DOES CONGRESS EXIST?

J.B. RUHL*

Giving the last presentation on the Friday afternoon of what has been a great conference is like taking the last bite of a fine French meal: either you savor it or you realize you've eaten too much. I'll try to make you feel the former, not the latter.

Let me first thank Shi-Ling Hsu for putting this event together. This has been a fabulous conference and it's really great to be back at FSU. It's such an impressive program, so kudos to Donna Christie, Dave Markell, Hanna Wiseman, and Shi-Ling for the academic momentum they have maintained at FSU.

Richard Lazarus gave us an absolutely fabulous keynote address this morning. It was one of the best hours I've spent in a long time, and it was a wonderful way to have begun this conference. My discussion will circle back to it with an applied example of some of the lessons Richard offered us. I'll also refer back to Todd Aagaard's presentation on "portaging," the idea Don Elliott developed some years ago about how to accomplish regulatory reform without Congress.[1] Thus is the advantage of going last!

When Shi-Ling asked for topics I decided to have a little fun. I thought about the theme—Environmental Law without Congress—and it reminded me of deism. Deism is "the belief, based solely on reason, in a God who created the universe and then

* David Daniels Allen Distinguished Chair in Law, Vanderbilt University Law School. This essay is an edited version of remarks I presented as the closing speaker at the Florida State University College of Law's conference on Environmental Law Without Congress: An Interdisciplinary Conference on Environmental Law. I am thankful to FSU for inviting me to participate in the conference and to the staff of the *Journal of Land Use & Environmental Law* for their helpful assistance at the conference, for transcribing my remarks, and for editing my final written product. Please direct any comments or questions to jb.ruhl@vanderbilt.edu.

1. E. Donald Elliott, *Portage Strategies for Adapting Environmental Law and Policy During a Logjam Era*, 17 N.Y.U. ENVTL. L.J. 24 (2008).

abandoned it, assuming no control over life, exerting no influence on natural phenomena, and giving no supernatural revelation."[2] I thought, "That's environmental law!" Congress created our universe from 1970 to 1990, abandoned it in 1990, and has assumed no control or influence since then.[3] Since 1990, it has been up to agencies, courts, practitioners, and scholars to divine the existence of Congress in environmental law purely from reason. But I had a nagging thought: Congress throws us (more accurately, only some of us) a small miracle now and then. Maybe evidence that Congress exists is found in supernatural revelation after all.

I'm going to use the Endangered Species Act (ESA) as case study to test my theory of environmental law deism.[4] The history of the ESA sure has the feel of deism at work. We had the big creation moment—the first day, if you will—in 1973. Some unhappiness ensued later, so Congress made some adjustments, and then just let it ride. Since 1982, the year of the last significant amendments to the statute, agencies, courts, practitioners, and scholars have been piloting the ship with only the scripture, so to speak, as the guide.

I. THE SCRIPTURE

The ESA is a relatively lean statute compared to other environmental laws.[5] There are four core programs. First, the Fish and Wildlife Service or the National Marine Fisheries Services, depending on the kind of species, identifies and "lists" a species as endangered or threatened and designates its "critical habitat."[6]

---

2. Deism Definition, thefreedictionary.com, http://www.thefreedictionary.com/deism (last visited Aug. 1, 2014).

3. Environmental law scholars generally identify 1990 as the last year of meaningful congressional activity in the field. See, e.g., Michael Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 131-140 (2013).

4. Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006). This Essay is not intended to provide a comprehensive overview of the ESA. For thorough treatments of the ESA, see generally MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 193–276 (3d ed. 1997); ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES (Donald C. Baur & Wm. Robert Irvin eds., 2d ed., 2010) [hereinafter LAW, POLICY, AND PERSPECTIVES]; ERIC T. FREYFOGLE & DALE D. GOBLE, WILDLIFE LAW: A PRIMER 233–77 (2009); LAWRENCE R. LIEBESMAN & RAFE PETERSEN, ENDANGERED SPECIES DESKBOOK (2d ed. 2010); JOHN COPELAND NAGLE ET AL., THE LAW OF BIODIVERSITY AND ECOSYSTEM MANAGEMENT 144-319 (3d ed. 2013); STANFORD ENVIRONMENTAL LAW SOCIETY, THE ENDANGERED SPECIES ACT (2001); SAM KALEN & MURRAY FELDMAN, ESA: ENDANGERED SPECIES ACT (2nd ed. 2012).

5. For example, in a leading academic statutory supplement of environmental laws, the ESA measures 32 pages compared to the Clean Air Act's 319 pages. *See* WEST ACADEMIC PUBLISHING, SELECTED ENVIRONMENTAL LAW STATUTES (2012).

6. 16 U.S.C. § 1533 (2012).

When a species is listed, all federal agencies must coordinate with the listing agency to ensure actions they fund, carry out, and authorize do not endanger the continued existence of the species or impair its critical habitat.[7] Also, all persons—public, private, state, and local—are prohibited from "taking" endangered species,[8] which, through a series of court opinions and regulations, includes destroying any habitat (not just critical habitat) in a way that actually injures or kills species.[9] Yet, as is the case for many environmental laws, where there is a prohibition, there is also a permit provision. So you can obtain what is known as incidental take authorization to take a species if you get a permit from the listing agency.[10] That is the structure that has been in place since 1982. On either side of that date one finds completely different stories of congressional existence.

II. CREATION

As Richard alluded to in his keynote address, the creation story for the ESA, like many of the other environmental laws, isn't that Congress just pulled it out of a hat. The concept of take goes back to early British common law—if you hunted and killed a deer in the woods, you took the Crown's property and that was a crime.[11] That word is used in the ESA hundreds of years later. And well before the ESA, we had the Lacey Act of 1900 and the Migratory Bird Treaty Act of 1918, both of which regulated on behalf of species conservation,[12] and later a series of federal agency planning and public land management laws that used the term endangered species.[13] So there was a slow creep towards the ESA. The catalyst came in 1973. As the U.S. entered the Convention on International Trade in Endangered Species, or CITES,[14] both President Nixon and Congress were competing for public acclaim as the most environmental branch.[15] Congress passed the

7. 16 U.S.C. § 1536 (2012).
8. 16 U.S.C. § 1538(a) (2012).
9. *See* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995); *See generally* LIEBESMAN & PETERSEN, *supra* note 4, at 63–72; STANFORD ENVTL. LAW SOC'Y, *supra* note 4, at 104–12; Alan M. Glen & Craig M. Douglas, *Taking Species: Difficult Questions of Proximity and Degree*, 16 NAT. RESOURCES & ENV'T 65 (2001); Patrick Parenteau, *The Take Prohibition*, *in* LAW, POLICY, AND PERSPECTIVES, *supra* note 4, at 146.
10. 16 U.S.C. §§ 1536, 1539 (2012). For a description of the incidental take authorization procedures, *see* LIEBESMAN & PETERSEN, *supra* note 4, at 73–81.
11. *See* BEAN & ROWLAND, *supra* note 4, at 193-276.
12. *See* STANFORD ENVTL. LAW SOC'Y, *supra* note 4, at 14-16.
13. *See id.* at 17-19.
14. *See id.* at 20.
15. *See id.* at 20-21.

Endangered Species Act of 1973 with overwhelming majorities.[16] President Nixon signed with a big celebration.[17]

It quickly became clear that nobody in the White House or Congress had a clue about what they had just done. Of course, accomplishing major reform does not necessarily lead to smooth sailing, but the ESA is an especially compelling example. Shortly after the ESA's creation moment, some unhappiness ensued, like that little problem Adam and Eve had. There was this project in Tennessee called the Tellico Dam, which the Tennessee Valley Authority dearly wanted to build. Zyg Plater, then a professor at the University of Tennessee College of Law, teamed up with some local farmers, read the ESA, got a little fish called the snail darter listed as an endangered species, and pointed out that the dam's planned spillway was right on top of the snail darter's critical habitat.[18] Suffice it to say that the case arrived in the Supreme Court notwithstanding relentless efforts of the TVA, the Tennessee congressional delegation, the lower courts, and influential members of the Carter Administration.[19] TVA kept building the dam, but then the Court ruled that the statute means what it says—federal agencies cannot jeopardize a listed species—and refused to exercise its equitable powers to let TVA off the hook.[20] The case remains one of the iconic judicial decisions of environmental law.[21]

---

16. *See id.* at 21.

17. *See* STANFORD ENVTL. LAW SOC'Y, *supra* note 4, at 21

18. *See generally* ZYGMUNT J.B. PLATER, THE SNAIL DARTER AND THE DAM: HOW PORK-BARREL POLITICS ENDANGERED A LITTLE FISH AND KILLED A RIVER (2013).

19. *See* Holly Doremus, *The Story of* TVA v. Hill*: A Narrow Escape for a Broad New Law, in* ENVIRONMENTAL LAW STORIES 120–26 (Richard J. Lazarus & Oliver A. Houck eds., 2005).

20. Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978). Having found that the operative language of section 7 "admits of no exception," 437 U.S. at 173, the Court rejected the government's argument that the courts' equitable powers justified denial of the plaintiffs' requested injunction. *See id.* at 193–95. After quoting Sir Thomas More, the Court closed with the stern observation that "in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal." *Id.* at 195. For concise legal histories of the case, including the events leading up to it, the Court's internal deliberations, and the decision's aftermath, see Doremus, *supra* note 19, at 109-40; Zygmunt J.B. Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and Its Consequences*, 19 U. MICH. J.L. REFORM 805 (1986).

21. Daniel A. Farber, *A Tale of Two Cases*, 20 VA. ENVTL. L.J. 33, 34 (2001) (noting that *Hill* may be the best-known case in environmental law); James Salzman & J.B. Ruhl, *Who's Number One?*, THE ENVTL. F., Nov.-Dec. 2009, at 36, 37–39 (*Hill* ranked first in 2001 and fourth in 2009 in surveys of environmental lawyers asking which cases are the most significant in the history of environmental law). *Hill* also was selected for inclusion in an anthology published in 2005 collecting chapters discussing the most important cases in the history of environmental law. *See* Doremus, *supra* note 19, at 109.

Congress was not pleased.[22] It handed down from on high the 1978 amendments, which most notably included the so-called God Squad amendment, allowing federal agencies to seek exemption from the jeopardy prohibition.[23] But it turned out that the committee of Cabinet and other officials that make the exemption decision decided that the Tellico Dam was not really that important, so exemption denied.[24] Congress blew another gasket and eventually passed a rider to an appropriations bill that allowed the TVA dam to be built notwithstanding the ESA.[25]

Congress came back to the ESA in a meaningful way only one more time. The 1982 amendments required that listing of species be based solely on science and also added the incidental take provisions, both of which have had significant impacts on how the statute has played out.[26] The 1988 amendments, while of interest to an ESA wonk like me, weren't really that structurally dynamic.[27] So I'd count Congress' involvement in the Endangered Species Act as ending in 1982.

III. ABANDONMENT

Of course, it's not unusual for Congress to go dormant on a particular legislative program for considerable periods of time. We should not lose faith in Congress' existence just because it is not in perpetual motion. But the ESA, like many environmental laws, soon entered deep space as far as congressional action is concerned. By 1995, it's fair to say that Congress was not merely distracted from the ESA by other work—it had entered the abandonment phase as a result of political gridlock.

The Spotted Owl controversy of 1986 to 1992 was really the beginning of the logjam era for the ESA.[28] It was one of those instances where you might reasonably have expected Congress to step back in and do something, but instead the controversy polarized Congress, and the White House (through two

22. For Congress' reaction, see Doremus, *supra* note 19, at 132–34. Justice Powell predicted "[t]here will be little sentiment to leave this dam standing before an empty reservoir, serving no purpose other than a conversation piece for incredulous tourists." 437 U.S. at 210 (Powell, J., dissenting). The Wall Street Journal quipped that "the Endangered Species Act is pretty silly." *Scopes Prosecution Vindicated*, WALL ST. J., June 16, 1978, at 16.

23. 16 U.S.C. § 1536(e) (2012); *see* STANFORD ENVIRONMENTAL LAW SOCIETY, *supra* note 4, at 22–24 (discussing the 1978 amendments to the ESA).

24. *See* STANFORD ENVIRONMENTAL LAW SOCIETY, *supra* note 4, at 22.

25. *See id.* at 23.

26. *See id.*

27. *See id.* at 24-25.

28. *See id.* at 25-26.

administrations) took over control of the flare-up.[29] The ESA quickly became one of the third rails of politics in Congress. In 1994, Newt Gingrich's Contract with America targeted the ESA as one of its top reform agenda items, but even with all the political stars aligned in favor of reform, nothing happened in the end.[30] Instead Bruce Babbitt, then Secretary of the Interior, initiated a series of administrative reforms to stave off congressional ire. The strategy worked.

IV. PORTAGING

What Babbitt did was classic Don Elliott style portaging around a congressional logjam. They say only Nixon could go to China; likewise, only Babbitt could have done what he did on the ESA. As a Democrat he instituted a series of pro-landowner reforms that largely diffused Republican congressional criticism.[31] The agencies ramped up the incidental take permitting program, issued permitting handbooks, developed new programs for safe harbors and conservation agreements, and so on, all while Congress sat on the sidelines.[32] Administrations since then have added habitat banking (which is like the wetlands mitigation banking program), recovery crediting (which allows agencies to get credit in advance for doing good things for species when they need to enter into consultations about jeopardy later), and a line of similar reforms going to the present.[33] The ESA is, in short, the

29. *See* STANFORD ENVIRONMENTAL LAW SOCIETY, *supra* note 4, at 26-39.

30. *See id.* at 29-30.

31. The most evident example of his strategy is the so called No Surprises Policy, which protects ESA permittees from bearing the costs of responding to unforeseen circumstances threatening a species covered in the permit. *See* 69 Fed. Reg. 71723-01, 71724 (Dec. 10, 2004) (codified at 50 C.F.R. §§ 17.22, 17.32(b)(5), and 222.307(g)). To say the least, the policy was controversial, taking over a decade to move from an informal guidance statement to an agency rule endorsed by the courts. *See* Spirit of the Sage Council v. Kempthorne, 511 F. Supp. 2d 31 (D.D.C. 2007) (upholding the No Surprises regulation over a litany of substantive challenges over a decade after the agencies first announced the policy). For a brief history of this litigation, see Douglas P. Wheeler & Ryan M. Rowberry, *Habitat Conservation Plans and the Endangered Species Act*, *in* ENDANGERED SPECIES ACT: LAW, POLICY AND PERSPECTIVES, at 221, 225–27.

32. For a detailed contemporaneous review of the reform agenda items and implementation, see J.B. Ruhl, *Who Needs Congress? An Agenda for Administrative Reform of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 367, 374–87 (1998). For comprehensive and thoughtful "insider" accounts of Secretary Babbitt's vision and implementation of this phase of ESA reform, see John D. Leshy, *The Babbitt Legacy at the Department of Interior: A Preliminary View*, 31 ENVTL. L. 199 (2001); Joseph L. Sax, *Environmental Law at the Turn of the Century; A Reportorial Fragment of Contemporary History*, 88 CAL. L. REV. 2375 (2000).

33. *See* U.S. Fish & Wildlife Serv., *Improving ESA Implementation – Regulatory Reform*, http://www.fws.gov/endangered/improving_esa/reg_reform.html (last visited Aug. 1, 2014) (describing various agency reform initiatives during the Obama administration).

poster child for administrative portaging—agencies working behind Congress' back, using *Chevron* as their path around the congressional logjam.

The ESA has had a slightly different portaging story in the courts. In the Supreme Court, the ESA started out with a bang in *TVA v. Hill*. In retrospect, many ESA followers are sure Justice Burger didn't really mean everything he said in the majority opinion,[34] but the flowery phrases are in print.[35] Slowly but surely, however, the Court has reduced the ESA to looking more like just a plain vanilla permitting statue.[36] The Court's most recent ESA opinion, *National Association of Home Builders v. Defenders of Wildlife*,[37] declared if an agency is engaging in a non-discretionary act the ESA doesn't apply. Before that, in *Bennett v. Spear*, a unanimous Court had surmised the ESA's requirement that agencies use "best science" in their ESA decisions is actually there to protect landowners from overzealous agency officials.[38] So the court has a very different view of the ESA today from what is on paper in *TVA v. Hill*.

The lower courts have not quite caught up with the Court's shift in sentiment, continuing to apply the words of *TVA v. Hill* for what they say rather than what Justice Burger may have intended.[39] The courts have had a tremendous role in making the ESA no less than a national land use and resources management program.[40] For example, we now have many major river systems in the nation that are for all intents and purposes run by courts under the auspices of the ESA.[41] So the courts have portaged as well, filling a vacuum left by congressional abandonment. You can debate whether that's good or bad, but the courts clearly have stepped up to the plate.

---

34. *See, e.g.*, Doremus, *supra* note 19, at 131; Jonathan Cannon, *Environmentalism and the Supreme Court: A Cultural Analysis*, 33 ECOLOGY L.Q. 363, 413–18 (2006).

35. For examples of some of Justice Burger's sweeping prose, see J.B. Ruhl, *The Endangered Species Act's Fall from Grace in the Supreme Court*, 36 HARV. ENVTL. L. REV. 487, 497-99 (2012).

36. *See id.* at 496-505 (tracing the ESA's history in the Court).

37. Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 661-73 (2007).

38. Bennett v. Spear, 520 U.S. 154, 176-77 (1997).

39. Westlaw's "citing references" results for *Hill* shows hundreds of cases "examining" and "discussing" the case, with hundreds more citing it.

40. Litigation under the ESA is active and contentious, as documented annually in a summary of litigation developments I have authored each of the past 15 years for the American Bar Association's Section on Environment, Energy, and Resources. *See generally* J.B. Ruhl, *Endangered Species Annual Report*, 2010 A.B.A. ENV'T. ENERGY & RESOURCES L.: YEAR REV. 52 (2010).

41. *See* Robin Kundis Craig, *Does the Endangered Species Act Preempt State Water Law?*, 62 KAN. L. REV. 851, 859-61, 865-75 (2014).

V. MIRACLES

By contrast, to put it bluntly, there is nothing going on these days in Congress regarding the ESA worth your attention. To be sure, major reform bills are periodically floated, and some even get far into the process, but they are all dead on arrival and everyone knows it.[42] It's purely rhetorical, a political sport of introducing a bill to please a constituency, to rattle a sword and call someone from the FWS down to a hearing. It's not that the proponents of these reform bills don't believe in the proposals, it's that they have to know no major ESA reform is going to get over the finish line. I have had reporters call and ask me what I think about this bill or that bill being proposed to overhaul and "improve" the ESA, and I tell them I haven't read it and never will; it's not worth my time because it's not going to happen.

There have been miracles, however, that suggest Congress actually is working on the ESA, and thus must exist. First, there was a little endangered squirrel—the Mt. Graham squirrel—that was posing some ESA problems for the construction of an observatory, and Congress passed legislation in 1988 commanding that the observatory be built notwithstanding the ESA.[43] Then, there is the complex story of the 1995 listing moratorium funding rider, lifted several years later, which Congress intended as an ESA "time out" but which only created more problems down the road as species worthy of listing backed up in the process.[44] These actions, however, came before (in the case of the squirrel) or on the brink of (in the case of the moratorium) the entrenchment of the abandonment phase. Pre-miracles, we might call them.

The real miracles began a decade later. First, in 2004, Congress exempted the Defense Department from the critical habitat provisions provided that military operations comply with specified land management provisions for lands under the Defense Department's jurisdiction.[45] That's a lot of land! Then the ESA

---

42. Even while editing these remarks, the House of Representatives passed an ESA reform bill, with great fanfare, which anyone cognizant of ESA politics knows is dead in the Senate and White House. *See* Marianne Levine, *House Approves Changes to Endangered Species Act Despite Veto Threat*, L.A. TIMES, http://www.latimes.com/nation/la-na-house-vote-endangered-species-act-20140729-story.html (last visited on July 29, 2014).

43. This ESA miracle is covered comprehensively in Stephen W. Owens, Recent Development, *Congressional Action Exempts Observatory from the Endangered Species Act*, 13 J. ENERGY, NAT. RESOURCES & ENVTL. L. 314 (1993).

44. This ESA miracle is covered comprehensively in Jason M. Patlis, *Riders on the Storm, Or Navigating the Crosswinds of Appropriations and Administration of the Endangered Species Act: A Play in Five Acts*, 16 TUL. ENVTL. L.J. 257, 287-99 (2003).

45. This ESA miracle is covered comprehensively in William E. Sitzabee et al., *An Evaluation of Endangered Species Act Exemptions in the Department of Defense and the*

equivalent of Our Lady of Lourdes happened. In 2011, following years of work with states on management of a distinct population of the grey wolf, the FWS moved to delist the wolf from a couple of states but not others.[46] The courts said it's all or nothing—delist the entire population or none of it.[47] But Congress stepped in and by legislation ordered FWS to implement the delisting rule,[48] which courts later ruled was well within congressional authority.[49] Now that's some kind of miracle!

So Congress seems to be there, working on the ESA, but only now and then and always in very strange ways. These are (amazingly) bipartisan, tactical measures targeted to intervene in the normal operations of the program and address a special problem or special interest. You might not agree that these miracles are saving the worthiest interests, but they are happening—they are evidence Congress exists! But which is better—would you like Congress to exist, or not?

VI. THE UNFAITHFUL

Here's a secret: there are many interests, from both "sides" of the ESA battleground, that don't want Congress to exist. I know this because they told me so.

In 2005 a bipartisan group of Senators asked the Keystone Center to convene a task force to address the ESA reform problem.[50] I was happy to be included in task force, a gathering of 24 ESA policy wonks representing a wide array of perspectives and interests affected by and involved in the ESA. It was a great gig—we met in Keystone, Colorado, over a snowy winter weekend. Work continued after that through other sessions and subcommittees. Many of us felt we were within reach of achieving a meaningful

---

U.S. Air Force, 15 FED. FACILITIES ENVTL. J. 19 (2004), available at http://onlinelibrary.wiley.com/doi/10.1002/ffej.20021/pdf. Such exemptions for the military are widespread throughout environmental laws. *See* DAVID M. BEARDEN, EXEMPTIONS FROM ENVIRONMENTAL LAW FOR THE DEPARTMENT OF DEFENSE: BACKGROUND AND ISSUES FOR CONGRESS, CONG. RES. SERV. REP. RS22149, at 4 (2007), *available at* http://fas.org/sgp/crs/natsec/RS22149.pdf.

46. This ESA miracle is covered comprehensively in Edward A. Fitzgerald, *Alliance for Wild Rockies v. Salazar: Congress Behaving Badly*, 25 VILL. ENVTL. L.J. 351, 351-52 (2014).

47. *See id.* at 368.

48. *See id.* at 370-72.

49. *See id.* at 372-73.

50. *See* THE KEYSTONE CENTER WORKING GROUP ON ENDANGERED SPECIES ACT HABITAT ISSUES, FINAL REPORT 5 (2006), *available at* https://www.keystone.org/images/keystone-center/spp-documents/Environment/ESA-Report-FINAL-4-25-06.pdf.

proposal to Congress on reform of the ESA, and then the process blew up.

I was a little naïve. I thought we were going to get somewhere, but eventually someone who knew better pulled me aside and said, to paraphrase:

> The reason the process is blowing up, J.B., is some of the interests represented on the Task Force don't want ESA reform. All you people in the middle, you're deluded. After decades of litigation, we all get what the words in the statute mean, so if Congress reforms and throws out "critical habitat" and replaces it with something like "recovery habitat" then no one knows what that means. And we're going to go through 10 or 15 years of agency rulemaking, and courts interpreting, and we don't know what we'll get. We'd rather live with this broken down, kind of wacky statute, because we've got case law this high, and agency rules this high, which we can understand and have learned to work with. Even though we don't always like how it turns out for us, we think opening Pandora's box is worse.[51]

So, I have to wonder, is it really just that Congress is ineffective and paralyzed? Or, are there strong and significant interest groups—from both "sides"—that don't want Congress to open up major reform in environmental law unless they have it all on their terms?

VII. LOOKING FORWARD

How much longer can this logjam go on? How much space is left for agency portaging behind the *Chevron* shield? What remains in the scriptures for the courts to interpret? Are we out of capacity to innovate? At some point, more innovation, more portaging, might simply be rewriting the statute and be struck down in the courts. I also wonder how long Congress and the White House—the twenty-five year olds in the White House—will tolerate the courts using the ESA to manage so much of our nation's land and resources.

---

51. This is, of course, not a quote, but rather the strong composite impression I gained from conversations with several Task Force members. It would not be appropriate to attribute these sentiments by name. Take my word for it.

Also, how generalizable is this story of ESA miracles? This stalemate in Congress has built up over a long time and we now have a deep history of court implementation and agency implementation. We have seen similar dynamics with other environmental statutes beginning to reach the limits of portage space.[52] But then think about a challenge like climate change adaptation, and you have to ask whether Congress can handle it with more tiny miracles. How will agencies and courts portage *at all* without a comprehensive statute in place? At least we have the ESA. But if we think that Congress won't even act on new problems, what scripture would we interpret?

And I'll close by suggesting that there's an untapped potential that has yet to materialize in the ESA, but which I think we're starting to see on other issues, in the form of private governance—private institutions stepping in and filling the void.[53] We might see continued congressional inertia on old and new issues opening the door to private institutions we really haven't seen weighing in on environmental governance. Insurance companies, for example, have a stake in climate change, and if Congress isn't going to act and the bottom-up process from the state and local legislatures takes too long, we might let them step in to use their private market power to impose adaptation measures on property owners.

VIII. MY EXPRESSION OF FAITH

If Congress does come back into the life of environmental law, will it be bipartisan or one-sided? Who knows? What would come out of that process? Who knows? Would the pulse of reform lead to yet another long period of sticky inertia, or would it kick start a continuous series of adaptive legislative actions? Who knows? Whatever you believe, I think we all have to concede that all we have to go on is our faith.

If Congress does not exist, I think we will continue to get more of the same: interest groups turn to agencies and courts with proposed portaging strategies; reform bills floated as rhetorical rallying points; narrow, rare, ad hoc miracles continuing to

52. *See generally* J.B. Ruhl, *Ecosystem Services and the Clean Water Act: Strategies for Fitting New Science into Old Law*, 40 ENVTL. L. 1381 (2010) (discussing the limits of administrative discretion to integrate the economics of ecosystem services into the Clean Water Act program); *but see Massachusetts v. EPA*, 549 U.S. 497 (2007) (a majority of the Court found that the EPA had erred in denying a citizen rulemaking petition to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act).

53. *See* Vandenbergh, *supra* note 3, *passim*.

happen, keeping us somewhat in wonder that maybe Congress does exist.

So, do I think Congress exists? Maybe. Do I want it to exist? Maybe. When the logjam finally bursts, though, I might throw myself in with the unfaithful! I'll leave it at that. Thank you.