



Animal Law Podcast: Transcript for Episode 97, Interview with Katherine Meyer

Mariann Sullivan: Welcome back to the Animal Law Podcast, one of my favorite guests.

Katherine Meyer: Ah, how sweet of you. Nice to be here always.

Mariann: I'm thrilled to have you because we're actually talking about a case that we sort of talked about a really long time ago. You were on the podcast a while back when you first started at the Harvard Law School Animal Law Clinic.

It was a previous case but in the exact same matter. We'll talk about it in a minute. It would really probably be helpful if people listened to that episode for some background. But a lot has happened since then, and most of the legal stuff has happened since then. So because that interview is available for people who are interested, I won't ask you to go into a lot of background.

But before we get to the facts of this case, which are, I have to say, insane. I say that all the time on this podcast. Like, you hear about a case, and you're like, "Oh, that sounds interesting." And then you start reading it, and you're like, "Oh my God! this is insane!" *Katherine laughs* And this one is definitely one of those cases. This might be the queen of all those cases.

But let's start at the beginning before we... I've tempted people, but let's start at the beginning. Can you just kind of give us an overview of the current state of primates, which is who this case is about, covered by the Animal Welfare Act?

Katherine: Yes. It's a very long saga. It's a really long saga. So this all started actually in 1985, many years ago, when Congress amended the Animal Welfare Act to require that the Secretary of Agriculture... Among other standards that have to be issued for the animals that are covered by that statute, Congress imposed a requirement that the secretary shall promulgate a standard that will promote the psychological well-being of primates. And the reason for that was

that even back in 1985, everyone realized, Congress included, that primates... we're primates. That all primates have special psychological needs in order to be treated humanely.

They have to have interaction with others of their species. They have to have things to play with, things to enhance their environment, things to manipulate in their hands, things to forage, nests that have to be built. Things that will allow them some semblance of engaging in their natural behavior. So that was in 1985. The USDA didn't do anything for many years.

There were lawsuits brought against the USDA to enforce this mandate. And finally, in 1991, 6 years after the statute was passed, the USDA issued a very weak standard that basically said each of the facilities that are subject to the Animal Welfare Act should come up with their own enrichment plan that will enhance, you know, promote the psychological wellbeing of primates and just rely on whatever the current literature tells you is needed for primates. And USDA is not gonna tell you what those requirements have to be, we'll just count on you to come up with an enrichment plan. Whatever you think would enrich the primates. *Katherine laughs*

I'm not making this up...

And by the way, don't even bother sending it into us for our approval. We don't wanna see it. In fact, don't even bother sending it to the USDA.

Because they didn't want it to be subject to the Freedom of Information Act. Just keep it at the plant.

So that was the sort of the state of the law. Lawsuits were brought. In fact, that's the lawsuit where we established the important standing principle for standing to protect animals in captivity. That was that en banc DC circuit, Glickman case in 1998.

Mariann: If people are studying animal law and are not familiar with that case, stop listening to this immediately. Go read Glickman because it's an amazing case.

Fixed a lot. And that was Kathy's case as well but certainly didn't fix everything.

Katherine: No, and in fact, it's great...(sarcastically) We have standing. Standing to lose. Standing to lose on the merits. *Mariann laughs*

Mariann: Victory for animal rights law! *laughs*

Katherine: Well, it has been used many times since then for successful merits challenges.

So that was in 1998, and then after we won standing, it was remanded back to the panel, which held that there was enough in this quote-unquote standard that was issued that it met the requirements, and therefore that whole effort to challenge the 1991 standard just kind of fell by the wayside.

After all of that happened. A number of things happened, including the USDA itself did a survey of its inspectors to find out how that 1991 quote-unquote standard was working. And the answer was, not surprisingly, the inspectors had no idea what this standard was (or) how to enforce it. It was too vague, letting each facility come up with its own enrichment plan.

What does that mean? They didn't know what they were supposed to be doing, and the whole thing was a disaster. But the USDA did nothing about that either. And then skipping way ahead because there are a lot of intervening developments. Meanwhile, over at the National Institutes of Health, which has jurisdiction over federally funded research on animals, Francis Collins, who was the director at the time, decided that...and there was a whole movement about this...that chimpanzees, in particular, should not be used in medical research anymore because they have such incredible needs, like humans. They are intelligent, they're sentient, their behavioral needs, et cetera, just do not lend themselves to being experimented on.

So there was a whole movement. Congress got involved. The listing status of chimpanzees got changed to endangered. And for a whole bunch of reasons, research on chimpanzees was coming to an end. And so, NIH decided that if any chimpanzees are left in any research that still has to be done on chimpanzees, for some reason, the chimpanzees who were left in the labs who could not be experimented on anymore but were still being maintained by the labs, NIH decided they needed to have special conditions and requirements to ensure that they were treated humanely.

Mariann: Okay, we're not gonna use them anymore, and we're gonna end that aspect of research.

(Sarcastically) So now, maybe we should treat them with some semblance of dignity. As long as they're, you know, not useful...

Katherine: Exactly. And, of course, those of us in the animal law world were saying, "Why don't you just send them to sanctuaries and create more sanctuaries?"

Mariann: Right. You don't even have to have principles.

Katherine: Yes. So they don't have to be kept in barren cages, et cetera, et cetera. So anyway, that all happened, and NIH came out with these very good recommendations and requirements for how chimpanzees, still maintained at labs, had to be treated. They had to be given more space, they had to be given social settings, they had to be given access to the outdoors, natural substrates, foraging materials, et cetera, et cetera.

So, based on what happened with the chimpanzee NIH situation in 2010, in 2013, I think it was, might have been 2014, I'm a little loose on the chronology here...

Mariann: None of us are gonna check that. *Katherine laughs*

Katherine: Ok. Our clients, The New England Anti-Vivisection Society, which is now called Rise for Animals, and Animal Defense Fund, submitted a petition to the USDA.

We thought this was an easy ask. I was actually representing them in my capacity at my firm before I was at Harvard, and we were representing them on this. They submitted a petition to the USDA, and they thought it was an easy ask and basically said, "Okay, your sister agency, NIH, has decided that chimpanzees in lab settings need to have special requirements in order to treat them humanely. And we want you to take that same approach with respect to other species of primates that are currently being used in research." And just basically, "Do what the NIH has done for chimpanzees in federally funded research for all primates used in all research, whether federally funded or not." And there was this very detailed, very long, scientifically based, expert-based petition to the USDA to change the standard for the psychological well-being of primates to incorporate the kinds of requirements that NIH was then, by that time, using for chimpanzees,

Mariann: Who we're talking about here is mostly monkeys, is that right?

Katherine: It's mostly macaques. Mostly macaques. There are a bunch of different species of primates, but that would be the principal species that's still being used in lots of research. All the evidence shows that, and this is all in this

rulemaking petition, all the evidence shows, and the scientific literature shows that A- primates are still being kept in barren cages with nothing to do, as they were before the 1985 amendment got passed. And number two- we now even know more about the special needs of primates, particularly their social needs and their need to play, and their intellectual curiosity and all of that.

And so the science shows that a change is desperately needed. And the third thing it showed was that a change in these requirements is perfectly feasible. And it gave the agency lots of different ways to come up with the kind of environmental enrichment that would be required, species by species, basically.

But yeah, you're right; it's mainly macaques, but there are other species being used as well.

Mariann: It wasn't just this, the petition itself, that was very sophisticated and very well researched and documented, but the comments as well, right? You got loads of comments, and they were just from people like me who are like, "Don't do mean things to animals." *Katherine chuckles* They were serious.

Katherine: Yeah. Well, this was the amazing thing. So, I think we submitted the petition in May of 2014, and within a week, the USDA...and this was unheard of when an agency gets a rulemaking petition. Within a week, the USDA got right back to us and said, "Yes, this is a really important issue. We're gonna put it out in the federal register for comment from the public, which it did a year later. It did this whole comment proceeding, and it got more than 10,000 comments. 99.9% of them supported granting the petition, and as you said, these were comments not just from action alerts from animal groups, but scientists and behaviorists were writing in and saying, "Yeah, way long, long overdue, and here's what you should do," again, "Feasible, can be done, should be done. The animals are suffering..." et cetera. So that was sort of the basis.

The rule petition went in, the agency got all this comment on the rulemaking petition, and then, as happens, the whole thing just kinda languished.

Mariann: And before we get to that, can we just go back and add a little law? Can you just tell people what a petition is and who can file it, and what it does?

Katherine: Okay. *chuckles* Yeah. So the Administrative Procedure Act allows any interested person to petition any agency of the federal government to promulgate a regulation, amend an existing regulation, or rescind an existing regulation.

And that is the right that every interested person has under the Administrative Procedure Act.

Mariann: I just think people really don't know that. That anybody can file a (petition)... I mean, it's kind of extraordinary. I mean, it becomes unextraordinary when you find out what happens to them. *both laugh*

Katherine: But we're winning this case so far, Mariann!

Mariann: No, not in this case, but what happens to a lot of them, which I'll get to in a second. But continue, I interrupted you.

Katherine: Well, that's something that I teach my students that are at the Harvard Law Animal Law Clinic is that this is a way you can actually make laws. I mean, that's what these regulations are. They're laws.

And the great thing about this right, under the Administrative Procedure Act, is you not only have this right but if the agency doesn't do it, you have a right to bring a lawsuit against the agency for failing to respond to your petition. So that's what we did. So, the very first lawsuit our clinic brought, which was in the fall of 2019...

Mariann: And that is what I interviewed you about on the last podcast.

Katherine: Yeah, that makes sense. Right.

Mariann: But it was very early stages, and that's all that lawsuit was about. All right, continue.

Katherine: Right. That's called an Unreasonable Delay lawsuit. You're suing the agency for its unreasonable delay in responding to your rulemaking petition.

And all you get, if you win a case like that, is an answer. You might not like the answer, but you get an answer. The answer's either, "Yes, we'll do it," which is great, or, "No, thank you. We're not gonna do it." *laughs*

Mariann: All of the ones I've ever heard of, they just get denied, you know? Does this actually result in a positive change from time to time?

Katherine: It does. It does, but it's hard. It's a very steep climb because, and this is something, if your listeners are going to start understanding about rulemaking petitions, they need to know this- if you get to the point where the

agency denies your rulemaking petition, you can then, assuming you have someone with Article Three standing, you could go to court and sue the agency for failing to grant your petition.

The standard of review is very deferential to the agency, and the standard of review is whether or not it was arbitrary, capricious, and abusive discretion or otherwise not in accordance with the law when the agency denied your petition. But here's the crucial thing, the judge can only look, in deciding whether or not the agency acted unlawfully in denying your petition, the judge can only look at the evidence that was submitted to the agency in support of the rulemaking petition and any other evidence that was before the agency when it made its decision to deny the petition. So, I'm emphasizing that because a lot of people think, "Oh, a rulemaking petition..." they'll just fire off a letter to an agency, but it's not supported by any science, by any law, by any other evidence. And then when they get to the point of wanting to sue the agency, they're out of luck.

Mariann: Because they can't add that...

Katherine: They don't have the goods, and you cannot add it. The rules (say) you cannot add it.

Mariann: I felt the judge in this case, which we'll get to in a minute, I don't mean to jump ahead, took that really seriously. Just said over and over, "I am limited to this record."

Which really does show how hard it is. Especially since, as happened here, frequently this happened a really long time ago. So there might be all sorts of new evidence that you'd love to bring in, but you're stuck.

Katherine: Exactly.

Mariann: I just wanna ask you, too, before we get to this- you did this years ago for a client when you worked with your firm, and then you start running the clinic at Harvard. Why did you decide this case was a good case for the clinic? Just because it was there? Or is there something about it that you really liked?

Katherine: Well, because it was there, because it was teed up, and because it implicates all of these lessons that I try to teach the students about how to use existing laws to protect animals. And so it allowed me to use this as a vehicle for teaching them about how you submit a rulemaking petition, the fact that judicial review is limited to the record before the agency, what the standards are for challenging an agency's unreasonable delay, how to tee something up for an

arbitrary and capricious challenge down the road, how to establish Article Three standing, all of those principles that are extremely critical to being an animal lawyer if you're going to be a litigator. It was just a great vehicle.

Mariann: Really, a perfect case, and turned out to be an even more perfect case because you managed to win it! *Katharine laughs*

Katherine: Exactly.

Mariann: That's gotta be fun.

Katherine: Yeah!

Mariann: Also, what I wanted to ask you next before we get to more of the law, just tell us what happened in this case when they denied it. You said that finally, as a result of this lawsuit that you and your students brought, they denied it. So what did they say?

Katherine: Well, their denial letter, which by the way, is the decision document that the court then looks at to decide whether or not the decision to deny it was lawful.

The decision document here said, “Oh, we don't really need to do this. Our 1991 standard is working just fine. It's doing everything we need it to do to protect the primates used in research,” and they went so far as to say, “One of the many reasons we don't need to change our regulation is because under the current system, our inspectors, every year when they inspect the research facilities, they inspect all of the animals, all of the facilities, all of the paperwork, and they make sure that the primates are being treated well in accordance with the enrichment plan and in accordance with all applicable Animal Welfare Act standards.”

That's what they said. “Therefore, since it's all working perfectly well under our current system, We don't need to change it, and we're not going to grant your petition.” That was their main decision.

Mariann: It's the kind of decision they issue all the time. And the courts just say, “Fine. Everything's cool. There's nothing I can do.” But in the meantime...

Alright...I wanna get this timing right because it's such an interesting development, and so I don't wanna get ahead of ourselves. So in the meantime, you get this decision, then you bring some FOIA requests.

Katherine: Yeah. So, let me get to that.

Mariann: That's what I wanna do in order cuz it's such an interesting story.

Katherine: Yes, and again, such a wonderful vehicle to teach my students how to use the Freedom of Information Act. *laughing*

So what happened was when we got the denial letter, we sent it out to lots of our colleagues in the animal law world and said, "What do you think of this?"

And we got back a bunch of, you know, "Oh, that's the usual, the usual." But one of the things we heard from a couple of different sources was, "Well, wait a minute. We're pretty sure that the USDA stopped doing full inspections of labs that are accredited by the Association for Assessment and Accreditation of Laboratory Animal Care," the acronym is ALAC...

Mariann: A Trade Organization,

Katherine: It's a trade organization. "...And we're pretty sure, we don't know for sure, but we think that the USDA stopped doing full inspections recently for any lab that is accredited by ALAC. They don't do full inspections anymore. They do some kinda focused inspection."

Mariann: So this was like a rumor that was floating around, and nobody was sure of?

Katherine: This was a rumor that was floating around. And nobody knew for sure, but by the way, most major research labs in this country are accredited by ALAC. This was not an insignificant rumor. It was a pretty substantial rumor.

So we decided to use the freedom...the clinic invoked the Freedom of Information Act and sent in a FOIA request to the USDA and said, basically, "We'd like to see any records that would reflect whether or not you stopped doing full inspections for ALAC accredited facilities."

It was a broader request than that, but that was the gist. We explained exactly what we wanted to find out. And the agency, of course, did not respond to our FOIA request within the time period required under FOIA. And so we filed another lawsuit in the same court as a related case...wait, I've gotta back up a minute...When we filed our complaint challenging the agency's denial of our rulemaking petition, when we got to the part in the complaint about the reason they gave, which is they do these full inspections every year to make sure that

primates are being treated well, we alleged on information and belief, because we couldn't prove it yet, that that was not correct.

Mariann: Can we go to the complaint now?

And just, everybody, hold on because we will tell you what happens on the FOIA requests, but the next step that happens is that you file this complaint.

Katherine: Correct.

Mariann: But you still just have rumors. So you say on information and belief that this is a load of hooey, as I think is the legal term...*both laugh*

Katherine: I was going to say it's a new legal term- a load of hooey! *both laughing*

Mariann: The reasons that they denied our petition were...a load of hooey is complimentary, actually...

Or like just falsehoods. Outright lies.

All right, so tell us about the complaint.

Katherine: By the way, this becomes really important because one of the bedrock bases upon which you can get a court to hold that an agency has acted unlawfully under the Administrative Procedure Act, (is) if it gives a reason in its decision document that is completely undermined by what is in the record. In other words, they can't give you a false reason that, when the court sees the record, is belied by what is in the record.

So that's why this became very important.

Mariann: It's a low standard, but it's not a non-existent standard. If they lie outright, that's not good.

Katherine: Correct. That's not good. No.

Mariann: So these things are going on at the same time. So let's switch back to the lawsuit. You don't have the info yet, but you need to file the lawsuit.

Katherine: So, we file the lawsuit...

Mariann: And the plaintiffs are the same, Rise for Animals and ALDF.

Katherine: Yes. And we filed it in the federal district court in Maryland because that's where the denial letter came from there. USDA's Riverdale, Maryland office. So we had venue there, and we drew Judge Hazel, who's no longer on the court; he was a senior judge, and so that case was pending.

So then, when the agency didn't respond to our FOIA request, we're trying to get to the bottom of this change in the inspection policy; we file as a related case, because it's definitely related, in the same court with Judge Hazel. We filed our FOIA case because it would give us an opportunity to tell Judge Hazel what was going on.

Mariann: Right. That's convenient.

In the main case, just to lay it out, I mean, you've sort of already said this, but this is under the Administrative Procedure Act when your petition is denied.

Katherine: Right. You get to bring a lawsuit there because, and by the way, there is no private right of action under the Animal Welfare Act. So the only way to challenge anything that goes on there is through the Administrative Procedure Act. You can bring lawsuits directly against the agency for failing to promulgate a standard that's required, which is what we did here. Well, denial of our rulemaking petition.

So, meanwhile, back at the ranch...not surprisingly, while all that was pending, the first thing the agency did, which is what they often do right out of the gate, is they filed a motion to dismiss our challenge to their denial of the rulemaking petition on the grounds that the plaintiffs lacked Article three standing.

So that's the first shot over the bow. That's what they do. So we had to file briefs explaining why we had standing. And here's the great thing, when the government filed their motion to dismiss, one of the arguments they made as to why the plaintiffs did not have Article Three standing was that they couldn't show any redressability for standing.

You have to show (that) there's injury. You have to show that it's caused by what you're challenging, and then the court could give you some kind of relief. That's the redressability prong. And the agency was arguing even if we win, even if we prevailed in our lawsuit against them, we wouldn't have any redressability.

Why? And then they repeated the same reasoning that they gave in the rulemaking petition, which is they said, "There would be no extra relief because

our inspectors already, every year when they do their inspections, inspect all of the animals, all of the facilities, all of the paperwork, and make sure the animals are being treated humanely in accordance with the enrichment plan and all applicable Animal Welfare Act standards. So even if the plaintiffs...they're not gonna get any more than that, so there's no redressability.”

Okay, so they had made those representations to the court. Because then, as our FOIA case is pending...

Mariann: Before the same court!! Did the lawyers at the USDA talk to each other?!?

Katherine: I love that you asked that question, Mariann. That's exactly the question my students asked me. Because meanwhile, because of our FOIA case, we start getting documents from the USDA and buried in the documents, and there were thousands of pages, and buried in there, which one of our students found was, oh my God, the policy, the change in policy. In black and white, it said, “As of February 2019, we haven't instructed our inspectors that if it's an ALAC accredited facility, they are prohibited from doing full inspections anymore, and they can only do a focused inspection on only one aspect of the facility every single year. Either the animals OR the paperwork OR some other aspect of the facility. And even then, they only have to do an inspection of a sampling.” They could look at one animal if they wanted to and then rotate, so it'll be another three to four years before they ever look at another animal at the facility.

So this was revealed in the FOIA documents that we got.

Mariann: And now, did you get those FOIA documents by accident, or did was it responsive to a court order?

Katherine: No, they released it as... No court order yet. We're just haggling. I mean, we're explaining...

Mariann: Ok, just kind of settled...

Katherine: Yeah, we're explaining, “You haven't given us the stuff.” They know we filed our lawsuit. They know they're got, so they started giving us documents. They did try to redact some information, which became critical down the road, but because of our advocacy on it, not through the court, but just with the government, they had to release it.

So, anyway, we get the documents in the FOIA case, and that's when my students asked the same thing you just asked, like, "Wait a second, don't the FOIA lawyers talk to the merits lawyers?" I was like, "Obviously not." Because what we got showed that not only did they lie in their denial of the rulemaking petition, but maybe even more critically, as far as the court is concerned, they lied to the judge when they said in the redressability argument that they still do full inspections of all labs every single year. So this was great. So, now they knew that we had the document.

We, of course, released it to the press. There was a big article in Science Magazine about all of this. And so now the USDA knows that we know about the secret inspection policy. So they filed a notice with the court, a notice of clarification with the court to try to explain to the court why, in their redressability argument, they lied to the court.

Mariann: Oh, so this is what's known as the Golden Tire declaration in the case?

Katherine: No, that's coming later.

Mariann: Oh, that's coming later. All right, then, I don't even know about this part. Tell me this part.

Katherine: Yeah. So this was because they had, in their motion to dismiss, lied to the court and said, "We do annual inspections every year of all of the animals," et cetera. They had to correct that statement to the court, and they said, "Well, we don't do full inspections anymore of every lab," la, la, la, la, la. "But our whole system is designed to make sure the animals are treated well. Since the statement we made to the court in our motion to dismiss is not correct, we are no longer relying on that statement as a basis for arguing that the plaintiffs don't have standing."

Mariann: Unbelievable. "We're reserving the right to argue it in on the merits." Is that the implication? *both laughing*

Oh my God.

Katherine: This is so great. When we actually got to the point of briefing this, we said, "You know, it was really nice of them to say we're no longer relying on the lie to argue about standing," but why is it that they're still relying on the lie? I mean, they haven't asked for a voluntary remand either on the grounds that

they can no longer rely on the lie. They're not taking back their denial of our rulemaking petition.

So that had happened, and all of this was before the same judge. So, all of this, the judge knew. So when Judge Hazel denied their motion to dismiss, he made a big point, a couple of times, in that decision, of highlighting the fact that the agency had...

Mariann: He was pissed. Yeah.

Katherine: The agency had misstated its inspection regime to the court. So that had all happened. And then, meanwhile, we had a big fight about what should be in the administrative record because, as I told you, for the merits challenge, now we're at the point of...

Mariann: You've got standing, so now go ahead.

Katherine: I was challenging their denial of the rulemaking petition, and we had a huge battle over what should be in the official administrative record. Not surprisingly, because the agency didn't want any of this stuff that we got under FOIA to go into the administrative record. We were saying, "Of course, it has to be in the administrative record. It was before the agency when it made its decision."

Pretty critical information.

Mariann: Before the agency!?! It was the agency's own policy!!

Katherine: Exactly. They knew they had to put in...we had this big battle. This, again, was such a great teaching vehicle for the students...

Mariann: Seriously, it's a good teaching vehicle for me!!

Katherine: Because they were learning, you know, what has to be in the administrat(ive record)...and they were learning don't let the agency bulldoze over you. You have to make sure that what you need to rely on when you make your arguments to the judge is in that record. And the great thing about this was, and also a great teaching thing was, I said to the students, in the end, they're not gonna fight us on this because if they fight us on it, we get to file a motion to compel, which puts a huge neon sign over the documents we got under FOIA that shows that they're lying. They don't want that. They don't want us to have another shot at making a big deal about this. And I was correct, and they

acquiesced and put all of the stuff in the record. So now we're at the point of briefing the case. Meanwhile, Judge Hazel retired from the court and...

Mariann: That must have given you a moment of panic.

Katherine: It did. It did because you never know who your judge is gonna be. And we have had a couple of intervening presidents since then that could have appointed various people. So yeah, we liked the standing decision we got from Judge Hazel very much. But anyway, it was assigned to Judge Rubin, who was appointed by Biden. She's a very new judge on the court in Maryland.

Mariann: Yeah. I looked her up, and I saw that she was very new and I thought she didn't hold back, did she? Good for her!

Katherine: Yeah. Not only that, but she jumped on this case right away. I must be one of the first cases she was assigned.

I mean, she hasn't been on the bench very long, which we were really happy about. Because this case had been languishing. You know, it takes a while to get to the merits of the case. So we briefed the case. We asked for an oral argument. She waived the oral argument. She didn't even bother having the oral argument.

And one of our main arguments was, "The reason they gave for denying the rulemaking petition is a lie. They said that they don't have to do anything more for the primates because they do these full inspections every year, and they make sure the primates are being treated in compliance with the enrichment plans, all of the standards. That they're being treated humanely..."

One of the things our client's petition asked for was not only a new standard that would require more space and social grouping and all of that, but also they wanted a standard that would require the actual facility, the caretakers, to understand what they're looking at. Like, to recognize signs of distress in a particular animal, to know what they're looking at, and then to address those signs of distress. So this requires actually observing the animals.

Mariann: And knowing something about primates

Katherine: And lo and behold, under this secret inspection policy that we uncovered, they're not looking at a single animal for years, if they're... And I wanna emphasize again, under this policy, the inspectors are prohibited from doing a full inspection. Even if they wanted to, they're not allowed to!

One of the reasons given that's reflected in the documents we got under FOIA, and it's unbelievable... This will not come as a shock to you, but the USDA actually refers to the research facilities as their "customers."

Mariann: Yeah, I've heard that before.

Katherine: And they're not wanting to anger their customers.

Mariann: And it also brings to mind something that we discussed at length in the prior interview. The fact that there are inspectors at the USDA who are trying to do their job. And they would look more because there are some good people there, or at least people who are trying to do what they're told to do.

But then it's the higher-ups, it's the administration, that frequently is actually prohibiting them from doing their job.

Katherine: Right. Yeah. And by the way, I haven't even emphasized this, this is crucial, but the Animal Welfare Act, actually, I'm gonna read it because I don't wanna paraphrase. One of the provisions of the Animal Welfare Act that was also added in 1985 when they added the provision requiring a standard for the psychological well-being of primates was a provision that requires "the secretary of the USDA shall inspect each research facility at least once each year. And in the case of deficiencies or deviations from the standards promulgated under this chapter, shall conduct such follow-up inspections as may be necessary until all deficiencies or deviations from such standards are corrected."

So, in other words, there's a statutory mandate here that requires the USDA to do annual inspections of each research lab to make sure they're in compliance with all of the Animal Welfare Act standards. And the secret policy shows that that's not happening.

Mariann: But it does explain a lot about how they crafted that secret policy. So there's kind of a gesture towards a yearly inspection, but they have to go and do something, but as little as possible. Because they have to make them do something every year.

So, they're setting it up so that they do as little as possible every year.

Katherine: Exactly. Exactly. So what happened was when we filed our opening summary judgment brief, and now we're in the merits case, challenging the agency's denial of the rulemaking petition. Not surprisingly, we harped very

heavily on the fact that we had uncovered the secret inspection policy that showed if it was ALAC accredited, they're no longer doing the full inspections. The inspectors are prohibited from doing full inspections, and this is a basis for finding that the agency's contrary statement in its petition denial (that they do these full inspections every year) was wrong. And therefore, it's a reason for finding that the agency's denial of a petition was unlawful under the standards that apply.

Mariann: And this is where the Golden Tire Declaration came in, correct?

Katherine: Correct. Yes.

Mariann: Ok, can you tell people what that is and then how the court responded? Just to this argument, and we'll get to the other arguments as well.

Katherine: Sure. Yeah. So in response to our opening brief, where we, again, make this pretty much our principal central point as to why the agency's denial of our petition was unlawful, the agency comes back and, in its opposing brief, makes a bunch of arguments and relies very heavily on a declaration that they filed from Elizabeth Goldentyer, the acting director of the animal care division at the USDA, in which she says, "I'm submitting this declaration as background information for the court." And, in the course of that declaration, explains that...and by the way, she's the one who also authored the denial of the petition. So she explains to the court, "When I said in my denial decision that every year we inspect all of the animals, all of the facilities, all of the paperwork, and make sure the animals are being treated in compliance with all of the Animal Welfare (Act). I didn't mean to suggest that's what we really do. What I meant to convey was that we have a machine in place. We have an overall system in place that makes sure that the animals are treated in compliance with Animal Welfare Act, and that overall system incorporates this reliance on ALAC accreditation if it's an ALAC accredited facility."

So basically, she was explaining that "when I said what I said, I didn't mean what I said, I meant to say something different. And here's what I meant to say." And in the course of explaining what she meant to say, she affirms that they no longer do full inspections. By the way, ALAC does not even do inspections based on Animal Welfare standards.

It doesn't even do inspections. It does site visits, announced visits every three years, and applies some other criteria. The company pays a huge fee to get that stamp of ALAC accreditation, so it's a totally industry-dominated group. But

anyway, she put in her declaration explaining that that's maybe what she said, but it's not what she meant to convey.

Mariann: The court was having none of it, right?

Katherine: Well, we got to come back because we had the next brief, and again, great lesson for my students because I've taught them that the judge has to rely only on the record that was before the agency when it's made its decision. And that it is a complete no-no for the agency to be putting in extra record evidence this late in the game and that this was a basis upon which you could strike or tell the court to disregard what's called a post hoc declaration by the agency.

So this was another great teaching vehicle. So, we came back to the judge and said, "You can't rely on what they said in that post hoc declaration where they tried to explain away what they said in their denial letter. There's fourth circuit case law that makes it very clear that judges cannot rely on those kinds of post hoc documents to justify what they've done.

And the judge, in her decision, which she issued in late March, completely agreed with us. And she said, "Not only is this not allowed, but this is ludicrous. What they're trying to pawn off as a clarification or background information, what they're really doing is it's corrective. They're trying to change the record. They're trying to change the basis upon which they denied the petition."

She basically said it's false. Her language is stronger than anything I've seen.

Mariann: Oh, she was angry. There's no question. I think absurd was one word. I noticed "beyond the pale."

Katherine: Yeah. Ludicrous was one word that was in there. Yeah. Judges don't like to be lied to. I mean, nobody likes to be lied to, but judges really don't like to be lied to.

Mariann: They kind of are forced to accept what people say, and that's all they know is what they're told.

So being lied to must be really annoying. And she was very annoyed

Katherine: Meanwhile, we settled our FOIA lawsuit. That was over. We still had this lawsuit pending. We filed another lawsuit, again as a related case. Now it's pending before Judge Rubin, challenging the legality of the secret inspection

policy and arguing that the secret inspection policy violates that provision of the Animal Welfare Act that I just quoted to you that says they're supposed to do inspections every year to make sure they're in compliance with all Animal Welfare Act standards.

Mariann: Yeah, because she actually said in the decision in this case that regardless of the lying, all of these shenanigans actually show that the agency failed to consider the relevant factors.

So regardless, even if they come and told the truth, there would be a big problem.

Katherine: Exactly. This was the icing on the cake. So not only did she hold that, a- I can't rely on this affidavit to shore up the lie that they gave for denying the petition. And by the way, because they lied about the basis for denying the petition, I'm hereby holding that the denial of the petition was unlawful, which is the big win that we got in the case.

But in the course of doing that, she said, but lemme just say a few things about this new inspection policy you have. This new inspection policy looks to be unlawful to me as violating the plain language of the Animal Welfare Act, the provision I just read to you, which bodes very well for our pending lawsuit.

It's also before Judge Rubin, where we're challenging the legality of the inspection policy.

Mariann: Well, good. I didn't realize that was going on. I just saw it was in this context.

Katherine: We're in briefing on that. We filed our opening brief, and we're going to get their responsive brief in about a month.

Mariann: So another thing that she talked about, which I really appreciated, was criticizing their reliance on their heavy workload.

Katherine: Yes! Yes.

Mariann: Like, that's the kinda thing...do they ever say, "And we asked for more money from Congress, or we asked for more money just from the USDA," which reportedly has a lot of money to throw around. No, they never say that. They just say, "Our inspectors work so hard." And what did she have to say about that?

Katherine: Yeah, she said...Because that's what the post hoc declaration that Elizabeth Goldentyer tried to put in the record was all about how overworked they are. "They don't have enough money, they have too many people to inspect, and therefore they had to come up with this partial, focused inspection approach in order to make anything work."

And she said, "Well, that's all very interesting, and maybe you should take that up with Congress. But that has nothing to do with...when I read the Animal Welfare Act, that is not one of the criteria that's in there as an excuse for not applying this law as it's written to quote-unquote ensure that animals are being treated humanely."

Mariann: The government could use that as a reason not to do anything that it is mandated to do. "Oh, we just don't have enough money." *both laugh*

Katherine: And the other thing about that, Mariann, that always drives me crazy is, as you know, for years, those of us in the animal law world have been saying we need a private right of action under the Animal Welfare Act.

So, just like under environmental laws, like the Endangered Species Act and Clean Water Act, and Clean Air Act have private rights of action where individuals and organizations can bring lawsuits to enforce those laws. The Animal Welfare Act doesn't have a private right of action.

The only entity that can enforce that statute is the USDA, and what I always say is, "But the USDA is always complaining that it doesn't have enough resources to enforce the Animal Welfare Act." This is a perfect response to that. It's like, let us enforce it!

Mariann: Let me sue.

Katherine: We're willing to enforce it. You don't have to spend any of your resources. We'll spend our resources.

That's not the real reason they don't want a private right of action.

Mariann: Of course not. That's definitely not it.

There were a few other...I mean, this was more than enough, but there were a few other things in there that I really wanted to mention.

The 10,000 comments, did they look at them?! *laughs*

Katherine: Well, this was an argument made that she adopted, which I was very happy to see, which is... The way it goes is that when someone submits a rulemaking petition to an agency, they don't have to have a public comment. It's rare that they do, by the way, but in this case, they did! They said, "This is a really important issue. We're gonna have comment on it, and after we review all the comments we get, we'll make a decision on your petition and let you know."

So, in other words, the agency itself said, "We need to hear from the public about this. We want to know what the public thinks about this." And that became, we argued, and she accepted the argument, a relevant factor.

Agencies have to consider all of the relevant factors to the issue at hand when making a decision. That's one of the standards the Supreme Court has said applies to judicial review of their decisions. And so we said, "Well, you yourself said this was..." and she completely adopted that.

She said, "The agency said it was a relevant factor. They had to look at the comments." The comments came in. There were 10,000 comments. And guess what? They didn't cite a single comment. They didn't respond to a single comment, and therefore on that ground also, she found that their denial of the rulemaking petition was unlawful.

Mariann: She was really disturbed about how much the public was misled by the agency to think that their comments matter and that the government will consider them. She had a real reaction to that. And we're so used to this in animal law. We're so used to the fact that people out there care about these issues.

These issues get more comments than any other thing going on in the government, by and large. We're so used to the fact that they're just ignored. That it's really nice to have this kind of new person coming in, looking at this, and saying, "What the hell's going on here?"

Katherine: Exactly. Yeah. Exactly.

Mariann: Another thing that, I know, wasn't the most important factor, but I really did love it. They tried to rely on the fact that they gave a symposium and, I think, issued some fact sheets to show that they're enforcing the statute.

Katherine: Yeah. Yeah. So that was another thing I said.

(They) said, “The regulated industry and the inspectors know how to implement this amorphous standard; come up with your own enrichment plan. But in any event, we've been having symposiums. We explain. We give examples and ideas at symposiums that we invite people to attend.” And we were like, “Who's attending the symposiums? There's no evidence in the record that every inspector and every regulated industry attended the symposium.”

And she agreed with us that...

Mariann: (sarcastically) Maybe this is how we should enforce all the laws. Just hold symposia on how it's wrong to do this, and people will come, and they won't do it anymore. It's a great enforcement mechanism.

All right. The one thing that I wasn't totally clear on was the relationship between these NIH standards, which you described in detail earlier, and what you wanted her to do, and what she did do, which wasn't exactly everything you wanted.

It might have been everything you expected, but...

Katherine: No, we got everything we wanted. All you get unfortunately, in a case like this, all you can get is the court to say the agency acted unlawfully in denying the petition, and then the court remands the matter back to the agency for a new decision.

That's pretty much what you get.

Mariann: Because she couldn't have imposed these NIH standards. I mean, obviously, that would've been really hard. But she kind of did. She did talk about them favorably.

Katherine: Yes. She has a footnote explaining all of that.

So we made an argument...the one argument of ours that she did not rely on in striking down this petition denial, which we don't need every argument to be accepted...

But the one argument we made that she did not accept was, one of the things we had said was- NIH, which is literally a sister agency to the USDA, they're under the statute, under the Animal Welfare Act. They're directed to consult with each other about these matters. All animals that are covered by the Animal Welfare

Act, whether they're involved in federally funded or non-federally funded research, are subject to the requirements of the Animal Welfare Act.

So, in other words, federally funded research funded by the NIH, all of those facilities have to comply with the Animal Welfare Act as well. In addition to whatever additional standards NIH imposes on them. So one of the arguments we made is when NIH decided that much more was needed for the psychological well-being of chimpanzees, and that's the only species they were looking at because they were deciding whether chimpanzees should be using research at all. When they made that decision that much more was needed, they were obviously rejecting the Animal Welfare Act standard that has existed since 1991 as being sufficient. If that 1991 standard were sufficient to promote the psychological well-being of chimpanzees, the NIH would not have needed to impose more requirements with respect to the research using chimpanzees.

So our argument was, “Obviously, the NIH, your sister agency, decided your standard was inadequate to protect chimpanzees. What do you have to say about that?” And they never really dealt with that. They claimed we waived that argument, which was ridiculous. It was the whole basis for our petition.

And she just said, “I agree they didn't waive that argument, but the fact that the NIH came to that implicit conclusion, that doesn't necessarily mean that the USD had to as well.” I mean, she basically threw them a little bone. *laughs*

Mariann: Okay. What I'd really like to know, since you have been doing this for a while...two things: Once you got the FOIA results, did you know that you were in very good shape? Or were you still nervous? And two, were you shocked? Or is this what you expect?

Katherine: Once we got the FOIA results, I knew we had a really good argument.

We had a solid argument that under the state farm standards that apply to arbitrary, capricious judicial review. I thought we were golden, frankly. Now it depends on who your judge is. Another thing I teach my students. Under a different judge, this could have very much kinda gone the other way.

There is no question about that. Another judge from a different inclination could have easily said, “Oh, I think the declaration they put in explains all of this, and therefore I'm gonna defer to the agency's expertise,” which is what most judges do. By the way, I should add, before I get to the next point, that the USDA has appealed her decision.

Mariann: That was my next question! I was gonna ask it in this context- that I can't believe they would have the nerve to appeal this. You would think they would wanna bury it, but did they? So they did.

Katherine: They have appealed it. I was surprised too. I thought maybe it was just a protective notice, but there's now a briefing schedule, and the government's brief is due, like, next month, I mean soon.

We'll see what happens. But in answer to your second question, which was, am I used to this? Do we expect this? Is this the way it goes? Yeah.

This is the way it goes. What I was happy about, it's really very difficult to win an arbitrary, capricious claim against an agency, period.

Because all the cards are stacked against us. The judicial review, the bar is really low or really high, depending on your perspective. *chuckles* There are standing requirements. It's very hard to win these cases. The courts defer to the agency's expertise. But it's super hard to win one of these cases when you're challenging the denial of a rulemaking petition.

That is when the deference is the highest that is afforded to the agency, which is why they put in that declaration. They were hoping, and I assume this is the argument they'll be making in the court of appeals, they were hoping that the court would defer to their expertise and say, "Oh, well that's what you meant to convey. So if that's what the system is and it looks okay to me," or something like that, I dunno.

So when we got this ruling, we were especially pleased because it's really rare. It's very hard to get a judge to find that an agency's denial of the rulemaking petition was unlawful.

Slam dunk! Slam dunk (unintelligible)

Mariann: It probably does happen a lot. But you don't always get the goods on them. Here, you managed to get the goods on them. Which part of that, I'd like to say, is that you mentioned that, well, of course, you have the Harvard Clinic, and then you were able to reach out to a lot of other people in the movement.

The movement is growing. The movement is stronger than it used to be. There are a lot more skilled people in it. And so this information actually managed to bubble up to you. Whereas in former times, maybe that wouldn't have

happened, and you never would've known, and they would've gotten away with it.

Katherine: That's absolutely correct. I mean, if someone hadn't put the bug in our ear, "I don't think this is...I think for ALAC-accredited facilities, they don't do this anymore." I never would've had any notion of that. And it wouldn't have been in their administrative record for sure.

Mariann: But they were keeping it a secret.

How does this work vis-a-vis the appeal? Is everything on hold? It doesn't go back to the agency, nothing happens, everything's on hold until the appeal is over? Assuming that you, uh, eventually win, what happens? It goes back to the agency?

Katherine: Yes.

There's another fight. It goes back to the agency, and they have to come up with a new decision taking into account.

Mariann: A new decision? What does that mean?

Katherine: Well, taking into account everything she said. So (in) a new decision, they'd have to admit that they don't do full inspections every year.

So they'd have to come up with some new reasons as to why they're not gonna grant the rulemaking petition. They couldn't rely on that anymore. They'd have to explain why doing focused inspections ensures compliance with the Animal Welfare Act, which will be hard to do.

Mariann: And she already ruled, she already kind of separately ruled that they're not good enough.

Katherine: Right. And they'd have to respond to the comments. They'd have to explain why none of the comments have any validity whatsoever.

In a new decision, they'd not only have to address everything that was wrong with their prior decision as to why that no longer matters, and they'd have to come up with new justifications that, A, are consistent with what she said in her opinion, and B, would justify denying the petition.

Mariann: So is there a change that they would just rewrite the rules and not...

Katherine: Wouldn't that be nice? They can certainly do that...

Mariann: I guess my overall question is, does this just go on forever?
Katherine laughs Is this just a way to keep lawyers employed and have nothing to do with what happens to these primates? Like is this an effective system for revising what's happening to animals?

How do we win? Actually, get a macaque out of a cage.

Katherine: Yeah. It's actually the only system we have right now, so it can be effective, and the system has worked. It just takes a long time, and a lot of perseverance, and a lot of brief writing, a lot of advocacy. And things do change, but it takes a long time.

And, then, in the meantime, of course, you use your advocacy as a basis for educating the public about what's going on and educating Congress and hopefully, you know, using that as an additional tool in your advocacy tool chest. You do what you gotta do. But yeah, it can be effective.

I mean, it's hard work, and it takes a long time.

Mariann: Hopefully, the agency...I can't believe that they aren't embarrassed. I mean, no heads rolled or anything? Like, nothing?

Katherine: Not that we know of.

Mariann: I mean, it's just unbelievable. Hopefully, they are still realizing that, "Oh, we don't want this to happen again. This was embarrassing."

Katherine: By the way, on the front of does this ever mature into anything for animals? I mean, the whole chimpanzee battle is a good example of that. It took a long time for us to get chimpanzees out of research, out of zoos, out of circuses, but it happened. There was a lot of advocacy that went into that from a lot of different fronts.

There was litigation, there was legislative, there was organizing. I mean, but it happened. So these things do happen. It's just, again, all the cards are stacked against us. *sarcastically laughs* It's a lot of really hard work. But by the way, my students were awesome in this entire...

Mariann: Yeah, that's the other thing I wanna hear about.

Katherine: Entire endeavor. They're so enmeshed in all of this. They can't wait. I mean, most of the ones who worked on this have graduated. There's one student who's gonna be a three-L next year.

Mariann: That must be frustrating that the personnel keep changing. But tell me specifically, what kind of work do they do?

Katherine: The students? Oh, they do everything!

Where to file the case. What's the venue? We file the case, they write the briefs, they write the motions, they respond to the briefs. They draft discovery, if we have discovery. I mean, they do everything. They do. It's like a law firm. We run it like a law firm.

Mariann: Yeah. Very exciting. So you're changing your role with the clinic, right? Can you just tell us a little bit about what's happening?

Katherine: Well, as of June 30th, I'll no longer be the director. I'm regrouping or rewiring or whatever the term is, but I probably will stay on in some kind of advisory role for some period of time.

Mariann: Good.

Katherine: That's all I can say.

Mariann: Well, it's been doing such remarkable work. Do you think, is it cool to go into court with Harvard Law School's clinic? Do you think that's something the judges are like, I don't wanna say impressed by, that's not exactly what I mean. I just mean that it has an impact on them, that this is something that's a little bit more important than if some lawyer came in here that I don't know.

Katherine: Yeah, maybe. It all comes down to the quality of the work. I mean, you could have a very prestigious law firm or clinic on the brief, but if it's badly written and badly argued, it's not gonna impress anybody, so...

I think it's more...I mean, hopefully, when they see Harvard Law, they do have high expectations that's gonna be good work. And our students do the highest quality work, and we make sure that everything that goes out the door is of the highest standard. So I think probably more it's the quality of the work than who's doing the work. If it were not well done and was Harvard, I don't think

judges would probably care at all. Or they'd probably say, "Ah, see, yeah, Harvard, what do they know?"

Mariann: But it takes a lot of different pieces to get people to take animals seriously. And, of course, the work has to be like Caesar's wife. *laughs* We're Caesar's wife. We have to be better than everybody else, right?

But also the fact that up-and-coming law students at good schools care about this is something judges maybe aren't aware of, and I think it can have an impact. So all of the different pieces can come together.

Tho the most important piece is when the government lies and you find out, so that's really good for your case. *both laugh*

Katherine: And, I gotta say, one of the things I love about this particular project, and many of the other projects that we've done, is that so many of the students have already signed up to go work for corporate law firms. Cause that's what they do, right?

Mariann: Right. Of course. I teach at Cornell, and it's exactly the same thing.

Katherine: Yeah. The corporate law firms, you know, swoop in the first week of school, and they offer them tons of money and lots of perks, and the students, you know, they have loans, and they sign up. And what I love about this clinic is that we've managed to turn several students around.

Mariann: Yeah, that's great.

Katherine: They realize that there are other ways to go that are important, that will allow them not only to do important work on behalf of animals and wildlife but will greatly improve their quality of life. Not because they'll have a lot of money. They won't have a lot of money... *laughs*

Mariann: But they won't be poverty-stricken.

Katherine: They won't be poverty-stricken. And what I say to them is, you know, for quality of life... I'm an old lawyer, so I can look back on this and tell them, you know, you wanna wake up in the morning and look forward to going your job and feel that you're using your talents and skills in a productive way to do something good for the world.

And that is a huge quality of life issue for anybody. And so what I love is when the students say, "I'm not going to that corporate firm. I'm gonna go get a public interest job. I'm trying to get a job working for animals in captivity or the wild, whatever." We do a lot of wildlife law.

That's the most rewarding thing for me.

Mariann: Absolutely. And I think probably, the most rewarding thing for them. I think that you've not only saved a few animals, but you've saved them from a hideous career.

Katherine: Hopefully, yeah. Thank you so much.

Mariann: You've done so much. And I'm so excited I got to hear about this case from you.

Just amazing. You said it was amazing. And I was like, "Okay, I'll read it." And then I was like, "Oh my God!"

Thanks so much, Kathy.

Katherine: Yeah. The judge's decision is awesome.

Thank you so much, Mariann, for covering it.