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Editor's Note
Advocacy Groups Make a Difference

David Cuillier, Ph.D., Editor, *University of Arizona*

At last, we have empirical evidence that public records acquisition works better in states served by nonprofit independent advocacy organizations.

In this issue of the *Journal of Civic Information*, A.Jay Wagner of Marquette University presents his findings from a field survey employing 1,002 public records requests across nine states. The key takeaway:

States with active freedom of information coalitions have better compliance with public record laws, meaning faster response, more communication from the agency, and more likelihood to receive records requested.

Florida, Wisconsin, Iowa, Maine, Oklahoma, New Jersey, and Washington state all have active coalitions for open government, and requests submitted to their county governments came out much better than counties in states without coalitions, Wyoming and Mississippi. His study identified other interesting findings, as well.

Granted, it's a little too early to pop the research champagne cork. This is just one study with just nine states, and correlation doesn't equal causation. But every piece of data helps us learn a little more about what matters in making civic information flow more freely, creating a more informed electorate, and ultimately a better society.

In all transparency, I am biased on this topic, as board president of the National Freedom of Information Coalition, which promotes and supports the more than 40 state freedom of information coalitions nationwide, including Guam and Puerto Rico.

Wagner's findings back up what we've seen anecdotally for decades: States with strong, diverse nonprofit coalitions promoting government transparency tend to enact stronger laws and build a culture of openness.

A survey of the coalitions earlier this year by NFOIC found that 80% offer hotlines for the public, about three-quarters help draft legislation, and many have aided dozens of lawsuits to improve transparency.[1] Some coalitions have led effective FOI audits, leading to change, as

[1] Todd Fettig and David Cuillier, *States of Denial*, National Freedom of Information Coalition (March 15, 2021), https://drive.google.com/file/d/1L8yJY1Lrufg-rfqxFBqQfsi54BUhsBRK/view.

described from a previous research project in the *Journal of Civic Information*, by Kevin Walby and Jeff Yaremko of the University of Winnipeg.[2]

The question is, do strong broad-based coalitions *cause* more transparency in a state, or is there something about the states that lead to stronger laws and creation of coalitions? That's the million dollar question, and one we will need more studies to get at. I suspect, like a lot of research, that it will be complicated, and that perhaps a little of both is going on.

Ultimately, though, the growing body of research indicates that nonprofit coalitions for open government make a difference, and they should be supported generously if we want to maintain this experiment we call democracy.

Case in point: The other article in this issue of the journal focuses on the lack of transparency in environmental records, as explained by Benjamin W. Cramer of Penn State. The bureaucratic process of saving species in the United States is clouded in secrecy, and when information is revealed it is often far too late to help the plants and animals in peril.

So who is going to go to bat for freedom of information, and indirectly for the snail darter and northern spotted owl?

The government? Some well-intentioned officials, perhaps, but many do not see it in their own best interest.

Corporations? Only if it boosts profit margins, and history shows they work harder to close records, not pry them open.[3]

News organizations? Sure, some are still active in fighting for records,[4] but legacy news is weakened, and journalists are less likely to acquire and litigate for records than in decades past.[5]

Academics and university law clinics? A growing community, but focused on teaching and their own research priorities, as they probably should be.

Everyday Joes and Janes? Some dedicated gadflies work hard for their communities, often lone voices against more powerful institutions.

All of these actors play a role in improving the information ecosystem, but they are less powerful on their own. It takes broad-based organizations, like the nonprofit coalitions in Wagner's study, to pull constituencies together and galvanize action for open, accountable government.

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[2] Kevin Walby and Jeff Yaremko, *Freedom of Information Audits as Access Advocacy,* 2 J. CIVIC INFO 2, 22-42 (2020).
[3] Jeannine Relly and Carol Schwalbe, *How Business Lobby Networks Shaped the U.S. Freedom of Information Act: An Examination of 60 Years of Congressional Testimony,* 33 JOURNALISM 3, 404-16 (2016).
[4] *See* the hundreds of Freedom of Information Act lawsuits filed by news organizations, particularly *The New York Times* and BuzzFeed News, as per The FOIA Project from the Transactional Records Access Clearinghouse at Syracuse University, http://foiaproject.org/.
[5] *See In Defense of the First Amendment,* Knight Foundation (April 2016), https://knightfoundation.org/reports/defense-first-amendment/.

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Nearly Extinct in the Wild: The Vulnerable Transparency of the Endangered Species List

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Abstract

This article reconstructs the Endangered Species Act as a government information statute. That Act makes use of an official list of vulnerable creatures that is used for agency action to save them from extinction. This article argues that the official list of species is not sufficiently accurate or transparent to citizens, so the compilation of that list does not satisfy the public interest goals of American environmental law or government transparency policy.

* Benjamin W. Cramer is an associate teaching professor at the Donald P. Bellisario College of Communications at Pennsylvania State University. Please send correspondence about this article to Benjamin W. Cramer at bwc124@psu.edu. An earlier version of this research under a different title was presented at an academic conference in 2011. This version is updated and expanded with additional judicial history and new research on developments through 2021.

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I. Introduction

The Endangered Species Act (ESA) in the United States[1] seeks to save animals and plants from extinction. The Act is popular among environmentalists who wish to prevent the loss of the Earth's creatures forever, but it is loathed by development interests due to its mandate for protecting such creatures by outlawing damage to their habitats. This Act is dependent upon a deceptively vulnerable item of government-held information: an official list of creatures that have qualified for protection.[2] This list, the management of which is mandated by the ESA[3] and under the purview of the U.S. Fish & Wildlife Service[4] and the National Marine Fisheries Service,[5] includes more than 1,000 animals and plants as of early 2021. These creatures have been deemed by scientists as *threatened* or *endangered* due to low population numbers. The ESA seeks to preserve the existence of those species by preventing destruction of their habitats.[6]

The ESA has generated many court disputes and public controversies, most of which revolve around development projects that threaten habitats. Much less attention has been paid to the list of creatures whose imperiled existence generates those disputes. There is little legal research on the transparency and accountability of the government officials who manage the list and whose activities are governed by it. The list is an item of government-held information that should be subjected to the transparency and disclosure philosophy embodied in the Freedom of Information Act,[7] and several environmental statutes that followed in its wake. The Endangered Species Act itself contains additional requirements for the furnishing of documents by regulated parties, citizen access to government meetings, and public participation in regulatory processes.[8]

The process of adding a creature to the official list, and thus mandating its protection, can be heavily politicized with poorly reported transparency issues. That list can be useful to citizens with ethical concerns about creatures that may be on the brink of disappearing forever, or more immediate concerns about development projects in pristine areas. However, the presence of a creature on that list, or the absence of a creature that *should* be on it, is often not the result of objective science. Political controversy can lead to the listing or delisting of particular species for reasons far removed from the science of habitat health and population levels. Furthermore, scientific uncertainty prevents many deserving creatures from being listed, and previously listed species can be removed from the

[1] 16 U.S.C. §§ 1531-1544 (1973).

[2] The Endangered Species Act envisioned one comprehensive list of vulnerable creatures. However, there are now two lists: one for plants and another for animals. *See infra* note 51. To avoid awkwardness, this article simply uses the generic term *list*. Also, those two documents do not have official titles, and are only referred to in the statute by the generic term *list*. 16 U.S.C. § 1533(c). To avoid vagueness, this article uses "endangered species list" and similar descriptive phrases that are found in research articles and court documents, but those phrases are not official titles. Also, despite common use of the term "endangered species list," the list includes both *endangered* and *threatened* creatures. *See infra* notes 40-41.

[3] 16 U.S.C. § 1533(c)(1).

[4] The U.S. Fish & Wildlife Service is within the Department of the Interior and enforces federal statutes and regulations that are relevant for wildlife and natural habitats, with a traditional focus on environmental conservation in the public interest. *See* U.S. Fish & Wildlife Service, *Conserving the Nature of America*, https://www.fws.gov/.

[5] The National Marine Fisheries Service is within the Department of Commerce and manages the populations of marine creatures not just for purposes of environmental conservation, but to maintain sustainable economic markets for such creatures. *See* NOAA Fisheries, *About Us*, https://www.fisheries.noaa.gov/about-us.

[6] 16 U.S.C. § 1533(a)(4).

[7] 5 U.S.C. § 552 (1966).

[8] *See e.g.*, Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 883 (1963); Vivek Ramkumar & Elena Petkova, *Transparency and Environmental Governance*, *in* THE RIGHT TO KNOW: TRANSPARENCY IN AN OPEN WORLD 282 (Ann Florini ed., 2007).

list regardless of whether their populations have recovered to healthy levels. Meanwhile, obscure processes of administrative law have stifled citizen oversight of the list's accuracy and the accountability of the officials who manage it.

This article reconstructs the Endangered Species Act as an informational statute with unresolved problems of transparency and accountability. The next section will introduce the provisions that make the Endangered Species Act an informational statute. The subsequent section will discuss the trend in which American courts have neglected the higher goals of the ESA and have adopted a focus on procedural minutiae that reduces citizen oversight of the official list. Next, the article will examine the history of court disputes over creatures that have been added to the list or removed from it for politicized or non-scientific reasons. The article concludes with a discussion of whether the endangered species list is sufficiently transparent and accountable, not just as a matter of American law, but as a matter of public interest in saving creatures from extinction.

II. Informational requirements in American environmental law

When it was enacted in 1973, the Endangered Species Act (ESA) fit into two different statutory trends of its era. The ESA is a key component of a wave a tough environmental laws passed in the early 1970s, when legislators were creating vast governmental solutions to nationwide problems that had overwhelmed local laws.[9] This rush of environmental protection was an offshoot of the civil rights era,[10] when lawmakers tackled racial injustice and inequality with expansive statutes that created entire new federal agencies with large enforcement budgets. The political momentum generated by the civil rights statutes inspired lawmakers to tackle other massive problems in the next round of legislation, with the environment being the next issue of interest.[11]

In a lesser-known trend, the Endangered Species Act and its environmental brethren also flowed from a new outlook on the transparency and accountability of federal government agencies, enshrined in the Freedom of Information Act (FOIA) of 1966.[12] The passage of FOIA revolutionized American government transparency by mandating that all documents should be freely available to citizens unless agency personnel could successfully argue that a particular document should remain secret.[13] This in turn inspired a new outlook on the public policy process, in which the generation of documents on many regulatory topics became compulsory while citizens could exercise oversight of politicians and regulators via easy access to those documents.[14] Some policy areas were subjected to information-intensive overhauls, with environmental policy being among the earliest. A new method of federal lawmaking arose in which aspirational statutes overhauled agency decision-making processes via information management requirements and increased public participation.[15]

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[9] *See* Jack Lewis, *Looking Backward: A Historical Perspective on Environmental Regulations*, 14 EPA JOURNAL 26 (Mar. 1988). Federal environmental statutes originated in the late 1800s, but prior to the early 1970s they were limited to particular issues of land/resource use and did not address pervasive problems like air pollution or deforestation. The much more expansive laws of the 1970s will be discussed *infra*.

[10] *See* RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW 47-66 (2004).

[11] *Id.* at 67-97.

[12] 5 U.S.C. § 552 (1966).

[13] S. REP. NO. 813-89 (1965); H. REP. NO. 1497-89 (1966). For general histories of the trends that led to the passage of FOIA, *see generally* Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966-2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing What the Government's Up To*, 11 COMM. L. & POL'Y 511 (2006); Glen O. Robinson, *Access to Government Information: The American Experience*, 14 FED. L. REV. 35 (1983).

[14] Halstuk and Chamberlin, *supra* note 13, at 531.

[15] *See* E. Donald Elliott, Bruce A. Ackerman, and John C. Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J. L., ECON. & ORG. 313, 333-338 (1985).

In the environmental realm, the burgeoning push for big solutions to big problems, and the concurrent push for the transparency of the government officials involved, were embodied in the National Environmental Policy Act (NEPA) of 1970.[16] This statute mandated not just environmental protection, but the proper management of information *about* that protection, allowing citizens to review how well their government protects the natural world.[17] NEPA is a procedural statute that regulates the activities of the entire federal government to achieve national environmental goals.[18]

NEPA was the first major federal statute that required not just the management of information, but the creation of it by regulated parties. The most important such requirement is the creation of an Environmental Impact Statement (EIS), which must be completed for any environmentally relevant project conducted by any government agency or any private party that it regulates. The statute mandates the scientific specificity of such documents in great levels of detail.[19] The EIS must be approved by the regulatory agency in question, compiled and stored by the Environmental Protection Agency, and furnished to any citizen upon request. Public comments and other types of citizen participation are required throughout the entire process.[20] This made NEPA a groundbreaker in subject matter-oriented government transparency requirements.[21]

The public participation and transparency philosophies of NEPA have been incorporated into most subsequent federal environmental statutes, which have also introduced their own specific information management mandates. Following on the heels of NEPA, Congress passed the much more specific Clean Air Act in 1970[22] and Clean Water Act in 1972.[23] These statutes introduced extensive new permitting requirements for industrial operators, and mandated periodic reports on their ongoing activities.[24] This creates significant amounts of information on the identities of polluters, and the nature and amount of their pollution, all of which are recorded in government-held documents that must be made available to the public upon request.[25]

Some subsequent environmental statutes, including the Endangered Species Act, introduced a third type of government-managed environmental information: official lists that are intended to inform government funding plans, mitigation efforts, enforcement against violators, and oversight of agency compliance. One noteworthy example is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980,[26] popularly known as Superfund, which names toxic dump

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[16] 42 U.S.C. §§ 4321-4375 (1970).

[17] *See* JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVTL. L. & POL'Y 45-46 (2003).

[18] 42 U.S.C. § 4331.

[19] 42 U.S.C. §§ 4332(C)(i)- 4332(C)(v). The Supreme Court has ruled that early "pre-decisional" deliberations and documents, partaken before the ultimate regulatory or informational decisions required by environmental statutes, can be withheld from public disclosure per Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5). United States Fish and Wildlife Service v. Sierra Club, 141 S.Ct. 777 (2021).

[20] 42 U.S.C. § 4332(C).

[21] The influence of NEPA can be seen in later statutes that mandated the transparency of government-held documents in other subject areas, such as finance and health care. *See e.g.* ALASDAIR ROBERTS, BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE 150-170 (2006); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Transparency*, 112 HARV. L. REV. 1197, 1276-89 (1999).

[22] 42 U.S.C. §§ 7401-7671 (1970).

[23] 33 U.S.C. §§ 1251-1387 (1972). This statute was originally known as the Federal Water Pollution Control Act, and was renamed the Clean Water Act upon the passage of amendments in 1977. The amendments are codified at Pub. L. No. 95-217, 91 Stat. 1582-1586 (1977).

[24] Under both statutes, the resulting information and documents are managed by the Environmental Protection Agency. 42 U.S.C. § 7661; 33 U.S.C. § 1341.

[25] The Clean Air Act requires two different types of permits depending on location and specific pollutants, codified at 42 U.S.C. §§ 7470-7492, 7501-7515. Permitting requirements for water pollution were left vague in the original text of the Clean Water Act, but were later codified at 40 C.F.R. § 122.21 (1983).

[26] 42 U.S.C. §§ 9601-9675 (1980).

sites and funds cleanup efforts that are often very expensive. These forlorn locations appear in a government-managed list on which unfortunate new discoveries are added and ameliorated sites are removed.[27] This type of managed list is also a crucial component of the Endangered Species Act.

The informational philosophy of the Endangered Species Act

In addition to its obvious goals on behalf of vulnerable creatures and the health of the natural world, this article contends that the Endangered Species Act is also an informational statute with transparency and accountability issues concerning the government officials who manage that information. No vulnerable creature will be the focus of any federal protection effort until that creature appears on a list that is itself vulnerable.

The need for federal protection of vulnerable creatures, mostly for reasons of their value to commerce and tourism, came up in 1969 during Congressional debates over the passage of the National Environmental Policy Act ("NEPA").[28] Senator Philip Hart (D-Mich.) proclaimed that rare species should be saved from extinction to "permit the regeneration of species to a level where controlled exploitation of that species can be resumed" because "with each species we eliminate, we reduce the [gene] pool… which may subsequently prove invaluable to mankind in improving domestic animals or increasing resistance to disease or environmental contaminants."[29] Species preservation was left out of NEPA, but the topic remained popular in political discussions, because scientists were beginning to sound the alarm on mass extinctions during this period,[30] while ambitious environmental statutes found favor among federal politicians and their constituents.[31]

Meanwhile, scientists had concluded during this period that one of the primary reasons animals and plants become endangered is the destruction of their habitats in favor of human developments. This raised the issue of statutory restrictions on land usage.[32] An endangered species protection bill was introduced in 1973, and during debate the House of Representatives reviewed the latest research on the importance of habitat preservation for an endangered species' survival, while noting that unchecked human construction and development were the main culprits. Representative Leonor Sullivan (D-Mo.) proclaimed that "as we homogenize the habitats in which these plants and animals evolved… we threaten their – and our own – genetic heritage."[33] It should be noted that the ensuing congressional debate was focused almost entirely on the economic losses that could occur if

[27] While outside of the scope of this article, the official list of federally significant toxic dump sites under the Superfund program is particularly prone to secrecy and political manipulation, due to the vast amounts of taxpayer money used to clean up such sites and the potential liability of the original polluters. *See generally* Dashiell Shapiro, *Superdumb Discrimination in Superfund: CERCLA Section 107 Violates Equal Protection*, 2002 U. CHI. LEGAL F. 331 (2002); Martina E. Cartwright, *Superfund: It's No Longer Super and It Isn't Much of a Fund*, 18 TUL. ENVTL. L.J. 299 (2005).
[28] *See* LAZARUS, THE MAKING OF ENVIRONMENTAL LAW, *supra* note 10, at 70-73.
[29] S. REP. NO. 91-526 at 3 (1969).
[30] The 1962 book SILENT SPRING by Rachel Carson alerted nature lovers to the effects of toxic pesticides on birds that eat the targeted bugs. By about 1970, the plight of the charismatic bald eagle and peregrine falcon, the populations of which were declining rapidly for that reason, caught the public's attention. *See* Martha Williams, *Lessons from the Wolf Wars: Recovery v. Delisting under the Endangered Species Act*, 27 FORDHAM ENVTL. L. REV. 110, 114 (2015).
[31] *See* MARY GRAHAM, DEMOCRACY BY DISCLOSURE: THE RISE OF TECHNOPOPULISM 77-90 (2002).
[32] *See* Erica Goode, *A Shifting Approach to Saving Endangered Species*, N.Y. TIMES (Oct. 5, 2015), http://nyti.ms/1Ng1OzG.
[33] H.R. REP. NO. 93-412 at 4 (1973). The statute's original title was the Endangered and Threatened Species Conservation Act of 1973.

charismatic creatures disappeared; for example, Rep. Sullivan cited losses for "furriers and hunters around the world" if big cats like tigers and cheetahs went extinct.[34]

The Congressional Record from the 1973 debates indicates an attitude toward protecting endangered species that was quite different from the focus on ecosystem health espoused by scientists then and now, not to mention the philosophical and ethical questions raised by environmentalists who despair when beloved animals and plants disappear forever. For instance, the final draft of the Endangered Species Act certainly instructed the U.S. government to ameliorate the destruction of an endangered species' habitat,[35] but the only activities that the Act expressly prohibited involved the commercial transport of such creatures.[36] This has caused some members of the judiciary to conclude that the ESA is focused on commerce.[37]

Nonetheless, the text of the ESA begins with a proclamation on the need to save the world's creatures from disappearing: "the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction."[38] Under the Act, all federal government agencies and all the private parties they regulate must avoid damaging the "critical habitat"[39] of any species that has been deemed "endangered"[40] or "threatened,"[41] under the rationale that saving such species from extinction is in the public interest.[42]

For most American animal and plant species, observance of the ESA was placed under the jurisdiction of the U.S. Fish & Wildlife Service (FWS), which is the federal subject matter authority on wildlife management.[43] The ESA mandates FWS investigation into any action by federal agencies or their regulated parties that may damage the habitat of any creature that has been placed on the official endangered species list.[44] That list is itself managed by the FWS, and includes creatures deemed worthy of protection by scientific researchers who work for or with the FWS. Citizens may also petition for the inclusion of a particular species on the list.[45]

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[34] *Id.* at 5. Note that none of the animals cited by Rep. Sullivan resided in the United States, while elsewhere in her testimony she relied on hypothetical examples like a rare plant that could contain a cure for cancer.

[35] 16 U.S.C. §§ 1536(a)(2)-1536(a)(3).

[36] 16 U.S.C. § 1538(a)(1).

[37] *See e.g.* National Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir., 1997). This case arose from a development dispute in California, in which the ESA prevented construction on a coveted land parcel. Judge Patricia Wald ruled that "one of the primary reasons that Congress sought to protect endangered species from 'takings' was the importance of the continuing availability of a wide variety of species to interstate commerce." *Id.* at 1050. In reaching this interpretation, Judge Wald cited the aforementioned congressional testimony by Rep. Sullivan and her use of the term "products." *See supra* notes 33-34 and accompanying text. The above quote by Judge Wald has since been cited verbatim in Shields v. Babbitt, 229 F.Supp.2d 638, 659-60 (W.D. Tex., 2000); and Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1073 (D.C. Cir., 2003).

[38] 16 U.S.C. § 1531(a)(4).

[39] *Critical habitat* is defined as "the specific areas within the geographical area occupied by the species," "essential to the conservation of the species," and "which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A).

[40] An *endangered species* is defined as "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6).

[41] A *threatened species* is defined as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. §§ 1532(20).

[42] 16 U.S.C. §§ 1531(b)-1531(c).

[43] For purposes of brevity, this article assumes that typical government actions toward endangered species are under the purview of the Fish & Wildlife Service. However, recall that some species are managed by the National Marine Fisheries Service; *see supra* note 5.

[44] 16 U.S.C. § 1533.

[45] 16 U.S.C. § 1537(a).

Whenever warranted, the ESA requires federal agencies to contact the FWS for expert guidance on species population levels or critical habitats before taking any action during construction and development projects.[46] For instance, the Federal Communications Commission must contact the FWS whenever issuing permits for antenna towers to be placed along the migration routes of endangered birds, because birds are known to collide with such towers frequently.[47] The ESA also requires the use of independent scientists,[48] who not only compile the list of endangered species and determine the locations of critical habitats, but may also issue opinions on the development projects at hand.[49]

Most pertinent for the present article, the contents and management of the official list of endangered species are clearly delineated in the Act's text:

> The Secretary of the Interior shall publish in the Federal Register a list of all species determined by him or the Secretary of Commerce to be endangered species and a list of all species determined by him or the Secretary of Commerce to be threatened species. Each list shall refer to the species contained therein by scientific and common name or names, if any, specify with respect to each such species over what portion of its range it is endangered or threatened, and specify any critical habitat within such range.[50]

Note that the original text of the ESA used the term *list* in the singular, but the information has since been split into two lists, perhaps as an unfortunate illustration of the sheer quantity of vulnerable creatures.[51] Those lists are the catalysts for enforcement of the ESA, because the actions of federal agencies and the parties they regulate must not infringe on the habitats of any of the included species. This is usually accomplished via civil lawsuits against agency violations of the ESA, when citizens suspect that an agency and/or its regulated party did not do enough to prevent critical habitat loss during a development project. The FWS and the Department of the Interior can charge administrative penalties against the offending government agencies,[52] and possibly criminal penalties against private parties that damage protected habitats.[53]

Thus, the official list of endangered species under the ESA is an item of government-managed information that must be transparent and made available to citizens upon request,[54] not only per the requirements of the Endangered Species Act itself, but also under the Freedom of Information Act[55] and the Administrative Procedure Act.[56] Therefore, the Endangered Species Act can be considered an informational statute. However, disputes over habitat protection under the ESA, the transparency of the list of vulnerable creatures, and the accountability of the officials who manage that list, all fall

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[46] 16 U.S.C. § 1536(a)(2).
[47] Benjamin W. Cramer, *For the Birds: The FCC and Avian Mortality at Communications Towers*; 14 INFO 3, 6 (2012).
[48] 16 U.S.C. § 1533(b)(1)(A).
[49] *See* SAMUEL P. HAYS, WARS IN THE WOODS: THE RISE OF ECOLOGICAL FORESTRY IN AMERICA 25 (2007).
[50] 16 U.S.C. § 1533(c)(1).
[51] The list of endangered and threatened wildlife (animals) is found at 50 C.F.R. § 17.11 (1973); the list of endangered and threatened plants is found at 50 C.F.R. § 17.12 (1973).
[52] 16 U.S.C. §§ 1540(c), 1540(g).
[53] 16 U.S.C. §§ 1540(a), 1540(b), 1540(e).
[54] Whether or not the lists are *transparent* is the focus of the remainder of this article, but the current lists can be easily found online, in many different searchable formats, at the FWS website. *See e.g.*, U.S. Fish & Wildlife Service, ECOS: Environmental Conservation Online System, https://ecos.fws.gov/ecp/.
[55] 5 U.S.C. § 552 (1966).
[56] 5 U.S.C. §§ 500-706 (1946).

under the rubric of administrative jurisprudence, in which the observance of procedure tends to take priority over the Act's public interest goals.

This pattern of jurisprudence was not considered at the time of the Act's passage. The Endangered Species Act faced little opposition in Congress, with no member of the Senate and only four members of the House of Representatives voting against it. There was also little media coverage when President Richard Nixon signed the law into effect on December 28, 1973.[57] Little did those lawmakers know how controversial the Act would become. Within just a few years, the ESA would become one of America's most divisive laws, attracting bitter opposition from economic interests while enjoying passionate support from nature lovers.[58] The inevitable political and legal disputes make the collection and management of accurate and accountable information on vulnerable creatures all the more important.

III. Substantive vs. procedural species protection

Since environmental protection in the United States is performed by executive branch agencies, the activities of those agencies fall under the realm of administrative law. This creates a conundrum because administrative law is by nature reactive, while most environmental protection statutes strive to be proactive.[59] Government officials are required by these laws to follow mandated procedures, but citizens are relegated to reviewing those procedural activities after the fact and if impropriety is found, initiating court challenges over procedural errors.

Per established administrative procedure, a successful citizen suit against agency malfeasance, while appearing to be a victory in court, often results in a mere "do-over" in which the agency makes minor procedural adjustments (such as issuing a call for citizen comments that it neglected to do the first time), after which the same regulatory decision is often reached. Also, such a courtroom victory typically comes too late to prevent the damage caused by the regulatory decision at issue, even if that decision was made inappropriately.[60] This conundrum is particularly acute in environmental law, in which an improper agency decision can result in irreparable damage to the natural world, after which concerned citizens can only object to procedural oversights that were made long before.[61]

The Endangered Species Act and its brethren are modeled after the procedural requirements of the National Environmental Policy Act,[62] which requires courts to review the minutiae of procedural compliance at regulatory agencies rather than the public interest-inspired spirit of those statutes. Surprisingly, those substantive goals enjoyed brief support amongst the federal judiciary, exemplified by the first NEPA-related case to reach the Circuit Court level. In the *Calvert Cliffs* ruling of 1971, the D.C. Circuit declared that "NEPA requires agencies [to] consider the

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[57] *See* SALZMAN & THOMPSON, *supra* note 17, at 255.

[58] For an analysis of modern critical views of the Act, *see generally* N. Scott Arnold, *The Endangered Species Act, Regulatory Taking and Public Goods*, 26 SOCIAL PHIL. & POL'Y 353 (2009); Annemarie Monique Taylor, *Death by a Thousand Cuts: Regulatory Takings under the Endangered Species Act*, 26 SAN JOAQUIN AGRIC. L. REV. 261 (2016-2017). For a discussion of recent conflicts between environmentalists and politicians over the interpretation and enforcement of the Act, *see* Jonathan Wood, *To Recover Endangered Species, Reduce Conflict and Reward Landowners Who Restore Habitat*, THE HILL (Dec. 22, 2020), https://thehill.com/opinion/energy-environment/530874-to-recover-endangered-species-reduce-conflict-and-reward.

[59] *See* LAZARUS, THE MAKING OF ENVIRONMENTAL LAW, *supra* note 10, at 185.

[60] *See* Wendy E. Wagner, *Commons Ignorance: The Failure of Environmental Law to Produce Needed Information on Health and the Environment*, 53 DUKE L. J. 1619, 1717-26 (2004).

[61] *Id.* at 1718.

[62] *See supra* notes 16-18 and accompanying text.

environmental impact of their actions to the fullest extent possible," and "at every stage where an overall balancing of environmental and nonenvironmental factors is appropriate."[63]

This judicial deference to substantive environmental protection would not last much longer. Since *Calvert Cliffs*, the courts have acknowledged the lofty goals of federal environmental protection in an informal fashion, but usually hand down rulings on mundane matters of procedural compliance. A crucial turning point came with the 1980 Supreme Court ruling in the *Strycker's Bay* case. Here the high court found that if an agency has followed proper statutory procedures when making a regulatory decision on environmental protection, and as long as that decision was not made arbitrarily and capriciously, then the procedural requirements of the environmental statute (NEPA in this case) are satisfied and the agency cannot be culpable for malfeasance.[64] This established the precedent that the major American environmental statutes do not give judges the authority to overrule agency regulatory decisions unless they were reached after demonstrable procedural errors, nor can judges opine on the environmental quality of those agency actions. Therefore, most American environmental laws allow procedural review but not substantive review.[65]

To put it more bluntly, American environmental statutes allow poor environmental decisions that are based on proper procedures. This is standard administrative law procedure, with the perhaps unintended consequence of sapping the environmental protection goals of these information-intensive statutes by focusing on how information is compiled. In turn, there is much less judicial consideration of whether the resulting information is even accurate or useful to citizen activists and government watchdogs, or whether the ultimate agency regulatory decision reflects the substantive philosophy of the statute in question.[66] This in turn has an impact on the effectiveness of the Endangered Species Act, because no vulnerable creature will be considered for protection unless it appears on the official list, which is dependent upon those same administrative procedures.

Specifically for the Endangered Species Act, the official list of creatures that is supposed to be the catalyst for federal habitat protection efforts is only ever reviewed by courts if a particular creature's presence on the list (or lack thereof) was decided via improperly followed procedures. There is little recourse for scientists or nature lovers who doubt the list's accuracy, and as will be discussed below, the official list is prone to administrative obfuscation and political interference. The ESA's judicial history raises serious questions about its effectiveness as an information-based statute, the integrity of decisions made while compiling the endangered species list, and the effectiveness of regulatory decisions that are mandated by the list.[67]

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[63] Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm'n, 449 F.2d 1109, 1118 (D.C. Cir. 1971). Some internal quotation marks omitted. The quoted statement refers to 42 U.S.C. § 4332(2)(C), which delineates the Environmental Impact Statement process. This dispute involved a permit for the construction of a nuclear power plant in Maryland, with local citizens believing that the Environmental Impact Statement required by NEPA had been compiled inappropriately. The court ultimately ordered the Atomic Energy Commission to correct some procedural errors in the compilation of the document, after which the facility was built.

[64] Strycker's Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227 (1980). This case involved an allegedly faulty Environmental Impact Statement compiled by the Department of Housing and Urban Development for a low-income housing project in New York City that was opposed by local residents. "Arbitrary and capricious" decision-making by government agencies is prohibited under the Administrative Procedure Act, 5 U.S.C. § 706 (2)(A).

[65] *See* SALZMAN & THOMPSON, *supra* note 17, at 277.

[66] Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*. 102 COLUMBIA L. REV. 903, 909-916 (2002).

[67] The following judicial history *infra* does not cover all the provisions of the Endangered Species Act, but focuses on rulings that are relevant to the list of vulnerable creatures. The majority of ESA disputes involve the management of a particular creature's habitat, particularly if it includes privately-owned land. For an introductory list of cases, *see* The National Agricultural Law Center, *Case Law Index Endangered Species Act*, https://nationalaglawcenter.org/aglaw-reporter/case-law-index/esa/.

Snail darters and the Hand of God (Squad)

The sweeping environmental protection statutes of the early 1970s briefly enjoyed some judicial deference to their lofty goals, but the honeymoon soon came to an end when the regulatory ramifications[68] and seemingly unattainable goals[69] of those statutes became the topics of court disputes. Just a few years after its passage, the ESA became the impetus for a bitter legal and political feud that persists to the present day. The public interest in preservation of the natural world was pitted against economic and development interests, with politics defining the sides and obstructing compromise.[70] By the late 1970s, opponents of the new environmental protection regime found an opportunity in a judicial injunction against the construction of a dam in Tennessee. When the potential power of the ESA became evident, anti-regulation interests engaged in a battle to impugn the ESA and environmental law in general, in ways from which the spirit of federal environmental protection has never quite recovered.[71]

A homely little fish called the snail darter, which in the 1970s lived only in a few rivers in eastern Tennessee, was the unlikely catalyst for this turning point in American environmental jurisprudence.[72] The Tennessee Valley Authority (TVA) began to construct Tellico Dam on the Little Tennessee River in 1967, several years before the advent of the Endangered Species Act. Members of a local chapter of Environmental Defense Fund opposed the project; they had little statutory recourse but managed to stall construction for a few years. Shortly after the National Environmental Policy Act went into effect in 1970, the citizens' group sued for procedural violations in the compilation of the project's Environmental Impact Statement. This merely enabled another delay in construction. Illustrating the emerging procedural focus of the courts toward environmental statutes, the TVA was instructed to prepare an appropriate document and then plans for construction were allowed to proceed.[73]

The year after that temporary victory in court, the newly passed Endangered Species Act gave the citizens' group a more powerful statutory weapon. The previously unknown snail darter was discovered by a biologist in the Little Tennessee River in 1973, shortly before the ESA went into

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[68] The shift in attitudes toward the early-'70s statutes is often attributed to the changing outlook of President Richard Nixon. Upon first taking office in 1969, Nixon supported environmentalism, though this may have been for reasons of political expediency rather than personal belief. The National Environmental Policy Act, Clean Air Act, Clean Water Act, and Endangered Species Act were all signed into effect by Nixon, and the Environmental Protection Agency was established during his administration. By the beginning of his second term in 1973, Nixon began to criticize the increase in governmental power enabled by those statutes, and he re-aligned himself with industrial and business interests who objected to the supposedly onerous new environmental requirements. Nixon's shift foreshadowed the end of America's support for sweeping civil rights-inspired statutes for the environment and other matters of the public interest. *See* J. BROOKS FLIPPEN, NIXON AND THE ENVIRONMENT 199-214 (2000).

[69] *See* LAZARUS, *supra* note 10, at 190.

[70] *See e.g.* Dale Deborah Brodkey, *The Snail Darter v. The Tennessee Valley Authority: Is the Endangered Species Act Endangered*, 66 KENTUCKY L.J. 363 (1977); David D. Freudenthal, *Snail Darters–A Threat to Private Use of the Public Domain–Tennessee Valley Authority v. Hill*, 14 LAND & WATER L. REV. 105 (1979).

[71] *See* Riley E. Dunlap, *Public Opinion and Environmental Policy*, JAMES P. LESTER, ED. 2 ENVIRONMENTAL POLITICS AND POLICY: THEORIES AND EVIDENCE 63-114 (1997).

[72] The snail darter (*Percina tanasi*) is in the minnow family, reaches a maximum of three inches in length, and is light brown with dark gray spots. It is only known to inhabit the upper tributaries of the Tennessee River. The FWS first listed the snail darter as *endangered* in 1975, and its status was upgraded to *threatened* in 1984. *See* U.S. Fish & Wildlife Service, *Snail darter (Percina tanasi)*, https://ecos.fws.gov/ecp/species/5603. An organization of independent scientists, the International Union for Conservation of Nature (IUCN), currently lists the snail darter as *vulnerable*. *See* International Union for Conservation of Nature, *Snail darter (Percina tanasi)*, http://www.iucnredlist.org/details/16595/0.

[73] Environmental Defense Fund v. Tennessee Valley Auth., 339 F. Supp. 806 (E.D. Tenn. 1972).

effect, and was determined to be of a dangerously small population.[74] Upon learning of the snail darter and its prospects for survival, the U.S. Fish & Wildlife Service added the fish to the official endangered species list in 1975.[75] By this point, construction of Tellico Dam was partially complete, but opponents finally had solid statutory support for shutting down the project, because it would disrupt the flow of the river that was the only home of the endangered snail darter. The resulting dispute soon reached the federal courts, and the Sixth Circuit shut down construction in 1977 per the habitat protection requirements of the Endangered Species Act.[76] The TVA appealed the injunction to the Supreme Court, and in *Tennessee Valley Authority v. Hill* the following year,[77] the high court upheld the injunction and ruled that the construction of Tellico Dam violated the Endangered Species Act.[78] This case was the first indication of the significant power of the ESA, and the construction project was shut down until a solution to the snail darter's imminent extinction was found.[79]

However, this turned out to be a temporary victory for environmentalists and other opponents of Tellico Dam, because Congress intervened almost immediately after the Supreme Court ruling. At the behest of the dam's supporters and critics of burdensome environmental regulations, in 1978 Congress quickly passed an amendment to the ESA that allowed particular construction projects to be exempted from the Act's habitat protection requirements by vote of a special committee.[80] In a dissent to the *Tennessee Valley Authority* decision, Supreme Court Justice Lewis F. Powell predicted this type of reaction from Congress.[81] Known colloquially as the "God Squad"[82] and composed of representatives from several Cabinet-level departments,[83] this committee immediately voted to arbitrarily exempt Tellico Dam from the requirements of the ESA.[84] Tellico Dam was completed and went into operation just one year later in 1979.

The God Squad's arbitrary decision-making process should raise questions about the transparency of the official endangered species list, its scientific accuracy, and the accountability of the officials who decide which creatures to include in that list and whether or not they receive full protection (as the snail darter did not). This in turn should create doubt about whether the Endangered Species Act can function as Congress originally intended—as a means to preserve plants and animals from extinction by highlighting their needs for protection.

Ironically, both Tellico Dam and the snail darter survived the controversy that pitted them against each other. During the battle over construction, biologists relocated some specimens of the snail darter to other rivers in the region, and populations became established in additional areas of

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[74] U.S. Fish & Wildlife Service, The Snail Darter Recovery Team, *Snail Darter Recovery Plan* (Dec. 17, 1982), https://www.nrc.gov/docs/ML1217/ML12173A447.pdf, at 2.
[75] *See* U.S. Fish & Wildlife Service, *Snail darter*, *supra* note 72.
[76] Hill v. Tennessee Valley Authority, 549 F.2d 1064, 1069 (6th Cir. 1977).
[77] 437 U.S. 153 (1978).
[78] *Id.* at 172-174.
[79] *Id.* at 167-168.
[80] Pub. L. 93-632, 92 Stat. 3751 (1978). This amendment authorized a special Cabinet-level committee, officially known as the Endangered Species Committee, as an amendment to the ESA at 16 U.S.C. § 1536(e), with the procedures for finding an exemption codified at §§ 1536(g)-1536(h).
[81] 437 U.S. 210.
[82] The source of the nickname "God Squad" is difficult to determine, but environmentalists generally decry this committee's ability to decide the fate of endangered creatures as if it has no higher authority. See Ted Gup, *Down with the God Squad*, TIME (Nov. 5, 1990), http://content.time.com/time/subscriber/article/0,33009,971548-1,00.html.
[83] The Endangered Species Committee ("God Squad") includes representatives from the Environmental Protection Agency, National Oceanic and Atmospheric Administration, Council of Economic Advisers, Department of Agriculture, Department of Defense, and Department of the Interior; plus an official from the state containing the contested habitat. 16 U.S.C. § 1536(e)(3).
[84] Jared des Rosiers, *Exemption Process under the Endangered Species Act: How the God Squad Works and Why*, 66 NOTRE DAME L. REV. 825, 845-46 (1991).

Tennessee, Georgia, and Alabama. This allowed the fish's status to be upgraded from *endangered* to merely *threatened* in 1984.[85] By 2019, biologists believed that the snail darter had increased in population enough to no longer need federal habitat protection under the Endangered Species Act.[86]

Private interests strike back

The snail darter dispute was a harbinger of the further erosion of substantive federal environmental protection in the following years. Starting in the 1980s. a newly conservative Supreme Court began to roll back the big public interest protections of the previous decade, and transitioned toward a focus on the rights of private property owners. This transition was inspired not only by broad changes in America's political stances during the Reagan era,[87] but by the reaction to the controversial *Tennessee Valley Authority* decision, as well.[88]

For citizens and scientists concerned about endangered species, their access to information about how federal agencies comply with the ESA was damaged by an esoteric and confusing ruling from the Eighth Circuit in 1989. This ruling weakened the transparency and accountability of efforts to place vulnerable creatures on the official endangered species list and to manage the ensuing habitat protection efforts. This is because the judiciary formulated a focus on procedural minutiae rather than substantive public interest goals.

In the *Defenders of Wildlife* case,[89] a wildlife conservation group accused the Environmental Protection Agency of violating several different federal statutes when it made a regulatory decision to authorize the agricultural use of certain pesticides containing strychnine. The concern was that these poisons would affect not just pests, but other animals—primarily birds, including some that could be endangered—higher in the food chain that fed upon those pests. Defenders of Wildlife claimed that the EPA violated the Federal Insecticide, Fungicide, and Rodenticide Act,[90] which directly regulates such use of pesticides, plus statutes covering the apparently affected animals including the Bald and Golden Eagle Protection Act,[91] the Migratory Bird Treaty Act,[92] and the Endangered Species Act.

The primary source of the dispute was that the EPA made the regulatory decision on pesticides without holding a public administrative hearing.[93] The EPA claimed that certain parties, including environmentalists, need not be invited to such meetings because they could request judicial

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[85] *See* U.S. Fish & Wildlife Service, *Snail darter*, *supra* note 72.

[86] *See Petition Seeks to Remove Snail Darter from Endangered Species List, Marking Conservation Success*, Center for Biological Diversity, press release (July 16, 2019), https://biologicaldiversity.org/w/news/press-releases/petition-seeks-remove-snail-darter-endangered-species-list-marking-conservation-success-2019-07-16/.

[87] *See* Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 VA. ENVTL. L.J. 75, 85-87 (2001).

[88] *See* Zygmunt J. B. Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and Its Consequences*, 19 U. MICH. J.L. REFORM 805, 825-30 (1986).

[89] Defenders of Wildlife v. Administrator, Environmental Protection Agency, 882 F.2d 1294 (8th Cir. 1989).

[90] 7 U.S.C. § 136 (1972). This act regulates the use of pesticides in agriculture in the interests of protecting consumers and the environment. 7 U.S.C. §§ 136(x), 136(bb).

[91] 16 U.S.C. § 668 (1940). This act prohibits the hunting of the two eagle species and other harms to individual specimens. 16 U.S.C. § 668(a).

[92] 16 U.S.C. §§ 703-712 (1918). This act was the first American statute that protected a family of animals purely for their aesthetic and environmental value. The act originated with a 1916 treaty between the United States and United Kingdom (acting on behalf of Canada in international affairs) to limit the rampant hunting of large flocks of birds that migrated across the US/Canada border. *See* Hye-Jong Linda Lee, *The Pragmatic Migratory Bird Act: Protecting "Property"*, 31 B.C. ENVTL. AFF. L. REV. 649, 652-53 (2004).

[93] 882 F.2d 1298. Such meetings are required per the Administrative Procedure Act at 5 U.S.C. § 706(2)(A).

review of the resulting regulatory decisions later.[94] Defenders of Wildlife responded that this procedural stance violated both the proactive spirit of environmental law and the procedural transparency required by the Administrative Procedure Act, as the EPA could make non-transparent decisions that violated procedural requirements, and citizens would have to clean up the mess later.[95]

The Eighth Circuit discussed the procedural requirements of the other statutes that the EPA had been accused of violating,[96] but this article will focus on the court's discussion of the Endangered Species Act. That statute includes its own clear mandate for judicial review and administrative relief of violations by any agency that fails to consider the needs of vulnerable creatures, and it allows any interested citizen to initiate a civil suit against an agency for violations of the Act.[97] In an initial victory for the wildlife lovers, the Eighth Circuit ruled that the EPA's decision on pesticide use was possibly a violation of the Endangered Species Act and was ripe for a civil suit brought by citizens. The EPA was enjoined from codifying the decision until it could prove that the Endangered Species Act had *not* been violated.[98]

However, this ruling only acknowledged that citizens can fight an agency's environmental regulatory decision *after* it has been made, and by the time citizens can bring a suit, it is entirely possible that environmental damage will have been done. Once again, the proactive spirit of American environmental law was subsumed by reactive procedural minutiae, and a bad agency decision could only be rectified after the fact by an order to go back and do the procedure correctly, which could very well lead to the same damaging regulatory decision but this time backed up by proper paperwork. The Eighth Circuit's ruling in the *Defenders of Wildlife* case shows no internal awareness of the procedural quagmire that it unleashed.[99] A threat of judicial review later is a questionable motivation for an agency to act transparently now, and concerned citizens must later rely on contorted procedural arguments to prove that the agency did *not* act transparently. Even though it was only a circuit court case, under the *Defenders of Wildlife* ruling the presence of vulnerable creatures on the official endangered species list did not ensure the protections intended by Congress when it passed the ESA. This convoluted focus on procedures soon reared its head at the Supreme Court as well.

By the early 1990s, the Supreme Court had issued a series of rulings that damaged the public interest rationale of American environmental law, with the Endangered Species Act weakened by association. First, the high court adjusted its views on the standing of environmental activists and other interested citizens when claiming that an environmental statute had been violated. Back in the early 1970s, the high court had ruled that activists with general knowledge of environmental protection did not need to demonstrate "injury in fact" and could act on behalf of the public, even if a volunteer group had no presence in the affected location.[100] The conservative turn in American politics led the high court to rethink this concept by the early 1990s. Two initially unrelated cases

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[94] *Id.* at 1297. The EPA's claim about not inviting certain parties to meetings was supported by a precedent from a different circuit court: Environmental Defense Fund v. Costle, 631 F.2d 922, 932-937 (D.C. Cir. 1980). The possibility for aggrieved citizens to seek judicial review later is supported by the Administrative Procedure Act at 5 U.S.C. § 706(2)(A).

[95] 882 F.2d 1298.

[96] *Id.* at 1298-1299.

[97] 16 U.S.C. § 1540(2).

[98] 882 F.2d 1303-04.

[99] *See* Cass R. Sunstein, *What's Standing after Lujan—Of Citizen Suits, Injuries, and Article III*, 91 MICH. L. REV. 163, 226-31 (1992).

[100] United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973). Standing based on a general interest (also known as the doctrine of "private attorneys general" in administrative law) in saving a natural resource for its own sake was first promoted at the Supreme Court by Justice William O. Douglas in a dissent to Sierra Club v. Morton, 405 U.S. 727, 744-45 (1972).

known as *Lujan I* and *Lujan II* were brought by activist groups against federal agencies that were believed to have violated environmental statutes. In *Lujan I* the high court ruled that an interested volunteer group did not have standing, per the Administrative Procedure Act,[101] unless the group could claim direct injury from the alleged malfeasance.[102] The Endangered Species Act was directly pertinent to *Lujan II*, in which an activist group accused the Department of the Interior of failing to consult with other agencies (which is required under the ESA[103]) when authorizing developments on federally owned lands. The high court ruled that the group must show direct injury, and must also prove that the accused agency was responsible for actual environmental harms arising from the regulatory decision at issue.[104]

The practical outcome of the *Lujan* cases was further entrenchment of the judicial focus on procedural minutiae rather than substantive environmental goals. Citizens were now required to prove direct harms *after* an agency's procedural noncompliance, at which time the environmental damage had been done, while agencies would not be required (even under judicial review) to provide evidence that they had properly observed all required procedures proactively.

The Supreme Court dealt another crucial blow to environmental statutes (including the Endangered Species Act, indirectly) by ruling in 1992 that a private landowner suffered an unconstitutional "regulatory taking" when he was required under a South Carolina state environmental law to alter the use of his land.[105] The landowner also claimed that the land use restrictions caused an uncompensated economic loss, and the high court found this argument persuasive as well.[106] As a result of this ruling, the broad non-economic public interest rationales of environmental laws were no longer sufficient, and a given environmental law had to prove that it did not damage anyone's economic interests.[107] This is particularly vexing for enforcement of the Endangered Species Act, which mandates protection of a vulnerable creature's habitat regardless of who owns the land in question. Thus, protection and rehabilitation actions can be stymied by economic arguments before they begin.[108]

IV. Listing and delisting, and the transparency thereof

As described earlier, this article seeks to frame the Endangered Species Act as an informational statute that raises unique matters of informational availability and transparency, and

[101] 5 U.S.C.A. § 702. Here the high court adopted a reverse interpretation of the language of the Administrative Procedure Act, which states, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." There is no direct indication in § 702 that someone outside of this definition does *not* have standing, but this was the court's interpretation.

[102] Lujan v. National Wildlife Federation, 497 U.S. 871, 871-72 (1990) (involving the volunteer group's dispute with a reclassification by the Department of the Interior of public lands in the American West that would remove their natural protections and allow private industrial development).

[103] 16 U.S.C. § 1536(a)(4).

[104] Lujan v. Defenders of Wildlife, 504 U.S. 555, 568-71 (1992).

[105] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1031-32 (1992). Lucas had purchased oceanfront property in South Carolina with the plan to build houses for sale. Shortly after Lucas's purchase, the state passed the Beachfront Management Act which barred construction for purposes of preserving fragile beachfront ecosystems. That state law was found to have an insufficient description of the public interest it was trying to preserve.

[106] *Id.* at 1052-56.

[107] *See* Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1454-55 (1993).

[108] *Id.* at 1437-40.

the accountability of the government officials who manage that information.[109] The official endangered species list can be particularly useful for citizens who have either ethical concerns about the possibility of the earth's creatures disappearing forever, or specific objections to development projects managed by federal agencies.[110] However, the presence of particular creatures on that list and how they got there, and the absence of other vulnerable creatures and why they are *not* on the list, are not the result of pure scientific consensus among wildlife biologists. Instead, the construction of the official list is often politicized by vested interests, during which transparency and accountability can be trumped by partisan chicanery.

Recall that once a creature is named as endangered or threatened in the ESA, all federal agencies must ensure that any actions by themselves or regulated parties must refrain from damaging that creature's habitat in order to prevent further loss of population.[111] Also recall that this focus on habitat protection has raised land use disputes that have severely damaged popular support of the ESA and federal environmental laws in general.[112] The greatest source of political and economic opposition to the ESA is its power to derail any development project to protect the smallest parcel of habitat for any vulnerable creature, with little room for debate over how to balance natural preservation with the costs of restricting development.[113]

The ongoing controversy has unleashed vested interests that meddle in the composition of the official endangered species list. Some may be nature lovers who want pristine ecosystems to be protected from development and use a local creature as justification; others may be economic interests that want to develop a land parcel and can do so if nobody knows that a vulnerable creature lives there. This has politicized the process under which species are listed as eligible for protection under the ESA.

How a creature becomes officially "endangered" or "threatened"

The majority of case law surrounding the Endangered Species Act concerns restrictions on development projects, but this article will examine a less prominent aspect of ESA case law: disputes over the placement of creatures on the official list and that list's accuracy. In turn, this analysis illustrates the importance of government-managed information and the processes of its creation. Such legal disputes reveal political machinations that damage the very meaning of how we learn that a creature is vulnerable and how to assess whether it receives effective protection from extinction.

The words *endangered* and *threatened* are established scientific terms used by wildlife biologists to assess the health of a creature's population and to determine if it is at risk of extinction.[114] Regardless, the terms are used differently for the administration and enforcement of

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[109] *See supra* notes 16-18 and accompanying text. Also recall that NEPA was partially inspired by the transparency protections of the Freedom of Information Act. *See supra* notes 12-13 and accompanying text.

[110] *See* David S. Wilcove, Margaret McMillan, and Keith C. Winston, *What Exactly Is an Endangered Species? An Analysis of the U.S. Endangered Species List: 1985-1991*, 7 CONSERVATION BIOLOGY 87, 91-92 (1993).

[111] 16 U.S.C. §§ 1531(b)-1531(c).

[112] Regardless of the animosity from landowners and economic interests toward land use restrictions, the value of habitat preservation for saving plants and animals from extinction continues to be confirmed by science. Among wildlife biologists, there is little dispute about the need to preserve critical habitats. *See generally* REED F. NOSS, MICHAEL A. O'CONNELL, AND DENNIS D. MURPHY, THE SCIENCE OF CONSERVATION PLANNING: HABITAT CONSERVATION UNDER THE ENDANGERED SPECIES ACT (1997). However, in recent times some scientists have suggested that protecting the local habitat of a particular endangered species is less effective than focusing on the health of entire ecosystems, which in turn invigorates all the creatures that live there. *See* Goode, *supra* note 32.

[113] *See* SALZMAN & THOMPSON, *supra* note 17, at 256.

[114] At the international level, scientists have developed a much more precise system for categorizing the health of species populations. The International Union for Conservation of Nature (IUCN) has implemented the categories *Least Concern*,

the ESA, at which time they become matters of procedural compliance by government agencies and regulated parties. When listing a creature for protection, agency employees are mandated to observe the transparency requirements of the Freedom of Information Act[115] and the procedural requirements of the Administrative Procedure Act.[116] However, these officials do not work in a political vacuum. Vociferous opposition from both environmentalists and supporters of property rights has turned the listing of species into a contentious and politicized process that may have damaged the informational integrity of the ESA.

Via agency petition and response processes mandated by the Administrative Procedure Act,[117] any citizen can request that the U.S. Fish & Wildlife Service initiate an investigation into a possibly vulnerable species, and the FWS is required to determine the merit of such an investigation and issue a response.[118] The FWS then has one year to perform scientific studies on that creature's population levels and habitat, and is required to officially list the species for protection if investigators find that "natural or manmade factors threaten the species with extinction."[119] There is no requirement for the FWS to consider political or economic factors when making this determination.[120] While courts rarely disagree with the findings of expert scientists,[121] they do frequently find procedural errors in the resulting additions to or subtractions from the official endangered species list, which can then be overturned per administrative law procedure.

Judicial adventures in listing and delisting

The only time a dispute over the protection of a vulnerable species reached the Supreme Court was the *Tennessee Valley Authority* case, but the creature in question (the snail darter) was already listed as endangered by the FWS via proper regulatory procedures mandated by the Endangered Species Act.[122] While the precise matter of the appearance of creatures on the official endangered species list has not been argued at the Supreme Court, there have been numerous rulings on this matter in the lower federal courts, and noteworthy examples will be analyzed here.

Tellingly, there were no such cases specifically about listing or delisting a creature until 1989, which (as described in the previous section) was around the time that the judiciary began to pull back the substantive public interest goals of the Endangered Species Act and shift toward procedural

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Near Threatened, *Vulnerable*, *Endangered*, *Critically Endangered*, *Extinct in the Wild*, and *Extinc*t. Unlike the Endangered Species Act, the IUCN system acknowledges missing information with the additional category *Data Deficient*. As of early 2021, IUCN states that more than 35,000 animals are threatened with extinction; this constitutes 28% of the species whose population figures are known; while there are surely more vulnerable species for whom data is deficient. *See* International Union for Conservation of Nature, *The IUCN Red List of Threatened Species*, https://www.iucnredlist.org/.

[115] 5 U.S.C. §§ 552(a)(1)(B)-552 (a)(1)(D).

[116] 5 U.S.C. § 500(a).

[117] 5 U.S.C. § 553.

[118] 16 U.S.C. § 1533(b)(3)(A).

[119] 16 U.S.C. § 1533(b)(1)(A).

[120] Note that the ESA includes a requirement for the FWS to consider impacts on economic and national security upon listing a species, but this pertains to the effects of losing the species in question or its habitat, not the concerns of landowners or developers. 16 U.S.C. § 1533(b)(2).

[121] *See* SALZMAN AND THOMPSON, *supra* note 17, at 259-260. Per the "Judicial Deference" doctrine in administrative law, during judicial review a judge will refrain from second-guessing agency regulatory decisions that were made with subject-matter expertise that is beyond the judge's personal knowledge. The assumption is that the statute in question was written by Congress to give authority to experts at the enforcement agency. Procedures for courts to follow when reviewing an agency decision, and determining how much deference to give to the agency's subject matter expertise, were laid out by the Supreme Court in Chevron USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

[122] *See supra* notes 74-75 and accompanying text.

minutiae and private property rights. Some such cases were brought by economic interests who opposed a recent listing, and others were brought by environmentalists who opposed a recent *delisting* or demanded a new listing. This shows that anyone can find reasons to accuse the FWS of violating the Endangered Species Act, and almost all such cases were battles over the procedural minutiae of how a vulnerable creature was added to or removed from the official list, with few substantive discussions of whether said creature may soon disappear forever.

The first noteworthy dispute over a creature's listing for protection under the ESA, when opposed by economic interests, reached the Circuit Court level in 1989. Desert tortoises in the Las Vegas area were perishing rapidly from a poorly understood contagious disease, leading to an emergency ESA listing that blocked planned housing developments. The city, which was in favor of new construction, challenged the FWS decision in court as "irrational" because the severity of the disease was still under scientific investigation, so perhaps the tortoises were not facing an emergency at all. The District of Columbia Circuit ruled that the city had the burden of proof on the accusation of an irrational decision; the plaintiffs failed to deliver the necessary evidence and the FWS listing decision for the desert tortoise was allowed to stand.[123] At the time of writing, the most recent case brought by opponents of an ESA listing was in 2020, when Texas demanded that a small bird called the golden-cheeked warbler be removed from the official endangered species list because the FWS had never sufficiently studied the bird's critical habitat. The Fifth Circuit determined that the original listing of the bird back in 1990 was appropriate, but also ordered the FWS to conduct new studies to determine if the population had climbed to viable levels in 2020, as claimed by Texas.[124]

The continuing desire of some economic and political interests to have a creature delisted, which would reduce or eliminate the protection of its habitat so new developments can proceed, are exemplified by the lengthy saga of the Alabama sturgeon. This rather large and long-lived fish is only known to inhabit the lower reaches of the Alabama River near the city of Mobile, and was first proposed for federal habitat protection in 1994.[125] Even the proposal was challenged by a local development consortium because the Department of the Interior had sought advice from a committee of experts that had not held open meetings. The Eleventh Circuit ruled that this was a violation of the Federal Advisory Committee Act, which requires open and transparent meetings of such committees,[126] and thus any listing of the Alabama sturgeon for endangered species protection was invalidated.[127] This was a purely procedural decision that disregarded whether or not the fish really was in danger of extinction.[128]

After following procedures to the best of its abilities, and with no apparent secrecy, the FWS formally listed the Alabama sturgeon as endangered in 2000. The same consortium sued again, claiming financial harm due to the prohibition of future development opportunities. The Eleventh Circuit found that the consortium had standing to sue for economic damages, and remanded the matter to district court.[129] That lower court dispute reached the Eleventh Circuit yet again a few years later, by which time the FWS had conducted a study of the fish's critical habitat. This time the local economic consortium claimed that the study was incomplete because it did not acknowledge an

[123] City of Las Vegas v. Lujan, 891 F.2d 927, 934 (D.C. Cir. 1989).
[124] General Land Office of Texas v. Dep't of the Interior, 947 F.3d 309, 320-21 (5th Cir. 2020).
[125] The Alabama sturgeon (*Scaphirhynchus suttkusi*) was first formally identified by biologists in 1991, and its population was soon determined to be dangerously low. *See* U.S. Fish & Wildlife Service, *Listing of the Alabama Sturgeon*, https://www.fws.gov/daphne/fact_sheets/alsturg.pdf.
[126] 5 U.S.C. app. § 10 (1972).
[127] Alabama-Tombigbee Rivers Coalition v. Dep't of Interior, 26 F.3d 1103, 1005 (11th Cir. 1994).
[128] *See generally* Ray Vaughan, *State of Extinction: The Case of the Alabama Sturgeon and Ways Opponents of the Endangered Species Act Thwart Protection for Rare Species*, 46 ALA. L. REV. 569 (1995).
[129] Alabama-Tombigbee Rivers Coalition v. Norton, 338 F.3d 1244, 1252-54 (11th Cir. 2003).

independent research report that favored the consortium's position against habitat protection, but the Circuit Court rejected this claim and ruled that the Alabama sturgeon had been listed for protection appropriately.[130] This legal saga took 13 years and all rulings were based on minor statutory paperwork requirements demanded by economic interests; research for this article located no substantive discussion in court of the fish's actual survival prospects during that period.

Lawsuits brought by environmentalists, in favor of a new listing or opposed to a delisting, are also common in the judicial record. A listing for the Queen Charlotte goshawk was desired by environmentalists but denied by the FWS in 1994; the bird's supporters sued but were unable to prove that the FWS had made any scientific errors when reaching its decision that the bird was *not* threatened or endangered.[131] Another noteworthy case of this nature was brought in 1998, after an environmental group petitioned for the listing of the Columbian sharp-tailed grouse for protection under the ESA, and complained that the FWS had not responded to the petition within the required 90-day period.[132] The Tenth Circuit ruled that the FWS had been hobbled by a recent budget cut and a backlog of scientific work, so the environmentalists' claim was unreasonable.[133] The Columbian sharp-tailed grouse is known to face population pressures but never was listed for protection by the FWS.[134]

The *delisting* of a previously protected species can also draw the ire of environmentalists, even though this development should indicate that the Endangered Species works by restoring a vulnerable creature's population to viable levels. This was the basis of a dispute brought by environmentalists over the delisting of the flying squirrel, with the D.C. Circuit holding that the FWS had made no scientific errors when it decided that the animal had recovered from the brink of extinction.[135]

On some occasions, the protection status of particularly charismatic animals will inspire legal challenges from all sides. This has been the case for two very controversial creatures that will be discussed in the next section of this article. For now, the saga of the American government's efforts to preserve the polar bear is illustrative. This superstar animal lives in several countries and is vulnerable everywhere;[136] its remaining population in Alaska may be eligible for protection under America's Endangered Species Act. In 2005, the FWS listed Alaska polar bears as *threatened* due to the effects of climate change. This brought legal challenges from environmentalists who wanted the polar bear to be listed as *endangered* (not just threatened) so it would qualify for stronger federal habitat protection; while opponents, largely affiliated with fossil fuel interests, accused the FWS of violating ESA requirements for scientific evidence on the supposed threats to its habitat. Several suits from all directions were combined by the D.C. Circuit, which ruled in 2013 that the FWS had made no scientific errors and had also consulted properly with local biological experts in Alaska, so the *threatened* listing for that state's resident population of polar bears was allowed to stand.[137] This

[130] Alabama-Tombigbee Rivers Coalition v. Kempthorne, 477 F.3d 1250, 1260-62 (11th Cir. 2007).
[131] Southwest Center for Biological Diversity v. Babbitt, 215 F.3d 58, 61 (D.C. Cir. 2000).
[132] Per the Endangered Species Act, this decision must be made within 90 days "to the maximum extent practicable." 16 U.S.C. § 1533(b)(3)(A).
[133] Biodiversity Legal Found. v. Babbitt, 146 F.3d 1249, 1251-52 (10th Cir. 1998).
[134] *See* Richard W. Hoffman and Allan E. Thomas, *Columbian Sharp-tailed Grouse (Tympanuchus phasianellus columbianus): A Technical Conservation Assessment*, United States Forest Service (Aug. 17, 2007), https://digitallibrary.utah.gov/awweb/awarchive?type=file&item=66400, at 87-90.
[135] Friends of Blackwater v. Salazar, 691 F.3d 428, 450-51 (D.C. Cir. 2012).
[136] The IUCN has dedicated significant resources and has inaugurated several groups of specialists to push for international action on polar bears and their declining population. For an introduction, *see* International Union for Conservation of Nature, IUCN/SSC Polar Bear Specialist Group, https://pbsg.npolar.no/.
[137] In re Polar Bear Endangered Species Act List and Sec. 4(d) Rule Litig., 709 F.3d 1, 19 (D.C. Cir. 2013).

was good news for the charismatic polar bear and its supporters, but other controversial animals have not fared so well, depending on who does or does not want them on the endangered species list.

V. The introverts and extroverts of endangered species listings

Environmentalists are often accused of striving to save glamorous animals like polar bears from extinction while ignoring the not-so-glamorous.[138] This may be a valid critique, but the obsession over controversial animals from all sides of the political spectrum has fueled court battles that have possibly damaged the ability of the Endangered Species Act to protect their humbler brethren.

While the selection of court rulings in the previous section covered many creatures great and small, two animals in particular have brought the Endangered Species Act to court again and again. This reflects political disputes over human developments in critical animal habitats, or enmity toward creatures that interact with humans in contentious ways. In both cases, politicians became involved, as did volunteer legal foundations and moneyed interests. The two most infamous animals in the American judicial record are the northern spotted owl—a reclusive bird that simply wishes to live in large old trees, and the gray wolf—an apex predator that cares little for human boundaries or economic concerns.

Up to your neck in northern spotted owls

> "This guy is so far out in the environmental extreme we'll be up to our necks in owls and out of work for every American." —Campaign speech by President George H.W. Bush, referring to future President Bill Clinton, 1992.[139]

In the 1980s and 1990s, the northern spotted owl[140] instigated a nationwide debate over the conflict between economic development and species preservation, with particularly nasty political rhetoric exchanged between conservative proponents of property rights and progressive proponents of environmental protection. This controversy was the catalyst for a nationwide debate over the Endangered Species Act,[141] and the northern spotted owl continues to feature in environmental debates to the present day.[142]

In the late 1980s, timber companies had targeted the old-growth forests of Oregon and Washington for extensive logging, arousing the ire of environmentalists, because those forests contained old-growth trees that had been hollowed out over time by the elements. Such trees are

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[138] *See e.g.* Eoghan Macguire, *Beauty Trumps Beast in Conservation Efforts*, CNN (May 8, 2012), https://www.cnn.com/2012/05/06/world/beautiful-ugly-animals.

[139] George Herbert Walker Bush, campaign speech in Warren, MI (Oct. 29, 1992), https://www.c-span.org/video/?33818-1/bush-campaign-speech. The comment about spotted owls begins at 21:35 in the video.

[140] The northern spotted owl (*Strix occidentalis caurina*), a subspecies of the spotted owl, stands at 16-19 inches and nests inside hollow old-growth trees, with a range extending from southwestern Canada to southern Oregon. As of 2021, spotted owls in general are listed as *near threatened* by IUCN, with a population that is trending downward. *See* International Union for Conservation of Nature, *Spotted Owl: Strix occidentalis*, https://www.iucnredlist.org/species/22689089/180937862.

[141] *See* Mark Bennett & Kurt Zimmerman, *Politics and Preservation: The Endangered Species Act and the Northern Spotted Owl*, 18 ECOLOGY L.Q. 105, 124-29 (1991).

[142] *See e.g.* Brad Knickerbocker, *Northern Spotted Owl's Decline Revives Old Concerns*, CHRISTIAN SCIENCE MONITOR, (June 27, 2007), http://www.csmonitor.com/2007/0627/p02s01-sten.html; Andy McGlashen, *Trump Administration Drastically Slashes Protections for Northern Spotted Owls*, AUDUBON (Jan 15, 2021), https://www.audubon.org/news/trump-administration-drastically-slashes-protections-northern-spotted-owls.

preferred nesting sites for the northern spotted owl, which at the time was a *potentially* threatened species. The environmental community struck upon a plan to get the northern spotted owl on the official endangered species list, which in turn would activate the power of the Endangered Species Act to shut down logging operations that could destroy the bird's critical habitat. This could potentially outlaw commercial logging across vast portions of the Pacific Northwest.[143]

A large coalition of environmental activists petitioned the FWS to add the northern spotted owl to the official list. After a lengthy scientific investigation, the FWS declined to list the bird, concluding that its regional population was not dangerously low.[144] The environmental coalition then sued the FWS under the Endangered Species Act, claiming procedural violations in the agency's decision against listing the bird for habitat protection.[145]

In the *Northern Spotted Owl* case of 1988, the federal court for the Western District of Washington ruled that the FWS had not conducted a sufficiently detailed scientific investigation into the bird's population levels and habitat needs, and ordered the agency to try again.[146] After another scientific investigation lasting about two years, the FWS changed its mind and listed the northern spotted owl as *threatened* and worthy of limited habitat protection, to be enforced by the U.S. Forest Service.[147] While this was a victory for the bird's supporters, the environmental coalition issued another legal challenge,[148] claiming that the Forest Service was unprepared to manage the habitat in the face of expected pressure from commercial logging operations. Per various provisions of the National Forest Management Act,[149] the Endangered Species Act, and the National Environmental Policy Act, Judge William Dwyer of the Western District of Washington shut down logging operations across much of Washington and Oregon in 1992,[150] igniting a political firestorm.[151]

The logging industry claimed that tens of thousands of jobs would be lost, loggers disparaged the northern spotted owl as a job killer, and environmentalists and economic interests battled it out in the media.[152] Bowing to the intense public controversy, the George H.W. Bush administration summoned the God Squad and instructed it to review the original listing of the northern spotted owl as threatened under the Endangered Species Act.[153] To the surprise of the political class, the God Squad agreed with the bird's listing and with Judge Dwyer's injunction, and announced that it

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[143] *See* Steven L. Yaffee, *Lessons about Leadership from the History of the Spotted Owl Controversy*, 35 NATURAL RESOURCES J. 381, 399-401 (1995).

[144] *See* Victor M. Sher, *Travels with Strix: The Spotted Owl's Journey through the Federal Courts*, 14 PUB. LAND L. REV. 41, 46-47 (1993).

[145] Northern Spotted Owl v. Hodel, 716 F. Supp. 479 (W.D. Wash. 1988). The bird was listed as the primary plaintiff on its own behalf, supported by a wide variety of volunteer groups as secondary plaintiffs. *Id.* at 480.

[146] 716 F. Supp. 481-483. The initial FWS decision was ruled to be arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). The *Hodel* ruling was mostly based on investigations of the bird's population levels. In a related ruling three years later, the FWS was ordered to re-investigate the bird's critical habitat needs as well. Northern Spotted Owl v. Lujan, 758 F.Supp. 621 (W.D. Wash. 1991).

[147] *Spotted Owl: Judge Issues Permanent Injunction Barring Timber Sales*, KITSAP SUN (Jul. 3, 1992), https://products.kitsapsun.com/archive/1992/07-03/245168_spotted_owl_judge_issues_perman.html.

[148] Seattle Audubon Society v. Moseley, 798 F.Supp. 1484 (W.D. Wash. 1992).

[149] National Forest Management Act of 1976, 16 U.S.C. § 1600 (1988).

[150] 798 F.Supp. 1492-94.

[151] Sher, *supra note* 144, at 71-75.

[152] Jeanne Brokaw, *Does Anybody Give a Hoot?*, MOTHER JONES (Nov./Dec. 1996), https://www.motherjones.com/politics/1996/11/does-anybody-give-hoot/. *See also* William R. Freudenburg, Lisa J, Wilson, and Daniel J. O'Leary, *Forty Years of Spotted Owls? A Longitudinal Analysis of Job Losses*, 41 SOCIOLOGICAL PERSPECTIVES 1 (1998). The number of potential lost jobs attributable to the court injunction was overestimated, and the industry had been steadily losing jobs during that period due to a variety of factors ranging from environmental regulations and weak prices to industrial automation and international competition.

[153] Officially known as the Endangered Species Committee; for information on this committee's composition and responsibilities, see *supra* notes 80-83 and accompanying text.

favored limitations (though not a complete ban) on logging in the region. Both the logging industry and environmentalists were dissatisfied by the decision.[154]

The God Squad's decision itself inspired yet another court dispute, this time at the circuit court level. In the *Portland Audubon* case the following year, the Ninth Circuit addressed heretofore unresolved matters of the God Squad's opaque procedures and the under-enforced public participation requirements of the ESA.[155] A local chapter of the Audubon Society, which favored *endangered* rather than merely *threatened* status for the northern spotted owl, disputed the God Squad's mysterious decision, and raised a specific dispute concerning suspected *ex parte* discussions between the committee and the White House, which was heavily invested in the controversy and had aligned itself with the logging industry.[156] The plaintiffs found such obfuscation to violate the spirit of the ESA, which requires the God Squad's meetings and the records thereof to be open to citizens.[157]

The Ninth Circuit agreed that the undisclosed *ex parte* contacts violated both the ESA and the Administrative Procedure Act, and noted with finality that such things were "prohibited by law."[158] However, this was a pyrrhic victory for the bird lovers, because as is usual in administrative law, the remedy for the God Squad's violation was framed as a matter of procedural compliance. The committee was ordered to add the previously secret records of conversations with the White House to the public record, and to hold another public hearing without forgetting to invite the public.[159] After this was done, the God Squad had fulfilled its procedural requirements, and reached the same decision as it did the first time. As a result, plans were laid to manage—but not ban—regional logging, in the interests of limited—but not comprehensive—habitat protection for the northern spotted owl. Judge Dwyer's 1992 injunction against all logging in the region was then dropped as moot.[160]

The ultimate outcome of this controversy was ironic. A minor victory for transparency in the listing of the northern spotted owl as worthy of protection eventually resulted in relatively weak protection for the bird. To the present day biologists consider this bird's survival to be one of the most important matters of conservation in the northwestern United States, and its population continues to hover at dangerously low levels.[161] The conflict between habitat protection and commercial interests continues to affect the northern spotted owl as well; one week before leaving office in January 2021, President Donald Trump declared that large territorial habitat zones for the bird were no longer necessary, and ordered the FWS to remove more than three million acres from those territories. This was characterized as a "common sense revision" to a previous regulatory

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[154] *See* Brad Knickerbocker, *Split Decision on Spotted Owl is Inconclusive*, CHRISTIAN SCIENCE MONITOR (May 18, 1992), https://www.csmonitor.com/1992/0518/18081.html.

[155] Portland Audubon Society v. Endangered Species Committee, 984 F.2d 1534 (9th Cir. 1993).

[156] The plaintiffs had obtained a declaration from a government employee who claimed that the God Squad faced political pressure from the George H.W. Bush administration to arbitrarily exempt the northern spotted owl from the Endangered Species Act, which would allow lucrative logging and development projects in the region to proceed. 984 F.2d 1550-1551.

[157] 16 U.S.C. § 1536(e).

[158] 984 F.2d 1538-41.

[159] *Id.* at 1548-1549.

[160] John H. Cushman, *Judge Drops Logging Ban in Northwest*, N.Y. TIMES (June 7, 1994), https://www.nytimes.com/1994/06/07/us/judge-drops-logging-ban-in-northwest.html.

[161] Randy Trick, *Saving the Spotted Owl*, 69 NW LAWYER 47, 48 (Sept. 2015). A rising regional population of more aggressive barred owls, which compete with more laidback northern spotted owls for the same habitats and food sources, became a problem in the 2010s.

decision, though evidence indicates that the logging industry still covets those lands.[162] Once again, the Endangered Species Act was unable to fully protect the habitat of a creature that is on its own official list.

In the company of wolves

> "Nobody has the right to endanger my life or my children's lives by introducing predators that kill for a living." —anonymous[163]

Wolves were once common throughout the northern hemisphere; in North America they reached from arctic Canada to central Mexico and were known to inhabit all of the continental United States.[164] During the industrial era their range in North America retreated mostly to Canada and Alaska; in the continental U.S. a few scattered populations hung on in remote wilderness areas.[165] Wolves and humans have a long shared history, and people either revere wolves as embodiments of the power of nature or fear them as ruthless killers. Contrary to popular opinion, wolves rarely attack humans but they have earned human enmity by feasting on livestock. In the belief that they might attack humans and the fact that they really do attack livestock, wolves have been hunted for most of American history, but due to their glamour as an American icon there have been many attempts to reestablish their population.[166]

As an iconic species, the wolf has been a lightning rod for controversy that in turn has fueled decades of regulatory actions and court battles; as noted by the District Court for the District of Columbia, "Wolves are the subject of heated disputes, with those on every side of the issue offering heartfelt arguments as to how best to manage this unique species. The last decade of litigation is a testament to those passions."[167] The *last decade* in that quote refers to a single decision by the FWS in 2003 to upgrade the gray wolf from endangered to merely threatened, which launched several federal lawsuits brought by both opponents and proponents of protecting the animal and its habitat.[168]

Popular opinion for and against restoring wolves to their ancestral range has generated controversy for much of modern American history, and the wolf was one of the first animals listed for protection as soon as the Endangered Species Act was passed in 1973.[169] The wolf has been entangled in court disputes about FWS authority and the science of animal populations ever since,

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[162] Lisa Friedman and Catrin Einhorn, *Trump Opens Habitat of a Threatened Owl to Timber Harvesting*, N.Y. TIMES (Jan. 13, 2021), https://www.nytimes.com/2021/01/13/climate/trump-spotted-owl.html.

[163] From a citizen's comment collected for the Environmental Impact Statement compiled for a 1994 plan to reintroduce wolves in the northwestern United States. *See* U.S. Fish & Wildlife Service, *The Reintroduction of Gray Wolves to Yellowstone National Park and Central Idaho; Final Environmental Impact Statement* (May 1994), https://digitallibrary.utah.gov/awweb/awarchive?type=file&item=60003, at 54.

[164] The animal is known more specifically as the gray wolf (*Canis lupus*), which in turn is made up of more than thirty subspecies that followed their own evolutionary paths after small populations became separated. Notable examples in the United States include the eastern wolf (*Canis lupus lycaon*, also known as the timber wolf) in the western Great Lakes region, and the very rare red wolf (*Canis lupus rufus*) of the southeastern United States. *See* International Wolf Center, *Types of Wolves*, https://wolf.org/wolf-info/basic-wolf-info/types-of-wolves/.

[165] *See generally* José María Fernández-García and Nerea Ruiz de Azua, *Historical Dynamics of a Declining Wolf Population: Persecution vs. Prey Reduction*, 56 EUROPEAN J. WILDLIFE RESEARCH 169 (2009).

[166] Williams, *supra* note 30, at 132.

[167] Humane Society of the United States v. Jewell, 76 F.Supp.3d 69, 137 (D.D.C. 2014).

[168] *Id.* at 106-129. This and other cases inspired by the 2003 FWS decision will be analyzed at *infra* notes 177-180 and accompanying text,

[169] Edward Roggenkamp, *Gray Wolf Removed from Endangered Species List & Environmental Groups File Notice of Intent to Sue*, Endangered Species Law & Policy, Nossaman LLP (Nov. 20, 2020), https://www.endangeredspecieslawandpolicy.com/trump-administration-removes-gray-wolf-from-endangered.

indicating its iconic status but also showing that litigation over the Endangered Species Act reflects regional and personal politics involving hunting revenues and unfounded fears about human safety, rather than its utility for saving vulnerable creatures from extinction.[170]

The record indicates that the FWS has been pressured to upgrade, downgrade, delist, or relist the wolf under the Endangered Species Act repeatedly, and the associated court hearings rarely discuss the wolf's long-term prospects for survival in any substantive way. Whenever the animal's protection under ESA is reduced, environmentalists challenge the regulatory decision with pleas to observe the spirit of ESA combined with settled science on the value of wolves to their ecosystems.[171] Whenever the animal's protection is enhanced under ESA, opponents challenge the regulatory decision with verifiable economic arguments on potential losses of livestock and unsupported horror stories of attacks on humans.[172] Both of those arguments have merits, but per the points being made in this article, the ongoing legal battle has reduced the utility of the Endangered Species Act's official list of vulnerable creatures, and whether that list truly reflects the state of nature and the threats to animals that are at risk of disappearing.

After the wolf nearly disappeared from all of the continental United States due to habitat loss and over-hunting, reintroduction programs began in 1995. Starting at Yellowstone National Park and nearby areas of Wyoming, Montana, and Idaho, fourteen wolves were imported from Canada and set loose in their new (but ancestral) homes. Wolves had not been seen in the area for about 70 years, but the initial imported individuals survived and reproduced, establishing a viable local population.[173] It did not take long for these wolves, and by extension the Endangered Species Act, to be hauled into court to resolve political and unscientific disputes over whether the animal should have been listed as endangered. The first such federal suit was brought by a Montana hunter who faced a criminal charge under ESA for bagging a wolf just barely after the imported specimens had been let loose. The hunter argued that the imported wolves were not worthy of protection because they were an "experimental population" that had not been considered separately from remnant native populations as required under ESA.[174] The Ninth Circuit found this to be an unpersuasive argument for overturning the hunter's criminal conviction.[175]

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[170] Jamison E. Colburn, *Canis (Wolf) and Ursus (Grizzly): Taking the Measure of an Eroding Statute*, 22 NAT. RESOURCES & ENV'T 22, 22 (2007).

[171] As an "apex predator" at the top of the food chain, a wolf has a large influence on the ecosystem in which it lives. For example, if wolves disappear, the smaller herbivorous animals that they hunt can explode in population, which in turn reduces the growth of plants that those prey animals eat, which causes new plant species to move in, which can then alter the availability of food for birds, and so on. *See e.g.* National Science Foundation, *Loss of Large Predators Caused Widespread Disruption of Ecosystems*, press release (July 14, 2011), https://www.nsf.gov/news/news_summ.jsp?cntn_id=121020. Reintroducing wolves and other apex predators to such altered ecosystems can restore them to their previous pristine state, but the process can take many years, especially if those ecosystems have been further damaged by human developments. These effects have been scientifically confirmed at Yellowstone National Park. *See* Katherine Lackey, *Yellowstone's Wolves are Back, but They Haven't Restored the Park's Ecosystem. Here's Why*, USA TODAY (Sept. 7, 2018), https://www.usatoday.com/story/tech/science/2018/09/07/wolves-reintroduction-yellowstone-ecosystem/973658002/.

[172] *See e.g.* Spencer McKee, *The Key Arguments for Both Sides of the Wolf Reintroduction Debate in Colorado*, OUTTHERE COLORADO (Aug. 23, 2019), https://www.outtherecolorado.com/features/the-key-arguments-for-both-sides-of-the-wolf-reintroduction-debate-in-colorado/article_be29ef6e-753a-5f7b-bef7-fd51a7bb33f5.html; Alesandra Tejeda, *What You Need to Know About a Ballot Effort to Bring Wolves Back to Colorado*, THE COLORADO INDEPENDENT (Jan. 6, 2020), https://www.coloradoindependent.com/2020/01/06/colorado-reintroduction-gray-wolf-ballot-measure-explainer/.

[173] William J. Ripple and Robert L. Beschta, *Trophic Cascades in Yellowstone: The First 15 Years after Wolf Reintroduction*, 145 BIOLOGICAL CONSERVATION 205, 206-08 (2012).

[174] 16 U.S.C. § 1533(j)(3).

[175] United States v. McKittrick, 142 F.3d 1170, 1178 (9th Cir. 1998).

Due to their local success in and around Yellowstone, the FWS upgraded the wolf from *endangered* to merely *threatened* in 2003, which resulted in less intensive habitat restoration plans and reduced controls on hunting.[176] This inspired multiple federal lawsuits brought by environmentalists accusing the FWS of violating the scientific requirements of the Endangered Species Act. The FWS decision was enjoined by federal judges in Oregon[177] and Vermont[178] (each of which hosted environmental groups hoping to protect local remnant populations of wolves hanging on from ancestral times), due to violations of two different ESA requirements.

The 2003 upgrading decision continued to haunt the FWS eleven years later, when another federal judge ruled that the decision did not properly consider another subpopulation of wolves thousands of miles away in the western Great Lakes region.[179] That ruling was upheld on appeal in 2017, when the D.C. Circuit added that the FWS did not use the best available science when determining that wolf subpopulations in the Rocky Mountain, Great Lakes, and southwestern regions of America were not distinct enough to qualify for separate protection decisions (as opposed to a nationwide decision).[180]

Wyoming, Montana, and Idaho were instructed to implement their own wolf protection plans after the 2003 FWS delisting decision,[181] with Wyoming deciding to manage the reintroduced wolves as predators that could be controlled via hunting. This put most of the new population at risk, so the FWS rejected Wyoming's plan under the requirements of the Endangered Species Act, after which the state's leaders sued. The case was dismissed because the state made an unconvincing case about the lack of an Environmental Impact Statement.[182]

Regardless, the political firestorm had begun, and the FWS was compelled to study wolf subpopulations at the local level and issued several listing or delisting decisions for wolves in several specific geographic areas.[183] This resulted in yet another lawsuit, this time brought by wildlife activists, in which the court ruled that the decisions on regional subpopulations were not authorized under ESA rules that required species-wide decisions.[184]

Meanwhile, Wyoming's wolf management plan from 2004 was still being litigated as late as 2017. After determining that the state's plan was in fact beneficial for the survival of the wolves (a reversal of its previous decision on the matter), the FWS again delisted the Wyoming subpopulation from ESA protection in 2011. Environmentalists challenged the FWS in court again with a claim of violating the ESA; the District Court for the D.C. Circuit ruled that the delisting was reasonable under some provisions of the ESA (regarding the agency's consultations with states) but unreasonable under others (regarding scientific determinations of population viability), and

[176] The text of the 2003 FWS decision is compiled at 76 Fed. Reg. 8166 (Dec. 28, 2011).

[177] Defenders of Wildlife v. Secretary, Dep't of the Interior, 354 F.Supp.2d 1156, 1172-73 (D. Or. 2005). In this ruling the FWS was found to have violated the ESA at 16 U.S.C.A. § 1533(a)(1), which requires listing or delisting decisions to be supported by the "best scientific and commercial data available."

[178] National Wildlife Federation v. Norton, 386 F.Supp.2d 553, 585 (D. Vt. 2005). In this ruling the FWS was found to have violated the ESA at 16 U.S.C.A. § 1532(6), which mandates that a species be listed as threatened or endangered if that is the situation in any of its native ranges.

[179] United States v. Jewell, 76 F.Supp.3d 69, 110-111 (D.D.C. 2014).

[180] Humane Society of United States v. Zinke, 865 F.3d 585, 605-06 (D.C. Cir. 2017).

[181] 72 Fed. Reg. 6106 (Feb. 8, 2007).

[182] Wyoming v. Dep't of the Interior, 360 F. Supp. 2d 1214, 1238 (D. Wyo. 2005). Wyoming claimed that the FWS did not prepare an adequate Environmental Impact Statement (EIS) when deciding to reject the state's wolf protection plan. An EIS is required under the National Environmental Policy Act at 42 USC § 4332(C). The court ruled that an EIS is only required for a "major federal action" related to construction and development, and the FWS regulatory decision was not such an action.

[183] *See* Williams, *supra* note 30, at 138-139.

[184] Defenders of Wildlife v. Salazar, 729 F. Supp. 2d 1207, 1215-16 (D. Mont. 2010). The relevant provision of ESA is at 16 U.S.C. § 1533(a)(1).

remanded the matter to the FWS for further study.[185] However, the District Court also ruled that Wyoming had succumbed to political arguments that damaged its claims to be able to protect the wolf from local extinction in its territory.[186] Several years later, the FWS decision to delist the Wyoming subpopulation was upheld by the D.C. Circuit as based on the best available scientific evidence as required by ESA.[187] That 2017 ruling wrapped up a procedural dispute that had been lurching along for 14 years; and a review of the various court documents reveals very little substantive discussion of whether the wolves were truly recovering from the brink of extinction during that period.

Outside of Wyoming's legal saga, political pressure from Montana and Idaho, which favored hunting wolves as a population control mechanism, led Congress in 2011 to arbitrarily delist the wolf from ESA protection in those states.[188] This legislative action had little to do with the science of viable wolf populations. The congressional move was challenged in court by environmentalists but upheld as an acceptable exercise of legislative power by the Ninth Circuit in 2017. [189] That same year the D.C. Circuit ruled that the FWS was not authorized to delist a different subpopulation of wolves in the western Great Lakes region.[190]

Not only did this result in an inconclusive split precedent at the circuit court level; both of these decisions were made via judicial inspections of procedural minutiae rather than the spirit of protecting an iconic animal from extinction, and they still managed to reach different outcomes.[191] Politics polluted all of the decisions by the FWS and the rulings in several different layers of the federal court system that upheld those decisions or struck them down. Since wolves were reintroduced in the Rocky Mountain region in 1995, the regional subpopulation has been subjected to at least eleven FWS decisions (and one by Congress[192]) in which those wolves have been listed or delisted or downgraded or upgraded for protection under the Endangered Species Act.[193] Other subpopulations, particularly that in the western Great Lakes region, have also been subjected to shifting levels of protection.[194]

According to the FWS, the western Great Lakes subpopulation has slowly returned to viable numbers.[195] As for the subpopulation in the Rocky Mountain region, environmentalists had conceded a comeback toward viable numbers by the 2010s,[196] and FWS studies confirmed the same.[197] While

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[185] Defenders of Wildlife v. Jewell, 68 F. Supp. 3d 193, 207-11 (D.D.C. 2014).
[186] *Id.* at 203.
[187] Defenders of Wildlife v. Zinke, 849 F.3d 1077, 1088-89 (D.C. Cir. 2017). Again, the relevant provision of ESA is at 16 U.S.C. § 1533(a)(1).
[188] This was accomplished via a rider to a Department of Defense appropriations bill, found at Pub. L. 112–10, 125 Stat. 38, § 1713 (2011). *See also* Williams, *supra* note 30, at 138.
[189] Alliance for the Wild Rockies v. Salazar, 672 F.3d 1170, 1174 (9th Cir. 2012).
[190] Humane Society of United States v. Zinke, 865 F.3d 614-615. This case was introduced at *supra* note 180 and accompanying text.
[191] *See* Williams, *supra* note 30, at 146-147.
[192] *See supra* note 188 and accompanying text.
[193] For a summary, *see* Earthjustice, *Timeline: The Fight for Northern Rocky Gray Wolves*, https://earthjustice.org/features/campaigns/wolves-in-danger-timeline-milestones. *See also* Katie Shepherd, *Montana's Governor Broke Rules to Kill a Yellowstone Wolf. A State Agency Gave Him a Warning*, WASH. POST (Mar. 24, 2021), https://www.washingtonpost.com/nation/2021/03/24/montana-greg-gianforte-wolf/.
[194] For a summary, *see* U.S. Fish & Wildlife Service, *Gray Wolves - Western Great Lakes States: Timeline of Federal Actions*, https://www.fws.gov/midwest/wolf/history/timeline.html.
[195] *See* U.S. Fish & Wildlife Service, *Gray Wolves - Western Great Lakes States: Wolf Numbers in Minnesota, Wisconsin and Michigan (excluding Isle Royale) - 1976 to 2015*, https://www.fws.gov/midwest/wolf/population/mi_wi_nos.html.
[196] *See* Earthjustice, *Are Wolves Endangered?* https://earthjustice.org/features/are-wolves-endangered.
[197] *See* U.S. Fish & Wildlife Service, *Gray Wolves in the Northern Rocky Mountains*, https://www.fws.gov/mountain-prairie/es/grayWolf.php.

the jury is still out on whether numbers are now strong enough to ensure long-term survival rather than extinction, hunters and livestock owners would like to see the removal of federal protection for wolves at the national level. Consequently, the FWS removed the gray wolf from protection under the Endangered Species Act, as no longer endangered *or* threatened, in late 2020.[198] The public comments collected for this latest regulatory decision include promises of yet more citizen lawsuits claiming violation of ESA procedures;[199] the first such lawsuit was filed in January 2021 and is in progress at the time of writing.[200]

VI. Conclusion: On transparent species protection

Political pressure for or against the listing of vulnerable creatures in the official endangered species list, and a judicial focus on procedural minutiae rather than the spirit of environmental preservation, is a continual problem for the credibility of the Endangered Species Act and the viability of its mandates for the protection of the listed creatures. Political pressures on the Act never cease, and while environmentalists often bring lawsuits demanding tougher enforcement of the Act, economic development interests have exercised pressure in more insidious ways. For example, in 1995 lobbyists convinced the Republican-controlled Congress to enact a one-year moratorium on any new species listings.[201] During times of political pressure and Congressional budget cuts, the U.S. Fish & Wildlife Service has been known to designate newly researched creatures as "candidate species" to postpone regulatory decisions until the political winds change.[202] During the heavily pro-business administration of George W. Bush, Rep. Richard Pombo (R-Cal.), a former development industry lobbyist and unrepentant critic of the Endangered Species Act, initiated several abortive attempts to have it abolished in Congress while pressuring the FWS to ignore scientific evidence.[203]

Pressure on the Endangered Species Act does not always follow partisan lines; the administration of Barack Obama never outwardly opposed the listing of additional vulnerable creatures but still issued regulations that generally weakened the ability of the FWS to protect critical habitats.[204] Donald Trump was never particularly vocal about the Act, but his administration made several relatively quiet moves to shrink protected habitat zones and reduce the ability of the FWS to require habitat protection actions by private landowners.[205] And for the first time in the Act's regulatory history, the FWS was strongly encouraged, though not quite forced, to include data on expected economic impacts when deciding to add a newly-researched creature to the official

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[198] 85 Fed. Reg. 69,778 (Nov. 3, 2020). *See also* Roggenkamp, *supra* note 169.

[199] *See e.g.* Earthjustice, *Notice of Violation of the Endangered Species Act: 2020 Gray Wolf Delisting Rule*, public comment (Nov. 5, 2020), https://www.biologicaldiversity.org/campaigns/gray_wolves/pdfs/Gray-Wolf-60-Day-Notice.pdf.

[200] Natural Resources Defense Council v. Dep't of Interior, Case No. 21-cv-56 (N.D. Cal. 2021).

[201] *See* SALZMAN AND THOMPSON, *supra* note 17, at 260.

[202] *Id*.

[203] *See* Michael Breen, *Briefing Paper on Congressman Pombo's Endangered Species Bill*, press release, Environmental Defense Fund (Sept. 19, 2005), https://www.edf.org/news/briefing-paper-congressman-pombos-endangered-species-bill.

[204] *See* Anna V. Smith, *Obama's Mixed Impact on Endangered Species*, HIGH COUNTRY NEWS (Dec. 28, 2016), https://www.hcn.org/issues/48.22/obamas-mixed-impact-on-endangered-species.

[205] *See* Norman M. Semanko, *Proposed Revisions to Federal Endangered Species Act Regulations: The Next Chapter in the Trump Regulatory Reform Agenda*, 62 ADVOCATE 32, 32 (2019).

endangered species list.[206] Some of Trump's executive actions to weaken the ESA were reversed by President Joe Biden in June 2021.[207]

The political and legal disputes surrounding the ESA have made it one of the most manipulated federal statutes in American history, going through many rounds of attempted weakening and strengthening in Congress, while that body has also never allocated nearly enough budget money for the FWS to fully investigate the populations and habitats of all vulnerable creatures.[208] Environmentalists do their own damage by focusing on iconic or controversial animals that may or may not be listed for protection, at the expense of other creatures that still need to be studied. This certainly has an impact on whether and how vulnerable creatures receive protection, based on passing political trends. The Endangered Species Act faces many challenges, but this article argues that the accuracy and transparency of the official list of vulnerable plants and animals is vulnerable in its own right.

The lesser-known informational focus of the Endangered Species Act is both a blessing and a curse for its public interest goals, not to mention the creatures that it strives to save from extinction. In substantive terms, the Act is not intended to turn vulnerable creatures into pieces of information by adding them to a list, but to later remove them from that list because they have recovered from the brink of extinction. But this happy outcome requires federal action that can only be initiated by a creature's appearance on that very same list. Therefore the list should be scientifically accurate and free of conflicts of interest, and citizens and government watchdogs should be furnished with transparent information on how it is compiled. This is how all of the officials involved can be held accountable.

The ESA has been partially successful in its mission. A 2019 scientific study determined that approximately 291 creatures had been saved from imminent extinction thanks to habitat protection mandated by the Act. Among species that had been listed for protection at any time, 39 had been delisted because their populations had fully recovered, though 26 had been delisted because they were believed to be or proven to be extinct.[209] On the other hand, previous scientific studies had determined that only about 15% of the world's plant and animal species have been studied enough to know if their populations and habitats are vulnerable, and America's official endangered species list may only include about 10% of species that are in danger of becoming extinct.[210] Therefore the official list of species protected by the ESA raises issues of which creatures are listed—and which are *not* listed and why.

Thus, the most crucial piece of information mandated by the ESA—the official list of endangered species—does not adequately reflect the severity of the environmental problems it purportedly informs the public about, while delisting is not always an adequate indicator of the Act's ability to actually bring a species back from the brink of extinction.[211] This makes the transparency

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[206] *Id*. at 34.

[207] Dino Grandoni and Darryl Fears, *Biden Administration Moves to Bring Back Endangered Species Protections Undone under Trump*, WASH. POST (June 4, 2021), https://www.washingtonpost.com/climate-environment/2021/06/04/biden-endangered-species/.

[208] *See* SALZMAN AND THOMPSON, *supra* note 17, at 255.

[209] Noah Greenwald, Kieran F. Suckling, Brett Hartl, and Loyal A. Mehrhoff, *Extinction and the U.S. Endangered Species Act*, 2019 PEERJ (2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6482936/. Of the 291 species that have been saved, many are still listed under the Endangered Species Act because they remain endangered or threatened even though they have escaped imminent extinction.

[210] *See* Davis S. Wilcove and Lawrence L. Master, *How Many Endangered Species are There in the United States?*, 3 FRONTIERS IN ECOLOGY AND THE ENVIRONMENT 414, 414 (2005).

[211] *See* Jeffrey J. Rachliniski, *Noah by the Numbers: An Empirical Evaluation of the Endangered Species Act*, 82 CORNELL L. REV. 356, 363-64 (1997). The cited article builds upon a review of the book NOAH'S CHOICE: THE FUTURE OF ENDANGERED SPECIES (1995), in which authors Charles C. Mann and Mark L. Plummer proposed a moratorium on

of the official endangered species list and the accountability of the government officials who manage it all the more important, because the ESA encourages citizen oversight of government efforts to protect those species and their habitats.[212]

Nature lovers surely appreciate the goals of the ESA, but may be unaware of two central characteristics of procedure-intensive environmental legislation as described in this article. First, substantive natural protection goals are bound to be subsumed by the narrow procedural focus of administrative jurisprudence. Second, procedure-oriented environmental legislation has revolutionized the use of information in the natural protection process and has greatly increased public participation in environmental regulation; but as this article shows, the potential usefulness of that information, and the true effectiveness of public participation, can be blunted by opaque and politicized agency behavior and the inability of citizens to achieve true accountability through retroactive judicial review.

The ESA can be a powerful check on rampant development and destruction of species habitats, but it has a crucial Achilles Heel – the official list of endangered species. The Act cannot begin to protect a creature's habitat if it is not on this simple list, and the creation and management of this list is not so simple. Citizens cannot assume that this list is truly accurate or that the processes of its creation are transparent. The political dramas surrounding the listing and delisting of the northern spotted owl and gray wolf, among other more humble creatures, illustrate that the composition of the official list is often not based on objective science.

Concerned Americans should not assume that the noble goals of the Endangered Species Act are fully achievable in the regulatory and political realms.[213] Agency officials make subjective decisions, often under extreme political pressure, and the judiciary's focus on paperwork procedures reduces the ability of citizens to hold those officials accountable. In turn, the integrity of the ESA's official list of species worthy of protection is not as transparent as it should be, and its true accuracy is anyone's guess. A true solution to this conundrum would require an unlikely revival of the judiciary's public interest focus toward environmental statutes that it practiced in the 1970s, which would result in more substantive discussions of whether the Endangered Species Act is fulfilling its goals for all vulnerable plants and animals. Unless that happens, citizens must assume that the official list of endangered species is useful but incomplete, and new types of public knowledge strategies, scientific research, and volunteer actions may be necessary to prevent further extinctions.

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the Endangered Species Act due to scientific uncertainty, inaccurate reporting, and lack of success in truly protecting vulnerable species.

[212] 16 U.S.C. § 1540(g).

[213] *See* LAZARUS, *supra* note 10, at 208; SALZMAN & THOMPSON, *supra* note 17, at 44-45.

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Inherent Frictions and Deliberate Frustrations: Examining the Legal Variables of State FOI Law Administration

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Abstract

FOI laws are of a category of laws acutely predisposed to internal resistance and erosion. The study seeks to better understand these limitations by examining legal elements of the laws through an exploratory field study, or audit, of nine state FOI laws. Among the study's findings are two uniquely strong predictors of better FOI results: The existence of an independent FOI advocacy organization in the state and a legislature subject to the law. The findings suggest cultivating a culture of transparency may be as or more important than any of the generally considered legal variables, such as deadlines or penalties.

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I. Introduction

On Feb. 28, 2018, WSB-TV in Atlanta submitted a request under the Georgia Open Records Act (ORA) for water billing information for the residence of Mayor Kasim Reed, a property rented by the mayor from his brother (Klepal & Deere, 2018). Reporting would show that this request spurred expletive-laden text messages between the mayor's spokesperson, Jenna Garland, and the head of communications at the Watershed Department. The request had uncovered thousands of dollars in unpaid water bills, a neglected disconnect notice and an ongoing investigation into water theft. When Garland asked whether a response had been issued, Lillian Govus, the communications manager for the Watershed Department, assured her, "Fuck no," she wrote. "I ain't stupid." Garland provided Govus with orders on how to handle the request, instructing Govus to "be as unhelpful as possible" and to "drag this out as long as possible," and concluding the exchange by encouraging Govus to "provide the information in the most confusing format possible." In a subsequent request for city council members' water bills, Govus was told not to deliver the requested records until the WSB-TV producer followed up on the request, even if the records were ready to be released (Trubey, 2019). The records would not be released until the television station hired a lawyer to threaten legal action. The Georgia Bureau of Investigation looked into the conduct of Garland, the spokesperson for Mayor Reed, in handling ORA requests and ultimately pressed charges. Garland was convicted on two misdemeanor charges of deliberately frustrating requests for public records. She was fined $1,980 but received no probation or jail time.

The punishment was meager, but the conviction noteworthy in the field of freedom of information (FOI) laws. It marked not only the first conviction, but also the first criminal investigation under the ORA, which was amended in 2012 to make violations criminal. The case received national coverage, with *The New York Times* observing the noteworthy outcome: "It is a rare predicament for an American government official," as Garland was, to be charged with intentionally obstructing access, calling the charges "extremely uncommon" in the United States (Fausset, 2019). Penalty provisions are so rarely applied that in Colorado's 2017 amendment of its state Open Records Act (CORA), legislators excised a misdemeanor penalty for the willful and knowing violation of CORA. The executive director of the Colorado Freedom of Information Coalition said the organization had no recollection of anyone ever being prosecuted for the crime, which carried a penalty of up to 90 days in jail and a $100 fine (Roberts, 2017).

Garland's instruction to "be as unhelpful as possible" provides a window into the often-hostile confrontations between FOI requesters and public bodies. The nature of the contentious legal mechanism introduces many issues, most of which can be categorized as either inherent frictions or deliberate frustrations. Inherent frictions can occur around disputed statutory language, the classification of a record, redaction choices, and processing delays. These are good-faith interpretive issues or real workload constraints. Garland's desire to intentionally slow processes, produce records in problematic formats, and generally exasperate the requesters would qualify as deliberate frustrations.

There are countless other methods for unnecessarily introducing aggravation into the FOI request process, including exorbitant fees, misapplied exemptions, and inapt denials. Each of these deliberate frustrations is rooted in the existence of an inherent friction. Thus, it is public officials exploiting the existing tensions of the law to undermine its intended objectives. An important course of action in improving public records laws involves mitigating inherent frictions and eliminating deliberate frustrations. Identifying and addressing legal frictions and frustrations could provide valuable grist in amending and enforcing FOI laws.

A substantial body of research explores political and legal variables, as well as public opinion on FOI preferences and results (Spac et al., 2017; Piotrowski & Van Ryzin, 2007). This study examines legal variables in state FOI laws via an exploratory study. Before investigating the varied characteristics of state public records laws, the article will consider theories and rationales for the mounting complications in implementing FOI laws. Then, the article will produce a statistical analysis of 1,002 public records requests submitted across nine states in an effort to isolate legal issues correlated with FOI compliance. The FOI audit requested noncontroversial, readily accessible records, and thus evaluates how government bodies across the country comply with simple requests. The article explores not disputed elements of the law but seeks to identify specific legal characteristics that either benefit or impede common FOI processes and outcomes.

Burdening the FOI process

Garland faced charges in Georgia over violations of the ORA, specifically for violating a provision that forbade "knowingly and willingly frustrating… the access to records by intentionally making records difficult to obtain or review" (Georgia Open Records Act, 2020). The provisions were new to the Georgia law and intended to discourage behavior like Garland's. On its codification, the Georgia attorney general praised the 2012 ORA amendments, calling them "the teeth needed to enforce the law" (Georgia Department of Law, 2012). Garland had conspired to make the ORA request difficult, to frustrate the requester and to undermine the function of the law. The Georgia legislature and attorney general sought to root out just these kinds of deliberate frustrations.

Herd and Moynihan (2018) have defined these kinds of intentional obstructions as administrative burdens, where "political ideology or policy preferences lead politicians to use burdens to make government a source of hinderance rather than of help" (p. 14). When a law is enacted, there is an assumption of good-faith implementation on the government's part, and often behavioral economics assumes burdens are incidental and not intentional, but the concept of administrative burden flips that assumption, suggesting long-term, unaddressed administrative issues are likely intended to undermine the law. Unworkable policy is not happenstance or an intrinsic byproduct of complex implementation; such sustained policy problems are presumed to be deliberate. While Herd and Moynihan are more focused on legal design that builds in difficulty or frustration, the concept also has downstream effects where enactment is slipshod, and oversight largely abandoned.

A premise of the administrative burden concept is in allowing the government to present and publicize the benefits of a government policy and accept any accordant goodwill, while minimizing government responsibility through bureaucratic and clerical hurdles. This allows the government to, as the adage goes, "have its cake and eat it too." Politicians receive the accolades for the manifestation of the program, while using a fraction of the assets and resources. Criticism is dismissed as a failure in lower-level administration or blamed on witless citizens. There are myriad reasons public officials may seek to introduce or allow administrative burdens, many of them political. FOI laws give public officials considerable incentive to deliberately frustrate requesters; most notably the ability to conceal embarrassing or incriminating information. Scholars have found FOI laws to be subject to administrative burdens (Bashir & Nisar, 2020; Michener et al., 2020). Worthy (2017) has suggested politicians grow to resent transparency and its accordant potential for exposure and uncertainty. Worthy observed that embracing transparency entailed ceding some of a politician's hard-won power, often to political opposition: "Opening up equates to a loss of control and a potential empowerment of enemies and critics. So once in office, actors seek to stall, delay and water down commitments: the classic trajectory of FOI reform is one of survival through dilution"

(p. 2). Former U.K. Prime Minister Tony Blair, under whom the nation adopted its first FOI law, was explicit in his regrets. In his memoirs, he called his support for the law "naïve, foolish, irresponsible… I quake at the imbecility of it" (Blair, 2010, p. 466). In criticizing FOI laws, Blair was unusually candid for a public official, suggesting the laws are merely a weapon of the press and political opponents, and the limited view afforded by FOI only further confused the public.

Due to the symbolic prominence of transparency laws, politicians cannot merely sweep them away. They must unobtrusively subvert the law, to hobble its impact while allowing the symbolic banner of transparency to remain. Undermining FOI quietly wrests back some of the power, and the more granular act of frustrating public records requests serves two more immediate purposes. When a public body delays a request, it makes the information less valuable (especially for deadline-dependent journalists). In providing a denial or a hard-to-decipher response larded with legalese, not only does the public body retain its secrecy (and potentially withhold embarrassing or incriminating records), it discourages future requests. It signals to the requester that this information is not for them, or they will need to mount a sustained effort to receive it. FOI laws manifest administrative burdens through varying provisions and legal elements and a general failure in oversight and enforcement. Administration of the law has become disfigured in courtrooms and capitols across the country. The laws are intended to be simple, but a bevy of administrative burdens belabor the process.

Characteristics of FOI laws

Along with the federal Freedom of Information Act (FOIA), all 50 states and Washington, D.C., have public record laws, and these laws vary in significant ways. This article seeks to highlight the most salient of these disparities in understanding how different statutory manifestations are related or unrelated to FOI outcomes and processes, while considering how these legal elements are also hosts to inherent frictions and deliberate frustrations.

Subject bodies

In his recommendations for universal FOI standards, Toby Mendel (2003) called for broad application of the laws as a foundational step. While Mendel sought specific affirmative disclosure expectations from as a wide a range of public bodies as possible, the scope of FOI laws, and government transparency generally, is explicitly determined by the legislature's (or in rare cases, the court's) decision as to which bodies will be subject to FOI expectations. FOI laws are almost universally targeted at executive or administrative elements of government, and U.S. state FOI laws all make the executive branch subject to requests. Some FOI laws exclude the head of the executive branch, including the state governor's office, under the premise of executive or presidential privilege. Unlike the federal FOIA, some states extend the reach of their FOI law into the legislative and judicial branches, though many state legislatures have chosen not to include themselves, and in some instances, courts have determined they are not subject as well.

Deadlines

Journalists, legislators, and scholars have routinely identified delay as the No. 1 issue with public records laws (Grabell, 2016; Committee on Oversight and Government Reform, 2016; Hazell and Worthy, 2010). Statutory deadlines are intended to mitigate slow responses and control delay in processing FOI requests. Yet, a review of federal FOIA lawsuits since 1992 found "failure to respond within statutory time limit" to be the most common legal complaint (The FOIA Project, 2020). States

have diverse approaches to statutory deadlines with some providing no mention of deadlines, others only an ambiguous expectation of expediency, while others have codified relatively quick turnaround requirements. Cuillier (2019) suggested there is an assumption that explicit deadlines produce the best results, but his research found deadlines to have no significant effect on FOI processes.

State offices of oversight

Another area of scholarly interest has been state-run oversight offices (Fenster, 2015; Danielson, 2012; Stewart, 2010). These bureaus are most commonly focused on open government compliance, primarily via mediation and enforcement. As with other elements of FOI laws, the structure and authority of the offices varies state-by-state. In most states, these offices were created after initial enactment, signifying an effort to reform FOI operations and establish stricter adherence. Other motives for establishing oversight offices include interest in cutting costs by avoiding expensive litigation that crowded court dockets and, in New Jersey's case, a direct response to a rash of public corruption (Stewart, 2010). The offices typically carry out specific duties or responsibilities; namely educating and guiding requesters and public bodies, mediating disputes between requesters and public bodies, and involvement in litigation.

There are a number of important factors when considering the effectiveness of these oversight offices. Danielson (2010) suggested the most common characteristic of successful oversight offices was independence, finding bureaus affiliated with the state attorney general to be "almost uniformly ineffective, because attorneys general have insufficient time, interest, or resources to prosecute open records requests" (p. 1,018). State departments of justice are inherently political, leaving them prone to conflicts of interest and political manipulation; making them poor choices for resolving transparency disputes. Fenster (2015) highlighted two other critical elements; the ability to investigate disputes and binding authority to enforce decisions. Investigation of requester grievances is key, because without the legal authority to compel public bodies to cooperate, public bodies can make light of or stonewall oversight efforts. Some states have given these offices the ability to subpoena information relevant to an investigation. Of equal importance, binding authority to enforce decisions is a common but nonuniform element of oversight offices. Without binding authority, these offices have little more than moral authority to resolve disagreements. Often, these offices will produce public opinions, which courts may consider, but these opinions have no definite legal influence, are easy to disregard and ultimately do little more than state a position for the general public to contemplate.

Independent advocacy organizations

Mendel's second, and less intuitive, recommendation for universal FOI standards was active promotion of open government, including public education and training of officials. In many states, this role has been filled by nongovernment entities. For instance, the Washington Coalition for Open Government plays an official role in training records custodians. While FOI advocacy organizations adapt to fit the needs of the state, it has become clear they play a key role in the legal ecosystem and the realization of FOI laws. These FOI-focused organizations concentrate solely on the functions of educating, overseeing, and litigating state public records and open meetings laws. They act as a citizen-centric corollary to the state oversight offices.

The composition, resources, and activity of these advocacy organizations vary, but in most cases they serve as a primary FOI resource for the public, acting as a knowledge base both holding training and information sessions and responding to everyday questions from requesters. Often, they

provide templates and tips for requesters that demystify the legal process. A key responsibility of FOI advocacy organizations is their role as a non-state legal authority. In this position, they often operate a hotline connecting requesters with lawyers or FOI experts, both aiding the requesting process and keeping a finger on the pulse for potential issues. Perhaps the most important element of the advocacy organization's function is its ability to litigate or support litigation of cases. Some organizations offer full legal representation for select cases, while others may connect a requester with a lawyer (who may work contingent on being awarded attorneys' fees, which are recoupable for successful suits in many states).

Exemptions

When considering research and press coverage, study of legal exceptions or exemptions would rank among the most popular. The federal FOIA provides nine explicit exemptions, and for the most part states have adopted a similar approach to exemptions. The most common and clearly articulated exemptions exclude release of records pertaining to personal privacy and law enforcement. All states also include a statutory exemption, which excludes records required to be withheld by other statutes. Often these statutory exemptions are codified as a small provision of sizeable, otherwise unrelated legislation, and over time these exemptions have accumulated with little accountability. Despite all states using a similar exemption template and same foundational exemptions, it should be noted that exemption schemes vary dramatically according to state character and legislative interests.

Fees

Copy and search fees are another area of concern among requesters and scholars alike, and examples of exorbitant fees surface with regularity (Wilks, 2020; Dolan, 2018; Thompson, 2017). These high fee estimates are often used as administrative burdens. Records custodians seek to dissuade requesters by requiring excessive fees for requested records. Lotte Feinberg (1986) has documented the practice as far back as the Reagan administration, and the tactic has been publicly acknowledged at the federal level as recently as the Obama administration (Jones, 2015). Governments have attempted to combat fees as barriers through restrictions on fees, and this has primarily been accomplished through two approaches. Some states provide loose or ambiguous limits on the amount that a requester can be charged, using language like "reasonable" or limiting fees to the "actual cost" of search, review, and duplication. Others enforce explicit cost restrictions, providing a fee schedule that, for instance, charges 25 cents for a standard one-sided copy.

Penalties

FOI penalties are the teeth of Georgia's ORA and many other FOI laws and are meant to discourage and punish deliberate frustrations. In his study of state FOI laws, Marzen (2018) concluded that enhanced penalties and legal consequences were crucial to the function and improvement of FOI laws. Penalties can be realized in a wide variety of manners, including civil and criminal remedies and can range from small civil fines, like Garland received in Atlanta, to jail time and compulsory removal from custodian's duties. In many states, public bodies can be required to pay the plaintiff's attorney fees. There are articulations within each of these penalties, particularly in whether the penalties are optional or mandatory, turning on the statutory word choice of "may" or "shall." The detail and experimentation in different forms of penalties represent governments'

sustained interest in enforcing compliance. Yet, there is no single accepted approach to punishing flagrant violators of FOI laws. Stewart (2010) has suggested no matter the statutory or common law manifestations of penalties, a more consistent approach is necessary for these provisions to yield their intended outcomes.

The objective of this study is to further explore which of these legal characteristics influence FOI results. The following exploratory research questions were asked in an effort at extending and establishing a firmer understanding of the legal characteristics related to state FOI outcomes and processes:

RQ1: How are legal variables related to compliance with public records requests?

RQ2: How are legal variables related to records request completion times?

RQ3: How are legal variables related to how quickly and completely agencies communicate with requesters?

Methods

The article sought to consider the fundamental operations of nine FOI systems through an exploratory field study employing 1,002 actual public records requests. The primary objective of the project was to determine whether FOI laws work for everyday citizens and journalists, and then considering which, if any, legal factors are correlated with desirable outcomes. In an effort to test the basic premises of these laws, the study requested simple, noncontroversial records, submitted requests exclusively to county-level government agencies, and considered quantifiable results, such as outcome, completion time, and how and when agencies communicated with requesters.

The requests

The study is an exploratory field survey—or FOI audit—of nine U.S. states, comprising 1,002 requests across 334 counties, employing techniques similar to previous FOI request-based field studies (Ben-Aaron et al., 2017; Cuillier, 2010; Grimmelikhuijsen et al., 2018; Jenkins et al., 2020; Spac et al., 2018; Worthy et al., 2017). The study was conducted during two time periods: Feb. 11, 2019, to July 10, 2019, and June 3, 2019, to Dec. 4, 2019. The majority of the requests, 786, were submitted by the author and four research assistants starting June 3, 2019. The remaining 216 requests were submitted on Feb. 11 by students in a graduate course. In both batches, the requesting process was tightly controlled. All requests were submitted as emails from a Gmail account clearly affiliated with the author. The subject line of each email identified the message as a request per the state FOI law. The body included a similar message with a reference to the appropriate statutory code and directed the email recipient to the request, an attached PDF. The request acknowledged the law and statutory code and clearly stated the sought records; a preferred file format (PDF) and delivery method (email) were indicated. The request provided the identity and profession of the requester, a general purpose for the requested information, and asked the recipient to identify any justifications for denial or delay. In jurisdictions with a statutory deadline, the request asked that the body meet the deadline. In cases where the public body provided no acknowledgement of receipt, evidence of progress or an estimated date of delivery, follow-up emails and phone calls occurred at coordinated intervals.

The requested records varied but were intended to be relatively routine and require a minimal amount of time to complete. In all cases, the requested records were substantial and meaningful but unequivocally free of exemptions or legal dispute. The objective in determining what records to request was in duplicating a basic request that was easy for public body to search, review, and deliver.

Three public records requests were submitted to all 334 counties. In total, five different records requests were used due to differing government structures and responsibilities. In all 334 counties, a request was submitted to the county sheriff's office seeking incident reports for a two-day period. In seven states, excluding Oklahoma and Maine, a request for complaints about potholes was submitted to the county office responsible for roads maintenance. In Oklahoma, where there is no stand-alone county-level roads department, the pothole request was submitted to county commissioners. In Maine, a request was submitted to the county Emergency Management Agency for the county's hazard mitigation plan, a state statutory requirement. In all states except Wisconsin, a request for recent collective bargaining agreements was submitted to the highest-ranking official, body, or records clerk in the county. In Wisconsin, a request was submitted to each county's district attorney for the office's annual budget.

Sample

The project chose to make requests to county-level offices and departments in an effort to consider an expansive, diverse, and stable range of governments. Counties are relatively consistent across the country, performing common functions across many states. They conduct routine law enforcement, road maintenance, and administrative functions in all corners of the United States. A primary motivation for choosing county and not municipal entities is the stability, which allows the project to consider more rural populations and ultimately a broader sample of American law. Municipal governments, especially in less populous locales, demonstrate broad variance in solidity and reliability. County governments often respond to state mandates in a way that municipal governments often do not and with these responsibilities comes stability and resources.

Nine states were identified for their geographical diversity, variance in key FOI law characteristics, and open government reputations. The study was especially interested in statutory deadlines, penalty provisions, fee provisions, and oversight offices; as such, the sample states represent differing approaches to these legal variables. The article also accounted for public perceptions of each state's FOI law effectiveness in determining the state law sample (Cuillier, 2019; Qiu et al., 2015). With regard to geography, the U.S. Census Bureau divides the nation into four regions and subdivides the four regions into nine divisions. In all, each region is represented with at least two states and each division with one state. In Maine, New Jersey, Washington, Wisconsin, and Wyoming, requests were submitted to all counties. In Florida, Iowa, Mississippi, and Oklahoma, the counties were divided in half and sorted by total population, and a request was submitted to every other county starting with the most populous.

Variables

The project compiled a wide range of data on the FOI request process—fees required, fees threatened, format choice, method of communication (email, fax, or postal mail), a subjective rating of compliance and hostility—but ultimately focused on the following variables, for simplicity.

Predictor variables

The following predictor variables comprising legal factors were created for each state, based on evaluation of state laws, previous studies, and other resources. These variables would then, through statistical analysis, be compared to the criterion outcome variables derived from the FOI audit. Scholars have warned against transparency formalism, or analyzing the letter of the statutes

(Pozen, 2020), and the project has instead examined the law as applied, or de facto. To that end, the study consulted not only state codes but court cases, attorney general and enforcement office opinions, and the Reporter's Committee for Freedom of the Press Open Government Guide. Once each state law was coded, an expert on each state's FOI law reviewed the results. The variables represent notable characteristics of FOI laws. Some have long been debated, while others represent more novel legal considerations.

Subject bodies. All FOI laws include the executive branch, and all nine sample states include the governor's office, leaving the study to consider the legislative and judicial branches. Each was considered separately, and state laws that did not subject the legislature or the judiciary were coded as 0, and when the state law expected the legislature or the judiciary to comply with FOI requests a 1 was recorded. In some states, broad exemptions for either the legislature or the judiciary severely limit access to records among these institutions. In these instances, the branches were still considered subject to the FOI law. If a request produced an FOI response, even if citing a broad exemption, the body was considered subject.

Deadlines. The deadlines were drawn from the state statutes. Unless there was a controlling judicial interpretation, the number of days identified in the black letter of the law was used as a continuous variable for all counties in each state. In analysis, states with ambiguous deadlines (*e.g*., "reasonably prompt") were determined to not have statutory deadlines.

State oversight offices. The state oversight offices considered three factors before reducing the variable to a binary. Those that had oversight, ombuds, or enforcement offices independent of the attorney general, with investigative powers and binding authority to enforce a decision, were coded as a 1. Those states that had no oversight office or an office with two or less of independence, investigative powers and binding authority were coded a 0.

Independent advocacy organizations. For the purposes of the study, states were coded as either a 0 for no state advocacy organization or a 1 for a state law with an advocacy organization. To qualify as an advocacy organization, the organization must be active, have a clear and recognizable identity and be solely dedicated to state open government causes. This precludes state press organizations, which frequently do valuable work in advocating for open government but concern themselves with a range of legal issues in addition to open government.

Exemptions. Exemptions were recorded as a continuous variable. The study used the number of explicit exemptions defined in the state's FOI statute and did not account for statutory exemptions elsewhere in state codes. The counts ranged from eight for Wisconsin (a state relatively reliant on common law exemptions) to 73 for Iowa. It is important to note that in many cases, the state experts disagreed with the recorded number; observing there were hundreds of unaccounted for statutory exemptions. The study used explicit and defined exemptions in statute as an indicator of legislative intent in detailing and updating records categories to be excluded. The profound difficulty in determining an exact number of total exemptions with statutory exemptions proved prohibitive as well, as many states do not keep an official calculation.

Fees. The study borrowed Cuillier's (2019) "copy fees" variable, relying on a 0-2 scale. States that made no mention or provided no guidance regarding fees were scored a 0. State laws that provided an ambiguous fee schedule or expectation (*e.g*., "reasonable costs" or "actual costs") were recorded as a 1. State laws that provided a specific fee schedule (*e.g*., a maximum of 25 cents per page) were recorded as a 2.

Penalties. All states have penalties provisions in their statutes. The baseline for penalties is a one-time fine for a violation of the FOI law. Other states have provisions opening up the possibility of more severe penalties, including felonies that include jail time. The study has used a binary code, recording a 0 for state FOI laws whose statute proposes only a one-time fine and a 1 for state FOI

laws that have more severe penalties, such as escalating fines or the possibility of jail time. See Table 1, below, for descriptive statistics of the predictor variables.

Table 1

Descriptive Statistics for Predictor (Legal) Variables

Variable	Mean	SD	*N*
Leg. Subject	.736	.441	1,002
Jud. Subject	.704	.457	1,002
Deadline	.500	.500	1,002
Oversight Office	.548	.498	1,002
Advocacy Org.	.808	.394	1,002
# of Exemptions	32.36	18.817	1,002
Fee Schedule	1.380	.486	1,002
Penalties	.520	.500	1,002

Criterion variables

The criterion outcome variables were derived from measuring the performance of the agencies through the 1,002 public records requests. These outcome variables would then be compared to the predictor variables to see what legal factors are related to more desirable outcomes.

Outcome. The first main criterion variable focuses on the actual results of the requests – did the requester get what was requested? The study coded the 1,002 requests into one of three categorial outcome variables. A Positive Outcome connoted a request that was completed successfully, either the requested records being transferred to the requester or the public body informing the requester of the existing availability of the information online. A Neutral Outcome represents requests that concluded with a No Records response, where the public body informed the requester that the requested records did not exist. The third result was a Negative Outcome and indicates a failed request, where the agency either denied the request or the request was abandoned due to the bodies' sustained unwillingness to communicate or refusal to mail, email, or fax the records.

Time. The article considered both the amount of time to receive a first response from an office or department, as well as the amount of time to complete the request. The two continuous Time variables used were Days until Completed and Days until First Response. Both represent a count of the total number of days from request submission. Days until Completed counts the number of days from request submission to the date the records were received, the requester was informed of the records existing online publication, the requester was informed of No Records response, the request was denied or the request was recorded as failed. Days until First Response counts the number of

days from request submission to the date the public body first acknowledged receipt of the request. The *N* for Days until Completed is 981 due to 21 requests never reaching completion.

Communication. The study also analyzed the number of ignored communications (either an email or a phone message) and the number of additional follow-up communications needed to complete the request. No Response is a count of the number of times communication was attempted until the public body acknowledged receipt of the request. Additional Contacts is a count variable recording the number of additional communications needed beyond the initial submission (the original submission is not counted in this number).

For examples, a request for pothole complaints was submitted to the county commissioner's office in Pontotoc County, Oklahoma, on June 3, 2019. The office did not respond to the first three efforts at submitting the request (two emails and one phone call). Forty-three days elapsed before the county acknowledged receipt of the request. The request required an additional four follow-up communications to complete the request. Before they could be released, the county board of commissioners scheduled and discussed the request at a meeting, and a total of 78 days passed between initial request and the delivery of three small digital files of unredacted pothole complaints. The request was recorded as a Positive Outcome, 43 Days until First Response, 78 Days until Completion, 3 No Responses and 6 Additional Contacts. Descriptive statistics are in Table 2.

Table 2

Criterion (Outcome) Descriptives by State

		Outcome			Time		Communication	
State	*N*	% Pos.	% Neu.	% Neg.	Avg. Days Comp.	Avg. Days 1 Resp.	Avg. # No Resp.	Avg. # Add. Cont.
Florida	102	70	30	0	18	6	.28	.66
Iowa	147	65	35	0	16	12	.51	.61
Maine	48	73	21	6	9	4	.15	.35
Mississippi	123	37	55	8	28	22	1.35	1.91
New Jersey	63	73	27	0	16	10	.35	.57
Oklahoma	117	23	68	10	22	19	1.04	1.71
Washington	117	92	9	0	13	4	.10	.30
Wisconsin	216	81	19	0	14	9	.32	.52
Wyoming	69	45	51	4	15	10	.42	.61
All	1,002	63	34	3	17	11	.53	.84

Analysis

The data were analyzed using multiple logistic regression (Outcome), negative binomial regression (Time; Days until Completion, Days until First Response) and Poisson regression (Communication; No Response, Additional Contacts) to assess the relationship between the variables. As the only nominal variable, Outcome was assessed using multiple logistic regression, as the variable was categorized into three groups (Positive, Neutral, and Negative), and Neutral Outcome was used as the reference variable. And while OLS regression was an option, the Outcome variables are not truly ordinal. The Time and Communication variables were counts data measured in discrete units, and normal distribution of residuals could not be assumed. With Time and Communication variables, the lowest count was zero, and the nature of the variables left error distribution skewed to the right. The Time variables had a larger mean and demonstrated overdispersion, and negative binomial regression was determined to be the most appropriate estimation method. Poisson regression was used for Communication variables as there were no dispersion issues.

Results

In considering *RQ1*, how legal variables are related to public records request outcomes, four predictors had significant parameter estimates when comparing the Positive Outcome with the Neutral Outcome, and two predictors have significant parameters when comparing the Negative Outcome with the Neutral Outcome (see Table 3 and Table 4, below).

The presence of active advocacy organizations was the only predictor with significant parameters for both Positive and Negative Outcomes. Advocacy organizations predicted a strong likelihood that requests would be granted or proactively disclosed rather than receive a Neutral Outcome. Advocacy organizations also strongly predicted a decreased likelihood of denial or failed request rather than receive a Neutral Outcome. Three other legal variables—the legislature being subject to the FOI law; an independent, empowered state oversight office; and an established fee schedule—also were significant predictors of a Positive Outcome rather than a Neutral Outcome. Legislatures being subject to FOI law was found to be the strongest predictor of a Positive Outcome.

Table 3

Predictors' Unique Contributions in the Multinomial Logistic Regression (*N* = 1,002)

Predictor	x^2	*df*	*p*
Leg. Subject	80.843	2	.000***
Jud. Subject	1.804	2	.389
Oversight Office	9.882	2	.007**
Advocacy Org.	129.82	2	.000***
# of Exemptions	1.804	2	.406
Fee Schedule	22.856	2	.000***

Note: χ^2 = amount by which -2 log likelihood increases when predictor is removed from the full model.
* $p < .05$, ** $p < .01$, *** $p < .001$

Table 4

Results of Multinomial Logistic Regression Contrasting the Neutral Group versus Positive and Negative Groups (*N* = 1,002)

Predictor	Neutral vs.	*B*	*OR*	*p*
Leg. Subject	Positive	2.044	7.723	.000***
	Negative	-1.049	.350	.322
Jud. Subject	Positive	.360	1.434	.179
	Negative	-.411	.663	.203
Oversight Office	Positive	.515	1.674	.003**
	Negative	-.581	.559	.547
Advocacy Org.	Positive	1.878	6.538	.000***
	Negative	-1.865	.155	.008**
# of Exemptions	Positive	.001	1.001	.875
	Negative	-.035	.965	.203
Fee Schedule	Positive	1.236	3.443	.000***
	Negative	-.838	.433	.552

Note: *OR* = odds ratio associated with the effect of a one standard deviation increase in the predictor.

* $p < .05$, ** $p < .01$, *** $p < .001$

Table 5, below, provides the results for *RQ2*, how legal variables are related to response and completion times. The results for the negative binomial regression for Days until Completed identified four variables as significant in predicting the number of days a request would take to be completed. Three of the significant predictors—explicit fee schedule, subject legislature, and advocacy organization—were found to predict faster completion times. The number of explicit statutory exemptions were found to predict a small but significant increase in the number of days until the request is completed. Three of the same predictors—explicit fee schedule, subject legislature and advocacy organization—were also found to be significant in predicting how quickly a department or office would first respond to or acknowledge receipt of the request.

Table 5

Results of Negative Binomial Regressions (*N* = 981, 1,002)

		Days until Completed			*Days until First Response*	
Variable	β	*B(SE)*	*p*	β	*B(SE)*	*p*
Subject Bodies						
Leg.	-.383	.135	.004**	-1.136	.137	.000***
Jud.	.017	.144	.904	-.216	.147	.142
Deadline	-.105	.112	.378	-.004	.121	.975
Oversight Office	-.154	.096	.106	.026	.098	.009
Advocacy Org.	-.375	.100	.000***	-.907	1.020	.000***
# of Exemptions	.008	.004	.035*	.000	.039	.975
Fee Schedule	-.640	.139	.000***	-.716	.143	.000***
Penalties	.209	.127	.100	.105	.135	.435
Likelihood ratio x^2	71.859***			254.600***		

Note: The *N* for Days until Completed is 981 due to twenty-one requests never being completed and being recorded as failed.

* $p < .05$, ** $p < .01$, *** $p < .001$

The results for the statistical analysis addressing *RQ3* can be found in Table 6. The final research question considers communication factors of the requesting process: number of no responses, or the number of times the initial request was ignored, and number of additional contacts, or the number of times communication beyond initial submission was required to complete (or fail) the request. As is to be expected due to the correlative nature of the Time and Communication variables, the results of the Poisson regression are very similar to the negative binomial regression addressing the Time variables. States with advocacy organizations and laws that include the legislature in the FOI and include a reasonable fee schedule were found to be strong predictors in decreasing the number of times a request was ignored or not responded to. The same three variables were also the strongest predictors of additional contacts or communications. Each of advocacy organizations, subject legislatures and explicit fee schedules were found to be significant in predicting a decrease in the number of communications needed to close a request. The presence of a statutory deadline and a strong, state oversight office also predicted moderate decreases in the number of additional contacts.

Table 6

Results of Poisson Regressions (*N* = 1,002)

	No Response			*Additional Contacts*		
Variable	β	*B(SE)*	*p*	β	*B(SE)*	*p*
Subject Bodies						
Leg.	-1.185	.237	.000**	-.851	.158	.000***
Jud.	.112	.255	.660	.219	.186	.238
Deadline	-.119	.218	.585	-.388	.153	.011*
Oversight Office	.188	.186	.312	-.318	.127	.012*
Advocacy Org.	-1.446	.195	.000***	-1.022	.132	.000***
# of Exemptions	-.005	.009	.545	-.005	.006	.388
Fee Schedule	-.778	.279	.005**	-.883	.191	.000***
Penalties	.248	.330	.456	-.073	.206	.724
Likelihood ratio x^2	274.562***			331.024***		

* $p < .05$, ** $p < .01$, *** $p < .001$

Discussion

The findings suggest, among the legal variables in the study, three are closely correlated with better FOI outcomes and processes: 1) a legislature subject to the FOI law, 2) an independent state FOI advocacy group and 3) defined fee limits.

The legislature being subject to the state FOI law can be read as a signal of sincerity and interest in pursuing thorough-going transparency. In most cases, the legislature has amended the statute, opting themselves into FOI responsibility. Schudson (2015) has documented the mid-20th century advent of modern FOI laws, suggesting in the United States the legislative movement was more of a congressional power grab than a democratic project. And as a result, Congress left itself out of the law and aimed the mechanism at the executive branch. In this light, legislatures that have opted in can be viewed as more invested in public interest transparency. This is a government body choosing inconvenience for the sake of access to government information. Certainly, some legislatures have also passed exemptions severely limiting the range of legislative records available, but the fundamental act of the body choosing to include itself in FOI responsibilities suggests a state

committed to FOI beyond mere tokenism. FOI laws, at the federal, state, and local levels, often must compete for resources, and custodians are often short-staffed and requests can be backlogged due to personnel limitations (AbouAssi & Nabatchi, 2018). Where some states allow FOI offices and custodians to languish, these are states that have expanded their commitment to FOI and moved more resources to support the cause. The uniformity and the strength of the findings was also notable. Having a legislature subject to FOI laws predicted more positive outcomes, faster response, and completion times, fewer ignored requests and fewer communications to complete the request; all these findings were among the strongest significant predictors in the study.

Along with legislatures subject to FOI laws, the presence of independent advocacy organizations predicted equally as strong of findings; More positive outcomes, fewer negative outcomes, quicker responses and completion, ignored less frequently and required fewer additional contacts. Like subject legislatures, this is not necessarily an obvious or intuitive finding. There is certainly a logic to it, though. Worthy (2017) has called these coalitions proxy forces that supply the momentum to push forward FOI laws and amendments in the absence of government support. They often represent an organized bottom-up force in realizing FOI laws. While states have attempted to implement their own oversight offices, it appears they are too close to the politics and too volatile in leadership to realize thorough and consistent oversight. By contrast, independent advocacy organizations make compliance their primary purpose and are able to do so divorced from government machinations. The findings suggest this true independence to be a key, as some states appear to have made sincere efforts to insulate state oversight offices. Another valuable facet of advocacy organizations is their flexibility. They address issues as they surface, which is critical in any legal expectation, especially so when compliance is often seen as a galling obligation. New FOI loopholes materialize and proliferate with some regularity. The responsiveness of these organizations allows them to remain current and adapt as needed. Legislatures nor courts can anticipate efforts to circumvent the laws. The focus and proximity of advocacy organizations allows them to remain vigilant and alert to state and local concerns. This is encouraging news for states interested in better FOI compliance. Investing more resources in these organizations and encouraging these organizations to increase activity across the board—education, training, answering requester queries, and litigating—would likely lead to better FOI compliance and results.

The third of the three strong predictors, explicit fee schedules, has a fairly apparent logic to it. Fee schedules are a more granular finding than subject legislatures or advocacy organizations, and the strength and significance of its value as a predictor was also weaker. However, states that have codified clear limitations to the fees that requesters can be charged likely suggests evolution in the statute and sustained legislative effort in improving the law. While many of the statues use the language of the pre-digital era (most often prescribing costs for different copy sizes), they eliminate wildly exorbitant fees (though abuse can still occur). State laws that rely on ambiguous language like "reasonable" allow public bodies a good deal of latitude and can result in the common FOI charade of stonewalling a requester with a suggestion that they litigate if they disagree with the assigned fee. The explicit fee schedule is the most technical of the three major significant legal variables, but it also accords with a theme. Subject legislatures, advocacy organizations and fee schedules are all read as fairly clear efforts to improve FOI results.

That penalties were found to be insignificant, as well as the general paucity of significant legal variables generally, is an interesting finding. Penalties are so rarely applied as to make national headlines when a mayor's chief of staff is fined $2,000 for flagrantly violating the law. So, while the study attempts to consider the impact of different penalty provisions, these penalty provisions, no matter their severity, are invisible in the everyday function of the laws. And this same principle can be applied to many of the legal variables. It is difficult to measure relationships when implementation

of the legal variables is inconsistent. The variable may be accurate de jure, but these penalty provisions are not present de facto, and as a result the penalty provision having no statistical significance feels curiously accurate. Instead, the study found significant predictors in variables that signal a culture of compliance. Legislatures being subject to the law and independent advocacy organizations speak less to actual implementation and legal mechanics and more to a vigorous commitment to transparency.

Conclusion

The nature of governance leaves all laws prone to disappointment; lapses in application and interpretive decay affect every law. They generally undergo changes, often diminishment, through court decisions and agency rulemaking. Laws rarely arrive fully realized and without issues in application. Some laws, however, are more acutely predisposed to internal resistance and efforts to decay; one category being oversight laws and laws that seek to implement accountability and transparency. In seeking to affect transparency and potentially conceal incriminating or embarrassing information, government offices and officials are highly motivated to circumvent or even violate FOI laws. When a law is likely to meet resistance in application, compliance is loosely enforced and penalties effectively nonexistent, public officers have and will choose to risk an unlikely penalty.

FOI laws are the host of both inherent frictions and deliberate frustrations. Again, this is the nature of implementing a difficult law, but too often deliberate frustrations are allowed to masquerade as inherent frictions. Herd & Moynihan have done away with the dichotomy; whether a naturally occurring difficulty in application or an intentional effort to undermine the law, both are failures to realize the purpose of the law. In following this logic, it is no surprise that variables that represent independent oversight and positive intentions proved to be the strongest predictors in the study. The laws are so inconsistent and erratic in application that general variables proving the best predictors is logical when these variables are taken as signals of sincerity.

Limitations

The audit and regression analyses do not allow for any assumptions of causation. There are undoubtedly many factors at play that are not considered in the statistical model. As discussed below, developing a culture of transparency is the elusive goal in FOI compliance. This study is only able to point to relationships that coexist between legal factors and FOI and outcomes and processes, and not make any observations about cause and effect. And while the findings may play a role in growing a culture of transparency, it is limited as there are surely many non-legal factors that drive FOI compliance.

One of the study's primary limitations lies in its effort to quantify the law. The law is ambiguous. Statutes never tell the whole story, failing to explain an operational element or fully define a pivotal term. Judicial interpretation adds necessary nuance but often manifests sporadically in implementation. The study is guilty of measuring rough and obvious quantitative outcomes and drawing declarative conclusions, a practice warned against by Pozen (2020), Michener (2019), and Cucciniello et al. (2017). This limitation is both compounded and conflated with the general disregard for FOI laws. However, this should not discourage future research in this area. Scholars should redouble their efforts in trying to pin down the law and what makes it work. Continued collaboration between conventional legal research with quantitative analysis has the potential to affect positive changes in FOI laws. And as a globally popular transparency mechanism, advances in this marriage of conventional legal research and quantitative analysis could bear democratic fruit.

The study is also limited by the possibility of the Hawthorne effect, whereby an experiment is tainted by subjects' awareness of the experiment (Adair, 1984). Though the project is not a true experiment, there were multiple instances where it became clear county custodians were discussing requests with custodians in other counties. How this impacted the study and to what degree is difficult to ascertain. However, the study sought to test and measure compliance with the law, and consultation with others is well within the law and could even be viewed as a positive.

The findings suggest cultivating a culture of transparency may be as or more important than conventional legal variables like deadlines or penalties. The primary conclusion of the study is the problematic nature of modern FOI implementation. It is exceptionally difficult to glean what benefits or impedes better FOI outcomes, when the laws are disregarded with impunity. At their most fundamental, FOI laws are clerical. They are designed to be transactional; simple, routine "paper-pushing" mechanisms that provide a window into government activity, and only a small share of requests should meet suspicion or denial. Though the majority of requests encounter well-intentioned custodians and successful ends, there is still a substantial amount of disinterest and hostility in FOI processes. And were the study to have considered more controversial records, surely the results would have been poorer. If the government and public are to realize the lofty covenant aspired to in the preambles of these laws—and not allow them to exist as hollow platitudes and empty appeals to democratic ideals—further effort is needed to produce a culture of transparency. Resting on the current state of these laws, saddled with administrative burdens, will not bring it about. The findings suggest it starts with more vigilance and a more willing legislature.

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