# A Different Perspective on the Endangered Species Act at 40: Responding to Damien M. Schiff

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People like to observe anniversaries at round, decadal intervals, and such observation generally means celebration. When the Endangered Species Act ("ESA") turned forty in December 2013, the birthday wishes were mostly laudatory, tempered by concerns over the Act's implementation.[1] Damien Schiff offers a different, and decidedly non-celebratory response in this journal, describing the ESA at forty as radicalized by courts, infected by politicized decisions, saddled by unwarranted bureaucratic delays, and facing senescence.[2] For these afflictions, Mr. Schiff prescribes a drastic new regimen, including paying landowners not to kill endangered species and prioritizing conservation

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[1] *See, e.g.*, Daniel J. Rohlf, *Introduction: The Endangered Species Act at Forty: The Good, the Bad, and the Ugly*, 20 ANIMAL L. 251 (2014); for a prior anniversary perspective, see D. GOBLE, THE ENDANGERED SPECIES ACT AT THIRTY: RENEWING THE CONSERVATION PROMISE (J.M. Scott, and F.W. Davis, eds., 2006).

[2] Damien M. Schiff, *The Endangered Species Act at 40: A Tale of Radicalization, Politicization, Bureaucratization, and Senescence*, 37 ENVIRONS ENVTL. L. & POL'Y J. 105 (2014).

of endangered wildlife and plants according to their utilitarian value.[3] He would target the strongest, most effective provisions of the ESA, including those most responsible for the ESA's success to date, for legislative euthanasia. Mr. Schiff, however, fails to establish that these remedies are needed or appropriate. We need not destroy the ESA to save it.

## I. REACTION AND EVOLUTION, NOT RADICALIZATION

According to Mr. Schiff's account, the ESA was "radicalized" by the U.S. Supreme Court in *Tennessee Valley Authority v. Hill*.[4] He explains that the Supreme Court "radicalized" the ESA by manifesting the notion that the ESA was "intended to codify a precautionary approach to wildlife protection indifferent to the potentially tremendous opportunity costs of protecting every species."[5] Here, he appears to be referencing the often-cited sentence in Chief Justice Burger's opinion that "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost."[6] There is little evidence, however, that the Supreme Court's decision opened the door to radical interpretations of the ESA in general. Rather, *TVA v. Hill* dealt with the specific question of whether the Fish and Wildlife Service's determination that a federal project would jeopardize the continued existence of a species required halting the project despite millions of dollars of sunk costs in the project and continuing federal appropriations for the project.[7] In answering this question in the affirmative, the Court looked to the plain language of the ESA.[8] The decision appeared radical only to those who, like Justice Powell in his dissenting opinion, believed the ESA could not possibly mean what it said.[9] Public reaction to *TVA v. Hill* expressed disbelief that a small fish could stop the construction of a large dam that had been mostly completed, but as Mr. Schiff acknowledges, this result was always implicit in the ESA.[10] When the ESA was amended in 1982, Congress expressly rejected a listing priority system that would "give consideration to whether species were 'higher or lower life form.'"[11]

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[3] *Id.* at 128-31.

[4] *Id.* at 110-11; Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978).

[5] Schiff, *supra* note 2, at 109-10. Nothing in *TVA v. Hill*, however, expresses indifference "to the potentially tremendous opportunity costs of protecting every species." The question of whether one species should be protected at the expense of another was not before the Court.

[6] *Tenn. Valley Auth.*, 437 U.S. at 180, 184.

[7] *Id.* at 184-88.

[8] *Id.*

[9] *Id.* at 195-96.

[10] JOE ROMAN, LISTED: DISPATCHES FROM AMERICA'S ENDANGERED SPECIES ACT 64-65 (Harvard University Press, 2011); Schiff, *supra* note 2, at 111.

[11] Endangered and Threatened Species Listing and Recovery Priority Guidelines, 48 Fed. Reg. 43098, 43102 (Sep. 21, 1983) (quoting Conference Report, Pub. L. 97-304). The 1983 Listing and

Mr. Schiff claims that the radicalization of the ESA "particularly in the lower courts, has remained to this day."[12] If lower courts have followed the Supreme Court in finding that the ESA gives the benefit of the doubt to endangered and threatened species, this is merely *stare decisis*, the opposite of judicial radicalism.[13] If there were examples of lower courts extending the Supreme Court's holding beyond what the *TVA v. Hill* decision justifies, these cases might be evidence of continued judicial radicalization of the ESA, but Mr. Schiff offers no such examples.

Mr. Schiff faults the precautionary principle as being based on the fallacy of arguing from ignorance:

> The House Report contends we should protect species of no known value to man, because at some future point they may become valuable. But this is an irrational argument, because it is not based on reason. One might just as well argue for the extinction of such species, on the chance that they might develop into vectors for as yet undiscovered pestilences.[14]

Mr. Schiff's paraphrase of the House Committee's Report on the ESA,[15] however, is not an expression of the precautionary principle, nor is the precautionary principle an example of argument from ignorance as it is not based *solely* on the absence of evidence regarding the reasons for protecting species. Rather, the ESA recognizes that species of fish, wildlife, and plants in danger of extinction "are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."[16] Thus, the ESA is premised on the idea that the species it protects *do* have value, not that they are "of no known value to man." Courts have applied the precautionary principle beyond the context of section 7 of the ESA, but these applications are straightforward interpretations of the ESA rather than radical extensions of *TVA v. Hill*. For example, courts have consistently held that the ESA's best available evidence standard does not require conclusive evidence to take preventative action to protect species.[17] The precautionary principle means acting with less than perfect knowledge, but that greatly differs from Mr. Schiff's formulation of arguing from ignorance.

Rather than radicalization, the more evident consequence of *TVA v. Hill* has

Recovery Priority Guidelines superseded previous guidelines that gave priority to "higher life forms" in the order mammals, birds, fishes, reptiles, amphibians, vascular plants, and invertebrates. *Id.*

[12] Schiff, *supra* note 2, at 113.

[13] ROMAN, *supra* note 10, at 65 (interpreting *TVA v. Hill* as upholding precautionary principle).

[14] Schiff, *supra* note 2, at 109 n.24.

[15] H.R. REP. NO. 93-412 at 144 (1973).

[16] 16 U.S.C. § 1531(a)(3) (2012).

[17] *See, e.g.*, Defenders of Wildlife v. Babbitt, 958 F. Supp. 670, 680 (D.D.C. 1997) (quoting Conner v. Burford, 848 F.2d 1441, 1454 (9th Cir. 1988) (explaining the principle of institutionalized caution at the heart of the ESA means giving "benefit of the doubt" to species)).

been a trend of *reaction* by all three branches of government. This trend is apparent even in Mr. Schiff's narrative, where the immediate response of lawmakers to the Supreme Court's decision was to amend the ESA to create a committee (the "God Squad" or "God Committee") that could issue exemptions allowing a federal project to proceed even if the Services made a determination that the project would jeopardize the continued existence of an endangered or threatened species.[18] The God Committee promptly and unanimously denied an exemption for the nearly completed Tellico Dam that the Supreme Court had so "radically" prevented from going forward in *TVA v. Hill*.[19]

Mr. Schiff calls the God Committee a "failed safety valve" because it has rarely been used.[20] He speculates that this may be because of the ESA's politicization; however, the more direct explanation is that jeopardy determinations by the Fish and Wildlife Service or National Marine Fisheries Service – the basis for the Supreme Court's seemingly radical decision – have been extremely infrequent since *TVA v. Hill*.[21] There are several reasons for the paucity of jeopardy findings, none of which are consistent with Mr. Schiff's suggested political explanation. First, projects tend to be modified to avoid jeopardy findings.[22] In virtually all such cases, the project moves forward.[23] If

[18] Schiff, *supra* note 2, at 111-13. The God Committee amendment was drafted prior to the *TVA v. Hill* decision, but came to a final vote in the Senate a week after the Supreme Court's decision, and was signed into law on November 10, 1978. ZYGMUNT J.B. PLATER, THE SNAIL DARTER AND THE DAM: HOW PORK BARREL POLITICS ENDANGERED A LITTLE FISH AND KILLED A RIVER 279-80 (Yale University Press 2013).

[19] PLATER, *supra* note 18, at 286-89. The Committee's review spotlighted the Tellico project as an economic boondoggle, with one Committee member stating "if one takes just the cost of finishing it, against the benefits, and does it properly, it doesn't pay! Which says something about the original design." *Id.* at 287 (quoting Charles Schultze, Chair of the Council on Economic Policy). While the Tellico project's environmental and economic shortcomings are well known, critics of the *TVA v. Hill* decision tend to overlook that the project involved a taking of private property for private economic development on a scale far larger than the project reviewed in the Supreme Court's controversial decision in *Kelo v. City of New London*, 545 U.S. 469 (2005). PLATER, *supra* note 18, at 2, 18-24, 347-51.

[20] Schiff, *supra* note 2, at 111.

[21] *Id.*; Dave Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 64 FLA. L. REV. 141, 163-65 (2012).

[22] In these instances, the Services typically issue biological opinions finding that jeopardy could occur but for reasonable and prudent conditions intended to avoid jeopardy and reduce take. Owen, *supra* note 21, at 170-72.

[23] *Id.* Projects move forward even though the Services have no idea of the cumulative take they have authorized for any given species:

> [The Services] routinely authorize federal as well as non-federal entities to incidentally take members of a particular species, but there is obviously a finite level of incidental take that can take place before any additional take would jeopardize the continued existence of the species. In deciding whether to authorize an additional increment of incidental take of a listed species, it is therefore crucial that the agencies know how much take they have *already* allowed, as well as how many members of the species currently exist. Yet the agencies at present have virtually no procedures in place to actually keep

the God Committee is a "safety valve," it is one of last resort, as it is far more efficient to resolve potential endangered species conflicts earlier in the process. The negotiation required to avoid jeopardy findings does raise the possibility that the Services will succumb to political pressure and back down from justified jeopardy findings, but this is not the politicization Mr. Schiff blames for the failure of the God Committee. Second, the Services have adopted a definition of "jeopardy" that sets a high threshold for a jeopardy finding.[24] According to this definition, a federally-permitted project may wipe out an entire population of a listed species without jeopardizing the species. Far from a radicalization of the ESA, this definition is a step back from the precautionary principle at the heart of the ESA because it allows imperiled species to be "nickel[ed] and dim[ed] toward extinction."[25] This retrenchment perhaps belongs in Mr. Schiff's "bureaucratization" category, but it reflects reaction rather than radicalization.

The judicial branch has also reacted by tempering the allegedly radical ESA. Mr. Schiff cites the prominent example of the Supreme Court's 2007 decision in *National Association of Home Builders v. Defenders of Wildlife*.[26] *National Association of Home Builders*, however, is not a lone outlier in a sea of judicial radicalism.[27] Mr. Schiff fails to provide any examples of truly radical ESA decisions post-*TVA v. Hill*, and there is no indication that courts have radicalized the ESA more than any other environmental law or, indeed, any other federal law.

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> track of the amount of incidental take that they themselves have authorized, much less methods for otherwise tracking the current status and trends of the species. Though the Consultation Handbook calls for such a tracking system for all listed species, this system apparently remains merely an aspiration rather than reality.

Daniel J. Rohlf, *Jeopardy Under the Endangered Species Act: Playing A Game Protected Species Can't Win*, 41 WASHBURN L. J. 114, 157 (2001).

[24] 50 C.F.R. § 402.02 (2012) (defining "jeopardize the continued existence" of a listed species as "to engage in an action that reasonably would be expected, directly or indirectly, 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.").

[25] Rohlf, *supra* note 1, at 268-69.

[26] Schiff, *supra* note 2, at 125 (citing Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 664 (2007) (holding ESA's consultation requirements do not apply to projects where federal government has no discretionary authority)). Although the *Nat'l Ass'n of Home Builders* majority distinguished *TVA v. Hill*, the Supreme Court did not "discard" the earlier case as Mr. Schiff suggests.

[27] *See, e.g.*, Butte Envtl. Council v. U.S. Army Corps of Eng'rs, 620 F.3d 936, 947-48 (9th Cir. 2010) (finding federally permitted action that would destroy hundreds of acres of designated critical habitat for listed species would not adversely modify critical habitat within the meaning of the ESA because affected habitat was only small part of total area designated as critical habitat); Conservancy of Sw. Fla. v. U.S. Fish & Wildlife Serv., 677 F.3d 1073, 1079 (11th Cir. 2012) (concluding the decision not to designate critical habitat for Florida panther was committed to agency discretion); Fund for Animals v. Rice, 85 F.3d 535, 548 (11th Cir. 1996) (holding that recovery plans for listed species lack the force of law); Friends of Blackwater v. Salazar, 691 F.3d 428, 434 (D.C. Cir. 2012) (Fish and Wildlife Service can ignore recovery plan goals in deciding species is recovered).

Although Mr. Schiff describes the ESA as "the nation's most controversial environmental statute,"[28] the law is supported by a large majority of the public.[29] It is undoubtedly controversial among its critics, including some lawmakers, developers, and trade associations, but Mr. Schiff offers no evidence that these critics represent either a broader or deeper nationwide constituency. The ESA has weathered repeated efforts aimed at weakening protections for imperiled wildlife and plants, perhaps because it remains popular while its critics have consistently failed to make the case that ESA "reform" requires weakening of the Act.[30]

It is difficult to escape the impression that Mr. Schiff intends the "radical" label to carry a pejorative political meaning, but whatever radicalism is present in the ESA was there from the start, and was discovered, not invented, by Chief Justice Burger's decision in *TVA v. Hill*. From its enactment, the ESA required that decisions to list wildlife and plants be based on science, rather than popularity or beauty contests;[31] promised that federally permitted or funded projects that could result in the extinction of listed species should not move forward;[32] and prohibited anyone from killing or harming listed wildlife.[33] These essential parts of the ESA may be radical, or merely visionary.

## II. POLITICIZATION OF ANOTHER KIND

The ESA has frequently been politicized to avoid protecting species faced with extinction, and Mr. Schiff provides several examples, while omitting some of the most blatant instances of politicization.[34] For a particularly egregious example of Congressional meddling in the ESA, one need look no further than the Congressional override of *TVA v. Hill* that allowed the completion of the fiscally and environmentally unsound Tellico dam project after the God Committee refused to exempt the project.[35] More recently, Congress has shut

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[28] Schiff, *supra* note 2, at 106.

[29] *See*, *e.g.*, Press Release, CTR. FOR BIOLOGICAL DIVERSITY, Poll: Two-thirds of Americans Want Congress to Strengthen, Protect Endangered Species Act (March 4, 2013), http://www.biologicaldiversity.org/news/press_releases/2013/endangered-species-act-03-04-2013.html (announcing poll results showing "two out of three Americans want the Endangered Species Act strengthened or left alone, but *not* weakened") (emphasis in original).

[30] Rohlf, *supra* note 1, at 252-53.

[31] 16 U.S.C. § 1533(b)(1)(A) (2012). The original provision requiring use of "best scientific and commercial data available" in listing determinations is in section 4(b)(1) of 1973 Act. Pub. L. 93-205, 84 Stat. 2090 § 4(b)(1) (1973).

[32] 16 U.S.C. § 1536(a)(2) (2012). The original provision is in section 7 of the 1973 Act. Pub. L. 93-205, 84 Stat. 2090 § 7 (1973).

[33] 16 U.S.C. § 1538(a)(1) (2012). The original take prohibition is in section 9(a)(1) of the 1973 Act. Pub. L. 93-205, 84 Stat. 2090 § 9(a)(1) (1973).

[34] Schiff, *supra* note 2, at 115-17.

[35] PLATER, *supra* note 18, at 306-23.

down the ESA listing program for a year with an appropriations rider,[36] legislatively delisted the northern Rocky Mountains population of gray wolves (also through an appropriations rider),[37] and attempted to block listing or force delisting of a variety of other species by legislative fiat.[38] Political appointees within the Fish and Wildlife Service have improperly influenced listing and critical habitat decisions.[39]

While the existence of politically-motivated ESA decisions is beyond dispute, Mr. Schiff makes several claims that are both unsubstantiated and unconvincing: (1) that the ESA's politicization is a product of its continued radicalization in the lower courts; (2) that its politicization is different in kind from that of other laws; (3) that the ESA's "intrinsic shortcomings" facilitated its politicization; (4) and that the politicization runs in both directions.[40] By politicization, he means that "the seemingly science-based decisions that the responsible agencies must make have become infected with political concerns."[41] This definition is a reasonable statement of the problem, but there is scant evidence to support his thesis of ESA exceptionalism, and Mr. Schiff offers no examples of politically-motivated decisions that have benefited species.[42] On the contrary, the preceding examples are part of the same tide of reaction that pre-dates *TVA v. Hill*.[43]

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[36] Pub. L. No. 104-6, 109 Stat. 73, 86 (1995); Envtl. Def. Ctr. v. Babbitt, 73 F.3d 867, 869-70 (9th Cir. 1995).

[37] Department of Defense and Full–Year Continuing Appropriations Act of 2011, Pub. L. 112-10, § 1713, 125 Stat. 38 (2011).

[38] *See*, *e.g.*, S. 2677, 113th Cong., 2d Sess. (2014) (bill to delist lesser prairie chicken and preclude re-listing prior to January 31, 2020); H.R. 4716, 113th Cong., 2d Sess. (2014) (bill to suspend any listing of greater sage grouse and Gunnison sage grouse for at least 10 years after receipt of state conservation plan); H.R. 1806, 112th Cong., 1st Sess. (2011) (bill to amend ESA to prohibit listing of bluefin tuna).

[39] OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF THE INTERIOR, INVESTIGATIVE REPORT: THE ENDANGERED SPECIES ACT AND THE CONFLICT BETWEEN SCIENCE AND POLICY (December 10, 2008).

[40] Schiff, *supra* note 2, at 113-16.

[41] *Id.* at 114.

[42] Schiff suggests that some species listings may be "pretextual" – that is, that they are pretexts for some other desired outcome, such as halting the Tellico dam or some other project. *Id.* at 116. This criticism has long history, as the same complaint was raised in response to the snail darter listing. *Id.* at 112; PLATER, *supra* note 18, at 294. Independent grounds for opposing Tellico dam existed prior to the discovery and listing of the snail darter. It does not follow from the mere existence of these other grounds, however, that the listing of the snail darter was pretextual or politicized. As applied to ESA listings in general, Mr. Schiff's "pretextual listing" theory is similarly illogical, as is his suggestion that the allegedly higher number of lawsuits involving threatened species compared to those involving endangered species "proves" the ESA's politicization. Schiff, *supra* note 2, at 115.

[43] Plater describes a mass-mailing solicitation letter prior to the Supreme Court's *TVA v. Hill* decision that uses rhetoric familiar to present-day anti-ESA lobbyists:

> As you know, the anti-development forces of *left wing environmental extremists* have been using the *extreme inflexibility* of the *Federal Government's Endangered Species Act* to halt some of the most important public works in our nation in their tracks!

Listing and conservation decisions are supposed to be based on science.[44] This is a strength, not an "inherent shortcoming" of the ESA. When political or economic pressures intrude, the ESA's science-based decision-making requirement provides a buffer against such pressures. When agencies succumb to political or economic pressure, as they sometimes have, the requirement affords a standard for judicial review. While courts are consistently unwilling to second-guess the science-based conclusions of federal agencies, they provide a needed check when agencies stray from this standard.[45]

## III. BUREAUCRATIZATION IS BAD, SO WHY DO THE ESA'S FOES PERPETUATE IT?

Mr. Schiff is on more certain ground with his argument that the ESA has become bureaucratized, while acknowledging that this bureaucratization is unremarkable because most laws implemented by bureaucratic agencies are bureaucratized.[46] The examples of harmful bureaucratization he provides, however, are insubstantial. He cites the "unjustified delay" in the bald eagle delisting, which put the development plans of a Minnesota landowner "on hold for eight years for no good reason."[47] It is true that the landowner – represented by Mr. Schiff – successfully sued to compel the Fish and Wildlife Service to take final action to delist bald eagles when the Service failed to meet the ESA's mandatory deadline.[48] Bald eagles remain under the protection of the Bald and Golden Eagle Protection Act, however, so it is not correct that the landowner's development plans were put on hold *as a result* of the delay in delisting.[49]

Mr. Schiff's other example of the evils of bureaucratization concerns the "unjustified delay in proposing the Valley elderberry longhorn beetle for

PLATER, *supra* note 18, at 176 (emphasis in original).

[44] 16 U.S.C. 1533(b)(1)(A) (2012); 16 U.S.C. § 1536(a)(2) (2012); 50 C.F.R. § 402.14(g)(8) (2012).

[45] *See, e.g.*, W. Watersheds Project v. U. S. Forest Serv., 535 F. Supp. 2d 1173, 1176, 1187-89 (D. Idaho 2007) (remanding Fish and Wildlife Service decision denying listing for greater sage grouse based in part on "inexcusable" political interference that attempted to "steer the 'best science' to a pre-ordained outcome.").

[46] Schiff, *supra* note 2, at 117.

[47] *Id.*

[48] Contoski v. Scarlett, 2006 U.S. Dist. LEXIS 56345 (D. Minn. 2006).

[49] 16 U.S.C. § 668-668d (2012); Susan R. Martin, *Continued Protection of the Bald Eagle After Delisting*, 82 FLA. BAR J., no. 7, 2008, at 44. Fish and Wildlife Service officials have indicated that the Bald and Golden Eagle Protection Act still prohibits disturbance of eagles near their nesting areas. Tom Meersman, *Minnesota Nest Could Swing Bald Eagles' Status*, MINNEAPOLIS STAR TRIBUNE, Oct. 31, 2006. The plaintiff and landowner in the delisting deadline suit, an anti-regulatory activist who reportedly refuses to wear a seatbelt in protest of mandatory seatbelt laws, has vowed to challenge restrictions under the Bald and Golden Eagle Protection Act as well. *Id.*; Peter Slevin, *Bald Eagle to Be Taken Off Endangered List*, WASHINGTON POST, Dec. 25, 2006.

delisting."[50] The Fish and Wildlife Service proposed to delist the beetle, which is found in California's Central Valley, in 2012.[51] Mr. Schiff suggests that the delay in delisting the beetle has increased the cost of maintaining levees.[52] There has been no delay in delisting, however, as the Fish and Wildlife Service ultimately decided to withdraw the proposed delisting rule because it "did not fully analyze the best available information."[53] Rather than an instance of bureaucratization, the Valley elderberry longhorn beetle provides another example of the ESA's best science requirement as a backstop against unwise action.

Mr. Schiff is aware of the chronic delays in species listings and critical habitat designations that have spurred hundreds of lawsuits.[54] He overlooks, however, perhaps the most egregious example of the ESA's bureaucratization: the Fish and Wildlife Service's practice of keeping "candidate" species in bureaucratic limbo without any legal protection, often for decades.[55] To add a species to its list of candidates, the Fish and Wildlife Service must find that (1) listing the species at this time is precluded by other pending listing proposals and (2) that expeditious progress is being made in species listing and de-listing.[56] The Service must review its candidate list annually; based on this review, it can decide to list the species, not list the species, or keep it on the candidate list.[57] The Service's most common choice was to maintain candidates on the candidate list by "recycling" the finding that listing the species was "warranted but precluded."[58]

Warranted-but-precluded findings are products of a bureaucratic loophole that allows the Service to avoid listing species that deserve to be listed.[59] Until 2010, the number of warranted-but-precluded findings outpaced the number of species listings, creating a backlog of 251 candidates in that year.[60] Many species have

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[50] Schiff, *supra* note 2, at 118.

[51] Endangered and Threatened Wildlife and Plants; Proposed Rule; Removal of the Valley Elderberry Longhorn Beetle From the Federal List of Endangered and Threatened Wildlife, 77 Fed. Reg. 60,238 (Oct. 2, 2012).

[52] Schiff, *supra* note 2, at 118-19.

[53] Endangered and Threatened Wildlife and Plants; Withdrawal of the Proposed Rule To Remove the Valley Elderberry Longhorn Beetle From the Federal List of Endangered and Threatened Wildlife, 79 Fed. Reg. 55,874 (Sept. 17, 2014).

[54] Schiff, *supra* note 2, at 117.

[55] "Warranted but precluded" findings are authorized by 16 U.S.C. § 1533(b)(3)(B)(iii) (2012).

[56] 16 U.S.C. § 1533(b)(3)(B)(iii) (2012).

[57] *Id.* at § 1533(b)(3)(C)(iii).

[58] *See, e.g.*, Endangered and Threatened Wildlife and Plants; Review of Native Species that are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions**,** 75 Fed. Reg. 69,222 (Nov. 10, 2010).

[59] K. Mollie Smith, *Abuse of the Warranted but Precluded Designation: A Real or Imagined Purgatory?*, 19 SOUTHEASTERN ENVTL. L. J. 119, 120, 132-145 (2010).

[60] Annual Description of Progress on Listing Actions, *supra* note 58, at 69,222.

languished on the candidate list for years or decades before they are listed.[61] Because they receive no protection under the ESA beyond the Service's obligation to monitor their status and use the emergency listing power to avoid a significant risk to the well-being of the species,[62] candidate species are much more likely to become extinct than listed species, and at least 42 species have gone extinct while awaiting listing.[63]

In 2011, the Fish and Wildlife Service resolved several lawsuits by entering settlement agreements with the Center for Biological Diversity and WildEarth Guardians that have dramatically reduced the backlog of candidate species.[64] By 2013, the number of candidates had dwindled to 146,[65] while the settlements require that the backlog as of 2010 will be eliminated entirely by the end of 2016.[66] The settlements have also substantially reduced the number of lawsuits filed to enforce ESA listing deadlines.[67]

The settlements have thus cleared the bureaucratic logjam that was threatening species with extinction before they could be protected. They have not ended the bureaucratization of the ESA, but the picture Mr. Schiff paints is incomplete. He might also have asked why states, trade groups, lawmakers, and others are abetting and attempting to perpetuate the ESA's bureaucratization by attacking the settlements. For example, Safari Club International, a hunting organization, sought to intervene in the underlying litigation to scuttle the settlement agreements.[68] To support its intervention bid, Safari Club expressed an interest in hunting candidate species such as the New England cottontail and lesser prairie chicken.[69] That is, Safari Club stated an interest in keeping these species (which the Fish and Wildlife Service had already determined warranted protection under the ESA) on the candidate list indefinitely so its members could

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[61] For example, the yellow-billed cuckoo, eastern Massasauga snake, and white fringeless orchid have been candidates since 1982. Annual Description of Progress on Listing Actions, *supra* note 58, at 69,222, 69,240, 69,245, 69,277. The cuckoo was listed as threatened in 2014. Determination of Threatened Status for the Western Distinct Population Segment of the Yellow-billed Cuckoo (*Coccyzus americanus*), 79 Fed. Reg. 59,992 (Oct. 3, 2014).

[62] 16 U.S.C. § 1533(b)(3)(C)(iii) (2012).

[63] ROMAN, *supra* note 10, at 132.

[64] James J. Tutchton, *Getting Species on Board the Ark One Lawsuit at a Time: How the Failure to List Deserving Species Has Undercut the Effectiveness of the Endangered Species Act*, 20 ANIMAL L. 401, 426-27 (2014).

[65] Endangered and Threatened Wildlife and Plants; Review of Native Species that are Candidates for Listing as Endangered or Threatened; Annual Notice of Findings on Resubmitted Petitions; Annual Description of Progress on Listing Actions**,** 78 Fed. Reg. 70,104 (Nov. 22, 2013).

[66] Benjamin Jesup, *Endless War or End This War? The History of Deadline Litigation Under Section 4 of the Endangered Species Act and the Multi-District Litigation Settlements*, 14 VT. J. ENVTL. L. 327, 373 (2012).

[67] *Id.* at 384.

[68] In Re: Endangered Species Act Section 4 Deadline Litigation, 704 F.3d 972, 976 (D.C. Cir. 2013).

[69] *Id.*

kill them.[70] The D.C. Circuit Court of Appeals rightly rejected the argument that the Safari Club had a legally protectable interest in delaying listing for deserving species[71] – to hold otherwise would require finding that Safari Club had an enforceable right to bureaucratic delay.[72]

## IV. PRESCIENCE, NOT SENESCENCE

Mr. Schiff repeatedly describes the ESA as an effort to protect every species regardless of the cost.[73] This depiction drives his narrative – how can such an absurd, quixotic purpose be legislated? He contends the ESA is "senescent" – no longer relevant to the recovery of listed species.[74] Indeed, he suggests that the ESA is not so much "senescent" as inherently defective.[75] These apprehensions stem from Mr. Schiff's fundamental mischaracterization of what the Act is all about. Today we know more about extinction than we did in 1973. But what we now know demonstrates the prescience of the ESA much more than its senescence or inherent defectiveness.

### *A. The ESA was Intended to Reverse the Dramatic Acceleration in Human-Caused Extinction*

The vast majority of species that have existed are extinct, and extinction is the expected fate of all species.[76] Many species, particularly local, endemic animals and plants with small populations, are at risk of extinction on relatively short time scales (on the order of a few million years) by numbers alone, through bad luck.[77] But human activity is loading the dice in favor of extinction. Biologists estimate that the present rate of extinctions is roughly 1,000 times higher than the background rate.[78] It may be higher now and will likely be higher in the

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[70] *Id*.

[71] *Id*. at 976-79.

[72] Despite the Safari Club's rebuff, the National Association of Home Builders filed a lawsuit collaterally attacking the settlement agreements on essentially the same grounds cited by Safari Club. Nat'l Ass'n of Home Builders v. U.S. Fish & Wildlife Serv., 2014 U.S. Dist. LEXIS 42946 (D.D.C. 2014). The district court dismissed the case on the ground that the Home Builders, like Safari Club, lacked standing to challenge the settlement agreements. *Id*. The dismissal is currently on appeal. The states of Oklahoma, Kansas, and North Dakota, joined by the Domestic Energy Producers Alliance and Oklahoma Farm Bureau, have filed nearly identical claims in the Northern District of Oklahoma. Oklahoma v. Dep't of the Interior, No. 14-00123, 2014 U.S. Dist. LEXIS 132528 (N.D. Okla. Sept. 22, 2014).

[73] *See*, *e.g*., Schiff, *supra* note 2, at 109-110, 123.

[74] *Id*. at 120.

[75] *Id*. at 124 n.117.

[76] DAVID M. RAUP, EXTINCTION: BAD GENES OR BAD LUCK? 3-4 (Norton 1991) (estimating that 99.9% of species that have existed are extinct).

[77] *Id*. at 124-27; ROMAN, *supra* note 10, at 42.

[78] S. L. Pimm, et al., *The Biodiversity of Species and Their Rates of Extinction, Distribution, and Protection*, 344 SCI., no. 6187, May 30, 2014, at 1246752-2.

future due to climate change, ironically fueled by fossils from previous mass extinctions.[79] Populations of vertebrate species across the globe are, on average, about half the size they were just 40 years ago, with freshwater species experiencing the sharpest declines (76 percent).[80] Species once so common that extinction seemed unthinkable have declined to the point where they are being considered for ESA protection.[81] Populations are being lost at a much higher rate than species, as would be expected, but that means that species may be extirpated from much of their range, leaving smaller remnant populations vulnerable to stochastic extinction.[82] This is a human-caused "first strike" that approximates the extraterrestrial agents (meteors or comets) believed to account for some or all previous mass extinctions.[83] Our contribution to the extinction of other species will be the most lasting legacy of our species.[84]

Extinction by human agency is what the ESA is trying to reverse. When it enacted the ESA in 1973, Congress found that "various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation" and that "other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction."[85] It was against this backdrop that Congress specified the purposes of the ESA: "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in [ESA § 2(a)]."[86] It is not a matter of protecting every species whatever the cost; this is Mr. Schiff's formulation, not the language of the ESA or the Supreme Court in *TVA v. Hill*. Rather, the Supreme Court held that "[t]he plain intent of Congress in enacting this statute was to halt and reverse *the trend toward species extinction*, whatever the cost."[87] Viewed in this proper context, the Act has been both successful in achieving its stated purpose

[79] *Id.*; ROMAN, *supra* note 10, at 34.

[80] WORLD WIDE FUND FOR NATURE, *Living Planet Report 2014*, 12, *available at* http://assets.panda.org/downloads/wwf_lpr2014_low_res.pdf. Worldwide, populations in protected areas have fared much better. *Id.* at 24-25.

[81] *See, e.g.*, Petition of the Center for Biological Diversity, Center for Food Safety, Xerces Society and Dr. Lincoln Brower to Protect the Monarch Butterfly (*Danaus Plexippus plexippus*) Under the Endangered Species Act (Aug. 2014), *available at* http://www.biologicaldiversity.org/species/invertebrates/pdfs/Monarch_ESA_Petition.pdf.

[82] ROMAN, *supra* note 10, at 35.

[83] RAUP, *supra* note 76, at 192-93.

[84] ROMAN, *supra* note 10, at 43-44.

[85] 16 U.S.C. § 1531(a)(1)-(2) (2012).

[86] *Id.* at § 1531(b).

[87] Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184 (1978).

and prescient in anticipating emergent issues.

Mr. Schiff's account is mostly silent regarding the Act's actual achievements, a surprising omission in light of the radical tinkering he proposes. Quantitative examinations of the effectiveness of the ESA indicate that it has been successful in its intended purpose of preventing extinctions caused by humans.[88] As of October 30, 2014, 1,563 domestic animal and plant species are listed as endangered or threatened.[89] It is estimated that 227 species would have become extinct by 2006 without the ESA.[90] Though critics point towards the relatively small number of species delisted, the ESA's success is much better assessed by the metric of extinctions avoided.[91] Studies evaluating recovery trends indicate that species listing also correlates with recovery, and that the longer a species is protected under the ESA, the more likely it is to be on the road to recovery.[92] Mr. Schiff's narrative is oddly detached from this record.

The ESA's record of effectiveness also stands in contrast to its predecessors. Previous species conservation laws required actions to protect species only to the extent practicable, covered only a limited range of animals, and allowed people to kill covered species without penalty.[93] These predecessor laws failed to provide a significant conservation benefit. In effect, we have already run a set of experiments examining the efficacy of species protection laws without strong,

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[88] J.M. Scott, et al., *By the Numbers* 29-33, *in* THE ENDANGERED SPECIES ACT AT THIRTY: RENEWING THE CONSERVATION COMMITMENT (D. Goble, J.M. Scott, and F.W. Davis, eds., Island Press, 2006); M. Taylor, K. Suckling, and J. Rachlinski, *The Effectiveness of the Endangered Species Act: A Quantitative Analysis*, 55 BIOSCIENCE 360-367 (2005).

[89] Summary of Listed Species Listed Populations and Recovery Plans, U.S. FISH & WILDLIFE SERV., http://ecos.fws.gov/tess_public/pub/boxScore.jsp (last visited Oct. 30, 2014).

[90] Scott, *supra* note 88, at 31.

[91] Critics of the ESA contend that the law has failed because only one percent of listed species have been delisted due to recovery. *See, e.g.*, Press Release, Rep. D. Hastings, Chairman of the House Committee on Natural Resources, *Excessive Endangered Species Act Litigation Threatens Species Recovery, Job Creation and Economic Growth* (December 6, 2011). According to the U.S. Government Accountability Office, however, the number of fully recovered species is not a useful measure of the ESA's effectiveness:

> The recovery plans we reviewed indicated that species were not likely to be recovered for up to 50 years. Therefore, simply counting the number of extinct and recovered species periodically or over time, without considering the recovery prospects of listed species, provides limited insight into the overall success of the Services' recovery programs.

U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-463R, ENDANGERED SPECIES: TIME AND COSTS REQUIRED TO RECOVER SPECIES ARE LARGELY UNKNOWN (April 6, 2006).

[92] Taylor, *supra* note 88, at 361.

[93] Endangered Species Protection Act of 1966, Pub. L. No. 89-669, 80 Stat. 926 (Oct. 15, 1966); DANIEL J. ROHLF, THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION 21-22 (Stanford Environmental Law Society, 1989); ROMAN, *supra* note 10, at 49-50. The Endangered Species Conservation Act of 1969, Pub. L. No. 91-35, 83 Stat. 275 (Dec. 5, 1969), extended protection to invertebrates and effected several other minor changes but otherwise did not significantly alter the scope of protection under the 1966 law. ROHLF, THE ENDANGERED SPECIES ACT at 21-22.

mandatory conservation measures, and these experiments failed, yielding to the ESA's 40-year record of success.

### *B. Reports of the ESA's Senescence are Greatly Exaggerated*

Despite this record, Mr. Schiff offers several examples in support of his argument that the ESA is senescent if not already irrelevant. First, he contends that the ESA is not well-suited to address climate change, citing as proof the undoubted fact that the ESA's suitability for addressing climate change is controversial.[94] The existence of controversy, however, does not validate any particular conclusion to the controversy. It likewise does not follow from the Environmental Protection Agency's experience implementing greenhouse gas regulation under the Clean Air Act that similar regulatory changes under the ESA will be "fraught with difficulty."[95] The Clean Air Act, a law considerably less flexible than the ESA in its mandates and comprehensive regulatory scheme, has still managed to adapt to climate change through regulatory change, with partial success.[96] Moreover, there is no indication that the ESA or its implementing regulations *need* to be amended to address climate change.

Mr. Schiff conflates several distinct layers implicit in the question of whether the ESA can effectively deal with climate change. First is the question of whether the ESA can help conserve animals and plants at risk of extinction as a result of climate change. There are strong reasons to believe it can. The Services have listed several species based primarily on threats related to climate change, including the polar bear, bearded and ringed seals, and twenty species of corals.[97] The ESA applies to these species like any other listed species, requiring federal agencies to ensure their actions do not jeopardize the species or destroy or adversely modify their critical habitat.[98] "Take" in the form of direct killing,

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[94] Schiff, *supra* note 2, at 120-21.

[95] *Id.* at 121-22, referring to the Environmental Protection Agency's "tailoring rule." 75 Fed. Reg. 31,514 (Jun. 3, 2010). While the Supreme Court invalidated the tailoring rule to the extent it allowed the Environmental Protection Agency to define "major sources" based solely on their greenhouse gas emissions, the Court by a broad 7 to 2 majority upheld the Environmental Protection Agency's authority to regulate greenhouse gas emissions from sources already regulated as "major sources." Util. Air Reg. Grp. v. Envtl. Prot. Agency, 134 S. Ct. 2427, 2439-49 (2014).

[96] *See* UARG, 134 S. Ct. at 2447-49 (upholding regulation of greenhouse gas emissions from sources already regulated as "major sources" under Clean Air Act).

[97] Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Polar Bear (*Ursus maritimus*) Throughout Its Range, Final Rule, 73 Fed. Reg. 28,212 (May 15, 2008); Endangered and Threatened Species, Threatened Status for the Arctic, Okhotsk, and Baltic Subspecies of the Ringed Seal and Endangered Status for the Ladoga Subspecies of the Ringed Seal, Final Rule, 77 Fed. Reg. 76,706 (Dec. 28, 2012); Endangered and Threatened Wildlife and Plants: Final Listing Determinations on Proposal to List 66 Reef-building Coral Species and to Reclassify Elkhorn and Staghorn Corals, 79 Fed. Reg. 53,852 (Sep. 10, 2014).

[98] 16 U.S.C. § 1536(a)(2) (2012).

hunting, and habitat destruction, is prohibited for listed animals.[99] The Services will need to develop and implement recovery plans.[100] If climate change is the "first strike" propelling these species toward extinction, these measures can help soften the blow.

A separate question is whether the ESA is capable of addressing climate change threats. Mr. Schiff acknowledges that the ESA "is most effective at addressing species threats based on habitat conversion, but it is very poorly adapted to addressing threats when their 'causal mechanisms are indirect (as in greenhouse gas emissions).'"[101] The distinction between direct and indirect causation, however, is irrelevant. If an action carried out, authorized, or funded by a federal agency "may affect" an endangered or threatened species or its critical habitat, the agency must formally consult with the Fish and Wildlife Service or National Marine Fisheries Service.[102] The term "action" expressly includes "actions directly or indirectly causing modifications to the land, water, or air," while the "effects of the action" includes both direct and indirect effects.[103] In practice, it is not the indirectness of the effects of climate change but their cumulative character that poses a challenge for ESA consultations, as individual emissions are inevitably small in comparison to global emissions. This challenge is not unique to greenhouse gas emissions, however; the Services face the same problem whenever they have to determine whether a discrete action will jeopardize a species' continued existence or adversely modify its critical habitat.[104]

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[99] *Id.* at § 1538(a)(1). For species listed as threatened, however, the Services may exempt the species from full application of the ESA's take prohibition, and the Fish and Wildlife Service adopted a special rule with such an exemption for the polar bear. Endangered and Threatened Wildlife and Plants; Special Rule for the Polar Bear; Final Rule, 73 Fed. Reg. 76,249 (Dec. 16, 2008).

[100] 16 U.S.C. § 1533(f) (2012).

[101] Schiff, *supra* note 2, at 121 (quoting J.B. Ruhl, *Keeping the Endangered Species Act Relevant*, 19 DUKE ENVTL. L. & POL'Y F. 275, 279 (2009)).

[102] 16 U.S.C. § 1536(a)(2) (2012); 50 C.F.R. § 402.14(a) (2014).

[103] 50 C.F.R. § 402.02 (2014); *but see* OFFICE OF THE SOLICITOR, U.S. DEP'T OF THE INTERIOR, MEMORANDUM M-37017, GUIDANCE ON THE APPLICABILITY OF THE ENDANGERED SPECIES ACT'S CONSULTATION REQUIREMENTS TO PROPOSED ACTIONS INVOLVING THE EMISSION OF GREENHOUSE GASES (Oct. 3, 2008) (concluding that proposed action that could emit greenhouse gases cannot pass "may affect" test).

[104] Rohlf, *supra* note 1, at 268-69, 272 (noting that the Services generally avoid jeopardy or adverse modification findings by comparing the action's effects to the "species as a whole" – even where the action *directly* eliminates populations or causes habitat destruction). On the problem of avoiding the cumulative harms of many small actions, *see* W.E. Odum, *Environmental Degradation and the Tyranny of Small Decisions*, 32 BIOSCIENCE 728-729 (1982); D. S. Wilcove et al., *Quantifying Threats to Imperiled Species in the United States: Assessing the Relative Importance of Habitat Destruction, Alien Species, Pollution, Overexploitation, and Disease*, 48 BIOSCIENCE 607-615 (1998); H. Spaling and B. Smit, *Cumulative Environmental Change: Conceptual Frameworks, Evaluation Approaches, and Institutional Perspectives*, 17 ENVTL. MGMT. 587-600 (1993); T. L. Swift and S.J. Hannon, *Critical Thresholds Associated with Habitat Loss: A Review of the Concepts,*

To date, the ESA has not been used effectively to reduce greenhouse gas emissions produced by undertaken or approved by federal agencies.[105] Mr. Schiff cites this imperfect implementation as evidence that the ESA is not well-suited to address climate change, but imperfect implementation does not reflect any inherent defect in the ESA.[106] Rather, the problem lies in the Fish and Wildlife Service's listings of the polar bear as a threatened species with a special exemption issued under section 4(d) of the Act.[107] This exemption directly hinders the operation of the ESA's most potent provisions – the consultation requirement and the take prohibition – as they apply to particular sources of greenhouse gas emissions that may affect polar bears and their habitat.[108] These exemptions are not compelled by the ESA, and need not be models for future species listings connected to climate change.[109] Similarly, the Department of the Interior Solicitor's Office conclusion that ESA consultation is not required for proposed sources of greenhouse gas emissions,[110] reflects politicized decision-making more than the best available scientific information. In addition, the ESA provides significant conservation benefits for species listed as a result of climate change and is no less relevant even if it ultimately proves ineffective in addressing the *sources* of climate change.

Mr. Schiff next complains that the ESA "anachronistically" protects individual species instead of ecosystems because "although the utility value of biodiversity may be great, the importance of any one species to preserving that biodiversity is not."[111] Evidently informed more by Social Darwinism than genuine evolutionary biology, Mr. Schiff suggests that the ESA shields species from the "harsh facts of life" and the "brutal, unforgiving struggle that is evolution."[112] Accordingly, he proposes that extinction is ecologically helpful as

*Evidence, and Applications*, 85 BIOLOGICAL REVIEWS 35-53 (2010).

105 Michael C. Blumm and Kya B. Marienfeld, *Endangered Species Act Listings and Climate Change: Avoiding the Elephant in the Room*, 20 ANIMAL L. 277, 309 (2014).

106 Schiff, *supra* note 2, at 120-21.

107 16 U.S.C. § 1533(d) (2012).

108 Blumm and Marienfeld, *supra* note 105, at 288-91, 306-09 (describing the consequences of the polar bear "4(d)" rule). The Fish and Wildlife Service also proposed listing the wolverine as a threatened species based on climate change and with a similar exemption. *Id*. at 297-300. The wolverine listing proposal was withdrawn in 2014. Endangered and Threatened Wildlife and Plants; Threatened Status for the Distinct Population Segment of the North American Wolverine Occurring in the Contiguous United States; Establishment of a Nonessential Experimental Population of the North American Wolverine in Colorado, Wyoming, and New Mexico, 79 Fed. Reg. 47,522 (Aug. 13, 2014).

109 Blumm and Marienfeld, *supra* note 105, at 306-07 (noting that polar bear and wolverine 4(d) rules "essentially adopted the approach of the dissenting opinion in the U.S. Supreme Court's Sweet Home decision, where Justice Scalia opined that FWS lacked authority to promulgate a take regulation that went beyond intentional, direct takes.").

110 OFFICE OF THE SOLICITOR, MEMORANDUM M-37017, *supra* note 103.

111 Schiff, *supra* note 2, at 122.

112 Schiff, *supra* note 2, at 122 n.104 (quoting John C. Kunich, *The Fallacy of Deathbed*

a "natural method of weeding the garden, of filtering out the weaker, or inflexible, or anachronistic species so as to maximize the evolutionary fitness of the gene pool at any point in time."[113] This view is biological nonsense, based on the erroneous premise that evolution is directed toward a particular, progressive goal.[114] Most extinctions prior to the current round of human-caused mass extinctions were likely due more to bad luck than the victims' lack of evolutionary fitness.[115] Extinction may play a role in evolution by allowing the development of new body plans or other innovations, but if so, this effect operates on the scale of millennia, not at the level of existing ecosystems.[116] Indeed, no credible scientific evidence exists that extinctions *within* an ecosystem promote biological diversity. And while some species may not be essential to their ecosystems, many if not most *are* essential, and our ability to detect which are and are not is limited.[117] The Fish and Wildlife Service considers all species to be "of some importance" to their ecosystems.[118] Thus, the suggestion that the ESA is standing in the way of evolutionary progress by conserving weak or unimportant species is fundamentally mistaken.

The complaint that the ESA ignores ecosystems in favor of species was a recurrent theme of ESA opponents twenty years ago,[119] but is as meritless now as it was then. The purpose of the Act has always been to "provide a means whereby the ecosystems upon which endangered species and threatened species

*Conservation Under the Endangered Species Act*, 24 ENVTL. L. 501, 560 (1994)). Kunich, like Schiff, argues from the mistaken premise that the ESA is intended to protect all species indiscriminately: "Regardless of whether certain species are in danger of extinction for reasons unrelated to human actions, including Darwinian maladaptation and lack of evolutionary fitness … the ESA blindly tilts at whatever extinction windmills come within its vast range and its immense scope." Kunich, *supra*, at 560-61.

113 Schiff, *supra* note 2, at 122 n.104 (quoting Kunich, *supra* note 112, at 560).

114 Kunich, *supra* note 112, at 560 (speculating that had humans and the ESA existed during the time of the dinosaurs, "we would have been required to stand in the path of evolutionary progress."). The mass extinction of dinosaurs at the end of the Cretaceous period about 65 million years ago, however, is strongly associated with the impact of an asteroid over 10 kilometers in diameter near the present town of Chicxulub Puerto, Mexico, rather than any weakness, inflexibility, anachronism, or other failings on the part of dinosaurs. TIM FLANNERY, THE ETERNAL FRONTIER: AN ECOLOGICAL HISTORY OF NORTH AMERICA AND ITS PEOPLES 13-24 (Atlantic Monthly Press, 2001). On the fallacy of progress in evolution, *see* STEPHEN J. GOULD, FULL HOUSE: THE SPREAD OF EXCELLENCE FROM PLATO TO DARWIN 167-75 (Harmony, 1996).

115 RAUP, *supra* note 76, at 191. By "random," Raup means that species go extinct "because they are subjected to biological or physical stresses not anticipated in their prior evolution and because time is not available for Darwinian natural selection to help them adapt." *Id*.

116 *Id*. at 187.

117 Fabrizio Sergio et al., *Ecologically Justified Charisma: Preservation of Top Predators Delivers Biodiversity Conservation*, 43 J. APPLIED ECOLOGY 1049, 1052-54 (2006) (finding biodiversity levels consistently higher in sites occupied by top predators); D. U. Hooper et al., *Effects of Biodiversity on Ecosystem Functioning: A Consensus of Current Knowledge*, 75 ECOLOGICAL MONOGRAPHS, no. 1, Feb. 2005, at 3-24.

118 Listing and Recovery Priority Guidelines, *supra* note 11, at 43,101.

119 *See, e.g.*, Kunich, *supra* note 112, at 552-53.

depend may be conserved. . . .”[120] Thus, the central purpose of reversing the trend toward human-caused extinction is to protect ecosystems. ESA listings *are* protecting entire ecosystems, and doing so effectively.[121] Ironically, the broader the scope of ecosystem protection afforded by individual species listings, the more likely it appears that the listing will be opposed by the ESA’s foes (including Mr. Schiff). For example, the delta smelt, listed as threatened, is often viewed as a proxy for the health of the entire San Francisco Bay-Delta system in light of massive exports of water that directly kill smelt and reduce their habitat by increasing salinity in the system.[122] Mr. Schiff recently filed a Petition for Writ of Certiorari with the Supreme Court inviting the Court to overturn *TVA v. Hill* based on water export limitations imposed by the smelt’s listing.[123] Similarly, Mr. Schiff authored a petition to de-list the coastal California gnatcatcher, a threatened species whose listing protected tens of thousands of acres of southern California’s rapidly disappearing coastal sage scrub habitat.[124] Mr. Schiff has also actively opposed the polar bear listing and critical habitat designation, although protecting the top predator in vast areas of the Arctic Ocean will have benefits for this entire ecosystem.[125] These examples suggest that the critics’ real argument with the ESA is that it *does* effectively protect ecosystems, rather than that it does not.

Mr. Schiff’s final example of the ESA’s senescence – that it imposes unjustifiable costs – rests on the claim that government officials are systematically hiding the true costs of protecting species under the ESA.[126] Evidence of this vast conspiracy is conspicuously lacking, as is any

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[120] 16 U.S.C. § 1531(b) (2012).

[121] The ESA listing of the northern spotted owl, for example, was the driving force for implementation of the Northwest Forest Plan, which provides protection for diverse forest and aquatic ecosystems on millions of acres of federal lands in Washington, Oregon, and California. *See* Jack W. Thomas et al., *The Northwest Forest Plan: Origins, Components, Implementation Experience, and Suggestions for Change*, 20 CONSERVATION BIOLOGY, no. 2, 2006, 277-87.

[122] Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Delta Smelt, 58 Fed. Reg. 12,854, 12,854-55 (Mar. 5, 1993); Natural Res. Defense Council v. Jewell, 749 F.3d 776, 780 (9th Cir. 2014) (en banc).

[123] Petition for Writ of Certiorari, San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581 (9th Cir. 2014) (*petition for cert. filed* Sept. 30, 2014), *available at* http://www.pacificlegal.org/document.doc?id=1636 (“Does the decision of this Court in Tennessee Valley Authority v. Hill . . . still require federal agencies to protect species and their habitat ‘whatever the cost’?”).

[124] Petition of the Center for Environmental Science, Accuracy and Reliability; Coalition of Labor, Agriculture, and Business; Property Owners Association of Riverside County; National Association of Home Builders; and the California Building Industry Association to Remove the Coastal California Gnatcatcher from the List of Threatened Species Under the Endangered Species Act (May 29, 2014), *available at* http://blog.pacificlegal.org/wp/wp-content/uploads/2014/06/SIGNED-DELIST-PET.pdf.

[125] Safari Club Int’l v. Salazar (In re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation), MDL No. 1993, 709 F.3d 1, 8-11 (D.C. Cir. 2013) (upholding polar bear listing decision based on declining sea ice throughout bear’s range).

[126] Schiff, *supra* note 2, at 125.

quantification of the "immense costs" the ESA is imposing (or, as Mr. Schiff claims, would impose if the radicalism of *TVA v. Hill* was strictly observed). Although Mr. Schiff suggests that society is unwilling to pay much to protect the furbish lousewort, Eastern indigo snake, or Kauai cave wolf spider, conservation by popularity contest is a poor method of allocating the "democratically justifiable costs" of conserving endangered species.[127]

## V. AVOIDING A PRESCRIPTION FOR EXTINCTION

Some of the problems Mr. Schiff notes are real, including the politicization and bureaucratization that hinder the ESA's effectiveness in reversing the trend of human-caused extinction. The remedies he proposes, however, appear calculated to exacerbate these problems and to ensure that the ESA will ultimately become as irrelevant as he predicts. There are two reasonably-obvious remedies for the ESA's sometimes paralyzing bureaucratization. First, courts should continue to reject lawsuits seeking to perpetuate bureaucratic delays in ESA listings.[128] While some, like the Safari Club, are unintended beneficiaries of bureaucratization, no one has a right to delay. Second, the Services' ESA listing programs must be adequately funded. Delays in species listing and delisting have multiple causes, including bureaucratization, politicization, and inadequate funding.[129] Funding for the Services' listing programs is itself a political issue, however, and agenda-driven lawmakers hostile to the ESA have consistently underfunded listing and recovery activities.[130] While he agrees that bureaucratization is a bad thing, Mr. Schiff suggests neither remedy; instead, he recommends amending the ESA to require the Services to initiate de-listing rulemaking based on their own status review recommendations.[131] Adding another mandatory deadline without adequate funding, however, does little to serve the goal of reducing bureaucratization.

To address the Act's politicization, Mr. Schiff suggests giving the Services

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[127] *Id.* at 124-25. *See* Frank B. Cross, *Natural Resource Damage Valuation*, 42 VAND. L. REV. 269, 289-92 (1989) (noting difficulty of applying valuation methodologies where there are "marginal harms to possibly unrecognized resources").

[128] *See* Nat'l Ass'n of Home Builders v. U.S. Fish & Wildlife Serv., 2014 U.S. Dist. LEXIS 42946 (D.D.C. 2014) (dismissing *inter alia* because plaintiffs' claims were "indistinguishable from those that this Court and Circuit considered and rejected in the *Safari Club* cases.").

[129] CTR. FOR BIOLOGICAL DIVERSITY, A FUTURE FOR ALL: A BLUEPRINT FOR STRENGTHENING THE ENDANGERED SPECIES ACT 5 (Oct. 2011), http://www.biologicaldiversity.org/campaigns/esa/pdfs/A-Future-for-All.pdf.

[130] Rohlf, *supra* note 1, at 256 n.24 [quoting J.R. DeShazo & Jody Freeman, *Congressional Politics, in* THE ENDANGERED SPECIES ACT AT THIRTY: RENEWING THE CONSERVATION PROMISE vol. 1, 68 (Dale D. Goble, J. Michael Scott & Frank W. Davis eds., Island Press 2006 ("members of Congress use their positions on oversight and appropriations committees to prevent [FWS] from complying with the specific provisions of the ESA."))].

[131] Schiff, *supra* note 2, at 128.

the discretion to decide how much protection each listed species should receive.[132] This proposal would open the door to additional political pressure while weakening the judicial check on agency decisions that deviate from the ESA's best available science standard. Mr. Schiff's suggestion to make the God Committee exemption easier to invoke[133] is similarly misguided – it is not clear how easier access to a body of political appointees with the express power to override the ESA's best available science standard would help *depoliticize* the ESA. Even if making the God Committee easier to invoke held some promise for depoliticizing the Act, this measure would be meaningless because the Services issue jeopardy and adverse modification findings so infrequently. Increasing the frequency of jeopardy and adverse modification findings does not appear to be part of Mr. Schiff's proposal.

Mr. Schiff prescribes an additional measure to remedy the ESA's politicization – paying landowners to avoid killing listed species and destroying their habitat.[134] While this proposal appears frequently on the wish lists of ESA foes,[135] it has little connection to any documented politicization. Instead, the underlying complaint is not that the Act has been politicized, but that it is sometimes applied on private lands, and the proposal is intended to end that application. Mr. Schiff claims that individual landowners are a "hapless few" that suffer disproportionately from the costs of endangered species protection, but the ESA affects landowners, if at all, only when they wish to "take" listed animals or seek federal approval for an activity that may affect a listed species or destroy or adversely modify its critical habitat.[136] The small sets of affected landowners are not "hapless" but active or prospective participants in activities that are prohibited by the ESA. In some circumstances, it may be appropriate to purchase the affected lands, but the ESA already provides for conservation purchases, and funds are available for this purpose through the Land and Water Conservation Fund.[137] But providing blanket payments to people and

[132] *Id.* at 126.

[133] *Id.* at 127.

[134] *Id.* at 128-31.

[135] *See, e.g.*, Threatened and Endangered Species Recovery Act of 2005, H.R. 3824, 109th Cong. (2006); Kunich, *supra* note 112, at 576.

[136] Schiff, *supra* note 2, at 128-29; 16 U.S.C. § 1538(a)(1) (2012) (take prohibition); 16 U.S.C. § 1536(a)(2) (2012) (consultation for federally authorized actions). "Take" is defined to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (2012). "Harm" includes significant habitat modification or degradation if "it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." Definitions, 50 C.F.R. § 17.3 (2006).

[137] 16 U.S.C. § 1534 (2012); Babbitt v. Greater Sweet Home Chapter of Communities for a Better Or., 515 U.S. 687, 702-03 (1995) (reasoning that even though other sections of the ESA prohibit significant habitat modification on private lands that actually kills or injures wildlife, purchase of habitat under § 5 may be appropriate to prevent harm from future development). The ESA also provides that landowners can obtain permits to take listed species, and the Services routinely authorize take through incidental take permits. 16 U.S.C. § 1539(a)(1)(B) (2012); Matthew

corporations to refrain from taking endangered animals, or to avoid jeopardizing listed species or adversely modifying their critical habitat is like paying polluters not to pollute. This burden is one that is justly borne by the actor, not the public as a whole.[138] While Mr. Schiff suggests that under-pricing the costs of the ESA's land use controls has resulted in overutilization of these controls,[139] evidence of overutilization is lacking, and his proposal appears intended to price the ESA into *non-utilization*.

As an alternative to the payment proposal, Mr. Schiff suggests that protections afforded listed species should be based on a sliding scale according to the species' utilitarian value.[140] He dodges the immense problems inherent in the task of having Congress, bureaucrats, scientists, or economists make judgments regarding the value of various species.[141] What good is a wolverine? What is a right whale worth? Mr. Schiff appears less interested in these questions than in ensuring that listing decisions can be blocked by those who will profit from species extinction.[142] It is difficult to imagine that any species but the most well-known, yet paradoxically most unaffected by human activity, would be listed in this hyper-politicized system.

Mr. Schiff's suggestions are the wrong prescriptions. They address non-existent issues while failing to address genuine problems with the ESA's implementation. They would target the strong, mandatory provisions of the ESA that have kept the Act robust and relevant over its forty-year existence. If they were adopted, the ESA would indeed be put on the path toward irrelevance, as it would be incapable of reversing the trend toward human-caused extinction as intended.

At forty years and counting, the ESA has aged well, even if it has been implemented less than perfectly. The Act's record of success, together with its capacity to respond to the threats of climate change and to protect entire ecosystems, reflect a robustness unusual for any legislation of comparable age.

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E. Rahn et al., *Species Coverage in Multispecies Habitat Conservation Plans: Where's the Science?* 56 BIOSCIENCE 613, 613 (2006) (noting that by 2005, Fish and Wildlife Service had approved nearly 450 habitat conservation plans through the incidental take permit program, covering about forty million acres).

138 *See* OECD, Recommendation of the Council on the Implementation of the Polluter-Pays Principle, OECD Doc. C(74)223 (1974), reprinted in 14 INT'L LEGAL MATERIALS 234 (1975) (adopting concept that "polluter should bear the expenses of preventing and controlling pollution" as "fundamental principle for allocating costs of pollution prevention and control measures introduced by the public authorities in [OECD] Member countries.").

139 Schiff, *supra* note 2, at 130 n.162 (citing Jonathan H. Adler, *Money or Nothing: The Adverse Environmental Consequences of Uncompensated Land Use Controls*, 49 B.C. L. REV., 301, 339 (2008)).

140 Schiff, *supra* note 2, at 130.

141 ROMAN, *supra* note 10, at 84-89.

142 Schiff, *supra* note 2, at 130 (noting a utilitarian listing process would become "a political issue subject to the normal give and take of political argument," essentially enabling landowners to lobby for their preferred option).

Rather than bemoaning its senescence, we should pay homage to the ESA's prescience in confronting the problem of human-caused extinction.