

**TESTIMONY OF
ROBERT V. PERCIVAL**

**BEFORE THE HOUSE COMMITTEE ON
NATURAL RESOURCES**

**HEARING ON
PROPOSED AMENDMENTS TO
THE ENDANGERED SPECIES ACT**

APRIL 8, 2014

My name is Robert V. Percival. I am the Robert F. Stanton Professor of Law and the Director of the Environmental Law Program at the University of Maryland Francis King Carey School of Law. Thank you for inviting me to testify today. A copy of my c.v. is attached to this testimony as Appendix A. For more than two decades I have been the principal author of the most widely-used environmental law casebook in U.S. law schools, *Environmental Regulation: Law, Science & Policy* (Wolters Kluwer Law & Business, 7th ed. 2013). I have taught Environmental Law for more than a quarter century and I also teach Constitutional Law, Administrative Law and Global Environmental Law.

I. THE ENDANGERED SPECIES ACT REFLECTS OUR HIGHEST MORAL ASPIRATIONS

The Endangered Species Act (ESA) is the product of a remarkable, bipartisan consensus concerning the moral imperative of preserving biodiversity. In his Special Message to Congress on February 8, 1972, President Richard Nixon called on Congress to enact “legislation to provide for early identification and protection of endangered species,” to “make the taking of endangered species a Federal offence for the first time,” and to “permit protective measures to be undertaken before a species is so depleted that regeneration is difficult or impossible.”¹ Congress responded by enacting the ESA by an overwhelming, bipartisan majority. The legislation passed the Senate by a vote of 92-0 on July 24, 1973. On September 18, 1973, the House approved its own version of the bill by a vote of 390-12. The final legislation that emerged from a joint conference committee was agreed to by the Senate unanimously on December 19, 1973 and by the House by a vote of 355-4 on

¹ Richard M. Nixon, Special Message to Congress Outlining the 1972 Environmental Program, Feb. 8, 1972 (<http://www.presidency.ucsb.edu/ws/index.php?pid=3731>).

December 20, 1973. President Nixon signed the ESA into law on December 28, 1973.

The ESA is a profoundly “pro-life” piece of legislation. It creates a presumption that humans should avoid activity that would harm endangered species and that federal agencies should avoid actions likely to jeopardize species continued existence. The ESA has been recognized as one of the most profound moral accomplishments of the human race because it recognizes that we have an ethical obligation to preserve all of God’s creation.²

In its first major decision interpreting the ESA, the U.S. Supreme Court declared the Act to be “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”³ It explained that “Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities.”⁴ As an illustration of “the seriousness with which Congress viewed this issue,” the Court specifically cited the ESA’s “provisions allowing interested persons to petition the Secretary to list a species as endangered or threatened and bring civil suits in United States district courts to force compliance with any provision of the Act.”⁵

² Roderick F. Nash, *The Rights of Nature: A History of Environmental Ethics* (Univ. Wisc. Press 1989). See also Evangelical Environmental Network, *On the Care of Creation: An Evangelical Declaration on the Care of Creation* (1994) (http://www.earthcareonline.org/evangelical_declaration.pdf).

³ *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978).

⁴ *Id.* at 194 (1978).

⁵ *Id.* at 181.

Despite strong public support for the ESA,⁶ it often has been a target for political attacks because the costs of species protection measures are more visible and immediate than the more diffuse, long-term benefits of preserving biodiversity. Yet the bipartisan majority that enacted this landmark legislation rejected the notion that species should be sacrificed to political expediency. As the Supreme Court explained in *TVA v. Hill* “Congress was concerned about the *unknown* uses that endangered species might have and about the *unforeseeable* place such creatures may have in the chain of life on this planet.”⁷ Thus “the plain intent of Congress in enacting” the legislation “was to halt and reverse the trend toward species extinction, whatever the cost.”⁸

Balanced, scientific evaluations of the ESA have consistently endorsed its basic principles. Evaluating more than two decades of experience with the ESA, the National Research Council in 1995, in a report commissioned by Congress, found that “the ESA is based on sound scientific principles.”⁹ It concluded that “there is no doubt that it has prevented the extinction of some species and slowed the decline of others.”¹⁰ In a letter to the U.S. Senate in March 2006 a group of 5,738 biologists praised the ESA and criticized proposals to weaken its protections. The biologists noted that the ESA had contributed to “significant progress” in species protection.

⁶ During the spotted owl controversy in 1992, voters supported the ESA by a margin of 66 to 11 percent. When asked to choose between protecting species or savings jobs and businesses, species protection was favored by a margin of 48 to 29 percent. Sawhill, *Saving Endangered Species Doesn’t Endanger the Economy*, Wall. St. J., Feb. 20, 1992, at A15

⁷ 437 U.S. at 178-79.

⁸ *Id.* at 184.

⁹ National Research Council, *Science and the Endangered Species Act 4* (1995).

¹⁰ *Id.*

They stressed the importance of the ESA's emphasis on "best available science" and they criticized proposals to mandate the use of non-scientific factors to delay or block listing decisions, designations of critical habitat or implementation of species recovery plans.¹¹

II. INADEQUATE FUNDING HAS JEOPARDIZED IMPLEMENTATION OF THE ESA. IMPOSITION OF ADDITIONAL UNFUNDED MANDATES ON AGENCIES WOULD ONLY EXACERBATE THIS PROBLEM.

A fundamental problem with implementation of the ESA has been the chronically inadequate funding that has been afforded the federal agencies charged with implementing the Act. Since it was last reauthorized in 1992, the ESA has been implemented through annual appropriations that have been inadequate to enable the agencies promptly to comply with their statutory responsibilities.¹² This has made the agencies targets for lawsuits seeking to compel them to perform their non-discretionary duties. Until Congress provides adequate funding to enable federal agencies to discharge in a timely fashion their responsibilities for listing endangered species, for consulting with other federal agencies concerning their conservation obligations for listed species, and for promoting species recovery efforts, the current pattern of litigation is likely to continue.

The imposition of additional unfunded mandates on the agencies would only exacerbate existing problems of inadequate agency resources. Three of the four bills under consideration at this hearing would create new statutory responsibilities

¹¹ Letter from 5,738 Biologists to the U.S. Senate Concerning Science in the Endangered Species Act, March 2006 (http://www.ucusa.org/assets/documents/scientific_integrity/biologists_california.pdf).

¹² Donald C. Baur, Michael J. Bean & William Robert Irvin, A Recovery Plan for the Endangered Species Act, 39 *Env't'l L. Rep.* 10006, 10010 (2009).

for the agencies implementing the ESA without increasing the already-inadequate funds available to them.

H.R. 4315 would require publication on the Internet of the basis for determinations that species are endangered and threatened. This is unnecessary given the agencies' existing statutory obligation under the ESA and the Administrative Procedure Act (APA) to provide public notice of proposed and final agency actions in the Federal Register, which is available on the internet, and to describe and evaluate the reasons and data upon which agency actions are based.¹³

H.R. 4316 would require the Secretary of Interior annually, in consultation with the Secretary of Commerce, to gather and to submit to Congress detailed data concerning not only every citizen suit brought under the ESA, but also every notice letter informing the agency of an alleged violation of the Act. This data would include not only direct expenditures by the agencies on any aspect of preparation for, or conduct of such litigation, but also estimates of employee time devoted to such activities. The bill targets only citizen suits and does not require reporting of the costs of responding to oversight requests by congressional committees, which have been quite substantial.¹⁴ By focusing solely on the costs of performing agency

¹³ See ESA § 4(b)(3)(B), 16 U.S.C. § 1533(b)(3)(B) (“the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.”) and ESA § 4(b)(4), 16 U.S.C. § 1553(b)(4) (mandating that the informal rulemaking provisions of the APA, 5 U.S.C. § 553, apply to regulations issued under the ESA), and ESA § 4(b)(8) (requiring that publication in the Federal Register of any listing regulation “shall include a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulation.”).

¹⁴ See Letter from Secretary of Interior Sally Jewell to Chairman Hastings, January 15, 2014 (http://www.eenews.net/assets/2014/01/16/document_daily_04.pdf)

duties under the ESA, without any consideration of the benefits of such actions, this data would contribute to a distorted view of the value of the ESA.

H.R. 4317 would dictate that the “best scientific and commercial data available” include “all such data submitted by a State, tribal, or county government.” If this is interpreted to mean that any data submitted by such a government must be deemed to be the “best scientific and commercial data available,” the requirement would constitute an improper effort by Congress to dictate scientific judgments. If instead it means only that when governments submit scientific and commercial data that is indeed the best available, it is unnecessary because this is already permissible under existing law.

III. CONGRESS SHOULD NOT AMEND THE ATTORNEY FEE-SHIFTING PROVISIONS OF THE ESA

The ability of citizen groups and businesses to go to court to hold agencies accountable is one of the most important features of our legal system that makes it the envy of the world. It has been absolutely critical to ensuring that our federal environmental laws are implemented and enforced in a manner consistent with statutory directives, as the Supreme Court noted in its landmark *TVA v. Hill* decision.¹⁵

(estimating that the Department of Interior spent more than 19,000 staff hours and nearly \$1.5 million responding to 27 document requests from this committee).

¹⁵ 437 U.S. 153, 181 (citing the ESA’s “provisions allowing interested persons to petition the Secretary to list a species as endangered or threatened and bring civil suits in United States district courts to force compliance with any provision of the Act.”)

The citizen suit provision contained in Section 11(g) of the Endangered Species Act¹⁶ mirrors those contained in the other major federal environmental statutes.¹⁷ It authorizes the court to “award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.”¹⁸ In *Ruckelshaus v. Sierra Club*,¹⁹ the Supreme Court interpreted similar language in the citizen suit provision of the Clean Air Act to require success on the merits before a party can become eligible for an award of attorneys fees.

The attorney fee-shifting provisions Congress has enacted in nearly all the federal environmental laws are designed to enable ordinary citizens to ensure that the laws are implemented and enforced.²⁰ Despite claims to the contrary, citizen suits have proven to be essential to effective implementation of the ESA²¹ and the other major federal environmental statutes. Thus, there is no justification for measures to discourage such actions.

H.R. 4318 would replace the existing standard for awarding attorneys fees under the ESA with a more restrictive standard contained in the Equal Access to Justice Act (EAJA). Rather than allowing judges to award “reasonable” fees to

¹⁶ 16 U.S.C. § 1540(g).

¹⁷ See generally, Congressional Research Service, Award of Attorneys’ Fees by Federal Courts and Federal Agencies, June 20, 2008.

¹⁸ 16 U.S.C. § 1540(g)(4).

¹⁹ 463 U.S. 680 (1983).

²⁰ Robert V. Percival & Geoffrey P. Miller, “The Role of Attorney Fee Shifting in Public Interest Litigation,” 47 Law & Cont. Problems 235 (1984), available online at: <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3755&context=lcp>

²¹ Laura Peterson, Lawsuits Not Hurting Endangered Species Act – FWS Director, Greenwire, July 5, 2012; Berry Bosi & Eric Biber, Citizen Involvement in the U.S. Endangered Species Act, 337 Science 802 (Aug. 2012).

prevailing parties when “appropriate,” as authorized under existing law, this amendment would single out ESA citizen suits and subject them to below-market fee caps under the EAJA. There is no justification for removing citizen suits brought under the ESA from the same fee-shifting standards applicable to the other major federal environmental laws. As noted above, *Ruckelshaus v. Sierra Club* already restricts attorneys fee awards to prevailing parties. Thus, H.R. 4318 is merely a measure designed to make it more difficult for citizens to hold government agencies accountable for failing to implement the ESA.

IV. CONCLUSION

The ESA is a landmark piece of legislation that was the product of an overwhelming, bipartisan consensus concerning the importance of preserving biodiversity. Congress authorized citizen suits to hold agencies accountable for violations of the Act. Measures to impose additional unfunded mandates on agencies implementing the ESA will only make it more difficult for them to carry out their statutory responsibilities. There is no justification for replacing the ESA’s attorneys fee-shifting provision that currently mirrors those contained in virtually every other major federal environmental law.

APPENDIX A

C.V. for ROBERT V. PERCIVAL

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UNIVERSITY OF MARYLAND SCHOOL OF LAW, Baltimore, Maryland 1987-present

Robert F. Stanton Professor of Law

Director, Environmental Law Program

Developed and manage one of the nation's top-rated environmental law programs. Created the program's environmental law clinic in 1987. From 1987-89 served as director of the university-wide Coastal and Environmental Policy Program. Appointed full professor in 1994 and Robert F. Stanton Professor in 2004. Selected as "Teacher of the Year" for the University of Maryland Baltimore in 2007.

Courses taught: Environmental Law, Environmental Law Clinic, Torts, Constitutional Law, Administrative Law, Environmental/Administrative Law Workshop, Seminars in Toxic Torts, Risk Assessment and Regulation, Management of Global Fisheries, Transboundary Pollution & the Law, Tobacco Control and the Law, and interdisciplinary seminars on Lead Poisoning Control and Comparative Environmental Law and Politics (winner of the 2005 University of Maryland Board of Regents' Award for Collaboration in Teaching for course co-taught with the Department of Government and Politics).

Summer teaching: Comparative U.S./China Environmental Law at Vermont Law School, South Royalton, Vermont (Summer 2012 & 2013), Principles of Environmental Law at Shandong University, Jinan, China (Summer 2012), Comparative Environmental Justice at University of British Columbia/Southwestern University School of Law, Vancouver, Canada (Summer 2006, Summer 2009), Environmental Law at Lewis & Clark College of Law in Portland, Oregon (Summer 1995), Comparative Environmental Law at the University of Aberdeen in Aberdeen, Scotland (Summer 1994 & 2000).

GEORGETOWN UNIVERSITY LAW CENTER, Washington, D.C.

Visiting Professor of Law

Fall Semester 2011

Taught Environmental Law

HARVARD LAW SCHOOL, Cambridge, Massachusetts

Spring Semester 2009

Visiting Professor of Law

Taught Environmental Law

CHINA UNIVERSITY OF POLITICAL SCIENCE & LAW *Spring Semester 2008*

J. William Fulbright Distinguished Lecturer

Taught Environmental Law and Comparative Law

GEORGETOWN UNIVERSITY LAW CENTER, Washington, D.C.

Visiting Professor of Law

Spring Semester 2005

Taught Administrative Law and a seminar on Transboundary Pollution and the Law

HARVARD LAW SCHOOL, Cambridge, Massachusetts

Fall Semester 2000

Visiting Professor of Law

Taught Environmental Law and a seminar on Transboundary Pollution and the Law.

COMENIUS UNIVERSITY SCHOOL OF LAW, Bratislava, Slovakia

Spring 1994

J. William Fulbright Scholar

Taught Environmental Law and Administrative Law as a Fulbright Scholar.

PREVIOUS EMPLOYMENT

ENVIRONMENTAL DEFENSE FUND, Washington, D.C.

1981-1987

Senior Attorney

Served as chairman of Toxic Chemical Regulation Program. Responsible for policy development, advocacy and litigation on a broad variety of issues.

U.S. DEPARTMENT OF EDUCATION, Washington, D.C.

1980-1981

Special Assistant to Hon. Shirley M. Hufstедler, first U.S. Secretary of Education

Assisted Secretary with the establishment of new cabinet department.

SUPREME COURT OF THE UNITED STATES, Washington, D.C.

1979-1980

Law Clerk to Justice Byron R. White

U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

1978-1979

Law Clerk to Judge Shirley M. Hufstедler

EDUCATION

STANFORD LAW SCHOOL, J.D., 1978

Nathan Abbott Scholar (awarded for graduating with highest grade point average)

Order of the Coif

Second Year Honor for highest grade point average in second year law school class

First Year Honor for highest grade point average in first year law school class

Managing Editor of Volume 28 of *Stanford Law Review*
Board of Editors' Award for outstanding editorial contributions to *Stanford Law Review*

Best Brief, Marion Rice Kirkwood Moot Court Competition
Runner-up Overall Advocate, Marion Rice Kirkwood Moot Court Competition
Hilmer Oehlman, Jr., Award for outstanding work in research and legal writing program

STANFORD UNIVERSITY, M.A. 1978 (Economics)

Danforth Foundation Fellowship
Passed all comprehensive examinations required for PhD. (Price & Allocation Theory, Theory of Income and Economic Fluctuations, Labor Economics, Structure of Industry, and Economic History).

MACALESTER COLLEGE, B.A. *summa cum laude* 1972 (Economics & Political Science)

National Merit Scholar
Phi Beta Kappa (junior year)
Elected to Omicron Delta Epsilon, national economics honor society
Numerous awards in intercollegiate debate team competition

OTHER PROFESSIONAL ACTIVITIES

Member, American College of Environmental Lawyers, *2012-present*

Member, National Committee on United States-China Relations, *2012-present*

Member, Board of Advisors, Transnational Environmental Law Journal, *2011-present*

American Law Institute (elected member), *2006-present*

Member, Maryland Governor's Environmental Restoration and Development Task Force, *2004*

Special Master in *Sherwin-Williams Co. v. ARTRA Group*, #S-91-2744 (D. Md.), *2002-2003*

By appointment of federal judge, presided as special master over a three-week trial in federal district court of damages phase of a CERCLA §113 contribution action.

Visiting Professor, University of Chile School of Law, Santiago, Chile, *Oct./Nov. 2002*
Presented lectures and helped develop South America's first environmental law clinic.

Natural Resource Law Institute Distinguished Visitor, Lewis & Clark College of Law, Portland, Oregon, *September 2002*

Contributing Editor, Environment & Natural Resources, Federal Circuit Bar Journal, *1999-2007*

Editorial Board, International Journal of Environmental Research, *2005-present*

Member of Board of Directors, Environmental Law Institute, *1993-1999*

Member of Steering Committee, D.C. Bar Section on Environment, Energy and Natural Resources

Law, 1992-1998 (co-chair from 1993-1996).

Secretary-Treasurer, Environmental Law Institute, 1997-1999
Member of the Commission on Environmental Law, International Union for the Conservation of Nature, Bonn, Germany, 1997-present

ADMITTED TO PRACTICE

Supreme Court of the United States (1987)
U.S. Court of Appeals for the D.C. Circuit (1982)
U.S. Court of Appeals for the Fifth Circuit (1985)
U.S. District Court for the District of Columbia (1984)
District of Columbia Court of Appeals (1981)
Supreme Court of California (1978)
Court of Appeals of Maryland (1988)

SELECTED PUBLICATIONS

Books and Book Chapters

“Risk, Uncertainty and Precaution: Lessons from the History of U.S. Environmental Law,” in *Trade, Health and the Environment: The European Union Put to the Test* (Marjolein van Asselt, Michelle Everson & Ellen Vos, eds. Routledge 2014).

Environmental Regulation: Law, Science & Policy (Aspen Publishing) (with Schroeder, Miller & Leape) – most widely-used environmental casebook in the U.S. first published in 1992 and now in its 7th edition (2013).

Environmental Law: Statutory and Case Supplement 2013-2014, Aspen Publishing (2013) – published annually since 2002 (with Christopher Schroeder).

“Law, Society and the Environment,” in *Law, Society and History: Themes in the Legal Sociology and Legal History of Lawrence M. Friedman* (Robert W. Gordon & Morton J. Horowitz, eds., Cambridge University Press 2011).

“La Responsabilidad por Daño Ambiental Global y la Evolución en las Relaciones entre el Derecho Público y Privado (Liability for Global Environmental Damage and the Evolution in the Relationship Between Public and Private Law)”, in *Derecho Ambiental en Tiempos de Reformas* (Environmental Law in Times of Reform) 99 (V. Duran Medina, S. Montenegro Arriagada, Pilar Moraga Sariego, D. Ramirez Sfeir & A. Lya Uriarte Rodriguez, eds. AbeledoPerrot Publishing (Chile) 2010).

“Resolución de Conflictos Ambientales: Lecciones Aprendidas de la Historia de la Contaminación de las Fundiciones de Metales (Resolution of Environmental Conflicts: Lessons from the History of Smelter Pollution),” in *Prevención y Solución de Conflictos Ambientales: Vías Administrativas, Jurisdiccionales y Alternativas* 399 (Lexis Nexos 2004).

Law and the Environment: A Multidisciplinary Reader (Temple Univ. Press 1997)
(with Dorothy C. Alevizatos).

"The Organometals: Impact of Accidental Exposure and Experimental Data on Regulatory Policy," in Tilson & Sparber (eds.), *Neurotoxicants and Neurobiological Function: Effects of Organoheavy Metals* 328 (John Wiley & Sons, 1987) (with Ellen K. Silbergeld).

The Roots of Justice (Univ. of N.C. Press, 1981) (with Lawrence M. Friedman) - winner of the Law & Society Association's J. Willard Hurst Prize in American Legal History, 1982; winner of the Western History Association's Robert G. Athearn Award, 1984.

Law Review Articles

"Looking Backward, Looking Forward: The Next 40 Years of Environmental Law," 43 *Env't'l L. Rep.* 10492 (2013).

"CERCLA in a Global Context," 41 *Southwestern Univ. L. Rev.* 727 (2012) (with Katherine H. Cooper and Matthew Gravens).

"Global Law and the Environment," 86 *Wash. L. Rev.* 579 (2011).

"Who's in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?" 79 *Fordham L. Rev.* 2487 (2011).

"Liability for Environmental Harm and Emerging Global Environmental Law," 25 *Maryland J. of International Law* 37 (2010).

"The Emergence of Global Environmental Law," 36 *Ecology Law Quarterly* 101 (2009) (with Tseming Yang).

"*Massachusetts v. EPA*: Escaping the Common Law's Growing Shadow," 2007 *Supreme Court Review* 111 (2008).

"Environmental Law in the Twenty-First Century," 25 *Va. Env't'l L. J.* 1 (2007).
Translated into Mandarin and published as "21世纪环境法展望", 2008 *International Environmental Law and Comparative Environmental Law Review* 204 (Wang Xi ed. 2008) (translation into Chinese by Professor Li Yanfang).

"Who Is Afraid of the Precautionary Principle?" 23 *Pace Environmental Law Review* 801 (2006).

"Environmental Law in the Supreme Court: Highlights from the Blackmun Papers," 35 *Env. L. Rep.* 10637 (2005).

“The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance,” 55 Ala. L. Rev. 717 (2004).

“Skeptical Environmentalist or Statistical Spin-Doctor?: Bjørn Lomborg and the Relationship Between Environmental Law and Environmental Progress,” 53 Case W. L. Rev. 236 (2003).

““Greening” the Constitution – Harmonizing Environmental and Constitutional Values,” 32 *Env’tl L.* 809 (2002).

“Presidential Management of the Administrative State: The Not-So-Unitary Executive,” 51 *Duke L. J.* 993 (2001).

“Escaping the Common Law’s Shadow: Standing in the Light of *Laidlaw*,” 9 *Duke Env’tl L. & Policy F.* 119 (2001) (with Joanna B. Goger).

“Separation of Powers, the Presidency and the Environment,” 21 *J. Land, Resources & Env’tl Law* 25 (2001).

“Responding to Environmental Risk: A Pluralistic Perspective,” 14 *Pace Env. L. Rev.* 513 (1997).

“Environmental Federalism: Historical Roots and Contemporary Models,” 54 *Md. L. Rev.* 1141 (1995).

“Environmental Law in the Supreme Court: Highlights from the Marshall Papers,” 13 *Environmental Law Reporter* 10606 (Oct. 1993).

“Overcoming Interpretive Formalism: Legislative Reversals of Judicial Constructions of Sovereign Immunity Waivers in the Environmental Statutes,” 43 *J. Urban & Cont. L.* 221 (1993).

“The Ecology of Environmental Conflict: Risk, Uncertainty and the Transformation of Environmental Policy Disputes,” 12 *Studies in Law, Politics and Society* 209 (1992).

“Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency,” 54 *Law & Cont. Problems* 127 (Winter 1991).

“Protecting Coastal and Estuarine Resources: Confronting the Gulf Between the Promise and Product of Environmental Regulation,” 47 *Md. L. Rev.* 341 (1988).

“Rediscovering the Limits of the Regulatory Review Authority of the Office of Management and Budget,” 17 *Env. L. Rep.* 10017 (1987).

"The Bounds of Consent: Consent Decrees, Settlements and Federal Environmental Policymaking," 1987 Univ. Chic. Leg. F. 327 (1987).

"The Role of Attorney Fee Shifting in Public Interest Litigation," 47 Law & Cont. Problems 235 (1984) (with Geoffrey P. Miller).

"A Tale of Two Courts," 10 Law & Society Rev. 267 (1976) (with Lawrence M. Friedman).

Policy Reports

"Strategies for Promoting Green Energy Innovation, Deployment & Technology Transfer," in American Institute for Contemporary German Studies, Intellectual Property Rights and Green Technology Transfer: German and U.S. Perspectives, Policy Report #45 at 7-59 (2010).

"Environmental Crisis Management -- A Comparative Analysis," in China Council for International Cooperation on Environment and Development, Report of the Task Force on Environmental Governance (2006) (translated into Chinese and reprinted in 19 Research in Environmental Sciences 133 (2006)) (with Miranda Schreurs).

Book Reviews

"Environmental Law Goes Global: *Taking Back Eden: Eight Environmental Cases that Changed the World*," 41 Environmental Law Reporter 10194 (March 2011).

"Chasing the Wind: Regulating Air Pollution in the Common Law State," 14 Law & Politics Book Review (2004).