National Security and the Endangered Species Act: A Fresh Look at the Exemption Process and the Evolution of Army Environmental Policy

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INTRODUCTION

The Endangered Species Act of 19731 ("ESA") was enacted with many noble goals in mind. Most basically, it may be viewed as the finished product of years of efforts by environmentalists and politicians to create meaningful, substantive protection for endangered species.2 The effort was successful, perhaps more so than its supporters anticipated.

By 1978, Congress had recognized the need for limitations to the ESA and created several exemptions that limited the sweeping substantive protection afforded by the original Act.3 Among these exemptions, and perhaps the most broad, is the Secretary of Defense's ("SECDEF" or 'Secretary") exemption for the purpose of national security.4 With no apparent limitation on the Secretary of Defense's authority, this exemption has, from the start, been controversial. The fact that this exemption has never been used has led commentators to speculate broadly on what the Secretary's authority is, how it should be applied, and how it affects the overall implementation of the ESA itself.5

Environmentalists and mainstream legal scholars in particular have viewed the absolute nature of the Secretary's exemption as a reason

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2 See infra Part I.A.
5 See infra Part III.B.
to avoid further substantive military exceptions to the ESA. Other commentators have asserted that the exception should be used to resolve some compliance issues, while arguing that the military may even need further substantive exemptions to environmental policies in general, including the ESA. The Army appears to have avoided the debate by focusing its environmental efforts on ESA compliance instead of exemption requests.

The debate over the national security exemption has continued, reinvigorated by the proposal and passage of new military exemptions to the ESA in 2004 as part of the Range Readiness and Preservation Initiative ("RRPI"). Although comparatively limited, the RRPI served as a lighting rod for competing viewpoints on military ESA compliance. Arguments against further deference to the military's training or operational needs resurfaced with new vigor, while proponents of the new exemptions saw the ever-increasing friction between scarce environmental resources and training requirements as necessitating new procedural safeguards to maintain military readiness.

This Note begins with a historical overview of the ESA and its subsequent amendments, addressing the use of the exemption process after 1978 while focusing specifically on the U.S. Army.

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6 See infra Part III.B.
8 See infra Part II.D.
10 See infra Part III.A-B.
11 See infra Part III.B.
12 See infra Part I. The U.S. Army will be the focus, as this allows for a more detailed look into policy development and practices of one organization. Also, the Army manages about half of the military's twenty-five million acres in the United States, with all other services combined managing the other. USALA Report: Environmental Law Division
Part II outlines the SECDEF's functional authority, including a discussion of some problem areas, and the evolution of Army environmental policy before 2004.\textsuperscript{13} Part III discusses the proposal of the RRPI and the passage of the new ESA amendment, including the concerns of scholars, commentators, and government officials about the scope of military exemptions to the ESA that emerged before and in the wake of the 2004 amendments.\textsuperscript{14} This Part concludes by reconciling these competing concerns with the existing SECDEF exemption and the realities of military training and operational needs.\textsuperscript{15} Viewing the history and scope of the 1978 SECDEF exemption together with the 2004 amendments, the new exemption appears less as an example of adversarial military-versus-the-environment policy-making and more as a compromise that promotes military readiness while facilitating and encouraging strict and transparent ESA compliance.\textsuperscript{16} Further, it suggests that the proposal of new exemptions to substantive environmental regulations need not always classically pit environmentalists against military officials and policy makers.

I. A HISTORY OF THE ENDANGERED SPECIES ACT AND ITS EXEMPTIONS

A. The Endangered Species Act of 1973: From Early Environmental Legislation to Tellico Dam

When the ESA was enacted in 1973, it was hardly the first piece of legislation that attempted to afford protection to endangered or threatened species at the federal level. Wildlife management was traditionally under exclusive state control and addressed through hunting regulations and the common law of property; it did not become federally regulated until the late nineteenth century.\textsuperscript{17} At the federal level, legal

\footnotesize{Notes, ARMY LAW., Mar. 1998, at 36, 37 n.9 (citing RAND NAT'L DEF. RES. INST., MORE THAN 25 MILLION ACRES? DOD AS A FEDERAL, NATURAL, AND CULTURAL RESOURCE MANAGER 4 (1996)).
\textsuperscript{13} See infra Part II.
\textsuperscript{14} See infra Part III.
\textsuperscript{15} See infra Part III.
\textsuperscript{16} See infra Part III.C.
justification for wildlife regulation came from several theories, but Congress’s commerce power, and the federal treaty and property powers, emerged as the most expansive.\textsuperscript{18}

Despite success with limited species- or location-specific legislation, by 1966, the stage was set for more comprehensive protection of threatened species.\textsuperscript{19} The Endangered Species Preservation Act, passed in that year, was Congress’s “first comprehensive legislative attempt to prevent human-caused extinctions.”\textsuperscript{20} However, its provisions were insufficient to achieve its purpose\textsuperscript{21} due to its application only to federal land, its exclusion of plants and invertebrates, and the lack of compulsory compliance by federal agencies.\textsuperscript{22}

Congress attempted to broaden the scope of protection, while remediying some of these ills, with the Endangered Species Conservation Act of 1969.\textsuperscript{23} This legislation was meant to supplement the 1966 Act by sharply limiting trade in endangered animals or animal products, including species threatened globally, and broadening protections to include invertebrates and other previously unprotected species.\textsuperscript{24}

By the early 1970s, the 1966 and 1969 Acts had proved inadequate to meet changing demands; public sentiment was changing, and with the recently signed Convention on International Trade in Endangered Species of Wild Flora and Fauna\textsuperscript{25} ("CITES") and the backing of

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\text{\textsuperscript{18} BEAN \\& ROWLAND, supra note 17, at 17-27. These three legal models provide separate theories for justifying federal regulation: The “federal property power,” at a minimum, allows for federal regulation of wildlife on federal lands or the species living there. Id. at 19-22. Congress's commerce power vests power where wildlife impacts interstate commerce. Id. at 23-25. The treaty-making power makes duly enacted treaties a “suprem[e]” source of wildlife regulation. Id. at 17-19.}
\text{\textsuperscript{19} See STANFORD ENVTL. L. SOC'Y, supra note 17, at 15-19; des Rosiers, supra note 3, at 834-37.}
\text{\textsuperscript{21} des Rosiers, supra note 3, at 835-36. “The 1966 Act was modest in scope; it authorized the Secretary of the Interior to review this agency’s existing programs to protect endangered species and to implement those programs only ‘to the extent practicable, . . . in furtherance of the purpose of this [1966] Act.’” Id. at 835 (quoting the Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, 80 Stat. 926 (1966) (repealed 1973)).}
\text{\textsuperscript{22} STANFORD ENVTL. L. SOC'Y, supra note 17, at 18-19.}
\text{\textsuperscript{24} Id.}
\end{align*}
President Nixon, the time was right to pass more substantial legislation. Congress passed the ESA in 1973 with no significant opposition in the House or Senate, or from the public at large. In addition to engendering wide support, the ESA went further than either of the previous two Acts in the protection of endangered species; almost all species were now included, and compliance by federal agencies was compulsory and not subject to a “practicability requirement.” Also significant was the provision for citizen suits under the ESA, which permitted any person to bring suit to enjoin actions believed to violate the Act or, where there is an alleged failure to perform certain non-discretionary duties, to compel protective action by the Secretary of the Interior. As a result, the ESA was then, and still is, “the broadest and most powerful law in the world for the protection of species.”

The purpose of this Note is not to delve into the extensive and well-documented history of the ESA; others have done so in great depth and detail. However, it should be noted that Congress’s intent in creating the ESA—to create sweeping, nearly absolute protection of endangered species—was clear from the start. This was bolstered by subsequent judicial interpretation, represented by the line of cases brought under the “Interagency Cooperation” section (Section 7) of the ESA between 1973 and 1978, which “reflect[ed] the gradual recognition of the strong pro-endangered species congressional policy embodied in Section 7.”

One case in particular deserves specific mention, first because it is the most important of the early ESA cases, and also because it served as the impetus for Congress's subsequent creation of the exemption process.\textsuperscript{37} \textit{Tennessee Valley Authority v. Hill}, decided by the U.S. Supreme Court in 1978, can be viewed as the completion of the judiciary's gradual recognition of, and willingness to enforce, Congress's strict and sweeping intent in enacting the ESA.\textsuperscript{38} The species at issue was the tiny snail darter, a small recently-discovered fish that had the potential to halt the Tellico Dam project on the Little Tennessee River.\textsuperscript{39} The dam had been under construction and receiving federal funding since 1966.\textsuperscript{40} Subsequently, the snail darter was discovered, and it was later listed as an endangered species in 1975, with the section of the Tennessee River it inhabited being "designated a critical habitat."\textsuperscript{41} This clearly presented the question, eventually to the U.S. Supreme Court, of whether an ongoing project that was specifically funded and authorized by Congress even before the enactment of the ESA, was nevertheless subject to the Act's requirements.\textsuperscript{42} In answering with a forceful "yes," the Supreme Court ruled that the congressional intent behind the ESA was clear: "species extinction was to be avoided 'whatever the cost' and endangered species were to be accorded 'priority over the "primary missions" of federal agencies.'"\textsuperscript{43} This ruling "practically invited" Congress to amend the ESA, which they did, creating the exemption process only four months later.\textsuperscript{44}

\textbf{B. The Creation of the Exemption Process}

The Court's ruling in \textit{TVA v. Hill} made it clear that changes to the ESA were necessary to avoid the frustration of future federal actions.\textsuperscript{45} Some members of Congress were surprised by the plain language in their own law, and had simply not previously appreciated the expansive nature of the legislation they had passed only five years

\begin{footnotes}
\item[37] Rosenberg, \textit{supra} note 36, at 512-16.
\item[38] Id. at 512-16. \textit{See} Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978); \textit{see also} des Rosiers, \textit{supra} note 3, at 841-43.
\item[40] Id. at 512.
\item[41] Id. at 512-13.
\item[42] Id. at 513-15.
\item[43] Id. at 514 (citing TVA, 437 U.S. at 184-85).
\item[44] Id. at 516.
\item[45] \textit{See} des Rosiers, \textit{supra} note 3, at 843-44; Rosenberg, \textit{supra} note 36, at 516.
\end{footnotes}
earlier. There were initially several recommendations for amending the Act. Some Congressmen recommended a specific exemption for the Tellico Dam, while others recommended the elimination of Section 7 altogether. Another suggestion was to reintroduce the practicability language to the ESA that had been so deliberately removed after the failure of the 1966 and 1969 Acts. In rejecting these courses of action, Congress instead amended Section 7 to create a permanent procedural work-around that would provide the flexibility to prevent future impasses such as Tellico Dam.

The first and most substantial of the amendments was the creation of the Endangered Species Committee ("Committee" or "God Squad"), which was empowered to grant exemptions from the requirements of the ESA for agency actions that would otherwise violate the Act. However, the flexibility that the Committee provided was sharply limited. The process is specified as follows: First, the federal agency involved must consult with the Secretary of the Interior about its course of action, and the Secretary must determine whether or not the action would "jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . ." If the Secretary finds that the action is prohibited under the ESA, the agency would then be required to conduct a biological assessment in order to apply for an exemption, generally in concert with the U.S. Fish and Wildlife Service, to determine the action's potential impact on threatened or endangered species. The Secretary of the Interior would then receive the application upon completion of the


47 des Rosiers, supra note 3, at 843.

48 Id. at 843 n.125.

49 Id. at 843-44. See Rosenberg, supra note 36, at 516-23; see also 16 U.S.C. § 1536 (2006).


52 16 U.S.C. § 1536(c); 50 C.F.R. § 451.02 (2006). It should be noted that compliance with this provision may also be satisfied by meeting the requirements of section 102 of the National Environmental Policy Act ("NEPA"). 16 U.S.C. § 1536(c)(1).
biological assessment and, upon ensuring that certain baseline requirements are met, refer the exemption application to the Committee.53

Once the application has been forwarded to the Committee, it will be evaluated based on four criteria: (1) the existence of "reasonable . . . alternatives,"54 (2) whether the "benefits of such action clearly outweigh the benefits of [any] alternative[s]" (and whether the proposal "is in the public interest"),55 (3) the proposal's "regional or national significance,"56 and (4) assurance that there had been no "irreversible or irretrievable commitment of resources . . . ."57 If these requirements are met, the Committee may grant an exemption with approval of at least five of its seven members.58

In addition to the creation of the "God Squad," Congress provided two other significant amendments. First, it allowed the Secretary of

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53 16 U.S.C. § 1536(g) (2006). Before forwarding the application, the Secretary of the Interior would ensure that the applicant had
(i) carried out the consultation responsibilities described in subsection (a) of this section in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives . . . ;
(ii) conducted any biological assessment required by subsection (c) . . . ; and
(iii) to the extent determinable . . . , refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) . . . .

Id. § 1536(g)(3)(a)(i)-(iii). If these requirements are satisfied, the Secretary of the Interior will then prepare a report to accompany the application to the Committee that explains:
(A) the availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative[s] . . . ;
(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;
(C) appropriate reasonable mitigation and enhancement measures which should be considered . . . ; and
(D) whether the . . . agency . . . and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d).

Id. § 1536(g)(5)(A)-(D).
54 Id. § 1536(h)(1)(A)(i).
55 Id. § 1536(h)(1)(A)(ii).
56 Id. § 1536(h)(1)(A)(iii).
57 Id. § 1536(h)(1)(A)(iv). The Committee must also "establish . . . reasonable mitigation and enhancement measures" to proceed with an exemption after the other criteria are met. Id. § 1536(h)(1)(B).
58 Id. § 1536(h)(1). See id. § 1536(e)(3).
State to keep applications from being considered by the Committee in cases of a possible international treaty violation. The second significant amendment was the national security exemption, which allowed the Secretary of Defense to direct the Committee to grant an exemption if deemed necessary for "reasons of national security."

With these new exemptions in place, the Tellico Dam controversy, which was still simmering, now had a potential vehicle for positive resolution for the TVA (and Congress). Both the Tellico Dam project and the Grey Rocks Dam Project in Wyoming, which had similarly been halted because of a potential threat to whooping cranes, were considered for exemptions almost immediately after passage of the 1978 amendments. The Committee granted an exemption in the case of the Grey Rocks Dam, but not in the case of Tellico Dam.

The immediate use of the "God Squad" exemption process seemed to be a natural result of Congress's response to TVA v. Hill. However, two significant observations are worth noting about the Committee's first decisions. First, Congress moved so quickly to resolve the Tellico issue that they short-circuited the procedural requirements—the Secretary of the Interior's evaluation and report—for sending the applications to the

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59 Id. § 1536(i).
60 Id. § 1536(j). This provision appears on its face to be a broad grant of power to the Secretary of Defense, simply due to the absolute and unqualified language. The full text of the provision is:

(j) Exemption for national security reasons. Notwithstanding any other provision of this chapter, 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.

Id.

61 It should be noted that additional amendments to the ESA were passed in 1979 and 1982 that altered some of the procedural exemption requirements without substantially changing the exemptions themselves. See des Rosiers, supra note 3, at 848-50 & n.163. Important to this discussion is the 1982 change to the "threshold review" process discussed supra note 53. Id. at 849-50 n.163. Originally, this review was conducted by a three-person board which included the Secretary of the Interior and was allowed sixty days for completion. Id. After the amendment, the Secretary of the Interior alone made the determination and was given only twenty days to do so. Id. An original fourth factor of consideration, "whether an irresolvable conflict exists," was also eliminated. Id. See Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1411 (1982).

62 Willard, Zimmerman & Bee, supra note 7, at 75.
63 Id. at 75; des Rosiers, supra note 3, at 846.
64 See supra notes 45-49 and accompanying text.
Endangered Species Committee. Although the substantive guidelines of the Committee's evaluation criteria were used in making its decision, it is significant that the Secretary of the Interior's baseline determinations, which appear to have been intended as a substantial procedural safeguard in the exemption process, were "sidestepped" by Congress. Secondly, it is important to note that the immediate use of the Committee to resolve these two cases was not followed by a flood of subsequent requests for ESA exemptions. In fact, the Committee has met only once since the Tellico/Gray Rocks decisions—this time concerning the spotted owl in Oregon—and the Committee granted the Bureau of Land Management a limited exemption for old-growth timber sales in 1992. While these two points are significant to a general understanding of the ultimate effect of the 1978 amendments, their effect will be more germane when the focus shifts to the national security exemption specifically.

II. THE NATIONAL SECURITY EXEMPTION: A FUNCTIONAL FRAMEWORK OF THE SECRETARY OF DEFENSE'S AUTHORITY AFTER 1978

With the statutory guidelines and process already discussed above, a functional analysis of the national security exemption is itself somewhat more difficult than it first appears. The sparse statutory language makes the Secretary's authority appear straightforward. However, actually marking the functional limits of this power is more problematic. First, because the power has never been used, the Secretary of Defense has never made an official determination of what constitutes "reasons of national security" in this context, and such a determination has thus never been subjected to legislative, judicial, or public scrutiny. Secondly,
no citizen or group has attempted to enjoin the military's activities after an exemption has been issued, either through the applicable citizen suit provisions of the ESA\(^7\) or through the National Environmental Policy Act ("NEPA").\(^7\) Last, and perhaps ironically, the military has tied its own hands to some degree. Even when presented with opportunities to officially ask the Secretary to exempt certain activities, the military has instead either conformed the activities to the ESA or relied upon favorable court rulings to sustain them.\(^7\) This Part discusses these problem areas and articulates a functional definition of the Secretary of Defense's exemption authority.

A. "Reasons of National Security"

The Secretary of Defense's determination of "reasons of national security"\(^7\) is the first unsettled area of this analysis. Contributing to the difficulty here is the fact that the Secretary has no other exemptions to major substantive environmental statutes,\(^7\) which makes analogizing to determine the relevant factors difficult.\(^7\)

Considerable debate exists as to what national security interests are or should be, even among those who agree that the concept encompasses more than the physical defense of the homeland from military threats. President George W. Bush announced in 2002 that the aim of the Administration's National Security Strategy ("Strategy") was to "help make the world not just safer but better," advocating "a distinctly American

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\(^7\) Two separate provisions apply here. The first is the general citizen suit provision of 16 U.S.C § 1540(g), discussed at supra note 25 and the accompanying text. The second is the "judicial review" provision of section 7 that specifically allows for citizen lawsuits seeking federal-court judicial review of Endangered Species Committee decisions. 16 U.S.C. § 1536(n) (2006).

\(^7\) 42 U.S.C. §§ 4321-47. U.S. Code Title 42 Chapter 55 includes several provisions that are not "generally considered part of NEPA." RUTH S. MUSGRAVE ET AL., FEDERAL WILDLIFE LAWS HANDBOOK 378 (Edwina Crawford & Carolyn Byers eds., 1998). See discussion infra notes 114-35 and accompanying text.

\(^7\) See infra Part II.C-D.

\(^7\) 16 U.S.C. § 1536(j).

\(^7\) See Willard, Zimmerman & Bee, supra note 7, at 65-85.

\(^7\) The Secretary of Defense has one other limited exemption for "Emergency Military Construction" in cases of war or emergency, which was authorized by Executive Order in 2001. Id. at 85 (citing 10 U.S.C. § 2808). See Exec. Order No. 13,235, 66 Fed. Reg. 58,343 (Nov. 16, 2001).
internationalism. Subsequently, the Administration's definition of national security interests sparked significant debate among commentators. Supporters claim the Strategy is the best way to ensure security in a post-9/11 world, some arguing that “transforming societies” through “safety, health, prosperity, and freedom” is the best way to protect security interests. Others are critical that the Strategy inadequately or inappropriately addresses concerns like “environmental security,” the threats posed by HIV/AIDS, and human rights generally. Another view is that

GEORGE W. BUSH, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 1 (2002) (hereinafter NATIONAL SECURITY STRATEGY 2002), available at http://www.whitehouse.gov/nsc/nss.pdf. This Strategy delineates eight methods through which this goal will be attained:

- champion aspirations for human dignity;
- strengthen alliances to defeat global terrorism . . . ;
- work with others to diffuse regional conflicts;
- prevent our enemies from threatening us . . . with weapons of mass destruction;
- ignite a new era of global economic growth through free markets and free trade;
- expand the circle of development by opening societies and building the infrastructure of democracy;
- develop agendas for cooperative action with other main centers of global power; and
- transform America's national security institutions . . . .


the Strategy reaches too broadly in defining, as important security interests, priorities such as "increasingly obsolete and irrelevant security commitments around the globe." Some arguments are even more critical, challenging the constitutionality of the Strategy or claiming that the Administration is casting other disputed policy goals as security concerns.

The debate over the nation's security strategy brings passionate arguments from many camps and is not likely to be an issue of broad consensus in the political arena. Important to framing the SECDEF's authority is simply the recognition that national security is difficult to define. It would probably be difficult to find a consensus among scholars or officials that categorically excludes any arguable definition. Perhaps surprisingly, it appears that the Army's understanding that "reasons of national security" denotes "wartime" could be significantly broadened if the need arose.

In conclusion, the ESA itself provides no statutory guidelines, as it does for the Endangered Species Committee, for determining what constitutes a national security interest. Further, there is no express subordination of human rights to national security is both unnecessary and strategically questionable. A more effective U.S. foreign policy would view human rights and national security as correlated and complementary goals.


Ann Scales & Laura Spitz, *The Jurisprudence of the Military-Industrial Complex*, Lecture at Seattle University (Feb. 27, 2003), in 1 SEATTLE J. SOC. JUST. 541. They criticize as "lawless" the alleged "moral imperative" status that the Strategy gives "free trade, . . . that as a matter of National Security the United States will enforce trade agreements . . . ." *Id.* at 547.

Georgia Congresswoman Cynthia McKinney has even proposed that expansion of federal programs to provide "affordable and quality health care is a matter of national security for the United States." Congresswoman Cynthia McKinney, *Current Issues: Health*, http://www.house.gov/mckinney/health.htm (last visited Dec. 1, 2006).

Diner, *supra* note 46, at 196 & n.225 (citing an interview with Major Craig Teller, United States Army Environmental Law Division).

The Committee has four criteria that it must consider in granting an exemption. 16 U.S.C. § 1536(h)(1)(A) (2006). *See supra* notes 54-58 and accompanying text.

*See supra* notes 54-60 and accompanying text. Contrast the four express criteria for the Committee in 16 U.S.C. § 1536(h)(1)(A), with the unqualified language of the Secretary's exemption in § 1536(j). This difference will become central to the judicial review and citizen suit discussion, *infra* Part II.B.
limitation on the Secretary to use the exemption only for actions by the military; it appears that any government agency may request an exemption for "reasons of national security."  

B. Judicial Review

These observations lead to the second problematic area: judicial review—particularly in citizen suits—of an exemption granted by the Secretary of Defense. In short, there appears to be no review provided for in the ESA, and very limited opportunities elsewhere. The ESA itself provides for two possible sources of judicial review. The first is the general provision for suits against the Secretary of the Interior, which permits suits in cases of alleged ESA violations to which the Secretary has not adequately responded. This provision, however, does not provide an avenue for judicial review of decisions by the Secretary of Defense. The Secretary of the Interior does have certain responsibilities to fulfill before an exemption application is forwarded, but these duties are not reviewable under the general citizen suit provision. The statute provides for suits in cases relating to the Secretary's duties only in Sections 4, 6, and 9—not Section 7.

The next possibility for judicial review of the Secretary of Defense's exemption authority is found in Section 7 itself. This avenue also affords little possibility for a successful citizen suit. The statute provides for review of all exemptions granted through the Committee, but it would apply differently to a SECDEF-directed exemption. The four evaluation criteria that the committee is required to consider would most likely provide the basis for judicial review under Section 7.

93 See supra note 74.
96 Id. § 1540(g)(1). There is also a provision for suits generally against "any person, including the United States and any government instrumentality or agency ... who is alleged to be in violation of any provision of this Act ... ." Id. § 1540(g)(1)(A). However, the "[n]otwithstanding any other provision of this chapter" language of the SECDEF's exemption would put it outside the scope of this provision. 16 U.S.C. § 1536(j).
98 The judicial review provision states that, "any person ... may obtain judicial review ... of any decision of the Endangered Species Committee under subsection (h) ... ." Id. The exemption that may be granted by the SECDEF for national security reasons is not found in subsection (h), but in subsection (j). Id. § 1536(j).
99 Id. § 1536(h)(1)(A)(i)-(iv).
The SECDEF’s exemption is based only on his or her determination of a “reason[] of national security,” not the four statutory criteria for the Committee, the absolute language of the Secretary’s exemption makes this apparent.

A citizen suit challenging a SECDEF-granted exemption would further be limited by provisions in the Administrative Procedure Act (“APA”), which provides for review of all “final agency action for which there is no other adequate remedy in a court . . . .” Review of the SECDEF’s finding of a national security interest would be subject to quite deferential review by courts, being reversible only if “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Further, the APA provides that “military authority exercised in the field in time of war or in occupied territory” is not “agency” action, making the judicial review provisions inapplicable in those situations.

The result is that it appears that the only challenge to the SECDEF’s exemption authority would be the adequacy of the “reasons of national security,” which he or she alone, with no statutory guidelines, may determine. The Section 7 avenue for a suit after an exemption by the SECDEF is, as a result, extremely limited.

While considering the possibilities for judicial review, it is important to address the role of NEPA, primarily because it provides a collateral review process for environmental decisionmaking that properly falls within

\footnotesize{100 Id. § 1536(j).} 
\footnotesize{101 Id. § 1536(h)(1)(A)(i)-(iv).} 
\footnotesize{102 “Notwithstanding any other provision of this chapter, the Committee shall grant an exemption . . . .” Id. § 1536(j) (emphasis added).} 
\footnotesize{103 5 U.S.C. §§ 500-96 (2006).} 
\footnotesize{104 Id. § 704.} 
\footnotesize{105 5 U.S.C. § 706(2)(A) (2006). While deferential to agency decisionmaking in other contexts, review may be even more so when involving national security concerns. See, e.g., Dep’t of the Navy v. Egan, 484 U.S. 518, 530 (1988) (“Unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.”).} 
\footnotesize{106 5 U.S.C. §§ 551(1)(G), 701(b)(1)(G) (2006).} 
\footnotesize{107 Id. § 551(1).} 
\footnotesize{108 Id. §§ 701-04.} 
\footnotesize{109 Willard, Zimmerman & Bee, supra note 7, at 80 (noting that “[c]ourts have interpreted this clause narrowly.”).} 
\footnotesize{110 Id. § 1536(j).} 
\footnotesize{111 Recall the discussion of the term “reasons of national security,” supra Part II.A.} 
\footnotesize{112 See Willard, Zimmerman & Bee, supra note 7, at 73-74. “This power [for the Secretary to grant national security exemptions] . . . appears to be virtually unlimited.” Id. at 74. The only other such absolute language in the ESA can be found in the Secretary of State’s treaty-violation determination in § 1536(i). Id.} 
\footnotesize{113 42 U.S.C. §§ 4321-47 (2006).}
the ESA. NEPA was enacted to ensure "harmony between man and his environment; to ... prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the [important] ecological systems ...." More importantly, NEPA stands to ensure federal agencies incorporate these concerns into their decisionmaking processes.

To accomplish this purpose, agencies, including the military, must weigh the effects of their actions by conducting an Environmental Assessment ("EA") or drafting an Environmental Impact Statement ("EIS") before proceeding with activities that may result in environmental harm. While not prescribed by the regulations, the Army's policy is to prepare an EA that results in either the more detailed EIS, or a Finding of No Significant Impact ("FONSI"). If potential endangered species issues are encountered in this process, the EIS stage is where a biological assessment would be conducted.

While creating a potentially important avenue for protecting endangered species through citizen suits, NEPA would not provide a...
substantive avenue for review of an exemption directed by the SECDEF. Two statutory provisions control. The first is the ESA itself, which specifies that exemptions issued under Section 7 “shall not be a major Federal action for purposes of [NEPA]. . . . Provided, That an . . . [EIS] which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to [the exempted action].”125 Because the EIS requirement in NEPA applies to “major federal actions,”126 the Army would only have to show that they had conducted an EIS with respect to the action at some point prior to the grant of an exemption.127 The EIS stage of the Army NEPA planning process is where potential endangered species issues are addressed.128 As a result, training activities which are proposed for an ESA exemption would normally meet this requirement.

The second potential statutory bar to a NEPA suit reversing an ESA exemption is the “emergency circumstances” exception found in the Council on Environmental Quality (“CEQ”) regulations implementing NEPA.129 In such circumstances, the Defense Department “should consult with the [CEQ] about alternative arrangements,”3 but activities would be exempted only if they were “necessary to control the immediate impacts of the emergency.”131 This provision has been relied upon for military activities in the past, most notably to exempt increased Air compliance. See Malama Makua v. Rumsfeld, 163 F. Supp. 2d 1202 (D. Haw. 2001). In this case, the plaintiffs questioned the adequacy of the Army’s EA and FONSI in considering the effects of military training and resulting wild fires on MMR’s forty-one endangered species. Id. at 1202-09. Makua secured a preliminary injunction against “live-fire [military] training,” which resulted in settlement agreements between the parties to continue more limited military activities. Id. at 1222. See Earthjustice, Biological and Cultural Treasures at Makua to be Protected, http://www.earthjustice.org/our_work/victory/biological_and_cultural_treasures_at_makua_to_be_protected.html (last visited Dec. 1, 2006); Press Release, Earthjustice, Citizens and Military Reach Settlement in Makua Lawsuit (Mar. 31, 2004), http://www.earthjustice.org/news/press/004/citizens_and_military_reach_settlement_in_makua_lawsuit.htm. In February of 2006, the District Court denied the Army’s request to resume “live-fire training . . . [for] soldiers scheduled to leave for Iraq,” observing that the Army’s EIS was still not complete. Malama Makua v. Rumsfeld, Civil No. 00-00813, 2006 U.S. Dist. LEXIS 3962, at *25 (D. Haw. 2006).

127 16 U.S.C. § 1536(k) (2006). In substance, this simplifies the EIS requirement by not requiring a new EIS after an exemption is granted.
128 See supra notes 117-29 and accompanying text; Telephone Interview with Colonel Charles L. Green, supra note 123; NEPA and the Army, supra note 119.
130 40 C.F.R. § 1506.11.
131 Id.
Force flight operations resulting from Operation Desert Storm in 1990.\(^{132}\) In that situation, “[t]he [existing] EIS provided that no military activity would be routinely scheduled between 10:00 p.m. and 7:00 a.m. . . .”\(^{133}\) The case reached the District Court, and, in ruling for the Air Force, the issue was confined to what “constituted an emergency sufficient to circumvent the EIS requirement,” as “the parties . . . never contended that an EIS was essential under all circumstances.”\(^ {134}\)

Summarizing, the ESA provides for very limited judicial review of the Secretary’s determination of a national security interest.\(^ {135}\) NEPA provides no substantive collateral opportunity for challenging an exemption.\(^ {136}\) Additionally, any remaining avenue for a suit is further limited by the terms of the APA.\(^ {137}\) As a result, the exercise of the exemption authority is virtually unchecked by the judiciary.

C. The Choice Not to Pursue Exemptions in the Face of ESA Compliance Issues

The last area that makes analysis of the exemption problematic is the military’s historical unwillingness to seek exemptions from the Secretary of Defense for its activities. This is not to say that the military has never benefitted from deferential treatment for their own determinations of necessity in military training or national defense, only that an official exemption has not been sought.\(^ {138}\) This is at least partially due to the Army’s view that the exemption is for “wartime” only.\(^^{139}\) As a result, the argument exists that the exemption process has simply not been necessary for the military to achieve its training and operational objectives.\(^ {140}\) Another argument states that no new ESA exemptions are needed for the military, such as those passed in the National Defense


\(^{133}\) Id.

\(^{134}\) Id.

\(^{135}\) See supra notes 93-112 and accompanying text.

\(^{136}\) See supra notes 117-29 and accompanying text.

\(^{137}\) See supra notes 103-09 and accompanying text.

\(^{138}\) See Scott M. Palatucci, Comment, The Effectiveness of Citizen Suits in Preventing the Environment from Becoming a Casualty of War, 10 WIDENER L. REV. 585, 591 (2004).

\(^{139}\) Diner, supra note 46, at 196 & n.225 (citing an interview with Major Craig Teller, United States Army Environmental Law Division).

\(^{140}\) Palatucci, supra note 138, at 591. “[T]he National Defense Exemption [to the ESA] . . . has proven to be quite unnecessary given how the military has otherwise triumphed over citizen suits brought under the ESA.” Id.
Authorization Act for Fiscal Year 2004, because the existing exemption is sufficient and has never been used. Both of these approaches minimize the role that the military's environmental policy choices have played in the process. Because these concerns will be more fully addressed in later sections of this Note, it is sufficient at this stage to simply point out that the military has had several opportunities in which to seek exemptions, but has not done so.

D. The Red-Cockaded Woodpecker at Fort Bragg: A Case Study in Endangered Species Management and the U.S. Army

To illustrate the military's posture towards endangered species management, a brief case study involving the U.S. Army and the red-cockaded woodpecker is included in this section to show the evolution of military ESA compliance after 1978.

The red-cockaded woodpecker ("RCW") has been described as "the most substantial ESA challenge facing the Army." The RCW's primary habitat is open pine forests with older trees, with a historical range stretching from East Texas to Virginia, as far south as Florida, and as far north as Kentucky and southern Missouri. The RCW was listed as an endangered species in 1970 after habitat loss resulting from deforestation "precipitated dramatic declines" in their population. Further, military training lands were becoming more important to endangered species conservation generally, and by 1992, eighty-four percent of the 3,000-9,000 remaining RCWs lived on public land, which included eight military reservations. The military would clearly play an important role in the recovery of the RCW.

143 See Diner, supra note 46, at 196-223.
144 See infra Part III.B.
145 Id. at 204.
147 Id.
149 Diner, supra note 46, at 200-01.
The Army was forced to directly confront the RCW issue at Fort Bragg, North Carolina, where military training was directly impacting RCW habitat. Fort Bragg was generally uncooperative with attempts to protect RCW habitat through the 1970s and 1980s, even though, by 1984, the Army had adopted forestry guidelines for RCW habitat that applied to installations nationwide. In 1988, the Fish and Wildlife Service informed Fort Bragg officials of their concerns about training-related habitat degradation, which led to a 1989 Army-led biological assessment. The team the Army sent to investigate found extensive training-related violations of the existing Army RCW policy. Fort Bragg’s response was “combative,” insisting that troops should be allowed to train “without environmental consideration.” In 1990, this situation came to a boiling point with the FWS issuing a finding that led to severe restrictions on training. The Army was subsequently sued under citizen-suit provisions of the ESA for alleged violations. This led to the FWS issuing a “jeopardy opinion” in 1992, requiring military officials to sharply limit training and develop a better management plan.

It would not be accurate to characterize Fort Bragg’s reaction to the FWS finding as mere obstinance. The Army’s XVIII Airborne Corps and 82nd Airborne Division are both headquartered at Fort Bragg, and their combat readiness, largely the result of training on Fort Bragg’s

151 Id. at 205-06. The Army also dealt with ESA compliance issues concerning the RCW at Fort Benning, Georgia. There, RCA protection had been addressed as a function of forest management, and officials were unaware of their responsibilities and the level of resources the problem required until a FWS investigation eventually led to the 1992 indictments of three Army civilian forestry employees for charges relating to the unlawful taking of RCW. Id. at 204-05. The Fort Benning situation is somewhat less germane to the discussion here because compliance issues were not directly related to military training, but were the result of other management practices. See id.
152 Id. at 205-08.
153 Id. at 206.
154 Id.
155 Id. at 207 & n.280 (quoting the findings of Lieutenant Colonel (Retired) John H. Beasley, former Chief of the Army's Environmental Litigation Branch, in The Army and the Red-Cockaded Woodpecker: Managing an Endangered Species 93 (1991) (unpublished M. Laws thesis, George Washington University)). Major Diner goes on to note Beasley's observation that Fort Bragg may have been inviting conflict with the Fish and Wildlife Service to bolster an attempt to use the national security exemption. Id. at 93 n.280.
156 Id. at 207 & n.284.
157 Id. at 207.
158 Matthew Weinstock, Bird Watchers, GOV'T EXEC., Oct. 1, 2002, available at http://www.govexec.com/features/1002/1002s4.htm. The FWS opinion "had a significant impact on training at Fort Bragg. The Army had to close some shooting ranges and totally redesign other training sites. Strict limits were placed on the movements of vehicles and soldiers." Id.
167,000 (primarily forested) acres, 159 contributed greatly to military successes in Panama and Desert Storm. 160 With new development surrounding the reservation, some officials believed that the fact that Fort Bragg was left largely wooded made it part of the solution to problems like habitat depletion. 161 Thus, the FWS opinion was surprising; although the Army may have been doing better than some surrounding landowners, 162 the effects of their training activities were of greater magnitude than officials had acknowledged. 163

Whatever the reasons, the FWS findings led to significant changes in Fort Bragg’s protection of RCW on its training lands. The Army’s response to the FWS findings was fast and successful, becoming one of the Army’s biggest success stories in endangered species management. 164 The Army began cooperating in developing effective management practices with the FWS, which led to many restrictions being lifted. 165 Further, the Army, FWS, and other conservation groups established a partnership, forming what would become the North Carolina Sandhills Conservation Partnership (“Partnership”). 166 The Partnership looked beyond short-term training and range use changes to the implementation of a long-term cooperative strategy for the conservation of RCW and the threatened ecosystem. 167

Despite the positive momentum, the situation was becoming more dire, as “private land was being developed at such a fast pace that the red-cockaded woodpeckers were flocking to Fort Bragg.” 168 To counter

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159 Id.
161 See Weinstock, supra note 158.
162 See id. Katherine Skinner, then the Executive Director of the Nature Conservancy’s North Carolina chapter, acknowledged that Fort Bragg did “such a great job of taking care of the trees,” doing “perhaps better than most private land owners.” Id. Skinner noted that “[w]hen the dust settled, they took the problem very seriously.” Id.
163 Id.
164 See Dycus, Osama’s Submarine, supra note 9, at 25 (noting the Army’s “pride” in its management of the RCW).
165 Weinstock, supra note 158.
167 Id.
168 Weinstock, supra note 158. This phenomenon, generally termed “[e]ncroachment,” is defined as “the cumulative impact of pressures placed on military installations and ranges and the surrounding communities and environmental controls resulting from growing development and urbanization around military facilities, increasing regulatory burdens, and competition for air, land, water, energy, radio spectrum, and other
the effect of "encroachment," military officials and the Nature Conservancy formed the Private Lands Initiative ("PLI"). This program went beyond the implementation of protections on Fort Bragg itself. Both organizations contributed $7 million each to purchase over 3,000 acres as a "buffer" between Fort Bragg's training areas and the development surrounding the installation. PLI provided benefits to both the RCW and the military; the lands would be managed by the Army and available for limited military training while providing additional sanctuary for RCW. As of 2002, several other parcels of land had been identified, with a total cost of about $50 million, and may be purchased under the PLI in the future.

In 2003, the North Carolina chapter of the Nature Conservancy awarded Fort Bragg and the Army Environmental Center ("AEC") with North Carolina Conservation Leadership Awards for their efforts in preserving the RCW, most notably the PLI. Katherine Skinner, the North Carolina chapter's executive director, said "[t]hanks to the efforts of the U.S. Army Environmental Center and Fort Bragg, endangered species management and military training are no longer mutually exclusive."

The Army has confronted endangered species management issues numerous times since the ESA was passed, and the RCW at Fort


See supra note 168.
171 Joyce, supra note 170.
172 Id.; Weinstock, supra note 158.
173 Weinstock, supra note 158.
174 Hajian, supra note 170.
175 Id.
176 See Diner, supra note 46, at 198-220. Diner cites three specific examples: the RCW, the Mexican Gray Wolf, and the Desert Tortoise. Id. In 1992, the Army published a new environmental strategy which found that a total of 100 threatened or endangered species were found on sixty-three Army installations. Id. at 198 (citing UNITED STATES ARMY,
Bragg may be the Army's biggest, although hardly the only, environmental success story. Coincidentally, the Army's success with the preservation of the RCW, most notably through the creation of the PLI, was recognized by the environmental community while RRPI was being proposed and debated in Congress. Despite the changes in the military's policy that had spelled success at Fort Bragg and other installations, many distrusted attempts by the military and the Bush Administration to obtain additional exemptions. While the impacts of the RRPI, or any general exception to the ESA, potentially affect endangered species at every U.S. military installation, the positive policy changes that manifested in the PLI at Fort Bragg are evidence that the Army's environmental stewardship is not on a collision course with endangered species preservation. Further, since the proposal and passage of the RRPI, the Army has issued a new sustainability-focused environmental policy, citing the progress at Fort Bragg as a model for environmental stewardship on other installations.


See id. at 1-12.

See Joyce, supra note 170.

The Pentagon and its supporters in Congress are trying to win the right to violate environmental laws on military reservations. They say rules that protect . . . endangered species cripple their ability to train soldiers . . . . In North Carolina, however, the people who run [Fort Bragg] . . . have found that the endangered species laws actually help them do their job.

Id.

[The . . . Bush Administration's . . . attacks on the critical habitat protections in the Endangered Species Act . . . warrant priority attention from the environmental movement. . . . [The proposed new approach] to economic impact analysis . . . . . . could provide the foundation for weakening not just critical habitat protection, but the full array of protections provided . . . by the ESA . . . .


The SECDEF’s exemption authority, and the effect of its use on the military or the environment, is difficult to predict because it has never been used. The conditions under which it would be invoked are unknown, and the public’s reaction to its use is difficult to gauge. If the military was to request an exemption, this uncertainty may be resolved by the actors involved, the political climate, or public perception. What is clear, however, is that the SECDEF’s ability to use the exemption is based on his definition or interpretation of “reasons of national security.” Further, judicial review will not provide any substantial check on the SECDEF’s decision to grant an exemption. Lastly, the military has not requested exemptions in the past, even when environmental stewardship was not receiving the priority it does today. Considering the history and scope of the SECDEF’s national security exemption and the military’s policies, the impacts of the RRPI can be placed in proper perspective.

III. THE RRPI AND “CRITICAL HABITAT”: EVALUATING THE NEW AMENDMENT IN LIGHT OF THE EXISTING MILITARY EXEMPTION PROCESS

Parts I and II provided an introduction to the history of the ESA, the SECDEF’s national security exemption, and a glimpse into the evolution of the Army’s environmental policy. This Part begins with a brief description of the changes to critical habitat requirements for the military that were passed as a part of the 2004 Defense Authorization Bill.\footnote{181} This is followed by a discussion of the debate between scholars and other commentators about military ESA compliance that surrounded, and resulted from, this new legislation.\footnote{182 See infra Part III.B.} This Part concludes by reconciling the history of the ESA exemption process with the evolution of Army policy, suggesting that the recent critical habit exemption may be a compromise that benefits both the military’s combat readiness and endangered species protection.\footnote{183 See infra Part III.C.}

A. The Passage of the New Military “Critical Habitat” Procedures

appreciate the substance of the change, one must first understand the history and role of the critical habitat process.

The term "critical habitat," while already present in the ESA, was first defined by the FWS in its 1978 regulations as "any air, land, or water area . . . and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species." The 1978 legislative amendments to the ESA, which created the exemption process in Section 7, defined "critical habitat . . . as embracing the concept of 'conservation.'" This was significantly more inclusive than the existing "survival and recovery" approach under the FWS regulations. After the change, the ESA required that the Secretary of the Interior designate critical habitat "to the maximum extent prudent and determinable," preferably at the time of listing, but also at any time "thereafter as appropriate." The designation was to be made for lands "essential to the conservation of the species and . . . which may require special management," determined "on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact . . . ." Critical habitat protection is viewed by many as providing broader protection for endangered species than the Section 7 requirements alone.


The term "critical habitat" for a threatened or endangered species means—
(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

Id.
188 Scarpello, supra note 185, at 408.
190 Id. § 1533(a)(3)(B).
191 Id. § 1532(5)(A)(I).
192 Id. § 1533(b)(2).
193 See, e.g. Senatore, Kostyack & Wetzler, supra note 180, at 448 ("While, [sic] the Act's
In substance, the change consists of two relevant parts. First, the Secretary of the Interior “shall not designate as critical habitat any lands . . . controlled by the Department of Defense . . . that are subject to an integrated natural resources management plan [“INRMP”] . . . if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed . . . .”

Second, “the impact on national security” was added to “economic impact” and “other relevant impact” as a balancing factor for consideration when the Secretary of the Interior determines whether or not “the benefits of . . . exclusion outweigh the benefits of specifying [an] area as . . . critical habitat . . . .”

It is important to note that this change, while amending the statute, did not appear to signal a shift in the quantum of substantive requirements placed on the military by the FWS in recent years. Even before the passage of these amendments, the FWS had considered “areas not in need of special management considerations . . . outside the definition of critical habitat.” This had “included lands covered by Department of Defense [INRMP] . . . .” The FWS found that this policy was “consistent with . . . [a] cooperative approach to conservation . . . .

prohibition on the ‘take’ of any listed species does theoretically provide protection for species’ habitat, the critical habitat provisions of ESA far and away provide the most concrete mandate . . . for federal agencies to advance the Act’s recovery goal through habitat protection.” (citation omitted). But see Scarpello, supra note 186, at 431 (calling the “critical habitat designation . . . a superfluous requirement that serves merely to appease environmentalists who desire another weapon against land development”). For a more complete discussion of the debate surrounding this issue, see infra Part III.B.


145 Id. § 318(b); 16 U.S.C. § 1533(b)(2).


(1) A current plan/agreement must be complete and provide sufficient conservation benefit to the species;
(2) the plan must provide assurances that the conservation management strategies will be implemented; and
(3) the plan must provide assurances that the conservation management strategies will be effective, i.e., provide for periodic monitoring and revisions as necessary. If all of these criteria are met, then the lands covered under the plan would no longer meet the definition of critical habitat.


147 Manson, supra note 196.
critical to maintaining our Nation’s biodiversity.\textsuperscript{198} Similarly, the Army viewed the change in critical habitat procedures as an “additional tool for the military and FWS,”\textsuperscript{199} acknowledging the previous FWS policy and its belief that the new provisions would actually make “coordination” with FWS even more critical.\textsuperscript{200} Stated simply, it appeared that neither the Army nor the FWS believed that the new critical habitat designation procedures denoted a relaxation in the substantive requirements placed on the Army to comply with the ESA.\textsuperscript{201}

The prior FWS practice may have seemed to make the new legislation unnecessary, as military readiness was already receiving deference in the designation process without a statutory provision.\textsuperscript{202} Two tensions were at work, both of which appeared significant enough for Congress and the Administration to take action.

First, the FWS policy of excluding from critical habitat designation those areas under plans, such as an INRMP, that addressed “special management considerations” had recently been strongly rejected by the Federal District Court.\textsuperscript{203} In \textit{Center for Biological Diversity v. Norton},\textsuperscript{204} the plaintiffs challenged the FWS’s exclusion of almost nine million acres from the Mexican Spotted Owl’s critical habitat in the Southwest United States.\textsuperscript{205} The Owl was listed as “threatened” in 1993, with the FWS initially finding that it was “prudent to designate critical habitat for the owl, but that such habitat was not determinable.”\textsuperscript{206} A series of litigation began in 1994 to “compel FWS to designate critical habitat,”\textsuperscript{207} with a final rule being published a year and a half later. This designation of critical habitat, however, was revoked in 1998, and another lawsuit was filed which again resulted in the court ordering FWS to designate critical habitat for the owl. A Proposed Rule was finally published in July of 2000.\textsuperscript{208} While over thirteen million acres were initially included,\textsuperscript{209} in

\textsuperscript{198} Id.
\textsuperscript{200} Id.
\textsuperscript{201} Some Army environmental litigators believed that, instead of being an “exemption,” this was a “substitution of a like-kind process.” Telephone Interview with Colonel Charles L. Green, \textit{supra} note 123.
\textsuperscript{202} See Manson, \textit{supra} note 196.
\textsuperscript{204} Id. at 1091.
\textsuperscript{205} Id. at 1092.
\textsuperscript{206} Id. at 1092.
\textsuperscript{207} Id. See Endangered and Threatened Wildlife and Plants; Proposed Designation of
considering the adequacy of tribal management plans and "Forest Plans" generated by the U.S. Forest Service, the FWS only actually designated about 4.9 million acres in Arizona and 4.6 million acres in New Mexico in the Final Rule.

The court rejected this process, finding the language of the ESA clear: "[w]hat is determinative is whether or not the habitat is 'essential to the conservation of the species' and special management of that habitat is possibly necessary." The FWS could not rely on the existence of other management plans to affect their decision to designate critical habitat, as this practice, which "limit[ed] the number of allowable protections to a listed species' habitat is not only unsupported by the English language, but runs contrary to one of the enunciated policies of the ESA.

The FWS, which had been struggling for years to keep pace with the "relentless cycle of litigation over its implementation [of the critical habitat provisions] of the ESA," was now faced with the potential for even more costly and time-consuming litigation stemming from the rejection of its "special management considerations [and] protections" policy. As a result, "codifying the policy on excluding military lands from critical habitat" was important to preserving efficiency in what some described as a "broken" system which was already "provid[ing] little real conservation benefit [while] consum[ing] enormous agency resources and impos[ing] huge social and economic costs."

The second tension at work was coming from the political arena, with policy makers concerned that the effects of encroachment on military installations were beginning to significantly impact "the kind of military


Ctr. for Biological Diversity, 240 F.Supp. 2d at 1092 (citing Proposed Designation of Critical Habitat for the Mexican Spotted Owl, 65 Fed. Reg. at 45,336.).

Id. at 1093-94.

Id. at 1096.

Id. at 1093.

Id. at 1099 (citing 16 U.S.C. § 1532(5)(a)(I)).

Id. at 1099-1100.

Manson, supra note 196.

Id.

Id.

Id.

Id. In addition to Center for Biological Diversity v. Norton, the FWS and the military had a more direct cause for concern; the Natural Resources Defense Counsel had recently filed a direct challenge to the FWS's reliance on a military INRMP in excluding parts of Miramar Marine Corps Air Base in California from critical habitat designation. REPUBLICAN POL'Y COMM., supra note 169, at 4-6. See generally Sandra L. Irwin, Pentagon Lobbies for Environmental Legal Relief: Environmental Managers Told to be More Attuned to Military Training Needs, NAT'L DEFENSE MAG., Apr. 2003, available at http://www.nationaldefensemagazine.org/issues/2003/apr/Pentagon_Lobbies.htm.
training that is critical to assuring combat readiness, winning wars, and protecting lives.Senate Republicans cited to several examples, identified by senior military officials, of the harmful effects encroachment was having on military training and operations around the globe. The Republican Policy Committee described the encroachment problem as "growing," partly due to the modern military's greater requirements and "in part because of urban sprawl." The Committee also cited General John Keane, the Army Vice Chief of Staff, who emphasized that "[t]he first time soldiers conduct a realistic operation cannot, cannot, be during a time of war. We must train as we intend to fight. And it is becoming increasingly difficult to do so under such environmental restrictions." The RRPI addressed these concerns by giving the military the flexibility it wanted.

A brief look at the critical habitat process on Army installations substantially validates the concerns of military officials. By 2002, the FWS had designated critical habitat on twelve Army bases. Fort Lewis, Washington, was one of the most restricted, with "[seventy] percent of the training land . . . designated as critical habitat for the threatened Northern Spotted Owl," even though no Northern Spotted Owls occupied the installation. Fort Irwin, California, home of the Army's National Training Center ("NTC"), was also significantly affected, with 22,000 acres of the base already restricted from certain military uses as critical habitat for the Desert Tortoise. Further, the Desert Tortoise at Fort Irwin proved to be an issue that would not soon be resolved, as a series of Army "Land Use Requirements Studies" indicated that the NTC required an increase in maneuver area of about seventy percent to meet its current and projected requirements.

219 REPUBLICAN POL'Y COMM., supra note 168, at 1.
220 See id. at 1-5. These included the issues with the RCW at Fort Bragg, various ESA compliance concerns for the Marine Corps in California at Miramar Marine Corps Air Station and Camp Pendleton, and training limitations to protect sea turtles at Vieques range in Puerto Rico. Id. at 3-5.
221 Id. at 3.
222 Id. at 2 (quoting General Keane's testimony before the Senate Armed Services' Readiness Subcommittee (Mar. 13, 2003)).
223 Id. at 6-8.
225 Id.
226 Id. ("Six of the 12 installations, including Fort Lewis, are as yet unoccupied by the species for which critical habitat is designated.").
227 Id.
228 Fort Irwin Expansion, Background Information: Determine Acreage Requirements, http://www.fortirwinlandexpansion.com/Background.htm#LURS (last visited Dec. 1, 2006). The latest of three studies, conducted in 2002, found that the NTC needed to expand its operating area from 350,304 to 593,041 acres. Id. The Army explained this
The two tensions influencing the military's critical habitat designation process, one from the courts and the other from political and environmental realities, provided the impetus for legislative change. Both the Army and FWS had reason to be relieved, and were able to continue their established procedure with explicit statutory authority after the amendment. However, the prospect of a new military exemption from the ESA sparked debate about the proper balance between national security and environmental protection.

B. Arguments Surrounding the Application of the SECDEF's "National Security" Exemption and the Critical Habitat Exemption

The prospect of new military exemptions from substantive environmental laws drew comment from many camps. The polarizing nature of this issue is not new, and unsurprisingly, the discussion of critical habitat among commentators was both passionate and widely divergent. This subpart provides an overview of the debate surrounding the critical habitat designation process and the RRPI, focusing on the new military critical habitat provisions and their interrelationship with the broader national security exemption.

The opinions represented in legal scholarship have been largely critical of changes to the critical habitat procedures. This criticism was at least partially the result of disagreement about the practical effects of critical habitat designation. Some environmental groups believed that the Bush Administration placed very little value on the critical habitat designation process in general. This criticism was validated to some degree by the litigation problems that the FWS faced, with the costs of the process itself swallowing the benefits secured for endangered and need thusly:

The expansion of the NTC at Fort Irwin is essential to maintaining operational readiness for national security.... When Fort Irwin was designated the NTC in 1980, tactics were structured around equipment that could effectively engage an enemy at ranges of 1 to 12 miles. Today, the Army effectively engages the enemy at ranges up to 60 miles away. Also, the pace of tactical operations has increased from 10 miles per hour to more than 25 miles per hour.

threatened species. However, many environmental practitioners asserted the opposite position, with the broader opinion being that the critical habitat was integral to achieving proper species protection. The inefficiency and inconsistency of the designation process was therefore a sign that FWS had not been adequately performing their duty to protect habitat. Any change in policy should therefore be to broaden the application of critical habitat designation.

In contrast to the concerns about critical habitat protections in general, other commentators were skeptical about any potential change in habitat designation because of the implications for military environmental compliance. Former FWS Director Jamie Clark viewed RRPI as "unjustified because DOD's longstanding approach of working through compliance issues on an installation-by-installation basis works." The most vocal...

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230 Scarpello, *supra* note 185, at 416-30. "In order to stop and defend these lawsuits—and then to compel compliance via the inevitable injunctions—the FWS will have to cutback [sic] on its other duties, including listing endangered and threatened species . . . . Therefore, Congress should eliminate the critical habitat designation requirement post haste." *Id.* at 430.

231 See Thomas F. Darin, Comment, *Designating Critical Habitat Under the Endangered Species Act: Habitat Protection Versus Agency Discretion*, 24 HARV. ENVTL. L. REV. 209, 235 (2000) ("[T]he most significant provision in the ESA to protect habitat [is] the requirement that the Department of Interior through FWS designate critical habitat concurrently with a species' listing . . . ."). Mr. Darin is a practitioner in Missoula, MT who works with the National Wildlife Federation. *Id.* at 209.

232 *Id.* at 235.

233 Senatore, Kostyack & Wetzler, *supra* note 179. "[T]he critical habitat provisions of ESA far and away provide the most concrete mandate in the ESA for federal agencies to advance the Act's recovery goal through habitat protection." *Id.* at 448. The authors are practitioners with the Defenders of Wildlife, the National Wildlife Federation, and the National Resources Defense Counsel, respectively. *Id.* at 447. *See also* Amy Armstrong, *Critical Habitat Designations Under the Endangered Species Act: Giving Meaning to the Requirements for Habitat Protection*, 10 S.C. ENVTL. L.J. 53 (2002). "Rather than weakening the ESA through a more general description of critical habitat, the FWS can use the broad habitat descriptions to issue 'survival habitat' concurrently with the listing of a species." *Id.* at 86. This would provide listed species with the "benefit from immediate protection of critical habitat . . . providing some protections beyond mere listing and waiting up to three years (or indefinitely in some cases) for critical habitat determinations to be made." *Id.* at 83.


[t]he Defense Department's proposed ESA exemption suffers from three basic flaws: it would severely weaken this nation's efforts to conserve imperiled species and the ecosystems on which all of us depend; it is unnecessary for maintaining military readiness; and it ignores the Defense Department's own record of success in balancing
criticism again came from the environmental community, which argued that the critical habitat amendments “[g]ive the DOD a [f]ree-[p]ass to [i]gnore [h]abitat [p]rotection.” An additional concern was the military’s perceived immunity from lawsuits brought by citizen groups to enforce the ESA, that “[t]he fear of terrorist attack . . . will serve only to quicken this trend [to sacrifice endangered species in the name of national security] and one day ultimately leave the citizen suit provision of the ESA powerless to stop military action that threatens endangered species.” Not surprisingly, there was also criticism of past FWS practices in excluding military lands from critical habitat designation.

In contrast, broad support also existed for the RRPI provisions from those both in and out of uniform. One argument proponents made was that the military-readiness-versus-environmental-protection calculus weighed in favor of the military, observing that “as increasing numbers of men and women die each day while serving the United States in Operation Iraqi Freedom, it seems appropriate that Congress does everything in its power to help them train and effectively execute their mission.” Outside of academia, some simply saw the RRPI as providing long-needed relief for the military to train effectively for combat.

The most important call for a decrease in training restrictions came from the military itself, asserting the need to “train as we intend to fight,” and noting that it was “becoming increasingly difficult to do so readiness and conservation objectives under existing law.

Id. at 597-98.

under such environmental restrictions." Additionally, in 2003, three Air Force Judge Advocates ("JAGs") suggested that the existing exemptions in substantive environmental statutes were inadequate to preserve military readiness, correctly observing that the existing exemptions, including the SECDEF's exemption to the ESA, are limited to individual cases where repeated use would inflict "death by a thousand cuts." The need was for exemptions to address "training and operations... as ongoing [sic] needs—not an emergency or an exception."

While some observers approached the issue from these discrete perspectives, Professor Stephen Dycus of the Vermont Law School attempted to reconcile the military's environmental policy with ESA compliance and modern training needs. Professor Dycus acknowledged both the sincerity of military leaders as well as the need for occasional "environmental compromises... in the interest of national security." His concern was that the RRPI was passed with neither "a thorough analysis of the interests at stake, [nor] a robust public discussion." He also saw the critical habitat amendment as providing little additional benefit to the military because of the already-available national security exemption. In addition to Professor Dycus, the larger environmental community seems to argue that further amendments should not be granted since the existing SECDEF exemption remains unused.

The competing concerns of military readiness and environmental compliance clearly elicit strong opinion and engender debate. The stakes, however, are not what they may appear, as the passage of the critical habitat exemption does not necessarily denote that one of these concerns must suffer wholesale for the other.

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241 REPUBLICAN POL'Y COMM., supra note 168, at 2 (quoting General Keane's testimony before the Senate Armed Services' Readiness Subcommittee (Mar. 13, 2003)).
243 Id. at 87.
244 Id.
245 See Dycus, Environmental Baby, Terrorist Bath Water, supra note 142; Dycus, Osama's Submarine, supra note 9.
246 Dycus, Osama's Submarine, supra note 9, at 53.
247 Id. at 54.
248 Dycus, Environmental Baby, Terrorist Bath Water, supra note 142.
249 See, e.g., Press Release, Defenders of Wildlife, supra note 229 ("The ESA already has tremendous flexibility, and the agencies regularly work with the DOD to exclude lands from critical habitat designation on a case-by-case basis. Moreover, the ESA includes a national security exemption that has never been utilized by the DOD.").
C. Reconciling the History of the ESA and the Evolution of Military Policy: The Critical Habitat Exemption as an Appropriate and Necessary Compromise

In the preceding discussion, three issues were identified that in many ways converge with the consideration of the new critical habitat exemption. The first is the evolution of Army environmental policy, especially concerning how it has dealt with the tensions between environmental regulatory compliance and training needs.\textsuperscript{250} The second is the functional scope of the SECDEF’s existing ESA exemption, which has remained unused throughout the recent evolution of the Army’s environmental policy.\textsuperscript{251} The third is the proposal and passage of the critical habitat amendments themselves.\textsuperscript{252} At the convergence of these issues, two important observations become evident.

First, although critics point to the broad scope of the SECDEF’s exemption while arguing against changes such as the RRPI,\textsuperscript{253} they do not acknowledge the potential environmental impacts that this type of confrontational approach could have. The course of Army policy has been to bring their activities within the requirements of the ESA where exemptions may in fact be reasonable. With competing definitions of “national security” making this statutory term anything but clear,\textsuperscript{254} the Army’s restrictive definition\textsuperscript{255} may actually result in the most circumscribed applicability of the exemption power. Using the existing exemption as an excuse to avoid additional exemptions or amendments may force the Department of Defense to couch any encroachment-related problem as a “national security” concern when their training needs are jeopardized.\textsuperscript{256} In the end, Army policy could shift from viewing the SECDEF’s exemption as an “extraordinary remedy, to be invoked as a measure of last resort in wartime,”\textsuperscript{257} to one which is relied on as a matter

\begin{itemize}
\item \textsuperscript{250} See supra Part I.
\item \textsuperscript{251} See supra Part II.
\item \textsuperscript{252} See supra Part III.
\item \textsuperscript{253} See Dycus, Environmental Baby, Terrorist Bathwater, supra note 142; see also Palatucci, supra note 138, at 587-93.
\item \textsuperscript{254} See supra Part II.A.
\item \textsuperscript{255} See Diner, supra note 46, at 196 n.225.
\item \textsuperscript{256} See supra note 88 and accompanying text.
\item \textsuperscript{257} Diner, supra note 46, at 196 (citing an interview with Major Craig Teller of the U.S. Army Environmental Law Division in 1993). See Willard, Zimmerman & Bee, supra note 7 at 87-88. “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.” \textit{Id.} (quoting the testimony of Deputy Under Secretaries of Defense Mayberry and DuBois before the
of course to meet training and operational requirements. Those opposed to new exemptions would surely not view a liberal application of the national security exemption as good for wildlife.

Second, the new critical habitat “exemptions” do not appear to be new at all, but merely the codification of an existing FWS and DoD practice. While military environmental practices may be subject to criticism by some, the success the Army has had with the RCW and its new focus on repeating this at other installations are signs that the Army is not intent on running roughshod over the ESA. Further, the success at Fort Bragg shows that habitat protection on military land can occur without a critical habitat designation by FWS. After Center for Biological Diversity v. Norton, the new critical habitat amendment is important to ensuring that the Army has a useful tool at its disposal for balancing its training needs with environmental protection.

These observations afford a backdrop for viewing the prudence of the critical habitat amendments. Ultimately, this presents the question of whether military and environmental interests are always in direct conflict. Both sides can probably agree that the “national security” exemption is best left as a “measure of last resort,” left unused in all but the most dire of circumstances. A requirement for broader use would hurt the military by demanding investment of substantial time and resources in each request. Environmentalists could also find the door opened for almost unchecked exemption authority which would include not only critical habitat designation, but all substantive requirements of the ESA itself.

CONCLUSION

It may seem almost automatic for military policy makers and environmentalists to find themselves pitted against one another in

House Armed Services Committee on Range Encroachment (May 16, 2002)).
258 Manson, supra note 196.
259 See, e.g., Palatucci, supra note 138.
260 See supra Part II.D.
261 See DEPT OF THE ARMY, supra note 180.
262 Dycus, Osama’s Submarine, supra note 9, at 25 & n.118.
265 Diner, supra note 46, at 196 (citing an interview with Major Craig Teller of the U.S. Army Environmental Law Division (1993)).
266 See Willard, Zimmerman & Bee, supra note 7, at 87-88.
267 See supra Part II.B.
268 See supra Part III.A.
competition to secure their interests, be it national security or environmental protection. While the broad implications of possible new exemptions to environmental statues are outside the scope of this discussion, the evolution of Army environmental policy and the ESA exemption process clearly demonstrate that military and environmental interests are not always mutually exclusive. The choice to keep the national security exemption unused is best for both sides, but doing so requires compromise. At first glance, the critical habitat amendment may seem to be a one-sided success for the military; however, viewed in light of the national security exemption and Army policy, it emerges as an appropriate and timely balance of important national interests.