

SAYING WHAT THE LAW ISN'T: LEGISLATIVE DELEGATIONS OF WAIVER AUTHORITY IN ENVIRONMENTAL LAWS

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I. INTRODUCTION

The rise of the modern administrative state has been accompanied by major changes to the relationships between the three branches of the federal government.¹ Executive agencies possessing a level of expertise not found in Congress are involved in policy formation through the promulgation of regulations to fill in the gaps in laws passed by the legislature, and courts

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¹ See Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2159–60 (2004).

defer to these agencies in recognition of their enhanced expertise. On top of this shift in the balance of powers, Congress has included provisions in many laws that delegate authority to a member of the executive branch to lift the application of various laws. In essence, these provisions grant the executive branch the discretion to determine when certain laws should not apply.

This Article explores the use of statutory grants of waiver authority to the executive branch within the specific context of environmental laws, and considers their merits on a constitutional and policy basis. Although these provisions are widespread and sometimes controversial, there has been little general discussion of them. Additionally, current Supreme Court jurisprudence, which is extremely deferential to delegations of legislative authority to the executive branch, has limited any analysis of waiver provisions by the courts. In recent years, several major environmental lawsuits have involved the executive branch's invocation of provisions to lift the application of laws, both narrowly and broadly, and to limit judicial review of the executive invocation.² The use of these provisions, while necessary in some emergency circumstances such as natural disasters, raises serious separation of powers questions that are particularly acute with respect to environmental laws. When Congress grants broad discretion and limits checks on executive action, such as judicial review, waiver provisions are extremely difficult to challenge. And because environmental interests tend to be at a systematic disadvantage in both the political branches and the courts,³ the challenges that are brought are often unsuccessful.

Statutory waivers in general have received relatively little academic attention, and legislative delegations of categorical waiver authority to the executive branch have received even less.⁴ Nevertheless, the question of when

² *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008); *County of El Paso v. Chertoff*, No. EP-08-CA-196-FM, 2008 U.S. Dist. LEXIS 83045 (W.D. Tex. Aug. 29, 2008), *cert. denied*, 129 S. Ct. 2789 (2009); *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007), *cert. denied*, 128 S. Ct. 2962 (2008).

³ See Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703 (2000) (arguing that the Supreme Court has failed to appreciate environmental law as a distinct area of substantive law, and describing the challenges to environmental protection in the lawmaking process).

⁴ There has been some recent discussion of delegations of external waiver authority, specifically in the context of the REAL ID Act of 2005, which this Article addresses in detail. See Bryan Clark, Comment, *Refining the Nondelegation Doctrine in Light of REAL ID Act Section 102(c): Time to Stop Bulldozing Constitutional Barriers for a Border Fence*, 58 CATH. U. L. REV. 851 (2009); Andrew Dudley, Comment, *Opening Borders: Congressional Delegation of Discretionary Authority to Suspend or Repeal the Laws of the United States*, 41 ARIZ. ST. L.J. 273 (2009) (undertaking a constitutional analysis of external waiver provisions through the lens of the REAL ID Act); Andrea C. Sancho, Note, *Environmental Concerns Created by Current United States Border Policy: Challenging the Extreme Waiver Authority Granted to the Secretary of the Department of Homeland Security Under the REAL ID Act of 2005*, 16 SOUTHEASTERN ENVTL. L.J. 421, 444–54 (2008). Additionally, some criticism of *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, which this Article also addresses in detail, has raised the issue of the waivers that were invoked in that case. See, e.g., William S. Eubanks II, *Damage Done? The Status of NEPA After Winter v. NRDC and Answers to Lingering Questions Left Open by the Court*, 33 VT. L. REV. 649, 667–70 (2009). For the most part,

executive officers should have the power to determine when the law does not apply is a timely and troubling one. Given the number of sudden events recently precipitating some kind of emergency action by the federal government, there is reason to think that more statutes will come to include delegation provisions, and that the executive branch will make greater use of them. Furthermore, due to the deferential posture of the courts toward legislative delegations to the executive branch, as well as the ways in which judicial review of executive action under these provisions is statutorily limited, there is little opportunity to challenge such delegations in any meaningful way.

This Article proceeds as follows: Part II provides an overview of executive branch waiver delegations in environmental law. No two provisions are identical, so to survey the range of ways in which Congress has delegated this authority to the executive branch, I discuss the axes along which these provisions differ. Some delegations, which I refer to as “internal waiver provisions,” only lift the applicability of the laws of which they are a part. Others, which I refer to as “external waiver provisions,” delegate authority to suspend multiple laws. Some reside within a single environmental law and only grant authority to waive that law; others grant broader authority to waive multiple laws. Some provisions apply according to their text to specific projects or categories of projects; others are nonspecific and grant the executive branch discretion to determine when to exercise the waiver authority. Finally, the provisions differ with respect to where within the executive branch they grant the authority, in the substantive and procedural criteria they offer to guide the exercise of the delegated authority, and in the availability of judicial review of exercises of the delegated authority.

Part III describes two recent sets of litigation that implicated three different waiver delegations. First, in *Winter v. Natural Resources Defense Council, Inc.*,⁵ the Natural Resources Defense Council (“NRDC”) challenged the Navy’s use of mid-frequency active (“MFA”) sonar in its training exercises off the coast of southern California.⁶ After the district court issued a preliminary injunction against the Navy, the Council on Environmental Quality (“CEQ”) issued an emergency exemption providing alternative arrangements for compliance with the National Environmental Policy Act (“NEPA”),⁷ and President George W. Bush invoked his authority under the Coastal Zone Management Act (“CZMA”)⁸ to exempt the Navy from that law’s requirements.⁹ Second, a series of lawsuits brought by environmentalists and local governments have challenged the Secretary of Homeland Security’s invocation of a broad external waiver provision in section 102(c) of

however, scholars have not attempted to situate their case-specific analyses of a particular provision within the context of delegations of waiver authority more generally.

⁵ 129 S. Ct. 365.

⁶ *Id.* at 370.

⁷ 40 C.F.R. § 1506.11 (2008).

⁸ 16 U.S.C. § 1456(c)(1)(B) (2006).

⁹ *Winter*, 129 S. Ct. at 373.

the REAL ID Act of 2005,¹⁰ which amended the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”).¹¹ Acting pursuant to the REAL ID Act, the Secretary suspended a host of federal and state environmental laws with respect to the construction of barriers along the United States-Mexico border in areas of high illegal entry. In *Winter*, NRDC did not directly challenge the constitutionality of either provision, and the Supreme Court, which ultimately vacated the district court’s injunction,¹² did not discuss the provisions. In the border fence cases, the external waiver provision at issue also limited the availability of judicial review.¹³ Environmental groups have not succeeded in their challenges to the constitutionality of the REAL ID Act’s waiver provision, and the Supreme Court denied certiorari in both lawsuits in which a petition was filed.¹⁴

In Part IV, I discuss the constitutional issues associated with the use of waiver provisions, and in particular the three provisions invoked in *Winter* and the border fence cases. I argue that while waiver delegations are not unconstitutional across the board, two features may cause them to run afoul of separation of powers principles generally, and the nondelegation doctrine and Presentment Clause more specifically. First, such provisions may amount to unconstitutional delegations of legislative authority to the executive branch. Second, they may amount to unconstitutional usurpations of judicial authority by the executive branch. Yet given the extremely deferential state of contemporary separation of powers jurisprudence, particularly with respect to the nondelegation doctrine, it is unlikely that challenges to waiver provisions will succeed, especially in the context of environmental laws.

Setting aside the uncertain constitutionality of at least some waiver provisions, their use creates troubling policy problems, which I address in Part V. The separation of powers concerns described in Part IV are particularly pressing in the context of environmental law, since environmental interests are traditionally disadvantaged in the lawmaking process. This makes provisions that limit judicial review in addition to delegating authority to the executive branch especially problematic. While there is a legitimate need for some executive authority to waive environmental legislation, such as following natural disasters or in other situations where the government must be able to act quickly and flexibly to respond to a time-sensitive need, waiver provisions are not always appropriate, and are never used without cost.

¹⁰ Pub. L. No. 109-13, div. B, § 102(c), 119 Stat. 302, 306 (2005), *reprinted in* 8 U.S.C. § 1103 note (2006) (Improvement of Barriers at Border).

¹¹ Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 and 18 U.S.C.).

¹² 129 S. Ct. at 370.

¹³ *See* REAL ID Act of 2005 § 102(c)(2), *reprinted in* 8 U.S.C. § 1103 note (Improvement of Barriers at Border).

¹⁴ *County of El Paso v. Napolitano*, 129 S. Ct. 2789 (2009); *Defenders of Wildlife v. Chertoff*, 128 S. Ct. 2962 (2008).

In Part VI, I discuss how Congress might delegate waiver authority in a manner that is responsive to both constitutional limits and policy concerns in light of the legitimate need for waiver provisions as well as the constitutional and policy concerns their use raises. I argue that authority to suspend or carve out exemptions to laws should be granted to members of the executive branch whose actions are subject to judicial review, in order to provide some check on the exercise of the authority beyond the executive officer's own discretion. To the extent possible, substantive criteria guiding the use of the waiver delegation should be stringent and specific. However, to preserve flexibility where needed, such as in emergencies, some discretion should be left to the executive to determine the scope of the provision. Procedural requirements can be less comprehensive where it is more difficult to satisfy substantive criteria, but again, where possible, there should be safeguards to limit the scope of the discretion of the executive official exercising the authority. This can be accomplished through intra-executive review or through more formal reporting requirements. Finally, judicial review should be preserved except in the small handful of situations where its availability would prevent the executive branch from taking swift action to respond to immediate needs. This should be a very stringent standard, and the burden should be on Congress to provide a compelling reason to limit access to the courts.

II. DELEGATIONS OF WAIVER AUTHORITY: AN OVERVIEW

A. *An Introduction to Delegations in Environmental Laws*

Before delving into an analysis of whether delegations of waiver authority in environmental laws are constitutional or even advisable, it is necessary to provide a broad sketch of the different ways Congress and the executive branch can make determinations that a law or group of laws should not apply to a particular situation or course of action. Waiver provisions may be project-specific, category-specific, or nonspecific. Project-specific provisions apply to individual circumstances by the terms of their legislation.¹⁵ Because these provisions by definition operate on a specified project or course of action, they do not involve a delegation to the executive branch of discretion to determine whether a provision should apply, and are thus outside the purview of this Article. Similarly, category-specific waiver provisions apply across a designated category of activities. These provisions often waive the requirements of NEPA review;¹⁶ alternatively, a single law,

¹⁵ On more than one occasion, Congress has waived environmental laws for specific projects through the use of riders attached to unrelated legislation. See *infra* note 19.

¹⁶ *E.g.*, Energy Supply and Environmental Coordination Act of 1974 § 7(c)(1), 15 U.S.C. § 793(c)(1) (2006) (exempting from NEPA review certain actions taken pursuant to the Clean Air Act); Alaska National Interest Lands Conservation Act of 1980 § 205, 16 U.S.C. § 410hh(4)(d) (2006) (creating alternate environmental review procedures for surface transport-

such as the Energy Policy Act of 2005,¹⁷ might suspend a variety of laws in a single category or context to further a specific policy goal.¹⁸ By contrast, nonspecific provisions involve a grant of discretion to a member of the executive branch to determine when waiver is warranted. A nonspecific provision may provide general principles to guide the executive's exercise of the delegated authority, but it does not delineate a specific or narrow category of actions to which the provision may apply. This Article is concerned with nonspecific waiver delegations, since they vest a particular executive branch official or commission with the discretion to determine when the requirements for a waiver have been satisfied, and thereby with the discretion to grant or deny waiver requests.

It is also worth noting that waivers have taken other forms that do not involve legislative delegations and are therefore not addressed in this Article. Most notably, Congress frequently attaches riders to appropriations legislation that suspend environmental laws.¹⁹ Additionally, until the Supreme

tation rights-of-way in the Gates of the Arctic National Preserve); Multifamily Housing Property Disposition Reform Act of 1994 § 305(c), 42 U.S.C. § 3547(2) (2006) (exempting certain Department of Housing and Urban Development ("HUD") funding decisions from compliance with NEPA); Power Plant and Industrial Fuel Use Act § 763, 42 U.S.C. § 8473 (exempting from NEPA review Department of Energy decisions to grant or deny exemptions from the regulations governing fuel use at coal-fired power plants); Nuclear Waste Policy Act of 1982 § 135, 42 U.S.C. § 10155(c)(2)(A) (deeming completion of an Environmental Assessment with respect to certain retrievable radioactive waste storage facilities sufficient for compliance with NEPA).

¹⁷ Pub. L. No. 109-58, 119 Stat. 594 (2005) (codified as amended in scattered titles of U.S.C.).

¹⁸ See 16 U.S.C. § 1465 (tightening the deadline for appealing permitting decisions under CZMA); 30 U.S.C. § 226 (2006) (expediting the permitting process for natural gas facilities located on federal lands); 42 U.S.C. § 300(h) (excluding hydraulic fracturing in aid of oil, gas, and geothermal energy extraction from certain requirements of the Safe Drinking Water Act); *id.* § 1362 (exempting oil and gas exploration, production, construction, and treatment projects from the Clean Water Act's construction stormwater regulations); *id.* § 15924 (requiring federal officials and land management agencies in western states to develop a project to expedite environmental review and permitting under several federal environmental statutes); *id.* § 15942 (creating a rebuttable presumption that oil and gas projects conducted on federal land pursuant to the Mineral Leasing Act are categorically excluded from NEPA).

¹⁹ For example, in 1995, Congress attached a rider for the "Emergency Salvage Timber Sale Program," which suspended environmental laws and judicial review related to the Pacific Northwest logging program, to the unrelated 1995 Rescissions Act. See Trilby C.E. Dorn, Comment, *Logging Without Laws: The 1995 Salvage Logging Rider Radically Changes Policy and the Rule of Law in the Forests*, 9 TUL. ENVTL. L.J. 447, 464 (1996). Because the Act was a spending measure "necessary to keep the federal government operating," there were no congressional hearings for the rider. *Id.*; see also Patti A. Goldman & Kristen L. Boyles, *Forsaking the Rule of Law: The 1995 Logging Without Laws Rider and its Legacy*, 27 ENVTL. L. 1035, 1036-37 (1997) ("Members of Congress have quickly learned that circumventing the normal legislative processes allows budget riders to escape full committee consideration and reasoned scrutiny. . . . [Proposed anti-environmental riders] could not pass on their own merits, so instead they rode along the coattails of popular or essential legislation."). President Clinton vetoed the rescissions bill, in part because of the logging rider, but then reached an agreement whereby Congress would make minor changes to the logging rider, which the House and the Senate subsequently passed. See *id.* at 1047-48; see also Victor M. Sher & Carol Sue Hunting, *Eroding the Landscape, Eroding the Laws: Congressional Exemptions from Judicial Review of Environmental Laws*, 15 HARV. ENVTL. L. REV. 435 (1991) (criticizing Congress's use of appropriations riders to modify environmental legislation and limit judi-

Court struck down the practice in 1983,²⁰ Congress frequently used the legislative veto in order to enable one house acting alone to invalidate executive action where it had delegated some authority to the executive branch.²¹ Before 1983, there were approximately three hundred legislative veto provisions in existence.²²

Delegations to suspend environmental laws have been in existence since the emergence of a federal environmental law regime.²³ Not all delegations within environmental laws came into existence at the time a particular law was enacted. For instance, Congress amended the Endangered Species Act ("ESA")²⁴ in 1978 to create the Endangered Species Committee, a group of high-level executive branch officials that could exempt specific projects from compliance with the requirements of the ESA.²⁵ The amendment followed the Supreme Court's decision in *Tennessee Valley Authority v. Hill*,²⁶ which held that the ESA barred the continued construction of the Tellico Dam because it would have threatened the snail darter, an endangered species.²⁷ Congress has added or contemplated other delegations in the wake of sudden events that have changed the balance of Congress's priorities between environmental protection and other interests. For example, after Hurricane Katrina devastated the Gulf Coast in 2005, Congress proposed bills calling for the delegation of authority to the President to suspend environmental laws.²⁸

Other statutes that are not in and of themselves strictly environmental may contain provisions that allow for the suspension of environmental and

cial review); Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457, 458 (1997) (arguing for a constitutional amendment banning the use of appropriations riders "to enact substantive exemptions or changes in the law").

²⁰ *INS v. Chadha*, 462 U.S. 919 (1983).

²¹ See *Chadha*, 462 U.S. at 968 (White, J., dissenting); Michael Herz, *The Legislative Veto in Times of Political Reversal: Chadha and the 104th Congress*, 14 CONST. COMMENT. 319, 324–25 (1997).

²² See James Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323, 324 (1977).

²³ Sher & Hunting, *supra* note 19, at 438.

²⁴ Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006).

²⁵ Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 3, 92 Stat. 3751, 3758 (1978) (codified as amended at 16 U.S.C. § 1536).

²⁶ 437 U.S. 153 (1978).

²⁷ Sher & Hunting, *supra* note 19, at 441–42. Interestingly, at the same time, Congress created a project-specific exemption for the Tellico Dam within an appropriations authorization bill for the ESA. See *id.* at 442–44.

²⁸ See, e.g., Louisiana Katrina Reconstruction Act, S. 1765, 109th Cong. (2005) (proposing suspensions beyond the emergency exemption provisions contained in several existing environmental laws, including exempting from environmental review processes any Army Corps of Engineers projects approved by a particular commission, as well as permitting the President to suspend any environmental law for any project for two years after Hurricane Katrina); see also Janell Smith & Rachel Spector, *Environmental Justice, Community Empowerment and the Role of Lawyers in Post-Katrina New Orleans*, 10 N.Y. CITY L. REV. 277, 283 (2006). See generally LINDA LUTHER, CONG. RESEARCH SERV., NEPA AND HURRICANE RESPONSE, RECOVERY, AND REBUILDING EFFORTS (2005), available at <http://hdl.handle.net/10207/2582>.

other laws.²⁹ Overall, these provisions can function as a sort of safety valve to shift the operation of environmental laws where Congress wants competing interests such as national security to take precedence.³⁰ These provisions may also function to incentivize behavior that might not otherwise be attractive under a statutory scheme, such as where a law allows for the waiver of environmental laws with respect to private parties that undertake cleanup activities.³¹ The suspension of environmental laws has also been an issue at the state level.³²

B. *Toward a Typology of Waiver Delegations*

Each time Congress has delegated authority to lift the application of environmental laws, it has done so differently. To appreciate the range of ways in which Congress has permitted the executive branch to lift the application of environmental laws, and to understand which delegations raise constitutional problems and which do not, it is helpful to have a typology in place.³³ We may categorize these provisions according to whether they permit single-law exemptions or broad suspensions, and according to how the provisions function — namely, to whom they delegate authority, what substantive and procedural obligations they impose, and whether or how they alter the availability of judicial review.

Some provisions suspend the statute containing the provision.³⁴ These provisions only lift the applicability of the laws of which they are a part; I refer to these as “internal waiver” provisions. Other provisions are more open-ended and permit the executive branch official who has been delegated authority to suspend the requirements of other laws if certain substantive and procedural requirements are met.³⁵ I refer to these as “external waiver” provisions. External waiver delegations located in laws having little or nothing

²⁹ *E.g.*, REAL ID Act of 2005 § 102, reprinted in 8 U.S.C. § 1103 note (2006) (Improvement of Barriers at Border). Suspension provisions are found most frequently in congressional appropriations riders. See *supra* note 19; Emergency Salvage Timber Sale Program, Pub. L. No. 104-19, §§ 2001(e), (f), (i), 109 Stat. 240, 244–46 (1995) (suspending environmental laws applicable to timber harvest for one year).

³⁰ *E.g.*, 16 U.S.C. § 1456(c)(1)(B) (CZMA); *id.* § 1536(j) (ESA); 42 U.S.C. § 6961 (2006) (Resource Conservation and Recovery Act).

³¹ See Bart Lounsbury, *Digging Out of the Holes We've Made: Hardrock Mining, Good Samaritans, and the Need for Comprehensive Action*, 32 HARV. ENVTL. L. REV. 149 (2008) (describing “Good Samaritan” bills that waive compliance with environmental laws for private parties who clean up certain mine sites).

³² See, *e.g.*, David Alexander Peterson, Comment, *Louisiana's Legislative Suspension Power: Valid Method for Override of Environmental Laws and Agency Regulations?*, 53 LA. L. REV. 247 (1992) (analyzing constitutionality of the Louisiana state legislature's proposed suspensions of environmental laws and regulations).

³³ For a more limited survey of waiver provisions, see Stephen R. Viña & Todd B. Tatelman, Cong. Research Serv., Memorandum on Sec. 102 of H.R. 418, Waiver of Laws Necessary for Improvement of Barriers at Borders 2–4 (Feb. 9, 2005), available at http://graphics8.nytimes.com/packages/pdf/national/20080408_CRS_report.pdf.

³⁴ See, *e.g.*, 16 U.S.C. § 1456(c)(1)(B); 40 C.F.R. § 1506.11 (2008);.

³⁵ See, *e.g.*, REAL ID Act of 2005 §102, reprinted in 8 U.S.C. § 1103 note (2006) (Improvement of Barriers at Border).

to do with the environment may nonetheless have environmental implications if they permit the suspension of environmental laws.³⁶ Although these laws are not strictly environmental, I include them in my discussion because their effect on the operation of environmental laws is no less significant.

1. *Location of Authority Within the Executive Branch*

If Congress exempts a specific action or category of actions from the requirements of other laws, it is not necessary to designate an executive officer who will exercise waiver authority in the future and who will determine when any conditions precedent to the waiver have been met. Nonspecific provisions, however, vest waiver authority in an executive branch official or council to be exercised in the future according to a set of procedural and substantive criteria. That authority may be vested in a number of different figures.

First, waiver provisions may vest authority in the President. For example, the CZMA³⁷ permits the President, upon written request from the Secretary of Commerce and following an appealable federal court decision that federal agency action is not in compliance with a section of the statute, to exempt the federal agency from compliance with the CZMA's requirements.³⁸

Second, Congress may delegate waiver authority to a cabinet-level officer. Under section 102(c) of the REAL ID Act of 2005 ("Section 102(c)"), the Secretary of Homeland Security is authorized to "waive all legal requirements . . . necessary to ensure expeditious construction" of the United States-Mexico border fence.³⁹ Michael Chertoff, who was Secretary of Homeland Security under President George W. Bush, invoked the Act to suspend a wide range of environmental laws.⁴⁰ Sometimes another cabinet officer who is not responsible for granting a waiver may also have discretion to decide whether a waiver is appropriate. For example, although it is the Endangered Species Committee that normally decides whether waivers of the ESA are warranted, it is the Secretary of Defense who exercises that discretion when the waiver is justified by national security concerns.⁴¹

Third, subcabinet officers charged with administering federal environmental laws often have authority to waive those laws. The Environmental Protection Agency ("EPA") Administrator has the authority to grant exemptions to several environmental laws, including the Clean Water Act

³⁶ For example, IIRIRA — which, as amended by the REAL ID Act, contains a broad external waiver provision exercisable by the Secretary of Homeland Security in furtherance of constructing fences along the United States-Mexico border — has been used specifically to suspend environmental laws and has become the subject of intense litigation by environmentalist groups. See *infra* Part III.B.

³⁷ 16 U.S.C. §§ 1451–1464; see also discussion *infra* Part III.A.

³⁸ 16 U.S.C. § 1456(c)(1)(B).

³⁹ REAL ID Act of 2005 § 102(c)(1).

⁴⁰ See *infra* Part III.B.

⁴¹ 16 U.S.C. § 1536(j).

(“CWA”),⁴² the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”),⁴³ and the Safe Drinking Water Act (“SDWA”).⁴⁴ The Trans-Alaska Pipeline Authorization Act authorizes both the Secretary of the Interior and “other Federal officers and agencies” to “waive any procedural requirements of law or regulation which they deem desirable to waive” in order to promptly construct the trans-Alaska oil pipeline system.⁴⁵

Fourth, authority may be delegated to an executive branch commission. CEQ, a three-member presidential council located in the Executive Office of the President, is tasked primarily with administering NEPA,⁴⁶ and promulgates regulations to flesh out NEPA and define its own role.⁴⁷ One such regulation, 40 C.F.R. § 1506.11 (“Section 1506.11”), provides that “[w]here emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of” NEPA, the federal agency taking the action “should consult with [CEQ] about alternative arrangements.”⁴⁸ Similarly, the ESA⁴⁹ allows the Endangered Species Committee to determine on a case-by-case basis whether to grant exemptions from the ESA’s consultation and no-jeopardy requirements.⁵⁰ The Committee is composed of the Secretary of Agriculture, the Secretary of the Army, the Chairman of the Council of Economic Advisors, the EPA Administrator, the Secretary of the Interior, the Administrator of the National Oceanic and Atmospheric Administration, and one member, appointed by the President, from each state affected by a given application.⁵¹

⁴² 33 C.F.R. § 337.7 (2008).

⁴³ 7 U.S.C. § 136p (2006); 40 C.F.R. § 166.2 (2008).

⁴⁴ 42 U.S.C. § 300g-1(b)(1)(D) (2006).

⁴⁵ 43 U.S.C. § 1652(c) (2006).

⁴⁶ 42 U.S.C. §§ 4342, 4344.

⁴⁷ See, e.g., William L. Andreen, *In Pursuit of NEPA’s Promise: The Role of Executive Oversight in the Implementation of Environmental Policy*, 64 *IND. L.J.* 205, 230–42 (1989); Aaron Ehrlich, *In Hidden Places: Congressional Legislation that Limits the Scope of the National Environmental Policy Act*, 13 *HASTINGS W.-NW. J. ENVTL. L. & POL’Y* 285, 288 (2007); Paul S. Weiland, *Amending the National Environmental Policy Act: Federal Environmental Protection in the Twenty-First Century*, 12 *J. LAND USE & ENVTL. L.* 275, 284–86 (1997).

⁴⁸ 40 C.F.R. § 1506.11 (2008). It is important to note that CEQ has in a sense delegated waiver authority to itself through its promulgation of Section 1506.11. See *infra* note 220 and accompanying text.

⁴⁹ 16 U.S.C. §§ 1531–1544 (2006).

⁵⁰ *Id.* § 1536(e). Federal agencies are required to consult with the Secretary of the Interior to ensure any action they authorize, fund, or carry out will not be “likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.” *Id.* § 1536(a).

⁵¹ *Id.* § 1536(e)(3).

2. *Substantive Criteria*

The substantive criteria that guide the use of waiver authority range widely in both specificity and substance. Some statutes contain several of the types of waiver provisions described below.⁵²

Waiver provisions are frequently triggered by emergencies.⁵³ These emergency exemptions exist in many environmental laws, though their language and requirements are not consistent from one statute to the next.⁵⁴ “Emergency” is defined under some statutes,⁵⁵ but not under others, and some agencies have defined “emergency” through the promulgation of regulations.⁵⁶ Where “emergency” is defined broadly or not at all, executive branch officials obviously have more discretion to determine when invocation of the exemption is appropriate. Additionally, many provisions directly exempt federal agencies or private parties from compliance in emergencies rather than delegate discretion to an executive branch official to determine when the provision should apply to other actors.⁵⁷ My focus here is on the latter type of exemption.

Emergency waiver provisions granting some degree of discretion also exist in the Clean Air Act;⁵⁸ the CWA;⁵⁹ the Comprehensive Environmental

⁵² For example, the ESA contains a general exemption that has rigid procedural and substantive requirements, as well as separate exemptions for national security, disasters, and emergencies. 16 U.S.C. §§ 1536(g), (j), (p).

⁵³ See Michael B. Gerrard, *Disasters First: Rethinking Environmental Law After September 11*, 9 WIDENER L. SYMP. J. 223, 230 (2003).

⁵⁴ *Id.*

⁵⁵ See, e.g., Clean Air Act § 110(f)(2), 42 U.S.C. § 7410(f)(2) (2006) (defining emergency for the purpose of temporary suspensions as “a temporary energy emergency involving high levels of unemployment or loss of necessary energy supplies for residential dwellings”).

⁵⁶ See, e.g., National Oil and Hazardous Substances Pollution Contingency Plan, 53 Fed. Reg. 51,394, 51,396 (proposed Dec. 21, 1988) (noting that for purposes of responding to remedial actions under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), EPA has defined “emergency” as “a release or threat of release generally requiring initiation of a removal action within hours of the lead agency’s determination that a removal action is appropriate.”).

⁵⁷ E.g., CWA § 311, 33 U.S.C. § 1321(c)(4) (2006) (suspending liability for removal costs or damages resulting from actions “consistent with the National Contingency Plan or as otherwise directed by the President relating to a discharge or a substantial threat of discharge of oil or a hazardous substance”); Oil Pollution Act of 1990 § 1003, 33 U.S.C. § 2703(a) (suspending liability for removal costs or damages associated with the discharge of oil or hazardous substances by providing a complete affirmative defense); CERCLA § 107, 42 U.S.C. § 9607(d) (suspending liability for the release and threat of release of hazardous substances). Of course, even if a statute does not delegate the power to determine whether or not the law should apply despite the existence of an emergency, executive officials may still have discretion to determine whether a law applies in the way they define “emergency” or determine whether an emergency exists. The level of deference accorded by courts to such decisions is unclear. Compare *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1249 (9th Cir. 2005) (holding EPA’s invocation of CERCLA emergency exemption in asbestos removal action was not arbitrary or capricious), with *APWU v. Potter*, 343 F.3d 619, 626–27 (2d Cir. 2003) (holding that EPA was incorrect in determining that anthrax removal was an emergency under CERCLA).

⁵⁸ 42 U.S.C. § 7410.

⁵⁹ 33 C.F.R. § 337.7 (2008).

Response, Compensation, and Liability Act (“CERCLA”);⁶⁰ the ESA;⁶¹ FIFRA;⁶² the Resource Conservation and Recovery Act (“RCRA”);⁶³ and SDWA.⁶⁴ The Robert T. Stafford Disaster Relief and Emergency Assistance Act operates more broadly to suspend the applicability of NEPA to many disaster relief and emergency response actions.⁶⁵ Similarly, the ESA authorizes the President to grant exemptions in areas declared to be major disaster areas under the Stafford Act if the President determines a project “(1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures” of the ESA to be carried out.⁶⁶

Additionally, while NEPA itself does not contain a delegation of waiver authority for emergencies, a subsequent regulation promulgated by CEQ has conferred on CEQ the authority to create emergency exemptions. As described above, federal agencies may avoid the standard NEPA review requirements “[w]here emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of” the review requirements.⁶⁷ Technically, federal agencies making use of the emergency exemption provision are still in compliance with NEPA, since the waiver provision specifies that CEQ will make “alternative arrangements” for compliance.⁶⁸ The alternative arrangements, however, are limited to “actions necessary to control the immediate impacts of the emergency,” while “[o]ther actions remain subject to NEPA review.”⁶⁹ CEQ has not defined “emergency” under NEPA,⁷⁰ meaning that it retains discretion in determining what circumstances merit an exemption.

Many environmental laws also contain waiver provisions with the purpose of protecting national security. For example, in addition to its more general exemption, the ESA provides that the Endangered Species Committee “shall grant an exemption for any agency action if the Secretary of De-

⁶⁰ 42 U.S.C. § 9606(c); 40 C.F.R. § 300.440(a)(2) (2008) (“In cases of . . . emergency actions . . . the On-Scene Coordinator (OSC) may determine that it is necessary to transfer CERCLA waste off-site without following the requirements of this section.”).

⁶¹ 16 U.S.C. § 1536(p) (2006).

⁶² 7 U.S.C. § 136p (2006) (permitting emergency exemptions at the EPA Administrator’s discretion, in consultation with the Secretary of Agriculture and the Governor of any affected state); 40 C.F.R. § 166.2.

⁶³ 42 U.S.C. § 6973(a).

⁶⁴ *Id.* § 300g-1(b)(1)(D) (permitting the EPA Administrator to “promulgate an interim national primary drinking water regulation for a contaminant without making a determination for the contaminant . . . to address an urgent threat to public health as determined by the Administrator”).

⁶⁵ *Id.* § 5159. The Stafford Act suspends the applicability of NEPA by excluding these actions from the definition of “major Federal action[] significantly affecting the quality of the human environment,” the triggering language for NEPA. *Id.* § 4332.

⁶⁶ 16 U.S.C. § 1536(p).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *See* *Natural Res. Def. Council, Inc. v. Winter*, 527 F. Supp. 2d 1216, 1225 (C.D. Cal. 2008).

fense finds that such exemption is necessary for reasons of national security.”⁷¹ Similarly, some provisions delegate authority to waive laws where doing so is in the “paramount interest” of the United States. RCRA permits the President to exempt solid waste management facilities “of any department, agency, or instrumentality in the executive branch” from compliance with the law’s requirements for one year “if he determines it to be in the paramount interest of the United States to do so.”⁷² Similarly, the CZMA allows the President, following an adverse court decision, to exempt federal agency activity from compliance with that law “if the President determines that the activity is in the paramount interest of the United States.”⁷³

Other statutes are more specific in their substantive requirements and link them with procedural obligations. Before the Endangered Species Committee can grant an exemption under the ESA, the exemption applicant must follow a specific application procedure and demonstrate that it has:

[C]arried out the consultation responsibilities . . . in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action . . . ; conducted any [required] biological assessment . . . ; and to the extent determinable . . . refrained from making any irreversible or irretrievable commitment of resources.⁷⁴

If these requirements are met, certain other procedural obligations follow, and the Committee then makes an on-the-record determination about whether to grant the exemption. The Committee is obligated to grant the exemption if it “establishes . . . reasonable mitigation and enhancement measures” and determines that:

[T]here are no reasonable and prudent alternatives to the agency action; the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest; the action is of regional or national significance; and neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources.⁷⁵

3. *Procedural Requirements*

The procedural requirements accompanying waiver delegations vary widely in scope and specificity. The suspension provision for the border fence in Section 102(c) only requires that the Secretary of Homeland Secur-

⁷¹ 16 U.S.C. § 1536(j).

⁷² 42 U.S.C. § 6961(a) (2006).

⁷³ 16 U.S.C. § 1456 (c)(1)(B).

⁷⁴ *Id.* § 1536(g)(3)(A).

⁷⁵ *Id.* § 1536(h)(1).

ity publish notice of the waiver decision in the Federal Register; no other procedures are required to suspend other laws.⁷⁶ Other provisions require that the recipient of the delegated waiver authority consult with the party seeking the waiver or another part of the executive branch. NEPA's emergency exemption, for instance, requires that CEQ consult with the federal agency seeking to avoid compliance with the standard NEPA requirements.⁷⁷ The general exemption to the ESA requires extensive consultation between the Secretary of the Interior and the Endangered Species Committee.⁷⁸

Hearings, reports, and notice to the public might also be required. The ESA general exemption specifies that the exemption applicant must follow a specific application procedure and demonstrate satisfaction of the substantive requirements outlined above.⁷⁹ If those requirements are met, the Secretary of the Interior must hold a hearing on the application, in consultation with the Endangered Species Committee,⁸⁰ and the Secretary must then submit a report to the Committee.⁸¹ Based on the hearing, the Secretary's report, and any other testimony or evidence, the Committee then makes an on-the-record determination whether to grant the exemption.⁸²

4. *The Role of Judicial Review*

Most waiver provisions preserve at least some level of judicial review. Endangered Species Committee exemption decisions under the ESA are reviewable in the U.S. Court of Appeals for any circuit where the exempted agency action will take place, or in the Court of Appeals for the District of Columbia Circuit for actions being carried out outside of any circuit.⁸³ Other provisions do not make changes to the normal statutory procedures for judicial review, and the Administrative Procedure Act ("APA") may keep judicial review of agency actions available.⁸⁴

At least one waiver provision, however, sharply narrows the availability of judicial review. The REAL ID Act limited judicial review of challenges to actions taken under the REAL ID Act's external waiver provision to only those challenges that alleged violations of the Constitution.⁸⁵ Additionally, the REAL ID Act granted exclusive jurisdiction to the federal district courts

⁷⁶ REAL ID Act of 2005 § 102(c)(1), *reprinted in* 8 U.S.C. § 1103 note (2006) (Improvement of Barriers at Border).

⁷⁷ 40 C.F.R. § 1506.11 (2008).

⁷⁸ 16 U.S.C. § 1536(g) (2006); *see* Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534 (9th Cir. 1993) (striking down an ESA exemption for failure to follow applicable procedures).

⁷⁹ 16 U.S.C. § 1536(g)(3)(A).

⁸⁰ *Id.* § 1536(g)(4).

⁸¹ *Id.* § 1536(g)(5).

⁸² *Id.* § 1536(h)(1).

⁸³ *Id.* § 1536(n).

⁸⁴ *See* 5 U.S.C. § 702 (2006).

⁸⁵ REAL ID Act of 2005 § 102(c)(2)(A), *reprinted in* 8 U.S.C. § 1103 note (2006) (Improvement of Barriers at Border).

and made district court judgments directly appealable to the Supreme Court, thus removing circuit courts of appeal from the process.⁸⁶

The role of judicial review may be altered in other ways. Although the CZMA waiver provision does not technically limit judicial review, it acts to lessen the judiciary's role in the operation of the statute. Since exemptions under the CZMA may only be granted after an adverse court ruling,⁸⁷ it means that court decisions regarding the applicability or requirements of the CZMA have less finality than they might otherwise.⁸⁸ Along these lines, it is important to keep in mind that while a statute might not by its terms alter the availability of judicial review, if a waiver provision is invoked after a court ruling mandating compliance with the statute, it effectively limits the meaningfulness of judicial review.

III. WHALES AND FENCES: TWO RECENT SETS OF WAIVERS

To better understand how delegations of waiver authority are used in practice and when and why they cause problems, it is helpful to look at a few instances where invocations of waiver delegations became the subject of litigation. Two recent controversies involved the operation of these delegations and implicated the constitutional issues their invocation often raises. First, in *Winter v. Natural Resources Defense Council, Inc.*, CEQ invoked Section 1506.11, the emergency exemption to NEPA, finding that emergency circumstances precluded the Navy from complying with NEPA's Environmental Impact Statement ("EIS") requirement in providing for the use of MFA sonar in its training exercises.⁸⁹ Additionally, President Bush invoked the CZMA's waiver provision to lift the application of that law to the Navy's use of sonar.⁹⁰

Second, a series of lawsuits have challenged the Secretary of Homeland Security's invocations of Section 102(c) to suspend a large number of environmental laws in the course of his efforts to construct a fence at the United States-Mexico border. This Article focuses on two of the more prominent

⁸⁶ *Id.* §§ 102(c)(2)(A), (C).

⁸⁷ 16 U.S.C. § 1456(c)(1)(B).

⁸⁸ See *infra* Part IV.B.

⁸⁹ Letter from James Connaughton, Council on Env'tl. Quality, to Donald C. Winter, Sec'y of the Navy (Jan. 15, 2008) [hereinafter CEQ Letter], reprinted in Petition for Writ of Certiorari app. at 233a, *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008) (No. 07-1239) [hereinafter *Winter* Petition].

⁹⁰ Memorandum from President George W. Bush to the Secretaries of Defense and Commerce, Presidential Exemption from the Coastal Zone Management Act (Jan. 15, 2008) [hereinafter Presidential Exemption from the CZMA], reprinted in *Winter* Petition, *supra* note 89, app. at 231a. A complete discussion of the issues litigated in *Winter* is outside the purview of this Article. For discussion of the question of the preliminary injunction standard, which ultimately became the basis for the Supreme Court's decision in the case, see Lisa Lightbody, Comment, *Winter v. Natural Resources Defense Council, Inc.*, 33 HARV. ENVTL. L. REV. 593 (2009).

lawsuits: *Defenders of Wildlife v. Chertoff*⁹¹ and *County of El Paso v. Chertoff*.⁹²

Both *Winter* and the border fence cases were appealed to the Supreme Court. Certiorari was granted in *Winter*, but on a question that arguably did not include either of the exemption provisions at issue in that case.⁹³ Although the plaintiffs filed petitions for certiorari in both border fence cases, the Supreme Court denied certiorari in both.⁹⁴

A. *Winter v. Natural Resources Defense Council*

In *Winter*, NRDC sought an injunction barring the Navy's use of MFA sonar in its training exercises in the waters off the coast of southern California.⁹⁵ The Navy had completed an Environmental Assessment ("EA") as required by NEPA but did not prepare an EIS.⁹⁶ Instead, it issued a Finding of No Significant Impact ("FONSI") after it concluded that the use of sonar in its training exercises would not have a significant impact on the environment.⁹⁷ NRDC then sued the Navy, arguing that its training exercises violated NEPA, the ESA, and the CZMA.⁹⁸ The district court granted NRDC's motion for a preliminary injunction on the grounds that the plaintiffs "demonstrated a probability of success on their claims" and that the "near certainty of irreparable injury to the environment" outweighed the possible harm to the Navy.⁹⁹ After the Navy filed an emergency appeal, the Ninth Circuit stayed the injunction, but ultimately concluded that an injunction was appropriate and remanded to the district court to tailor the injunction, as it did not find a blanket injunction to be appropriate.¹⁰⁰

The district court then issued a modified preliminary injunction permitting the Navy's training exercises to go forward, but requiring the Navy to implement several mitigation measures to restrict how MFA sonar would be

⁹¹ 527 F. Supp. 2d 119 (D.D.C. 2007), *cert. denied*, 128 S. Ct. 2962 (2008).

⁹² No. EP-08-CA-196-FM, 2008 WL 4372693 (W.D. Tex. Aug. 29, 2008), *cert. denied*, 129 S. Ct. 2789 (2009).

⁹³ Although NRDC included extensive arguments in its Supreme Court briefing regarding the constitutionality of CEQ's emergency exemption in this particular case, the government petitioners questioned whether those arguments were properly before the Court. See Reply Brief for the Petitioners at 2, *Winter*, 129 S. Ct. 365 (2008) (No. 07-1239) [hereinafter *Winter* Petitioners' Reply Brief]; *infra* Part III.A.

⁹⁴ *County of El Paso*, 129 S. Ct. 2789; *Defenders of Wildlife*, 128 S. Ct. 2962.

⁹⁵ *Winter*, 129 S. Ct. at 372. The use of MFA sonar has the potential to harm individual marine animals "by causing mass strandings, hemorrhaging around the brain, ears, and kidneys, acute changes in the central nervous system, and gas/fat clots in the lungs, liver, and other vital organs," and can bring about species-level impacts by "displacing habitat and altering behavior." Lightbody, *supra* note 90, at 601. The precise effects that would result from MFA sonar use in this particular set of training exercises were in dispute in *Winter*. *Id.*

⁹⁶ *Winter*, 129 S. Ct. at 372.

⁹⁷ *Id.* at 374.

⁹⁸ *Id.* at 374.

⁹⁹ *Id.* at 372, 373 (internal quotation marks omitted).

¹⁰⁰ *Natural Res. Def. Council, Inc. v. Winter*, 508 F.3d 885 (9th Cir. 2007).

used.¹⁰¹ The Navy appealed some of the mitigation measures and simultaneously sought relief from the executive branch. This relief, which was intended to enable the Navy to proceed with the use of MFA sonar in its training exercises, came in the form of two exemptions. First, CEQ devised alternative arrangements for compliance with NEPA under its self-created emergency exemption regulation. Second, the President exempted the Navy from the requirements of the CZMA.¹⁰²

NEPA, which aims to ensure that federal agencies consider national environmental policy goals, normally requires federal agencies to prepare an EA to determine whether a contemplated major action will have a significant impact on the environment, and to prepare an EIS if the action will have such an impact.¹⁰³ Section 1506.11, however, gives CEQ authority to create “alternative arrangements” for compliance with NEPA requirements “[w]here emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions” of those requirements.¹⁰⁴ Promulgated by CEQ eight years after NEPA became law,¹⁰⁵ Section 1506.11 was a result of an executive order by President Carter instructing CEQ to “[i]ssue regulations to Federal agencies for the implementation of the procedural provisions of [NEPA].”¹⁰⁶ Between its promulgation in 1978 and September 2008, CEQ invoked Section 1506.11 forty-one times, including in this case.¹⁰⁷ Courts have upheld every one of the small handful of emergency exemptions that have been challenged.¹⁰⁸

¹⁰¹ *Natural Res. Def. Council, Inc. v. Winter*, 530 F. Supp. 2d 1110 (C.D. Cal. 2008). The two mitigation measures that formed the basis of the Navy’s subsequent appeal were the imposition of a shutdown zone, which would have required “shutting down MFA sonar when a marine mammal is spotted within 2,200 yards of a vessel,” and a requirement to power down sonar “by 6 dB during significant surface ducting conditions, in which sound travels further than it otherwise would due to temperature differences in adjacent layers of water.” *Winter*, 129 S. Ct. at 373.

¹⁰² *Winter*, 129 S. Ct. at 373. A third waiver provision was implicated in the case: the Marine Mammal Protection Act’s (“MMPA”) exemption from the prohibition against “taking” a marine mammal where necessary for national defense. *See* 16 U.S.C. § 1371(f)(1) (2006). Because the MMPA exemption was not challenged through the majority of the litigation, I do not address it here.

¹⁰³ *See* 42 U.S.C. § 4332 (2006); 40 C.F.R. § 1508.9 (2008).

¹⁰⁴ 40 C.F.R. § 1506.11.

¹⁰⁵ 43 Fed. Reg. 25,230, 25,243 (proposed June 9, 1978) (draft regulation); 43 Fed. Reg. 55,978, 56,002 (Nov. 29, 1978) (final regulations).

¹⁰⁶ Exec. Order No. 11,991, 3 C.F.R. 123 (1977).

¹⁰⁷ *See* COUNCIL ON ENVTL. QUALITY, ALTERNATIVE ARRANGEMENTS PURSUANT TO 40 CFR SECTION 1506.11 — EMERGENCIES (2008), available at http://ceq.hss.doe.gov/nepa/eis/Alternative_Arrangements_Chart_092908.pdf.

¹⁰⁸ *See Winter* Petitioners’ Reply Brief, *supra* note 93, at 5; KRISTINA ALEXANDER, CONG. RESEARCH SERV., WHALES AND SONAR: ENVIRONMENTAL EXEMPTIONS FOR THE NAVY’S MID-FREQUENCY ACTIVE SONAR TRAINING 10 (2009), available at <http://www.fas.org/sgp/crs/weapons/RL34403.pdf>. Before *Winter*, courts had ruled on — and upheld — the creation of emergency alternative arrangements in three cases: (1) the release of HUD funding for an urban renewal project in Detroit in 1980, *Crosby v. Young*, 512 F. Supp. 1363 (E.D. Mich. 1981); (2) the issuance of a permit to capture the remaining California Condors and remove them from the wild after a change in the Fish and Wildlife Service’s policy in 1985, *Nat’l Audubon Society v. Hester*, 801 F.2d 405 (D.C. Cir. 1986); (3) the allowance of night flights into and a greater overall number of flights from an air force base in 1991, during Operation

What sets the CEQ emergency exemption provision apart from other provisions discussed in this Article is that it is not a statutorily delegated power. Rather, CEQ, which is authorized to promulgate regulations to flesh out the substance of NEPA, promulgated the regulation to permit itself to create exemptions.¹⁰⁹ NEPA says nothing about emergency or national defense exemptions.

On January 15, 2008, CEQ set forth alternative arrangements for NEPA compliance under Section 1506.11, concluding that the district court injunction created an emergency by producing “a significant and unreasonable risk that Strike Groups will not be able to train and be certified as fully mission capable.”¹¹⁰ CEQ permitted the Navy to go forward with its training exercises, but implemented several mitigation measures including notice, research, and reporting requirements.¹¹¹ Its decision was based on studies, letters, and other supporting evidence provided by the Navy, and its statements as to the importance of using MFA sonar and the uniqueness of the training area aligned with the Navy’s own arguments in earlier briefing.¹¹²

The executive branch then exempted the Navy from compliance with a portion of the CZMA, an act meant to encourage coastal states to develop plans to protect their coastal zones. The CZMA includes a consistency requirement, which mandates that federal agency activities affecting coastal zones “shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.”¹¹³ The CZMA also permits the President to exempt federal agency activity from compliance upon written request by the Secretary of Commerce “if the President determines that the activity is in the paramount interest of the United States.”¹¹⁴ The exemption provision includes two preconditions, however, one of which is that the President cannot grant an exemption until *after* a federal court has issued an appealable order concluding that the federal activity in question is not in compliance with the consistency requirement.¹¹⁵

Desert Storm, Valley Citizens for a Safe Environment v. Vest, Civ. A. No. 91-30077-F, 1991 WL 330963 (D. Mass. May 6, 1991).

¹⁰⁹ See ALEXANDER, *supra* note 108, at 9 (noting that Section 1506.11 can be supported by 42 U.S.C. § 4331(b), “which states that it is the responsibility of the United States government to ‘use all practicable means, consistent with other essential considerations of national policy’ to consider the environmental impacts of its actions”).

¹¹⁰ CEQ Letter, *supra* note 89, at 238a; Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 373 (2008).

¹¹¹ See CEQ Letter, *supra* note 89; Winter, 129 S. Ct. at 373–74.

¹¹² See CEQ Letter, *supra* note 89, at 238a (identifying information conveyed to CEQ by the Navy as the foundation for its determination regarding alternative arrangements). NRDC played no part in CEQ’s decision-making process.

¹¹³ 16 U.S.C. § 1456(c)(1)(A) (2006).

¹¹⁴ *Id.* § 1456(c)(1)(B).

¹¹⁵ *Id.*; see also Joseph Romero, *Uncharted Waters: The Expansion of State Regulatory Authority over Federal Activities and Migratory Resources under the Coastal Zone Management Act*, 56 NAVAL L. REV. 137, 146 (2008) (arguing that the threshold requirement of an adverse judicial ruling indicates that Congress intended to limit use of the exemption to rare occasions). The second precondition is that the Secretary of Commerce must certify that medi-

On the same day that CEQ invoked Section 1506.11, President George W. Bush exempted the Navy's training exercises from compliance with the CZMA's consistency requirement.¹¹⁶ President Bush stated that the training exercises, "including the use of mid-frequency active sonar . . . are in the paramount interest of the United States."¹¹⁷ Furthermore, compliance with the CZMA consistency requirement "would undermine the Navy's ability to conduct realistic training exercises This exemption will enable the Navy to train effectively and to certify carrier and expeditionary strike groups for deployment in support of world-wide operational and combat activities, which are essential to national security."¹¹⁸ Like the CEQ emergency exemption, the CZMA exemption was based on information primarily provided by the Navy.¹¹⁹

In light of the CEQ emergency exemption and the President's CZMA waiver, the Navy moved to vacate the district court's earlier modified preliminary injunction.¹²⁰ On remand, the district court refused to do so.¹²¹ With respect to the CEQ exemption, the district court ruled that because there were no "emergency circumstances," Section 1506.11 could not apply to the activity in question for four reasons.¹²² First, CEQ's interpretation of Section 1506.11 was contrary to the plain meaning of "emergency circumstances," since the Navy's predicament was not a sudden, unanticipated event but rather the result of its own failure to prepare an EIS.¹²³ Second, the limited regulatory history of Section 1506.11 supported a narrower interpretation of the term to apply only to sudden, unanticipated events, not the "unfavorable consequences of protracted litigation."¹²⁴ Third, CEQ and the Navy's interpretation of Section 1506.11 violated the presumption against reading an exemption into a statute, and would result in a conflict with NEPA's "directive that agencies comply with their NEPA duties 'to the fullest extent possible.'"¹²⁵ Finally, the court noted that CEQ's invocation of Section 1506.11 in this case raised separation of powers concerns because there was a "serious question as to whether CEQ, an executive body, [was] sitting in review of a decision of the judicial branch (and, in effect, crafting its own, alternative injunction)."¹²⁶

ation is not likely to result in compliance with the consistency requirement. 16 U.S.C. § 1456(c)(1)(B).

¹¹⁶ Presidential Exemption from the CZMA, *supra* note 90.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *See id.* (referring to the EA prepared by the Navy).

¹²⁰ *See* Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 374 (2008).

¹²¹ Natural Res. Def. Council, Inc. v. Winter, 527 F. Supp. 2d 1216 (C.D. Cal. 2008).

¹²² *Id.* at 1227. Since neither Section 1506.11 nor any other part of NEPA defined "emergency," the court looked to plain meaning, agency intent, and other principles of statutory construction to support its conclusion. *See id.*

¹²³ *Id.* at 1228.

¹²⁴ *Id.* at 1229.

¹²⁵ *Id.* at 1230.

¹²⁶ *Id.* at 1232.

With respect to the President's CZMA exemption, the court determined that the injunction rested on NEPA grounds and that it did not need to decide the constitutionality of the President's action.¹²⁷ Nevertheless, the court did note that the timing of the exemption, which suggested that the Navy was merely forum shopping for a more favorable decision, and the absence of any considerations other than those already weighed by the court, rendered the exemption constitutionally suspect in light of Article III's prohibition on political branch revision of judicial decisions or direction of pending cases.¹²⁸

The Ninth Circuit affirmed the district court's decision.¹²⁹ At this point in the case, the CZMA waiver was no longer being litigated, and the focus shifted to the Ninth Circuit's standard for granting a preliminary injunction.¹³⁰ The government then petitioned the Supreme Court for certiorari, arguing that CEQ had permissibly authorized alternative arrangements for NEPA compliance and that the district court's preliminary injunction was improperly based on its own assessment of harm to marine mammals and was granted on an incorrect, overly lenient standard.¹³¹ In contrast, NRDC's framing of the first issue in its brief was drastically different. Because of positions it had previously taken in other matters,¹³² NRDC could not argue that the CEQ emergency exemption was invalid on its face, so it argued instead that CEQ's invocation of the exemption in this particular case was unconstitutional because CEQ had effectively revised the decision of an Article III court.¹³³ NRDC also argued that the district court had actually found a "near certainty" of irreparable harm to marine mammals, thereby obviating the need to review the Ninth Circuit's standard for determining irreparable harm in the preliminary injunction setting.¹³⁴

The Supreme Court reversed the Ninth Circuit's decision and vacated the preliminary injunction.¹³⁵ The Court's opinion only addressed the Ninth Circuit's standard for issuing a preliminary injunction. It did not address the merits of the plaintiffs' claims and only acknowledged in passing NRDC's constitutional arguments.¹³⁶ The lack of engagement with the arguments the litigants had made about the CEQ emergency exemption might suggest that

¹²⁷ *Id.* at 1237–38.

¹²⁸ *Id.* at 1236–37.

¹²⁹ *Natural Res. Def. Council, Inc., v. Winter*, 518 F.3d 658, 687 (9th Cir. 2008).

¹³⁰ The Ninth Circuit standard required only that NRDC establish a possibility of irreparable injury. *See id.* at 696.

¹³¹ *Winter* Petition, *supra* note 89. The petitioners included the Secretary of the Navy, the Secretary of Commerce, the National Marine Fisheries Service, and the National Oceanic and Atmospheric Administration.

¹³² *See id.* at 23 n.4 (noting that NRDC had argued to Congress that NEPA permitted emergency action in consultation with CEQ prior to completing environmental documentation).

¹³³ *See* Brief for the Respondents at 24, *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008) (No. 07-1239) [hereinafter *Winter* Respondents' Brief].

¹³⁴ *Id.* at 41, 48.

¹³⁵ *Winter*, 129 S. Ct. 365.

¹³⁶ *Id.* at 381.

some members of the Court were troubled by the process by which CEQ authorized alternative arrangements for the Navy. Whatever the reason, the Court failed to resolve the questions of whether the executive branch invocations of the NEPA and CZMA exemptions were permissible and whether the exemption provisions themselves were constitutionally sound.

B. *Border Fence Litigation*¹³⁷

Although they also implicate a controversial balancing of policy goals, the border fence cases concern a legislative delegation that is quite different and ultimately more problematic. Several recent cases have centered on the portion of the REAL ID Act of 2005¹³⁸ that amended section 102 of IIRIRA¹³⁹ to expand executive authority and discretion under the Act and to limit judicial review of actions taken thereunder. Section 102 of IIRIRA initially directed the Attorney General to “install additional physical barriers and roads . . . in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States,” and authorized the Attorney General to waive the ESA and NEPA to the extent “necessary to ensure expeditious construction of the barriers and roads” at the border.¹⁴⁰ After the creation of the Department of Homeland Security (“DHS”), many of the Attorney General’s functions under IIRIRA were transferred to the Secretary of Homeland Security.¹⁴¹

In 2005, the REAL ID Act amended section 102(c) of IIRIRA to broaden the Secretary of Homeland Security’s authority regarding the construction of barriers in places of high illegal entry.¹⁴² The REAL ID Act now

¹³⁷ For more information on border fence construction and the REAL ID Act, see generally MICHAEL JOHN GARCIA, MARGARET MIKYUNG LEE & TODD TATELMAN, CONG. RESEARCH SERV., IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005 (2005), available at <http://www.fas.org/spp/crs/homesecc/RL32754.pdf>; CHAD C. HADDAL, YULE KIM & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., BORDER SECURITY: BARRIERS ALONG THE U.S. INTERNATIONAL BORDER (2009), available at <http://www.fas.org/spp/crs/homesecc/RL33659.pdf>; BLAS NUÑEZ-NETO & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., BORDER SECURITY: THE SAN DIEGO FENCE (2007), available at <http://www.fas.org/spp/crs/homesecc/RS22026.pdf>.

¹³⁸ Pub. L. No. 109-13, div. B, 119 Stat. 302 (2005) (codified as amended in scattered sections of 8 U.S.C.).

¹³⁹ Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 and 18 U.S.C.).

¹⁴⁰ Pub. L. No. 104-208, div. C, § 102, 110 Stat. 3009-546, 3009-554-55 (1996).

¹⁴¹ *E.g.*, Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 5, 6, 18, 44, and 49 U.S.C.).

¹⁴² REAL ID Act of 2005 § 102, reprinted in 8 U.S.C. § 1103 note (2006) (Improvement of Barriers at Border). The REAL ID Act has received much more publicity for its creation of national standards for state-issued driver’s licenses and identification cards and, to a lesser extent, its tightening of certain asylum and deportation laws. *See, e.g.*, Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the Real ID Act is a False Promise*, 43 HARV. J. ON LEGIS. 101 (2006); Aubra Fletcher, Recent Development, *The REAL ID Act: Furthering Gender Bias in U.S. Asylum Law*, 21 BERKELEY J. GENDER L. & JUST. 111 (2006); Manoj Govindaiah, Recent Development, *Driver Licensing under the Real ID Act: Can Current Technology Balance Security and Privacy?*, J.L. TECH. & POL’Y 201 (2006). Many state

grants the Secretary the authority, notwithstanding other laws, “to waive all legal requirements such Secretary, in such Secretary’s sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section.”¹⁴³ The Secretary of Homeland Security now has authority to waive *all* laws, and *sole discretion* to determine which laws must be waived to “ensure expeditious construction” of the border fence.¹⁴⁴

The REAL ID Act also limited the availability of judicial review in three ways.¹⁴⁵ First, claims arising from the Secretary’s actions pursuant to that law may only be brought if they allege constitutional violations.¹⁴⁶ Second, federal district courts have exclusive jurisdiction to hear those constitutional challenges.¹⁴⁷ Third, the REAL ID Act removes appellate jurisdiction from the circuit courts, making district court judgments under the statute reviewable only by the Supreme Court.¹⁴⁸

Environmentalists and local governments have brought several suits challenging the constitutionality of the REAL ID Act’s suspension provision; the facts and the legal bases for the parties’ arguments have been similar across cases. Potential harms relating to construction of the border fence include compromises to an Indian tribe’s ability to protect sacred grounds that have been used for centuries to conduct ceremonies;¹⁴⁹ threats to a water district’s ability to deliver water to a city and to thousands of farmers;¹⁵⁰ alteration of a biologically diverse conservation area that is home to more than 100 species of breeding birds and another 250 species of migratory and

governments have criticized the law. See Eric Lipton, *Rebellion Growing as States Challenge a Federal Law to Standardize Driver’s Licenses*, N.Y. TIMES, Feb. 5, 2007, at A1. The Obama Administration is considering scaling back the law by replacing it with a less rigorous and less expensive program. See Spencer S. Hsu, *Administration Plans to Scale Back Real ID Law*, WASH. POST, June 14, 2009, at A03.

¹⁴³ REAL ID Act of 2005 § 102(c)(1), *reprinted in* 8 U.S.C. § 1103 note (2006) (Improvement of Barriers at Border).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* § 102(c)(2).

¹⁴⁶ *Id.* § 102(c)(2)(A) (“A cause of action or claim may only be brought alleging a violation of the Constitution of the United States. The court shall not have jurisdiction to hear any claim not specified in this subparagraph.”).

¹⁴⁷ *Id.* (“The district courts of the United States shall have exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to [§ 102(c)(1)]. . . . The court shall not have jurisdiction to hear any claim not specified in this subparagraph.”).

¹⁴⁸ *Id.* § 102(c)(2)(C) (“An interlocutory or final judgment, decree, or order of the district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.”). Amendments subsequent to the REAL ID Act have further altered IIRIRA beyond Section 102. See Secure Fence Act of 2006, Pub. L. No. 109-367, §§ 2–3, 120 Stat. 2638, 2638–39 (codified at 8 U.S.C. §§ 1103 note, 1701 note (2006)) (providing, *inter alia*, more detailed instructions as to the security features of the border fence to be constructed, and directing the Secretary of Homeland Security to take action to achieve and maintain “operational control” over U.S. borders); Department of Homeland Security Appropriations Act of 2008, Pub. L. No. 110-161, Div. E, Tit. V, § 564, 121 Stat. § 2042, 2090–91 (codified at 8 U.S.C. § 1103 note).

¹⁴⁹ Petition for Writ of Certiorari at 8–9, *County of El Paso v. Chertoff*, 129 S. Ct. 2789 (2008) (No. 08-751) [hereinafter *County of El Paso* Petition].

¹⁵⁰ *Id.* at 9.

wintering birds;¹⁵¹ and the fragmentation of native habitat and reduction of gene pools of several native endangered species.¹⁵² So far, no challenge has been successful. Two cases culminated in the filing of petitions for certiorari with the Supreme Court that were ultimately rejected. I outline these two cases below.

1. *Defenders of Wildlife v. Chertoff*

In *Defenders of Wildlife*, a group of environmentalists challenged the DHS's attempt to obtain a perpetual right-of-way for the San Pedro border fence from the Bureau of Land Management ("BLM").¹⁵³ In September 2007, the Army Corps of Engineers ("Corps") had begun constructing the San Pedro border fence under instructions from the DHS.¹⁵⁴ The fence was located in the San Pedro Riparian National Conservation Area, a biologically diverse area containing hundreds of species of birds, which has been recognized by the National Audubon Society and the United Nations World Heritage Program for its ecological significance.¹⁵⁵ The BLM conducted an EA pursuant to NEPA but not an EIS, and granted the right-of-way to the DHS.¹⁵⁶ *Defenders of Wildlife* then requested an administrative stay of the fence construction; when the Department of the Interior ("DOI") did not act on the request, the plaintiffs sued under the APA in the District Court for the District of Columbia, challenging the BLM's failure to comply with NEPA and the Arizona-Idaho Conservation Act of 1988.¹⁵⁷ The district court granted the plaintiffs' motion for a temporary restraining order ("TRO") barring construction of the fence.¹⁵⁸

After the district court issued its TRO, Secretary of Homeland Security Michael Chertoff invoked his authority under Section 102(c) and waived "all federal, state, or other laws, regulations, and legal requirements of, deriving from, or related to the subject of" twenty environmental laws, asserting that the waiver of these laws was "necessary . . . to ensure the expeditious construction of the barriers and roads."¹⁵⁹ He published notice

¹⁵¹ Petition for Writ of Certiorari at 5, *Defenders of Wildlife v. Chertoff*, 128 S. Ct. 2962 (2008) (No. 07-1180) [hereinafter *Defenders of Wildlife* Petition].

¹⁵² HADDAL ET AL., *supra* note 137, at 32.

¹⁵³ *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 120-21 (D.D.C. 2007).

¹⁵⁴ *Id.* at 121.

¹⁵⁵ *Defenders of Wildlife* Petition, *supra* note 151, at 5.

¹⁵⁶ *Defenders of Wildlife*, 527 F. Supp. 2d at 121. *Defenders of Wildlife* alleged in its petition for certiorari that the EA "disclosed the possibility of serious impacts to the soils and natural resources of the [San Pedro Riparian National Conservation Area]." *Defenders of Wildlife* Petition, *supra* note 151, at 6.

¹⁵⁷ *Defenders of Wildlife* Petition, *supra* note 151, at 6.

¹⁵⁸ *Defenders of Wildlife*, 527 F. Supp. 2d at 121.

¹⁵⁹ 72 Fed. Reg. 60,870 (Oct. 26, 2007). The laws waived were:

The National Environmental Policy Act (Pub. L. 91-190, 83 Stat. 852 (Jan. 1, 1970) (42 U.S.C. 4321 *et seq.*)), the Endangered Species Act (Pub. L. 93-205, 87 Stat. 884 (Dec. 28, 1973) (16 U.S.C. 1531 *et seq.*)), the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act) (Act of June 30, 1948, c. 758, 62 Stat. 1155 (33 U.S.C. 1251 *et seq.*)), the National Historic Preservation Act (Pub. L.

of his decision in the Federal Register, but did not explain the reasoning behind his determination.¹⁶⁰

After Secretary Chertoff invoked his waiver authority, the district court vacated its earlier TRO.¹⁶¹ The plaintiffs then amended their complaint to argue that Section 102(c) violated separation of powers principles and that the Secretary's waiver was therefore invalid.¹⁶² The district court, however, held that there was no separation of powers violation and dismissed the lawsuit.¹⁶³ Specifically, the court concluded that the waiver provision was "not equivalent to the power to amend or repeal duly enacted laws,"¹⁶⁴ meaning that Supreme Court precedent invalidating the Line Item Veto Act was inapplicable.¹⁶⁵ The court also concluded that Section 102(c) was not an impermissible delegation to the executive branch because Congress "has laid down an intelligible principle to guide the Executive Branch."¹⁶⁶

The plaintiffs appealed directly to the Supreme Court.¹⁶⁷ In their petition for certiorari, they argued that Section 102(c) was unconstitutional for two reasons. First, because the Secretary's actions were not subject to judicial review "to ensure that they comport with the standard established by Congress,"¹⁶⁸ Section 102(c) failed to satisfy the nondelegation doctrine, which requires that Congress "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform."¹⁶⁹ Specifically, judicial review was necessary to give the "broad stat-

89-665, 80 Stat. 915 (Oct. 15, 1966) (16 U.S.C. 470 *et seq.*), the Migratory Bird Treaty Act (16 U.S.C. 703 *et seq.*), the Clean Air Act (42 U.S.C. 7401 *et seq.*), the Archeological Resources Protection Act (Pub. L. 96-95, 16 U.S.C. 470aa *et seq.*), the Safe Drinking Water Act (42 U.S.C. 300f *et seq.*), the Noise Control Act (42 U.S.C. 4901 *et seq.*), the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*), the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 *et seq.*), the Federal Land Policy and Management Act (Pub. L. 94-579, 43 U.S.C. 1701 *et seq.*), the Fish and Wildlife Coordination Act (Pub. L. 73-121, 48 Stat. 401, 16 U.S.C. 661 *et seq.*), the Archaeological and Historic Preservation Act (Pub. L. 86-523, 16 U.S.C. 469 *et seq.*), the Antiquities Act (16 U.S.C. 431 *et seq.*), the Historic Sites, Buildings, and Antiquities Act (16 U.S.C. 461 *et seq.*), the Arizona-Idaho Conservation Act of 1988 (Pub. L. 100-696, 16 U.S.C. 460xx *et seq.*), the Wild and Scenic Rivers Act (Pub. L. 90-542, 16 U.S.C. 1281 *et seq.*), the Farmland Protection Policy Act (7 U.S.C. 4201 *et seq.*) and the Administrative Procedure Act (5 U.S.C. 551 *et seq.*).

Id. at 60,870.

¹⁶⁰ It is worth noting that DHS took considerable steps following the exercise of Secretary Chertoff's suspension authority to mitigate the fence construction's effects on endangered or threatened species and culturally significant sites. See Dudley, *supra* note 4, at 277; Statement of Secretary Michael Chertoff Regarding Exercise of Waiver Authority, Dep't. of Homeland Sec. (Apr. 1, 2008), available at http://www.dhs.gov/xnews/releases/pr_1207083685391.shtm.

¹⁶¹ *Defenders of Wildlife*, 527 F. Supp. 2d at 123.

¹⁶² *Id.*

¹⁶³ See *id.* at 129.

¹⁶⁴ *Id.* at 126.

¹⁶⁵ *Id.* at 124.

¹⁶⁶ *Id.* at 129.

¹⁶⁷ *Defenders of Wildlife* Petition, *supra* note 151.

¹⁶⁸ *Id.* at 3.

¹⁶⁹ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)) (internal quotation marks omitted).

utory principles” of IIRIRA “concrete meaning.”¹⁷⁰ Second, the petitioners argued that Section 102(c) was unconstitutional because it effectively granted legislative power to the Secretary to “void any federal law, free of any review of his determinations,”¹⁷¹ in contravention of the constitutional process for amending and repealing laws.¹⁷²

The government responded that Congress’s limitation of judicial review clearly demonstrated its goal of ensuring that “‘expeditious construction’ of border barriers . . . [would] take priority over the normal operation of other federal statutes and the long delays often associated with litigation.”¹⁷³ Additionally, under the lenient standards of the intelligible principle requirement, the statutory delegation of suspension authority did not violate the nondelegation doctrine, particularly because the Secretary of Homeland Security “‘possesses independent authority over the [delegated] subject matter.’”¹⁷⁴ Third, there was no requirement that a delegation to the executive branch be accompanied by provisions for judicial review in order to satisfy the nondelegation doctrine.¹⁷⁵ Finally, the Secretary of Homeland Security had not effectively amended acts of Congress, thereby distinguishing the REAL ID Act suspension provision from the line item veto invalidated in *Clinton v. City of New York*.¹⁷⁶

The Supreme Court denied the petition for certiorari on June 23, 2008,¹⁷⁷ the same day it granted certiorari in *Winter*.¹⁷⁸ Although NRDC advanced arguments about the constitutionality of CEQ’s emergency exemption,¹⁷⁹ the Court’s simultaneous denial of certiorari in a case that only dealt with constitutional issues that substantially overlapped with NRDC’s constitutional argument might have suggested to NRDC that the Court was uninterested in constitutional issues. In light of this timing, the Court’s refusal to

¹⁷⁰ *Defenders of Wildlife* Petition, *supra* note 151, at 13. The petitioners further argued that delegations of legislative power to the Executive Branch without provisions for judicial review had only been upheld in limited circumstances where the intelligible principle requirement did not apply. *See id.* at 17–19.

¹⁷¹ *Id.* at 3.

¹⁷² *Id.* at 9.

¹⁷³ Brief for the Respondent at 10, *Defenders of Wildlife v. Chertoff*, 128 S. Ct. 2962 (2008) (No. 07-1180) [hereinafter *Defenders of Wildlife* Respondent’s Brief] (quoting REAL ID Act of 2005 § 102(c)(1), *reprinted in* 8 U.S.C. § 1103 note (2006) (Improvement of Barriers at Border)).

¹⁷⁴ *Id.* at 13 (quoting *Loving v. United States*, 517 U.S. 748, 772 (1996)).

¹⁷⁵ *Defenders of Wildlife* Respondent’s Brief, *supra* note 173, at 14.

¹⁷⁶ *Id.* at 24 (citing *Clinton v. City of New York*, 524 U.S. 417, 438 (1998)). In *Clinton*, the Supreme Court struck down the Line Item Veto Act, which empowered the President to cancel three types of spending provisions that had been signed into law. 524 U.S. at 436. The Court held that in using the Line Item Veto Act to cancel portions of the Balanced Budget Act of 1997 and the Taxpayer Relief Act of 1996, the President effectively amended two Acts of Congress without conforming to the procedures required by Article I of the Constitution. *See id.* at 438, 440 (“What has emerged in these cases from the President’s exercise of his statutory cancellation powers . . . are truncated versions of two bills that passed both Houses of Congress. They are not the product of the ‘finely wrought’ procedure that the Framers designed.”).

¹⁷⁷ *Defenders of Wildlife v. Chertoff*, 128 S. Ct. 2962 (2008).

¹⁷⁸ *Winter v. Natural Res. Def. Council, Inc.*, 128 S. Ct. 2964 (2008).

¹⁷⁹ *Winter* Respondents’ Brief, *supra* note 133, at 19–29.

engage the constitutional arguments NRDC made in its brief is hardly surprising.¹⁸⁰

2. *County of El Paso v. Chertoff*

After the denial of certiorari in *Defenders of Wildlife*, another group of plaintiffs brought a lawsuit challenging two waivers issued under the REAL ID Act. On April 8, 2008, Secretary Chertoff published notice in the Federal Register of two waivers pursuant to Section 102(c), each waiving thirty-seven federal laws in an area covering almost 500 miles of territory in four states along the United States-Mexico border.¹⁸¹ The plaintiffs filed suit in the Western District of Texas to challenge the constitutionality of Congress's delegation of waiver authority in the REAL ID Act.¹⁸² The district court denied their motion for a preliminary injunction and granted the government's motion to dismiss,¹⁸³ and the plaintiffs filed a petition for certiorari with the Supreme Court on December 10, 2008.¹⁸⁴

The petitioners' arguments were similar but not identical to those made in *Defenders of Wildlife*. The petitioners argued that the Court should grant certiorari on the question of the REAL ID Act's limitation of judicial review for several reasons. Most significantly, the lack of judicial review made the REAL ID Act suspension provision an unconstitutional delegation of legislative power.¹⁸⁵ Because the nondelegation doctrine required Congress to establish an "intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform,"¹⁸⁶ it must be possible to test whether the intelligible principle established by Congress had been followed.¹⁸⁷ Since the delegated power in this instance was broad and threatened private rights, judicial review was necessary to "test the application of the policy in light of [Congress's] legislative declarations."¹⁸⁸ Additionally, the REAL ID Act's preclusion of judicial review for all but constitutional questions effectively nullified congressional limitations on the

¹⁸⁰ Of course, the Court's reluctance to engage with the constitutional arguments advanced in *Winter* and the border fence cases may also be motivated more broadly by the constitutional avoidance canon or judicial minimalism. See Cass R. Sunstein, *Leaving Things Undecided*, 110 HARV. L. REV. 4, 20–21 (1996). Nevertheless, the opinion in *Winter* might have suggested that the Court was particularly wary of constitutional challenges with respect to waiver delegations.

¹⁸¹ 73 Fed. Reg. 19,077 (Apr. 8, 2008); 73 Fed. Reg. 19,078 (Apr. 8, 2008); see *County of El Paso* Petition, *supra* note 149, at 8.

¹⁸² *County of El Paso v. Chertoff*, EP-08-CA-196-FM, 2008 U.S. Dist. LEXIS 83045, at *5 (W.D. Tex. Aug. 29, 2008).

¹⁸³ *Id.*

¹⁸⁴ *County of El Paso* Petition, *supra* note 149. After the petition for certiorari was filed, Janet Napolitano, who succeeded Michael Chertoff as Secretary of Homeland Security, was substituted for Chertoff.

¹⁸⁵ *Id.* at 12.

¹⁸⁶ *Id.* at 12–13 (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (alteration in original)).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 13 (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

Secretary of Homeland Security's authority, permitting him both to waive statutes and interpret the scope of Section 102(c) broadly to include in the definition of "construction" issues like the upkeep of fences and surrounding infrastructure.¹⁸⁹

The respondents countered that even with some limitation on judicial review, Section 102(c) still satisfied the intelligible principle requirement, particularly since the executive branch had independent authority over issues relating to the border fence.¹⁹⁰ Relatedly, the respondents argued that there was no support for petitioner's argument that judicial review was part of the intelligible principle requirement.¹⁹¹

After all briefing was submitted, the Supreme Court took no action on the petition for certiorari for several months, redistributing it for conference eight times.¹⁹² Finally, on June 15, 2009, the Court denied the petition for certiorari.¹⁹³

IV. ARE WAIVER DELEGATIONS CONSTITUTIONAL?

Within *Winter* and the border fence cases, as well as more broadly, the use of statutory provisions to exempt parties from specific environmental laws or to suspend the application of numerous environmental laws to a specific course of action raises separation of powers concerns and may sometimes be unconstitutional. The Framers were vigilant against the undue concentration of powers within a single branch of the national government.¹⁹⁴ Madison famously wrote that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."¹⁹⁵ Justices on the Supreme Court have also decried, in at least some contexts, the notion that "the political branches have a somewhat free hand to reallocate their own authority."¹⁹⁶ In his concurrence in *Clinton v. City of New York*,¹⁹⁷ which invalidated the Line Item Veto Act, Justice Kennedy set out the separation of powers concerns that led him to reject that notion.¹⁹⁸ First, permitting the political branches to act in this way could not be in the public good because "[t]he

¹⁸⁹ *Id.* at 18–19. The petitioners also argued that an executive branch agency could not preempt state law on its own authority without a clear and unequivocal grant of authority by Congress. *Id.* Because the focus of this Article is on the separation of powers issues raised by the use of suspension and waiver provisions, I do not address the arguments made as to whether the Secretary of Homeland Security could use the REAL ID Act to preempt state law.

¹⁹⁰ Brief for the Respondents in Opposition at 17, *County of El Paso v. Napolitano*, 129 S. Ct. 2789 (2009) (No. 08-751).

¹⁹¹ *Id.* at 18.

¹⁹² See Docket for 08-751, available at <http://origin.www.supremecourtus.gov/docket/08-751.htm>.

¹⁹³ *County of El Paso v. Napolitano*, 129 S. Ct. 2789 (2009).

¹⁹⁴ See, e.g., THE FEDERALIST NO. 47, at 1–2 (George F. Hopkins ed., 1802).

¹⁹⁵ *Id.*

¹⁹⁶ *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring).

¹⁹⁷ 524 U.S. 417.

¹⁹⁸ *Id.* at 449 (Kennedy, J., concurring).

Constitution's structure requires a stability which transcends the convenience of the moment."¹⁹⁹ Second, it is a threat to liberty "when one or more of the branches seek to transgress the separation of powers."²⁰⁰ Additionally, the fact that Congress had voluntarily surrendered legislative authority to the executive branch did not make the surrender permissible.²⁰¹

Two separation of powers problems can arise with the use of waiver provisions and accompanying limitations on judicial review: unconstitutional delegations of legislative authority to the executive branch, and unconstitutional usurpations of judicial authority by the executive branch.²⁰² This Part explores each of these problems in turn.

With respect to the nondelegation doctrine, delegations of waiver authority are particularly questionable where they afford broad discretion over an equally broad grant of authority, where the recipient of the delegated authority does not possess independent constitutional power over that area of the law, and where the delegation essentially functions as a grant of the ability to amend or repeal a law. With respect to the availability of judicial review, the ability of the courts provides an important backstop against executive overreaching and a means to measure whether the executive branch has followed Congress's stated policy goals. While most waiver delegations likely do not run afoul of separation of powers principles, more extreme provisions such as the one found in the REAL ID Act do raise constitutional doubts.²⁰³ Additionally, policy considerations counsel against the indiscriminate delegation of waiver authority, as discussed in Part V. However, given the federal courts' longstanding practice of upholding delegations, most challenges to these provisions are likely to be unsuccessful.

A. *Waivers and the Nondelegation Doctrine*

The nondelegation doctrine, which functions as a limit on the legislative powers Congress may delegate to the executive branch, derives from the Vesting Clause in Article I of the Constitution, which states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 450.

²⁰¹ *Id.* at 451–52 ("The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow. Abdication of responsibility is not part of the constitutional design." *Id.* at 452 (citations omitted)).

²⁰² See also Dudley, *supra* note 4, at 288–89 (arguing, on a contractarian account, that suspension provisions enable the delegate "to selectively obey or disregard decisions that society deliberately entrusted to other institutions").

²⁰³ See Risa E. Kaufman, *Access to the Courts as a Privilege or Immunity of National Citizenship*, 40 CONN. L. REV. 1477, 1518–19 & nn.203–05 (2008); Tana M. Sanchez, Note, *Waiving Good-Bye to Environmental Laws Along the Arizona Borderlands*, 16 MO. ENVTL. L. & POL'Y REV. 281 (2009) (analyzing the constitutionality of the REAL ID Act's waiver provisions).

States.”²⁰⁴ Yet the doctrine does not prohibit all delegations of legislative power.²⁰⁵ As it is currently construed, these delegations are permissible to the extent that Congress provides an “intelligible principle” to guide the agency exercising the delegated power.²⁰⁶ The requirement that delegations be accompanied by such standards is intended to “ensure[] to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress,” to prevent arbitrary exercises of delegated authority, and to enhance the likelihood of meaningful judicial review.²⁰⁷ Three relationships contained in the nondelegation doctrine are particularly relevant to a determination of the constitutionality of waiver delegations: the relationship between the amount of discretion and the scope of power conferred to the executive branch, the relationship between the delegated authority and the independent constitutional authority of the executive officer in question, and the relationship between legislative delegations and the power to amend or repeal laws.

Recent Supreme Court jurisprudence makes it clear that the Court’s stance toward delegations is a lax one; indeed, the Court has not invalidated a statute on nondelegation grounds since 1935.²⁰⁸ The last laws to be rejected as excessive delegations were two sections of the National Industrial Recovery Act. The first authorized the President to establish trade groups to implement codes of fair competition but did not identify what constituted fair or unfair methods of competition.²⁰⁹ The second granted the President the power to enforce a prohibition on interstate shipping of petroleum in excess of quotas, but it had “no criterion to govern the President’s course.”²¹⁰ Since then, the Court has recognized that its intelligible principle jurisprudence:

[H]as been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives. . . . Accordingly, this Court has deemed it “constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.”²¹¹

²⁰⁴ U.S. CONST. art. I, § 1.

²⁰⁵ See Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1178–79 (1999).

²⁰⁶ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001); *Mistretta v. United States*, 488 U.S. 361 (1989). But see Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722–23 (2002) (arguing that the nondelegation doctrine does not exist as a constitutional rule and that “[a] statutory grant of authority to the executive isn’t a *transfer* of legislative power, but an *exercise* of legislative power”) (emphasis added).

²⁰⁷ *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring).

²⁰⁸ Rossi, *supra* note 205, at 1178.

²⁰⁹ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

²¹⁰ *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 415 (1935).

²¹¹ *Mistretta*, 488 U.S. at 372–73 (1989) (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)) (citations omitted).

The Court affirmed this approach most recently in *Whitman v. American Trucking Associations*.²¹²

Although the nondelegation doctrine has largely been moribund in the federal courts for the last half century, scholars still disagree on the merits of delegations. Some have suggested that the laxity of the nondelegation doctrine has gone too far, and that the absence of general statements of policy that would otherwise be provided by Congress results in a “piecemeal, ad hoc” response by agencies to interest groups, which “violate[s] notions of representative governance.”²¹³ Because the legislative branch is “the branch of our Government most responsive to the popular will,”²¹⁴ Congress, and not the executive branch, should be the decider of “important choices of social policy.”²¹⁵ Delegation does have its proponents, however. From a purely practical standpoint, the proliferation of administrative agencies changes the balance of powers between the executive and legislative branches, and agencies’ institutional advantages lower the costs of making decisions.²¹⁶ Additionally, since the President is arguably more accountable to the general electorate than the legislature, delegation to the executive branch might actually democratize the political decision making process.²¹⁷

There is no blanket answer to the question of whether waiver provisions satisfy the intelligible principle requirement, since the delegations vary so widely in the amount of discretion they grant to the executive branch. On one end of the spectrum are provisions like the ESA’s general exemption, which requires a formal application, an on-the-record hearing, and a report filed by the Secretary of the Interior. It also specifies a list of conditions that must be met in order for the Secretary to grant an exemption.²¹⁸ These procedural and substantive obligations undoubtedly meet an even more stringent definition of the intelligible principle requirement than that currently espoused by the Supreme Court. In keeping with the rationales of the nondelegation doctrine, these obligations ensure that the DOI will follow the policy choices clearly stated by Congress, that the DOI’s exercise of its exemption authority will be consistent and not arbitrary, and that the basis for the DOI’s decision on a particular exemption will be reviewable by a court.²¹⁹

On the other end of the spectrum are the multitude of provisions that include only some general conditions on the exercise of waiver authority and do not specify the procedures that must accompany the exercise of that au-

²¹² 531 U.S. 457 (2001).

²¹³ Rossi, *supra* note 205, at 1179 (citing THEODORE J. LOWI, *THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY* 156 (1969)).

²¹⁴ *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring).

²¹⁵ *Id.*

²¹⁶ Rossi, *supra* note 205, at 1179 (citing JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 148–52 (1997)).

²¹⁷ *Id.*

²¹⁸ 16 U.S.C. §§ 1536(g), (h) (2006).

²¹⁹ *See Indus. Union Dep’t*, 448 U.S. at 685–86. (Rehnquist, J., concurring).

thority. For instance, CEQ's emergency exemption permits CEQ to grant exemptions from NEPA review requirements, but it does not specify what constitutes an emergency or what procedures federal agencies and CEQ must follow in creating alternative arrangements for compliance.²²⁰ Furthermore, NEPA itself does not even contain an emergency exemption; CEQ carved one out through its own regulations, essentially delegating exemption authority to itself.

Of course, the purpose of a particular waiver provision will affect the degree of specificity Congress uses to guide the executive branch. In *American Trucking*, the Supreme Court noted that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."²²¹ Emergency exemptions understandably come with fewer procedural and substantive restrictions than general exemptions, since they ostensibly are to be used more rarely and in situations where flexibility is more necessary.

It follows that laws permitting the broad suspension of other laws ought to be more restrictive in terms of how executive branch officials may suspend laws. We can visualize two axes at play here: Along one, the delegate possesses increasing discretion as to when to invoke the waiver provision. Along the other, the delegate is authorized to waive an increasing number of laws or an increasingly wide swath of a single law. Permissible delegations thus operate on a kind of sliding scale along the axes: On one end are laws that permit executive officers to carve out wide exemptions from single laws or broadly suspend multiple laws, but only when specific substantive and procedural criteria are satisfied. On the other end, the executive officer in receipt of delegated authority has broader discretion to determine when exercise of the exemption or suspension authority is appropriate, but the scope of the laws that may be suspended or exemptions that may be created is much narrower. By contrast, a waiver delegation allowing broad discretion to waive a broad number of laws would be constitutionally questionable.

The multiple waiver provisions contained in the ESA provide a nice example of this scale. The ESA's national security exemption applies to a narrow set of circumstances (i.e., where the Secretary of Defense "finds that [such an] exemption is necessary for reasons of national security"), but can be granted without hearings or the preparation of reports.²²² The statute's more general exemption, which can be granted across a wider range of circumstances, requires a specific application procedure, including a hearing by the Secretary of the Interior, a report from the Secretary to the Endangered Species Committee, and an on-the-record determination by the Committee.²²³ Thus the framers of the ESA, by limiting executive discretion where the scope of executive power was broader and vice versa, ensured that the

²²⁰ 40 C.F.R. § 1506.11 (2008).

²²¹ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001).

²²² 16 U.S.C. § 1536(j).

²²³ *Id.* §§ 1536(g), (h).

delegations contained in that statute would not run afoul of the nondelegation doctrine.

When considering delegations along this scale, the distinction between internal and external waiver provisions becomes particularly important. As described above, an internal waiver provision permits a member of the executive branch to waive only the law in which the provision is found, whereas an external waiver provision grants the authority to waive laws beyond just the one containing the provision. In exercising external waiver authority, the executive branch affects the relationship among several laws, not just the operation of a single set of legal requirements. In theory, then, the executive officer's discretion to determine when waiver is appropriate should be much narrower, since the scope of the authority granted to her is so broad.

Yet under Section 102(c), in order to waive any law, the Secretary of Homeland Security need only use his sole discretion to make the determination that waiver is "necessary to ensure expeditious construction," and need only publish notice of the waiver in the Federal Register in order for it to become effective.²²⁴ This combination of broad authority to suspend any law when necessary, along with broad discretion to determine when suspension is appropriate, is particularly problematic. If the executive official wielding waiver authority also determines the scope of the triggering condition (i.e., what constitutes an emergency, or what is in the "paramount interest" of the United States), what limiting principle is there to guard against an overly expansive interpretation? Judicial review functions as something of a safeguard, but it is not fully available under all statutes or for all actions, as with the REAL ID Act. As Representative Earl Blumenauer noted during the House debate on amending IIRIRA, Section 102(c) grants the Secretary of Homeland Security the authority to "give a contract to his political cronies that had no safety standards, using 12-year-old illegal immigrants to do the labor, run it through the site of a Native American burial ground, kill bald eagles in the process, and pollute the drinking water of neighboring communities."²²⁵ While Representative Blumenauer surely did not think the Secretary would do any of these things, his point is a sobering one: the unbridled discretion granted to the executive branch to suspend laws under the REAL ID Act is truly extraordinary.²²⁶

Notwithstanding the broad power and the discretion it confers, courts have found the REAL ID Act's delegation to satisfy the intelligible principle

²²⁴ REAL ID Act of 2005 § 102(c)(1), *reprinted in* 8 U.S.C. § 1103 note (2006) (Improvement of Barriers at Border).

²²⁵ 151 CONG. REC. H466 (daily ed. Feb. 9, 2005) (statement of Rep. Blumenauer). Representative Blumenauer also noted that "no member of Congress, no citizen could do anything about [such a waiver] because you waive all judicial review." *Id.*

²²⁶ Indeed, a Congressional Research Service report concluded that there are no other waiver or suspension provisions that contain such an extensive delegation of authority. Viña & Tatelman, *supra* note 33, at 2–3. The report noted that other statutory provisions contained equally broad delegations of waiver authority, but that in all of those cases, qualifications (such as national security requirements) or reporting requirements functioned as limitations on the authority. *Id.* at 3.

test as set forth in *Mistretta*.²²⁷ In *Defenders of Wildlife*, the district court ruled that because section 102 of the Act limited its goal to the “expeditious construction of barriers and roads,” and limited construction of barriers and roads — and therefore the extent of the Secretary of Homeland Security’s suspension authority — to areas of “high illegal entry into the United States,” the law provided a “clearly delineated” policy that satisfied the nondelegation doctrine.²²⁸ Additionally, the scope of the Secretary’s suspension authority was sufficiently limited by the prescription that he could only suspend laws for the purpose of satisfying that policy.²²⁹ Finally, the Act makes the Secretary responsible for applying this policy.²³⁰ The Secretary arguably possesses independent constitutional authority over IIRIRA’s subject matter area, and may only suspend laws as they apply to the construction of roads and barriers in high-entry areas and where suspension is necessary to ensure expeditious construction of the same.²³¹ Yet, because it is left to the Secretary’s sole discretion to determine the exact parameters of the delegation by deciding when the policy conditions are met, the boundaries delineated by Congress are perhaps not so clear after all.

The REAL ID Act’s delegation may be helped, however, by the fact that delegations to an executive officer can be broader if the delegated authority lies within a subject area over which the officer already has independent constitutional authority.²³² For instance, a delegation to the President to prescribe aggravating factors permitting a court-martial to impose the death penalty was held to be “interlinked with [the Commander-in-Chief] duties already assigned to the President by express terms of the Constitution.”²³³ The district courts that have issued opinions in the border fence cases have cited this principle as a basis for concluding that Congress’s broad delegation to the Secretary of Homeland Security was permissible because of the executive branch’s independent constitutional authority over foreign affairs and immigration control.²³⁴ In prior cases applying this principle, however, the Supreme Court has referred to the independent constitutional authority of the President, not of a cabinet-level officer or the executive branch as a whole.²³⁵ Furthermore, despite the fact that the REAL ID Act relates to immigration,

²²⁷ *Mistretta v. United States*, 488 U.S. 361, 372–73 (1989).

²²⁸ *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 127 (D.D.C. 2007).

²²⁹ *Id.* at 128.

²³⁰ REAL ID Act of 2005 § 102(c)(1), *reprinted in* 8 U.S.C. § 1103 note (2006) (Improvement of Barriers at Border).

²³¹ *Id.*

²³² *Loving v. United States*, 517 U.S. 748, 772–73 (1996); *Clinton v. City of New York*, 524 U.S. 417, 445 (1998).

²³³ *Loving*, 517 U.S. at 772–73.

²³⁴ *See Defenders of Wildlife*, 527 F. Supp. 2d at 129 (“When Congress legislates regarding foreign affairs or immigration control, ‘it is not dealing alone with a legislative power. It is implementing an inherent executive power.’” (quoting *Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950))); *see also* *Save Our Heritage Org. v. Gonzales*, 533 F. Supp. 2d 58, 63 (D.D.C. 2008); *County of El Paso v. Chertoff*, EP-08-CA-196-FM, 2008 U.S. Dist. LEXIS 83045, at *8 (W.D. Tex. Aug. 29, 2008); *Sierra Club v. Ashcroft*, No. 04-CV-0272, 2005 U.S. Dist. LEXIS 44244, at *22 (S.D. Cal. Dec. 12, 2005).

²³⁵ *Loving*, 517 U.S. at 772–73; *Clinton*, 524 U.S. at 445.

which is certainly within the Secretary of Homeland Security's purview, it authorizes the Secretary to waive laws even in those areas in which the DHS has absolutely no technical expertise.²³⁶ Thus, the Secretary may waive environmental laws without fully comprehending the impact such a suspension will have on the environment, and without having to consider the opinions of those who do have the appropriate technical knowledge.²³⁷ It is therefore unclear whether an expansive delegation to the Secretary of Homeland Security of subject matter over which the President has constitutional authority is permissible, or whether district courts in the border fence cases have been overly broad in construing executive branch authority.

Aside from the intelligible principle issue, some delegations could be unconstitutional on the basis that they impermissibly grant to the executive branch the legislative power to amend or repeal laws. The Presentment Clause sets out the process by which bills become federal law.²³⁸ The Supreme Court has characterized this process as "a single, finely wrought and exhaustively considered procedure"²³⁹ and has held that "the power to enact statutes may only 'be exercised'" according to that procedure.²⁴⁰ In *Clinton*, the Court concluded that the President's use of the line item veto to cancel provisions of two statutes effectively amended and repealed two acts of Congress, thereby circumventing constitutionally established procedures for legislation.²⁴¹ Relatedly, there is a question as to whether waiver provisions amount to a delegation of purely legislative power to the executive branch. The Supreme Court in *INS v. Chadha*²⁴² articulated the presumption that "when any Branch [of the federal government] acts, it is presumptively exercising the power the Constitution has delegated to it."²⁴³ The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States;"²⁴⁴ the characteristically legislative function "[has] the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch."²⁴⁵

A broad reading of the Presentment Clause and the holding in *Clinton* would call into question all of the waiver provisions discussed in this Article. This is not to say, however, that every waiver of a law by a member of

²³⁶ Brief for William D. Araiza et al. as Amici Curiae Supporting Petitioners at 8, *Defenders of Wildlife v. Chertoff*, 128 S. Ct. 2962 (2008) (No. 07-1180) [hereinafter *Defenders of Wildlife Araiza Brief*], available at http://www.defenders.org/resources/publications/programs_and_policy/in_the_courts/border/scholars_amicus_brief_dhs_waiver_challenge.pdf.

²³⁷ *Id.*

²³⁸ U.S. CONST. art. I, § 7.

²³⁹ *INS v. Chadha*, 462 U.S. 919, 951 (1983).

²⁴⁰ *Clinton*, 524 U.S. at 439 (quoting *Chadha*, 462 U.S. at 951).

²⁴¹ 524 U.S. at 438. Although the *Clinton* Court rejected an act by the President that was legislative in nature, it did so on Presentment Clause grounds, not nondelegation grounds.

²⁴² 462 U.S. 919 (1983).

²⁴³ *Id.* at 951.

²⁴⁴ U.S. CONST. art. I, § 1.

²⁴⁵ *Chadha*, 462 U.S. at 952. The Court noted that "quasi-legislative" actions, including agency rule-making, did not constitute an exercise of legislative power, because that administrative activity "cannot reach beyond the limits of the statute that created it." *Id.* at 953 n.16.

the executive branch is unconstitutional. Even the petitioners challenging the constitutionality of the REAL ID Act waiver provision in the border fence cases have not taken this position.²⁴⁶ Indeed, the Supreme Court has upheld delegations of waiver authority in the past on the basis that they do not delegate the lawmaking function. In *Marshall Field & Co. v. Clark*,²⁴⁷ the Court upheld the Tariff Act, which directed the President to impose retaliatory tariffs on articles that were normally exempted from import duties if the President determined that “any country producing and exporting those products imposed duties on the agricultural products of the United States that he deemed to be ‘reciprocally unequal and unreasonable.’”²⁴⁸ In so ruling, the Court determined that the Tariff Act did not work a delegation of legislative authority because once the President determined that the relevant conditions had occurred, “it became his duty” to suspend the tariff exemption; the President “had no discretion in the premises except in respect to the duration of the suspension so ordered.”²⁴⁹

But the scope of the REAL ID Act waiver provision is quite different than that of the Tariff Act. It functions as a freestanding authority to waive any legal requirement, not just a tariff exemption. Additionally, its focus is broader, and it limits judicial review.²⁵⁰ The Secretary of Homeland Security also enjoys greater discretion under the REAL ID Act in that the contingency triggering the REAL ID Act’s waiver provision is more open to interpretation than that contained in the Tariff Act. Unlike the Tariff Act, which “absolutely required” the President to suspend the tariff exemption upon finding a fact that Congress had already specified,²⁵¹ the REAL ID Act does not identify a specific condition under which the Secretary of Homeland Security must suspend a particular law. The broad suspension of laws in furtherance of border fence construction inevitably “alter[s] the legal rights, duties and relations of persons . . . outside the legislative branch,”²⁵² and unlike “quasi-legislative” authority, the Secretary’s discretion reaches beyond the limits of the statute granting him waiver authority. The Secretary

²⁴⁶ *Defenders of Wildlife* Petition, *supra* note 151, at 21.

²⁴⁷ 143 U.S. 649 (1892).

²⁴⁸ *Id.* at 693–94 (“The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the later no valid objection can be made.”). See also *Clinton v. City of New York*, 524 U.S. 417, 442 (1998).

²⁴⁹ *Marshall Field*, 143 U.S. at 693. The Court further noted that:

Legislative power was exercised when congress declared that the suspension should take effect upon a named contingency. What the president was required to do was simply in execution of the act of congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.

Id.

²⁵⁰ See *Defenders of Wildlife* Petition, *supra* note 151, at 21; *Defenders of Wildlife* Araiza Brief, *supra* note 236, at 19–22.

²⁵¹ *Marshall Field*, 143 U.S. at 693.

²⁵² *INS v. Chadha*, 462 U.S. 919, 952 (1983).

thus exercises a “quintessentially legislative function” with minimal restrictions.²⁵³

The question of whether such delegations function as amendments to existing laws is most relevant in relation to external waiver provisions, since internal waivers are limited to the statutes in which they are located and are often included in the statute to begin with. This suggests that Congress did not intend for the law to be applied universally. External waivers, on the other hand, operate broadly even on laws enacted before the date of the delegation and on laws that have nothing to do with the goals of the statute containing the suspension provision. It is true that the waiver authority exercised by the Secretary of Homeland Security under the REAL ID Act is not a full waiver authority. The Secretary may not change the text of other statutes, and the suspended statutes remain in effect outside the narrow application of the suspension regarding construction of the border fence. Yet although the REAL ID Act waiver delegation is narrower than provisions such as the Line Item Veto Act,²⁵⁴ it is not clear that an executive officer must have full authority to cancel or effectively repeal a statutory provision for the delegation to violate the Presentment Clause. Nevertheless, pre-*Clin-ton* case law suggests that the Presentment Clause’s rule against delegated authority to repeal or amend laws does not extend so far.²⁵⁵

Ultimately, there are convincing arguments that provisions conferring broad authority to suspend multiple laws, or affording the executive branch broad discretion to determine triggering conditions for a waiver provision, are unconstitutional delegations of legislative authority. However, a court is unlikely to invalidate such a provision on the sole basis of the nondelegation doctrine.²⁵⁶ The Supreme Court’s deferential stance towards legislative delegations means that even the more suspect invocations of exemption or suspension authority will likely be upheld, yet it is certainly possible that a statutory delegation conferring broad or even unlimited authority on only a vague general policy axis would be struck down.²⁵⁷

B. *Waivers and Limitations on Judicial Review*

Although the mere delegation of waiver authority is likely insufficient to render a statute unconstitutional, such a delegation in combination with

²⁵³ *Defenders of Wildlife Araiza Brief*, *supra* note 236, at 19.

²⁵⁴ See *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 124 (D.D.C. 2007).

²⁵⁵ See *Byrd v. Raines*, 956 F. Supp. 25, 35 (D.D.C. 1997) (arguing that the President’s use of power under the Line Item Veto Act, which “unilaterally effects a repeal of statutory law such that the bill he signed is not the law that will govern the Nation,” is “precisely what the Presentment Clause was designed to prevent”).

²⁵⁶ See *Mistretta v. United States*, 488 U.S. 361, 373–74 (1989) (noting that the Court had “upheld, again without deviation, Congress’ ability to delegate power under broad standards” after invalidating two statutes as excessive delegations in 1935).

²⁵⁷ See Jack Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 145–48 (2006); Camas J. Hubenthal, *American Trucking v. EPA: Unjustified Revival of the Nondelegation Doctrine*, 23 ENVIRONS ENVTL. L. & POL’Y J. 17, 22 (2000).

limitations on judicial review may well present constitutional problems. The limitation or elimination of judicial review in statutory delegations raises three main issues: when Congress may strip federal courts of jurisdiction; whether judicial review is ever required to satisfy the nondelegation doctrine's intelligible principle requirement; and whether the relationship between waivers and judicial review ever violates the rule against advisory opinions.

Article III of the Constitution establishes the federal judicial power and vests it in a Supreme Court and "such inferior courts as Congress . . . may establish."²⁵⁸ The Supreme Court has upheld statutory limits on lower federal court jurisdiction, however, based on Article III's grant to Congress of authority to make exceptions to jurisdiction.²⁵⁹ And in *Webster v. Doe*,²⁶⁰ the Court held that a law precluded judicial review of statutory claims but preserved review of constitutional claims because Congress had not made clear its intent to preclude judicial review of constitutional claims. The House of Representatives has recently adopted several pieces of jurisdiction-stripping legislation, suggesting a change in how Congress sees itself in relation to the federal courts.²⁶¹ Although none of these bills have been adopted, it is possible that Congress will make increased efforts to specifically limit judicial review of delegations of exemption and suspension authority.

Under this precedent, the REAL ID Act's limitation on judicial review, which restricts the federal district courts to hearing constitutional challenges to the Secretary of Homeland Security's actions under the statute and eliminates intermediate appellate review, is technically constitutional. While the provision sharply limits the kinds of lawsuits that may be brought under

²⁵⁸ U.S. CONST. art. III, § 1.

²⁵⁹ *Ex parte McCordle*, 74 U.S. 506, 512–13 (1868); *Sheldon v. Sill*, 49 U.S. 441, 448–49 (1850). A review of Congress's authority to remove jurisdiction from the federal courts to hear certain types of cases is beyond the scope of this Article. For discussion of the constitutionality of jurisdiction-stripping, see, for example, Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Akhil Reed Amar, *Article III and the Judiciary Act of 1789: The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990); Lloyd C. Anderson, *Congressional Control Over the Jurisdiction of the Federal Courts: A New Threat to James Madison's Compromise*, 39 BRANDEIS L.J. 417 (2000); Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 Nw. U. L. REV. 143 (1982); Lawrence Gene Sager, Foreword, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).
²⁶⁰ 486 U.S. 592 (1988).

²⁶¹ See James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 Nw. U. L. REV. 191, 193–94 (2007); see also Constitution Restoration Act of 2005, H.R. 1070, 109th Cong. (2005) (proposing to remove appellate jurisdiction from the Supreme Court to hear cases involving a government officer's acknowledgement of religious beliefs); Marriage Protection Act of 2005, H.R. 1100, 109th Cong. (2005) (proposing to remove jurisdiction from the Supreme Court and lower federal courts to hear challenges to provisions of the Defense of Marriage Act); Sanctity of Life Act of 2005, H.R. 776, 109th Cong. (2005) (proposing to remove jurisdiction over challenges to certain state and local laws restricting abortions); Pledge Protection Act of 2004, H.R. 2028, 108th Cong. (2004) (proposing to remove jurisdiction over challenges to the validity of the Pledge of Allegiance).

Section 102(c), judicial review remains available, if truncated, and within the bounds of Congress's Article III authority to limit federal jurisdiction on most theories of jurisdiction-stripping.²⁶² Furthermore, outside the context of waiver delegations, courts have held that the presumption of judicial review of agency decisions "can be overridden by specific language or by clear and convincing evidence of legislative intent."²⁶³ In *National Coalition to Save Our Mall v. Norton*,²⁶⁴ the D.C. Circuit upheld a law passed while a challenge claiming that the design and construction of the World War II Memorial violated several environmental laws was pending.²⁶⁵ The act passed by Congress suspended other laws as applied to construction of the memorial (though without a delegation of discretion) and eliminated judicial review of agency decisions underlying the memorial's construction.²⁶⁶ Applying this reasoning to delegations of discretion that also limit judicial review, such a limitation is permissible and evident from the specific language used by Congress in curtailing the availability of judicial review.

But the role of judicial review goes beyond the mere question of whether Congress may limit it at all; it may also be implicated in broader separation of powers and federalism concerns, as well as more narrowly in the nondelegation doctrine context. Since Section 102(c) precludes non-constitutional challenges, there is "no other mechanism available for individuals to resolve" issues relating to the government's compliance with environmental, civil rights, and labor laws.²⁶⁷ The limitation on judicial review thus removes an essential check on federal executive overreaching and interference with the interests of state and local governments and individuals.²⁶⁸

The availability of judicial review might also function as a component of the intelligible principle requirement when a delegation to the executive branch interferes with private rights. There is some support in the case law of the Supreme Court and lower federal courts for a procedural due process approach to the nondelegation doctrine.²⁶⁹ On this account, broad delegations of legislative authority must be limited by procedural protections, including but not limited to the opportunity for judicial review.²⁷⁰ In *Amalgamated Meat Cutters v. Connally*,²⁷¹ a three-judge federal district court panel upheld the Economic Stabilization Act of 1970,²⁷² which authorized the President, acting through the Cost of Living Council, to limit wage and price increases, after determining that the delegation was circumscribed

²⁶² See Kaufman, *supra* note 203, at 1521–22.

²⁶³ *Nat'l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092, 1095 (D.C. Cir. 2001).

²⁶⁴ 269 F.3d 1092.

²⁶⁵ *Id.* at 1093.

²⁶⁶ *Id.* at 1094.

²⁶⁷ Kaufman, *supra* note 203, at 1521–22.

²⁶⁸ *Id.*

²⁶⁹ See Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 14 (1982); Donald A. Dripps, *Delegation and Due Process*, 1988 DUKE L.J. 657, 658–59 (1988).

²⁷⁰ Aranson et al., *supra* note 269, at 14.

²⁷¹ 337 F. Supp. 737 (D.D.C. 1971).

²⁷² Pub. L. No. 91-379, 84 Stat. 799 (1970) (expired 1974).

by the APA's requirement of notice-and-comment rulemaking and its provision for the availability of judicial review.²⁷³ The court identified "[t]he safeguarding of meaningful judicial review" as "one of the primary functions" of the nondelegation doctrine.²⁷⁴

It is not the case, however, that courts have affirmatively *required* judicial review in order to satisfy the intelligible principle test, contrary to the arguments advanced by petitioners in the border fence cases.²⁷⁵ More recent pronouncements on the nondelegation doctrine have not addressed the availability of judicial review or other procedural obligations in upholding statutory delegations.²⁷⁶ With respect to the Secretary of Homeland Security's suspensions under the REAL ID Act, it is true that procedural protections for would-be litigants are severely limited, since nonconstitutional judicial review is unavailable and the Secretary has suspended the application of the APA. This alone would likely be an insufficient basis for a court to conclude that the REAL ID Act's suspension provision lacks an intelligible principle. Yet the breadth of the Secretary's suspension authority, as well as the generality of the policy goals, might, when combined with the limitation on judicial review, amount to a lack of intelligible principle and therefore an unconstitutional delegation.

Furthermore, some executive waivers granted after court rulings on the same matter threaten to violate the rule against advisory opinions, which prohibits the federal courts from giving advice to other branches of government, deciding issues without a sufficiently adversarial context, and issuing decisions that are subject to the review of another branch of government. The rule has been in existence since the Supreme Court declined to give an opinion to President Washington as to what the laws and treaties required with respect to an international conflict, on the ground that it would violate separation of powers principles for the judiciary to give advice to another branch of the government.²⁷⁷ Similarly, in *Hayburn's Case*,²⁷⁸ the Court refused to carry out the Invalid Pensioners' Act of 1792, which required judges to make recommendations regarding veterans' pension claims to the Secre-

²⁷³ *Amalgamated Meat Cutters*, 337 F. Supp. at 760–62.

²⁷⁴ *Id.* at 759; *see also* *South Dakota v. Dep't of the Interior*, 69 F.3d 878 (8th Cir. 1995), *vacated*, 519 U.S. 919 (1996) (vacated after the Secretary of the Interior promulgated a new rule providing for judicial review). Some commentators have argued that the Supreme Court's decision in *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), provided support for the due process approach to delegation, but only obliquely. Aranson et al., *supra* note 269, at 14 n.59. The Supreme Court has noted elsewhere that "[p]rivate rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations." *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).

²⁷⁵ *County of El Paso Petition*, *supra* note 149, at 13.

²⁷⁶ *But see* *Touby v. United States*, 500 U.S. 160, 170 (1991) (Marshall, J., concurring) (noting that "judicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds," and arguing that where violations of an administrative scheme carry criminal penalties, judicial review should be required).

²⁷⁷ Letter from Chief Justice John Jay and Associate Justices to President George Washington (Aug. 8, 1793), in 3 *THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY* 488 (Henry P. Johnston, ed. 1891).

²⁷⁸ 2 U.S. 408 (1792).

tary of War, who could adopt or reject the judges' recommendations.²⁷⁹ The Court reasoned that the task assigned to the Article III judges was not of a judicial nature because the Act permitted the executive branch to review the courts' decisions, thereby resulting in an unconstitutional encroachment on judicial power.²⁸⁰

As a corollary, Congress cannot render a court opinion advisory by permitting executive branch officials to revisit it,²⁸¹ nor can it direct the result of a pending case.²⁸² In other contexts, the Supreme Court has held that Congress may not retroactively mandate that courts reopen final judgments. In *Plaut v. Spendthrift Farm, Inc.*,²⁸³ the Court invalidated section 27A(b) of the Securities Exchange Act,²⁸⁴ which was intended to reinstate shareholders' claims that had been dismissed after an intervening Supreme Court decision²⁸⁵ rendered their claims untimely.²⁸⁶ Congress is nevertheless permitted to "effectively moot a controversy notwithstanding its pendency before the courts" by amending an underlying law at issue in pending litigation.²⁸⁷

The two waivers invoked in *Winter* demonstrate the dangers of permitting the executive branch to take on a judicial role in acting to exempt federal agencies from environmental laws after courts have already ruled on the same issue. After the President waived the CZMA for the Navy's training exercises, the district court sharply questioned the constitutionality of the CZMA exemption on advisory opinion grounds, though it ultimately avoided ruling on that issue.²⁸⁸ Because the CZMA waiver may only be invoked *after* an adverse judicial decision, it essentially turns a court's decision into a first draft. If the President disagrees with a court's conclusion as to what the CZMA requires, he may effectively overrule that conclusion. While Congress may certainly legislate to overturn court decisions, this is not how the CZMA waiver operates, even if Congress has provided for the executive branch to exercise the exemption authority in the future.²⁸⁹ It is unclear why the CZMA waiver provision was written in this way, since no

²⁷⁹ See *id.* at 409.

²⁸⁰ See *id.* at 410 ("[B]y the constitution, neither the Secretary of War, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.").

²⁸¹ *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) ("Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch.").

²⁸² *United States v. Klein*, 80 U.S. 128 (1872).

²⁸³ 514 U.S. 211.

²⁸⁴ 15 U.S.C. § 78aa-1(b) (2006).

²⁸⁵ *Lampf v. Gilbertson*, 501 U.S. 350 (1991).

²⁸⁶ See *Plaut*, 514 U.S. at 218-19.

²⁸⁷ *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1432 (9th Cir. 1989) (quoting *Friends of the Earth v. Weinberger*, 562 F. Supp. 265, 270 (D.D.C. 1983)); accord *Plaut*, 514 U.S. at 214.

²⁸⁸ *Natural Res. Def. Council, Inc. v. Winter*, 527 F. Supp. 2d 1216, 1236-38 (C.D. Cal. 2008). The court avoided ruling on the constitutionality of the President's exemption because it concluded that the injunction "stands firmly on NEPA grounds." *Id.* at 1238.

²⁸⁹ Cf. Ira Bloom, *Prisons, Prisoners, and Pine Forest: Congress Breaches the Wall Separating Legislative from Judicial Power*, 40 ARIZ. L. REV. 389, 390 (1998) ("[F]inality has long been critical to the role of the judiciary and to curtailing the threat presented by executive or legislative revision. Forty years ago, the Court underscored the principle that judicial decisions cannot be revised or overturned by Congress or the executive branch.").

other waiver provision in an environmental law appears to require an adverse judicial ruling before it can be invoked. However anomalous the CZMA may be, it is no less suspect, particularly since the President's own actions in providing exemptions are not subject to judicial review.²⁹⁰

The district court in *Winter* challenged CEQ's use of its emergency exemption regulation following the court's initial injunction on similar grounds, though it did not ultimately reach a conclusion as to the constitutionality of CEQ's actions.²⁹¹ The court noted that there was a "serious question as to whether the CEQ, an executive body, is sitting in review of a decision of the judicial branch (and, in effect, crafting its own, alternative injunction)."²⁹² By this account, because the Navy was unhappy with the district court's injunction, it went to CEQ, which, through its creation of "alternative arrangements," effectively lifted the court's injunction and substituted its own plan. Furthermore, in crafting those alternative arrangements, CEQ only heard the Navy's arguments, not NRDC's.²⁹³ It thus assumed a quasi-judicial function but without the judicial obligation to hear both sides.

When a court decides whether an environmental law applies to federal action, it is obligated to hear those who wish to challenge the action, and its decision is reviewable by higher courts. By contrast, there is no rule against one part of the executive branch consulting another part of the executive branch without also consulting outside interested parties. Additionally, review of executive branch suspensions or exemptions may be more deferential, or, in the case of exemptions authorized by the President, nonexistent. Although, as I discuss below, there might be good reasons to limit judicial review of some waivers in very limited circumstances, a statute that both permits executive branch waiver of laws and limits the availability of judicial review without a compelling reason should be analyzed with an extremely skeptical eye.

V. ARE WAIVERS ADVISABLE ON A POLICY BASIS?

Although it might be difficult to successfully challenge waiver delegations on constitutional grounds, those delegations nonetheless remain troubling. On the most basic level, waivers of environmental laws can cause environmental harm.²⁹⁴ Beyond this obvious risk, other policy considera-

²⁹⁰ *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).

²⁹¹ *Winter*, 527 F. Supp. 2d at 1232. NRDC did not challenge the constitutionality of Section 1506.11 on its face.

²⁹² *Id.*

²⁹³ CEQ Letter, *supra* note 89, at 233.

²⁹⁴ See, e.g., Julia C. Webb, Note, *Responsible Response: Do the Emergency and Major Disaster Exceptions to Federal Environmental Laws Make Sense from a Restoration and Mitigation Perspective?*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 529, 552 (2007) (describing waivers imposed in the wake of Hurricane Katrina, including EPA's waiver of regulations regarding gasoline and diesel in all 50 states, and a waiver allowing local authorities to burn vegetative debris without prior notice).

tions counsel against the widespread use of waiver provisions to lift the application of environmental laws to the government or private parties. The limitations on judicial review contained in some waiver provisions remove a key protection for environmental interests, particularly since environmental lawmaking is traditionally at a disadvantage compared to pro-development interests in the political branches. Additionally, the excessive use of waivers threatens the deliberative process inherent in lawmaking by removing the legislature's obligation to weigh policy priorities and follow more transparent and accountable procedures for giving effect to those policy determinations. These considerations must, of course, be balanced against the legitimate need for waiver authority, which exists in a narrow band of situations such as natural disasters and other emergencies, where the executive branch needs to act swiftly to protect human health and safety.

A. *Concerns Counseling Against Waivers*

The goal of environmental protection poses unique challenges to the traditional framework for lawmaking and the separation of powers principles that undergird it.²⁹⁵ Two aspects of waiver provisions are particularly troubling, especially in the environmental law context: the lack of political accountability and transparency, and the limited judicial review that accompanies some provisions. The political branches often must balance environmental concerns against interests such as national security and economic development, yet it is difficult to quantify environmental costs and benefits in any way that permits the environment to compete with those interests in the balancing. Environmental law attempts to mitigate injuries and risks that are physically and temporally distant, continuing, uncertain, noneconomic, and caused by multiple factors.²⁹⁶ When pitted against more immediate and quantifiable goals in the lawmaking process, the environment loses. What's more, while there certainly is a lobby for environmental interests, industrial and pro-development groups have traditionally had more in-

²⁹⁵ See Richard J. Lazarus, Essay, *Human Nature, the Laws of Nature, and the Nature of Environmental Law*, 24 VA. ENVTL. L.J. 231, 240, 244–45 (2001) (“Environmental lawmaking within this constitutional framework and through these political processes is . . . systematically disadvantaged. It constantly runs into obstacles, sometimes pitting one branch of government against another, sometimes prompting conflicts between different parts of the same branch, and just as often generating conflicts between competing sovereigns . . .”); Robert V. Percival, *Separation of Powers, the Presidency and the Environment*, 21 J. LAND RESOURCES & ENVTL. L. 25, 25 (2001) (“Competition between executive, legislative and judicial actors has been particularly intense in the environmental policy area.”).

²⁹⁶ Lazarus, *supra* note 3, at 745–48.

fluence in the political branches.²⁹⁷ For a variety of reasons, environmental law remains poorly integrated into our legal system.²⁹⁸

Waiver delegations expand executive authority and contract legislative authority, thereby threatening to remove a significant element of accountability from environmental laws. Public choice theory argues that “delegation enables individual legislators to reduce the political costs of policies that injure relatively uninterested voters, without losing credit for benefits bestowed on those interest groups intensely enough motivated to trace the chain of power.”²⁹⁹ When an executive officer determines that a law or laws should not apply to a particular situation or contemplated course of action, she is making a determination that other policy objectives are more important than the goals embodied in the statute being waived. While Congress does, of course, acquiesce in the reordering of priorities by providing for such reordering in advance, and while the establishment of policy goals is as much an executive task as it is a legislative one, delegations effectively permit the executive branch to undo the legislative balancing of policy goals much more quickly and with less accountability to the public.

Although the purpose of waiver delegations is ostensibly to permit the executive branch to carry out Congress’s overarching policy goals, it is hypothetically possible that a delegate would act contrary to the stated policy preferences of Congress or the President.³⁰⁰ While such action would be more susceptible to challenge on arbitrary and capricious review, given how little public notice is required when delegates invoke their authority, even egregious contraventions of congressional policy might go unchallenged.

Relatedly, there is a risk that an executive agency that has been delegated waiver authority will be subject to “capture” by special interest groups, and will thereafter exercise its delegated authority in a way that is advantageous only to a small group of interests.³⁰¹ With respect to the heads of executive agencies, “[t]heir symbolic personification of their bureaus also makes the chiefs targets for demands and pressures.”³⁰² While legisla-

²⁹⁷ See, e.g., David A. Dana, *Existence Value and Federal Preservation Regulation*, 28 HARV. ENVTL. L. REV. 343, 372–73 (2004) (“[A]gency rulemaking and enforcement processes are influenced by the information offered by groups in the general population, and the ability of a group to harness and present information is, presumably, not unrelated to the size of the group and intensity of the preferences of its members.” *Id.* at 372 n.72); Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE L. & POL’Y REV. 67, 102 (1996). But see William W. Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, 21 WM. & MARY ENVTL. L. & POL’Y REV. 1, 32 (1997) (identifying electoral accountability as an influence on politicians’ choices, particularly with respect to the passage of major environmental laws in the late 1960s and early 1970s).

²⁹⁸ See A. Dan Tarlock, *Is There a There There in Environmental Law?*, 19 J. LAND USE & ENVTL. L. 213, 217 (2004).

²⁹⁹ Dripps, *supra* note 269, at 668 (citing Aranson et al., *supra* note 269, at 64).

³⁰⁰ See Dudley, *supra* note 4, at 283–84.

³⁰¹ See *id.* at 303–04. An executive officer may also be “captured” by her agency’s own mission. See *id.*

³⁰² HERBERT KAUFMAN, *THE ADMINISTRATIVE BEHAVIOR OF FEDERAL BUREAU CHIEFS* 137 (1981) (“People in government and out want to influence them not only because of what

tors are certainly susceptible to lobbying as well, there are more checks on any one legislator who has been improperly influenced, both in the greater number of lawmakers that must reach agreement and in the more rigorous set of procedures for making laws.

Most troubling of all, however, are delegations that limit judicial review, thereby reducing opportunities for groups outside the political branches to advocate for their positions on environmental issues in any meaningful way. There is no legal prohibition on *ex parte* communications within the executive branch, so that, for example, when the Navy approaches CEQ — as it did in *Winter* — to seek an emergency exemption to NEPA, CEQ is not required to hear arguments or receive evidence from NRDC or other interested parties. Likewise, the President need not consider any information beyond the Secretary of Commerce's request in granting a waiver under the CZMA.³⁰³ Normally, interested nongovernmental parties seeking to challenge federal action that involves intra-executive branch communication can bring suit in court, thereby ensuring the consideration of their arguments in at least one forum. But with respect to Section 1506.11 as applied in *Winter*, and to the CZMA provision on its face, both provisions interfered with the process of judicial review such that the executive branch, which was not required to take NRDC's arguments into account, had the last word.

That one member or section of the executive branch can make decisions based solely on information provided by another part of the executive branch without full judicial review is potentially destructive to the transparency and quality of executive action. Without the possibility that litigation will expose the weakness of a decision based solely upon arguments advanced by an executive agency, executive officials tasked with granting waivers will lack the incentive to consider more than just the government's position on a contemplated course of action. Not only is there no place for arguments by nongovernmental parties under this arrangement, there is little incentive for the executive official exercising the exemption or suspension authority to seek out such arguments. Of course, an agency that is subject to judicial review may be found to have acted arbitrarily and capriciously if it relies on only one side of the record.³⁰⁴ But if a statute limits judicial review, or if the executive official exercising delegated waiver authority is not subject to suit, the threat of litigation ceases to function as a check against arbitrary and capricious executive action.

In the past, the courts have played a key role in interpreting environmental laws during their early days and ensuring that their mandates were

they are legally empowered to do but also because their positions lend them stature and legitimacy and visibility that magnify their authority and their publicity value.”).

³⁰³ See 16 U.S.C. § 1456(c)(1)(B) (2006).

³⁰⁴ See, e.g., *Natural Res. Def. Council, Inc. v. Winter*, 518 F.3d 658, 686 (9th Cir. 2008) (raising question as to whether CEQ acted arbitrarily and capriciously), *rev'd*, 129 S. Ct. 365 (2008).

respected.³⁰⁵ The courts were particularly instrumental in developing a set of common law principles surrounding NEPA that were later embodied in regulations promulgated by CEQ to provide more substantive guidance regarding the law.³⁰⁶ Limitations on judicial review threaten to remove what little involvement courts retain in the process of environmental protection.³⁰⁷

The path from bill to enacted law is a lengthy one, involving advocacy by constituents, votes by legislators, and approval by the President. While there are many problems with the lawmaking process both in theory and practice, it is a “finely wrought” procedure painstakingly established by the Framers and calibrated to produce effective laws with transparency and accountability.³⁰⁸ The unnecessary delegation of waiver authority removes the opportunity for citizens to make their interests heard, and damages legislative accountability in the process.

B. *Legitimate Uses of Waivers*

This is not to say that waiver provisions should never exist or be invoked. Indeed, there are three principal ways in which such delegations are actually desirable. First, delegations are almost always made to executive officers possessing expertise in the field for which the delegation is made. The entire principle behind delegations of any type of discretionary authority is that “in our increasingly complex society, replete with complex and ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”³⁰⁹ An agency that is tasked with enforcing a particular statute is likely to be in a good position to judge when certain terms of the statute should not apply.³¹⁰ Of course, this benefit is only applicable to delegations of authority to create

³⁰⁵ See ROBERT G. DREHER, GEORGETOWN ENVTL. LAW & POL'Y INST., GEORGETOWN UNIV. LAW CTR., NEPA UNDER SIEGE 14–15 (2005), available at http://www.law.georgetown.edu/gelpi/research_archive/nepa/NEPAUnderSiegeFinal.pdf.

³⁰⁶ *Id.*; e.g., Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109 (1971).

³⁰⁷ However, the federal courts are admittedly an imperfect arena for the vindication of environmental grievances. Legal doctrines developed by the courts, such as Article III standing, property law, the dormant commerce clause, and corporate law, all limit courts' consideration of environmental claims. See Lazarus, *supra* note 3, at 749–57; Robert V. Percival, “Greening” the Constitution — *Harmonizing Environmental and Constitutional Values*, 32 ENVTL. L. 809, 829–56 (2002) (describing the Supreme Court's recent constitutional jurisprudence as posing barriers to environmental protection efforts). Environmental interests face something of a triple bind: they need the courts to stay open to compensate for environmental law's relative disadvantage in the political branches, but the courts are unlikely to reach the merits of environmental claims; when they do reach the merits, courts are likely to misunderstand the nature of environmental injuries and give environmental interests short shrift. The fact that courts do not quite live up to their historical role in the realm of environmental protection, however, does not make it acceptable for Congress to rearrange the balance of powers within environmental laws however it sees fit.

³⁰⁸ *Clinton v. City of New York*, 524 U.S. 417, 419 (1998) (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)); see also U.S. CONST. Art. I, § 7.

³⁰⁹ *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

³¹⁰ See Dudley, *supra* note 4, at 296–97.

internal waivers, not to delegations of external waiver authority. Where an executive officer is given broad discretion to suspend all laws, not just those in that officer's areas of expertise, there is a risk that the officer will not properly understand the implications of her actions.³¹¹

Second, delegations of waiver authority permit executive officers to take swift action when exigent circumstances require it. There may be situations where the executive branch is faced with some national emergency and must take immediate protective action to address it.³¹² In these situations, complying with all applicable laws or getting Congress to change the laws in order to permit the desired action would take so long that the emergency would have passed or worsened before the executive branch could take action. The executive branch needs some flexibility to avoid having to comply with every stricture of every environmental law. Allowing executive branch waiver of laws — and permitting the official to whom the waiver authority is delegated to determine when the applicable conditions have been satisfied — grants the flexibility to act swiftly when necessary.

Third, delegations of waiver authority permit Congress to legislate without having to predict the future. Congress cannot be expected to pinpoint in advance every situation in which full compliance with the requirements of environmental laws is not appropriate.³¹³ Many emergencies are by definition unanticipated, their details and impacts impossible to predict before they happen. If Congress is required to establish guidelines and procedures for the executive branch to follow in every abnormal or urgent set of circumstances, it will undoubtedly fail to account for less expected but no less urgent situations, and it might call for suspensions or exemptions that turn out to be unnecessary. If the executive branch possesses more expertise regarding what constitutes an emergency and how to handle it, then it makes sense to grant some discretion to an executive officer to make the determination as to whether waivers are warranted.

Natural disaster response is a classic example of an area where the executive branch ought to have at least some discretion to rebalance competing policy goals by waiving environmental laws. In the aftermath of Hurricanes Katrina and Rita in 2005, federal agencies including the Fish and Wildlife Service, the Corps, and the Federal Emergency Management Agency all took advantage of various means to avoid compliance with environmental laws as written in order to provide disaster relief such as shoring up levees and restoring infrastructure.³¹⁴ CEQ issued a memorandum to federal agency NEPA contacts instructing agencies to contact CEQ if alternative arrange-

³¹¹ See *id.*

³¹² See Ehrlich, *supra* note 47, at 301–02 (arguing that Congress should encourage federal agencies to more fully utilize CEQ's emergency exemption provision).

³¹³ *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) (noting that “[t]he legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation”).

³¹⁴ See Webb, *supra* note 294, at 548–51.

ments for NEPA compliance were necessary due to emergency circumstances.³¹⁵ Factors CEQ and agencies were to consider when creating alternative arrangements included the “nature and scope of the emergency; actions necessary to control the immediate impacts of the emergency; potential adverse effects of the proposed action; components of the NEPA process that can be followed and provide value to decisionmaking . . . ; duration of the emergency; and potential mitigation measures.”³¹⁶ Agencies also took advantage of the Stafford Act,³¹⁷ which is designed to enable quick and orderly federal, state, and local responses to disasters and which excludes certain disaster response actions from NEPA compliance following a presidential declaration of emergency.³¹⁸ There was also discussion in Congress of making available measures beyond the standard emergency waivers federal agencies had used.³¹⁹ The proposed Louisiana Katrina Reconstruction Act³²⁰ would have exempted certain emergency projects from NEPA and other environmental laws entirely for two years.³²¹

The example of natural disaster response demonstrates that some flexibility to avoid compliance with every stricture of every environmental law is necessary in order for the federal government to respond quickly when human lives and safety are threatened. This does not mean, however, that waiver provisions are always appropriate, or that they do not come with costs even where their use is desirable. Even where suspension of environmental laws immediately following a natural disaster is necessary to protect extensive loss of life and property, such suspension can cause further envi-

³¹⁵ Memorandum from Horst G. Greczmiel, Assoc. Dir. for NEPA Oversight, CEQ, to Federal NEPA Contacts, Emergency Actions and NEPA (Sept. 8, 2005), available at http://gc.energy.gov/NEPA/nepa_documents/TOOLS/GUIDANCE/Volume1/4-16-emergencyguidance_sept05.pdf. Recognizing the potential conflict between emergency responses and long-term environmental protection, Greczmiel cautioned:

This is the time to respond and use NEPA to facilitate, not slow down or hinder, actions necessary to preserve life and resources. It is also the time to demonstrate our continuing commitment to environmental stewardship by ensuring that response and revitalization activities do not inadvertently create unnecessary future environmental problems.

Id. at 2.

³¹⁶ *Id.*, Attachment 1 (“Emergency Alternative Arrangements under the National Environmental Policy Act”), at 2.

³¹⁷ Robert T. Stafford Disaster Relief and Emergency Assistance Act (Disaster Relief Act of 1974), Pub. L. No. 93-288, 88 Stat. 143 (1974) (codified in scattered sections of 42 U.S.C.).

³¹⁸ See 42 U.S.C. § 5170a (2006) (permitting the President to coordinate federal, state, and local disaster relief responses and provide resources following a major disaster); *id.* § 5170b (identifying specific disaster relief activities in which federal agencies may engage at the direction of the President); *id.* § 5172 (permitting the President to make contributions to state and local governments for repair, restoration, reconstruction, or replacement of public and certain non-profit facilities damaged or destroyed by a major disaster); *id.* § 5173 (authorizing the President, through federal agencies, to clear debris and wreckage from major disasters); see also LUTHER, *supra* note 28, at 3.

³¹⁹ See LUTHER, *supra* note 28, at 7–9.

³²⁰ S. 1765, 109th Cong. (2005).

³²¹ See *id.* §§ 501, 502, 652; see also LUTHER, *supra* note 28, at 7–8.

ronmental harm in the future.³²² The next section explores how to balance these competing interests.

VI. A WAY FORWARD: CRAFTING BETTER WAIVER PROVISIONS

It is clear from the discussion above that delegations of waiver authority, while problematic, are valuable in some ways and are probably inevitable in an administrative state. Given that waiver provisions can serve a valid purpose, our goal should be not to eliminate them, but to craft them in such a way that they are responsive to constitutional limits and policy concerns. This Part mirrors the structure of the typology outlined in Part II.B: I discuss who should be delegated suspension waiver authority, what substantive criteria and procedural requirements ought to operate as limits on the exercise of authority, and what provisions should be included for judicial review. Since each delegation must account for its statutory context and the purposes for which it will be invoked, it is impossible to prescribe specific language for delegations to incorporate. Nevertheless, more generally applicable principles have emerged from my analysis, and I describe them here.

A. Location of Authority Within the Executive Branch

In general, Congress must “clearly delineate[] . . . the public agency which is to apply” a delegation of suspension or exemption authority.³²³ A constitutionally acceptable delegation will therefore identify the section of the executive branch that is to be given discretion to suspend laws or create exemptions. There is a risk that delegations of waiver authority will limit accountability and result in underdeterrence and disincentives to exercise the delegated authority reasonably. However, the location of delegated authority within the executive branch — whether agency head or commission — can mitigate this risk.

First, Congress should delegate waiver authority to cabinet-level officials, since they are generally more accountable and their actions are therefore more transparent. This way, Congress can recognize the role agency heads play in filling in the policies of environmental laws, while still ensuring that the executive exercise of discretion does not go unchecked. Commissions such as the Endangered Species Committee, which is composed of high-level executive branch officers, can also improve accountability, particularly when combined with significant procedural requirements such as holding hearings or preparing reports. Commissions have the added benefit of including executive officers with a variety of perspectives, so that multiple and competing policy interests are represented and balanced in the pro-

³²² See Webb, *supra* note 294, at 548–53.

³²³ *Mistretta v. United States*, 488 U.S. 361, 372–73 (1989).

cess of deciding whether to exercise waiver authority.³²⁴ There is a risk, however, that a commission will be less able to act quickly than a single delegate, which could be problematic in a true emergency.

Second, delegates should have expertise in the subject matter in which the waiver operates. That way, officers in charge of creating a waiver are likelier to fully understand both the technical and policy implications of exercising their delegated authority. Of course, this is not an issue with internal waiver authority, which is generally delegated to the executive officer in charge of the agency tasked with enforcing the statute within which the waiver provision resides. And unless a delegation of external waiver authority is limited to statutes over which the delegate has authority or expertise, this criterion is not feasible with respect to external waiver provisions. For the reasons outlined above, however, the fact that external waiver provisions empower delegates to exercise authority over laws in areas they may know little about ought to make us especially suspicious of those provisions.

Third, with respect to delegations that do not restrict judicial review, delegates themselves should be subject to judicial review, so that any actions they take pursuant to their delegated authority may be tested by the judiciary. The location of authority within a specific part of the executive branch makes a difference, particularly with respect to delegations that do not limit judicial review of claims brought under the APA.³²⁵ Shielding waivers from challenges in the courts by vesting waiver authority in figures not subject to judicial review removes a crucial means for ensuring that there is ample justification for exercising the delegated authority. In particular, the President is immune to suit for acts committed while in office,³²⁶ is not subject to arbitrary and capricious review under the APA,³²⁷ and need not comply with NEPA requirements, since he is not considered a "federal agency."³²⁸ When the President is granted authority to waive or suspend laws, he may thus do so without having his actions subjected to the same level of scrutiny as if another member of the executive branch had taken the same action. For instance, President Bush's grant to the Navy of a waiver under the CZMA noted, in a single paragraph with minimal elaboration, that compliance with the CZMA's consistency requirement would undermine the Navy's training needs and that the Navy's use of MFA sonar in its training exercises was in the paramount interest of the United States.³²⁹ In contrast, CEQ's emergency exemption for the Navy contained pages of findings that, while repetitive of the Navy's own arguments in briefs and affidavits, at least set forth in some

³²⁴ For example, the Secretary of the Army, whose goals focus on national defense, and the EPA Administrator, whose goals focus on environmental protection, both serve on the Endangered Species Committee. 16 U.S.C. § 1536(e)(3) (2006).

³²⁵ See 5 U.S.C. § 701 (2006).

³²⁶ See *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

³²⁷ See *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).

³²⁸ See 40 C.F.R. § 1508.12 (1978).

³²⁹ Presidential Exemption from the CZMA, *supra* note 90.

kind of detail the reasons why alternative arrangements for compliance with NEPA were necessary.³³⁰

B. Substantive Criteria

With respect to substantive criteria that guide the exercise of waiver authority, it is likely that the more criteria that are in place and the more specific they are, the less arbitrary and more predictable the exercise of delegated authority will be. Accordingly, Congress should aim to specify as narrowly as possible the substantive criteria that must be met before the delegated authority can be invoked. Congress must also take into consideration the likelihood that the delegated authority will be brought to bear on unforeseen circumstances, and whether any key terms in the substantive criteria have already been defined within the statute or through agency-promulgated regulations.

The ESA general exemption, for example, provides a list of specific substantive requirements that must be satisfied before the Endangered Species Committee will grant an exemption.³³¹ In contrast, the REAL ID Act's waiver provision, while specific in its goal of furthering the construction of the United States-Mexico border fence, is not at all clear as to what constitutes a circumstance where it is necessary to suspend a given law.³³² Such a vague guiding principle, combined with such a broad authority to suspend any law, raises serious nondelegation questions.

Instead, Congress should define the policy underlying the delegation as narrowly as it is able, particularly when the delegated authority is broader (e.g., to suspend multiple laws, not merely create exemptions to one) or the procedural requirements are less onerous. Specificity in substantive criteria also helps to maximize the transparency of executive invocations of suspension and exemption. The more explicit the guidance given to the executive branch, the more individuals whose rights might be affected or governmental agencies whose conduct is governed by the laws in question will know what to expect in terms of when statutes will apply.

As described above, however, some substantive criteria need flexibility. For instance, what constitutes an emergency, or a national security need, or the paramount interest of the United States, will not always be the same thing. Yet even "emergency" as a criterion can be narrowed to account for natural disasters, national security needs, or the distinction between situations caused by an actor and situations outside that actor's control, as was litigated in *Winter*.³³³ Indeed, statutes that already define "emergency" ac-

³³⁰ CEQ Letter, *supra* note 89.

³³¹ 16 U.S.C. § 1536(g) (2006).

³³² See REAL ID Act of 2005 § 102, reprinted in 8 U.S.C. § 1103 note (2006) (Improvement of Barriers at Border).

³³³ Compare *Natural Res. Def. Council, Inc. v. Winter*, 527 F. Supp. 2d 1216, 1228 (C.D. Cal. 2008) (rejecting the Navy's argument that its need to conduct training exercises constituted "emergency circumstances" on the ground that "[t]he Navy's current 'emergency' is

cordingly limit the category of situations that can be defined as emergency circumstances triggering a suspension or exemption.

If an emergency exemption is intended to preference only certain policy goals over environmental protection in emergencies, Congress should not shy away from specifying the underlying cause or nature of the emergency circumstances that trigger an exemption. Of course, criteria should not be so specific that the executive branch official exercising the authority cannot invoke it for some unforeseen situation where necessary. For instance, CERCLA contains a nondiscretionary delegation that suspends liability in part for remedial actions undertaken in emergencies.³³⁴ EPA has defined “emergency” for purposes of remedial response as “a release or threat of release *generally requiring initiation of a removal action within hours* of the lead agency’s determination that a removal action is appropriate.”³³⁵ This type of definition is ideal: it retains flexibility by not identifying the causes or specific consequences of an event giving rise to an emergency, but rather defines emergency in terms of what response an event will require from the executive branch. It therefore allows for the suspension of liability in wholly unanticipated circumstances, but only where environmental, health, and safety impact is so severe that a removal action is necessary within hours. This combination of flexibility and specificity avoids tying the hands of pertinent actors while ensuring that they act within the goals of the original statute.

C. *Procedural Requirements*

The more relaxed the substantive criteria that must be satisfied before waiver authority may be invoked, the more stringent the procedural requirements should be (and vice versa). This sliding scale is evident in the numerous exemptions to the ESA, which trade off procedural and substantive requirements.³³⁶ One of the major drawbacks to waivers is that they circumvent a “finely wrought” legislative process that is designed to allow for public input while reducing the risks of capture and improper influence. Putting procedure back into waivers injects at least some measure of transparency into the process, even if it falls short of that guaranteed by conventional means of lawmaking.

Of course, onerous procedural requirements can slow down government response to the kinds of time-sensitive situations for which waiver delega-

simply a creature of its own making”), with *Winter* Petition, *supra* note 89, at 24–25 (arguing that an emergency may be foreseen as well as unforeseen, and that the fact that an actor contributed to an outcome does not mean that the resulting outcome is not an emergency).

³³⁴ 42 U.S.C. §§ 9607(b), (d) (2006).

³³⁵ National Oil and Hazardous Substances Pollution Contingency Plan, 53 Fed. Reg. 51,394, 51,396 (proposed Dec. 21, 1988) (emphasis added).

³³⁶ 16 U.S.C. § 1536(g) (setting out a lengthy set of procedural requirements for a general exemption); *id.* § 1536(p) (setting out more lenient requirements where the President has identified an emergency and the need to prevent the “recurrence of . . . a national disaster and reduce the potential loss of human life”).

tions were made in the first place. Fast-track review programs might strike a balance between requiring the government to jump through endless hoops and permitting the government to act before considering legal requirements and the goal of environmental protection.³³⁷ In the case of emergency exemptions, such a program might leave executive discretion to craft exemptions in place, but provide for independent review of whether an emergency exemption is warranted and whether any alternative arrangements are the least harmful to environmental protection or other goals.³³⁸ Alternatively, limited public consultation, such as public hearings on the exemption or suspension decision in the affected area, could be required.³³⁹

Another component of procedural requirements, related to the location of delegated authority, is the availability of review by a part of the executive branch that does not itself exercise the authority to suspend laws. As amended by the REAL ID Act, IIRIRA grants the Secretary of Homeland Security “sole discretion” to determine what laws need to be waived to “ensure expeditious construction of” the border fence.³⁴⁰ The Secretary thus interprets the scope of her own authority. Particularly where waiver provisions also limit judicial review, locating discretion solely with the decision maker renders decisions to suspend laws or create exemptions practically unreviewable. Provisions for intra-executive review create a backstop to guard against potentially limitless authority. For example, in the ESA, the Endangered Species Committee decides on exemptions based on a report prepared by the Secretary of the Interior.³⁴¹ Again, where delegations are particularly broad, such as the delegation of discretion in the REAL ID Act to waive *all* laws, it is essential to have some check on the exercise of discretion by a single executive officer.

D. *The Role of Judicial Review*

The relationship among the judicial, executive, and legislative branches in the context of environmental law is an uneasy one. We cannot assume that the mere existence of judicial review will have a meaningful impact on the outcome of attempts to vindicate environmental claims. The availability of judicial review is nevertheless essential to properly maintaining separation of powers, and on some accounts, it may be required to satisfy the requirements of the nondelegation doctrine.³⁴²

Where immediate action by the executive branch is not required, at least some, and preferably full, judicial review should remain available.

³³⁷ See Robert Orsi, Comment, *Emergency Exemptions from NEPA: Who Should Decide?*, 14 B.C. ENVTL. AFF. L. REV. 481, 514–16 (1987) (proposing an expedited EIS process to be used in emergencies).

³³⁸ See *id.* at 515.

³³⁹ See *id.* at 516.

³⁴⁰ REAL ID Act of 2005 § 102(c)(1), *reprinted in* 8 U.S.C. § 1103 note (2006) (Improvement of Barriers at Border).

³⁴¹ 16 U.S.C. § 1536(g)(5).

³⁴² *County of El Paso* Petition, *supra* note 149, at 13.

However, even delegations that do not expressly curtail judicial review may not allow for suspensions or exemptions to be challenged in court if they delegate such authority to the President, who enjoys immunity and is not subject to arbitrary and capricious review under the APA.³⁴³ Accordingly, delegations of suspension and exemption authority should be made to executive officers whose actions are subject to judicial review.

The combination of external waiver provisions allowing delegates to suspend a broad array of laws with limits on judicial review represents an extreme deviation from the system of shared and separate powers envisioned by the Constitution. Because the transfer of power to the executive branch is already so great, further restriction of the other two branches is inappropriate. At the very least, with respect to external waiver provisions, Congress might prohibit full suspension of the APA, such that some opportunity for public input through a hearing or the creation of a record is still available, even if full judicial review is not.

Although the combination of enhanced executive and contracted legislative and judicial authority is a troubling one, the process of judicial review invariably slows down executive action, thereby stymieing the goal of waiver provisions to facilitate swift action where necessary. In a genuine emergency, the availability of full judicial review could hinder the federal government's ability to respond to emergencies that threaten safety or lives. To the greatest extent practicable, however, judicial review should remain open, and waiver provisions that are not intended to govern in exigent, time-sensitive circumstances should not limit judicial review. With respect to the REAL ID Act's waiver provision, while illegal immigration certainly presents pressing issues, Congress has not demonstrated that construction of a border fence is so immediately necessary that legal challenges to construction should be all but foreclosed. Where Congress does wish to limit access to the courts, it should be able to demonstrate that the circumstances under which it anticipates a delegation will be invoked will require swift action that the judiciary is completely unable to accommodate.

VII. CONCLUSION

In an ideal society, laws might govern universally, without a need for special exceptions. In the real world, of course, laws cannot account for every future situation, nor do we necessarily want them to. Provisions that allow for a member of the executive branch to waive the application of a law or suspend the application of multiple other laws function as a safety valve and allow Congress to legislate for most normal situations with the knowl-

³⁴³ See *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992) (“Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President’s performance of his statutory duties to be reviewed for abuse of discretion.”).

edge that the operation of the laws can be adjusted where the situation demands it. These provisions also acknowledge the reality of the modern administrative state and the role that executive agencies play in both formation and implementation of policy. Additionally, waiver provisions permit swifter action where necessary, such as in emergencies like natural disasters, where full-on legislation would be unfeasibly time-consuming.

Yet waiver provisions also threaten to disrupt the constitutional separation of powers framework, impermissibly delegate broad legislative functions to the executive branch without strong limits, and cut courts out of the process of environmental protection. On top of this, such provisions are especially problematic in the environmental law context, where the separation of powers is already tenuous and environmental interests are not well protected. This Article has described two recent sets of cases in which executive branch officials have exercised broad discretion with restricted judicial involvement to the disadvantage of the environment. More stringent limitations on the crafting and exercise of waiver provisions are necessary in order to ensure that environmental protection does not always lose out in the balance against other national interests.