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# COMMENT

## THE DISCLOSURE OF POLITICALLY SENSITIVE SPECIES' LOCATION INFORMATION UNDER THE FREEDOM OF INFORMATION ACT: ON WHETHER AUDUBON SOCIETY'S<sup>1</sup> "PUZZLING SITUATION"<sup>2</sup> SHOULD BE ADDRESSED BY LEGISLATION

### INTRODUCTION

Most conscientious biologists agree that we are entering a new wave of mass extinction.<sup>3</sup> While there have been mass extinctions throughout Earth's history, the conduct of humans has never before been the catalyst.<sup>4</sup> In 1973, Congress formally recognized the human role in this tragedy and articulated "the most clear-cut and absolute federal policy mandate for the protection of nature"<sup>5</sup> when it enacted the Endangered Species Act (the "ESA").<sup>6</sup> Since that time, the ESA has unfortunately been credited with creating a tremendous conflict between the government's policy of protecting endangered species and the

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<sup>1</sup> *Audubon Soc'y v. United States Forest Serv.*, 104 F.3d 1201 (10th Cir. 1997) [hereinafter *MAS III*]; see also *Maricopa Audubon Soc'y v. United States Forest Serv.*, 108 F.3d 1082, 1085 (9th Cir. 1997) [hereinafter *MAS I*] (considering "identical arguments in a case involving the same questions and the same parties"). The case appealed to the Tenth Circuit is referred to as "*MAS II*," following the approach taken by the Audubon Society's counsel in the Ninth Circuit litigation, see Brief of Appellants at tbl. of contents, *Audubon Soc'y v. United States Forest Serv.*, 108 F.3d 1082 (9th Cir. 1997) (No. 95-16919) (on file with *Brooklyn Law Review*) [hereinafter Brief of Appellants]. The Ninth Circuit case was filed prior to, but decided after, the Tenth Circuit appeal. See *id.*

<sup>2</sup> KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 5.3, at 126 (3d ed. Supp. 1999).

<sup>3</sup> See David Quammen, *Planet of Weeds: Tallying the Losses of Earth's Animals and Plants*, HARPER'S, Oct. 1998, at 57, 58-59.

<sup>4</sup> See *id.* at 61.

<sup>5</sup> RICHARD N.L. ANDREWS, *MANAGING THE ENVIRONMENT, MANAGING OURSELVES: A HISTORY OF AMERICAN ENVIRONMENTAL POLICY* 293 (1999).

<sup>6</sup> The Endangered Species Act of 1973, Pub. L. No. 93-205, 81 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1544 (1994 and Supp. 1998)).

interests of property owners.<sup>7</sup> Recent federal courts of appeals decisions and proposed legislation have brought to this conflict the question of how access to information about endangered species might be regulated to advance the federal government's wildlife policy.

The United States Forest Service (the "FS") recently lost two significant cases concerning the release of sensitive data about the location of endangered species.<sup>8</sup> In each, the Maricopa Audubon Society (the "MAS") gained access to information through the Freedom of Information Act ("FOIA")<sup>9</sup> which, according to the FS, could also be used by adversaries of wildlife protection, thereby increasing the risk of harm to endangered species that the FS is charged with protecting.<sup>10</sup> Shortly after these decisions were handed down, the Senate Committee on Environment and Public Works reported out a bill, which, among other significant amendments, proposed a change to current law to avoid the situation raised by these decisions.<sup>11</sup>

The bill's introduction provides a textbook example of how the separation of powers works, in that the debate about access to information that might help undermine the effectiveness of a federal statute was transferred from the chambers of the judiciary to the policy-balancing arena of the legislature. This bill stalled, however, and no specific legislative action has been taken to address the FS's concerns about these cases, although other bills have considered similar language.<sup>12</sup> This Comment reviews these recent decisions, engages in the debate about whether they should be addressed by legislation, and concludes with a qualified endorsement. While this precedent is ripe for congressional action, any new law providing an additional basis to withhold information about the location of

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<sup>7</sup> See ANDREWS, *supra* note 5, at 294.

<sup>8</sup> *MAS II*, 104 F.3d 1201; *MAS I*, 108 F.3d 1082.

<sup>9</sup> 5 U.S.C. § 552 (1994 & Supp. 2000).

<sup>10</sup> See *MAS II*, 104 F.3d at 1203; see also *MAS I*, 108 F.3d at 1086.

<sup>11</sup> The Senate and the House introduced similar bills, S. 1180, 105th Cong. (1997) and H.R. 2351, 105th Cong. (1997), both named the "Endangered Species Recovery Act of 1997." The amended version of Senate Bill 1180 was reported out of the Senate Committee on Environment and Public Works and contains the proposed exemption analyzed in this Comment. See S. REP. NO. 105-128 (1997), available at 1997 WL 688536.

<sup>12</sup> See *infra* Part III.

endangered species must be narrowly crafted to accomplish a careful balancing between the interests of environmental groups, who provide independent oversight of federal agency actions (and the effects of those actions on protected species), and the interests of landowners, which are certainly not always aligned with the federal policy articulated in the ESA.

FOIA<sup>13</sup> generally requires federal agencies to open their files to public inspection to advance the interests of democracy and good government, regardless of the identity of the FOIA requester.<sup>14</sup> Recognizing that the federal government must sometimes operate behind closed doors to be effective, Congress provided limited exceptions to this broad disclosure mandate.<sup>15</sup> One such exemption, Exemption 2,<sup>16</sup> permits the withholding of information "related solely to the internal personnel rules and practices of an agency."<sup>17</sup>

One accepted variant<sup>18</sup> of Exemption 2 permits the withholding of agency materials if (1) the requested documents satisfy the language of Exemption 2 and (2) the agency sustains its burden of showing that release of the documents would increase the risk that agency regulations might be circumvented.<sup>19</sup> Most cases upholding the assertion of this so-called "high 2"<sup>20</sup> variant of Exemption 2 do so where the documents are clearly related to internal rules and practices.<sup>21</sup> One scenario not contemplated by the current two-part test is

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<sup>13</sup> 5 U.S.C. § 552.

<sup>14</sup> See FREEDOM OF INFORMATION ACT GUIDE AND PRIVACY ACT OVERVIEW 3 (1998) [hereinafter FOIA GUIDE] (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)); see also *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 770 (1989); Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 655 (1984).

<sup>15</sup> See FOIA GUIDE, *supra* note 14, at 3.

<sup>16</sup> See 5 U.S.C. § 552(b)(2).

<sup>17</sup> *Id.*

<sup>18</sup> The variant discussed in this Comment has been adopted by four circuits. See *MAS II*, 104 F.3d 1201, 1204, 1204 n.1 (10th Cir. 1997) (citing *Kaganove v. Env'tl. Prot. Agency*, 856 F.2d 884 (7th Cir. 1988); *Crooker v. Bureau of Alcohol, Tobacco, and Firearms*, 670 F.2d 1051 (D.C. Cir. 1981); *Hardy v. Bureau of Alcohol, Tobacco, and Firearms*, 631 F.2d 653 (9th Cir. 1980); *Caplan v. Bureau of Alcohol, Tobacco, and Firearms*, 587 F.2d 544 (2d Cir. 1978)).

<sup>19</sup> See, e.g., *Kaganove*, 856 F.2d at 889-90 (withholding an employee candidate rating plan to avoid thwarting agency objectives).

<sup>20</sup> *Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992).

<sup>21</sup> See 5 U.S.C. § 552; see also FOIA GUIDE, *supra* note 14, at 108-10.

that in which the documents do not clearly fall within the language of Exemption 2, but where their release might nevertheless lead to circumvention of agency regulations. It is this limitation in particular that transfers the dispute from the courtroom to Congress.

The Tenth and Ninth Circuits recently confronted this scenario in two nearly identical cases brought by the MAS against the FS: *Audubon Society v. United States Forest Service*<sup>22</sup> and *Maricopa Audubon Society v. United States Forest Service*<sup>23</sup> (respectively, "MAS II" and "MAS I"). Over the strong objections of the FS, both courts of appeals approved the disclosure of documents because they did not clearly fall within the language of Exemption 2, even though, as the FS was prepared to argue, the release of information might lead to circumvention of agency regulations.<sup>24</sup>

As argued below, under Exemption 2, the MAS cases were probably decided correctly.<sup>25</sup> Yet the result of these decisions is that information that reveals the precise location of endangered species is available to anyone who submits a request for it under FOIA, including those intent on harming species.<sup>26</sup> To date, the risk that an individual could request information pursuant to FOIA to circumvent the FS's enforcement efforts remains unresolved, largely because the 105th Congress failed to enact a version of a Senate bill containing language specifically intended to close the loophole revealed by these cases.<sup>27</sup> This Comment contends that because the FS's basis for asserting Exemption 2 was weak under most constructions of that exemption, one remedy available to the FS is to seek specific exemption language in Congress.

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<sup>22</sup> 104 F.3d 1201.

<sup>23</sup> 108 F.3d 1082.

<sup>24</sup> See *MAS II*, 104 F.3d at 1204-05; *MAS I*, 108 F.3d at 1086-87.

<sup>25</sup> See *infra* Part II.C.

<sup>26</sup> See DAVIS & PIERCE, *supra*, note 2, § 5.3, at 126.

<sup>27</sup> Despite intense efforts by supporters to attach the bill as a rider to a last-minute appropriations bill, it was never enacted. See Tom Daschle, *The 105th Congress: Much Promise; Little Progress*, CONG. PRESS RELEASE, Oct. 7, 1998, at 10.

Part I of this Comment presents an introduction to the underlying statute, the ESA,<sup>28</sup> an examination of the basis for the FS's concern that disclosure of the documents at issue would increase the risk of circumvention of the ESA, and a discussion of the relevant provisions of FOIA. Part II reviews the Tenth and Ninth Circuit decisions that give rise to this analysis, concluding that while these decisions were correctly decided, the analytical framework of Exemption 2 is ill-suited to resolve future disputes in which a FOIA requester could successfully obtain information to harm protected species. Drawing on background provided in Part I, Part III analyzes the implications of the recent congressional response to the MAS decisions. This Part contends that the proposed exemption could be used to close the loophole illustrated by the MAS litigation, and it concludes that if Congress should choose to create an exemption that permits the withholding of data relating to the location of species, it should do so only in a manner that promotes federal wildlife protection without disturbing the oversight functions of environmental groups.

## I. STATUTORY BACKGROUND

### A. *The Endangered Species Act of 1973*<sup>29</sup>

#### 1. Development and General Provisions

Sometime after (and possibly in reaction to) the publication in 1962 of Rachel Carson's *SILENT SPRING*, Congress recognized that "consideration of [the] need to protect the endangered species went beyond the value of the aesthetic."<sup>30</sup> In the ESA, Congress codified what would prove to be a powerfully divisive policy: the federal government would no longer be indifferent to the destruction of our country's "natural bounty."<sup>31</sup>

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<sup>28</sup> 16 U.S.C. §§ 1531-1544 (1994 & Supp. 1998).

<sup>29</sup> *Id.*

<sup>30</sup> JACK W. GROSSE, *THE PROTECTION AND MANAGEMENT OF OUR NATURAL RESOURCES, WILDLIFE, AND HABITAT* 91 (1997).

<sup>31</sup> Congressman John D. Dingell, *The Endangered Species Act: Legislative Perspectives on a Living Law*, in *BALANCING ON THE BRINK OF EXTINCTION: THE ENDANGERED SPECIES ACT AND LESSONS FOR THE FUTURE* 25, 26 (Kathryn A. Kohm

Declaring that some species "have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation," Congress determined, among other things, that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities" to protect the ecosystems on which the species depend.<sup>32</sup> The ESA is an expansive legislative scheme intended "to halt and reverse the trend toward species extinction, whatever the cost."<sup>33</sup>

The ESA first requires the Secretary of the Interior or the Secretary of Commerce<sup>34</sup> to determine which species are endangered or threatened<sup>35</sup> by using various broadly-phrased factors.<sup>36</sup> The Secretary is not alone, however, in initiating the listing process. Interested persons may petition to add or remove a species from the endangered or threatened species list.<sup>37</sup> The Secretary then examines the sufficiency of scientific and commercial information to determine whether further action is warranted for such "candidate" species.<sup>38</sup> On the Secretary's determination that further consideration is required, the species is then "proposed" for listing by promptly publishing notice thereof in the Federal Register.<sup>39</sup> In certain "emergency" situations, the Secretary may by-pass detailed notice and comment requirements to temporarily, but immediately, list a species.<sup>40</sup> A list of those species determined to be

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ed., 1991) [hereinafter BALANCING].

<sup>32</sup> 16 U.S.C. § 1531(a)(1), (b), (c)(1).

<sup>33</sup> *TVA v. Hill*, 437 U.S. 153, 184 (1973).

<sup>34</sup> "Secretary" is defined in the ESA to denote either the Secretary of the Interior or the Secretary of Commerce, and in some situations, the Secretary of Agriculture. See 16 U.S.C. § 1532(15).

<sup>35</sup> An "endangered" species is one "in danger of extinction throughout all or a significant portion of its range" except for certain insects. A "threatened" species is one "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(6), (20).

<sup>36</sup> These factors include the following: habitat destruction, overutilization of the species, disease or predation, inadequacy of current regulation, and other factors natural and manmade. See *id.* § 1533(a)(1)(A)-(E).

<sup>37</sup> See *id.* § 1533(a)(3).

<sup>38</sup> See *id.* § 1533(b); see also Laurence Michael Bogert, *That's My Story and I'm Stickin' To It: Is the "Best Available" Science Any Available Science Under the Endangered Species Act?*, 31 IDAHO L. REV. 85, 93 (1994) (citing 50 C.F.R. § 424.20(b)).

<sup>39</sup> See 16 U.S.C. § 1533(b)(3)(B).

<sup>40</sup> See *id.* § 1533(b)(7).

endangered or threatened under either the notice and comment procedures or on an emergency basis must be published in the Federal Register.<sup>41</sup>

Once a species is listed as endangered or threatened, the Secretary is then required to designate its "critical habitat" to the "maximum extent prudent and determinable."<sup>42</sup> Critical habitat designation need not be made where the identification (and subsequent publication in the Federal Register) of a species' location might bring greater harm to the species.<sup>43</sup> While the Secretary may consider the economic impact in making a critical habitat designation,<sup>44</sup> listing decisions are to be based on the best scientific and commercial data available.<sup>45</sup> The Secretary is also responsible for developing "recovery plans" for listed species, unless doing so would not promote conservation.<sup>46</sup> Such "recovery plans" are to include site-specific actions necessary for recovery, criteria for evaluating recovery, and estimates of how long the plan will be in effect.<sup>47</sup> The ESA also requires all federal agencies to consult with the Secretary and to insure that any agency actions are "not likely to jeopardize the continued existence of any endangered species or threatened species" or adversely modify their critical habitat.<sup>48</sup>

The ESA expressly prohibits a wide range of conduct relating to listed species, including the import or export, the "taking,"<sup>49</sup> the possession, the transportation, and the sale of listed species of fish or wildlife.<sup>50</sup> Some recent court decisions

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<sup>41</sup> See *id.* § 1533(c).

<sup>42</sup> See *id.* § 1533(a)(3).

<sup>43</sup> The designation of critical habitat can lead both vandals and rare wildlife collectors to the species the ESA intends to protect. See Thomas F. Darin, *Designating Critical Habitat Under the Endangered Species Act: Habitat Protection Versus Agency Discretion*, 24 HARV. ENVTL L. REV. 209, 217 (2000); Jack McDonald, Chapter, *Critical Habitat Designation Under the Endangered Species Act: A Road to Recovery?*, 28 ENVTL L. 671, 683 (1998).

<sup>44</sup> See 16 U.S.C. § 1533(b)(2).

<sup>45</sup> See *id.* § 1533(b)(1)(A).

<sup>46</sup> See *id.* § 1533(f).

<sup>47</sup> See *id.* § 1533(f)(1)(B)(i)-(iii).

<sup>48</sup> See *id.* § 1536(a).

<sup>49</sup> "[T]ake' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

<sup>50</sup> See *id.* § 1538(a)-(g).



have condoned an expanded interpretation of the term "taking," which now includes habitat degradation that kills or injures species.<sup>51</sup> The ESA imposes both civil and criminal penalties for violations.<sup>52</sup>

Some provisions of the ESA belie its intent to save species at all costs. There are several limited exemptions that exclude from coverage acts that allow for establishment of experimental populations, acts that may result in only "incidental" takings, acts resulting from contracts entered into before the ESA was enacted, hunting by Alaskan natives for subsistence purposes, etc.<sup>53</sup> Furthermore, in response to the unexpected Supreme Court ruling in *TVA v. Hill*,<sup>54</sup> the ESA was amended to permit submission of applications to the Endangered Species Committee, which is empowered to override the effect of the act with respect to agency actions.<sup>55</sup>

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<sup>51</sup> See, e.g., *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 704-08 (1995) (upholding Secretary's determination that "take" includes "significant habitat modification or degradation that actually kills or injures wildlife."); *Palila v. Hawaii Dep't of Land and Natural Res.*, 852 F.2d 1106, 1110 (9th Cir. 1988) (holding that habitat destruction by competing species constituted a "taking" of endangered bird).

<sup>52</sup> See 16 U.S.C. § 1540; see also *United States v. Dion*, 476 U.S. 734, 746 (1986) (upholding conviction, based in part on the ESA, of a Yankton Sioux for shooting several bald and golden eagles).

<sup>53</sup> See 16 U.S.C. § 1539.

<sup>54</sup> 437 U.S. at 173 (citing 16 U.S.C. § 1536 (1976)) (upholding an injunction prohibiting the completion of the Tellico Dam because the ESA mandated that federal agencies must "insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence" of an endangered species); see also Lynn A. Greenwalt, *The Power and Potential of the Act*, in *BALANCING*, *supra* note 31, at 32 ("The real strength of the act, however, did not become evident until the tiny snail darter illuminated the issue."). In fact, it appears that the result in *TVA v. Hill* was entirely unanticipated by legislators, who would later report that they did not think they were voting to protect anything other than eagles, bears, and whooping cranes and that they certainly did not believe the ESA would raise any questions about large public works projects and similar developments. See *BALANCING*, *supra* note 31, at 32.

<sup>55</sup> See 16 U.S.C. § 1536(e).

## 2. The Basis for the Forest Service's Concern About Increased Risk of Circumvention

Because the ESA causes significant economic impact on society,<sup>56</sup> it should not be surprising that ESA regulation has occasionally motivated people to retaliate against groups involved in activities related to protecting endangered species.<sup>57</sup> Furthermore, while some landowners express concern that the law does not promote responsible stewardship, others appear to have taken more direct action in order to avoid ESA regulation.<sup>58</sup> These results, caused by the fear of regulation, have led many to criticize the ESA because it creates "perverse incentives that destroy habitat."<sup>59</sup>

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<sup>56</sup> For example, "federal protection for the northern spotted owl under the ESA has been estimated at a 'societal' cost of between \$21 and \$46 billion." See Bogert, *supra* note 38, at 87.

<sup>57</sup> See, e.g., Mike Taugher, *Group Claims Santa Fe Shooting*, ALBUQUERQUE J., Dec. 12, 1998, available at 1998 WL 16514365 (reporting that underground group took credit for shooting out window at animal protection office on news of reintroduction of endangered Mexican grey wolves).

<sup>58</sup> One property owner recently editorialized, "If an endangered species is discovered on my property, the government is empowered to effectively confiscate my land to preserve the species' habitat." Joe Pryor, Editorial, *Species-Protection Act Needs to be Updated*, GREENSBORO NEWS & REC., June 14, 1998, at F3, available at 1998 WL 2175745. Pryor lamented and explained, "The law gives me no incentive to manage my land with sound environmental practices. Instead it's in my financial interest to destroy the habitat and thereby accelerate the extinction of species." *Id.* Fear of habitat regulation under the ESA has induced some landowners to "take affirmative actions to ensure that no such habitat exists on their property." Ike Sugg, Viewpoints, *Safe Harbors Aren't Safe for Landowners*, THE DALLAS MORNING NEWS, Sept. 5, 1998, at 37A, available at 1998 WL 13100592.

<sup>59</sup> Sugg, *supra* note 58. Some have stated that on finding listed species, the ESA produces the following result: "Even if you don't have any plans [to build], you still might want to kill the creature lest it someday wipe out the value of your property." Jesse Walker, *Specious Reform*, NAT'L REV., May 18, 1998, at 36, available at 1998 WL 14557063. Stated similarly, "[C]urrent laws [including the ESA] create perverse incentives that discourage people from creating, enhancing or preserving wetlands or species habitat . . . . Tragically, there is mounting evidence that fear of government regulation is driving landowners to destroy potential habitat for endangered species to avoid attracting them." H. Sterling Burnett, Commentary/OP-ED, *Endangered Property*, THE WASH. TIMES, June 19, 1996, available at 1996 WL 2957986. "[F]armers nonetheless live in such fear of enforcement [of a state endangered species act] that many engage in 'scorched earth' farming, not allowing any stray greenery to take hold on fallow ground or around the edges of fields." Mary Lynne Vellinga, *State Loosens Species Guards; Bill Overhauls Rules on Killing Animals*, THE DAILY NEWS OF L.A., Sept. 28, 1997, at N10, available at LEXIS, News Library, Curnws File (reporting on passage of California bill which allows developers and farmers to kill endangered species).

These critics claim that the current scheme has produced the unexpected result of "panic cutting" in which landowners destroy habitat to avoid regulation, often leading to an accelerated rate of extinction and environmental degradation (i.e., publication of a proposed listing in the Federal Register may lead to acceleration of commercial development of the species' habitat).<sup>60</sup> Environmental groups and habitats are not the only ones threatened by landowners' fears of regulation. The species themselves have been targeted in retaliation for efforts to control land use.<sup>61</sup>

As articulated by the FS, there are several legitimate bases for the fears of landowners. While the last basis was the only one presented by the FS in the MAS litigation,<sup>62</sup> an additional basis for these fears (often expressed in the context of making critical habitat designations) is that there is an increased risk of illegal takings at the hands of wildlife collectors.<sup>63</sup>

## B. *The Freedom of Information Act and Exemption 2*

### 1. Introduction

The disclosure mandate of FOIA is based on the belief that an informed citizenry is vital to the functioning of democracy and that government information is "needed to check against

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<sup>60</sup> See Eric Pryne, *Unintended Dilemma: Endangered Species Act Prompts Owners to Clear-or Sell*, CHI. TRIB., June 25, 1995, at 5G, available at 1995 WL 6220320; see also *supra* notes 38-39 and accompanying text.

<sup>61</sup> See, e.g., Scott Sonner, *Endangered Species Act Critics Claim Victory in Yearslong Fight Over Rare Plant*, THE COLUMBIAN, Nov. 28, 1998, available at 1998 WL 17203497 (reporting delisting of the Sodaville Milkvetch and noting that "listing the plant could do more harm than good if someone decided to wipe it out in retaliation" and that to do so would be quite easy considering the limited number of specimens remaining—"A can of gasoline would take care of the whole species."). Department of Justice Attorney John Schnitker stated at oral argument in the MAS II litigation, "We'd have to disclose [the maps] to Joe Six-Pack who just lost his job at the lumber mill." Scott Sandlin, *Forest Service Fights Release of Owl Maps: Move Could Hurt Species, Lawyer Says*, ALBUQUERQUE J., Nov. 20, 1996, at D3, available at LEXIS; see also Brief for Appellees at 33-34, *Audubon Soc'y v. United States Forest Serv.*, 108 F.3d 1082 (9th Cir. 1997) (No. 95-16919) (on file with *Brooklyn Law Review*) [hereinafter Brief for Appellees].

<sup>62</sup> See Brief for Appellees, *supra* note 61, at 7 n.4, 33-35.

<sup>63</sup> "There is little doubt a critical habitat map can be a virtual 'treasure map' to a collector of a rare species . . ." McDonald, *supra* note 43, at 683.

corruption and to hold the governors accountable to the governed.”<sup>64</sup> In order to achieve this goal, FOIA “generally provides that any person has a right, enforceable in court, of access to federal agency records, except to the extent that such records . . . are protected from disclosure by one of nine exemptions or by one of three special law enforcement exclusions.”<sup>65</sup>

Under FOIA, federal agencies are required to make certain categories of information available to the public either by publishing information in the Federal Register,<sup>66</sup> by making information available for public inspection and copying in “reading rooms,”<sup>67</sup> or by making records available on request.<sup>68</sup> Congress substantially amended FOIA several times since its enactment in 1966<sup>69</sup> to deal with disclosure provisions of other statutes, district court review of FOIA requests, special law enforcement record exclusions, and electronic records.<sup>70</sup>

While the purpose of FOIA may be to ensure an informed citizenry, the policy of broad disclosure articulated by FOIA<sup>71</sup> is not to be advanced so zealously as to ignore the conflict between disclosure and “other vital societal aims.”<sup>72</sup> Therefore, a number of exemptions to FOIA allow agencies to withhold information under specific circumstances,<sup>73</sup> although it is

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<sup>64</sup> FOIA GUIDE, *supra* note 14, at 3 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)).

<sup>65</sup> FOIA GUIDE, *supra* note 14, at 3.

<sup>66</sup> See 5 U.S.C. § 552(a)(1) (1994 & Supp. 1998).

<sup>67</sup> *Id.* § 552(a)(2).

<sup>68</sup> See *id.* § 552(a)(3).

<sup>69</sup> Most notably in 1974 in response to Watergate. See Wald, *supra* note 14, at 659 (reviewing FOIA success stories after the 1974 Amendments); see also FOIA GUIDE, *supra* note 14, at 10.

<sup>70</sup> See FOIA GUIDE, *supra* note 14, at 9-13.

<sup>71</sup> “The mandate of the FOIA calls for broad disclosure of Government records,” *CIA v. Sims*, 471 U.S. 159, 166 & n.9 (1985) (“The Court has consistently recognized this principle.”).

<sup>72</sup> See FOIA GUIDE, *supra* note 14, at 3. The right of access provided by FOIA must be “balanced against other values . . . [in a manner that is] often excruciatingly difficult . . . .” Wald, *supra* note 14, at 656.

<sup>73</sup> For the purposes of this Comment, the relevant subsections of § 552(b) read as follows:

This section does not apply to matters that are—

. . . .

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the mat-

well-settled that any such exemption must be narrowly construed<sup>74</sup> in light of FOIA's purpose of providing for broad disclosure.<sup>75</sup>

## 2. Exemption 2: "Related Solely to the Internal Personnel Rules and Practices of an Agency"<sup>76</sup>

Exemption 2 permits the withholding of federal agency records "related solely to the internal personnel rules and practices of an agency."<sup>77</sup> Ambiguous on its face,<sup>78</sup> this language was initially the source of significant judicial consternation as courts struggled with conflicting sources of legislative history.<sup>79</sup> While the bill's Senate Report suggested that the scope of Exemption 2 permits the withholding of mere house-keeping matters,<sup>80</sup> the House report stated that the exemption permits the withholding of "[o]perating rules, guidelines, and manuals."<sup>81</sup> The following section provides an introduc-

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ters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

5 U.S.C. § 552(b)(2)-(3).

<sup>74</sup> See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220-21 (1978); *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

<sup>75</sup> See *CIA v. Sims*, 471 U.S. 159, 166 (1985).

<sup>76</sup> 5 U.S.C. § 552(b)(2).

<sup>77</sup> *Id.*

<sup>78</sup> See CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE* § 3.38[4], at 255 (2d ed. 1997) ("The scope of [Exemption 2] is not clear from the language of the Act.").

<sup>79</sup> "The interpretation of this exemption has been hotly contested." *Dirksen v. United States Dep't of Health and Human Servs.*, 803 F.2d 1456, 1458 (9th Cir. 1986). See generally Marnie Joy Carro, Note, *Crooker v. Bureau of Alcohol, Tobacco, and Firearms: A Result-Oriented Approach to FOIA Exemption 2*, 32 CATH. U. L. REV. 317, 318-34 (1983) (reviewing early cases and the legislative history of Exemption 2).

<sup>80</sup> "Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like." *Vaughn v. Rosen*, 523 F.2d 1136, 1140-41 (D.C. Cir. 1975) (quoting S. REP. NO. 89-813, at 8 (1965)).

<sup>81</sup> The *Vaughn* court quoted House Report 1497 when it stated:

2. Matters related solely to the internal personnel rules and practices of any agency: Operating rules, guidelines, and manuals of procedure for Government investigators or examiners would be exempt from disclosure, but this exemption would not cover all "matters of internal management"

tion to this heavily litigated area of law by reviewing the leading federal appellate decisions, particularly those of the D.C. Circuit<sup>82</sup> and, of course, the Supreme Court,<sup>83</sup> which resolved these differences by harmonizing the two approaches. Generally speaking, house-keeping matters of little public interest may be withheld under the "low 2" interpretation. However, more significant matters of public interest, the release of which might facilitate the circumvention of agency regulations, may be withheld under the "high 2" interpretation.<sup>84</sup>

Considering the withholding of Civil Service Commission management evaluations, the Court of Appeals for the District of Columbia Circuit in *Vaughn v. Rosen*<sup>85</sup> articulated its preference for the Senate Report.<sup>86</sup> The D.C. Circuit read Exemption 2 to prevent disclosure of "only routine 'house-keeping' matters in which it can be presumed the public lacks any substantial interest."<sup>87</sup> Because the management evaluation materials at issue did not relate to "housekeeping" matters such as parking facilities, lunchrooms, sick leave, and the like," and because the reports were of "legitimate public interest," the court denied the withholding of the materials.<sup>88</sup> In his concurrence, Judge Leventhal added an important gloss to assist in

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such as employee relations and working conditions and routine administrative procedures which are withheld under the present law.

*Id.* (quoting H.R. REP. NO. 89-1497, at 10 (1996)).

<sup>82</sup> See, e.g., *Crooker v. Bureau of Alcohol, Tobacco, and Firearms*, 670 F.2d 1051, 1074 (D.C. Cir. 1981) (en banc) (overruling the rationale of *Jordan* and extending Exemption 2 to cover a law enforcement training manual); *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 781 (D.C. Cir. 1978) (en banc) (refusing to extend Exemption 2 to apply to documents the disclosure of which might lead to circumvention of agency regulations); *Vaughn v. Rosen*, 523 F.2d 1136, 1143 (D.C. Cir. 1975) (limiting Exemption 2 to apply to house-keeping internal matters of no legitimate public interest). The D.C. Circuit is "at the forefront" of FOIA jurisprudence. Laurie A. Doherty, Chapter, *The Freedom of Information Act: The Government's Authority to Withhold Previously Disclosed Information Under FOIA*, 56 GEO. WASH. L. REV. 880, 881 (1988).

<sup>83</sup> See *Dep't of Air Force v. Rose*, 425 U.S. 352 (1976).

<sup>84</sup> See FOIA GUIDE, *supra* note 14, at 96.

<sup>85</sup> 523 F.2d 1136 (D.C. Cir. 1975).

<sup>86</sup> See *id.* at 1140.

<sup>87</sup> *Vaughn*, 523 F.2d at 1140. One commentator approved the adoption of the Senate report because it "seems fully faithful to the words of the statute"; whereas, the House version reflects the House Committee's attempt "to change the meaning of the legislative language." KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 5:30, at 390-91 (2d ed. 1978).

<sup>88</sup> See *Vaughn*, 523 F.2d at 1143.

reading the language of Exemption 2. Noting that " 'relating' is potentially all-encompassing while 'solely' is potentially all-excluding," he stated that the language should be construed to cover "predominantly" internal materials.<sup>89</sup> The Supreme Court soon thereafter approved the *Vaughn* majority's reading, but it suggested that, on different facts, an expansion of Exemption 2 might be warranted.

On facts very similar to *Vaughn*, the Supreme Court agreed with the *Vaughn* court's interpretation in *Department of Air Force v. Rose*.<sup>90</sup> Considering the withholding of Air Force disciplinary summaries,<sup>91</sup> the Court reviewed lower court decisions and found that a majority of them considered the Senate Report to reflect congressional intent.<sup>92</sup> The remaining decisions followed the House Report and allowed the withholding of documents where release of information might result in the circumvention of agency regulations.<sup>93</sup> Because it believed that the hearing summaries in *Rose* would not pose a threat of circumvention of Air Force regulations, the Court found it unnecessary to rule decisively on the applicability of the House version.<sup>94</sup> The Court then agreed with the *Vaughn* court's reasoning,<sup>95</sup> but it left open an important question of whether the House version might, under different circumstances, be appropriate. The Court stated, "[A]t least where the situation is not one where disclosure may risk circumvention of agency regulation, Exemption 2 is not applicable to matters subject to such a genuine and significant public interest."<sup>96</sup>

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<sup>89</sup> *Id.* at 1150-51 (Leventhal, J., concurring).

<sup>90</sup> 425 U.S. 352.

<sup>91</sup> *See id.* at 354-55.

<sup>92</sup> *See id.* at 363 n.5 (collecting cases).

<sup>93</sup> *See id.* at 363-64; *see also* *Maricopa Audubon Soc'y v. United States Forest Serv.*, 923 F. Supp. 1436, 1439 (D.N.M. 1995). The district court noted:

[A] majority of the Circuit Courts of Appeal have interpreted the language of exemption 2 to encompass two types of information: (1) internal matters of a relatively trivial or mundane nature, i.e., rules as to personnel's use of parking facilities, regulations of lunch hours, and statements of sick leave policy, and (2) more substantial internal matters, the disclosure of which would allow circumvention of a statute or agency regulation, i.e., rules, guidelines, and manuals of procedure for government investigators.

*Maricopa Audubon Soc'y*, 923 F. Supp. at 1439 (citations omitted).

<sup>94</sup> *See Rose*, 425 U.S. at 364.

<sup>95</sup> *See id.* at 365-67.

<sup>96</sup> *Id.* at 369.

The D.C. Circuit did not immediately expand the scope of Exemption 2 to embrace the "risk of circumvention" application that the *Rose* Court had left open. Although *Jordan v. United States Department of Justice*<sup>97</sup> presented just such a case (the requested materials were charging manuals of the U.S. Attorney's Office),<sup>98</sup> the court did not read *Rose* to permit the use of Exemption 2 in these circumstances.

Instead, the *Jordan* court engaged in a structural analysis of the statutory language.<sup>99</sup> Reading "internal" to modify the entire phrase "personnel rules and practices of an agency," the court concluded that the exemption was intended to allow withholding of those internal rules dealing with "relations among the employees of an agency" while requiring the disclosure of those that have a "more direct impact" on the public.<sup>100</sup> The court stated that "internal personnel" modified both "rules" and "practices."<sup>101</sup> The *Jordan* court noted that the DOJ's disjunctive reading had already been ruled out when the court vacated the *Ginsburg, Feldman & Bress v. Federal Energy Administration* decision.<sup>102</sup> This reading would bifurcate the language to permit withholding of "internal personnel rules" (i.e., material dealing with the agency's relations with its employees) and of "practices of an agency" (i.e., material dealing with the "operational conduct of the employees").<sup>103</sup> The court in *Jordan* stated that such a disjunctive reading of the statute would be "violative of . . . English grammar."<sup>104</sup> The *Jordan* court then concluded that *Rose* did not imply that Exemption 2 could be used to withhold documents where "disclosure may risk circumvention of agency regulation."<sup>105</sup>

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<sup>97</sup> 591 F.2d 753 (D.C. Cir. 1978) (en banc).

<sup>98</sup> See *id.* at 771.

<sup>99</sup> See *id.* at 763.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 764.

<sup>102</sup> See *Jordan*, 591 F.2d at 763-64 (citing *Ginsburg, Feldman & Bress v. Fed. Energy Admin.*, 591 F.2d 717 (D.C. Cir. 1978)).

<sup>103</sup> *Id.* at 763.

<sup>104</sup> *Id.* at 764.

<sup>105</sup> *Id.* at 771 (no citation in original). Judge Leventhal's concurrence criticized the majority's rejection of the *Rose* Court's suggestion that Exemption 2 could be used to withhold materials that could increase the risk of circumvention of agency regulations. However, Judge Leventhal did not believe that the interest in preventing circumvention of the law outweighed the public interest in the documents, so he concurred in the result. See *id.* at 784 (Leventhal, J., concurring).



This "bare . . . holding[]" of *Jordan*, however, was subsequently overruled by the D.C. Circuit in *Crooker v. Bureau of Alcohol, Tobacco, and Firearms*,<sup>106</sup> which explicitly adopted the view of Exemption 2 that the Supreme Court first suggested in *Rose*.<sup>107</sup>

After *Rose*, several other courts of appeals departed from the D.C. Circuit's view in *Jordan* and adopted versions of Exemption 2 that permitted withholding in cases where circumvention of agency regulations presented a problem. For example, in *Caplan v. Bureau of Alcohol, Tobacco, and Firearms*,<sup>108</sup> the Second Circuit followed the suggestion of the *Rose* Court to allow the withholding of portions of a Bureau of Alcohol, Tobacco, and Firearms ("BATF") training manual pursuant to Exemption 2.<sup>109</sup> Because a training manual was at issue, the court considered the House Report and determined that disclosure of the manual would increase the risk of circumvention of agency regulations.<sup>110</sup> In support of its conclusion that withholding of the materials was proper, the court stated that disclosure "would increase the risk of physical harm to those engaged in law enforcement and significantly assist those engaged in criminal activity by acquainting them with the intimate details of the strategies employed in its detection."<sup>111</sup> Although the court was also presented with the question of whether a court might properly exercise its equitable discretion to sustain withholding of the materials, it declined to rule on this question, but not before suggesting that a court may do so under "exceptional" circumstances.<sup>112</sup> Considering the same portions of the BATF manual at issue in *Caplan*, the Ninth Circuit, in *Hardy v. Bureau of Alcohol, Tobacco, and Firearms*,<sup>113</sup> interpreted Exemption 2 more narrowly, permitting the withholding of "law enforcement materials, disclosure of which may risk circumvention of agency regu-

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<sup>106</sup> 670 F.2d 1051, 1052 (D.C. Cir. 1978) (en banc); see also discussion *infra* notes 115-24 and accompanying text.

<sup>107</sup> See 670 F.2d at 1074.

<sup>108</sup> 587 F.2d 544 (2d Cir. 1978).

<sup>109</sup> See *id.* at 547-48.

<sup>110</sup> See *id.* at 547.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 546. (citation omitted).

<sup>113</sup> 631 F.2d 653 (9th Cir. 1980).

lation."<sup>114</sup> Its view was adopted shortly thereafter by the D.C. Circuit in *Crooker*.<sup>115</sup>

It did not take long before the D.C. Circuit changed the course set in *Jordan* to adopt the view left open by *Rose* and applied in *Caplan* and *Hardy*. In *Crooker*, the court revisited the issue presented in *Jordan* several years before.<sup>116</sup> Here, the BATF sought to withhold portions of an agent training manual.<sup>117</sup>

Holding that the training manual met the "test of 'predominant internality,' and since its disclosure significantly risks circumvention of federal statutes or regulations," the *Crooker* court sustained the BATF's assertion of Exemption 2.<sup>118</sup> First, noting the inconsistency between *Jordan* and this opinion, the *Crooker* court rejected the rationale applied in *Jordan*, which supported the view that risk of circumvention of agency regulations could not sustain the withholding of documents under Exemption 2.<sup>119</sup> Since the rationale of *Jordan* was not essential to support the holding of that decision, the *Crooker* court noted that the outcome of *Jordan* remained undisturbed.<sup>120</sup>

Pitting its own opinion in *Jordan* against those of the Ninth and Second Circuits, in *Hardy* and *Caplan*, respectively, the *Crooker* court reconciled the split by stating that Exemption 2 covers both "minor employment matters" and other "significant matters like job training for law enforcement personnel."<sup>121</sup> Harmonizing these divergent readings of the statute and its legislative history, the *Crooker* court formally announced the view suggested by the Supreme Court in *Rose*.<sup>122</sup>

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<sup>114</sup> *Id.* at 656.

<sup>115</sup> See *Crooker*, 670 F.2d 1051.

<sup>116</sup> See *id.* at 1052-53.

<sup>117</sup> See *id.* at 1053.

<sup>118</sup> *Id.* The holding in *Crooker* has not been met with uniform approval. See Carro, *supra* note 79, at 321 (criticizing the *Crooker* majority's construction of Exemption 2). But see KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE, § 5:30, at 143, 147 (Supp. 1989) (stating "[t]hat the *Crooker* theory is fundamentally preferable [to *Jordan*]" and that "courts should reject *Jordan* and follow *Crooker* . . .").

<sup>119</sup> *Crooker*, 670 F.2d at 1053.

<sup>120</sup> See *id.*; see also *id.* at 1091 (Ginsburg, J., concurring); DAVIS, *supra* note 118, at § 5:31, at 145 ("The *Jordan* case is largely superseded by *Crooker* but not overruled.").

<sup>121</sup> *Crooker*, 670 F.2d at 1056.

<sup>122</sup> See *id.* at 1074.

Citing Judge Leventhal's concurrence in *Vaughn*,<sup>123</sup> the court then reiterated that the language of Exemption 2 could be read to contradict itself with respect to scope: "[P]ushed to their logical ends, 'relating' is potentially all-encompassing while 'solely' is potentially all-excluding."<sup>124</sup> Relying on Judge Leventhal's construction of the language, the *Crooker* court adopted his term "predominantly" to reconcile the differences between "relating" and "solely."<sup>125</sup>

Not all cases considering a risk of circumvention present such obvious risks as those implicit in the release of the BATF training manual at issue in *Caplan*, *Hardy*, and *Crooker*. For example, in *Founding Church of Scientology v. Smith*,<sup>126</sup> the D.C. Circuit considered whether administrative "filing and routing" notations on an airmail relating to L. Ron Hubbard could be withheld based on a risk of circumvention.<sup>127</sup> After reaffirming the *Crooker* court's extension of Exemption 2,<sup>128</sup> the court expressed doubt as to whether the Supreme Court in *Rose* intended that one must show that risk of circumvention will arise after disclosure, but the court presumed that the agency had shown circumvention because Scientology failed to contest this aspect of the lower court's finding.<sup>129</sup>

If *Caplan*, *Hardy*, and *Crooker* limited Exemption 2 to law enforcement materials such as BATF training manuals, such limitation has been eroded by other courts of appeals. This erosion has extended the scope of Exemption 2 to "situations where there is neither a statute nor an agency regulation at risk of circumvention, but disclosure would render the records operationally useless."<sup>130</sup> For example, over a strongly-worded dissent, the Ninth Circuit in *Dirksen v. United States Department of Health and Human Services*<sup>131</sup> permitted the with-

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<sup>123</sup> 523 F.2d at 1150-51 (Leventhal, J., concurring).

<sup>124</sup> *Crooker*, 670 F.2d at 1056.

<sup>125</sup> *See id.* at 1057.

<sup>126</sup> 721 F.2d 828 (D.C. Cir. 1983).

<sup>127</sup> *Id.* at 829.

<sup>128</sup> *See id.* at 830-31 & n.4.

<sup>129</sup> *See id.* at 831.

<sup>130</sup> Allan Robert Adler, *Recent Developments in FOIA Law*, 11 COMM. LAW. 13 (1993); *see also* *Kaganove v. Envtl. Prot. Agency*, 856 F.2d 884, 889-90 (7th Cir. 1988) (withholding a job candidate evaluation plan); *Nat'l Treasury Employees Union v. United States Customs Serv.*, 802 F.2d 525, 531 (D.C. Cir. 1986) (same).

<sup>131</sup> 803 F.2d 1456 (9th Cir. 1986).

holding of "Medicare Policy Guidelines."<sup>132</sup> Arguing that processing guidelines constitute a form of administrative materials, the court permitted withholding because the release of the documents would allow care providers to circumvent agency oversight.<sup>133</sup> The dissent pointed out that *Hardy* limited the withholding to traditional "law enforcement materials" only and faulted the majority for extending that rule.<sup>134</sup>

Another important variation extending the scope of Exemption 2 beyond the context of rules and practices appears in *Schwaner v. Department of Air Force*,<sup>135</sup> where an insurance salesman sought the "names and military duty addresses" of low-ranking Air Force personnel.<sup>136</sup> Unlike the line of cases dealing with instructions to law enforcement and unlike the processing guidelines withheld by *Dirksen*, *Schwaner* considered the withholding of a mere roster of names.<sup>137</sup> The *Schwaner* court recognized that the list was not "a rule or practice in the most literal sense," and it acknowledged that prior case law did not squarely address materials that were neither rules nor practices.<sup>138</sup> Rejecting the government's comparison of the summaries of Honor Committee rulings that were contested in *Rose* to the name and address roster sought here on the basis that they related to the Air Force's practice of collecting data and that the roster could be withheld under Exemption 2,<sup>139</sup> the court stated that to be related to an agency rule to the extent that the documents may be withheld, they must "bear upon, or cast light upon, those practices."<sup>140</sup> Then, deciding that "lists do not necessarily . . . shed significant light on a rule or practice; insignificant light is not enough," the court refused to endorse the government's position.<sup>141</sup>

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<sup>132</sup> *Id.* at 1458.

<sup>133</sup> *See id.* at 1459.

<sup>134</sup> *Id.* at 1460-61 (Ferguson, J., dissenting).

<sup>135</sup> 898 F.2d 793 (D.C. Cir. 1990).

<sup>136</sup> *Id.* at 794.

<sup>137</sup> *See id.*

<sup>138</sup> *Id.* at 795.

<sup>139</sup> *See id.* at 795-96.

<sup>140</sup> *Schwaner*, 898 F.2d at 796.

<sup>141</sup> *Id.* at 797-98.

Not until *Schiller v. NLRB*<sup>142</sup> did the D.C. Circuit provide an easy shorthand for the two interpretations of Exemption 2 that the court had framed in *Vaughn* and the post-*Rose* cases.<sup>143</sup> In *Schiller*, a requester sought "memoranda and instructions pertaining to the implementation of the Equal Access to Justice Act," a fee-shifting statute.<sup>144</sup> Writing for the panel, Chief Judge Mikva articulated Exemption 2 as follows: "If the threshold test of predominant internality is met, an agency may withhold the material 'by proving that either [1] 'disclosure may risk circumvention of agency regulation,' or [2] 'the material relates to trivial administrative matters of no genuine public interest.' " <sup>145</sup> The *Schiller* court then named the two types of Exemption 2 material: "Predominantly internal documents the disclosure of which would risk circumvention of agency statutes and regulations are protected by the so-called 'high 2' exemption. Predominantly internal documents that deal with trivial administrative matters fall under the 'low 2' exemption."<sup>146</sup>

Citing *Crooker*, the court stated that if the material was "designed to establish rules and practices for agency personnel and . . . involved no 'secret law' of the agency," it could be withheld.<sup>147</sup> Ruling that the litigation documents at issue could be withheld under a "high 2" interpretation of Exemption 2, the court acknowledged that the principle articulated in *Crooker* is not limited to situations "where penal or enforcement statutes could be circumvented" and may also apply to situations where "disclosure . . . would render those documents operationally useless."<sup>148</sup>

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<sup>142</sup> 964 F.2d 1205 (D.C. Cir. 1992).

<sup>143</sup> See *id.* at 1207.

<sup>144</sup> *Id.* at 1206.

<sup>145</sup> *Id.* at 1207 (quoting *Schwaner*, 898 F.2d at 794 (citations omitted)) (numerals in *Schiller* text).

<sup>146</sup> *Id.*

<sup>147</sup> *Schiller*, 964 F.2d at 1207 (quoting *Crooker*, 670 F.2d at 1073 (quoting *Rose*, 425 U.S. at 369)).

<sup>148</sup> *Id.* at 1208 (quoting *Nat'l Treasury Empl. Union v. United States Customs Serv.*, 802 F.2d 525, 530-31 (D.C. Cir. 1986)).

## II. THE MARICOPA AUDUBON SOCIETY LITIGATION

The MAS submitted FOIA requests in 1994 to the FS seeking documents that reveal the specific nesting sites of two species, one listed as "threatened," the other considered a "candidate."<sup>149</sup> In response to these requests, the FS asserted the "high 2" variant of Exemption 2, which exempts from disclosure those documents "relating solely to the internal personnel rules and practices of an agency," where disclosure would also risk circumvention of agency regulations.<sup>150</sup> Presenting a novel set of facts,<sup>151</sup> the cases were eventually appealed to the Tenth and Ninth Circuits, both of which held that the materials could not be withheld under Exemption 2.<sup>152</sup>

### A. *The Tenth Circuit Ruling: Audubon Society v. United States Forest Service*<sup>153</sup> ("MAS II")

In the litigation brought in the United States District Court for the District of New Mexico, MAS sought disclosure of FS management territory maps<sup>154</sup> that identify various nesting sites of the Mexican spotted owl.<sup>155</sup> In part responsible for the management of fish and wildlife in national parks, the FS prepared these maps in the execution of its duties imposed by the ESA.<sup>156</sup> Before the Tenth Circuit, the FS asserted that

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<sup>149</sup> *MAS II*, 104 F.3d 1201, 1202 (10th Cir. 1997); Brief of Appellants, *supra* note 1, at 5.

<sup>150</sup> See *MAS II*, 104 F.3d at 1203; *MAS I*, 108 F.3d 1082, 1084 (9th Cir. 1997). For a discussion of "high 2," see *supra* Part I.B.2.

<sup>151</sup> One district court framed the facts narrowly, stating, "There appear to be no reported decisions in which a federal court has analyzed whether factual material pertaining to a threatened or endangered species, such as maps, should be withheld under exemption 2 of the FOIA." *Maricopa Audubon Soc'y v. United States Forest Serv.*, 923 F. Supp. 1436, 1440 (D.N.M. 1995).

<sup>152</sup> See *MAS I*, 108 F.3d at 1085 (noting the Tenth Circuit's rejection of "identical arguments"). The Tenth Circuit ruled in January, 1997, see *MAS II*, 104 F.3d at 1201, and the Ninth Circuit rendered its decision in March, 1997, see *MAS I*, 108 F.3d at 1082.

<sup>153</sup> 104 F.3d 1201 (10th Cir. 1997).

<sup>154</sup> Management territory maps reveal the area "around a confirmed or inferred sighting of . . . Mexican spotted owls." *Maricopa Audubon Soc'y*, 923 F. Supp. at 1437 n.1. Certain activities, such as, road building, timbering, and drilling are prohibited within these roughly 2000 acre management territories. See *id.*

<sup>155</sup> See *MAS II*, 104 F.3d at 1202.

<sup>156</sup> See *id.* at 1203.

the management territory maps fell within the statutory language of Exemption 2, urging the court to adopt a "high 2"<sup>157</sup> interpretation applied in some circuits,<sup>158</sup> because the disclosure of nesting sites would create a risk of circumventing the ESA.<sup>159</sup>

In an effort to nudge the maps into "the terms of the statutory language,"<sup>160</sup> the FS argued for a construction of § 552(b)(2)'s language that implied that the descriptive words, "internal personnel," modified only "rules" and not "practices of an agency."<sup>161</sup> Under this disjunctive reading, the FS argued that "internal personnel rules" are distinct from those documents revealing the "practices of an agency."<sup>162</sup> That is, the documents should be withheld because they relate to an agency practice by "assist[ing] [FS] personnel in their management duties."<sup>163</sup>

Relying on *Jordan*,<sup>164</sup> the court rejected the disjunctive reading that the FS gave to the phrase, "related solely to the internal personnel rules and practices of an agency."<sup>165</sup> Ruling that "internal personnel" modifies both "rules" and "practices," the court adopted the narrower construction and stated that the proper inquiry is whether the maps were sufficiently related to "personnel" practices, not whether the maps were related to "agency" practices (as the FS urged).<sup>166</sup> Concluding its inquiry, the court briefly stated, "It stretches the language of the exemption too far to conclude that owl maps 'relate' to personnel practices of the [FS]."<sup>167</sup> The court, citing *Vaughn*,<sup>168</sup> noted the risk of holding otherwise:

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<sup>157</sup> See discussion *supra* Part I.B.2.

<sup>158</sup> The *MAS II* court noted that four circuits have adopted the "high 2" interpretation. See *MAS II*, 104 F.3d at 1204 n.1.

<sup>159</sup> See *id.* at 1203.

<sup>160</sup> *Id.* at 1204 (quoting *Schwanner v. Dep't of Air Force*, 898 F.2d 793, 794 (D.C. Cir. 1990)).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *MAS II*, 104 F.3d at 1204.

<sup>164</sup> For a discussion of the Tenth Circuit's reliance on *Jordan*, see *infra* Part II.C.

<sup>165</sup> 5 U.S.C. § 552(b)(2) (1994 & Supp. 1998).

<sup>166</sup> See *MAS II*, 104 F.3d at 1204.

<sup>167</sup> *Id.*

<sup>168</sup> 523 F.2d 1136.

In some attenuated sense, virtually everything that goes on in the Federal Government, and much that goes on outside of it, could be said to be "related" through some chain of circumstances to the "internal personnel rules and practices of an agency." The potentially all-encompassing sweep of a broad exemption of this type [would] undercut[] the vitality of any such approach.<sup>169</sup>

Finding that the maps fail the first prong of the "high 2" *Crooker* analysis because they are not sufficiently related to rules and practices of an agency, the court declined to proceed any further.<sup>170</sup> Indeed, *MAS II* leaves open the question of whether the Tenth Circuit would adopt the "high 2" interpretation so vigorously urged by the FS.<sup>171</sup>

The court also rejected the FS's argument that since the maps do not constitute "secret law,"<sup>172</sup> the agency is not required to disclose them. Reasoning that although the agency must disclose the information if it constitutes secret law, the court stated that the converse is not true. Because the information is not secret law does not mean that the agency may withhold it.<sup>173</sup>

The court declined much comment on the district court's order that the parties enter into a confidentiality agreement regarding the maps because the issue was not raised on appeal. However, the court questioned whether such agreements are consistent with the purposes of FOIA.<sup>174</sup>

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<sup>169</sup> See *MAS II*, 104 F.3d at 1204 (citation omitted) (alterations in *MAS II*).

<sup>170</sup> See *id.*

<sup>171</sup> "We agree with the district court that *even if we were* to adopt the high 2 analysis . . . ." *Id.* (emphasis added).

<sup>172</sup> Secret law is "information withheld from the public which defines the legal standards by which the public's conduct is regulated." *Id.* at 1204 (citing *Hardy v. Bureau of Alcohol, Tobacco, and Firearms*, 631 F.2d 653, 657 (9th Cir. 1980)).

<sup>173</sup> See *id.* ("[E]xemption [2] was not designed to authorize withholding of all matters except . . . secret law . . . . Rather, the general thrust of the exemption is simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest." ) (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 369-70 (1976)).

<sup>174</sup> *MAS II*, 104 F.3d at 1204-05. Because the *MAS II* court found it unnecessary to consider the propriety of confidentiality agreements to dispose of the appeal under Exemption 2, an extended discussion of this dicta lies beyond the immediate scope of this Comment, which is concerned primarily with the court's application of Exemption 2.



B. *The Ninth Circuit Ruling: Maricopa Audubon Society v. United States Forest Service*<sup>175</sup> ("MAS I")

Argued while *MAS II* was pending in the Tenth Circuit, the facts of *MAS I* are almost identical to that litigation. MAS's request for "nest sites of northern goshawks on [FS] lands"<sup>176</sup> was denied by the FS, which relied on Exemption 2.<sup>177</sup>

The United States District Court for the District of Arizona ruled against disclosure of the information on alternative grounds. First, exercising its equitable discretion, the court denied disclosure, articulating a concern that if MAS were given the information, the FS would also have to give the information to those who might harm the goshawk.<sup>178</sup> Alternatively, it ruled that the information indeed "related to the agency's 'internal policies and procedures' for law enforcement," therefore, falling within the language of Exemption 2.<sup>179</sup>

The court of appeals rejected the FS's arguments that the "creation of nest-site location information 'relates to' an agency 'practice' because (1) the creation of such information itself constitutes a 'practice' and (2) the 'practice' of creating the information 'also "casts light" ' on other "practices" of the [FS] . . . ."<sup>180</sup> The court of appeals stated its fear that under this approach, the government would be able to withhold "almost all information collected or created by the government . . . ."<sup>181</sup>

Following the Tenth Circuit's opinion and adopting a narrow reading of Exemption 2, the Ninth Circuit rejected the FS's argument that the materials must relate to "personnel practices," and not simply "practices of an agency," to be withheld under Exemption 2.<sup>182</sup> Citing the D.C. Circuit's ruling in

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<sup>175</sup> 108 F.3d 1082.

<sup>176</sup> *Id.* at 1084.

<sup>177</sup> *Id.*

<sup>178</sup> *See id.*

<sup>179</sup> *Id.*

<sup>180</sup> *MAS I*, 108 F.3d at 1085 (quoting Brief for Appellees, *supra* note 61, at 24-25).

<sup>181</sup> *Id.*

<sup>182</sup> *See id.*

*Schwaner*,<sup>183</sup> the Ninth Circuit analogized the goshawk nesting maps to a roster of names and military duty addresses of Air Force personnel.<sup>184</sup> In both situations, the court suggested that arguments stating that disclosure would reveal an agency practice could enable an agency to "withhold practically all of the information that it ever gathers."<sup>185</sup> Therefore, unless the materials shed "significant light" on an agency practice, they may not be withheld under Exemption 2.<sup>186</sup>

In addition, the Ninth Circuit rejected the FS's argument that the nesting information should be exempt because it could be considered "law enforcement materials, the disclosure of which may risk circumvention of agency regulation."<sup>187</sup> Distinguishing both *Hardy* and *Dirksen*, which held that Exemption 2 covered, respectively, federal agent training manuals on searches and raids and Medicare claims-processing guidelines (which could have been used to avoid audits), the Ninth Circuit held that since the "information [in the maps] does not tell the [FS] how to catch lawbreakers; nor does it tell lawbreakers how to avoid the [FS]'s enforcement efforts," Exemption 2 did not apply to the nesting information.<sup>188</sup>

The Ninth Circuit also reversed the district court's exercise of equitable discretion, noting that the litigants both agreed that the district court ruling on this basis was improper.<sup>189</sup> The court then concluded by addressing the issue of whether the FS could enter into a confidentiality agreement with MAS in which the FS would be bound not to disclose the information

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<sup>183</sup> 898 F.2d 793 (D.C. Cir. 1990).

<sup>184</sup> *MAS I*, 108 F.3d at 1086.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* (citing *Hardy v. Bureau of Alcohol, Tobacco, and Firearms*, 631 F.2d 653, 656 (9th Cir. 1980)); *Dirksen v. United States Dep't of Health and Human Servs.*, 803 F.2d 1456, 1458 (9th Cir. 1986).

<sup>188</sup> *Id.* at 1087.

<sup>189</sup> The *MAS I* court stated:

The notion that a district court may exempt materials that do not fall within one of FOIA's nine enumerated exemptions runs contrary not only to the fact that the exemptions are "explicitly exclusive," . . . , but also to the unmistakable intent of Congress: "Congress sought to insulate its product from judicial tampering and to preserve the emphasis on disclosure by admonishing that the 'availability of records to the public' is not limited, except as *specifically* stated."

*MAS I*, 108 F.3d at 1087 (citations omitted).

to a third party.<sup>190</sup> Agreeing with the district court's decision, the Ninth Circuit stated, "FOIA does not permit selective disclosure of information only to certain parties, and that once the information is disclosed to [MAS], it must be made available to all members of the public who request it."<sup>191</sup>

### C. Discussion

Put simply, the facts of *MAS II* and *MAS I* present a "puzzling situation"<sup>192</sup> as far as FOIA case law is concerned, one that reveals the limitations of the current analytical framework of Exemption 2 and suggests that it is ill-suited to resolve future cases in which the FOIA requester is not an environmental advocacy and research group but a landowner or poacher who does not have the best interests of endangered species in mind.

Because of the significant public interest in the documents at issue in the MAS litigation, the only variant of Exemption 2 available to the FS was the "high 2" variant. In fact, the district court in *MAS II* acknowledged this limitation,<sup>193</sup> and the FS did not assert the "low 2" exemption in either litigation.<sup>194</sup> Accordingly, the discussion presented below focuses on the courts' application of the "high 2" variant.

#### 1. The First Prong: Whether the Maps Fall Within the Statutory Language

As one commentator has noted, the FS's contention that the maps satisfied the first prong of the "high 2" variant was

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<sup>190</sup> See *id.* at 1088. In doing so, the Ninth Circuit rejected the view, extensively briefed by MAS, that elimination of the risk of circumvention through the use of a confidentiality agreement would take the case out of Exemption 2 entirely. See Brief of Appellants, *supra* note 1, at 18-20.

<sup>191</sup> *Id.* Because the parties to the *MAS I* case agreed that the lower court's exercise of equitable discretion was improper, see *MAS I*, 108 F.3d at 1087, a more detailed discussion of the court's dicta lies beyond the scope of this Comment. However, it is important to note that, having been reminded by the parties that the court left this issue open in *Hardy*, see *Hardy*, 631 F.2d at 655 n.1, the court took this opportunity (albeit in dicta) to speak disfavorably about the exercise of equity powers in the FOIA context.

<sup>192</sup> DAVIS & PIERCE, *supra* note 2, at § 5.3, at 126.

<sup>193</sup> See *Maricopa Audubon Soc'y*, 923 F. Supp. at 1439.

<sup>194</sup> See generally *MAS II*, 104 F.3d 1201; *MAS I*, 108 F.3d 1082.

"weak."<sup>195</sup> Under most interpretations of Exemption 2, maps such as those at issue in the MAS litigation could probably not be considered "related solely to the internal personnel rules and practices of an agency."<sup>196</sup> As argued by MAS before the Ninth Circuit, the documents do not "bear an adequate relation," nor are they "predominantly internal"; therefore, they do not satisfy the first prong of the analysis.<sup>197</sup> The FS, on the other hand, chose to argue that the maps do indeed fall within the statutory language, insofar as the language does not limit application of the exemption to "strictly 'personnel' matters."<sup>198</sup> Noting that the FS had argued nothing more than that it "uses [the maps] to carry out its duties,"<sup>199</sup> MAS counter-argued that the relationship between the maps and those duties was too attenuated to satisfy the first prong and indeed that the alternative would render the exemption "all-encompassing."<sup>200</sup>

Considering the FS's argument first, while compelling, its disjunctive reading of Exemption 2 (even if it had been successful before either court) would probably not have been sufficient to sustain withholding because the FS would not have been able to draw an adequate relation between the maps and either personnel rules or practices of an agency.

Before both courts of appeals, the FS attempted to withhold management territory maps under its disjunctive reading of the statutory language to avoid having to argue that there was an adequate relationship between the maps and a personnel rule. The FS's disjunctive reading of the phrase into "internal personnel rules" on the one hand, and "practices of an agency" on the other, is not entirely unsupported by precedent. The FS's argument for reading the statutory language disjunctively is analogous to a reading offered in the vacated panel opinion of the D.C. Circuit, *Ginsburg, Feldman & Bress*.<sup>201</sup> *Jordan*, the case rejecting this reading as "viola-

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<sup>195</sup> DAVIS & PIERCE, *supra* note 2, § 5.3, at 126.

<sup>196</sup> 5 U.S.C. § 552(b)(2) (1994 & Supp. 2000).

<sup>197</sup> See Brief of Appellants, *supra* note 1, at 11.

<sup>198</sup> Brief for Appellees, *supra* note 61, at 17 & 23-24.

<sup>199</sup> Brief of Appellants, *supra* note 1, at 11.

<sup>200</sup> Brief of Appellants, *supra* note 1, at 11 (citation omitted).

<sup>201</sup> 591 F.2d 717.

tive . . . of English grammar,"<sup>202</sup> has itself been called into question.<sup>203</sup> Yet even under a disjunctive reading of the language, the FS might have struggled to show an adequate relation to the agency practice, let alone the personnel rules.

The Tenth Circuit's analysis of the adequacy of the relationship between the maps and an internal personnel practice appears conclusory,<sup>204</sup> but even under a lenient interpretation of other decisional law, the result would probably have been the same. As the Ninth Circuit did in *MAS I*, a powerful analogy a court might draw to support disclosure lies between the maps sought here and the roster of names and service addresses contested in *Schwaner*. As the *Schwaner* court stated, documents requested do not need to be related to "a rule or practice in the most literal sense."<sup>205</sup> Therefore, given an adequate relationship between the materials sought and the personnel practice, an agency could still justify the withholding of management territory maps. That is, simply because a map does not clearly articulate a rule or reveal a practice does not mean that it could not be withheld. But, where the document, such as the list in *Schwaner*, fails to "shed significant light" on such a practice, withholding may not be justified.<sup>206</sup> Here, the maps fail to shed any light on an agency practice other than, as the Tenth Circuit noted, the practice of making such maps.<sup>207</sup> While the maps are evidence of the FS's practice of monitoring species populations, because they only identify nesting sites, they offer no more insight into the FS's practice or strategy than one might be able to glean from the ESA or the applicable regulations themselves.

Furthermore, the maps themselves, unlike the manuals at issue in *Caplan*, *Hardy*, and *Dirksen*, reveal not procedures for investigating violations or evaluating medicare claims, but the

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<sup>202</sup> *Jordan*, 591 F.2d at 764.

<sup>203</sup> See *Crooker v. Bureau of Alcohol, Tobacco, and Firearms*, 670 F.2d 1051, 1053, 1073 (D.C. Cir. 1981).

<sup>204</sup> In this part of the decision, the court does not draw any analogies between the facts at hand and any other decision dealing with similar materials. In fact, the only precedent the court cites in this section is *Vaughn*, and it does so only to express a fear over interpreting the exemption too broadly. See *MAS II*, 104 F.3d 1201, 1204 (10th Cir. 1997).

<sup>205</sup> *Schwaner*, 898 F.2d at 795.

<sup>206</sup> *Id.* at 797-98.

<sup>207</sup> See *MAS I*, 108 F.3d 1082, 1086 (9th Cir. 1997).

mere location of nesting sites. The essence of the parties' dispute over the maps' relatedness to internal rules and practices turns on the threshold of reasonableness to be applied to the Exemption 2 language. As raised by Judge Leventhal's concurrence in *Vaughn*, one must temper the language to avoid the situation in which the statute would become a bar to all disclosure based on merely superficial relationships.<sup>208</sup> The tension, therefore, exists between competing views of whether maps are more like lists requested in *Schwaner* or more like law enforcement training manuals. If the maps shed significant light on the internal personnel rules or agency practices, the FS would be closer to passing this threshold. However, to the extent that the FS merely asserted that they were "assist[ed]"<sup>209</sup> by the maps and did not contend that the maps revealed any particular method or process, the court's ruling was correct.

Common definitions of the term "map" support this view. While the noun is generally understood as "[a] representation, usually on a plane surface, or a region of the earth or heavens,"<sup>210</sup> the verb form reminds one of a different, but very common kind of map. In one sense, the verb form means "to plan or delineate, especially in detail; arrange."<sup>211</sup> Where these two parts of speech converge is in the sort of map (such as a diagram of dance steps) that does both. Much as a schematic diagram details the location of various objects and actors, maps may also represent the "plan" or process by which the actor is to accomplish his goal. Had the facts allowed, or had the FS considered, arguments that the maps represent the processes followed by FS personnel, not merely a set of nest locations, the FS would have been that much further towards convincing the court that release of such maps would damage the FS's efforts. Only then would the maps bear enough of an adequate relationship to defeat MAS's claim.

To avoid the self-contradictory nature of the statutory language, Judge Leventhal, in *Vaughn*, articulated the "pre-dominantly internal" test.<sup>212</sup> As clarified by the D.C. Circuit

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<sup>208</sup> See *supra* notes 85-89 and accompanying text.

<sup>209</sup> *MAS II*, 104 F.2d at 1204.

<sup>210</sup> THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1096 (3d ed. 1992).

<sup>211</sup> *Id.* at 1097.

<sup>212</sup> See *supra* notes 85-89 and accompanying text.

in *Cox v. United States Department of Justice*,<sup>213</sup> to be considered internal, the documents may "not purport to regulate" the public, nor may they set standards for "agency personnel in deciding whether to proceed against" the public.<sup>214</sup> The FS's argument in this regard is that the maps contain no regulations or "secret law"; therefore, they need not be disclosed.<sup>215</sup> When argued before the Tenth Circuit, this same argument failed because a mere preference for disclosing secret law cannot be converted into a basis for non-disclosure where no secret law is at issue, especially where, as here, the public has an interest in the documents<sup>216</sup> and considering that the purpose of FOIA is to effectuate broad disclosure of agency records.<sup>217</sup>

## 2. The Second Prong: The Risk of Circumvention of ESA Regulations

Neither court of appeals in the MAS litigation reviewed whether the FS had sustained its burden of proving that disclosure of the documents would risk circumvention of agency regulations.<sup>218</sup> Had the FS convinced both courts to proceed to the second prong of Exemption 2's analysis, several decisions, dealing with arguments of increased harm to species in the context of critical habitat designation, suggest that the FS might have lost by failing to satisfy prong two. However, these decisions are not directly controlling on this issue. The arguments presented before the Ninth Circuit reveal an interesting problem concerning the scope of the *Rose* Court's "circumvention" language,<sup>219</sup> but the FS's arguments with respect to the second prong would not necessarily have been fatal to its claim.

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<sup>213</sup> 601 F.2d 1 (D.C. Cir. 1979) (per curiam).

<sup>214</sup> *Id.* at 5 & n.2.

<sup>215</sup> See Brief for Appellees, *supra* note 61, at 29-32.

<sup>216</sup> See *MAS II*, 104 F.3d 1201, 1204 (10th Cir. 1997) (citing *Dep't of Air Force v. Rose*, 425 U.S. 352, 369-70 (1976)).

<sup>217</sup> See *supra* note 71 and accompanying text.

<sup>218</sup> See *id.*; *MAS I*, 108 F.3d 1082, 1086-87 (9th Cir. 1997). The *MAS I* court did, however, consider the narrower law enforcement manual version of the exemption. See *MAS I*, 108 F.3d at 1086-87.

<sup>219</sup> *Rose*, 425 U.S. at 369.

Whether the release of management territory maps might risk circumvention of agency regulations is a question that raises concerns about the scope of the language "circumvention of agency regulations."<sup>220</sup> Borrowing language typically used in FOIA law enforcement manual cases, MAS argued for a narrow interpretation of the circumvention language, arguing that circumvention of agency regulation would only be met where a violator would be instructed on how to " 'avoid detection' " or "get away with" breaking the law.<sup>221</sup>

On the other hand, the FS interpreted this language broadly by citing cases dealing with Medicare guidelines and candidate hiring plans, equating "serious risk of harm to the goshawk" with circumvention of statutes and regulations passed for the purpose of protecting the species.<sup>222</sup> While the former approach would permit release of information up to the point that it would enable one to elude *law enforcement detection*, the latter would entertain arguments that disclosure would frustrate or diminish the FS's objectives *generally*, not merely with respect to catching violators.

Perhaps unable to find case law supporting its position that "circumvention of law" should always be narrowly construed, MAS attempted to turn this lack of precedent to its favor. Finding that the only cases supporting non-disclosure dealt with the types of "manual[s] for personnel on how to screen or detect violators of law,"<sup>223</sup> MAS reasoned that because the maps give no instructions, but merely point out where the species are, withholding should not be permitted.<sup>224</sup> MAS concluded, "Release to the public would

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<sup>220</sup> See Brief of Appellants, *supra* note 1, at 17-21; Brief for Appellees, *supra* note 61, at 33-44; Reply Brief of Appellants at 10-14, *Audubon Soc'y v. United States Forest Serv.*, 108 F.3d 1082 (9th Cir. 1997) (No. 95-16919) (on file with *Brooklyn Law Review*).

<sup>221</sup> See Brief of Appellants, *supra* note 1, at 15 (citing *Hardy v. Bureau of Alcohol, Tobacco, and Firearms*, 631 F.2d 653, 657 (9th Cir. 1980)); *Dirksen v. United States Dep't of Health and Human Servs.*, 803 F.2d 1456, 1458 (9th Cir. 1986) (citing *Caplan v. Bureau of Alcohol, Tobacco, and Firearms*, 587 F.2d 544, 545 (2d Cir. 1978)).

<sup>222</sup> See Brief for Appellees, *supra* note 61, at 35-37 (citing *Kaganove v. Envtl. Prot. Agency*, 856 F.2d 884, 889 (1988) (candidate evaluation plans); *Nat'l Treasury Employees Union v. Customs Serv.*, 802 F.2d 525, 530 (D.C. Cir. 1986) (same); *Dirksen*, 803 F.2d at 1459 (Medicare processing guidelines)).

<sup>223</sup> Brief of Appellants, *supra* note 1, at 15.

<sup>224</sup> Brief of Appellants, *supra* note 1, at 15.



not risk circumvention of law, any more than the general knowledge of the locations of banks increases the risk that they will be robbed."<sup>225</sup>

While it appears that most cases sustaining an agency's withholding tend to deal with law enforcement instructions, this does not mean that current readings of "circumvention of agency regulation" should not be expanded to include the FS's broader frustration-of-objectives interpretation. In fact, this broader view has also been endorsed by the Attorney General, who articulated a policy of asserting the exemption "where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption."<sup>226</sup>

Nor does MAS's analogy to disclosing the location of banks sustain MAS's narrow construction. While one could argue that species' nests are protected by the height of a tree and criminal prosecution under the ESA, just as banks are protected by fortifications and the threat of criminal prosecution, the analogy misses the mark in a more fundamental manner. After all, it is the mere presence of species at a particular location that sparks the kind of animosity that threatens the species' continued existence.<sup>227</sup> The presence of a bank on a particular corner does not typically aggravate individuals to the extent that the presence of a protected species on a tract of their land might.

In support of its allegation that the maps' disclosure would increase risk to the goshawk, the FS cited its "awareness" and general evidence of the risk to the particular species at issue—goshawk behavior makes the bird easy to identify in the wild, other FOIA requests, and related lawsuits—revealing that they are a politically sensitive species particularly vulnerable to attack.<sup>228</sup> Stating that the documents' release would " 'facilitate conduct that . . . statute or regulation proscribes,' " the FS articulated its broad interpretation of the circumvention language.<sup>229</sup> Additionally, the FS stated that withholding was

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<sup>225</sup> Brief of Appellants, *supra* note 1, at 17.

<sup>226</sup> Attorney General's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act (Oct. 4, 1993), *cited in* FOIA GUIDE, *supra* note 14, at 104.

<sup>227</sup> See *supra* Part I.A.2.

<sup>228</sup> See Brief for Appellees, *supra* note 61, at 34.

<sup>229</sup> Brief for Appellees, *supra* note 61, at 35 (quoting Nat'l Treasury Employees

warranted where the maps' disclosure would render the documents " 'operationally useless.' " <sup>230</sup>

The difference between the two positions, as argued in the *MAS I* litigation, is essentially this: while the release of the documents (in the FS's opinion) would make it easier for someone to "take" a protected species, the documents themselves (as MAS argued) would not hinder the criminal prosecution that might follow such a "taking." FOIA case law apparently supports both views. The line of cases from *Caplan* to *Crooker*, permitting the withholding of portions of BATF manuals, generally supports MAS's view because each case deals with catching law-breakers. Yet cases such as *Dirksen* and *NTEU* (both of which permit withholding based on frustration of an agency's statutory duties) appear to support the more expansive view adopted by the FS.

As suggested above, the distinction between learning how to commit a crime more easily and learning how to avoid detection once the crime has been committed is perhaps a distinction without a difference. Moreover, the difference is less meaningful in the MAS scenario because the FS's claims may be viewed as too speculative. Two recent cases reflect a trend that if either court of appeals had ruled in the FS's favor with respect to the first prong of Exemption 2, the FS might have lost its case based on the speculative nature of the perceived risk of harm to the species. These cases also suggest that courts might ultimately begin to adopt the FS's broader interpretation of "circumvention of agency regulation."

In the same year that *MAS I* was decided, the Ninth Circuit ruled against the Fish and Wildlife Service (the "FWS") on a similar "circumvention" claim in *Natural Resources Defense Council v. United States Department of Interior*.<sup>231</sup> In response to the Natural Resources Defense Council's (the "NRDC") claim that the FWS improperly refused to designate a threatened songbird's critical habitat, the FWS asserted an exception to designating critical habitat based on its opinion that publication of the designation would subject the species to

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Union v. United States Customs Serv., 802 F.2d 525, 530 (D.C. Cir. 1986)).

<sup>230</sup> Brief for Appellees, *supra* note 61, at 35 (citing *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992) (quoting *Nat'l Treasury Employees Union*, 802 F.2d at 530-31)).

<sup>231</sup> 113 F.3d 1121 (9th Cir. 1997).

increased retaliation and vandalism.<sup>232</sup> Although the FWS cited eleven such incidents, the Ninth Circuit rejected this argument as too speculative.<sup>233</sup>

The Ninth Circuit is not alone in viewing as speculative the FWS's claims that retaliation and vandalism may result from disclosing species' habitats. In *Conservation Council for Hawaii v. Babbitt*,<sup>234</sup> the District of Hawaii followed the *NRDC* court's lead, rejecting analogous arguments by the FWS on behalf of listed plants, although the FWS's arguments before the court were substantially weakened by a lack of evidence.<sup>235</sup>

While *NRDC* and *Conservation Council* ruled on this issue in the context of evaluating failure to designate critical habitat, not the more specific risks that may arise from disclosure of management territory maps, they remain instructive as to the courts' likely views of the FS's claims. However, because the maps at issue in the MAS litigation are much more specific than those involved in the designation of critical habitat, it is more likely that a court would find an adequate risk of circumvention in the MAS scenario. Yet even where the FWS alleged eleven incidents of retaliation and vandalism, the Ninth Circuit still took a hard stand against this evidence, revealing a tendency to view such claims with skepticism. In the future, should the FS present specific evidence revealing an increased risk because of the very precise nature of the species' location information, courts may not necessarily dismiss these arguments as entirely speculative.

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Both *MAS II* and *MAS I* were correctly decided because the alternate result would have yielded an extension of Exemption 2 law that would run the risk that the scope of the exemption would become dangerously "all-encompassing."<sup>236</sup> These cases, therefore, reveal a significant limitation of the law of the

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<sup>232</sup> See *id.* at 1123.

<sup>233</sup> See *id.* at 1125.

<sup>234</sup> 2 F. Supp. 2d 1280 (D. Haw. 1998).

<sup>235</sup> See *id.* at 1284-85.

<sup>236</sup> *Vaughn v. Rosen*, 523 F.2d 1136, 1150 (D.C. Cir. 1975) (Leventhal, J. concurring).

"high 2" variant of Exemption 2 (in that it does not contemplate those cases in which the first prong is not satisfied, but the second prong is satisfied). Perhaps for this reason, Congress recently considered creating a new exemption to address the result of *MAS II* and *MAS I*.

### III. ANALYSIS: CONSIDERING THE LEGISLATIVE RESPONSE TO *MAS II* AND *MAS I*

The MAS decisions appear correctly decided pursuant to current formulations of FOIA's Exemption 2. The peculiar result of the decisions is, however, that information about the specific location of endangered species is available to anyone who requests it, regardless of their intentions. Soon after the decisions were handed down, a bill was introduced in the Senate to reauthorize and substantially amend the ESA. Entitled "The Endangered Species Recovery Act of 1997" (the "ESRA"),<sup>237</sup> the bill contained a FOIA Exemption 3 "statutory exemption"<sup>238</sup> ("ESRA FOIA Exemption" or "proposed exemption") to override this precedent.<sup>239</sup> The proposed language gave agencies an additional basis to justify the withholding of such information—where the release of the information might bring greater harm to protected species—from all FOIA requesters, except those who are landowners of the species' habitat.

Reporting the bill out of committee, the Senate Committee on Environment and Public Works stated that the addition of a FOIA Exemption 3 statutory exemption seeks specifically to address the MAS decisions.<sup>240</sup> As authorized by § 552(b)(3),

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<sup>237</sup> The amended version of Senate Bill 1180 was reported out of the Senate Committee on Environment and Public Works and contains the proposed exemption analyzed in this Comment. See S. REP. NO. 105-128 (1997), available at 1997 WL 688536.

<sup>238</sup> FOIA Exemption 3 permits statutory exemptions that are incorporated into FOIA by inserting non-disclosure language into other statutes such as the ESA. See 5 U.S.C. § 552(b)(3) (1994 & Supp. 2000); see also FOIA GUIDE, *supra* note 14, at 120.

<sup>239</sup> See *infra* note 239.

<sup>240</sup> Senate Report 105-128 provides:

Section 2(d) of the bill addresses two recent court decisions that prevented the U.S. Forest Service from withholding information on the location of nesting sites for two threatened species of birds. The Forest Service sought to withhold the information pursuant to exemption 2 of the Freedom of Information Act (the "FOIA"), on the basis that disclosure would

Congress may create such an exemption within a particular statute without amending FOIA itself because FOIA "incorporates disclosure provisions of other statutes";<sup>241</sup> the Committee report states the intention to do so here.<sup>242</sup> The ESRA FOIA Exemption provision read:

(2) FREEDOM OF INFORMATION ACT EXEMPTION.—The Secretary, and the head of any other Federal agency on the recommendation of the Secretary, may withhold or limit the availability of data requested to be released pursuant to section 552 of title 5, United States Code, if the data describe or identify the location of an endangered species, a threatened species, or a species that has been proposed to be listed as threatened or endangered, and release of the data would be likely to result in an increased taking of the species, *except that data shall not be withheld pursuant to this paragraph in response to a request regarding the presence of those species on private land by the owner of that land.*<sup>243</sup>

While this specific language has not yet been enacted, other new legislation aimed at reauthorizing the ESA contains similar provisions.<sup>244</sup> The following Section reflects on several problems with the language and evaluates the possible effects of enacting a similar exemption.

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facilitate the unlawful taking of the species, but both the 9th Circuit, in *Maricopa Audubon Society v. Thomas*, and the 10th Circuit, in *Audubon Society v. U.S. Forest Service*, required release of the information. The bill allows for certain information to be withheld, provided that the information describes or identifies the location of a listed species or one proposed to be listed, and the release of the information would likely result in increased take of the species. Exemption 3 of FOIA (5 USC 552(b)(3)) incorporates disclosure provisions of other statutes, and this provision is to be considered under that exemption. The provision is also to be narrowly construed, such that increased take of a species must be likely, rather than merely possible. Furthermore, the exemption may not be used to withhold information regarding the presence of a species on private land from the owner of that land.

S. REP. NO. 105-128 (1997), available at 1997 WL 688536.

<sup>241</sup> FOIA GUIDE, *supra* note 14, at 120.

<sup>242</sup> See *supra* note 239.

<sup>243</sup> S. REP. NO. 105-128 (1997), available at 1997 WL 688536 (emphasis added).

In addition to other minor changes, the second version of the bill deleted the italicized text. See S. 1180, Version 2, 105th Cong. (Nov. 4, 1997).

<sup>244</sup> See H.R. 3160, 106th Cong. (1999).

### A. *Omission of Candidate Species' Information*

The Senate Report states that the ESRA FOIA Exemption is intended to provide a basis for a FOIA exemption denied by the MAS decisions; however, the bill's language fails to address one of the species involved in those cases.<sup>245</sup> While the Mexican spotted owl was listed as "threatened" at the time of suit and would be covered by the proposed exemption, the northern goshawk was merely a "candidate" and had not yet been proposed.<sup>246</sup> Failure to include candidate species in the proposed exemption would cause specific nesting location information to remain available before formal proposal or listing of the species.<sup>247</sup> That is, information that could be used to harm the species would be available to the public while the species is under consideration by the Secretary as a candidate, but not once it had been proposed. Theoretically, FOIA requesters would still be able to obtain specific location information about species prior to formal listing; thus, providing them with data useful to poachers and vandals.

### B. *Different Approaches to Different Risks*

The proposed legislation raises another issue regarding how one might approach the different risks to endangered species and their habitats that arise from the disclosure of information about them. There appears to be an inconsistency among agencies responsible for enforcing the ESA as to whether the increased risk of harm to species as a result of vandalism or retaliation is serious. While the FS in the MAS litigation asserted that the species at issue would be more threatened by retaliation and vandalism, the FWS (in the context of critical habitat designation for plants) has "downplayed the danger, stating that while vandalism does happen, 'most plant species are more seriously threatened by conversion of habitat or incompatible land management regimes than by collecting or vandalism.'"<sup>248</sup> This inconsistency is perhaps largely the

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<sup>245</sup> See *supra* note 239.

<sup>246</sup> See *supra* note 149 and accompanying text.

<sup>247</sup> See discussion *supra* Part I.A.1.

<sup>248</sup> McDonald, *supra* note 43 at 683-84.

result of the differences between the types of information available in a critical habitat designation and a management territory map such as that requested in the MAS litigation.

While a federal agency may assert a "not prudent" defense to claims of failing to designate critical habitat,<sup>249</sup> the MAS decisions removed a basis for an agency to withhold information from a FOIA requester based on the risk of harm to individual species during the listing process and thereafter. Yet a growing line of cases and approving scholarship is eroding agencies' ability to delay the designation of critical habitat based on the fears of increased vandalism.<sup>250</sup> This may warrant giving agencies a second chance to withhold more specific information should concrete evidence of vandalism and retaliation surface. After all, while a critical habitat map may lead one to a species' preferred range (and may be a "treasure map"),<sup>251</sup> it will not identify specific nesting sites (certainly not with the accuracy of the management territory maps contested in the MAS litigation). The proposed exemption might retain its vitality in this situation. Because of the increased detail in the management territory maps,<sup>252</sup> the degree of specificity should weigh in favor of non-disclosure when evaluating risk and should sustain non-disclosure more frequently than in the context of designating critical habitat.

### C. *The Landowner Loophole*

The landowner exception as included in the version of S. 1180 published with the Senate Report would facilitate illegal takings and habitat modification that are already occurring. This language, deleted from the text in version two of S. 1180,<sup>253</sup> should probably not be considered in future bills without implementing a mechanism for reducing the risk of

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<sup>249</sup> See *supra* notes 42-43 and accompanying text.

<sup>250</sup> See *supra* notes 230-34 and accompanying text.

<sup>251</sup> See *supra* note 63.

<sup>252</sup> A FS "biological evaluation noted that more precise information, such as a management territory map, could reveal locations of nest stands which might increase the likelihood of malfeasance." *Maricopa Audubon Soc'y v. United States Forest Serv.*, 923 F. Supp. 1436, 1438 (D.N.M. 1995) (noting that management territory maps are arranged such that the location of a nesting site appears in the middle of the map).

<sup>253</sup> See S. 1180, Version 2, 105th Cong. (Nov. 4, 1997).

habitat destruction during the process of listing a species.<sup>254</sup>

Under current law, a landowner is free to develop habitat with impunity if a species located thereon has not been listed.<sup>255</sup> The last clause of the ESRA FOIA Exemption preserves for landowners the opportunity to use FOIA to obtain nesting maps for the private lands they own whether the species has been proposed or listed.<sup>256</sup> Submission of a FOIA request under the proposed law by a private landowner would proceed to complete disclosure, even if (1) the documents requested reveal the location of a species and (2) release of the documents would lead to an increased likelihood of "takings."<sup>257</sup> Therefore, as far as proposed species are concerned, a landowner under the language proposed in the first version of S. 1180 could continue to destroy species and habitat of proposed species.

This clause could eviscerate the utility of the exemption in many cases by permitting disclosure of even an endangered species' location. After all, landowners have an economic incentive (greater in most instances than that of poachers, hunters, and others) in escaping ESA regulation because the Act can reduce or destroy most commercial uses of their land.<sup>258</sup> On the other hand, as long as enforcement of non-commercial violations of the ESA remain a "high priority" for the FWS,<sup>259</sup> one could make the argument that a landowner in possession of the information is adequately deterred from harming listed species by the criminal and civil sanctions provided for in the ESA,<sup>260</sup> although yet unlisted species and their habitats would remain vulnerable.

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<sup>254</sup> For a discussion of one possible mechanism, see Martha F. Phelps, *Candidate Conservation Agreements Under the Endangered Species Act: Prospects and Perils of an Administrative Experiment*, 25 ENVTL AFF. 175 (1997) (describing and criticizing the use of conservation agreements to avoid listing species).

<sup>255</sup> "Because it is perfectly legal to modify the habitat of unlisted species, this notification can induce landowners to remove candidate species from their property or to adversely modify their habitat before listing is final." Jeffrey J. Rachlinski, *Protecting Endangered Species Without Regulating Private Landowners: The Case of Endangered Plants*, 8 CORNELL J.L. & PUB. POL'Y 1, 6 (1998).

<sup>256</sup> See S. REP. NO. 105-128, available at 1997 WL 688536.

<sup>257</sup> See *supra* note 245 and accompanying text.

<sup>258</sup> See *supra* Part I.B.

<sup>259</sup> See United States Fish and Wildlife Service, Memorandum: Prioritization of Law Enforcement Activities, Aug. 4, 1992.

<sup>260</sup> See *supra* note 52 and accompanying text.



### D. *Achieving a Balance Through Selective Disclosure*

The ESRA FOIA Exemption calls for agencies to set standards for determining whether the release of the documents "would be likely to result in an increased taking of species."<sup>261</sup> The Senate Report provides more guidance, stating, "The provision is also to be narrowly construed, such that increased take of a species must be likely, rather than merely possible."<sup>262</sup> Because the ESRA FOIA Exemption was drafted in response to the MAS cases, which reaffirm the principle that FOIA disclosures are to be made without consideration of the identity of the requester,<sup>263</sup> one could read the language in the proposed exemption to either (1) call for the consideration of the requester's identity in the limited circumstances presented in the MAS litigation or (2) require the Secretary to find that release of the information generally might increase the risk of retaliation.

In either case a new exemption should carefully balance the benefit to environmental advocacy and research groups like MAS from use of information against those benefits of land-owners and property rights advocates in order to avoid becoming a sweeping basis for non-disclosure. The maps such as those at issue in the MAS litigation are important components of MAS' review of the effectiveness of an agency's enforcement of the ESA and the results of an agency's actions on endangered species populations.<sup>264</sup> Such activities are warranted, if not protected, by the policy of broad disclosure embodied in FOIA to "hold the governors accountable to the governed."<sup>265</sup> Enactment of any such exemption should be carefully formulated to preserve the opportunity for such groups (including property rights groups) to do so, for without the review of interested organizations, the development of new regulations would not be guided by their input.<sup>266</sup> That is, any system that creates differential access to information should be very

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<sup>261</sup> S. REP. NO. 105-128, available at 1997 WL 688536.

<sup>262</sup> *Id.*

<sup>263</sup> "Any person . . . , for whatever reason, good or ill, may file a request for an agency record . . . ." Wald, *supra* note 14, at 655.

<sup>264</sup> See Brief of Appellants, *supra* note 1, at 25.

<sup>265</sup> See FOIA GUIDE, *supra* note 14, at 3.

<sup>266</sup> See Brief of Appellants, *supra* note 1, at 25-26.

narrowly constructed to maintain as near a level playing field as possible.

## CONCLUSION

The Maricopa Audubon Society litigation presented an unusual set of facts to the Tenth and Ninth Circuits, in a dispute which (while not remedied by current Exemption 2 law) could be remedied with legislative action. As presented in the Maricopa Audubon Society cases, although there exists a risk that the information requested could be used to circumvent the FS's regulation of an endangered species' habitat, the maps at issue will not fall within the coverage of Exemption 2's language. If Congress finds such an exemption is warranted, this Comment suggests that a careful balance between the interests of environmental groups and landowners must be struck to minimize the likelihood of harm to species and their habitat throughout the listing process, while preserving the rule-making processes that will achieve more equitable ends.

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