

# SLAMMING SHUT THE ARK DOORS: CONGRESS'S ATTACK ON THE LISTING PROCESS OF THE ENDANGERED SPECIES ACT

By  
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## I. INTRODUCTION

The first time humankind saved the animals of this world it was essentially a one-man show; Noah let two of every animal onto his Ark before he closed the doors and waited out the flood.<sup>1</sup> In the Twentieth Century, we again are facing global extinctions of this earth's plants and animals.<sup>2</sup> But the 104th Congress, in an anti-regulatory flood of its own,

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<sup>1</sup> See 142 CONG. REC. S1816, S1842 (daily ed. Mar. 12, 1996) (statement of Sen. Chafee). Senator Chafee (R-RI) noted that "when Noah led the animals into the ark he included all species. If I could quote, 'One pair male and female of all beasts, clean and unclean, of birds and everything that crawls on the ground.' And God did not direct him to select only the most beautiful animals or those plants that might have some particular use to mankind and perhaps to help him to cure cancer, whatever it might be. Noah saved all the creatures." *Id.* In response to Senator Chafee's reference to Noah, Senator Kempthorne (R-Idaho) responded, "If there had been an Endangered Species Act in existence at the time that Noah was charged with saving those species, I do not know if he would have gotten permits before the floods came." *Id.* at S1848.

Along biblical lines, there has been a recent movement among some Evangelical Christians to support a strong Endangered Species Act (ESA). The Evangelical Environmental Network includes 90 colleges and 1,000 churches whose members oppose any reduction of environmental protection for threatened plants and animals. See James Bornemeier, *The Washington Connection: A Political Noah's Ark Fights Wildlife Bill*, L. A. TIMES, Mar. 8, 1996, at A3; see also Bill Broadway, *Tending God's Garden: Evangelical Group Embraces Environment*, WASH. POST, Feb. 17, 1996, at C8 (noting Evangelical Environmental Network is spearheading a \$1 million campaign in support of endangered species and trying to prevent congressional conservatives from sinking the "Noah's Ark of our day"—the ESA); Tony Campolo & Ron Sider, *All Creatures Great and Small*, ATLANTA J. & CONS., Feb. 18, 1996, at 5 ("If Noah were around today, he'd take one look at attempts to gut the Endangered Species Act, and he'd start building another ark."); Peter Steinfels, *Evangelical Group Defends Laws Protecting Endangered Species as a Modern "Noah's Ark"*, N.Y. TIMES, Jan. 31, 1996, at A12 (containing statement of Dr. Calvin B. DeWitt, a founder of the Evangelical Environmental Network, noting that "Congress and special interest are trying to sink [the ESA]").

<sup>2</sup> Prominent biologist E.O. Wilson sees species extinction as a metaphorical fourth horseman of an environmental apocalypse. E.O. Wilson, *Biodiversity, Prosperity, and Value*, quoted in LAKSHMAN D. GURUSWAMY ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER 254 (1994) ("Now there is increasing awareness of the fourth horseman in the envi-

slammed shut the doors of our modern ark—the Endangered Species Act (ESA)<sup>3</sup>—before all creatures were allowed to board. On April 10, 1995 a rider tacked onto an emergency appropriations bill was signed into law by President Clinton, legislating a complete moratorium on listing species or critical habitat under the ESA.<sup>4</sup> This essay explores the motivating factors behind the Moratorium. It attempts to separate rhetoric from reality in discussing why the 104th Congress passed this legislation and considers the role that the Contract with America played in bringing about the Moratorium.

This article shows that market forces powerfully shaped the 104th Congress's anti-ESA legislation and are behind bills<sup>5</sup> which, if passed, will further weaken the ESA. Corporate America viewed the swearing in of the 104th Congress as an irresistible opportunity to loosen environmental regulations which had cut into short-term profits. After years of Democratic Congresses, which began to place checks on corporate cost externalization as early as the 1970's, industry found sympathetic support among the more conservative members of the 104th Congress.

The veil of populism which corporate-sponsored senators and representatives tried to spin around their anti-ESA legislation has recently worn thin. Whether the repeal of the Moratorium and the apparent demise of pending ESA legislation signals a new era of environmental awareness which will no longer accept corporate welfare at the public's expense, or whether it is merely a return to pre-Contract days where industry will be more discreet in its manipulation of the legislative process, remains to be seen.

## II. THE LISTING PROCESS UNDER THE ESA

### A. *Listing as Endangered or Threatened*

Currently, under the Endangered Species Act, the species listing process is based on science.<sup>6</sup> An endangered species is defined as "any species which is in danger of extinction throughout all or a significant portion of its range,"<sup>7</sup> while a threatened species means any species likely to become endangered within the foreseeable future.<sup>8</sup> Taking into account the

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ronmental apocalypse, one that, unlike the first three, is neither reversible nor predictable in its consequences. This horseman is species extinction and other forms of genetic depletion due to the destruction of natural habitats.").

<sup>3</sup> Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1994).

<sup>4</sup> Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-6, tit. II, ch. 4, 109 Stat. 73, 86 (1995).

<sup>5</sup> Bills pending in the 104th Congress at the time this article was written will not be pending upon its publication as the 105th Congress will have convened.

<sup>6</sup> 16 U.S.C. § 1533(b).

<sup>7</sup> *Id.* § 1532(6).

<sup>8</sup> *Id.* § 1532(20). Today there are 960 species listed as endangered or threatened in the United States. United States Department of the Interior, ENDANGERED SPECIES BULLETIN, Jan.-Feb., 1996, at 32, reprinted in School of Natural Resources and Environment, The Univer-

best scientific and commercial data available,<sup>9</sup> the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) must weigh a variety of factors in determining whether a species should be listed as an endangered or threatened species, including consideration of loss of habitat, predation, disease, and any other natural or manmade factors affecting the species' continued existence.<sup>10</sup> Thus, based solely on a comprehensive survey of the scientific data revealing the status of a species, the Services must determine whether a species is endangered or threatened. Economic factors are not considered at the listing stage.<sup>11</sup>

### B. Critical Habitat Listing

Concurrent with listing of endangered species, the Services are urged to designate critical habitat for such species.<sup>12</sup> In contrast to the listing process, in which listing is to be based solely on science, the Services must take into account the economic impact of designating critical habitat.<sup>13</sup> Moreover, designation of an area as critical habitat, unless necessary to prevent extinction, must confer benefits to the species that outweigh the social and economic benefits of not including the area as critical habitat.<sup>14</sup> Thus, in regard to critical habitat, the claims that the current ESA disregards the economic costs to society of species recovery are false.

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sity of Michigan, ENDANGERED SPECIES UPDATE, Mar., 1996 (listing 754 endangered species (320 animals, 434 plants) and 206 threatened species (114 animals, 92 plants)).

<sup>9</sup> 16 U.S.C. § 1533(b).

<sup>10</sup> 16 U.S.C. § 1533(a)(1) states:

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or threatened species because of any of the following factors:

- (A) the present or a threatened destruction, modification, or curtailment of its habitat or range;
- (B) over utilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.

See also 50 C.F.R. § 424 (1995).

<sup>11</sup> H.R. CONF. REP. NO. 835, at 19 (1982), reprinted in 1982 U.S.C.A.N. 2807, 2860-61 (noting that the principle purpose of the amendments "is to ensure that decisions in every phase of the process pertaining to the listing or delisting of species are based solely upon biological criteria and to prevent non-biological considerations from affecting such decisions").

<sup>12</sup> 16 U.S.C. § 1533(a)(3).

<sup>13</sup> 16 U.S.C. § 1533(b)(2); see generally Karl Gleaves & Katherine Wellman, *Economics and the Endangered Species Act*, 13 PUB. LAND L. REV. 149 (1992). Gleaves and Wellman note "[e]conomic considerations are not ignored by the ESA. The role of economics, while circumscribed in some instances, is an important part of evaluating projects that may affect listed species or their habitat, and is valuable in the implementation of recovery actions. . . . While some feel that biological decisions should not be 'contaminated' by economic considerations, a faulty economic analysis may pose an even greater threat to the integrity of the ESA." *Id.* at 165.

<sup>14</sup> 16 U.S.C. § 1533(b)(2).

Many members of the 104th Congress believed that the ESA listing process was inherently flawed and has led to innumerable injustices committed against the nation's hard-working, law-abiding citizens.<sup>15</sup> Thus, until the ESA listing processes could be rewritten in an amended ESA, the new majority in Congress decided that it was better to halt listings altogether, rather than to allow even the most threatened of species to be added to the list.<sup>16</sup>

### III. THE MORATORIUM

#### A. *Public Law 104-6: The Moratorium*

On April 10, 1995 Congress officially slammed shut the gateway to the ESA. Of course, the 104th Congress thought it best to close the doors in the dead of night rather than in the broad daylight of public scrutiny. Tucked away in a lengthy rescissions bill, The Emergency Supplemental Appropriations and Rescissions Act for the Department of Defense To Preserve and Enhance Military Readiness Act of 1995 withdrew \$1,500,000 from the FWS.<sup>17</sup> The Act also precluded the FWS from using any of the remaining funds for listing species as threatened or endangered.<sup>18</sup> Additionally, the FWS was prohibited from making any critical habitat designations.<sup>19</sup> Despite the Clinton administration's objections to this provision, the President decided that he was compelled to sign the Act to replenish funds for military operations in the Persian Gulf, Somalia, Rwanda, Haiti, and elsewhere.<sup>20</sup> Thus, an absolute bar to species listings went into effect and the List of Endangered and Threatened Species became frozen in

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<sup>15</sup> See *infra* part III.C.1.

<sup>16</sup> See *infra* part V (discussing pending legislation to amend ESA).

<sup>17</sup> Pub. L. No. 104-6, 109 Stat. 73, 86 (1995). The specific language of the statute states: Of the funds made available under this heading in Public Law 103-332—

(1) \$1,500,000 are rescinded from the amounts available for making determinations whether a species is a threatened or endangered species and whether habitat is critical habitat under the Endangered Species Act of 1973 (16 U.S.C. § 1531 et seq.); and

(2) none of the remaining funds appropriated under that heading may be made available for making a final determination that a species is threatened or endangered or that habitat constitutes critical habitat (except a final determination that a species previously determined to be endangered is no longer endangered but continues to be threatened).

To the extent that the Endangered Species Act of 1973 has been interpreted or applied in any court order (including an order approving a settlement between the parties to a civil action) to require the making of a determination respecting any number of species or habitats by a date certain, that Act shall not be applied to require that the determination be made by that date if the making of the determination is made impracticable by the rescission made by the preceding sentence.

*Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See Statement By President William J. Clinton Upon Signing H.R. 889, 31 WEEKLY COMP. PRES. DOC. 603, (Apr. 17, 1995), reprinted in 1995 U.S.C.C.A.N. 88-1. President Clinton stated:

time. The voices of concerned citizens and environmental groups regarding species that were proceeding through the listing process were ineffective as the FWS was completely powerless to respond.<sup>21</sup>

Initially, the Moratorium was supposed to be a brief time out, lasting only until the end of the fiscal year—September 30, 1995.<sup>22</sup> The Moratorium continued, however, and remained in effect by a series of continuing resolutions, which contained language that locked in the substantive provisions of the original Moratorium.<sup>23</sup> The resolutions actually expanded the effects of the moratorium by precluding FWS from doing any work which would constitute preparation or publication of listing proposals as well as final listings.<sup>24</sup>

The debate over whether to continue the Moratorium escalated during discussions concerning appropriations for the remainder of the 1996 Budget. Senator Reid (D-Nev.) introduced an amendment to the appropriations bill which would have ended the Moratorium.<sup>25</sup> The amendment, however, was narrowly defeated 51-49 in the Senate.<sup>26</sup> Instead, the Senate adopted an amendment introduced by Senator Hutchison (R-Tex.) which continued the Moratorium with allowance for "emergency listings."<sup>27</sup> The Hutchison Amendment also conveniently allowed the Secretary to delist

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Despite my Administration's objections, the Act contains a provision that will rescind \$1.5 million for listing threatened and endangered species and determining critical habitats needed for the recovery of such species, while imposing a moratorium until the end of this fiscal year on the remaining funds. As a result, these provisions will impair the Administration's ability to proceed on its recently announced package of reform principles and consequently, our ability to respond to the needs and concerns of private landowners.

*Id.* at 88-1 to 88-2.

<sup>21</sup> See *Endangered Species: Reid Offers Amendment to Spending Bill to Lift Moratorium on Species Listing*, Nat'l Env't Daily (BNA) (Mar. 14, 1996), available in LEXIS, Bna Library, Bnaned File (noting that the "FWS has continually responded to groups protesting the listing or delisting of a certain species that Interior does not have the money to process petitions to delist species, propose listings, or make previously proposed listings final").

<sup>22</sup> See H.R. CONF. REP. NO. 104-101, at 22 (1995) reprinted in 1995 U.S.C.C.A.N. 85; see also *infra* note 44.

<sup>23</sup> See H.R.J. RES. 103, 104th Cong. (1995); H.R.J. RES. 123, 104th Cong. § 106 (1995); see also *Environmental Defense Ctr. v. Babbitt*, 73 F.3d 867, 870 (9th Cir. 1995) (explaining how joint resolutions continued effects of Moratorium).

<sup>24</sup> Margret McMillan, *Report from the Field: Effects of the Moratorium on Listings Under the Endangered Species Act*, ENDANGERED SPECIES UPDATE, Mar. 1996, at 5.

<sup>25</sup> 142 CONG. REC. S1816, S1837-40 (elaborating on the "Reid Amendment"—No. 3478); see also *Endangered Species: Reid Offers Amendment to Spending Bill to Lift Moratorium on Species Listings*, Nat'l Env't Daily (BNA) (Mar. 14, 1996), available in LEXIS, Bna Library, Bnaned File.

<sup>26</sup> John H. Cushman Jr., *Democrats Fight to Restore Curbed Programs*, N.Y. TIMES, Mar. 14, 1996, at B11; see also *Budget: Senate OKs Species-Listing Ban; EPA Vote Next*, GREENWIRE, Mar. 14, 1996, available in LEXIS, Envirn Library, Grnwre File.

<sup>27</sup> See 142 CONG. REC. S1907, S1909 (daily ed. Mar. 13, 1996). The emergency listing process is a completely impractical way to protect endangered species, however. Emergency listings only last for 240 days, before they must be renewed. Trying to develop a comprehensive recovery strategy in the midst of such a tentative listing is likely to be futile. See *id.* (statement of Sen. Chafee). Senator Chafee stated: "[The emergency listing process] is not the kind of situation that is really going to lead to the saving of a species. It is not going to

or downlist a species if that action was appropriate.<sup>28</sup> Thus the Moratorium remained in place, perhaps more precariously than when it was originally passed; and what was supposed to be a "brief time out" had now stretched beyond one year.

### B. Consequences of the Moratorium

Within a year of the implementation of the Moratorium almost 250 species had been denied final listing.<sup>29</sup> The Services had proposed endangered status for eighty percent of these species, suggesting their truly imperiled status.<sup>30</sup> For example, the Quino Checkerspot butterfly, which had originally been proposed for listing in 1994 still waits to be listed. This butterfly, which has already lost three-quarters of its range, is quickly approaching extinction due to poaching and habitat destruction.<sup>31</sup> Additionally, the jaguar which was proposed for listing in July 1994, and was once abundant in the southern United States, is now rarely seen. Still unlisted, jaguars may be legally hunted, shot, and killed.<sup>32</sup> Also, only 120 Atlantic Salmon returned to spawn in Maine last year, and although proposed for listing in September of 1995, they still are not listed as endangered.<sup>33</sup>

The effects of the Moratorium were made starkly clear in a ruling by the United States Court of Appeals for the Ninth Circuit in a case involving the fate of the California red-legged frog.<sup>34</sup> In 1992, based on information that the California red-legged frog was in serious decline, several concerned scientists petitioned the FWS to list the red-legged frog as endangered under the ESA.<sup>35</sup> The FWS failed to act within the statutorily prescribed twelve month period during which FWS must act on a petition, and the Environmental Defense Center (EDC) filed suit against the Secretary.<sup>36</sup> After FWS agreed to publish a proposed rule to list the red-legged frog by November 1993, EDC agreed to dismiss its lawsuit.<sup>37</sup> The FWS

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permit long-term decisions to be made and expenditures of money . . . for the saving of habitat." *Id.*

<sup>28</sup> 142 CONG. REC. S1816, S1846 (showing Hutchison's Amendment No. 3479 which allows money appropriated under the act for de-listing species).

<sup>29</sup> See McMillan, *supra* note 24, at 5.

<sup>30</sup> *Id.*

<sup>31</sup> See DEFENDERS OF WILDLIFE, EXTINCTION RIDER ATTACHED TO INTERIOR APPROPRIATIONS BILL (1995) (pamphlet on file with author); see also, McMillan, *supra* note 24, at 6 (noting only one of six original colonies of Behren's silverspot butterfly remain, yet butterfly collectors are still free to capture these butterflies until it is listed).

<sup>32</sup> DEFENDERS OF WILDLIFE, *supra* note 31.

<sup>33</sup> *Id.* Although traditionally, animal species get more ESA publicity than plants, about eighty percent of the species awaiting listing are plants—many of which are barely clinging to existence. See McMillan, *supra* note 24, at 5-6 (describing the threat that the Moratorium poses to plants).

<sup>34</sup> See generally *Environmental Defense Ctr. v. Babbitt*, 73 F.3d 867 (9th Cir. 1995).

<sup>35</sup> *Id.* at 869; see also Timothy Noah, *Caught in a Trap—Democrats Get Snared By GOP Pact on List of Endangered Species*, WALL ST. J., Feb. 17, 1995, at A1 (noting that mosquito populations are kept in check by dropping small fish that love to eat mosquito eggs into ponds—unfortunately they also eat the eggs of red-legged frogs).

<sup>36</sup> *Environmental Defense Ctr.*, 73 F.3d at 869.

<sup>37</sup> *Id.*

failed to meet its November deadline and EDC filed a second suit in January 1994 to compel the Secretary to publish the proposed rule.<sup>38</sup> During February of 1994, FWS finally proposed a rule that the red-legged frog be listed as endangered—a rule which must be finalized within one year.<sup>39</sup> Again, the FWS missed its deadline of February 2, 1995 and EDC filed an intent to sue on May 1, 1995.<sup>40</sup> By this time the Moratorium had been enacted.

The Ninth Circuit ruled that the Moratorium made it impossible for the Secretary to list any new species as endangered.<sup>41</sup> The Secretary of the Interior had unquestionably violated his nondiscretionary duty to take final action on the California red-legged frog by February 2, 1995. However, because there were no funds for the Secretary to take final action, he would not have to do so until funds were made available for such activities.<sup>42</sup>

Meanwhile, the red-legged frog waits precariously, unprotected, its habitat continuing to shrink, until the moratorium is lifted. The story of the California red-legged frog is one of agency inertia and disregard for statutorily imposed procedures. The state will do nothing to protect the frog; thus, as long as the moratorium is in place, there will be no debate on the merits of the plight of the species.<sup>43</sup>

### C. *The Purported Rationale for the Moratorium*

The purported rationale for originally imposing the Moratorium was the need for a "time out" so Congress could have time to reauthorize the ESA.<sup>44</sup> Authorization for appropriations to the ESA ended on September

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 872.

<sup>42</sup> *Id.*; see also *Oregon Nat. Resources v. Ronald Brown*, No. C-95-3117 SI, (N.D. Cal. Mar. 18, 1996) ("finding that NMFS cannot be ordered to make a decision on a petition to list West Coast steelhead trout under the ESA because of a lack of funding for such activities"), reported in *Endangered Species: NMFS Cannot Be Ordered to Act on Steelhead Listing Petition, Judge Says*, Nat'l Env't Daily (BNA) (Apr. 2, 1996), available in LEXIS, Bna Library, Bnaned File. Cf. *Marbled Murrelet v. Babbitt*, 918 F. Supp. 318, 322-23 (W.D. Wash. 1996) (holding that Moratorium did not abrogate Secretary's obligation to designate critical habitat based on ruling in a case prior to the implementation of the Moratorium).

<sup>43</sup> Initially, an unintended, and poetically just side effect of the Moratorium was that it prevented species from being delisted as well. See *Energy and Natural Resources, Shrimp: CA Biz Groups Petition for Delisting of 2 Species*, GREENWIRE, Mar. 4, 1996, available in LEXIS, Envirn Library, Grnwre File (noting that attempts to have two species of freshwater shrimp removed from the federal endangered species list have been thwarted due to lack of funds in FWS). Senator Hutchison (R-Tex.) attempted to correct this oversight on the part of the Moratorium supporters. See *supra* note 28 and accompanying text.

<sup>44</sup> See H.R. CONF. REP. No. 101-104, at 37 (1995), reprinted in 1995 U.S.C.C.A.N. 85; see also 141 CONG. REC. S4009 (daily ed. Mar. 16, 1995) (statement of Sen. Hutchison) ("My amendment will say time out."); *id.* (statement of Sen. Gorton (R-Wash.)) ("This amendment will give both the country and the Congress the breathing space for a period of approximately 6 months during which the Endangered Species Act itself can be examined . . .").

30, 1992.<sup>45</sup> Congress, however, has funded species protection activities every year since that time. There is a general consensus in Congress, even among those who support a strong ESA, that the regulatory framework of the ESA could and should be improved.<sup>46</sup> The debate revolving around the Moratorium, then, is whether we should prevent any new species from being added to the list until there is reauthorization.

Those in support of the Moratorium, such as Senator Hutchinson, argue that the process for ESA listing is flawed, and that as a result, the average, hardworking, taxpaying American is being regulated to death. Thus, we must stop any further listings until what is perceived to be an inherently anti-human listing process is corrected through reauthorization.<sup>47</sup>

Those opposed to the Moratorium, led by Senator Reid, concede that the ESA has its problems but that to try to solve them by closing the doors to the ESA does not resolve any of the ESA's problems and in fact will only make species recovery more difficult once the moratorium is lifted.<sup>48</sup> As one commentator questioning the merits of imposing a moratorium on endangered species listing wrote, "despite all the frustration engendered by America's health care crisis, no one has suggested locking the hospital doors until we have a better health care system."<sup>49</sup>

### 1. *In Support of Locking the Doors*

Several senators and representatives, most of whom are Republicans from states such as Texas, California, Idaho, Montana, and Alaska, paint the ESA as an Act out of control—a bureaucratic monster laying waste to the Homer Simpsons of the country. The rhetoric of those in support of the Moratorium has been vehement. For example, Senator Smith's (R-Tex.) remarks are typical: "The Endangered Species Act has destroyed the rights of hardworking, tax-paying American families for the sake of blind cave spiders, fairy shrimp, and golden-cheeked warblers."<sup>50</sup> Never without a real-life example to emphasize their point, representatives fill the Congressional Record with references to homes burning down because federal authorities desired instead to protect endangered rats;<sup>51</sup> citizens fined

<sup>45</sup> 142 CONG. REC. S1816, S1841 (1996) (statement of Sen. Hutchinson).

<sup>46</sup> See generally Margaret Kriz, *Caught in the Act*, NATIONAL JOURNAL, Dec. 16, 1995, at 3090 (elaborating on diverse views in Congress and society in general, relating to endangered species protection).

<sup>47</sup> See *infra* part III.C.1.

<sup>48</sup> See *infra* part III.C.2.

<sup>49</sup> McMillan, *supra* note 24, at 5.

<sup>50</sup> 141 CONG. REC. H2087, H2105 (daily ed. Feb. 23, 1995) (statement of Rep. Smith). Along similar lines, Rep. Calvert (R-Cal.) argues "in the last Congress, rats, bugs, and even weeds were more important than people. Certain bureaucrats have become so eager to list new species as endangered, they have lost sight of the intent of the Endangered Species Act and ignored human concerns." 141 CONG. REC. H2182 (daily ed. Feb. 24, 1995).

<sup>51</sup> 141 CONG. REC. H2182 (statement of Rep. Calvert (R-Cal.)). A Government Accounting Office investigation revealed that the fact that some home owners were not allowed to create firebreaks around their homes had no relation to whether their homes were damaged by fire or not. David Helvarg, *Red Herrings of the Wise Use Movement*, PROGRESSIVE, Nov. 1995,

for shooting grizzly bears in self-defense;<sup>52</sup> and property values plummeting in Texas due to the infamous golden-cheeked warbler.<sup>53</sup> These injustices, Moratorium supporters argue, are a direct result of an Act which has been applied out of proportion to the intent of the framers of the original ESA, who envisioned protecting worthy animals like eagles, elephants and alligators, but certainly not weeds and spiders.<sup>54</sup>

Moratorium supporters propose that the process whereby a species initially gets listed is flawed. There are two lines of arguments to this rationale. The first, and perhaps more wishful argument is that the listing process is supposed to be based on pure science, but that somehow FWS is able to manipulate science to list more species than are really endangered. Proponents of this view often make astounding intellectual insights, such as Representative Chenoweth's (R-Idaho) remark in which she questioned how salmon could be endangered "when you can go in and you can buy a can of salmon off the shelf in [the supermarket]?"<sup>55</sup> Thus, the way to

at 18. Whether homes were destroyed depended entirely on wind direction, not on whether brush was cleared from around homes. *Id.*

<sup>52</sup> Orin Hatch (R-Utah) claimed "a man was fined \$4,000 for not letting a grizzly bear kill him." Helvarg, *supra* note 51, at 18. The man was a Montana sheep farmer who shot a two-year-old bear after it had repeatedly raided his sheep corral, after Montana Department of Fish and Game had offered to pay for and install an electronic fence around his property to prevent further raids. *Id.* The rancher refused the help and shot the bear himself one evening. The next morning the wounded bear was still alive and the rancher shot it again to finish it off. *Id.*

<sup>53</sup> 142 CONG. REC. S18907, S1908 (1996) (statement of Sen. Hutchison). A study conducted by MIT's Dr. Stephen Meyer revealed that the study conducted by the Texas and Southwestern Cattleraisers Association which showed this property value decline was analyzed incorrectly and "that the data did not in fact support the conclusion that property value declines were associated with the presence of endangered species." ENDANGERED SPECIES COALITION, ENDANGERED SPECIES ACT: THE REST OF THE STORY: THE ALLEGATIONS AND RESPONSES (Aug. 1995) (pamphlet on file with author). Most of the land value decline could be attributed to the S&L scandals of the mid 1980's. *Id.*

Indeed, some of ESA "horror stories" go beyond the absurd. *See, e.g.*, 142 CONG. REC. S1816, S1838 (statement of Sen. Reid) (refuting story that speed limit on I-15 was reduced to 15 mph so that the petals of an endangered flower would not be blown off by passing cars). An enlightening report issued by the Department of the Interior, *Facts About the Endangered Species Act* (June/July 1995), reveals the truth behind the extreme allegations made about the ESA; *see also* The National Wildlife Federation, *Fairy Tales & Facts About Environmental Protection*, available at <gopher://gopher.igc.apc.org:70/00/environment/misc/endangered/esainfo/8> (undermining myths surrounding the ESA).

<sup>54</sup> *See, e.g.*, 142 CONG. REC. S1907, S1913 (1996) (statement of Sen. Lott (R-Miss.)).

<sup>55</sup> Ken Silverstein, *Dumb and Dumber: How the 10 Dimmest Bulbs in Congress Spend Their Time*, BOSTON PHOENIX, Jan. 5, 1996, at 16, 17. Apparently, this kind of reasoning makes sense to other Senators as well. *See* 142 CONG. REC. S1816, S1850 (1996) (statement of Sen. Burns (R-Mont.)) (questioning the decision to spend over \$2 billion in recovery on the Columbia River trying to recover the sockeye and the chinook salmon, when "[y]ou can buy salmon in any grocery store fresh, frozen, or canned."). Of course, nobody has yet to top Representative Sonny Bono's (R-Cal.) remark that the best way to deal with endangered species is to "give them all a designated area and then blow it up." Paul Rauber, *An End to Evolution: The Extinction Lobby in Congress is Now Deciding Which Species Will Live and Which Will Die*, SIERRA, Jan. 1996, at 28, 31 (quoting Rep. Bono).

fix the listing process in the ESA, is to get "real science" back into the ESA.<sup>56</sup>

The second, and perhaps more sincere argument, is that the listing process is flawed because currently it only takes science into account in determining whether a species should be listed.<sup>57</sup> As Senator Hutchison reveals, many supporters of the Moratorium would like the watchdog of cost-benefit analysis guarding the gateway of the ESA. In a debate concerning the continuation of the Moratorium she states "we want to have good science, we want to have cost-benefit analysis, we want to have economic impact analysis because . . . there is no reason for people in the Northwest to have the entire timber industry shut down because of the spotted owl."<sup>58</sup> Thus, listing should not be based on whether a species is truly endangered or not, but by how much it will cost to save it.<sup>59</sup>

## 2. *In Support of Keeping the Doors Open*

Opponents of the Moratorium agree that the current ESA could be improved upon and should be reauthorized by Congress. Opponents fail to see the wisdom in making a bad situation worse, however, by prohibiting any new species from being added to the list until reauthorization. The comments of Senator Baucus (D-Mont.) reflect the concerns of many who opposed the Moratorium. "[T]he Hutchison [A]mendment [which would continue the Moratorium] is a diversion. It is also more than that. The amendment cuts out money for species that are on the brink of extinction. That will make a bad situation worse. Some other species may be lost; others will survive, but, in the meantime, the population will have declined. As a result, our options will be more limited. Recovery will be more expensive."<sup>60</sup> The message of those opposed to the Moratorium is clear—

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<sup>56</sup> See, e.g., 141 CONG. REC. E444 (daily ed. Feb. 27, 1995) (statement of the Hon. Robert Underwood of Guam) ("As Congress and Committee on Resources reauthorizes the Endangered Species Act, I will fight to bring diligent science and responsible Federal action back into the equation. Scrupulous science should be the hallmark of critical habitat designation, not impetuous land grabbing.").

<sup>57</sup> See *supra* part II.A.

<sup>58</sup> 142 CONG. REC. S1907, S1908 (1996) (statement of Sen. Hutchison); see also 141 CONG. REC. S4009, S4028 (daily ed. Mar. 16, 1995) (statement of Sen. Hutchison) ("How are we going to determine what is really endangered? . . . we are going to be able to take up cost-benefit analysis. We are going to be able to look at the people who might lose jobs like the logging industry in the [N]orthwest. . .").

<sup>59</sup> Many environmentalists agree that cost-benefit analysis should be a factor in determining how species recovery should proceed, as it currently is taken into account. See *supra* part II.B. There is no reason, however, for cost-benefit analysis to prevent a species from being listed. All this accomplishes is a denial that the species is imperiled. Many environmentalists in fact embrace cost-benefit analysis because it often shows that environmentally harmful projects are not worth their social costs. The problem is that it is easy to manipulate the numbers by undervaluing non-market costs or simply ignoring the results. See, e.g., Zygmunt J.B. Plater, *Reflected in a River: Agency Accountability and the TVA Tellico Dam Case*, 49 TENN. L. REV. 747, 758-60 (1982) (noting that cost-benefit analysis revealed that construction of Tellico Dam could not be justified—yet market forces and bureaucratic momentum steamrolled the project to completion).

<sup>60</sup> 141 CONG. REC. S4009, S4030.

denying that a problem exists does nothing to solve that problem, and indeed often makes it worse.

#### *D. The Latent Agenda*

There are several purported rationales for supporting or opposing the Moratorium. However, true motivations for supporting the Moratorium are revealed once one goes beneath the thin layer of rhetoric that coats most ESA debate in Congress. Several senators are not blind to the real purpose behind the Moratorium—to halt the effects of the ESA. As Senator Bradley (D-N.J.) notes, “If we continue to prevent the law from functioning, we might as well not even have that law, which, of course, is the intention of some who will delay the implementation of the law.”<sup>61</sup> Similarly, the suggestion that the Moratorium is merely a means of putting pressure on Democrats to approve a significant alteration of the ESA—while perhaps partly true—has also been questioned. “I have heard some say that the [M]oratorium would be leverage to get the Endangered Species Act reauthorized. That certainly has not proven to be the case in point. In fact, I think they are wrong. The moratorium has nothing to do with efforts to reauthorize the Endangered Species Act.”<sup>62</sup>

The Moratorium was a calculated, if not devious way of instantly preventing the effects of the ESA from broadening while avoiding public debate on the merits of halting ESA implementation.<sup>63</sup> The question of what we should do to save the California red-legged frog is held indefinitely in limbo as representatives argue back and forth about how the California red-legged frog should be saved. After all, the debate in Congress over the ESA reauthorization is not about whether we should save endangered species, but how we should save them, and to a lesser extent, what should be included as an endangered species and what should not.

Suppose that a newly incorporated town cannot decide whether it is going to pay professional fire fighters to put out the fires in its town, or whether it will maintain a volunteer fire department. There is a heated debate in the town as to which is more appropriate. In the meantime, however, the town provides for neither. As the town council debates the merits of each approach, house after house burns to the ground. By the time the town finally decides upon which type of fire fighters to use, it no longer matters because all the homes have already burned to the ground.

Since it is hard to fathom that the representatives actively involved in promoting the moratorium would accidentally watch our endangered species disappear off the face of the earth, or allow such a catastrophe due to

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<sup>61</sup> 141 CONG. REC. S18603 (daily ed. Dec. 14, 1995).

<sup>62</sup> See 142 CONG. REC. S1816, S1838 (1996) (statement of Sen. Reid); see also 142 CONG. REC. S1816, S1842 (1996) (statement of Sen. Chafee) (“[I]f this moratorium is extended, the pressure to reauthorize the Endangered Species Act is reduced. The best way to get the Endangered Species Act reauthorized is to get rid of this moratorium and have everybody concentrate their energies on the reauthorization.”).

<sup>63</sup> See 142 CONG. REC. S1816, S1839 (statement of Sen. Reid) (“The moratorium which passed last year with . . . no public comment and no attention from the environmental community, was wrong.”).

ineptitude, the only conclusion is that they desire such a result. To understand why some representatives would like to see this happen, this essay considers just whom the representatives are representing.

#### IV. THE POLITICS OF LISTING

##### A. *The Contract with America*

The imposition of a Moratorium shortly after the swearing in of the 104th Congress was no coincidence. The anti-regulatory, anti-environmental bent of the 104th Congress resulted in legislation, such as the Moratorium, which has chipped away at the environmental protections implemented over the past quarter century. Some believed that the mandate of the 1994 elections called for legislation like the Moratorium which would halt ESA protection until thorough cost-benefit analyses were inserted into every nook and cranny of the statute.<sup>64</sup>

But, it is far from clear what the mandate of the 1994 elections was,<sup>65</sup> especially in terms of the environment, as *The Contract with America*, once thought of as the embodiment of the 1994 mandate, barely mentions the word environment and certainly does not give the topic any substantive consideration.<sup>66</sup> Adopting the reasonable conclusion that there was no anti-environmental mandate in 1994, it is surprising that the 104th Congress was so dedicated to weakening all environmental gains made over the past quarter century. The path that GOP leaders set, however, starts making more sense when one considers who supports those who support the Moratorium.

##### B. *Industry Support of the Moratorium*

Representative Gingrich (R-Ga.) and company rode a wave of anti-government sentiment to victory in 1994. Prior to the 1994 elections the Contractarians blamed Washington's lobbyists for "a grotesque distortion of the public will."<sup>67</sup> After taking over in January, however, one commentator has noted that "the would be revolutionaries have been tripping over themselves to embrace [Washington's lobbyists] in an efficient effort to extract as much money for the 1996 campaign as they can."<sup>68</sup> So much for the revolution. Although many believed that they had elected the 104th Congress to end business as usual in Washington, to end "the partisan

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<sup>64</sup> See 142 CONG. REC. 1907, 1910 (statement of Sen. Gramm (R. Tex.)) ("This is not just about endangered species. This is about whether or not we are going to let a small group of people who do not agree with the mandate of the 1994 election ride roughshod over that mandate by extending a law which expired 4 years ago and by allowing bureaucrats to continue to not consider cost and benefits.").

<sup>65</sup> Senator Boehlert (R-N.Y.) stated, "I want smaller government, less costly government, but nobody I know of voted to dismantle government." Helvarg, *supra* note 51, at 18.

<sup>66</sup> See generally REPUBLICAN MEMBERS OF THE HOUSE OF REPRESENTATIVES, *CONTRACT WITH AMERICA* 1 (Sept. 28, 1994).

<sup>67</sup> Gareth Cook, *Law for Sale: Republicans in Congress Let Lobbyists Write the Laws*, WASH. MONTHLY, July 1995, at 44.

<sup>68</sup> *Id.*

dams and challenge Washington's entrenched elite," it appears that, with respect to industry influence over politicians, nothing has changed.<sup>69</sup> What many Contractarians tried to sell to the American public as "populism" was soon revealed to be nothing more than catering to the corporate elite.

Private industry wasted no time in exerting its influence over the 104th Congress. Shortly after the swearing in of the 104th Congress, industry lobbyists acting like kids in a candy store, selected which environmental laws they would like to see gutted or eliminated altogether. Sometimes industry representatives simply wrote replacement laws themselves. A letter to Senator Gorton (R-Wash.) from one of his aides was leaked to the press and stated "[t]he coalitions delivered your ESA bill to me on Friday. It is important that we have a better than adequate understanding of the bill prior to introduction. . . . It takes some getting used to."<sup>70</sup> The "coalitions," it turned out, which wrote Senator Gorton's bill<sup>71</sup> to amend the ESA, consisted of industries such as Kaiser Aluminum, Chevron, Boise Cascade, Newmont Mining, Western States Petroleum and 140 other large industries, which contributed \$34,000 to Senator Gorton's 1994 re-election campaign.<sup>72</sup> Ralph Nader's Public Citizen filed a complaint with the Senate Ethics Committee complaining about Gorton's abdication of his legislative responsibilities. They argued, "It's one thing for industry to urge Congress to change a law. It's quite another for Congress to turn over its law-writing duties to industry."<sup>73</sup>

Private industries perceived the Contract as an open invitation to the drafting table, in more than just the context of the ESA, and they certainly needed no prodding. In an article written in *Pulp & Paper International*, the author noted that pulp and paper companies had been "unusually happy" since the Republicans obtained majorities in the House and Senate.<sup>74</sup> The article gleefully continued that, "[t]he pulp and paper industry has been intimately involved with the rewriting of the CWA, the federal law designed to protect surface waters, rivers and lakes. . . ."<sup>75</sup> In another example of industry infiltration of the legislative process, Democrats were surprised when a draft version of legislation which would allow polluters

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<sup>69</sup> *Id.*; see also Edward Chadd, *Manifest Subsidy; How Congress Pays Industry—With Federal Tax Dollars—To Deplete and Destroy the Nation's Natural Resources*, COMMON CAUSE MAG., Fall 1995, at 18, 21 ("But for all the Republican cries of no more business as usual, business is, as usual, faring quite well.").

<sup>70</sup> Rauber, *supra* note 55, at 28; Cook, *supra* note 67, at 44.

<sup>71</sup> S. 768, 104th Cong. (1995).

<sup>72</sup> Rauber, *supra* note 55, at 28; Helvarg, *supra* note 51, at 20. Senator Gorton (R-Wash.) is not the only Senator who has a cozy relationship with industry. Senator Murkowski (R-Alaska)—recently forced to divest a \$30,000 investment in Louisiana Pacific (which operates the main sawmill in the Tongass National Forest)—has kept his money in a blind trust administered by Jim Clark, a lobbyist for the Alaska Loggers Association. David Helvarg, *Congress Plans an American Clearcut: Defoliating Our Green Lawns (environmental policy dismantling)*, THE NATION, Dec. 4, 1995, at 699.

<sup>73</sup> Paul Rauber, *Plutocracy in Action: Corporate Lobbyists Write Anti-Environmental Legislation*, SIERRA, July, 1995, at 32.

<sup>74</sup> *Republicans Write the Book on Environmental Regulations*, PULP & PAPER INT'L, June, 1995 at 70.

<sup>75</sup> *Id.*

to be considered in "statistical compliance" with pollution limits if they only exceeded certain limits some of the time, still had the logo for the lobbying firm hired by The Chemical Manufacturers Association on the top of the faxed document.<sup>76</sup>

Perhaps nowhere is special interest infiltration of the legislative process more apparent than in the organization of "Project Relief" by Representative Tom Delay (R-Tex.).<sup>77</sup> More than 350 groups and their lobbyists were brought together to stop federal regulation of business.<sup>78</sup> One favorite tactic of the industry-Contractarian alliance has been to create "citizens" groups to support their causes. For instance, a group calling themselves "Northwesterners for More Fish"—and who supported a significant rewrite of the ESA—proved to be an industry front-group created by Republican consultants and industry officials.<sup>79</sup> Such tactics led one U.S. Senator to challenge, "I defy anyone to tell me that there are people-organizations . . . that support the elimination of the Endangered Species Act. I have not found any."<sup>80</sup> Indeed there seemed to be very little support for the notion that the country's citizens desired a weakening of the ESA, and polling shows a high percentage of Americans support a strong ESA.<sup>81</sup>

<sup>76</sup> Cook, *supra* note 67, at 44.

<sup>77</sup> Michael Weisskopf & David Maraniss, *Forging an Alliance for Deregulation*, WASH. POST, Mar. 12, 1996, at A1 (noting Delay's nickname when he entered the Texas legislature in 1978—"Mr. DeReg.").

<sup>78</sup> *Id.* (commenting on Rep. Delay's ties to industry and noting that the Republican Revolution "represents a triumph for business interests, who after years of playing a primarily defensive role in Democratic-controlled Congresses now find themselves a full partner of the Republican leadership in shaping congressional priorities."). Delay considers his partnership with industry necessary to create a "fair fight" with Democrats who have formed alliances with labor unions and environmentalists. *Id.*

<sup>79</sup> This insight was provided by the Endangered Species Coalition, Apr. 1, 1996:

Members of fish conservation groups in four Pacific Northwest cities held a press conference on March 27 to expose an industry front-group, "Northwesterners for More Fish," who posed as fisherman opposed to species protections. Real fisherman appeared at the Washington press conference held at the National Press Club via "video phone" to explain that the group was founded by Republican consultant Eddle Mahe, Jr., Sen. Slade Gorton (R-WA) and Sen. Larry Craig's (R-Idaho) chief of staff to help hydropower, aluminum, chemical, timber and mining companies weaken protections for imperiled coho salmon and steelhead trout. The real fishermen belong to groups such as Idaho Steelhead and Salmon Unlimited, the Northwest Sportfishing Industry Association, the Washington and Alaska Trollers Associations, Save Our Wild Salmon, Salmon for All, Trout Unlimited and American Rivers. They told D.C.-based reporters the phony fish group should either disband or change its name to "Non-Northwesterners for Fewer Fish"—adding that its logo seems to show a squaw fish, a predator that eats salmon.

This was posted by the Endangered Species Coalition on April 1, 1996, which can be contacted at <<http://www.eicinfo@acpa.com>>. (a printout of this posting is on file with the author).

<sup>80</sup> 142 CONG. REC. S1816, S1840 (1996) (statement of Sen. Reid).

<sup>81</sup> See, e.g., Bill Dawson, *Babbit lauds plan for Galveston Bay*, HOUSTON CHRON., Feb. 8, 1996 at 24 ("Public polls are 'striking their affirmation of support for the Endangered Species Act, the Clean Water Act and for public lands' - all areas where the GOP leadership has tried to make major changes . . ."); Karen Hosler, *House GOP Backs Away from Curbs on the*

A study conducted by the D.C. based Environmental Working Group revealed that during the years 1993-94, 115 PACs associated with Project Relief gave members of the House approximately \$10.3 million.<sup>82</sup> The Environmental Working Group also noted that approximately \$43 million was contributed by PACs connected to interests that were lobbying to weaken protections for endangered wildlife.<sup>83</sup> The "anti-wildlife PACs" consisted mostly of mining, petrochemical, timber, real estate, and agribusiness interests.<sup>84</sup> The top recipient of this anti-wildlife PAC money in Congress was Representative Don Young (R-Alaska), cosponsor of House Bill 2275, a bill designed to dismantle the current ESA.<sup>85</sup> Young received over \$100,000 from the anti-wildlife PACs in the short period between January 1994 and December 1995.<sup>86</sup> Meanwhile, in the Senate, Senator Hutchinson—author and greatest supporter of the Moratorium—received nearly \$400,000 from anti-wildlife PACs between 1993 and 1995.<sup>87</sup>

It would be hard to convince anybody that the correlation between anti-wildlife PAC money and anti-wildlife legislation proposed by the recipients of such money was a coincidence. The connections were too overt to be denied. Industry investment resulted in much more than the passage of the Moratorium, however. With the Moratorium in place to keep the doors of the ESA shut and prevent any more species from obtaining ESA protection, industry turned its resources to a more permanent goal—repeal of the ESA altogether.

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EPA, BALTIMORE SUN, Nov. 3, 1995, at 1A ("Polls show strong public opposition to such GOP initiatives as restricting protections of the Endangered Species Act . . .").

<sup>82</sup> ALLISON DALY (ENVIRONMENTAL WORKING GROUP) & MARY L. WELLS (U.S. PIRG) CONTRIBUTING TO EXTINCTION: POLITICAL CONTRIBUTIONS AND THE ATTACK ON THE ENDANGERED SPECIES ACT (1996) (copies of this report containing detailed descriptions of the influence of PAC money in Washington can be ordered from U.S. PIRG at 218 D St. SE, Washington, D.C. 20003); see also Cook, *supra* note 67, at 44.

<sup>83</sup> DALY & WELLS, *supra* note 82, at 11; see also *ESA: Members Got \$65 Million from PACS Opposing Endangered Species Protection*, Nat'l Env't Daily (BNA) (Mar. 25, 1996), available in LEXIS, Bna Library, Bnaned File [hereinafter *Members Got \$65 Million from PACS*]. The Environmental Working Group report notes:

When we followed the money given to 125 cosponsors of the main bill designated to dismantle the ESA in the House, we found they received, on average, \$28,935 from anti-wildlife PACs since January of 1994—33 percent more than those same PACs contributed on average to House members, and nearly twice as much as those same PACs contributed on average to House members who signed a "Dear Colleague" letter to end the current moratorium. . . .

DALY & WELLS, *supra* note 82, at 3.

<sup>84</sup> DALY & WELLS, *supra* note 82, at 4.

<sup>85</sup> H.R. 2275, 104th Cong. (1995).

<sup>86</sup> DALY & WELLS, *supra* note 82, at 11 (noting "Young (R-AK) raked in more anti-ESA PAC money between January 1994 and December 1995 than any other member of the House: \$102,450, roughly 5 times more than the House average from those PACs"); see also *infra* part V.A (discussing details of H.R. 2275).

<sup>87</sup> DALY & WELLS, *supra* note 82, at 14; see also *Members Got \$65 Million from PACS*, *supra* note 83.

V. THE DIRECT ATTACK ON THE ESA LISTING PROCESS AND ITS POTENTIAL CONSEQUENCES: PROPOSED BILLS TO AMEND THE ESA

The trick, industry realized, was to repeal the ESA without anybody realizing it had been repealed. Hence, industry needed to find support from representatives who could be persuaded of this view. While several bills have been introduced in both the Congress and the Senate to amend the ESA,<sup>88</sup> Representative Don Young and Representative Richard Pombo's (R-Cal.) "Endangered Species Conservation and Management Act"<sup>89</sup> and Dirk Kempthorne's (R-Idaho) "Endangered Species Conservation Act"<sup>90</sup> became the prevailing bills in the 104th Congress. Not coincidentally, both these bills would significantly weaken endangered species protection by weighing down the endangered species listing process in a bureaucratic labyrinth of endless appeals, and make endangered species protection discretionary rather than mandatory.<sup>91</sup>

A. *Young-Pombo House Bill 2275*

Section 3 of H.R. 2275, misleadingly entitled "Scientific Requirements for Listing" amends the current listing process under the ESA.<sup>92</sup> Under the bill's new listing requirements, the Secretary is required to obtain input from states and non-federal persons with an interest in species listings.<sup>93</sup> The Secretary is required to consider empirical data more heavily than projections or extrapolations based on modeling.<sup>94</sup> Furthermore, the Secretary must consider captive-bred populations in determining whether a species should be listed.<sup>95</sup> Also, distinct populations would be stripped of ESA protection, making species listed in the United States as distinct populations, such as the grizzly bear, bald eagle, and gray wolf inelligible for status as a listed species.<sup>96</sup> H.R. 2275 requires the Secretary to propose species for listing for six months, subject to another six months upon the request of any person.<sup>97</sup> If any species actually makes it through the addi-

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<sup>88</sup> See J.B. Ruhl, *Section 7(a)(1) of the "New" Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species*, 25 ENVTL. L. 1107, 1155-59 (1995) (discussing all the major bills introduced in the first session of the 104th Congress to amend the ESA); see generally Donald A. Carr & William L. Thomas, *The Law and Policy of Endangered Species Act Reauthorization: Noah's Choices and Ecological Mandarins*, 25 ENVTL. L. 1281 (1995) (discussing several different perspectives on ESA reform).

<sup>89</sup> H.R. 2275, 104th Cong. (1995).

<sup>90</sup> S. 1364, 104th Cong. (1995).

<sup>91</sup> See *infra* parts VI.A-B. Since this article focuses on the Moratorium which mostly affects the listing process, the effects that these bills would have on the listing process will be discussed. To analyze all the ways these bills weaken the ESA would require too extensive a diversion from the focus of this article.

<sup>92</sup> H.R. 2275, 104th Cong. § 301 (1995).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* § 902.

<sup>97</sup> *Id.* § 301.

tional procedural requisites, any listing is subject to de novo review by federal courts.<sup>98</sup>

Based on the effects of these changes to the ESA, the purpose of the Young-Pombo Bill could not be perceived as species protection. Rather, the goal of this bill is to place new species listings into an administrative quicksand through which few species listings could emerge. If instilling real science into the ESA were the true purpose of those drafting this bill, such science does not appear in the listing process. As one of this country's leading authorities on federal wildlife law noted, H.R. 2275 "[i]mposes significant substantive and procedural hurdles to listing threatened and endangered species."<sup>99</sup> In addition, the bill makes it much easier to delist a species than it previously had been, with the process taking as little as ninety days after the initial proposal.<sup>100</sup> Anyone familiar with Representative Young's voting record on wildlife and environmental issues<sup>101</sup> should not be surprised by the implications of H.R. 2275. After all, as one commentator has noted: "Ranching, timber and mining interests have been generous campaign contributors to Young and, more often than not, Young seems to return the favors. Earlier this year one of Young's aides told a lobbyist that whatever Kennecott Mining wants is what Don Young wants."<sup>102</sup> Understood as a wish list of changes to the ESA that industry would desire, H.R. 2275 makes a lot more sense.<sup>103</sup> The effects of H.R. 2275 on the ESA were recently summed up in an editorial of the *New York Times* which concluded that "the amazing duo of Alaska's Don Young and California's Richard Pombo . . . would like nothing better than to render meaningless the Endangered Species Act."<sup>104</sup>

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<sup>98</sup> *Id.*

<sup>99</sup> Michael J. Bean et al., *Section-By-Section Summary and Analysis of H.R. 2275, The Young-Pombo Endangered Species Conservation and Management Act of 1995*, available at <<http://www.econet.apc.org/endangered/young-pombo.html>>.

<sup>100</sup> H.R. 2275, 104th Cong. § 307 (1995).

<sup>101</sup> He received a score of "0" from the League of Conservation Voters in 1995, meaning he voted against the environment on every single significant environmental vote in Congress. The 1995 League of Conservation voting scores can be accessed at <[www.lcv.org/lcv95](http://www.lcv.org/lcv95)>. Rep. Pombo received an 8 on a scale of 0 to 100, with 100 being the most eco-friendly.

<sup>102</sup> Chadd, *supra* note 69; see also DALY & WELLS, *supra* note 82 (noting that Young received more "anti-wildlife" PAC money than any other House member).

<sup>103</sup> Most organizations concerned with wildlife preservation condemned the bill. See, e.g., The Humane Society, The Human Society of the U.S. Denounces the Young/Pombo ESA Bill (Sept. 1995) on file with author ("The Young-Pombo bill amounts to a wish list for special interests intent on capturing, shooting, and otherwise harming rare species. It is an extreme measure that would promote trophy hunting of threatened species abroad, flood American markets with threatened animals captured from the wild, and put foreign interests ahead of U.S. law and the will of the American people."); see also Bornemeier, *supra* note 1, at A3 ("Pombo overseeing a rewrite of [the Endangered Species Act] is the ultimate fox-in-the-henhouse scenario.")

<sup>104</sup> *The Greening of Newt Gingrich*, N.Y. TIMES, Apr. 28, 1996, § 4 (Editorial), at 12. [hereinafter *The Greening of Newt Gingrich*]. Rep. Young does little to hide his disdain for "environmentalists" who he called "a self-centered bunch, a waffle-stomping, Harvard-graduating, intellectual bunch of idiots pursuing a socialist agenda." George Miller, *The Rollback: Republicans Are Just Biding Their Time; The Kinder, Gentler Environmental Image More than*

B. *Kempthorne Senate Bill 1364*

The Kempthorne Endangered Species Conservation Act of 1995 would similarly make it much more difficult to list new species as threatened or endangered.<sup>105</sup> Under Senate Bill 1364, if a party introduces new information that suggests a species should be listed, the Secretary must obtain input from affected states and tribes with respect to whether the petitioned action is warranted.<sup>106</sup> The Secretary also may request the newly created Endangered Species Commission—comprised of a nine member assessment and planning team—to review the request.<sup>107</sup> The bill allows judicial review of the Secretary's decision to take such preliminary steps.<sup>108</sup> If states or tribes object to the listing, the Secretary sustains the burden of proving that the listing is warranted.<sup>109</sup> Farther along in the process, the Secretary must publish in the Federal Register summaries of expected impacts on taxes, employment, property value and use, as well as other social and cultural values, and conclude that the conservation benefits outweigh negative conservation impacts.<sup>110</sup>

Michael Bean notes that these provisions “[add] enormous complexity and expense to the listing process.”<sup>111</sup> Additional administrative agencies are created, judicial review allowing legal challenges is available at every turn. If the added administrative burden were not enough to slow down or stop species listing, Kempthorne's revised ESA would require automatic termination of any listing process whenever any deadline was missed.<sup>112</sup> Considering how infrequently FWS has been able to meet listing deadlines in the past, this provision alone is enough to torpedo most proposed listings.

Kempthorne, like Pombo and Young, is no friend of the environment. Like his anti-ESA counterparts in the House, Kempthorne, being the former executive director of the Idaho State Home Builders Association, has

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*Likely Will Evaporate After the November Election*, L.A. Times, Mar. 1, 1996, (Op Ed) at B9 (quoting Rep. Young).

<sup>105</sup> S. 1364, 104th Cong. (1995). Senators Kempthorne (R-Idaho) and Chaffee (R-R.I.) have recently proposed, although have not officially introduced, legislation to reauthorize the ESA in the 105th Congress. An analysis of the proposed legislation is available at <<http://www.defenders.org/esa.comm.html>>.

<sup>106</sup> *Id.* § 4.

<sup>107</sup> *Id.* § 15.

<sup>108</sup> *Id.* § 4.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> See Michael J. Bean et al., *Section-By-Section Summary and Analysis of S. 1364, The Kempthorne Endangered Species Conservation Act of 1995*, available at <<http://www.econet.apc.org/angered/kempthorne.html>>. Bean has also prepared a flow-chart showing the steps that would be required to list a species such as the Bald Eagle under S. 1364. According to the chart, it would take a minimum of two years to list the species and would take four years before the Secretary could implement a final conservation plan. In addition, along the process there are several dozen ways in which the listing process could be thwarted. (On file with author).

<sup>112</sup> S. 1364, 104th Cong. § 4 (1995).

close ties to industry.<sup>113</sup> The President of the National Mining Association recently issued a statement in support of Senator Kempthorne's amendments to the ESA.<sup>114</sup> Senator Kempthorne previously had encouraged coal industry lobbyists with the call "[d]on't give in to others calling themselves environmentalists, because we're all environmentalists."<sup>115</sup> Like other conservative GOP members this term, Kempthorne brings an unconventional definition of "environmentalism" to Idaho. Apparently, he advocates a type of environmentalism that seeks the demise of the state's once great salmon runs. Kempthorne's ESA bill would be disastrous for endangered salmon in his own state, yet this fact seems not to concern him.<sup>116</sup>

The connections between special interest groups and legislators are nothing new. In the 104th Congress, however, the connections resulted in particularly egregious anti-public legislation, having virtually no redeeming civil value. The Moratorium and the proposed amendments to the current ESA accomplish nothing more than reduction of the regulatory burden on industry at the public's expense. The phenomenon of this recent industry coup can be explained only by considering market forces and their influence on the legislative process generally.

## VI. UNDERSTANDING THE MORATORIUM IN LIGHT OF MARKET FORCES

### A. *Weird Science*

Evidence that there was more behind the anti-environmental bent of the 104th Congress than simple disdain for, or ignorance of, the environment was demonstrated by the 104th Congress's obsessive desire to eliminate science from environmental decision making. When Congress originally passed the ESA, it recognized the importance of establishing the status of wildlife in this nation based on pure facts.<sup>117</sup> Political considerations such as cost-benefit analysis, the practicality of plans for recovering species, and the consequences that recovery would have on local economies were all important factors in determining how a species would be protected, but not in the listing itself. Such complicated factors were not to block the gateway of the ESA. The Congress which passed the ESA in 1973, unlike the 104th Congress, recognized that denying that a species is

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<sup>113</sup> Kempthorne's 1995 League of Conservation Voters score was also "0". See Kempthorne's 1995 LCV score, available at <<http://www.lcv.org/lcv95>>. Apparently, Sen. Kempthorne remembered his friends at the Home Builders Association when he drafted S. 1364. The Environmental Working Group Report notes, "The Kempthorne bill practically grants developers a waiver of the ESA with its 'cooperative management agreements.' . . . While providing absolute certainty to developers, these cooperative management agreements require little scientific backing and provide no safety net for species that may require greater conservation efforts in the future." DALY & WELLS, *supra* note 82, at 16.

<sup>114</sup> *Coal in the West; News from Washington*, COAL, Dec. 1995, at 10.

<sup>115</sup> *Congress Faces Key Coal Issues in Fall Session*, COAL, Aug. 1995, at 8.

<sup>116</sup> *The Endangered West*, N.Y. TIMES, June 18, 1995, § 4 at 14 ("Meanwhile, back in Washington . . . Dirk Kempthorne . . . is leading the Senate charge to cripple the Endangered Species Act, which provides what little protection the salmon have.") [hereinafter *The Endangered West*].

<sup>117</sup> See *supra* part II.A.

in trouble by refusing to recognize its endangered status, does nothing toward its recovery.

A common theme in the Contractarian's rhetoric is reforming regulatory decision-making so that it will be based on "good science."<sup>118</sup> The seriousness of this goal however, was undermined by the voting record of the 104th Congress. First, they voted to shut down the Office of Technology Assessment, a research arm of Congress established during the Nixon Administration which gave impartial advice to members of Congress of both parties on a wide array of issues.<sup>119</sup> Casting more doubt on the sincerity of their support of better science, the 104th Congress also eliminated the National Biological Survey which gathered information that contributed to an understanding of the nature and extent of the nation's biological resources.<sup>120</sup> Additionally, the 104th Congress slashed funding for a study of the ecology of the Columbia River basin which concerned the effects of logging on endangered species.<sup>121</sup> As one commentator notes: "These actions seem more consistent with a desire to bury information that might support current or future protective regulation than with the professed goal of tracking down the best scientific information available. . . ."<sup>122</sup>

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<sup>118</sup> Robert L. Glicksman & Stephen B. Chapman, *Regulatory Reform and (Breach of) The Contract With America: Improving Environmental Policy or Destroying Environmental Protection?*, 5 KANS. J.L. & PUB. POL'Y 9 (1996).

<sup>119</sup> Warren E. Leary, *Congress's Science Agency Prepares to Close Its Doors*, N.Y. TIMES, Sept. 24, 1995, § 1 (National), at 26 (noting the remarks of the head of the Office of Science and Technology, who stated: "the demise of the agency after it had proved its effectiveness reflected an anti-intellectual and anti-science mentality among some members of Congress who were not interested in looking at issues factually.").

<sup>120</sup> Glicksman & Chapman, *supra* note 118, at 11; *see also* H.R. REP. NO. 104-173, at 30; John H. Cushman, Jr., *Spending Bill Would Reverse Nation's Environmental Policy*, N.Y. TIMES, Sept. 22, 1995, at A1, A29; *Society and Politics Budget II: NBS Folded Into Geological Survey*, GREENWIRE, Feb. 6, 1996, available in LEXIS, Envirn Library, Grnwre File. The 104th Congress is so determined not to allow for the collection of scientific data that it has prohibited FWS from using volunteers for the collection of scientific data.

The decision by this committee to eliminate the use of volunteer resources for collecting information about wildlife populations is a gratuitous assault on the nation's ability to understand, protect and preserve its wildlife. This decision is certainly not based on a desire to save money. . . . The only possible purpose for denying volunteer resources to the surviving data collection efforts is to stop the flow of scientific information on the status of American wildlife. While this information permits a more intelligent application of the Endangered Species Act and other federal wildlife policies which benefit all parties it would appear that the sponsors of this language see it as a backdoor means of gutting the Endangered Species Act. Clearly, the denial of volunteer resources to these data collection programs would be devastating to our continuing knowledge on the well-being of American wildlife.

H.R. REP. NO. 104-173, at 30 (dissenting views of David Obey).

<sup>121</sup> *See* Cushman, *supra* note 120, at A29.

<sup>122</sup> Glicksman & Chapman, *supra* note 118, at 11; *see also* *The Greening of Newt Gingrich*, *supra* note 104, § 4, at 12 (noting that "[t]here is no sound science in the bills the Youngs, Pombos, and Delays are promoting"). Vice President Al Gore noted that the budget cutting Republicans in Congress are "approaching science with all the wisdom of a potted plant." *Society and Politics Research: Gore Slams GOP on Science Funding Cuts*, GREENWIRE, Feb. 13, 1996, available in LEXIS, Envirn Library, Grnwre File.

It is hard to accept the assertion that the problem with the ESA is that it does not use real science considering how Representative Pombo has conducted his hearings on the ESA around this country. When he learned that famous biologist E.O. Wilson was going to give strong testimony in favor of the current ESA he uninvited him to the hearing.<sup>123</sup> The same fate happened to Massachusetts Institute of Technology political science professor Stephen Meyer who was prepared to testify that there was no correlation between the number of endangered species in a state and its economic growth.<sup>124</sup> Those who advocated a fundamental change in the ESA listing process have come upon an insurmountable problem—“[t]rouble is, science is firmly on the side of the Endangered Species Act.”<sup>125</sup>

Thus, the Contractarians have had to do what they have shown themselves to be quite resourceful at—re-defining terms. What the Contractarians mean when they argue for “good science” has little to do with biological evidence relating to the status of a species. Rather, as one commentator noted, “[g]ood science is good policy, in other words, only until it flies in the face of the Contract’s deregulatory design.”<sup>126</sup> The Contract reveals itself for what it really is, namely a misguided blueprint for deregulation at any cost. It is an agenda that initially sought legitimacy in the objectivity of science, but upon recognizing that science could not be bent to support its objectives, sought simply to eliminate good science wherever possible. The problem with science, apparently, is that it reveals a truth that industry does not want to be told.

### B. *The Problem of Market Forces*

The extraordinary pressure that has resulted in this dual attack on the ESA—both by the Moratorium, suspending all current listing activity, and through proposed amended versions of the ESA—can be explained by considering the insights of Rachel Carson<sup>127</sup> and Ronald Coase.<sup>128</sup> Their works demonstrate that because of market forces, corporate management inevitably attempts to externalize costs and strenuously resists attempts to impose external accounting and liability through regulation.<sup>129</sup>

Corporate America viewed closing the doors to the ESA as a cheap and easy way to externalize costs and to eliminate public debate on the

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<sup>123</sup> Rauber, *supra* note 55, at 32; see also Paul Roberts, *A Green Coup? The GOP and Environmental Protection*, THE NEW REPUBLIC, Nov. 20, 1995, at 25 (“During a series of committee hearings [Pombo] stacked the witness lists with ranchers, farmers and other aggrieved parties while systematically excluding wildlife experts.”).

<sup>124</sup> Rauber, *supra* note 55, at 32.

<sup>125</sup> *Id.*

<sup>126</sup> Glicksman & Chapman, *supra* note 118, at 12.

<sup>127</sup> RACHEL CARSON, *SILENT SPRING* (1962).

<sup>128</sup> Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & Econ. 1 (1960).

<sup>129</sup> See Zygmunt J.B. Plater, *Facing a Time of Counter-Revolution—The Kepone Incident and a Review of First Principles*, 29 U. RICH. L. REV. 657, 659-70 (discussing the implications of Coase and Carson’s insights with respect to the Kepone incident).

merits of individual listings.<sup>130</sup> The most common forms of cost externalization are pollution and environmental destruction. If the cheapest way to dispose of toxic chemicals is to dump them into a river, that is where the chemicals will be dumped; if the cheapest land to buy for a new plant is wetlands, that is where the plant will be built; if protection of wildlife will decrease profits, the solution must be eliminate the wildlife, or alternatively, eliminate the regulations protecting the wildlife. As far as corporate managers are concerned, the bottom line is that it is cheaper to destroy endangered species than to protect them.

In recognizing the inevitability of these market forces, and the destructive results which were caused by them, Congress finally stepped in during the early 1970's and passed legislation to reduce cost externalization.<sup>131</sup> Amid the flurry of environmental legislation that was passed in the beginning of the 1970's was the Endangered Species Act. As Karyn Strickler—the former Director of the National Endangered Species Coalition noted, “[the ESA] protects our private property from corporations that benefit financially from the destruction of our natural heritage.”<sup>132</sup> Thus, the ESA not only protects endangered species, it protects the public from industry's constant attempts to externalize as many costs as possible.

One way industry sought to reduce the effectiveness of endangered species protection, and thus to decrease costs, was to shift protective responsibilities from the federal government to the states. With the Moratorium in place, species that are not yet listed rely solely on the protection provided by states for their salvation. Similarly, the Young-Pombo and Kempthorne bills increase the role that states play in species protection

<sup>130</sup> One of the major problems with corporations is that they have rights similar to those of natural persons, but not any moral ego to offset the indulgent id. As one commentator notes in an article exploring the movement to revoke the human rights of corporations:

In 1886, the U.S. Supreme Court, in *Santa Clara County vs. Southern Pacific Railroad*, granted the rights of natural persons to corporate entities, in a willful perverse interpretation of the 14th Amendment to the U.S. Constitution . . . Thus empowered, these fleshless beings have affixed themselves symbiotically to human host organisms: the CEOs and chairmen of the board who are paid millions to manage the labor and resources that fuel the corporate mission. Indeed, these executive are required by law to do their best to increase profits of the spectral creations that employ them. To that end, they hire lawyers, flacks and lobbyists to ensure that public policy advances the expansion of these seemingly immortal corporate beings.

Joel Bleifuss, *The New Abolitionists*, IN THESE TIMES, Apr. 1, 1996 at 12.

To put things into perspective, it is estimated that what most people think of as “crime” in terms of burglary and robbery costs this country about \$4 billion in 1995. In contrast, white collar fraud (i.e. corporate crime) costs this nation approximately \$200 billion a year. Russell Mokhiber, *Underworld, U.S.A.*, IN THESE TIMES, Apr. 1, 1996, at 14 (also noting “[m]ost corporate wrongdoing and violence goes unreported for one compelling reason—unlike all other criminal groups in the United States, major corporations have enough power to define the law under which they live.”).

<sup>131</sup> Zygmunt J.B. Plater, *From the Beginning, A Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law*, 27 LOY. L.A. L. REV. 981, 1002 (1994) (noting “parade of regulatory” statutes passed during the early 1970's).

<sup>132</sup> Karyn Strickler, *Environmental Towers Build Too High to Keep Grass Roots*, CHRISTIAN SCIENCE MONITOR, Apr. 21, 1995, at 18.

and reduce the role of the federal government.<sup>133</sup> Traditionally, state governments are more susceptible to market force pressures.<sup>134</sup> Corporations are experienced at protecting their local interests through both enticement (jobs, increased taxes to a community, and bribery of officials) and coercion ("Let us do X, or we'll go to state Y.").

For example, in Montana, despite citizen opposition to legislation which would permit higher levels of toxic wastes to reach the state's streams and lakes, the bills were signed by a reluctant Governor. The reason the bills passed was clear: "Mining lobbyists were conspicuous during the parliamentary maneuvering—including representatives from Crown Butte and its Canadian parent, Noranda Inc. These companies are working relentlessly for permission to build in geologically precarious terrain a gold mine that would leave a permanent reservoir of pollutants in the watershed of one of Montana's most important wilderness streams."<sup>135</sup> Furthermore, Idaho's people face a threat under a new state statute which allows a watershed advisory group to set water quality standards. These groups "will be well stocked with large landowners and representatives from timber, mining, and agribusiness companies who are almost certain to write new and more permissive regulations."<sup>136</sup> Finally, the result of shifting the responsibility of protecting endangered species from the federal government to state legislatures such as Idaho's is predicted to be disastrous for endangered species. One reporter, considering the effects that Senator Kempthorne's amendments to the ESA would have on endangered species concludes: "If Senator Kempthorne succeeds in transferring protection of endangered species from Washington to Boise, it will be goodbye salmon, with grizzlies and wolves to follow."<sup>137</sup>

Thus, market forces provide incentives for corporations to influence legislation which will result in reduced costs. By imposing barriers to the listing of endangered species and by shifting wildlife protection from the federal government to states, industry seeks to attain its goal of cost reduction. Although industry achieved initial success during the beginning of the 104th Congress, events suggest that industry has pushed too hard for the dismantling of environmental regulation, resulting in a backlash against Contract supporters.

### C. *The Counter Counter-Revolution*

The Contractarians may be forced to retreat from their entrenched anti-environmental stance. On April 26, 1996, a compromise was reached between the parties which ended the Moratorium. House Bill 3019, signed into law as the Omnibus Consolidated Rescissions and Appropriations Act

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<sup>133</sup> See, e.g., S. 1364, 104th Cong. § 7 (1995); H.R. 2275, 104th Cong. § 105 (1995).

<sup>134</sup> Zygmunt J.B. Plater, *Environmental Law as a Mirror of the Future: Civic Values Confronting Market Force Dynamics in a Time of Counter-Revolution*, 23 B.C. ENVTL. AFF. L. REV. 733, 759 n.92 (1996) (showing attempts of Alaska legislature to eliminate common law protections which might be used by citizens against polluting industries).

<sup>135</sup> *The Endangered West*, *supra* note 116, § 4, at 14.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

of 1996, contained language which continued the Moratorium until the end of the fiscal year.<sup>138</sup> However, H.R. 3019 also allowed the President to suspend the Moratorium at his discretion.<sup>139</sup> On the same day as the passage of H.R. 3019 President Clinton suspended the Moratorium stating, "I have determined that such suspension is appropriate based upon the public interest in sound environmental management, sustainable resource use, protection of national or locally-affected interests, and protection of cultural, biological, or historic resources."<sup>140</sup> After 381 days, the doors of the ark were again open.

Meanwhile, Representative Gingrich conceded that the Young-Pombo bill to amend the ESA was unlikely to be debated on the House floor.<sup>141</sup> Additionally, Representative Gingrich changed his tune with respect to the environment and endangered species in particular. Back in February, 1995, during the height of Contractarian optimism, Representative Gingrich displayed his lack of concern for endangered species when he noted that "it makes little sense to spend large sums of money on species protection when extinction is a natural process."<sup>142</sup> In March of 1996, however, Gingrich appeared on Larry King Live with several fuzzy endangered species and in April stated that "every species we lose is a level of knowledge that is irreparable."<sup>143</sup> He realized how much his party's anti-environmental stance has hurt the GOP at the polls and that he must now "figure out a way to control a handful of retrograde Republican colleagues who still cannot grasp a simple fact . . . namely, that Americans do not want their basic environmental laws trifled with. . . ."<sup>144</sup> Whether Gingrich's remarks reveal that Representative Gingrich has embraced, or at least recognizes the importance of endangered species protection, or whether it is simply a

<sup>138</sup> H.R. 3019, 104th Cong. (1996) (enacted).

<sup>139</sup> *Id.*; see also *Clinton Signs Omnibus Appropriations Bill, Waives Environmental Provisions*, Nat'l Env't Daily (BNA) (Apr. 30, 1996), available in LEXIS, Bna Library, Bnand File. Although passage of the law allowed the listing process to continue, the law cut the FWS listing program by 39% down to \$4 million. *Society and Politics Budget: Clinton Waives Three Riders; Some Riders Remain*, GREENWIRE, Apr. 29, 1996, available in LEXIS, Envirn Library, Grnwre File. Senator Kempthorne strongly urged the President not to waive the Moratorium. See 142 CONG. REC. S4161 (daily ed. Apr. 25, 1996) ("The \$4 million that we have provided to accomplish emergency listing activities, to manage petitions, and deal with existing lawsuits would soon be totally exhausted. Waiving the moratorium would leave us worse off than before.").

<sup>140</sup> *Text of Memorandum from President Clinton to Interior, Commerce*, U.S. Newswire, Apr. 26, 1996, available in 1996 WL 5620994.

<sup>141</sup> See *Spotlight Story Interview: Gingrich Says Cmte-Passed Species Bill is Dead*, GREENWIRE, Apr. 30, 1996, available in LEXIS, Envirn Library, Grnwre File; see also *Endangered Species Act: No Further Action on Young-Pombo Bill Expected This Year, GOP Counsel Says*, Nat'l Env't Daily (BNA) (May 1, 1996), available in LEXIS, Bna Library, Bnand File.

<sup>142</sup> *Spotlight Story GOP: Gingrich Admits Mistakes, Charts New Enviro Agenda*, GREENWIRE, April 25, 1996, available in LEXIS, Envirn Library, Grnwre File.

<sup>143</sup> *Id.* (quoting Rep. Gingrich).

<sup>144</sup> *The Greening of Newt Gingrich*, *supra* note 104, § 4, at 12; see also Bornemeier, *supra* note 1, at A3 ("Polls show that voters worry that the GOP is too eager to roll back environmental protections, and in an election year, Republicans are leery of fooling with the law that saved Smokey Bear and the bald eagle.").

temporary act of self-preservation,<sup>145</sup> the attempts by the 104th Congress to permanently weaken the ESA were stalled.

It is too early to know whether this is the beginning of a significant response to the failed coup of the 104th Congress, or if it is a return to pre-Contract days, where industry influence over legislation was still significant, but at least more discreet. With the recent displacement of the most anti-environmental Congress of the century by the 105th Congress, has a lesson been learned? It is unclear how much the public has opened its eyes to the fact that industry has been pulling the levers in Washington for a number of years and whether the public will reject such manipulation of their public servants in the future. Perhaps it is industry that has learned that the key to exploiting political opportunity is subtlety—and in the future, industry lobbyists will restrain themselves by acting only in the shadows, as in pre-Contract days.<sup>146</sup>

## VII. CONCLUSION

The Moratorium is over and the FWS has proceeded to list species under guidance especially prepared in anticipation that the Moratorium would one day end.<sup>147</sup> It may be some time, if ever, before we know, the permanent damage done by the Moratorium.

What we do know is that the Moratorium and the proposed anti-ESA legislation revealed the powerful market forces that influence our representatives. The Moratorium was not a people's law. It was an attempt by corporate America to reduce its own costs and impose them on society. It was an attempt to bury debate on the merits of endangered species listing. This time, however, industry miscalculated and was too callous in its disregard for the public's concerns for our environment and the endangered species with which we live. Although it took over a year before the pub-

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<sup>145</sup> See Miller, *supra* note 104, at B9 ("But no one should underestimate the intent and desire of key Republican lawmakers in positions of power to weaken environmental policies. They merely have recognized the high political risk in this election season of an agenda they designed when more confident of their votes and are hoping to renew that agenda with a Republican president and Congress in 1997.")

<sup>146</sup> Some critics argue that President Clinton has been influenced by industry as much as GOP members are and has been no better for the environment than the GOP. See *Society and Politics: Admin, Big Greens Betray the Cause—Progressive*, GREENWIRE, May 1, 1996, available in LEXIS, Envirn Library, Grmwre File (noting an article in the *Progressive* by Alexander Cockburn and Jeffrey St. Clair in which the authors argue the Clinton Administration and Democrats "had already done most of the damage themselves," without GOP help, especially by conceding that market forces, not government regulators, hold the solution to environmental problems). Cockburn and St. Clair are also critical of the "Big Green Groups" who "have brought into a system where government backs exploitation of resources by corporations." *Id.*; see also *The Greening of Newt Gingrich*, *supra* note 104, § 4, at 12 (noting that part of a recent speech by Rep. Gingrich "sounded very much like the recent utterances of another late-blooming conservationist, President Clinton.")

<sup>147</sup> Endangered and Threatened Wildlife and Plants; Interim Listing Priority Guidance, 61 Fed. Reg. 9651 (1996) ("When adequate appropriations are provided by the Congress for the administration of a listing program . . . the Service will face the considerable task of restaffing its listing program and allocating the available resources to the following listing activities that have accrued significant backlogs."). *Id.*

lic's will prevailed, the overthrow of the Moratorium perhaps symbolizes the dawning of a new political accountability. Perhaps the members of the 105th Congress will finally recognize that they have sworn to represent the "People," and not just the corporate elite.