115 Stat. 2118, 2131 (2002).

126. STATE DEP’T REPORT, *supra* note 5, § 5.

127. Schettler, *supra*, note 111, at 1.

sponsored spraying in Colombia uses fixed-wing aircraft.¹²⁸ This could lead to greater spray drift, and could hamper the EPA's ability to assess exposure and ensure safety.¹²⁹

Condition (3) requires the State Department to ensure that "procedures are available to evaluate claims of local citizens that their health was harmed or their licit agricultural crops were damaged by such aerial coca fumigation, and to provide fair compensation for meritorious claims."¹³⁰ In response, the report states that if Colombian government agencies determine that spraying did not take place in the area where harm is claimed, Colombia's National Directorate of Dangerous Drugs dismisses the complaint.¹³¹ Yet, this procedure does not appear to account for downwind damage due to spray drift. The EPA acknowledges that drift is a potential consequence of aerial spraying,¹³² yet the compensation procedure seems to leave downwind Colombian citizens without a remedy. As described *supra*, it is disconcerting that eighty percent of the claims have been dismissed with the justification that spraying did not take place in the complainant's vicinity during the date of the complaint, and to date, not one citizen has been compensated.¹³³ One additional aspect of the compensation scheme seems flawed: the statute does not specify who is to pay compensation to Colombians who have been harmed, which is arguably a significant factor in determining whether there will be sufficient resources to compensate the victims. On the whole, the level of investigation and remedy described in the report fails to provide satisfying proof that the compensation for harm from spraying is being carried out in accordance with congressional intent.

As to the Alternative Development Programs, the State Department certifies that Colombian, U.S., and international agencies are implementing such programs in all but one of the areas where spraying has taken place or is anticipated to take place.¹³⁴ Yet the report fails to provide any details on such programs, such as what types of alternative development have been implemented, how many acres of alternative crops have been planted, or how many farmers have benefited from these programs. The report also assumes that the existence of any alternative development program in each department is sufficient.¹³⁵ Critics point out that between 1997 and 2001, fumigation covered 3.8 times as much land

128. *Id.*; EPA REPORT, *supra* note 19, Executive Summary.

129. Schettler, *supra*, note 111, at 2 (arguing that use of a fixed wing aircraft increases the likelihood of drift).

130. 115 Stat. at 2131.

131. STATE DEP'T REPORT, *supra* note 5, § 7.

132. EPA REPORT, *supra* note 19, § 2.

133. STATE DEP'T REPORT, *supra* note 5, § 7.

134. STATE DEP'T REPORT, *supra* note 5, § 8; *see also* HAUGAARD, *supra* note 4, at 5.

135. HAUGAARD, *supra* note 4, at 5.

as was covered by alternative development projects.¹³⁶ In addition, the State Department report fails to address Congress's requirement in FOAA that such programs are developed "in consultation with communities."¹³⁷

These are just a few examples of the numerous existing and potential critiques of the State Department report. In fact, based on questions about the adequacy of the State Department's certification, the Senate Appropriations Committee "held up" the FOAA appropriation for Plan Colombia after the report was received, calling State Department staff members to the Senate to brief members.¹³⁸ These significant concerns lead to the inquiry addressed in the following section: if a strong argument can be made that the State Department failed to comply with the conditions set forth by Congress, can critics and/or injured parties seek review of the report in a U.S. court?

III. DISCUSSION

The conditions on appropriations for the Andean Counterdrug Initiative sought to address what the Senate Appropriations Committee characterized as pressing concerns: the health, environmental, and economic impacts of aerial coca fumigation on rural Colombian communities.¹³⁹ Assuming, *arguendo*, an entrenched foreign policy in favor of aerial fumigation in the Andes,¹⁴⁰ this discussion analyzes whether the statute created effective procedures to address harmful

136. *Id.* at 6.

137. FOAA, Pub. L. No. 107-115, 115 Stat. 2118, 2131 (2002); HAUGAARD, *supra* note 4, at 6.

138. Interview with Tim Rieser, Democratic Clerk, Foreign Operations Subcommittee of the Senate Appropriations Committee. (May 6, 2003). *See infra* § III(C) (discussion of Appropriations Committee notification procedures).

139. The State Department's report clearly downplays these concerns in its conclusion to proceed with spraying. *See id.* § 1.

140. U.S.-sponsored aerial fumigation in developing countries has been strongly criticized by policymakers, scholars, and activists because of its human health, environmental, and human rights effects, as well as concerns about the overall effectiveness of these programs at actually reducing narcotics production. *See, e.g.*, S. REP. NO. 107-58 (2001); 147 CONG. REC. S10,924, 10,942 (daily ed. Oct. 24, 2001) (comments of Senator Wellstone). Solimar Santos, Comment, *Unintended Consequences of United States' Foreign Drug Policy in Bolivia*, 33 U. MIAMI INTER-AM. L. REV. 127 (2002); Jefferson M. Fish, *Rethinking our Drug Policy*, 28 FORDHAM URB. L.J. 9, 250 (2000); John T. Curtin, *Drug Policy Alternatives—A Response from the Bench*, 28 FORDHAM URB. L.J. 263, 269-70 (2000); Press Release, Earthjustice, *Coca Cultivation in Colombia—The Story Behind the Numbers* (Feb. 27, 2003), available at <http://www.earthjustice.org/news/display.html?ID=550>. Furthermore, some lawyers have argued that U.S.-sponsored coca fumigation violates international human rights norms and have argued such claims before the U.N. Commission on Human Rights. *See, e.g.*, Press Release, Earthjustice, *Earthjustice Urges the UN Commission on Human Rights to Act* (Jan. 15, 2002). These inquiries, however, are beyond the scope of this Comment.

collateral impacts of fumigation. It first explores ways in which the statutory provision is novel within the context of extraterritorial application of U.S. environmental regulations. Next, given critics' skepticism as to the State Department's compliance with FOAA, this Comment considers whether the report is subject to review in U.S. federal court.¹⁴¹ Finally, in light of significant hurdles to judicial review, it evaluates the overall impact of the statute, considering, in particular, the avenues of congressional control and public pressure it provides.

A. Role of the FOAA Conditions in the Context of Extraterritorial Environmental Regulation

By requiring that aerial spraying "be[] carried out in accordance with regulatory controls required by the [EPA] as labeled for use in the United States,"¹⁴² FOAA directly applies U.S. environmental standards to joint U.S.-Colombian actions abroad. In general, there is a presumption against extraterritorial application of U.S. law.¹⁴³ Courts assume that Congress did not intend legislation to apply beyond U.S. borders absent a clearly expressed contrary intent.¹⁴⁴ Here, Congress has clearly expressed its intent to extend the scope of a statute to conduct by U.S. citizens in Colombia and to ensure compliance with U.S. law for activities conducted abroad.

In other policy areas, Congress has explicitly extended the reach of legislation to actions beyond U.S. borders. Examples include Title VII of the Civil Rights Act,¹⁴⁵ the Foreign Assistance Act of 1961,¹⁴⁶ and the Nuclear Nonproliferation Act.¹⁴⁷ In the environmental arena, extraterritorial regulation has been limited, with few such explicit

141. See *supra* note 10.

142. FOAA, Pub. L. No. 107-115, 115 Stat. 2118, 2131 (2002).

143. NEPA Coalition of Japan v. Aspin, 837 F. Supp. 466, 467 (D.D.C. 1993); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949); see also *Env'tl. Def. Fund v. Massey*, 986 F.2d 528, 530 (D.C. Cir. 1993) (discussing RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 38 (1965)).

144. See *Foley Bros.*, 336 U.S. at 285-86.

145. Kathryn M. Murphy, Note, *Title VII and Its Ability to Bind American Companies Acting Outside the United States*, 16 SUFFOLK TRANSNAT'L L. REV. 593 (1993) (discussing Civil Rights Act of 1991, Pub. L. No. 102-166 § 109, 105 Stat. 1071, 1077 (1991), which amended U.S. anti-discrimination laws to apply to conduct of U.S. corporations acting outside the U.S.).

146. *Massey*, 986 F.2d at 533 (citing 22 U.S.C. §§ 2151(k), 2218(c) (1976), which requires U.S. Agency for International Development to consider degree to which programs integrate women into the economy, as well as democratic and social trends, before approving developmental assistance).

147. *Id.* (citing 22 U.S.C. §§ 3201-3282 (1976), 42 U.S.C. §§ 2156-2157 (Supp. III 1979) (requiring the Nuclear Regulatory Commission to consider a nation's willingness to cooperate with nonproliferation efforts before approving nuclear export licenses)).

statutory provisions. For example, a hazardous waste export provision of the Resources Conservation and Recovery Act requires that the government of a receiving country be notified of shipments of hazardous waste.¹⁴⁸ The Marine Mammals Protection Act appears to be another example of extraterritorial environmental regulation, in that it prohibits persons or vessels subject to the jurisdiction of the United States from taking a marine mammal upon the high seas.¹⁴⁹ This law, however, has been held not to apply to the territories of other sovereign nations.¹⁵⁰

The National Environmental Policy Act (NEPA)¹⁵¹ does not contain explicit language that clearly applies its requirements to actions within the territory of other sovereign states. Considerable litigation, however, has arisen over whether Congress intended it to apply extraterritorially.¹⁵² In a case that also involved aerial spraying of pesticides as part of a U.S.-sponsored narcotics eradication program, the D.C. District Court assumed that NEPA applied, since the defendants did not dispute the existence of potential environmental impacts within the U.S.¹⁵³ The presumption against extraterritoriality also failed to block the application of NEPA to the National Science Foundation's decision to allow incineration of wastes in Antarctica, because the decision-making process to be reviewed was conducted almost entirely within the U.S.¹⁵⁴ Yet, that decision rested in part on the "unique" status of Antarctica as a global commons rather than an independent, sovereign nation.¹⁵⁵ Thus far, because of sovereignty concerns and deference to the executive branch in the area of foreign relations, where U.S. action takes place exclusively within a foreign nation, with no environmental impact in the U.S., NEPA

148. 42 U.S.C. § 6938 (2003).

149. 16 U.S.C. § 1372(a) (2003) (listing exceptions in Sections 1371–74, 1381, 1383). The high seas are defined as the jurisdictional zone of the ocean that lies more than 200 miles off the coastlines. The high seas are not subject to national jurisdiction and are considered to be part of the global commons. HUNTER ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 660–61 (2d ed. 2002); *United Nations Conference on the Law of the Sea (UNCLOS)*, 21 I.L.M. 1261, 1286–88 (1982), available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/part7.htm.

150. *United States v. Mitchell*, 553 F.2d 996, 1003 (5th Cir. 1977). Similarly, the Endangered Species Act prohibits the take of endangered species upon the high seas. 16 U.S.C. § 1538(a)(1)(C) (2003).

151. 42 U.S.C. § 4321 (2003).

152. HUNTER ET AL., *supra* note 149, at 1444.

153. *Nat'l Org. for Reform of Marijuana Laws (NORML) v. United States*, 452 F.Supp. 1226, 1232 (D.D.C. 1978) (plaintiffs alleged environmental and health impacts from paraquat-treated marijuana imported into the U.S.).

154. *Env'tl. Def. Fund v. Massey*, 986 F.2d 528, 529, 533–34 (D.C. Cir. 1993); see also *Natural Resources Defense Council (NRDC) v. United States Dep't of the Navy*, 2002 WL 32095131, *10 (C.D. Cal. 2002) (applying *Massey* to hold that presumption against extraterritoriality does not apply to Navy sonar testing program in the open sea or the United States' Exclusive Economic Zone, where decision-making process took place within the U.S.).

155. *Id.*

has been held not to apply.¹⁵⁶ The only explicit statement of the extraterritorial extent of NEPA is found in Executive Order 12,114, signed by President Carter in January of 1979.¹⁵⁷ NEPA, in sum, does not contain a clearly-expressed congressional intent for extraterritorial application sufficient to overcome the judicial presumption against such extensions.

Thus, in the context of U.S. extraterritorial environmental regulation, the 2002 Foreign Operations Appropriations Act contains a somewhat novel extension of U.S. pesticide regulation to joint U.S./Colombian actions abroad. If the State Department's compliance with the conditions is challenged in court, Congress's clear intent that U.S. standards apply extraterritorially will most likely overcome the presumption against extraterritorial application of environmental law.

B. Reviewability of State Department Report

As explained *supra*, the FOAA required the State Department to report to Congress certifying compliance with the conditions on the aerial fumigation in Colombia. Since critics have questioned the adequacy of the State Department's report pursuant to FOAA, it is useful to examine whether the report is subject to review in court. This section first discusses judicial review of agency action generally, next analyzes cases specifically dealing with review of reports to Congress, and finally examines the applicability of the political question doctrine.¹⁵⁸

1. Review of Agency Action under the Administrative Procedure Act

The FOAA does not contain an express provision for judicial review, and thus the reviewability of the State Department's compliance with the statutory conditions is subject to analysis under the Administrative Procedure Act (APA).¹⁵⁹ The APA provides that every "[a]gency action

156. *NRDC v. NRC*, 647 F.2d 1345, 1347-48 (D.C. Cir. 1981) (holding that NEPA did not apply to the Nuclear Regulatory Commission's approval of nuclear export applications). For a thoughtful analysis of the application of NEPA to Plan Colombia, see Moorhouse, *supra* note 49.

157. Exec. Order No. 12,114, 44 Fed. Reg. 1957 (Jan. 1979). The order applies NEPA to "major Federal actions significantly affecting the environment of a foreign nation which provide to that nation" products which are strictly regulated in the U.S. because their "toxic effects on the environment create a serious public health risk." *Id.* § 2-3(c)(1). Significantly, the Order exempts actions taken pursuant to national security interests or in the course of an armed conflict. *Id.* § 2-5(iii).

158. Other potential barriers to judicial review of the State Department's compliance with the FOAA conditions, such as forum non conveniens, standing, and mootness, are not addressed in this Comment.

159. See *Center for Biological Diversity v. Veneman*, 335 F.3d 849, 852-53 (9th Cir. 2003) (citing *Hells Canyon Alliance v. United States Forest Serv.*, 227 F.3d 1170, 1176 (9th Cir. 2000); 5 U.S.C. §§ 702-703 (2003)).

made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”¹⁶⁰ In *Bennett v. Spear*, the Supreme Court articulated the following test for a “final agency action:” first, the action must mark the “consummation” of the agency’s decision-making process—it must not be of a merely tentative or interlocutory nature; second, the action must be one by which “rights or obligations have been determined,” or from which “legal consequences will flow.”¹⁶¹

In general, courts maintain a strong presumption in favor of judicial review of agency actions.¹⁶² The APA’s review provisions apply “except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.”¹⁶³ A statutory preclusion can be explicit or implicit.¹⁶⁴ Withdrawal of a right of review for actions committed to agency discretion is a “very narrow exception” to the presumption of reviewability, applying only in “those rare instances where ‘statutes are drawn in such broad terms that in a given case there is no law to apply.’”¹⁶⁵

2. Reviewability of Reports to Congress

In spite of this preference for review of agency actions, courts have held that agency reports to Congress are not subject to judicial review, based on three major concerns: finality, separation of powers, and the lack of judicially manageable standards by which to judge the agency’s compliance. First, congressional reporting requirements have been held not to be subject to APA review because they are not considered final agency actions. For example, in *Dalton v. Specter*, a case concerning the reviewability of reports to Congress and the President by the Secretary of Defense and the Defense Base Closure and Realignment Commission, the Supreme Court articulated “[t]he core question’ for determining

160. *Id.* § 704; *Bennett v. Spear*, 520 U.S. 154, 175 (1997).

161. *Spear*, 520 U.S. at 177–78 (citations omitted).

162. See *Abbott Labs. v. Gardner*, 387 U.S. 136, 140–41 (1967), *overruled in part by* *Califano v. Sanders*, 430 U.S. 99, 105 (1977) (finding that the “APA is not to be interpreted as an implied grant of subject-matter jurisdiction to review agency actions”); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986).

163. 5 U.S.C. § 701(a).

164. See, e.g., *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349–51 (1984) (finding Congressional intent to preclude review for consumers in complex scheme where express review provisions had been made for other classes of affected parties, and holding that standard should be limited to whenever congressional intent to preclude suits is ‘fairly discernable’ in the legislative scheme).

165. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (quoting S. REP. NO. 752, at 26 (1945)), *overruled in part by* *Califano*, 430 U.S. at 105 (finding that the “APA is not to be interpreted as an implied grant of subject-matter jurisdiction to review agency actions”); see also *Heckler v. Chaney*, 470 U.S. 821, 828–31 (1985).

finality: 'whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.'¹⁶⁶ Applying this test, the Court viewed the reports at issue to be "more like a tentative recommendation than a final and binding determination."¹⁶⁷ The reports did not carry the requisite "direct consequences" because, under the statutory scheme, the President "takes the final action that affects' the military installations."¹⁶⁸ The Court thus held that the reports were not reviewable under the APA.¹⁶⁹

One could distinguish the State Department report pursuant to FOAA from the reports in *Dalton* because the report on the aerial spraying program is not merely an intermediate step prior to further congressional action. Instead, the State Department is making the determination whether to continue spraying, without further formalized, enforceable congressional control (at least for the current fiscal year).¹⁷⁰ The statute provides that the appropriated funds "may be made available" for the aerial spraying programs "only if" the Secretary of State, after consultation with the required agencies, "determines and reports to the Committees on Appropriations" that the conditions have been met.¹⁷¹ There is no subsequent legal step for Congress to take, and therefore it can be argued that the State Department's act of determining and reporting is a "final agency action," subject to judicial review.

Support for this argument could be drawn from *Japan Whaling Ass'n v. American Cetacean Society*,¹⁷² which involved a challenge to the Secretary of Commerce's failure to certify to the President Japan's violation of whaling quotas pursuant to the Pelly and Packwood Amendments to the Fishermen's Protective Act of 1967,¹⁷³ and the Magnuson Fishery Conservation and Management Act.¹⁷⁴ The Supreme Court found that the Secretary's formal agreement with Japan that it would not certify was an action "for which there is no other adequate remedy in a court." As such, it constituted a final agency action.¹⁷⁵

166. 511 U.S. 462, 470 (1994) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992)). The Commission is an independent body composed of members appointed by the President. *Id.* at 465.

167. *Id.* at 469 (quoting *Franklin*, 505 U.S. at 798).

168. *Id.* at 470 (quoting *Franklin*, 505 U.S. at 799).

169. *Id.* at 470-71. See also *Guerrero v. Clinton*, 157 F.3d 1190, 1194-95 (9th Cir. 1998) (holding unreviewable a report from the Director of the Office of Insular Affairs to Congress as required by Compact of Free Association Act of 1985 based, in part, on lack of finality).

170. Cf. *infra* § III(C) (discussing Senate informal notification procedures).

171. FOAA, Pub. L. No. 107-115, 115 Stat. 2118, 2030-31 (2002).

172. 478 U.S. 221 (1986).

173. 22 U.S.C. § 1978 (2003).

174. 16 U.S.C. § 1801 (2003).

175. *Japan Whaling*, 478 U.S. at 230 n.4. Cf. *Earth Island Inst. v. Christopher*, 19 Ct. Int'l Trade 812, 819 (Ct. Int'l Trade 1995), (holding judicial review of agency compliance with

Similarly, the State Department has formally decided to continue its aerial spraying of the glyphosate mixture. It could be argued that absent review of the State Department's compliance with the FOIA conditions, there will be no other adequate legal remedy for potential plaintiffs. The finality element of the judicial reluctance to review reports to Congress may thus be distinguished in potential litigation over the FOIA conditions.

The second rationale courts have used in declining invitations to review reports to Congress is grounded in separation of powers concerns. In *Natural Resources Defense Council (NRDC) v. Hodel*, the D.C. Circuit held that the Secretary of the Interior's submission of an explanation and proposal to Congress, pursuant to an appropriations provision, was not subject to judicial review.¹⁷⁶ The court found no precedent deeming congressional reporting requirements reviewable, and was thus highly reluctant to "sail into uncharted waters."¹⁷⁷ The general presumption of reviewability of an agency action did not apply, because in that case, the agency was "simply reporting back to the source of its delegated power."¹⁷⁸ The court reasoned that from a constitutional and logical perspective, Congress should be the branch to evaluate the adequacy of the Secretary's response.¹⁷⁹ In the absence of an explicit judicial review provision, the court concluded that "this issue seems to us quintessentially within the province of the political branches to resolve as part of their ongoing relationships."¹⁸⁰

This reasoning was followed by the Eighth Circuit in *Taylor Bay Protective Ass'n v. Administrator*, which held that a report to Congress prepared by the Army Corps of Engineers pursuant to the Flood Control Act of 1970 was not judicially reviewable.¹⁸¹ The *Taylor* Court agreed with the D.C. Circuit's view that "courts are ill-equipped to review the

appropriations act certification requirements regarding sea turtle protection and shrimping not precluded).

176. 865 F.2d 288, 317 (D.C. Cir. 1988) (discussing Continuing Appropriations Act, Fiscal Year 1987, Pub. L. No. 99-591, § 111, 100 Stat. 3341 (1986)).

177. *Id.*; accord *Greenpeace USA v. Stone*, 748 F. Supp. 749, 765 (D. Haw. 1990) ("There is no legal precedent which would allow plaintiffs a private right of action to enforce a reporting provision of a Congressional appropriations bill").

178. *Hodel*, 865 F.2d at 318.

179. *Id.* at 318-19.

180. *Hodel*, 865 F.2d at 319.

181. 884 F.2d 1073, 1081 (8th Cir. 1989). The Eighth Circuit applied 5 U.S.C. Section 701(a)(2), which precludes APA review when the "agency action is committed to agency discretion by law." *Id.* at 1080. "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Id.* (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984)). The court reasoned that nothing in the statutory scheme of the Flood Control Act indicated the necessity or advisability of judicial review of the required reports. *Id.*

results of these reporting statutes.”¹⁸² Similarly, in *NRDC v. Lujan*, the District Court for the District of Columbia relied on the separation of powers reasoning in *Hodel* and denied review of a Department of Interior report to Congress pursuant to the Alaska National Interest Lands Conservation Act (ANILCA).¹⁸³ In *Nat’l Assoc. of Gov’t Employees v. Schlesinger*, the Eastern District of Pennsylvania refused to review the adequacy of a report to Congress by the Secretary of Defense required by the Military Construction Authorization Act of 1967 for proposed base closures.¹⁸⁴ The court reasoned that there was no indication of congressional intent that the courts, rather than Congress itself, should determine the Secretary’s compliance with this reporting provision.¹⁸⁵ The ordinary presumption that Congress would have intended that courts interpret the statute was held inapplicable: “We see no reason why Congress would believe a Court would know better than [sic] Congress whether Congress had received in any particular case the information it needed.”¹⁸⁶

The closest case on point, *Greenpeace USA v. Stone*, addressed review of the Army’s compliance with a Defense appropriations condition constructed very much like the spraying conditions in question.¹⁸⁷ The statute prohibited both appropriation of funds and movement of chemical munitions from their existing storage sites, until the Secretary of Defense certified to Congress that live chemical munitions had been destroyed and that adequate storage capacity existed.¹⁸⁸ The court distinguished this appropriations condition from the *Japan Whaling* certification requirement because it was

a unique sort of agency action which is directly tied to Congress’ appropriation of funds. [citing *Hodel*] It does not involve the enforcement of an international treaty, or any other Act of Congress. It is, like numerous other similar congressional reporting

182. *Id.* at 1081.

183. 768 F. Supp. 870, 881–83 (D.D.C. 1991).

184. 397 F. Supp. 894, 894 (E.D. Pa. 1978) (citing 10 U.S.C. § 2662).

185. *Id.* at 896.

186. *Id.* The court also based its holding on the constitutional absence of the judiciary in the deployment of military resources. *Id.* at 897. See also *Guerrero v. Clinton*, 157 F.3d 1190, 1195-96 (9th Cir. 1998) (citing *Hodel*, 865 F.2d at 316-19); *Cf. United States v. White*, 869 F.2d 822, 829 (5th Cir. 1989) (holding nonjusticiable as a political question the adequacy of reports to Congress prepared by the General Accounting Office (GAO) and the United States Sentencing Commission pursuant to the Sentencing Reform Act of 1984, Pub. L. No. 98-473 § 235(a)(1)(B)(ii), 98 Stat. 2031, 2033); *United States v. Eves*, 880 F.2d 376, 379-80 (11th Cir. 1989) (same as to GAO report only) (“Determining whether reports to Congress are adequate to enable it to do its job is not the role of the Judicial Branch.”); *United States v. Martinez-Cortez*, 924 F.2d 921, 924-25 (9th Cir. 1991) (same).

187. 748 F. Supp. 749, 765 (D. Haw. 1990).

188. Department of Defense Appropriations Act, 101 Pub. L. No. 165, 103 Stat. 1112, 1127 (1990).

requirements, “simply [a] reporting back to the source of [the agency’s] delegated power in accordance with the Article I branch’s instructions.”¹⁸⁹

In sum, courts are reluctant to review reports to Congress out of a sense that Congress can take care of itself: “[T]he most representative branch is not powerless to vindicate its interests or ensure Executive fidelity to Legislative directives Generally, congressional reporting requirements are, and heretofore have been, a management tool employed by Congress for its own purposes.”¹⁹⁰

Finally, courts have grounded decisions against reviewing reports to Congress on a lack of judicially manageable standards for review. In *Hodel*, the appropriations provision required the Secretary of Interior to “indicate in detail” why specific portions of proposals for lease sales were rejected.¹⁹¹ The D.C. Circuit found that an inquiry into the requisite detail of the report would be “inherently elusive” because the report involved ongoing negotiations between the Secretary and members of Congress.¹⁹² Following this reasoning, the *Lujan* Court found that the reporting provision in ANILCA provided only “vague guidelines” for evaluating compliance with the ANCILA reporting requirement.¹⁹³ The statute “merely set forth topics that Congress wanted studied” and did not provide the court with means of ascertaining the level of detail intended by Congress.¹⁹⁴ The court in *Schlesinger* similarly noted the absence of standards for judicially determining whether the report would be satisfactory to Congress.¹⁹⁵ Significantly, both the *Lujan* and *Schlesinger* Courts noted that their rulings relied on the separation of powers factor, not the lack of judicially manageable standards.¹⁹⁶

189. 748 F. Supp. at 766 (emphasis added) (quoting *Hodel*, 865 F.2d at 318).

190. *Hodel*, 865 F.2d at 318-19.

191. *Id.* at 316 n.27.

192. *Id.* at 319.

193. 768 F. Supp. 870, 883 (D.D.C. 1991). *See also id.* at 873-4 (citing 16 U.S.C. § 3142 (h)) (text of ANILCA provision).

194. *Id.* at 882.

195. 397 F. Supp. 894, 899 (E.D. Pa. 1978). *See also* Guerrero v. Clinton, 157 F.3d 1190, 1196 (9th Cir. 1998) (finding no judicially manageable standards by which to assess adequacy of Director of the Office of Insular Affairs report to Congress); White, 869 F.2d at 829 (finding there is no judicially manageable standard to assess adequacy of GAO and Sentencing Commission reports to Congress); Erves, 880 F.2d at 379-80 (same as to GAO report only); Martinez-Cortez, 924 F.2d at 924-25 (9th Cir. 1991) (same).

196. *Schlesinger*, 397 F. Supp. at 899; *Lujan*, 768 F. Supp. at 882 (“even were the Court to conclude that the statute’s requirements were sufficiently discernible to judge the Report, that would not be dispositive because [*Hodel*] did not rely on the absence of such standards to find the statute unreviewable. The existence of that checklist [of purported standards for review] does not lessen the impropriety of the Court making ‘a judgment peculiarly for Congress;’ it would be constitutionally questionable for the Court (and plaintiffs) ‘to act as an ersatz proxy for Congress itself.’”) (citing *Hodel*, 865 F.2d at 318).

Thus, there is a strong judicial resistance to reviewing reports to Congress, particularly in the appropriations context. Even if plaintiffs could convince a court that the State Department's report was a final agency action, or that the FOAA conditions provided judicially manageable standards for evaluating compliance, the separation of powers concerns expressed by the courts in *Hodel*, *Taylor Bay*, and *Lujan* would likely compel dismissal of a challenge to compliance with a congressional reporting requirement.

3. *Foreign Affairs and the Political Question Doctrine*

Another potential barrier to potential litigation over the State Department's compliance with the FOAA conditions could arise because the issue relates to the foreign affairs functions of the executive branch. Judicial avoidance of "questions touching foreign relations"¹⁹⁷ is based on the political question doctrine, which "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."¹⁹⁸ Yet, as the Court stated in *Baker v. Carr*, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."¹⁹⁹ The *Baker* Court set out six factors for determining whether a political question is nonjusticiable:

[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.²⁰⁰

The Court declared that unless one of the six factors is "inextricable" from the case, it should not be dismissed as nonjusticiable under the political question doctrine.²⁰¹

197. *Baker v. Carr*, 369 U.S. 186, 211 (1962).

198. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986); see also *Made in the USA Found. v. United States*, 242 F.3d 1300, 1312-13 (11th Cir. 2001); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918).

199. *Id.*

200. *Id.* at 217.

201. *Id.*

Thus, in *Japan Whaling* the Court found that review of the Secretary of Commerce's failure to certify to the President that Japan harvested whales in excess of treaty quotas was not barred by political question doctrine.²⁰² The Court found the Secretary's decision not to certify after conclusion of an executive agreement with Japan²⁰³ to be "a purely legal question of statutory interpretation."²⁰⁴ Despite the "interplay" between the legislation at issue and foreign relations, the Court stated that "under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones."²⁰⁵ Furthermore, there is precedent in the D.C. Circuit for review of agency compliance with an appropriations condition, despite probable impact on the Executive's foreign affairs authority. In *Population Institute v. McPherson*,²⁰⁶ the court found reviewable the Administrator of the Agency for International Development's determination, pursuant to a condition in a 1985 appropriation for population planning, not to fund certain organizations in China. Although the court acknowledged that review would "likely have some effect on the Executive's latitude in conducting foreign affairs," it applied the *Baker* factors and held it not to be a nonjusticiable political question.²⁰⁷

On the other hand, the failure of the President to submit a report to Congress pursuant to the War Powers Resolution of 1982 was held to be a nonjusticiable political question in *Lowry v. Reagan*.²⁰⁸ In that case, the D.C. District Court reasoned that to grant or deny declaratory relief to plaintiff members of Congress would force it to decide whether U.S. Armed Forces were engaged in "hostilities." A judicial determination of this question might have contradicted legislative and executive branch pronouncements, and, according to the court, "would risk 'the

202. *Japan Whaling*, 478 U.S. at 230. Under the Pelly Amendment to the Fishermen's Protective Act of 1967, 85 Stat. 786 (codified as amended, 22 U.S.C. § 1978 (2003)), the Secretary was required to certify to the President if foreign nationals were fishing in a manner that "diminish[ed] the effectiveness" of the International Convention for the Regulation of Whaling. The Packwood Amendment to the Magnuson Fishery Conservation and Management Act, 90 Stat. 337 (codified as amended, 16 U.S.C. § 1821 (2003)), expedited this certification process and required mandatory sanctions for nations certified by the Secretary. *Japan Whaling*, 478 U.S. at 226.

203. *Id.* at 227-28.

204. *Id.* at 230.

205. *Id.*; see also *Int'l Labor Rights Educ. & Research Fund v. Bush*, 954 F.2d 745, 757 (D.C. Cir. 1992) (Mikva, J., dissenting) ("the Supreme Court has made it clear that the political question doctrine does *not* bar judicial review of a challenge to Executive compliance with a federal statute, even if the challenge involves important questions of foreign affairs.").

206. 797 F.2d 1062, 1064 (1986).

207. *Id.* at 1070.

208. 676 F. Supp. 333, 340 (D.D.C. 1987).

potentiality of embarrassment [that would result] from multifarious pronouncements by various departments on one question."²⁰⁹

One could argue that the aerial fumigation of coca in Colombia is a highly sensitive area of foreign policy unfit for judicial involvement.²¹⁰ For example, a judicial determination that the State Department has not properly ensured that the spraying does not pose unreasonable risks to human health or the environment could create the kind of "embarrassment from multifarious pronouncements" cautioned against in *Baker* and *Lowry*. Yet, the *McPherson* Court addressed this issue by reasoning that "at the end of the day, there will only be one pronouncement on this question. By reviewing the Administrator's determination, we simply assure that the final pronouncement, which is indisputably his to make, will be in accord with law and accepted principles of statutory construction."²¹¹ Applying this reasoning, potential plaintiffs may successfully argue that while judicial review of the report does touch on foreign relations, none of the *Baker* factors clearly bars judicial review. Review of the State Department's report pursuant to the FOAA conditions is arguably more like "a purely legal question of statutory construction"²¹² and is similar to justiciability of compliance with appropriations conditions found in *McPherson*. Whether the State Department has ensured that the aerial fumigation program complies with U.S. and Colombian regulatory controls, for example, could be viewed as a familiar question of statutory interpretation and administrative law. A court would not be forced to rule on issues clearly committed to coordinate branches, such as whether the U.S. is engaged in hostilities, as in *Lowry*.

In the aggregate, however, *Japan Whaling*, *McPherson* and *Lowry* are all distinguishable from a potential suit over the FOAA conditions, because they do not involve judicial review of the adequacy of a report to Congress. Given the great reluctance of courts to review reports to Congress discussed *supra*, the merits of a foreign affairs inquiry are unlikely to be reached in potential litigation.

C. Overall Evaluation of the FOAA Conditions

The State Department report has not satisfied critics' complaints about the aerial spraying component of the Andean Counterdrug Initiative. Given the high barrier to judicial review of agency reports, citizen enforcement of the FOAA conditions cannot be relied upon to

209. *Id.* (citing *Baker*, 369 U.S. at 217).

210. *E.g.*, *Baker*, 369 U.S. at 281-84.

211. *McPherson*, 797 F.2d at 1070.

212. *See Japan Whaling*, 478 U.S. at 230.

ensure compliance. The effectiveness of the statute would therefore have been greatly improved with an explicit provision for judicial review.²¹³

One potential means of encouraging compliance with the appropriations conditions and providing accountability is through the Senate's internal practices. The Senate Appropriations Committee has informal "notification" procedures, through which it requires agencies to provide fifteen-day notice before obligating appropriated funds.²¹⁴ If the Committee has questions or is dissatisfied with the agency's proposed course of action, it can "hold up" the appropriation.²¹⁵ The FOAA conditions contain an explicit reference to these procedures: "funds made available under this heading shall be subject to the regular notification procedures of the Committees on Appropriations."²¹⁶ For the 2002 Plan Colombia appropriation, the Committee did hold up the funds until it had been fully briefed by the State Department on the report required by the FOAA conditions.²¹⁷ This "hold" procedure appears to provide a modest measure by which Congress can promote compliance with the conditions. Through this procedure, concerned citizens may at least pressure members of the Committee to force the State Department to conduct a more complete analysis.

The fact that the 2002 State Department report was made public on the State Department's website provided a means of access to information for concerned members of the public. However, it is important to recognize that the notification procedure is unenforceable and informal, and that the FOAA conditions did not require that the report be made public.²¹⁸ On the whole, significant concerns about the detrimental human health, environmental, and human rights impacts of the Plan Colombia fumigation remain despite the State Department's certification to Congress that its conditions were met.

CONCLUSION

Congress should be commended for attempting to control U.S.-sponsored aerial coca fumigation in Colombia by extending the reach of U.S. environmental regulations to this U.S.-sponsored action abroad. By demanding that the spraying be carried out in a manner that does not

213. See, e.g., 16 U.S.C. § 1540(g) (2003) (Endangered Species Act citizen suit provision); 33 U.S.C. § 1365 (2003) (Clean Water Act citizen suit provision).

214. Rieser, *supra* note 138.

215. *Id.*

216. FOAA, Pub. L. No. 107-115, 115 Stat. 2118, 2131 (2002).

217. Rieser, *supra* note 138.

218. See, e.g., *NRDC v. Hodel*, 865 F.2d 288, 317 n.30 (D.C. Cir. 1988) ("a reporting-to-Congress obligation is entirely different than a congressionally imposed requirement that an Executive Branch department or agency gather information and make that information, upon compilation, publicly available.").

pose unreasonable risks to health or the environment, and by requiring a means of redress for those who have been adversely impacted by the spraying, this provision sought to address a vital concern. At a minimum, the conditions provided a means of congressional oversight of the fumigation component of Plan Colombia, and thereby created an avenue for political advocacy.

As discussed in this Comment, however, the State Department's implementation of these conditions leaves ample room for critique. It remains unclear whether the spraying is being conducted in compliance with U.S. environmental law and in a safe manner, and whether injured Colombian citizens are being compensated for their losses, despite the State Department's certification to Congress that this is occurring. Given that there are significant hurdles to overcome in obtaining judicial review of the State Department's compliance with the conditions, the statute did not go far enough in providing enforcement mechanisms.²¹⁹

219. Some issues for further research include the effect of the Colombian court ruling that the aerial fumigation program is unconstitutional, *see supra* note 10, the applicability of NEPA to the fumigation program, *see Moorhouse, supra* note 49, and the use of international human rights mechanisms to challenge the U.S. policy of aerial fumigation, *see Terry Collingsworth, The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183 (2002).