Deferring to the Assertion of National Security: The Creation of a National Security Exemption under the National Environmental Policy Act of 1969

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DEFERRING TO THE ASSERTION OF NATIONAL SECURITY: THE CREATION OF
A NATIONAL SECURITY EXEMPTION UNDER THE NATIONAL
ENVIRONMENTAL POLICY ACT OF 1969

Emily Donovan

Abstract

The National Environmental Policy Act of 1969 (NEPA) aims to ensure that agencies consider the potential environmental impacts of their actions before engaging in them. In contrast to other major environmental legislation, Congress did not include a national security exemption under NEPA, meaning that, in theory, agencies in the business of national security must comply with NEPA just as any other agency, by considering mitigation measures and alternatives, and preparing environmental impact statements when necessary. The courts, however, in deciding NEPA noncompliance cases, have created a national security exemption that the legislature never intended. They have done so by failing to engage in the appropriate balancing required of courts when deciding injunctions; when faced with requests for injunctive relief, courts have failed to weigh the potential harm to the environment against the potential harm to national security. Although national security is of extreme importance, when courts blindly defer to agencies’ national security assertions without first exploring such assertions, they risk thwarting NEPA’s primary purpose.

This article first examines the purposes and goals of NEPA and explains why it is important for agencies to comply with it. Next, it discusses some of the more notable controversies in which courts have deferred to the national security argument in NEPA noncompliance cases rather than engaging in the appropriate balancing. It then contrasts these cases with others in which the courts refused to defer to agencies’ national security assertions and instead properly weighed the competing harms. Finally, this article contextualizes this controversy in light of the proper roles of the three branches of government and concludes by arguing that courts should not be creating a national security exemption which the legislature purposefully excluded from NEPA.
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I. INTRODUCTION

The primary goal of the National Environmental Policy Act of 1969\(^1\) (NEPA) is to ensure that agencies consider the environmental impacts of their actions before engaging in them. NEPA forces agencies to evaluate reasonable alternatives to their proposed actions and design appropriate mitigation measures, leading to the implementation of such measures when necessary. The intended result of the NEPA process is that governmental decision-making be informed, rather than hasty or arbitrary, with regard to impacts on environmental quality, and as such, NEPA applies broadly to agency decision-making. However, by arguing that the public interest in national security outweighs environmental concerns, some agencies have been successful in thwarting NEPA’s purpose. A recent example is found in *Winter v. Natural Resources Defense Council, Inc.*,\(^2\) where the U.S. Navy circumvented NEPA’s environmental impact statement (EIS) requirement and proceeded with its proposed action without regard for the NEPA process.

Because NEPA noncompliance cases often include requests for injunctive relief, courts have a duty to weigh the public interest in national security against the public interest in the environment when deciding whether to grant relief. Instead, however, courts have tended to defer to the agencies of the Executive Branch and, in doing so, have created a national security exemption from NEPA, one that the Legislature purposefully excluded from the statute. To be sure, national security is important and should be given elevated attention when appropriate — such as when the time to prepare an EIS itself causes a threat — but it should not be used as a pretext for avoiding NEPA requirements. NEPA’s EIS requirements serve the important roles of effecting substantive changes in decision-making, informing the public, and creating a record.


which courts can review in the determination of challenges for noncompliance. It is necessary for courts to balance the competing harms in NEPA noncompliance cases because environmental concerns could outweigh national security concerns in a given case. When injunctions are at issue, courts should closely examine agencies’ assertions that delays associated with NEPA compliance pose a threat to national security and strike down such assertions when used merely as attempts to avoid compliance with NEPA.

This article begins in Part II by highlighting the purposes and goals of NEPA and arguing that the operation of NEPA is a vital component of our environmental policy. Part III reviews some of the more notable controversies in which courts have deferred to the national security argument in NEPA noncompliance cases rather than engaging in the appropriate balancing required for the determination of injunctions. It then looks at cases in which the courts have properly weighed the competing harms and reviews the proper roles of the three branches of government. This article concludes, in Parts IV and V, by examining the absence of a statutory national security exemption and the dangers that courts face when extending deference to the assertion of national security.

II. THE PURPOSES AND GOALS OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 (NEPA)

NEPA’s purpose is to: “encourage productive and enjoyable harmony between man and his environment; . . . promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; . . . [and] enrich the understanding of the ecological systems and natural resources important to the Nation.” ³ To implement these goals, NEPA requires that all federal agencies prepare an environmental impact statement (EIS)

on every “recommendation, or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.” The EIS must include:

(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.  

In deciding whether to prepare an EIS, an agency will first determine whether the action concerns a proposal for legislative action or a major federal action. If so, it will then determine whether the environmental impacts are significant. In doing so, an agency may consider whether the proposal is one that normally requires an EIS. If there is not enough information to answer this question, the regulations require that the agency prepare an Environmental Assessment (EA) to aid in determining whether a full EIS is warranted. If the agency, after preparing an EA, decides that an EIS is not necessary, it will issue a Finding of No Significant Impact (FONSI) and the action may proceed. Agencies typically memorialize the threshold decision in a Record of Decision (ROD), which can be challenged in court.

If an EIS is prepared, a draft EIS is distributed and made available for public comment and the agency may not make a decision on the proposed action until 90 days after the notice of the draft EIS is published in the Federal Register. The agency may then respond to public

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5 Id.
6 Id.
7 Id.
8 40 C.F.R. § 1501.4(a) (1978).
9 40 C.F.R. § 1501.4(b) (1978); 40 C.F.R. § 1501.4(c) (1978).
comments and prepare a final EIS.\textsuperscript{13} Once a final EIS and ROD are issued, there is a 30-day moratorium on agency action to afford opponents of the decision an opportunity to file legal challenges.\textsuperscript{14} The EIS must be prepared before the agency engages in its proposed action so that the agency can use it in making its decision on whether or how to engage in its proposed activity: “[t]he statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made”.\textsuperscript{15} The general remedy for a NEPA violation is a remand to the agency and a stay of the proposed action until it prepares and considers a satisfactory EIS.\textsuperscript{16}

Although NEPA is procedural in nature — meaning that a court will not require any substantive result from an agency’s preparation of an EIS, but rather will consider whether the process was properly followed and ensure that the agency has considered the consequences and alternatives to its actions — it also plays an important role in protecting the environment.\textsuperscript{17} NEPA is procedural in that “‘the only role for a court is to ensure that the agency has considered the environmental consequences; it cannot interject itself within the area of discretion of the executive as to the choice of the action to be taken.’”\textsuperscript{18} In other words, a court will only require that an agency inform itself of the environmental impacts of its proposed action; it will not tell the agency which action to take once it has informed itself. When a court reviews an agency’s decision regarding the preparation of an EIS, it uses an arbitrary and capricious standard: “[t]he court must determine whether the agency has taken a ‘hard look’ at the consequences of its actions, based its decision on a consideration of relevant factors, and provided a ‘convincing

\textsuperscript{13} 40 C.F.R. § 1506.10(c) (1978).
\textsuperscript{14} 40 C.F.R. § 1506.10(b)(2) (1978).
\textsuperscript{15} 40 C.F.R. § 1502.5 (1978).
\textsuperscript{16} Save Our Ecosystems v. Clark, 747 F.2d 1240, 1250 (9th Cir. 1984).
statement of reasons to explain why a project's impacts are insignificant." The court will not substitute its own judgment for that of the agency; it will defer to the agency’s decision not to prepare an EIS as long as the agency has taken a “hard look” at the consequences of its actions and explained why they are insignificant. However, this does not mean that courts can defer to an agency’s decision not to comply with NEPA. Courts will not require an agency to implement alternatives or mitigation measures discovered by the EIS process, but must ensure that the agency considered such things. Courts will not require an agency to prepare an EIS, but must first decide that the agency has taken a “hard look” at the possible consequences of its actions before deciding not to prepare one. If an agency has not taken the requisite “hard look,” the court must not allow the action to continue until the agency has fully complied with NEPA.

Although the statute is procedural, compliance with NEPA is important for the preservation of our environment: “[NEPA] is more than an environmental full-disclosure law. NEPA was intended to effect substantive changes in decisionmaking.” Although the courts will not require a substantive result, inherent in NEPA’s purpose is the goal that an agency will nevertheless take substantive action — that an agency will learn from the EIS process and implement alternatives or mitigation measures to reduce or better the impact that its actions will have on the environment.

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19 Makua v. Rumsfeld, 163 F.Supp.2d 1202, 1216 (D. Hawaii 2001) (quoting Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998) (internal quotations omitted)).
When an agency fails to draft an EIS without taking the requisite “hard look,” or drafts an EIS after engaging in the proposed action, this underlying purpose cannot be fulfilled. An agency cannot take alternative action or implement mitigation measures if it does not first perform a study to discover them. Hence, the requirement that an EIS be prepared before an agency takes action: “[a]n agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal.”\textsuperscript{22} The purpose of this requirement is to ensure that the EIS “can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.”\textsuperscript{23} An EIS is intended to be a tool used to assist agencies in making informed decisions about whether and how to engage in their proposed actions.\textsuperscript{24} The EIS cannot fulfill this purpose if agencies do not complete it before taking action.\textsuperscript{25} 

In addition to forcing agencies to consider environmental impacts, the EIS also serves as an important mechanism for informing the public: “[s]ection 102(2)(C) thus serves twin aims. The first is to inject environmental considerations into the federal agency's decisionmaking process by requiring the agency to prepare an EIS. The second aim is to inform the public that the agency has considered environmental concerns in its decisionmaking process.”\textsuperscript{26} When an agency prepares an EIS, the information is disclosed to the public, alerting the public to the agency’s considerations.\textsuperscript{27} This is as an important check on the agency’s decision regarding its proposed action. Once the public is informed as to the likelihood that an agency’s action will significantly impact the environment, it can ask questions, form opinions, and challenge the

\textsuperscript{22} 40 C.F.R. § 1502.5 (1978).  
\textsuperscript{23} Id.  
\textsuperscript{24} Id.  
\textsuperscript{25} See London, supra note 17.  
\textsuperscript{27} Id.
action that the agency ultimately decides to take after considering the information brought to light by the EIS.\textsuperscript{28} In the absence of such a mechanism, an agency could keep important information to itself, inviting the potential for wrongdoing; if an agency was not required to disclose the impacts of its actions, it might be more apt to engage in action regardless of the impacts because nobody would know enough to be able to challenge the action.\textsuperscript{29}

This demonstrates a third purpose of NEPA’s EIS requirement, the creation of a record which courts can review when determining challenges for noncompliance: “in making its review, the Court must have, not merely that full articulation of the agency’s reasoning, but it must also have ‘the whole record’ on which the agency acted.”\textsuperscript{30} When agency action is challenged, the court must inquire into the agency’s reasoning for making the decision it made, which, in NEPA-related challenges, is found in the EIS: “in its review, the Court is to ‘engage in a substantial inquiry’ into the reasonableness of the agency action.”\textsuperscript{31} A court must look at the contents of the EIS to determine “‘whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.’”\textsuperscript{32} Without an EIS, a court cannot see upon what the agency based its decision and therefore does not have what it needs to make an informed ruling on a NEPA noncompliance challenge.

\section*{III. The Courts’ Review of Cases}

NEPA noncompliance cases are typically brought by groups seeking to enjoin agencies from engaging in activities before complying with NEPA. To obtain an injunction, a plaintiff must establish four things: (1) that it, the plaintiff, is likely to succeed on the merits; (2) that it is

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\textsuperscript{28} 40 C.F.R. § 1506.6 (1978); 40 C.F.R. § 1506.10 (1978).
\textsuperscript{29} For more on NEPA’s public education function, see French, \textit{supra} note 21, at 947–48. \textit{See also} Ichter, \textit{supra} note 21, at 645–46.
\textsuperscript{30} Appalachian Power Co. v. E.P.A., 477 F.2d 495, 507 (4th Cir. 1973) (overruled on other grounds).
\textsuperscript{31} \textit{Id.} (quoting Citizens to Improve Overton Park, Inc. v. Volpe, 91 S.Ct. 814, 823–824 (1971) (overruled on other grounds)).
\textsuperscript{32} \textit{Id.} (quoting Citizens to Improve Overton Park, Inc., 91 S.Ct. at 823–824 (1971) (overruled on other grounds)).
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likely to suffer irreparable harm in the absence of an injunction; (3) that the balance of equities tips in its favor; and (4) that an injunction is in the public interest. In NEPA noncompliance cases in which environmental groups seek to enjoin the actions of Executive Branch agencies, the environmental groups generally argue that the potential harm to the environment that comes as a consequence of noncompliance outweighs the potential harm to national security that comes with compliance, while the agencies argue just the opposite. Therefore, in determining whether to grant relief in such cases, the courts have a duty to weigh the potential harm to the environment against the potential harm to national security. However, as the following cases demonstrate, courts rarely engage in this balancing and instead defer to the agencies’ national security assertions.

A. Cases in which Courts Deferred to the Assertion of National Security rather than Engaging in the Appropriate Balancing

In Winter, after preparing an EA, the U.S. Navy determined that an EIS was not warranted. The Navy’s proposed action was to use mid-frequency active (MFA) sonar in the waters off the coast of Southern California (SOCAL) in training to detect and track enemy submarines. At least thirty seven species of marine mammals inhabit the SOCAL area and the parties disputed the amount of harm that the use of this sonar would cause to these mammals. The Navy argued that, at most, MFA sonar could cause temporary hearing loss or brief

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35 Winter, 129 S.Ct. at 372.
36 Id. at 370.
37 Id. at 371.
disruptions of their behavioral patterns, while the Natural Resources Defense Council (NRDC) argued that MFA sonar could cause permanent hearing loss, decompression sickness, and major behavioral disruptions, and has led to several mass strandings of marine mammals.38 The Navy’s EA, issued in February of 2007, determined that its training would cause 8 level A harassments, or those that would cause potential destruction or loss of biological tissue, and 274 level B harassments, or those that would cause temporary injury or disruption of behavioral patterns, but classified the latter as level A harassments as well, as a precaution.39 From this data, the Navy determined that its training would not have a significant impact on the environment, and decided not to prepare an EIS.40

Plaintiffs, the NRDC, brought suit seeking a preliminary injunction to enjoin the Navy from engaging in its training without first preparing an EIS.41 The District Court granted the preliminary injunction and prohibited the Navy from using MFA sonar in its training.42 Upon the Navy’s emergency appeal, the Ninth Circuit agreed that injunctive relief was appropriate, but remanded to the District Court and required it to narrow the injunction by providing mitigation conditions under which the Navy could conduct its training.43 On remand, the District Court issued a new injunction with six mitigation measures, and the Navy appealed, challenging two of these: “(5) shutting down MFA sonar when a marine mammal is spotted within 2, 200 yards of a vessel; and (6) powering down MFA sonar by 6 dB [decibels] during significant surface ducting conditions.”44 The President then granted the Navy an exemption from the Coastal Zone

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38 Id.
39 Id. at 372.
40 Id.
41 Id.
42 Id.
43 Id. at 373.
44 Id.
Management Act (CZMA) under 16 U.S.C. § 1456(c)(1)(B) and the Council on Environmental Quality (CEQ) authorized the Navy to implement “alternative arrangements” to NEPA compliance due to “emergency circumstances.” The Ninth Circuit, however, concluded that the District Court’s preliminary injunction, including the six mitigation measures, was proper and questioned the lawfulness of the CEQ’s interpretation of the “emergency circumstances” regulation.

But, the United States Supreme Court, in a split decision, disagreed, reversed the Ninth Circuit’s holding, and vacated the injunction. It held that any irreparable injury caused by the Navy’s training was “outweighed by the public interest and the Navy’s interest in effective, realistic training of its sailors.” It agreed with the Navy’s assertions that realistic training could not be accomplished under the two mitigation measures at issue and that it was important for the Navy, and for the Nation, for the Navy to be able to conduct its training under realistic conditions. Using the President’s statement that training with active sonar is “essential to national security” to rationalize its decision, the Court held that: “the balance of equities and consideration of the overall public interest in this case tip strongly in favor of the Navy.”

The Court’s decision, however, is devoid of any analysis on the possible harms to the environment; the Court flatly concluded that “any” injury is outweighed by Navy’s and the Nation’s interest in national security, without analyzing the injuries that could occur from the

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45 The CZMA serves to “preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation’s coastal zone for this and succeeding generations.” 16 U.S.C. § 1452(1) (1972).
46 Winter, 129 S.Ct. at 373. However, an exemption to the CZMA does not affect an agency’s duties under NEPA. Because these are two separate statutes with different purposes, an agency must comply with NEPA regardless of its duties, or lack thereof, under the CZMA. Furthermore, CEQ’s ability to authorize “alternative arrangements” due to “emergency circumstances,” is questionable — the U.S. Supreme Court has “never suggested that CEQ could eliminate [NEPA’s] command.” Id. at 391 (Ginsburg, J., dissenting).
47 Id. at 374.
48 Id. at 382.
49 Id. at 376.
50 Id. at 377.
51 Id. at 378.
Navy’s actions or the consequences of those injuries. When, then, will the public interest ever tip in favor of the environment? The Supreme Court in Winter stated: “[o]f course, military interests do not always trump other considerations, and we have not held that they do. In this case, however, the proper determination of where the public interest lies does not strike us as a close question.” But the Court did not explain why the proper determination of where the public interest lies was not a close question, and it failed to include a discussion on when military interests will not trump environmental concerns. Rather than weighing the potential harms to the environment against the potential harms to national security, the Court simply declared that there was not a close question and deferred to the Navy’s assertion of national security. It seems, then, that the national security argument is a surefire way to circumvent the requirements of NEPA.

This circumvention, accomplished by agencies and ratified by courts that defer to such agencies rather than properly weighing the competing harms, allows agencies to take action without regard for the NEPA process. Demonstrably, in Winter, the U.S. Navy failed to draft an EIS before engaging in its training. Had it prepared an EIS prior to taking action, however, it might have considered the two mitigation measures it disputed in the injunction ordered by the district court. Without an EIS, though, how could it have known that implementing such measures was not the proper thing to do? As Justice Breyer pointed out in his concurrence/dissent: “[t]he absence of an injunction thereby threatens to cause they very environmental harm that a full preaction EIS might have led the Navy to avoid (say, by adopting the two additional mitigation measures that the NRDC propose[d]).” Without the injunction, the Navy was free to engage in the training without restriction, without considering any

52 Id.
54 Winter, 129 S.Ct. at 383 (Breyer, J., concurring in part, dissenting in part).
alternatives or mitigation measures. If it was at least required to draft an EIS first, it might have found that the mitigation measures ordered by the injunction were acceptable. In fact, the Navy accepted four of the six mitigation measures in the district court’s injunction, four measures that it would not have adopted if the injunction had not brought them to light. Without the EIS, though, we do not know the harm avoided by the adoption of these four, nor the harm caused by the refusal to adopt the disputed two; Justice Breyer continued:

> it would seem important to have before us at least some estimate of the harm likely avoided by the Navy’s decision not to contest here *four of the six mitigating conditions* that the District Court ordered. Without such evidence, it is difficult to assess the relevant harm — that is, the environmental harm likely caused by the Navy’s exercises with the four uncontested mitigation measures (but without the two contested mitigation measures) in place.\(^{55}\)

If the Navy had informed itself of the environmental harms ahead of time, by preparing an EIS, it could have used such information to assess the advantages and disadvantages of implementing the mitigation measures and could have thereby made an informed decision on whether to adopt them.\(^{56}\)

In fact, the Navy announced its intent to prepare an EIS in December of 2006.\(^ {57}\) It began the EIS process and said it would be complete in January of 2009.\(^ {58}\) However, it began its training exercises in February of 2007.\(^ {59}\) It prepared an EA, which it concluded with a Finding of No Significant Impact (FONSI) on February 12, 2007, and began the training exercises that same day.\(^ {60}\) As explained above, an EA is used to determine whether an EIS should be prepared.\(^ {61}\) In *Winter*, though, the Navy had already decided to prepare an EIS and had already

\(^{55}\) Id. at 384 (Breyer, J., concurring in part, dissenting in part).

\(^{56}\) For more on Justice Breyer’s opinions in *Winter*, see Kendall, supra note 21, at 11116–17.

\(^{57}\) Winter, 129 S.Ct. at 387 (Ginsburg, J., dissenting).

\(^{58}\) Id. at 387–88 (Ginsburg, J., dissenting).

\(^{59}\) Id. at 388 (Ginsburg, J., dissenting).

\(^{60}\) Id. (Ginsburg, J., dissenting).

\(^{61}\) 40 C.F.R. § 1501.4(b) (1978).
begun the EIS process before it prepared the EA.62 The preparation of the EA and the FONSI, then, appear to be an attempt to get around the EIS timing requirements. By preparing the EA and issuing the FONSI, the Navy could begin its training before preparing the EIS. If there was truly no significant impact as the Navy claimed after its EA, however, there should have been no reason to continue the EIS process; when a FONSI is issued at the conclusion of the EA, it means no EIS is warranted. In fact, the Navy did not challenge the lower courts’ decision that an EIS was required for its training exercise in SOCAL.63 Instead, it argued that it should have been able to prepare the EIS after beginning its training because of CEQ’s authorization of “alternative arrangements” to NEPA due to “emergency circumstances.”64 It sought this authorization to overcome the lower courts’ rulings.65 But, preparing an EIS after beginning an action defeats the purpose of NEPA: “[h]ad the Navy prepared a legally sufficient EIS before beginning the SOCAL exercises, NEPA would have functioned as its drafters intended: the EIS process and associated public input might have convinced the Navy voluntarily to adopt mitigation measures, but NEPA itself would not have impeded the Navy’s exercises.”66 Had the Navy prepared an EIS before engaging its training exercises, it would have considered mitigation measures and/or alternatives to its action and might have implemented some of them after becoming aware of their existence. Although NEPA would not require the implementation of such measures, its purpose is to force agencies to consider them. The Navy thwarted this purpose by not preparing an EIS and therefore not considering any alternatives or mitigation measures before taking action.

62 Winter, 129 S.Ct. at 388 (Ginsburg, J., dissenting).
63 Id. at 389 (Ginsburg, J., dissenting).
64 Id. (Ginsburg, J., dissenting). CEQ’s ability to authorize “alternative arrangements” because of “emergency circumstances,” however, is questionable. Id. at 373. The U.S. Supreme Court has “never suggested that CEQ could eliminate [NEPA’s] command.” Id. at 391 (Ginsburg, J., dissenting).
65 Id. at 389 (Ginsburg, J., dissenting).
66 Id. at 390 (Ginsburg, J., dissenting).
The U.S. Supreme Court permitted the Navy to thwart NEPA when it vacated the injunction against the Navy without properly weighing the competing interests.\textsuperscript{67} By deferring to the Navy’s assertion of national security instead of conducting the appropriate balancing between it and environmental concerns, the Court created a national security exemption to NEPA. It allowed the Navy to avoid NEPA simply because the Navy argued “national security,” without exploring the real threat that would be caused to national security if the Navy was required to prepare an EIS before beginning its training. The Court did this despite the lack of a national security exemption under NEPA.

Similarly, in \textit{State of Wisconsin v. Weinberger}, the Seventh Circuit held that, even if there had been a NEPA violation, an injunction was not warranted, and the Navy did not have to prepare a supplemental EIS, because of the importance of national security.\textsuperscript{68} The court stated that, “[a]lthough there is no national defense exception to NEPA, and the Navy does not claim one, the national well-being and security as determined by the Congress and the President demand consideration before an injunction should issue for a NEPA violation.”\textsuperscript{69} While the court was correct in stating that national security must be considered before an injunction is issued, it failed to recognize that this interest must be balanced against that of the environment.

The Navy had constructed an extremely low frequency (ELF) submarine communications test facility in northern Wisconsin in 1969.\textsuperscript{70} The facility was deactivated in 1978, but operations resumed in 1981.\textsuperscript{71} The public’s concern was the possible effects of continuously exposing

\textsuperscript{68} State of Wis. v. Weinberger, 745 F.2d 412, 425 (7th Cir. 1984).
\textsuperscript{69} Id.
\textsuperscript{70} Id. at 414–15.
\textsuperscript{71} Id. at 415.
humans, animals, and plants to extremely low frequency electromagnetic radiation.\textsuperscript{72} When the
Navy reactivated the facility in 1981, it did not prepare a supplemental EIS.\textsuperscript{73} The court deferred
to the Navy’s expertise in making its decision of whether to require the preparation of a
supplemental EIS: “[t]he Navy has emphasized that an ELF submarine communications system
is of the highest priority for national defense. The Secretary of the Navy also stated . . . that it is
essential to the national defense and that any delay in its construction is contrary to national
defense interests.”\textsuperscript{74} Because of these statements, the court held that the delay that would be
caused by compliance with NEPA outweighed the benefit of preparing a supplemental EIS.\textsuperscript{75}
The court simply deferred to the Navy’s judgment without considering its motives. As Judge
Cudahy, concurring in part, dissenting in part, pointed out: “the majority’s discussion of the
evidence in the case treats as authoritative any statements made by the Navy's experts.”\textsuperscript{76} The
court did not balance the national security claims against the environmental concerns, and it
never considered the fact that the Navy could be biased — that it may not want to prepare a
supplemental EIS.\textsuperscript{77} The court did not engage in a determination of whether there was an
emergency that warranted an exception to NEPA compliance because of the delay it might cause.
It did not explain why any delay caused by the preparation of an EIS would not have been
harmless since the facility had already been closed for years. How much harm could be caused
by the added delay associated with the preparation of an EIS? But, instead of questioning if
national security would actually be affected, and instead of weighing the potential harm to it
against the potential harm to humans and the environment caused by exposure to radiation, the

\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 427.
\textsuperscript{75} Id. at 428 (“[T]he delay occasioned by the issuance of an injunction could bring about serious consequences for
our national defense.”).
\textsuperscript{76} Id. at 428–29 (Cudahy, J., concurring in part, dissenting in part).
\textsuperscript{77} For a discussion on judges’ deference to factual judgments made by the executive branch in litigation involving
national security, see Chesney, supra note 34.
Seventh Circuit held that, even if there was a NEPA violation, the Navy did not have to prepare an EIS because of the importance of national security.\footnote{State of Wis., 745 F.2d at 428.}

The United States District Court for the District of Columbia, in \textit{National Resources Defense Council, Inc. v. Pena}, also deferred to the assertion of national security in its determination of whether an Executive Branch agency had to comply with NEPA, even when there was no ongoing emergency.\footnote{Nat’l Resources Def. Council, Inc. v. Pena, 972 F.Supp. 9, 20 (D.C. Cir. 1997) (“This Court is reluctant to override national security judgments on the viability of our nuclear program made by the Secretaries of Energy and Defense.”).} The proposed action was the construction of numerous sites for a nuclear weapons stockpile stewardship and management (SSM) program by the Department of Energy (DOE).\footnote{\textit{Id.} at 11.} The plaintiffs sought to enjoin the defendants from going further until they prepared an adequate EIS.\footnote{\textit{Id.}} While the court agreed that more public disclosure was necessary, it would not let this interfere with the continuance of construction: “[t]he Court is not entirely satisfied with the disclosure that surrounds these programs. The Court will request that the DOE perform a fuller disclosure of the environmental, health and safety risks . . . [s]uch disclosure should be responsive to Plaintiffs’ concerns, but need not hold up the implementation of either program.” In making its decision, the court deferred to DOE’s judgment that any delay would be harmful to national security: “[d]efendants contend that any delay in the SSM Program could have serious national security implications. Secretary Peña stated that any delay in the SSM Program ‘may cause other countries to doubt or question the credibility of our Nation’s nuclear deterrent.’”\footnote{\textit{Id.} at 20.} The court simply went along with the agency’s contention of national security implications without exploring the truth of it. With an injunction at issue, the court claimed that it was balancing the environmental harms with the interest in national security: “[i]n this case,
the Court must balance two important competing interests in assessing the public interest.”\textsuperscript{84} But then it flatly concluded that national security took precedence, stating that the “national security interest here must be paramount.”\textsuperscript{85} While the court purported to rationalize its decision, “[a]ny doubt over the credibility of our nuclear deterrent would create unacceptable risks in the event of a future crisis akin to the Cuban Missile Crisis,” it admitted that there was no current crisis: “[w]hile the probability that such future crises might come to pass is not as great today as in the past, we must never ignore such a possibility. Although the sun shines today, dark and ominous clouds can emerge without much warning.”\textsuperscript{86}

Nobody is arguing that national security is not important. But, when there is an injunction at issue, the court must balance the competing interests. If there is no current crisis threatening national security, courts should look at the assertion of national security more skeptically when it is used as a way to avoid compliance with NEPA because, in such situations, environmental concerns could very well outweigh national security concerns. There is no reason that the DOE could not have prepared an adequate EIS before engaging in the proposed action in \textit{National Resources Defense Council, Inc.} The low probability of a future crisis should not justify the failure to prepare an adequate EIS before taking action today, especially when the environmental concerns today are immense. The court recognized the environmental concerns: “there have been enough accidents involving nuclear programs to make Plaintiffs’ concerns over the environmental, health and safety issues in this case real.”\textsuperscript{87} In fact, the impacts of programs like the one proposed in \textit{National Resources Defense Council, Inc} have been horrific: “American citizens may have been exposed to excessive amounts of radiation in the nuclear tests of the

\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
1950’s. Environmentalists suggest that this could be responsible for cancers in as many as 75,000 people who were inadvertently exposed.” But, even while acknowledging the extent of the environmental impacts that such programs could have, the court would not allow its deference to national security to waiver. A potential future threat to national security, even if unlikely, apparently outweighed the present possibility of great harm to the environment, public health, and safety.

The Circuit Court for the District of Columbia agreed with this notion in Commission for Nuclear Responsibility v. Seaborg, where it deferred to the assertion of national security “despite the real potential for significant harm to the environment.” In Commission for Nuclear Responsibility, the plaintiffs sought to enjoin an underground nuclear explosion, arguing that the Atomic Energy Commission failed to fully comply with NEPA. Even though there was a question about the legality of the test, the court held that the plaintiffs were not entitled to an injunction enjoining the test. Again, with an injunction at issue, the court had the responsibility of balancing the competing interests. And again, in deciding which was in the public interest: protecting the environment or what was claimed to be protecting national security, it chose the assertion of national security and denied the injunction. Despite the potential of great harm to the environment and the lack of a national security exception under NEPA, the court ruled that the agency did not have to fully comply with NEPA merely because it made “assertions of harm to national security and foreign policy.” Assertions of harm to national security again

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88 Id. at 20–21.
90 Comm. for Nuclear Responsibility, 463 F.2d at 797.
91 Id.
92 Id. at 798.
apparently outweighed real potential for significant environmental harm and allowed the government to avoid NEPA’s EIS requirements.  

Likewise, in *Smith v. Schlesinger*, the United States District Court for the Central District of California also held that national security was a reason not to require the preparation of an EIS under NEPA, merely because the Navy was involved: “[t]o grant the requested injunctive relief following such unreasonable delay would, under the facts of this case, severely prejudice the Navy, its personnel, and most importantly, the national defense.”  

Again, instead of engaging in the appropriate balancing required in deciding a case involving injunctive relief, the court focused on the harm to national security without weighing it against the harm to the environment. The plaintiffs sought an injunction on the Navy’s project involving the transfer of armed forces from the Long Beach Naval Facility to other ports until an EIS was prepared. Although the main reason that the court ruled against the plaintiffs was the fact that they brought their action long after the project had begun, the court did not state why the national defense would be prejudiced if the preparation of an EIS was required, except that the project at issue involved the Navy and national defense.  

It does not follow merely from the fact that a project involves national security that environmental concerns are insignificant and that the preparation of an EIS will harm national security. If this were the case, Congress would have created a national security exception under NEPA whereby agencies would not have to prepare an EIS before engaging in action in furtherance of national security.  

Lastly, in *National Audubon Society v. Department of Navy*, even though the Fourth Circuit held that the Navy failed to comply with NEPA’s requirements, it determined that a

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95 *Id.*
96 *Id.*
narrower injunction than that imposed by the District Court was warranted.\textsuperscript{97} The U.S. Navy proposed to construct an aircraft landing field within five miles of a National Wildlife Refuge.\textsuperscript{98} The court held that, although the Navy failed to take a hard look at the environmental effects of its proposed action, thereby violating NEPA, the court would not prevent the Navy from engaging in its proposed activities while it prepared a supplemental EIS.\textsuperscript{99} It reasoned that, in national security matters, deference will be given to the Executive Branch: “[d]istrict courts should not substitute their own judgments for those of the Executive Branch in such national security matters as pilot training, squadron readiness, and safety.”\textsuperscript{100} While it is true that courts should defer to the Executive agencies’ judgments in their areas of expertise, it is not within the court’s authority to exempt such agencies from complying with NEPA because there is no national security exemption under NEPA. The court can, after deciding that an agency took a “hard look” at the consequences of its actions and properly determined that there was no significant environmental impact, defer to the agency’s decision not to prepare an EIS, but it cannot allow the agency to avoid complying with NEPA altogether by failing to even take the requisite “hard look.” By allowing the Navy to avoid NEPA, the National Audubon Society court created a national security exemption that is not otherwise present under NEPA. Because an injunction was at issue, the court had a duty to balance the competing harms; it should not have been able to simply defer to the Navy because national security was at issue. Instead, however, the Fourth Circuit concluded, without conducting the appropriate balancing, that, because the activities at issue would not cause environmental harm, they should have been

\textsuperscript{97} Nat’l Audubon Soc’y, 422 F.3d at 204.
\textsuperscript{98} Id. at 181.
\textsuperscript{99} Id. at 207.
\textsuperscript{100} Id. at 203.
permitted while the Navy prepared a supplemental EIS. But because the EIS is the tool used to determine what the environmental effects of a project are, it is unclear how the court could have concluded without the EIS that the actions were not harmful to the environment, especially if the court was not substituting its own judgment for that of the Navy.

B. Cases in which Courts Engaged in the Appropriate Balancing rather than Deferring to the Assertion of National Security

Arguably, the Fourth Circuit erred in overturning the district court’s decision in National Audubon Society: the district court engaged in the appropriate balancing and its decision should have been affirmed. Rather than deferring to the Navy’s assertion of national security, the district court considered the competing harm to the environment: “[w]ithout an injunction, . . . additional landowners will be permanently displaced, tax revenue permanently lost, and the fragile habitat around [the site] will be disrupted. This irreparable harm will occur despite the fact that a proper EIS has never been completed.” The court weighed this harm against the harm to the Navy and national security: “[t]he harm to the Navy will not be appreciable if its development . . . is enjoined until a proper NEPA assessment is completed, but without an injunction, [p]laintiffs and the public will be irreparably harmed.” After properly weighing the competing harms, the court concluded that an injunction was warranted, finding that “[a]bsent an injunction, the Navy will be permitted to undertake substantial and irreversible changes affecting the fragile wildlife refuges of the Pungo Unit and Pocosin Lakes without first thoroughly considering the consequences of its actions.” On appeal, the Fourth Circuit ignored these environmental impacts when it narrowed the injunction, reasoning that the Navy’s

\[101\] Id. at 207.
\[103\] Id. at 878.
\[104\] Id.
action posed no environmental harm. The Fourth Circuit allowed the Navy to circumvent NEPA by ruling that, even though the Navy had violated NEPA, it could continue its activities while it prepared a supplemental EIS. As previously discussed, this was not within the court’s authority. The district court, on the other hand, conducted the appropriate balancing and recognized that the Navy had to be enjoined from engaging in its proposed activity before preparing a supplemental EIS. If the district court had not granted injunctive relief to the plaintiffs in *National Audubon Society*, it would have permitted the Navy to take action before considering the impacts, mitigation measures, and alternatives, defeating the purposes of NEPA. However, the district court stayed within the bounds of its authority as it properly weighed the competing harms and refrained from creating a national security exemption to NEPA for the Navy.

The United States District Court for the District of Hawaii also engaged in the appropriate balancing in *Makua v. Rumsfeld*, as it weighed the public interest in national security against the public interest in the environment. The court recognized “that the public has a substantial interest in the national well-being and security of the nation. . . . [but] the public also has a significant interest in the protection of endangered species, cultural resources, . . . and the environment.” In *Makua*, the plaintiff, an environmental group, sought to compel the defendant, the U.S. Army, to prepare an EIS addressing the effects of military training with live ammunition at the Makua Military Reservation (“MMR”). The Army had conducted an EA which resulted in a FONSI, meaning that the Army had no intention of preparing an EIS. Rather than deferring to the Army, the court conducted the proper analysis to ensure that the Army had at least taken the requisite “hard look” under NEPA and to determine whether the

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105 *Makua*, 163 F.Supp.2d at 1222.
106 *Id.* at 1204.
107 *Id.* at 1206.
requirements for an injunction were met. It ultimately decided that, “because the balance of hardships tips decidedly in favor of Malama Makua,” a preliminary injunction enjoining the Army’s training pending final disposition on the merits of the case was warranted. The court reasoned that the Army did not demonstrate that significant harm would result from the imposition of a preliminary injunction. On the other hand, there was evidence that, in the absence of an injunction, significant environmental harm could have resulted.

Further, the Army, in its EA, failed to take the requisite “hard look.” The EA lacked evidence as to the extent of the environmental harm which would occur as a result of its actions: “[a]lthough the Army states that there is some risk from wildfires, the [supplemental environmental assessment] fails to specify and quantify that risk for the public.” The court determined that there was no way that the Army could have concluded its EA with a FONSI when it did not examine in detail the possible environmental impacts of its actions: “[t]his lack of data undermines the reliability of the [supplemental environmental assessment]. It is unlikely that an agency can determine whether a proposed action would have no significant impact on the environment when the agency does not even examine or quantify the potential for adverse environmental effects.” The Army’s EA had not actually found that its activities would not have had a significant environmental impact, despite claims that it had done so, and the court would not tolerate this. Again, although NEPA does not require a substantive result from agencies, it is not a nullity; it requires agencies to conduct meaningful assessments of their activities and the environmental effects of those activities. The Makua court held that no

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108 Id. at 1216, 1220–22.
109 Id. at 1204, 1222.
110 Id. at 1222.
111 Id. at 1221.
112 Id. at 1217.
113 Id.
114 Id.
115 Id.
meaningful assessment was conducted: “general statements about ‘possible effects’ and ‘some risk’ do not constitute a ‘hard look’ absent a justification regarding why more definitive information could not be provided.”116 Although courts will defer to an agency’s judgment on what to do with the results obtained after compliance with NEPA, they cannot defer to an agency’s decision to not fully and properly comply with NEPA, for example, by failing to take the requisite “hard look,” as the Army did in Makua. The Makua court, however, would not allow the Army to circumvent NEPA with an empty assertion of national security.

The court was able to bar the Army from engaging in its training activities without first complying with NEPA by conducting the appropriate balancing. Because the Army did not provide an adequate assessment of the environmental harms that its activities would cause; did not refute the possible environmental harms, which included the extinction of endangered species, the loss of cultural resources, the denial of Native Hawaiian rights, and adverse effects on the environment; and did not present sufficient evidence regarding the harm that an injunction would cause it, the court could not hold that the balance of equities tipped in the Army’s favor.117 Furthermore, as the court pointed out, there were alternative sites where the Army could have conducted its training.118 Even if these sites were more expensive, “financial harm is ‘not the sort of “unusual circumstance” that justifies a court's refusal to enjoin NEPA violations.’”119 Financial harm is not a deciding factor for courts when determining whether to grant injunctive relief for a NEPA violation. Accordingly, the court found that the balance of equities tipped in

116 Id. (quoting Blue Mountains Biodiversity Project, 161 F.3d at 1213 (internal quotations omitted)).
117 Makua, 163 F.Supp.2d at 1221.
118 Id.
119 Id. (quoting Greenpeace Found. v. Mineta, 122 F.Supp.2d 1123, 1139 (D.Hawaii 2000)).
favor of the plaintiff and granted the preliminary injunction to compel the Army to prepare an adequate EIS before engaging in its proposed activity.\footnote{Makua, 163 F.Supp.2d at 1222.}

*Youngstown Sheet & Tube Co. v. Sawyer*\footnote{343 U.S. 579 (1952). The following discussion includes three cases that do not involve NEPA. The cases, however, are important examples of courts using the proper balancing in determining whether to grant injunctive relief.} is another case in which the Court properly weighed the competing interests rather than simply deferring to the Executive’s assertion of national security. In *Youngstown*, the President issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation’s steel mills.\footnote{Id. at 582.} The owners of the steel mills brought suit, seeking injunctive relief to restrain the enforcement of the orders.\footnote{Id. at 583.} The United States argued that it had the power to issue such orders to protect the well-being and safety of the Nation.\footnote{Id. at 583–84.} Instead of deferring to the national security assertion, the U.S. Supreme Court balanced the harms that would occur to national security if an injunction, which would prohibit seizure, were granted, against those harms that would occur to mill owners in the absence of an injunction, the absence of which would permit seizure.\footnote{Id. at 585.} The Court noted that “seizure and governmental operation of these going businesses were bound to result in many present and future damages of such nature as to be difficult, if not incapable, of measurement.”\footnote{Id. at 586.} The Court also took into account the fact that the Legislature had already considered allowing for governmental seizure in times of emergency and decided against it because it was thought to interfere with collective bargaining.\footnote{Id. at 586.}

In addition, the Court considered the President’s authority to issue the orders that he had issued: “[t]he President's power, if any, to issue the order must stem either from an act of
Congress or from the Constitution itself.” 128 And it found none: “[t]here is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied.” 129 Even as Commander in Chief, the Court found that the President lacked authority to give the order of seizure: “we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production.” 130 The Executive does not have the power to make laws because “[t]his is a job for the Nation's lawmakers, not for its military authorities.” 131 The Executive cannot simply claim “national security” and then do whatever it pleases, especially when the Legislature has already considered and rejected a law that would permit the action that the Executive is proposing to take. The Legislative Branch, not the Executive, has the power to make laws and the Executive must abide by such laws. 132

Furthermore, it is the Court’s responsibility to ensure that the Executive is abiding by such laws, rather than creating its own. To do so, the Court must review the actions of agencies, when challenged, rather than simply deferring to the judgments of such agencies, even in times of war. If the Court fails to do so, there is no check on the Executive’s power; the Executive is free to disregard the limits that Congress has placed on it. 133 In Hamdan v. Rumsfeld, the U.S. Supreme Court properly refused to allow the Executive to ignore the limits on its power. 134

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128 Id. at 585.
129 Id.
130 Id. at 587.
131 Id.
132 For a further discussion on Youngstown Sheet and Tube Co. and the paradigms it provides for interpreting the Constitution’s allocation of power between Congress and the Executive during times of war, see generally Michael Stokes Paulsen, Youngstown Goes to War, 19 CONST. COMMENT. 215 (2002).
133 For a discussion on the courts’ reluctance to curb the military and the possible future effects this reluctance will have in light of new exemptions for the military under various environmental laws, see Hope Babcock, National Security and Environmental Laws: A Clear and Present Danger?, 25 VA. ENVTL. L.J. 105, 147–48 (2007).
Court held that “[w]hether or not the President has independent power, absent congressional authorization, . . . he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.”  The Executive cannot use war as a justification for any action it desires to take.  The Executive has certain powers while Congress has certain others: “‘[t]he power to make the necessary laws is in Congress; the power to execute in the President. . . . But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President.’” Each branch of government must stay within the bounds of its power and must not usurp the powers of the other branches.  If the Executive is allowed to do whatever it pleases in times of war, the notion of separation of powers, upon which this nation was founded, is destroyed.  In *Hamdan*, the Court would not allow this.  At issue there was the Executive’s use of a military commission to try Hamdan, a Yemeni national captured by the U.S. in Afghanistan, for then-unspecified crimes, later designated as conspiracy “to commit . . . offenses triable by military commission.” The Court found that no congressional act authorized the Executive to convene a military commission to try Hamdan, and “[a]bsent a more specific congressional authorization, the task of this Court is . . . to decide whether Hamdan’s military commission is so justified.” If the Executive’s power to take action is not specifically authorized by Congress, the Court has a duty to examine the action to see if it is justified; if the Court, instead, simply defers, it allows the Executive too much authority, authority in excess of what was intended for it.  In the absence of congressional authorization for an act of the Executive, the Executive must show that the act is

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135 *Id.*

136 *Id.* at 591–92 (quoting *Ex parte Milligan*, 71 U.S. 2, 139 (1866)).


138 *Hamdan*, 548 U.S. at 566.

139 *Id.* at 594–95.
necessary in order for the Court to permit it, which the Executive failed to do in *Hamdan*.\(^{140}\)

Because there was no congressional authorization for the Executive’s action establishing a military commission and because the Executive failed to show necessity, the Court would not permit the action. The Court refused to simply defer to the Executive’s judgment because it was during a time of war. Instead, the Court conducted the proper analysis and concluded that the Executive was overstepping its bounds; the fact that it was a time of war did not authorize the Executive to exceed its authority.\(^{141}\)

The U.S. Supreme Court also refused to defer to the Executive in *Hamdi v. Rumsfeld*, where it made clear its role in reviewing challenges.\(^{142}\) The Court stated that it will give weight to the Executive’s judgments during times of war: “we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war . . . .”\(^{143}\) However, it explained that this does not mean that it will simply defer to the Executive.\(^{144}\) Instead, it will review the Executive’s actions: “it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.”\(^{145}\) The Court reviewed the Executive’s decision to detain Hamdi, an American citizen classified as an “enemy combatant,” indefinitely during the war with Afghanistan, without allowing him to challenge the basis for his detention.\(^{146}\) The Court stated that “the threats to military operations posed by a

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\(^{140}\) *Hamdan*, 548 U.S. at 612 (“[There is] a broader inability on the Executive’s part here to satisfy the most basic precondition — at least in the absence of specific congressional authorization — for establishment of military commissions: military necessity.”).

\(^{141}\) See Babcock, *supra* note 133, at 153 (arguing that we should doubt the genuineness of the armed forces’ claims that environmental laws are encroaching on their military efforts when there is evidence that such claims are mere excuses to avoid compliance with the laws).


\(^{143}\) *Id.*

\(^{144}\) *Id.*

\(^{145}\) *Id.*

\(^{146}\) *Id.* at 509.
basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator.”

In other words, the Court said that it would not refrain from reviewing the Executive’s action merely because the Executive claimed that doing so would be a threat to its military operations; the threat to such operations does not trump a citizen’s right to review. The Court stressed the importance of the doctrine of separation of powers and declared: “[w]e have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.”

A state of war does not mean that the Executive can do whatever it pleases. And if it tries to do so, the Court is the mechanism to stop it: “the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions.”

If the Court defers to the Executive’s decisions rather than engaging in the appropriate review, it allows the Executive’s power to go unchecked, permitting the Executive to take actions that are not authorized by the Legislature. It is up to the Court to ensure that the Executive Branch is not creating its own laws, but rather is abiding by the laws as created by the Legislative Branch.

IV. CONGRESS DID NOT INTEND A NATIONAL SECURITY EXEMPTION TO NEPA

The Legislative Branch did not include a national security exemption under NEPA. It did, on the other hand, create exemptions for national security under other environmental laws, including the Clean Air Act (CAA), the Clean Water Act (CWA), the Coastal Zone

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147 Id. at 535.
148 Id. at 536.
149 Id. For a further discussion on the government’s attempts to persuade the courts to defer to its judgment and the courts’ opinions in Hamdi, including the differing views of the various Justices, see Chesney, supra note 34, at 1367–71.
150 See Babcock, supra note 133, at 110.
Management Act (CZMA), the Endangered Species Act (ESA), and the Marine Mammal Protection Act (MMPA). If Congress intended a national security exemption to NEPA, then, it would have included it in the statute as it did with all of these other environmental statutes. Because the scope of NEPA is broad, it may overlap with these other statutes at times, as it did in *Winter*, where the MMPA and the CZMA were also at issue. However, when an agency is granted a national security exemption to one of these, as was the Navy in *Winter*, its duties under NEPA should not be affected. An agency that is exempted, for example, from a rule that says it cannot take a marine mammal (the MMPA), does not necessarily have to be exempted from a rule that says it must prepare an EIS before engaging in an activity that will result in the taking of a marine mammal (NEPA). It is one thing to be allowed to take a marine mammal and another to have to consider the environmental impacts of taking the mammal before doing so. In fact, this is the essence of NEPA: agencies must consider the environmental impacts of their actions before engaging in them, allowing them to discover and take steps to lessen the impacts if they so choose, but will not be required to affect any substantive result. Therefore, the grant of an exemption to a substantive statute, like the MMPA, should not affect an agency’s duty to comply with the procedural statute, NEPA. The goal is that, after considering the impacts of the proposed action under NEPA, the agency will decide not to take the action or to implement mitigation measures to lessen the environmental impacts of the action, even though it is permitted to take the action under the national security exemption to the substantive statute.

Because Congress did not include a national security exemption under NEPA, the agencies of the Executive Branch must abide by it, even in times of war, and the courts cannot

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take it upon themselves to except these agencies from doing so.\textsuperscript{156} Instead, the courts must give effect to what Congress enacted. As the Maryland Court of Appeals stated: “[w]e are obliged to ascertain and carry out the legislative intent; to consider the language of the enactment in its natural and ordinary signification; to not insert or omit words to make a statute express an intention not evidenced in its original form.”\textsuperscript{157} Courts cannot substitute their own opinions of what the law should be for what the law says; they must apply the law as it is stated. And, as stated, NEPA does not include a national security exemption. If Congress does intend a national security exemption to NEPA, it should write this into the law, but, until then, it is not within the Court’s authority to create or grant one.\textsuperscript{158}

V. CONCLUSION

By deferring to the agencies of the Executive Branch in determining whether to grant injunctive relief in NEPA noncompliance cases, the Court ignores its duty to act as a check on the Executive’s power and instead grants the Executive an exemption from NEPA. When injunctive relief is requested, the Court is required to give due weight to each competing harm and grant relief to the party toward whom equity tips. This means that, in NEPA noncompliance cases where national security is asserted as a defense, courts must balance the harm to the environment against the harm to national security. When courts ignore their duty to conduct this balancing and instead defer to the assertion of national security, they create a national security exemption to NEPA, one which the legislature did not include or intend.

\textsuperscript{156} The Executive must seek and obtain exemptions from the Legislature, not the Court. For a discussion of the various other environmental statutes from which the Executive sought and obtained exemptions from the Legislature, see Babcock, supra note 133, at 126–131.


\textsuperscript{158} “[A]ll three branches of government [should] assume their respective responsibilities for protecting the nation in its entirety.” Burke, supra note 137, at 875. See also Stephen Dycus, Osama’s Submarine: National Security and Environmental Protection after 9/11, 30 WM. & MARY ENVTL. L. & POL’Y REV. 1, 12, 54 (2005) (discussing the Executive’s lack of support for the exemptions it seeks under environmental laws).
The agencies of the Executive Branch serve an important role and the preservation of national security is of extreme importance, but environmental impacts from the actions of these agencies can be just as significant; the effects of agency action on our health and safety can be just as damning as the absence of action on the preservation of national security. Courts must not, without first examining the environmental effects, deny injunctive relief any time an agency claims that an injunction will prevent it from protecting national security. When an agency’s proposed action is in the interest of national security and compliance with NEPA would truly cause a delay that would impede the agency’s ability to protect and preserve national security, an exception to NEPA compliance may be justified. But, a court cannot decide if this is true without first weighing the competing harms. Courts must explore the truth of the national security assertion to ensure that it is not being used merely as a pretext to avoid complying with NEPA.

NEPA serves as an important check on agency action. It forces agencies to consider the consequences of and alternatives to their actions, in turn, leading to substantive changes in decision-making. NEPA’s EIS requirements also serve to inform the public and to create records which courts can review in determining challenges for noncompliance. While the agencies of the Executive Branch may play a crucial role in the protection and preservation of our national security, this should not give them a free pass to escape NEPA compliance; it is important for them to consider the environmental impacts of their proposed actions.

The Legislature did not intend to exempt agencies in the business of national security from NEPA. If it did, it would have written a national security exemption into the statute, just as it wrote one into other major environmental statutes. And if a national security exemption to NEPA is the Legislature’s intent, the Legislature should write it into the statute. But unless and
until Congress writes a national security exemption into NEPA, courts have a duty to conduct the
appropriate balancing in determining whether to grant injunctive relief in NEPA noncompliance
cases rather than merely giving it lip service in order to refrain from creating an exemption
which Congress did not intend.