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THE TARNISHING OF AN ENVIRONMENTAL JEWEL: THE ENDANGERED SPECIES ACT AND THE NORTHERN SPOTTED OWL*

ELIZABETH A. FOLEY**

I. INTRODUCTION

> *[B]y tomorrow morning we shall almost certainly have one less species on Planet Earth than we had this morning. It will not be a charismatic creature like the tiger. It could well be an obscure insect in the depths of some remote rainforest. It may even be a creature that nobody has ever heard of. But it will have gone. A unique form of life will have been driven from the face of the earth forever.*[1]

Species are being driven to extinction by human activities at an ever accelerating pace. It is estimated that one species vanishes each day.[2] By the turn of the century, the rate of extinctions is expected to increase to 100 per day.[3]

The Endangered Species Act of 1973 (ESA)[4] stands as the final barrier against the relentless increase in species depletion and extinction. Characterized as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation,"[5] the goal of the ESA was to elevate regard for threatened and endangered species over that of the economic and political forces that had so long operated "untempered by adequate concern and conservation."[6]

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* This article won the grand prize in the 1991-92 Nicholas V. Schaps, Jr. Environmental Law Legal Writing Competition.

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1. NORMAN MYERS, THE SINKING ARK: A NEW LOOK AT THE PROBLEM OF DISAPPEARING SPECIES 3 (1979).
2. James Salzman, *Evolution and Application of Critical Habitat Under the Endangered Species Act*, 14 HARV. ENVTL. L. REV. 311 (1990).
3. MYERS, *supra* note 1, at 5.
4. 16 U.S.C. §§ 1531-1544 (1988) (original version at Pub. L. No. 93-205, 87 Stat. 884 (1973)).
5. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 180 (1978).
6. 16 U.S.C. § 1531(a)(1).

When enacted, the ESA enjoyed a broad nonpartisan consensus, overwhelmingly passing the House and the Senate.[7] Since the act became law, however, considerable controversy has emerged over the balance between the protection of threatened and endangered species and local economic interests.[8] In 1992, Congress must reauthorize this powerful and vital piece of legislation. Ironically, its renewal will depend on just the sort of political and economic pressures that it was enacted to avoid: the politics of an election year and the added economic pressure of a recession.[9]

The controversy surrounding the northern spotted owl is a recent example of the conflict between species preservation and economic and political interests.[10] Efforts to protect a rare owl that depends for its survival on the old-growth forests of the Pacific Northwest directly conflict with the interests of the local logging industry, the area's principle economic resource.[11] The political process, increasingly driven by economic concerns, has figured heavily in how much protection the northern spotted owl receives. As a result, the local economies are winning the battle at the expense of an endangered species.

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7. The ESA passed with a 92-0 vote in the Senate and 390-12 vote in the House. STEVEN YAFFEE, PROHIBITIVE POLICY: IMPLEMENTING THE FEDERAL ENDANGERED SPECIES ACT 55-56 (1982).

8. *See, e.g., Hill*, 437 U.S. at 153 (snail darter against dam construction); Palila v. Hawaii Dep't of Land & Nat. Resources, 852 F.2d 1106 (9th Cir. 1988) (palila finch against sheep grazing); Sierra Club v. Lyng, 694 F. Supp. 1260 (E.D. Tex. 1988) (red cockaded woodpecker against the logging industry), *aff'd in part and rev'd in part sub nom.* Sierra Club v. Yeutter, 926 F.2d 429 (5th Cir. 1991); Sierra Club v. Clark, 577 F. Supp. 783, 789 (D. Minn. 1984) (protection of the wolf despite interests of sheep ranchers), *rev'd in part*, 755 F.2d 608 (8th Cir. 1985).

9. *See Endangered Species Act Endangered; It Faces Renewal Vote in Recession-Plagued Year*, TWIN CITIES STAR TRIB., Jan. 20, 1992, at 7A.

10. This conflict has resulted in a number of legal challenges in Oregon and Washington beginning in 1988. *See, e.g.*, Headwaters, Inc. v. Bureau of Land Management, 940 F.2d 435 (9th Cir. 1991); Seattle Audubon Soc'y v. Robertson, 931 F.2d 590 (9th Cir. 1991), *rev'd*, 112 S. Ct. 1407 (1992); Portland Audubon Soc'y v. Lujan, 884 F.2d 1233 (9th Cir. 1989); Citizens Interested in Bull Run, Inc. v. Edrington, 781 F. Supp. 1502 (D. Or. 1991); Gifford Pinchot Alliance v. Butruille, 752 F. Supp. 967 (D. Or. 1990); Northern Spotted Owl v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988).

11. The timber industry has engaged in a long-term campaign to block or delay the identification of the northern spotted owl as a threatened or endangered species. Following almost 20 years of discussion, analysis, and litigation, the Fish and Wildlife Service reluctantly declared the northern spotted owl to be a threatened species in 1990. Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Northern Spotted Owl; Final Rule, 55 Fed. Reg. 26,114, 26,118 (1990) [hereinafter Listing Rule] (codified at 50 C.F.R. § 17.11(h) (1990)).

For a history of the efforts to protect the spotted owl, see INTERAGENCY SCIENTIFIC COMM. TO ADDRESS THE CONSERVATION OF THE NORTHERN SPOTTED OWL, A CONSERVATION STRATEGY FOR THE NORTHERN SPOTTED OWL 51-57 (1990) [hereinafter Thomas Report] (interagency committee chaired by Jack Ward Thomas).

In the case of the northern spotted owl, as in other similar cases, individuals who perceived that species protection threatened their economic interests appealed to their legislators, who in turn sought to exempt certain agency actions and projects from compliance with ESA and other environmental legislation.[12] Exemption from compliance with environmental legislation is often accomplished by attaching case-specific riders to appropriation bills.[13] This approach sidesteps the democratic process by avoiding committee review and preventing public scrutiny and input.[14] The controversy surrounding the northern spotted owl is a particularly egregious example of this case-specific legislation.

In response to ongoing litigation, Congress enacted section 318 of the Department of the Interior and Related Agencies Appropriations Act, popularly known as the Northwest Timber Compromise (Compromise).[15] The legislation provided that the United States Forest Service's current management proposal for federal old-growth timber sales, the subject of ongoing litigation, constituted "adequate consideration" for meeting the statutory requirements of the ESA. The Court of Appeals for the Ninth Circuit held, in *Seattle Audubon Society v. Robertson*,[16] that, in passing an act addressing ongoing litigation, Congress exceeded its constitutional authority. The appeals court found the act invaded the province of the judicial branch of government in violation of the Separation of Powers doctrine. The Ninth Circuit's holding seemed a long awaited victory for those who felt that the ESA was designed to avoid the economic pressures inherent in politically driven legislative decisions. The feeling of victory, however, was short lived, as the Supreme Court reversed the Ninth Circuit's decision in *Robertson v. Seattle Audubon Society*.[17] The Supreme Court held that the Northwest Timber Compromise compelled changes in law, not results under old law, by replacing the legal standards underlying the pending litigation with those set forth in the Compromise's subsections.[18] Further, the Court held, enactment of an

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12. *See* cases cited *supra* note 10.
13. *See* discussion *infra* part V.C.
14. *See* discussion *infra* part V.C.
15. Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, Tit. III, § 318(b)(6)(A), 103 Stat. 701, 747 (1989) (purporting to resolve the issues raised in the cases styled Seattle Audubon Soc'y v. Robertson, Civ. 89-160, and Portland Audubon Soc'y v. Lujan, Civ. 87-1160-FR).
16. 914 F.2d 1311 (9th Cir. 1990), *rev'd*, 112 S. Ct. 1407 (1992).
17. 112 S. Ct. 1407 (1992).
18. *Id.* at 1410.

entirely different statute merely modified the old laws through the operation of the canon that specific provisions qualify general ones.[19]

This comment argues that the short-term economic gains sought by case-specific legislation have become increasingly favored over long term species survival. Examining each of the issues in the context of the controversy surrounding the northern spotted owl, this paper will analyze, in part III, the history and important provisions of the ESA. Further, this comment will address, in part V, the process of attaching case-specific riders to appropriation legislation and other actions designed to side-step environmental regulation. Finally, part VI concludes by observing that the ESA and other environmental legislation cannot retain their efficacy if they continue to be routinely undercut in the interest of short-term economic gain. The focus on short-term gain could jeopardize the long-term health of our planet and its inhabitants. Moreover, this disturbing trend threatens the democratic process that ensures our survival as a society.

II. The Controversy Surrounding the Northern Spotted Owl

The controversy surrounding the spotted owl involves more than the loss of one species of bird. It concerns the destruction of an entire ecosystem and the loss of many of the species that depend on it for survival.[20] The ecosystem in jeopardy is the Pacific Northwest's old-growth forests, almost all of which are on federal lands.[21] Because of

19. *Id.* at 1411.

20. "About 60 currently listed, proposed, and candidate species have been observed within areas designated as critical habitat" for the northern spotted owl. Endangered and Threatened Wildlife and Plants; Determination of Critical Habitat for the Northern Spotted Owl; Final Rule, 57 Fed. Reg. 1796, 1827 (1992) (to be codified at 50 C.F.R. § 17.95(b)) [hereinafter Critical Habitat Rule]; *see also* Gary Meyers, *Old-Growth Forests, The Owl, And Yew: Environmental Ethics Versus Traditional Dispute Resolution Under The Endangered Species Act and Other Public Lands and Resource Laws*, 18 B.C. ENVTL. AFF. L. REV. 623, 632 (1991) (estimating that as many as 40 species may rely on old-growth forest for survival).

21. Old-growth forests usually have trees over 200 years old, have a highly diverse genetic content, provide essential habitat for thousands of vertebrate and invertebrate species, act as a giant water filtration system, provide oxygen, trap dust, and are especially effective at regulating water flows and reducing nutrient losses. Meyers, *supra* note 20, at 633 (citing Jerry F. Franklin, *Structural and Functional Diversity in Temperate Forests*, *in* BIODIVERSITY 166, 167 (Edward O. Wilson ed., Francis M. Peter, assoc. ed., 1988)).

In addition to their ecological services, old-growth forests are also valuable for their beauty and are a significant attraction in the lucrative tourism and recreation business which brings six billion dollars a year into Washington and Oregon. *Id.* at 639. Ninety-five percent of users indicate that scenic quality is important to the recreational experience in national forests. Critical Habitat Rule, *supra* note 20, at 1819.

Only about 10% of the original Pacific forest remains and almost all of the remaining old-growth is on public lands. Michael Blumm, *Ancient Forests, Spotted Owls, and Modern Public Land Law*, 18 B.C. ENVTL. AFF. L. REV. 605, 607 (1991).

its recognized reliance on the old-growth forests,[22] the northern spotted owl has been selected as an indicator species, a species whose rise or fall in population mirrors the health of all the plant and animal species in that ecosystem.[23]

The northern spotted owl is not an unusually impressive creature. The medium-sized, round-headed bird has dark brown plumage, dark eyes, and a mottled breast and abdomen. It weighs between twenty and twenty-six ounces and is sixteen to nineteen inches tall.[24] The bird is secretive, monogamous, territorial and nocturnal.[25] The owl's distinguishing characteristic is that it depends on old-growth forests for survival.[26] It requires broken treetops and tree cavities for nesting, and uses the multi-storied canopy of the old-growth forests for protection from both predators and extreme weather. The snags and decaying matter on the forest floor provide ideal homes for the owl's prey, such as mice and other small rodents.[27]

The old-growth forests are also home to thousands of vertebrate and invertebrate species.[28] In fact, experts agree that the old-growth Pacific forests are home to a greater mass of life than the most productive tropical forest.[29] A threat to the northern spotted owl therefore represents a threat to biodiversity, to an entire ecosystem, and possibly to the forest itself.[30]

The territorial owl is not alone in its preference for old-growth forests. For some, the public old-growth forests represent a plentiful source of low-cost timber. As a result, the timber industry and local politicians continue to vigorously resist protection of the northern

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22. "Ninety-three percent of the 1500 known owl sites are in stands exceeding 100 years of age, while areas with little old growth harbor only 1.7 percent of the known sites." Mark Bonnett & Kurt Zimmerman, *Politics and Preservation: The Endangered Species Act and the Northern Spotted Owl*, 18 ECOLOGY L.Q. 105, 111 (1991).

23. Meyers, *supra* note 20, at 635. Since not every species can be monitored, "indicator species" are observed as signs of general wildlife viability. National Forest System Land and Resource Management Planning Act, 36 C.F.R. § 219.19(a)(1) (1991). Accordingly, the impending extinction of the owl signals a much wider loss of habitat, biodiversity and the maintenance of commercially important gene pools.

For an excellent discussion about the biology, habitat requirements, management, and factors driving the spotted owl to extinction, see Bonnett & Zimmerman, *supra* note 22, at 108-24.

24. Bonnett and Zimmerman, *supra* note 22, at 109. The owl's scientific name is *Strix occidentalis caurina*.

25. *Id.*

26. *Id.* at 111.

27. *Id.*

28. Meyers, *supra* note 20, at 633.

29. Critical Habitat Rule, *supra* note 20, at 1819; *see also* Catherine Caufield, *The Ancient Forest*, NEW YORKER, May 14, 1990, at 46; Seattle Audubon Soc'y v. Evans, 771 F. Supp. 1081, 1088 (W.D. Wash.), *aff'd*, 952 F.2d 297 (9th Cir. 1991).

30. Blumm, *supra* note 21, at 608-09.

spotted owl which could limit access to a lucrative resource. Timber industry concerns center on economics and maximizing financial gain. Ironically, this same concern for economics works against the timber interests. Some forestry experts, for example, maintain that timber on federal lands is being sold at prices notably below cost.[31] One expert estimates that the federal timber program actually generated a net *loss* to the federal treasury of $186 million in 1990.[32] Others assert that the timber industry now looks to federal forests because they have harvested their lands at a rate nearly double the sustainable yield.[33]

Politicians, on the other hand, maintain that they are motivated by the prospect that the proposed reduction in timber harvesting may have a profound negative effect on many rural communities through the loss of jobs and the loss of direct revenues that support city and county governments.[34] Estimates of the number of jobs that will be lost range from a high of 106,000, in a study funded by the timber industry, to a low of 6000, in an estimate by the United States Forest Service prepared for other purposes.[35] One reason for such a wide discrepancy is a dispute over what factors will cause a loss of timber jobs. Environmentalists, economists, the General Accounting Office, and the Fish and Wildlife Service agree that, even without further restriction in old-growth harvesting, a significant reduction in timber jobs has occured and will continue due to mill mechanization, computerization and the increasing exportation of raw logs.[36]

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31. Perri Knize, *The Mismanagement of the National Forests*, ATLANTIC MONTHLY, Oct. 1991, at 98, 100, 103 (quoting Robert Wolf, a retired staffer at the Congressional Research Service, a forester, and a road engineer, who analyzed the Forest Service's timber income accounting system at the request of Representative Mike Synar).

32. *Id.*

33. Alexander Cockburn, *Big Timber is the Culprit, not Spotted Owl*, TWIN CITIES STAR TRIB., Jan. 20, 1992, at 7A (quoting Bob Morris, resource chief for Louisiana Pacific's Western Division, who described this as a resource philosophy akin to "liquidation").

34. Meyers, *supra* note 20, at 640 (citing Al Sample & Randall O'Toole, *At Issue: What's Really Driving National Forest Management*, AM. FORESTS, Jan.-Feb. 1989, at 58, 68).

35. Knize, *supra* note 31, at 103. The Fish and Wildlife Service estimated that 1,420 total jobs, 847 direct and 573 indirect and induced, may potentially be lost as a result of critical habitat designation. *Critical Habitat Rule*, *supra* note 20, at 1816.

36. Timber industry employment in the Northwest dropped by 40,000 workers between 1979 and 1985 while productivity increased from 109,000 board feet per worker in 1975 to 146,000 board feet per worker in 1988. Critical Habitat Rule, *supra* note 20, at 1813. In 1989, raw log exports represented 25% of the log volume extracted from the Northwest. *Id.* at 1814; *see also* Seattle Audubon Soc'y v. Evans, 771 F. Supp. 1081, 1094-95 (W.D. Wash.) (finding that about 30% of raw timber harvested in Washington and 11% harvested in Oregon is exported), *aff'd*, 952 F.2d 297 (9th Cir. 1991); Cockburn, *supra* note 33, at 7A (reporting that Louisiana Pacific's Western Division work force dropped from 2700 in 1988 to 1700 in 1992 because of mill closures and its export of unfinished redwood logs to its new plant in Baja,

Although the national economics of timber sales is still debated, the local effect of logging is clear. Local governments derive a significant portion of their annual revenues from timber sales. In some northwest counties, timber revenues account for nearly two-thirds of annual budgets.[37] One commentator argues, however, that "local governments are sacrificing stability and long-term timber production for a short-term fix."[38] Some would fault the local governments for failing to diversify and placing their local economic bases in a precarious position. At current rates of harvesting, remaining old-growth will disappear in fifteen to thirty years.[39] Thus, whether or not timber harvesting continues in spotted owl territory, income from timber sales will cease to be a significant source of revenue for local governments in the near future.

As early as 1973—coincidentally, the year the ESA was enacted—a national reference list of possible species for listing as endangered included the northern spotted owl.[40] Despite this early recognition of its peril, the owl was not officially listed as threatened until 1990.[41] Even so, in light of current political trends, being listed as an endangered species under the ESA does not guarantee survival for the owl or for the old growth forest that it inhabits.

III. Evolution of the Endangered Species Act

The need for meaningful national comprehensive protection of endangered species first gained wide recognition in the 1960s.[42] Although concern about the environment existed before then, species protection

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Mexico); Meyers, *supra* note 20, at 640-41 (stating that export is attractive because the Japanese, for example, have been willing to pay 5-10% more for unfinished timber than United States purchasers).

37. Meyers, *supra* note 20, at 641; *Evans*, 771 F. Supp. at 1095.

38. Meyers, *supra* note 20, at 642. Some industry insiders have revealed that the timber industry is harvesting at a rate nearly double the sustainable yield and that this is akin to "liquidation." Cockburn, *supra* note 33, at 7A.

39. Cockburn, *supra* note 33, at 7A; Critical Habitat Rule, *supra* note 20, at 1800 (estimating complete depletion in 20 to 30 years and as little as 10 years in some areas).

40. Thomas Report, *supra* note 11, at 51-52.

41. Listing Rule, *supra* note 11, at 26,118.

42. The federal government actually began regulating wildlife in 1900 with the passage of the Lacey Act. *See* ch. 553, 31 Stat. 187 (1900) (current version at 16 U.S.C. §§ 701, 1540, 3371-3378 (1988) and 18 U.S.C. § 42 (1988)). The Lacey Act prohibited interstate transportation of wild animals and birds killed in violation of state law. Other earlier efforts included the Migratory Bird Treaty Act of 1918, ch. 128, 40 Stat. 755 (current version at 16 U.S.C. §§ 703-711 (1988)), the Migratory Bird Conservation Act of 1929, ch. 257, 45 Stat. 1222 (current version at 16 U.S.C. §§ 715-715k, 715n-715r (1988)), and the Fish and Wildlife Coordination Act of 1934, ch. 55, § 2, 48 Stat. 401 (current version at 16 U.S.C. §§ 661-666(c) (1988)).

was primarily the province of the states.[43] This changed in the 1960s when the social and political conditions brought about the critical mass of concern necessary to enact the majority of federal environmental legislation still in existence today, including the Endangered Species Act.[44] "The environmental revolution undoubtedly was inevitable. Population was growing inexorably; pollution was increasing dangerously; land was being desecrated relentlessly. At some point, these excesses were bound to reach the limits of political endurance."[45]

During the 1960s, more people began to experience directly the effects of environmental degradation. They began to see that their own streams and lakes were fouled and that the air they breathed hung in a grey haze over their cities. They began to discuss the dangers of DDT and other pesticides and rapid depletion of the nation's forests. A cry rose up that "Lake Erie is dead."[46] Slowly, people began to band together to resist the forces responsible for these offensive environmental conditions.[47]

As the general public began to feel the effects of a deteriorating environment, a rush of social consciousness and rebelliousness emerged. The civil rights movement, the antiwar movement, the war on poverty, the women's liberation movement, and the environmental movement converged in a push toward egalitarian reform. Eventually, citizens from these various movements began to see that they had common values and purposes and a common passion for reform.[48] This vision of a more egalitarian society included concern about the other species that occupy our fragile planet.[49] It was commonly recognized that "[e]verything is connected to everything else."[50] Whether human activity involves the destruction or degradation of one race, one nationality, one sex, or one plant or animal, it affects the whole.[51]

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43. RICE ODELL, ENVIRONMENTAL AWAKENING: THE NEW REVOLUTION TO PROTECT THE EARTH 2 (1980).

44. *See, e.g.*, National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321-4370 (1977)); Clean Air Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7642 (1988)); Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1387 (1988)).

45. ODELL, *supra* note 43, at 2.

46. *Id.* at 3, 5-6.

47. *Id.* at 4.

48. *Id.*

49. Rice Odell, of The Conservation Foundation, and others have theorized that the views of earth taken from outer space in 1967 and 1968 and broadcast on public television led to wide-scale recognition of the limitations and vulnerability of our planet in the vast universe. *Id.*

50. *Id.* at 12 (quoting BARRY COMMONER, THE CLOSING CIRCLE 3 (1971)).

51. For a more comprehensive discussion about the social and political forces that converged to bring about the environmental revolution, see *id.* at 1-51.

The Endangered Species Act was one piece of environmental legislation that emerged from the social and political conditions of the 1960s. It began with the enactment of the Endangered Species Preservation Act in 1966,[52] and was extended in 1969 with the Endangered Species Conservation Act.[53] The weaknesses of both of these measures, however, soon became evident. Their scope and management tools were enhanced with the passage of the Endangered Species Act of 1973.[54] A brief review of each of these measures illustrates the overall purpose of species preservation.

In 1966, Congress enacted the first comprehensive program directing federal agencies to preserve the habitats of native vertebrate species found by the Secretary of Interior to be in danger of extinction.[55] The Act also prohibited the taking[56] of endangered species found on federal lands designated as wildlife refuges and mandated that federal agencies consider the impact of their actions on the survival of wildlife. The 1966 Act was a significant first step but it was weak in a number of important ways. First, it applied only to native vertebrate species.[57] Second, the Act promoted preservation only to the extent "practicable and consistent" with the primary purposes of the federal agencies.[58] Third, the Act narrowly defined wildlife refuge areas in which takings were prohibited.[59] Finally, Congress allocated only limited funds for additional habitat acquisition.[60] Not surprisingly, proponents of the measure moved to expand and strengthen its provisions shortly after passage.

In 1969, Congress amended the 1966 Act with the Endangered Species Conservation Act.[61] The 1969 amendment extended protection to invertebrate species as well as vertebrates; prohibited interstate com-

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52. Pub. L. No. 89-669, 80 Stat. 926 (1966) (repealed 1973).

53. Pub. L. No. 91-135, 83 Stat. 275 (1969) (repealed 1973).

54. Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C §§ 1531-1544 (1988)).

55. Pub. L. No. 89-669, 80 Stat. 926 (1966). For a more detailed discussion of the provisions and shortcomings of the 1966 Act, see YAFFEE, *supra* note 7, at 39-42; *see also* DANIEL ROHLF, THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION 21 (1989).

56. "Taking" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct." Endangered Species Act of 1973, 16 U.S.C. § 1532 (1988); *see also* Donald L. Soderberg & Paul E. Larsen, *Triggering Section 7: Federal Land Sales and "Incidental Take" Permits*, 6 J. LAND USE & ENVTL. LAW 169, 176, n.51 (1991) (elaborating on definition).

57. Endangered Species Preservation Act, 80 Stat. at 926(b).

58. *Id.*

59. YAFFEE, *supra* note 7, at 40.

60. Endangered Species Preservation Act, 80 Stat. at 926(b).

61. Pub. L. No. 91-135, 83 Stat. 275 (1969).

merce in illegally taken reptiles, amphibians, molluscs, and crustaceans; recognized the worldwide nature of the endangered species problem; and called for the assembly of an international conference.[62]

In one way, the 1969 amendment actually narrowed the provisions of the earlier measure. Unlike the 1966 Act, which passed with broad acceptance, the 1969 amendment met with political opposition in the course of the legislative process.[63] During the debate over the proposed changes, commercial interest groups surfaced to express their concerns. As a result, a compromise narrowed the definition of an endangered species to include only those "threatened with worldwide extinction."[64] This change occurred as a result of protests by the national fur industry which argued that it would be greatly handicapped if the United States was the only country to have such a law.[65]

After passage of the 1969 amendments, pressure to enact a statute with stronger measures to protect wildlife continued to build. This pressure peaked after Earth Day 1970 drew even more attention to the plight of endangered species. Finally, in 1972, President Nixon stated that the 1969 Act "simply does not provide the kind of management tools needed to act early enough to save a vanishing species."[66] Nixon "proposed legislation that 'would make the taking of endangered species a federal offense, and would permit protective measures to be undertaken before a species is so depleted that restoration is impossible.'"[67]

This pressure led to the drafting of a truly comprehensive statute, the Endangered Species Act of 1973 (ESA)[68], which replaced the two earlier efforts entirely. Like its predecessor in 1966, it passed both houses of Congress with very little opposition.[69] The new law rectified many of the weaknesses of the prior legislation. It dropped the 1969 amendment requiring an endangered species to be threatened with worldwide extinction and substituted the requirement that a species

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62. *See generally id.* For a more detailed discussion, see YAFFEE, *supra* note 7, at 42-47.

63. *See generally* YAFFEE, *supra* note 7, at 42-47.

64. *Id.* at 44.

65. *Id.* at 46.

66. *Id.* at 49 (quoting 8 WEEKLY COMP. PRES. DOC. 218-24 (Feb. 8, 1972)).

67. *Id.*

68. Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-1543 (1988)). For a more detailed discussion, see YAFFEE, *supra* note 7, at 47-57, and ROHLF, *supra* note 55, at 23-24.

69. *See supra* note 7 and accompanying text. It has been suggested that most people, including members of Congress, did not understand the implications of this legislation. If there had been strong opposition from commercial interests, state and local government, and other federal agencies, the final version of this act could have been very different. ROHLF, *supra* note 55, at 25.

need only be "threatened in a significant portion of its range."[70] The ESA also dropped the distinction between native and non-native species and eliminated the "where practicable" clause from the provision directing agencies to consider the effect on protected species in any agency actions.[71]

IV. How the Endangered Species Act Operates

The Endangered Species Act of 1973 was intended to elevate concern about species preservation above most other considerations.[72] The ESA declared that endangered and threatened species "are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."[73] One purpose of the ESA was to "take such steps as may be appropriate" to conserve the ecosystems on which endangered species depend so as to better safeguard, for the benefit of all citizens, the nation's heritage in fish, wildlife, and plants.[74]

Writing for the Supreme Court, Chief Justice Warren Burger stated that "the plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as 'incalculable.'"[75] Congress intended to elevate fish and wildlife concerns to a level that would "halt and reverse the trend toward species extinction, whatever the cost."[76]

A. *The Duty to Implement and Enforce the ESA*

The authority to implement and enforce the provisions of the ESA was given to the Secretaries of the Interior and of Commerce.[77] The Secretary of Commerce remains primarily responsible for marine species, while administration is handled by the National Marine Fisheries Service.[78] The Secretary of the Interior (Secretary), acting through the

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70. YAFFEE, *supra* note 7, at 50.

71. Sections 2(c) and 3(2) instructed agencies to "use . . . all methods and procedures which are necessary to preserve endangered species." 16 U.S.C. §§ 1531(c), 1532(2) (1977). Furthermore, the deliberate omission of "where practicable" from the language of the Act was interpreted as a conscious decision by Congress to give endangered species priority over the "primary missions" of federal agencies. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 185 (1978).

72. ROHLF, *supra* note 55, at 25.

73. 16 U.S.C. § 1531(a)(3) (1988).

74. *Id.* §§ 1531(a)(5), 1531(b).

75. *Hill*, 437 U.S at 187.

76. *Id.* at 184.

77. 16 U.S.C. §§ 1532(15), 1533(a).

78. Richard J. Tobin, *Interorganizational Implementation of the Endangered Species Act: A Hawaiian Case Study*, 4 J. LAND USE & ENVTL. L. 309 (1989).

Fish and Wildlife Service (FWS), is responsible for terrestrial and freshwater species.[79] The ESA also contains a provision permitting citizens to bring suit to enjoin violations of the statute or to compel the appropriate secretary to perform nondiscretionary duties or to enforce the taking prohibition.[80] The citizen's suit provision has proved invaluable in the case of the northern spotted owl. Virtually every action taken by federal agencies to protect the spotted owl has been prompted by court decisions in response to citizen suits.[81]

B. The Listing Process

Operation of the ESA begins when a species is nominated as a candidate for "listing."[82] This process begins either at the initiation of the Secretary of the Interior or when an "interested person" petitions the Secretary of Interior or the Secretary of Commerce to list a species as threatened or endangered.[83] Next, to the maximum extent practical, the Secretary of the Interior must determine within ninety days whether or not the petition presents substantial scientific and commercial information to warrant action on the petition.[84] Within twelve months of receiving the petition, the Secretary must publish a decision stating that the species should be listed, that listing is not warranted, or that additional information is required to determine whether the species is either threatened or endangered.[85]

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79. *See* Bonnett & Zimmerman, *supra* note 22, at 139 (citing Memorandum of Understanding Between the U.S. Fish and Wildlife Service and the National Marine Fisheries Service Regarding Jurisdictional Responsibilities and Listing Procedures Under the Endangered Species Act (Aug. 28, 1974)).

80. 16 U.S.C. § 1540(g).

81. *See* discussion *infra* parts IV.B., IV.C., V.C.1.a-c, V.C.2.

82. 16 U.S.C. § 1533(a)(2)(A).

83. *Id.* § 1533(b)(3)(A).

Threatened species are those likely to become endangered in the foreseeable future. *Id.* § 1532(20). A species that is identified as merely threatened is entitled to less protection under § 9 of the ESA. Private persons may apply for a permit from the secretary granting permission to engage in an "incidental take." An "incidental take" is defined as "any taking otherwise prohibited by section 9 . . . if such taking is incidental to, and not the purpose of, the carrying our of an otherwise lawful activity." *Id.* § 1539(a)(1)(B). In addition to other factors, the Secretary may grant a permit if he first determines that the taking "will not appreciably reduce the likelihood of the survival and recovery of the species in the wild." *Id.* § 1539(a)(2)(B)(iv). *See generally*, Soderberg & Larsen, *supra* note 56.

An endangered species is one that is likely to become extinct throughout all or a significant portion of its range. 16 U.S.C. § 1532(6).

84. 16 U.S.C. § 1533(b)(3)(A). This provision was added in an effort to force the Secretary to act on a vast backlog of candidate species, estimated to be as many as 4000. ROHLF, *supra* note 55, at 43.

85. 16 U.S.C. § 1533(b)(3)(B).

The Secretary must also determine whether or not to list a species "solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species . . . ."[86] Congress intended to exclude economic factors from the listing decision. Such intent was reiterated as recently as 1982 when Congress noted that petitions need not include any information on the economic impacts of listing a species.[87]

In January of 1987, after years of study and analysis without any action by the Fish and Wildlife Service, Greenworld, a Massachusetts environmental group, petitioned the Secretary to list the northern spotted owl as an endangered species.[88] On July 23, 1987, the FWS accepted the petition "as presenting substantial information indicating that listing might be warranted and initiated a status review."[89] On August 4, 1987, a second petition was submitted by the Sierra Club Legal Defense Fund (Defense Fund) on behalf of twenty-nine local, regional, and national conservation organizations, requesting that the northern spotted owl be listed as endangered in certain parts of Oregon and Washington and threatened throughout the balance of its range.[90]

On December 23, 1987, the Fish and Wildlife Service rejected both petitions on the basis that additional study was needed to develop population trend information and other biological data.[91] In May of 1988, the Defense Fund and twenty-two other conservation groups filed suit in the Federal District Court for the Western District of Washington.[92] In November of 1988, the court ruled that the Fish and Wildlife Service finding was arbitrary and capricious and remanded the matter to the Service for further review.[93] The court concluded that the Service's decision not to list the owl lacked scientific credibility and was, in fact, contrary to all the expert opinion.[94] All of the experts, including some employed by the agency itself, concluded that the owl was in risk of extinction.[95]

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86. *Id.* § 1533(b)(1)(A).

87. H.R. CONF. REP. No. 835, 97th Cong., 2d Sess. 19 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860.

88. Listing Rule, *supra* note 11, at 26,118.

89. *Id.*

90. *Id.*

91. *Id.*

92. Victor M. Sher & Carol Sue Hunting, *Eroding the Landscape, Eroding the Laws: Congressional Exemptions From Judicial Review of Environmental Laws*, 15 HARV. ENVTL. L. REV. 435, 453 n.111 (1991).

93. Northern Spotted Owl v. Hodel, 716 F. Supp. 479, 483 (W.D. Wash. 1988).

94. *Id.* at 482.

95. *Id.* at 482-83.

The Fish and Wildlife Service finally published the proposal to list the owl as threatened on June 23, 1989.[96] It was not until June 26, 1990, however, that the final rule was published listing the northern spotted owl as a threatened species, to be effective July 23, 1990.[97]

C. *Critical Habitat Designation*

Concurrent with making a determination to list a species as threatened or endangered, the Secretary is required to designate the species' critical habitat.[98] Critical habitat is an area essential to the *conservation* of a listed species.[99] The goal of conservation is to allow an endangered species to recover to a point where it may be removed from the protected list.[100]

The "concurrent" obligation to designate critical habitat is weakened by the requirement that this be done "to the maximum extent prudent and determinable."[101] Legislative history suggests that Congress intended these words to mean that critical habitat need not be identified in those rare instances where the benefits of such a designation are outweighed by the drawbacks.[102] It seems that the Secretary, however, has interpreted this modification as a grant of broad discretion. The Secretary frequently relies on this section to delay identification of critical habitat. In 1986, for example, concurrent habitat designation was not considered prudent in forty-one of forty-five final listing cases.[103]

As with the listing process, the Secretary must make the critical habitat designation on the basis of the best scientific and commercial data available.[104] Unlike the listing criteria, however, the Secretary may also take into consideration the economic impact and any other

96. 54 Fed. Reg. 26,666 (1989).

97. Listing Rule, *supra* note 11, at 26,114.

98. 16 U.S.C. § 1533(a)(3)(A).

99. Critical habitat is described as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed . . . , on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed . . . , upon a determination by the Secretary that such areas are essential for the conservation of the species.

Id. § 1532(5)(A).

100. *Id.* § 1532(3).

101. *Id.* § 1533(a)(3).

102. H.R. REP. No. 1625, 95th Cong., 2d Sess. 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9467.

103. ROHLF, *supra* note 55, at 51.

104. 16 U.S.C. § 1533.

relevant impacts of specifying any particular area as critical habitat.[105] Consequently, the economic impact can be a significant factor in the consideration unless failure to designate a particular area as critical habitat will result in the extinction of the species concerned.[106]

Not surprisingly, a citizen's suit was also required to push the Fish and Wildlife Service to designate the critical habitat of the northern spotted owl.[107] Consideration of economic factors appears to have played a major role in delaying identification of the owl's critical habitat. After years of resistance and injunctions,[108] the Service finally agreed to list the spotted owl as threatened.[109] In October 1989, a committee was established to create an ecologically reliable conservation strategy for the northern spotted owl.[110] The committee's efforts resulted in the issuance of the *Thomas Report*.[111] This "[r]eport has been described by experts on both sides of the issue as the first scientifically respectable proposal regarding spotted owl conservation to come out of the executive branch."[112] Despite the credibility of the *Thomas Report*, the Service chose to ignore its findings and refused to designate the critical habitat as recommended. The Service found that critical habitat could not be determined at the time.[113]

Finally, on January 15, 1992, the Fish and Wildlife Service published its final rule designating 6.9 million acres of forest as the critical habitat for the northern spotted owl.[114] Consideration of economic factors led to a reduction in protection for spotted owl habitat of 1.4 million acres from an August, 1991, proposal and 4.7 million acres from a May, 1991, proposal.[115]

D. *Protecting the Remaining Populations*

Two provisions of the Endangered Species Act are designed to protect the remaining populations of threatened and endangered species.

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105. *Id.* § 1533(b)(2).

106. *Id.*

107. *See* Northern Spotted Owl v. Lujan, 758 F. Supp. 621 (W.D. Wash. 1991).

108. The history of this long arduous process is set out articulately in Seattle Audubon Soc'y v. Evans, 771 F. Supp. 1081, 1088-95 (W.D. Wash.), *aff'd*, 952 F.2d 297 (9th Cir. 1991).

109. Listing Rule, *supra* note 11.

110. This was the Interagency Scientific Committee to Address The Conservation of the Northern Spotted Owl. Thomas Report, *supra* note 11.

111. *Id.*; *see also Evans*, 771 F. Supp. at 1092.

112. *Evans*, 771 F. Supp. at 1092.

113. Listing Rule, *supra* note 11, at 26,192. This reasoning appears to lack credibility. The *Thomas Report* is 427 pages long and completely summarizes all known biological data on the spotted owl. Meyers, *supra* note 20, at 651 n.253.

114. Critical Habitat Rule, *supra* note 20; *see also* Cockburn, *supra* note 33, at 7A.

115. Critical Habitat Rule, *supra* note 20, at 1809.

Section 9 of the ESA applies to all persons subject to United States jurisdiction.[116] Section 7 applies only to federal agency action.[117] Section 9 prohibits both private entities and governmental entities from taking any species of wildlife listed as endangered.[118] To "take" such a species means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct."[119] It is significant to note that section 9 applies principally to endangered species; unless specific regulations have been promulgated, this section does not protect threatened species.[120]

An endangered species may be taken under certain circumstances. A 1982 amendment authorized the Secretary to issue an incidental take permit to either private or governmental applicants who submit a conservation plan.[121] This permit allows the incidental taking of an endangered species in the course of carrying out an otherwise lawful act,[122] provided that the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.[123] The Secretary may also exempt any action where conservation of a newly listed species will cause undue economic hardship.[124]

Although section 9 provides a certain amount of protection for endangered species, section 7 has become the most significant provision of the ESA. Section 7 imposes both substantive and procedural requirements on federal agency action. Substantively, it requires that agencies insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of its critical habitat.[125] The term "jeopardize" is defined as any action "that would be expected, directly or indirectly,

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116. 16 U.S.C. §§ 1538, 1532(13). " '[P]erson' means an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State" or political subdivision thereof, or of any foreign government. *Id.* § 1532(13).

117. *Id.* § 1536.

118. *Id.* § 1538(a)(1)(B)-(C).

119. *Id.* § 1532(19).

120. *Id.* § 1538(a)(1)(G) merely prohibits the violation of any regulation pertaining to threatened species.

121. The conservation plan must specify the likely impact of the taking, steps that will be taken to minimize and mitigate such impacts, alternative actions considered and why they were rejected, and any other measures the Secretary may require. *Id.* § 1539(a)(2).

122. *Id.* § 1539(a).

123. *Id.* § 1539(a)(2)(B)(iv).

124. *Id.* § 1539(b). This is a very narrow exception, however, because it only applies to situations where there will be substantial economic loss resulting from a contract that was entered into before notice of consideration of a species has been published in the Federal Register.

125. *Id.* § 1536(a)(2).

to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species."[126] The Secretary must evaluate the effects of the action on listed species or critical habitat, including direct, indirect, and cumulative effects.[127]

Procedurally, section 7 requires federal agencies to consult with the Secretary if they have reason to believe that a threatened or endangered species is present in an area affected by a project and that the action may affect such species.[128] If the Secretary advises that such a species may be present, based on the best scientific and commercial data available, the acting agency may be required to conduct a biological assessment.[129] Section 7 also supplies a process by which an agency may apply for an exemption; however, its procedures are exceedingly complex and have not been used since their creation in 1978.[130]

In the spotted owl controversy, the agencies responsible for managing the national forests, the Forest Service and the Bureau of Land Management (Bureau), have been faced with many section 7 and section 9 directives. Agency inaction resulted in two additional citizen's suits challenging agency decisions not to protect owl habitat.[131] These suits resulted in an injunction prohibiting further sales of logging rights in spotted owl habitat areas until the Forest Service complied with the National Forest Management Act and adopted regulations to assure that a viable population of the species is maintained in the forests.[132] At the hearing challenging the agency's failure to identify owl habitat under the National Forest Management Act, a Forest Service biologist testified that the delay arose "primarily because in every instance, there was a considerable—I would emphasize considerable—amount of political pressure to create a plan which was an absolute minimum. That is, which had a very low probability of success and which had a minimum impact on timber harvest."[133] The injunction,

126. Sierra Club v. Lyng, 694 F. Supp. 1260, 1272 (E.D. Tex. 1988) (citing 50 C.F.R. § 402.02 (1987)), *aff'd in part and rev'd in part sub. nom.* Sierra Club v. Yeutter, 926 F.2d 429 (5th Cir. 1991).

127. 50 C.F.R. §§ 402.02, 402.14(g)(3).

128. 16 U.S.C. § 1536(a)(3)-(4).

129. *Id.* § 1536(c). Regulations have limited the language of the statute. The statute mandates that such an assessment "shall" be done pursuant to "any" agency action, while the regulations specify that a biological assessment need only be done if the project is a "major construction activity." 50 C.F.R. § 402.02 (1991).

130. *See* ROHLF, *supra* note 55, at 135.

131. *See* Seattle Audubon Soc'y v. Evans, 771 F. Supp. 1081 (W.D. Wash. 1991), *aff'd*, 952 F.2d 297 (9th Cir. 1991); Portland Audubon Soc'y v. Lujan, 768 F. Supp. 755 (D. Or. 1991).

132. *Evans*, 771 F. Supp. at 1096.

133. *Id.* at 1089 (quoting Dr. Eric Forsnan, a research wildlife biologist with the Forest Serv-

issued on May 23, 1991, gave the Forest Service until March 5, 1992, to come up with a conservation plan for the owl.[134] This injunction may have served as an incentive for the FWS to finally publish the owl's critical habitat designation on January 15, 1992.

V. Avoiding the Requirements of the Endangered Species Act

Not long after its enactment, the true strength and breadth of the Endangered Species Act (ESA) became apparent. Commercial interests, federal agencies, and local government officials suddenly realized that their interests were threatened by this powerful statute. This realization surfaced following *Tennessee Valley Authority v. Hill*,[135] in which the Supreme Court halted construction of the nearly completed Tellico Dam because it threatened the continued existence of the snail darter, a small three inch fish listed as endangered under the ESA.[136]

Efforts began immediately to weaken the ESA and to exempt certain projects from compliance with its provisions. As the saga of the spotted owl suggests, federal agencies' principal avoidance method is delay. Several other tactics, however, have been utilized as well. The decision in *Hill* was delivered in June, 1978, and before the end of that year, the ESA had been amended at the urging of Senator Howard Baker of Tennessee.[137] When that amendment failed to bring about an exemption applicable to the Tellico Dam project,[138] a "dark of night" amendment to an appropriation bill was quietly passed

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ice).

In the appeal that followed from the above case, the Forest Service advanced the novel argument that it was no longer required to plan for the future survival of the spotted owl because it had been declared a threatened species under the ESA and was therefore not a "viable" species entitled to consideration under NFMA. Seattle Audubon Soc'y v. Evans, 952 F.2d 297 (9th Cir. 1991).

134. *Evans*, 771 F. Supp. at 1096.

135. 437 U.S. 153 (1978). This suit was initiated in February, 1976, three months after the snail darter was listed as an endangered species. *Id.* at 164.

136. The project was 80% complete and some $78 million dollars had already been expended on the Tellico Dam project. Some $53 million would be lost in nonrecoverable obligations. *Id.* at 166.

The snail darter (*Peracina (Imostoma) tanasi*) was formally listed as an endangered species in 1975. 40 Fed. Reg. 47505-06 (1975); *see* 50 C.F.R. § 17.11(i) (1976). It was found to inhabit the Tennessee River and believed to require the river's unique clean gravel substrate for its survival. *Hill*, 437 U.S. at 162.

137. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 3, 92 Stat. 3751, 3758 (codified at 16 U.S.C. § 1536 (1988)); 124 Cong. Rec. 9804, 21,138 (1978) (statement of Senator Baker).

138. The 1978 amendment created a committee able to exempt projects from compliance with the ESA. *See* discussion *infra* part V.A.

through the legislative process by Representative John James Duncan of Tennessee.[139] By June of 1979, the Tellico Dam project had been exempted from compliance with the ESA and Congress had authorized conduct fully expected to result in extinction of a species.[140] The reaction to *Hill* set the stage for future actions intended to circumvent and weaken the protection afforded threatened and endangered species under the ESA.

A. *The God Squad*

In 1978, Congress amended the ESA to create the Endangered Species Committee (Committee), a group of high ranking government officials who could exempt a particular project from compliance with the ESA if it was determined that the project was of regional or national significance and that no reasonable alternatives were available.[141] Because of its power to determine which species survive and which do not, this committee has been nicknamed "the God Squad."[142]

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139. The process by which this amendment was spirited through the legislative process was documented by a reporter from the Washington Post:

> The clerk began to read [the amendment], but before he came to the word "Tellico," Duncan moved that the reading be waived.
>
> A reader of the Congressional Record for June 18 will not find the amendment and Duncan's explanation of what it would do. In fact, he did not make the explanation, and members on the floor at the moment did not know what he was proposing.
>
> The two key Appropriations Committee members on the floor, Rep. Tom Bevill (D-Ala.) and John T. Myers (R-Ind.), assured the House that they had reviewed the amendment and had no objection to it. Duncan's amendment was passed on a perfunctory voice vote. The official videotape of that day's proceedings showed that, in a span of 42 seconds, without knowing what they were voting on, House members had ordered completion of the Tellico [D]am project.

Ward Sincliar, *Lawmakers Cutting Legal Corners to Save Tellico Dam*, WASH. POST, July 17, 1979, at A2; *see* 125 CONG. REC. 15,301 (1979).

140. Energy and Water Development Appropriation Act of 1980, Pub. L. No. 96-69, 93 Stat. 437, 449 (1979) (codified at 16 U.S.C. § 831 (1980)). This amendment stated that the Tennessee Valley Authority Corporation is "authorized and directed to complete construction, operate and maintain the Tellico Dam and Reservoir project . . . notwithstanding the provisions of" the ESA.

141. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 3, 92 Stat. 3751, 3758 (codified at 16 U.S.C. § 1536 (1988)).

142. "The Endangered Species Committee was nicknamed the 'God Committee' or 'God Squad' because its primary function, distinguishing species truly worthy of protection under the ESA (thus insuring their continued existence) from those which are not (thus dooming them to certain extinction), seems to infringe upon the normal duties of the deity." Bonnett & Zimmerman, *supra* note 22, at 164 n.485.

The value of most species is unknown and unknowable. It is too complex and requires the convergence of factors that are impossible to predict. What if the God Squad had been sitting in judgment of the lowly bacteria that produced penicillin or the pokeweed that may control the

The Committee may grant an exemption if five of the Committee's seven members find that:

> (1) there are no reasonable or prudent alternatives to the agency action,
> (2) the benefits of the agency action clearly outweigh the benefits of alternative courses of action which would preserve the critical habitat of the species,
> (3) the action is in the public interest and of regional or national significance,
> (4) neither the agency nor the exemption applicant has made irreversible or irretrievable commitments of resources, and
> (5) the agency establishes reasonable mitigation and enhancement measures, including habitat acquisition and improvement, to minimize the adverse effects of the action on the species' critical habitat.[143]

The God Squad has been called upon in the case of the northern spotted owl. The Committee was asked by the Bureau of Land Management to exempt timber sales from complying with the section 7 requirements of the ESA. On June 17, 1991, the Fish and Wildlife Service determined that fifty-two timber sales proposed by the Bureau, primarily located in Oregon's coastal ranges, would jeopardize the continued existence of the northern spotted owl.[144] The Bureau then modified eight of the sales and applied to the God Squad for an exemption for the remaining forty-four sales.[145]

The Committee decided to deny thirty-one and allow thirteen of the forty-four timber sales based on criteria clearly accounting for local economic well-being.[146] In deciding whether the sales were of regional or national significance, the Committee decided that a countywide impact constitutes regional significance.[147] The Committee looked at several factors in order to determine whether an impact would be regionally significant. The impact was considered greater in those counties in which the direct timber jobs associated with the sales were high in comparison to non-timber employment or where the county government relied heavily on timber sales revenues.[148] These impacts

snail that transmits the dreaded disease schistosomiasis? Such examples abound. In the words of botanist, Edward S. Ayensu: "There is no plant that is unimportant. The genetic information contained in the germ plasm of each species is unique and cannot be reproduced once the last living tissue is gone." ODELL, *supra* note 43, at 258.

143. 16 U.S.C. § 1536(h)(1).

144. Critical Habitat Rule, *supra* note 20, at 1802.

145. 57 Fed. Reg. 23,405 (Dep't Int. 1992).

146. *Id.*

147. *Id.* at 23,407.

148. *Id.*

were measured against the impact of the sales on the northern spotted owl or its habitat.[149]

Providing for timber jobs at the expense of the northern spotted owl exemplifies the fact that economic factors have invaded the ESA decision making process. Such an outcome was preordained by the language contained in the Proposed Recovery Plan for the Northern Spotted Owl issued by the Department of the Interior.[150] In recognizing the cost of protecting the owl, the plan stated that "[p]rotection of enough habitat to support a self-sustaining owl population will be costly where high-quality habitat contains high-value timber, and in localized areas where timber harvest is the only source of income."[151] Clearly, the agency action demonstrates more of a concern for short-term economic well-being than with species preservation and long-term ecosystem survival.[152]

B. *Consideration of Economic Factors*

Despite the statutory mandate that the decision to list a species is to be made solely on the basis of the best scientific and commercial data available,[153] economic factors frequently become part of the equation. Further, critics charge that listings are sometimes deliberately delayed or put on indefinite hold for political reasons or to avoid potential conflicts with planned development activities.[154]

In 1978, an amendment to the ESA was enacted which permitted the consideration of economic factors in critical habitat designation and required that habitat designation occur concurrent with species listing.[155] This requirement had the effect of halting species listing almost entirely. Almost 2000 species proposed for listing in 1978 were withdrawn and no new species were added during the first year of Reagan's presidency.[156]

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149. *Id.*

150. *See generally* DEPARTMENT OF THE INTERIOR, SUMMARY OF THE RECOVERY PLAN FOR THE NORTHERN SPOTTED OWL—DRAFT (1992).

151. *Id.* at 22.

152. *See Bush Administration Wants Logging Ban Lifted*, WASH. TIMES, Aug. 27, 1992, at A2.

153. 16 U.S.C. § 1533(b)(1)(A) (1988).

154. *See* YAFFEE, *supra* note 7, at 86-91. A General Accounting Office report to the Congress in 1979 confirmed the fact that such actions had in fact occurred. *See generally* U.S. GEN. ACCOUNTING OFFICE, ENDANGERED SPECIES—A CONTROVERSIAL ISSUE NEEDING RESOLUTION (1979).

155. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632 §§ 11, 13, 92 Stat. 3751 (1978) (codified at 16 U.S.C. § 1533(b)(1)(B)(2)).

156. ROHLF, *supra* note 55, at 27.

Two subsequent amendments, one in 1982[157] and one in 1988,[158] attempted to remedy this situation. The first amendment somewhat separated species listing and habitat designation.[159] The second amendment provided for more expeditious listing and designation procedures.[160] These changes were designed to protect candidate species while the agencies acted to clear up the huge backlog of petitions that had accumulated following the 1978 amendment.[161] Currently, however, over 3000 species proposed for listing have yet to reach agency consideration.

Injecting economic factors into the process of critical habitat designation (unless extinction is imminent) also creates a strong incentive for interested parties to exert pressure on the Secretary to identify species as threatened rather than endangered. Further, consideration of economic factors is contrary to the very purpose and structure of the ESA:

> As currently written, the critical habitat provision is a startling section which is wholly inconsistent with the rest of the legislation. It constitutes a loophole which could readily be abused by any Secretary of the Interior who is vulnerable to political pressure, or who is not sympathetic to the basic purposes of the Endangered Species Act.[162]

The truth of this observation is exemplified in the case of the spotted owl. Consideration of economic factors reduced the size of the spotted owl critical habitat, as suggested by the *Thomas Report*, by some 4.7 million acres or forty percent.[163]

C. *Appropriation Bill Riders*

The use of appropriation bill riders has emerged as the principal means of sidestepping compliance with the ESA and other environmental laws. This approach serves the dual purposes of exempting local projects from complying with environmental laws and of avoiding

157. Pub. L. No. 97-304, § 2(a), 96 Stat. 1411 (1982).

158. Pub. L. No. 100-478, 102 Stat. 2306 (1988) (codified at 16 U.S.C. § 1533(b)(3)).

159. Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, § 2(a), 96 Stat. at 1411.

160. Endangered Species Act Amendments of 1988, Pub. L. No. 100-478, 102 Stat. at 2306.

161. *Id.*

162. H.R. REP. No. 1625, 95th Cong., 2d Sess. 69 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9483.

163. Critical Habitat Rule, *supra* note 20, at 1809. The *Thomas Report* is quoted extensively throughout the rule designating the owl's critical habitat.

the political fallout attendant with an attempt to change the laws themselves.[164] Use of these case-specific riders to avoid environmental laws began in the mid-1970's with the Tellico Dam Project.[165] These riders have been utilized extensively in the controversy surrounding the spotted owl in order to facilitate continued logging of the owl's essential habitat, the old-growth forests.

1. *The Spotted Owl and Appropriation Riders*

As a result of the success in the Tellico Dam controversy, appropriation riders have become the preferred method of exempting agency action from compliance with environmental regulations. This approach has been used on a number of occasions to exempt large scale sales of old growth timber from national forests in the Pacific Northwest.[166] Recent riders have gone so far as to include language that precludes judicial review all together.[167]

a. The Mapleton District riders

The first rider affecting northern spotted owl habitat followed the decision in *National Wildlife Federation v. United States Forest Service*.[168] The court halted logging in Oregon's Mapleton District of the Siuslaw National Forest. In 1984, the Oregon District Court ruled that an environmental impact statement was required under the National Environmental Policy Act of 1969.[169] The court therefore enjoined further timber sales until the Forest Service issued the statement.[170]

In 1985, while an appeal was pending before the Ninth Circuit, Oregon Senator Mark O. Hatfield added a rider to a Fiscal Year 1985 Supplemental Appropriation Bill.[171] It authorized the Forest Service to resell timber previously sold but returned to the government unlogged

164. Sher & Hunting, *supra* note 92, at 469-70.

165. *See supra* notes 136-41 and accompanying text.

166. Seattle Audubon Soc'y v. Robertson, 931 F.2d 590 (9th Cir. 1991), *rev'd*, 112 S. Ct. 1407 (1992); Headwaters, Inc. v. Bureau of Land Management, 940 F.2d 435 (9th Cir. 1991); Portland Audubon Soc'y v. Lujan, 884 F.2d 1233 (9th Cir. 1989); Citizens Interested in Bull Run, Inc. v. Edrington, 781 F. Supp. 1502 (D. Or. 1991); Gifford Pinchot Alliance v. Butruille, 752 F. Supp. 967 (D. Or. 1990); Northern Spotted Owl v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988).

167. *See, e.g.*, Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Northwest Timber Compromise, Pub. L. No. 101-121, Tit. III, § 318(b)(6)(A), 103 Stat. 747 (1989).

168. 592 F. Supp. 931 (D. Or. 1984).

169. 42 U.S.C. § 4321 (1988).

170. *National Wildlife Fed'n*, 592 F. Supp. at 944-45.

171. Pub. L. No. 99-88, 99 Stat. 293, 340 (1985).

because the contract price exceeded the market value.[172] The rider expressly allowed these sales to proceed "notwithstanding any other provision of law, and notwithstanding the injunctions issued" by the courts involved.[173] It also provided that the decision by the Forest Service to resell "shall not be subject to judicial review."[174] This rider was renewed in fiscal year 1989, again notwithstanding the prior injunction and again precluding judicial review.[175]

The new rider permitted the sale of up to ninety million board feet of additional timber from the Mapleton District in order to "ensure adequate availability of timber" to support the logging industry in Oregon.[176] It provided that these sales should be treated as satisfying environmental laws and that agency actions "shall not be subject to administrative or judicial review for compliance with [these] Acts."[177]

b. The Medford District rider

The Medford District involves a scenario very similar to that of the Mapleton District. The Medford District is a forested area in southern Oregon. An environmental group, Headwaters, Inc., claimed that the Bureau had permitted clear-cutting in excess of the statutory limit.[178] In anticipation of litigation, Senator Hatfield and Oregon Representative Les AuCoin attached a rider to a continuing resolution for fiscal year 1987, providing for an uninterrupted supply of timber.[179] This rider also exempted Bureau decisions from judicial review.[180]

c. Old-growth forests and the spotted owl rider

Between 1978 and 1983, the Bureau issued an impact statement for each of seven forest management districts in Oregon's old-growth forests. These impact statements failed to consider protection for the northern spotted owl.[181] In 1987, responding to pressure from environ-

172. Return of this timber had previously been authorized by the Federal Timber Contract Payment Modification Act, 16 U.S.C. § 618 (1988).

173. Fiscal Year 1985 Supplemental Appropriations Bill, ch. VII, 99 Stat. at 340.

174. *Id.*

175. Department of the Interior and Related Agencies Appropriations, Fiscal Year 1989, Pub. L. No. 100-446, § 321, 102 Stat. 1774, 1827 (1988).

176. *Id.*

177. *Id.* The Ninth Circuit, in Siuslaw Task Force v. United State Forest Serv., 912 F.2d 469 (9th Cir. 1990) (unpublished disposition, text in Westlaw), held the statute, though "not the model of clarity," was valid and allowed logging in the Mapleton District to proceed.

178. *See* Headwaters, Inc. v. Bureau of Land Management, 914 F.2d 1174 (9th Cir. 1990).

179. Pub. L. No. 99-190, 99 Stat. 1185, 1226-27 (1985).

180. *Id.* at 1227.

181. Portland Audubon Soc'y v. Lujan, 712 F. Supp. 1456, 1458 (D. Or. 1989).

mental groups, the Bureau conducted an assessment to determine if a supplemental impact statement was needed to consider the effect of timber harvesting in the old growth forest on the viability of the spotted owl.[182]

The Bureau assessment concluded that the information about the spotted owl "was too preliminary in nature to support a decision" to prepare a supplemental impact statement.[183] The Bureau assessment failed to mention more recent scientific information concerning the impact of old-growth clear-cutting on the viability of the spotted owl.[184]

After exhausting administrative appeals, the Portland Audubon Society filed suit on October 19, 1987.[185] In *Portland Audubon Society v. Lujan*, the society asked the court to enjoin further old-growth timber sales within a 2.1 mile radius of 289 spotted owl habitat sites.[186] In December, 1987, Senator Hatfield attached a rider to a continuing resolution for fiscal year 1989 that directly addressed the supplemental environmental impact statement controversy at issue in *Portland Audubon Society v. Lujan*.[187] That rider, often referred to as Section 314, was renewed for fiscal year 1990.[188]

Section 314 of the fiscal year 1989 and 1990 riders exempted the existing timber sales and precluded "challenge to any existing plan . . . solely on the basis that it does not incorporate information available subsequent to its completion."[189] The rider left one loophole, however. It permitted judicial review for "particular activities on these lands."[190]

This contradictory language led to conflicting decisions in the courts. The federal district in Oregon first dismissed the pending action, holding that Section 314 precluded judicial review.[191] The Court of Appeals for the Ninth Circuit then reversed, holding that the wording was too confusing to be sure of the legislative intent.[192] On remand, the district court again found that the intent of Section 314

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182. *Id.* at 1460.

183. *Id.* at 1462.

184. *Id.*

185. *Id.* at 1461.

186. *Id.*

187. Pub. L. No. 100-202, § 314, 101 Stat. 1329-254 (1987).

188. Department of the Interior and Related Agencies Appropriations, Fiscal Year 1988-89, Pub. L. No. 100-446, § 314, 102 Stat. 1774, 1825-26 (1988).

189. *See supra* notes 187, 188.

190. *See supra* notes 187, 188.

191. *See* Portland Audubon Soc'y v. Lujan, 712 F. Supp. 1456, 1461 (D. Or. 1990).

192. Portland Audubon Soc'y v. Hodel, 866 F.2d 302, 306 (9th Cir.), *cert. denied*, 492 U.S. 911 (1989).

precluded judicial review.[193] Finally, in an abrupt about-face, the Ninth Circuit affirmed the lower court decision.[194]

Ironically, before concluding that Section 314 precluded judicial review, Judge Frye of the district court found that the new information was sufficient to conclude that the northern spotted owl was in danger of extinction if the proposed timber sales were allowed to proceed.[195] Judge Frye also concluded that the Bureau's decision not to generate a supplemental impact statement was arbitrary and capricious.[196] Nonetheless, Section 314 forced the judge's hand.[197] It permitted the Bureau to ignore environmental laws, despite possible irreparable consequences.

2. *The Hatfield-Adams Appropriation Bill of 1990*

Efforts by the Oregon and Washington congressional delegations to protect logging industry interests and local government revenues have continued. The effort culminated in the most blatant effort yet to avoid operation of environmental laws by using legislative power to validate agency action on a case-specific basis.

In 1989, the Seattle Audubon Society (Society) and others filed suit challenging the Forest Service's 1988 Northern Spotted Owl Suitable Habitat Guidelines and sought an injunction to prohibit further sales of old-growth timber in areas known to be inhabited by the northern spotted owl.[198] In March of 1989, the district court issued a preliminary injunction enjoining approximately 165 specific Forest Service timber sales.[199]

As with the earlier cases, the preliminary injunction prompted protests from the northwest timber industry. Before a trial could be held on the merits, Senators Hatfield and Adams drafted a rider to an appropriation bill to exempt these timber sales from compliance with environmental statutes.[200] Insulating the agencies, however, from the requirements of the underlying environmental laws and from judicial

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193. *Lujan*, 712 F. Supp. at 1488-89.

194. Portland Audubon Soc'y v. Lujan, 884 F.2d 1233 (9th Cir. 1989), *cert. denied*, 494 U.S. 1026 (1990).

195. *Lujan*, 712 F. Supp. at 1485.

196. *Id.*

197. *Id.* at 1488.

198. *See* Seattle Audubon Soc'y v. Robertson, C89-160 (W.D. Wash. Mar. 24, 1989).

199. *Id.*

200. The bill was eventually enacted as Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, § 318, 103 Stat. 701, 745-50 (1989).

oversight faced new and increased opposition in the House.[201] Consequently, the original rider was revised to say that proposed agency action

> is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned *Seattle Audubon Society et al. v. F. Dale Robertson*, Civil No. 89-160 and *Washington Contract Loggers Assoc. et al. v. F. Dale Robertson*, Civil No. 89-99 (order granting preliminary injunction) and the case *Portland Audubon Society et al. v. Manual Lujan, Jr.*, Civil No. 87-1160-FR.[202]

For the first time, Congress' intent to decide cases in controversy currently before the court was made explicitly clear.

Citizen groups reacted quickly. The Society and others immediately filed suit.[203] After losing in the federal district court, the Society prevailed on appeal in *Seattle Audubon Society v. Robertson*.[204] The court in *Seattle Audubon* ruled that Congress had violated the doctrine of Separation of Powers by intruding into matters reserved for resolution by the judiciary.[205] This victory, however, was short-lived when the Supreme Court reversed on March 25, 1992. The flaws in the Court's reasoning bear separate discussion.

3. *Separation of Powers and Appropriation Bill Riders*

The notion of separation of powers is fundamental to the very structure and effectiveness of our system of government. Its principles, established in the Constitution, are clear. Congress was granted the power to legislate[206] and the power to decide cases and controver-

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201. More than 100 members of the House sent a letter to Representative Sidney Yates, the Chairman of the House Interior Appropriations Subcommittee, expressing these objections. *See* Brief for Respondents at 13, App. B, Robertson v. Seattle Audubon Soc'y, 112 S. Ct. 1407 (1992).

202. Hatfield-Adams Appropriation Rider of 1990, tit. III, 103 Stat. at 747.

203. Seattle Audubon Soc'y v. Robertson, No. 89-160 (W.D. Wash. Nov. 14, 1989).

204. 914 F.2d 1311 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 2886 (1991), *rev'd*, 112 S. Ct. 1407 (1992).

205. 914 F.2d at 1311. The Supreme Court agreed to hear an appeal of this case on June 28, 1991. Seattle Audubon Soc'y v. Robertson, 111 S. Ct. 2886 (1991). Numerous amicus curiae were granted leave to participate in the arguments before the Supreme Court. Among those submitting briefs in this case were the Mountain States Legal Foundation, Pacific Legal Foundation, Public Citizen, The Association of O & C Counties and Benton County, and State Attorneys General from Minnesota, Florida, Nevada, Arkansas, Texas, Mississippi, Maine, New Jersey, Ohio, Connecticut, Arizona, and North Dakota. The Supreme Court reversed in Robertson v. Seattle Audubon Society, 112 S. Ct 1407 (1992).

206. U.S. CONST. art. I, § 1.

sies was vested in the courts.[207] It has long been acknowledged that Article III, Section 1, of the United States Constitution, together with the doctrine of Separation of Powers, prevents Congress from "prescrib[ing] rules of decision to the Judicial Department of the government in cases pending before it."[208] A statute violates the doctrine of Separation of Powers if it "prescribes a rule of decision in a case pending before the courts, doing so in a manner that requires the courts to decide the case in the Government's favor."[209]

It is a breach of national fundamental law for one branch of government to attempt to invest itself with power reserved to another branch.[210] This principal serves "as a self-executing safeguard against the encroachment or aggrandizement" of one branch at the expense of another.[211] Founding father James Madison first expressed this view in *The Federalist* No. 48. Madison said that "none of [the branches] ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers."[212]

The framers of the Constitution were especially concerned about the ability of the legislative branch to intrude into areas reserved to the executive and judicial branches. James Madison stated:

> Its constitutional powers being at once more extensive, and less susceptible to precise limits, it can, with greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the coordinate departments.[213]

Throughout the history of our country, courts have attempted to minimize this concern by requiring Congress to follow the "single, finely wrought and exhaustively considered, procedures specified in Article I" whenever it is exercising the legislative power.[214]

The Hatfield-Adams Appropriation Rider of 1990 was enacted in violation of the doctrine of Separation of Powers. As the Ninth Circuit stated, "Congress did not amend or repeal laws, as it unquestionably could do, but rather prescribed a rule for the decision of a case in a particular way, without changing the underlying laws, as it unques-

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207. *Id.* art. III, §§ 1, 2.
208. United States v. Klein, 80 U.S. 128, 146 (1872).
209. United States v. Sioux Nation of Indians, 448 U.S. 371, 404 (1980).
210. Buckley v. Valeo, 424 U.S. 1, 121-22 (1976).
211. *Id.* at 122.
212. THE FEDERALIST No. 48, at 332 (J. Madison) (J.E. Cooke ed., 1961).
213. *Id.* at 334.
214. Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 111 S. Ct. 2298, 2311 (1991) (citing INS v. Chadha, 462 U.S. 919, 951 (1983)).

tionably cannot do."[215] Justice Thomas' opinion reversing the Ninth Circuit summarily dismissed an argument based on the express mandates of Article III by stating that subsection (b)(6)(A) of the rider amended applicable law rather than directing the outcome in *Seattle Audubon*.[216] The reasoning of the remarkably short opinion strains logic.

It is hard to imagine a situation where Congress could more clearly intrude upon the powers of the judiciary. The Hatfield-Adams rider was enacted in response to ongoing litigation.[217] It was intended to extinguish pending claims. It named specific cases and stated:

> Congress hereby determines and directs that management of. . . the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases [Seattle Audubon] and [Portland Audubon].[218]

The Hatfield-Adams rider, directing the outcome in two specific cases, violated both of the restraints enunciated in the Separation of Powers doctrine. First, it intrudes into a core function reserved to the judiciary to decide cases and controversies. Second, it was enacted without use of the procedures specifically required by Article I. The flaws in the Court's reasoning in *Seattle Audubon* deserve seperate discussion in future articles. For purposes of this comment, however, it represents yet another instance of political expediency taking precedent over long-term species survival. In this way it can be seen to sidestep the very safeguards imposed to prevent intrusions by the legislative branch into functions reserved to the other branches.

V. CONCLUSION

The Endangered Species Act must be reauthorized and strengthened in 1992. The ESA is the crown jewel of the nation's environmental laws. It is the best hope, not only for saving the northern spotted owl, but for stopping the relentless momentum toward mass species extinc-

215. Seattle Audubon Soc'y v. Robertson, 914 F.2d 1311, 1317 (9th Cir. 1990), *rev'd*, 112 S. Ct. 1407 (1992).

216. Robertson v. Seattle Audubon Soc'y, 112 S. Ct. 1407, 1414 (1992).

217. Justice Thomas seems to concede to this interpretation in his introductory language, stating that Congress enacted section 318 "in response to ongoing litigation." *Id.* at 1410.

218. Hatfield-Adams Appropriations Rider of 1990, tit. III, 103 Stat. at 747.

tion. Polls establish that a significant majority of Americans favor strong measures to protect the environment.[219]

The arguments advanced in promoting the continuing devastation of our national old-growth forests are specious at best. The loss of jobs is little more than a political red herring being used by the timber industry to retain its below cost access to old-growth timber. Since, at the current rate of cutting, all the old-growth will be gone within fifteen to thirty years, local governments are risking the long-term benefits of tourism for a short-term boost to their treasuries. In contrast is the tremendous cost in terms of the permanent loss of biodiversity and the destruction of a priceless national treasure—the national old-growth forest. The ESA cannot withstand the current economic and political pressures facing it. The Act should be restructured and its loopholes repaired in order to save species from extinction without any deference to short-term political and economic pressures.[220]

Legislators must be given the message that appropriation riders are not an appropriate means for exempting projects from compliance with the ESA or any other vital legislation.[221] Appropriation bills often pass in the eleventh hour as the federal government's spending authority is about to run out. There are tremendous pressures, unrelated to the substance of the rider, to propel the bill toward passage.[222]

Appropriation riders are rarely, if ever, relevant to the legislation being enacted. They are often secretly placed in the bill without the knowledge of concerned parties. Discussion and debate are minimal, if any. They are not reviewed by the committee that usually oversees legislation on the subject, thereby casting doubt on the wisdom of the decision in some cases. The process completely excludes input from

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219. A July 2, 1989, poll conducted by the New York Times and CBS News revealed that 80% of those polled agreed with the statement: "Protecting the environment is so important that requirements and standards cannot be too high, and continuing environmental improvements must be made regardless of the cost." *See* Sher & Hunting, *supra* note 92, at 486.

220. Presidential campaign developments seem to make this goal more distant. After assuring voters that he was "the environmental president" in 1991, President George Bush stated in 1992:

> The Endangered Species Act was intended as a shield for species against the effects of major construction projects like highways and dams, not a sword aimed at jobs, families and communities of entire regions like the Northwest. . . . It's time to put people ahead of owls.

Micheal Wines, *Bush, in Far West, Sides With Loggers*, N.Y. TIMES, Sept. 15, 1992, at A11 (quoting President Bush).

221. This message may have already been delivered to members of Congress during the uproar caused by sections 314 and 318. For the first time since 1986, the 1991 Interior Appropriations Bill did not contain any riders exempting timber-related activities from complying with environmental laws, nor did any restrict judicial review. Sher & Hunting, *supra* note 92, at 487.

222. *Id.* at 479.

the general populace. At the same time, such riders often operate to undermine laws that were enacted through a lengthy public process.

The exceptional benefit gained by special interests when the legislative process is avoided results in a circumventing of the public will.[223] The use of appropriations riders usurps one of the fundamental principles of our democracy, the principle that the people deserve to have issues that affect them proposed and debated in the light of day. It also undermines public confidence in our system of government. This loss of confidence is exacerbated when a rider also restricts access to judicial review. Judicial review represents the "very essence of civil liberty."[224] It is the principal means by which individual citizens can take direct action to restrain an abuse of governmental power.

The underhandedness of the use of these case-specific amendments to appropriation legislation was well articulated by Democrat Senator John Culver of Iowa in a debate following the Tellico Dam amendment. Senator Culver stated:

> This, in fact, [was] an amendment that originated in the dark of night in the House of Representatives, and I doubt if it is anything to take the occasion to brag about. . . .
>
> On an appropriations bill this Tellico amendment was added on the floor. It was not germane, because it is legislation on an appropriations bill, and if it were ever offered in the daylight in the House of Representatives it would be ruled out of order. A Member of the House stood up and began to read an amendment, this exemption, which he did not even complete on the floor, with 15 Members present. It took 42 seconds . . . .
>
> It was not even explained that this was the Tellico Dam.[225]

Actions such as those described by Senator Culver are certain to lead to an American public evermore cynical about the responsiveness of its government.

The continued existence of the national old-growth forest and the survival of the species that inhabit the forest is of importance to *all* Americans. Its fate should not be decided by special interest groups who have the economic and political clout to sidestep the democratic process.

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223. It is logical to see that the dearth of scrutiny would actually encourage those with special interest goals to seek out the appropriations process specifically because the likelihood of full examination and analysis is minimized or even avoided in some cases. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 476-77 (1989).

224. Marbury v. Madison, 5 U.S. 137, 163 (1803).

225. 125 CONG. REC. 18,936-37 (1979).