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An Unfulfilled Promise: How National Security Deference Erodes Environmental Justice

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AN UNFULFILLED PROMISE: HOW NATIONAL SECURITY DEFERENCE ERODES ENVIRONMENTAL JUSTICE

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I. Introduction

Environmental justice proponents seek equal treatment of every community regardless of color or socio-economic status.[1] In particular, advocates highlight the environmental hazards that disproportionately affect low-income and minority communities. Much like other civil rights and environmental causes, environmental justice enjoyed an auspicious, albeit slow, upbringing. Standing on the shoulders of civil rights era giants,[2] environmental justice garnered national attention through community activism and presidential recognition.[3] Armed with an executive order, advocates have celebrated the movement's ascent into adulthood. President Bill Clinton's 1994 Executive Order 12898 ("the Order") directed federal agencies to identify and address adverse environmental effects on minority and low-income communities.[4] Despite that mandate, the movement has experienced a slump in its growth. Because the Order does not create substantive rights, environmental justice continues to op-

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[1] Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, Nat. Resources Def. Council, http://www.nrdc.org/ej/history/hej.asp (last updated Oct. 12, 2006).

[2] *Brief History of Environmental Justice in the United States*, Md. Dep't Env't, http://www.mde.state.md.us/programs/CrossMedia/EnvironmentalJustice/WhatisEnvironmentalJustice/Pages/Programs/MultimediaPrograms/Environmental_Justice/ej_intro/ej_history_us.aspx (last visited Mar. 27, 2015); *A Brief History of Environmental Justice*, Pac. W. Community Forestry Center, http://www.sierrainstitute.us/PWCFC/projects/ej_brief_history.htm (last visited Mar. 27, 2015).

[3] Skelton & Miller, *supra* note 1.

[4] Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994), *available at* http://www.archives.gov/federal-register/executive-orders/pdf/12898.pdf.

erate as a procedural consideration, much like the proverbial black sheep within a flock of worthier causes.

Both Congress and the courts consider national security paramount to environmental justice and other environmental causes. National security is an appropriately recognized concern. However, the military enjoys exceptional deference, even during peacetime. Courts apply super-deference[5] to military activities by invoking the need for military preparedness, particularly when national security concerns are invoked. National security represents a broad exemption from legal constraints and often includes readiness and non-emergency activities. For decades, courts have favored military training over environmental causes.[6]

Concern over military deference resulting in reduced environmental oversight is especially important for environmental justice communities located near military bases. The U.S. Department of Defense (DOD) oversees U.S. military operations and is the largest agency in the federal government.[7] The DOD's immense size means many communities are affected by its operations.[8] In San Francisco, the Bayview-Hunters Point community (BHP) is adjacent to a closed naval base: the San Francisco Naval Shipyard ("the Shipyard").[9] As a result of military operations and decades of polluting, the Shipyard is a contaminated site[10] with many health risks.[11] Although the Shipyard closed over four

[5] Particularly in administrative law, the military is given more deference than other agencies despite congressional intent to create the same level of deference to all federal agencies under the Administrative Procedure Act (APA). Kathryn E. Kovacs, *Leveling the Deference Playing Field*, 90 OR. L. REV. 583, 585 (2011).

[6] Natalie Barefoot-Watambwa, Comment, *Who Is Encroaching Whom? The Balance Between Our Naval Security Needs and the Environment: The 2004 RRPI Provisions as a Response to Encroachment Concerns*, 59 U. MIAMI L. REV. 577, 605 (2005); *see, e.g.*, Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982); Weinberger v. Catholic Action of Haw., 454 U.S. 139 (1981).

[7] The DOD utilizes over thirty million acres of land worldwide, has a budget of $419,300,000,000, and has over three million employees. By comparison, ExxonMobil has a budget of $200,000,000,000 and employs 98,000 people. *DoD 101*, U.S. DEP'T DEF., http://www.defense.gov/about/dod101.aspx (last visited Mar. 27, 2015).

[8] The DOD owns nineteen million acres of land and operates 4,127 defense sites in the fifty states and in U.S. territories. ROSS W. GORTE ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1, 11-13 (2012), *available at* http://www.fas.org/sgp/crs/misc/R42346.pdf.

[9] In fact, the Shipyard is also known as the "Hunters Point Shipyard." *Hunters Point Naval Shipyard*, U.S. ENVTL. PROT. AGENCY, http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/vwsoalphabetic/Hunters+Point+Naval+Shipyard?OpenDocument (last updated Feb. 20, 2015).

[10] *Id.*

[11] BHP has higher levels of asthma, asthma hospitalizations, cancer rates, infant mortality, and low birth weight than the rest of San Francisco. MITCHELL H. KATZ, HEALTH PROGRAMS IN BAYVIEW HUNTER'S POINT & RECOMMENDATIONS FOR IMPROVING THE HEALTH OF BAYVIEW HUNTER'S POINT RESIDENTS 8, 15, 18 (2006), *available at* http://www.sfdph.org/dph/files/reports/StudiesData/BayviewHlthRpt09192006.pdf; *see* Vicky Nguyen et al., *Former Contractors Claim Hunters Point Cleanup Is Botched*, NBC BAY AREA, http://www.nbcbayarea.com/investigations/

decades ago, environmental justice concerns continue to affect BHP today.[12]

Environmental justice proponents have long argued that codification of the Order is an important step in remedying environmental racism. However, when the military can opt out of environmental laws already on the books, the prospect of achieving true environmental justice is bleak. Proponents are apprehensive of environmental justice's future under this framework, because communities have little to gain from codification when the military continues to benefit from environmental law opt-out measures.

Beyond the military context, environmental justice has also encountered significant hurdles. Using civil rights statutes, environmental justice plaintiffs have sued federal agencies by arguing that poor and minority communities are being disproportionately burdened by hazardous waste facilities. These "disparate impacts" had traditionally been the focus of antidiscrimination lawsuits based on regulations promulgated under Title VI, section 602, of the Civil Rights Act ("Title VI"), which bars discrimination based on race, color, and national origin in federally funded programs.[13] However, in 2001, the Supreme Court decided *Alexander v. Sandoval*, holding that no private right of action exists to enforce disparate-impact regulations promulgated under Title VI.[14] Therefore, advocates interpret *Alexander v. Sandoval* as barring disparate-impact claims for environmental justice causes.[15]

This Comment focuses on two main issues: environmental justice's procedural limitations following *Alexander v. Sandoval*, and the loopholes within existing environmental legislation as they apply to military activities. In this respect, Richard Armour's famous idiom "hindsight is 20/20" is telling.[16] As long as the military has carte blanche to ignore environmental laws, environmental justice will continue to remain a legal mirage beholden to the government's pecking order of judicial deference.

Former-Contractors-Claim-Hunters-Point-Cleanup-is-Botched-259871511.html (last updated 2:45 PM PDT, May 23, 2014).

[12] *Environmental Justice*, ARC ECOLOGY, http://www.arcecology.org/#environmental_justice (last visited Mar. 27, 2015).

[13] Civil Rights Act of 1964 § 602, 42 U.S.C.S. § 2000d-1 (LEXIS 2015).

[14] Alexander v. Sandoval, 532 U.S. 275, 289 (2001).

[15] *See, e.g.*, Kyle W. La Londe, *Who Wants To Be an Environmental Justice Advocate?: Options for Bringing an Environmental Justice Complaint in the Wake of* Alexander v. Sandoval, 31 B.C. ENVTL. AFF. L. REV. 27, 27 (2004) (describing the Supreme Court's decision as a "major blow" to the environmental justice movement); Michael D. Mattheisen, *The Effect of* Alexander v. Sandoval *on Federal Environmental Civil Rights (Environmental Justice) Policy*, 13 GEO. MASON U. C.R. L.J. 35, 70 (2003).

[16] Fred Shapiro, *Quotes Uncovered: Hindsight and Crowds*, FREAKONOMICS (Feb. 11, 2010 2:00 PM), http://www.freakonomics.com/2010/02/11/quotes-uncovered-hindsight-and-crowds.

Vague notions of national security and deference to the military wrinkle the fabric of environmental laws that are intended to create safe and healthy communities. Legislators must close loopholes in environmental laws, codify the Order, and explicitly create a private cause of action for disparate-impact plaintiffs so that environmental justice can finally be achieved.

Subpart A of the Argument describes existing military exceptions from environmental laws. Of particular concern is the military's invocation of "national security" to opt out of environmental laws. Despite congressional intent to limit national security waivers to exceptional and emergency contexts, courts interpret security needs broadly.[17] Subpart A also highlights the concern for environmental justice proponents when faced with national security waivers. Subpart B examines the procedural limitations that environmental justice advocates experience through the National Environmental Policy Act (NEPA). Then, Subpart C discusses why super-deference to the military under the Administrative Procedure Act (APA) is of particular concern to environmental justice proponents. Subpart D focuses on *Alexander v. Sandoval*, a Supreme Court case that limited private causes of action for disparate-impact claims.[18] Following *Alexander v. Sandoval*, there are three ways for communities to fight environmental justice. First, communities facing disproportionate environmental hazards must prove that the government intentionally discriminated against them. Second, claimants may seek redress through Title VI's administrative review process. However, because intentional discrimination is so difficult to prove and Title VI's administrative review process rarely results in a finding for the claimants, these options are inadequate. Third, claimants may seek alternatives to the court and administrative systems to combat disparate impacts of environmental hazards facing their communities. Finally, Subpart E discusses these alternatives, which include avoiding "lawyer-centered" models by advocating grassroots activism and community partnerships with the military.

II. BACKGROUND

Environmental justice focuses on combating environmental burdens that disproportionately affect minority and poor communities. Although environmental justice concerns have existed for decades, the movement first received national attention in 1982 in Warren County, North Caro-

[17] *See, e.g.*, Abreu v. United States, 468 F.3d 20, 27 (1st Cir. 2006); Water Keeper Alliance v. U.S. Dep't of Def., 271 F.3d 21, 34 (1st Cir. 2001).

[18] *Alexander*, 532 U.S. at 289.

lina.[19] There, hundreds[20] of protesters were arrested for staging a sit-in that prevented 6,000 truckloads of soil containing toxic chemicals[21] from being dumped at a site in the primarily black community.[22] Civil rights activists accused the North Carolina government of racism for locating its dumpsite in Warren County. Following, the Warren County incident, the Commission for Racial Justice of the United Church of Christ published a report in 1987 finding that:

> Race proved to be the most significant among variables tested in association with the location of commercial hazardous waste facilities. . . . Communities with the greatest number of commercial hazardous waste facilities had the highest composition of racial and ethnic residents. In communities with two or more facilities or one of the nation's five largest landfills, the average minority percentage of the population was more than three times that of communities without facilities . . . . Although socio-economic status appeared to play an important role in the location of commercial hazardous waste facilities, race still proved to be more significant.[23]

Following United Church of Christ's findings and growing national support, President Bill Clinton signed the Order in 1994, directing federal agencies to assure protection and enforcement of environmental laws for the most impacted communities.[24] In 1995, the United States General Accounting Office (GAO) conducted a study that concluded there was "little association between the race, income, or poverty status of people living near the landfills and landfill characteristics related to potential risk."[25]

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[19] Skelton & Miller, *supra* note 1.

[20] *Id.*

[21] The trucks attempted to dump PCBs in the site. PCB stands for polychlorinated biphenyl, a chemical compound with known health risks. *Health Effects of PCBs*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/wastes/hazard/tsd/pcbs/pubs/effects.htm (last updated June 13, 2013).

[22] Skelton & Miller, *supra* note 1.

[23] BENJAMIN F. CHAVIS JR. & CHARLES LEE, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES xiii (1987) (footnote omitted), *available at* http://d3n8a8pro7vhmx.cloudfront.net/unitedchurchofchrist/legacy_url/13567/toxwrace87.pdf?1418439935.

[24] Exec. Order No. 12,898, *supra* note 4.

[25] U.S. GEN. ACCOUNTING OFFICE, HAZARDOUS AND NONHAZARDOUS WASTE: DEMOGRAPHICS OF PEOPLE LIVING NEAR WASTE FACILITIES 58 (1995), *available at* http://www.gao.gov/assets/160/155134.pdf. In this context, "risks" refer to exposure to a variety of types of waste, including "household garbage, commercial waste, construction and demolition debris, nonhazardous industrial waste, hazardous industrial waste . . ., incinerator ash, infectious waste, asbestos, and sewage sludge". *Id.* app. VII at 107.

A. The Order Directs Federal Agencies to Incorporate Environmental Justice but Lacks Necessary Binding Requirements

The Order focuses on minority and low-income populations that disproportionately experience "high and adverse human health and environmental effects."[26] The Order directs federal agencies to make environmental justice a part of their mission to the greatest extent practicable.[27] Additionally, the Order created an interagency working group on environmental justice tasked with developing criteria for identifying communities experiencing environmental injustice and identifying strategies for ensuring interagency cooperation in complying with the Order.[28] Prior to the Order, numerous states had enacted environmental justice programs or legislation.[29]

Since the Order was promulgated, federal agencies, including the Environmental Protection Agency (EPA), have integrated environmental justice considerations into their policies and activities.[30] Despite that integration, the Order lacks enforcement mechanisms and does not create any right to judicial review.[31] Ultimately, the Order does not promulgate crucial substantive law.[32] And some have highlighted that environmental injustice endures:

> Today, environmental justice activists and others face the same battle against apathy and facially neutral policies that relegate African-Americans and other racial minorities to bear disproportionate pollution burdens with the acceptance of federal and state law officials.

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[26] Exec. Order No. 12,898, *supra* note 4. *See also* U.S. Gen. Accounting Office, *supra* note 25 at 57-58.

[27] *Id.*

[28] *Id.*

[29] *See* Pub. Law Research Inst., Univ. of Cal. Hastings Coll. of the Law, Environmental Justice for All: A Fifty State Survey of Legislation, Policies and Cases 13, 44, 95, 119, 191, 197 (Steven Bonorris ed., 4th ed. 2010), *available at* http://gov.uchastings.edu/public-law/docs/ejreport-fourthedition.pdf.

[30] *See* Nat'l Envtl. Justice Advisory Council, Integration of Environmental Justice in Federal Agency Programs 10–36 (2002), *available at* http://www.epa.gov/environmentaljustice/resources/publications/nejac/integration-ej-federal-programs-030102.pdf.

[31] Exec. Order No. 12,898, *supra* note 4.

[32] The presidential memorandum accompanying the Order suggested using NEPA and Title VI of the Civil Rights Act to assure compliance. *See* Memorandum on Environmental Justice, 30 Weekly Comp. Pres. Doc. 279 (Feb. 11, 1994), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=49639&st=Environmental+Justice&st1=; *see also* Alan Ramo, *Environmental Justice as an Essential Tool in Environmental Review Statutes: A New Look at Federal Policies and Civil Rights Protections and California's Recent Initiatives*, 19 Hastings W.-Nw. J. Envtl. L. & Pol'y 41, 46 (2013).

> This struggle began when claims of "environmental racism" surfaced in the 1970s.[33]

Recently, President Barack Obama honored the Order's anniversary by reaffirming his support for environmental justice.[34] However, his acknowledgment of environmental justice is merely ceremonial. Even after twenty years, the Order operates as an auxiliary concern because it still lacks the substantive law and implementation mechanisms necessary for combating environmental injustice at the federal level.[35] Without more vigorous implementation and enforcement, environmental justice will remain an unrealized goal.

B. After Decades of Polluting, BHP Has Extensive Environmental Justice Concerns Because of Its Exposure to Contaminants in the Neighboring Shipyard

BHP is a unique illustration of environmental injustice because it is a low-income, minority community,[36] harbors a former military base, and has endured decades of pollution. The community is also subject to extensive redevelopment.[37] Occupying almost four square miles of bayfront property in San Francisco's southeastern district,[38] BHP is one of the most marginalized and disadvantaged communities in San Francisco.[39] It suffers from high rates of unemployment, industrial and for-

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[33] Carlton Waterhouse, *Abandon All Hope Ye That Enter? Equal Protection, Title VI, and the Divine Comedy of Environmental Justice*, 20 Fordham Envtl. L. Rev. 51, 57 (2009).

[34] Proclamation No. 9082, 79 Fed. Reg. 8821 (Feb. 10, 2014).

[35] Robin Bravender, *"A Lot of Work" Remains on Environmental Justice—Ex-Official*, Governors' Biofuels Coalition (Apr. 30, 2014), http://www.governorsbiofuelscoalition.org/?p=9210.

[36] Mayor's Office of Cmty. Dev., City & Cnty. of S.F., Bayview Hunters Point Neighborhood Profile 1, 4, *available at* http://www.sf-moh.org/Modules/ShowDocument.aspx?documentid=911.

[37] Clifford Rechtschaffen, *Fighting Back Against a Power Plant: Some Lessons from the Legal and Organizing Efforts of the Bayview-Hunters Point Community*, 14 Hastings W.-Nw. J. Envtl. L. & Pol'y 537, 539 (2008).

[38] San Francisco encompasses a land area of almost forty-seven square miles. In BHP, the Shipyard occupies roughly one square mile of land. The Shipyard's redevelopment is considered the biggest development project since the 1906 earthquake. Redevelopment on this site is a *massive* undertaking, requiring a delicate balance of economic and business opportunities with environmental concerns and community doubt. *San Francisco (city), California*, U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/06/0667000.html (last updated Mar. 24 2015, 08:50:54 EDT); J.K. Dineen, *Lennar Snags $30 Million Loan for Hunters Point Shipyard Development*, S.F. Bus. Times (Jan. 2, 2014, 10:28 AM), http://www.bizjournals.com/sanfrancisco/blog/2014/01/lennar-snags-30m-loan-for-shipyard.html?page=all.

[39] Clean Coalition, The Hunters Point Project: A Model for Clean Community Power 1 (2014), *available at* http://www.clean-coalition.org/site/wp-content/uploads/2014/09/Hunters-Point-29_zf-5-Sept-2014.pdf.

mer military environmental degradation, and high crime and disease rates.[40] Despite successfully thwarting private parties from polluting the community,[41] BHP must brave the lasting effects of the Shipyard's toxic and radiological testing during the Cold War. The Shipyard was home to the National Radiological Defense Laboratory from 1948 to 1969.[42] During that time, ships designated for nuclear testing were sent to the Shipyard for decontamination and disposal.[43] The site was also used for extensive radiological testing before closing in 1974.[44]

After decades of toxic and radiological dumping, the Shipyard is San Francisco's most contaminated waste site.[45] Congress and federal agencies identified the nation's most toxic and hazardous sites under the Comprehensive Environmental Response Compensation and Liability Act, also known as Superfund.[46] Enacted to identify and reduce the number of hazardous waste sites, Superfund also imposes liability on polluters at hazardous waste sites and establishes a fund for cleanup.[47] Originally, Superfund excluded federally owned property.[48] In 1986,

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[40] Lindsey Dillon, *Redevelopment and the Politics of Place in Bayview-Hunters Point* 3, 9 (U.C. Berkeley Inst. for the Study of Societal Issues Working Paper No. 2010-2011.53), *available at* http://www.escholarship.org/uc/item/9s15b9r2; Susan Sward, *The Killing Streets / A Cycle of Vengeance / Blood Feud / In Bayview-Hunters Point, a Series of Unsolved Homicides Has Devastated One of S.F.'s Most Close-Knit Communities*, S.F. CHRON., Dec. 16, 2001, 4:00 AM, http://www.sfgate.com/news/article/THE-KILLING-STREETS-A-Cycle-of-Vengeance-2839391.php.

[41] Dillon, *supra* note 40, at 2.

[42] *Hunters Point Naval Shipyard*, *supra* note 9; *U.S. Naval Shipyard—San Francisco Bay*, MESOTHELIOMA CANCER ALLIANCE, http://www.mesothelioma.com/asbestos-exposure/jobsites/shipyards/naval-shipyard-san-francisco-bay.htm (last updated Feb. 5, 2015).

[43] *Hunters Point Naval Shipyard*, *supra* note 9.

[44] "The purposes of the NRDL included radiological decontamination of ships exposed to atomic weapons testing as well as research and experiments on radiological decontamination, the effect of radiation on living organisms, and the effects of radiation on materials." *Id.*

[45] "At many locations throughout the Shipyard, groundwater, bay sediments, and soil are contaminated with petroleum fuels, pesticides, heavy metals (such as lead and zinc), polychlorinated biphenyls (PCBs), or volatile organic compounds (VOCs) such as trichloroethylene, perchloroethylene, vinyl chloride and carbon tetrachloride. . . . Likely due to the activities of the NRDL, radionuclides such as Radium-226, Cesium-137, and Strontium-90 have been detected in low concentrations in soil and inside stormdrains at the Shipyard. Risks primarily arise when people accidentally ingest or come in direct contact with contaminated soils, dust, sediments, surface water, or groundwater. Another important risk comes from VOCs gases evaporating from underground VOC-contaminated soil and groundwater. These VOC gases can migrate and accumulate inside buildings where they can be inhaled." *Id.*; *see Hunters Point Naval Shipyard San Francisco Naval Shipyard*, FED'N AM. SCIENTISTS MIL. ANALYSIS NETWORK, http://www.fas.org/man/company/shipyard/hunters_point.htm (last updated Dec. 6, 1998).

[46] Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. § 9601 et seq.); *see CERCLA Overview*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/superfund/policy/cercla.htm (last updated Dec. 12, 2011).

[47] *Id.*

[48] *Environmental Law & Federal Facilities: State & Federal Regulations*, ARC ECOLOGY, http://www.arcecology.org/library/env_laws.shtml (last visited Mar. 27, 2015).

Congress amended Superfund by passing the Superfund Amendments and Reauthorization Act (SARA) to include property owned by the U.S. government.[49] Since SARA's enactment, over 1,000 sites have been added to the Pentagon's Superfund list of most polluted sites.[50]

In 1989, the Shipyard was designated a Superfund site.[51] Additionally, Congress passed the Resource Conservation and Recovery Act (RCRA), regulating the control and disposal of solid and hazardous waste.[52] In 1992, Congress passed the Federal Facility Compliance Act, which amended RCRA by waiving the sovereign immunity of the United States in enforcement of hazardous waste cleanup.[53] Consequently, military base cleanup efforts are now subject to Superfund.[54] In 1991, the Base Realignment and Closure Commission approved the Shipyard for official closure with the eventual goal of conveying the entire property to the City and County of San Francisco (CCSF) for reuse and development.[55]

Today, BHP experiences higher levels of disease and asthma compared to San Francisco's thirty-five other recognized neighborhoods.[56] The Navy has freely admitted that continued cleanup in BHP is necessary.[57] In 2011, the cleanup was expected to be complete by 2017.[58]

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[49] Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 120, 100 Stat. 1613, 1666 (codified as amended at 42 U.S.C. § 9620); *see Environmental Law & Federal Facilities: State & Federal Regulations*, *supra* note 48.

[50] *National Priorities List (NPL)*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/superfund/sites/npl/index.htm (last updated Oct. 17, 2013).

[51] The Shipyard has numerous contaminants involving groundwater, surface water, soil, sludges, and dust. *Hunters Point Naval Shipyard*, *supra* note 9; *Hunters Point Naval Shipyard*, ASBESTOS.COM, www.asbestos.com/shipyards/hunters-point-naval/ (last updated Jan. 23, 2015).

[52] Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 27 (codified as amended at 42 U.S.C. § 6901 et seq.); *see Resource Conservation and Recovery Act (RCRA) and Federal Facilities*, U.S. ENVTL. PROT. AGENCY, http://www2.epa.gov/enforcement/resource-conservation-and-recovery-act-rcra-and-federal-facilities (last updated Jan. 29, 2015).

[53] Federal Facility and Compliance Act of 1992, 42 U.S.C.S. § 6961 (LEXIS 2015).

[54] *Id.*

[55] It is unclear when the Shipyard's conveyance will be complete. The Navy plans on continuing to convey the property to CCSF on a parcel-by-parcel basis. *Former Naval Shipyard Hunters Point*, NAVAL FACILITIES ENGINEERING COMMAND, http://www.bracpmo.navy.mil/brac_bases/california/former_shipyard_hunters_point.html (last visited Mar. 30, 2015); ONPOINT NEWS FROM BAYVIEW HUNTERS POINT, http://www.hunterspointcommunity.com (last visited Mar. 30, 2015).

[56] *See* Jaron Browne, *Court Blocks Hunters Point Shipyard Redevelopment until Navy Completes Toxic Cleanup*, S.F. BAYVIEW (Sept. 16, 2011), http://www.sfbayview.com/2011/09/court-blocks-hunters-point-shipyard-redevelopment-until-navy-completes-toxic-cleanup; EVA GLASER ET AL., S.F. DEP'T OF PUB. HEALTH, CANCER INCIDENCE AMONG RESIDENTS OF THE BAYVIEW-HUNTERS POINT NEIGHBORHOOD, SAN FRANCISCO CALIFORNIA, 1993–1995, at 3 (1998), *available at* http://www.sfdph.org/dph/files/reports/StudiesData/DiseaseInjury/bvhuntca.pdf; *see* KATZ, *supra* note 11, at 6, 8; *see also Neighborhood Groups Map*, CITY & COUNTY S.F., http://www.sf-planning.org/index.aspx?page=1654 (last updated Aug. 13, 2014).

[57] Extensive industrial activity, power plants, sewage disposal, cement and diesel storage, substandard housing, and low standard of living compound the issue. KATZ, *supra* note 11, at 6; *see*

Cleanup now exceeds $1.1 billion and the anticipated completion date has been extended to 2021.[59] In 2004, only one of twelve Shipyard parcels had been transferred to CCSF for development.[60] Nonetheless, this transfer was blocked when local nonprofits sued developers and CCSF, arguing that the transfer was not consistent with Superfund completion requirements.[61] The plaintiffs argued that the transfer was made in order to rush development, without ensuring the area was safe and in fact "clean."[62] The pressure[63] to develop the marginalized neighborhood, coupled with the need to ensure proper environmental cleanup, continues to engender tension within the BHP community.[64]

The Navy is the primary decisionmaker at the Shipyard and is responsible for environmental cleanup.[65] Most members of the BHP community have acknowledged health as a primary concern with regard to

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Will Kane, *Navy Promises Hunters Point Cleanup by 2017*, S.F. CHRON., Sept. 6, 2011, 1:59 PM, http://www.sfgate.com/bayarea/article/Navy-promises-Hunters-Point-cleanup-by-2017-2311177.php.

[58] Kane, *supra* note 57.

[59] Michael Cabanatuan, *Hunters Point Shipyard Tour a Peek at $1 Billion Cleanup*, S.F. CHRON., June 28, 2014, 4:14 PM, http://www.sfgate.com/bayarea/article/Neighbors-get-look-at-Hunters-Point-shipyard-5586983.php.

[60] To date, no additional parcels have been transferred. NAVAL FACILITIES ENG'G COMMAND, HUNTERS POINT NAVAL SHIPYARD (HPNS) ENVIRONMENTAL RESTORATION (INSTALLATION) AWARD NOMINATION BASE REALIGNMENT AND CLOSURE PROGRAM MANAGEMENT OFFICE (BRAC PMO) 1 (2014), *available at* http://www.denix.osd.mil/awards/upload/-USN-Hunters-Point-NSY-Narrative.pdf. The site is divided into several parcels to better organize and facilitate cleanup. *Hunters Point Naval Shipyard*, *supra* note 9; *Former Naval Shipyard Hunters Point*, *supra* note 55.

[61] Browne, *supra* note 56. At BHP, the Navy digs up contaminated soil, which is removed to off-site landfills. Contaminated groundwater is cleaned using chemical and biological degradation processes. Following cleanup at a particular parcel, the Navy obtains input from the local community, the EPA, and the California EPA. If the parties agree cleanup is complete, a durable cover is placed over the parcel to prevent human contact with the leftover soil. *Hunters Point Naval Shipyard*, *supra* note 9. For general information about the cleanup process at Superfund sites, see *Cleanup Process*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/superfund/cleanup/ (last updated Dec. 24, 2013).

[62] The trial court's decision was not appealed. *See* People Organized to Win Emp't Rights v. S.F. Planning Dep't, No. CPF10510670 (Super. Ct. S.F. City & Cnty. 2011,); Browne, *supra* note 56.

[63] BHP remains one of the last large neighborhoods in San Francisco suitable for private development. Developers hope new housing in BHP will ease the pressure for affordable units. Opportunities for industry, commerce, and extensive parks and recreation facilities are abundant. *Bayview Hunters Point Area Plan*, S.F. PLANNING DEP'T, http://www.sf-planning.org/ftp/General_Plan/Bayview_Hunters_Point.htm (last visited Mar. 30, 2015).

[64] *E.g., People Organized to Win Emp't Rights*, No. CPF10510670.

[65] BASE REALIGNMENT & CLOSURE PROGRAM MGMT. OFFICE W., U.S. DEP'T OF NAVY, FINAL COMMUNITY INVOLVEMENT PLAN UPDATE, HUNTERS POINT NAVAL SHIPYARD SAN FRANCISCO, CALIFORNIA 49 (2014), *available at* http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/3dc283e6c5d6056f88257426007417a2/a85e8e2eba447e6a88257cc50061019b/$FILE/Final_HPNS_CIP_Update_combined.pdf [hereinafter FINAL COMMUNITY INVOLVEMENT PLAN UPDATE]

the Shipyard and its contaminants.[66] Unfortunately, Superfund does not focus on the health of individuals, but instead concentrates on cleaning contamination to acceptable safe levels.[67] Superfund requires the Navy to consider numerous factors when choosing the type of cleanup actions to be taken to control the effects of contamination at the Shipyard.[68] The Navy must develop estimates of exposure risks that can affect a person's health.[69] Those estimates determine what cleanup action is taken to reduce risk levels.[70] Additionally, the Navy uses conservative safety margins in its analysis and has stated that "people will not necessarily become sick even if they are exposed to materials at higher dose levels than those estimated by the risk assessment."[71] However, when health concerns are cited, these complaints are forwarded to public health agencies, organizations, and programs whose "missions are health-based."[72] This is important because agencies that cause health risks should be responsible for addressing health concerns directly. Instead, the Navy refers to outside agencies to respond to these issues. Health impacts are the root of environmental justice concerns.[73] In communities such as BHP, achieving environmental justice is a cumbersome task. Although the Shipyard has been closed for more than forty years, BHP continues struggling to achieve environmental justice because, for years, the Shipyard was exempt from environmental laws.[74]

The Pentagon has admitted that cleaning up hazardous and toxic waste at military sites is its "largest challenge."[75] In fact, the U.S. mili-

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[66] *Id.* at A-1.

[67] For example, the acceptable standard for exposure to naturally occurring radiation according to the EPA is 15 mrem (millirems) annually per person. It is estimated that a dental x-ray is 1.5 mrem of exposure to radiation. NAVAL FACILITIES ENG'G COMMAND, U.S. DEP'T OF THE NAVY, FACT SHEET HUNTERS POINT NAVAL SHIPYARD RADIOLOGICAL PROGRAM 1 (2014), *available at* http://yosemite.epa.gov/R9/SFUND/R9SFDOCW.NSF/3dc283e6c5d6056f88257426007417a2/42f5a316b6d2282488257d3300724f43/$FILE/60915851.pdf/RAD%20Program_Fact%20Sheet_Aug2014.pdf; *see* U.S. ENVTL. PROT. AGENCY, NATURALLY OCCURRING ASBESTOS IN BAYVIEW HUNTERS POINT 1–2 (2010), *available at* http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/3dc283e6c5d6056f88257426007417a2/f406871d70cf2a7188257802000475bc/$FILE/Hunters%20Point%20Asbestos%20Factsheet%2002-23-10.pdf (discussing the effects of asbestos on the community). FINAL COMMUNITY INVOLVEMENT PLAN UPDATE, *supra* note 65, at A-1; Melissa Ann Resslar, *Environmental Justice Case Study: San Francisco Energy Company in Bayview/Hunter's Point, CA*, http://www.umich.edu/~snre492/melissa.html (last visited Mar. 30, 2015).

[68] FINAL COMMUNITY INVOLVEMENT PLAN UPDATE, *supra* note 65, at A-1.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] Charles Lee, *Environmental Justice: Building a Unified Vision of Health and the Environment*, 110 ENVTL. HEALTH PERSP 141, 142 (Supp. Apr. 2002)

[74] *Environmental Justice*, *supra* note 12.

[75] Richard A Wegman & Harold G. Bailey, Jr., *The Challenge of Cleaning Up Military Wastes When U.S. Bases re Closed*, 21 ECOLOGY L.Q. 865, 868 (1994) (citing *Dep't of Def. Envtl.*

tary is one of the world's most prolific polluters.[76] Lack of funding and support in Congress may affect the EPA's ability to implement proper cleanup measures in communities like BHP.[77] The Navy's cleanup plan for BHP includes digging out a portion of the contaminated soil, while capping the remaining polluted soil with a special seal.[78] Local environmentalists studying the Shipyard express doubts about the effectiveness of this method, arguing the analysis is politically and economically motivated.[79] Although Shipyard operations ceased in 1974, some commentators have expressed concern over the military's approach to environmental issues.[80] Some fear that the drive for military security will hamper environmental cleanup and protection:

> Throughout almost half a century of Cold War we polluted the water and air, made noise, defaced the landscape, and generated millions of tons of hazardous and radioactive wastes, all in the name of national security. Early on, we acted at least partly out of ignorance of the environmental risks. More recently, we simply disregarded those risks, assuming that it would be impossible to maintain a strong defense if we had to worry about protecting the environment.[81]

The military's exemption from environmental laws offers unique insight into the difficulty of achieving true environmental justice.[82] The U.S. armed forces continue to seek broader exemptions from environ-

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Programs: Hearing Before the Readiness Subcomm., the Envtl. Restoration Panel, and the Dep't of Energy Def. Nuclear Facilities Panel of the House Comm. n Armed 102d Cong. 194 (1991) (of Thomas E. Baca, Deputy Assistant Sec'y of Def.), *available at* http://babel.hathitrust.org/cgi/pt?id=pst.000019275697;view=1up;seq=1)).

[76] H. Patricia Hynes, *The Military Enterprise as Global Polluter*, PHYSICIANS FOR SOC. RESP, http://www.psr.org/environment-and-health/environmental-health-policy-institute/responses/the-military-enterprise-as-global-polluter.html (last visited Mar. 30, 2015).

[77] According to one Senator, funding for Superfund is "falling short." In 1995, Congress allowed a cleanup tax to expire, thereby slowing the rate at which sites can be cleaned. In response to recent testimony, Republican Senators argued the EPA should be "doing more with less." Sam Pearson, *Citing Alarming Delays, Senator Urges Reinstating Industry Tax o Fund Cleanups*, ENV'T & ENERGY DAILY, June 11, 2014, *available at* http://www.eenews.net/eedaily/2014/06/11/stories/1060001090. Perhaps . A recent report shows the EPA improperly overpaid a local Superfund cleanup contractor $1.5 million. George Russell, *$1.5 illion at Center of Internal Battle over Superfund Contractor's Alleged Overbilling*, FOX NEWS (July 23, 2014), http://www.foxnews.com/politics/2014/07/23/15-million-at-center-internal-epa-battle-over-superfund-contractors-alleged.

[78] Kane, *supra* note 57.

[79] *Id.*

[80] *See, e.g.*, John Wildermuth, *Debate over S.F. Shipyard Report Grows Heated*, S.F. CHRON., July 14, 2010, 4:00 AM, http://www.sfgate.com/bayarea/article/Debate-over-S-F-shipyard-report-grows-heated-3182137.php.

[81] STEPHEN DYCUS, NATIONAL DEFENSE AND THE ENVIRONMENT xiii (1996).

[82] *See generally* THE HUMAN RIGHTS COMM'N, CITY & CNTY. OF S.F., ENVIRONMENTAL RACISM: A STATUS REPORT & RECOMMENDATIONS 40, 63, 71 (2003), *available at* http://www.sf-hrc.org/sites/sf-hrc.org/files/migrated/FileCenter/Documents/HRC_Publications/Articles/Environmen-

mental laws.[83] Due to the military's role as the nation's protector, both the courts and Congress have deferred to the military and its functions. This deference has created opt-out measures for environmental legislation when the military implicates national security concerns.[84] The current paradigm of deference to the military must shift to greater respect for and adherence to environmental laws. Legislators should close loopholes for military readiness activities by allowing exemptions to environmental laws only for actual emergencies.[85] The Order should be codified, directing all federal agencies to observe environmental justice, and Congress should explicitly allow plaintiffs to bring lawsuits for disparate-impact discrimination in order to allow private parties to challenge violations of the Order.

III. ARGUMENT

A. THE MILITARY MUST ADHERE TO ENVIRONMENTAL LAWS WITHOUT EXEMPTIONS FOR READINESS PROGRAMS OR NATIONAL SECURITY

Environmental justice cannot be achieved while the military continues seeking exemptions from environmental legislation. If current legislation does not change, then environmental justice will continue to be treated as a minor issue. Most federal environmental laws rightly include waivers for military activities "in the paramount interest of the United States."[86] National security[87] waivers were originally intended to be exceptional, existing almost exclusively for national emergencies or for declarations of war.[88] However, courts have commonly interpreted these

tal_Racism_A_Status_Report_and_Recommendations.pdf (describing factors that compound environmental justice concerns in BHP).

[83] DAVID M. BEARDEN, CONG. RESEARCH SERV., RS22149, EXEMPTIONS FROM ENVIRONMENTAL LAW FOR THE DEPARTMENT OF DEFENSE: BACKGROUND AND ISSUES FOR CONGRESS 2 (2007), *available at* http://www.fas.org/sgp/crs/natsec/RS22149.pdf.

[84] *Id.*; ROBERT MELTZ, CONG. RESEARCH SERV., RS21217, EXEMPTIONS FOR MILITARY ACTIVITIES IN FEDERAL ENVIRONMENTAL LAWS 1 (2002), *available at* http://www.congressionalresearch.com/RS21217/document.php?study=Exemptions+for+Military+Activities+in+Federal+Environmental+Laws.

[85] What constitutes an "emergency" should be explicitly discussed in proposed legislation. Clearly articulating legislative intent would leave less room for judicial interpretation.

[86] Sarah E. Light, *The Military-Environmental Complex*, 55 B.C. L. REV. 879, 888 (2014).

[87] The definition of "national security" has changed based on the military's mission during a particular time frame. According to Harold Brown, U.S. Secretary of Defense during the Carter administration, "national security" was the "ability to preserve the nation's physical integrity and territory; to maintain its economic relations with the rest of the world on reasonable terms; to preserve its nature, institution, and governance from disruption from outside; and to control its borders." CYNTHIA ANN WATSON, U.S. NATIONAL SECURITY: A REFERENCE HANDBOOK 5 (2d ed. 2008).

[88] Light, *supra* note 86, at 889.

provisions to include everyday training activities: "Environmental organizations and scholars decry these exemptions as allowing vast environmental degradation under elusive standards."[89] The military argues that environmental laws influencing military operations encroach upon its sovereignty.[90] The military claims that encroachment[91] "would hamstring" the effective training of soldiers.[92] Despite DOD insistence, evidence of encroachment is lacking:

> Even though DOD officials in testimon[y] and many other occasions have repeatedly cited encroachment as preventing the services from training to standards, DOD's primary readiness reporting system did not reflect the extent to which encroachment was a problem. In fact, it rarely cited training range limitations at all. Similarly, DOD's quarterly reports to Congress, which should identify specific readiness problems, hardly ever mentioned encroachment as a problem.[93]

Courts and Congress have granted the military exemptions from environmental laws since the Cold War.[94] Moreover, post-9/11 terrorism concerns have re-invigorated judicial and congressional insistence on military exceptionalism.[95] As one scholar bluntly stated, "it is difficult to see how any [exemptions from environmental and public disclosure laws] will prevent another 9/11 from occurring."[96] Many scholars argue that the post-9/11 atmosphere is reminiscent of Cold War era concerns. After 9/11, the military requested that Congress grant it even broader exemptions from certain environmental laws.[97] For example, the National Defense Authorization Act of 2004 exempted the DOD from ad-

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[89] *Id.* at 891.

[90] *Military*, CTR. FOR PUB. ENVTL. OVERSIGHT, www.cpeo.org/encroachment.html (last visited Mar. 30, 2015); Light, *supra* note 86, at 891.

[91] "Encroachment" is defined as "the real or perceived conflict between the military training mission and the physical environment of habitat, species, people and communities." *Military*, *supra* note 90.

[92] Hope Babcock, *National Security and Environmental Laws: A Clear and Present Danger?*, 25 VA. ENVTL. L.J. 105, 127–28 (2007), (quoting Martha Townsend, *Military Exemptions from Environmental Laws*, 19 NAT. RESOURCES & ENV'T 65, 66 (2005)).

[93] *Environmental Laws: Encroachment on Military Training?: The Impact of Environmental Laws upon Military Training Procedures and upon the Nation's Defense Security: Hearing Before the Comm. on Env't & Pub. Works*, 108th Cong. 1 (2003), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-108shrg91745/html/CHRG-108shrg91745.htm (concluding the DOD has not properly assessed or reported encroachment problems).

[94] *See* Stephen Dycus, *Osama's Submarine: National Security and Environmental Protection After 9/11*, 30 WM. & MARY ENVTL. L. & POL'Y REV. 1, 4 (2005).

[95] *Id.* at 1.

[96] Babcock, *supra* note 92, at 155.

[97] This includes the Endangered Species Act, Marine Mammal Protection Act, and Migratory Bird Treaty Act. Light, *supra* note 86, at 891 n.50; Babcock, *supra* note 92, at 125–36.

hering to certain provisions within the Endangered Species Act and the Marine Protection Act.[98] Changes in the Endangered Species Act for the military can prohibit the Secretary from categorizing a habitat as "critical" if it is owned or used by the DOD.[99] Additionally, national security *must* now be considered when designating habitat as critical.[100] When a species is endangered, its habitat is labeled as "critical" to protect it from extinction.[101] As a result of the National Defense Authorization Act of 2004, whether an endangered species obtains protected status can hinge on unrelated national security concerns.[102] Military activity can make laws such as the Endangered Species Act and Marine Protection Act susceptible to nebulous security concerns. Absent an emergency situation, such exemptions are overly broad.

Military preparedness has often trumped environmental concerns:[103] "In its proprietary military capacity, the Federal Government has traditionally exercised *unfettered* control with respect to internal management and operation of federal military establishments."[104] One case of environmental litigation highlighting this deferential orthodoxy is *Doe v. Browner*, in which employees at a classified Air Force operating site in Nevada sued to force compliance with RCRA.[105] The plaintiffs attempted to force the EPA to inspect the site, arguing that the site was violating requirements imposed by the RCRA.[106] However, the EPA argued that it had already inspected the site and that its report and inventory documentation were classified.[107] Despite the EPA's assertion, classifying the report conflicted with a RCRA provision requiring public

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[98] National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, §§ 318-19, 117 Stat. 1392, 1433-35 (codified at 16 U.S.C.S. §§ 1362(18)(B)-(D), 1371(a), (f), 1533(a)(3) (LEXIS 2015)). *See also* Barefoot-Watambwa, *supra* note 6, at 577.

[99] The National Defense Authorization Act for Fiscal Year 2004 modified the Endangered Species Act to state the following: "The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense . . . ." National Defense Authorization Act for Fiscal Year 2004 § 318 (codified at 16 U.S.C.S. § 1533(a)(3)(B)(i) (LEXIS 2015).

[100] *Id. See also* Barefoot-Watambwa, *supra* note 6, at 577 n.4.

[101] 16 U.S.C.S. § 1533 (LEXIS 2015).

[102] *Id.*

[103] *See, e.g.*, Pauling v. McNamara, 331 F.2d 796, 798–99 (D.C. Cir. 1963); Nielson v. Seaborg, 348 F. Supp. 1369, 1372 (D. Utah 1972).

[104] McQueary v. Laird, 449 F.2d 608, 612 (10th Cir. 1971) (emphasis added).

[105] Doe v. Browner, 902 F. Supp. 1240, 1242 (D. Nev. 1995), *aff'd in part, dismissed in part sub nom.* Kasza v. Browner, 133 F.3d 1159 (9th Cir. 1998); *see* E.G. Willard et al., *Environmental Law and National Security: Can Existing Exemptions in Environmental Laws Preserve DOD Training and Operational Prerogatives Without New Legislation?*, 54 A.F. L. REV. 65, 68-69 (2004).

[106] Plaintiffs argued the military did not properly store, treat, or dispose of hazardous waste.

[107] *Doe*, 902 F. Supp. at 1244; *see* Willard et al., *supra* note 105, at 68.

disclosure.[108] Accordingly, the court ordered that EPA declassify the report or seek a presidential exemption from the disclosure requirement.[109] After appealing the case, EPA asked for and received an exemption from President Clinton.[110] The appellate court upheld the exemption, explaining that the President had discretion to issue the exemption because he found it to be "in the paramount interest of the United States."[111] *Doe v. Browner* highlights the DOD's increasing efforts to sidestep environmental laws.[112] Congress should explicitly direct the military to adhere to environmental laws, because otherwise courts will continue deferring to military activity when interpreting legislation.

Post-9/11 security concerns have furthered the "unfettered" leeway that courts have consistently granted to U.S. armed forces.[113] For example, in 2008, the Supreme Court heard *Winter v. National Resources Defense Council, Inc.*, ultimately holding that the Navy's military preparedness outweighed environmental concerns.[114] The Court determined that the potential injury to marine mammals due to Naval sonar training exercises was offset by the public interest and the Navy's need for effective preparation of its sailors.[115] The Court concluded that the case "tip[s] *strongly* in favor of the Navy."[116] The military's mission to protect America's security often allows it to circumvent environmental laws, including those covering habitat conservation and toxic-chemical disclosure.[117] Furthermore, the President or Secretary of Defense may grant waivers from environmental laws in the interest of national security.[118] Ultimately, the military enjoys enhanced legislative exemptions from environmental laws and judicial deference in litigation, and it may seek waivers from the executive branch if all else fails. Waivers should exist only to protect military activities during emergencies and to prevent

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[108] 42 U.S.C. § 6961(a) (LEXIS 2015); *Doe*, 902 F. Supp. at 1250; *see* Willard et al., *supra* note 105, at 68–69.

[109] *Doe*, 902 F. Supp. at 1252; *see Willard* et al., *supra* note 105, at 68–69.

[110] Kasza v. Browner, 133 F.3d 1159, 1173 (9th Cir. 1998). President Clinton's Order exempted the site from *any* provision regarding solid and hazardous waste disposal from disclosure of classified information. Presidential Determination No. 95-45, 60 Fed. Reg. 52,823 (Sept. 29, 1995), *available at* http://www.gpo.gov/fdsys/pkg/FR-1995-10-10/pdf/95-25244.pdf; *see* Willard et al., *supra* note 105, at 68–69. A military request for exemption from an environmental law has never been denied. Babcock, *supra* note 92, at 154.

[111] *Kasza*, 133 F.3d at 1173–74; *see* Willard et al., *supra* note 105, at 67.

[112] *See* BEARDEN, *supra* note 83, at 1.

[113] McQueary v. Laird, 449 F.2d 608, 612 (10th Cir. 1971).

[114] Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 26 (2008).

[115] *Id.* at 32–33.

[116] *Id.* at 26 (emphasis added).

[117] Light, *supra* note 86, at 880–81 (citing Toxic Substances Control Act, 15 U.S.C. § 2621 (2012), and 16 U.S.C. § 1536(j) (2012)).

[118] Light, *supra* note 86, at 888–89 nn.37–38.

disclosure of highly sensitive information. Congress should amend current laws to specifically require a narrow interpretation of waivers and explicitly state when waivers are appropriate.[119]

The post-9/11 atmosphere built upon national security concerns long brewing at the Supreme Court.[120] In *Weinberger v. Catholic Action of Hawaii*, the Supreme Court held that Congress did not intend to allow for public disclosure of an Environmental Impact Statement (EIS) under the Freedom of Information Act (FOIA).[121] Generally, an EIS is a document certain environmental laws require when government actions significantly affect communities and their wellbeing.[122] An EIS must usually be compiled prior to the beginning of a project and articulate the positive and negative environmental effects of the proposed action.[123] In *Weinberger*, the Navy first prepared an Environmental Impact Assessment (EIA).[124] An EIA, also known as an EA, is a public document with three functions.[125] First, the document provides evidence and analysis to determine whether to prepare an EIS.[126] Second, an EIA assists agency compliance with NEPA.[127] When no EIS is necessary, it helps identify alternatives to the proposal. Lastly, an EIA facilitates an EIS's preparation.[128] In *Weinberger*, the EIA concluded new nuclear facilities would not have a significant environmental impact.[129] Consequently, an EIS was never prepared.[130] In addition, other information was classified for national security reasons.[131] In response, the plaintiffs requested an injunction to prevent construction of military facilities until an EIS was filed.[132] The Court concluded that the Navy was not proposing to *store* nuclear weapons at new facilities; instead, the Navy's facilities were

[119] Ideally, a waiver would rest on a fact-specific balancing test. One scholar, Professor Stephen Dycus, recommends that the DOD obey existing laws and be candid about its defense and secrecy needs. He also recommends transparency throughout the process via public participation. Exemptions should be allowed only when necessary, not merely for the sake of convenience. DYCUS, *supra* note 81, *passim*; *see* John S. Applegate, *National Security and Environmental Protection: The Half-Full Glass*, 26 ECOLOGY L.Q. 350, 398 (1999) (reviewing DYCUS, *supra* note 81).

[120] United States v. Reynolds, 345 U.S. 1, 10 (1953).

[121] Weinberger v. Catholic Action of Haw., 454 U.S. 139, 145 (1981).

[122] National Environmental Policy Act of 1969, 42 U.S.C.S. § 4321 et seq. (LEXIS 2015).

[123] *Id.*

[124] *Environmental Assessments & Environmental Impact Statements*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/reg3esd1/nepa/eis.htm#ea (last updated Feb. 2, 2015).

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] Weinberger v. Catholic Action of Haw., 454 U.S. 139, 141 (1981).

[130] *Id.* at 141.

[131] *Id.*

[132] *Id.* at 142.

merely "nuclear *capable*."[133] Therefore, the Navy was exempt from preparing an EIS and was not required to disclose additional information under the FOIA.[134] The Court held that "respondents have made no showing in this case that the Navy has failed to comply, *or even need comply*, with NEPA's requirements regarding the preparation and public disclosure of an EIS."[135] This case is another example of military preparedness in a non-emergency situation trumping environmental concerns. Courts should not circumvent environmental legislation in the interest of military preparedness when the military violates environmental and disclosure laws. Military preparedness activities are a concern for environmental justice advocates because environmental justice is often considered when the military prepares an EIS. Environmental justice concerns will never be adequately addressed when nuclear capable[136] facilities are not required to draft an EIS.

Military exemptions from environmental laws are dangerous because there are few external checks on how they are administered.[137] Courts should conduct these external checks but currently do not. Traditionally, courts have "played a limited role in reviewing the military's actions, especially during wartime and when foreign policy and presidential discretion are involved."[138] Courts have the unique power and ability to control broad military exemptions and should exercise this right more vigorously.[139] The military's history of failing to comply with environmental laws is troublesome for environmental justice proponents because if the military can dismiss existing laws, environmental justice will never be truly possible because the Order's directives are suggested, not required.[140] Currently, courts are of little help to plaintiffs because they generally do not review military action:[141] "No other institution is likely to have the power and impetus to curb the military's excesses under the new exemptions."[142] National security has ballooned from initially being

[133] *Id.* at 146 (emphasis added).

[134] *Id.* at 141.

[135] *Id.* at 142 (emphasis added). NEPA has been described as the "Magna Carta" of U.S. environmental law because it was one of the first in a set of sweeping environmental laws enacted in the 1970s to "ensure that all branches of government give proper consideration to the environment prior to undertaking any major federal action that significantly affects the environment." *Environmental Law & Federal Facilities: State & Federal Regulations*, *supra* note 48.

[136] "Nuclear capable" only means the military has "contemplated the possibility that nuclear weapons, of whatever variety, may at some time be stored" at a particular site. *Catholic Action of Haw.*, 454 U.S. at 146.

[137] Babcock, *supra* note 92, at 147.

[138] *Id.*

[139] *Id.* at 148.

[140] *Id.* at 150.

[141] *Id.* at 147.

[142] *Id.* at 148.

regarded as military conduct during wartime to now including deference for readiness and preparedness activities during peacetime. The threat of a new 9/11 is not a sufficient reason to disregard decades of environmental legislation:

> The state acts at its lowest level of legitimacy when the risk is low and the means are ill-suited to achieve legitimate ends. It is important to stress that even in high-risk settings, means that exceed the scope of the threat or use public health as a pretext for discrimination are unacceptable.[143]

The cases discussed above all highlight instances of nebulous security concerns trumping existing environmental legislation. This security deference is troubling for the environmental justice movement. Because environmental justice is not codified law, compliance with it is merely recommended to the "greatest extent practicable."[144] Communities facing environmental justice concerns are even less capable of combating military wrongdoing than codified environmental laws, because environmental justice advocates lack the advantage of judicial review.[145] Therefore, when environmental laws are undermined by military activities, true environmental justice is not available. Judicial deference to the military must end. The judiciary is the only branch of government capable of interpreting military conduct. Continued deference to the military erodes existing environmental laws and limits mechanisms for enforcing environmental justice. True justice in this regard requires codifying the Order, creating a right to judicial review, and eliminating loopholes for non-emergency national security concerns.

B. Procedural Guidelines Do Not Properly Protect Communities from Environmental Injustice

Congress should codify the Order to create substantive rights for environmental justice proponents, because federal guidelines for appropriate agency conduct do not sufficiently protect minority and low-income populations. Although proponents have attempted to use NEPA's procedural law to further environmental justice, the law is overly deferential to the military and creates a vacuum for civil rights litigants. Without codification, environmental justice will continue to operate as a consideration instead of a requirement.

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[143] Lawrence O. Gostin, *When Terrorism Threatens Health: How Far Are Limitations on Personal and Economic Liberties Justified?*, 55 Fla. L. Rev. 1105, 1139 (2003).

[144] Exec. Order No. 12,898, *supra* note 4.

[145] *Id.*

NEPA serves as a procedural statute[146] with two primary functions: requiring federal agencies to consider the "environmental impact of an action *before* proceeding with it" and guaranteeing the public is informed regarding the action through a decisionmaking process.[147] Plaintiffs often use this procedural framework as a basis for a cause of action, arguing for example that an EIS was insufficient or that the impacts of agency action are more significant than the agency previously reported.[148]

However, NEPA is merely an accounting parameter for environmental ideals and it does not provide any substantive requirements. NEPA's policy is "to promote efforts which will prevent or eliminate damage to the environment."[149] This policy mandates federal agencies "to use all *practicable* means, consistent with other essential considerations of national policy."[150] National security is among other "essential considerations" that can exempt the military from NEPA.[151] However, NEPA does not have a specific national security waiver of its EIS requirement for "major federal actions significantly affecting the quality of the human environment."[152] Environmental justice proponents generally cite EIS insufficiency when arguing that federal agency action does not satisfactorily include consideration of disproportionate effects on low-income and minority communities.[153] Again however, judicial and legislative deference to the military remains steadfast and consistently broad. This deference makes it difficult for environmental justice proponents to overcome NEPA's reporting requirements when reviewing military actions and emergency exceptions. As previously mentioned, NEPA merely requires that environmental reviews be conducted "to the fullest extent possible."[154] This vague language allows federal agencies to set

[146] NEPA does not require compliance with any specific environmental law. Instead, it is a framework that ensures federal agencies observe substantive law. LINDA LUTHER, CONG. RESEARCH SERV., RL33152, THE NATIONAL ENVIRONMENTAL POLICY ACT: BACKGROUND AND IMPLEMENTATION 2 (2005), *available at* http://www.fta.dot.gov/documents/Unit1_01CRSReport.pdf.

[147] *Id.* at 1.

[148] *Id.* at 2.

[149] 42 U.S.C.S. § 4321 (LEXIS 2015).

[150] *Id.* § 4331(b) (emphasis added); "All practicable means" under NEPA means procedural duties must be achieved to the "fullest extent possible." *See* Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1114-1116 (D.C. Cir. 1971).

[151] *E.g.*, Nielson v. Seaborg, 348 F. Supp. 1369, 1372 (D. Utah 1972); *Calvert Cliffs'*, 449 F.2d at 1112.

[152] Babcock, *supra* note 92, at 115 (quoting 42 U.S.C. § 4332 (2000)).

[153] Nonetheless, there is no requirement that an EIS specifically address these components. Instead, federal agencies are required to take into account relevant environmental factors impacted by its action(s). 42 U.S.C.S. § 4332(C) (LEXIS 2015). *See* H. Paul Friesema & Paul J. Culhane, *Social Impacts, Politics, and the Environmental Impact Statement Process*, 16 NAT. RESOURCES J. 339, 339 (1976).

[154] 42 U.S.C.S. §§ 4332(C), 4334 (LEXIS 2015); Babcock, *supra* note 92, at 115.

their own standards for practicability. The military has capitalized on NEPA's ambiguities to the detriment of environmental laws.

A clear instance of this ambiguity occurred during the Persian Gulf War.[155] There, the military successfully marshaled an emergency exception to NEPA to sidestep certain reporting requirements.[156] When enacted, NEPA created the Council on Environmental Quality (CEQ). The CEQ was created to review exemption requests and coordinate environmental efforts between federal agencies.[157] During the Persian Gulf War, the military sought an exemption from the FOIA to prevent disclosure of information in a supplemental EIS.[158] The DOD consulted CEQ to obtain an exemption and succeeded.[159] CEQ justified the exemption because the military required that preparations be made in response to Iraq's invasion of Kuwait, some of which "may result in adverse environmental impacts."[160] These actions constituted an "emergency"[161] because the military needed to "support the President's directives in the Middle East,"[162] thereby justifying an exemption from customary NEPA requirements. In that case, an "emergency" exemption[163] to NEPA environmental disclosures was granted for U.S. military preparations in response to Iraq's invasion of Kuwait, which was over 6,000 miles away. This exemplifies the broad impact that military exemptions may have on legally mandated reporting requirements. Without reporting requirements, the public is unaware of important military activities that can affect their community. Required disclosures must be made public. Because environmental justice specifically addresses disproportionate impacts of environmental contaminants on poor and minority communities, disclosures must occur so communities can protect themselves, enforce their rights, and combat wrongdoing.

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[155] The Gulf War began in August 1990 and ended in a cease-fire on February 28, 1991. *Persian Gulf War*, HISTORY.COM, http://www.history.com/topics/persian-gulf-war (last visited Mar. 31, 2015).

[156] Valley Citizens for a Safe Env't v. Vest, No. CIV. A. 91-30077-F, 1991 WL 330963, at *2 (D. Mass. May 6, 1991).

[157] *The Council on Environmental Quality—About*, THE WHITE HOUSE, http://www.whitehouse.gov/administration/eop/ceq/about (last visited Mar. 14, 2015).

[158] *Valley Citizens for a Safe Env't*, 1991 WL 330963, at *2.

[159] *Id.*

[160] Babcock, *supra* note 92, at 115 n.50 (quoting Letter from Colin McMillan, Assistant Sec'y of Def., to Michael Deland, CEQ Chairman (Aug. 24, 1990)).

[161] *See* 40 C.F.R. § 1506.11 (LEXIS 2015), *available at* www.law.cornell.edu/cfr/text/40/1506.11; Babcock, *supra* note 92, at 115 n.50.

[162] Babcock, *supra* note 92, at 115 n.50 (quoting Letter from Colin McMillan, Assistant Sec'y of Def., to Michael Deland, CEQ Chairman (Aug. 24, 1990), and Letter from Michael Deland, CEQ Chairman, to Colin McMillan, Assistant Sec'y of Def. (Aug. 28, 1990)).

[163] 40 C.F.R. § 1506.11 (Westlaw 2015).

Although disclosures regarding the Gulf War may appear to be a distant concern for environmental justice proponents, their implications are far-reaching. Military exemption from public disclosure of information removes the public from the government decisionmaking process. For environmental justice proponents, this is a serious concern, because communities are able to protect themselves only to the extent that they have information: "An informed public can do a better job of protecting itself than an uninformed one."[164] One of NEPA's core aims is public disclosure.[165] The disconnect between NEPA disclosure requirements and military exemptions creates an unneeded risk to community safety. Censoring disclosures jeopardizes communities because they are not made aware of environmental dangers. Required disclosure laws should be just that: required. Disclosure loopholes for vague national security concerns should end.

In addition to disclosure requirements, NEPA also requires the balancing of environmental concerns when preparing an EIS. In some circumstances, environmental justice concerns have been incorporated into the balancing of environmental considerations and alternatives required in federal agency impact statements. Although not specifically required under NEPA, the Navy has taken environmental justice[166] into account in its procedural framework. For example, in *Citizens Concerned About Jet Noise, Inc. v. Dalton*, plaintiff brought an action seeking an injunction to prevent the Navy from placing 156 aircraft at a particular naval air station. Plaintiff asserted the Navy's decision would create jet noise, safety hazards, air pollution, and would lower property values in the area.[167] Specifically, plaintiff challenged the reasonableness and adequacy of the Navy's final environmental impact statement (FEIS), arguing that the Navy did not properly evaluate reasonable alternatives, that the noise analysis was inadequate, and that the FEIS's environmental justice analysis was flawed.[168] The Navy argued that its FEIS was reasonable and adequate, and filed a motion for summary judgment. The district court

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[164] Babcock, *supra* note 92, at 136; *see* Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 316–17 (2001).

[165] LUTHER, *supra* note 146, at 1.

[166] The DOD adheres to the following principles: promoting partnerships, identifying impacts of DOD activities on low-income and minority populations, streamlining government, improving day-to-day operations, and fostering nondiscrimination in its programs. DEP'T OF DEF., STRATEGY ON ENVIRONMENTAL JUSTICE 2 (1995), *available at* http://www.denix.osd.mil/references/upload/DoD-Environmental-Justice-Strategy-24-Mar-1995.pdf.

[167] Citizens Concerned About Jet Noise, Inc. v. Dalton, 48 F. Supp. 2d 582, 586 (E.D. Va. 1999), *aff'd*, 217 F.3d 838 (4th Cir. 2000) (unpublished table decision).

[168] Plaintiffs had additional complaints as well, totaling eight issues. *Id.* at 589.

agreed with the Navy, granting the motion for summary judgment and dismissing plaintiff's case.[169]

In its analysis, the district court found an EIS requires the federal agency only to "make a reasoned assessment of the project's environmental impact."[170] Additionally, the court stated, "it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process."[171] The court also pointed out that NEPA does not require environmental justice to be considered and that the provisions in the Order are not subject to judicial review.[172] Therefore, the district court determined it had no jurisdiction to review the FEIS's environmental justice provision and therefore did not address plaintiff's argument.[173]

On appeal, the plaintiff-appellant argued that the Navy's EIS and record of decision were contrary to existing administrative law; specifically, the plaintiff argued that the EIS findings were arbitrary and capricious, an abuse of discretion, and not in accordance with the law.[174] The burden is on a plaintiff challenging an EIS to identify why the EIS was erroneous.[175] The court then looks to see if the error is significant enough to find that the agency acted arbitrarily or capriciously.[176] Unsurprisingly, this is a very difficult burden to meet[177] and plaintiffs generally have difficulty proving an agency's actions were arbitrary and capricious. The courts at both the trial level and on appeal in *Citizens Con-*

[169] In fact, both sides filed motions for summary judgment. The district court denied plaintiff's motion for summary judgment. *Citizens Concerned About Jet Noise*, 48 F. Supp. 2d at 585.

[170] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 332 (1989).

[171] *Id.* at 350.

[172] *Citizens Concerned About Jet Noise*, 48 F. Supp. 2d at 604; *see also* Exec. Order No. 12,898, *supra* note 4.

[173] *Citizens Concerned About Jet Noise*, 48 F. Supp. 2d at 604.

[174] Brief of Appellant 1-2, Citizens Concerned About Jet Noise, Inc. v. Dalton, No. 99-1887, 217 F.3d 838 (4th Cir. 2000) (unpublished table decision), 1999 WL 33615306. In reviewing federal agency actions, the APA requires that agency actions not be arbitrary or capricious. The agency's action must be set aside if the reviewing court finds the action was arbitrary or capricious. Administrative Procedure Act, 5 U.S.C.S. § 706 (LEXIS 2015).

[175] Sierra Club v. Froehlke, 816 F.2d 205, 213 (5th Cir. 1987).

[176] Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 89-90 (1983).

[177] An agency action would be arbitrary and capricious if the agency relied on factors Congress did not intend, entirely ignored an important component of the problem, made a decision contrary to evidence provided to the agency, or made a decision that was implausible. For example, if an agency relied on astrology to render a decision, that action would be set aside. *See* Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 378 (1989); *see also What Is "Arbitrary and Capricious" Agency Action?* ALBO & OBLON L.L.P. (Nov. 5, 2010), http://www.procurement-lawyer.com/2010/11/what-is-arbitrary-and-capricious-agency-action.

cerned determined there was no basis for plaintiff's claims that the government's actions were arbitrary and capricious.[178]

As the plaintiff learned in *Citizens Concerned*, successfully challenging military conduct is extremely difficult. *Citizens Concerned* also demonstrated that although environmental justice might be a procedural consideration, it offers no rights enforceable in court. Because environmental justice operates only as a procedural matter, it is only one of many factors in an EIS, if it is considered at all. However, even if environmental justice is considered, courts will not review environmental justice arguments because the Order does not provide for judicial review of environmental justice issues.[179] This gap prevents environmental justice proponents from enforcing a community's rights if wrongdoing occurs. As the preceding examples show, procedural considerations do not create substantive rights. Without more rigorous legislation creating substantive rights, specifically the right to judicial review, courts will continue setting aside environmental justice arguments even if they have merit. Communities should have an opportunity to address their environmental justice grievances in court. Congress must codify the Order to create substantive rights for environmental justice proponents, specifically, the right to judicial review.

C. Deferential Standards for Review of Federal Agency Conduct Fail to Protect Communities from Environmental Injustice

Deference to federal agencies prevents communities from adequately enforcing their environmental justice concerns. Due to a lack of substantive rights, environmental justice advocates have employed administrative law in attempts to combat injustice by challenging federal agencies' discretionary powers. However, environmental justice is not effectively pursued through administrative procedures because the Administrative Procedure Act requires deference to federal agency conduct. Therefore, the Order should be codified. Codifying the Order would create substantive rights for environmental justice communities by requiring federal agencies to adhere to environmental justice at all times, instead of adhering to it only when practicable. This would allow complaints to be heard in court, instead of deferential administrative agency proceedings.

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[178] *Citizens Concerned About Jet Noise*, 48 F. Supp. 2d at 590, *aff'd*, 217 F.3d 838 (4th. Cir. 2000) (unpublished table decision).

[179] *See* Exec. Order No. 12,898, *supra* note 4.

The APA requires courts to review federal agency conclusions, processes, and procedures.[180] If the reviewing court determines that a federal agency's actions were arbitrary, capricious, an abuse of discretion, or not in accordance with the law, then the actions must be rejected and set aside.[181] This requirement is intended to ensure an agency's conclusions evolve from a rational decisionmaking process.[182] Since the APA was enacted, courts have created additional guidelines to ensure federal agencies comply with APA requirements. Courts can review three aspects of a federal agency's decision: the outcome of the decision, the procedure taken to reach an outcome, and the decisionmaking process.[183] Under APA guidelines, only two cases have successfully challenged a federal agency's EIS that cited environmental justice as a factor.[184] Frequently, a federal agency's EIS will only mention environmental justice among a host of factors. To date, there are few cases in which environmental justice concerns operated as the cornerstone of an EIS or were the focus of a challenge to the validity of an EIS.[185]

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[180] Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313 *passim* (1996).

[181] 5 U.S.C.S. § 706 (LEXIS 2015). It is important to point out there are *many* nuances to this rule. For further guidance, see Lawson, *supra* note 180, *passim*.

[182] Lawson, *supra* note 180, at 319.

[183] *Id.* at 317. Courts generally use the "substantial evidence" test to review an agency's factual conclusions. This is conducted in a formal proceeding in which the judge considers only whether the conclusion "satisfies a certain threshold of consistency with the record." Agency conclusions can also be set aside if determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Id.* Procedural "error" is described as the "failure to jump through all the hoops prescribed by law—[it] is a distinct form of error that is independent of the substantive merits of the agency's outcome." *Id.* at 318. The "arbitrary and capricious test" is required here. To use the previous example, astrological divination is not a rational decisionmaking process. *Id.* at 319.

[184] *See, e.g.*, Washington Cnty., N.C. v. U.S. Dep't of Navy, 317 F. Supp. 2d 626, 636 (E.D.N.C. 2004) (stating in its decision to grant plaintiff's motion for preliminary injunction: "The Court does not undertake an arbitrary and capricious review of the Navy's actions at this time . . . . However, given the information before the Court, the Court finds that Plaintiffs have raised serious, substantial, and difficult questions as to whether the Navy acted arbitrarily and capriciously . . . such that the Navy failed to provide the environment with the kind and quality of consideration it is due under the law."). Although no additional details are given, environmental justice was one of the factors plaintiffs in *Washington County* claimed the Navy failed to comply with in preparation of its Final Environmental Impact Statement. *Id.* After the district court entered a final judgment (including a permanent injunction) in *Washington County*, the case was appealed and ultimately consolidated with Nat'l Audubon Soc'y v. Dep't of Navy, 422 F.3d 174 (4th Cir. 2005) (concluding that the EIS did not take the "hard look" required by NEPA, but that the broad injunction issued by the district court should have been narrowed to permit the Navy to engage in activities to complete its supplemental EIS). *See also* S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior, 588 F.3d 718 (9th Cir. 2009) (per curiam).

[185] *See, e.g.*, In re La. Energy Servs., L.P. (Claiborne Enrichment Ctr.), 47 N.R.C. 77, 82–83 (1998).

Deferential standards are especially dangerous in reviewing DOD action, considering the DOD is the largest agency in the federal government.[186] Within a military context, the armed forces receive excessive deference compared to other federal agencies in administrative law cases.[187] Some scholars suggest the excessive deference given to the military interferes with the courts' ability to fulfill their critical function of ensuring that agencies comply with federal law.[188] Nonetheless, different agencies are subject to different standards of review.[189] Admittedly, the APA does contain certain exceptions for the military when conducting its core functions. These core military functions include an exception for "military authority exercised in the field in time of war or in occupied territory."[190] However, for military conduct that is not considered a "core military function," the APA acts as a waiver of sovereign immunity, thereby opening up that conduct to judicial oversight.[191]

Courts have granted excessive deference to the military, despite congressional intent when drafting the APA to create a normative standard for *all* federal agencies.[192] Although there is concern that courts should not question military decisionmaking, there is a parallel concern that "military super-deference undermines the goals of the APA."[193] Few military actions fall under the core function exception. Instead, courts have unilaterally adopted a deferential standard despite congressional intent.[194]

Cases involving foreign affairs and national security endorse super-deference to military conduct.[195] For example, in *Custer County Action Ass'n v. Garvey*, the plaintiffs challenged Federal Aviation Administration (FAA) and Air National Guard orders allowing special airspace use for military training over Colorado.[196] The court held that it was precluded from interfering with an FAA directive that was necessary for

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[186] Kovacs, *supra* note 5, at 584.

[187] *Id.*

[188] *See, e.g., id. at* 584.

[189] *See, e.g.*, Cone v. Caldera, 223 F.3d 789, 793 (D.C. Cir. 2000); Cherokee Nation v. Norton, 389 F.3d 1074, 1077-79 (10th Cir. 2004); *see also* Kovacs, *supra* note 5, at 585.

[190] Administrative Procedure Act, 5 U.S.C.S. § 551(1)(G) (LEXIS 2015); Kovacs, *supra* note 5, at 585-88.

[191] Administrative Procedure Act, 5 U.S.C.S. § 701(b)(1)(G) (LEXIS 2015); Kovacs, *supra* note 5, at 587.

[192] Administrative Procedure Act, 5 U.S.C.S. § 706(2)(A) (LEXIS 2015); Kovacs, *supra* note 5, at 584.

[193] Kovacs, *supra* note 5, at 586.

[194] *Id.* at 591.

[195] *Id.* at 597 (citing William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1097-98 (2008).

[196] Custer Cnty. Action Ass'n v. Garvey, 256 F.3d 1024, 1028 (10th Cir. 2001).

military training.[197] Moreover, the court determined the record "amply demonstrate[d]"[198] that the FAA believed the airspace training was in the interest of national security, thereby affording a "particularly high degree of deference in the area of military affairs."[199] One scholar goes as far as to argue that super-deference raises separation-of-powers concerns when courts ignore legislative intent by creating a super-deferential standard never intended by Congress.[200] This super-deference "excuse[s] the military from meaningful judicial review in precisely the cases Congress determined should be reviewable."[201] Additionally, super-deference hinders one of the goals of the APA to incorporate judicial review:

> This unpredictability causes doctrinal confusion, which does not do agencies, plaintiffs, or regulated industries any favors. It also raises concerns related to the hypocrisy of courts: they purport to keep agencies within the bounds of their delegated authority through rules of administrative common law, even though creating that common law may exceed the courts' authority. Likewise, courts emphasize the rule of law while defying rule-of-law values by singling out one agency for special treatment and leaving little restraint on the agency's discretion.[202]

Courts must re-evaluate their super-deferential treatment of the military and return to the deferential procedure outlined by Congress. Courts should adhere to legislative intent so that challenges to agency action are conducted on the merits.

Despite the super-deferential hurdles, some environmental advocates have used APA standards to challenge military actions. Unsurprisingly, successful cases are rare. In some cases, environmentalists successfully challenged the military, only to face serious repercussions. A disastrous example of unintended consequences is *Center for Biological Diversity v. Pirie*, in which plaintiff sought an injunction under the APA to stop the Navy from training in the Northern Mariana Islands.[203] In that case, the court found that Naval training directly violated the Mi-

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[197] *Id.* at 1031.

[198] Plaintiffs contested this statement, arguing that there was no evidence in the record that the FAA ever "independently considered the issue of necessity, or reach[ed] any determination of its own with respect to that issue." Brief for Petitioner at 20, Custer Cnty. Action Ass'n v. Garvey, 534 U.S. 1127 (2002) (No. 01-652).

[199] *Custer Cnty. Action Ass'n*, 256 F.3d at 1031.

[200] Kovacs, *supra* note 5, at 597-98.

[201] *Id.* at 604–05.

[202] *Id.* at 600.

[203] Ctr. for Biological Diversity v. Pirie, 191 F. Supp. 2d 161, 163 (D.C. 2002), *vacated and dismissed as moot sub nom.* Ctr. for Biological Diversity v. England, Nos. 02-5163, 02-5180, 2003 WL 179848 (D.C. Cir. Jan. 23, 2003) (per curiam); Kovacs, *supra* note 5, at 634-35.

gratory Bird Treaty Act (MBTA), and the plaintiff was granted summary judgment.[204] Unfortunately, the plaintiff's successful motion was ultimately a pyrrhic victory. Congress responded by enacting the Bob Stump National Defense Authorization Act of 2003, authorizing the Navy to continue its military readiness activities by specifically exempting all military branches from the MBTA.[205] Similarly, in *Natural Resources Defense Council, Inc. v. Evans*, plaintiffs sued the Navy under the APA for violating the Marine Mammals Protection Act (MMPA).[206] In that case, plaintiffs sought and were granted a permanent injunction. But as in *Center for Biological Diversity v. Pirie*, their victory was short-lived.[207] Three months later, Congress responded by enacting the National Defense Authorization Act of 2004, which carved out a national-security exception to the MMPA for readiness.[208] Although it is not unusual for Congress to enact laws based on court decisions, these cases were especially damaging for environmentalists. Current administrative law grants excessive deference to the military, but even when environmentalists succeed in court, the win can be fleeting. For environmental justice proponents, overcoming procedural requirements and super-deference to the military is burdensome and rarely effective.

Given this burden, an affirmative substantive right protecting environmental justice is necessary because current administrative law grants excessive deference to the military. This creates undue obstacles for environmental justice plaintiffs when transgressions occur. When courts defer to the military even during peacetime, environmental advocates suffer. Courts should be neutral interpreters of the law. In the administrative law context, a primary goal of the courts is to ensure that federal agencies engage in rational decisionmaking processes.[209] Courts should recognize their role as interpreters of administrative statutes, instead of advocating for military preparedness. Because procedural administrative requirements do not create the substantive rights required to achieve en-

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[204] *Ctr. for Biological Diversity*, 191 F. Supp. 2d at 164; *see* Migratory Bird Treaty Act, 16 U.S.C.S. § 703 (LEXIS 2015); Kovacs, *supra* note 5, at 634-35.

[205] Enacted in response to 9/11, the portion of the Bob Stump Act regarding military exemptions to MBTA was debated on the Senate Floor for only seventy-five minutes. Erin Truban, Comment, *Military Exemptions from Environmental Regulations: Unwarranted Special Treatment or Necessary Relief?*, 15 VILL. ENVTL. L.J. 139, 169 n.235 (2004) (citing BOB STUMP NATIONAL DEFENSE AUTHORIZATION ACT FISCAL YEAR 2003—CONFERENCE REPORT, 148 CONG. REC. S10858 (daily ed. Nov. 13, 2002)), *available at* http://digitalcommons.law.villanova.edu/elj/vol15/iss1/6. Bob Stump National Defense Authorization Act for Fiscal Year 2003, 16 U.S.C.S. § 703 (LEXIS 2015); Kovacs, *supra* note 5, at 635.

[206] Natural Res. Def. Council, Inc. v. Evans, 279 F. Supp. 2d 1129, 1137-38 (N.D. Cal. 2003); *see* Marine Mammals Protection Act, 16 U.S.C.S. § 1361 (LEXIS 2015).

[207] *Natural Res. Def. Council*, 279 F. Supp. 2d at 1147.

[208] 16 U.S.C.S. § 1371 (LEXIS 2015).

[209] Lawson, *supra* note 180, at 319.

vironmental justice, codification of the Order that explicitly eliminates loopholes for military preparedness activities is necessary.

D. Congress Must Create a Private Cause of Action for Disparate Impact

Environmental justice should be considered a civil right because no person should be subject to discrimination on the basis of color, race, or national origin.[210] The 1964 Civil Rights Act prohibits discrimination by any program or activity receiving federal funding.[211] When President Clinton issued the Order, he identified Title VI of the Civil Rights Act as a law that could help "prevent those minority communities and low-income communities from being subject to disproportionately high and adverse environmental effects."[212] However, in the last fifteen years, civil rights jurisprudence has become less effective for environmental justice communities.[213]

Historically, plaintiffs have used civil rights legislation to challenge federal agency action under an environmental law framework using Sections 601, 602, and 1983 of Title VI of the Civil Rights Act of 1964.[214]

> Environmental justice advocates and the EPA have focused heightened attention since the early 1990s on the role that Title VI of the Civil Rights Act of 1964 can play in remedying perceived environmental inequities. Over the past few years, this effort has focused on application of civil rights law to the processes employed by states and local municipalities in issuing site permits for industrial use facilities and the potentially disparate impacts these facilities are alleged to impose on minorities, using Section 602 of Title VI as the vehicle for this effort.[215]

Section 601 provides that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under

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[210] 42 U.S.C.S. § 2000d (LEXIS 2015); Dora Acherman, Comment, *Discrimination by Any Other Name: Alternatives to Proving Deliberate Intent in Environmental Racism Cases*, 4 Fla. Int'l U. L. Rev. 255, 256 (2008).

[211] 42 U.S.C.S. § 2000d (LEXIS 2015).

[212] Memorandum on Environmental Justice, *supra* note 32.

[213] Acherman, *supra* note 210, at 257.

[214] 42 U.S.C.S. §§ 2000d–2000d-1 (LEXIS 2015); 42 U.S.C.S. § 1983 (LEXIS 2015); *See Environmental Justice: Basic Information*, U.S. Envtl. Prot. Agency, http://www.epa.gov/environmentaljustice/basics/ejbackground.html (last updated May 24, 2012).

[215] Frank B. Cross, Federal Environmental Regulation of Real Estate, § 3:20 (2014).

any program or activity receiving Federal financial assistance."[216] Section 602 grants federal agencies power to carry out these provisions "by issuing rules, regulations, or orders of general applicability."[217] Environmental justice proponents recognize that minority and low-income communities "are exposed to a disproportionately greater share of environmental hazards than affluent, Caucasian neighborhoods—not because of invidious racism, but as a result of neutral decisions made within intrinsically biased decision-making structures."[218]

Although not specifically addressing funding like Sections 601 and 602, 42 U.S.C. § 1983 does create a private right of action for any person who has suffered a deprivation of federal rights under color of state law. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[219]

Environmental justice proponents traditionally rely on Title VI in litigation by asserting that poor, minority communities endure a disproportionate amount of environmental hazards, or "disparate impacts". To combat these hazards, environmental justice plaintiffs have argued that hazardous facilities receiving federal funding violate Title VI if their communities receive a disproportionate amount of environmental hazards. Plaintiffs were also able to sue if they could prove that an agency receiving federal funding intentionally discriminated against a protected community. Prior to 2001, private plaintiffs successfully used Title VI to sue, asserting disparate-impact discrimination or intentional-discrimination claims.[220] However, since *Alexander v. Sandoval*, this rule has been hollowed out because the Supreme Court held that Title VI created a private cause of action based only on intentional discrimination, not disparate impacts.[221]

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[216] 42 U.S.C.S. § 2000d (LEXIS 2015).

[217] *Id.* § 2000d-1.

[218] David J. Galalis, Note, *Environmental Justice and Title VI in the Wake of* Alexander v. Sandoval*: Disparate-Impact Regulations Still Valid Under* Chevron, 31 B.C. ENVTL. AFF. L. REV. 61, 62–63 (2004).

[219] Civil Rights Enforcement Act of 1871, 42 U.S.C.S. § 1983 (LEXIS 2015).

[220] Alexander v. Sandoval, 532 U.S. 275, 280-81 (2001).

[221] *Id.* at 281. As one scholar suggests, "[a] strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry. As overtly bigoted behavior has be-

Alexander v. Sandoval centered on a private plaintiff suing to enjoin an English-only policy in Alabama's administration of driver's license exams.[222] The decision has had broad implications because it effectively disallowed a private cause of action for disparate-impact discrimination claims under Sections 601 and 602 of Title VI.[223] For environmental justice proponents, the decision is disheartening because without disparate-impact claims, plaintiffs must prove they were intentionally discriminated against. This is extremely difficult to prove, requiring "smoking gun" evidence rarely available to plaintiffs.

Justice Stevens, in his dissenting opinion in *Alexander v. Sandoval*, cited numerous prior cases in which plaintiffs were afforded a private right of action under Title VI.[224] Justice Stevens also argued that every court of appeal before *Alexander v. Sandoval* had afforded plaintiffs the right to a private cause of action for disparate-impact claims.[225] His dissent vehemently opposed the majority's statutory interpretation, arguing the "decision [is] unfounded in our precedent and hostile to decades of settled expectations."[226] Because intentional discrimination is so difficult to prove, Title VI disparate-impact claims are curtailed due to *Alexander v. Sandoval*. However, private litigants may still have the option of enforcing environmental justice regulations under § 1983.[227]

The majority in *Alexander v. Sandoval* did not directly address the viability of disparate-impact claims under § 1983.[228] In his dissent, Justice Stevens stated that "[l]itigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief."[229] Following *Alexander v. Sandoval*, many circuits addressed the availability of § 1983 claims.[230] In *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, the Third Circuit addressed § 1983 claims, ultimately ruling that an

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come more unfashionable, evidence of intent has become harder to find." Acherman, *supra* note 210, at 279.

[222] *Alexander*, 532 U.S. at 289.

[223] *Id.*

[224] *Id.* at 294 (Stevens, J., dissenting); *see, e.g.*, Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983); Cannon v. Univ. of Chi., 441 U.S. 677 (1979); Lau v. Nichols, 414 U.S. 563 (1974).

[225] *Alexander*, at 294 (Stevens, J., dissenting).

[226] *Id.* at 294 (Stevens, J., dissenting); *see, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977); Washington v. Davis, 426 U.S. 229, 242 (1976); *Lau*, 414 U.S. at 568.

[227] CROSS, *supra* note 215, § 3:20.

[228] *Id.*

[229] *Alexander*, at 300 (Stevens, J., dissenting).

[230] *See* Gonzaga Univ. v. Doe, 536 U.S. 273, 284 n.3 (2002) (indicating 42 U.S.C. § 1983 did not create a right of action to enforce the Family Educational Rights and Privacy Act and that Title VI claims would likely also be barred).

EPA regulation against unintentional discrimination alone "cannot create an interest enforceable under section 1983."[231] The Fourth and Eleventh Circuits agreed.[232] At one point, the Sixth Circuit was the only court to hold to the contrary, but this has since been called into question.[233] The Supreme Court has not decided this particular issue.[234]

Because the Supreme Court has not directly addressed the viability of § 1983 claims, the best means of enforcing environmental justice is by proving intentional discrimination. However, those claims require evidence that an agency receiving federal funding purposely and intentionally discriminated against a community based on a protected class, like race, color or national origin. Because that is so difficult to prove, environmental justice claimants face enormous challenges to enforcing their civil rights.[235]

As an alternative to litigation, environmental justice complainants can elect to use the administrative process established under Title VI.[236] However, this process has numerous drawbacks. When the victim of discriminatory impact files a grievance with the EPA, the victim is generally "excluded from the investigation process of the executive agency, and the remedies available are limited to the revocation of federal funding to the offending party."[237] The process begins when a letter of complaint is written to the Office of Civil Rights of the EPA.[238] The EPA does not accept all complaints.[239] Instead, a complaint must allege specific acts of discrimination and must show the offender received EPA

[231] S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 774 (3d. Cir. 2001); *see* CROSS, *supra* note 215, § 3:20.

[232] CROSS, *supra* note 215, § 3:20; Smith v. Kirk, 821 F.2d 980, 984 (4th Cir. 1987); Harris v. James, 127 F.3d 993, 1008 (11th Cir. 1997).

[233] *Compare* Loschiavo v. City of Dearborn, 33 F.3d 548, 552 (6th Cir. 1994) (holding a regulation was enforceable under a § 1983 claim), *with* Johnson v. City of Detroit, 446 F.3d 614, 617 (6th Cir. 2006) (holding regulations promulgated did not create enforceable rights of their own accord under § 1983).

[234] Some scholars suggest a § 1983 claim can and should fail. *E.g.*, Keith E. Eastland, *Environmental Justice and the Spending Power; Limits on Using Title VI and § 1983*, 77 NOTRE DAME L. REV. 1601, 1644 (2002) (concluding that using § 1983 claims to enforce Title VI disparate-impact regulations is barred because states have not voluntarily agreed to private enforcement of such claims and that this "legal fiction" would otherwise upset congressional limits on Article I spending power).

[235] John McQuaid, *Experts Are Divided on Future of Environmental Justice Cases*, NEW ORLEANS TIMES PICAYUNE, July 12, 2001, at 4.

[236] EPA Compliance Procedures, 40 C.F.R. §§ 7.120–7.130 (LEXIS 2014).

[237] Tanya L. Miller, Note, Alexander v. Sandoval *and the Incredible Disappearing Cause of Action*, 51 CATH. U. L. REV. 1393, 1424 (2002); *see* Luke W. Cole, *Civil Rights, Environmental Justice and the EPA: The Brief History of Administrative Complaints Under Title VI of the Civil Rights Act of 1964*, 9 J. ENVTL. L. LITIG. 309, 314–15 (1994).

[238] Cole, *supra* note 237, at 314–15.

[239] *Id.*

funding.[240] The complaint also must be filed within specific time periods. Thereafter, the EPA handles the rest of the complaint. If the EPA finds the alleged offender actually discriminated, the EPA may respond by conducting negotiations, revoking the offender's funding, or having the Department of Justice investigate the complaint.[241] Instead of a victim-centric administrative process, the perpetrator is both the focus of the investigation and the remedy.[242] Despite this process, few cases are accepted for investigation or decided on the merits, and most are decided in favor of the funding recipients.[243]

Communities with environmental justice complaints should be a part of the investigative process. Therefore, the EPA's administrative procedure is not an effective alternative. Instead, plaintiffs should have the right to sue for disparate-impact discrimination. To authorize that, Congress must amend Title VI by specifically addressing the viability of private causes of action for disparate-impact claims. Without a more vigorous enforcement mechanism, environmental justice claimants will continue to be secondary in the administrative process and many otherwise legitimate claims will be disallowed in courts. Without a means of enforcing their rights, communities with environmental justice concerns will not be able to stop or prevent environmental hazards that affect them.

E. National Security Means More than the Buildup of the Military Industrial Complex: Human Security Should Be Incorporated into the Framework

Environmental justice activists should remain cautiously optimistic because there are alternatives to litigation and internal administrative procedures. In recent history, the environmental role of the military has been largely pejorative[244], especially where the military has used "the 'war on terrorism' as a Trojan horse to get out from under thirty years of constraining environmental laws it has never fully accepted."[245] For decades, national security colloquially referred to Cold War military considerations, which later evolved into a post-911 association with

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[240] *Id.*

[241] *Id.* at 317–18.

[242] Miller, *supra* note 237, at 1424–25; *see* Cole, *supra* note 237, at 314–15.

[243] Acherman, *supra* note 210, at 273-74; Melissa A. Hoffer, *Closing the Door on Private Enforcement of Title VI and EPA's Discriminatory Effects Regulations: Strategies for Environmental Justice Stakeholders After* Sandoval *and* Gonzaga, 38 New Eng. L. Rev. 971, 1004 (2004).

[244] Light, *supra* note 86, at 880.

[245] Babcock, *supra* note 92, at 110.

terrorism and border security.[246] Traditionally, environmental issues and environmental justice proponents have been considered subordinate to military readiness programs. Although the military has unique incentives driven by its role as our nation's protector,[247] sidestepping environmental laws in the interest of national security hinders community health. The military's immense power and innovative need enable it to "drive behavioral changes"[248] because it controls millions of acres of land and natural resources, has innovative technology that private industry can only dream of, and, given its size, is uniquely situated to effect change.

Today, environmental justice proponents are in a unique position to leverage the military to create safer, healthier communities, reflecting holistic, human security. National security should refer to more than just an arms race, because local communities deserve to be safe. The military's drive for security can provide reinforcement for environmental justice advocates. A meeting of the minds would benefit both the military and environmentalists. Instead of operating within an "us vs. them" power structure, both environmentalists and the military would be better served by partnering with one another.

Currently, national security ideology refers to power struggles, increased armaments, training, and combat. Environmentalists are often viewed as tree-hugging hippies. However, neither of these descriptions is accurate or informative. Some scholars have advocated public-private military partnerships in other settings. For example, one scholar, Professor Sarah Light, argues a new Military-Environmental Complex exists in which the military is often voluntarily improving its sustainable energy use by leveraging public-private partnerships to transform the energy industry.[249] Furthermore, Professor Light argues the lines between the national security mission and environmental sustainability are blurring, thereby creating new opportunities for public-private partnership.[250] Although this discussion refers to energy technology, sustainable energy industries have become an increasingly respected environmental behemoth among government and emerging private industries. Because communities with environmental justice concerns are often historically disadvantaged, much more can be done to prevent further burdens on

[246] LAWRENCE KORB ET AL., CTR. FOR AM. PROGRESS, INTEGRATING SECURITY: PREPARING FOR THE NATIONAL SECURITY THREATS OF THE 21ST CENTURY 3, 7, 14, *available at* http://www.voltairenet.org/IMG/pdf/Integrating_Security.pdf.

[247] Light, *supra* note 86, at 886.

[248] *Id.* at 887. Although Professor Light's comment was made with respect to attitude in the climate-change context, her argument is persuasive in a broader context. *See* Sarah E. Light, *Valuing National Security: Climate Change, the Military, and Society*, 61 UCLA L. REV. 1772 (2014).

[249] Light, *supra* note 86, at 925.

[250] *Id.* at 939.

these communities. Environmental endeavors that combat climate change, produce green technologies, or promote environmental justice are all important undertakings that make people safer and healthier. However, environmental justice concerns should be afforded greater respect because communities of color have been historically disadvantaged. A poor minority community should not be unfairly burdened with environmental hazards.

In light of disappointing setbacks in civil rights litigation for environmental justice proponents, alternative approaches to activism should be explored in addition to lobbying Congress to codify the Order. New grassroots community activism approaches offer alternative models that have and will benefit the environmental justice movement.[251] For example, in BHP, community groups successfully closed one of California's oldest and most polluting power plants.[252] One environmental justice scholar, Professor Clifford Rechtschaffen, has identified three approaches the BHP community employed to combat power plant construction: (1) document the concentration of pollution in the environmental justice community, (2) directly engage with local politicians about environmental justice concerns, and (3) employ temporary moratoriums on projects to determine environmental justice disparities.[253] Professor Rechtschaffen concluded that community campaigns and strategies in BHP have garnered a more "informed and assertive community" that will benefit the community into the future.[254] Community activism and grassroots organizing in BHP have been important components in achieving environmental justice. Communities with environmental justice concerns are best served by using as many tools as possible at their disposal, including grassroots campaigns, litigation, and lobbying.

A strict reliance on the legislature is unwise as well. Although the Order indicates that environmental justice is a priority, congressional activity suggests otherwise. Of the ninety-five bills mentioning "environmental justice" that were introduced in Congress from 1991 through

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[251] Acherman, *supra* note 210, at 284-85; Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 VA. ENVTL. L.J. 687, 709 (1995) (concluding lawyer-dominated schemes perpetuate environmental injustice).

[252] Described as a grassroots effort that "did not happen because of current politicians," a community campaign closed the plant. Through hard work, protests, lawsuits, and meetings, the community successfully closed the plant. A study by the San Francisco Foundation reported the plant's emissions included high levels of nitrogen oxide, carbon monoxide, smog, and other chemicals. Leslie Fulbright, *Big Victory for Hunters Point Activists*, S.F. CHRON., May 15, 2006, 4:00 AM, http://www.sfgate.com/news/article/Big-victory-for-Hunters-Point-activists-As-PG-E-2534998.php.

[253] Rechtschaffen, *supra* note 37, at 571.

[254] *Id.* at 572.

2012, a mere seven became law.[255] In comparison, 15,871 bills were introduced during the same time that mentioned "national security." Of those bills, 803 cited public land, natural resources, and environmental protection as their primary subject.[256] Given the current lack of congressional enthusiasm, grassroots organizers will be particularly important in this regard because they can generate awareness of environmental justice issues. Although it will likely take time, awareness campaigns for environmental justice issues can grab the nation's attention like it did in Warren County, North Carolina. Community awareness can pressure Congress to codify the Order. Grassroots campaigns have enormous potential to affect legislative attitudes. Communities like BHP should continue galvanizing their political representatives to enact legislation that combats disparate impacts of environmental hazards. Communities deserve legislation that enforces substantive environmental justice. Nebulous security concerns should not hinder environmental justice. Legislation protecting low-income and minority communities should persevere by safeguarding communities into the future.[257]

IV. CONCLUSION

Environmental justice causes currently face a losing battle in court because the judiciary has been unreliable and antagonistic toward environmental causes when they conflict with the military's asserted needs.[258] Environmental law's dalliance with national security concerns makes environmental justice even more difficult to achieve due to super-deference afforded military training. Currently, environmental justice plaintiffs cannot sue under Title VI section 602 for disparate-impact vio-

[255] H.R. 3547, 113th Cong. (2014) (enacted); H.R. 2055, 112th Cong. (2012) (enacted); H.R. 1105, 111th Cong. (2009) (enacted); H.R. 5160, 109th Cong. (2006) (enacted); H.R. 2361, 109th Cong. (2005) (enacted); S. 2845 108th Cong. (2003) (enacted); H.R. 2828, 108th Cong. (2003) (enacted). Of the eighty-eight bills that did not become law, only eight bills passed their respective houses. Over 90% of bills were tabled when sent to their first committee. *See* LIBR. CONGRESS, http://www.congress.gov (click "Current Legislation" button; then click "All Legislation"; in the search bar type "environmental justice"; on the left column box labeled "Congress," click the boxes for "Congresses 102–112"; click the left column box labeled "Bill Type" and click "Bills (H.R. or S.).";; the search will yield 103 results; by clicking into each bill, the author determined only ninety-five of the bills actually mentioned "environmental justice" in their text).

[256] LIBR. CONGRESS, http://www.congress.gov (in the search bar type "national security"; under the left column box "Congress," click the boxes for "Congresses 102–112"; under the left column box labeled "Bill Type" click "Bills (H.R. or S.)"; under the left column box "Subject—Policy Area" check the boxes for "Public Lands and Natural Resources" and "Environmental Protection"). Sixty-three of these bills became law.

[257] California is a leader in adopting environmental justice policies. *See* Ramo, *supra* note 32, at 42.

[258] *See generally* Light, *supra* note 86, at 883 (describing the need to diversify approaches to combating climate change).

lations. Additionally, the military enjoys super-deference in courts and administrative procedures. Internal EPA investigations of discrimination complaints are also inadequate because they are rarely investigated. A regime shift is necessary.

The military's independence creates far too much leniency for non-compliance with environmental laws. Protection from threats abroad should not be sacrificed for the health, welfare, and safety of our communities. Without codification, plaintiffs will rarely, if ever, withstand national security claims or overcome super-deference to the military in administrative jurisprudence, nor will a private cause of action be possible for disparate-impact claims. Congress must revisit environmental justice with renewed focus and determination to protect communities from disparate impacts of environmental hazards. Specifically, the military should not be granted the privilege of exemption from community equality simply based on its stature as the nation's protector. The military is less of a separate society than ever because it is increasingly integrated with civilian communities.[259]

Although Congress has enacted laws that support environmental causes, environmental justice requires a renewed legislative focus. In recognizing the need to encourage environmental conservation and sustainability, Congress has issued mandates for all federal agencies, including the military, to develop renewable energy sources and promote environmental efficiency.[260] In furtherance of respect for environmental causes, Congress should codify the Order, specifically granting plaintiffs a private cause of action, and eliminate loopholes for military readiness activities. Only when environmental injustice can properly be challenged will true justice occur.

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[259] *See* Goldman v. Weinberger, 475 U.S. 503, 506 (1986). *See also* Raymond T. Odierno, *The U.S. Army in a Time of Transition: Building a Flexible Force*, FOREIGN AFFAIRS, May/June 2012, *available at* http://www.foreignaffairs.com/articles/137423/raymond-t-odierno/the-us-army-in-a-time-of-transition (describing a period of transition for the U.S. Army, including contribution to broader national efforts).

[260] These laws include, but are not limited to, the National Energy Conservation Policy Act of 1978, Pub. L. No. 95-619, §§ 541–551, 92 Stat. 3206, 3277–80 (codified as amended at 42 U.S.C.S. §§ 8251–8261 (LEXIS 2015)); the Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 101–105, 119 Stat. 594, 605–11 (codified as amended at 42 U.S.C.S. §§ 8253-8259b (LEXIS 2015)); the Energy Independence and Security Improvement Act of 2007, 42 U.S.C. §§ 8253–8259b (LEXIS 2015). *See* Light, *supra* note 86, at 907 nn.139–48.