

Whale Watching from 200 Feet Below: A New Approach to Resolving Operational Encroachment Issues

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I. INTRODUCTION

“The only way in which a navy can ever be made efficient is by practice at sea, under all the conditions which would have to be met if war existed.”¹ The men and women of the Navy who serve on seagoing warships understand this maxim all too well. They experience the hardships of going to sea, primarily leaving family and home for extended periods of time, just as Roosevelt’s Great White Fleet did a century ago. Family separation is even more difficult to withstand when it is endured not to fulfill the Navy’s primary mission of maritime dominance through force, but to prepare for the time when such force may be required. Indeed, considering that today’s Navy has seen little in the way of traditional maritime warfare, it is fitting that Chief Justice Roberts incorporated President Roosevelt’s quotation in an important decision concerning the balance between military training and environmental protection.²

Military training objectives and environmental protection have been at odds for years.³ One can argue, not unconvincingly, that military training by land, air, or sea is inherently antithetical to environmental protection.⁴ The essential goal of the armed forces—to protect the sove-

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1. 42 CONG. REC. 67, 81 (1907) (statement of President Theodore Roosevelt).

2. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 382 (2008).

3. Environmental protection groups have sought judicial injunctions against the military since 1977, when the Navy was sued over the use of bombing ranges on the Hawaiian island of Kaho’olawe. See *Aluli v. Brown*, 437 F. Supp. 602 (D. Haw. 1977), *rev’d*, 602 F.2d 876 (9th Cir. 1979).

4. See Nancy 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 (2002). Ms. Bethurem describes the physical, cultural, and sociological impact military training

reign territories of the United States—requires each uniformed service to be ready to engage hostile enemies in any locale with destructive impact. This need for readiness does not mean that the military necessarily and institutionally disregards potential environmental impacts when planning training operations. However, the emergence of strong national environmental protection laws presents a fundamental conflict for military leadership. How does the Department of Defense (DOD) reconcile the laudable goals of these environmental protection laws with the need for realistic military training?

The term “operational encroachment” has been used to encapsulate the description of this often abrasive relationship.⁵ Operational encroachment occurs when the court system issues injunctive relief against the DOD in the interest of promoting compliance with environmental laws.⁶ The armed forces have repeatedly encountered the issue of operational encroachment when conducting training scenarios; from California to North Carolina, Hawaii and Puerto Rico, the Army, Air Force, Navy, and Marine Corps have been forced to significantly alter or altogether cease the manner in which they had previously trained.⁷

Most recently, the Navy was embroiled in a legal battle while attempting to carry out extensive battle group training exercises off the coast of southern California.⁸ The primary dispute concerned the use of mid-frequency active (MFA) sonar and the potential deleterious effects that MFA sonar has on marine mammals.⁹ The plaintiffs successfully obtained a preliminary injunction requiring the Navy to implement several restrictive mitigation measures. The case reached the U.S. Supreme Court in October of 2008 for final adjudication.¹⁰

What could have sparked a genuine factual investigation—of whether the Navy’s use of MFA sonar posed a threat to marine life and what depth of MFA sonar training was required by the Navy—instead

exercises have on the environment by providing examples spanning from digging trenches to dropping bombs. *Id.*

5. Eric Montalvo, *Operational Encroachment: Woodpeckers and Their Congressmen*, 20 TEMP. ENVTL. L. & TECH. J. 219, 223 (2002). The author does not claim to have coined the phrase, but it has since become widely used.

6. *Id.*

7. See Colonel E.G. Willard et al., *Environmental Law and National Security: Can Existing Exemptions in Environmental Laws Preserve DOD Training and Operational Prerogatives Without New Legislation?*, 54 A.F. L. REV. 65 (2004). Encroachment can occur when the protection of an endangered species or wildlife habitat affects military training. *Id.* Two well-known examples of operational encroachment include the protection of the Desert Tortoise in California and of the Red-cockaded Woodpecker in North Carolina. *Id.*

8. See *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008).

9. *Id.*

10. *Id.*

sparked a legal shell game that did not effectively resolve the underlying issue of balancing these conflicting priorities. The Legislature's failure to create a system that adequately balances these priorities has resulted in unpredictable and costly lawsuits.

Most environmental laws contain provisions to allow for exemptions in the interest of national security, but it is difficult to state a definitive policy regarding these exemptions because the legal requirements are inconsistent.¹¹ There is no clear statutory scheme to dictate who grants an exemption, under what circumstances an exemption is appropriate, or what the military needs to do to obtain an exemption. To promote efficiency and predictability, and more importantly to clearly define the license of the armed forces in carrying out daily training exercises, Congress should resolve these inconsistencies. By reforming current environmental laws to establish a uniform standard and by creating a new commission to apply that standard, a balance between national security and protecting the environment can be attained.

Part II of this Comment analyzes current federal environmental protection laws to illustrate the inconsistent approach to providing national security exemptions. This inconsistent approach underscores the vast potential for litigation. Part III further exposes the potential for litigation by discussing the recent Supreme Court decision in *Winter v. Natural Resources Defense Council*.¹² Finally, Part IV proposes several possible solutions for resolving existing inconsistencies and inefficiencies to achieve a proper balance between environmental protection and appropriate levels of military training.

II. NATIONAL SECURITY EXEMPTIONS IN ENVIRONMENTAL LAWS

Armed with a host of environmental laws that contain citizen suit provisions, environmental protection groups wield the threat of injunctive relief when it appears that non-wartime military action may cause environmental harm. Foreseeing the potential for revolving door litigation between the government and activist groups, Congress created various mandatory exceptions and exemptions for military actions that are in the interest of national security. However, the extent and form of such exemptions are anything but uniform.

A. Existing National Security Exemptions

While most federal environmental statutes have some form of exemption for issues of national security, the following are particularly ap-

11. See *infra* Part II.

12. 129 S. Ct. 365.

plicable to military training scenarios and are most likely to enter the dialogue in operational encroachment cases.¹³

1. The Clean Air Act

The Clean Air Act allows the President to issue regulations that exempt any equipment of the armed forces from compliance with the Act for three years if the President finds the exemption to be in the paramount interest of the United States.¹⁴ The President holds a nearly identical power under the Clean Water Act (CWA).¹⁵

2. The Endangered Species Act

Under the Endangered Species Act (ESA), a unique statutory scheme is in place where the Endangered Species Committee shall exempt any agency's action if the Secretary of Defense finds that the action is necessary for national security.¹⁶ While this specific exemption has never been invoked, the Secretary's exemption power seems unlimited.¹⁷

3. The Migratory Bird Treaty Act

Another statute with a national security exemption, and one that has recently been used in an attempt to enjoin military training exercises, is the Migratory Bird Treaty Act (MBTA).¹⁸ After both the Navy and Air Force had been separately precluded from using a bombing range out of concern for birds protected under the Act, Congress wrote into the Fiscal Year 2003 Defense Authorization Act that the MBTA did not apply to military readiness activities.¹⁹ This temporary fix applies until the Secretary of Interior writes regulations codifying the exemption or until a subsequent Congress repeals the exemption.²⁰

13. Several statutes that also have national security exemptions built in are not discussed because they do not particularly apply to military training scenarios. These include the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675, 9620(j) (2006); the Toxic Substances Control Act, 15 U.S.C. §§ 2601–2629, 2621 (2006); and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6992, 6961(a) (2006).

14. 42 U.S.C. §§ 7401–7431, 7418(b) (2006).

15. 33 U.S.C. §§ 1251–1376, 1323(a) (2006).

16. 16 U.S.C. §§ 1531–1544, 1536(j) (2006).

17. Willard et al., *supra* note 7, at 73–74.

18. 16 U.S.C. §§ 703–712, 704 (2006).

19. Willard et al., *supra* note 7, at 77–78.

20. *Id.*

4. The Marine Mammal Protection Act

The Marine Mammal Protection Act (MMPA) likewise contains an exemption for military activities.²¹ If the Secretary of Defense determines that military action would violate the Act by taking a marine mammal and that such action is necessary for national defense, the Secretary may issue a two-year exemption.²² Within thirty days of granting the exemption, the Secretary must report the terms of and reasons for the exemption to the Senate and House Armed Services Committees.²³

5. The Coastal Zone Management Act

Under the Coastal Zone Management Act (CZMA), when federal agencies plan to take action that affects any land or water use or natural resource of the coastal zone, they are required to comply with applicable state laws to the greatest extent possible.²⁴ The CZMA allows for an exemption that can be utilized for military activities.²⁵ After a federal court finds that a federal activity is noncompliant with a state coastal zone management plan, the President may exempt the activity if it is of paramount interest to the United States.²⁶

B. *The National Environmental Policy Act*

Passed in 1969, the National Environmental Policy Act (NEPA)²⁷ is a unique statute, one that is largely policy centered, as opposed to regulatory, and one that commands agencies to undertake informed decision-making with regard to environmental effects as opposed to providing a list of prohibitions and penalties.²⁸ Enacted to “declare a national policy which will encourage harmony between man and his environment,”²⁹ NEPA has since been described as “the most successful environmental law in the world and the most disappointing.”³⁰ Initially, NEPA was thought to have little regulatory force, but through an influential decision

21. 16 U.S.C. §§ 1361–1407, 1371(f) (2006).

22. *Id.*

23. *Id.*

24. *Id.* §§ 1451–1464, 1456(c)(1)(A).

25. *Id.* § 1456(c)(1)(B).

26. *Id.*

27. 42 U.S.C. §§ 4321–4370 (2006).

28. Lynton K. Caldwell, *Beyond NEPA: Future Significance of the National Environmental Policy Act*, 22 HARV. ENVTL. L. REV. 203, 204–207 (1998).

29. 42 U.S.C. § 4321.

30. Oliver A. Houck, *Is that All? A Review of the National Environmental Policy Act, An Agenda for the Future*, by Lynton Keith Caldwell, 11 DUKE ENVTL. L. & POL’Y F. 173, 173 (2000) (book review).

by the D.C. Circuit³¹ and a set of regulations written by the President's Council on Environmental Quality in 1978,³² the Act was given some bite.³³

Two important aspects of NEPA are relevant to issues of operational encroachment. First, NEPA requires agencies to craft an environmental impact statement (EIS) when considering an action that will significantly affect the environment.³⁴ Second, NEPA created the Council on Environmental Quality (CEQ), an executive three-member panel responsible for reporting to the President on a host of environmental issues and assisting in interpreting and enforcing NEPA.³⁵

A notable exception to the previously discussed environmental laws, NEPA provides no statutory exemption for issues of national security.³⁶ However, it provides a close equivalent. Where emergency circumstances require action that will have a significant environmental impact but preclude construction of an EIS, the agency may consult with the CEQ to make alternative arrangements.³⁷ Thus, while not the same as an executive waiver, the President still retains some ability to circumvent the requirements of the Act through the CEQ.

C. Problems with the Current Framework of National Security Exemptions

From the military's perspective, there are many problems associated with the way exemptions are currently implemented under the previously discussed Acts.³⁸ The most obvious problem with the current

31. In an emphatic opinion written by Judge Skelly Wright, the D.C. Circuit reviewed several actions under NEPA and ensured that the legislative aims of NEPA would be enforced. *Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

32. Exec. Order No. 11,991, 42 Fed. Reg. 26,967 (May 24, 1977). This Executive Order provided the committee, previously empowered to issue only advisory guidelines, with regulatory power. *Id.*

33. *See* Houck, *supra* note 30, at 181–85. The author argues that the Act as originally written was too ambiguous to provide any judicial guidance—possibly too ambiguous to pass congressional vote. *Id.* The author further argues that the current Supreme Court clearly views NEPA as no more than a public disclosure mechanism that threatens the autonomy of agency decision-making. *Id.* at 185. Perhaps foreshadowing the result in *Winter*, the author points out that NEPA is zero for twenty-two in the halls of the Supreme Court. *Id.* at 185–86.

34. 42 U.S.C. § 4332. The EIS must include detailed statements explaining the environmental impact and adverse environmental effects of the proposed action, alternatives to the proposed action, and any irretrievable commitments of resources involved in the proposed action. *Id.* A completed EIS is subject to public disclosure in accordance with the Federal APA. 5 U.S.C. § 552 (2006).

35. 42 U.S.C. §§ 4342, 4344.

36. *See supra* Part II.A; 42 U.S.C. §§ 4321–4370.

37. 40 C.F.R. § 1506.11 (2006).

38. *See* Willard et al., *supra* note 7, at 87. The authors argue that it is infeasible to obtain exemptions for regular training operations. *Id.* But *see* Hope Babcock, *National Security and Environmental Laws: A Clear and Present Danger?*, 25 VA. ENVTL. L.J. 105, 117–19 (2007).

exemption framework is that it generally requires intervention from the highest level of the Executive Branch.³⁹ This problem is closely related to the next. The current system is suited to one-time, isolated events that are irreconcilable with environmental laws. When such isolated events arise, it may be appropriate to require the President to intervene and balance the importance of the military mission with the potential environmental impact. However, operational encroachment rarely involves a one-time, isolated event; it is far more likely to occur with regular and recurring training events. In recognition of the unsuitability of current exemptions to one-time scenarios, the DOD has commented that, while being “a valuable hedge against unexpected future emergencies, [the current statutory scheme of exemptions] cannot provide the legal basis for the Nation’s everyday military readiness activities”⁴⁰ The result is “death by a thousand cuts” from “having to employ these exemptions on a case-by-case basis.”⁴¹

Other military concerns are notable, including the potential for release of classified information due to exemption reporting requirements;⁴² so-called “negative training”;⁴³ increased wear and tear when equipment is shipped to locations suitable for an exercise;⁴⁴ and the significant financial costs involved in attempting to comply with exemption requirements.⁴⁵

While most environmental statute exemptions name the same granting authority (the President) and invoke the same standard (paramount interest to the United States), there are differences among the statutes that introduce inconsistencies and inefficiencies to the process. For example, the ESA, the MBTA, and the MMPA all require action by the Secretary of Defense rather than the President.⁴⁶ Some exemptions last for one year, others for two years, yet each exemption is limited to one

39. See, e.g., the Clean Air Act, 42 U.S.C. §§ 7401–7431, 7418(b) (2006); the Clean Water Act, 33 U.S.C. § 1323(a) (2006); the Coastal Zone Management Act, 16 U.S.C. §§ 1451–1464, 1456(c)(1)(B) (2006).

40. Willard et al., *supra* note 7, at 87. See also *Critical Challenges Confronting National Security—Continuing Encroachment Threatens Force Readiness: Hearing Before the H. Comm. on Government Reform*, 107th Cong. (2002) (statements of Raymond F. DuBois, Jr., Deputy Under Secretary of Defense for Installations and Environment & Paul Mayberry, Deputy Under Secretary of Defense, Readiness), [hereinafter *Hearing on Continuing Encroachment*].

41. Willard et al., *supra* note 7, at 87.

42. Babcock, *supra* note 38, at 118.

43. *Hearing on Continuing Encroachment*, *supra* note 40. Negative training is the result of artificialities that are forced into training scenarios, which reinforce tactics contrary to what will be employed in real combat. *Id.*

44. *Id.*

45. *Id.*

46. See *supra* Part II.A.

specific planned event.⁴⁷ Exemptions have different reporting requirements.⁴⁸ And most importantly, NEPA—arguably the most powerful of the environmental laws—contains no exemption at all.⁴⁹

The current framework can hardly satisfy environmentalists either. While the military may worry that the standard of “paramount interest” that is most often invoked lacks the requisite specificity to effectively guide judicial scrutiny,⁵⁰ the same ambiguity may explain the judiciary’s tendency to grant significant deference to military decisions.⁵¹ The statutory language allowing exemptions is broad and vague, permitting a wide array of military action to be included where perhaps Congress intended something much narrower.⁵² Furthermore, proponents of further transparency regarding exemptions and of limiting deference to military decision-making cannot rely on the vast enforcement potential of NEPA because its effectiveness in the courts is dubious.⁵³

While the application of each environmental law poses interesting questions, it is this contradictory view of NEPA—a broad and powerful statute without a national security exemption, yet one that lacks judicial backing—that made the litigation of *Winter v. Natural Resources Defense Council*⁵⁴ so compelling for the future resolution of operational encroachment issues.

III. THE COLLISION OF ENVIRONMENTAL AND DEFENSE CONCERNS

One does not have to look far to see a clear example of the problems with the status quo. *Winter* shows how citizen suits can be used to halt military training and move environmental issues to the forefront of

47. For example, under the ESA, exemptions are presumed to be permanent, 16 U.S.C. § 1536(h)(2) (2006); CWA exemptions last for one year, 33 U.S.C. § 1323(a) (2006); and MMPA exemptions last for two years, 16 U.S.C. § 1371(f)(2)(B) (2006).

48. The CZMA contains no specific reporting requirements. 16 U.S.C. § 1456 (2006). Under the CWA, the President must report all exemptions to Congress every January. 33 U.S.C. § 1323 (2006). The MMPA requires the Secretary of Defense to report to a congressional committee within thirty days of granting an exemption. See *supra* Part II.A.4.

49. See *supra* Part II.B. It is somewhat ironic that the loudest champion of NEPA’s inception was Washington Senator Henry M. Jackson, whose name would later be used for the Ohio-class submarine SSBN-731. While the USS Henry M. Jackson is not equipped with MFA sonar, it is safe to say that using NEPA to enjoin the use of MFA sonar runs contrary to the mission and goals of the submarine force.

50. Babcock, *supra* note 38, at 118.

51. *Id.* at 147–50. See also Julie G. Yap, *Just Keep Swimming: Guiding Environmental Stewardship Out of the Riptide of National Security*, 73 FORDHAM L. REV. 1289, 1337 (2004).

52. Babcock, *supra* note 38, at 151.

53. Yap, *supra* note 51, at 1298 (“[t]he history of judicial deference to the military’s declarations of national security concerns makes NEPA an ineffective tool for communities” to stop major military actions).

54. 129 S. Ct. 365 (2008).

legal and media focus.⁵⁵ This Part will provide a brief discussion of the military's history with environmental litigation, in particular with regards to NEPA, to provide a context from which *Winter* can be fully appreciated.

A. Historical Military Compliance with Environmental Statutes

As a result of unclear congressional intent regarding sovereign immunity and a national desire to win the Cold War at all costs, for decades the military seemed immune to suit for environmental damage.⁵⁶ The 1990s, however, signaled significant changes to the culture of eco-consciousness within the DOD.⁵⁷ The close of the Cold War allowed senior civilian defense leadership to state goals of environmental protection and good faith compliance with the regulations and restrictions placed upon other federal agencies.⁵⁸ At the same time, sound environmental policy was advanced as a supporting tenet of national security rather than an irreconcilable difference.⁵⁹ Not unlike the current emphasis on renewable energy to lower dependence on foreign oil, the argument that resource scarcity can lead to ethnic conflicts, massive migrations of peoples, or insurgencies has been critically tied to the defense of the United States and its allies.⁶⁰

To be sure, the shift in focus at the DOD was not driven solely by a newfound ecological altruism. At the same time that the DOD began to shift some of its priorities to focus on environmental stewardship, lawsuits were filed under various citizen suit statutes to force compliance on the military.⁶¹

Despite actions within the DOD such as the creation and appointment of a Deputy Undersecretary of Defense (Environmental Security) and the publishing of a comprehensive environmental strategy,⁶² efforts

55. See, e.g., Bill Mears, *Court Sides With Navy in Dispute Over Sonar and Whales*, CNN, Nov. 12, 2008, <http://www.cnn.com/2008/TECH/science/11/12/navy.sonar.whales/> (last visited July 26, 2009); Juliet Eilperin & Jerry Markon, *Justices Revoke Limits on Navy Use of Sonar*, WASHINGTON POST, Nov. 13, 2008, at A4.

56. See Donald N. Zillman, *Environmental Protection and the Mission of the Armed Forces*, 65 GEO. WASH. L. REV. 309, 314 (1997) (reviewing STEPHEN DYCUS, NATIONAL DEFENSE AND THE ENVIRONMENT (1996)).

57. Bethurem, *supra* note 4, at 114–15.

58. *Id.* at 114–18.

59. *Id.* at 114 (quoting Seth Shulman, *Operation Restore Earth*, ENV'T, Mar./Apr. 1993, at 38).

60. See generally Sanford E. Gaines, *Sustainable Development and National Security*, 30 WM. & MARY ENVTL. L. & POL'Y REV. 321 (2006) (discussing the argument that environmental factors are intimately tied to issues of national security).

61. See Bethurem, *supra* note 4.

62. *Id.* at 115–16. The DOD established an environmental program with four pillars that focused on restoration from past contamination, compliance with environmental statutes, reduction in pollution, and preservation of natural resources. *Id.*

to force the military into environmental stewardship were mounting on Capitol Hill.⁶³ For the first time, operational encroachment was being discussed with the Legislature in an effort to strike an appropriate balance between military training needs and environmental protection.⁶⁴

In May of 2001, the U.S. House Committee on Government Affairs held hearings to discuss the effects of operational encroachment on military readiness and training.⁶⁵ After hearing testimony from several military leaders regarding the detrimental effects of operational encroachment, the Committee issued a letter to President Bush stating that the availability of realistic military training was eroding and that the Administration needed to address the issue to maintain force readiness.⁶⁶

Perhaps as a counter-response to the Committee's findings, the next month, Representative Bob Filner proposed the Military Environmental Responsibility Act, H.R. 2154, to the House.⁶⁷ The bill would have eliminated any exemption, exception, or waiver for the military in any state or federal environmental statute, placing the military on the same plane as any private individual or corporation.⁶⁸

Like most issues, it is clear that members of the House were split on how to approach military compliance with environmental protection laws. What appeared to be a mounting conflict was soon derailed, however, as the terrorist attacks of September 11, 2001, enhanced the nation's focus on military readiness. As the President repeatedly briefed the United States on the pending war on terrorism, it appeared that a "paradigm shift" had occurred in the United States; the ground swelling of patriotism and support for U.S. troops reached levels unseen in over a generation.⁶⁹ A nation at war does not have the heart or desire to impact military training at home.⁷⁰

Even as public support for the military has remained at extremely high levels, the unpopularity of the wars in Iraq and Afghanistan has les-

63. *Id.* at 120–22.

64. *Id.*

65. *Id.* at 120. That same month, the U.S. House of Representatives, Armed Forces Committee and Military Readiness Subcommittee also discussed the problems associated with encroachment. *Id.* at 122 n.73.

66. *Id.* at 122.

67. *Id.* at 123. Representative Filner represents San Diego, California, an area with a very strong military presence and community support for environmental protection. Representative Bob Filner—Biography, <http://www.house.gov/filner/biography.htm>.

68. Bethurem, *supra* note 4, at 123.

69. *Id.* at 126.

70. *Id.* at 126–28. The author argues that where the military once was viewed as a nuisance, it has regained its national security "trump card." *Id.* Comparing post-9/11 U.S. patriotism to the 1940s, the author states, "During World War II, it would have been impossible to curb General Patton's tanks because of excessive air pollution or to stop General MacArthur's beach assaults because of threats to endangered species. Winning the war was foremost." *Id.*

sened the resolve to remain committed to high levels of military readiness at any cost. The Military Environmental Responsibility Act, forgotten immediately after the 9/11 attacks, has been reintroduced by Rep. Filner as H.R. 672 and is currently with the House Armed Services Subcommittee on Readiness.⁷¹ Whether it gains any traction with the Legislature remains to be seen.

B. Winter v. Natural Resources Defense Council

It is in this post-9/11 atmosphere that the case *Winter v. Natural Resources Defense Council*⁷² takes shape.

1. Factual Background

Naval forces based on the West Coast routinely deploy to the western Pacific and the Middle East, typically with an aircraft carrier or amphibious landing ship as the central warship and with three to five accompanying surface combatants.⁷³ Prior to deploying, each strike group must complete integrated training exercises during which the group is certified in various forms of warfare, including antisubmarine operations.⁷⁴ These training missions are crucial; without certification, strike groups are unable to deploy, affecting the operational rotation of other strike groups, or worse, hindering the nation's readiness for critical missions.⁷⁵

The Navy and Marine Corps have used the southern California operating areas (SOCAL) for these certifying exercises for over forty years because they compose the only location on the West Coast allowing the military to simulate every aspect of certification necessary for these large-scale operations.⁷⁶

One critical aspect of deployment certification is antisubmarine warfare (ASW).⁷⁷ To detect quiet diesel-electric submarines, such as

71. After a reintroduced bill died in the 110th Congress, Rep. Filner reintroduced it yet again for the 111th Congress. GovTrack.us, 111th Congress, H.R. 672: Military Environmental Responsibility Act, <http://www.govtrack.us/congress/bill.xpd?bill=h111-672> (last viewed July 6, 2009).

72. 129 S. Ct. 365 (2008).

73. Brief for the Petitioner-Appellant, at 3–4, *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008) (No. 07-1239).

74. *Id.* at 4.

75. *Id.*

76. *Winter*, 129 S. Ct. at 370.

77. During strike group certification, accompanying ships must protect the high value unit (HVV) (typically an aircraft carrier or amphibious assault ship) from attack, in addition to supporting the HVV in conducting its primary mission. Deployments to the western Pacific and Middle East place HVVs in the way of several nations that operate modern diesel-electric submarines. The advantage of nuclear-powered submarines, such as those operated by the U.S. Navy, is range and the sustained capability to remain submerged. Unlike nuclear-powered submarines, however, diesel

those operated by potentially adversarial countries,⁷⁸ warships rely on the use of MFA sonar. The principle behind active sonar is simple, even if the implementation may be complex.⁷⁹ Varying levels of sound are emitted into the ocean, those sound waves reverberate off of items such as the ocean floor, mines, ice floats, ships, or submarines, and the return reverberations are received by the emitting ship. The sonar returns are processed and analyzed to create a picture of the ocean environment.⁸⁰ In this manner, warships can use active sonar not only for submarine detection but also for contact avoidance, sea floor mapping, and ice avoidance.⁸¹ MFA sonar is specifically designed to enhance the detection capabilities of warships, particularly in detecting modern, nearly silent diesel-electric submarines.⁸²

The Navy scheduled a series of fourteen training exercises in SOCAL to run from February 2007 to January 2009.⁸³ In preparation for these exercises, the government took several steps to attempt compliance with environmental statutes. First, the Navy determined that the use of MFA sonar during the exercises would not affect the California coastal zone and submitted a “consistency determination” to the California Coastal Commission pursuant to the CZMA.⁸⁴ Next, the Secretary of Defense issued a two-year National Defense Exemption under the MMPA for the use of MFA sonar in these exercises, citing the need to use MFA sonar in the interest of national defense.⁸⁵ Under the ESA, the National Marine Fisheries Service issued an “incidental take statement” allowing the Navy to take several species with the use of MFA sonar.⁸⁶ Lastly, the Navy completed a lengthy environmental assessment (EA) in

submarines can operate on battery power alone, which essentially eliminates machinery noise making them nearly impossible to detect with passive sonar alone. While the range of a diesel-electric submarine is less than that of a nuclear-powered one, the stealth and cost advantages make the diesel-electric submarines attractive warships for militaries with fewer resources than the United States.

78. Countries that operate quiet diesel-electric submarines in the Western Pacific and Indian Oceans include China, Russia, North Korea, Iran, Pakistan, and India. JANE’S FIGHTING SHIPS 2008–2009 (Commodore Stephen Saunders ed., 2008).

79. Brief for the Petitioner-Appellant, *supra* note 73, at 5.

80. Training and qualification on sonar systems are required of any submarine officer. Any error in this simplified explanation of sonar operation is the author’s alone.

81. Such alternative uses of active sonar are generally met through the use of high frequency active sonar rather than MFA sonar.

82. Brief for the Petitioner-Appellant, *supra* note 73, at 5.

83. *Id.* at 2.

84. *Id.* at 6. Under the CZMA, any federal agency undertaking any development program within the coastal zone of a state shall ensure that the action is compliant with the state’s resource management program. 16 U.S.C. § 1456(c)(1)(C) (2006).

85. Brief for the Petitioner-Appellant, *supra* note 73, at 7.

86. *Id.* at 8.

accordance with NEPA.⁸⁷ The EA concluded that the Navy's use of MFA sonar would not significantly impact the environment, making a full EIS unnecessary.⁸⁸

Despite the Navy's attempts to meet each applicable environmental law's requirements, several environmental protection advocates, including the Natural Resources Defense Council and Jean-Michel Cousteau, filed a claim alleging violations of ESA, CZMA, and most importantly NEPA.⁸⁹ The plaintiffs sought a preliminary injunction to prevent the use of MFA sonar during the integrated training exercises.⁹⁰

2. Procedural Background

While the procedural history of the case is complex, the district court essentially granted the plaintiffs' preliminary injunction in part, but withheld relief under the ESA claim due to little likelihood of success.⁹¹ The district court decided that there was probable success on the merits for both the NEPA claim—that the Navy failed to perform an EIS—and the CZMA claim—that the Navy's filing with the California Coastal Commission did not adequately account for the planned use of MFA sonar.⁹²

While the injunction was on appeal, the Navy attempted to achieve exemption from both the CZMA and NEPA for national security reasons.⁹³ The CEQ approved alternative arrangements that would allow the Navy to continue use of MFA sonar without completing an EIS, which in turn would effectively negate the NEPA claim.⁹⁴ That same day, President Bush granted an exemption from the CZMA requirements because completion of the exercises was in the "paramount interests of the United States."⁹⁵

Before hearing appellate arguments, the Ninth Circuit remanded the case to the district court to consider these executive actions.⁹⁶ The district court questioned the constitutionality of the President's exemption from the CZMA but ultimately upheld the injunction on the basis of the

87. *Id.* at 8–9.

88. *Id.* at 10.

89. *Natural Res. Def. Council, Inc., v. Winter*, 518 F.3d 658, 660–62 (9th Cir.), *rev'd*, 129 S. Ct. 365 (2008).

90. *Id.* at 661.

91. *Id.*

92. *Id.*

93. Brief for the Petitioner-Appellant, *supra* note 73, at 14–15.

94. *Winter*, 518 F.3d at 661. Under NEPA, the CEQ is allowed to make alternate arrangements with a federal agency when emergency circumstances make compliance with the Act's requirements impossible. 40 C.F.R. § 1506.11 (2006).

95. Brief for the Petitioner-Appellant, *supra* note 73, at 14.

96. *Id.* at 15.

NEPA claim.⁹⁷ The court concluded that the CEQ's alternative arrangements were invalid absent an emergency situation authorizing such action.⁹⁸ The Ninth Circuit agreed with the district court and upheld the injunction on the same grounds.⁹⁹

3. The Exposure of Current Statutory Shortfalls

The U.S. Supreme Court disagreed. The Court reversed the Ninth Circuit's decision and vacated the district court's preliminary injunction, holding that the Navy's need to conduct realistic training exercises outweighed the plaintiffs' interests in marine mammal protection.¹⁰⁰ While the Court's decision is intriguing on many levels, it is particularly useful in exposing the problems within the current framework of environmental law exemptions.

The Supreme Court focused its decision on three key factual issues: first, the veracity of the claim that MFA sonar undeniably harms marine mammals; second, the potential environmental harm required to trigger an EIS in lieu of an environmental assessment in accordance with NEPA; and third, the propriety of a federal district court judge halting the operations of such a complex naval exercise.¹⁰¹ After stating that irreparable injury to a plaintiff must be likely (rather than possible) to warrant an injunction,¹⁰² the majority criticized the lower courts for failing to adequately consider the public interest in national defense.¹⁰³ The Court

97. *Winter*, 518 F.3d at 661. While the district court expressed concern over the constitutionality of the President's actions (essentially describing it as executive review of a judicial decision), the court did not make a final decision on the constitutionality of the CZMA claim. *Id.* None of the higher courts took up the issue; it remains no more than a passing comment in this litigation. *Id.* Interestingly, the exemption allowed within the CZMA is explicitly granted to the President "[a]fter any final judgment, decree, or order of any Federal court that is appealable." 16 U.S.C. § 1456(c)(1)(B) (2006).

98. *Winter*, 518 F.3d at 661.

99. *Id.* at 687, 703.

100. *Winter*, 129 S. Ct. at 382.

101. *See generally* Transcript of Oral Argument, *Natural Res. Def. Council v. Winter*, 129 S. Ct. 365 (2008) (No. 07-1239). While discussion of each issue merits time and effort, this Comment focuses only on the argument that the Supreme Court is not the most efficient venue for these discussions. *See infra* Part IV.

102. *Winter*, 129 S. Ct. at 375. Squarely at issue here are the merits of the claims that MFA sonar will harm marine mammals. *Id.* Reasonable scientific minds have disagreed on the likelihood that active sonar emissions will injure marine mammals. However, the Supreme Court (at least Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Alito, and Breyer) seemed to place significant weight on the fact that similar naval exercises in SOCAL during the previous forty years showed no documented cases of sonar-induced injuries. *See id.*

103. *Id.* at 376 ("[E]ven if plaintiffs have shown irreparable harm from the Navy's training exercises, any such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors. A proper consideration of these factors alone requires denial of the requested injunctive relief.").

held that the balancing of equities tipped strongly in favor of the Navy because “forcing the Navy to deploy an inadequately trained antisubmarine force jeopardizes the safety of the fleet . . . and the President—the Commander in Chief—has determined that training with active sonar is essential to national security.”¹⁰⁴

The *Winter* decision brought to light several significant failings associated with granting environmental law exemptions to the military. First, although the district court opined that the President’s waiver of the CZMA was unconstitutional, the constitutionality of such executive action was never addressed due to the validity of the NEPA claim.¹⁰⁵ Had NEPA been written with a national security exemption, the constitutionality of the President’s waiver could have been decided.¹⁰⁶ As written, however, the nation’s environmental laws do not promote a clear and unified policy regarding the balancing of national security interests.

Second, despite the Navy’s best efforts to comply with the statutory exemptions as written, it was still forced to defend against the plaintiffs’ ESA and CZMA claims.¹⁰⁷ Because the statutes that authorize environmental law exemptions each have different requirements and citizen suit provisions, the military will experience a revolving door of litigation whenever it plans a large-scale training operation.¹⁰⁸

Third, the ability of a single district court judge to enjoin a naval exercise that is reportedly necessary for national defense tends to generate uneasiness. While judges are frequently required to make determinative rulings on issues they lack expertise on, the costs of misjudging the import of naval operations is considerably greater when their rulings have significant effects on the safety and security of the nation.¹⁰⁹

104. *Id.* at 378 (internal citation omitted).

105. *Natural Res. Def. Council, Inc. v. Winter*, 518 F.3d 658, 661 (9th Cir.), *rev’d*, 129 S. Ct. 365 (2008).

106. Presumably, the district court would have found any waiver of NEPA to be just as unconstitutional as the CZMA waiver. The district court was concerned with separation of powers, in that the President’s actions constituted an executive reversal of a judicial decision. *Id.*

107. *See id.*

108. This is not to say that judicial review is never appropriate when the military successfully obtains an exemption from environmental laws. However, as will be discussed *infra* in Part IV, the compartmentalization and specificity of environmental laws leads to this form of litigation, which imposes significant time and resource burdens on the government.

109. Justice Breyer expressed his concern as follows:

Look, I don’t know anything about this. I’m not a naval officer. But if I see an admiral come along with an affidavit that says—on its face it’s plausible—that you’ve got to train people . . . or there will be subs hiding there with all kinds of terrible weapons, and he swears that under oath. And I see on the other side a district judge who just says, you’re wrong . . . I know that district judge doesn’t know about it, either.

Transcript of Oral Argument, *supra* note 101, at 35.

Finally, partially due to the previous three problems, the federal court system is not the proper venue to resolve these issues. In announcing the Court's decision, Chief Justice Roberts made the exact same determination that the district court could have—the Commander in Chief determined that this training was of paramount interest to national security.¹¹⁰ It seems implausible that such an easy determination, resting not on the discretion of necessarily biased military leaders or factually limited judges, but on the determination of the Commander in Chief, would require the Supreme Court to resolve.

These are the problems, brought to the forefront of the discussion as a result of *Winter*, that the next Part will attempt to redress.

IV. RECOMMENDED SOLUTIONS

As discussed above, the current framework of statutory exemptions provided in environmental laws is inadequate, inconsistent, and inefficient.¹¹¹ How then should the Legislature uphold the force of each environmental statute while allowing the armed forces to adequately prepare for battle? The first step is to acknowledge that operational encroachment exists. Next, an appropriate venue must be designated to resolve the inevitable issues that arise when military objectives and environmental protection collide. Lastly, that venue must have a clear standard to apply in order to fairly and uniformly settle disputes with national security implications.

A. Does Operational Encroachment Actually Exist?

Operational encroachment can be a difficult concept to quantify—there will inherently be arguments that it does not exist at all.¹¹² Several factors listed below help to explain why the effects of operational encroachment are difficult to quantify, and they have been used as arguments that operational encroachment does not in fact exist.¹¹³

110. *Winter*, 129 S. Ct. at 378.

111. It should be acknowledged that environmental laws have contributed greatly to the national conscience and have effectively forced federal agencies to consider the environmental consequences of their decisions. In no small part, that is due to the citizen suit provisions of the various statutes and the courts' willingness to hold agencies accountable. However, while the courts look to balance the agency's interests against environmental protection interests, the weight given to the agency's interest is fundamentally different when national security concerns are implicated.

112. One must ask: If the military cannot specify how much training time is lost as a result of court-ordered injunctions and what impact that loss has on readiness, then how can operational encroachment possibly exist? See *infra*, note 113.

113. Some argue that the lack of quantifiable proof offered to Congress through military testimony shows that encroachment issues, if not fantasy *in toto*, are severely exaggerated. See Catherine M. Vogel, *Military Readiness and Environmental Security—Can They Co-Exist?*, 39 REAL PROP. PROB. & TR. J. 315, 340 (2004) (“[T]he lack of a nexus between the modified training scena-

The primary problem with accurately gauging the military's readiness is the availability of information. Due to the nature of the military's command structure, those answering congressional inquiries into realistic training are not the soldiers and sailors who must receive the training or even the unit commanders responsible for directing those soldiers and sailors.¹¹⁴ While senior military leadership routinely relies on reports from "deck plate"¹¹⁵ subordinates, their testimony inherently cannot address the specific issues confronting individual unit commanders.¹¹⁶ Furthermore, it is possible that senior military leadership may be unwilling to admit to training weaknesses for tactical, strategic, or personal reasons.¹¹⁷

Additionally, the military faces the problem of defining a metric to measure the levels of encroachment. Readiness levels are subjective by nature, and in a world where traditional military capabilities such as anti-submarine warfare, mine warfare, or antisurface warfare are highly perishable,¹¹⁸ there is no clear line between being ready and not being ready for war. This is evidenced by Chief Justice Roberts's response in *Winter* to the Ninth Circuit's proposal that the Navy could return to the courts if it could prove an inability to train naval forces: "This is cold comfort to the Navy [W]e do not think the Navy is required to wait until the injunction actually results in an inability to train By then it may be too late."¹¹⁹

rio and a quantitative reduction in readiness ability weakens the DOD's argument." See also Stephen Dycus, *Osama's Submarine: National Security and Environmental Protection After 9/11*, 30 WM. & MARY ENVTL. L. & POL'Y REV. 1, 9–10 (2005) (citing military successes in Afghanistan and Iraq by forces trained under restrictive environmental laws as further evidence of the inexistence of operational encroachment).

114. For instance, the officers called in to testify about operational encroachment were all flag officers—i.e., generals and admirals. See *supra*, note 65; Bethurem, *supra* note 4, at 122.

115. "Deck plate" is a term used to refer to sailors at the lowest levels of command; those maintaining and operating the ship's equipment. They are the ones who actually see the effects of training, or lack thereof, because their feet are literally on the deck plates.

116. For instance, a naval commanding officer is the only one aware of the capabilities of his or her crew at any given time; operational capabilities are affected by rapidly changing factors such as personnel turnover, equipment malfunction, or training artificialities created by externalities.

117. After all, a fundamental trait of the military is to hold the highest-ranking officer accountable for every aspect of readiness. Thus, strike group commanders are not likely to admit that their forces are susceptible to attack from a diesel-electric submarine, not only for obvious tactical reasons but also for the purpose of improving sailors' morale and their own reputations (regardless of the paucity of training opportunities for the group's combatants).

118. The skills required for such specialty warfare lead to a considerably higher level and intensity of training prior to deployment. This is due not only to deployment certification but also to the concern of watchteam cohesion and operator skill that are affected by the high rate of crew turnover on naval warships.

119. *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 380–81 (2008) (internal citations omitted).

In light of the difficulty of measuring levels of operational encroachment, Congress's reaction to claims of operational encroachment provides additional credence to the military's claims. Congress has distinguished between military objectives and objectives of other federal agencies by providing national security exemptions in most environmental statutes¹²⁰ and, more recently, by making military activities exempt from most provisions of certain environmental acts.¹²¹ After Congress rejected the Military Environmental Responsibility Act,¹²² the shift in Congress's attitude towards environmental lawsuits involving the military is evident. Recent notable lawsuits,¹²³ testimony from senior DOD personnel,¹²⁴ and political pressure¹²⁵ led to more discretion being handed to military authorities to balance environmental concerns with training objectives without the threat of judicial second-guessing. If there is any congressional trend to be ascertained, it is that the current laws are not meant to completely frustrate the military's training exercises.

Adding to the debate on the existence of operational encroachment are discussions regarding the effects of 9/11 and the nation's reaction to the war on terrorism. Critics of the post-9/11 weakening of certain environmental laws argue that it was an opportunistic exploitation of the nation's fear of another terrorist attack. This theory shifts the focus from the true issue—shrinking possibilities for realistic training—by playing into political emotions. It is easier for critics to dismiss the DOD's concerns regarding encroachment when those concerns are connected to a president's largely unpopular administration.¹²⁶ These critics attribute any military gains since 9/11 to congressional acquiescence during a time

120. See *supra* Part II.A.

121. Babcock, *supra* note 38, at 127–30. In the FY04 and FY05 versions of the National Defense Authorization Acts, Congress attached riders that significantly limited the applicability of the MBTA, the MMPA, and the ESA to military readiness activities. *Id.* Several articles analyze these changes as an exploitation of the atmosphere of national fear in the wake of the 9/11 attacks. See, e.g., Dycus, *supra* note 113.

122. See *supra*, note 71.

123. *Natural Res. Def. Council v. Evans*, 179 F. Supp. 2d 1129 (N.D. Cal. 2003) (enjoining the Navy from use of Low Frequency Active sonar because of potential harm to marine mammals under the ESA, the MMPA, and NEPA); *Ctr. for Biological Diversity v. Pirie*, 201 F. Supp. 2d 113 (D. D.C. 2002) (enjoining the Navy and Air Force from using a bombing range on a small island near Guam because bombing runs caused unintentional takes of migratory bird species protected under the MBTA).

124. See *Hearing on Continuing Encroachment*, *supra* note 40.

125. See *supra*, notes 66, 69, and accompanying text.

126. In October 2008, at the time of the decision announced in *Winter*, gallup polls showed President George W. Bush's approval rating at 25%, the lowest since 1952. Frank Newport, *Bush Job Approval at 25%, His Lowest Yet*, GALLUP, Oct. 6, 2008, www.gallup.com/poll/110980/Bush-Job-Approval-25-Lowest-Yet.aspx (last visited July 6, 2009).

of national uncertainty and vulnerability.¹²⁷ The encroachment issue, however, has little, if anything, to do with the war on terror. Any relevant discussion on the merits of the DOD's claims of encroachment must be detached from this politically and emotionally charged undercurrent.¹²⁸

As stated above, the difficulty in measuring operational encroachment levels supports the position that action to curtail encroachment is unnecessary. However, if Congress can recognize that encroachment poses real problems with training the armed forces, despite the lack of quantifiable proof, they can propose an adequate resolution to deal with the problem.

B. Where Should These Decisions Be Made?

Once it has been established that operational encroachment exists, the Legislature must determine the appropriate venue to resolve the inevitable conflicts between the military and environmental activists. This Comment does not argue for a removal of all forms of military accountability when it comes to environmental harms. National defense and environmental protection are similarly cherished values for the nation, and neither should completely subjugate the other. Rather, this Comment calls for a more fair and impartial balancing of the United States' environmental conservation interests and its national defense interests.

Due to the limitations of the federal court system, the federal courts should not be the first arbiter when these conflicts arise. Instead, a federal executive commission should be formed to adjudge these matters. An executive commission would have several benefits over the federal courts.

First, an executive commission would provide the level of expertise that is required to fully appreciate and weigh the competing interests in these conflicts. Take *Winter* as an example.¹²⁹ The likelihood of injury to marine mammals resulting from the Navy's use of MFA sonar is an important consideration, but there are significant scientific materials that

127. Babcock, *supra* note 38, at 120–26. In an article intended to describe the diminished effect of environmental laws on military training operations, the author devotes a significant portion of her argument to a discussion of the PATRIOT Act and various infringements on civil liberties under sweeping executive powers. *Id.*

128. Commentary analyzing the Navy's use of active sonar is a clear example of reducing real operational constraints into this construct. Professor Dycus' choice of title for the discussion regarding the effects of sonar on mammals evokes this connection. Dycus, *supra* note 113, at 29. Of course, the Navy does not contend that training with MFA sonar will assist in locating Osama bin Laden or on preventing the next attack staged by Al Qaeda. Yet, the title of the article, *Osama's Submarine*, connotes just that proposition, thereby belittling the actual claim that MFA sonar training is needed to enhance the Navy's defense against more traditional enemy forces. *See id.*

129. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008).

support both parties' contentions.¹³⁰ Similarly, the need for an unrestricted ability to engage in MFA sonar emissions during a large-scale training exercise is equally important, but parties differ as to what mitigation measures could be taken to provide for realistic training. Both considerations require close examination of facts that are most likely unfamiliar to a federal judge.

A commission comprised of multiple experts would better resolve these factual disputes because it would have more time and expertise than the court system allows. While not every commissioner can be an expert in biology, ecology, and military training, the combined knowledge and expertise of the commissioners can strike the right balance—for example, a five-member panel consisting of two national security experts, two scientific experts, and a neutral adjudicator. Congressional ratification of commission appointments would hold the Executive Branch accountable for filling vacant spots with qualified and capable minds.¹³¹

Second, an executive commission would resolve the inconsistencies in the current framework of exemptions. If one administrative body handled each exemption, the military could request all foreseeable exemptions from one party at the same time, reducing the time and expense of obtaining each individual exemption. Additionally, any opposing parties would be able to present their arguments and contradictory evidence, just like they can at a trial. The commission could relax the rules of evidence, allowing for access to more evidence than at a traditional trial, to attempt the best result.

Third, the administrative structure of the commission would allow for greater flexibility and efficiency in making such factually complex decisions. The establishment of the new commission would not require significant legislative debate about form and structure because the commission would not be experimental in nature. A commission operated in this manner would be largely subject to the Federal Administrative Procedure Act (APA),¹³² allowing Congress to determine several aspects of how the decisions should be made and reviewed. The commission's enabling act would (1) determine how much deference reviewing courts would grant to the commission (most likely the "arbitrary and capri-

130. For analysis that minimizes the risk to marine mammals see Brief for the Petitioner-Appellant, *supra* note 75, at 7–8. *But see* Michael Jasny et al., *Sounding the Depths II: The Rising Toll of Sonar, Shipping, and Industrial Ocean Noise on Marine Life*, NAT'L RESOURCES DEFENSE COUNCIL REP. (NRDC/Marine Mammal Prot. Project, New York, N.Y.) Nov. 2005, available at <http://www.nrdc.org/wildlife/marine/sound/sound.pdf> (last visited July 26, 2009).

131. Senate confirmation would be required under the U.S. Constitution. U.S. CONST. art. II, § 2, cl. 2.

132. 5 U.S.C. §§ 551–559, 701–706 (2006).

cious” standard of review),¹³³ and (2) allow for informal adjudication.¹³⁴ Informal adjudication has the advantage of avoiding the time-consuming requirements found in formal adjudication.¹³⁵ This type of conflict resolution circumvents the more complicated and controversial legal determinations in the federal courts regarding how much deference to grant military leaders and the court’s willingness to oppose the military or the current Administration.¹³⁶

The obvious drawback to a newly formed commission would be diminishing the President’s influence on granting exemptions. Under the current statutory schemes, the President is typically the one with the authority to exempt an agency from statutory compliance. (This power undeniably stems from the President’s Commander-in-Chief constitutional mandate.) By authorizing a commission to grant exemptions, even one staffed by presidential appointees, some of the President’s powers would be delegated to an administrative body.

It is beyond the scope of this Comment to address the separation of powers concerns voiced by the Ninth Circuit in *Winter*.¹³⁷ However, it is worth noting that of any one person, the President is uniquely situated to make determinations regarding national security, particularly when it comes to the problem of operational encroachment. Despite the President’s unique position, final authority does not have to rest with that office alone. The President may exert significant influence over the new commission through appointment; presumably, a president that desires a stronger emphasis on environmental preservation will appoint members similarly inclined, and vice versa. Therefore, the President would not completely relinquish the power to grant exemptions to military activities, even though the official decision would come from a commission.

As with Executive appointments to other administrative commissions, there would likely be significant political infighting during the confirmation process. Appointments might be viewed as a way to curry favor with congressional committees, rather than as an attempt to nominate the most skilled and able administrators. Under this view, complex cases that require balancing environmental concerns with national securi-

133. *Id.* § 706(2)(A).

134. *Id.* § 555.

135. *Id.* §§ 556–557.

136. In fact, this new system could avoid questions such as those posed by Justice Alito in *Winter*: “Isn’t there something incredibly odd about a single district judge making a determination on that defense question that is contrary to the determination that the Navy has made?” Transcript of Oral Argument at 30, *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008) (No. 07-1239).

137. *Natural Res. Def. Council, Inc. v. Winter*, 518 F.3d 658, 661 (9th Cir.), *rev’d*, 129 S. Ct. 365 (2008).

ty would be better decided by an impartial federal judge. While there may be no way to completely avoid political cronyism and posturing, requiring five commissioners of varied backgrounds to undergo a public nomination and confirmation process (similar to that enacted for judicial nominees) would provide the fairest process that our government can muster.

Although national defense and environmental protection are subject to lobbying from interest groups as much as any other field, objective outsiders would ensure that the commission was not subject to industry capture. Any time that an administrative decision-making body loses impartiality or neutrality, it is possible that one interest group has effectively “captured” the commission and can influence decisions in its favor. Under the proposed model, in addition to the checks imposed by requiring Senate approval of appointments, the possibility of industry capture would be offset by the diverse professional and intellectual backgrounds of the commissioners.

C. What Should the Guiding Standard Be?

Ultimately, even if a new commission is formed to adjudicate these conflicts, it will only be as effective as the standards that guide it. The current variations in environmental statutes do not constitute a clear and uniform approach to issues of national security.¹³⁸ Three potential options could resolve this issue. However, each would require substantial legislative effort and would most likely meet significant political opposition.

First, the Legislature could combine all current environmental laws into one comprehensive statute with standard enforcement provisions, including applicability and exemptions. There are obvious drawbacks to such an endeavor: it would take extreme legislative muscle; there are inherent differences and nuances amongst the various environmental law statutes; and innumerable interested parties would lobby for their own interests. However, a comprehensive statute would not only be more efficient (because all regulations and requirements would be located in one authority), but also more authoritative. Instead of having either a specific enforcement statute or an aspirational policy objective (like NEPA’s mandate for federal agencies to consider the environmental effects of their actions), the nation would have one clear policy-based law with bite. Despite any possible benefits, the political cooperation required to draft and pass such a bill makes this option, at best, a hypothetical reserved for law school discussion.

138. *See supra* Part II.C.

Under the second option, in lieu of an environmental super-statute, Congress could amend NEPA to allow for a national security exemption. As it stands now, NEPA is alone in disregarding the potential for conflict between procedural compliance and national security.¹³⁹ For a statute that supposedly states the nation's overall policy towards environmental stewardship, it is strange that NEPA remains silent on national security. Because it is clear that national security and environmental protection are occasionally at odds, an exemption is needed to signal a clear legislative intent to resolve these issues.

Some may argue that there is no need to form an exemption from NEPA because NEPA does not proscribe activity but rather requires an impact analysis to determine the level of harm expected from the proposed activity.¹⁴⁰ Furthermore, in true emergency situations, NEPA already excuses compliance.¹⁴¹ The procedural history of *Winter*, however, indicates that NEPA no longer wears the label of all form and no substance. Rather, NEPA is a powerful judicial tool for halting military training exercises.¹⁴²

One can imagine a scenario where agency action will cause environmental harm, national security will be a predominant interest, but the circumstances do not fit the definition of an "emergency situation."¹⁴³ Under the current NEPA framework, the agency would be forced to undergo the resource intensive EIS process or risk standing in violation of federal law. Even though altering NEPA at this stage would raise the ire of many, this option is much more viable than the first and at least provides the potential for resolving some conflicts in the future.

The third option, perhaps the easiest to reach in terms of convenience, would surely raise the hackles of many environmental coalitions that have struggled for years to hold the DOD accountable for actions that harm the environment. Legislation could be proposed that would provide one blanket rule regarding exemptions from all environmental statutes for national security reasons.¹⁴⁴ This proposal satisfies the need

139. See *supra* Part II.B.

140. See Caldwell, *supra* note 28.

141. 40 C.F.R. § 1506.11 (2006).

142. See *Winter*, 518 F.3d 658.

143. Such scenarios are probably most apparent in the realm of homeland security. Whether the situation was to involve underwater sensor installation near ports, increased Jeep patrols along the border, or improved physical security barriers at commercial nuclear power plants, homeland security regulations could require agencies to act faster than possible if completing an EIS.

144. But see *supra* Part III.A. This idea would be the foil to the Military Environmental Responsibility Act. The proposed bill would address each issue present when these conflicts arise—such as likelihood of environmental harm, necessity of the military objective, and potential classification and confidentiality issues—in one set of regulations applied uniformly to each environmental statute.

to provide a uniform application of environmental laws to the military, and it would allow the exempting body to weigh all factors (including all potential harms under the various environmental protection laws) against the national security interests. By streamlining the process, not only could the military plan training scenarios more efficiently and reliably, but judicial economy would also benefit because there would be one factual balancing conducted under a single statute on review.

While the requisite congressional effort may be less with this option than the first one, any such bill would still be met with significant opposition. Providing a bill streamlining the exemption process for military activities would likely be seen as a return to the Cold War era mindset of military might at all costs. Similar to the opposition to option one, critics would argue that bundling each environmental law together undercuts the effectiveness of each statute. For example, the CWA may require a different standard to overcome an exemption than the ESA, and so on. Additionally, environmental protection groups might rely on the current inefficiencies of the system as a tool to hinder military operations, if not to halt them altogether. However, from a meta-approach to balancing national security and environmental concerns, the specifics of each statute are not as important as the decisive tipping of the scales. If a commission, agency, or court determines that national security is paramount, then the proposed activity should be exempted from each applicable statute. This form of efficiency would greatly streamline the process, saving resources for both the military and the courts.

Any of the three proposed options would be an improvement on the current system. Due to the scope of legislation required, option one seems unrealistic, even if the end result would be the most efficient system. With option two or three, future litigation can be avoided, or at least minimized, without sacrificing the necessary balancing of competing interests.

V. CONCLUSION

Operational encroachment threatens the military's ability to adequately simulate combat scenarios during necessary training operations for the soldiers and sailors who may be thrust into harm's way. The perpetuation of operational encroachment is supported by the current statutory scheme of environmental laws and is an unnecessary hindrance to proper military interests in defending our national security. Due to inconsistencies and inefficiencies in the current laws, the government is forced to conduct lengthy and costly litigation to satisfy each environmental statute.

This problem is evident in *Winter v. Natural Resources Defense Council*, where the Supreme Court was called upon to reverse an injunction that prevented the Navy from maximizing training operations with MFA sonar.¹⁴⁵ Had a different framework been in place in January 2007, the ensuing litigation could have been avoided and the same results reached. If all environmental laws had been combined into one super-statute, NEPA had been crafted with a national security exemption, or the military had been able to utilize a separate exemption statute with authority over each environmental law, the Navy could have adequately planned its training operations. If the Navy could have then proposed its case for the use of MFA sonar in SOCAL to an executive commission consisting of both national security and environmental experts, the commission could have issued a single decision subject only to limited judicial review as defined by Congress.

Incorporating these proposed changes to the current framework of environmental law is necessary for the military to maintain operational capability. Because military operations and environmental statutes will always be somewhat at odds, a streamlined process is required to promote efficiency and consistency in the dispute resolution process. Only then will operational encroachment be limited and an appropriate balance struck between environmental protection and a strong national defense.

145. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008).