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National Security and Environmental Laws: A Clear and Present Danger?

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ARTICLE

NATIONAL SECURITY AND ENVIRONMENTAL LAWS: A CLEAR AND PRESENT DANGER?

Hope Babcock*

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The potential for the disastrous rise of misplaced power exists and will persist. We must never let the weight of this combination endanger our liberties or democratic processes.1

* Professor of Law, Georgetown University Law Center. This article is based on remarks made at the March 29-31, 2006 Virginia Environmental Law Journal Symposium, The Next 25 Years: New Directions in Environmental Law. The author thanks her research assistant, Anne Snyder, for her outstanding research and editing assistance, without which the article would not have been as easily completed and content-rich.

1 Farewell Address of President Eisenhower, quoted by Bob Herbert, Ike Saw It Coming, Op-Ed, N.Y. TIMES, Feb. 27, 2006, at A19. Although Eisenhower was speaking about the “conjunction of an immense military establishment and a large arms industry,” id., his comments are just as relevant to the coincidence of interests between the government and regulated industries in the current climate of fear.
I. Introduction

Without question, life in the United States has changed significantly since September 11, 2001. The attacks launched from within the United States in broad daylight against non-military targets and innocent civilians, followed by the intentional dispersal of the biological agent anthrax, ushered in an era of uncertainty and fear in this country unlike any in recent memory. The visible manifestations of this fear are still with us – concrete barriers and the closing of public spaces around public buildings, heightened security at airports and train stations subjecting people to invasive searches of their persons and belongings, the sudden, seemingly random appearance of fighter planes over major cities, previously benign colors taking on a whole new and frightening appearance, and the detention of persons who were our neighbors and, we thought, our friends.

This is also a war unlike any other the United States has experienced. No nation-states are threatening our shores. Therefore, it is unlikely that there will be a clear signal that the war is over as no armistice will be signed. Instead, the country appears to be now perpetually at war with “shadowy groups, often fluid in nature, motivated by a distorted Islamist ideology and only sometimes in

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association with established governments." The methods and weapons these groups use are "unconventional" and "intended to disrupt civil society rather than conquer it with large-scale military means." In response to the horrors of that day, the country is newly and fervently patriotic, and "the military is popular again."

The events of 9/11 have also brought into sharp focus a conflict that this country has not witnessed since the Cold War: the clash between the safety and continuation of the Republic and other values we hold dear, among them a healthy environment. That conflict is the subject of this article.

3 Jonathan D. Moreno, Symposium Article, Bioethics and the National Security State, 32 J.L. MED. & ETHICS 198, 204 (2004); see also John D. Becker, Book Note, National Security Law in the Post 9-11 World: A Survey of Recent Legal Materials, 31 DENV. J. INT’L L. & POL’Y 629, 635-36 (2003) (saying that the “advent of non-state players, like terrorist networks . . ., and the continuing transformation of state players into market-states, and other significant factors like technology, migration, and culture” mean that “the international arena is in flux” and that national security issues will be on the “front pages” and “national security law will remain at the forefront of our legal system”).

4 Moreno, supra note 3, at 204. See also id. at 206 (saying “America is now threatened less by conquering states than we are by failing ones. We are menaced less by fleets and armies than by catastrophic technologies in the hands of the embittered few.”).

5 Nancye L. Bethurem, Environmental Destruction in the Name of National Security: Will the Old Paradigm Return in the Wake of September 11?, 8 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 109, 127 (2002) (describing the “amazing ‘rush to patriotism’”); see also Julie G. Yap, Note, Just Keep Swimming: Guiding Environmental Stewardship out of the Riptide of National Security, 73 FORDHAM L. REV. 1289, 1308 (2004) (noting that an “increased sense of patriotism and unified support for the military following September 11, 2001 created a chilling effect on the effectiveness of this public participation.”). Stephen Dycus gives as an example of this heightened patriotic rhetoric a comment by a Department of Defense (DOD) official that:

[t]he Army has endeavored to take care of the 16.5 million acres America has entrusted to us. But America also entrusts us with an even more precious resource, her sons and daughters. We are committed to providing our soldiers with the most realistic training possible, to ensure [that] they come home to their families.

6 Much has been written about how Congress and the Bush Administration have responded to the events of 9/11 and the extent to which that response threatens basic civil liberties. See, e.g., Kmiec, supra note 2; Robert M. Chesney, The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention, 42 HARV. J. ON LEGIS. 1 (2005); Becker, supra note 3; Daniel Angel, Recent Development, United States of America v. Usama Bin Laden: District Court Extends Application of Foreign Intelligence Exception, 10 TUL. INT’L & COMP. L. 387 (2002). Legal scholars, however, have paid less critical attention to the impact of these initiatives on the laws that protect the environment. This is not to say that that the topic has completely escaped the attention of scholars. See, e.g., Dycus, supra note 5; Bethurem, supra note 5; Paul C. Kiamos, National Security and Wildlife Protection: Maintaining an Effective Balance, 8 ENVTL. L. 457 (2002). The topic also has drawn significant student interest for notes and comments. See, e.g., Yap, supra note 5; Moreno, supra note 3; Bridget Dorfman, Comment, Permission to Pollute: The United States Mili-
Unavoidable conflicts between the requirements of environmental laws and protecting national security exist, although some like Dycus believe that they are avoidable with proper planning and foresight. No one understands this situation better than the military.

We face numerous challenges and adversaries that threaten our way of life. The President has directed us to “be ready” to face this challenge. To fulfill this directive, we must conduct comprehensive and realistic combat training—providing our sailors with the experience and proficiency to carry out their missions. This requires appropriate use of our training ranges and operating areas and testing weapons systems. The Navy has demonstrated stewardship of our natural resources. We will continue to promote the health of lands entrusted to our care. We recognize the responsibility to the nation in both these areas and seek your assistance in balancing these ... requirements.

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7 See, e.g., Stephen Dycus, National Defense and the Environment 185 (1996) (declaring that “with rare exceptions, we can maintain a strong, effective defense without endangering the public health or destroying our natural resources.”); see also Dycus, supra note 5, at 54 (concluding that “if trade-offs are to be made, they ought to be the result of a thorough analysis of the interests at stake, as well as a robust public discussion”); Lawrence O. Gostin, When Terrorism Threatens Health: How Far Are Limitations on Personal and Economic Liberties Justified?, 55 FLA. L. REV. 1105, 1165 (2003) (arguing that “by circumscribing the conditions under which agencies can exercise power, it is possible to permit effective action while reigning in governmental excesses”); Martha Townsend, Military Exemptions from Environmental Laws, 19 NAT. RESOURCES & ENV’T 65, 67 (2005) (stating that “environmental protection and national security are not mutually exclusive [and that] environmental laws are designed to protect the basic infrastructure that we all depend on for survival”); Kiamos, supra note 6, at 518 (concluding that “[c]larified environmental requirements [would] permit U.S. naval forces to train more effectively and to test weapons and sensors while maintaining protections for human health and the environment”).

In time of war, the resolution of these conflicts may favor national security over the environment.\textsuperscript{9} According to Gostin, in a constitutional democracy, however, "[t]he state acts at its lowest level of legitimacy when the risk [of harm] is low and the means are ill-suited to achieve legitimate ends."\textsuperscript{10} Even in high-risk situations, if "the means . . . exceed the scope of the threat," Gostin suggests the government's actions will be "unacceptable."\textsuperscript{11} The challenge is to find a workable balance in this new, and perhaps unending, era of terror without undercutting the national defense and the government's legitimacy. This article posits that the proper balance has not been found, at least with respect to laws protecting the environment and public health.

The first section of the article describes the ways in which pre-9/11 environmental laws protected the country's national security interests. To provide a broader context for understanding the more narrowly focused changes to environmental laws after 9/11, the article next briefly describes the USA PATRIOT Act and the fundamental changes it has made to basic civil liberties.\textsuperscript{12} The third part of the article describes changes made to wildlife laws in the immediate aftermath of 9/11, and pending revisions to pollution control laws, which have not moved as swiftly. This part of the article also contains a discussion of modifications made to public disclosure laws and policies, including those curtailing the release

\textsuperscript{9} As Dycus puts it, "the potential gravity of a wrong decision" when the threat is to our national security usually means the environment will be "sacrificed," but the question is "whether the threat of another terrorist attack justifies the permanent suspension of environmental protections that do not appear to have materially affected military readiness." Dycus, supra note 5, at 5.

\textsuperscript{10} Gostin, supra note 7, at 1139.

\textsuperscript{11} Id.

\textsuperscript{12} USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001). Prior to 9/11, the momentum was going the other way in Congress with respect to the military's compliance with environmental laws. For example, The Military Environmental Responsibility Act, which was introduced in 2001, but died in the House Judiciary Committee, Subcommittee on Commercial and Administrative Law in mid-July of the same year, required DOD, the Department of Energy (DOE), the Nuclear Regulatory Commission, and all armed forces to be subject to environmental laws to the same extent as other individuals and entities. It would have replaced all exemption clauses from the Clean Air Act (CAA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Coastal Zone Management Act, EPRCA, the Clean Water Act (CWA), the Endangered Species Act (ESA), and the Marine Mammal Protection Act (MMPA) with a power to grant 180-day exemptions. Extended exemptions would be possible through a subsequent act of Congress. The bill's provisions, however, did not apply to the Safe Drinking Water Act (SDWA) or the Solid Waste Disposal Act. It would have waived sovereign immunity for all federal agencies and protected individual administrators from personal liability for civil damages, although they could be held criminally liable. The Military Environmental Responsibility Act, H.R. 2154, 107th Cong. (2001).
of information to the public about environmental risks. The article concludes by discussing why these initiatives should be of concern and asks whether they are a necessary response to the perceived terrorist threat to the country; a question made all the more urgent by the fact that war now appears to be "continually on the horizon." The article concludes that the military is using the "war on terrorism" as a Trojan horse to get out from under thirty years of constraining environmental laws it has never fully accepted.

II. NATIONAL SECURITY EXEMPTIONS UNDER EXISTING ENVIRONMENTAL LAWS

Congress was aware of the tension between national security and environmental protection when it drafted the basic environmental laws. With the exception of the National Environmental Policy Act (NEPA), these laws authorize the President to grant waivers to the armed forces from environmental requirements if the waiver is "in the paramount interest of the United States," or if it satisfies a similar standard. These waivers may only be granted for a specific activity and for a specified length of time, and they are subject to judicial review. Most require that the President inform Congress in some way about the waivers he has granted. The key components of these provisions are set forth below.

Under existing law, the President can exempt federal sources and facilities from compliance with the Clean Air Act (CAA) if it is "in the paramount interest of the United States." These waivers are good for up to one year, and the President must notify Congress of their issuance. They cannot be applied to new sources, and

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14 Some scholars believe that the "line between protection of the environment and a strong national defense may have shifted" back to the Cold War era. See Bethurem, supra note 5, at 111. See also Gostin, supra note 7, at 1111-30 (finding the risk of a bioterrorist event "sufficiently credible to warrant serious consideration of restricting personal and proprietary freedoms" in some instances because biological weapons are "readily available, inexpensive to produce, more difficult to detect, and more efficient in [their] lethal effects," and "non-state actors have expressed the interest, if not yet the unfettered ability, to develop their own weapons").

15 Federal agencies are required to comply with the CAA "in the same manner, and to the same extent as any nongovernmental entity." 42 U.S.C. § 7418(a) (2000). The statute also specifically requires federal facilities "to comply with all permitting and record-keeping requirements, and to pay fees imposed by state and local regulatory programs." Dycus, supra note 7, at 50.

there are special waiver provisions for hazardous air pollutants.\textsuperscript{17} The President can authorize the use of certain ozone depleting substances when doing so is consistent with the Montreal Protocol, there are no adequate substitute substances, and the exemption is “necessary to protect national security interests.”\textsuperscript{18} The President can also issue regulations waiving CAA requirements for “any weaponry, equipment, aircraft, vehicle, or other classes or categories of property owned or operated” by the armed forces (or any state’s National Guard), which are “uniquely military in nature.”\textsuperscript{19} The EPA, acting under this authority, can exempt new motor vehicles and engines from the requirements of Title II for motor vehicles\textsuperscript{20} and from the Act’s fleet vehicle program.\textsuperscript{21} “Tactical vehicles” can receive a national security exemption from new vehicle and diesel fuel standards,\textsuperscript{22} and federally operated facilities that sell alternative fuel can be closed to the public for the same reason.\textsuperscript{23} The EPA’s regulations also exempt from a conformity determination actions undertaken in response to an emergency.\textsuperscript{24} In addition to the general regulatory exemptions, some DOD sites contain specific exemptions from CAA requirements for national emergency situations.\textsuperscript{25}

\textsuperscript{17} Id.

\textsuperscript{18} 42 U.S.C. § 7671c(f) (2000). Regulation of ozone-depleting substances is “aimed particularly at the Defense Department and its contractors, which are the nation’s largest consumers of ozone depleting chemicals.” Dycus, supra note 7, at 54.

\textsuperscript{19} 42 U.S.C. § 7418(b) (2000). The President is only required to reconsider the need for the vehicle-exemption regulations at three-year intervals. The waivers for executive branch emission sources are good for one year, but may be extended.


\textsuperscript{21} 42 U.S.C. § 7588(e) (2000).


\textsuperscript{23} 42 U.S.C. § 7586(g) (2000).

\textsuperscript{24} 40 C.F.R. § 51.852 (2006) (defining emergency as “a situation where extremely quick action on the part of the Federal agencies involved is needed and where the timing of such Federal activities makes it impractical to meet the requirements of the subpart” and listing natural disasters, civil disturbances, and military mobilizations as examples of emergency situations); id. § 51.853(d) & (e) (2006) (exempting emergency actions commenced within six months of the emergency, or, after six months, when the agency makes a written determination that for a specified period, not to exceed another six months, it would be impractical to complete the conformity analysis and the actions cannot be delayed due to overriding concerns of national security, among other things). According to Willard and his co-authors, an emergency circumstance can include not only a response to terrorist acts, but also to military mobilizations. Willard et al., supra note 22, at 71.

\textsuperscript{25} For example, the EPA included a national security exemption in its Title V permit for its China Lake Naval Air Weapons Station. Willard et al., supra note 22, at 71 (citing Great Basin Unified Air Pollution Control District, Permit # V-1A, general condition 16).
The Clean Water Act (CWA) also authorizes the President to exempt otherwise regulated sources, including federal sources, from the Act’s requirements, if the action is “paramount to the interest of the United States” and does not involve requirements under the Act’s provisions regulating new sources or toxic pollutants. Like the CAA, waivers under the CWA are only good for one year, but are renewable in one-year increments after that. Congress must be notified each January of waivers granted in the preceding year. Also like under the CAA, the President can “issue regulations exempting any weaponry, equipment, aircraft, vessels, vehicles, or other classes or categories of property . . . which are owned or operated by the United States . . . and which are uniquely military in nature” from the Act’s requirements.

Upon a finding that a waiver is “necessary in the interest of national defense,” the President can waive compliance with the requirements of the Toxic Substances Control Act (TSCA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and the Emergency Planning and Community Right-to-Know Act (EPCRA). The President can also grant relief to federal agencies from the requirements of the Safe Drinking Water Act (SDWA) when doing so will be in the “paramount

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27 33 U.S.C. § 1317 (2000). There is also an exemption for marine sanitation devices. If the Secretary of Defense finds that compliance “would not be in the interest of national security,” then vessels owned and operated by the United States do not have to comply with the EPA regulations for marine sanitation devices. 33 U.S.C. § 1322(d) (2000).
29 Id. According to Willard and his co-authors, the President has never acted under this authority. Willard et al., supra note 22, at 79. Cf. Dycus, supra note 7, at 46 (saying “the court observed that the President may waive compliance with the NPDES [permitting] system without having to show that compliance otherwise would be impossible” (citing Natural Res. Def. Council v. Watkins, 954 F.2d 974, 982-3 (4th Cir. 1992))).
30 15 U.S.C. § 2621 (2000) (allowing the President to grant exemptions upon notification in the Federal Register “unless that notification itself would be contrary to the interests of national defense”). No report to Congress is required.
31 42 U.S.C. § 9620(j) (2000) (giving the President the power to exempt specific sites from CERCLA requirements, including any requirements of the Superfund Amendments and Reauthorization Act of 1986 (SARA), “to protect the national security interests of the United States). The President must notify Congress within thirty days of granting an exemption. Id.
32 42 U.S.C. §§ 11001-11050 (2000). Although Congress has authorized an exemption to EPCRA, the statute “on its face” does not apply to federal agencies. However, Executive Order 13,148 applied EPCRA to federal agencies. See Willard et al., supra note 22, at 84.
interest of national defense.” The Resource Conservation and Recovery Act (RCRA) authorizes the President to seek a renewable one-year exemption from the Act’s requirements upon a showing that it is “in the paramount interest of the United States to do so.” Under RCRA, the President must report to Congress every January on any exemptions he has granted and give the reasons for each exemption. Courts have compelled federal agencies to comply with RCRA’s provisions unless they obtain a presidential waiver. For example, the United States District Court for the District of Nevada held that the Air Force could not circumvent RCRA’s permitting requirements by arguing that they did not apply to it; rather, the court required the agency to obtain either a permit or a Presidential exemption.

The pollution control laws are not the only environmental statutes that authorize relief from their provisions for reasons of national security or defense. For example, the United States Department of Interior’s Endangered Species Committee can exempt DOD from the requirements of the ESA’s jeopardy provisions, if the Secretary of Defense finds doing this is necessary for

33 42 U.S.C. § 300h-7(h) (2000). These exemptions can be renewed.
34 33 U.S.C. § 6961(a) (2000). Lack of funds can be a basis for the exemption only if the President requested such an appropriation, and Congress failed to make it available. Id. RCRA has broad language requiring federal facilities to comply with “all Federal, State, interstate, and local requirements, both substantive and procedural . . . in the same manner, and to the same extent as any person is subject to such requirements.” Id.
35 Id. TSCA requires that the Administrator keep a “written record of the basis upon which such waiver was granted” and publish “a notice that the waiver was granted for national defense purposes, unless, upon the request of the President, the Administrator determines to omit such publication because the publication itself would be contrary to the interests of national defense, in which event the Administrator shall submit notice thereof to the Armed Services Committees of the Senate and the House of Representatives.” 15 U.S.C. § 2621 (2000). CERCLA and EPCRA both require the President to notify Congress within 30 days of issuing an exemption for a specific site or facility for national security reasons. 42 U.S.C. § 9620(j)(1) (2000). The SDWA does not require that the President report to Congress when he exempts federal facilities from the SDWA requirements when it is in the “paramount interest of the United States to do so.” 42 U.S.C. § 300h-7(h) (2000).
36 See, e.g., Legal Envtl. Assistance Found., Inc. v. Hodel, 586 F. Supp. 1163, 1167 (E.D. Tenn. 1984) (finding DOE’s hazardous waste was subject to RCRA’s permitting requirements).
national security reasons. For military installations, an Integrated Natural Resource Management Plan (NRMP) under the Sikes Act may "substitute" for critical habitat designation under the ESA, but protection of wildlife habitat under an NRMP may not cause a "net loss in the capability of military installation lands to support the military mission of the installation" — a limitation that does not appear in the ESA.

Three other laws offer the military flexibility for national security reasons. Under the Marine Mammal Protection Act (MMPA), the National Marine Fisheries Service (NMFS) can authorize the incidental, unintentional take of small numbers of animals within a specified geographical region for up to five years, if the take will have only a negligible impact on the species or stock. The Coastal Zone Management Act (CZMA) provides that, even if a federal court finds a proposed federal activity inconsistent with an approved state coastal zone management plan, the President can exempt the activity upon a finding that it is in "the paramount interest of the United States" to do so. Finally, the National Historic Preservation Act (NHPA) allows an agency head to waive all NHPA responsibilities under "extraordinary circumstances" and upon a finding of an imminent threat of a major natural disaster or an imminent threat to the national security such that emergency action is necessary for the preservation of human life or property, and that such emergency actions would be impeded if the federal agency were to concurrently meet its historic preservation responsibilities under . . . the Act.

38 16 U.S.C. § 1536(j) (2000) ("Notwithstanding any other provision of the Act, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security."). Interestingly, in light of the military's complaints about the ESA, this provision has never been used.


44 36 C.F.R. § 78.3(a) (2006), promulgated under 16 U.S.C. § 470h-2(j) (2000) (directing the Secretary of the Interior to promulgate regulations under which the NHPA can be waived in whole or part in response to a major natural disaster or threat to national security).
This waiver, called an "emergency undertakings" waiver, can last for the duration of the emergency.\textsuperscript{45}

The National Environmental Policy Act (NEPA) does not contain a specific national security waiver of its requirement to prepare an environmental impact statement (EIS) for "major federal actions significantly affecting the quality of the human environment."\textsuperscript{46} Despite that omission, the language of the Act offers federal agencies sufficient flexibility to prevent it from being a barrier to the achievement of national security goals. For example, section 4331(b) (NEPA section 101(b)) provides that the government shall "use all practicable means, consistent with other essential considerations of national policy" to comply with NEPA, and section 4332 (NEPA section 102) only requires that federal agencies conduct environmental reviews "to the fullest extent possible." Furthermore, the national security exemption under the Freedom of Information Act (FOIA) will keep exempt information out of an EIS,\textsuperscript{47} and the Council on Environmental Quality can authorize exceptions to the EIS preparation requirements in emergency circumstances.\textsuperscript{48} The federal agency seeking the relief need only consult with the Council about alternative arrangements,\textsuperscript{49} which DOD did during the buildup to the Persian Gulf War.\textsuperscript{50} Courts have gener-

\textsuperscript{45} 36 C.F.R. § 78.3(b) (2006). The agency head must notify the Secretary of the Interior within 12 days of the waiver action. 36 C.F.R. § 78.4(a) (2006). The Secretary can reject or terminate the waiver. 36 C.F.R. § 78.5(a) (2006).

\textsuperscript{46} 42 U.S.C. §§ 4332(2)(C), 4334 (2000).

\textsuperscript{47} 5 U.S.C. § 552(b)(1)(A) (2000). See also Cary Ichter, Beyond Judicial Scrutiny: Military Compliance with NEPA, 18 GA. L. REV. 639, 657 (1984) (discussing the Supreme Court's use of the national security exemption in Weinberger v. Catholic Action, 454 U.S. 139 (1981) to free the Navy from the requirement to prepare an EIS, and explaining that classified information can be "withheld under both NEPA regulations governing public disclosure and the provisions of the Freedom of Information Act (FOIA), which is incorporated by reference into NEPA").

\textsuperscript{48} The waiver of normal NEPA procedures is limited to actions "necessary to control the immediate impacts of the emergency." 40 C.F.R. § 1506.11 (2005).

\textsuperscript{49} Id. See Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139, 144-45 (1981) (holding the information concerning storage of nuclear weapons in magazines was exempt from disclosure under FOIA exemption relating to national defense); Valley Citizens for a Safe Env't v. Vest, 22 Envtl. L. Rep. (Envtl. L. Inst.) 20,335, 20,339-41 (D. Mass. 1991) (upholding the emergency provision when used to allow the Air Force to bring flights into Westover Air Force Base to serve Persian Gulf operations during Operation Desert Storm; CEQ certified the emergency and the Air Force committed to preparing an EIS as soon as possible). The district court in Valley Citizens, quoting 42 U.S.C. § 4332, pointed out that NEPA only requires compliance "to the fullest extent possible." Id. at 20,337.

\textsuperscript{50} Letter from Colin McMillan, Assistant Sec'y of Def., to Michael Deland, CEQ Chairman (Aug. 24, 1990) (requesting CEQ agree that DOD's activities in the United States conducted in response to "Iraq's invasion of Kuwait," some of which "may result in
ally been protective of the military when confronted with a conflict between NEPA mandates and military needs.\textsuperscript{51}

The definition of "agency" in the Administrative Procedure Act (APA) excludes "military authority exercised in the field in time of war or in occupied territory."\textsuperscript{52} This exclusion gives the armed forces additional relief from the public disclosure requirements of NEPA because the obligation to prepare an EIS falls on "all agencies of the Federal Government."\textsuperscript{53} The exclusion may have the added benefit for the military of blocking claims against it in certain situations since meeting the requirements of the APA is a prerequisite for individuals seeking judicial review under NEPA.\textsuperscript{54} While, to date, courts have "interpreted this clause narrowly" and "have not given military departments much deference" when other laws, like NEPA, are implicated,\textsuperscript{55} the circumstances of 9/11 and the continual state of war may change that posture.

Finally, if the President declares that there is a national emergency, or if there is a declaration of war, the Secretary of Defense, "without regard to any other provision of law," can undertake military construction projects required to support the use of the armed forces.\textsuperscript{56} President Bush invoked this authority on November 16, 2001 in Executive Order 13,235.\textsuperscript{57}

51 See, e.g., Weinberger, 454 U.S. at 142 (1981) (refusing to require the Navy to prepare a "hypothetical" EIS before completing facilities that contained magazines capable of storing nuclear weapons, saying none would be required unless the Navy actually stored nuclear weapons at the facility even though the Navy could neither admit nor deny, for national security reasons, that it proposed to store nuclear weapons there).


55 Willard et al., supra note 22, at 80 n.106 (citing Doe v. Sullivan, 938 F.2d 1370, 1372 (D.C. Cir. 1991) (holding plaintiff's challenge to HHS "rulemaking that allowed military to use investigational drugs was outside military authority exception").


The armed forces have never liked this system of Presidential waivers. The scope of these waivers is too narrow, and the time limits placed on them are not compatible with many training activities. Since these waivers are intended for one-time use only, the vast number of training exercises conducted on hundreds of military installations across the country makes them burdensome to obtain. To the military, "training and operations are on-going needs – not an emergency exception." DOD has asserted:

Although existing operations are a valuable hedge against unexpected future emergencies, they cannot provide the legal basis for the nation's everyday military readiness activities. The Defense Department believes that it is unacceptable as a matter of public policy for indispensable readiness activities to be unlawful under our environmental laws absent repeated invocation of emergency authority – particularly when narrow clarifications of the underlying regulatory statutes would enable us both to conduct essential activities and protect the environment.

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58 For example, Dycus notes that "[f]or its part, DOE has admitted that throughout the 1980s it followed a deliberate policy of avoiding compliance [with RCRA] at its nuclear weapons complex, and it instructed its contractors to do the same." Dycus, supra note 7, at 63.

59 Willard et al. liken "the aggregate result of having to employ these exemptions on a case-by-case basis . . . [to] 'death by a thousand cuts.'" Willard et al., supra note 22, at 87. This is especially true because since 9/11, the military has experienced a "surge" in the number of units required for combat operations on very short notice, increasing the need to train these units in live action drills very quickly. Ctr. for Biological Diversity v. Pirie, 191 F. Supp. 2d 161, 169 (D. D.C. 2002).

60 For example, Catharine Vogel states that DOD argued that the "usefulness of the ESA exemption is limited because it only applies to individual military actions and not to entire military range operations," and "[b]ecause of the evolving nature of military training, each exception would have very limited duration and benefit." Note, Military Readiness and Environmental Security – Can They Co-Exist?, 39 REAL PROP. PROP. & TR. J. 315, 347 (2005).


62 Hearing of May 16, 2002 Before the H. Comm. on Government Reform, 107th Cong. (testimony of Deputy Sec'y of Def. (Readiness) Dr. Paul M. Mayberry and Deputy under Sec'y of Def. (Installations and Environment) Raymond F. DuBois Jr.), quoted in Willard et al., supra note 22, at 87-88; see also News Transcript, DOD, Roundtable on Range and Readiness Preservation Initiative 5 (Apr. 6, 2004), available at http://www.defenselink.mil/transcripts/2004/tr20040406-0582.html (stating that the DOD "is really seeking clarification" of the laws to ensure they are not "applied beyond their original intent").
Some waivers require the disclosure of information that the armed forces would prefer remain confidential. The military also worries that the standard "in the paramount interests of the United States" might give courts an excuse to overturn the waiver once granted. The military particularly chafes against the role that courts play in adjudicating disputes with those who disagree with its conclusions about the need for training activities or the resulting impact on the environment. The armed forces worries that an injunction could lead to the complete cessation of military training, and "identifies as a priority 'protecting [its] ranges from harassment by litigation.'" But, their fear of the courts is grossly exaggerated, as, is discussed later in this article, the judicial branch has treated Presidential waivers with great deference since they lie entirely within the President's discretion. DOD's paranoia about a "wave of nationwide litigation" and resulting liability for the Department seems to be equally unfounded.

To the armed forces, laws that require the protection of wildlife and the cleanup of unexploded ordnance "introduce an unacceptable degree of artificiality" into training exercises by forcing the military to 'work around' protected habitat and suspend activities

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63 For example, the courts have applied the waivers strictly, requiring that the waiver must "be drafted carefully to ensure its scope reflects the underlying statutory authority and encompasses all anticipated activities." Willard et al., supra note 22, at 70. See also P. R. v. Muskie, 507 F. Supp. 1035, 1048-49 (D.P.R. 1981) (denying a waiver under RCRA because the facility for which the Navy sought an exemption was not covered by the statute). This may mean that information is disclosed that the military prefer remain confidential.


65 Id. at 660 (citing News Transcript, supra note 62 (noting "DOD identifies as a priority 'protecting [its] ranges from harassment by litigation.'"))

66 Sislin, supra note 64, at 660 (quoting Marine Corps General Michael J. Williams' analogy of a military installation to a "tale of two cities" because military installations require "numerous environmental compliance measures" like a medium-sized city, "but unlike a civilian city, its primary purpose is sustain military readiness").

67 Sislin, supra note 64, at 677 (stating that "the only two courts to examine a determination of paramount interests have found discretion to not be an appropriate matter for judicial review"). See, e.g., Kasza v. Browner, 133 F.3d 1159, 1180 (9th Cir. 1998) (holding that a determination of what is in the "paramount interest of the United States" is a matter Congress explicitly left to the President's discretion); Colon v. Carter, 633 F.2d 964, 967 (1st Cir. 1980) (opining that "[i]t is difficult to imagine a determination more fully committed to discretion or less appropriate to review by a court" than the determination that the paramount interest of the United States requires an exemption).

68 Sislin, supra note 64, at 679. Sislin points out that "one senior DOD official indicated that litigation may result in improvements to readiness" and cites the closing of the Vieques firing range as an example of this because it spurred the "development of 'significant alternatives' to traditional training techniques." Id. at 680.
while fulfilling environmental compliance mandates."\(^{69}\) They contend, not unreasonably, that urban development around their bases has made them places of last resort for endangered and threatened wildlife, placing an unfair burden on the armed forces to protect habitat.\(^{70}\) However, unfortunately for the military, the defense establishment (such as private contractors who manufacture military equipment and weapons, and produce ordnance, including rocket fuel) – of which military installations are only one part – has substantial land holdings and engages in activities that significantly affect the environment. These factors make the military, and the defense establishment as a whole, subject to the wide variety of environmental laws currently in place.\(^{71}\)

As the foregoing discussion shows, existing laws contain substantial flexibility for the President to give the military relief from constraining environmental laws. The military's objections to that system of presidential waivers seem somewhat suspect given that it has rarely requested any waivers.\(^{72}\) It appears much more likely that the armed forces’ problem is with the underlying laws,\(^{73}\) which they have never fully accepted as evidenced by the fact that they sought much broader changes to those well before September 11.\(^{74}\) This raises the question addressed later in the article whether the changes they seek in those laws, and in some instances have already secured, are really warranted.

\(^{69}\) Id. at 659-60.

\(^{70}\) Barefoot-Watambwa, supra note 8, at 612-13.

\(^{71}\) The DOD owns thirty million very biodiverse acres. See News Transcript, supra note 62. Often the military, particularly the Navy, selects “picturesque” places to conduct their training because, from a military perspective, those appeared to be the best places. Barefoot-Watambwa, supra note 8, at 591. Although it took twenty-seven years to evict the Navy from its base at Kaho‘olawe, Hawaii and twenty years from Vieques, Puerto Rico, the protestors were ultimately successful. Id. at 591-97. The Navy had actually used Vieques for sixty years before the legal battles stopped that use. Id. at 594.

\(^{72}\) Dycus, supra note 5, at 49 (identifying only two instances where the military sought relief from RCRA and none under CERCLA). Moreover, as Sislin points out, DOD has never identified a single instance where environmental laws or their enforcement has adversely affected military readiness. Sislin, supra note 64, at 678. “The few extraordinary cases” that the military cites are “instances in which DOD did not sufficiently respond to severe, long-term public health threats,” requiring federal intervention. Id.

\(^{73}\) See infra text accompanying note 246.

\(^{74}\) See Dycus, supra note 5, at 1-2 (observing that “only a few months after the 9/11 terrorist attacks, the Pentagon announced” a fully-formed and “highly organized, multi-year campaign entitled the Readiness and Range Preservation Initiative”). The Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, 116 Stat. 2458, containing national security exemptions from the Migratory Bird Treaty Act and the MMPA, was passed on December 2, 2002.
However, before examining those changes to environmental laws, it is helpful to widen the perspective on national security-driven changes to non-environmental laws and policies brought about by the USA PATRIOT Act. Placing the changes to environmental laws in the broader context of the USA PATRIOT Act makes more comprehensible the speed with which Congress initially granted relief from environmental requirements and why so little opposition was generated to those actions, and may also explain the aggressiveness and persistence of the military in seeking even broader relief.

III. Non-Environmental National Security Initiatives — The USA PATRIOT Act

This Part of the article looks at the USA PATRIOT Act for the limited purpose of seeing how the country’s response to the “War on Terror,” like the Cold War before it, has broadened the powers of the executive and national security institutions and altered the military’s mission from one of responding to particular situations to anticipating threats before they occur. What is striking about these initiatives is that the resulting “significant expansion of state power” initially occurred almost without objection.

Although President Bush vowed in the immediate aftermath of the attacks on 9/11 that “we will not allow this enemy to win the war by changing our way of life or restricting our freedoms,” it became quickly apparent that quite the reverse would happen. And, while the original intent behind the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, commonly known as the USA PATRIOT Act, may not have been to restrict civil liberties, “its

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75 Moreno, supra note 3, at 206-07 (finding “striking similarities” between the Cold War and the War on Terror, and saying only twice in recent history has the United States' national security policy undergone such a radical change — once in response to the communist threat, and now in response to terrorism). Moreno also notes that in both cases “science was recognized as potentially playing a central role in providing an advantage to the U.S. and its allies.” Id. at 207.

76 Id. at 207.

77 After the Attacks; Bush’s Remarks to Cabinet and Advisers, N.Y. TIMES, Sept. 13, 2001, at A16, quoted in Whitehead & Aden, supra note 2, at 1083.

unintended consequences"\(^{79}\) have been the opposite, as shown below.\(^{80}\)

The USA PATRIOT Act has substantially increased the government's surveillance and investigatory powers. For example, since 9/11, law enforcement officials can search homes and offices without prior notice, use roving wiretaps to eavesdrop on otherwise private telephone conversations,\(^{81}\) and monitor emails and computer text messages, including privileged attorney-client communications.\(^{82}\) The Act also expanded the scope of searches authorized under the Foreign Intelligence Surveillance Act (FISA),\(^{83}\) permit-

\(^{79}\) Whitehead & Aden, supra note 2, at 1083 (saying the Act's "unintended consequences threaten the fundamental constitutional rights of people who have absolutely no involvement with terrorism").

\(^{80}\) The USA PATRIOT Act was preceded by a September 14, 2001 Proclamation declaring a state of emergency and invoking important presidential powers including the power to summon reserve troops and marshal military units. Proclamation No. 7463, 66 Fed. Reg. 48,199 (September 14, 2001). Although it took the USA PATRIOT Act only three days from introduction to passage and signature, its subsequent reauthorization has not been so smooth. Thomas (Library of Congress) legislative history shows that it was introduced in the House on October 23, 2001 and was signed on October 26, 2001. H.R. 3162, 107th Cong. (2001), available at http://thomas.loc.gov/. It passed the House 357-66 and the Senate 98-1. See In re Sealed Case, 310 F.3d 717, 732 (2002) (noting that no committee reports accompanied passage of the 2001 USA PATRIOT Act). See also Congress to Resume Consideration of Patriot Act, Habeas Stripping Proposals, 30 CHAMPION 6, 6 (2006) (reporting that two weeks prior to the expiration of the USA PATRIOT Act, the reauthorization bill was blocked by a filibuster because of sharp disagreements over several controversial measures, and that Congress was forced to pass a shorter, five-month reauthorization); Sheryl Gay Stolberg, Postponing Debate, Congress Extends Terror Law 5 Weeks, N.Y. TIMES, Dec. 23, 2005, at A1; Sheryl Gay Stolberg & Eric Lichtblau, Senators Thwart Bush Bid to Renew Law on Terrorism, N.Y. TIMES, Dec. 17, 2005, at A1.


\(^{82}\) Former Attorney General John Ashcroft instituted this change by allowing the correspondence and private telephone conversations between all prisoners, not just those suspected of terrorism, and their counsel to be monitored upon certification by the Attorney General that "reasonable suspicion exists to believe that an inmate may use communications with attorneys or their agents to further or facilitate acts of violence or terrorism." Whitehead & Aden, supra note 2, at 1116. He did this by posting the rule in the Federal Register on October 31, 2001, the day after it went into effect. Id. Even the American Bar Association has condemned this rule as an infringement on the attorney-client privilege and a suspect's Sixth Amendment right to counsel. Id. at 1116-17.

\(^{83}\) Section 218 of the USA PATRIOT Act amends FISA to provide that foreign intelligence need only be a "significant purpose" (as opposed to the primary purpose) of the electronic surveillance and warrants for physical searches of property, thus expanding the
ting the FBI to seize business records and computer systems without notice and "gag" the company that was the subject of the search from disclosing what happened to it. Additionally, law enforcement officials can acquire "sneak and peek" warrants more easily.

The USA PATRIOT Act authorizes the Attorney General "to investigate not only acts of terrorism, but most acts of violence against public officers and property." The breadth of this investi-

84 Whitehead & Aden, supra note 2, at 1100.

85 These types of warrants are referred to as "sneak and peek" warrants because they give law enforcement officials the ability to search a dwelling or other area that would normally be protected by the Fourth Amendment without notifying the owner and without authorizing any seizures. A "sneak and peek" warrant is intended to supplement law enforcement officials' information in a way that would enable them to obtain a normal search and seizure warrant.

86 Section 213 of the USA PATRIOT Act authorizes law enforcement officials to delay giving notice of any search of a dwelling, including after the search has been conducted, if notice would have "an adverse effect." This means that a homeowner who has been the subject of such a search may not discover that her computer disks or mail, for example, have been seized until she is finally "informed [about the seizure] through a letter in the mail weeks or even months later." Whitehead & Aden, supra note 2, at 1112. DOJ has indicated that section 213 sneak and peek warrants had been used as of April 1, 2003. Letter from Jamie E. Brown, Acting Assistant Attorney General, to F. James Sensenbrenner, Jr. (May 13, 2003) (responding to questions by Rep. Conyers) (on file with The George Washington Law Review) cited in Beryl A. Howell, Seven Weeks: The Making of the USA PATRIOT Act, 72 Geo. Wash. L. Rev. 1145, 1189 n.285 (2004).

87 Section 802 of the USA PATRIOT Act adds a new definition of "domestic terrorism," which includes activities that:

"(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to effect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States."

18 U.S.C. § 2331(5) (2000). In addition, section 808 of the Act amends the definition of "federal crime of terrorism" to include nearly all acts that result in any federal crime of violence. 18 U.S.C. § 2332b(g)(5) (2000). The Attorney General has "assured the Senate
gative authority may cover "diverse domestic political groups . . . accused of acts of intimidation or property damage such as Act Up, People for the Ethical Treatment of Animals (PETA), Operation Rescue, and the Vieques demonstrators." The Administration has also heightened its rhetoric against such groups.

Charges of "kangaroo courts" and "shredding the Constitution" give new meaning to the term, "the fog of war." We need honest, reasoned debate; not fearmongering . . . . [T]o those who scare peace-loving people with phantoms of lost liberty; my message is this: Your tactics only aid terrorists — for they erode our national unity and diminish our resolve. They give ammunition to America's enemies, and pause to America's friends. They encourage people of good will to remain silent in the face of evil.

Grand jury proceedings are no longer kept confidential to protect the privacy of those who appear before them, but can be disclosed to federal officials. Non-citizens accused of acts of terrorism have lost their right to grand jury indictment, have had that the U.S. government's definition of terrorism has, since 1983, included as terrorists only 'those who perpetrate premeditated, politically motivated violence against noncombatant targets.'" Testimony of Dec. 6, 2001 Before S. Comm. on the Judiciary, 107th Cong. (written testimony of Attorney General John Ashcroft), available at http://www.justice.gov/archive/ag/testimony/2001/1206transcriptsenatejudiciarycommittee.htm [hereinafter Ashcroft Testimony], quoted in Whitehead & Aden, supra note 2, at 1100. Whitehead and Aden note that, "[i]f that is true, it certainly begs the question of why the Bush Administration felt the need to redefine 'terrorism' to include a wide variety of domestic criminal acts." Whitehead & Aden, supra note 2, at 1094.

88 Whitehead & Aden, supra note 2, at 1093. An example of this is the recent sentencing of an Earth Liberation Front member to twenty-two years in prison for burning three SUVs. See Convicted Arsonist Finds Wide Support, SEATTLE TIMES, June 13, 2005, at B3. Whitehead and Aden also point out that former Attorney General Ashcroft used inflammatory rhetoric against those who question the Administration's commitment to civil liberties, "labeling" critics as "'un-American' and 'unpatriotic.'" Whitehead & Aden, supra note 2 at 1100.

89 Ashcroft Testimony, supra note 87, quoted in Whitehead & Aden, supra note 2, at 1100.

90 Section 203(a) of the USA PATRIOT Act amends Federal Rule of Criminal Procedure 6 to allow disclosure of foreign intelligence, counterintelligence, or foreign intelligence information to federal officials to "aid the official receiving the information in the performance of his official duties." Whitehead & Aden, supra note 2, at 1109, n.171. Grand jury proceedings have traditionally been secret in order to "[recognize] a compromise between the public interest in investigating crimes and limiting intrusions to privacy." Risa Berkower, Note, Sliding Down a Slippery Slope? The Future Use of Administrative Subpoenas in Criminal Investigations, 73 FORDHAM L. REV. 2251, 2258 (2005).

91 See Military Order Concerning Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terror, 66 Fed. Reg. 57,833 (Nov. 13, 2001) (suspending the rights of indictment, trial by jury, appellate relief, and habeas corpus for all non-citizens accused
their access to counsel denied or obstructed,\textsuperscript{92} and are subject to indefinite detention without due process.\textsuperscript{93} The law also amends the Immigration and Nationality Act to bar entry of not only any non-citizens who represent a foreign terrorist organization, but also any non-citizens who are members of, support, or encourage others to become members of, groups "whose public endorsement of acts of terrorist activity . . . undermines the United States efforts to reduce or eliminate terrorist activities."\textsuperscript{94} Law enforcement officials can seize assets without due process, and the federal Privacy Act was amended to allow disclosure of banking records for financial analysis.\textsuperscript{95} Educational\textsuperscript{96} and library loan records must now be disclosed to law enforcement officials.

The USA PATRIOT Act ushered in a "phalanx" of new measures to enhance the government's power to respond to the potential threat of terrorists. Some of these initiatives were well publicized, others less so, often appearing in executive orders or agency operating procedures.\textsuperscript{97} The new measures reveal an "unprecedented emphasis on preemptive military engagement as a necessary tactic to root out terrorism before it can strike" and on aggregating power in law enforcement officials.\textsuperscript{98} A major prob-
lem with all of this occurring during an undeclared "war" with no clear end is that there may be no signal to return these lost civil liberties, let alone protections lost under environmental laws, to which the article now turns.

Homeland security is not a temporary measure just to meet one crisis. Many of the steps we have now been forced to take will become permanent in American life. They represent an understanding of the world as it is, and dangers we must guard against perhaps for decades to come. I think of it as the new normalcy.106

IV. RELIEF FROM ENVIRONMENTAL AND PUBLIC DISCLOSURE LAWS

Clearly, one response to the terrorist attacks on 9/11 has been a significant erosion of basic civil liberties.101 Congress has given unprecedented power to the President and his law enforcement agencies to wage this war against terror, and when not directly given, the Administration has seized additional power without objection. It should be no surprise, then, that the military has sought, and largely received, permission from Congress to weaken environmental and public disclosure laws as part of the arsenal of "tools" it needs to fight this war.102 It should also be no surprise

99 See Whitehead & Aden, supra note 2, at 1085 (lamenting that "[t]he U.S. Constitution, if compromised now, may never again be the same. In today's world, once civil liberties are fenced, they may never be freed, becoming captive to the warden of national security.").


101 See also Cole & Lobel, supra note 98, at 5 ("The administration's adoption of the preventative paradigm has radical implications for the core values that we associate with the rule of law, and has resulted in far-reaching sacrifices in basic commitments to equality, transparency, fair procedures, clear rules, checks and balances, and basic human rights.").

102 See Truban, supra note 8, at 165 (quoting Congressman Weldon (R. Pa.) "We are trying to do the right thing. We are also trying to protect our troops. We are also trying to give some relief so our military personnel can be properly trained and equipped when they are called upon to protect America."). In fact, there appears to have been only one House floor debate on section 315 giving the military exemptions from environmental laws. Id. at 163 n.188 (citing 148 Cong. Rec. H2249 (May 9, 2002)). The Stump Act was debated on the Senate Floor for only seventy-five minutes. Id. at 169 n.235.
that, in a war in which the overriding theme is prevention and not reaction, the government is not waiting until experience demonstrates that these laws are obstructing the war's successful administration before seizing the initiative to weaken them.

The military's principal approach to environmental laws has been to seek significant legislative expansion of existing exemptions or the creation of new ones. Congress has also been complicit in efforts by the Administration to drastically curtail, and in some cases completely eliminate, the dissemination of information to the public about environmental risks. While these initiatives can be seen as preemptive to the extent that they seek relief before a problem has been demonstrated, it is difficult to see how they are truly directed at ferreting out terrorism "before it can strike."104

A. Exemptions from Environmental Laws

One of the primary thrusts of the new exemptions has been directed at laws the military believes "encroach upon" military training and operations — what it calls "military readiness."105 The

103 See, e.g., Homeland Defense Before the Senate Comm. on the Judiciary, 107th Cong. (Sept. 25, 2001) (written testimony of the Honorable John Ashcroft, Attorney General), available at http://judiciary.senate.gov/testimony.cfm?id=108&wit_id=42 (Americans "must prevent first, prosecute second"), quoted in Whitehead & Aden, supra note 2, at 1087 n.22. See also Chesney, supra note 6, at 27 (saying "the overriding priority of the Department [of Justice] since 9/11 is to prevent attacks before they occur using all available tools"); Bob Woodward, Bush at War 42 (2002) quoted in id. at 28 (reporting that former Attorney General John Ashcroft said at a meeting of the National Security Council shortly after the September 11 attacks that "[t]he chief mission of U.S. law enforcement . . . is to stop another attack and apprehend any accomplices or terrorists before they hit us again. If we can't bring them to trial, so be it.").

104 Moreno, supra note 3, at 204. Moreno raises the alarm that the increasing fear of terror attacks and the need to have a scientific response when one occurs may make "commitments to human research protections . . . seem less important." Id. at 205.

105 The military is using "encroachment" in two senses: the physical encroachment on military lands by expanding urban populations and the intrusion of environmental regulations into military operations. Both increase the administrative burdens on the military, potentially interfere with military readiness, and increase opportunities for litigation. Barefoot-Watambwa, supra note 8, at 612-13.

106 See Encroachment: Hearings before the H. Gov't Affairs Comm., 10th Cong. (2001) (including testimony from Commanders from all three branches of the military to examples where compliance with environmental laws was substantially impacting the ability of the military to properly defend the United States). See also Letter from Ten Members of the House of Representatives to Donald Rumsfeld, Sec'y of Def. (Oct. 5, 2001), cited in U.S. Army Legal Services Agency, Environmental Law Division Notes: Pending Legislation Targets Military Environmental Compliance, 2001 Army L. 30 n.17 (2001) (outlining their concerns with "encroachment" on military installations and examples where training effectiveness has been sacrificed to "feel good environmentalism" without any scientific support).
position of the DOD is that "to be successful, soldiers must train" and "[e]nvironmental regulations requiring the protection of natural habitat or the cleanup of unexploded ordnance would hamstring" the achievement of that objective.\(^{107}\) Although there is little to no "empirical evidence that environmental laws encroached upon the use of training areas,"\(^{108}\) the DOD easily persuaded Congress, in the wake of 9/11, to attach riders to the 2004 and 2005 Defense Appropriation Acts\(^{109}\) as part of its "range readiness preservation initiative" (RRPI).\(^{110}\) These riders exempted the military first from the Migratory Bird Treaty Act (MBTA),\(^{111}\) and then from the MMPA\(^{112}\) and various provisions of the ESA,\(^{113}\) as

\(^{107}\) See Townsend, supra note 7, at 66.

\(^{108}\) BARRY W. HOMAN, GOVT. ACCOUNTABILITY OFFICE, MILITARY TRAINING: DOD APPROACH TO MANAGING ENTRCYMENT ON TRAINING RANGES STILL EVOLVING (2003) (comprising testimony before the S. Comm. on the Env't and Public Works) ("Even though [military] officials ... have repeatedly cited encroachment as preventing the services from training to standards, [the DOD]'s primary readiness reporting system did not reflect the extent to which encroachment was a problem. In fact it rarely cited training range limitations at all."). quoted in Townsend, supra note 7, at 66.

\(^{109}\) The Defense Authorization Act for FY 2004, Pub. L. No. 108-136, 117 Stat. 1392 (2003). For example, the Senate spent only seventy-five minutes debating the issue of military exemptions from the MBTA. See Truban, supra note 8, at 169 n.235. See also Yap, supra note 5, at 1320 ("Congress's support of the military's desire for environmental non-compliance has remained strong in the years since September 11, 2001, and has resulted in the enactment of virtually all of the DOD's environmental wishlist into law.").

\(^{110}\) Yap notes that the "shift in [the] legislature's policy set against the background of the ever-present threat of terrorism ... illustrates a shift from the way the country had previously approached and balanced two complex and important concerns: national defense and the environment." Yap, supra note 5, at 1293.

\(^{111}\) See Pub. L. No. 107-314, 116 Stat. 2458 § 315 (2002). Congress reacted to a district court decision holding that the Navy's continued bombing of the Farallon de Medinilla Island (a small uninhabited island north of Guam that is home to a wide variety of migratory bird species) without a permit and resulting in the knowing death of migratory birds, violated the MBTA exemption for military readiness activities from the statute. See Ctr. for Biological Diversity v. Pirie, 191 F. Supp. 2d 1129 (N.D. Cal. 2002).

\(^{112}\) Similarly, the DOD won its exemption from the MMPA in response to another successful environmental lawsuit, this time enjoining the Navy's use of Low Frequency Active (LFA) Sonar because of its impact on marine mammals. Natural Res. Def. Council v. Evans, 179 F. Supp. 2d 1129 (N.D. Cal. 2003).

described in more detail below. Immediate relief was sought from these laws for reasons of national security and military readiness.\textsuperscript{114}

The FY 2004 Defense Authorization Act substantially amended the MBTA.\textsuperscript{115} The amendments direct the Secretaries of Interior and Defense to prescribe new regulations that allow for the incidental, unintentional take of migratory birds during combat training and testing of military equipment and weapons,\textsuperscript{116} which they promptly did.\textsuperscript{117} The regulatory exemptions apply to defense contractors as well as the DOD.\textsuperscript{118} However, the Secretary of Interior must suspend the exemption for a particular activity if the activity would not be compatible with one of the migratory bird treaties or would result in “significant adverse effect on the sustainability of the population” of a migratory bird species.\textsuperscript{119}

Fresh from its success with the MBTA, the armed forces easily persuaded Congress to make several critical changes to the MMPA. Congress made these changes in response to the Navy’s desire\textsuperscript{120} to test the efficacy of Low Frequency Active Sonar at
detecting a new category of very silent and difficult to detect submarines.\textsuperscript{121} The amendments redefined the statutory term “harassment” to cover only military readiness activities that actually injure or disturb marine mammals to such an extent that their behavioral patterns are abandoned or significantly altered.\textsuperscript{122} Congress also removed existing restrictions on the size of the geographic area and the number of individuals that can be covered by an incidental take permit for military readiness activities. The law now directly allows the Secretary of Defense to grant two-year, nonrenewable waivers from the Act’s restrictions for broad categories of activities in the interest of national defense\textsuperscript{123} where before only the President could grant waivers under the MMPA. These amendments effectively erased the Act’s “precautionary standard” and will enable


\textsuperscript{123} 16 U.S.C. § 1371(f) (2000 & Supp. 2004). Prior to authorizing this exemption, the Secretary of Defense must confer with the Secretary of Commerce or the Interior and notify the House and Senate Committees on Armed Services and describe the exemptions and the reasons for it. The statute also provides that the notice may be classified if the Secretary of Defense determines that it is necessary for national security. \textit{Id.} § 1371(f)(3)(A). The NMFS has determined that the sonar is important for national security purposes and has codified an incidental take exception for the United States Navy’s SURTASS LFA sonar program. 67 Fed. Reg. 46,712-89 (July 16, 2002) (codified at 50 C.F.R. § 216.180-216.191).
the Navy "to destroy local populations of marine mammals, outside of the eye of public notice."124

Congress also made several changes to the ESA in the aftermath of 9/11. Section 318 ("Military Readiness and Conservation of Protected Species") of the National Defense Authorization Act for fiscal year 2004 turned what had been a discretionary decision of the Secretary under § 4(a)(3)(B) into a flat prohibition preventing the Secretary from designating as critical habitat "any lands or other geographical areas owned or controlled" by the DOD that are covered by an NRMP under the Sikes Act.125 Although NRMP plans are prepared in cooperation with the Fish & Wildlife Service, unlike proposed critical habitat designations under the ESA,126 they are not available for public comment, and the public has no way of challenging the Secretary's decisions in the plan.127 The Secretary, for the first time, must now consider the "impact on national security" when designating critical habitat under ESA section 4(b)(2)128 on any type of land, and there can be no balancing of interests under that section that would compromise the military mission of an installation.129

124 Barefoot-Watambwa, supra note 8, at 613-14. Barefoot-Watambwa finds this particularly distressing because she sees no connection between fighting the war on terror and the MMPA's key provisions that the RRPI changes, and because there were other less drastic alternatives available to the Navy that might have allowed them to "achieve the goal of flexibility for the military." Id. at 614.


128 With regard to the ESA amendment, the DOD contends that "with 25 million acres, 525 training ranges, and 300 endangered or threatened species under its control, protecting habitat becomes so prohibitive that it inhibits the Army's ability to train soldiers." Townsend, supra note 7, at 66.

129 See 16 U.S.C. § 1533(b)(2) (2000 & Supp. 2004) (declaring that DOD must still comply with § 9 (takings) and § 7(a)(2) (consultation) and go through the "God Squad" to get exemption for takings). Oddly, for such an environmentally unfriendly piece of legislation, the National Defense Authorization Act for Fiscal Year 2004 contains section 323 ("Public Health Assessment of Exposure to Perchlorate") which requires the Secretary of Defense to provide for: (1) an epidemiological study of exposure to perchlorate in drinking water;
These changes to basic species protection laws have substantially weakened them. The changes are permanent until a subsequent Congress repeals them. Given the importance of military lands for wildlife habitat and the impact of military activities on wildlife, these changes are not insignificant.

The military has also aggressively and persistently sought to replace the existing presidential waiver system under the nation's pollution control laws with permanent exemptions. Its goal has been to gain greater flexibility for conducting military readiness activities and to reduce the burdens and unwieldiness of the existing system. Specifically, as Dycus points out, the armed forces would like to have a permanent, nationwide shield from RCRA's "imminent and substantial endangerment" provision out of concern that the EPA or environmentalists might use this provision to stop live-fire training on its military ranges. They would like to have protection from any RCRA requirement that might force them to clean up live-firing ranges, subject military waste disposal and management practices to regulation, allow non-military inspectors to observe the processes that generate hazardous waste, and then open those inspection reports to public inspection. The armed forces want relief from any CERCLA requirement that might otherwise make them clean up soil and groundwater at any of their training ranges that have been contaminated by abandoned ordnance. They would like to remove their facilities from the reach of state laws enforcing national ambient air quality standards for stationary sources for as long as they can to delay the nonattainment effects from the buildup of troops and equipment at various bases.

130 Dycus, supra note 5, at 45.
131 See id. at 45-46 (stating that the DOD's concern is that the provision will interrupt live-fire training).
132 See Willard et al., supra note 22, at 67 (stating that 42 U.S.C. § 6961(a) allows EPA officials to inspect hazardous wastes sites). See, e.g., Frost v. Perry, 161 F.R.D. 434 (D. Nev. 1995); Doe v. Browner, 902 F. Supp. 1240 (D. Nev. 1995) (subjecting DOD to the Act's public disclosure requirements in Section 3007b and requiring the agency to either declassify the EPA's inspection report and inventory of hazardous wastes at the Air Force's Groom Lake facility or get a presidential exemption under § 6961(a)).
133 Willard et al., supra note 22, at 67.
134 Townsend, supra note 7, at 67.
With these goals in mind, for the past several years, DOD has attempted to secure protection from various provisions of RCRA and CERCLA, and the CAA. While the DOD’s efforts have not yet been met with success, these measures are pending before the 109th Congress and are likely to be pushed by the Administration in subsequent Congresses.

The DOD’s proposed approach to those laws has been sweeping; the antithesis of the approach of the presidential waiver system, which is narrowly focused, time limited, and activity specific. For example, the military has proposed defining “solid waste,” in RCRA and “release” of a hazardous substance in CERCLA to exclude military munitions on all operational ranges. These changes would allow untreated and uncontrolled munitions and munitions-related contamination to remain on a training range for as long as the range remained operational, i.e., indefinitely.


See, e.g., National Defense Authorization Act for FY 2006, Pub. L. No. 109-163, 119 Stat. 3136 (2006), in which DOD tried and failed to gain exemptions from RCRA and CERCLA. See also Sislin, supra note 64, at 662-70 (chronicling the failed attempts of DOD to get relief from RCRA and CERCLA). In the Second Session of the 108th Congress, one of the most controversial issues regarding DOD environmental programs was whether to provide further exemptions for military readiness activities from certain air quality and hazardous waste cleanup requirements. See id. at 669 (saying that the House hearings revealed the “extensive scope and controversial nature” of the proposed exemptions).

DOD has attempted to get relief from the requirements of RCRA, CERCLA, and the CAA since 2002. In January 2005, DOD proposed legislation again seeking exemptions from those three laws for fiscal year 2006. Sislin, supra note 64, at 649. Although, these efforts failed to make it into either the final House authorization bill, H.R. 5122, or into the Senate authorization bill which was brought to the floor in June, the fight seems far from over. Linda Roeder, House, Senate Lawmakers Reject Efforts By Pentagon for Environmental Law Changes, 37 Env’t. Rep. (BNA) 1054 (May 19, 2006). It is interesting to contemplate why DOD’s arguments about problems with the existing statutory exemptions, the “paralyzing effect of environmental litigation on military readiness,” and the “insignificance” of the policy changes that would be made should the amendments pass, have only prevailed with respect to the laws protecting various species. Sislin, supra note 64, at 649.

See Sislin, supra note 64, at 667 (stating that the proposed amendments to RCRA in the latest iteration of the RRPI “would have changed the definition of ‘solid waste’ to affirmatively exclude ‘military munitions,’ including unexploded ordnance,” that have been dropped on the firing range and left there). RCRA would continue to cover munitions that have been deposited offsite, or that have migrated there. Id. at 668. Similarly, the proposed FY 2005 changes to CERCLA would have changed the definition of “release” to exclude unexploded ordnance deposited on a firing range during their normal and
Existing requirements would apply only to ordnance that has been deposited outside the perimeter of an operational training range or on an abandoned range. The EPA's ability to respond to problems that develop on active firing ranges would be restricted to those that cause an "imminent and substantial endangerment," and even then the agency could only use its more limited powers under the SDWA or CERCLA.

The DOD argued that these proposed changes to existing law would merely codify existing federal regulations under the Military Munitions Rule (MMR). The Department also contended that the proposed amendments were not "major policy alterations" and would not present a significant risk to human health or the environment.

Quite the contrary, if these amendments had been enacted, their effect on human health and the environment would have been enormous and would have represented a significant departure from existing law. For example, the proposed amendments to RCRA expected uses, and which remain where they have been deposited. Id. at 667. Like RCRA, CERCLA would still cover "military munitions [or their constituents] that migrate or are deposited off an operational range, or that remain on the range" after its use has been discontinued. Id. at 668. See generally id. at 667-70 (discussing in more detail the FY 2005 proposed exemptions to RCRA and CERCLA and their legislative travails).


See Dycus, supra note 5, at 47.

Under the MMR when munitions are abandoned preceding disposal, removed from storage for disposal, have deteriorated to the point of obsolescence, or are determined to be solid waste by a military official," they fall within RCRA's requirements. Sislin, supra note 64, at 666. But, if munitions are being used for their "intended purpose," i.e., being fired or being used during training or research, "when they are destroyed during range clearance operations," or are being reused or recycled, they are no longer abandoned and, therefore, not susceptible to regulation under RCRA. Id. See id. at 665-68 (providing a more detailed look at the MMR and DOD's proposed changes to it).

See Sislin, supra note 64, at 670 (saying "DOD claimed that the exemptions were limited in scope, mere clarifications of existing rules governing the military's hazardous waste responsibilities")

Sislin notes that the proposed amendments will result in "significant policy and definition changes" in existing laws, reduce opportunities for "government and public oversight of hazardous waste management on DOD lands," and permit "the continued unregulated emissions of . . . hazardous contaminants into soil and groundwater at DOD facilities," thus imperiling public health. Id. at 649-50. As recently as 2003, the EPA opposed the proposed changes to RCRA and CERCLA saying that it would make "judicious" use of its authorities on active firing ranges as it has in the past and would consult with the military "to minimize any disruption in military readiness." Dycus, supra note 5, at 48-49 (citing EPA, EPA's Comments on DOD's FY 04 Legislative Proposals to the
and CERCLA would have affected approximately 24 million acres of land.\textsuperscript{145}\ They were not limited to military readiness activities and "could thus conceivably" have exempted any munitions or unexploded ordnance from the regulatory reach of these laws, "as long as the munitions and ordnance were being put to their 'normal and expected use.'"\textsuperscript{146} The proposed legislative changes to the MMR "would [have] exempt[ed] most used munitions and munitions constituents from RCRA's cleanup protocols, if ... [they] had been 'deposited incident to their normal use.'"\textsuperscript{147} By including "munitions constituents" for the first time under the MMR, the exemption would have covered some very troublesome chemicals like perchlorate and white phosphorous.\textsuperscript{148} These contaminants can "leach into soil or ground water beneath military firing ranges and cause demonstrable harm to human health."\textsuperscript{149}

Limiting the circumstances in which regulators could investigate and remediate contamination of soil and groundwater to situations where the contamination has migrated offsite from an operational range or where the range itself is no longer being used\textsuperscript{150} would have substantially increased the difficulties and costs of remediation as well as health risks from exposure.\textsuperscript{151} Further, restricting the EPA's ability to respond to "imminent and substantial endangerment" threats on active firing ranges to its authority under the SDWA and CERCLA would have increased the risk to public health and the environment because those laws have significant limitations.\textsuperscript{152}

\textsuperscript{145} See Sislin, \textit{supra} note 64, at 670 (stating that 24 million acres of land would have qualified as "operational ranges").

\textsuperscript{146} \textit{Id.} at 671.

\textsuperscript{147} \textit{Id.} at 672: DOD claims that the changes to the MMR would apply only to operational ranges, but according to the Defense Authorization Act for FY 2004, an "operational range" is "a range that is under the jurisdiction, custody, or control of the Secretary of Defense and (A) that is used for range activities or (B) although not currently being used for range activities, that is still considered by the Secretary to be a range and has not been put to a new use that is incompatible with range activities." \textit{Id.} at 670-71 (emphasis added). Sislin points out that this "could include a range that has been defunct since World War I, but that still contains used munitions deposits remaining after live-fire training." \textit{Id.} at 671.

\textsuperscript{148} \textit{Id.} at 672.

\textsuperscript{149} \textit{Id.}

\textsuperscript{150} \textit{Id.} at 672-73.

\textsuperscript{151} \textit{Id.} at 674.

\textsuperscript{152} See, e.g., \textit{id.} at 675 (pointing out that DOD's reliance on the SDWA to protect public health is misplaced because the Act is "fundamentally" not a remedial statute and "applies
DOD has asked as well for three additional years to come into compliance with CAA's conformity requirements. This extension would be applied to each activity at the base and the base itself, and could start anew for each new activity. The states would also be given three additional years to accommodate the new increases in pollution by offsetting or otherwise reducing releases from other sources. This delay is intended to enable the armed forces “to deploy new weapons at various installations and to move or ‘realign’ existing forces among the various bases without having to worry about the impacts on air quality.” This change would enable the military to transfer training operations to areas with poor air quality and avoid any possibility of restrictions on these operations because of the emissions that they might produce.

These changes to the CAA are potentially quite serious. Depending on how the military chooses to redistribute its forces and equipment, a particular base could remain out of conformity “indefinitely.” There were no limits placed on the amount by which releases from military readiness activities may exceed national ambient air quality standards. Dycus points out that the “[e]ngines for virtually all new weapon systems will burn hotter, and will, therefore, emit more nitrogen oxides.” This means that areas that are in nonattainment for nitrogen oxides, like southern

largely to public water systems, . . . not to private water wells or agricultural irrigation,” and would not cover any of the “over two hundred contaminants derived from military munitions, including perchlorate,” while pursuing remediation under CERCLA is extremely cumbersome, resource intensive, and time consuming).

153 42 U.S.C. § 7506(c) (2000). DOD sought, as an inclusion in the National Defense Authorization Act for FY 2006, a three-year extension for military readiness activities to come into compliance with a state implementation plan (SIP), which would start anew for each new activity at a particular location. This relief would not only apply to the particular military facility or activity, but to the state as well. This would allow states additional time to accommodate or offset these emissions. See Dycus, supra note 5, at 51-52.

154 Id. at 52.
155 Id. at 52.
156 Id. at 50-51.
157 See DOD, supra note 61, at 5 (stating that the exceptions to the CAA would have a “strongly positive” impact on the environment because they would facilitate realignment of units from closing bases, reducing the total number of DOD facilities and substantially reducing aggregate, nationwide DOD emissions, while only “temporarily” authorizing less than 0.5% of total emissions in air regions) (emphasis in original).

158 Dycus, supra note 5, at 52.
159 Id. DOD responds to this accusation by saying that the proposed amendments only “temporarily” authorize military readiness activities to exceed national ambient air quality standards and at a level that “typically” amounts to “less than 0.5% of total emissions in each region.” Id.
160 Id. at 51.
California, and that are desirable locations for military buildups, can expect to see their air quality worsen.\textsuperscript{161} States, although relieved for three years from having to institute temporary measures to offset these new emissions; will in reality be forced to either shift the burden of complying with CAA standards to the private sector or expose their populations to the health risks associated with high levels of air pollutants during the exemption period.\textsuperscript{162}

\textbf{B. Constraining the Release of Public Information}

Congress and the Administration have also waged a less visible, but equally serious attack on the laws requiring public disclosure of information in the government’s possession and public participation in government decisionmaking.\textsuperscript{163} Even though this assault does not specifically target environmental laws, public disclosure of information is critical to their effective implementation, especially with regard to information about environmental risks. An informed public can do a better job of protecting itself than an uninformed one,\textsuperscript{164} and can provide more useful and specific com-

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  \item \textsuperscript{161} See id. (noting that the military would like to deploy a new Joint Strike Fighter and Marine Advanced Amphibious Assault Vehicle in southern California and have the flexibility to move fighter aircraft squadrons from closed bases to new locations without forcing an area into nonattainment or increasing the seriousness of the nonattainment).
  \item \textsuperscript{162} Even though states get temporary relief from having to bring nonattainment areas into compliance or amend their SIPs, eventually, they will have to make adjustments unless the military is able to reduce its level of emissions. Reflecting this concern, the Environmental Council of States wrote letters in April 2006 to the Chairmen of the Senate and House Armed Services Committees, saying “[w]hile we are very supportive of our military’s efforts and recognize the need to train and maintain military readiness, we do not believe DOD has made a convincing case for the proposed changes to multiple environmental laws.” Roeder, \textit{supra} note 137 (quoting from the letters). The National Association of Attorneys General, the National Council of State Legislatures, the Association of State and Territorial Solid Waste Management Officials, the National League of Cities, and the Association of Metropolitan Water Agencies also wrote letters expressing their opposition to the pending amendments. \textit{Id.}
  \item \textsuperscript{164} Professor Bradley Karkkainen observes that the dissemination of information through the Toxics Release Inventory (TRI) improves environmental regulation of toxic
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ments on agency initiatives and plans to protect the public, leading to "more rational" and better-supported agency decisions. Information disclosure "empower[s]" local citizens and communities and "promote[s] democratic decision-making."

Knowledge will forever govern ignorance; and a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.

An informed citizenry can also pressure industry (through, for example, litigation, boycotts, and proxy initiatives) to comply with environmental laws and reduce environmental and health risks, as the Toxics Release Inventory (TRI) has demonstrated since its inception.

Because of the effectiveness of an informed citizenry, nearly all environmental laws require disclosure of information to the public about releases of pollutants into the environment as well as actions taken by federal agencies with respect to permits, land management plans, and the protection of certain species, fragile resources, and important habitats. Some laws, like substances in three ways: (1) by lowering the "barriers" to acquisition of corporate information, communities can more easily verify or learn of environmental problems; (2) "by strengthening the community's informational hand," TRI levels the negotiation playing field with corporations; and (3) by requiring corporations to disclose such information, plant managers become more aware of the environmental record of their firms, and "thereby improve the information base upon which they make crucial decisions." Bradley C. Karkkainen, Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?, 89 GEO. L.J. 257, 316-17 (2001).


165 Id.


167 During the first eight years after the TRI was implemented, the total amount of toxic material released into the environment fell from 10.4 billion pounds in 1987 to 2.6 billion pounds in 1995. See ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 377-78 (3d ed. 2000). Much of this large reduction in toxic releases has been credited to the reporting requirement. See CMA Initiative Cuts Toxic Emissions 49 Percent Over Six Years, Official Says, 27 ENV'T REP. (BNA) 11 (May 3, 1996).

168 For example, applicants for Prevention of Significant Deterioration (PSD) permits under the CAA must gather continuous air quality monitoring data for a year prior to application, which must then be made public at the time of application. 42 U.S.C. § 7475(e)(2) (2000). Under the CWA, 33 U.S.C. § 1318 (2000), holders of National Pollution Discharge Elimination System (NPDES) permits must disclose discharge monitoring reports and other information submitted to environmental regulators (except on a showing that such disclosure would "divulge methods or processes entitled to protection as trade secrets"). EPCRA, 42 U.S.C. § 11023 (2000), requires disclosure of the type and amount of toxic chemical spilled or released into the environment and the results of emergency response efforts for facilities that: (1) are involved in manufacturing, (2) employ more than
NEPA\textsuperscript{170} and EPCRA,\textsuperscript{171} have public disclosure of information at their heart. Additionally, the APA requires that almost all agency proceedings be held on the record, which is to be open to public review, and that agency rulemaking initiatives be preceded by public notice and comment.\textsuperscript{172} FOIA compels agencies to make certain documents available for public review,\textsuperscript{173} and the Federal Advisory Committee Act directs agencies to abstain from holding secret proceedings.\textsuperscript{174} More recently, Congress has sought to promote federal agency use of the Internet for public information purposes. For example, in 1996, Congress enacted the Information Technology Management Reform Act\textsuperscript{175} to ensure that government agencies used new technologies to improve access to public information and public participation in government decisionmaking.\textsuperscript{176} That same year, Congress also passed the Electronic Freedom of Information Act\textsuperscript{177} to encourage agencies to use the Internet and new information collection and dissemination systems and to protect as well as expand public access to these systems.

\textsuperscript{171} 42 U.S.C. §§ 6921(b), 6922 (2000).


There is an obvious tension between the need to keep certain information from the public for reasons of national security and the public disclosure and public participation requirements of these laws. However, as is the case with environmental laws, existing public disclosure laws accommodate this tension and give the armed forces considerable discretion to withhold confidential or classified information, including during litigation. For example, FOIA protects from disclosure information that the President has determined by executive order should be kept secret “in the interest of national defense or foreign policy.”178 As noted previously, this exemption applies to information that might otherwise be disclosed in environmental impact statements.179 Other disclosure laws contain similar limitations.180

The military has also successfully used the common law “state secrets” privilege to protect security sensitive environmental data during litigation challenging its actions.181 Recently, the government has used this privilege to dismiss such cases outright.182 Once

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179 See supra text accompanying note 47.
180 See, e.g., the Government in the Sunshine Act, 5 U.S.C. § 552b(c)(1) (2000) (containing language similar to FOIA, § 552(b)(1)(A)); and the Federal Advisory Committee Act, 5 U.S.C. app. 2 §§ 10(a)(2), 10(b), 10(d) (2000) (providing in § 10(a)(2) that meetings can be closed to the public in the interest of national security, in § 10(b) subjecting public availability of records to § 552 of FOIA, and in § 10(d) limiting openness of meetings to constraints imposed by the Government in the Sunshine Act).
181 The state secrets privilege enables the government to deny discovery of military secrets. See United States v. Reynolds, 345 U.S. 1 (1953). Willard and his co-authors identify an additional privilege, the Totten Doctrine, under which contracts for secret services can be “kept secret forever.” Willard et al., supra note 22, at 86-87. Willard and his co-authors note that the privilege has the potential to be “even more powerful than the state secrets privilege because it requires immediate dismissal of the case [by the court once invoked] without the in camera review or disentanglement of the non-sensitive items.” Id. at 87.
182 For more recent use of the state secrets privilege by the government to actually dismiss lawsuits, see Neil A. Lewis, U.S., Citing State Secrets, Challenges Detainee Suit, N.Y. TIMES, May 13, 2006, at A12 (describing the government’s use of the state secrets privilege as a basis for asking that “the case . . . be dismissed at the outset,” and saying that the state secrets doctrine, until recently, was used to “prevent classified information from being introduced in civil suits,” but now is being used to “stop trials altogether”); Neil A. Lewis, Federal Judge Dismisses Lawsuit By Man Held in Terror Program, N.Y. TIMES, May 19, 2006, at A21 (reporting that the United States District Court granted the government’s motion, even though the facts of the case had been “widely reported”). See also Dana Priest, Secrecy Privilege Invoked in Fighting Ex-Detainee’s Lawsuit, WASH. POST, May 13, 2006, at A3 (“For at least the fifth time in the past year, the Justice Department yesterday invoked the once rarely cited state secrets privilege to argue that a lawsuit alleging government wrongdoing should be dismissed without an airing . . . .”); Reuters, U.S. Asks for Suit Against AT&T to Be Dismissed, WASH. POST, May 14, 2006, at A8 (describing the government’s filing of a motion to intervene and dismiss a lawsuit brought by a civil liberties
the state secrets privilege is deployed, it is absolute and immune to any showing of necessity by the plaintiff. The Ninth Circuit, in *Kasza v. Browner*, remarked that the state secrets privilege has “constitutional underpinnings” and rejected out-of-hand plaintiffs’ argument that RCRA’s presidential waiver constitutes the only statutory exemption from the law’s requirements. Illustrating the potential breadth of the privilege, Willard and his co-authors point out that the appellate court in *Kasza* employed the “mosaic theory” to justify withholding seemingly innocuous data, if, when those data were analyzed, they could “result in the identification of military operations and capabilities.”

Despite the ability to withhold national security information from public disclosure, Congress and the Administration have taken several steps to constrain FOIA’s applicability even more and to make it more difficult for the public to get access to information under the Act. For example, Congress included provisions in the Homeland Security Act exempting from FOIA critical information voluntarily submitted to government agencies by pri-

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183 133 F.3d 1159 (9th Cir. 1998). Courts generally have an obligation to try to disentangle sensitive from non-sensitive information. *Id. at 1166*. According to Ichter, although the Court in *Weinberger v. Catholic Action*, 454 U.S. 139 (1981), did not mention the state secrets privilege, nonetheless, given the sources that the Court relies on as a basis for its holding, placing military initiatives beyond the reach of NEPA “makes clear that it is grounded in state secret privilege.” *Ichter, supra* note 47, at 639, 670.

184 *Kasza*, 133 F.3d at 1167-68. *See also* Willard et al., *supra* note 22, at 85. (saying that the state secrets privilege “may well be at the head of the list of common law privileges”). In *Kasza*, the privilege was supported by an unclassified declaration signed by the Secretary of the Air Force and other documents that were classified and filed with the court for in camera review. *See also Ichter, supra* note 47, at 675 (saying that “[w]hen the privilege is invoked to neutralize statutory schemes intended to guide government operations, courts should carefully scrutinize both the use of such a privilege and the conflicting public policies involved”).

185 *Kasza*, 133 F.3d at 1182.

private entities "regarding the security of critical infrastructure and protected systems, analysis, warning, interdependency study, recovery, reconstitution, or other informational purpose." Critical infrastructure information is defined in the statute as information not customarily in the public domain, which is related to the security of critical infrastructure or protected systems. In some cases this definition would include information the public would have an interest in, such as operational problems with these facilities and repairs to them. The legislation makes criminal the knowing use or disclosure of that information, except in furtherance of an investigation or the prosecution of a criminal act, or when disclosure of the information is to Congress or the Comptroller General. The punishment for violating the law is a fine of not more than $100,000 and/or imprisonment for up to one year, as well as removal from public office or employment.

The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 amends the SDWA to exempt from dis-

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187 See Homeland Security Act of 2002, Pub. L. 107-296, § 204, 116 Stat. 2135 ("Information provided voluntarily by non-Federal entities or individuals that relates to infrastructure vulnerabilities or other vulnerabilities to terrorism and is or has been in the possession of the Department shall not be subject to [FOIA]."). The term "critical infrastructure information" means information not customarily in the public domain and related to the security of critical infrastructure or protected systems." 6 U.S.C. § 131(3) (2000 & Supp.). "Protected system" is defined to include "any service, physical or computer-based system, process, or procedure that directly or indirectly affects the viability of a facility of critical infrastructure," including not only computers, but also "any communications network," "hardware," "software program, processing instructions, or information or data in transmission or storage" regardless of the means of transmission or storage. § 131(6).

188 Among other things, critical information includes information about: (a) actual, potential, or threatened interference with, attack on, compromise of, or incapacitation of critical infrastructure or protected systems by either physical or computer-based attack or other similar conduct; (b) the ability of any critical infrastructure or protected system to resist such interference, including any planned or past assessment, projection, or estimate of the vulnerability of critical infrastructure; and (c) any planned or past operational problem or solution regarding critical infrastructure or protected systems, including repair, recovery, reconstruction, insurance, or continuity, to the extent it is related to such interference. § 131(3).

189 The legislation does not restrict individuals or the government from independently obtaining information and does not apply to any information that is lawfully and properly disclosed generally or broadly to the public.

190 The Critical Infrastructure Information Act (CIIA) states that an individual may be fined under Title 18, which provides that an individual guilty of a Class A Misdemeanor may be sentenced to up to one year in prison and a $100,000 fine. 6 U.S.C. § 133(f) (2000 & Supp.).


closure under FOIA assessments made by water providers “to
determine their [facilities’] vulnerability to intentional acts that
could significantly harm public health.”¹⁹⁴ These facility assess-
ments, as well as any description of the use, storage, and handling
of various chemicals, cannot even be provided to state or local offi-
cials without the EPA’s approval. While there have been various
measures introduced in recent congressional sessions to restore
FOIA, to date, none of them has even made it out of
Committee.¹⁹⁵

In the months following 9/11, the Administration issued three
internal memoranda further weakening FOIA’s provisions. The
first of these, the Ashcroft Memorandum, advises agency heads
that “[a]ny discretionary decision to disclose information protected
under FOIA should only be made after full and deliberate consid-
eration of the institutional, commercial, and personal privacy inter-
est that could be implicated by disclosure of the information,”¹⁹⁶
and directs them to require that the public show a “need to know”
the information it seeks before it is disclosed. This latter require-
ment contrasts starkly with the original presumption of FOIA that
the public has a “right to know” most government information.¹⁹⁷

House Committee on Homeland Security since May 12, 2005) (revoking the Ashcroft and
Card Memoranda, and certain executive orders that limited access to presidential information,
and requiring the publishing of the names of presidential interagency advisory committee
(2005) (referred to the House Committee on Government Reform and the Senate Com-
mittee on the Judiciary’s Subcommittee on Terrorism, Technology and Homeland Security)
(strengthening FOIA’s procedures by setting time limits for answers to FOIA requests,
establishing a system of identification numbers to track requests, and creating the Office
of Government Information Services to review administrative FOIA procedures); Restore
to prohibit the withholding of voluntary records under the Critical Infrastructure Informa-
tion Act only if (1) the provider of the information would not normally make such infor-
mation available to the public, and (2) the record is designated as certified by the provider
as confidential and not customarily made available to the public).
¹⁹⁶ Memorandum from John Ashcroft, Att’y General, to Heads of All Federal Dep’ts
and Agencies (Oct. 12, 2001), available at http://www.usdoj.gov/04foia/011012.htm [herein-
after Ashcroft Memorandum]. The Ashcroft Memorandum superceded the 1993 FOIA
Memorandum of former Attorney General Janet Reno and replaced Reno’s “foreseeable
harm” test, which favored disclosure, with a “sound legal basis” test that favors nondisclo-
sure. Bill Berkowitz, Working for Change, the Freedom of Information Center, October 11,
¹⁹⁷ Congress specifically stated that one of the purposes of FOIA is “to establish and
enable enforcement of the right of any person to obtain access to the records of [federal]
agencies, subject to statutory exemptions, for any public or private purpose.” Pub. L. No.
The second memorandum, the Card Memorandum, issued by former White House Chief of Staff Andrew Card, directs agencies to withhold “sensitive but unclassified” data (i.e., data not automatically exempted from disclosure in response to FOIA requests). The Washington Post reported that the Pentagon removed approximately 6,000 DOD documents from disclosure in compliance with the Card Memorandum and lamented that now no one “outside of government can verify that any of those documents contained information that could help terrorists.”

The final memorandum, issued by Laura L.S. Kimberly, Acting Director of the Information Security Oversight Office, supplements the Card Memorandum. It broadly defines the term “sensitive information,” referred to in the Card Memorandum, as “government information regarding weapons of mass destruction, as well as other information that could be misused to harm the security of our nation or threaten public safety.” The memorandum directs that the disclosure to the public of sensitive, but unclassified, information should be “carefully considered, on a case-by-case basis,” alongside the “benefits that result from the open and efficient exchange of scientific, technical, and like information.”


200 Memorandum from Laura L.S. Kimberly, Acting Dir. Information Security Oversight Office, to Dep’ts and Agencies (Mar. 19, 2002), available at http://cio.doe.gov/Documents/wh031902.html. In addition to the congressional and Administration initiatives described above, the Bush Administration engaged in several other activities reflecting its extreme sensitivity to public disclosure of information it deems potentially useful to terrorists. In October 2001, the Bush Administration reduced the number of congressional officials allowed to attend intelligence briefings, allegedly because of leaks regarding potential future terrorist attacks. Dana Milbank & Peter Slevin, Bush Edict on Briefings Irks Hill: White House Siems Information Flow, WASH. POST, Oct. 10, 2001, at A1. Again, in October of that year, Chief Immigration Judge Michael Creppy issued a memo providing for blanket closures of all immigration proceedings deemed to be of “special interest.” George Lardner Jr., Democrats Blast Order on Tribunals: Senators Told Military Trials Fall Under President's Power, WASH. POST, Nov. 29, 2001, at A22. Since October 2001, the Bush Administration has steadfastly refused to reveal the names and identities of the people detained in the immediate aftermath of the terrorist attacks, until ordered to do so by the Southern District of New York. See Susan Sachs, Traces of Terror: Detainees: U.S. Defends the Withholding Of Jailed Immigrants' Names, N.Y. TIMES, May 21, 2002, at A01. See also Neil A. Lewis, Threats and Responses: The Detainees: Secrecy Is Backed on 9/11 Detainees, N.Y. TIMES, June 18, 2003, at A1 (“A sharply divided appeals court ruled today that the Justice Department was within its rights when it refused to release the names of
In spring of 2003, the Administration continued its assault on the public disclosure of information in the government's possession by amending President Clinton's executive order on national security information.\(^{201}\) President Bush's amendments to the Clinton order expanded the government's leeway to designate material as classified for longer periods of time than the previous order\(^{202}\) and reclassified previously released information.\(^{203}\) The amended order also broadened the government's ability to exempt certain categories of information from automatic disclosure by requiring that the government need only show that the information could hurt national security, if released. It additionally removed several provisions of the original order that were designed to protect against excessive secrecy by requiring that information be disclosed or classified at the lowest level of secrecy if there was any doubt about the propriety of its classification.\(^{204}\)

more than 700 people arrested for immigration violations in connection with the Sept. 11 terrorist attacks.\(^{201}\)); Linda Greenhouse, Justices Allow Policy of Silence on 9/11 Detainees, N.Y. TIMES, Jan. 13, 2004, at A1 ("Without comment, the court let stand a ruling by a federal appeals court here that had accepted the Bush administration's rationale for refusing to disclose either the identities of those it arrested, most of whom have since been deported for immigration violations unrelated to terrorism, or the circumstances of the arrests."); Associated Press v. DOD, 395 F. Supp. 2d 17 (S.D.N.Y. 2005) (ordering DOD to submit a questionnaire to each detainee regarding whether they wanted identifying information to be released to the Associated Press, which the court would then review to determine if it must be released under FOIA), \(reh'g denied\), Associated Press v. DOD, 410 F. Supp. 2d 147 (S.D.N.Y. 2006) (ordering DOD to provide the documents to the Associated Press). In November 2001, the Bush Administration issued Executive Order No. 13,233, 66 Fed. Reg. 56,025 (Nov. 3, 2001), expanding the ability of sitting and incumbent presidents to delay release of presidential records from the national archives. During the summer of 2002, the Bush administration also refused to reveal information regarding its implementation of the USA PATRIOT Act in response to congressional questions and only released the information after Congress threatened to subpoena the information. See Jeffrey Rosen, Liberty Wins—So Far: Bush Runs Into Checks and Balances in Demanding New Powers, WASH. POST, Sept. 15, 2002, at B1. Even then, the Administration asserted that much of the material was classified. Also during the summer of 2002, the White House requested that congressional officials produce documents and take lie detector tests to determine if they had leaked information regarding the September 11 attacks. Dana Priest, FBI Leak Probe Irrks Lawmakers: Many Spurn Polygraph Requests on Issue of NSA's 9/11 Intercept, WASH. POST, Aug. 2, 2002, at A1.


\(^{204}\) In October 2002, the Department of Justice announced a policy of aggressively enforcing existing laws to prevent disclosures of classified information and suggested that a new law criminalizing disclosures generally, not simply in the espionage context, might be helpful. Letter from John Ashcroft, Att'y General, to Congress and the President (Oct.
Almost immediately after the 9/11 attacks, "government agencies began removing from their Web sites environmental, health, or safety information they believed could, if disclosed, increase risks to public safety." For example, the EPA removed from its Web site emergency planning information for chemical facilities as well as information about adverse effects from exposure to various airborne chemicals. The agency also limited the "public's ability to search its Envirofacts database, which contains information about pollution and environmental compliance" at regulated industrial facilities. Nearly overnight, the EPA went from being "a leader" among federal agencies "in using the Internet as a public involvement tool" to something considerably less exuberant. Similarly, the Nuclear Regulatory Commission "removed a map of nuclear reactors from its web site and temporarily 'disabled its entire Web site,'" while the Department of Transportation "removed pipeline mapping information from its Web site," the United States Geological Survey removed reports on water resources, and the Agency for Toxic Substances and Disease Registry removed a report on chemical plant security.

These measures restricting the public availability of information are a "throw-back to the 1970s," when little information was available to the public about environmental risks. They reverse what was a pronounced trend before 9/11 "toward greater openness, increased public participation, increased information disclosure, and increased use of the Internet in federal and state government decision-making generally, and in environmental decision-making specifically." They also carry on DOD's long-standing culture of secrecy and record of keeping information hidden, even if disclo-


205 Johnson, supra note 165, at 110; see also John D. Echeverria & Julie B. Kaplan, Poisonous Procedural "Reform": In Defense of Environmental Right-to-Know, 12 Kan. J.L. & Pub. Pol'y 579, 596-98 (2003) (noting that "industry and its allies focused on the national security issue with a great deal more intensity following September 11th,... encouraging EPA to bar, at least temporarily, any public access" to information concerning the off-site consequences of accidental releases of extremely hazardous materials and that states including New Jersey and Pennsylvania also removed critical infrastructure information from their agencies' Web sites).

206 Echeverria & Kaplan, supra note 205, at 597.

207 Johnson, supra note 165, at 110.

208 Johnson, supra note 165, at 123.

209 Johnson, supra note 165, at 110-11.

210 Echeverria & Kaplan, supra note 205, at 598.

211 Johnson, supra note 165, at 109.

212 Johnson, supra note 165, at 122.
sure would not threaten national security. These changes in public disclosure laws not surprisingly parallel the pre-9/11 non-security related efforts by some regulated industries to "limit disclosure of toxic release inventory data, under EPCRA," as well as "information regarding 'violations discovered during environmental audits of those facilities.'"

The substantive changes to environmental laws will make, or have already made, substantial inroads into the effectiveness of those laws. The new laws and policies discouraging, and in some cases prohibiting, public disclosure of information about environmental risks and government activities under these laws will only make these problems worse.

V. THESE CHANGES TO ENVIRONMENTAL AND PUBLIC DISCLOSURE LAWS ARE TROUBLING

The combination of an unhappy armed forces and a "self-declared," politically compelling "war against terror" has turned out to be lethal, not only for civil liberties but also for the laws and policies that protect the environment and the public's access to critical information about environmental risks. This situation is made worse by the breadth of the new authorizations and by the lack of institutional checks on the armed forces to prevent them from abusing their new authorities or causing serious environment-

213 See Dycus, supra note 7, at 5. Dycus highlights a situation where residents downwind from the nuclear weapons plant at Los Alamos were not notified when radionuclides were released into the air. Id. When the environmental engineer found that the laboratory was not complying with EPA regulations for air emissions of radionuclides, "his [DOE] supervisors warned him to write only 'positive factual statements' about the laboratory's radiation program in the future, then transferred him to other duties." The EPA only learned of the emissions when the engineer "informally" contacted the agency with his information. Id. at 52. Similarly, at the Rocky Flats site, DOE only admitted that radionuclide contamination had gone off the plant site in 1967 after a group of independent scientists discovered plutonium in the soil outside the plant's boundaries in 1970. The truth about the " sloppy production line practices and other problems at the plant" leading up to the 1969 contamination were "well-concealed in secret documents" until the 1990s. Len Ackland, The Press, "National Security," and Nuclear Weapons: Lessons from Rocky Flats, 24 LAND RESOURCES & ENVTL. L. 17, 22-23 (2004). For a description of the process piecing together the history of national security events, such as the experiments at Los Alamos, see Robert W. Seidel, Clio and the Complex: Recent Historiography of Science and National Security, 134 PROC. AM. PHIL. SOC'Y 420, 421 (1990) (discussing the problems historians face researching issues involving postwar science because of the "secrecy of scientific work related to national security concerns" and saying that the "lack of rigor and substance in treating military technology may be due in part to the secrecy surrounding it").

214 Johnson, supra note 165, at 115-16 (saying these initiatives were for "primarily economic," not national security reasons).
tal harm. It will not be easy to restore the prior legal regime, and
the impact of military activities under the new laws may well be
irreversible.

There will be no external check on how the military administers
the exemptions detailed throughout this article. The courts have
traditionally played a limited role in reviewing the military’s
actions, especially during wartime and when foreign policy and
presidential discretion are involved.\(^{215}\) Since what Kmiec calls the
Court’s “full-throated judicial endorsement”\(^{216}\) of military deci-
sionmaking in times of war in Hirabayashi v. United States in
1943\(^{217}\) through the recent Fourth Circuit opinion in Hamdi v.
Rumsfeld,\(^{218}\) the courts have been reluctant to curb the armed
forces.\(^{219}\) Kmiec notes that even during “colder periods” of war,
the judicial branch has been only slightly more vigorous in preserv-
ing certain civil liberties, such as free speech claims made against
classified information.\(^{220}\) While it is still too soon to predict the
ability of the USA PATRIOT Act to withstand claims of civil liber-

\(^{215}\) See Kmiec, supra note 2, at 272. Kmiec describes Justice Frankfurter’s ambivalence
in Korematsu v. United States, 323 U.S. 214, 225 (1944), about judicial review of military
action, saying “on the one hand” the Justice wrote that the “business of war was the mili-
tary’s,” and, “on the other hand,” that “review of military action is of no greater strain on
judicial capability than the Court determining whether Congress has stayed within the
Commerce power,” which today it does quite regularly. Kmiec, supra note 2, at 278. See
also supra text accompanying note 49 (discussing Valley Citizens for a Safe Env’t v. Vest).

\(^{216}\) Kmiec, supra note 2, at 272-73.

\(^{217}\) 320 U.S. 81 (1943).

\(^{218}\) Hamdi v. Rumsfeld, 296 F.3d 278, 284 (4th Cir. 2002) (saying “allowing alleged com-
batants to call American commanders to account in federal courtrooms would stand the
warmaking powers of Articles I and II on their heads”), rev’d and remanded, Hamdi v.

\(^{219}\) See, e.g., Chappell v. Wallace, 462 U.S. 296 (1983) (illustrating courts’ reluctance to
interfere in command relationships or in military decisions on training and equipping);
Gilligan v. Morgan, 413 U.S. 1 (1973) (finding no justiciable controversy was presented in
an appeal by the Kent State student government against the Ohio National Guard’s actions
in response to the 1970 civil demonstrations at Kent State), cited by Willard et al., supra
note 22, at 80. See also DYCUS, supra note 7, at 156 (highlighting Wisconsin v. Weinberger,
745 F.3d 412 (7th Cir. 1984) where the court found that even though there was no national
defense exemption to NEPA at that time, and the Navy had not even asserted such a
defense, environmental protection was outweighed by the larger interests of society in
national defense).

\(^{220}\) Kmiec, supra note 2, at 272 (saying that “the judiciary has, by conscious, institutional
choice, played little role during hot war and reserved its relatively rare attempts at constitu-
tional boundary-keeping to post-war analysis. In cold war, there has been greater, but
still infrequent judicial involvement.”). Kmiec goes on to opine that while “rights matter,”
they are “subject to diminution both by one’s own government and by the terror that
threatens the continuation of one’s government,” and that “the Court’s job is to keep a
jealous eye on both threats, or at least not to blind the executive from doing so.” Id. at
294.
ties violations, Kmiec sees deference to military decisions "in the early judicial response to the war on terrorism."221 Given the current Supreme Court's general hostility toward environmental laws,222 it may be easier to predict that the military will get the benefit of the doubt in its implementation of these new environmental exemptions and will be able to justify the removal of critical environmental information from public view.223 Since courts usually defer to presidential determinations of what is in the "paramount interests of the United States,"224 there is no reason to expect them to react differently to claims under the various amendments to FOIA or the new post 9/11 administrative measures.

No other institution is likely to have the power and impetus to curb the military's excesses under the new exemptions. Widespread paranoia about future terrorist attacks, political polarization, and the Bush Administration's recent aggressive use of the "unitary executive theory" make it highly unlikely that Congress will provide any real check on the military.225 The proposed

221 Id. at 281. For an example of the danger of complete abdication to the military, see Korematsu v. United States, 323 U.S. 217, 248 (1944) (J. Jackson, dissenting and objecting to the Court's undertaking review of the matter) ("The military reasonableness of [military] orders can only be determined by military superiors... [T]he courts wield no power equal to its restraint."). See also Kmiec, supra note 2, at 272.

222 See generally Richard Lazarus, Thirty Years of Environmental Protection Law in the Supreme Court, 19 PACE ENVT'L. L. REV. 619, 620-21 & 631 (2002) (stating that in the author's view, the Supreme Court decisions over the past thirty years demonstrate the Court's lack of "appreciation of environmental law as a distinct area of law," and noting the "increasingly... disfavored role" of, and the Justices' skepticism about the efficacy of, environmental protection goals in influencing the Court's outcome).

223 See, e.g., Weinberger v. Romero-Barcelo, 456 U.S. 305, 318 (1982) (holding that the existence of presidential exemption from the permitting requirements of the CWA does not require the lower court to enjoin the Navy for an unpermitted discharge of ordnance, and finding that the exemption specifically permits "noncompliance by federal agencies in extraordinary circumstances"); Natural Res. Def. Council v. Watkins, 954 F.2d 974, 982 (4th Cir. 1992) (finding that the "Executive branch possesses ultimate unilateral authority to prevent any compromise to national security concerns," and finding that Court's holding in Romero-Barcelo showed that a presidential exemption "could completely isolate a non-complying federal facility from the purview of the courts"); Australians for Animals v. Evans, 301 F. Supp. 2d 1114, 1128-29 (N.D. Cal. 2004) (deferring to NMFS' reasonable judgment that sonar research on gray whales would cause no harm); Natural Res. Def. Council v. Evans, 279 F. Supp. 2d 1129, 1139, 1189-92 (N.D. Cal. 2003) (saying "the Court will not second guess the Navy's determination within its expertise that it needs to test and train with LFA sonar in a variety of oceanic conditions," and refusing to enjoin all uses of LFA sonar systems).

224 See, e.g., Kasza v. Browner, 133 F.3d 1159, 1173-74. (9th Cir. 1998).

225 The Administration has aggressively used an expanded version of this theory to claim exclusive authority for actions that previously were considered to require congressional concurrence. For example, after signing the "torture amendment" to the USA PATRIOT Act, President Bush sent out an email "signing statement" to members of Congress stating
changes to RCRA and CERCLA, if enacted, will prevent state and federal government agencies from auditing military activity or monitoring the impacts of those activities on the environment.\textsuperscript{226} The restrictions on the disclosure of information to the public will prevent the press and environmental groups from effectively overseeing the armed forces' use of their newfound powers. And the broader public cannot be expected to check the actions of the military as it has generally acquiesced in the much more visible loss of civil liberties outlined in the early parts of this article,\textsuperscript{227} and is mostly unaware of how environmental laws have been, or may be, weakened in the name of national security.

The idea of the armed forces being beyond the reach of meaningful judicial review is especially troubling because the military will be granting itself relief from laws that have always vexed it.\textsuperscript{228}

that he would interpret the amendment “in a manner consistent with the constitutional authority of the president to supervise the unitary executive branch and as commander in chief and consistent with the constitutional limitations on judicial power.” Elisabeth Bumiller, For President, Final Say on a Bill Sometimes Comes After Signing, N.Y. TIMES, Jan. 16, 2006, at A1; cf. Bob Egelko, How Bush Sidesteps Intent of Congress: Instead of Vetoing Bills, He Officially Disregards Portions with which He Doesn’t Agree, SAN FRANCISCO CHRON., May 7, 2006, at A1 (noting that after signing a military spending bill that contained a much-fought-over provision banning cruel, inhumane, or degrading treatment of detainees, President Bush published a notice in the Federal Register asserting his right to ignore the ban when necessary to protect Americans from terrorists). See also John Yoo, Transferring Terrorists, 79 NOTRE DAME L. REV. 1183, 1200 (explaining that during war the country needs the strength of “a single hand” when making decisions that affect the “strength of enemy forces, the morale of our troops, the gathering of intelligence about the dispositions of the enemy, the construction of infrastructure that is crucial to military operations, and the treatment of captured United States servicemen”) (citing THE FEDERALIST NO. 70, at 500 (Alexander Hamilton) (Jacob E. Cooke ed., 1982)); Stephen J. Hedges & Mark Silva, Bush: No Laws Were Broken, CHI. TRIB., May 12, 2006, at A1 (reporting on the Bush administration’s defense of the NSA’s creation of a database of all Americans’ phone calls in the face of requests for Congressional oversight); Charlie Savage, Bush Challenges Hundreds of Laws: President Cites Powers of His Office, BOSTON GLOBE, Apr. 30, 2006, at A1 (stating that Bush has asserted his power to set aside any statute, including military rules, passed by Congress when it “conflicts with his interpretation of the Constitution” and that legal scholars have viewed the Bush administration’s assertions as a “concerted effort to expand his power at the expense of Congress, upsetting the balance between the branches of government”).

\textsuperscript{226} See Sislin, supra note 64, at 675 (noting that the "proposed exemptions would circumvent current governmental authority under RCRA and CERCLA to monitor DOD's sampling and mitigation of toxic munitions waste," thus making DOD's regulation of perchlorate "essentially voluntary" under the SDWA).

\textsuperscript{227} See supra Part III.

\textsuperscript{228} Showing how easy it is to turn the military environmental clock backward, on March 9, 2005, DOD withdrew a 1996 directive indicating that the Department would integrate environmental factors into its decisionmaking and do what it could to protect, preserve and restore, as well as enhance, the quality of the environment, requiring instead only compliance with "applicable laws and DOD policies." Dycus, supra note 5, at 4 n.8 (quoting
Self-regulation is problematic, even in the best of circumstances, but here it is made worse by the military's long history of non-compliance with environmental laws. The DOD's recent efforts to conserve habitat and protect species on military lands, as well as its environmental research initiatives and attempts to mitigate the effects of toxic contaminants, while commendable, do not begin to offset its record as one of the country's "worst polluters" and the fact that military facilities and lands are among the most contaminated in the nation. For example, 129 of the 177 federal facilities on CERCLA's National Priorities List belong to DOD. Military ranges are contaminated with chemicals that are known or possible
human carcinogens, neurotoxins, and teratogens.\textsuperscript{234} The pending exemptions, if enacted, will enable the military to add to that inventory of abuse.

The language of the exemptions and proposed exemptions is extremely broad\textsuperscript{235} and vague, creating the potential that many more activities may be swept into their protective coverage than even Congress intended. Because the wildlife exemptions were enacted as riders to appropriations bills, there was little or no floor debate on them and, consequently, almost no limiting legislative history.\textsuperscript{236} As noted previously, the lack of meaningful legislative standards in the amendments will hamper what judicial review of military action does occur,\textsuperscript{237} creating a very real risk of “mere convenience masquerading as military necessity.”\textsuperscript{238}

The changes and proposed changes to environmental laws partially exempt the military permanently from the regulatory reach of those laws. Unlike the prior system, under which the President issued narrowly focused, temporary waivers on a case-by-case basis, these legislative exemptions are for poorly defined, broad classes or categories of activities and will last indefinitely. The fact that the “war on terror” has no foreseeable end makes it highly likely that these changes will become permanent.\textsuperscript{239} Since most of

\begin{footnotesize}
\begin{enumerate}
\item Sislin, \textit{supra} note 64, at 653-54. Sislin singles out perchlorate, a material used in rocket fuel, as a toxic chemical of particular concern. Perchlorate contaminates groundwater and military manufacturing and test sites are primary contributors. \textit{Id.} at 654-55.
\item The exemptions are also not restricted to DOD, but extend to military research laboratories and testing facilities, as well as to private contractors and consultants and their facilities.
\item See Townsend, \textit{supra} note 7, at 66 (commenting that the amendment to the MMPA passed as most appropriation packages do – “without significant public awareness or congressional debate”); Rep. Rahall (D. W.Va.) objected to the fact that the Stump Act was passed as a rider to a military appropriation bill, thus avoiding committee jurisdiction and public debate.
\item See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413 (1971) (holding that courts cannot review agency action when there is “no law to apply”). \textit{See also} Korematsu, 323 U.S. 214 at 246 (1944) (Jackson, J., dissenting) (“The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of urgent need. . . . A military commander may overstep the bounds of constitutionality, and it is an incident. But, if we review and approve, that passing incident becomes the doctrine of the Constitution.”).
\item See Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction, V. Forging America’s New Normalcy: Securing Our Homeland, Preserving Our Liberty 2 (2003) (“There will never be an end point in America’s readiness. Enemies will change tactics, citizens’ attitudes about what adjustments in their lives they are willing to accept will evolve, and leaders will be confronted with legitimate competing priorities that will demand attention.”).
\end{enumerate}
\end{footnotesize}
them were legislatively promulgated, as opposed to administratively promulgated, they can only be removed by a subsequent act of Congress. Strong interests will develop a stake in the new policies, making it difficult to return to the days of environmentally protective regulation and public oversight. The synchronicity of governmental and industrial interests will make it particularly hard to return to the prior regime.

Even if the exemptions are ever removed, their impact may be irreversible. Species that are lost as a result of the abandonment of the incidental take provisions in the MBTA and MMPA or curtailment of habitat protection programs are unrecoverable. Should the proposed changes to RCRA and CERCLA become law, contaminated soil and groundwater will remain contaminated until the contaminants leave the military reservation. At that point, it will be extremely difficult and costly to clean up the contamination, and the damage may already have been done. Military contaminants are highly toxic and often create "highly unconventional environmental hazards," including "extremely corrosive and highly radioactive" liquid waste, unexploded ordnance, and "defoliant production residue." More air and water pollution, particularly in parts of the country already suffering from these problems, will increase public health risks and eventually cause harm.

These are particularly perilous times for the nation, made even more so by changes to basic constitutional and environmental protections. An atmosphere of fear affecting both Congress and the public, a compliant judiciary faced with broad, amorphous standards, and a gag on information about covered activities mean there will be little to no check on how the military implements these new and proposed statutory exemptions. Given the military's status as environmental renegade rather than good citizen, there is much to worry about, especially in light of the very real possibility that these exemptions will be in effect for a very long time, if not forever. The question remains, however, whether the changes to environmental and public disclosure laws discussed in this article are nonetheless warranted by circumstances.

\footnote{Applegate, \textit{supra} note 238, at 354-55.}
VI. The Circumstances of September 11 Do Not Warrant a Rollback of Environmental and Public Disclosure Laws

The 9/11 attacks may well have provided useful cover for the military to return to a regulatory regime in which it felt more comfortable.²⁴¹ This is not to say that some tweaking of the existing system of presidential waivers might not have been in order. However, empirical support is lacking for the military’s claims that environmental laws are impeding military readiness and that disclosure of information about environmental and public health risks may undermine national security. Until such support is provided, the broad changes that Congress and the Administration have made to the laws, as well as those changes currently under consideration, seem unwarranted. Instead, there seems to be ample support for the proposition that the 9/11 attacks provided DOD with an opportunity that it seized to get relief from laws that it has resisted for decades.²⁴²

There are many reasons to doubt the genuineness of the armed forces’ repeated statements about the crucial importance of an unfettered capacity to train and prepare soldiers for combat in Afghanistan and Iraq and their demonization of environmental regulations for impeding that effort.²⁴³ Prominent among those

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²⁴¹ The 9/11 events have also provided useful cover for both an anti-environmental Administration and for certain key members of Congress, like Rep. Richard Pombo, Chair of the House Resources Committee, Rep. Billy Tauzin, Chair of the House Energy and Commerce Committee, and Sen. James Inhofe, Chair of the Senate Environment and Public Works Committee, on whom the DOD has been relying to advance its agenda with some expectation of success. Truban, supra note 8, at 141.

²⁴² Barefoot-Watambwa, supra note 8, at 614 (saying “the military’s encroachment agenda attached itself to the momentum of September 11th couched in the necessity for ‘military readiness’” and enabled it to “rid itself of environmental burdens that it ironically claims forms a part of their every day experience and an essential part of their mission”). Barefoot-Watambwa points out how the Navy had already targeted the MMPA as a law being used in a way that was far-removed from its original purpose of regulating commercial fishing’s impact on marine mammals and was highly critical of its “precautionary approach,” vague legislative history on, and regulatory definitions of, key legislative terms, “lack of quality data,” and limited scientific information on issues of concern to the Navy, like the acoustic impact of sonar on marine mammals. Id. at 600. The Navy particularly complained about “buffer areas, restrictions on night-time operations, and prohibitions on the use of explosives.” Id.

reasons is that the initiatives contained in the RRPI relieving the military from compliance with three critically important wildlife laws were under development before 9/11.\textsuperscript{244} Further, many of the pollution control laws from which the armed forces have sought relief have been in effect for over thirty years. With the exception of an occasional lawsuit, these laws have not constrained the armed forces.\textsuperscript{245} Furthermore, "no President has ever denied a request from the military for exemptions from an environmental statute," and there appear to be no examples where pollution control laws have actually, as opposed to theoretically, interfered with military readiness activities.\textsuperscript{246} As Dycus points out, the military's initial success in Afghanistan and Iraq was achieved under pre-9/11 training and weapons testing conditions.\textsuperscript{247}

Despite the lack of evidence that military readiness has actually been compromised by environmental laws, the military's arguments have gained sufficient traction to get broad, perhaps permanent, relief from important wildlife laws, and it is unabashedly seeking similar relief from basic pollution control laws by mounting

\textsuperscript{244} See Dan Myers & Everett Volk, "W" for War and Wedge? Environmental Enforcement and the Sacrifice of American Security – National and Environmental – To Complete the Emergence of a New "Beltway" Governing Elite, 25 W. New Eng. L. Rev. 41, 84 (2003) (claiming that prior to September 11, 2001, an environmental public interest group learned DOD "planned to seek broad exemptions of many federal environmental laws for military readiness activities, all in the name of national security"); Barefoot-Watambwa, supra note 8, at 600 (commenting that the Navy, in December 2000, had developed a plan targeting the MMPA).

\textsuperscript{245} See Sislin, supra note 64, at 658 (citing Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'ys of the Army, Navy, and Air Force (2003) ("In the vast majority of the cases, we have demonstrated that we are able both to comply with environmental requirements and to conduct necessary military training and testing.").\textsuperscript{246} See also Dycus, supra note 5, at 5-6 (Paradoxically, the way Wolfowitz suggested achieving the "twin imperatives of producing the best-trained military force in the world and providing the best environmental stewardship [was to] . . . adopt sweeping permanent exemptions from compliance with some environmental laws, [rather than] relying on individual executive waivers based on case-by-case determinations of need.").

\textsuperscript{246} Sislin, supra note 64, at 649-50 (saying arguments about "the inadequacy of the existing exemption structure, the paralyzing effect of environmental litigation on military readiness, and the narrow scope of the exemptions . . . tend to reflect unfounded concern rather than grounded fact"). With respect to RCRA and CERCLA particularly, there was sufficient flexibility under the MMR and the CERCLA national security exemption for the military to meet national security needs without sacrificing environmental protection. Id. at 650.

\textsuperscript{247} Dycus, supra note 5, at 9.
the same arguments. The military's largely unmonitored activities under these exemptions could be as, if not more, damaging to the environment than what occurred on its bases before environmental regulations took hold. In this time of "war," the military will be able to self-regulate. Based on prior experience, it is reasonable to assume that the courts will give the military substantial deference in its use of these exemptions, and that neither the public nor Congress will display much interest in constraining military activities. Because of the changes to public disclosure laws, much of what the military does and the effects of those activities will be withheld from public view.

These changes to environmental and public disclosure laws are preemptive as they seek relief before any problem occurs, and thus they fit within the broader national response to the events of 9/11. However, it is difficult to see how any of them will prevent another 9/11 from occurring. It may be harsh to say, but not unreasonable to conclude, that DOD "rode the wave of public insecurity of another terrorist attack" to rid itself of environmental and public disclosure burdens it has been chafing under for decades.

VII. Conclusion

Gostin sets up a hierarchy of risk to try to understand when state intervention in private matters to protect public health is justified. He concludes that "well-targeted" state intervention in high-risk situations is appropriate, but that intervention is inappropriate when there is a "negligible risk," because in such situations it "violates basic tenets of liberalism" without "substantially advance[ing] any collective interest in health and security." For "moderate risks," which present the difficult cases for risk regulators, Gostin proposes a "framework for balancing the goods of personal freedom and public security." This framework consists of "traditionally successful mechanisms, like the democratic process, checks and balances, clear criteria for decisionmaking, and judicial procedures designed to control the abuse of power by governmental agencies." As the country appears at present to be in a time of

248 Barefoot-Watambwa, supra note 8, at 614.
249 Gostin, supra note 7, at 1139-40.
250 Id. at 1139.
251 Id. at 1159.
252 Id. at 1161.
moderate risk,\textsuperscript{253} Gostin's framework offers a useful analytical approach for evaluating the appropriateness of the government's actions described in this article.

Not surprisingly, given current circumstances, all of the elements of Gostin's framework are missing in the government's response to the perceived risk of future terrorist actions with respect to environmental and public disclosure laws. The changes to basic laws appeared as riders to appropriation bills or as internal Administration memoranda, and, as such they were made without public debate, outside of the democratic process and the glare of media attention.\textsuperscript{254} Because the government has clamped down on the release of information that would be critical to the public functioning as a check on potential abuses under these exemptions, because it is highly unlikely that Congress will act as a corrective in the face of questionable, even excessive action by the military, and because courts give great deference to the military in time of war, there will be no external check on how the military proceeds to balance environmental protection with the needs of national security. In all that they do, the armed forces will be largely self-regulating, which, if the past is prologue to the future, does not bode well for the environment.

\textsuperscript{253} Most of the country appears to be at yellow, or at an elevated risk level, which is at the middle of the spectrum. See Department of Homeland Security, Threats & Protection: Advisory System, http://www.dhs.gov/dhspublic/display?theme=29 (last visited Oct. 30, 2006).

\textsuperscript{254} See Gostin, supra note 7, at 1163 (stating that often "public health officials, outside the gaze of the media and the political process, make choices covertly").