

KILLING RARITY

Shahrokh Falati, Ph.D., J.D.*

On May 22, 2019, Botswana decided after many years to lift its ban on hunting elephants and in February 2020 held its first auctions for the right to hunt elephants. This turnaround change in their law coincides with a rapidly changing legal landscape in the United States related to the practice of trophy hunting of rare, intelligent animals, including elephants. This Article analyzes the fluid legal landscape surrounding this uncommon form of hunting of rare animals and possible ways of using the Administrative Procedures Act and the Federal Advisory Committee Act as a means of challenging the government’s rapidly changing position. This Article also explores the legal status of rare animals in the context of our property rights and humanity’s cultural heritage, urges Congress to take action to limit this form of hunting, and ends by offering both international trophy hunters and conservationists alike four innovative and practical solutions to consider. In December 2021, the British government announced a ban on importing hunting trophies of rare animals into the UK; the United States government should do likewise in 2022.

I.	INTRODUCTION.....	710
II.	KILLING RARITY.....	715
	A. <i>Canned Hunting</i>	720
	B. <i>A Rare Animal: An Object or a Subject?</i>	722
	C. <i>Property Rights in Animals Versus the Need to Maintain Cultural Heritage</i>	725
III.	LAW ON INTERNATIONAL TROPHY HUNTING	730
	A. <i>The Convention on International Trade in Endangered Species of Wild Fauna and Flora</i>	731
	B. <i>The Endangered Species Act</i>	732
	1. <i>The ESA, USFWS, and the Scope of Permits for Importing Rare Animal Body Parts from International Trophy Hunts</i>	733
	C. <i>The Administrative Procedures Act</i>	737

* Professor of Law from Practice; Director of the Patent Law Clinic; and Senior Fellow of the *Innovation Center for Law & Technology* at New York Law School. The author declares no conflicts of interest and thanks New York Law School for its support. I am also thankful to my former Albany Law School Faculty colleagues who made suggestions to early drafts of this piece, to my family and friends for their love and support, as well as to our daughter, Maya, whose birth in late January 2022, has been an inspiration.

I.	<i>Does the Quick 180-Degree Turnaround in the U.S. Fish & Wildlife Service’s own Position on Trophy Hunting Violate the APA?</i>	738
D.	<i>The Federal Advisory Committee Act</i>	741
I.	<i>The Illegitimacy of the International Wildlife Conversation Council</i>	742
IV.	SIDE EFFECTS OF U.S. LEADERSHIP ON INTERNATIONAL TROPHY HUNTING	743
V.	U.S. CONGRESS SHOULD ACT TO LIMIT INTERNATIONAL TROPHY HUNTING	746
VI.	INNOVATIVE SOLUTIONS TO BENEFIT BOTH SIDES OF THE INTERNATIONAL TROPHY HUNTING DEBATE	749
VII.	CONCLUSION	753

*“We all have a responsibility to protect endangered species, both for their sake and for the sake of our own future generations.”*¹

*“The natural world is in serious trouble and it needs our help as never before. We continue to lose the precious wildlife that enriches our lives”*²

I. INTRODUCTION

Consider this question: is there a difference to killing a fox or deer, as opposed to a tiger, lion, or elephant?

Instinctively for most people, the short answer is yes—there is a difference to killing a deer versus killing a rare tiger or lion. Those instincts are indeed supported by broad research.³ However, instincts backed by research aside, why should that answer matter if there is no such distinction in law? Asked differently, why should the distinction between killing a deer and a lion matter when killing both is legal?

The colloquial way to explain this difference is that certain species are “rare,” or at least much fewer in number than other species, and that the taking of such rare property would have deleterious consequences not only to the animal itself and its social community and ecosystem but also to us as

1. Press Release, Loretta Lynch, U.S. Att’y, E. Dist. of New York, Lynch Statement on Elephant Ivory Investigation (July 26, 2011), <https://www.justice.gov/archive/usao/nye/pr/2011/2011jul26.html>.

2. Damian Carrington, *One in 10 UK Wildlife Species Faces Extinction, Major Report Shows*, THE GUARDIAN (Sept. 14, 2016) (quoting Sir David Attenborough), <https://www.theguardian.com/environment/2016/sep/14/one-in-10-uk-wildlife-species-faces-extinction-major-report-shows#:~:text=One%20in%2010%20UK%20wildlife%20species%20faces%20extinction%2C%20major%20report%20shows,-This%20article%20is&text=More%20than%20one%20in%2010,according%20to%20a%20major%20report>.

3. Elizabeth Byrd et al., *Perceptions of Hunting and Hunters by U.S. Respondents*, 7 ANIMALS, no. 11, Nov. 2017, at 1 (A study found that of the 825 U.S. residents surveyed, “87% of respondents agreed that it was acceptable to hunt for food. However, only 37% agreed that it was acceptable to hunt [an animal] for a trophy.”).

humans. This is premised on the notion that a rare item, whether it be a rare historical object such as the burial shroud in which Jesus of Nazareth was wrapped after crucifixion, or a place such as the Grand Canyon, or a subject such as a rare animal, is part of our wider cultural heritage, property, and something we associate with on a humanitarian level as a citizen of the shared planet on which we all live.

As such, when it comes to rare animals, the international community has laws and regulations related to the practice of traveling abroad to hunt and kill such rare species of animal.⁴ The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is an international agreement to which the United States is a party that creates stringent restrictions on imports and exports of certain wildlife.⁵ In the United States, international trophy hunting is addressed by several laws, including the Endangered Species Act (ESA), which implements CITES and was passed in 1973 in order to ban the import into the United States of trophies of endangered or threatened species.⁶ Trophy hunting of rare animals is not regulated by the ESA within host countries; instead, the law governs what can and cannot be imported back into the United States.⁷ The ESA authorizes the U.S. Fish and Wildlife Service (USFWS) to regulate trophy hunting by requiring the international trophy hunters to apply for and obtain permits to allow for the importation into the United States of body parts of threatened or endangered species that have been trophy hunted abroad.⁸

Although there is unanimous public support for protecting such rare animals, including elephants, from trophy hunting,⁹ the USFWS recently issued a memorandum withdrawing its own earlier findings that trophy hunting of certain species from certain countries in Africa did not help the species' survival chances.¹⁰ USFWS's reversal of its own position, not long after it was first articulated in 2014, has practically resulted in it readily

4. PERVAZE A. SHEIKH & LUCAS F. BERMEJO, CONG. RSCH. SERV., R45615, INTERNATIONAL TROPHY HUNTING, at 8 (2019).

5. *Id.*

6. *Id.* at 11; 16 U.S.C. §§ 1531–44.

7. PERVAZE A. SHEIKH & LUCAS F. BERMEJO, CONG. RSCH. SERV., R45615, INTERNATIONAL TROPHY HUNTING, at 11 (2019); 16 U.S.C. § 1538.

8. PERVAZE A. SHEIKH & LUCAS F. BERMEJO, CONG. RSCH. SERV., R45615, INTERNATIONAL TROPHY HUNTING, at 11 (2019); 16 U.S.C. § 1538..

9. *U.S. Poll Shows Strong Support for Protecting Elephants and Keeping Trophy Hunting Ban in Botswana*, HUMANE SOC'Y INT'L (Mar. 30, 2019), <https://www.hsi.org/news-media/u-s-poll-shows-strong-support-for-protecting-elephants-and-keeping-trophy-hunting-ban-in-botswana/>. A poll of 1,091 registered U.S. voters, conducted by the Remington Research Group on March 3–5, 2019, showed that 75% of registered voters in the U.S. believed that it is important to protect elephants from trophy hunting. *Id.*

10. Memorandum from the Principal Deputy Director, International Affairs, U.S. Fish & Wildlife Serv. to Assistant Director, International Affairs, U.S. Fish & Wildlife Serv (Mar. 1, 2018), <https://www.fws.gov/policy/m0405.pdf> [hereinafter Memorandum from the Principal Deputy Director, International Affairs, U.S. Fish & Wildlife Serv.].

issuing permits in 2019 and 2020 for the importation of body parts from rare animals hunted abroad and imported for display on mantlepieces in the United States.¹¹

In the past, getting a permit to import body parts of a rare animal that was trophy hunted abroad required proving that the hunt enhances the survival of the wild species in question (e.g., lions), which was a high bar that few hunts were able to meet.¹² Yet, beginning in 2018, the U.S. Department of the Interior (DOI) under former Interior Secretary Ryan Zinke began to take active measures to promote trophy hunting.¹³ The USFWS significantly changed course by reversing several bans on big-game imports from African countries and granted more than thirty import permits for dead lions, some from previously banned countries.¹⁴ As another example, the USFWS recently granted an import permit to an American trophy hunter who had paid \$400,000 to travel to Namibia to kill a rare thirty-five-year-old male black rhino.¹⁵

The U.S. government's position is becoming increasingly clear on this issue, evidenced further by the fact that the government has been pushing to repeal the automatic trophy hunting protections for *threatened* species under the pretext that *threatened* species are at less risk of extinction than *endangered* species.¹⁶

The DOI is the federal agency responsible for trophy import controls.¹⁷ Although former President Donald Trump may not have been a fan himself of trophy hunting of such animals, his administration proved to be very pro-trophy hunting.¹⁸ This is also reflected by the fact that the DOI in 2017 established the International Wildlife Conservation Council (IWCC)—an advisory council whose members are comprised almost exclusively of

11. *See id.*

12. *See* PERVAZE A. SHEIKH & LUCAS F. BERMEJO, CONG. RSCH. SERV., R45615, INTERNATIONAL TROPHY HUNTING, at 11 (2019).

13. *See* Memorandum from the Principal Deputy Director, International Affairs, U.S. Fish & Wildlife Serv., *supra* note 10.

14. *CECIL Act*, ANIMAL WELFARE INST., <https://awionline.org/legislation/cecil-act> (last visited Apr. 8, 2022).

15. Kitty Block, *Fish and Wildlife Service Fails in Its Mission to Protect Critically Endangered Species*, THE HUMANE SOC'Y OF THE U.S.: A HUMANE WORLD KITTY BLOCK'S BLOG (Feb. 14, 2019), <https://blog.humanesociety.org/2019/02/fish-and-wildlife-service-fails-in-its-mission-to-protect-critically-endangered-species.html>.

16. Lisa Friedman, *U.S. Significantly Weakens Endangered Species Act*, N.Y. TIMES (Aug. 12, 2018), <https://www.nytimes.com/2019/08/12/climate/endangered-species-act-changes.html>.

17. *See* National Invasive Species Council, *U.S. Department of the Interior (DOI)*, U.S. DEP'T OF THE INTERIOR, <https://www.doi.gov/invasivespecies/interior> (last visited Apr. 8, 2022).

18. *See* Vanessa Romo, *Controversial Trophy Hunting Council Disbanded Amid Legal Battle*, NPR (Feb. 10, 2020), <https://www.npr.org/2020/02/10/804647908/controversial-trophy-hunting-council-disbanded-amid-legal-battle>.

pro-hunting groups.¹⁹ Because this council's task is to help rewrite federal rules for importing rare animal parts into the United States and otherwise advising the DOI on the benefits of Americans going abroad to hunt, it has practically meant "open game" on trophy hunting of rare animals abroad.²⁰

Curiously, of the sixteen board members appointed to this council, based on a review of the backgrounds by the Associated Press, it is easy to predict that virtually all of the members will agree with the government's new 180-degree turnaround position that in order to save endangered animals such as lions, cheetahs, elephants, and rhinos, for example, from the threat of extinction, the best approach is to make it *easier* for wealthy Americans to go abroad and kill these rare animals.²¹ According to the Associated Press, appointees to this advisory council include wealthy people who in the past have bragged about killing the coveted "Big Five" (elephant, rhino, lion, leopard, and Cape buffalo); celebrity hunting guides; advocates for trophy hunting; representatives from rifle and bow manufacturers; one member who reportedly has nearly 500 kills, including at least eighteen lions, thirteen leopards, six elephants, and two rhinos; another member who auctioned off a permit for \$350,000 to kill an endangered black rhino in Namibia; and a television personality who has killed about ninety different species abroad and brought back to the United States around 150 animal carcasses.²²

Evidently, President Trump said one thing in a tweet to indicate his "horror" at this practice,²³ perhaps to stay in tune with the feelings of a vast percentage of American voters on this issue; however, in practice, his government quietly did quite the opposite.²⁴ The U.S. government currently is making it easier for wealthy Americans to go to impoverished countries in Africa to find, hunt, and kill rare animals so that they can bring into the

19. *Secretary Zinke Announces the Creation of the International Wildlife Conservation Council*, U.S. DEP'T OF THE INTERIOR (Nov. 8, 2017), <https://www.doi.gov/pressreleases/secretary-zinke-announces-creation-international-wildlife-conservation-council>.

20. *See id.*

21. Michael Biesecker, *Trump Wildlife Protection Board Stuffed with Trophy Hunters*, AP NEWS (Mar. 15, 2018), <https://apnews.com/article/06ea925cd83e4a348c0c4b306643d1ab>.

22. *Id.*

23. Olivia Beavers, *Trump Dubs Elephant Trophy Practice a 'Horror Show,' Suggests He Won't Lift Ban*, THE HILL (Nov. 19, 2017), <https://thehill.com/homenews/administration/361142-trump-says-decision-on-elephant-trophies-to-be-announced-next-week>. The Obama administration categorically banned the import of elephant trophies under the ESA. *Id.* However, in November 2018, the USFWS announced it would lift the ban. *Id.* President Trump tweeted regarding trophy hunting of elephants: "be very hard pressed to change my mind that this horror show in any way helps conservation of [e]lephants or any other animal." *Id.*

24. *See* Biesecker, *supra* note 21. President Trump displayed ambivalence towards trophy hunting. *Id.* First, he removed an executive order outlawing the importation of elephant body parts from trophy hunting. *Id.* Then, after a public outcry, he reversed himself and called the practice a "horror show." *Id.* *See also* Rachael Bale, *Botswana Lifts Ban on Elephant Hunting*, NAT'L GEOGRAPHIC (May 22, 2019), <https://www.nationalgeographic.com/animals/2019/05/botswana-lifts-ban-on-elephant-hunting/> (discussing the government evaluating trophy import applications on a case-by-case basis).

United States their body parts as souvenirs.²⁵ It is becoming self-evident that the U.S. government presently not only allows but even indirectly promotes the hunting and killing of animals abroad already threatened by extinction.²⁶ This position is made even more odd by the fact that a recent poll found that at least 75% of Americans are firmly opposed to the practice of trophy hunting.²⁷

Whether the prospect of having an endangered animal, such as the black rhino, becoming extinct is viewed as a potential loss of a property right for us as humans, a loss to our broader cultural heritage, or something we never thought about but would feel we lost if it ever ceased to exist, and whether you take a utilitarian view or a philosophical one, there is growing public resentment against the sudden U-turn in the government's position to now promote or otherwise make it easier for wealthy Americans to go kill rare animals abroad and import their body parts back to the United States as souvenirs.²⁸ An oft-used argument for allowing and even promoting such a practice is that it contributes to conservation efforts.²⁹ However, upon scrutiny, this argument fails and, indeed, many experts have concluded that the frequently asserted conservation benefits of hunting rare, endangered animals are questionable at best.³⁰

In this Article, the author outlines the practice of international trophy hunting; analyzes the currently changing international and domestic legal landscape, including how the sudden 180-degree U-turn in the U.S. government's own articulated position on importing rare animal body parts could be a violation of the Administrative Procedure Act (APA) and various sections of the Federal Advisory Committee Act (FACA); explores the legal status of rare animals *in toto* in the context of our common cultural heritage and property right; offers Congress and the Biden Administration some practical measures and legislation they could support; and ends by offering both sides of the debate four innovative and practical solutions that could be

25. See Eli Rosenberg, *Trump Administration Quietly Makes It Legal to Bring Elephant Parts to the U.S. as Trophies*, WASH. POST (Mar. 6, 2018), <https://www.washingtonpost.com/news/animalia/wp/2018/03/06/trump-called-elephant-hunts-a-horror-show-his-administration-just-lifted-a-trophy-hunting-ban/>.

26. See *id.* As is developed in Part III of this Article, although the IWCC was disbanded, the government agency in charge of regulating the importation of body parts from rare, endangered animals still has procedures that are arguably illegal at best and at worse promote international trophy hunting. See *infra* Section III.D.1 (discussing the invalidity of the IWCC).

27. See Press Release, Humane Soc'y of the U.S., *New Poll: Vast Majority of Americans Oppose Elephant and Lion Trophy Hunting* (Dec. 5, 2017), <https://www.humanesociety.org/news/new-poll-vast-majority-americans-oppose-elephant-and-lion-trophy-hunting> [<https://perma.cc/39SE-ZKRH>].

28. See Cyril Christo, *Trophy Hunters, You're Wrong. Dead Wrong*, THE HILL (Jan. 25, 2021), <https://thehill.com/changing-america/opinion/535688-trophy-hunters-youre-wrong-dead-wrong/#:~:text=Dead%20wrong.,-by%20Cyril%20Christo&text=%E2%80%9CTrophy%20hunting%20and%20poaching%20are,of%20dollars%20for%20the%20pleasure.>

29. *Id.*

30. Zoe Verhoeven, *Symposium Note 2018: The Myth of Hunting as a Conservation Tool in the Crosshairs, Facing Extinction*, 95 DENV. L. REV. F. 68, 70 (2018).

adopted in the short-term and be acceptable to both sides. In December 2021, the British government announced a ban on importing hunting trophies of rare animals into the U.K.;³¹ the U.S. government should adopt similar legislation in 2022.

II. KILLING RARITY

To explore the question of whether there is a difference between killing a deer or pheasant as opposed to a lion or elephant, or the question of how we should consider rare animals in the context of a property right in any meaningful way, one must spend some time reading literature from a variety of fields, including reproductive animal biology,³² social community and culture amongst particular species of animals,³³ animal social behavior and hierarchy,³⁴ interdependent ecosystems, and each species' way of life to name a few.³⁵ It is well accepted that African elephants (*Loxodonta Africana*), for example, are highly social animals who are intelligent and form strong, permanent social bonds with their family units and that their existence and way of life are crucial to Africa's forests and savannas.³⁶ In another example, only after consulting a variety of fields does one appreciate that lions are highly social and that it is this feature of their lives that also raises their vulnerability to trophy hunters because the hunting of male lions from a pride escalates disruption within a population of lions, increases rates

31. *Importing of Hunting Trophies Banned to Protect World's Threatened Species*, GOV.UK (Dec. 10, 2021), <https://www.gov.uk/government/news/importing-of-hunting-trophies-banned-to-protect-world-s-threatened-species> ("Government response to the consultation and call for evidence sets out one of the toughest bans in the world on the import of hunting trophies."); see also *Ban on Trophy Hunting Imports*, UK PARLIAMENT, <https://edm.parliament.uk/early-day-motion/58519/ban-on-trophy-hunting-imports> (last visited Apr. 8, 2022).

32. Janine L. Brown, *Comparative Reproductive Biology of Elephants*, in 753 REPRODUCTIVE SCIENCES IN ANIMAL CONSERVATION, at 135–69 (William V. Holt et al. eds., 2014); see also T.B. Hilderbrandt et al., *Aspects of the Reproductive Biology and Breeding Management of Asian and African Elephants *Elephas Maximus* and *Loxodonta Africana**, 40 INT'L ZOO Y.B. 20, 20–40 (2006); Judith Rudnai, *Reproductive Biology of Lions (*Panthera Leo Massaica Neumann*) in Nairobi National Park*, 11 AFR. J. ECOLOGY 38, 38–44 (1973).

33. G.A. Bradshaw et al., *Elephant Breakdown: Social Trauma: Early Disruption of Attachment Can Affect the Physiology, Behaviour and Culture of Animals and Humans over Generations*, 433 NATURE 807, 807 (2005); see also Megan Gannon, *Elephant Poaching Threatens Animals' Culture; Leaves Lasting Impact, Research Suggests*, HUFFPOST (Nov. 4, 2013, 4:04 PM), https://www.huffpost.com/entry/elephant-poaching-impact_n_4214599; Jackie Abell et al., *A Social Network Analysis of Social Cohesion in a Constructed Pride: Implications for Ex Situ Reintroduction of the African Lion (*Panthera leo*)*, 8 PLOS ONE 1, 1–11 (2013).

34. See generally JANIS DICKINSON & WALTER KOENIG, ANIMAL SOCIAL BEHAVIOR, in ENCYCLOPAEDIA BRITANNICA, INC. (2018).

35. Pierre Comizzoli & William V. Holt, *Breakthroughs and New Horizons in Reproductive Biology of Rare and Endangered Animal Species*, *Biology of Reproduction*, 101 NEW HORIZONS (SPECIAL ISSUE) 514, 514–25 (2019).

36. *The Status of African Elephants*, WWF, <https://www.worldwildlife.org/magazine/issues/winter-2018/articles/the-status-of-african-elephants> (last visited Apr. 8, 2022).

of infanticide, lowers reproductive and survival rates, and causes a scattering of members of the pride.

Yet, although it is critical to have some basic knowledge of these topics, this Article sidesteps such necessary analysis of the cause and effect of international trophy hunting of an endangered species to instead focus on how the rule of law informs on this issue. The law is not always a good place to start when looking for boundaries of what to do and what not to do.³⁷ For example, the law may treat killing a lion the same as killing a chicken, namely finding both legal, and yet, common sense and humanity may provide a different answer than the law does.³⁸ Some actions may be legal but highly unethical,³⁹ especially when performed under exploitative or corrupt legal regimes⁴⁰ as is, for example, the case in some developing countries.⁴¹

The above question of hunting a deer versus a lion is not a hypothetical one. Wealthy people travel frequently for recreation, typically to poor, underdeveloped countries, to hunt and kill rare mammals and bring back to the United States their body parts as souvenirs.⁴² This practice is called international trophy hunting.⁴³ If your instinct answered in the affirmative that killing a deer is different from killing a rare, threatened animal, you likely will be surprised to learn that the U.S. government's position has rapidly changed in the past few years to promote and generally make it easier for wealthy people in the United States to travel abroad and enjoy this rare form of hunting and souvenir gathering of rare animal parts.⁴⁴

Evidence from paleontological research suggests hunting as a practice has deep roots in human society.⁴⁵ As human populations grew and demand for resources increased, rampant exploitation of wildlife species through

37. Andrei Marmor & Alexander Sarch, *The Nature of Law*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2015).

38. *See Law v Common Sense*, THE ECONOMIST (Jan. 17, 2009), <https://www.economist.com/united-states/2009/01/15/law-v-common-sense>.

39. India Wentworth, *What Is the Difference Between Unethical and Illegal Business Practice?*, DELTANET INT'L, <https://www.delta-net.com/compliance/ethics/faqs/what-is-the-difference-between-unethical-and-illegal-business-practices> (last visited Apr. 8, 2022).

40. Raquel Baldelomar, *Where Is the Line Between Ethical and Legal?*, FORBES (July 21, 2016), <https://www.forbes.com/sites/raquelbaldelomar/2016/07/21/where-is-the-line-between-what-is-ethical-and-legal/?sh=69f88dcc250b>.

41. Thomas Donaldson, *Values in Tension: Ethics Away from Home*, HARV. BUS. REV. (1996), <https://hbr.org/1996/09/values-in-tension-ethics-away-from-home>.

42. PERVAZE A. SHEIKH & LUCAS F. BERMEJO, CONG. RSCH. SERV., R45615, INTERNATIONAL TROPHY HUNTING, at 1 (2019).

43. *Id.*

44. *Id.* at 8–9.

45. N. Leader-Williams, *Conservation and Hunting: Friends or Foes*, in RECREATIONAL HUNTING, CONSERVATION AND RURAL LIVELIHOODS, at 9–24 (Barney Dickson et al. eds., 2009).

hunting began to occur in the nineteenth century.⁴⁶ It has been hypothesized by others that unregulated hunting has already led to the extinction of a number of wildlife species—a term labeled as overkill.⁴⁷ For example, in Africa, uncontrolled trophy hunting decades ago resulted in negative consequences, particularly for those large-bodied species favored by trophy hunters.⁴⁸ The blue buck (*Hippotragus Leucophaeus*), for example, was made extinct due to overhunting.⁴⁹ In the ensuing years, this resulted in the rise of various conservation initiatives aimed at protecting the remaining wildlife populations.⁵⁰ Over time, this resulted in certain areas being protected in most countries,⁵¹ and the concept of international trophy hunting was institutionalized and highly regulated, initially as a conservation tool.⁵²

To highlight the issue more particularly, this is not a question about hunting in the United States.⁵³ This is an issue about a narrow type of hunting: international trophy hunting. In this form of hunting, wealthy tourists, typically from America, travel abroad to hunt rare animals.⁵⁴ For the international trophy hunter, the rarer the animal, the more valuable the trophy typically is and the greater the thrill of finding and killing the rare animal.⁵⁵ The objective is usually to select an animal with exceptional phenotypic traits (e.g., large horns, tusks, body size, or mane because the rarer the animal, the greater the prestige), kill it, and then bring back the body parts of the rare animal to the United States to display as a trophy.⁵⁶

Thus, it is not difficult to imagine that such a practice, if not carefully managed, can cause great damage to efforts to protect species that are threatened and edging closer to becoming extinct. The notion that hunting a threatened species is an important aspect of helping that species survive is oft

46. See TIM INGOLD ET AL., HUNTERS AND GATHERERS VOLUME 1: HISTORY, EVOLUTION AND SOCIAL CHANGE (1991); TIM INGOLD ET AL., HUNTERS AND GATHERERS VOLUME 2: PROPERTY, POWER AND IDEOLOGY (1991).

47. See generally Paul S. Martin, *Africa and Pleistocene Overkill*, 212 NATURE 339 (1966).

48. See *id.*

49. William B. Adams, *Good Hunting*, in AGAINST EXTINCTION: THE STORY OF CONSERVATION, at 19–23 (2004).

50. *Id.*

51. See generally Shane P. Mahoney & John J. Jackson III, *Enshrining Hunting as a Foundation for Conservation—the North American Model*, 70 INT’L J. ENV’T STUD. 448 (2013).

52. E.J. Milner-Gulland et al., *The Science of Sustainable Hunting*, in RECREATIONAL HUNTING, CONSERVATION, AND RURAL LIVELIHOODS, at 75–94 (Barney Dickson et al. eds., 2009).

53. S. P. Mahoney, *Recreational Hunting and Sustainable Wildlife Use in North America*, in RECREATIONAL HUNTING, CONSERVATION, AND RURAL LIVELIHOODS, at 266–82 (Barney Dickson et al. eds., 2009).

54. PERVAZE A. SHEIKH & LUCAS F. BERMEJO, CONG. RSCH. SERV., R45615, INTERNATIONAL TROPHY HUNTING, at 1 (2019).

55. See *id.* at 6–7.

56. See *id.* at 13.

used by trophy hunters and advocates.⁵⁷ While it has been reported that well-managed trophy hunting can involve low off-takes, be sustainable, and otherwise create incentives for the conservation of particular species,⁵⁸ there is growing recognition of the flaws in this line of argument and the fundamental problems associated with international trophy hunting of such rare animals.⁵⁹

The fact is that rare animals are becoming rarer because of our activities.⁶⁰ It is a sobering statistic that 30–50% of all species may be extinct by 2050.⁶¹ Such is the rapid pace of disappearance that some of the most distinguished and recognizable large, threatened animals on our planet are facing huge obstacles to survive.⁶² Such rare animals cannot communicate with us, and so it is easy for some of us to be distant and unconcerned about what is happening to them. Humans are driving rare animals closer to extinction by destroying their forests and ecosystems in which they have lived for hundreds of years by our military activities in some cases (like the case of the rare Astor Mountain goats in Pakistan), by poaching, and by paying upwards of \$50,000 to travel to poor third-world countries to find and kill rare large animals for recreation and animal-part trophies.⁶³ To add further insult to injury, according to a recent study by Queen Mary University of London, England, hunting the most impressive animals—for example, by killing the big males or animals with the largest horns, antlers, tusks or manes—weakens a species' ability to survive in the face of environmental changes,⁶⁴ the latter of which incidentally is typically also caused by humans.

Take the case of Cecil the Lion, who was a major attraction at Hwange National Park in Zimbabwe.⁶⁵ On one night in the summer of 2015, a rich

57. P.A. Lindsey et al., *Economic and Conservation Significance of the Trophy Hunting Industry in Sub-Saharan Africa*, 134 *BIOLOGICAL CONSERVATION* 455, 461–64 (2006).

58. IVAN BOND ET AL., *PRIVATE LAND CONTRIBUTION TO CONSERVATION IN SOUTH AFRICA*, at 29–61 (2004); Lindsey, *supra* note 57, at 465–66.

59. Mayanna Dellinger, *Trophy Hunting – A Relic of the Past*, 34 *J. ENV'T L. & LITIG.* 25, 40–46 (2019).

60. See *Halting the Extinction Crisis*, CTR. FOR BIOLOGICAL DIVERSITY, https://www.biodiversity.org/programs/biodiversity/elements_of_biodiversity/extinction_crisis/index (last visited Apr. 8, 2022).

61. *Id.*

62. Press Release, Humane Soc'y of the U.S., U.S. Imported More than 1.2 Million Wildlife Trophies in Last Ten Years, Having Dire Impact on World's Wildlife (Feb. 8, 2016), <https://www.humane.society.org/news/us-imported-more-12-million-wildlife-trophies-last-ten-years-having-dire-impact-worlds>.

63. Dellinger, *supra* note 59, at 46; CTR. FOR BIOLOGICAL DIVERSITY, *supra* note 60.

64. Robert J. Knell & Carlos Martínez-Ruiz, *Selective Harvest Focused on Sexual Signal Traits Can Lead to Extinction Under Directional Environmental Change*, 284 *PROC. OF THE ROYAL SOC'Y BIOLOGICAL SCIS.* 1, 1–7 (2017).

65. Wildlife Watch, *Exclusive: An Inside Look at Cecil the Lion's Final Hours*, NAT'L GEOGRAPHIC (Mar. 3, 2018), <https://www.nationalgeographic.com/animals/article/wildlife-watch-cecil-trophy-hunting-andrew-loveridge>.

American dentist reportedly paid \$50,000 to travel from Minnesota to Zimbabwe.⁶⁶ There, he waited on private land next to the national park in order to track and kill a lion when the lion roamed outside the national park.⁶⁷ He and his local tracker built a hunting blind on private property and shot and wounded Cecil at night with an arrow when Cecil roamed onto the private land.⁶⁸ Then, about twelve hours later, in the morning, the dentist tracked and killed Cecil with a second arrow.⁶⁹ Cecil's body was then skinned and his head removed; he was thirteen years old when killed.⁷⁰ This case became an international issue and raised much publicity and global outrage around the practice of international trophy hunting of lions.⁷¹ Two summers later in 2017, Xanda, Cecil's son, was also killed by trophy hunters in Zimbabwe.⁷² Xanda had just fathered several young cubs and was six years old.⁷³

Sadly, lions today are worth more dead than alive, whether they are being shot and killed by wealthy hunters or slaughtered for their bones for pseudomedicine purposes.⁷⁴ Trophy hunters kill as many as 600 African lions annually, roughly a 2% loss every year of otherwise healthy, typically large adult male lions.⁷⁵ The male lions are preferred by trophy hunters because the trophy, typically the male lion's head, looks nicer with its mane.⁷⁶ This has resulted in about half of the population of wild lions in Africa being wiped out and lost within the last two decades.⁷⁷ Indeed, American hunters killed

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. Brian Clark Howard, *Killing of Cecil the Lion Sparks Debate Over Trophy Hunts*, NAT'L GEOGRAPHIC (July 28, 2015), <https://news.nationalgeographic.com/2015/07/150728-cecil-lion-killing-trophy-hunting-conservation-animals/>.

72. Karin Brulliard & Lindsey Bever, *Cecil the Lion's Son Has 'Met the Same Fate' - Killed in a Trophy Hunt in Zimbabwe*, WASH. POST (July 20, 2017), <https://www.washingtonpost.com/news/animal-ia/wp/2017/07/20/cecil-the-lions-son-shot-dead-by-trophy-hunter-officials-say/>.

73. *Id.*

74. Andrew Harmon, *WildAid and Panthera Launch Lion Campaign, 1 Year After Cecil*, WILDAID (June 30, 2016), <https://wildaid.org/wildaid-and-panthera-launch-lion-campaign-1-year-after-cecil/Lions-and-Tigers-Being-Farmed-for-Traditional-Medicine>, WORLD ANIMAL PROT. (July 9, 2019), <https://www.worldanimalprotection.us/news/lions-and-tigers-being-farmed-traditional-medicine>.

75. Christopher Ingraham, *Rich American Tourists Kill Hundreds of Lions Each Year, and It's all Legal*, WASH. POST (July 29, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/07/29/rich-american-tourists-kill-hundreds-of-lions-each-year-and-its-all-legal/>.

76. *Id.*

77. Harmon, *supra* note 74. Dr. Luke Hunter, the President of Panthera and Chief Conservation Officer, said:

One year ago, with the loss of Cecil, the world responded unequivocally that it stands with Africa in saving the lion. Sadly, we have since lost hundreds and possibly thousands of lions. The species is now approaching the point of no return in many countries. Saving this extraordinary animal requires the international community to convert their outrage over Cecil into action and dollars supporting African governments, people[,] and initiatives fighting to save the lion.

more than 5,600 lions in Africa and imported their body parts into the United States as trophies between 1999 and 2008.⁷⁸ This decline in the lion population is devastating for the species and comes as no surprise because lions are highly vulnerable to overhunting.⁷⁹ The lion's social network elevates this vulnerability because removal of pride males, typically sought by the international trophy hunter for their impressive mane, can cause turmoil in a pride population, increase rates of infanticide, lower survival and reproductive rates, and scatter members of the pride into higher risk areas.⁸⁰

A. Canned Hunting

With the insatiable appetite of humans for killing rare animals, including lions, a distinctly human-invented industry has taken shape and is flourishing: canned hunts of exotic animals. The demand for animal trophies has led to this cruel practice of "canned hunting."⁸¹ It is estimated that about 1,000 captive lions are legally killed in these canned hunts in South Africa each year.⁸² These canned hunts refer to shooting exotic animals on a game farm for a guaranteed kill, and as such they cost much less than a "fair chase" hunt (compare the \$20,000 U.S. cost for canned hunting to the near \$76,000 for other forms of hunting).⁸³ The animals are raised from birth by humans, and once they are big enough to be considered a trophy, they are sold to hunters to kill as a trophy hunt on the ranch.⁸⁴ Exotic animal hunters prefer these animals because they are hand-raised large game that are not afraid of humans and ultimately easier to shoot.⁸⁵

Canned hunts also provide for better looking trophies because the animal has not had to face the realities of a harsh environment in the wild.⁸⁶ Once cubs of exotic animals are born into this setting, their fate is all but certain. They will be enslaved by humans and can never live wild and free.⁸⁷

Id.

78. John R. Platt, *African Lions Move Closer to U.S. Endangered Species Act Protection*, SCI. AM. (Nov. 27, 2012), <https://blogs.scientificamerican.com/extinction-countdown/african-lions-move-closer-endangered-species-act-protection>.

79. *See id.*

80. *Id.*

81. Paul Steyn, *Is Captive Lion Hunting Really Helping to Save the Species?*, NAT'L GEOGRAPHIC (May 5, 2015), <https://www.nationalgeographic.com/science/article/150504-lions-trophy-hunting-tiger-ban-south-africa-australia-cites>.

82. *Id.*

83. *See generally* P. Lindsey et al., *Possible Relationships Between the South African Captive-Bred Lion Hunting Industry and the Hunting and Conservation of Lions Elsewhere in Africa*, 42 S. AFR. J. OF WILDLIFE RSCH. 11 (2012).

84. *See id.* at 12.

85. *See* IRUS BRAVERMAN, WILDLIFE: THE INSTITUTION OF NATURE (2015) for a discussion of the differences between species that are held captive and those that are wild.

86. Steyn, *supra* note 81.

87. *Id.*

The babies are frequently taken from their mothers so that the mother can keep reproducing.⁸⁸ How ironic, some may say, for humans to enslave from birth the one animal on our planet that represents freedom and the wild the most: the lion.

South Africa is famously known for canned hunting where, for example, the law allows for the farming and hunting of captive enslaved lions.⁸⁹ According to a study by P.A. Lindsey in 2006, trophy hunting is big business in Africa, bringing in a revenue of \$200 million.⁹⁰ The researchers argued that private hunting operations in Africa control more land than is protected by national parks.⁹¹ This business has been rapidly expanding recently, especially with rising demand from the United States.⁹² Within the United States, it is a booming multi-billion-dollar industry.⁹³

In Texas alone, canned hunting of exotic animals exists.⁹⁴ There are about 500 hunting ranches in Texas that allow “exotic animal hunts”; there are about 4,000 captive tigers but only 3,820 in the wild.⁹⁵ According to the Humane Society of the United States, in about half of the states in America, there are over 1,000 exotic hunting ranches where captive, rare exotic animals are grown and raised for the purpose of being killed by rich trophy hunters.⁹⁶ Take the example of canned hunts of tigers on U.S. soil.⁹⁷ In this form of canned hunting, the animal is fenced into a corner and hunters pay

88. *See id.*

89. *See id.*

90. P.A. Lindsey et al., *supra* note 57, at 455–69.

91. *Id.*

92. *See id.*

93. *Trophy Hunting: Killing or Conservation?* (CBSN Originals documentary June 6, 2019).

94. Manny Fernandez, *Blood and Beauty on a Texas Exotic Game Ranch*, N.Y. TIMES (Oct. 19, 2017), <https://www.nytimes.com/2017/10/19/us/exotic-hunting-texas-ranch.html>.

95. *Wild Tiger Numbers Increase to 3,890*, WWF, https://tigers.panda.org/news_and_stories/stories/wild_tiger_numbers_increase_to_3890/ (last visited Apr. 8, 2022) (“Based on the best available data, WWF and the Global Tiger Forum (GTF) have announced that there are now close to 3,900 wild tigers.”); *see also Summary - Tigers in America*, TIGERS IN AMERICA, <https://tigersinamerica.org/summary/> (last visited Apr. 8, 2022) (“In 1900[,] there were 100,000 tigers in the wild[,] now only 3,200 remain. A tragic loss by any measure”); *Tragedy for Tigers*, YOUTH FOR WILDLIFE, <https://youthforwildlife.com/tigers.html> (last visited Apr. 8, 2022) (“Tigers are among the most striking and unique animals on our planet. A hundred years ago there were around 100,000 wild tigers roaming the swamps, forests[,] and tundras of Asia They have never lived in Africa. Wild tiger numbers have fallen by about 95% over the past 100 years. Today conservationists estimate that there are as few as 3,000 tigers left in the wild and they are steadily being pushed to the verge of extinction.”).

96. Ines Novacic, “Bred Simply to be Shot”: *Inside America’s Exotic Hunting Industry*, CBS NEWS (June 9, 2019, 9:05 PM), <https://www.cbsnews.com/news/exotic-hunting-business-trophy-hunting-cbsn-originals/>.

97. Tristian Kennedy, *Canned Hunting | The Gruesome Truth About the Industry Which Breeds Lions for the Slaughter*, MPORA (July 6, 2016), <https://mpora.com/animals/canned-hunting-gruesome-truth-industry-slaughters-tame-lions-sport/>; *see also* Josh Robertson, *It’s in the Can — Everything You Need to Know About Canned Hunting with the ‘Lion Whisper’*, CONSERVATION CONVERSATION (Apr. 8, 2020), <https://www.conservationconversation.co.uk/post/ep-2-its-in-the-can-everything-you-need-to-know-about-canned-hunting-with-the-lion-whisperere28099>.

up to \$25,000 to be able to shoot and kill a tiger.⁹⁸ The cats are hand-raised and kept hungry before the shoot so that they will approach people for food and otherwise make it easier to kill them.⁹⁹

In one video of a lion canned hunt, a lioness's own cub is used to draw in and lure the lioness closer, and then the lioness is shot and killed.¹⁰⁰ Technology now also provides for canned hunts that allow a hunter to remotely control several guns and fire and kill from the comfort of one's office or home computer.¹⁰¹

B. A Rare Animal: An Object or a Subject?

A recent book, *Half-Earth: Our Planet's Fight for Life*, by arguably the world's most lauded living evolutionary biologist, Dr. Edward Wilson, calls for action to commit 50% of the planet's surface to protected zones.¹⁰² Presently, about 25% of the planet's surface is covered by national parks and protected areas.¹⁰³ If we increase protected areas, Wilson argues, about 85% of the species on our planet would be protected—keeping life on Earth in a safe zone.¹⁰⁴ To not do so is akin to treating animals as disposable objects or property of little value. And yet, as this Article attempts to differentiate, there is a further distinction between rare, endangered animals as property versus other animals.¹⁰⁵

For example, would a rare bobcat living on your vast property be yours? Would your answer be different if the animal was a common deer? By way of this example, does rarity of the animal factor into the property rights of the animal? Presented differently, should the animal be treated as a subject or an object, and does the rareness of the animal have any determination in the analysis? In this Article, the author posits that rareness itself should be treated as a key factor in determining if animals are deemed property under the law.¹⁰⁶ One could take a further step and also contemplate whether animals, especially rare animals, could themselves be afforded property rights (i.e., not be treated as property but as property owners, a distinction that would afford certain species a means for their survival).

98. *Id.*

99. *Id.*

100. *Id.*

101. Mike Schoby, *Remote-Control Hunting*, OUTDOOR LIFE (Sept. 18, 2007, 8:26 PM), <https://www.outdoorlife.com/articles/mike-schoby/2007/09/remote-control-hunting/>.

102. *See generally* EDWARD O. WILSON, *HALF-EARTH: OUR PLANET'S FIGHT FOR LIFE* (2016).

103. *Id.*

104. EDWARD O. WILSON, *THE DIVERSITY OF LIFE*, at 280 (1992) (noting that 27,000 species become extinct annually).

105. *See* Holmes Rolston, *Property-Rights and Endangered Species*, 61 *COLO. L. REV.* 283, 303 (1990).

106. *See infra* Section VI.A (implementing a rareness-based policy that fires hunters for trophy hunting).

Animals are currently treated as property under the law¹⁰⁷ despite our significant understanding of the intelligence and rich emotional lives of animals. This lesser status to these nonhuman animals greatly limits their legal protections and as a result animals can be subject to significant cruelty and neglect.¹⁰⁸ And yet, even though animals can exhibit similar intelligence and social bonding, they are treated differently in society than other forms of property such as bikes, computers, and shoes.¹⁰⁹ The first animal anticruelty statute in North America was enacted in 1641 by the Massachusetts Bay Colony,¹¹⁰ and many states followed to protect animals from “unnecessary” cruelty, with Maine being the first state to enact such laws.¹¹¹ Yet, nearly all states also allow for nearly all forms of institutionalized animal exploitation by having exemptions to their anticruelty laws, including, for example, the hunting and trapping of animals.¹¹² Such exemptions to anticruelty statutes are driven by powerful interest groups that include not only hunters and the National Rifle Association,¹¹³ but also other groups that benefit from exploitation of animals, including pharmaceutical companies¹¹⁴ and agricultural businesses.¹¹⁵ Further still, to be liable, present laws require a mens rea of malice, and defendants can use this high bar and accepted practices to their advantage and escape liability.¹¹⁶ This unbalanced legal framework is compounded by the fact that statutes, such as the federal Animal Welfare Act, permit the animal owner to appreciate the “necessity”

107. GARY L. FRANCIONE, *ANIMALS, PROPERTY AND THE LAW* (1995). Unless and until they are lawfully captured, wild animals are treated in various jurisdictions as either the property of the owner of the land on which they are located, as property of the state, or as *res nullius*—literally “nobody’s thing.” *Id.*

108. David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 MARQ. L. REV. 1021, 1021–26 (2010), <http://scholarship.law.marquette.edu/mulr/vol93/iss3/3/>.

109. Rolston, *supra* note 105, at 285–90.

110. ANIMAL WELFARE INSTITUTE, *ANIMALS AND THEIR LEGAL RIGHTS: A SURVEY OF AMERICAN LAWS FROM 1641 TO 1990*, at 1–2 (4th ed. 1990).

111. ME. STAT. tit. 17, § 1031 (1987); TEX. PENAL CODE ANN. § 42.092 (2017); ARIZ. REV. STAT. ANN. § 13-2910 (2019); MICH. COMP. LAWS § 750.53 (1931).

112. Darian M. Ibrahim, *The Anticruelty Statute: A Study in Animal Welfare*, 1 WM. & MARY 175, 180 (2006).

113. Dena M. Jones & Sheila Hughes Rodriguez, *Restricting the Use of Animal Traps in the United States: An Overview of Laws and Strategy*, 9 ANIMAL L. 135, 152 (2003) (failure of federal antitrapping legislation caused by powerful lobby groups representing hunting, trapping, and agricultural interests).

114. John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L. J. 513, 560 (2003).

115. See James A. Albert, *A History of Attempts by the Department of Agriculture to Reduce Federal Inspection of Poultry Processing Plants – A Return to the Jungle*, 51 LA. L. REV. 1183, 1183–85 (1991) (discussing the USDA’s dominance and criticizing their efforts to ensure food safety); Dion Casey, Comment, *Agency Capture: The USDA’s Struggle to Pass Food Safety Regulations*, 7 KAN. J.L. & PUB. POL’Y 142, 142–56 (1998); Betsy Tao, *A Stitch in Time: Addressing the Environmental, Health, and Animal Welfare Effects of China’s Expanding Meat Industry*, 15 GEO. INT’L ENV’T L. REV. 321, 349 (2003) (discussing how the growing power for the agricultural businesses in America has weakened U.S. anticruelty statutes through exemptions and lack of enforcement).

116. See Justin Marceau, *Palliative Animal Law: The War on Animal Cruelty*, 134 HARV. L. REV. 250, 260 (2021).

of using their animal property in any way they wish, including if the level of pain it inflicts is necessary or not.¹¹⁷ In parallel, our laws deem any activity that assists a legitimate use of the animal by the owner of the animal as being “necessary.”¹¹⁸

However, although animals are treated as property by law, they are not only protected to an extent by anticruelty laws but also are gaining more legal rights.¹¹⁹ As an example, as of 2017, animals can be named and benefit from trusts in the United States, and most states also permit animals to be named in domestic violence protection orders.¹²⁰ Further still, if an animal companion is harmed because of tortious misconduct, some courts have viewed animals as more than just property and levied noneconomic damages caused because of the emotional harm to the owner.¹²¹ The view of treating animals is changing from a strict property analysis, with some states enacting laws to protect the interests of companion animals in divorce proceedings as opposed to treating animals as traditional property to be equitably divided.¹²² Some progressive states have also addressed animals as “sentient beings capable of feeling pain, stress[,] and fear.”¹²³

Like their human cousin, animals are living beings and deserve a legal status commensurate with the fact that they can feel many of the same emotions as humans including pain, pleasure, joy, fear, and sorrow. Historically, other living beings have also been mischaracterized by law as being mere property.¹²⁴ For example, history informs us that slaves, women, and even children were considered property in the past.¹²⁵ It is time to also move the status of animals out of being characterized as merely property. In the present context, it is even more urgent to elevate the legal status of rare

117. *Animal Welfare Act*, U.S. DEP’T OF AGRIC. (Jan. 12, 2022), https://www.aphis.gov/aphis/ourfocus/animalwelfare/sa_awa.

118. *See id.*

119. Steven M. Wise, *The Evolution of Animal Law Since 1950*, in *THE STATE OF THE ANIMALS II*: 2003, at 99 (Deborah J. Salem & A.N. Rowan eds., 2003), https://www.wellbeingintlstudiesrepository.org/cgi/viewcontent.cgi?article=1005&context=sota_2003.

120. *Pet Trust Laws*, ASPCA, <https://www.asPCA.org/pet-care/pet-planning/pet-trust-laws> (last visited Apr. 8, 2022); Rebecca F. Wisch, *Domestic Violence and Pets: List of States that Include Pets in Protection Orders*, ANIMAL LEGAL & HIST. CTR., <https://www.animallaw.info/article/domestic-violence-and-pets-list-states-include-pets-protection-orders> (last visited Apr. 8, 2022).

121. *See* Victor E. Schwartz & Emily J. Laird, *Non-Economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*, 33 PEPP. L. REV. 227, 234–38 (2006).

122. *See* Kelly Olszuk, *Who Let the Dogs Out?: Companion Animals in Human Divorces*, ANIMAL LEGAL & HIST. CTR., <https://www.animallaw.info/article/detailed-discussion-divorce-and-pets> (last visited Apr. 8, 2022).

123. OR. REV. STAT. § 167.305(1)–(2) (2013). Oregon law recognizes that “[a]nimals are sentient beings capable of experiencing pain, stress and fear” and that “[a]nimals should be cared for in ways that minimize pain, stress, fear[,] and suffering.” *Id.*

124. FRANCIONE, *supra* note 107.

125. *Id.*

animals from being objects to being subjects because the survival of certain species on our planet depends on it.¹²⁶

C. Property Rights in Animals Versus the Need to Maintain Cultural Heritage

If animals are property under the law,¹²⁷ can a hunter who owns vast tracks of land kill a rare animal living on that land? These types of questions fractionate debate, focusing on human development of land and property rights fashioned over time as a cultural concept versus the deep-rooted concept of evolutionary and natural history. Said differently, does our individual desire for property (e.g., land and everything on it) and the property right laws we use to claim and take it sit well with our collective desire to enjoy and protect rare animals that have lived on that land long before property laws were formed by humans?

The author suggests giving certain animals property rights and factoring in the rareness of the animal in the government-bestowed property right of that animal to continue living on the land—as it has done so for thousands of years. The land and the rare animals who inhabit it should not be our species to take without careful consideration. Indeed, philosophers and advocates in recent times have focused on similar animal rights issues.¹²⁸

How ownership in property vests is taught in the first year of law school with reference to a case in which one hunter pursues a fox and yet another hunter later kills and takes the fox as his own.¹²⁹ The U.S. Constitution prohibits the “taking” of private property by the government unless it is for public use and just compensation is given.¹³⁰ Rare animals typically roam free on vast tracks of land, with the rare wild animal not belonging to any person.¹³¹ If we treat rare animals as property, what happens when a hunter’s kill or taking of such a rare animal is facilitated or indeed encouraged by the government? The meaning and scope of “take” in reference to animals, as provided by the ESA, is outlined as “[t]he term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”¹³² If we treat the killing of rare animals as a

126. A LIFE ON OUR PLANET (Netflix 2020) (a film showing how human activity is pushing many species closer to extinction).

127. Favre, *supra* note 108, at 1026.

128. The Australian philosopher, John Hadley, argues for animal property rights. See JOHN HADLEY, ANIMAL PROPERTY RIGHTS: A THEORY OF HABITAT RIGHTS FOR WILD ANIMALS (2015); see also Karen Bradshaw, *Animal Property Rights*, 89 U. COLO. L. REV. 809, 815 (2018).

129. *Pierson v. Post*, 3 Cai. R. 175, 177–82 (N.Y. Sup. Ct. 1805).

130. U.S. CONST. amend. V. The Fifth Amendment of the United States Constitution states: “[N]or shall private property be taken for public use without just compensation.” *Id.*

131. See *Pierson*, 3 Cai. R. at 176.

132. 16 U.S.C. § 1532(19).

taking, the U.S. Constitution then demands there be “just compensation.”¹³³ The question is then raised as to what value we put on the life of a very rare animal? As an intelligent species, our need for maintaining and growing our cultural heritage should allow us to devise laws to disincentivize taking rare animals from lands abroad for mere thrill-seeking sports hunters.¹³⁴

One mechanism for doing so is to afford animals, especially those that are rare and endangered, much broader domestic and international rights, and the U.S. has a unique position and responsibility to lead on this.¹³⁵ Another mechanism would be to focus on the value of rare animals to our broader cultural heritage and use existing laws to heavily disincentivize the international trophy hunting of rare animals for sport and the importation of their body parts into the United States.¹³⁶ If animals are private property, the just compensation for such taking (a.k.a., killing of a rare animal), for example, could be set so high that the government’s culpability in actively promoting such killing would expose the government to significant liability, and therefore, laws would favor making situations in which rare endangered animals can be killed abroad for sport sparse.¹³⁷ The ESA provides some protections in this regard; however, violations of the ESA could also be more harshly enforced as a deterrent.¹³⁸

To better explain the critical nature of our focus on affording more rights to rare animals and having our own cultural heritage in mind, a cursory review of past actions concerning such hunting of rare animals is instructive.

Setting aside the case of Cecil the Lion and his son Xanda, take another case of a female hunter and member of the Safari Club International who traveled abroad from Arizona.¹³⁹ She is seen in a picture online cuddling the body of a very large leopard that she shot and killed in its prime in September 2018.¹⁴⁰ The photo generated much discussion and many comments regarding the practice of killing rare animals for sport.¹⁴¹ There is also the more recent situation in which a wild cheetah, a stealthy animal that can run

133. See U.S. CONST. amend. V; Michael J. Coren, *Putting a Value on Endangered Species to Save Them*, FAST CO. (Apr. 17, 2012), <https://www.fastcompany.com/1679688/putting-a-value-on-endangered-species-to-save-them>.

134. See Coren, *supra* note 133.

135. See *infra* Part IV (explaining that the United States may have laws that could potentially limit or ban trophy hunting).

136. See *infra* Part V (discussing possible ways to eliminate the killing of rare animals).

137. See U.S. CONST. amend. V.

138. See generally PERVAZE A. SHEIKH & LUCAS F. BERMEJO, CONG. RSCH. SERV., R45615, INTERNATIONAL TROPHY HUNTING (2019).

139. Sophie Evans, *Grinning Trophy Hunter Cuddles Massive Dead Leopard that She “Shot and Killed in Its Prime,”* MIRROR (Sept. 18, 2018, 9:26 AM), <https://www.mirror.co.uk/news/world-news/grinning-trophy-hunter-cuddles-massive-13263827>.

140. *Id.*; see also *The Right Leopard*, SAFARI CLUB INT’L (July 7, 2014), <https://safariclub.org/the-right-leopard/>.

141. See Evans, *supra* note 139.

up to eighty mph and of which a mere 7,100 remain on our planet, was hunted and killed by an American trophy hunter in Namibia earlier this year; the hunter has applied to import the trophy parts of the rare cheetah into the United States.¹⁴²

Furthermore, in 2019, a trophy hunter reportedly paid \$110,000 to travel from Texas to Pakistan to gun down a rare Astor Markhor mountain goat.¹⁴³ These rare endangered mountain goats are fewer than 2,000 in number on our planet, and this one had been sitting quietly beside other goats from its family in Pakistan's mountainous Himalayan region.¹⁴⁴ There is another recently publicized case of a woman who went from Texas to South Africa and killed a rare black giraffe and posed for a photograph next to the large giraffe's body.¹⁴⁵

In yet another example, the former Idaho Fish and Game Commissioner resigned in late 2018 after public outcry based on pictures the commissioner posted of himself in front of a family of baboons he killed in Namibia.¹⁴⁶ Other photos included the commissioner and his wife posing with more than a dozen animals they killed, including a giraffe and a leopard.¹⁴⁷ Also, with only 5,500 black rhinos remaining in the wild on our planet, an American

142. Kitty Block & Sara Amundson, *An American Trophy Hunter Wants to Bring Home an Endangered Cheetah He Killed in Namibia*, THE HUMANE SOC'Y OF THE U.S.: A HUMANE WORLD KITTY BLOCK'S BLOG (May 15, 2019), <https://blog.humanesociety.org/2019/05/an-american-trophy-hunter-wants-to-bring-home-an-endangered-cheetah-he-killed-in-namibia.html>; see also *Trophy Hunting of a Highly Vulnerable Species – Cheetahs*, LIONAID (Oct. 2, 2020), <https://lionaid.org/news/2020/10/trophy-hunting-of-a-highly-vulnerable-species-cheetahs.htm>.

143. Michelle Kretzer, *Another Rare Animal Killed by Wealthy American Trophy Hunter*, PETA (Feb. 13, 2019), <https://www.peta.org/blog/rare-mountain-goat-killed-american-trophy-hunter/> (“Another member of an endangered species has died at the hands of a wealthy American trophy hunter. This time, the victim was a rare Astor markhor mountain goat, the national animal of Pakistan. Texas trophy hunter Bryan Kinsel Harlan paid \$110,000 to gun down the animal, who had been sitting calmly next to one of his companions in Pakistan's northern Himalayan region.”).

144. See *id.*

145. Christine Hauser, *Texas to South Africa and Killed a Rare Black Giraffe Bull*, N.Y. TIMES (2018), <https://www.nytimes.com/2018/07/03/world/africa/woman-kills-giraffe.html>; Africa Digest (@africallandpost), TWITTER (June 16, 2018, 11:09 AM), https://twitter.com/africallandpost?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1008018728879992833%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.kgw.com%2Farticle%2Fnews%2Fnation-world%2Famerica-n-woman-sparks-outrage-after-killing-rare-giraffe%2F507-569838507 (“White [A]merican savage who is partly a neanderthal comes to Africa and shoot[s] down a very rare black giraffe courtesy of South Africa stupidity.”); see also Hollie McKay, *American Hunter's Images of Her Black Giraffe 'Trophy Kill' Spark Outrage*, FOXNEWS (July 1, 2018), <https://www.foxnews.com/world/american-hunters-images-of-her-black-giraffe-trophy-kill-spark-outrage>.

146. Bill Chappell, *Idaho Game Commissioner Resigns After Killing 'Family Of Baboons' in Africa*, NPR (Oct. 15, 2018), <https://www.npr.org/2018/10/15/657485097/idaho-game-commissioner-criticized-for-killing-family-of-baboons-in-africa>.

147. *Idaho Fish and Game Official Under Fire for Photos of Animals Killed on African Hunting Trip*, NEWS ON 6 (Oct. 15, 2018), <https://www.newson6.com/story/5e3485f6527dcf49dad78326/idaho-fish-and-game-official-under-fire-for-photos-of-animals-killed-on-african-hunting-trip>.

traveled to Namibia to trophy hunt and kill a black rhino, and the hunter applied in 2019 to import the trophy of the black rhino to the United States.¹⁴⁸

Elephants are also prized by international trophy hunters, with numerous examples of hunters, mainly from the United States, traveling to Africa in order to find and kill elephants and bring their body parts back to the United States as a trophy.¹⁴⁹ Yet, elephants are a keystone species and crucial to Africa's forests and savannas.¹⁵⁰ Both male and female African elephants have ivory tusks, making both elephant sexes the target of trophy hunters and poachers alike.¹⁵¹ These ivory tusks are deemed valuable and desirable as personal trophies and for etching carvings into them.¹⁵² This targeting of elephants has contributed greatly to a catastrophic decline in elephant numbers.¹⁵³ Namely, in a recent survey, it has been estimated that the elephant population in the African savanna has declined by as many as 144,000 elephants (accounting for a 30% population decline) in the years between 2007 and 2014 and that this decline has continued at a rate of 8% per year since then.¹⁵⁴ Given that African elephants reproduce very slowly, this decline is significant because such a precipitous loss threatens the continued existence of the species.¹⁵⁵ This is concerning, especially given that African elephants are the largest land mammals on earth, one of the most intelligent species, and their loss would be a major blow given their iconic stature.¹⁵⁶

As alluded to in this section, international trophy hunters target certain animals, and this is not just limited to elephants and lions.¹⁵⁷ Take yet another case, where President Trump's sons were shown in trophy hunting photos

148. Sara Amundson & Kitty Block, *An American Trophy Hunter Wants to Bring Home an Endangered Cheetah He Killed in Namibia*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/explore/savingearth/an-american-trophy-hunter-wants-to-bring-home-an-endangered-cheetah-he-killed-in-namibia> (last visited Apr. 8, 2022).

149. Virginia Morell, *What Trophy Hunting Does to the Elephants it Leaves Behind*, THE ATL. (Nov. 18, 2017), <https://www.theatlantic.com/science/archive/2017/11/elephant-trophy-hunting-psychology-emotions/546293/>.

150. *African Bush Elephant*, THE NATURE CONSERVANCY (July 16, 2020), <https://www.nature.org/en-us/get-involved/how-to-help/animals-we-protect/african-bush-elephant/>; see also *Saving Africa's Elephants*, CTR. FOR BIOLOGICAL DIVERSITY, https://www.biologicaldiversity.org/species/mammals/African_elephants/ (last visited Apr. 8, 2022).

151. THE NATURE CONSERVANCY, *supra* note 150.

152. *Ivory: Significance and Protection*, SMITHSONIAN NAT'L MUSEUM OF AFR. ART (June 2019), <https://africa.si.edu/collection/conservation/protect-ivory/>.

153. *African Elephant Species Now Endangered and Critically Endangered - IUCN Red List*, IUCN (Mar. 25, 2021), <https://www.iucn.org/news/species/202103/african-elephant-species-now-endangered-and-critically-endangered-iucn-red-list>.

154. The Great Elephant Census was an eighteen-country aerial elephant count, funded by the late Paul Allen and conducted by Elephants Without Borders, that was completed in 2016. See *Great Elephant Census*, PAULALLEN.COM, <http://www.greatelephantcensus.com/> (last visited Apr. 8, 2022).

155. *Id.*

156. See *id.*

157. See *supra* notes 140–143 and accompanying text (discussing other animals targeted by trophy hunters).

standing next to a dead elephant, crocodile, kudu, and leopard.¹⁵⁸ Although President Trump is not a fan, a few of our past presidents have also been avid trophy hunters.¹⁵⁹ Most notably, former President Teddy Roosevelt was a renowned African big-game hunter, describing in his 1910 book of his trip to Africa that, after seeing a rhino in Congo, he fired his gun, “the bullet going through both lungs” and then “the bullet entering between the neck and shoulder and piercing his heart,” with a third bullet bringing down the large rhino “just thirteen paces from where we stood.”¹⁶⁰

In all the above examples and such cases, there is the typical picture of the hunter standing or sitting beside the dead animal, typically before the head of the animal is severed off to take back home as a trophy souvenir.¹⁶¹ This type of killing has happened for decades and continues all the time; a small portion of rich people enjoy international trophy hunting.

Yet, from a legal perspective, the law is in flux on this issue, with the current legal landscape becoming increasingly more pro-trophy hunting. For example, even domestically as described previously, canned hunting of rare animals inside the United States is increasing at a rapid pace, and yet there is no federal law at present that governs canned hunting operations.¹⁶² In particular, the Animal Welfare Act (AWA) does not regulate such hunting preserves or canned hunts, and the ESA also provides no protection because it does not prohibit private ownership of endangered animals and even allows endangered species to be hunted under a valid permit.¹⁶³ As such, trophy hunting of large, intelligent mammals will continue unabated unless it is

158. Kerry Lauerman, *The Trump Sons Go Hunting Again. Will More Trophy Photos Follow?*, WASH. POST (Apr. 6, 2016), <https://www.washingtonpost.com/news/animalia/wp/2016/08/06/the-trump-sons-go-hunting-again-will-more-trophy-photos-follow/>.

159. Beavers, *supra* note 23; Daniel Xu, *America's 5 Greatest Hunting Presidents*, OUTDOOR HUB (Mar. 2, 2015), <https://www.outdoorhub.com/stories/2015/03/02/americas-5-greatest-hunting-presidents/>.

160. THEODORE ROOSEVELT, *AFRICAN GAME TRAILS: AN ACCOUNT OF THE AFRICAN WANDERINGS OF AN AMERICAN HUNTER-NATURALIST*, at 74 (Peter Capstick ed. 1988) (1910) (“The twenty-sixth president of the United States was also a world-renowned hunter, conservationist, soldier, and scholar. In 1908[,] he took a long safari holiday in East Africa with his son Kermit. His account of this adventure is as remarkably fresh today as it was when these adventures on the veldt were first published. Roosevelt describes the excitement of the chase . . . African Game Trails includes stories about President Theodore Roosevelt[’s] adventures throughout East Africa, Belgian Congo, Mombassa, Khartoum, etc. Travelling the world to hunt and kill dozens of animals including Lions, Rhinos, Giraffes, Leopards, Buffalo, Hippos and Elephants.”).

161. *See id.*

162. *Canned Hunts: Spreading Like a Disease*, WILDLIFE RSCH. & REHAB, <https://wildlife-rescue.org/services/advocacy/canned-hunts/> (last visited Apr. 8, 2022).

163. *Summary of the Endangered Species Act*, EPA, <https://www.epa.gov/laws-regulations/summary-endangered-species-act> (last visited Apr. 8, 2022); *Permits for the Incidental Taking of Endangered and Threatened Species*, NOAA FISHERIES (Mar. 21, 2021), <https://www.fisheries.noaa.gov/permit/permits-incidentally-taking-endangered-and-threatened-species>.

challenged legally, public awareness is increased to the point of putting pressure on the legislature to act, or both.¹⁶⁴

III. LAW ON INTERNATIONAL TROPHY HUNTING

The international community has laws and regulations related to international trophy hunting. CITES is an international agreement, to which the United States is a party, that creates stringent restrictions on imports and exports of certain wildlife.¹⁶⁵ In the United States, international trophy hunting is addressed by several laws, including the ESA¹⁶⁶ which implements CITES and was passed in 1973 to ban the import into the United States of trophies of endangered or threatened species.¹⁶⁷ Trophy hunting is not regulated by the ESA within the foreign host countries; instead, the U.S. law governs what can and cannot be imported back into the U.S.¹⁶⁸ In conjunction with the ESA, the USFWS regulates trophy hunting to an extent by requiring permits to be obtained to allow for the importation into the United States of trophies of species that are considered threatened or endangered by the ESA.¹⁶⁹

Although there is unanimous public support for protecting certain primates, including elephants, from trophy hunting,¹⁷⁰ the USFWS recently issued a memorandum withdrawing its own earlier findings that trophy hunting of certain species from certain countries in Africa did not help their survival chances.¹⁷¹ USFWS's reversal of its own position, not long after it was first articulated, has practically resulted in it issuing permits in the past two years, on a case-by-case basis, for importing trophies from rare animal

164. See EPA, *supra* note 163 (explaining that, as of now, the law only requires that the actions of federal agencies do not jeopardize the survival of endangered animals).

165. See *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 27 U.S.T. 1087 (1975). The CITES treaty provides a foundation on which member nations can develop their own legislation with a view to protecting endangered species. *Id.* CITES divides different species into three appendices: Appendix I lists species threatened with extinction and is regulated to prevent extinction; Appendix II lists species not necessarily threatened; and Appendix III lists species that would benefit from regulation to avoid exploitation. *Id.* at arts. 3–5.

166. 16 U.S.C. §§ 1531–43.

167. KRISTINA ALEXANDER, THE CONG. RSCH. SERV., R42447, THE ENDANGERED SPECIES ACT (ESA) AS IMPLEMENTING LEGISLATION FOR INTERNATIONAL TREATIES (2012).

168. See *The US Endangered Species Act: Protecting At-Risk Animals and Plants from Extinction*, WWF, <https://www.worldwildlife.org/pages/the-us-endangered-species-act> (last visited Apr. 8, 2022); 16 U.S.C. § 1538.

169. *Endangered Species, CITES, Endangered Wildlife, Plants, Ivory, Exotic Skins and Animals*, U.S. CUSTOMS & BORDER PATROL (Dec. 11, 2020, 6:32 PM), https://help.cbp.gov/s/article/Article-64?language=en_US.

170. HUMANE SOC'Y INT'L, *supra* note 9. A poll of 1,091 registered U.S. voters, conducted by the Remington Research Group on March 3–5, 2019, showed that 75% of registered voters in the U.S. believed that it is important to protect elephants from trophy hunting. *Id.*

171. See Memorandum from the Principal Deputy Director, International Affairs, U.S. Fish & Wildlife Serv., *supra* note 10.

hunts abroad.¹⁷² Thus, practically this means a loosening of the restrictions and granting of permits to kill a rare animal abroad for sport and then allowing an international trophy hunter to use these now-enabling laws to bring back a body part of a rare animal to the United States as a souvenir.¹⁷³

The U.S. government's position is becoming increasingly clear on this issue, evidenced further by the fact that during the last two years, the U.S. government has pushed to repeal the automatic trophy hunting protections for *threatened* species.¹⁷⁴ The government's current argument is that *threatened* species are at less risk of extinction than *endangered* species, and as such, these threatened species can be hunted and should have no protections.¹⁷⁵

President Trump may not be a fan of trophy hunting such animals himself;¹⁷⁶ however, his administration was pro-trophy hunting.¹⁷⁷ This is also reflected by the DOI establishing the IWCC and installing almost exclusively pro-hunting groups as members of this council.¹⁷⁸ Because this council's task is to help rewrite federal rules for importing rare animal parts into the United States and otherwise advising the DOI on the benefits of Americans going abroad to hunt, it will practically mean rubber-stamping more trophy hunting of rare animals unless President Biden and his administration change course.¹⁷⁹

A. The Convention on International Trade in Endangered Species of Wild Fauna and Flora

The importation of threatened species into the United States, including elephants or lions from Africa, is governed by both international convention and U.S. law.¹⁸⁰ The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is an international conservation treaty that was adopted in 1973, initially by eighty countries, to regulate worldwide commercial trade in wild animal and plant species.¹⁸¹ CITES's goal was, and continues to be, the survival of wild animals and plants in the

172. *U.S. Fish & Wildlife Service Permitting Approach Benefits Hunters*, SAFARI CLUB INT'L (Aug. 21, 2020), <https://safariclub.org/u-s-fish-wildlife-service-permitting-approach-benefits-hunters/>.

173. *Id.*

174. *Id.*

175. *Id.*

176. Beavers, *supra* note 235.

177. *See generally* 16 U.S.C. §§ 1531–44.

178. U.S. DEP'T OF THE INTERIOR, *supra* note 19.

179. *Id.*

180. *What Is Cites?*, CITES, <https://www.cites.org/eng/disc/what.php> (last visited Apr. 8, 2022) (“CITES (the Convention on International Trade in Endangered Species of Wild Fauna and Flora) is an international agreement between governments. Its aim is to ensure that international trade in specimens of wild animals and plants does not threaten [their survival].”).

181. *Id.*

face of growing international trade.¹⁸² The convention initially resulted as a resolution that was adopted at a meeting of member countries of the International Union for Conservation of Nature in 1963.¹⁸³ The formal text from that convention was adopted by eighty member countries of the World Conservation Union, the global authority on the conservation status of wild animals and plants, and it ultimately came into force on July 1, 1975.¹⁸⁴

Presently, CITES is a legally binding international agreement that binds the 183 member-nations to the convention and encourages these countries to legislate and adopt their own domestic laws in order to implement CITES's goals.¹⁸⁵ These goals include regulating “the international trade of wildlife and wildlife products—everything from live animals” to food and all kinds of leather goods.¹⁸⁶ Although this international agreement is legally binding on the parties and requires each country to implement the convention, it does not require anything that would conflict with or supplant existing national laws of any country.¹⁸⁷ Instead, the CITES agreement provides a framework to be respected and used by each country in order to adopt its own domestic legislation to ensure that CITES is implemented at the national level.¹⁸⁸

There are about 5,800 species of animals that are protected by CITES currently, categorized depending on how at-risk from trade they are.¹⁸⁹ As of 2021, the governments of 183 countries, including the United States, are party to CITES and thus must abide by CITES to implement national legislation consistent with the goals of CITES.¹⁹⁰

B. The Endangered Species Act

The ESA became law when President Richard Nixon signed it into law in 1973 and is arguably the most popular and powerful environmental law in the U.S.¹⁹¹ “The Supreme Court has called the Endangered Species Act ‘the

182. *Id.*

183. *Id.*

184. *CITES Marks 40 Years of International Cooperation and National Action*, CITES, https://cites.org/eng/cites_1975_2015 (last updated Jan. 12, 2021).

185. *See generally* PERVAZE A. SHEIKH & M. LYNNE CORN, CONG. RSCH. SERV., RL32751, *THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA (CITES)* (2016).

186. Rachel Fobar, *What Is the Convention on International Trade in Endangered Species?*, NAT'L GEOGRAPHIC (July 3, 2019), <https://www.nationalgeographic.com/animals/article/convention-on-international-trade-in-endangered-species#:~:text=The%20Convention%20on%20International%20Trade%20in%20Endangered%20Species%20of%20Wild,%2C%20leather%20goods%2C%20and%20trinkets.>

187. *See id.*

188. *Id.*

189. *Id.*

190. *List of Contracting Parties*, CITES, <https://cites.org/eng/disc/parties/chronolo.php> (last visited Apr. 8, 2022).

191. *See generally* 16 U.S.C. §§ 1531–44.

most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”¹⁹² The ESA is a federal statute that seeks “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species.”¹⁹³ Thus, the ESA aims to protect threatened and endangered species, and the Act implements CITES into U.S. law.¹⁹⁴

To comply with the ESA and its implementing regulations, if a hunter wanted to import a body part of a rare endangered animal into the United States, for example an African elephant (*Loxodonta Africana*)¹⁹⁵ or African lion (*Panthera leo melanochaita*),¹⁹⁶ the USFWS¹⁹⁷ is required to make a written “enhancement” finding to show that the exporting country’s governance, wildlife population, and management of hunting quotas will enhance the survival of the threatened species.¹⁹⁸

The ESA lists African elephants and lions living in Zimbabwe, South Africa, Zambia, Namibia, Tanzania, and Botswana as “threatened” species, meaning they are in danger of extinction in the foreseeable future.¹⁹⁹ Section 4(d) of the ESA requires the USFWS to use its regulatory authority to “issue such regulations” that are deemed “necessary and advisable to provide for the conservation” of the species.²⁰⁰ Section 9 of the ESA also bans the importation of any part of the species into the United States if the species is listed as endangered.²⁰¹

1. The ESA, USFWS, and the Scope of Permits for Importing Rare Animal Body Parts from International Trophy Hunts

The ESA protects not only the particular species but also the ecosystems on which they depend.²⁰² To achieve these conservation objectives, the ESA authorizes the USFWS to list imperiled species, which then receive certain

192. *California ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999, 1018 (9th Cir. 2009) (citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978)).

193. 16 U.S.C. § 1531(b).

194. *Id.* §§ 1532(4), 1537a, 1538(c).

195. *African Savanna Elephant*, BRITANNICA, <https://www.britannica.com/animal/African-savanna-elephant> (last visited Apr. 8, 2022).

196. Marc de Manuel et al., *The Evolutionary History of Extinct and Living Lions*, PROC. OF THE NAT’L ACAD. OF SCIS. (May 4, 2020), <https://www.pnas.org/doi/10.1073/pnas.1919423117>.

197. U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/> (last visited Apr. 8, 2022) (“Working with others to conserve, protect, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people.”).

198. 50 C.F.R. §§ 17.32(a), 17.40(e)–(r) (2022).

199. 16 U.S.C. § 1532(6).

200. *Id.* § 1531(b), (c).

201. *Id.* § 1538(a)(1)(A).

202. *See id.* § 1533(b)(2).

protections.²⁰³ The ESA provides certain protections for species that are listed as threatened or endangered.²⁰⁴ Specifically, section 9 of the ESA affords protections for listed animals, including automatically prohibiting the import of endangered species, unless such activity is “for scientific purposes or to enhance the propagation or survival of the affected species.”²⁰⁵ The USFWS, acting on behalf of the Secretary of Interior, can commence a process for listing a species, and this process can also be initiated by way of a petition from any interested third party.²⁰⁶ If the USFWS determines that listing a species is warranted, it must proceed by rulemaking.²⁰⁷ The basis for USFW’s decision to formally list a species must be “solely on the basis of the best scientific and commercial data available” and upon consideration of any of five factors.²⁰⁸ The protections that the ESA provides can only be triggered after a species is listed by the USFWS as being either “threatened” or “endangered,” based on the scientific assessment facing the particular species in question.²⁰⁹

Under the ESA, it is unlawful to take any listed species, which includes by hunting.²¹⁰ The ESA makes it illegal to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect” any endangered species or to attempt to do so.²¹¹ If the species in question is not listed, the ESA does not prohibit hunting of that species, including in situations where the prohibition on hunting of the candidate species may be apt and warranted.²¹² African elephants and lions in certain Africa countries, for example, are currently listed as a “[t]hreatened [s]pecies.”²¹³ That is, these species are “likely to

203. *Id.* § 1533 (a).

204. *Id.* §§ 1531, 1538(a)(1)(G).

205. *Id.* §§ 1538(a)(1)(A), 1539(a)(1)(A).

206. *Id.* § 1533(a), (b)(3)(A).

207. *Id.* § 1533(b)(3)(B)(ii), (b)(5)-(6).

208. *Id.* § 1533(a)(1), (b)(1)(A).

Determination of endangered species and threatened species[:]

(a) Generally

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

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) overutilization 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.

Id. § 1533(a)(1)(A)–(E).

209. *Id.* §§ 1533(a), (c), 1538(a).

210. *Id.* §§ 1538(a)(1)(B), 1532(19).

211. *Id.* §§ 1532(19), 1538(a).

212. *See id.* §§ 1532(19), 1538(a).

213. IUCN, *supra* note 153; *see also Vulnerable and Endangered Species: African Lion*, AFR. IMPACT (July 18, 2019), <https://africanimpact.com/african-lion/>; *The Magnificent Lion: The Symbol of Africa*, WWF, <https://www.wwf.org.uk/learn/wildlife/african-lions> (last visited Apr. 8, 2022).

become an endangered species within the foreseeable future through all or a significant portion of its range.”²¹⁴ Thus, at least in theory, the ESA should provide protection for African elephants and lions because elephants and lions from certain countries are listed as threatened, and thus trigger the ESA’s protections.²¹⁵ This would, of course, also be the case if the species in question was “endangered.”²¹⁶ Under the ESA, a threatened species is one that “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”²¹⁷ Similarly, an endangered species is “any species which is in danger of extinction throughout all or a significant portion of its range.”²¹⁸

One example animal that the ESA protects because it is threatened is the elephant.²¹⁹ There used to be ten million elephants in Africa about 100 years ago; yet today, there are only a few hundred thousand, and their numbers are still declining.²²⁰ In tandem with the ESA, the International Union for Conservation of Nature’s Red List of Threatened Species has also listed elephants in Africa as being vulnerable.²²¹ Indeed, as an example, many elephant populations in Africa are listed as “endangered” or “critically endangered” under the ESA.²²²

Any individual or entity wishing to import into the United States any part of an animal that is protected by the ESA as being threatened or endangered (African lion and elephant trophies, for example) must obtain a permit from the USFWS.²²³ The USFWS is required to show that permitting the importation into the U.S. of any such rare animal part will enhance the survival of that species in the wild (“[e]nhancement [f]inding” or

214. 16 U.S.C. § 1532(20).

215. 50 C.F.R. § 17.11(h) (2022); *see also* Listing Two Lion Subspecies, 80 Fed. Reg. 79,999, 80,000 (Dec. 23, 2015) (codified at 50 C.F.R. pt. 17); Listing of the African Elephant as a Threatened Species, 43 Fed. Reg. 20,499 (May 12, 1978) (codified at 50 C.F.R. pt. 17).

216. *See Listing Species Under the Endangered Species Act*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/national/endangered-species-conservation/listing-species-under-endangered-species-act> (last visited Apr. 8, 2022).

217. 16 U.S.C. § 1532(20).

218. *Id.* § 1532(6).

219. 50 C.F.R. § 17.11(h) (2022).

220. *World Elephant Day: Should We Be Worried About the Number of Elephants?*, BBC (Aug. 12, 2018), <https://www.bbc.co.uk/newsround/45032922> (“A count of Africa’s elephants published in August 2016 found that nearly one in three has disappeared over the past seven years[—]meaning there was fewer than 400,000 left.”).

221. *African Forest Elephant*, IUCN RED LIST, <https://www.iucnredlist.org/species/181007989/204404464> (last visited Apr. 8, 2022); *African Savannah Elephant*, IUCN RED LIST, <https://www.iucnredlist.org/species/181008073/204401095> (last visited Apr. 8, 2022); *IUCN Red List of Threatened Species*, IUCN, <https://www.iucn.org/resources/conservation-tools/iucn-red-list-threatened-species> (last visited Apr. 8, 2022) (“The IUCN Red List of Threatened Species[] is the world’s most comprehensive inventory of the global conservation status of plant and animal species.”).

222. *See Species Directory*, WWF, <https://www.worldwildlife.org/species/directory> (last visited Apr. 8, 2022).

223. *See* 16 U.S.C. § 1539.

“finding”).²²⁴ Indeed, it is clear from the legislative history of the ESA that the issuance of enhancement permits was intended to be extremely limited in scope.²²⁵ The scope was such that the permit to kill would only be given if it was deemed necessary to benefit the species in the wild.²²⁶

In past decades, the USFWS infrequently issued enhancement findings focusing on rare animals living in countries abroad and did so without providing notice to or seeking comment from the public.²²⁷ The USFWS did so on a belief that their enhancement finding process was not rulemaking.²²⁸ In a recent decision, the court disagreed with the USFWS and found that such country-by-country “enhancement findings reflect a final rule” and must therefore only be issued after rulemaking (i.e., a public notice and comment process is required)²²⁹ before the USFWS may adopt them.²³⁰ Shortly before the December 2017 ruling, the USFWS issued two new enhancement findings for Zimbabwe that allowed importation of elephant and lion body parts into the United States, and the decision was compounded by the fact that the USFWS found the exact opposite just a year prior in its findings regarding the very same elephants.²³¹ As is outlined below, such action by the USFWS is open to challenge for not complying with the powerful APA.²³²

Having lost, and instead of accepting the recent court ruling, the USFWS changed its position to bypass this rulemaking requirement, announcing that it will rescind many of its prior findings and make any future enhancement findings for international trophy hunting on a permit-by-permit basis as an informal adjudication basis that would not require the necessary

224. See, e.g., Letter from U.S. Dep’t of the Interior to Carl R. Atkinson, *reprinted in Lion Enhancement Finding*, CTR. FOR BIOLOGICAL DIVERSITY, <https://www.biologicaldiversity.org/programs/international/pdfs/Tanzania-lion-enhancement-finding.pdf> (last visited Apr. 8, 2022); see also *U.S. Fish & Wildlife Service Permitting Approach Benefits Hunters*, SCI FIRST FOR HUNTERS (Aug. 20, 2020), <https://safariclub.org/u-s-fish-wildlife-service-permitting-approach-benefits-hunters/>.

225. A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, at 155–56 (1982).

226. *Id.* at 156 (“Any such activities to encourage propagation or survival may take place in captivity, in a controlled habitat or even in an uncontrolled habitat so long as this is found to provide the most practicable and realistic opportunity to encourage the development of the species concerned.”).

227. *Safari Club Int’l v. Zinke*, 878 F.3d 316, 320–21 (D.C. Cir. 2017).

228. See *id.* at 331–34.

229. *Id.* at 331; see also Administrative Procedure Act (APA), 5 U.S.C. § 553.

230. *Zinke*, 878 F.3d at 331–34; see also *Safari Club Int’l v. Jewell*, 842 F.3d 1280, 1288–89 (D.C. Cir. 2016).

231. Issuance of Import Permits for Zimbabwe Elephant Trophies Taken on or After January 21, 2016, and on or Before December 31, 2018, 82 Fed. Reg. 54,405 (Nov. 17, 2017); Emily Ronis, *USFWS Takes Middle-Ground Approach on Trophy Imports*, THE WILDLIFE SOCIETY (Mar. 13, 2018), <https://wildlife.org/usfws-takes-middle-ground-on-trophy-imports/>.

232. See 5 U.S.C. § 553.

notice and comment proceedings.²³³ As is developed further below, these actions by the USFWS run afoul of basic tenants of administrative law.²³⁴

C. The Administrative Procedures Act

The APA governs agency actions.²³⁵ If a person is adversely affected or aggrieved by any agency action, the APA provides for judicial review of final agency actions.²³⁶ The APA authorizes a reviewing court to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”²³⁷ As the Supreme Court has made clear, if a government agency takes a position on a policy or legal interpretation, any change to that policy or legal interpretation is arbitrary or capricious unless the agency displays awareness that it has changed position *and* provides a reasoned explanation to illustrate why the agency believes the new interpretation is better than its previous interpretation.²³⁸

The USFWS’s flip-flopping on its own enhancement findings, from deterring the importation of the endangered African elephant (*Loxodonta africana*) or lion (*Panthera leo melanochaita*) to actively promoting its importation by finding international hunting of these rare animals to help the species, has raised major legal questions, both on substantive and procedural grounds.²³⁹ For example, although the African lion gained ESA protections in 2016, a year later the USFWS issued an enhancement finding that trophy hunting of lions helps survival rates.²⁴⁰ In 2017, the USFWS also encouraged elephant hunting by reversing its established prohibition against such hunts and the importation of elephant body parts into the United States from Africa.²⁴¹ Moreover, to avoid legal scrutiny of its position on just one example related to international trophy hunting, in 2018 the USFWS issued a memorandum to withdraw seventeen of its previously issued enhancement findings for elephants and lions and make any future enhancement findings

233. See Ronis, *supra* note 231.

234. See *infra* Section III.C (detailing the basic tenants of administrative law); see also 5 U.S.C. §§ 551–9.

235. See generally 5 U.S.C. §§ 551–9.

236. *Id.* § 702.

237. *Id.* § 706(2)(A).

238. Fed. Comm’n v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

239. See generally Memorandum from the Principal Deputy Director, International Affairs, U.S. Fish & Wildlife Serv., *supra* note 10.

240. Issuance of Import Permits for Zimbabwe Elephant Trophies Taken on or After January 21, 2016, and on or Before December 31, 2018, 82 Fed. Reg. 54,405 (Nov. 17, 2017) (“The U.S. Fish and Wildlife Service . . . has made a finding that the killing of African elephant trophy animals in Zimbabwe, on or after January 21, 2016, and on or before December 31, 2018, will enhance the survival of the African elephant.”).

241. *Id.*

for international trophy hunting on a permit-by-permit basis as an informal adjudication basis.²⁴² The obvious goal has been to avoid the required notice and comment proceedings of the APA.²⁴³

Crucially, however, the USFWS has indicated that it would still use its illegally adopted past enhancement findings in this new proposed process.²⁴⁴ In practice, the USFWS is not only using its prior illegally adopted enhancement findings but is simply copying and pasting these findings and adding the name of a trophy hunter to make it now a case-by-case process.²⁴⁵ Yet, this new procedure still runs afoul of the APA.²⁴⁶ Namely, irrespective of the USFWS's desire to avoid the clear rules of the APA, the agency's enhancement findings are legislative rules and, therefore, it is necessary to comply with the requirements of § 553 of the APA.²⁴⁷ That is, even though the USFWS abruptly changed its own position to name it a permit-by-permit finding, not only is it not so in practice, but even on a procedural level, these substantive reversals in position are considered rule changes and require compliance with the APA.²⁴⁸

1. Does the Quick 180-Degree Turnaround in the U.S. Fish & Wildlife Service's own Position on Trophy Hunting Violate the APA?

The USFWS recently reversed its position on banning trophy imports for several African species. In practice, the USFWS is now reviewing trophy import applications for rare animals from Africa on a case-by-case basis.²⁴⁹ The USFWS also withdrew its own enhancement findings for species whose importation to the United States was banned based on its own findings not long ago.²⁵⁰ These enhancement findings are required under the ESA to grant sport-trophy import permits for listed species, and the findings aim to show how trophy hunting would enhance a species' survival.²⁵¹ The restrictions on importing body parts of rare animals from trophy-hunting kills were initially

242. See Memorandum from the Principal Deputy Director, International Affairs, U.S. Fish & Wildlife Serv., *supra* note 10; see also Memorandum from the Chief, Branch of Permits, U.S. Fish & Wildlife Serv. (Nov. 7, 2017), <https://www.fws.gov/sites/default/files/documents/Responsive-Record-final-Binder-2474-pp-Redacted.pdf>.

243. See generally, Memorandum from the Chief, Branch of Permits, U.S. Fish & Wildlife Serv., *supra* note 242.

244. See *id.* at 1–2.

245. *Id.* at 439.

246. See generally *id.*

247. See 5 U.S.C. § 553.

248. See generally *id.*; Memorandum from the Chief, Branch of Permits, U.S. Fish & Wildlife Serv., *supra* note 242.

249. See *id.*

250. See Memorandum from the Principal Deputy Director, International Affairs, U.S. Fish & Wildlife Serv., *supra* note 10.

251. *Id.*

implemented in 2014 after the USFWS did not make a positive enhancement finding based on available information.²⁵² That is, the USFWS did not see how allowing international trophy hunters to kill these threatened species would in any way help their survival rates.²⁵³ This swift turnaround by the USFWS reverses an Obama-era suspension on importing body parts of rare animals from Africa, including elephant body parts from Zimbabwe and Zambia.²⁵⁴

Pursuant to 50 C.F.R. §17.22(a)(2), the USFWS issues these enhancement permits generally considering factors such as

the probable direct and indirect effect which issuing the permit would have on the wild populations of the wildlife sought to be covered by the permit; whether the permit, if issued, would in any way, directly or indirectly, conflict with any known program intended to enhance the survival probabilities of the population from which the wildlife sought to be covered by the permit was or would be removed; [and] whether the purpose for which the permit is required would be likely to reduce the threat of extinction facing the species of wildlife sought to be covered by the permit.²⁵⁵

Whether it be a threatened or endangered species, these same criteria generally apply.²⁵⁶ When a species is listed as threatened, such as lions and elephants from certain African countries, § 9 of the ESA prohibits the importation of the species.²⁵⁷ Moreover, § 4(d) of the ESA provides that

[w]hensoever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538 (a)(1) of this title [i.e., section 9].²⁵⁸

Thus, the USFWS is required to issue regulations to conserve both threatened and endangered species.²⁵⁹

252. See Issuance of Import Permits for Zimbabwe Elephant Trophies Taken on or After January 21, 2016, and on or Before December 31, 2018, 82 Fed. Reg. 54,405 (Nov. 17, 2017).

253. See generally Memorandum from the Principal Deputy Director, International Affairs, U.S. Fish & Wildlife Serv., *supra* note 10.

254. *Id.*

255. 50 C.F.R. § 17.22(a)(2) (2022).

256. *Id.* § 17.32(a)(2).

257. 16 U.S.C. § 1538(a)(1)(A).

258. *Id.* § 1533(d).

259. See *id.*

The USFWS's recent reversal of the agency's position on banning trophy imports, facilitated by the USFWS withdrawing the agency's enhancement findings to suddenly find that killing of rare animals such as elephants, lions, and other endangered large game would help the species.²⁶⁰ This reversal in the agency's position and the manner in which it was done violates the APA on both procedural and substantive grounds.²⁶¹

The APA governs government agency action, and this agency action is defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."²⁶² The APA defines a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy"²⁶³ and an adjudication as the "agency process for the formulation of an order."²⁶⁴ If a party alleges unlawful agency action, the APA can be used to seek remedy because the APA authorizes a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²⁶⁵ Unless another statute applies, all agencies of the government must follow APA procedures when it promulgates a legislative rule by publishing a general notice of the proposed rulemaking in the Federal Register and giving an opportunity for interested parties to comment and participate in the rulemaking process.²⁶⁶ This can be in the form of written comments, arguments, or data with the goals being transparency and public participation when an agency proposes new rules.²⁶⁷

In 1997, the USFWS's enhancement finding indicated that the hunting of elephants for trophies would enhance their survival.²⁶⁸ This was followed by the opposite finding in 2014 and 2015, determining that negative enhancement findings are appropriate for elephants.²⁶⁹ Near the end of 2017, the USFWS reversed course from its prior elephant and lion findings to allow for the importation of their body parts from Zimbabwe, issuing new

260. See generally Memorandum from the Principal Deputy Director, International Affairs, U.S. Fish & Wildlife Serv., *supra* note 10.

261. *Id.*

262. 5 U.S.C. § 551.

263. *Id.*

264. *Id.*

265. *Id.* § 706(2)(A); see also Fed. Comm'n v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (holding that if a government agency takes a position on a policy or legal interpretation, any change to that policy or legal interpretation is arbitrary or capricious and violates the APA unless the agency displays awareness that it has changed position and provides a reasoned explanation to illustrate why the agency believes the new interpretation is better than its own previous interpretation).

266. 5 U.S.C. § 553.

267. Sugar Cane Growers' Coop. of Fla. v. Veneman, 289 F.3d 89, 95 (D.C. Cir. 2002) (citing 5 U.S.C. § 553(b)-(c)); see also FBME Bank Ltd. v. Lew, 209 F. Supp. 3d 299, 314 (D.D.C. 2016).

268. Memorandum from the Principal Deputy Director, International Affairs, U.S. Fish & Wildlife Serv., *supra* note 10.

269. *Id.*

enhancement findings for the first time since lions were listed under the ESA.²⁷⁰ In doing so, the USFWS not only found in its new enhancement finding that killing these rare, endangered animals as “trophy” would *enhance* their survival, but the agency stated that it would not publish notice of their changed enhancement findings for sport-hunted trophies in the Federal Register.²⁷¹ However, USFWS’s reversal and adoption of the enhancement findings was recently found to be unlawful because the agency did not follow the notice-and-comment rulemaking requirements of the APA.²⁷² The ruling that trophy import enhancement findings require public notice and comment ensures transparency and public participation by hunters and nonhunters alike.²⁷³

Instead of complying with the ruling, the USFWS issued a memo in 2018 to rescind their prior findings, including their 1997, 2014, 2015 and 2017 findings, again doing so without providing the required notice-and-comment rulemaking processes pursuant to the APA.²⁷⁴ These recent acts of the agency have flouted the very basic tenets of administrative law, including the fact that the substance of these enhancement findings and the process involved to reach them are rules requiring rulemaking to be repealed or amended.

D. The Federal Advisory Committee Act

In 1976, Congress recognized that committees, boards, commissions and other expert groups provide the Executive Branch of the government with valuable advice and opinions and passed the Federal Advisory Committee Act.²⁷⁵ “However, Congress was also cognizant of the fact that many advisory committees were created without adequate justification.”²⁷⁶ This permitted new committees to be formed with little public or congressional oversight and for special interest groups to directly influence federal policymaking.²⁷⁷ FACA was, therefore, enacted to stop these unwanted outcomes by aiming to create a meaningful check on the formation of new advisory committees, to police the membership of these committees

270. *Id.*

271. *Id.*

272. *Safari Club Int’l v. Zinke*, 878 F.3d 316, 331–34 (D.C. Cir. 2017).

273. *Id.*; 5 U.S.C. § 553.

274. *See* Memorandum from the Principal Deputy Director, International Affairs, U.S. Fish & Wildlife Serv., *supra* note 10.

275. *People for Ethical Treatment of Animals v. Barshefsky*, 925 F. Supp. 844, 847 (D.D.C. 1996).

276. *Id.*

277. *Id.*

to ensure against conflicts of interest, and to allow for transparency and public participation in the process.²⁷⁸

To reach these goals, various sections of FACA discourage, for example, formation of “useless” or “self-serving” advisory committees by requiring federal agencies to justify new committees to Congress, the public, and the General Services Administration (GSA).²⁷⁹ In particular, any agency wishing to form a new committee “must consult” with GSA before establishing the committee.²⁸⁰ Each advisory committee ought to reflect diverse interests as mandated by Congress and must minimize against being influenced by special interests.²⁸¹ Finally, FACA is designed to provide full transparency and public participation through various provisions, including the requirement to provide “timely notice” of committee meetings to the public and requiring advisory committees to publish and otherwise make available to the public the content of their meetings.²⁸²

1. The Illegitimacy of the International Wildlife Conversation Council

The DOI is the federal agency responsible for international trophy hunting import controls.²⁸³ DOI established the IWCC, an advisory council tasked with assisting rewriting federal rules for importing rare animal parts into the United States and yet curiously one whose members are comprised almost exclusively of pro-hunting groups.²⁸⁴ Given that a number of clear safeguards the FACA was designed to protect against were violated during the process of the IWCC’s formation and subsequent composition, it is possible to strongly challenge the government’s position vis-à-vis a biased IWCC and the legitimacy of the IWCC *in toto*.²⁸⁵

In particular, the DOI unlawfully established the IWCC and failed to abide by the consultation requirements of FACA’s § 9.²⁸⁶ Moreover, the DOI broke federal law by not providing, nor aiming for, an unbiased, balanced

278. *Cummock v. Gore*, 180 F.3d 282, 284 (D.C. Cir. 1999) (citation omitted) (“Congress . . . feared the proliferation of costly committees . . . dominated by representatives of industry and other special interests seeking to advance their own agendas.”).

279. *Consumers Union of U.S., Inc. v. Dep’t of Health, Educ. & Welfare*, 409 F. Supp. 473, 475 (D.D.C. 1976).

280. 41 C.F.R. § 102-3.60(a) (2022); *see also* 5 U.S.C. app. § 9(a)(2).

281. 5 U.S.C. app. § 5(b)(2), (c) (“the membership of [an] advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee”).

282. *Id.* § 10(b).

283. *See* U.S. DEP’T OF THE INTERIOR, *supra* note 17.

284. *See* U.S. DEP’T OF THE INTERIOR, *supra* note 19.

285. *See infra* notes 289–91 and accompanying text (discussing the illegality of the IWCC and its disbandment).

286. *See* 5 U.S.C. app. § 9(a).

membership of the IWCC as required under FACA, § 5(b)(2).²⁸⁷ The DOI also violated other federal laws, including failing to appreciate the unlawful nature of having very powerful, one-sided special interests unfairly influencing decisions against the express requirements of FACA, § 5(b)(3)²⁸⁸ and also circumventing congressional desire for transparency and public participation as provided for by § 10 of FACA²⁸⁹ by not allowing public participation in IWCC's meetings. By attacking the legitimacy of the IWCC, one can aim to divorce the DOI from any IWCC recommendations and aim to weaken the government's position and assist in bringing to an end this form of hunting of rare animals abroad.²⁹⁰ Indeed, in a loss to the government, in a recent court filing, the DOI indicated that the IWCC would no longer meet and would be disbanded.²⁹¹

IV. SIDE EFFECTS OF U.S. LEADERSHIP ON INTERNATIONAL TROPHY HUNTING

In 2014, Botswana made a historic decision to ban trophy hunting.²⁹² Since the ban took effect, the Humane Society International used data from the CITES international trade database to estimate that Botswana's trophy hunting ban has saved nearly 2,400 elephants and 140 leopards, species whose numbers in the wild are dropping dangerously.²⁹³ Fast forward to summer 2019, Botswana, a country in Africa that counts on the United States

287. *Id.* § 5(b) (stating, “In considering legislation establishing, or authorizing the establishment of any advisory committee, each standing committee of the Senate and of the House of Representatives shall determine, and report such determination to the Senate or to the House of Representatives, as the case may be, whether the functions of the proposed advisory committee are being or could be performed by one or more agencies or by an advisory committee already in existence, or by enlarging the mandate of an existing advisory committee. Any such legislation shall . . . require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee . . .”).

288. *Id.* § 5(b)(3) (stating, “Any such legislation shall . . . contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment . . .”).

289. Section 10 of FACA outlines the advisory committee procedures, meetings, notice, publication in the Federal Register, regulations, minutes, certification, annual report, federal officer or employee, and attendance requirements. *Id.* § 10.

290. See *After Legal Loss, Trump Administration Disbands Illegal Trophy Hunting Council*, CTR. FOR BIOLOGICAL DIVERSITY (Feb. 9, 2020), <https://biologicaldiversity.org/w/news/press-releases/after-legal-loss-trump-administration-disbands-illegal-trophy-hunting-council-2020-02-09/>.

291. *Id.* The DOI told a federal district court in New York in 2020 that the IWCC was terminated in December 2019 and that no future meetings of this Council would take place. *Id.*

292. *Botswana's Hunting Ban: Bushmen Starve, Trophy Hunters Carry On*, SURVIVAL (Mar. 31, 2014), <https://www.survivalinternational.org/news/10112>.

293. Kitty Block, *Botswana Moves Closer to Lifting Ban on Trophy Hunting Despite Declining Interest in Such Kills*, THE HUMANE SOCIETY OF THE U.S.: A HUMANE WORLD KITTY BLOCK'S BLOG (Feb. 25, 2019), <https://blog.humanesociety.org/2019/02/botswana-moves-closer-to-lifting-ban-on-trophy-hunting-despite-declining-interest-in-such-kills.html>.

as its second largest source of tourists visiting the country and in which about a third of Africa's elephants (126,000 elephants) happen to live, decided to lift its ban on hunting elephants.²⁹⁴ Moreover, as recent as February 2020, this economically challenged country promoted trophy hunting elephants by holding one of seven open auctions for the right to hunt elephants.²⁹⁵ Some argued that this was purely a politically or economically driven move, not one based on conservation, because the United States was pivoting that way and there was money to be made.²⁹⁶ For example, just the administrative cost to kill one elephant is \$15,000 in Zimbabwe.²⁹⁷ Indeed, the overtly pro-international trophy hunting posture of President Trump's administration led to the specter at the recent meeting of parties to CITES of having many African countries siding with Botswana's new pro-elephant hunting position.²⁹⁸ So much so that some southern African countries have recently threatened to leave CITES completely to allow such hunting by wealthy foreigners in their country.²⁹⁹

Unsurprisingly, this move was largely condemned, with a petition signed by 87,000 people, co-signed by thirty-three animal, welfare, and wildlife conservation organizations sent to President Masisi of Botswana in June 2019.³⁰⁰ The decision to lift the ban and allow the trophy hunting of elephants also caught the attention of the TV personality Ellen DeGeneres, who tweeted, "President Masisi, for every person who wants to kill elephants, there are millions who want them protected."³⁰¹ The public backlash has been so ferocious that in late May 2019, Botswana hired a public relations firm in

294. Jason Burke, *Botswana Condemned for Lifting Ban on Hunting Elephants*, GUARDIAN (May 23, 2019, 7:43 EDT), <https://www.theguardian.com/world/2019/may/23/botswana-lifts-ban-on-hunting-elephants>.

295. *Botswana Auctions Off Permits to Hunt Elephants*, BBC NEWS (Feb. 7, 2020), <https://www.bbc.com/news/world-africa-51413420>.

296. See generally *id.*

297. See HUMANE SOC'Y OF THE U.S. & HUMANE SOC'Y INT'L, TROPHY HUNTING BY THE NUMBERS, at 2 (2016), https://www.hsi.org/wp-content/uploads/assets/pdfs/report_trophy_hunting_by_the.pdf.

298. See Busani Bafana, 'Let Us Trade': Debate Over Ivory Sales Rages Ahead of CITES Summit, MONGABAY (July 11, 2019), <https://news.mongabay.com/2019/07/let-us-trade-debate-over-ivory-sales-rages-ahead-of-cites-summit/>.

299. Mbongeni Mguni, *Southern African Nations Say They May Quit Global Wildlife Pact*, BLOOMBERG (Aug. 28, 2019), <https://www.bloomberg.com/news/articles/2019-08-28/southern-african-nations-says-they-may-quit-global-wildlife-pact>.

300. Sadly, as reported by change.org, "Masisi has also gone to the extent of attempting to pay a top Hollywood public relations firm \$125,000.00 to put a positive spin on the trophy hunting of elephants." *Reinstate Botswana's Ban on Elephant Trophy Hunting!*, CHANGE.ORG, <https://www.change.org/p/president-mokgweetsi-masisi-reinstate-botswana-ban-on-trophy-hunting> (last visited Apr. 8, 2022). The reason decisions in Botswana are important for elephants is that Botswana hosts the highest population of elephants in Africa. *Id.* To give this context, "currently one elephant is slaughtered every 26 minutes . . . 32% of the entire elephant population resides in Botswana," according to change.org. *Id.*

301. Ellen DeGeneres (@TheEllenShow), TWITTER (May 22, 2019, 4:30 PM), <https://twitter.com/theellenshow/status/1131311446271258625?lang=en>.

Hollywood to push back against the negative press.³⁰² Most recently, in June 2019, the ex-President of Botswana who imposed the ban five years ago has stated that “[r]esorting to killing is a blood policy that should not be supported It is a political move.”³⁰³

The backlash is growing against this recent decision to permit trophy hunting of elephants in Botswana. Sadly, just weeks after the trophy hunting ban on elephants was lifted in Botswana on May 22, 2019, newly published aerial surveys show that elephant killing is on the rise.³⁰⁴ Indeed, one of the world’s pre-eminent elephant conservationists Mike Chase, from the Elephants Without Borders group, recently showed that there has been a 500% increase in fresh carcasses in Botswana.³⁰⁵ During their on-the-ground investigations of these fresh carcasses, they found the gruesome spectacle of large, fresh elephant carcasses who had their spines severed with an ax or machete to immobilize the animal while they worked on its head and face.³⁰⁶ All of this is placed in the historical context of a 97% decline in elephant numbers in the past century.³⁰⁷

The connection between changes in laws on international trophy hunting in the United States in 2019 and the recent lifting of the ban on trophy hunting of elephants in Botswana may not be apparent. However, U.S. leadership on such issues has knock-on effects, especially on countries that are poor and whose economies are heavily dependent on the direction of emerging U.S. policies. Moreover, it should not go unappreciated that political turmoil in areas notorious for corruption does not make for a compelling setting for decision making based on animal conservation and protecting the environment.³⁰⁸

Thus, one of the key questions that remains is how current U.S. laws can be used to restrict, if not entirely ban, this unique form of international hunting of rare animals. Further still, to what extent is reform necessary to

302. Brian Slodysko & Michael Biesecker, *Botswana Hires Hollywood Firm to Fight Elephant Hunting PR*, AP NEWS (May 24, 2019), <https://apnews.com/article/entertainment-business-africa-ap-top-news-north-america-30fa2fc00782405b8b81cf3a9c41ca42>.

303. David McKenzie & Brent Swails, *Botswana’s Return to Elephant Hunting Won’t Solve Any Problems, Ex-President Says*, CNN (June 2, 2019), <https://www.cnn.com/2019/06/02/africa/botswana-president-hunting-ban-intl/index.html>.

304. *Aerial Surveys*, ELEPHANTS WITHOUT BORDERS, <https://elephantswithoutborders.org/projects/aerial-surveys/> (last visited Apr. 8, 2022).

305. McKenzie & Swails, *supra* note 303.

306. *Id.*

307. *#ShockWildlifeTruths: The Elephants’ 97% Decline in Less than a Century*, NEWS24 (Feb. 8, 2016), <https://www.news24.com/News24/endangered-wildlife-the-elephants-97-decline-in-less-than-a-century-20160208> (“Accurate estimates suggest that there were 12 million elephants in the early 1900s. Today there are only 350[,j]000, which includes both savanna elephants (*Loxodonta africana*) and forest elephants (*Loxodonta cyclotis*). That’s a 97% decline in a century.”).

308. See Univ. of Cambridge, *Political Instability and Weak Governance Lead to Loss of Species, Study Finds*, SCIENCE DAILY (Dec. 20, 2017), <https://www.sciencedaily.com/releases/2017/12/171220131712.htm>.

our existing legal regimes that address international trophy hunting of rare animals? And finally, what can Congress do to enact laws that reflect the current overwhelming majority of Americans' views on this topic?³⁰⁹ Addressing this issue face-on will have direct effects in the United States and indirect effects abroad.

V. U.S. CONGRESS SHOULD ACT TO LIMIT INTERNATIONAL TROPHY HUNTING

To grasp the true scale of this issue, from 2005 to 2014, recreational hunters who kill animals for the fun of it imported about 1,260,000 wildlife trophies into the United States.³¹⁰ That is an average of 126,000 trophy imports a year, or 345 imports into the United States of trophy animals' body parts from abroad every day.³¹¹ In that time period, American trophy hunters imported nearly 32,500 lions, elephants, rhinos, buffalo, and leopards.³¹² In all, over 1,200 species of animals are hunted and killed as trophies in which the head of the animal is typically cut off to put on a wall inside a building someplace in the United States. As an example, according to NPR, coincidental to the plummeting population of the world's largest mammal, trophy hunters import giraffes and giraffe body parts into the United States on a daily basis.³¹³

309. A poll of 1,091 registered U.S. voters, conducted by the Remington Research Group on March 3–5, 2019, showed that seventy-five percent of registered voters in the United States believed that it is important to protect elephants from trophy hunting. HUMANE SOC'Y INT'L, *supra* note 9.

310. HUMANE SOC'Y OF THE U.S. & HUMANE SOCIETY INT'L, *supra* note 297, at 1; *see also Trophy Hunting*, HUMANE SOC'Y INT'L, <https://www.hsi.org/issues/trophy-hunting/> (last visited Apr. 8, 2022) (“Trophy hunters pay huge sums of money to kill wild animals for in-home display. They enter their achievements into record books kept by member organizations. Trophy hunting harms conservation by exacerbating the population decline of many imperiled species. Compared to trophy hunting, wildlife-watching tourism generates far more income to support conservation and provides far more jobs to local people.”).

311. Rachael Bale, *Exclusive: Hard Numbers Reveal Scale of America's Trophy-Hunting Habit*, NAT'L GEOGRAPHIC (Feb. 6, 2016), <https://www.nationalgeographic.com/animals/article/160206-American-trophy-hunting-wildlife-conservation> (“A new analysis from the Humane Society finds American hunters import more than 126,000 animal trophies a year.”).

312. *Id.*

313. Laurel Wamsley, *Wildlife Groups Want Giraffes Added to Endangered Species List*, NPR (Apr. 19, 2017), <https://www.npr.org/sections/thetwo-way/2017/04/19/524718131/wildlife-groups-want-giraffes-added-to-endangered-species-list>; *see also* Sara Amundson & Kitty Block, *American Imports of Giraffe Trophies and Body Parts Are Driving the Animals to Extinction*, HUMANE SOC'Y LEGIS. FUND (Oct. 12, 2021), <https://hslf.org/blog/2021/10/american-imports-giraffe-trophies-and-body-parts-are-driving-animals-extinction> (“Between 2006 and 2015, more than 40,000 giraffe products were imported into the [United States], including 3,744 giraffe hunting trophies—on average, more than one per day. These imports also included 21,402 giraffe bone carvings, 4,789 bones[,] and 3,008 skin pieces, parts used to create grotesque products like knife handles, giraffe skin pillows[,] and even Bible covers . . .”); Kitty Block, *HSUS and HSI Investigation Uncovers a Thriving U.S. Market for Trophy-Hunted Giraffe Parts*, HUMANE SOC'Y OF THE U.S.: A HUMANE WORLD KITTY BLOCK'S BLOG (Aug. 23, 2018),

Americans like to travel to various countries in Africa, Canada, Mexico, Argentina, and New Zealand for such recreational hunting.³¹⁴ In the United States, currently thirty-two states allow for the trophy hunting of black bears.³¹⁵ There are complex consequences of treating animals as commodities and promoting canned hunts or wild hunts of rare animals abroad.³¹⁶ It may be legal in the host country; however, U.S. lawmakers ought to recognize that if the practice is left unchecked, it would be bad for public relations because it is seen by the vast majority of American voters as being unethical, cruel, and unsustainable.³¹⁷

Ever since President Trump tweeted, “[I] will be very hard pressed to change my mind that this horror show in any way helps conservation of Elephants or any other animal,” Americans of all ages and political affiliations have demonstrated a deep dislike of trophy hunting.³¹⁸ Indeed, only one in five Americans supports trophy hunting.³¹⁹ For example, a 2019 public poll of registered voters in the United States showed that 75% of respondents think it is important to protect elephants from trophy hunting.³²⁰ There is even less, next to negligible, support for allowing parts from elephants and lions to be brought into the United States from Africa to be used as trophy displays.³²¹

Congress has an opportunity to resonate with the vast majority of the Americans’ public view on this issue and show creative leadership to address the trophy hunting matter.³²² This can be done through actions such as regulating trophy imports into the United States, legislating for transparency as to what is being imported when and by whom, or providing financial and other resources to conserve hunted species in host countries. Lawmakers could also work to make sure the U.S. government engages with foreign governments and partners to monitor and promote only trophy hunting practices that have a positive impact on the environment in those countries and work towards creating an independent institution to monitor trophy hunting facilities in foreign countries, especially in canned hunting situations.

<https://blog.humanesociety.org/2018/08/hsus-and-hsi-investigation-uncovers-a-thriving-u-s-market-for-trophy-hunted-giraffe-parts.html>.

314. THE HUMANE SOC’Y OF THE U.S. & HUMANE SOCIETY INT’L, *supra* note 297, at 3.

315. *Banning Trophy Hunting*, THE HUMANE SOC’Y OF THE U.S., <https://www.humanesociety.org/all-our-fights/banning-trophy-hunting> (last visited Apr. 8, 2022).

316. THE HUMANE SOC’Y OF THE U.S. & HUMANE SOCIETY INT’L, *supra* note 297, at 3.

317. HUMANE SOC’Y INT’L, *supra* note 9.

318. *At Elephants’ Expense, USFWS Sticks to Its Guns*, ANIMAL WELFARE INST. (2018), <https://.org/awi-quarterly/summer-2018/elephants-expense-usfws-sticks-its-guns>.

319. See Press Release, Humane Soc’y of the U.S. *supra* note 27.

320. See HUMANE SOC’Y INT’L, *supra* note 9 (providing a poll that is referenced multiple times above and shows that 75% of registered U.S. voters support protecting elephants from trophy hunting).

321. Press Release, Humane Soc’y of the U.S. *supra* note 27.

322. See HUMANE SOC’Y INT’L, *supra* note 9.

Congress could address the killing of rare animals abroad for fun by regulating trophy imports and funding conservation activities overseas as key areas of focus. Domestically, for example, efforts by Rep. Raúl Grijalva, who assumed his position in 2019 as House Natural Resources Committee Chairman, ought to be supported.³²³ He reintroduced the Conserving Ecosystems by Ceasing the Importation of Large Animal Trophies Act (CECIL Act).³²⁴ This bill would stop the importation of body parts of trophy-hunted elephants and lions from three target African countries, namely Tanzania, Zimbabwe, and Zambia.³²⁵ Moreover, the Prohibiting Threatened and Endangered Creature Trophies (ProTECT) Act that was introduced in Congress in 2019 should be fully supported.³²⁶ This bill would have prohibited trophy hunting of ESA-listed species in the United States and the import of any trophy of a species listed under the ESA.³²⁷ Only by supporting such legislation would the trophy hunting industry be held back here at home and globally.

In 2018, dozens of House democrats demanded in a letter that Interior Secretary Zinke “halt all trophy imports, initiate a full regulatory process for the policies, make license issuances public[,] and require annual reports from countries where FWS will allow imports,” according to *The Hill*.³²⁸ Senators Carper and Duckworth sent a similar letter.³²⁹ Moreover, animal welfare groups also filed legal actions against the Interior Department over its decision to stack the advisory council with near-exclusive pro-hunting interests groups and over the DOI’s decision to allow elephant trophy imports. Curiously, the loosening of these laws in the United States happens to precede—by only a matter of months—Botswana’s unusual decision in the summer of 2019 to lift their own ban on hunting elephants.³³⁰

There are also knock-on effects of U.S. leadership on this issue. With higher demand from the United States, coupled with the now easing of legal restrictions for trophy hunters wishing to hunt and bring back body parts of rare animals, certain countries in Africa are adjusting their own stance on the

323. See CECIL Act, H.R. 2245, 116th Cong. (2019) (this bill was introduced in 2019 but still has not been passed into law in 2022).

324. *Id.*

325. *Id.*

326. See ProTECT Act, H.R. 4804, 116th Cong. (2019) (this bill has not been passed into law as of 2022).

327. *Id.*

328. Timothy Cama, *Dems Push Zinke to Halt Trophy Hunting Imports*, *THE HILL* (Mar. 13, 2018), <https://thehill.com/policy/energy-environment/378162-dems-push-zinke-to-halt-all-trophy-hunting-imports>.

329. *Carper and Duckworth Raise Concerns Regarding Trump Administration Policies on the Importation of Wildlife Trophies*, U.S. SENATE COMM. ON ENV’T & PUB. WORKS (Mar. 28, 2018), <https://www.epw.senate.gov/public/index.cfm/2018/3/carper-and-duckworth-raise-concerns-regarding-trump-administration-policies-on-the-importation-of-wildlife-trophies>.

330. Burke, *supra* note 294; see also *BBC NEWS*, *supra* note 295.

issue as a means to increase their revenue, albeit they may not admit to this.³³¹ For example, after many years, Botswana just recently ended their ban on elephant hunting.³³²

In view of a parallel strategy, Congress gave greater flexibility to the USFWS to stop a species extinction the greater the threat to the species. Indeed, Congress gave the USFWS the option to go beyond areas occupied by the endangered species when designating the habitat of that species as being critical. Under current law, critical habitat can extend into areas “outside the geographical area occupied by the species” because the occupied areas might be so compromised, small, or isolated that they will not support recovery by themselves.³³³ Efforts to recognize the fate of rare animals being sport-hunted in canned hunts on private land in the United States ought to also be an area to focus on, both in view of the rare animal itself and the habitat in which it was brought to live on in the United States for the purpose of these canned hunts of rare animals.³³⁴

When it comes to the hunting of rare, endangered animals abroad and the importation of their body parts into the United States, it remains to be seen what happens next. On December 10, 2021, the British government announced a ban on importing hunting trophies of rare animals into the U.K.³³⁵ The U.S. government should do likewise in 2022. However, if Congress fails to act, what else can be done? Are there other innovative solutions to address this issue of international trophy hunting?³³⁶

VI. INNOVATIVE SOLUTIONS TO BENEFIT BOTH SIDES OF THE INTERNATIONAL TROPHY HUNTING DEBATE

Is trophy hunting and the importation of rare animal parts into the United States really lawful though? Possibly. Is it unethical? Yes. Is it good for public relations in the internet-splashed information age? Absolutely not. The question for the practically focused scholars is how we can find a solution to give pro-large game hunters the excitement that goes with hunting the rarest of animals and yet allow conservationists to better protect rare animals from rapid and unsustainable population loss.

331. Burke, *supra* note 294; BBC NEWS, *supra* note 295.

332. Burke, *supra* note 294; BBC NEWS, *supra* note 295.

333. *Critical Habitat*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/national/endangered-species-conservation/critical-habitat> (last visited Apr. 8, 2022).

334. *See supra* Part II (discussing canned hunting).

335. GOV.UK, *supra* note 31 (“Government response to the consultation and call for evidence sets out one of the toughest bans in the world on the import of hunting trophies.”); *see also* UK PARLIAMENT, *supra* note 31.

336. Peter A. Lindsey et al., *Trophy Hunting and Conservation in Africa: Problems and One Potential Solution*, 21 CONSERVATION BIOLOGY 880, 880–83 (2007).

The average yearly income in America happens to be about \$59,000, the same rough amount that an international trophy hunt costs.³³⁷ Thus, it is not rocket science to think that the average person in America would find it difficult to support a rich person spending what amounts to a year's income of the average American on an international travel spree to go kill a rare animal that is already facing hard times trying to survive. And yet, law, ethics, or public relations concerns do not bother many folks who still plan such expensive, exotic, thrill-seeking trips.³³⁸

While the current CEO of the Humane Society argues that trophy hunting of iconic species, such as lions, is a relic of the colonial past and a hobby reserved for the very wealthy and unfit for today's society, there are pro-hunting groups, albeit not as many in number, with opposite views.³³⁹ For any party wishing to offer attractive, practical solutions to both sides of this debate, it is important to recognize the indoctrinated and divergent views on whether we should be loosening or tightening up our laws to more easily allow or discourage this rare form of hunting.³⁴⁰ For example, one needs to understand the trophy hunter from Texas who went to Africa and commented that she “[s]potted this rare black giraffe bull and stalked him for quite a while. [She] knew it was the one. He was 18 years old, 4[,]000 lbs” and the pictures online of her beside the giant dead giraffe.³⁴¹ Equally, it is important to understand the resistance to this practice and listen to, for example, the CEO of the Humane Society who recently stated that “[t]rophy hunting of

337. According to the U.S. Census Bureau's report in September 2017, the real median household income was \$59,039 in 2016. JESSICA L. SEMEGA ET. AL., U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2016, at 5 (2017), <https://www.census.gov/content/dam/Census/library/publications/2017/demo/P60-259.pdf>.

338. See, e.g., Nes Novacic, “*He was Delicious*”: Trophy Hunters Defend Killing Iconic Animals, CBS NEWS (June 7, 2019, 7:36 AM), <https://www.cbsnews.com/news/trophy-hunting-killing-or-conservation-cbsn-originals/>.

339. *Trophy Hunting: Killing and Displaying Wild Animals as Trophies*, FOUR PAWS IN US, <https://www.fourpawsusa.org/campaigns-topics/topics/wild-animals/trophy-hunting> (last visited Apr. 8, 2022) (“Every year, hunters from Europe and the United States travel to Africa to participate in ‘trophy hunting,’ the act in which hunters bring home dead animals to display as trophies and souvenirs on their walls . . . [G]ruesome form of trophy hunting in South Africa called canned lion hunting, where an estimated 10,000 [to] 12,000 captive lions await a deadly fate.”); see also *Trophy Hunting – Are There Pros to Go with the Cons?*, RANGERMAC.ORG, <https://rangermac.org/trophy-hunting-pros-go-cons/> (last visited Apr. 8, 2022); Amy Dickman, *Ending Trophy Hunting Could Actually Be Worse for Endangered Species*, CNN (Jan. 4, 2018), <https://www.cnn.com/2017/11/24/opinions/trophy-hunting-decline-of-species-opinion-dickman/index.html>.

340. Melanie Flynn, *Trophy Hunting – Can It Really Be Justified by ‘Conservation Benefits’?*, THE CONVERSATION (Oct. 10, 2019), <https://theconversation.com/trophy-hunting-can-it-really-be-justified-by-conservation-benefits-121921>; see also Josh Robertson, *Trophy Hunting*, CONSERVATION CONVERSATION, <https://www.conversationconversation.co.uk/trophy-hunting> (last visited Apr. 8, 2022); High Webster, *Trophy Hunting – A Complex Picture*, CONSERVATION FRONTLINES (Oct. 2, 2020), <https://www.conservationfrontlines.org/2020/10/trophy-hunting-a-complex-picture/>.

341. Elinor Aspegren, *After Backlash for Slain Giraffe Photo, Hunter Says Animal was ‘Majestic,’ ‘Delicious’*, USA TODAY (June 7, 2019), <https://www.usatoday.com/story/news/nation/2019/06/07/viral-photo-giraffe-hunter-no-regrets/1379728001/>.

giraffe [shows] sheer [and] arrogant disregard for the imperiled status of [an] iconic species Their dire conservation status should not be further compounded by the horror of trophy hunters bent on killing them for senseless and gruesome trophies.”³⁴²

Having read some literature to understand the deeper feelings of opposing parties on this issue of hunting sometimes very rare animals,³⁴³ this author suggests there are solutions that both pro-trophy hunting and antitrophy hunting parties to the debate may find palatable. And one day, if both sides see any one of the four proposals work on a pragmatic level, then perhaps more advocacy can result in the changing, or at least fine-tuning, of our existing laws on this issue at a later date.

Because it is hard to control other countries’ laws and hunting regulations, one possible solution to discourage international trophy hunts is to levy an automatic large fine (For example, \$250,000) if any evidence comes to light of a new kill (including pictures online of the recently dead rare animal with the hunter). The rarer the animal, the larger the fine. These fines can be listed transparently such that the wealthy, eager hunter can still hunt, but they will have to pay for killing rare animals for fun as trophies. This would also generate more money by making it a business, albeit expensive enough by design to discourage but not entirely ban the practice. The U.S. taxpayers would benefit from increased revenue.³⁴⁴ The big game trophy hunter, who typically is very rich, can still go hunt. Crucially, the rare animals would be less prone to being hunted to the point of putting inordinate pressure on their species. Enforcement would also be easier because it would be borderless; any evidence of a recent kill of a listed protected animal anywhere on the planet would trigger the fine.

A second middle ground would be to restrict trophy hunting to older trophy males. This may be hard to enforce because the hunter cannot always tell the age of the animal; however, the idea here is that this practice can at least have the effect that the older male would have had time to spread their good genes before they are killed and that the younger adults can have time

342. *HSI Issues Statement on American Hunter Who Posed with the Giraffe She Killed*, HUMANE SOC’Y INT’L (July 3, 2018), https://www.hsi.org/news-media/giraffe_trophy_hunt_070318/. Kitty Block, President and CEO of the Humane Society, stated: “Trophy hunting of giraffe shows sheer and arrogant disregard for the imperiled status of an iconic species There has been an overall population decline of 40 percent over the last 30 years.” *American Hunter in Viral Photo of Slain Giraffe is “Proud to Hunt.”* CBS NEWS (June 7, 2019, 11:06 AM), <https://www.cbs7.com/content/news/American-hunter-in-viral-photo-of-slain-giraffe-is-proud-to-hunt-510969681.html>.

343. J. J. Jackson III, *An International Perspective on Trophy Hunting*, in *TOURIST HUNTING IN TANZANIA*, at 7–11 (1996) (promoting international trophy hunting); see also Enrico Di Minin et al., *Banning Trophy Hunting Will Exacerbate Biodiversity Loss*, 31 *TRENDS IN ECOLOGY & EVOLUTION* 91, 99–102 (2016) (“[T]rophy hunting can be an important conservation tool, provided it can be done in a controlled manner to benefit biodiversity conservation and local people.”).

344. See, e.g., Tejvan Pettinger, *Benefits of Economic Growth*, ECON. HELP (Dec. 14, 2019), <https://www.economicshelp.org/macroeconomics/economic-growth/benefits-growth/#:~:text=High%20economic%20growth%20leads%20to,to%20take%20risks%20and%20innovate>.

to mature and reproduce. This can also, at least potentially, help future populations of the rare animals keep good genes from an evolutionary perspective and adapt to extreme challenges the animals will face in view of environmental changes affecting them.

A third proposal would allow such hunts to continue as is but with a twist. If it is the excitement, planning, and travel that matters for such trophy hunting of rare animals, then we should keep that. So, under this proposal, everything would remain the same, including the set-up, planning, the build-up to the hunt, travel to the foreign location, the seeking, waiting, stalking, the excitement, the thrill, and yes, the shooting of the rare animal will all remain the same. The photo opportunity would also remain the same, with the hunter being able to examine the rare large animal and lift it on the hunter's shoulder or sit beside it and take pictures.

The middle ground give-and-take here would be that, under this proposal, it would be illegal to actually kill the rare animal. Thus, it would be only the nature of the bullets the law would seek to regulate, not the hunter's gun nor any aspect of the trophy hunter's practices, so that the experience and the joy and thrill for the trophy hunter would remain the same. In this proposal, the trophy hunter would be required to use only tranquilizer bullets so that after the hunter shoots and brings the rare large animal down and after pictures are taken, the hunter would be best advised to walk away and allow the glorious animal to sleep and wake up some hours later. The prospect remains for the unfortunate specter of having one rare animal be shot twice in as many years with tranquilizer bullets by different hunters; however, sleeping off the drug is better than the animal being shot once with a real bullet that kills.

Of course, a combination of the shoot-not-to-kill proposal and the proposal to levy heavy fines if any hunter does indeed kill—and shows it online—can also be a proposal to consider.

Lastly, in the case of lions in Africa, to make sure Africa's lions do not suffer a similar fate to tigers in Asia, educational campaigns in Africa and Asia, especially in China, are required to focus on the demand for lion products. The United Nations Convention on International Trade in Endangered Species has already noted the international trade in lion body parts has the potential to grow uncontrollably, as it has with other big cats.³⁴⁵ One key focus would be to use special educational campaigns to suppress the demand from Asia for these body parts before it decimates Africa's wild lions. Such campaigns would aim to educate the public in Asia about the current state of lions and discourage the use of big cat body parts in traditional medicines by debunking false medicinal beliefs and encouraging local conservation efforts in Africa.

345. See *supra* notes 78–80, 167–70 and accompanying text (discussing the effects of lion hunting on the population and the role of the convention).

VII. CONCLUSION

As a member of the animal species, we as humans have an ethical, even if not legal, obligation and duty to honor God's creation of our fellow mammals and to not accelerate the decline of rare animals facing hard times on our planet. We may not understand them enough to talk to them, but God has created these indisputably glorious large rare animals to live by our side and our interactions with them ought to have some balance and be seen as more than a property right.