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# ESSAY

## LAW AND THE FOURTH ESTATE: ENDANGERED NATURE, THE PRESS, AND THE DICEY GAME OF DEMOCRATIC GOVERNANCE

BY

ZYGMUNT J.B. PLATER\*

*Building upon the story line of a current book project on the Tellico Dam case, this Essay explores a challenging reality of modern public interest lawyering—the critical role of public perceptions and of the Press’s role in shaping them. Most public interest attorneys come to realize that their lawyering must move simultaneously on two different tracks that determine outcomes—law and public opinion. This double task can be difficult and sometimes impossible. Both tracks require the organization and presentation of facts, but the two contexts can be quite different. A legal case requires proof of each technical element of the cause of action. On the other hand, the public’s perception of the controversy is instead likely to be shaped by common sense facts that are selected and given meaning by the “perceptual frame” context in which the Press delivers them. The way information is initially presented shapes the frame through which it will thereafter be perceived by the public and the Press itself. Once established, frames tend to hold. New facts contradicting the frame are more likely to be unperceived than to change the frame. The central case study in this essay is the notorious “snail darter” litigation. Farmers and*

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*environmentalists in Tennessee, outsiders to the political marketplace establishments, tried to use preservation of an endangered fish species as leverage to block the Tennessee Valley Authority's Tellico Dam project. Over a period of seven years of extraordinary efforts, the environmental plaintiffs were successful in the legal process, but in the realm of the Press and public opinion were disastrously unsuccessful in getting across the dramatic facts that would have shown that good ecology made good economic sense. From this frustrating experience the Essay offers some analytical conclusions and some wistful suggestions for possible systemic improvements.*

I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion . . . .<sup>1</sup>

*Thomas Jefferson*

Here is a proposition: Environmental attorneys, and especially public interest environmental attorneys, must constantly be aware that they—we—are lawyering simultaneously on two very different yet concurrent tracks. It is essential but insufficient to put together and present the technical merits of a winning legal argument in the forums of courts or agencies. In most public interest cases, ultimate outcomes are likely to be finally determined within the intricacies of the political process—local, state, or national. And while this second track requires that the rational merits of public interest cases are well presented in the internal processes of agencies or legislatures, that also is not enough. In many or most public interest cases *it ultimately is the public's perception of the case that is the most important and determinative factor*. What the public knows (or, significantly, does not know) of the case, ultimately determines outcomes.

And where is it, in the rapid-fire daily complexities of modern American democratic governance, that the public almost exclusively gets the information that shapes its perceptions and its Jeffersonian “discretion”? From the important and frustrating realm of the Fourth Estate. The Press inevitably plays a critical role in the ultimate resolution of most public interest controversies, and its omissions (rather than its more often criticized acts of commission) are the central focus of this Essay and the three suggestions with which it ends.

Warning: At one level at least, much of this disquisition is a legal war story, with all the dangers that implies. The kind people who invited me to present this Essay were warned that I would be enmeshed this year in the project of writing, finally after twenty-five years, a book about an endangered species case in which, for seven years in the 1970s, my students and I had the honor and the frustrating burden of representing an

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<sup>1</sup> Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), in 15 THE WRITINGS OF THOMAS JEFFERSON 278 (Andrew A. Lipscomb et al. eds., 1903).

endangered two-and-a-half inch fish. The case is *Tennessee Valley Authority v. Hill (TVA v. Hill)*,<sup>2</sup> which pitted the final dam of the Tennessee Valley Authority (TVA), the Tellico Dam on the Little Tennessee River, against the diminutive endangered fish, the snail darter.

There are always dangers in the war story mode. If the storyteller won, the hidden message is “How smart I am!” (Not much of a problem here, because ultimately we lost. In retrospect, if we had been a little smarter, a river that had flowed for 200 million years would still be flowing.) There is a danger that storytellers will refight old battles long ago lost, will believe that what they have experienced deeply is a metaphor for everything else in human society, or will be the last to realize that the story has become old hat.

But friends have urged that this case we experienced was important and has assumed something of the character of a classic.<sup>3</sup> It touched hundreds of lives and dozens of legal and governmental institutions in interesting and revealing ways. Though I’ve been challenged by a number of other interesting legal experiences in the years since, this one is the case that has pushed me into more legal explorations than any other—equitable remedies, review of agency discretion, puzzles of legislative process and statutory interpretation, the critically useful role of citizen activism, and more. And this is the one that still wakes me up in the middle of the night. The case has had some useful consequences, but it also has had some continuing and really bad consequences for the Endangered Species Act (ESA)<sup>4</sup> and for environmental protection. *TVA v. Hill* apparently is still nationally notorious as The Most Extreme Environmental Case There Ever Was. Twenty years later the snail darter still resurfaces regularly in news commentary and editorials, congressional floor speeches,<sup>5</sup> and Rush Limbaugh’s diatribes against environmentalism,<sup>6</sup> and the deprecating terms

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<sup>2</sup> 437 U.S. 153 (1978).

<sup>3</sup> In a recent on-line poll of environmental law professors from across the country seeking a consensus on America’s ten most important environmental protection court cases, *TVA v. Hill* received the highest number of votes, almost twice as many as the two cases that placed second (*Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) and *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976)). Posting of James Salzman, salzman@wcl.american.edu, to envlawprofs@darkwing.uoregon.edu (Oct. 26, 2001) (copy on file with author).

<sup>4</sup> Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2000).

<sup>5</sup> See 142 CONG. REC. H10,501 (daily ed. Sept. 17, 1996) (Tribute to the Honorable James H. Quillen on his retirement from Congress) (“And Jim [was] persuaded that the fish could get along just as well whether the dam was there or not.”); 141 CONG. REC. S6423 (daily ed. May 10, 1995) (statement of Sen. Packwood (R-OR)) (“We do not care if the snail darter disappears.”); 137 CONG. REC. S7848 (daily ed. June 13, 1991) (statement of Sen. Johnston (D-LA)) (“Ask hardworking voters to sacrifice in the name of the snail darter, and, if they are feeling polite, they will give you a shrug.”); 136 CONG. REC. H7508 (daily ed. Sept. 13, 1990) (statement of Rep. DeLay (R-TX)) (“Because the rabid environmentalists felt it was more important to jeopardize the lives of our brave American serviceman than risk the death of a single snail darter.”).

<sup>6</sup>

America today is a new homosocialism, communism. What these people are is against private property rights. They are trying to attack capitalism and corporate America in the form of going after timber companies. And they’re trying to say that we must preserve these virgin trees because the spotted owl and the rat kangaroo and whatever live in

in which the fish is remembered makes our point and makes it worth a retrospective look.

The Tellico Dam was indeed an Extreme Case. From start to finish the public and the political process perceived it, through the Press, as the story of a trivial little fish discovered at the last moment by cynical environmental extremists who misused the fish and the law to block a huge hydroelectric dam. This story, however, was almost completely inaccurate, in fact backwards. Significantly, the case was extreme in ways 180 degrees opposite to the public perception, to the implied mismatch on the economic merits between the little fish and the TVA dam that Rush mocks with his listeners and even sympathetic observers seem to take for granted.<sup>7</sup> The dam had never made economic sense. The environmental argument for the fish and its habitat maximized economic as well as ecological benefits to the public. A retrospective look may thus cast a small but useful spotlight not only on environmental lawyering issues but also more grandly on how American government works. In the Tellico Dam case, as you so often find in the environmental law field, when you scratch away at the surface of a story pretty soon you find yourself staring at big questions of democracy.

#### MISTAKE

In a nutshell, on the objective record, the TVA's Tellico Dam project was a major public policy mistake from the start. In our legal system, however, even if on its merits a project is irrational and destructive, there is no forum in which public interest advocates, outsiders facing the insider

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them, and it's the only place they can live, the snail darter and whatever it is.

Rush Limbaugh, *The Rush Limbaugh Show* (radio broadcast, Dec. 7, 1993).

<sup>7</sup> See, for example, the ethical point that is earnestly and empathically made while nevertheless assuming the extremism of the snail darter case, missing the basic facts and common sense utility merits, in a published anecdote concerning an environmental lawyer with a famous name:

On a day in early June, Bobby Kennedy Jr. stands over the body of a decomposing fox, killed by one of his homemade traps that had been set after the rabid creature had menaced his children at his home in Mount Kisco, N.Y. Nature is his faith, and he recounts a conversation he'd had with a Catholic priest on a mountain top. "I kind of challenged him with the most difficult episode in the history of environmental advocacy, which was the snail darter case. I said, 'How did we allow this 2-inch fish with no economic significance to hold up a \$1 billion dam project that would have provided energy and jobs to people? Why did we put fish before people?' And he said, 'That's not what happened. We know at our core, as Americans, that if we lose a single species, we lose part of our ability to sense the Divine, to understand who God is and therefore what our potential is, as human beings.' Then I understood that God reveals himself through many avenues. When we destroy those things, whether whole species or huge ecosystems, to me it's the moral equivalent of tearing the last pages out of the last Bible on Earth."

John Marks, *Special Report: The Return of the Kennedys: Struggling Against Conservatives and Cynics, A New Generation of Activists Tries to Assert Itself*, U.S. NEWS & WORLD REP., Sept. 2, 1996, at 42.

Establishment of an "Iron Triangle"<sup>8</sup> pork barrel, can reliably trigger analytical scrutiny to obtain an accounting, and no way to "speak truth to power."

Twenty-five years after its founding, TVA, the New Deal's brightest rose, had lost momentum and suffered from low morale. After building more than five dozen dams, it had run out of places where another dam could be justified. The agency had shifted ninety percent of its energy production to coal and nukes and was becoming just another big utility company. But in a decisive turnaround meeting held at his Watts Bar Dam conference center, Aubrey Wagner, the agency's general manager and later chairman, resurrected the agency's spirits by launching a new initiative that would let them build more dams: Starting with a dam to impound the last thirty-three miles of flowing river left in the Little Tennessee River, the Tellico Dam, TVA would justify a new series of projects as "regional economic demonstrations."<sup>9</sup>

TVA had to come up with a positive benefit-cost justification. Every federally-funded public works project is required to have a benefit-cost ratio that on its face is at least theoretically positive; that is, that at least \$1.01 will arguably be returned over time for every taxpayer dollar invested.<sup>10</sup> Because such water projects are primary components of the congressional pork barrel, this requirement typically stimulates great bureaucratic artistry in boosting the hypothetical benefits and minimizing the estimated costs of the projects that the Iron Triangles want to build.<sup>11</sup> TVA's Tellico Project, ultimately a \$150 million spending opportunity, was such a case. When the agency brought it to the pork barrel appropriations committees in Washington for funding, the committees welcomed TVA's benefit-cost

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<sup>8</sup> "Iron Triangles" in the political science rubric are the colluding political blocs formed in a particular area by industry groups in the marketplace, by the agencies that fund or regulate them, and by their congressional supporters. Examples are the timber industry, United States Forest Service, and timber states' legislators; the barge and shipping industries, the Army Corps of Engineers, and southern delegations; and more. See FRED POWLEDGE, *WATER: THE NATURE, USES, AND FUTURE OF OUR MOST PRECIOUS AND ABUSED RESOURCE* 285-89 (1982).

<sup>9</sup> See WILLIAM BRUCE WHEELER & MICHAEL J. McDONALD, *TVA AND THE TELLICO DAM, 1936-1979: A BUREAUCRATIC CRISIS IN POST-INDUSTRIAL AMERICA* 3-33 (1986) (describing the February 13, 1959 Watts Bar meeting); see also STEPHEN J. RECHICHAR & MICHAEL R. FITZGERALD, *THE CONSEQUENCES OF ADMINISTRATIVE DECISION: TVA'S ECONOMIC DEVELOPMENT MISSION AND INTRAGOVERNMENT REGULATION* (1983). These two books are excellent sources of background data on the history and merits of the controversy and TVA's adamancy in pushing the dam in the face of the law and critical analysis on the merits. TVA can self-authorize projects if they fit its charter, and Wagner was seizing upon section 22 of the TVA Act, which authorizes "the proper use, conservation, and development of the natural resources of the Tennessee River drainage basin and of such adjoining territory as may be related to or materially affected by the development consequent to this chapter." Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831u (2000) (original version at ch. 32, § 22, 48 Stat. 69 (1933)).

<sup>10</sup> At the time, the benefit-cost requirements were set out in S. DOC. NO. 87-97, at 4 (1964). In making the official project-justification calculations, the span of time and the interest-rate accounting for the cost of money have always been part of the manipulations, despite growing criticisms from critics including a few libertarians.

<sup>11</sup> See generally WILLIAM ASHWORTH, *UNDER THE INFLUENCE: CONGRESS, LOBBIES, AND THE AMERICAN PORK-BARREL SYSTEM* (1981).

projection with open coffers, as they do a parade of similar spending projects each year, despite questionable benefit-cost ratios.<sup>12</sup>

At the heart of TVA's project justifications for Tellico was a decision to acquire large areas of land that would never be flooded by the long, winding, shallow lake—more than twice as much private land was to be condemned than was needed for a reservoir, 340 family farms<sup>13</sup>—and the theory was that this land would be re-sold and redeveloped as a model industrial city to be called "Timberlake New Town." At a cost of \$850 million, including at least \$145 million in additional "infrastructure grant" subsidies that Congress would be asked to provide at some later date, TVA and its partner, the Boeing Corporation, said the hypothetical city would bring 50,000 people and 26,000 new jobs to the area.<sup>14</sup> The "shoreland development" benefits of this plan, along with even greater hypothesized recreational benefits, allowed TVA to claim a 1.70/1.00 benefit-cost ratio (later modified downward).<sup>15</sup> Because Tellico was such a marginal site, traditional water

<sup>12</sup> TVA had a dynamic ecological niche in the interlocked structural network of federal subsidy: construction agencies, congressional appropriations committees, and legislators desire to bring money into their districts and the local businesses into which subsidy monies would go.

<sup>13</sup> Of the project's 38,000 acres, only 14,000 acres of land would be seasonally covered by the reservoir. As a result of its New Deal genesis, TVA had the power to condemn land in an internal agency process using its own "assessors," not a jury, to set land prices. Thus the agency could take rich agricultural land, at the edge of a river and adjoining the Great Smoky Mountains National Park, for an average of less than \$400 per acre.

<sup>14</sup> TVA planners hypothesized the model city would follow the design of a utopian city conceived by Athelstan Spilhaus in the 1940s, which likewise was never built. See TVA, TENNESSEE VALLEY AUTHORITY ENVIRONMENTAL STATEMENT: TIMBERLAKE NEW COMMUNITY I-1-32 (1976). Swatara, Minnesota, also considered building a Spilhaus utopia in the form of a 20,000-acre domed city, which, after approximately \$1.5 million in private and public money was spent on planning throughout the 1960s and early 1970s, was finally defeated in the 1973 Minnesota legislature due to stiff opposition and budgetary constraints. *Once a Dead and Buried Idea, a Futuristic Domed City Shows Signs of Life*, CHI. TRIB., Jan. 27, 1987, at 3C. TVA planners named the hypothetical city "Timberlake" after Lt. Henry Timberlake of King George III's colonial army who visited the valley and produced the first map of the area in 1762. WHEELER & McDONALD, *supra* note 9, at 169, 182.

<sup>15</sup> The official benefit-cost ratio as of the 1972 environmental impact statement:

<u>Direct Annual Benefits:</u>	
Flood control	\$505,000
Navigation	400,000
Power	400,000
Recreation	1,440,000
Fish & wildlife	220,000
Water supply	70,000
Shoreline development	714,000
<u>Redevelopment</u>	<u>15,000</u>
Total Annual Benefits:	\$3,760,000

<u>Direct Annual Costs:</u>	
Interest & amortization	\$2,045,000
<u>Operation &amp; maintenance</u>	<u>205,000</u>
Total Annual Costs:	\$2,250,000

Benefit-Cost Ratio [later downgraded]: 1.7: 1

project benefits were minimal—small potential increments in barge navigation, water supply, power generation (Tellico had no generators itself, but could redirect flows through a canal to an adjacent dam), and flood control. Despite the inevitable image of the controversy, the Tellico Project was fundamentally not a hydroelectric dam project. The dam was just the dubious central feature of a federal recreational and land-development project.<sup>16</sup>

Starting in 1962, TVA's purported project justifications for Tellico had been challenged and resisted by a motley little coalition of farmers, fishermen, Native Americans, historians, archaeologists, and others.<sup>17</sup> The case they made from the beginning was that the hypothesized benefit claims were unreal and irrational and the project's true costs would be staggering. TVA was eliminating more than 300 family farms on some of the richest agricultural soils in the world. Of the project's 38,000 acres, 25,500 were prime-class soils.<sup>18</sup> The last remaining thirty-three-mile stretch of the Little Tennessee River was the best big river trout fishing resource east of the Mississippi, with special recreational values as a float-trip river, while twenty-four dams within fifty miles had eliminated all surrounding river mileage.<sup>19</sup> According to the archaeologists, the river and rich valley lands had been inhabited continuously for more than 10,000 years, longer than any other site in the continental United States,<sup>20</sup> and had been the heart of the

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<sup>16</sup> It was never seriously questioned within TVA why an economic development project required a dam. Institutionally, it was well understood that the opportunity to build another dam was the central motivation for the project and an essential part of the reinvigoration of internal agency morale. WHEELER & McDONALD, *supra* note 9, at 3–33. TVA's most constantly voiced justification for insisting on a dam and reservoir was the so-called "Foster Hypothesis." Minnard "Mike" Foster, TVA's director of navigation and regional development planning, regularly repeated his intuitive assertion, incorporated into the agency's official benefit-cost calculations, that corporate investment would be drawn to Timberlake New Town by the particular transportation combination, at the Tellico Project's midpoint, of a railroad line, interstate highway access, and a barge terminus. See TELLICO DAM AND RESERVOIR, STAFF REPORT TO THE ENDANGERED SPECIES COMMITTEE (Jan. 19, 1979). The latter required a Tellico reservoir and canal. As it happened, the barge terminal lies choked in weeds, and appears today, after 20 years, to have been used only once, by a TVA dredging barge.

<sup>17</sup> Most people in East Tennessee are more sensible. The region had learned; when TVA wanted something, people lowered their eyes, kept their heads down, and didn't get involved. It was kind of like being in eastern New Jersey when Tony Soprano's organization decides it wants something. No development without a dam would be considered by TVA, and no one else was in a position to do anything. So many people undoubtedly made the pragmatic judgment that if any economic development was to come to the valley, which is a good thing, it would have to be on TVA's terms.

<sup>18</sup> The soils in the Little T Valley were United States Department of Agriculture (USDA) Class I, II, and III soils. Of these, 15,500 acres were Class 1 and 2, now only rarely found in such concentration in any bottomlands anywhere on the planet. Peter Allimain, Agricultural Plan & Statistics (Feb. 1977) (unpublished paper submitted to U.S. Government Accounting Office) (on file with author). The USDA rates soils from Class I to Class VIII, with Class I as the richest level of soil in the world. DOUGLASS HELMS, DEVELOPMENT OF THE LAND CAPABILITY CLASSIFICATION, SOIL CONSERVATION SERV., READINGS IN THE HISTORY OF THE SOIL CONSERVATION SERVICE 60–71 (1992), available at <http://www.nhq.nrcs.usda.gov/RESS/econ/History/LandClassification.html>.

<sup>19</sup> ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 676 (2d ed. 1998).

<sup>20</sup> See Russell Cave National Monument, at <http://www.nps.gov/ruca/cave/cave/htm> (last



Cherokee civilization before Andrew Jackson sent the U.S. Army to move the Cherokee to Oklahoma. Echota, the Cherokees' Jerusalem, and five other Indian town sites lay within the project; Cherokee mounds still dotted the fields, arrowheads abounded, and medicine men from the Cherokee who remained in North Carolina after Jackson's forced removal still returned clandestinely to the valley to gather medicine from along the river banks.<sup>21</sup> The alternative options available for development of the valley—agriculture, tourism, industrial parks, recreation, and historical interpretation centers linked to the Great Smokies Park—constituted a valuable opportunity for maximizing direct public economic returns from the project area, not to mention the valley's extensive, unquantifiable cultural and ecological values.

In retrospect, the dam was quite certainly a mistake. Although fortuitously the endangered darter has survived,<sup>22</sup> its prime natural habitat and the function the darter served in that habitat as a legal bellwether for rational decision making have been wastefully lost. The citizens were quite certainly correct in their analysis of the benefits, costs, and valuable alternatives to the Tellico Dam. TVA was massively wrong in its increasingly obstructionist attempts to promote and justify its dam and derail outside scrutiny of the economic merits of the Tellico project. The Timberlake model city was never feasible, and Boeing pulled out in 1976, scuttling that part of the project.<sup>23</sup> TVA pushed on, however, desperately bulldozing farms and trees, building new roads and bridges, and spending money in a "sunk cost" strategy, while they held off the citizen enforcement litigation. Yet, when citizens got an injunction, more than ten years after construction began (after \$130 million, the vast majority of the project's expenditures had been spent), the Tellico Dam still flunked economic reviews. A federal Cabinet-level tribunal, the "God Squad," gave the Tellico Dam Project the

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visited Nov. 20, 2001) (providing detailed information about history of Russell Cave National Monument). Russell Cave National Monument also has a 10,000-year record of habitation, though it was used primarily as shelter, not as a functioning community as were the human settlements along the Little Tennessee.

<sup>21</sup> See, e.g., WHEELER & McDONALD, *supra* note 9, at 48–49 (discussing Cherokee settlement of the valley prior to occupation by Colonial settlers).

<sup>22</sup> Through massive transplantation and the discovery of several small relict populations, the darter's ultimate survival seems assured, and it has been downgraded to "threatened" status. See U.S. Fish & Wildlife Serv., *Threatened and Endangered Species*, at <http://www.ecos.fws.gov/servlet/TESSpeciesReport/generate> (last visited Nov. 20, 2001). To some this latter-day news exposes the litigation as an extremist sham and the ESA as Chicken Little over-regulation. Even in the narrowest light, however, ESA cases must proceed on the best information then available, not ignoring the Precautionary Principle in a wistful faith that environmental disruptions driven by the political marketplace will resolve themselves benignly at a later date. In larger terms, if endangered species inherently serve a societal function as "canaries in the coal mines" linked by their habitat dependence to physical conditions that have human importance as well, then that utilitarian function is not likely to be resolved by transplantation. See *infra* note 37. The loss of the darter's major natural population in its major surviving natural habitat remains an unfortunate loss under the Act both for the species and for humans.

<sup>23</sup> WHEELER & McDONALD, *supra* note 9, at 182. There probably never was a serious likelihood that Congress would give Boeing and TVA the \$850 million in appropriations and infrastructure grants necessary to build Timberlake New Town.

most searching economic analysis ever given to a federal water project.<sup>24</sup> The 1979 tribunal's charge was to determine whether the dam was worth completing in light of its costs, benefits, and the river's non-dam alternatives. The tribunal concluded unanimously, in the words of Charles Schultze of the Council of Economic Advisors, that "[t]he interesting phenomenon is that here is a project that is *95% complete*, and if one takes *just the cost of finishing it* against the [*total*] benefits, and does it properly, *it doesn't pay*. Which says something about the original design!"<sup>25</sup>

This was a case where the environmentalists' critical analysis of the project was not only correct in holistic terms, giving weight to intangible unmarketable values, but it also was overpoweringly right in direct terms of bankable market economics. Since then, not one economist, not even within TVA, has argued seriously that in retrospect the dam project made public policy sense on its actual economic merits. Tellico Lake today is a pretty reservoir in the warm months when it is not drawn down, it has many expensive second homes along its shores, with more and bigger boats than before, and industrial tenants in its industrial park, but the farms, forests, Indian sites, and trout fishing are gone, tourism is minimal, and the opportunities for coordinated economic development along the river and linkage with the Smokies Park have been frustrated.<sup>26</sup> When questioned at the turn of the century whether TVA felt that its project had lived up to the agency's benefit justifications, TVA's spokesperson said, "I can't answer that question."<sup>27</sup>

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<sup>24</sup> See DEP'T OF THE INTERIOR, TELLICO DAM AND RESERVOIR: STAFF REPORT TO THE ENDANGERED SPECIES COMMITTEE 2.1-.18, 5.1-.5 (Jan. 19, 1979) (analyzing the costs and benefits of alternatives to the proposed dam); Robert Davis, Points that Seem Relevant from the Tellico Transcript—Knoxville 1-2 (1979) (unpublished notes from Robert Davis's presentation to the Endangered Species Committee) (on file with author); Robert Davis, Talking Points on Relationship Between the TVA Tellico Report and the Staff Report to the Endangered Species Committee 1-15 (1979) (unpublished notes from Robert Davis's presentation to the Endangered Species Committee) (on file with author); Robert Davis, The Consideration of the Tellico Dam and Reservoir Project Under the Endangered Species Act 1-13 (1979) (unpublished notes from Robert Davis's presentation to the Endangered Species Committee) (on file with author); Memorandum from Robert Davis, Chief Economist of the Endangered Species Committee, to the [Endangered Species Committee] files 1-3 (Dec. 22, 1978) (on file with author).

<sup>25</sup> Charles Schultze, Chairman of Council on Economic Advisers, Endangered Species Committee, Tellico Dam and Reservoir Project 25-26 (Jan. 23, 1979) (unpublished transcript of public hearing) (on file with author).

<sup>26</sup> There is always a problem contrasting what is with what would have been. Most local people never heard about the alternative development potentials for the valley and undoubtedly appreciate economic benefit from the extensive construction activity building resort homes and golf courses. It is difficult to remember what was lost and that most current development could have occurred without a dam—the citizens' plan included twice as much industrial park land and available second-home development along the river. If lakefront homes were needed, there were dozens of other existing lakes where TVA could have given 4,000 acres to second-home development corporations (although Cooper Communities, the Arkansas developer owned in part by Wal-mart's Sam Walton, stated that it would have preferred to build its 4,000 acres of expensive resort homes along a river, as a number of resort developments had famously done along Arkansas's White River).

<sup>27</sup> Karen Nazor Hill, *'70s Snail Darter Saga Began as Term Paper*, CHATTANOOGA FREE PRESS, Oct. 11, 1998, at C1. "According to TVA biologist Dr. Charles Saylor, there is no barge traffic on

But here's the problem: It is not enough that the citizens were correct on the merits of their argument that Tellico Dam was a mistake. The merits of challenged projects and programs are irrelevant unless they can be authoritatively established and (even more important) forced into the mechanics of the political structures that support those initiatives. And, as so often happens in public interest cases, the citizens' arguments on the merits missed the point of the players in the political process. As noted earlier, historical examinations of the case reveal that TVA's project was being built for unavowed reasons of internal institutional momentum, not for the avowed civic development purposes that the citizens spent their time cross-examining. In such settings, the only way to shift an entrenched agenda is to bring it into an open forum where its details will be assessed upon its public, rather than its clandestine merits.

### FORUM?

What forums did the Tennessee citizens have available to present their case and force a reckoning? Not many, though they tried them all. Petition the executive branch? Whom? TVA? Department of the Interior? The White House? The Governor? No response.<sup>28</sup> Congress? The citizens testified repeatedly to the pork barrel appropriations committees that hold annual funding hearings and were ignored, and prior to the discovery of the darter they were never able to get a hearing in the regular statutory oversight committees. The Press? No, the local press was strenuously uninterested in investigating a TVA project, and the national press paid little attention. So they went to court, where, starting in the 1960s, American pluralistic democracy showed the world that citizens have a right to participate meaningfully in their government.<sup>29</sup> If you pay the filing fee, a judge has to listen to you, and if the facts and law are clearly on your side, you have a pretty good chance that the judge will apply the law. They first filed a National Environmental Policy Act (NEPA)<sup>30</sup> suit because TVA took the position that it did not need to file an environmental impact statement (EIS) for Tellico.<sup>31</sup> The citizens won the NEPA suit with the help of the

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the river.

<sup>28</sup> In 1971 the citizens got support from Governor Winfield Dunn of Tennessee, who begged TVA to drop the dam and to support agriculture and river-based economic development, but the agency rejected his plea. RECHICHAR & FITZGERALD, *supra* note 9, at 29-30; WHEELER & McDONALD, *supra* note 9, at 142-43.

<sup>29</sup> See PLATER ET AL., *supra* note 19, at 376-77; see also Zygmunt J.B. Plater, *From the Beginning, A Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law*, 27 LOY. L.A. L. REV. 981, 984-86 (1994) (discussing legal battle between timber industry advocates and allies of the northern spotted owl).

<sup>30</sup> National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370e (1994 & Supp. III 1997).

<sup>31</sup> *Env'tl. Def. Fund v. TVA*, 339 F. Supp. 806, 810 (E.D. Tenn. 1972), *aff'd*, 468 F.2d 1164 (6th Cir. 1972). TVA filed a draft environmental impact statement with the Council on Environmental Quality on June 18, 1971. However, because of its unsupported cost-analysis statements, the Governor of Tennessee concluded, "The interests of the state would be best served if TVA were to discontinue plans to impound the Little River." Letter from Gov. Winfield Dunn to Aubrey

Environmental Defense Fund and stopped the project for sixteen months until the court approved an EIS, but NEPA is only a procedural statute and an EIS is rarely a functional forum. As soon as the agency writes a statement noting alternatives and adequately cataloguing what it is going to destroy, it can proceed to do so unless the political process intervenes, and in Tellico, as so often happens, it didn't.<sup>32</sup>

Where in this country's modern industrial democracy is there an operative forum to which stupendous mistakes can be brought for effective public interest review? Apparently the answer is "nowhere," unless citizens have money, power, or press enough to get traction and crack into the political process. There is nothing within the process itself that goes out looking for ongoing major agency or economic initiatives that need review,<sup>33</sup> and courts for their part do not willingly take on the function of project and program scrutiny.

But it may be different where citizens can find and prove a substantive statutory violation in court, forcing the other branches of government to take account of the larger questions. Without an endangered fish, the American system of governance provided no mechanism for addressing and rectifying the ongoing mistakes of the Tellico Dam. With a fish, the dam got the highest-level economic review in the history of the American pork barrel.

## TWO TRACKS

In October 1974, second-year law student Hank Hill (yes, as in *Hill*) walked into his environmental law prof's office and told how the fish biology professor in a class his friends were taking had just found a small, hitherto-unknown perch, an endangered species, on a large set of shoals at Coyatee Springs smack in the middle of the Tellico project; a fish that apparently existed only here because it had been extirpated in every other big river

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Wagner, Dec. 7, 1971 (on file with author). TVA responded with a seven-page letter, espousing only the economic benefits to be realized by TVA from the project. *Envtl. Def. Fund*, 339 F. Supp. at 808-09.

<sup>32</sup> See *id.* at 811. TVA argued that NEPA was not retroactively applicable to ongoing projects and that as an emergency agency, created to resist the Great Depression, it was exempt from NEPA. The local federal judge, Robert Taylor, issued his first and only decision against TVA on a substantive issue, which was written by his sexagenarian law clerk Harvey Broome, who happened to be chair of the Tennessee chapter of the Wilderness Society. When the EIS came back for review, after Broome died, Judge Taylor quickly lifted the injunction and allowed the project to continue. See *Envtl. Def. Fund v. TVA*, 371 F. Supp. 1004, 1015 (E.D. Tenn. 1973), *stay denied*, 414 U.S. 1036 (1973), *aff'd*, 492 F.2d 466 (6th Cir. 1974). The Tellico EIS, like most such agency statements, was a strong advocacy document rather than a straightforward weighing of costs, benefits, and alternatives.

A procedural halt can be enough in some cases, allowing the political process to see and intervene. How does that work? If a project is stopped, sometimes sister agencies or competing corporations can mount a charge. Or the press shows the project or program is a substantive as well as procedural loser. Or the proponent and its allies might change their minds themselves. But not here.

<sup>33</sup> Senator Proxmire used to issue annual Golden Fleece Awards to projects and programs he identified as wasteful, but that maverick process was scarcely a "forum" for review, and the good Senator and his awards are no longer with us.

habitat in the Southeast by dams. "Do you think that is enough of a topic for a ten-page term paper?"

At a hastily called meeting at Old Fort Loudon the next Saturday night, a contingent of us from the University of Tennessee College of Law discussed the prospects for another lawsuit with the farmers and other local citizens who had fought and lost the NEPA fight. Should the battered little coalition pull together and try once more with an action under the Endangered Species Act?

The facts and the law seemed clear, we said. If you parsed section 7 of the Endangered Species Act of 1973 carefully, there were at least two causes of action hidden within its verbal foliage. Eliding the italicized words that follow, once we got the species and its critical habitat listed, we could assert two separate violations:

#### Interagency Cooperation

The Secretary [of the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. *All other Federal departments and agencies shall*, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 [1533] of this Act and by taking such action necessary to *insure that actions* authorized, funded, or carried out by them *do not jeopardize the continued existence of such endangered species or threatened species or result in the destruction or modification of habitat* of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical.<sup>34</sup>

The dam would eliminate the entire known population of darters and destroy its critical habitat. The statute was violated and an injunction should issue. Asa McCall, old and grizzled, who for months had been holding off the TVA condemnation marshals with his dog and his shotgun and the presence of a news photographer, looked around the room and said, "I've never before heard of this little fish, but if it can save our farms, I say let's give it a try." He passed his hat around the room and the \$29 collected in it that night was the start of the lawsuit.

But even at that early meeting at the Fort, a strategic reality was clear to the citizen group: This case was not just a lawsuit. The attempt to save the darter and the river would have to proceed successfully and simultaneously on two separate tracks—in the courts and in the realm of public policy debate. Ultimately, it was the much broader context of political decision making where this case would inevitably be decided. Some situations are such that if you win in court, you win. But not here, given the plaintiffs' obvious weakness, the agency's power and desperation to assert a new mission, and the irreconcilability of the positions.

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<sup>34</sup> 87 Stat. 884, 892 (1973) (current version at 16 U.S.C. § 1536(a)(1)–(2) (2000)) (emphasis added).

On Track One we would have to work hard technically to win in court, hopefully arriving at a permanent injunction on legal terms, on the narrow technicalities of section 7.<sup>35</sup> But beyond the courts we had to be continually ready extra-legally to present and defend the rational solidity of our argument—to whom? To Congress, it seemed (because from the beginning we took the position that the lawsuit should lead to a “remand to Congress”; the courts would enforce the law, and TVA would then bring the controversy to Congress where we could get an informed decision on the merits<sup>36</sup>), and to the Public—in order to save the darter and the river.

As to Track Two, we didn’t use fancy language for it, but from the beginning the group was conscious of the impending public political reaction to the snail darter lawsuit, of the critical role of the media in shaping public perceptions, and in a primitive sense, of some important points of cognitive theory.

You did not have to be a genius to sense from the very start that the public perception of this case would be important to its resolution. If we were completely successful in the courts, but only there, the little fish and the river valley would ultimately lose to TVA in Congress where the pork barrel committees were so powerful. It was easy to predict we would be accused of “hypocrisy,” because our real objective was to preserve the river and its valley—yet we were “using” the darter and the Act instead of suing directly on the dam’s merits (which of course was impossible).<sup>37</sup> We could foresee a backlash against the ESA and against environmentalism generally.

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<sup>35</sup> The lawsuit was the *sine qua non*. We had to do everything right in the courts and succeed in getting an injunction to get traction and credibility—usually, if you are washed out in the lawsuit, you are all washed up in the political realm—and the injunction is just the price of admission to the real game in Washington.

<sup>36</sup> This position, emphasizing that our ESA argument was not an extremist’s absolutism as the press continued to insist on characterizing it, expressly invited Congress, not the courts, to do the ultimate deliberative balancing, which we hoped would give us an honest hearing on the merits. This is the argument that won the Supreme Court majority, built on Joe Sax’s concept of “remand to the legislature” cited in our brief. “[T]he role of courts is not to make public policy, but to help assure that public policy is made by the appropriate entity.” JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT: A HANDBOOK FOR CITIZEN ACTION* 151 (1970), *quoted in* Brief for Respondents at 44, *TVA v. Hill*, 434 U.S. 954 (1977) (No. 76-1701).

<sup>37</sup> Were we hypocrites to bring the case? During the Supreme Court argument Chief Justice Burger implied that he thought the citizens didn’t really care about the darter: The fish was just “a handy handle,” and “I’m sure that they just don’t want this project, for a combination of reasons.” Oral Argument of Zygmunt J.B. Plater at 60–61, *TVA v. Hill*, 434 U.S. 954 (1977) (No. 76-1701). Whenever this accusation was levied directly or by innuendo, we would remind the accuser that the Act was concerned with endangerment, and Congress knew that the primary cause of species endangerment is habitat disruption, as in *Tellico*. Further, the function of endangered species was like the “canary in the coal mine,” a utilitarian function keyed to the human consequences of disruptions of the species’s habitat. Zygmunt J.B. Plater, *The Embattled Social Utilities of the Endangered Species Act—A Noah Presumption, and Caution Against Putting Gas Masks on the Canaries in the Coal Mines*, 27 *ENVTL. L.* 845, 853–54 (1997) [hereinafter *Embattled Social Utilities*]. We would readily admit that Congress would not have passed ESA section 7 if it had specifically foreseen this case and cases like it. But statutory interpretation should not be a process of judicial rewriting of laws to accord with what judges think in their hearts that a majority in some past Congress would probably vote to do in a present case. *Tellico* did precisely what the Act generically prohibited.

But we decided that night to go ahead, (in)completely aware of the risks. The consensus we reached was this: We knew the dam was wrong, and we knew that we were right on the statutory law, but also that we were right on the economics and common sense of the case. One of the little group said: "Hell, our chances here are not great. But can you imagine thirty years from now walking along the mudflats of a lake that has eliminated the river, the farms, the Cherokee sites, and an entire endangered species, that we say to our grandchildren 'we had the law and the facts and the economics on our side but didn't have enough faith in ourselves and the legal system to try to stop it?'"

### THE SNAIL DARTER IN THE NEWS

So how did we anticipate the process of public perception? The discussion at the Fort focused naturally on the Press. We said to each other that, if we got an injunction, the story would be lifted out of the Tennessee Valley, where the politics and Press inertia on Tellico were insuperable, and into national focus. The story would undoubtedly start out with the "little-fish-bites-dam" caricature, which would, in fact, serve the purpose of attracting the national attention we needed. In that we were correct. That caricature would hold sway for a few days or a week, we said to ourselves, but afterward the Press would need more fuel for its stories. As the court appeal continued, therefore, investigative reporters would travel down to Tennessee to dig into the details, reporting the dramatic truth about this controversy, and when America knew the facts the tide would turn. That's what never happened.

When on Track One we successfully won an injunction from the Sixth Circuit,<sup>38</sup> the story broke in the Press as predicted, focusing on—

[T]he celebrated case of Tennessee's snail darter, a three-inch fish that flourishes only in a 17-mile stretch of the Little Tennessee River . . . . In a decision that rocked the dam-building world, the Sixth U.S. Circuit Court of Appeals last week ruled that construction had to stop on the Tellico, even though it is 90 per cent complete. The \$116 million dam has been building since 1966 . . . . For the TVA, other dam-building agencies, and members of Congress who like dams, the list of endangered species is itself a growing danger . . . . According to the U.S. Fish and Wildlife Service, its endangered species list includes, or will soon include, about 10 crayfish, 30 fish, 40 mussels, 40 freshwater snails and one shrimp—all living in habitats imperiled by government dams.<sup>39</sup>

But in the weeks that followed, in the brouhaha that began to escalate around the snail darter case, the Press almost never looked deeper into the story.<sup>40</sup> The citizens poured time and effort into a series of Senate hearings

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<sup>38</sup> Hill v. TVA, 549 F.2d 1064, 1074 (6th Cir. 1977).

<sup>39</sup> William Chapman, *Endangered Species Endanger Dams*, WASH. POST, Feb. 11, 1977, at A1.

<sup>40</sup> We actually did get a few stories that told details of the story, especially *Washington Post* stories by Ward Sinclair. See Ward Sinclair, *Snail-Darter Ruling Seen Benefiting Taxpayers*,

in John Culver's Environment subcommittee, convincing several senators and most of the committee staff that the ESA made sense and the Tellico project was far less desirable than the alternatives that preserved the darter.<sup>41</sup> The hearings were barely mentioned in the Press, however, and largely ignored by the rest of Congress. The focus in the Press and the congressional corridors remained on the fish-versus-dam cliché and the portent of future blockages of public works projects by endangered species lawsuits.

As the snail darter case approached the Supreme Court, working to sharpen the public perceptions of Tellico as well as working on the litigation, by a stroke of luck we managed to engineer an official inquiry into Tellico's merits in a little-known investigative forum. At the request of the House committee with ESA jurisdiction, the congressional General Accounting Office (GAO) agreed to study Tellico, and it produced a scathing report.<sup>42</sup> The Comptroller-General's team concluded that TVA's justifications for Tellico "do not give a truly valid picture," were "statistically weak," and "inflated." The GAO report ended with an unusually decisive "Conclusion and Recommendation to Congress—The Congress should prohibit by law the Authority from spending any more appropriations for work on the project that would further endanger the darter" or be wasted if the dam was not completed.<sup>43</sup>

So what did the "liberal" national Press say when this dramatic report came out? Nothing.<sup>44</sup>

After waiting a few days with no pickups, the darter's supporters carried the GAO conclusions to reporters all over Washington. Still nothing. Only local Tennessee papers noted the report, and they focused on TVA's

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WASH. POST, June 24, 1978, at A2; Ward Sinclair, "Pork Panic" Sweeping Congress in Wake of Darter's Rescue, WASH. POST, June 28, 1978, at A2. There was also a probing feature story in the *Post* that we put in all our press and lobbying packets and carried all over Washington. See Colman McCarthy, *Tellico Dam: The Fish Is Not the Big Issue*, WASH. POST, Apr. 7, 1977, at 38. Like the few others like it, however, it was a flash-in-the-pan and was never picked up upon by the rest of the national media or even by the *Times*.

<sup>41</sup> *Endangered Species Act Oversight: Hearing Before the Senate Comm. on the Environment and Public Works*, 95th Cong. 205-41 (1977).

<sup>42</sup> See COMPTROLLER-GENERAL OF THE UNITED STATES, REPORT TO THE CONGRESS: THE TVA'S TELlico DAM PROJECT—COSTS, ALTERNATIVES, AND BENEFITS, EMD-77-58 (Oct. 14, 1977) [hereinafter GAO REPORT] (the GAO Report requested by Chairman Jack Murphy and Subcommittee Chair Robert Leggett of the House Committee on Merchant Marine and Fisheries). The GAO is an agency of Congress itself, not an executive agency, established to inform members of Congress on complex accounting issues and beyond. 2 U.S.C. § 601(b)(4) (2000). This forum can be dramatically useful to citizens trying to obtain an authoritative confirmation of their analysis of challenged projects and programs, but the GAO needs to be requested by powerful congressional figures to do a study. The Tennessee citizens were able to get the request from two committee chairmen through luck, legerdemain, and a small bribe, which is another story.

<sup>43</sup> GAO REPORT, *supra* note 42, at 29, 32.

<sup>44</sup> Reinforcing the author's recollection that no national press story reported the GAO's dramatic report, a Lexis Nexis search revealed only one story even mentioning the study, written almost a year later. Dick Kirschten, *Acting on Endangered Species*, NAT'L. J., July 22, 1978, at 1176.



rejection of it rather than the facts it reported.<sup>45</sup>

In the Supreme Court, our brief and oral argument were stuffed with information on the GAO study, the critical congressional hearings on the project's shaky merits, rational alternatives, and TVA's unwillingness to consult as required by the ESA. After the Supreme Court decision in favor of the darter, which ignored all references to the factual record on project modifications, the Press stories, virtually all on page one of the papers and lead stories on the evening news, were basically the same old fish-bites-dam: "Tiny Fish Wins, But For How Long?—The Supreme Court has ruled that work on a \$116 million dam must stop because the Endangered Species Act expressly protects the river home of a three-inch long fish."<sup>46</sup>

After the Supreme Court decision, Congress's Endangered Species Act Amendments of 1978<sup>47</sup> sent Tellico into the God Squad tribunal's intensive economic scrutiny process. After six months of study and a full dress inquiry into the merits of the dam and the darter's river valley, the tribunal unanimously concluded that the dam did not make economic sense. The large majority of project expenditures were found to have public value even without completion of the dam. The darter was found to represent recreational, tourist, and developmental values including \$40 million worth of prime agricultural lands. How was this astonishing reversal of received wisdom communicated to the public? The Court's stark decision had received front-page coverage all around the country. The turned-table story of the God Squad decision verdict—that the darter's case made economic

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<sup>45</sup> Under the Legislative Reorganization Act of 1970, the agency that has been audited by the GAO must report to the Senate Committee on Governmental Affairs on its actions taken in response to the GAO report recommendations. 31 U.S.C. § 720(b) (1994). TVA's chairman, Aubrey Wagner, wrote a five-page letter to Senator Ribicoff, the committee chairman, rehashing TVA's case for the dam, insisting that the GAO report was inaccurate and that it would be foolish to stop the dam, and ending with the complaint about delays created by judicial and administrative processes "which plague efforts . . . to overcome our social and economic problems." Letter from Aubrey Wagner, Chairman of Committee on Governmental Affairs, to Abraham Ribicoff, Senator (Dec. 13, 1977) (on file with author). He indicated that TVA would do nothing in response to the GAO report. *Id.* Under the statutory procedures, however, Congress need do nothing in response to the GAO report or to TVA's recalcitrance, and didn't.

<sup>46</sup> UPI wire service story, June 16, 1978 (predicting a rapid congressional override, with no mention of doubts about the dam's economics or the existence of alternative development possibilities); see also Warren Weaver, Jr., *High Court Bar Dam, Reprising Rare Fish*, N.Y. TIMES, June 16, 1978, at 1 ("The Supreme Court ruled today, 6 to 3, that Congress' commitment to protecting endangered species of wildlife is so strong that completion of a \$120 million Federal water project must be halted to save the last survivors of an obscure kind of tiny fish."); *The Darter and the Dam*, WASH. POST, June 19, 1978, at A22 ("So the Tennessee Valley Authority's Tellico Dam does have to be stopped, on the verge of completion, to save a three-inch fish."); Morton Mintz, *Court: Dam Must Yield to Snail Darter; TVA Dam Must Yield to Snail Darter, High Court Rules*, WASH. POST, June 16, 1978, at A1; *The Fish Wins*, NEWSWEEK, June 26, 1978, at 99 ("It was a lawsuit that pitted David against Goliath—a 3-inch fish called the snail darter against a \$119 million Federal dam project."); *The Environment; Second Thoughts*, ECONOMIST, June 24, 1978, at 44 ("The triumph of the three-inch, impassive-featured fish, the snail darter, in the Supreme Court on June 15th, against the virtues of an \$120m federal dam which is almost completed on the Little Tennessee river, might have seemed outrageous to many.").

<sup>47</sup> Pub. L. No. 95-632, 92 Stat. 3751 (1978).

sense—got page twenty-one in the *Times*,<sup>48</sup> page twelve in the *Washington Post*,<sup>49</sup> and was not even printed in most papers that took the AP wire. Television and radio, in deciding what to cover as headline news, rarely pick up stories buried that deeply.

Tellico may have been one of the three most-reported environmental cases in the 1970s,<sup>50</sup> but the coverage was almost exclusively superficial. Astonishingly, not one investigative journalistic foray into the intriguingly iconoclastic details of the case occurred, even after the God Squad's uniquely authoritative and dramatic reversal of the fish-dam caricature.

### IT MATTERS

The consequences of the Press's failure to create an informed public perception of Tellico were significant and revealing, then and now. Consider three instructive examples.

Hearings in Congress on the dam and the darter did not have the dramatic impact that our eighth grade civics teachers had led us to expect nor that the sessions' factual revelations warranted. When the darters' defenders started commuting to Washington in 1976 to maintain the second track effort on Tellico, we had to figure out "Who is the target audience for our information?" Did we have to address and reverse the common perception of TVA's presumed technocratic omniscience in Interior, in the White House, in Congress, or beyond? The answer was all of the above and beyond. Interior was easy. The Carter election gave us a Department of the Interior Secretary, Cecil Andrus, and a leadership group who, for a time, were less sensitive to the resource-depletion industries and pork barrel programs than their immediate predecessors and successors.<sup>51</sup> The White House gave us access to Domestic Council staffers for briefings on the facts and logic of the controversy, and the administration quickly defined a position in support of the ESA and its application to the darter.<sup>52</sup> But we

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<sup>48</sup> Seth S. King, *Snail Darter and Whooping Crane Win the First Test of Species Act*, N.Y. TIMES, Jan. 24, 1979, at A21. *But see Government Panel Confirms TVA Dam Must Give Way to Survival of Tiny Fish*, WALL ST. J., Jan. 24, 1979, at 2.

<sup>49</sup> Margot Hornblower, *Panel Junks TVA Dam; Cites Cost, Not Snail Darter*, WASH. POST, Jan. 24, 1979, at A12.

<sup>50</sup> Prof. Ronald Rollet of the University of Michigan's Program in Environmental Journalism communicated this factoid to the author in 1980. The other two cases were presumably Hooker Chemical's Love Canal and the Allied Chemical Kepone disaster.

<sup>51</sup> The Carter administration was far more conscious of conservation principles than its GOP predecessors and successors, although it should be noted that the President who promulgated more environmental protection statutes than any other in history was . . . Richard Milhous Nixon. See ZYGMUNT J.B. PLATER ET AL., FEDERAL ENVIRONMENTAL STATUTES: A CHRONOLOGICAL COMPILATION OF SELECTED RELEVANT FEDERAL ACTS 355, 357-59, supplement to ENVIRONMENTAL LAW & POLICY: NATURE, LAW & SOCIETY (2d ed. 1998 & Supp. 2001). Gerald Ford's Interior Assistant Secretary Nathaniel Reed was the one who, despite heavy pressure from his party, felt forced by the scientific and legal record to sign the official listing of the snail darter. Amendment Listing the Snail Darter As an Endangered Species, 40 Fed. Reg. 47,505, 47,505-06 (1975) (codified at 50 C.F.R. § 17.11(h)).

<sup>52</sup> According to comments made to the author by White House staff, the economic faults of the Tellico Dam were discussed with the administration's first nominee to the TVA Board, David

soon learned that in Washington's day-to-day realities, it was Congress that held determinative power in the eyes of other official players. So was Congress then the prime target?

### CONGRESSIONAL HEARINGS

Both the House and Senate subcommittees with jurisdiction over the ESA held three hearings on the snail darter and the ESA in the months following the Sixth Circuit's injunction, and the hearings records established on the merits of the Tellico Dam injunction were powerful.<sup>53</sup> The subcommittee chairmen and their staffs became solidly convinced of our position's superior rationality. But we quickly learned this was not enough. "I wish there were more Members and reporters who could have been here," said Representative Bonior, after one dramatic session where several Cherokees and farmers testified about what would be lost with a dam and what could be capitalized upon with the river and darter preserved. But the hearing might as well never have happened because only three Members attended, they already knew the case, and no reporter had occasion to sit in on the hearing despite our placing it on the journalists' Day Book and scheduling a congressional balcony press conference for the Tennessee witnesses that morning. Hearing testimony gets printed in a book that virtually no one will ever again have the time or occasion to read unless perhaps in the flesh it made a dramatic impression that registered on some legislator's antennae.

How we envied the hearings that Members did attend. We would walk past a crowded door where a jumble of TV cables snaked in from the hallway, and it started to become clear. Members of Congress are busy people, constantly trying to keep their political profiles high. When they choose to come to a hearing it often is not to see and hear but to be seen and heard on lively mediagenic topics (and if a topic is too technical or intellectually nuanced, it is a difficult venue in which to shine).

The Press and legislators are often linked in a political symbiosis, as one hearing session showed us with particular clarity. In a planned morning hearing session in the Senate subcommittee, we were going to present some vivid testimony on what the farmers and historical tourism developers could do with the undammed valley, and we wanted to be sure that it would make an impression. We phoned the *Washington Post's* Margot Hornblower at home as she was eating breakfast and said, "You've got to come. This is the core of the sensible argument for the darter and the ESA." "Who's going to be there?" she asked. "Farmers, an economist," we said. "No, I mean what

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Freemen, before he was nominated.

<sup>53</sup> *Endangered Species, Part 1: Hearing Before the Subcomm. on Fisheries & Wildlife Conservation & the Env't of the House Comm. on Merch. Marine & Fisheries*, 95th Cong. 52-59, 112-71, 231-47, 283-396, 534-44 (1978); *Endangered Species, Part 2: Hearing Before the Subcomm. on Fisheries & Wildlife Conservation & the Env't of the House Comm. on Merch. Marine & Fisheries*, 95th Cong. 627-82, 728-91, 856-80 (1978); *Endangered Species Act Oversight: Hearing Before the Subcomm. on Res. Prot. of the S. Comm. on the Env't & Pub. Works*, 95th Cong. 6-23, 133-76, 178-300, 357-93, 516-49 (1977).

senators are going to be there?" "Senator Randolph is," we told her, because we had begged the senior senator's staff to have him attend. "O.K." she said. Then we called Randolph's office. "The *Washington Post* is going to be at this hearing," we said. "O.K." said his legislative assistant, "I'll try to get him there."

The hearing began with Senator John Culver alone behind the curved dais, but after twenty-five minutes in came Senator Randolph and took a seat. The hearing took on a sense of importance. But after ten minutes of listening, Randolph turned to his legislative assistant, who then brought a scribbled note back to me sitting in the corner of the room. "WHERE IS THE POST?" Until Margot arrived twenty minutes later, our stock was pretty low. In any event, the story she filed<sup>54</sup> was a disappointment, and Senator Randolph never became a power player in the darter's legislative process. But, thinking about this afterward, we realized that we, as well as Senator Randolph, had come to rank well-connected reporters in the top level of our structural chart of political importance.

#### WHAT CONGRESS KNEW

On July 16, 1979, Secretary Cecil Andrus wrote a dynamite letter to every senator, and on July 27 to every member of the House. After the God Squad verdict, Howard Baker and TVA had engineered a rider to overthrow the ESA injunction despite the decision on the merits. Andrus reminded all the members of Congress that they had appointed him chair of the special seven-member committee to scrutinize the Tellico Dam, and the committee had unanimously found that, "on the basis of economic considerations alone, the project is not justified."<sup>55</sup> The detailed three-page letter hammered down the hapless economics of the dam, the fact that it violated federal dam safety standards, and that better non-dam alternatives were available. On this record, Andrus said, "I intend to urge the President to veto the . . . bill if the language on Tellico remains . . ." and "I strongly urge [you] . . . to strike the Tellico language from the bill."<sup>56</sup>

As the motion to strike the rider came to a vote in both chambers, appropriations committee members worked the floor with Howard Baker and the local Tennessee congressman, saying a No vote was obligatory to save Congress's traditional logrolling public works system. The factual public merits of the case were not the issue. The political merits of the pork barrel were. The darter and the river lost by one hundred votes in the House and narrowly in the Senate.<sup>57</sup> But how could this be, given the powerful verdict of the God Squad? Clearly, virtually every member of Congress knew

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<sup>54</sup> Margot Hornblower, *Wildlife Species Act Endangers Project; Change in Law Opposed*, WASH. POST, July 21, 1977, at A3.

<sup>55</sup> *Id.*

<sup>56</sup> Letters from Secretary of the Interior Cecil Andrus to Members of the House and to Members of the Senate (July 16, 1979, July 27, 1979) (on file with author).

<sup>57</sup> House Roll Call No. 427, 125 CONG. REC. 21,987-22,011 (Aug. 1, 1979) (TVA wins 214 to 184 [36 abstentions]); Senate Roll Call Vote No. 269, 125 CONG. REC. 23,863-272 (Sept. 10, 1979) (TVA wins 48 to 44 [8 abstentions]).

that the dam's claimed merits were objectively false and the environmentalists' case was economically and rationally sound. The appropriations committees, like TVA, had known this for years. Hell, everyone knew that pork barrel projects typically could not withstand realistic economic scrutiny. Tellico was only unusual in that the facts had come out. But the majority of members wanted to vote against the darter and the Act for their own internal institutional reasons, and the only question was whether anything could force them nevertheless to vote on the merits. Congress, though it has nearly peremptory power in functional terms of day-to-day dominance of the political life of the federal government, does not operate on factual merits but on political merits. Its insider players, internal deals and alliances, and selective perspectives of self-interest dominate its day-to-day actions. What could have forced them to vote on the merits? A realistic threat that an informed public would perceive what they were doing. "The public interest" is not a meaningful standard motivating the actions of Congress, and the actual comparative public merits of the dam and the darter were not particularly relevant in Congress unless they were actively perceived by the Press and the public.

Deeply distressed, we realized that the issue *was not what the congressional majority knew* about Tellico and the ESA. It was *that the congressional majority knew that America did not know* the merits of the case, and probably never would, so they could vote their accustomed insider game with impunity. And they were right. The news story on the AP wire after the rider vote as usual missed the merits—"the multimillion dollar Tellico Dam had been blocked by a minimal fish, but now could be completed in the public interest."

#### PRESIDENT AND PRESS

But there was more. As soon as Congress passed the appropriations bill with the rider nullifying the ESA as it applied to Tellico, the darter's defenders and our NGO allies throughout the Washington conservation community, along with Secretary Andrus, began a campaign to persuade President Carter to veto the bill. The bill not only exempted Tellico, undercutting common sense economics and the ESA, it also killed off Carter's attempt to establish an economic review committee on all subsidized federal public works projects. Carter was to make his decision on the afternoon of September 25 and then board Air Force One to fly to meetings with civic and community leaders in New York City. With an hour to go before his departure, Carter decided to veto the bill, drafted a veto message for release after his departure, and we had begun preparations to defend the veto in the House and Senate in a situation where maybe at last America would see the facts. We waited anxiously. The White House had told us to be ready for a call. Two hours later we got a call patched through from the presidential plane. "Deacon is calling." "Hello, Professor Plater? I understand you have been working on this matter and wanted you to know I have decided it is best to approve the appropriations bill as it stands." To angry remonstrances that ensued he repeatedly said that signing the bill was

a tradeoff he felt forced to make “because the appropriations subcommittee chairman is insisting on this rider . . . . I think I am doing the best I can for the environment on this . . . . This is not an issue on which we can prevail.”

Later that fall (while pursuing yet another unsuccessful attempt to save the darter and the river by bringing a constitutional lawsuit to overturn the statute on First Amendment Native American freedom of religion grounds<sup>58</sup>), we learned what had happened in Carter’s head that day. Friends in the White House reported to us that just before the President boarded the helicopter to fly to Andrews Air Force Base for the trip to New Jersey, Frank Moore, Carter’s fellow Georgian and chief of liaison with Congress, had come into the Oval Office. “I hear you are planning to veto that bill with the TVA rider in it?” “Yes,” Carter reportedly said. “The bill undercuts our environmental program and all the work Andrus’s Committee put into this thing.” Moore replied, “Mr. President, you cannot veto this bill. If you do, you are going to wake up tomorrow and in the papers all you’ll see is editorial cartoons of you holding a Snail Darter in one hand and a Killer Rabbit in the other. You can’t afford that kind of press.”<sup>59</sup> Carter yielded, judging that even the President of the United States in a pointed veto message could not get this endangered species success story through the Press to the American people.

The significant audience, it finally was clear to us, was not the President and not Congress. President Carter, a particularly weak executive, nevertheless reflected the general vulnerability and dependence of the modern chief executive toward the power and volatility of Congress. The actions of Congress showed us that, for public interest advocates, the most practical constraint on Congress was the coverage and climate of the Press.

We came to hold a very strong practical conviction: If the snail darter story had been covered by the local or national media on its economic merits, in a way that framed the conflict on those merits, the Tellico Dam project would long since have died, and a river that had flowed for 200 million years would *still* be a dynamic national treasure.<sup>60</sup>

What did the snail darter case need from the media? Not just stories on the dam conflict. There were hundreds of those over the seven years of the

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<sup>58</sup> *Sequoyah v. TVA*, 480 F. Supp. 608 (E.D. Tenn. 1979), *aff’d*, 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980).

<sup>59</sup> The killer rabbit reference is to a story that had come out in the Press mocking Carter for being attacked by a swimming rabbit while fishing in the South one day on a vacation from Washington. See, e.g., Henry Mitchell, *Any Day: Animal Animus and the Ripper Rabbit*, WASH. POST, Sept. 7, 1979, at C1; Kenneth Bredemeier, *Carter Told to Yell “Shoo” at Rabbits*, WASH. POST, Sept. 4, 1979, at A5. Editorial cartoons were regularly mocking Carter’s diminishing political strength and his inability to command media attention.

<sup>60</sup> This is neither a novel conviction nor a novel experience for public interest advocates. Once, in Michigan, facing an attempt by the billboard lobby—one of the strongest lobbies in many state capitols—to push through a sham regulation that limited billboards to the size of 40,000 square feet, our Environmental Law Society at the University of Michigan Law School stopped the bill in its tracks for a time by raising, for 20 minutes, a huge plastic tarp message on pylons on the state Capitol lawn: “If Senate Bill 517 passes, Billboards twice this size will be legal!” With swarms of reporters and TV cameras covering the episode, the bill was withdrawn and did not resurface and pass for months, after press attention had died down.

controversy. Rather, to inform public perceptions in a manner that would shape legislators' votes, we needed coverage that reported at least some of the details of the two very different views—ours and TVA's—of the dam's alleged benefits and costs, and most critically, the existence of non-dam alternatives. If the existence of this debate was reported, then further coverage might be expected to investigate and analyze the merits of the debate, especially if that coverage came in a nation-wide market medium. Further, we realized that ideally we needed coverage “with legs”—a rolling story with continually developing details and momentum that would carry beyond a one-shot appearance<sup>61</sup>—to create an ongoing “news climate” pulling in other media coverage and becoming a node of public debate.

But in the Tellico Dam case, the political process was able to ignore the public merits of the controversy—ultimately finessing the snail darter through a business-as-usual maneuver of the pork barrel's insider game—because, even though the case was getting lots of stories, those stories pictured it as a frivolous excess of hyper-technical environmentalism. Thus, the pork barrel was able to fly beneath the radar of the public's awareness. The public never heard even a hint that the snail darter injunction might make economic sense. When America discovered that the dam would be completed, it was greeted as a rational outcome, which was long-expected, too-long delayed, and finally applied common sense to environmental extremism. (To the end, the people of East Tennessee never heard that they could have had far more and better development in the valley, keeping the river and the farms as well, and today TVA's Tellico reservoir is matter-of-factly taken for granted as the only alternative that was available. What is, is.)

### WHY?

Why didn't the Press and thence the public ever perceive and respond to the horde of available data, vivid images, and opportunities for policy analysis, dramatic juxtapositions, cultural and economic talismans, and warmly affirming possibilities of the Tellico snail darter story? It's a very useful question because so much turned on it then and now. Predictably, there is more than one probable and partially correct answer.

### WE TRIED

The superficial nature of the Tellico Dam's press coverage was not for want of our trying. Over the course of seven years we spoke with more than 150 reporters. (According to my notes, I personally spoke with 127 reporters,

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<sup>61</sup> We had come to see that we didn't need just one national story. What did we need? A rolling story. A *60 Minutes* segment would do it. Or a big investigative feature that gets attention. (Peter Mathiessen's article might have done it if it had come earlier because New York City press people really noticed it.) Why? Because it “takes” with the Press. It legitimizes the story so others can hop on and stay on it awhile. When we'd get a good story, we'd try to peddle it around, but it rarely got a pick-up.

some more than a dozen times.) To save the reporters research time, our press packets contained Tellico chronologies, good data, good quotes, Xerox copies of useful official documents, maps, pictures, some of the few articles detailing arguments on the merits, and contact references for farmers, Cherokees, and environmental spokespersons. Press coverage remained frequent but resolutely superficial. Disappointed with the torpor of the news beat reporters, we even traveled with photographs and press packets to the 1977 National Outdoor Writers' Convention in Georgia. This group of rod and gun journalists knew the richness of the Little Tennessee River and had voted a resolution against the Tellico Dam in the late 1960s. But by the late 1970s, they were passive. "That's a news story," they told us. "We are sports reporters. Our readers don't want us to get into politics." We got CBS's *60 Minutes* and ABC's *20/20* news magazines to film shows on the Tellico story, interviewing farmers, biologists, and economists and laying out the contrasting merits of the river and the dam. The programs never were aired, however. As ABC's Aram Boyagian told us, "We've had a lot of environmental stories lately." What would trigger a decision to run the segment? "If you find Senator Baker shtupping a milkmaid along the river, maybe that'd be a hook to run the segment."<sup>62</sup>

Increasingly desperate as we realized how our truncated press coverage was serving TVA's efforts to override the dam's economic demerits and the ESA, we tried to recruit a pro bono PR firm. The PR firm said our case was exactly the kind of important public policy issue that they were interested in taking on. They would accept our case pro bono and carry its merits to the media, both print and broadcast. All we needed to do was provide them \$15,000 to cover their expenses. Told that this was not possible—all of us working on the darter's legal and political process were volunteers surviving on T-shirt sales, potluck dinner fundraisers, personal credit cards, and the kindness of hospitable activists willing to share their lodgings—they regretfully bowed out.

We then appealed to Ben Badikian. Bagdikian was ombudsman for the *Washington Post* and one of America's most respected journalists, a Pulitzer Prize winner, author of *The Media Monopoly*, and subsequently dean of UC-Berkeley's journalism school. As ombudsman, he was charged with independent overview of the accuracy and integrity of the *Post's* coverage. Usually he dealt with complaints about what reporters wrote, not what they did not write. We catalogued our frustrations in getting the editors to give adequate coverage of the dramatic but complex realities of the Tellico Dam conflict, and the unfortunate political consequences that resulted from this lack of coverage. Even the *Post's* Ward Sinclair, the best reporter we had encountered, was not able to get his editors' permission to dig deeper into the story. Bagdikian sighed and told us that he understood our problem, but

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<sup>62</sup> When Dan Rather saw a report from Tennessee after the dam closure, which showed Nell McCall and other dispossessed farmers unsuccessfully attempting to buy back their own unflooded lands at auction, Kathie Moore, his producer for that story, told us: "I didn't have the heart to tell him we had filmed the story for *60 Minutes* but never could find a good time to run it."



it was an inherent problem in journalism. It was an issue that bothered his students too. Stories don't get covered just because they deserve to be covered, or need to be covered for the sake of accurate informed public debate. He was sorry, but there was nothing he could do.

During the endgame, the day after the pork barrel process overrode our statutory injunction, we held a press conference that, finally, attracted more than a dozen reporters. As they listened to our frustrated laying out of the real merits of the conflict, one of the reporters—Phil Shabecoff of the *New York Times*—grew increasingly angry, and then burst out, “Why are you only telling us this now!? Why didn't you tell us this earlier so we could have covered the story!?” I proceeded to lose self-control. “Sir, we have been calling your offices, sending you fact sheets and position papers, setting up interview conferences on the Day Book with the farmers, Cherokees, and biologists for the past three years. I personally have dropped press packets into your box at the Press building at least twice in the past year. Don't blame us for this. Where the hell were you all this time!?”

#### ONE BASIC PROBLEM: HUMAN COGNITION AND PERCEPTUAL FRAMES

Part of the reason that the Press could not or would not penetrate the details of this internationally notorious case may lie within the peculiarities of how humans—the Press and their public audience alike—process information. In terms of cognitive theory, we never were able to resolve a fundamental problem in perception processing. We didn't understand why the accumulation of intriguing facts within the case did not get through to the Press, the public, and the political process. Why was it always the “little-fish-big-dam” cliché? In retrospect, the answer should have been obvious. Some of the players in the political process—TVA, the pork barrel committees, the anti-regulation movement, and its lobbyists—were extremely well-served by the caricature and would be threatened by the merits and lessons of the snail darter case. But why did the Press stay with the cliché? We came to the conclusion that it was because the cliché was a succinct, interesting, and conveniently fitting way to frame the story. Humans are continually bombarded with a welter of information factoids and must impose frameworks upon them in order to derive understanding and meaning. Building on Kenneth Boulding's pioneer work in the field,<sup>63</sup> you can think of these processing structures as the “perceptual frames”

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<sup>63</sup> KENNETH BOULDING, *THE IMAGE* 7–13 (1956). Boulding began the inquiry into how human minds process complex facts through interpretive “images” that can hide or reinforce perception of facts, as well as the process by which additional new facts can occasionally but not easily change the original interpretive image. These concepts are now well established in modern journalism scholarship. See Carol M. Liebler & Jacob Bendix, *Old Growth Forests on Network News: News Sources and the Framing of an Environmental Controversy*, 73 *JOURNALISM & MASS COMM. Q.* 53, 53 (1996) (examining how networks reflected particular positions through choice of visuals, sources, and summary remarks); PAMELA SHOEMAKER & STEPHEN D. REESE, *MEDIATING THE MESSAGE: THEORIES OF INFLUENCES ON MASS MEDIA CONTENT* (1991) (looking at factors that shape mass media in an attempt to develop a comprehensive theory of media content).

(PFs) through which people discern and understand what is presented to them. Facts that fit the terms of a perceptual frame get organized by the frame into a comprehensible structure. More perversely, *facts that do not fit a perceptual frame are not cognitively acknowledged; they may not be perceived at all.* To some extent the Press and the public could not see the facts or the story's intriguing twists that ended up supporting the darter and the river.<sup>64</sup>

Before the darter, Tellico Dam had probably been perceived from outside Tennessee through the perceptual frame of the New Deal's TVA, an image in which massive dams with roaring spillways bring the backward region into the twentieth century. Once the snail darter lawsuit was filed, the citizens had consciously realized that the case inevitably would initially be perceived as "little-fish-big-dam," but we thought that perception would change as more information was brought to bear. It was hard to understand how persistent the little-fish-big-dam perceptual frame would be. Reporters' and legislators' eyes glazed over when the citizens rolled out maps, reports, and documents showing the weaknesses of the dam and the beneficial role of the endangered species in facilitating alternative development of the valley. The fish/dam rubric is quick, easy, funny, and comforting. It is discomfiting and hard, on the other hand, for reporters and their audiences to devote energetic attention to a complex and disruptively contrary image that is not so familiar and crisp.

#### FISH AS DAVID . . . FISH AS CANARY?

Consider the further dimensions of the fish/dam frame. It invokes a David and Goliath image, which to a certain degree should be helpful to the little fish because everyone knows David was the good guy. But what lies behind this? Perniciously, the juxtaposition invites a less affirmative polarization: "What's more important, Bugs, Trees, and Fish, or the interests of Humans?" Even worse, this perceptual frame invokes the classic put-down of environmentalism, the often-alleged fundamental Unavoidable Tradeoff used by anti-government, anti-regulation activists: You've got to choose. It's either Environment or Economics. Our society cannot have both. In this tradeoff the little fish translates as a metaphor for Environmental Protection, and the Tellico Dam as Economic Progress in the Marketplace.<sup>65</sup> Frustratingly, if this is the perceptual frame, the facts that

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<sup>64</sup> Public opinion is built around PFs, and a given story targets a PF, and then it grows, or changes. Courts are supposed to use a more objective PF: cause of action has elements; you line up the elements and if they fit, you get whatever finding of liability therein provided, and move to the remedy. Some judges merely fit each case into their own PFs and disregard facts, logic, and precedent that don't fit, but Chief Justice Burger's opinion was a rejection of such unfettered judicial process. Instead he bought our Saxian argument that this should be remanded to Congress, where of course we had to face the unfettered PF.

<sup>65</sup> See generally CHARLES C. MANN & MARK L. PLUMMER, *NOAH'S CHOICE: THE FUTURE OF ENDANGERED SPECIES* (1995). *Noah's Choice* is a beautifully written book, ostensibly seeking to bring a rational societal overview to the field. It surveys many of the scientific delights and philosophical challenges of endangered species conservation and advances several major lines

show the dam's diseconomies just don't register in the picture. Once, right after the Supreme Court verdict, I spent more than an hour on the telephone with two researchers for the most respected journalist in America, CBS's Walter Cronkite. To prepare the eminent anchorman for that evening's newscast on Tellico they took copious notes on project costs, dubious benefits, and the public's lucrative alternatives to the dam. Eagerly we waited for America finally to hear the story straight. But "In a classic confrontation between environment and energy production," intoned our suddenly-fallen icon, "the \$150 billion Tellico hydroelectric dam was stopped this week by a two-inch endangered minnow."<sup>66</sup> The fish/dam perceptual frame was too powerful, the cute juxtaposition too seductive. This dam got bigger in the telling, and, as Cecil Andrus once said, "This is the only fish story I know where the fish keeps getting smaller."

As the darter's defense team, we continually racked our brains, consciously looking for ways to form a new perceptual frame. How could we re-cast the snail darter in order to open the Press and the public's perceptual frame to the valuable benefits of the darter and the flaws and detriments of the dam? Besides literally hundreds of conversations briefing reporters, we held public teach-ins, had bumper stickers: "It's More Than A Little Fish," wrote close to a hundred op-eds and letters to editors, and even released a bluegrass record: "(Dam the TVA and) Save the Little T." How about using the "canary in the coal mine" as a perceptual frame? Endangered species in their natural habitats can serve human interests in the same way as when nineteenth century miners carried canaries down into the coal seams, knowing that when the sensitive little species began to show harm from odorless methane coal gas, it gave warning that there was a serious threat to humans as well, identifying and protecting human welfare.<sup>67</sup> If the fish-

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of argument. One is that we get very limited tangible benefits from the ESA and that, in effect, the ESA is a practical failure because few species have been successfully removed from the endangered list. *Noah's Choice* also notes the powerful perverse incentives the Act gives, especially to private property interests, to subvert its protections. The authors do not take these as reasons to strengthen the Act. Rather, after asserting the lack of success of the ESA and downplaying collateral species protection benefits, they argue that the undoubtedly substantial cost of species preservation is a fundamental reason to back down. Their main argument then, as the book's title indicates, is that endangered species pose an inescapable loaded choice: If we as a society want to save species for whatever their charms, we would have to ratchet back living standards and pay trillions of dollars; otherwise, we must regretfully override endangered species according to whatever may be dictated by the marketplace. Interestingly, apropos of this Essay, *Noah's Choice* appears to be written to "frame" the congressional debates over the Endangered Species Act as an issue of all-or-nothing tradeoffs, either accepting the logic of the marketplace industries that oppose the Act—timber, mining, grazing, real estate—or bankrupting the economy to achieve species protections. The authors also egregiously fail to note what appears to be their intimate personal connections to the resource-exploitation industries. *Id.* But see Jeffrey J. Rachlinski, *Noah by the Numbers: An Empirical Evaluation of the Endangered Species Act*, 82 CORNELL L. REV. 356 (1997) (reviewing Mann & Plummer and contesting the conclusion that the ESA is a failure).

<sup>66</sup> CBS Evening News (CBS television broadcast, Jan. 31, 1977).

<sup>67</sup> See Oliver A. Houck, *Why Do We Protect Endangered Species, and What Does That Say About Whether Restrictions on Private Property to Protect Them Constitute "Takings"?*, 80 IOWA L. REV. 297, 301 (1995); *Embattled Social Utilities*, *supra* note 37, at 883.

versus-dam cliché could be recast by reframing the endangered fish as a canary, offering a signal opportunity to the legal system to protect the endangered human resources in the valley, then the new frame would open up the merits of the case to anyone who looked through it. Since then, the canary metaphor has become commonplace, but in the years we flogged it around Washington and the journalist staffs of the national press, it never caught on for the snail darter. We also tried the frame of “endangered species as barometers”—because the primary cause of endangerment was habitat disruption, the existence of an endangered species signaled that the continuation of its habitat qualities was likewise threatened for humans. (The frames we pushed, it may be noted, focused on utilitarian arguments for human welfare, to counteract the implication of environmental aestheticism and intangibles in the fish/dam cliché.) It was all to no avail.<sup>68</sup>

Why didn't the perceptual frame evolve?

Perhaps in part it was inertia. Once a frame is established, it tends to hold on. A rolling stone gathers momentum. To reverse it, and admit that they had gotten it backwards, the media would implicitly have had to eat a lot of crow.

In part it was a consciously manipulated tool. TVA's public relations department sidestepped criticism of the dam on its merits, but continually distributed materials for the Press that reinforced the cliché—a photo clip handout showing the dam (photographed with a wide-angle lens to increase its mass) juxtaposed against a close-up of a little darter lying on a stiff cold lab table alongside a ruler calibrating its diminutive size. Others in the anti-regulation industrial community leapt upon the fish-versus-dam icon in their press releases and lobbying materials to further their initiatives against environmentalism.

In some cases it undoubtedly reflected political biases in the Press. Local reporters in Tennessee reported that their editors did not welcome the idea of investigative stories about Tellico. One reporter from the Lenoir City paper confessed to us, “I know a lot about the Tellico project, and you are right, it's nuts. But my publisher won't let me write a word about this.” So stories continued with superficial reporting on the latest maneuvers between the fish and the dam. Another time we spent half a precious afternoon in Washington with a *Wall Street Journal* reporter who came to talk to us at the Friends of the Earth office at Betsy Aigle's request. He poured through the maps and data with us and was obviously taken with the case. He told us that, in economic terms, this project demonstrated the fictions of the pork barrel, and our injunction certainly seemed to deserve more respect than it was getting in the media. “So what will you write about Tellico?” we asked. He paused, shook his head, and told us regretfully, “Nothing. It's against our editorial policy.” “But you don't write for the editorial page. You are a news reporter!” He sighed and said that was correct, but the *Wall Street Journal's*

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<sup>68</sup> Perhaps we should have pushed the farmers' story as a wedge into opening up the realities of the case, although that would have cast the endangered fish as a seemingly cynical ploy. The farmers rightly or wrongly thought that, having failed in the earlier NEPA suit, their participation would seem like an inappropriate “second bite at the apple.”

editors didn't want to run news stories where environmentalists made economic sense.

The snail darter seemed sometimes to get bias from both sides. Already in the 1970s, media concentration had gathered force, and the ideological tendency in most media empires seemed inclined toward the marketplace and the right, making the anti-regulationist mockery of the darter a repetitive theme of their coverage. More than one "liberal" reporter, however, mentioned to us that they had been raised on the progressive New Deal image of FDR's TVA dams bringing social progress to a benighted region. They were distressed that we were urging them to think of the agency as just another calcified giant utility, vested with extraordinary governmental powers.<sup>69</sup>

#### ANOTHER BASIC PROBLEM: INFOTAINMENT: THE PRESS IS A BUSINESS

In greater part, however, it probably was because the fish/dam cliché meshed so well with tendencies and pathologies within the American press process itself. The frustrating and ultimately destructive persistence of the fish/dam frame reflects basic perplexities of today's media.

How does the media decide whether to cover a story, and in what depth? The most compelling explanations come down to "Infotainment"—the broadcast news departments' perceived need to be attractive and engaging to their desired audience by producing quick and catchy news segments, and the print press's unfortunate perceived need to fight for market share with the broadcasters. The Press's news and information function, so important to the functioning of modern democracy, is thus generically dominated by the need to attract larger audiences and market share. This *de facto* market competition requires that both print and broadcast news departments compete with other formats to attract and hold the attention of audiences that have a wide variety of seductively diverting options available. Complexity is a problem, as are stories that are repetitive, distressing "downers," or are overly intellectual or serious.

"You need a *peg*, or *hook* for reporters to hang the story on, and to catch the attention of their editors," Charles Eisendrath of University of Michigan's Natural Resources Journalism program told us. "If the story you

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<sup>69</sup> There had been much earlier warnings that the media was subject to political pressures from TVA. In 1969, the year Congress passed NEPA, Justice Douglas wrote an extended exposé of Tellico, with photographs, analyzing the project's deficits and the extraordinary development potential available for river valley agriculture and tourism, strongly hinting that it should be enrolled in the Wild and Scenic River System. *National Geographic* agreed to publish it! The citizens thought they had scored a coup, and now America would see what really was at stake in the valley. But TVA found out about the article's imminence, called *National Geographic's* editor, Frederick G. Vosburgh, and persuaded him to cut it. TVA carried its suasion to other magazines. Justice Douglas ultimately was able to find only one national periodical to publish the article. He added fishing details and some heavy sarcasm and published it in *True*, a men's magazine, where it ran behind a cover of a bathing beauty on the beach, and needless to say, it did not build an informed public debate. William O. Douglas, *This Valley Waits To Die*, TRUE: FOR TODAY'S MAN, May 1969, at 40.

want is Tellico's benefits, costs, and alternatives, then you have to give them heartwarming farmers, or Indians, or use the Great Man theory, finding some figure who commands big time media attention to be tied to the story."<sup>70</sup> Good pegs or hooks don't just get one story run. They justify running a second and third take on a story with new spins and angles.<sup>71</sup> Ward Sinclair was able to get a second ESA story into the *Washington Post* one week, and on page two at that, because, as he told us, it had such a cool quoted phrase, "pork panic," in the lead paragraph and headline. But note: such pegs are themselves a part of the infotainment phenomenon. The implicit query is "Will this pull, titillate, and hold a desired audience?"

We heard about this need for "titillations" from colleagues at Syracuse University's S.I. Newhouse School of Public Communications when we asked them to explain how the Press decides what to cover in their papers and broadcasts. As one said, "Well, you have really asked The Big Question. [Although] the short answer is: Nobody really knows, the 'standard' answer seems to be 'Whatever they [or their editor] think their reader/viewer will be interested in.'"<sup>72</sup> Most news departments, they said, use some version of a common list of factors in deciding what to publish:

- conflict
- impact
- interest (of audience)
- novelty
- prominence (people, institutions, etc.)
- proximity
- timeliness.<sup>73</sup>

Note that these factors, which the Tellico story would seem to possess, all appear to embody attractor-stimulators likely to pull in readers and viewers, but, perhaps in some cases, can also serve the societally important public-information function. "Two other criteria sometimes used are 'news that educates' and 'news that explains (democracy, system, process, etc).'"<sup>74</sup>

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<sup>70</sup> We tried all of these, inviting reporters to Tennessee, bringing farmers and Cherokees to the Press in Washington, unsuccessfully trying to bring Ralph Nader, Robert Redford, Chip Carter (the President's son) and others, even Dolly Parton, who was born nearby, to come forward publicly for the darter and the river.

As the dam was being closed, a compelling story by Peter Matthiessen finally appeared in the *New York Review of Books*, chronicling his visit to the desecrated Cherokee sacred sites at Tellico. See Peter Matthiessen, *How to Kill a Valley*, N.Y. REV. OF BOOKS, Feb. 7, 1980, at 31. "The New York press really respects Matthiessen and the NYRB," we were told. "If only they had run that story earlier, you would have gotten all the press you needed going down there to Tennessee to investigate your valley."

<sup>71</sup> Stories develop a "news climate." If a story goes too long without new spins or the perceived potential for satisfying resolution, it becomes off-putting old news.

<sup>72</sup> E-mails from Barbara Croll Fought & Patricia H. Longstaff, Professors, Syracuse University, S.I. Newhouse School of Public Communications, to David E. Cole, Research Assistant, Boston College Law School (July 25, 2001) [hereinafter Fought & Longstaff e-mails] (on file with author).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*; see also JERRY LANSON & BARBARA CROLL FOUGHT, NEWS IN A NEW CENTURY:

These latter factors seem more directly civic-minded, serving the informational needs of society, but our Newhouse colleagues indicate that they accordingly may be a good deal less common: "The cynical answer is, [reporters report] 'whatever they can get easily (without a lot of research)' and the REALLY cynical answer is 'Whatever has sex and violence.'"<sup>75</sup> On this matrix, we would have thought that the Tellico Dam story's details, though lacking in sex and violence, would have registered on all scores. It could be played as infotainment—a dramatic conflict with impact on national wildlife and public works policy, with an intriguing mix of fish, farmers, and Indians, a new twist on the ecology/economics debate, the mighty TVA in Tennessee, all-America's country home, and a timely congressional battle—as well as serious civic information. It was not to be.<sup>76</sup>

Not all reporters are competent journalists,<sup>77</sup> but as even good reporters resignedly informed us, "It's a business. It's infotainment." The Press is not a

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REPORTING IN AN AGE OF CONVERGING MEDIA (1999) (noting that today's audience wants to know how news events will affect daily life).

<sup>75</sup> Fought & Longstaff e-mails, *supra* note 72. In a study of press sensationalism that focused on the Tellico Dam case, the authors were deeply critical of how the story was consistently trivialized in both the Knoxville paper and the *New York Times*:

The press can be neither condemned nor absolved of responsibility for the sensationalism that existed in the articles. . . . It seems that the more unique an issue, the more likely it will be treated in a sensational fashion. . . . An event for the press must have inherent news value—a "quicken[ing] urgency" befitting newsroom codes. . . . Since news space is limited, [editors] decide what is "newsworthy" and what is "extraneous" in headlines, leads, and major parts of news articles. Given such organizational constraints, one can better understand why the snail darter captured the attention of both the local and national press, and why the less "newsy" long-term issues, such as the dam's impact on the economy, environment, and culture, did not.

Carroll J. Glynn & Albert R. Tims, *Environmental and Natural Resource Issues: Press Sensationalism*, in TRANSACTIONS OF THE 45TH NORTH AMERICAN WILDLIFE AND NATURAL RESOURCES CONFERENCE 99, 109 (1980).

<sup>76</sup> Perhaps the closest we got to an investigative inquiry into the merits of Tellico came in September 1979 when we were able to sit down with Charles Seabrook of the *Atlanta Constitution*. He took our data sheets, maps, charts, and chronologies home and called back excitedly, "They want me to do this story. There is a Pulitzer in this story, and everyone has missed it!" Seabrook came to Tennessee in October, interviewing a dozen citizens around the valley. Unfortunately, however, on October 20th, when he came to a mass rally of river defenders at Echota on the meadows along the Little Tennessee, some dam supporters had put nails on the access road and called in a threat that proved to be twelve sticks of dynamite planted in a bush in the middle of our meeting ground. Given the flat tires, the bomb scare (the dynamite proved to have no blasting cap igniters), and a small grass fire under his car caused by its overheated catalytic converter, Seabrook apparently decided he'd had enough, unceremoniously left the rally, and drove home. No investigative story, no Pulitzer.

<sup>77</sup> Inaccuracy and incompleteness are endemic. How many of you have read news stories about something you personally knew a lot about? And what did you find there? Reporters are often not very hardworking, or some are too hardworking with too much to do in too little time. Occasionally, reporters are unintelligent or uneducated. Several top rank reporters spoke despairingly to us of university communications majors: "Why don't they learn a science or a language or an era of history or political philosophy? Something rigorous that teaches them to think and gives them something to think about? If you major in communications, you are majoring in nothing."

civic utility. "The whole operation is keyed to the bottom line."<sup>78</sup> So what gets covered? Stuff that the editors or producers believe will attract a sufficiently rewarding large audience, and these decisions turn on what the editors or producers think of their audiences. Their image of their audience does not appear to be civically inspiring. The AP wire service's legislative beat man in Washington at the time, Dave Espo, told us, "We are warned not to pitch our writing level any higher than eighth grade, because otherwise we will lose the significant core of our audience. Only the *Times*, the *Post*, and *WSJ* reporters are allowed to write at a high school graduate level or higher." Who are the editors and producers pitching for? In a post-modern age of lowered societal aspirations,<sup>79</sup> is Homer Simpson the Press's image of America? What about the civic information role? "Why," we asked Espo, "don't you write stories that inform the public and members of Congress about the facts of the Tellico case when critical votes are about to be taken in the committees or on the floor?" "You'd like me to do that, wouldn't you?" Espo responded, sensing that the very fact of national reporting on the reasoning behind our public interest issues would shift political outcomes. "But you don't understand. Our role isn't to make the news. We just report it after it happens."

To be sure, some issues and perceptual frames have such obvious gravitas that it is clear to the media editors that they must receive serious coverage, even if it is not clear that the audience will stay tuned or read the text. On some such issues, but very few, it is clear to the Press itself that it has a civic duty to inform society on those matters or happenings. (Hence,

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<sup>78</sup> The phenomenon is especially visible in broadcast journalism. The PBS documentary *Local News* focuses on "the struggle to reconcile honorable journalism with profitable television," on the assumption that "the health of the press . . . is directly proportional to the health of the country. If it's sick, the country is sick. But how do you get the public interested in the efforts to do good journalism, to understand the pressures against doing it?" Samuel G. Freedman, *Fighting to Balance Honor and Profit on the Local News*, N.Y. TIMES, Sept. 30, 2001, sec. 2, at 26 (quoting co-producer Calvin Skaggs). "I oftentimes wonder," says Mike Redding, a reporter for WCNC in Charlotte, North Carolina,

if they ought to just scrap the ratings and let us go back to telling stories that are important. Not because they're the ones we feel will get us the numbers . . . In every decision that's made, there's a push and pull between wanting to do a high-quality job and then needing to absolutely cover the stuff that we know people will watch.

*Id.* Keith Connors, the news director who battles this conflict, wistfully observes, "If this is only all about a number to get a rating to get a dollar, . . . well, then, it's a shallow, vacant, meaningless pursuit." *Id.* at 36. He hopes that "If you do things the right way, you can still win. You don't have to succumb to t-and-a, flash and trash, murder and mayhem." *Id.* In the end WCNC exceeded its revenue objectives. *Id.*

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[There is a] profound cultural shift that both accompanies and feeds on the current deadening of political debate. High culture and low culture have flip-flopped in what may at first have seemed a welcome overthrow of elitism, but has instead encouraged the magnification of trivia, and the discrediting of substantive debate on the grounds that it isn't entertaining.

Jay Carr, *Celluloid Zeroes With Few Exceptions, This Summer's Dismal Movies Shortchange Art for Easy Box-Office Bucks*, BOSTON GLOBE, Aug. 24, 2001, at C1.



for instance, boring, low-rated, presidential-nominating conventions nevertheless get covered.)

But, while the fish/dam perceptual frame grabbed reporters, this snail darter story, as covered, did not convey any sense of gravitas. It was fundamentally a light-hearted juxtaposition, which by its nature did not invite probing inquiry. It was such a ready and useful quip—familiar, dynamic, diverting (in both senses of the word), a matrix upon which news stories could easily be written without a lot of investigative work.

Compare this simplicity to the difficulties of telling the full story, trying to shift to a perceptual frame of the contrasting merits of the dam and the river. The canary-in-the-coal-mine required a lot of research and explaining. It wasn't light. In fact, it was doubly depressing to report because first, it would open the disquieting possibility that you cannot rely on government systems to work rationally, second, that TVA was not the historic progressive success story we wanted it to be, and third, that the little fish story that had been chuckled and churned over for thirty-six months turns out to be backwards. The Press had been gulled.

Could this sad journalistic tale recur today? Tellico was the focus of the Society of Environmental Journalists' (SEJ) 1999 National Convention in Chattanooga, Tennessee. The overwhelming consensus of the reporters there, most of whom said that, despite the fish/dam story's notoriety, they themselves had never heard the internal facts of the dam controversy, was that the Press could well miss the real story again today. Infotainment is in some ways stronger; publishers are even less civically active and the environmental beat has lost some of its earlier cachet. Getting editors or producers to authorize an extended or an in-depth story remains as difficult today, unless the story has a sexy hook or an on-rolling "news climate."

John Cushman, environmental reporter for the *New York Times*, strongly disagrees.<sup>80</sup> The *Times*, he says, covers many issues that are "eat-your-broccoli stories," where his paper in effect says to the American public, "You may not actively desire these stories, but read them, they're good for you." He describes *Times* reporters, at least, as guided by four journalistic mandates: 1) to transmit information necessary to the improvement of society, 2) to shake the readership out of their complacency, 3) to give voice to the voiceless, and 4) to demand access uncompromisingly to information held within the government. Reporters, he insisted, are trained to be open-minded in the sense of taking in information from all perspectives and listening deeply to reasoned presentations. Biases are inevitable, but good reporters will constrain themselves so that they do not write in a committed way until they know the facts and have processed them rationally. He agrees that a news story, in order to shape public policy, generally must be repeated. Repetition builds the kind of "news climate" that shapes public policy. He firmly believes, however, that the Press today would give the Tellico Dam story repeated coverage in all its important details. He couldn't,

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<sup>80</sup> Mr. Cushman served as a discussant at an Environmental Law Workshop addressing a draft of this Essay, at Georgetown University Law Center, on October 25, 2001. His comments are reported from notes taken during that workshop by the author.

however, explain the inaction of the series of *New York Times* reporters—including Phil Shabecoff, Boyce Rensburger, Charles Mohr, Ben Franklin, Phil Boffey, Jack Rosenthal, Tom Farrell, and Drummond Ayres—whom we had variously begged unsuccessfully over a span of six years to bring the details of the Tellico story to light. The SEJ correspondents' judgment seems more believable: today, as in the 1970s, the Tellico case's merits would still come across to producers, editors, and reporters as a broccoli story, so a variety of extraneous factors would determine whether the story ever got the coverage it deserved.

### THREE CLOSING SUGGESTIONS

For better or worse, the Press is the *de facto* national information service providing the majority of operative information that shapes the public policy debates of the day. The degree to which it does or does not fulfill its role of informing public perceptions has great civic consequences.

Let me clarify what is *not* my proposition here: I am not advocating that all public interest cases must get the intelligent deep investigative national coverage that it seems obvious the Tellico Dam and the darter should have received. There are far too many environmental issues, at too many levels. One cannot expect any information system to do that. Rather, I would assert that if our national information communication system fails even in extraordinarily high-profile cases like Tellico, so that the insider calculus of the political marketplace ends up bulldozing the public interest, then it is clear that our current system of governance, if it is to do what we need government to do, urgently requires some systemic improvements for communicating information in cases at all levels. (You are a part of this.)

Propelled by the frustrating lessons in government we in Tennessee learned from Tellico, I propose three concurrent suggestions for improvement.

#### 1. EXHORT THE PRESS TO ITS HIGH CIVIC DUTIES.

If we think that Thomas Jefferson was right that the only "safe depository of the ultimate powers of the society [is] the people themselves," it is indeed important to "inform their discretion."<sup>81</sup> Who in the lightning-paced complexities of our society today is to inform the people effectively, if not the Press? Administrative agencies? The brigades of lobbyists who work throughout government? The schools and universities whose lead time is measured in years? Congress? The Governors and the President? For better and for worse the Press is our national information-supply system and the most important game in town that can make a difference. So it is useful to try to encourage the Press to step up to the plate on its societal role. Marc Landyia, a valued colleague of mine in political science warns, "For 220 years thoughtful observers have urged that the performance of the Press is crucial and must be improved, and what has happened? Which way is it

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<sup>81</sup> Jefferson, *supra* note 1, at 278.

going?" James Fallows has abandoned hope in the Press. Business chains have replaced family ownership, etc. Infotainment marketing rules! But there is a large societal stake in moving public discourse away from the trivial and superficial and toward meaning and substance, and the Fourth Estate has a heritage and mandate that include aspirations higher than profit margins. Perhaps in the new circumstances of today, in the grim shadow of the towers that are no longer there, this is not as empty a hope as it may have seemed a year ago.

## 2. BECOME PRESS-SAVVY

Public interest attorneys especially must recognize that press savviness is an important professional skill in their legal training and practice. There are many angles to be explored. Here are a few:

- Write every complaint so its first paragraphs could be lead paragraphs in the AP wire service story.

- Name the case so it makes your case with the Press. In retrospect, what line of entry best simplifies the necessary full perceptual frame for the Tellico Dam case? The *farmers*. We tried but failed to get the Press to focus on the farmers whose homelands were being condemned for TVA resale and development. I am convinced that if only I had named the case *Tellico Farmers v. TVA*, the river would still be flowing. When reporters called down to Tennessee, they asked to speak with Hank Hill, the first-named plaintiff. Hank could talk for hours on technical details, but he also is a bright, fiery speaker, so the Press tended to focus on his punchy sound bites about TVA's illegitimate parentage. If I had named it *Tellico Farmers*, every reporter would have wanted to talk to a farmer and quickly would have learned about the farmlands being taken, most for resale and dubious redevelopment, and off we'd go on the merits.

- Argue common sense as well as law. Briefs and legal arguments miss the point if they are restricted to technical legal artistry. No decision maker wants to go home at the end of the day saying, "I issued an order today that the press will say doesn't make common sense."

- Speak to reporters with sound bites and photos, have B-roll<sup>82</sup> available,

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<sup>82</sup> B-roll is the video footage on unsolicited cassettes supplied for free, along with written materials, to hundreds of news outlets across America by industrial lobbyists seeking to shape public perceptions of their issues. It contains generic images that can be cut into the nightly TV newscasts as news footage or as a backdrop for the heads of newscasters. For a chemical manufacturing story, for instance, the industry lobbyists' B-roll would show a plant in the hazy background, with nesting birds and kids fishing in the foreground. A timber lobbyists' video clip would not show clear-cuts, but rather a father and son pair of lumberjacks neatly trimming a selectively cut tree. The strip mine lobbyists' B-roll would show manicured excavations and spotless reclamation. To discredit their opposition, the industries' B-roll would show a few scruffy anarchist hoodlums would dominate B-roll images of debates on international environmental accords.

In contrast, B-roll downloadable from a public interest information archive would show less idyllic, less sanitized views of industrial production and resource extraction and on international environmental debates would show peaceful, middle class demonstrators marching by the thousands or soberly discussing the countervailing tendencies of unhindered,

prepare handout primer sheets with conceptual images that provide effective perceptual frames, with quotable quotes, and follow-up contact information. Remember to pass all that you say to the Press through a filter that tests whether this is what you want to have come out in the reported story. Otherwise you cannot know which of your ramblings will be plucked out and published. Note: Becoming a press impresario may be unethical. Some jurisdictions appear to hold that attorneys in litigation must confine their communications with the Press to the official record. This is often an impossible constraint where the public interest attorney is the only effective spokesperson regularly available, while opposing counsel have PR firms on retainer. (TVA had a large press office as well as a corps of lobbyists.)

- Use graphics all the time. The legal profession is largely stuck in the eighteenth century in its hesitation to mobilize graphic representations—maps, charts, photos—of the facts, places, and things that *will* move their cases in the eyes of juries, judges, governmental officials, and the Press.

- Use your moments in the klieg lights wisely. In the Supreme Court we defeated Attorney General Griffin Bell, who appeared rather hapless before the Justices. On the Court's steps, however, Bell beat us flat out. When the reporters and cameras swarmed around him, he raised a little bottle with a dead darter in it, and said, "This is what it is all about." When the reporters turned to us, I blew it. If I had said, "Mr. Bell wants you to focus on just that little fish, so you won't look at the river valley habitat where it is endangered. But look deeper and you'd see that this little dam is really a big turkey, a boondoggle. . . . The fish can save a precious river valley and 340 family farms. . . . Mr. Bell doesn't want you to see the amazing truths you'd find if the press looked into this case . . . ." Instead, I pigheadedly voiced several variations on "We are trying to teach a federal agency to obey the law," totally missing our prime opportunity to focus international attention onto the farmers and public economic values being jeopardized by an incredibly stupid dam, and incidentally reinforcing the impression that we were standing on a mere statutory technicality, not common sense.

- You get the idea. . . .

### 3. A PUBLIC INTEREST INFORMATION ARCHIVE IN CYBERSPACE?

A final modest proposal: Could the miracle of the Internet be at least a partial solution to the problem of building informed public perceptions? Here is one final hypothesis for changing modern democracy through the hyper-capabilities of modern communication technology. Take for example the congressional pork barrel's reaction to Secretary Andrus's letter. The pork barrel insiders knew that they could operate without regard to the public merits because the public did not know the merits.<sup>83</sup>

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global marketplace economics and long-term global civic values.

<sup>83</sup> Similarly in the 104th Contract-with-America Congress, when the industrial anti-regulationist movement literally took over the legislative process, the players were unconstrained by the Press because it was unable to cope with the rush of legislative assaults that avalanched the capital.

If every member of Congress who stood to make a speech against the ESA and the snail darter—about how endangered species were impoverishing the South, or allowing houses to catch fire in kangaroo rat habitat in California, or blocking huge hydroelectric dams, or stopping thousands of economic projects across the nation—knew that reporters could go to one comprehensive public interest information website where their allegations would be laid out and contradicted by the facts, then the debate would tend to move closer to the truth. Such a website could contain a compendium of different environmental issue sectors, each with summaries of the opposing assertions and authoritative presentations of the public interest case, charts, maps, data, sound bites, lists of published sources and experts available to respond to reporters' queries, online photographs and B-roll video footage. Reporters themselves would be straightened-up by the knowledge that if they wrote stories that ignored information readily available in one consistent authoritative location, they would be revealed as incompetent. Such an experiment should be worth trying for civic-minded foundations willing to risk a couple million dollars in a high-aspiration venture that could change the nature of modern public policy discourse in government.<sup>84</sup>

If one or more of these three suggestions were to pick up some speed and traction, we, the minions of *TVA v. Hill*, could rest a bit easier knowing that some systemic good has come from the lessons of our seven painful years trying to help a fish in a pork barrel.

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<sup>84</sup> Successful implementation of such a public interest informational archive would obviously spawn corollary opposing archives that would be far better funded and sponsored by the short-term profit-maximizing perspectives of the marketplace. However, the resulting facilitated marketplace of information would by its nature delve deeper into the factual realities and logic of the issues. Most public interest advocates seem to believe implicitly that complex facts, when comprehensively explored and analyzed, ultimately lead to progressive conclusions. Thus, leveling the playing field of access to the information communication process, on balance, would ultimately serve the progressive public interest as well as the Holmesian ideal of a free market in ideas.