"W" FOR WAR AND WEDGE?
ENVIRONMENTAL ENFORCEMENT AND THE SACRIFICE OF AMERICAN SECURITY—NATIONAL AND ENVIRONMENTAL—TO COMPLETE THE EMERGENCE OF A NEW "BELTWAY" GOVERNING ELITE

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Dan Meyer¹
Everett E. Volk²

I. Nine-Eleven (“9-11”): Fueling the Dynamo, Citizens
Sacrificed, and American Consumers in Denial

A. The Bush Administration

“But where . . . is the King of America? . . . In America the law is
king. For . . . in free countries the law ought to be king; and there
ought to be no other.”³

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(PEER). J.D., Indiana University School of Law-Bloomington, Indiana (1995); A.B.,
Cornell University (Government & Naval Science, 1987). Mayor, Town of Burkittsville,
Maryland (2001-2002); Surface Warfare Officer, U.S. Navy (1987-1991), including
combat service during the Persian Gulf War. His former Gun Turret holds the current
record for naval offshore gunnery—distance and accuracy—achieved with his crew
onboard battleship IOWA (BB-61) in 1989. In 1991, he served onboard the flagship
LASALLE when it assumed USS TRIPOLI’s minesweeping duties off Kuwait and batt-
tled Iranian pirates at Nahkilu Island. Mr. Meyer wishes to thank his mother, Mary
Kinney Meyer, and the Idleman family of Morristown, New Jersey, for their charity and
resolve in seeing him transition from “war” to “peace” following the Desert Storm.
And special thanks goes to four wizened Cornell sachem: George McTurnan Kahin,
Isaac Kramnick, Walt LaFeber, and Ted Lowi who all softly and not-so-softly chided
their charges to “speak truth to power.”

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orgetown Law Center, J.D. Candidate 2005 provided patient editing for this Article.
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(1776). What constitutes, or is essential to, the “rule of law” is a contested and mul-
tifaceted question. For a discussion of the concept in modern constitutional law, see
Richard H. Fallon, Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97
The authors wish to note from the outset that this is no war protest, but rather a protest and polemic of the means by which those who have little or no record of national security or environmental public service have been permitted to push this Republic into a war of speculative national and environmental security return, at best. Return in question, the costs are now rising in currencies diverse: financial, international (good will), and environmental. It is this last cost which is the primary theme of this work. But the authors combine national and environmental security concerns liberally because, they argue, the two are intrinsically combined. It does no good to win on the wing if one has soiled one's nest before, during, and after the flight.

And there should be no doubt that we support the troops, especially in the brewing witch hunt of recent days. It is possible to support the sailors, soldiers, marines, and aircrews fighting this war without wholly endorsing the convoluted decision-making which caused the war and its impact on American environmental law and policy. We support the troops because we recognize what few, if any, members of the American élite recognize: these troops are paying a disproportionately high degree of this war's cost while those who shunned national service in their youth make the cost determinations regarding the war. We would include in the ranks of those decision-makers the President of the United States, but not his Secretaries of State and Defense. Below Messieurs Powell and Rumsfeld, the numbers of veterans—combat tested or otherwise—dwindles to an alarming degree.

With respect to the increasing environmental cost of the Second Resource War, it is imposed domestically as well as internationally. The first signals that there would be a 9-11 attack probably came as Vice President Gore and Governor George Bush were fighting for the Election 2000 return. The President's control over the foreign policy process centralizes American government at a time when the sophistication of world trade—global carriage—has accelerated the event/reaction cycle of government to unparalleled

4. Calling the present war the "Second Gulf War" is deceitful. One ought to distinguish between the ideological engagements of the Cold War—the last of which were the Balkan and Somalian campaigns—and the waging of war to secure favorable pricing of the resources necessary to supply the post-Cold War's "New World Order" (a phrase coined by the first Bush Administration just prior to the First Resource War (1990-1991)). But even if one rejects the "Blood for Oil" argument, the War on Terrorism is also based on an economic justification. Terrorism damps consumer confidence, which leads to less consumer spending, which has been the primary engine—or Dynamo—of the American economy since the mid-1990s.
levels of speed. This has forced the American government to new levels of expertise (or lack thereof).\(^5\)

9-11 allowed the Bush Administration to focus, as events moved toward the Executive Branch's area of expertise.\(^6\) This overall demand for higher performance is predicated on the skills required of governments in general. Both candor and prudence are qualities that have been lacking in the Executive Branch. Actions over the past twenty-four months have been predicated on expectation of prerogative or right. As a result, the American people have gone without information essential to deciding whether they, the sovereign, endorse the war option and under what conditions they endorse that option.\(^7\) The Bush Administration has powered its drive to war on the emotional response to 9-11. Candor, the lack of which injured the Clinton-Gore team, turns out to be the missing characteristic of the Bush-Cheney team, as well. But what of prudence? Has this holding of cards served a national security inter-

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\(^5\) A broad consensus has developed in political science literature on the extent to which Americans view the President as the center of government and invest their hopes and expectations for governance primarily in his person. See, e.g., Theodore J. Lowi, The End of Liberalism: The Second Republic of the United States 302 (2d ed. 1979); Bert A. Rockman, The Leadership Question: The Presidency and the American System xvi (1984); Peter J. Spiro, Old Wars/New Wars, 37 WM. & MARY L. REV. 723, 725 (1996) (reviewing Louis Fisher, Presidential War Power (1995) and William C. Banks & Peter Raven-Hansen, National Security Law and the Power of the Purse (1994), and listing the ingredients of a successful foreign policy process as precision, flexibility, dispatch, secrecy, and leadership); see also Theodore J. Lowi, Presidential Power and the Ideological Struggle over Its Interpretation, in The Constitution and the American Presidency 227, 238-39 (Martin Fausold & Alan Shank eds., 1991) (describing a growing “fast track” of powers that are better exercised by the executive where “secrecy, unilateral action, energy, commitment, and decisiveness” are important, and time is of the essence).

\(^6\) Recall the wobbly state of the Administration on the eve of 9-11. Had the attack not occurred, the Bush Administration may have stagnated indefinitely. See Karen DeYoung & Amy Goldstein, Senate Democrats Say Nominees Could Lose Confirmation Battles, WASH. POST, Sept. 6, 2001, at A02 (reporting on the uncertain state of the Schregardus and Reich appointments before Congress.).

\(^7\) Noticeably absent from the current debate is the Legislative Branch, perhaps cowed (as has been the modern tradition) by an attack from abroad. It is interesting that older Congresses—during the American Revolution, the War of 1812, the Mexican War, the Civil War, the Spanish-American War, and the First World War—were more active in our war planning. Expectations of congressional resurgence with the end of the Cold War may be premature. See Spiro, supra note 5, at 723 (“With the end of the Cold War, Congress has become increasingly assertive on the foreign policy stage.”). Certainly, the failure of the “Shock and Awe” strategy so early in the Second Resource War and fractures between the Secretaries of State and Defense over who to blame—the civilians under Rumsfeld or General Tommy Franks and his team—seem to underscore tensions which the Senate ought to have noted and acted on in its foreign policy role.
est? Though it would be unwise for President Bush to sit for his White House portrait before the end of the war, when he does commit his visage to oil and canvas he may want to orchestrate the Renaissance pose of a predecessor with similar dynastic ambitions:

In Renaissance art there is a wonderful representation of prudence as a three-headed man looking to the left, the right, and straight out of the picture at the viewer. Prudence seeks to look at the present in light of what has gone on in the past and with an eye to the future. Prudence understands that, at any given moment, it must work with the set of limits and opportunities it has inherited from the past to reach future goals that themselves cannot be fully defined now. Our past is not simple enough to be reduced completely to rules or principles. Our present is complex. Our future is uncertain. Mere technical knowledge is not enough. A sense of what is politically feasible and promising is also essential. That sense must be gained by practical experience in politics and in the complexities and uncertainties of the human condition.8

Professor Idleman’s cite to Shapiro is recalled not so much for what is says about the President’s practice of prudence, but more for the historical irony that flows from it.

The subject of the most famous example of that artistic technique—the Triple Portrait of Charles I (1635) by Antoon Van Dyck—acted with imprudence when assessing the Forced Loan of 1626. The loan, litigated in Darnel’s Case (The Five Knights’ Case), 3 How. S.T. 1 (K.B. 1627), led to a milestone of the English constitution—the first conferencing between Lords and Commons. At that conference, Sir Edward Coke, a justice noted for candor, furthered Parliament’s constitutional aeneid by proposing the seminal Petition for Right (1628).9

Prudence is more than holding one’s information close, close enough to control the Washington message; prudence entails understanding the limits of one’s situation. In the present season of war drums, limitations misunderstood by the President include fiscal

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and environmental limitations. Though he rules through a self-expectation of right—even dynastic right—procedurally conferred by the United States Supreme Court, President Bush cannot see the limits of his own situation. Van Dyke chose to flatter another similarly situated world leader, Charles Stuart, by portraying him in a pose reflecting prudential characteristics to which he might have aspired, but certainly never reached. Charles Stuart lacked prudence, and lacked an understanding of the limitations of his office. George Bush came to the White House with much the same naïveté, and his advisors have lacked a sufficient grounding in the public interest to assist him in overcoming this obstacle.

And so we come to the critical question: here, at the midpoint of the first George W. Bush Administration, does “W” stand for “war” or “wedge” or both? In formulating this question, the “wedge” may be both the separation of the President from the political base he needs in order to win a second term, and his use of this war as a wedge to further a realignment of American government. Either way, American environmental security is caught in the middle. The President’s consensual sliver spoke overwhelm-


11. As bad as our fiscal situation has become under President Bush, any similarity with Charles Stuart is relative to the situations both men inherited. Stuart’s actual public finance predicament was much worse, though his penchant for war—both invited and uninvited—does seem to match our current President’s appetite for war in Afghanistan, Iraq, the Philippines, and, perhaps, in the Koreans.

12. For an erudite treatment of prudence and candor as it is exercised in the Judicial Branch, see Idleman, supra note 8. With respect to the shift from the public to the private interest following Election 2000, see, for example, Federal Judge Approves California Desert Protection Settlement, ASCRIBE NEWSWIRE, Mar. 22, 2001, 2001 WL 288985. “Recognizing the desert agreements as ‘within the public interest’ and ‘fair, equitable and reasonable,’ Judge William Alsup on Tuesday approved the lawsuit settlement signed January 17 between the Center for Biological Diversity, Public Employees for Environmental Responsibility, Sierra Club and the U.S. Bureau of Land Management [BLM].” Federal Lawsuit Settled to Protect 24 Endangered Species on 11 Million Acres of Public Land in California Desert, ASCRIBE NEWSWIRE, Jan. 18, 2001, 2001 WL 2884834.

13. The rush to realign government operations and thereby funnel money to the President’s supporters among private sector contractors has led to a proposed vitiating of the nation’s environmental laws. Leaders who placed their private security ahead of public security in avoiding Vietnam service are now placing their private financial security, through the need to build political donor bases, ahead of the public’s environmental security. See, e.g., Editorial, Above the Law: Bush’s Environmental Radicalism, MINN. STAR-TRIB., Feb. 10, 2003, at 10A, 2003 WL 5528555.

Now, with war in Iraq on the horizon, Bush hopes to gain the remainder of the blanket exemptions he was denied last year. To that end, the Defense Department organized a “forum” last week in which generals derided such imaginary
ingly in favor of an all-Republican national government in the November 2002 elections. The impact on the American environment and environmental law will be felt for generations to come, as a Republican-dominated Congress moves to ratchet back existing environmental statutes and as the Chief Justice and at least one Associate Justice contemplate leaving the high Court.\textsuperscript{14}

1. Practicing the Preaching: Oligarchy Replaces Republic as Metaphor

[T]he country deserves governance and if you don't assert the sovereignty and legitimacy of your administration from the outset, you undermine your ability to achieve your goals.\textsuperscript{15}

In a moment of candor to a Washington Post journalist, a Bush Administration insider revealed the deeply personal nature of George Bush's presidency. Having been granted the presidency by the U.S. Supreme Court, the President felt he had to assert his sovereignty—not the American people's sovereignty, not the sovereign scenarios as holding up a battle-bound destroyer until a permit for disturbing sea lions could be obtained.

No such thing has ever happened, and no such thing ever would. \textit{Id.; see also} Charles F. Bostwick, \textit{Death Valley Fight Looms; Air Safety, Environmental Conflict}, \textit{DAILY NEWS} (L.A.), Sept. 17, 2001, at AV1 ("Hosting military facilities is a major departure from the mission and philosophy of the National Park Service," said Frank Buono, a PEER board member. "For those who know the Saline Valley, it is a special place: awesome scenery in the day and vast dark skies at night.").

14. The extremes to which conservatives will vilify "the Welfare state" while slicing pork cutlets for themselves are becoming more and more pronounced the longer they are in power at both the federal and the state level. "Beach renourishment" is one such entitlement, producing what the left could call "Sand Queens" where the right once denounced "Welfare Queens." \textit{See} Editorial, \textit{Sandblasting}, \textit{VERO BEACH PRESS J.}, Jan. 5, 2003:

The benefit of the Ambersand project to these "select few homeowners unwise enough to build or purchase homes within feet" of ocean tides, PEER asserts in its letter, is outweighed by the potential harm to the reefs and the expense to taxpayers. But those homeowners are also taxpayers, major taxpayers in this area. They may have been unwise to live on the oceanfront, but they've a legal right to be there. And not only does the impact of erosion on humankind count. The impact on animal life of no action to slow chronic erosion can be considerable as well.


of sovereignty as defined within the United States Constitution, but George Bush's sovereignty. The placement of sovereignty in the People and the recording of that act in a written Constitution was a uniquely American improvement upon the republican form of government. Our commitment to that rule of law is now open to question. If the American people find themselves subjects rather than citizen-rulers in a half-century or so, Election 2000 may well be the moment historians select as the turning point when the American republic reverted to older, European principles. Instead of the myriad of electors who convened once in a lifetime to elect a Holy Roman Emperor, the United States watched quietly as the living Constitution was altered by a Supreme Court of the United States comprised of nine electors.\(^\text{16}\)

The personalization of sovereignty follows on the heels of an older tradition of personalizing the presidency.\(^\text{17}\) This personalization raises the question of whether the United States is still committed to the rule of law, rather than the rule of men. When a nation permits such acts of personalization and the consequent alterations they make in the basic law, or constitution, of the republic, that nation triggers a series of events which force decision-makers to choose between the personal, or private, interest and the public interest. Following Election 2000, American environmental law and policy has been subjected to just such a series of events as the nation has turned to its national security concerns. National and environmental security are both now the hegemonic policy concerns in Washington, D.C. With respect to the latter, it is being managed so as to convert the former into a means of consolidating power following Election 2000.\(^\text{18}\)

\(^{16}\) See supra note 10 and accompanying text (discussing the 2000 election).


But environmentalists and their supporters in Congress accused the Bush administration of trying to take advantage of a wartime situation. They also charged President George W. Bush with ignoring his principle of giving states a say in policy changes that seriously affect them, and breaking a campaign pledge to make federal agencies comply with the same laws that private industry must obey.

The Defense Department "has not established the need for these significant exemptions from federal environmental laws and has failed to consider the views of state and local interests," said Rep. John D. Dingell (D-Mich.), ranking Democrat on the House Energy and Commerce Committee, which has jurisdiction over pollution laws.
Personalization of the presidency is leading to a privatization of government. The potential for the contamination of public interest by private interests was identified early in our constitutional history by James Madison:

... The Federalist No. 10 is most famous for its discussion of faction and its description of society as a multiplicity of competing interests. But Madison obviously was not the first to discover the problem of private interest in government. Political debate in the Enlightenment had long been haunted by the specter of parties and factions and interests, apparitions inherited from classical and Renaissance writers. No one who had studied Harrington or Hume or Bolingbroke—or, for that matter, Shaftesbury, Molesworth, Hoadly, Trenchard and Gordon, Priestley, Burgh, or any of the other English radicals who were popular in America—would have been surprised to hear that men might pursue their own interests through factions and parties to the detriment of the public good. Americans had lived and wrestled with this danger since the colonies were founded.19

2. Blood for Oil?20

At a symposium sponsored by the Western New England College School of Law a year after the 2000 Election and a year before the Second Resource War, panelists were asked to assess the Bush Administration’s environmental record. One of the authors of this piece, Dan Meyer, General Counsel of Public Employees for Environmental Responsibility (“PEER”), advanced the hypothesis that our environmental policy—that is the means by which we secure the environmental—was subordinated to our national security pol-

_id._


20. So much of the public debate and media coverage of the Second Resource War has gone out of its way to deny the claim of “Blood for Oil” that one ought to be suspicious of all the network crooning regarding the need to plant democracy on the banks of the Euphrates. Witness the panicked assessments of the Venezuelan crisis and the Nigeria tribal interruption of oil supplies during the run-up and execution of the war. One week into the war, pundits were already speculating on what it might mean to have control of the Iraqi southern oil fields if the Republican Guard stopped the Anglo-American offensive short of Baghdad. Oil so saturates the war issue—and our record of promoting democracy in Kuwait was so weak—that one can only be honest by admitting that the desire to protect porcine practices—such as driving SUVs—is pivotal in our decision whether to commit forces. The international crises in Somalia, Rwanda, and in the Balkans were dealt with in an entirely different manner: no oil.
icy. This was also not quite six months after the beginning of the second expeditionary campaign into Southwest Asia under a Bush family member's command. Environmental enforcement is a subject deserving academic review on its own accord, but this environmental symposium occurred midstream between the War on Terrorism and the second war against Iraq. Environmental security and national security are now twin components in the same process of decision-making, and it would be unwise to see the allocation of the Bush Administration's priorities as primarily a reaction to 9-11. There were movements afoot to de-emphasize Clintonian priorities—such as the environment and international multilateralism—well before the enemy struck New York City, Washington, D.C., and Somerset, Pennsylvania. The debate was advanced enough that members of the new "Beltway Élite" were advocating a return to a force structure last advocated by President Ronald W. Reagan.21

This can only happen because of the manner in which we now conduct national and environmental security decisions. Both means of addressing our insecurities are being relegated to the back rooms of government offices, or worse yet, corporate offices. There is a lack of candor in the land. Had it been otherwise, those reading Mr. Lehman's call for battleship reactivation would have noticed the omission. The battleships were deactivated because questions were raised regarding their safety and the environmental security of those who work on board them. So as the Symposium focused on this matter in an attempt to review an area of policy formation and execution, the issue of environmental policy was merging with national security. All of this was occurring without a substantive change in the American environmental ethic, codified through laws passed by Congress, and internalized by the American public as a core belief:

In direct contrast to Defense Department efforts to be exempted from parts of our nation's most important environmental laws, a new Zogby poll finds that an overwhelming majority of registered voters—85%—do not want any government agency to be placed above the law. "Americans clearly want the Department of Defense to obey the law. That's why Congress should not be putting exemptions to our environmental laws on a fast track without a full and fair public participation process," said

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Brock Evans, executive director of the Endangered Species Coalition and a former Marine.22

Similar views were expressed across the nation as the military encroachment/exemption debate of 2002 moved through Congress:

George W. Bush is making a big political mistake in assuming that the American people equate environmentalism with liberals or Democrats. For 30 years, the nation has been moving toward an environmental consensus, and Bush risks being on the wrong side of history.

To the shock of environmentalists, Bush has reversed policies and protections that Republican Presidents Dwight Eisenhower, Richard Nixon and George Bush helped put in place. According to Andrew Kohut, the director of the Pew Research Center, polls find that the president is running a serious political risk, especially among middle-class swing voters in both parties.23

Cynical attempts to create false choices between environmental and national security aside, the Bush Administration has a wide chasm to transverse in its domestic policies.24 While the American

22. Endangered Species Coalition, Overwhelming Majority of Americans Want Department of Defense to Obey the Law, According to Numerous Conservation Organizations, Bus. Wire, Apr. 30, 2002; Andrew Goldstein & Matthew Cooper, How Green Is the White House?, TIME, Apr. 21, 2002, at 30 ("Trashing the environment is a sure vote loser, so the Administration frequently tries to paint itself green, and sometimes ends up saying one thing and doing another."); see also Katharine Q. Seelye, Pentagon Seeks Exemption from Environmental Laws, N.Y. Times, Mar. 30, 2002, 2002 WL 18534720. It should also be remembered that the decision to rebuild the armed forces came before 9-11, and was not a response to the security threat. More than likely, it was an attempt to shift the federal budget in directions that would reinforce the ties to the President's supporters. The environment was passé and national security was hip. Bill Gertz & Rowan Scarborough, Top, Bottom, Wash. Times, Mar. 9, 2001, at A10. Support for the Defense budget, however, is not support for the men and women who fight; they have been asked consistently to do more with less since the 1984 Defense budget. The budget is, however, an excellent way of currying campaign donations from Defense contractors—who, as members of the new Beltway élite, will gain the largesse of new armaments expenditures and contracts for Defense Department activities (such as caretaking of the environment) formerly done by federal employees. Another major component of the new élite is the outsourcing of federal employee responsibilities through commercial bidding for contracts.


"The Defense Department has not established the need for these significant exemptions from federal environmental laws . . . ," said Rep. John D. Dingell, of Michigan, the ranking Democrat on the House Energy and Commerce Committee . . . . The Pentagon "should concentrate on complying with the law and cleaning up the environment instead of seeking special preference to continue as the nation's greatest polluter."
people are largely pro-environmental in their outlook, the Administration is largely anti-environmental in its approach to law and policy. A certain amount of spin may allow them to avoid awkward questions in the short term, but the issue of the Administration’s war on the environment will remain long after other wars are over.

For the time being, however, the war looms and the Administration’s hawks rule the roost. Thus, much is heard about Deputy Secretary of Defense Paul Wolfowitz’s new preemption strategy and its vital role in protecting our national security. In such a context, it might be useful to recall that both Democratic and Republican Administrations have used preemptive means against alleged enemies for some time. The current rush to preemption raises the prospect that we will repeat the mistakes of the Cold War, where preemption operated side-by-side with containment. It is the rule of law, and not the rule of the knife, which should dictate our strategy. But make no mistake: had the United Nations determined that Saddam Hussein was a pending threat to world peace, the United States and its allies would have had the right to strike, and strike with overwhelming force. The United Nations would have then undertaken a federal, democratic reconstruction to foster a true Arab Republic where the concept has failed in Egypt and Syria, and where it may be decades in the making on the Arabian Peninsula.

As written, this bill is a license to ravage the earth,” says Dan Meyer, general counsel for Public Employees for Environmental Responsibility (PEER) a Washington-based advocacy group. “Our military does not have to despoil our shores to defend them.” Meyer, a former naval officer, said the proposed legislation is unnecessary because many environmental laws already contain carefully drawn exceptions for military activities. Defense Secretary Donald Rumsfeld has the authority to invoke exemptions from environmental protections, but so far has not done so, say critics.


King Abdullah ought to play a prominent role in the reconstruction, as Jordanian-Iraqi post-war relations will determine the range of peace options available to the world community after the war. However, this talk is academic: it fails to address the root causes of why we went to war and ignores how the costs of our national insecurities are inextricably connected to pending, domestic environmental insecurities.  

The current Department of Defense’s push to gain exemptions from the nation’s environmental laws is not part of the older, Clinton-era initiative to combat encroachment upon military facilities. Were the Clinton model still in play, President George W. Bush would be pushing land use mandates toward the states, forcing them to accept less sprawl and suburbanization within designated zones around bases used for training and other activities. Rather, careerists within the Pentagon used the failing light of the Clinton Administration during the winter of 2000 to push for a new, radical agenda: the assertion of a New States’ Rights equivalent for a federal agency, giving that agency a form of sovereign immunity by another name. Combined with the President’s outsourcing of federal work, privatization of formerly essential government functions, support for delegation of responsibility and accountability to the states, the military exemptions battles of 2001, 2002, and 2003 are a fight over the central role of the federal government in American

26. Though this work is not designed to be a generational attack, both authors—who are members of Generation X—find it odd that a national media dominated by Baby Boomers has completely missed the parallel between the present national crisis and their seminal generational moment, the Vietnam Conflict (1965–1973). Lyndon B. Johnson’s two greatest failures were (1) packaging the advice of his Cabinet to meet the ends he wished to achieve, and (2) embarking on a policy for which he failed to provide financing. Significant failures of the Bush Administration’s war decisionmaking process could have been revealed had the Baby Boomers remembered events central to their own definition.

27. As the military exemptions battled raged in D.C., the states were successfully advancing their campaigns to exempt themselves from some provisions of federal environmental law. Peter B. Lord, ACLU Jumps into Case of Whistleblower vs. R.I., PROVIDENCE J.-BULL., July 20, 2001, at 1B.

The ACLU’s brief, filed by volunteer attorney Jonathan Gutoff, a professor at Roger Williams University School of Law, argues that the doctrine of sovereign immunity does not insulate a state from investigations by federal agencies of federal law violations. “The ability of all Americans to receive protection of federal law depends on the ability of the executive branch to enforce that law,” Gutoff wrote. “It is vital that citizens be able to petition federal agencies charged with enforcing federal law to inform those agencies of violations of the law and to encourage them to enforce the law.”

Id.; see also Ariel Sabar, Almond Urged to Sign Right-to-Sue Bill, PROVIDENCE J.-BULL., July 4, 2001, at 1B.
life. As a successor to the old, Democratic New Deal coalition and its forms, the President intends to use the present crisis as the springboard to realignment.

3. The “Exemptions” Game

During the summer of 2001, the Bush Administration was still recovering from its mishandling of its relations with Senator Jim Jeffords (R-VT), a naïve miscalculation which underscored the new Administration's weak legs for Beltway—and perhaps international—work. An Administration incapable of reading a great guy like Jim Jeffords will struggle with reading the likes of a Saddam. In this vacuum, career Pentagon officials slowly moved their Office of Legislative Affairs closer to a campaign inside Congress to exempt all Department of Defense activities from the nation's environmental laws. The United States Navy played the role of flying monkey:

The U.S. Navy has confirmed that the military is seeking special consideration from environmental laws for training, military readiness and national security purposes. . . .

. . . .

Environmental encroachment can mean having threatened or endangered species on DOD training areas, where training is limited to certain times of year or specific areas. But encroachment can also involve limited use of training areas because of existing archaeological sites, noise concerns by the surrounding community or bandwidth encroachment in airspace from cellular phones, to name a few.

. . . .


For example, Maj. Gen. Edward Hanlon, commanding general at Camp Pendleton Marine Corps Base, said: "Our ability to train effectively is being slowly eroded by encroachment on many fronts," including "environmental regulations and community complaints about noise from military activities."

. . . .

"The Navy's environmental philosophy is 'damn the torpedoes, full speed ahead.' The Navy's senior command does not appreciate that defense of the nation does not demand despoliation of our natural resources," said Dan Meyer, general counsel for the environmental group that released the draft Navy document.

But a Navy spokesman said Thursday, "we're not asking, as they claim, to be exempted from these laws."

While space is at a premium, the military says it will need even more in the future. "Our military is changing. The weapon systems, force structure and tactics of the future will require larger areas in which to test and train," said DOD's deputy undersecretary for readiness, Joseph Angello Jr., at the House hearing in May.

A Navy official voiced similar concerns in the Senate hearing in March. "While our naval forces may have decreased in number, our requirement for ranges has not. Today's higher performance aircraft and ships employ weapons of greater capability, but also of greater complexity and unique delivery tactics. The combination of capability, complexity and tactics also translates into the need for larger ranges," said Vice Adm. James Amerault, deputy chief of naval operations, fleet readiness and logistics.29

This concern was not a new one within Republican circles. Both Donald Rumsfeld—during his first service as Secretary of Defense in the 1970s—and former Secretary of Defense Caspar Weinberger were the subjects of lawsuits related to the administration of environmental laws in the context of Defense Department activities. The older environmental activism in this field battled against the judiciary's presumption that national security called for the shifting of costs, paying for the Cold War with the savings incurred through a degradation of the environment. Following the end of the Cold War in 1989, the legal landscape began to shift, a trend accelerated by President Clinton's progressive environmental policies. But the need to address the total cost of national defense, and the danger of decreasing the nation's environmental security to pay for national defense, is a constant.

The U.S. Navy's role in this matter was carefully crafted. The U.S. Army was already besieged by state attorneys general over proposed exemptions to the solid and hazardous waste statutes with respect to their facilities. Governors were not about to be saddled with these Cold War costs, and their resolve quickly moved these core statutes off the Pentagon's immediate agenda in 2002 and 2003. Taking a "camel's nose in the tent" strategy, Secretary Donald Rumsfeld fashioned a new strategy based on statutes which, though reflective of the American environmental ethic, nonetheless regulate these environmental resources which generally have few defenders inside the Beltway:

The Pentagon is moving toward asking Congress to rewrite the Endangered Species Act and other laws so that military training exercises can be exempted from restrictions to protect sea turtles, desert tortoises, shore birds and other rare creatures, according to documents leaked to the press. The migration of right whales off the Atlantic coast affects ship maneuvers, and amphibious training on North Carolina beaches is affected by turtle and woodpecker populations. A memo and slides from a presentation carrying the Department of Defense seal recommends that the department work with Congress to reauthorize the act with reforms that:

1. Delete all references to "critical habitat."
2. Allow increases of "incidental take," meaning harassment or death of endangered species, when federal agencies can demonstrate an increase in the species' population.
3. Shorten the time limits for environmental review and require consultation with wildlife agencies only when a military activity "may adversely affect" a protected species, rather than the current language, which requires a review when such activity "may likely affect" the wildlife.

Public Employees for Environmental Responsibility, the group that released the documents, said they were leaked by a military official helping prepare the recommendations to be delivered to Congress this fall.

"Nobody should be surprised that this is happening," said Dan Meyer, the group's general counsel and a former Navy lieutenant. "It's entirely predictable to come out of the Bush administration, as a way to weaken progressive environmental rules of the Clinton administration."

Congressional staff said that after the Bush administration took over, the Pentagon started a lobbying effort to try to get Congress to lift some of the restrictions of the Endangered Species Act.

Earlier this year, Rep. Dan Burton, R-Ind., chairman of the House Committee on Government Reform, asked leaders from all three services to recommend ways to amend environmental laws that restrict military training.

He and 15 other House leaders formalized that request on May 24, in a letter to President Bush to "initiate government reforms" of environmental laws, airspace restrictions and conflicts over radio waves that threaten national security and military readiness.

The leaked documents maintain that the Endangered Species Act, more than any other federal law, has the potential for
obstructing the Defense Department’s mission.\textsuperscript{30}

By attacking the exemptions through the marine environmental resources field, the U.S. Navy sought to spark the debate without fanning the fire.

The unstated reality behind America’s current situation is that our wars against Iraq are more a direct necessity of our environmental choices, notably our dependence on fossil fuel, than they are the product of global political games. Our war against terror is an indirect necessity of those same choices. We have not been fighting international terrorists as much as we have been fighting the global economy’s “surplus flesh.” “Surplus flesh,” meaning those billions of people for whom globalization offers only the assimilation of their local cultures into a worldwide web of popular American culture, and a consequential subordinate status to the American economy.\textsuperscript{31} Not only has our nation overlooked the effect its choices have had on the rest of the world, it has overlooked the fact that our once citizen-based society is now a consumer-based machine dependent on foreign fossil fuel.\textsuperscript{32}


This shifted the national defense costs against the environmental security of those Americans residents in New England, the Mid-Atlantic, Southeastern, and Pacific states. As the solid and hazardous waste statutes were being removed from the debate, that left a net cost savings to the residents of states not on the seaboard. One set of Americans were paying the national security costs—with a degradation of their environmental security—of another set of Americans.


Globalization’s enemies have enjoyed amazing success in framing the debate. An anarchically inclined branch of the protest movement has established a dominant narrative of American popular culture run amok, genetically engineered food, and Third World sweatshops. A parallel narrative stressing autarky targets free trade, developmental lending, and cooperation among central banks—the very raisons d’etre of the WTO, the World Bank, and the IMF. These intergovernmental bodies, so the complaint goes, advance the interests of multinational corporations at the expense of rights too precious to be left to the vagaries of the marketplace. The triumph of the new economy over the welfare state has allegedly spurred nations to undertake a ruinously competitive race to the bottom. Labor standards, environmental protection, and cultural identity allegedly hang in the balance. The protest movement denounces globalization as imperialist insofar as it projects the moral values of the United States and the military interests of the north Atlantic alliance.”

\textit{Id.}

\textsuperscript{32} If one makes a choice, one ought to pay the full cost of that choice unless we, as a society, choose to discount the activity because it is in the public interest. Then one
The irony of all this is that the President and his Cabinet have chosen a single platform and received a mandate from the American people to follow it: restoration of domestic security to its pre-9-11 level, the level left to the President by his predecessor, Bill Clinton. Domestic security can only be re-established by resolving our current geographical challenge. The geographic challenge, in turn, stems from the fact that the fuel for our post-Industrial economy is extracted from and carried through regions of the world not sharing our faith in the "New World Order." As both his political survival and the American economy hinge on resolving the threat to American energy supplies, President Bush stands in a position not unlike Franklin Delano Roosevelt in the late 1930s. Bush's success, and the prospect for a sea of change in American politics, hinges upon the President's execution of the war. At a general yet poorly articulated level, the present twin wars against global terror and Iraq, both force recognition of the critical choices Americans have brought upon themselves through a reliance on foreign energy sources.

Conventional wisdom holds that President Clinton presided over a golden age of global security. His Administration, however, was simply adroit in keeping all parties talking in an endless feedback loop. The threat to our security had been growing since the early 1980s; we had just confined the threat to discourse. The potentially fractious transfer of power marked by razor-thin electoral margins and the Bush Administration's decision not to take up the Clinton feedback loop strategy left a vacuum in American foreign policy. In that vacuum, our enemies struck, as they struck our

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has to review the equities of the cost spreading: who pays for another's choice, and why? When one pulls a plastic container off the shelves at Wal-Mart, one is consuming oil and a whole series of costs are triggered, including the cost of warring in the Middle East. This same reasoning applies to all imprudent environmental choices. See Joel Eskovitz, Bush Budget Trims Beach Projects, VERO BEACH PRESS J., Feb. 9, 2003, at A1. The Clinton-Bush initiative to strip federal funds from beach renourishment efforts in the Southeast is one example of forcing individuals to face the results of imprudent environmental choices, such as building homes too close to the sea. We, as a nation, have yet to take similar actions to tie the results of imprudent social choices—such as not volunteering for the common defense—and shifting the costs of these choices on to the backs of others, such as minorities and the economic underclass.

33. The Bush Administration arrived in Washington in January 2001, in a highly defensive position, suffering from an inferiority complex resulting from a contested election in which the President failed to receive the majority of votes. Like other weakened regimes, it has lashed out at alleged "enemies," foreign and domestic, using the politics of fear and loathing to prop up its standing with the American people. Art Buchwald, Protecting Our Land, WASH. POST, Jan. 21, 2003, at C3 ("The Pentagon has declared war on the terrorist environmentalists.").
Marines in Lebanon in 1983 and the USS STARK in 1987. The attack on the USS COLE was our warning, as the attack on the USS STARK was a test by Saddam Hussein in the run up to Desert Storm. We missed the message sent with the rubber rafts against the USS COLE, and the Twin Towers fell. But all of this is a pretext for avoiding the larger issue: we have been on notice that our consumer habits and our foreign policy were on a collision course with the "surplus flesh" of the global economy since the failure of the Carter Administration's energy policy in 1979. The mouthing of globalization as a golden age of peace following the Cold War was the Baby Boom's echo of Neville Chamberlain's peace in our time. It was a wish. And if wishes were horses, beggars would ride.

4. The Irony of Ribs, Cowboy Boots, and Mixed Metaphors: Insider Elitism Parading as Backslapping of the Common American

The reorganization of the federal government toward Homeland Security could garner a new, Republican-based system of political largesse rooted in the national security industry. The old New Deal system of largesse, championed by the Democratic Party, will be delegated to the states, where the prospects of national coalition building are weaker. This lock-out of the left and co-opting of the center has already garnered the interest of Associate Justice Breyer. Whether one is a labor or environmental rights activist, the sea change could be a tsunami. Make no mistake, our security

34. The capacity of the Baby Boomers to govern and inform needs to be reviewed—as all generation's biases need to be reviewed—on a regular basis. The information fetish that has led to reporting of questionable usefulness during the Second Resource War may, in part, be due to the lack of required national service—a condition under which the Baby Boomer profited immensely in their early years. There is a plausible argument that one is less likely to be titillated by the war, to engage in an orgy of media-watching and reporting, if one has had to bear an equal share of the national security burden through actual service. A return to the military draft could not only help focus older Americans in times of crisis, but also give our financial decision-makers on Wall Street some experience upon which to speculate when such crises occur.


36. The Bush Administration's attack on environmental enforcement has come from its own choice for Labor Solicitor (now former Labor Solicitor)—Eugene Scalia—and from Administration allies in the states advancing the "New States' Rights" jurisprudence through Eleventh Amendment arguments against federal whistleblower protection clauses in the environmental statutes. Compare John Caniglia, U.S. Prosecutor Wins Suit Against His Bosses, CLEVE. PLAIN DEALER, May 10, 2002, at B1, and Alison Grant, Cleveland Case Expands Protections: Lawyer Makes Retaliation Claim in NASA
interests aside, the past eighteen months have been as much about reengineering American governance as the next eighteen months will be about reengineering Iraq. Environmentally, we are trading the security of our environment for the security of our private lives—lives dependent on foreign oil. "Federal authorities have quietly drafted scores of federal wildlife agents and public land rangers from Oregon and other Western states to serve as airline sky marshals and guard federal buildings in Washington, D.C. raising concerns that Western wildlife and lands may go unprotected."37

This is not merely pulling rangers off "Smokey the Bear" duty and moving them over to more essential war-time missions. The vast, lonely federal lands of the American West are where the second, older domestic terrorist threat to our security tends to organize. Eight years before 9-11, domestic terrorists toppled an office building in Oklahoma City. During the year following 9-11, the nation's capitol was terrorized more by Americans than by Al-Qaeda: the unidentified anthrax killer(s), the elusive "dirty bomber," and the Beltway Snipers. It is across the lonely expanses of this country that this American threat organizes. And it is largely a right wing phenomenon, building on the angst and anger of our own domestic "surplus flesh." In stripping our defenses to tackle the international threat at home, the current Administration may tip the balance back in favor of domestic terror, which is the product of our own domestic politics. Absent the federal law enforcement activities of public employees in all of the land stewardship agencies, this national tendency toward violence and self-destruction will continue to metastasize.

The choices brought about by the events of 9-11 involve more than federal environmental enforcement staffing issues. The Clinic

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37. Michael Milstein, Transfers to Aid Security Leave Gaps in West, OREGONIAN, Oct. 25, 2001, at A01; see also Michael Ball, EPA: Changes Needed in Approach to Enforcement, Lawyers Say, GREENWIRE, June 11, 2001, at http://www.eenews.net/Greenwire.htm ("A major problem with the current system is the lack of guidelines that give federal investigators and prosecutors a clear sense of what environmental violations should constitute a criminal offense . . . ").
ton Administration was, at times, conflicted on the environment. But Bush Administration officials—having no shame—employed the death of 2965 Americans as an excuse to curry favor with the industry lobbyists of their own agencies.\textsuperscript{38} What 9-11 exposed is the cold heart of current Administration policies. Since 1992, we have witnessed a rising, Washington-based national security élite in its final molt of maturation, an élite which has the dubious distinction of never having served this nation under arms. These decision-makers share with their Clinton Administration counterparts a lack of national service. But unlike their Democratic counterparts, they are often hawks on foreign policy issues.\textsuperscript{39} They are unlike President George H. W. Bush, General Brent Scowcroft, or other members of the older national security élite. War, to the new élite, is merely a transaction cost to manage for American business.\textsuperscript{40}

\textsuperscript{38} See Jonathan Brinckman, \textit{E-mail Endorses Speedup on Permits to Fill Wetlands}, \textit{OREGONIAN}, Oct. 6, 2001, at A4 (“The chief of the U.S. Army Corps of Engineers’ regulatory branch has told agency officials they should help the nation recover from the Sept. 11th terrorist attacks by moving quickly on the thousands of wetland filling permits they handle each year.”).

Earthjustice’s executive director, Buck Parker, said that since last January a surprising number of industry groups have sued to overturn Clinton-era environmental regulations, and the Justice Department “puts up only the feeblest of defenses” and fails to resist the suits, particularly in the case of the roadless forest rule and Pacific coho salmon case. Parker said the administration has a history of telling the public it supports certain ideals, such as roadless forests and wetlands protection, and then holding private meetings with industry groups and reversing its position to favor industry.


\textsuperscript{39} Those of us who did answer the call to national service are often left wondering whether this faux militarism is a diversion of their attention from a more important question of our national leadership’s private lives: who took the bullet for them in Vietnam?

\textsuperscript{40} Al Kamen, \textit{In the Loop: Knees Under the Desk, or the Dash}, \textit{WASH. POST}, Feb. 10, 2003, at A19 (describing an American family—the Foley family—that exemplifies placing the public interest ahead of their private interests). This is exactly what the “Chicken Hawks” failed to do in their younger years. See \textit{infra} note 231 and accompanying text for a discussion of the term “Chicken Hawk.” National service need not be a litmus test; people grow out of their past mistakes, as both Presidents Bill Clinton and George Bush have noted to the nation. But the question of whether a leader may separate the public from the private interest must be asked, and the defining moral test of the Chicken Hawk’s generation is one they appear to have failed. Until presented with countervailing evidence, the public must assume they will mix private and public interests in their decision-making. Note also the environmental choice being made with respect to the Department of Defense’s renewed effort to exempt themselves from the nation’s environmental laws. Many of the contractors who will assume environmental review work under the Bush Administration’s initiative will become part of the govern-
It is not my place to call the President a coward for his actions during the Vietnam war, nor to highlight the number of his senior advisors who took deferment after deferment while the black and brown of our society died for his social class's interests. But as with our nation's inability to recognize the foreign policy costs of our environmental choices, this Administration's unwillingness to face the facts means that Americans will continue to ignore the costs of our social choices. It is no mere coincidence that a nation that drives SUVs while preparing to seize Iraq's oil fields also does not demand national service of all its citizens to accomplish that mission. Place the coming losses at the feet of the elite, and our choices—environmental and social—would quickly change. The fire is always warmer when someone else carries the wood.

41. The social choice of the President and his men not to serve this nation under arms is, first and foremost, a comment on their response to that innate reaction to "fight or flight" in times of danger. As a public matter, this lack of public service during Vietnam is more important in what it says about the Bush Administration's collective decision-making ability. If they failed to make the correct social choice for the correct reason three decades ago, the danger of them having made a second failed decision, this time with respect to the Second Gulf War, is all the more probable.

Among those who are rattling their sabers for war with Saddam at the moment, most if not all were of age during the Vietnam War to serve in the military. Few of them did serve. In fact, most of them did not. Had they gotten out of military duty for reasons of conscience, or had they served their nation in some other capacity (say, the Peace Corps), this would at least give them a leg to stand on. However, most of them simply had—in Dick Cheney inimitably feeble explanation for his own avoidance of military duty—"had other priorities." . . .

In addition to the increasingly creepy Cheney, these hypocrites include Trent Lott, Tom Delay, Dick Armey, Phil Gramm, Andrew Card, Don Evans, Harvey Pitt, Paul Wolfowitz, Antonin Scalia, Bob Barr, Ken Starr, Jeb Bush, Pat Buchanan, Spencer Abraham, Rudy Giuliani, Mitch McConnell, Dennis Hastert, Don Nickles, Rush Limbaugh (he got out due to "anal cysts"), Marc Racicot ("psoriasis"), Tommy Thompson, Brit Hume and Dan Quayle.

George W. Bush would say that he served in the military during the time of the Vietnam War . . . . He did not always show up for his assignment and sometimes he simply went AWOL . . . . When terrorists attacked the United States on Sept. 11, Bush went AWOL again, hightailing it on a series of military jets until late in the day, when he snuck back into Washington, DC, aboard Air Force One.

Alan Bisbort, Another Vietnam, AM. POLITICS J., July 31, 2002, at http://www.americanpolitics.com/20020731Bisbort.html. It should be remembered that decisions are made every day—privately and publicly—which shift national security costs in the same manner similar decisions shift environmental costs. See Larry Bonko, Hell on the USS IOWA on TV: FX Movie Re-Creates Moments Leading Up to Battleship's Tragedy, VIRGINIAN-PILOT, Mar. 16, 2001, at E1.

42. The failure of the President and his Chicken Hawks to make the social
5. War: The True Cost of Driving SUVs

Our choices are all about avoiding the costs of our actions. This theme runs through domestic policies, as well. The Bush Administration does not seek to serve the public interest through regulation. It is as if the national mission is now seen only as the management of security, and a security provided for white-collar professionals by an increasingly black and brown armed forces. Old national missions—like the environment—are being sent to choices in the public interest and volunteer for national service during Vietnam leads to a presumption that this crowd will, if offered the choice, shift the costs of national security away from an impact on their own private interests, and on to the shoulders of others outside their social caste. See Ariel Sabar, *Toxic Legacy of Military Haunts Bases*, BALT. SUN, Jan. 19, 2003, at 1A. For residents of recently closed military bases, the direct—as opposed to indirect—threat to their health and that of their children comes from Secretary of Defense Donald Rumsfeld, and not Osama Bin-Laden. It is possible that more Americans will die or suffer a degraded life from the willful mishandling of our Cold War national security costs than have died, or will die, from foreign terrorism. Costs for national security are only carried by all Americans when the Pentagon is required to conform its actions to the nation’s environmental laws. When it does not, citizens adjacent to current or former military reserves end up paying a higher price for national defense. See also Charles Schmidt, Policy News, *National Security at the Cost of Environmental Protection?*, ENVTL. SCI. & TECH. ONLINE (2002), at http://pubs.acs.org/subscribe/journals/estag-w/2002/may/policy/cs_security.html:

Dan Meyer, with Public Employees for Environmental Responsibility, a non-profit group representing public employees, says the deliberations in the House committee were also influenced by lobbying from state attorneys general who have had “long, painful experiences with environmental contamination on military bases.” Says Meyer, “These exemptions will further complicate state efforts to determine compliance and liability for cleanup” of past and future polluting activities . . . . But Meyer counters . . . saying it overlooks the public health hazards that munitions—including lead bullets, exploded fragments, and fuel—already pose near some of DOD’s key training facilities. “Look at Camp Edwards [in Cape Cod, Massachusetts],” he says. “Polluted soils there lie above an aquifer supplying drinking water to up to half a million people.”

*Id.*

43. Vernon Loeb, *Unexploded Arms Require Big Cleanup at 16,000 U.S. Sites; EPA Papers Note Major Health Risks*, WASH. POST, Nov. 25, 2002, at A4. The cost allocation of our common defense requires more than cursory analysis, and it moves well beyond the payment of taxes to provide the service. Without a draft, who sponsors what facilities at what cost can become a community issue of some debate. Some commercial interests will promote national defense, but their benefit is not the community’s benefit. And some communities find the locating of the facilities themselves a burden. See Lori A. Martin, Comment, *The Legality of Nuclear Free Zones*, 55 U. CHI. L. REV. 965 (1988).

44. The lie that maintaining fidelity to the nation’s environmental laws will impact mission readiness has been exposed by another hero of the American environmental movement, Dr. Albert Bivings, a U.S. Army endangered species specialist. See Gidget Fuentes, *Marine Division Plans Major Desert Crossing*, NORTH COUNTY TIMES, Apr. 16, 2002, at A1. But see Vernon Loeb, *Rules on Environment Concern Pentagon,*
the states; others, like telecommunications or corporate finance, are
being turned over to the regulated industries and their captured
agencies—like the Federal Communications Commission and the
Securities Exchange Commission. In this era of tax cuts for the rich
and massive defense spending increases, the federal government
lacks the funds and personnel to enforce all laws in all jurisdictions.
By abandoning the Clinton Administration's "Rubinesque" fiscal
responsibility, George W. Bush has taken upon himself the mantle
of the old "tax and spend" liberals who were both free spending
hawks and avid dispensers of largesse to their political base. One
Civil Rights Act and a generation ago, Senator Trent Lott (R-MI)
would have been a Democrat. Outgoing Senator Phil Gramm (R-
TX) was a Democrat. Recall the advice of the Nixon Administra-
tion: "watch what we do, not what we say." Words are—at the
same time—mirages of all that Washington does, and markers of
what Washington is not doing.45

As a result of this federal spending continuity, despite the best
efforts of Presidents Nixon and Clinton, decisions regarding our
national and environmental security have increasingly become an
exercise in resource trading. As Americans confront the lawlessness
threatening both our foreign oil supply and our SUVs, we have left
other watchtowers—including those guarding the environment and
keeping federal lands clear of domestic terrorists—unmanned.46
Federal rangers who once patrolled the vastness of the West, deny-
ing it as a refuge to terrorists, drug dealers, and other malcontents,
now guard oil depots and nuclear reactors. Thus we can see that
the stripping of ranger posts in the West serves as a metaphor for
the Bush environmental agenda in general: it is a proffer and not a
policy of substance. It fails to produce a higher level of overall se-
curity.47 We are merely trading the increased domestic security

45. What has yet to be determined is how the far right will be a part of the Bush
Administration's realignment. Bush could, conceivably, focus on equidistant voter
groups on either side of the center. To some extent, all the President needs to do is
placate that wing to the point where it does not produce detractors. If he needs to do
that, further neglect of the environmental laws may be fresh meat for the dogs. The
media, driving public awareness of the war and its causes, was also lacking patriotic
fervor when it was their turn to serve.


47. The inability of the American citizen-as-consumer to recognize the trade-offs
between lifestyle and environmental quality is ubiquitous, and it transcends the national
produced post-Oklahoma City for the appearance of renewed security post-9-11. Like a huge searchlight, federal security policy has moved away from Timothy McVeigh's peers to focus on Osama Bin Laden's cartel—but we have done little to address the underlying, root causes of our insecurity. If we kill Bin Laden, and the Jacobins and sans culottes of the New World Order will simply create another leader.

There is a naïve assumption within the Bush Administration that in some way the Second Gulf War is a Manichean fight between “good” and “evil,” as if Gary Cooper is tipping his hat into the sun in *High Noon*. In truth, there is evil in all of us—and that is probably a better lesson to draw from *High Noon* than some fundamentalist notion that “God is on our side.” If you are religious, then the war in Iraq should be viewed as a test of your character: What have you done personally to avoid war? How do you live your life independent of fossil fuels? If you feed the evil within, you will be on the evil side of this war—regardless of whether you are an Iraqi or an American. Author Dan Meyer was on the team that killed several hundred thousand in what we declared to be instilling “democracy in the Near East”; the past decade has shown the false assumptions in that declaration. The First Resource War was about oil: who has it, who wants it, and the price that moves the resulting transaction. It was a calculus of national security predicated on national assumptions regarding our environmental security. That becomes a moral calculus every warrior faces and many Americans can now falsely avoid because we have moved to the All-Volunteer Force (AVF).

So as the nation focuses exclusively on national security, what remains of its environmental security? Much of the permanent legacy of the Clinton Administration was already in place by the point President Bush has now reached. The Clinton team desired a centrist environmental agenda, part-environmental and part-accomodationist, and their early tardiness was perhaps rooted in the general, if not congenial, tardiness of the Clinton Administration on security crisis now facing the Republic. In addition to ill-disciplined habits requiring foreign oil purchased, ultimately, with the deaths of our fellow citizens in New York City, other trade-offs were more quietly made during the recent “tech boom” of the 1990s. See Alisa LaPolt, *Cables Could Harm Coral Reefs*, FLA. TODAY, June 18, 2001, at 2. The seemingly innocuous act of chatting on a cell phone while sucking on a latte is bounded by global impacts: who picked the coffee beans and how do they fare, and how have endangered species and rare habitats been destroyed or damaged to provide the cell phone system's infrastructure?
many fronts; timing was not always its strong suite. Conversely, the Bush team has no environmental agenda.\textsuperscript{48} Environmental enforcement is a transaction cost imposed on business. Its proper management prevents the retarding of business plans adopted by the politically well-connected, that traditional porcine ring of industries and their captured federal agencies.\textsuperscript{49}

6. Gail Norton and the Department of the Interior: A Lesson in Rejecting the Public Trust

Let us look to one agency, the U.S. Department of the Interior. The Bush Administration’s own captains have already reinforced the widespread public opinion that the Republicans reject the public trust when it comes to either maintaining a balanced budget or conserving the environment:

When U.S. Interior Secretary Gale Norton steps aboard an airboat for a spin across the sawgrass this week, nobody is going to mistake her for the reincarnation of Marjory Stoneman Douglas. In less than one year in office, she’s battled to put oil rigs into a pristine Alaskan tundra, signed off on offshore drilling near Florida’s Panhandle, blocked a ban on snowmobiles in Yellowstone Park, revoked efforts to restore grizzly bears in Idaho and advocated opening vast federal wilderness, mostly in the West, to wider industrial and recreational access.\textsuperscript{50}

The U.S. Department of Interior is one of three primary federal environmental agencies (with the Department of Agriculture and the U.S. Environmental Protection Agency). Under Norton’s


In a letter last month to the Senate Environment and Public Works Committee, the Sierra Club cited a Gallup poll that found 77 percent of Americans believe environmental laws should be more strongly enforced. And Public Employees for Environmental Responsibility says the Bush plan would lead to an 11 percent reduction in criminal and 20 percent reduction in civil investigations.


\textsuperscript{50} Curtis Morgan, Interior Secretary: Glades Plan a Priority, \textit{Miami Herald}, Jan. 14, 2002, \texttt{at A1}. 
leadership, the Interior Department has seen: (1) the disruption of both public access and employee productivity as Norton supervised the closure of the Interior Department’s Web site and e-mail;\(^51\) (2) the loss of financial integrity in the management of trust accounts for Native Americans, for which she was cited for contempt of court;\(^52\) (3) the falsification of her own agency’s science, reported to Congress after questions were raised regarding the impact of oil drilling in Alaska’s Arctic National Wildlife Refuge;\(^53\) (4) the destruction of morale through an all-employee e-mail pledging to contract out five percent of all employee jobs;\(^54\) (5) the frustration of the U.S. Fish & Wildlife Service’s attempt to file substantive comments against a major relaxation of wetlands protection (and then claiming it was Congress’ fault);\(^55\) (6) confused decision-making when deciding whether to pull out of, or stay committed to, a settlement agreement regarding the preservation of the California desert;\(^56\) and (7) a refusal to adopt a non-retaliation policy to protect agency scientists, following the abrupt termination of a mapmaker.\(^57\)

These are the actions of a challenged administrator, one not used to the size of the average federal agency. Her Intermountain Region has been an incubator for gag laws and regulations to muzzle federal employees critical of Bush Administration policies—much in the way that her Mountain States Legal Defense Fund supported legal enterprises promoting 11th Amendment restrictions on federal laws themselves. At the same time the Bush Administration has largely ignored domestic security threats, it has advanced a philosophy of vitiating the very federal laws that combat such violence.\(^58\) Environmental enforcement—necessary to retain control of federal lands and resources, as well as to enforce federal laws—is in a state of disarray.

\(^52\) Id.
\(^53\) Id.
\(^54\) Id.
\(^55\) Id.
\(^56\) Id.
\(^57\) Id.
\(^58\) The confluence of international, domestic, and environmental security comes in odd ways. Western lands and communities—where we see most of our environmental compliance challenges—also support the sub-communities most implicated in the ebb and flow of domestic security challenges. And note that both Timothy McVeigh, and perhaps—if guilty—John Allen Muhammad—were not only veterans of our first war against Iraq, but also had ties to the same western sub-communities.
Instead of treating the U.S. Department of Interior as an instrument to enable the congressional mandates embodied in the nation's environmental statutes, Secretary Norton is using the same as a means of consolidating the President's coalition building activities before and after Election 2000. But holding up the Secretary of the Interior as an effigy to be burned fails to reveal other more important changes brought to Washington by Election 2000. We have come to the current crossroads in our environmental security policy because of choices—environmental, social, individual, and collective—made by individuals regarding our standard of living, and who is to pay for that standard of living. To understand the intersection of our consumer, environmental, and social choices, one needs to see the current crisis in terms our energy policy, or lack thereof.

7. Whose Responsibility?

[H]e began to feel the forty-foot dynamos as a moral force, much as the early Christians felt the Cross. The planet itself seemed less impressive, in its old-fashioned, deliberate, annual or daily revolution, than this huge wheel, revolving within arm's length at some vertiginous speed, and barely murmuring . . . . Before the end, one began to pray to it; inherited instinct taught the natural

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59. Al Kamen of the Washington Post writes:
If folks at the Bureau of Land Management, which issues permits for drilling and such on federal lands, seem a little edgy these days, they've probably got good reason. Here's an e-mail invitation some enviros have intercepted to a meeting in Denver between the Independent Petroleum Association of Mountain States (IPAMS), the largest and most influential oil and gas industry trade association in the Rocky Mountain region, and top administration officials.

Subject: Meeting with Interior and BLM

Members are invited to attend a very special meeting on May 7 with Deputy Secretary of Interior J. Steven Griles, Assistant Secretary for Land and Minerals Rebecca Watson, and BLM Director Kathleen Clarke. The meeting will take place in the Bluebell Room of the Pinnacle Club (37th Floor), beginning at 1:00 p.m. Seating is limited and participants must RSVP if they plan to attend. Members are invited to listen and ask questions about the Administration's plans to improve land access and permitting in the Rocky Mountain States. Specific concerns about BLM Field Offices and personnel should be submitted (in writing) to the IPAMS office one week prior to the meeting (April 30). Special thanks to IPAMS Member Jim Wallace (of Brownlie, Wallace, Armstrong & Bander Exploration) for arranging this meeting.

About 90 people from about 70 companies are expected to attend the hour-long meeting and talk about, an IPAMS spokesman said, improving the application process.

expression of man before silent and infinite force.\textsuperscript{60}

At the Chicago Exposition of 1893, an event seminal in so many ways to the manner in which Americans presently live their lives, pundit Henry Adams noted that the fossil-fuel drive turbine was to our America as the crucifix was to the mind of the Middle Ages. The "dynamo" drives our choices; it is the icon to which we all—implicitly or explicitly—order our lives.

The most important development in Washington over the previous twelve months is in the cross-over of issues relating to the environment as it is impacted by our need to genuflect to the dynamo, the supply of non-renewable fuel to meet the demands of American lifestyle, the source of that non-renewable fuel, and the need to overcome the implications of this energy challenge to the Presidential election of 2004. Missing from the current debate is a central, common understanding that our current security crisis is the direct result of our own actions, and our own environmental choices regarding energy. Presidents Richard Nixon, Gerald Ford and Jimmy Carter did foster this public dialogue following the Energy Crisis of 1973 and our subsequent entanglements in the Near East. But from 1980 onward, the central focus of our Near Eastern policy has been maintaining process in the Levant and benefiting from relatively short-termed Arab price competition with respect to petroleum supplies.

The public debate has been silent in this SUV era. And we should not find it awkward that American environmental law—which sought to establish a weighing of resource choices—is now the target for Bush Administration action. Environmental actions, whether they are enforcement, compliance or assessment, or impact-based, belay the lie we have told ourselves.\textsuperscript{61} They remind us


\textsuperscript{61.} Under President Bush's Administration, the alienation of the environmental agency missions from Administration priorities and the weakness of the Council on Environmental Quality have subjected the environmental review process to discord among competing federal agencies. With their fear-wrought Washington, D.C. headquarters unable to exercise a common policy with respect to environmental programs, federal agencies such as the U.S. Fish & Wildlife Service, the National Marine Fisheries Service and others have devolved into a patchwork of field offices exercising varying levels of environmental assessment, review, compliance, and enforcement. Scott Wyman, U.S. Agencies Split over Restoration of Broward Beach Project; Fisheries Seeks Safeguards for Coral Reef, S. Fla. Sun-Sentinel, June 11, 2002, at 5B (stating that the local offices of the Interior Department and U.S. Army Corps of Engineers are teaming up to bully the National Marine Fisheries Service on the issue of protecting coral reefs from sediment produced by beach renourishment projects).
that we are living on borrowed time. American law—and environmental law in particular—cuts the playing field for this version of the global Great Game. American politics supplies the players and rules. And the fact that American politics, and not American law, supplies the rules is the change with which environmentalists must concern themselves. In this sense, environmental law is a tracer, a means of charting the relative level security liability we have built into our own lives through our economic choices. The manner in which we assess, comply with, and enforce our environmental laws—and the manner in which we treat those public servants who administer those laws—tells us how insecure we are, and how high a security threat the American consumer will create and ask others to defend against.62

B. The Berlin- to-Baghdad Axis as the Matrix

Though this is not an article on the interaction of international public and private law, some explanation of American foreign policy, its role as an underpinning of the global economy, and the threat both may pose to the domestic environment is necessary. Drain resources from domestic concerns—such as conserving the environment—and the environment will revert to its former state of degradation. There is an environmental security challenge facing the Bush Administration between now and Election Day 2004. The United States has the most stringent environmental laws on the globe; yet the federal government has one of the worst enforcement records when judged in light of those laws. In pundit-speak, "we talk the talk, but we don't walk the walk." The empirical evidence of this failure lies in Chevron,63 and the agency-dominated decision-making process it has produced. Lacking effective judicial review, Americans have watched decisions regarding their natural resources become lodged in that set of governing institutions least resistant to levels of political discretion and capable of precluding enforcement of the law.

62. Freed from almost any level of accountability by the Telecommunications Act of 1996, the Federal Communications Commission ("FCC") emerged as one of the most environmentally insensitive agencies of the new century. The scope of the FCC impact is small, but significant, in its areas of operations. As for level of hubris, it is surpassed only by the U.S. Army Corps of Engineers. See Heather Forsgren Weaver, FCC Draft on Tower Impact Agreements Criticized by Tribes, RCR WIRELESS NEWS, June 10, 2002, at 8; Warren Publishing, Tower Policy Complicated by Bird Concerns, Pending Reviews, MOBILE COMM. REP., May 27, 2002, at 2002 WL 8272089.
In other words, there is a disconnect between our public expression of environmentalism, and our private lives which do not support that environmentalism. We cannot enforce our environmental laws without exposing this disconnect. Accordingly, we simply choose to proceed without enforcement. To feed our energy-addiction, we are becoming that which we detest. We are succumbing to the darkness. This disconnect supports and enables the criminality of two groups: domestic terrorists who use the vastness of our Western federal lands to organize against our society and American corporations seeking to undermine the health and welfare of our society through violation of our environmental laws. This point bears a note of legal philosophy. There is a general belief that law is firmest at its most localized point—traffic regulations being the clearest and, say, United Nations resolutions being the most malleable or weakest. The law is seen as progressing from a localized clarity to an international opacity. But in truth, law is firmest where it can be enforced—at the municipal and international center. As you progress away from this point, domestically and internationally, you enter the borderlands of those who feed—spiritually or materially—on the inability to enforce. Timothy McVeigh and Osama bin Laden are twins of the same dark fraternity.64

64. The inability to control the creation of such semi-autonomous palatines within a system of governance is not exclusive to the Bush Administration’s management of federal agencies such as the U.S. Army Corps of Engineers. Internationally or domestically, wherever one has de jure jurisdiction (jurisdiction) but lacks sufficient, de facto Executive control or will (gubernaculum), these failures will result. Martin Edwin Andersen, Oversight Crisis at Development Banks, INSIGHT MAG., Feb. 14, 2003, available at http://www.insightmag.com/news/370638.html (“The tape barred entry to the room, but it could not contain the horror within, where a former official of an IDB Central American office, reportedly distraught over misconduct at the multilateral development bank (MDB), had slashed [his] throat and wrists. While doing so, say IDB insiders, the former official wrote in blood on an office wall: “The bank is corrupt!”). A hero of the modern environmental movement, John Fitzgerald, was the first to disclose the rot at the core of our international practices. He was quickly removed following raised eyebrows over at Treasury. See James V. Grimaldi, Lawyer Says USAID Cut Job in Retaliation, WASH. POST, Sept. 24, 2003, at A19; Amy Strahan Butler, U.S. Environmental Expert Files Whistleblower Claim, WASH. POST, Sept. 24, 2002, at A19; Reviews of International Projects Blocked, ENVTL. NEWS SERV., Sept. 20, 2002, at 2002 WL 2414937: “The Bush Administration is giving short shrift not only to environmental protections but also to safeguards against rank corruption and disruption of native peoples,” said PEER executive director Jeff Ruch. “While a domestic project like oil drilling in the Arctic National Wildlife Refuge receives extensive study and debate, each year the U.S. is financing scores of projects in developing countries, each with potentially far greater impact, with little or no environmental review.”

To the great shame of this nation, some public officials even use this disconnect as grist for the expansion of their parochial interests. When the Executive has jurisdiction but cannot act on an issue, Congress often provides an agency to act with the combined functions of the Executive, Judicial, and Legislative Branches. The powers remain with their respective Branches, and the functions are delegated. This can create the modern constitutional equivalent of the "county palatine" or "march," a medieval form used when the King's writ could not run to a certain area (usually because he could not maintain its security) over which he nonetheless had sovereignty. Our marches in American government are not geographical, but rather subject-matter based. They rise where we want to act but cannot. These are areas where the private interest is often conflated with the public interest, usually to the detriment of the latter. These are also areas one associates with a loss or failing of security, be it national or environmental.

For example, one such county palatine would be the Federal Communications Commission:

Virtually all relevant technical data are held by private firms. These "owners" of information are scattered throughout the economy, and each harbors its "knowledge capital" as a productive asset. FCC rule-makings solicit this information, and the Commission relies on that which is revealed. The agency staff is tiny in comparison to the size and complexity of the industry it regulates. In 1997, the Commission employed 2255 full-time equivalent workers, of which only a small fraction were professionally trained in engineering, economics, communications, or law.65

The paucity of the Commission budget and staff makes it more reliant on private interests—such as the telecoms, the broadcaster, et cetera—than one expects in the maintenance of a public interest (such as spectrum management). When a role is defined and resources do not follow from the Executive or the Legislature, the arrival of private interests to fill the vacuum should only be expected even if not welcomed. Weak governments, regardless of the century in which they execute, have recourse to the "march crea-

tion of counties palatine."66

When assessing the relative ability of a government to enforce laws which give it jurisdiction, one should keep in mind that the law is most inchoate at either end, and firmest in the middle.67 Public international law is notoriously inchoate—look at the confusion over United Nations resolutions as we came to war in the Euphrates valley—and municipal law, at some local level, becomes just as inchoate (if four thousand drivers are doing eighty-five miles per hour in a sixty miles per hour speed zone, there is a good argument the law has broken down). Subject areas of the law also fall into this sliding scale of authority. Courts are always reluctant to apply the law of the center, or hearth—such as the First Amendment—to emerging technologies. Prudence typically dictates a period of observation so as not to lead the market.68

March lords strike to create their counties palatine when crisis reigns. No institution has disgraced the American military service more in the past eighteen months than the U.S. Army Corps of Engineers. Under the Bush Administration, ill-disciplined "rogue" agencies such as the Corps have spent the last year preventing environmental enforcement domestically and easing the way for greater private exploitation of our natural resources. Indeed, hypocrisy rooted in the disconnect is so compromised that senior Corps military staff would use the death of nearly 3000 Americans as a pretext for expanding their annual budgets, even when those proposed budget outlays would not increase American security.69 Soldiers

66. This is one of the most historical of calculations made by a government, and one that still has ramifications today. Theodore J. Lowi, Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power, 36 AM. U. L. REV. 295, 296-97 (1987). "[E]very delegation of discretion away from electorally responsible levels of government to professional career administrative agencies is a calculated risk ...." Id. at 297.

67. At the beginning of the Reagan era, two opinions by Justice Rehnquist offered a stricter non-delegation doctrine. See Am. Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting); Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring). However, despite the urgings of many commentators, see, for example, JOHN HART ELY, DEMOCRACY AND TRUST 131-34 (1980); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY (1993); Lowi, supra note 66, a stricter doctrine has not emerged. See also 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.6, at 76. (3d ed. 1994).

68. Leading Case, Indecent Speech—Communications Decency Act, 111 HARV. L. REV. 329 (1997) ("Similarly, courts were reluctant to extend the full protections of the First Amendment to radio.") (citing Robert Corn-Revere, New Technology and the First Amendment: Breaking the Cycle of Repression, 17 HASTINGS COMM. & ENT. L.J. 247, 267-68 (1994)).

who do not fight are preying on the sacrifice of civilians who did.\textsuperscript{70} Even more disconcerting than the fact that our national security élite is fixated on avoiding the question of who took their bullet in Vietnam is the fact that we have a generation of Corps Commanders who wear military uniforms but lack the American military tradition of service to the nation. They are pork-chewing politicians, first and foremost. The uniform is a costume.

1. Consumer Ill-Discipline Trumps Environmentalism

The lack of candor regarding American environmental compliance is bad enough; the lack of shame on the part of such uniformed hucksters lends a surreal nature to our present war. Non-combat, politico-generals distant from the front have become moneychangers in the temples of American governance. And why have American decision-makers created this constitutional compromise? Why do Americans tolerate such a system? The issue goes far beyond judicial prudence, the administrative burden on American courts, or the \textit{Chevron} need to defer to expert agencies. We have established a system of \textit{avoiding} the law, not efficiently enforcing the same. The simple answer is that we are hypocrites. We hold a double standard. Americans want a clean environment in a macro-jurimetric sense: we will pass laws that speak of clean water, clean air, stable and thriving species, safe solid and hazardous waster disposal, et cetera. We will even craft strict standards for the governing of such a system. But as a matter of micro-jurimetrics, we are reluctant or unwilling to adopt the practices necessary to maintain those standards. That is why we pass laws and do not enforce them.

Between the macro and micro-jurimetric lines of our jurisprudence lies a shadow borderland, where neither law, rule, nor regula-
tion apply; this is the area of unfettered political discretion over which public interest groups such as PEER range on a daily basis; it is also the area where federal employees find themselves caught in an ethical morass. How great is the American capacity to lie to ourselves? Roughly three thousand of our fellow citizens were slain on 9-11 in the largest slaughter of non-combatant Americans since the Indian Wars of the late 19th century (when European Americans were largely slaughtering Native Americans). For the first time since the War of 1812, a significant number of American non-combatants were forced—by a failure of American foreign policy—to defend this nation. The heroes of United Flight 93 were no different than the volunteers who rallied against Crown columns issuing forth from Boston in 1774 or the Buffalo militia mustered at Niagara in 1812.

Americans have grown fat on global cream during the past quarter century, and have done so while paying others to defend their borders. The All-Volunteer Force was created to separate

71. The cathartic effect of a public War on Terrorism aside, the Bush Administration made a series of national security blunders in its opening days, blunders the size of which would have been hard enough to recover from during the Cold War but may be insurmountable at this point. The move to a “fight, hold, fight” strategy under Secretary Rumsfeld is based on the presumptions of his generation, a generation which won the Cold War and thought—until the current crisis on the Korean peninsula—that future conflict would be sub-regional, akin to what our Imperial British cousins faced between Waterloo (1815) and the First World War (1914), almost a century later. To the contrary, without Mutual Assured Destruction to hold co-hegemonies and their client states in place, it is imperative that we have a “fight-fight” strategy directed at all rogue states with nuclear capability. If Asia rearms, the Bush Administration’s institutionalization of a post-New Deal Republican coalition will have been bought with a destabilization of both our Near Eastern and East Asian foreign policy. As for the “War on Terrorism,” it probably would have made a better covert war supervised in conjunction with appropriate Senate and House Committees. The American people have been extremely patient with the war we are currently waging in Columbia, and which we have been waging for almost a decade. But a covert war would not allow for the creation of Homeland Security Department, the continued outsourcing of federal union jobs, and other measures necessary to institutionalize the Bush Administration’s realignment of the American government.

72. The war against Iraq finds its proximate cause in two national security failures. To the humiliation of the Desert warriors ten years ago, then-President Bush’s resolve against Saddam ebbed, and we were not permitted to smash the present threat when we had an overwhelming advantage militarily and geopolitically. Subsequently, the culture war between the Clinton White House and the Pentagon over the ensuing decade led to a dizziness in our national security constitution—our ability to assess and remove external threats. We had a decade to remove Saddam, and we failed. But these are only proximate causes, and analysis of these causes provides marginal insight. The long-term causes of this war are our failed energy policy and our failed nuclear non-proliferation policy. The Cold War limited our need to address these failures; what could be a very hot war has pushed our noses into the same.
Americans from their common defense. This separation gave the President greater control over foreign policy: mercenaries do not protest in the streets; draftees—particularly the sons of bankers and lawyers—do. But absent the creation of a concurrent police state, such an AVF cannot protect the average American from the “surplus flesh” of the global economy. Americans over Somerset County, Pennsylvania were called back to defend our standard of living. This is what happens when those borderlands of the law collapse, when the marches of global society sweep into the smallest of communities. During the Cold War, such variations of security were unheard of: all violence occurred overseas or in communities of the disenfranchised. Scarsdale and Chevy Chase were immune; now they are not.

We have tended to honor the New York City peers of these fallen citizens by highlighting their role as sacrificial lambs in some unexplainable drama involving foreigners we neither understand, nor frankly, wish to understand. This unreflective path of public reasoning led us to 9-11, as well. The events of 9-11 were built over two decades, beginning with the Reagan Administration’s failed 1983 Beirut intervention. Beginning with the post-Second World War consumer expansion, we launched a parallel, supporting foreign policy to secure foreign supplies of non-renewable sources of energy. The area west of the line drawn from Berlin to Baghdad provided the bulk of our “swing supply” during this period. Assuming the level of domestic consumption was fixed or ever-increasing and not open to disciplined living through mass transit, recycling, and “alternative” lifestyles, we heeded the maxim guiding the Empire of Japan in the 1930s: if you are going to rely on foreign energy, you need to defend foreign energy. There lies the root of the most significant saga of the post-Cold War, roots deep in the heart of the Cold War.

2. America’s Foreign Policy in the Near East: Resource Extraction to Feed Consumer Addiction

Our relations with all nations in the Near East have revolved not around our shared heritage as “people of the Book”—the children of Abraham—but around the need to supply Americans with

73. The dependence on foreign oil can be deceptive; we receive much of our imports from the Western hemisphere. But the Near Eastern oil is influential beyond its simple percentage: it powers much of Western Europe and Asia’s economy, making it the lubricant for the global economy.
energy which cannot be produced at a cost Americans are willing to pay from sources within our hemisphere. We did not go to war in 1991 to preserve or even instill democracy in Kuwait; and holding forth Israel as a model for democratic reform in the Near East fails to wash clean. Our Near Eastern policy centers on the promotion and defense of resource extraction. No better example of this truth exists than Desert Storm and its aftermath, in which roughly a million Iraqis have died to keep the price of gas below $4.38 per gallon at the American pump. Yes, the “Butcher” is a butcher. Hacking off his knees now may prevent the detonation of chemical or nuclear weapons in Boston or Baltimore harbor within the next decade. But focusing on the symptoms only shifts one away from the root causes: absent the need for non-renewable sources of energy, we would treat the Near East countries no different than Chad or Somalia. That is, we would ignore them. And they would probably ignore us. What is our foreign policy for Bhutan?

September 11th is a significant milestone in that it was the first time we had to address this challenge from the region east of the Berlin-to-Baghdad axis of oil. Do not underestimate the oil politics that flow from Afghanistan, a non-OPEC member. Afghanistan was useful to Al-Qaeda because it is an emerging regional crossroads for the labor (India, Pakistan, and points southeast) moving toward employment (the Gulf and now, increasingly, petroleum jobs in Central Asia) directed primarily in the supply of non-renewable energy to the West. Osama bin Laden was able to build his forces because of where he located and because the people moving through those crossroads to join him were placed, by the global economy, in a relationship with the United States which they found emasculating. The foregoing analysis in no way lessens the heinous nature of 9-11, but 9-11 in no way changes the fundamentals underlying our porcine addiction to foreign oil. Like sugar in pre-Revolutionary Cuba, fruit in interbellum Central America, or cotton in the Old South, resource-supply economies produce dependent-identities in one crop countries. This dependence breeds contempt for the society conducting the advanced, value-adding production of finished goods and materials. Though Osama bin Laden reaped the deadly harvest of 9-11, piggish American commuters driving SUVs sowed many of the seeds from which those fruits sprouted.

With this context in mind, one can map our current crisis. Knowing the environmental laws, understanding how they require us to assess impact, and then watching how we seek to avoid the lessons presented by enforcement and compliance actions—these
are the tools to mapping the present domestic and international security threat.

II. Case Example: The Northeast Attacked by Enemies, Foreign and Domestic

The attack on 9-11 was an ingenious tactical strike against the heart of the carriage systems which are fueled, in part, by sources of foreign fossil-fuel. The dynamo of the Industrial Revolution was turned on itself, creating death where its original design was simply to create efficiency. But Al-Qaeda had no strategic vision: it failed to strike again at the other carriage systems essential to our energy-drive economy—the natural gas pipelines, the electrical grid, and the shipping lanes—which are the trademark of a liability-rich economy. A worthy opponent would have planned a second strike, fast on the heels of the first, against one of these carriage systems.

The expansion and maturation of carriage systems, and the consequential clash of the media and/or commodities which travel over them, was first noted in the context of airline deregulation, through the Airline Deregulation Act of 1978, and financial deregulation, through the Depository Institutions Deregulation and Monetary Control Act of 1980. One of the more ancient carriage systems—the sealanes over which our fossil-fuel is carried—was the concern of the mid-1970s initiative in response to the then-Soviet Navy’s floating of a “blue water” fleet capable of intersecting our trading routes. Given that the present national security crisis has been used to prompt an environmental security crisis, it is interesting to note that one of the formative decisions during this period was one of cost-shifting. The Defense intelligence community had

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76. Scott C. Truver, Ph.D., The Law of the Sea and the Military Use of the Oceans in 2010, 45 LA. L. REV. 1221, 1224-1225 (1985) (citing the tragic reactivation of the IOWA Class—which lead to the death of forty-seven men through the operation of unsafe gunnery systems—as one means by which modern Defense establishments economize). Such examples of trading are common to both national security and environmental security decisions.

It is the combination of our All-Volunteer Force with the judicial rules which bar cost-shifting in the event of accident which leads to the disproportionate allocation of national security costs. To be blunt, the argument runs that because Vice President Dick Cheney did not serve the nation at war during Vietnam he did not incur the initial cost of national security, and continues to avoid that cost through the advantages the judiciary have given him, a taxpayer, when unforeseen costs arise. Cheney, Wolfowitz, and other decision-makers derive an additional benefit when they, as federal executives, participate in the making of the decisions which lead to others paying national
modeled an attack on the World Trade Towers sometime after 1995. The threat was known, and a decision was made—implicitly or explicitly—to not defend against the threat. The cost was accordingly spread on to the families of the victims, the communities attacked, and ultimately on to the national economy. Emotionally, one wants to recognize the greater loss of life on 9-11, and to recognize that the attack was by foreigners bent on destruction of our homes. But in truth, these are nuances of the carriage system and the demands it makes on us all. The critical query to ask is why—in our culture of avoiding accountability—have we failed to identify the domestic enemies who force threats upon us with the same resolve as foreign enemies. Remember, on 9-11 our enemies succeeded in the only sure way to strike a carriage system, by using the tools of that system to strike the markets it serves. Who we identify as “foe” says as much about American society as whom we identify as “friend.”

But as our carriage system was attacked from without, a less obvious attack was also occurring against our domestic welfare, at home. Public Employees for Environmental Responsibility opened a New England Office in November 2001, to deal with the increasing number of concerns emanating from local, state, and federal environmental employees. The message was clear: a new politics pushed from Washington and into the states was trumping science-based legal and regulatory environmental decisions at all levels of government. Although a few intakes highlighted New England-specific concerns, most employee concerns focused on the Bush Administration’s application of its anti-environmental policies to local state and federal relations.

Where this initiative led to a de-emphasis of environmental enforcement, it encouraged corrosion of domestic law enforcement operations as those are directed against non-9-11 related threats. Moreover, after 9-11, many public employees and non-governmental employees alike felt constrained in their ability to criticize anything slightly-flavored by a national security rationale. The Bush administration and fellow-traveling Congressmen took advantage of the nation’s fear and proceeded to undo the environmental enforcement legacies of both Presidents George H. W. Bush

defense costs. In other words, federal Defense budgets are inked in blood, blood typically of someone else’s child. See Donald N. Zillman, Protecting Discretion: Judicial Interpretation of the Discretionary Function Exception to the Federal Tort Claims Act, 47 Me. L. Rev. 366, 374 n.66 (1995) (citing numerous suits against the government that cut across the spectrum of security interests, including national, environmental (including safety, public, and workplace), and commercial security).
(1988–1992) and Bill Clinton (1992–2000). New national security rationales became the means of launching a domestic war against the environment and, more alarmingly, the public employees who steward that environment.

These attacks on the nation’s environmental well-being were both blatant and thinly veiled. The Department of Defense took a Clinton-era, pre-September 11th agenda to gain wholesale exemptions from the nation’s environmental laws. PEER leaked this story in August 2001 and leaked the second attempt by the Defense Department to do the same in 2002:

The markup will address only two parts of the changes DOD requested from Congress on Monday, a spokeswoman for Subcommittee Chairman Joel Hefley (R-Colo.) said Wednesday, although she could not specify which provisions would be considered. At a March hearing, Hefley said his panel had been getting reports from DOD and the military branches that envi-

77. See, e.g., Rewriting the Rules: The Bush Administration’s Assault on the Environment, NRDC REPORT (Natural Resource Defense Council, New York, N.Y.), Apr. 22, 2002 (noting that the Administration’s attack on environmental protections intensified after 9-11); Dan Meyer, Letter to the Editor, Military Assaults on the Environment, WASH. POST, Aug. 26, 2002, at A14 (“Mr. Woodley did not mention the staggering record of environmental violations by the Defense Department, which is the basis for the opposition of the National Association of Attorney Generals, among others, to the Pentagon’s quest for legal exemptions.”).

78. As the Democratic leadership retreated from direct opposition to the President following Election 2000 and 9-11, the focused opposition to the Bush Administration devolved—for the first time in many decades—to simple citizens impassioned about the unintended consequences of globalization and the intended trashing of the environment by the rising Republican majority. If the war is a “wedge” for the President to deploy against the Democrats in the final break-up of the New Deal coalition, the environment is a “counter wedge” for Democrats to drive against the President’s tenuous hold on the American center. See Editorial, Balancing Act, Must Environment Really Suffer for Military Readiness?, CHARLOTTE OBSERVER, Jan. 17, 2003.

Congress should be cautious of military requests to ease environmental laws that allegedly impede training and harm combat readiness . . . . Defense readiness is crucial, of course, and the Pentagon’s concerns should be given a serious hearing. But before any compromise of irreplaceable resources, Congress should require this country’s very resourceful military to show that other options have been exhausted.

Id.

environmental laws were having "adverse impacts" on their readiness, which could affect national security in the future.

However, he stressed the subcommittee does not intend to propose or support any legislation that would harm the environment. "We are not trying to overturn or repeal any of the existing environmental laws," Hefley said. "What we are trying to do is find a balance between the need to protect national security and the environment."

Earlier this month, Public Employees for Environmental Responsibility, released a draft of the bill, calling it "a license to pollute" since military training facilities would not have to adhere to key environmental laws. Jeff Ruch, PEER executive director, said "clean water provisions in the draft have since been dropped, but sections allowing DOD to enter into agreements with private groups to take control of excess military land had been added."80

The agenda was advanced, in part, as the prudent response to the terrorist threat. Defense lobbied that encroachments—conservation-based restrictions on how military land was used and how training could be conducted—were impacting readiness by reducing training opportunities for the uniformed services. Raymond Dubois, Jr., Deputy Under Secretary of Defense, stated,

We have only recently begun to realize that encroachment at our operational ranges is increasingly constraining our ability to conduct the testing and training that we must do to maintain our technological superiority and combat readiness. And in the post 9/11 world, we know that our forces and our weaponry must be more diverse and flexible than ever before.81


In the wake of last week's terrorism in New York City, Washington, and Pennsylvania, the nation is preparing for war. Cranking up the war machine could involve expanding training operations at military installations throughout the country—many of which harbor endangered species—and some environmentalists are concerned that laws to protect the species may be relaxed in the name of national security.

Don Pitts, president of the National Military Fish and Wildlife Association and a wildlife biologist with the Army, says expanded training operations inevitably will have some adverse impact on the environment.

"Any time you've got 35,000 more people out there into any [military]
Moreover, Senator Frank Murkowski (R-Alaska) argued that the 9-11 attacks made it essential to exploit the pristine Arctic National Wildlife Refuge (ANWR) for oil:

There is no doubt that at this time of national emergency, an expedited energy-security bill must be considered. Opening ANWR will be a central element in finally reducing this country's dangerous overdependence on unstable foreign sources of energy.82

While American soldiers, sailors, marines, and aircrews were suiting up for war, those among the President's men—and many others—were suiting up to find carpetbagging opportunities at home, despoiling the very environment the uniformed services were pledged to defend from "all enemies, foreign and domestic." Even environmental activists grew silent and failed to rally in opposition to questionable appointments, such as that of Donald Schregardus for the lead enforcement position at the Environmental Protection Agency.83 Copperheads within the environmental movement and carpetbaggers without cheered the new paradigm. Many environmentalists, afraid to be viewed as unpatriotic, remained silent.

A nation truly committed to its national security would have appraised its liabilities, looked to its vulnerability at home and abroad, and then looked to its President for the decision as to where the national sacrifice needed to be made: we have sacrificed little, if anything, over the past year to increase our relative level of security.84 We want to drive the SUV, and win the war. The unstated choice in citizens' calculus is that we will balance that equation activity, it will have a negative environmental impact," Pitts said, referring to President Bush's recent decision to call 35,000 reservists to active duty. "You'll have more military vehicles operating and training pressure will increase on the military lands, no question about that. Will this run up against endangered species? Yes, it could. Will it tear up a lot of lands? Yes, it will."

At the same time, he says, military readiness is the top priority of the armed forces and understandably takes precedence over all other concerns. "I can fully understand an army lieutenant saying, 'Hey, my men are more important than your little dickey bird,'" Pitts says. "Their number one objective is keeping as many guys alive as possible."

Id.

84. As provocative as it may be, the American people—as the Sovereign—need to assess threats to the Republic's security in terms of both national security risks, as in those posed by foreign enemies intent upon 9-11-genre destruction, and environmental security, as in those posed by malignant federal executives, whether they be President Bush's Chicken Hawks or other such executives in future Republican and Democratic Administrations. See Editorial, Homeland Threat, Balt. Sun, Jan. 23, 2003, at 12A;
through a defiling of our environment and by asking others—our volunteer soldiers, sailors, aircrews, and marines—to fight our resource wars.85

A. Field Study: Camp Edwards, or the Massachusetts Military Reservation ("MMR")

New England provides an example of how the indirect allocation of resources for collective security can lower a citizen’s overall sense of security.86 Cape Cod, Massachusetts is home to Massachusetts Military Reservation (MMR), which encloses approximately 21,000 acres of Cape Cod, including the 14,000-acre Camp Edwards training area. Since 9-11, the uniformed services have trained at Camp Edwards in small arms, artillery, and mortar practice on the base. A century of lead and powder discharges have accumulated on the site. Sections of the facility have also been used for the burning of propellant bags, detonation practice for explosives, and the disposal of unexploded ordnance. In 1983 and 1984, the U.S. Air Force detected volatile organic compounds (VOCs)87 and other potential carcinogens in on-site monitoring wells near the base landfill and live fire training area. MMR was added to the U.S.

Ariel Sabar, Senators Oppose Military Exemption; Pentagon's Environmental Proposals Raise Skepticism, BALT. SUN, Jan. 22, 2003, at 1B.


In recent briefings to the Shoreline Preservation Committee of the San Diego Association of Governments, however, Army Corps officials contended the sand was unsuitable for beach replenishment because it is too silty and could contain unexploded munitions. A handful of unexploded cartridges and a mortar shell were discovered in sand dredged from the harbor in 1997. Id. at B3:2.


Ken Salazar, attorney general of Colorado and head of a national committee of state attorneys general, complained in a letter to the House committee that the exemptions could have "adverse impacts on human health and the environment." Currently, the Defense Department, he said, has a poorer record complying with the Clean Water Act than other federal agencies or private industry. Id.; see also Suzanne Struglinski, DOD: Bill Said to Clarify Enviro Laws to Improve Military; Readiness, GREENWIRE, Apr. 23, 2002, at http://www.eenews.net/Greenwire.htm.

87. VOCs are listed as Hazardous Air Pollutants under the Clean Air Act, and include hydrocarbons, oxygenated hydrocarbons, and organic compounds containing nitrogen or sulfur. VOCs present a potential health hazard to humans.
Environmental Protection Agency's National Priority List of Superfund sites in 1989.\textsuperscript{88}

In 1995, EPA Region 1 conducted a multi-media inspection at MMR, identifying numerous potentially contaminated areas. Ten plumes of contaminated groundwater were discovered as sourced and emanating from Camp Edwards; even today, these plumes continue to migrate \textit{one to two feet a day}. Numerous municipal and private wells were contaminated. The plumes were of particular concern to EPA Region 1 because the groundwater underlying the MMR is the sole source of drinking water for the Upper Cape's year-round and seasonal residents. The largest part of the aquifer lies \textit{directly} under the Camp Edwards training range, and is particularly susceptible to contamination given the shallow depth to groundwater and the sandy, porous soils.

Though 9-11 was obviously a deep wound, and the insecurity it poised was life changing for many Americans, is it a threat greater or lesser than the threat poised to the drinking water of the residents of Upper Cape Cod? And if your health is threatened by your own country men and women, is that betrayal lesser or greater than that of a foreign national conducting an act of terrorism? How does one weigh environmental treason against international treachery?

EPA Region 1 began taking enforcement actions against the Massachusetts Air National Guard, the Massachusetts Army National Guard, and the United States Marine Corps' collective improper hazardous waste handling practices at MMR. In May 1997, EPA Region 1 ordered the Massachusetts Army National Guard to

\textsuperscript{88} Despite EPA Administrator Christine Whitman's "green" reputation, EPA is no longer positioned as it was when it sought to correct the problems at Cape Cod's Camp Edwards. Cory Reiss, \textit{Environmentalists Question EPA's Priorities}, SARASOTA HERALD-TRIB., Jan. 13, 2002, at A12.

Environmentalists are concerned that the war on terrorism is hampering the war on pollution as criminal investigators for the EPA are diverted to homeland security. They argue that the shift of priorities comes as the agency posted its third straight decline in the number of people it referred to the Justice Department for prosecution. Last month, Environmental Protection Agency Administrator Christie Whitman said that 40 percent of the agency's 232-person criminal enforcement office had been reassigned to assist the FBI and help at the three terrorist crash sites. An official in the criminal office said Friday that such diversion will continue, including teams sent to the Super Bowl in New Orleans and the Olympics in Salt Lake City next month. EPA investigators have been assigned to the international criminal police agency Interpol and the Treasury and Justice departments, among other duties.

\textit{Id.}
suspend all training activities at MMR capable of releasing contaminants into the air, soil, and water on Upper Cape Cod. 89 It was the first time in the history of the nation that an environmental agency suspended military training activities due to an overriding concern for public health and the environment. Subsequently, the National Guard agencies were directed to remove unexploded ordnance, clean up contaminated groundwater, and clean up contamination in soil that had not yet reached the groundwater, but threatened the aquifer. 90 EPA issued these orders under the emergency provisions of the Safe Drinking Water Act (“SWDA”), citing concerns for the health and safety of approximately 200,000 year-round residents and 520,000 summer visitors who depend on the Cape Cod aquifer as their sole source of drinking water.

Just prior to the Al-Qaeda attacks on New York City and Washington, D.C., PEER learned that Defense planned to seek broad exemptions of many federal environmental laws for military readiness activities, all in the name of national security. 91 These were the very same activities which threatened the lives of the Upper Cape residents who drew their potable water from the aquifer beneath Camp Edwards. Defense asserted that encroachment in the form of environmental compliance requirements led to an ill-prepared uniformed service, jeopardizing the security of all Americans. 92 All of the activities that take place at Camp Edwards and the MMR are considered military readiness activities and the De-
Defense proposals put the suspension of training activities, and the clean up of MMR at risk. For the people of Massachusetts, the second wave of attacks following 9-11 were coming from Washington, D.C., and were not directed toward the same.

Defense's initial proposals did not specifically seek relief from the SWDA. But it did specify exemptions from provisions of the Clean Water Act regarding the discharge of munitions and ordnance, and from the Resource Conservation and Recovery Act (RCRA) and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or Superfund) provisions—all of which were relevant to MMR. It was also clear that Defense had the SDWA in its sights. On March 14, 2002, Mario P. Fiori, Assistant Secretary of the Army, testified before the U.S. House of Representatives' Subcommittee on Military Readiness. In his testimony, Fiori claimed that the nation's environmental laws significantly constrained the Army's ability to conduct military training, to the point where national security was jeopardized. Specifically, Fiori stated:

> The use of environmental statutes, such as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Resource Conservation & Recovery Act (RCRA), and the Safe Drinking Water Act (SDWA), to require investigation and cleanup of munitions and munitions constituents on operational military ranges will likely impact the Army's ability to fulfill its national security mission by causing the shut down or disruption of live-fire training . . .

Fiori went on to bitterly complain about EPA's actions at MMR, stating:

> In 1997, the U.S. Environmental Protection Agency (EPA) Region I issued an Administrative Order under the SDWA prohibiting the use of lead ammunition, propellants, explosives, and demolition materials at the Massachusetts Military Reservation (MMR). This Order was issued to prevent possible impacts to an EPA-designated sole source aquifer. This discretionary action essentially shut down live-fire training at MMR except for use of

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Cape's congressman who has testified at congressional hearings on this subject over the past two years.


94. Id.
plastic, frangible, and green ammunition. Given the fact that our units employ a large number and type of weapons, and that we train with those weapons on literally thousands of ranges, the potential for cessation of live-fire training at other ranges is of great concern to us. The inability to fully train at MMR caused Army Reserve and Army National Guard units to schedule training at other locations, such as Fort Drum, which added approximately 12 hours travel time to already tight training schedules.  

Fiori’s statements made it clear that Defense had little concern for public health or the environment, and that Defense would be seeking to eviscerate EPA’s powers to issue enforcement orders against active military installations. PEER and a host of other environmental organizations fought against the exemptions, and ultimately, the bid for exemptions failed.  

Ironically, the General Accounting Office (GAO) recently found that the military services have not demonstrated that environmental laws impede their military readiness. GAO’s well-timed report stated, “Military services report they have increasingly lost training range capabilities because of encroachment . . . [but] service readiness data do not indicate the extent to which encroachment has significantly affected reported training readiness . . . . Training readiness, as reported in official readiness reports, remains high for most units.” Despite this report, DOD has made no secret of its plans to reintroduce the exemptions in fiscal year 2004. If DOD is successful, EPA-ordered clean-ups of lead, unexploded ordnance, and propellants on MMR and other military installations around the country could be compromised, if not eliminated altogether, regardless of the impacts to human health or the environment. In the case of MMR, training activities could likely resume, and Cape Cod’s sole source aquifer would again be at risk from additional contamination, jeopardizing the health of hundreds of thousands of Americans.  

95. Id.  
96. The Senate’s original bill, S. 2225, sought changes to the Endangered Species Act, Migratory Bird Treaty Act, Marine Mammal Protection Act, Clean Air Act, the Comprehensive Emergency Response, Compensation and Liability Act, and the Resource Conservation and Recovery Act. The Chairman of the Senate Armed Service Committee, Carl Levin, ruled that the proposed exemptions were out of the Committee’s jurisdiction, and issued S. 2514 which did not include the exemptions. The House version, H.R. 4546, included changes to only the Migratory Bird Treaty Act and the Endangered Species Act.  
97. GENERAL ACCOUNTING OFFICE, GAO-02-614, MILITARY TRAINING: DEPARTMENT OF DEFENSE LACKS COMPREHENSIVE PLAN TO MANAGE ENCROACHMENT ON TRAINING RANGES (2002).
The Massachusetts Military Reservation matter reveals the false choice we often set up in our public discourse: we must have national security or a secure environment, but not both. The real choice hidden in this representation by federal officials is the unspoken calculus: we cannot police both our national lawbreakers and foreign lawbreakers concurrently for some reason, and because of the sensitivity of that reason, we would prefer not to engage in the discourse.

B. Case Example: The North Atlantic Right Whale

The North Atlantic right whale, *Eubalaena glacialis*, is one of the rarest large whales on earth. Numbering only around 300, the whales spend their lives migrating between the east coast of Canada, where they summer, to Florida, where they calve in the winter. The right whale population was decimated in past centuries by whaling. In fact, right whales were given their name because they were the “right” whale to kill; they were slow swimmers, and they floated when dead. Despite a global moratorium on killing right whales in 1935, the North Atlantic right whale has been slow to recover. Today, the two primary causes of death are ship strikes and entanglements in fishing gear. Given the precarious position of the right whales, the death of any one right whale can affect the entire population and is of grave concern.

The North Atlantic right whale is listed as endangered under the Endangered Species Act, and each year for the past several years, Congress has appropriated millions of dollars to enhance right whale recovery and conservation. Under the Bush Administration, however, right whales are facing more imminent dangers, again in the name of national security.

In June of 2002, PEER was informed that the Brunswick Naval Air Station in Brunswick, Maine, was bombing areas where right whales had been sighted off Cape Cod. With a portion of the budget appropriated from Congress, the National Marine Fisheries Service (NMFS) conducts regular aerial surveys to record the locations of right whales. This information is then disseminated to mariners, fishermen, whale watch boats, the Coast Guard, and the

Navy so that these entities can give the whales a wide berth to reduce the potential for ship strikes or entanglements in fishing gear. On June 10, 2002, NMFS aerial surveys discovered the disintegrated carcass of a partially decapitated right whale calf. While dead right whales are found occasionally, the wounds to this calf were not consistent with a ship strike or fishing gear entanglement. Fearing that the calf had been hit by a Navy explosive charge, PEER issued a press release describing the Navy bombing in right whale habitat, and elaborating on the risk the bombing posed to the species.

The response from the Navy was immediate. John W. James, director of public affairs for the Brunswick Naval Air Station, immediately rolled out his press defense, denying that the bombing had occurred. James insisted that the Brunswick Naval Air Station had not dropped any bombs in the area in years, and attacked PEER's credibility. On the same day, however, a Navy representative from Washington D.C. was quoted as saying the area where the bombs were allegedly dropped off Cape Cod was "fairly active," and bombing exercises were indeed conducted in May.

Faced with these conflicting reports, the Navy ultimately admitted that PEER was correct, and explosive charges had been dropped in the right whale habitat. John James stated that the Navy "dropped 24 Mark 20 cluster bombs and eight Mark 82s, which are 500-pound bombs, from May 1 to May 9 as part of a routine training exercise to prepare a squadron for overseas deployment." The Navy excused its behavior by claiming that before

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99. It is illegal to approach a right whale within 500 yards in U.S. waters without a permit from NMFS.


101. See Jim Geraghty, Navy Denies Doing Bombing Runs in Whale Habitat, BANGOR DAILY NEWS, June 28, 2002 (quoting James as calling the accusation speculative and questioning where PEER was getting its information from).


The cause of death of a North Atlantic right whale calf discovered recently in the Gulf of Maine is listed as undetermined, but the calf's condition led some activists to question whether naval training exercises could have been the cause. However, a study and tissue samples taken by the New England Aquarium Right Whale Research Team found no link between the death and the Navy's operations... The Humane Society and Public Employees for Envi-
dropping any explosives, pilots "are required by regulation to fly 1,500 feet or lower and visually clear the area," looking for whales. 104 Unfortunately, aerial surveys for whales, while helpful, are not determinative. Whales cannot be seen by planes when they are engaged in diving activity, nor can they be seen in choppy waters or in fog. The North Atlantic right whale is in the Brunswick Naval Air Station's bombing range only a few months out of each year. Given the critically endangered status of the species, it is imperative that the Navy engage in their training exercises elsewhere during this time of year.

The 2002 Right Whale controversy belied the historic tendency of the U.S. Navy's public affairs officers (PAOs) to lie. Let us face the sad tragedy of our Armed Forces and their relations with the general public. 105 Stung by failed public relations during the Vietnam Conflict, they have developed a professional cadre of spin doctors. For some reason, the Navy PAOs—and not necessarily the Army, Air Force or Marines' PAOs—have institutionalized the au-

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104. Id.


The Navy decries actions to protect threatened and endangered species by federal wildlife protection agencies such as the U.S. Fish & Wildlife Service and the National Marine Fisheries Service because they take a "precautionary approach" toward protecting sea life, arguing that its operations should not be hampered by "lack of quality data" and "limited scientific understanding" of the vulnerability of marine mammals, sea turtles and other aquatic life. Despite recommendations that Navy contractors "consider, wherever practical, using closed environments (e.g. quarries, catch-ponds) for the testing of ordnance and other live-fire testing" the Navy resists adopting any possible changes in its own operations to avoid environmental impacts. Instead the documents outline a series of statutory exemptions that the Navy intends to seek from the Endangered Species Act.

Id.
omatic denial to the point of lying.106

When assessing the 2002 Right Whale incident and what it says about the relationship between the Bush Administration and New England, it is helpful to look at the public relations between the Department of Defense and the nation during George H. W. Bush's Administration. Again, national security has components of environmental security worked into its tenets, and the manner in which a decision-maker handles the choices in one area of concern sheds light on the manner in which they will treat the other.

Remember the rule: once a senior executive exhibits a tendency to place the private interest over the public interest, all decision-making then becomes suspect. This truth holds equal weight in decisions of both national and environmental security. And an administration which cannot think in the public interest will almost never be able to reason its way to a coherent set of environmental policies. For this reason, the Bush Administration will never be able to conduct its environmental policies toward any goal other than resource distribution—trees, fish, grass, minerals, oil, and polluted air—precisely because it has no public ethic with respect to national or environmental security. Both these areas of decision-making are bound to the private interest of realigning American governance to ensure its succession.

In this daily world, the tendency is to spin rather than to govern. The tendency is to do exactly what the public affairs officer did at the Brunswick Naval Air Station when he was asked why they were bombing a federally-protected species. He denied they bombed; he said they went to Puerto Rico when it was common knowledge that Brunswick NAS uses the coast of New England as a practice area. For those who thought Election 2000 ended deceit in Washington, there is very bad news behind all the white noise produced by war drums. Lies are being told about the quality of your water, the quality of your air, the health of your forests, the care of your prairies and grasslands, and the size of your fisheries. A nation which cannot sustain laws promoting candor—such as the whistleblower protection clauses in the environmental statutes or the Whistleblower Protection Act itself—is a nation which is hiding

106. Compare Geraghty, supra note 101 (a Navy spokesman vehemently denied the accusation. “We don’t know where they’re getting their information from,” said John W. James, director of public affairs for Brunswick Naval Air Station. “We generally fly down to a range off of Puerto Rico for any live weapons drops. We do not regularly drop exploding live weapons in the Gulf of Maine.”) with Associated Press, supra note 102 (the Navy admitted the bombing).
something from itself.107

In the 1950s, the U.S. Air Force used killer whales for target practice, allegedly butchering thousands of them with machine guns, rockets, and depth charges.108 This practice continued as late as the mid-1960s, when the Air Force used killer whales as "targets for strafing runs in the Atlantic."109 Although this behavior by the United States armed services is no longer condoned—or legal—the post-9-11 acceptance of military supremacy can and does lead to unacceptable environmental results, including the indiscriminate bombing in areas occupied by critically endangered marine mammals. If this were simply a calculation of whether whales should perish in order to save citizens, the debate could follow a fairly predictable course—but this is not such a calculation. The naval officers who are required to ensure a secure environment can also train to detect that Iraqi or Libyan submarine stalking up on New England to strike from the sea and do so without killing an endangered species. But we do not want to follow such a course because we do not want to engage in the debate; conducting the science publicly forces the discourse into the public realm where it cannot be controlled.110

C. New England's Environment under the Bush Administration

The six New England states have benefited over the years from

107. New England has been the battleground for one of the past decade's most desperate environmental and labor fights. Under both the Clinton and Bush Administrations, the ability of state workers to challenge environmental compliance failures within federal programs managed by states has been vitiating by the Supreme Court of the United States (through its 11th Amendment jurisprudence). A heroine of the modern environmental movement—Bev Migliore—took a determined stand against this abandonment of congressional mandates in a case now before the Supreme Court. See Peter B. Lord, Panel Upholds Ruling for DEM, PROVIDENCE J.-BULL., Apr. 11, 2002, at B-01.


109. Id.

110. It is the factual presumptions and the standard under which analytical conclusions may be drawn which have unsettled those who understand that science can lay bare the planned Republican realignment, the forming of a new post-New Deal and post-Reagan power elite in Washington. Along with contractors expecting largesse in the form of outsourcing and commercial interests planning on bargain use of public resources, the manufacturing and energy lobbies also see a role for themselves in the new Republican coalition. Cf. Dennis Drabell, Dirty Business, WASH. POST, Jan. 12, 2003, at T13 (book reviews of Cass R. Sunstein, Risk and Reason: Safety, Law and the Environment (2002) and Devra Davis, When Smoke Ran Like Water: Tales of Environmental Deception and the Battle Against Pollution (2002)).
relatively strong local and state environmental laws, and from EPA and U.S. Army Corps of Engineers regions that are, relative to other regions in the country, environmentally conscientious. Sensing an independent base rooted in politics distinct from the Washington, D.C. headquarters, federal officials in New England have sought to craft their own agenda to suit the needs of the region. However, the Bush Administration, taking advantage of the post-9-11 public acceptance of all things military, acts on the premise that its unsubstantiated needs for increased military readiness take precedence over the health and safety of New England's endangered species and human citizens alike. It is possible that the Bush Administration would have sought exemptions from environmental laws and engaged in arbitrary bombing exercises among endangered animals even if 9-11 had not occurred. However, the 9-11 tragedy has afforded the Bush Administration a cloak of propriety, which they continue to use to attack environmentalism across the country. The real turn for New England is only just now being assessed, as the President's allies bring his policies to states such as Massachusetts for the first time.

The now almost-universal deference to local authority and business interests has created conditions where even institutions one could formerly trust are capable of the deepest of environmental betrayals. Delegation of environmental assessment, review, and compliance to the local level runs the risk that enforcement will be sacrificed in deference to community leaders or interests irrelevant when ensuring fidelity to the law. 111

111. Press Release, PEER, Berkshire Community College Wetlands Violations Investigated; Embattled School President in Center of Controversy (Aug. 29, 2002), available at http://www.peer.org/press/265.html; see also Jack Dew, Environmental Group Accuses BCC of Lying, BERKSHIRE EAGLE, Aug. 30, 2002, at A1 ("On the eve of the grand opening of a new soccer field complex at Berkshire Community College, a national environmental advocacy group has blasted the college and its president for allegedly destroying wetlands and falsifying data to cover up the damage to make room for the fields.").

As a result of the breakdown of environmental assessment, review, compliance, and reinforcement, decisions which ought to have been made at the agency level are now rebounding back upon Congress.

"These lands are where the Pechanga people came into being," said the ponytailed Macarro, who opened his statement to the committee with a greeting in his native language. He is chairman of the 1,400-member Pechanga Band of Luiseno Mission Indians, whose reservation comprises 4,396 acres near Temecula. Macarro testified in favor of a bill that would put a hold on SDG&E efforts to condemn land for a power line corridor through the 724-acre Great Oak Ranch, which the Pechangas bought last year. The company is seeking a route for a 500,000-volt line that would connect the Valley substation
The planned realignment of American governance seeks to decouple the remaining partners of the New Deal coalition—such as public labor unions—who have not already been won over to the Reagan coalition (such as Reagan Democrats) from their dwindling ties to the U.S. Government. Other partners will find the activities forming the basis of their governing relationship devolved to the states (as through outsourcing), where any Democratic ties will have a lesser impact on the federal Republican coalition now forming. The outsourcing of essential government functions to private contractors is one of the foundation stones of the new Republican realignment. The realignment of American govern-

in Riverside County to a new substation 30 miles south in the San Diego County community of Rainbow.


The Telecom Right-of-Way (TelROW) Coalition urged a House Resources Committee panel to move legislation (HR-3258) by Rep. Barbara Cubin (R-Wyo.) that would establish market-based fee criteria for fiber projects crossing federal lands. TelROW Exec. Dir. Eric Myers told the Parks, Recreation & Public Land Subcommittee the bill would ensure federal agencies charged right-of-way (ROWS) fees based on the fair market value of the land, rather than the value of infrastructure being deployed. The Bureau of Land Management (BLM) and Forest Service had considered modifying their respective policies, but since have backed away from implementing a fee schedule based on factors such as the number of fiber strands in telecom projects. Myers suggested the federal govt. apply “a cost or impact-based methodology” to private sector use of public land, similar to how the govt. determines payment when it acquires privately held land: “Since there is no true market in federal land, overall valuation, as well as the cost of the land impact, must be estimated.”


A bill sponsored by Rep. Mary Bono, R-Palm Springs, would allow a broadcasting company to travel through landscape designated with the highest protection given to public land. The designation also bans motorized vehicles. Environmentalists fear passage of the bill will send a dangerous message. “It defeats the whole idea of wilderness,” said Frank Buono of Public Employees for Environmental Responsibility and one-time assistant park superintendent at Joshua Tree.


ance and the replacement of both the New Deal coalition and the Reagan coalition with a true, conservative hegemony require the channeling of public largesse to the Republican base.114

III. EMASCULATION OF AMERICAN ENVIRONMENTAL LAW

“This is a criminal investigation, sir. You are asking about bias controls, which refers to research.”115

New England provides an example of where we may be heading following the election of an Republican-led national government in the fall of 2002. But even prior to 9-11 and the inauguration of President Bush, the pitch was prepped for the game in which we are all now involved. The United States is largely understood to have the most aggressive environmental laws on the books, globally, and is also understood to have government agencies least interested in ensuring compliance with those laws. This is evident in the federal government’s own compliance with the law. For example, the presence of extensive PCB contamination in the Columbia River was disclosed to the U.S. Army Corps of Engineers in 1992; despite this clear danger to the American people, the U.S. Army failed to act on the problem for nearly a decade.116

114. See Brian Stempeck, House Panel Attempts to Revive Controversial; Utah Land Swap, GREENWIRE, Sept. 12, 2002, at http://www.eenews.net/Greenwire.htm; Lee Davidson, Future Dim for San Rafael Swell Land Swap, DESERET NEWS, Sept. 10, 2002; Norton Ordered to Probe Utah Land Swap, WASH. POST, Oct. 1, 2002, at A2 (“The U.S. Office of Special Counsel, which oversees federal whistle-blower complaints, concluded that there was a ‘substantial likelihood’ that top Bureau of Land Management negotiator Terry Catlin abused her authority, ignoring warnings by six BLM officials that the swap was lopsided.”); see also Dan Harrie & Greg Burton, Land Swap Probe Ordered, SALT LAKE TRIB., Oct. 1, 2002, at A1.


116. Political realignments can fracture the funding bases for specific federal agencies, such as the U.S. Army Corps of Engineers. Long used to being the plum of local members of Congress dishing pork to their base, the Corps now finds itself at odds with not only the Bush Administration, but fiscal conservatives around the country. But
Instead of informing EPA Region 10 and the Oregon Department of Environmental Quality of the contamination, the Corps sat on the information until 1996. Clean up began in 2000, after eight years of aquatic harvesting within the Columbia River watershed downstream from the site. The presence of high PCB concentrations in clam and mussel populations near the mouth of the Columbia gives a strong indication that American consumers were knowingly exposed to toxic levels of PCBs by their own government. Given that the Corps itself is charged with environmental compliance, this is unpardonable.

For someone ingesting seafood that has occupied the PCB-laden habitat of the lower Columbia River, which is the greater trade-off? Is the risk of an earlier death due to PCB contamination higher or lower than the risk of a terrorist attack on Portland? How is such risk assessed? The National Environmental Policy Act of 1969 established the framework for conducting such assessments, but we flinch when considering the debate that follows from such

stripping federal funding is only a start; the Corps has yet to aggressively step in and police beach renourishment projects for actual environmental compliance through its permitting process. See Frank Zorc, Letter to the Editor, Help for Opponents of Sand Pumping, VERO BEACH PRESS J., Jan. 12, 2003.

PEER ... and Dan Meyer, its general counsel, stepped up to bat for us and Meyer hit a grand slam home run. ... We have an incredible advocate for what we have spoken repeatedly to the intentionally deaf ears of local special-interest politicians ... Remember the words of Mr. Meyer. The Vero Beach project "does not advance the public interest." The harm to the reefs and the expense to taxpayers "far outweigh the benefit to the select few homeowners unwise enough to build or purchase homes within feet of the Atlantic Ocean's tidal forces."


discourse.\textsuperscript{119}

A. \textit{Federal Courts Have Largely Removed Themselves from Environmental Law Enforcement}

Post Cold War, security has taken on an older meaning, one we were more familiar with in our pre-1948 experience. The threat during the Cold War was both distant and immediate. Because of that unique characteristic—and the totality of Mutual Assured Destruction—you could view the slow, creeping nature of environmental security threats as different than national security threats. A preemptive first strike is characteristically distinct from, say, Love Canal. The new security threat, post-9-11, is as proximate as it is protracted. The strike is closer to hearth and home, and it is continuous and ongoing. You cannot effectively establish a special culture—as we did with nuclear warfare—to manage the new security threat. The new threat will force us to handle national security in the same manner as we have handled environmental security since 1980: through trades of resource for degradation, through risk assessment and liability shifting. The national security and environmental security paradigms are merging.

Cost shifting necessitates the setting of public standards, the standards under which private interests may be converted into some activity which warrants a subsidy, or public largesse, in order to further that activity. When Vice President Cheney and his fellow Chicken Hawks gained deferments from service in Vietnam, those deferments were gained because we placed some activity higher than their commitment. Someone else took their place; someone else paid their portion of the national defense cost. Given that Ivy League institutions where still largely white male and upper class sanctuaries until the mid-1980s, that meant that wealthy white males had a disproportionate advantage in shifting their costs on to

\textsuperscript{119} But see Larry Seaquist, \textit{The People's Intelligence}, \textsc{Christian Sci. Monitor}, Feb. 18, 2003, at 11. Captain Seaquist is one of the legends of the modern American Navy, having completed ten sea tours and executing them as an intellectual. His junior officers used to say he had a “mind like a steel trap.” An iconoclast, he regularly produced contrarian results in war games (as was evidenced by the USS IOWA (BB-61) sinking three aircraft carriers in trans-Atlantic engagements in 1987 and 1988). He was one of the tacticians who planned the raid on Libya in 1986. His presence onboard a warship could be absolutely imperial. With Admiral Denny Brooks in 1987, Seaquist formed the core of a group of naval officers in the North Arabian Sea who walked a thin line between tanker escort duty and giving the White House a much-desired excuse to land Marines in Iran to secure the Straits of Hormuz.
someone else's back: education was a preferred activity, even though it was not open to all.

As with national security, so too with environmental security: if the Defense Department is not accountable under the nation's environmental laws, then some citizens pay more toward the common defense than others. The environmental security costs of national security are spread iniquitably in the same way that, for instance, the social cost of fighting in Vietnam was spread iniquitably when the young Dick Cheney and Paul Wolfowitz were permitted to avoid national service while others shipped out for the Mekong. For those still struggling with an understanding of this argument, a recent example from another area of public policy may help. It is worthwhile to note that the executives who gouged the American people during the economic boom following telecommunications and energy deregulation also shifted their costs—business costs—on to the backs of others. As was reported last year in the Green Earth Journal:

A growing coalition of environmental groups has successfully challenged the placement of telecommunications facilities in environmentally sensitive areas. Besides a number of site-specific victories, a more general review of environmental compliance by “telecom” companies is pending by the Federal Communications Commission (FCC) and the Council on Environmental Quality in response to a petition filed by Public Employees for Environmental Responsibility (PEER).

Over the past year, PEER, Cry of the Water, Wilderness Watch, the Forest Conservation Council, and others have coordinated attacks against unregulated technology build-outs. Last year, for example, legal challenges prompted the National Park Service (NPS) to cancel the construction of cellular towers along the wilderness stretch of the John D. Rockefeller Memorial Highway in Wyoming.

More recent victories include:

- In Death Valley National Park, NPS bowed to environmental challenges and did not reissue a right-of-way permit to SBA Towers, Inc., which erected and improved a tower on a Native American archaeological site adjacent to Mormon Peak—a designated wilderness area.
- SBA Communications, Inc., one of the nation's largest telecom companies, agreed to reduce the size of its cell phone tower and eliminate the aviation safety light near the Pecos National Historic Park in Glorieta, New Mexico. NPS administers the 6,600-acre park, which is listed,
in its entirety, on the National Register of Historic Places and contains sites sacred to Jemez Pueblo. The Tower is 1.2 miles from the central feature of the park - the ruins of the 17th century Pecos Mission Church.

- Along the Chesapeake & Ohio National Historical Park in Maryland, PEER has forced federal environmental review of a controversial power plant proposal near Point of Rocks.

Despite the results in applying environmental restrictions against communications towers, PEER and other groups have suffered set backs in their fight against laying fiber optic cables (FOC's) across endangered coral reefs off the coast of Florida. Moreover, thus far, FCC has allowed telecom companies to self-certify environmental compliance.

"None of the new telecommunications technologies are consequence free," stated PEER General Counsel Dan Meyer. "The state of regulation is only now just beginning to catch up with changes on the ground."  

Having just incurred the cost of irresponsible corporate actions in the telecommunications and energy sectors of the economy, why does the American public find itself now exposed to environmental security hazards, trading cleaner water for the vitiated environmental standards required to feed our un-renewable energy source needs? 


On the 29th anniversary of the Clean Water Act, an alliance of environmental groups on the Gulf Coast argued that the promise of the federal law aimed at improving water quality and protecting wetlands has so far been unfulfilled . . . . The network cited a wetland report card issued by Public Employees for Environmental Responsibility, which found that between 1993 and
tion that expert agencies left to their own devices are sufficient to ensure environmental enforcement and compliance with the law. In other words, it is *Chevron*\(^{122}\) that maintains this state of high environmental standards and low environmental compliance. *Chevron* is the Rosetta Stone to understanding why we defer to agencies not as experts, but as decision-making bodies which allow us to live the Big Lie through having unenforced, and yet, *tough* environmental laws. Absent *Chevron*, the heightened public debate would force the trade-offs into public awareness thereby developing public consensus as to which threats to our environmental security would be acceptable.

The effect of *Chevron* and its progeny has also been to reduce the role of the courts from enforcers of the law to enforcers of contracts between activists and federal agencies seeking to avoid protracted litigation.\(^{123}\) Effectively, *Chevron* forced a privatization of our environmental security in much the same way that our national security and environmental management is now being privatized. As such, litigation now becomes an exercise of game theory, with each party to a settlement agreement calculating its ability to stretch or shrink the zone of acceptable behavior within the context of negotiations.\(^{124}\) Regarding sensitive environmental resources such as the Mojave Desert, this has led to protracted, trench-and-cave warfare between activists and ranchers, with the federal agency and courts trapped in a no man's land between the combatants:

Mojave Desert cattle ranchers won a reprieve Wednesday when a judge decided they don't have to move more livestock off desert tortoise territory—at least for now. Eight ranchers had been ordered to move cattle from nearly a half-million acres of grazing ranges for two months while tortoise hatchlings are active. The U.S. Bureau of Land Management began enforcing the

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2000, the corps Galveston District denied only 26 of 1,292 applications for permits in developing wetlands.

*Id.*


123. *See Federal Lawsuit Settled to Protect 24 Endangered Species on 11 Million Acres of Public Land in California Desert*, *Ascribe Newswire*, Jan. 18, 2001, 2001 WL 2884834 (quoting Elden Hughes, a desert activist with the Sierra Club, as saying "No longer can BLM plan and plan without completion while the tortoise and other species free-fall toward extinction").

order Sept. 7 . . . . The judge, with the Interior Department's Office of Hearing and Appeals, stayed the cow-removal order until another judge can determine whether the BLM properly consulted with the ranchers.\textsuperscript{125}

In this political environment, courts cease their primary decision-making role and take up positions as fence-menders, minding the pickets of public debate. Enforcement of standards established by statute becomes less the goal of the judiciary. The significance of raw political power is heightened. Given that environmental enforcement is often time sensitive (e.g. the resource (tortoise) dies without sufficient habitat), \textit{Chevron} therefore produces a decision-making climate conducive to the gutting of environmental standards. Judges do not enforce standards so much as they monitor the enforcement of standards. And when the standards have been found unenforced, the fact that the resource endangered has already been harmed produces an incentive to not enforce the standard retroactively.\textsuperscript{126}

One way to illustrate the failure of the judiciary post-\textit{Chevron} is to look at the interplay of the various federal environmental statutes which are triggered when the U.S. Army Corps of Engineers, the U.S. Fish & Wildlife Service, and the National Marine Fisheries Service must take federal actions in support of local efforts to dredge sand and place it between homes erected by imprudent landowners and the sea.\textsuperscript{127} This activity has been underway for al-

\begin{footnotesize}
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  \item[126.] Jennifer Bowles, \textit{Desert Deal Set; Off-roaders, Ranchers Irked}, \textit{The Press-Enterprise} (Riverside, Cal.), Jan. 19, 2001, at A1 ("There's no question in our mind that we are entering a hostile world, a world in which the public leadership will advocate misuse of the environment." (quoting Dan Meyer, General Counsel, PEER)); see \textit{Federal Judge Approves California Desert Protection Settlement}, \textit{Ascribe Newswire}, Mar. 22, 2001, 2001 WL 2885985 (describing the more prevalent manner in which the judiciary now acts on environmental issues). \textit{But see Environmentalists Ask Federal Court to Hold B.L.M. in Contempt for Failure to Protect Desert Tortoise}, \textit{Ascribe Newswire}, Mar. 29, 2001, 2001 WL 2886069 (describing the difficulty encountered with enforcement of settlement agreements).
\end{itemize}
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most two decades and became routine about a decade after the federal environmental laws were passed. And yet, the post-Chevron deference to agencies has produced no scientific consensus on the impact all parties acknowledge. As a result, federal agencies become actors in state-run proceedings, or worse, unprogressive states circumvent environmental review all together.\textsuperscript{128}

The authors of our nation's environmental laws envisioned detached, reasoned public agency analysis by field offices of federal agencies working toward policies established by law and through Congress. What has been achieved is a marketplace of process, with compromises being made in order to placate well-funded interests, usually tied to the development iron triangle of local construction companies, banks, and real estate agents. What is entirely lacking is any ability—as the judiciary previously provided through tort law, for instance—to allocate costs equitably and fairly. As the impact of an individual's environmental choices is not linked to an assessment of the costs upon that individual, our environment degrades.\textsuperscript{129} Again, the analogy to our national security is direct.

\textit{Id.} Erika Bolstad, \textit{Sand Plan Runs Aground on Concerns over Turtles}, \textit{MIAMI HERALD}, Aug. 4, 2002, 2002 WL 24341658 ("'Our goal is to address everyone's concerns,' Somerville said. 'Nobody wants to have to renourish the beach. It's expensive, and it's not without some environmental impact.'"); Scott Wyman, \textit{Wildlife Officials Block Plans to Restore Broward's Beaches}, \textit{SUN-SENTINEL} (Ft. Lauderdale, Fla.), July 25, 2002, at 1B.

\textsuperscript{129} Jeff Nesmith \& William M. Hartnett, \textit{Martin Request for Beach Help Challenged}, \textit{PALM BEACH POST}, July 11, 2002, at 1B.

"The fact that the (White House) is now openly questioning the merits of (beach renourishment), that puts this whole debate into a new arena altogether," said the group's lawyer, Dan Meyer. The corps has not made a decision on the Hutchinson Island renourishment proposal. A spokesman declined to comment on the public employees [sic] statement or the OMB memorandum because they have not been officially made public by the White House. The appearance of the OMB memorandum in the Martin County case could signal a new strategy by beach renourishment opponents. Instead of concentrating on environmental concerns, such as the effect the projects are thought to have on coral reefs, opponents could attempt to shift costs to local taxpayers, for whom such projects would likely prove prohibitively expensive.


"The Army Corps is required by law to spend its money on projects that bring in a national benefit," he said. "Someone in Florida or in Washington has to make the case that saving the Florida community with beach renourishment is a national priority," Meyer said. "No one is making that case nationwide." In
individuals are unable to discern the public from the private interest, and if costs are spread without attribution, those individuals will make unreasonable and imprudent choices. A President who availed himself of options only available to the elite will not understand the impact of his decisions on the ground. A Vice President who had “other priorities” while others carried his pack in national service will not understand the institutional constraints within which he is operating. The beachfront homeowner will not understand the environmental costs of their view, unless those costs are brought home. Environmental security and national security are two sides of the same coin, and the judiciary has removed itself from providing a means of allocating those costs, by statute, through *Chevron* and its progeny.

B. *The Executive Branch and the Independent Agencies Now Enforce the Law Selectively*

It is now more appropriate to view American environmental law as optional, enforced only when it suits the political agenda of the leadership within the agencies charged with enforcement of the particular law in question. And where the enforcement lies with an agency with no environmental interest, the rule of non-enforcement is the standard. The FCC, for instance, has had a long-standing commitment to non-enforcement of the environmental laws as they pertain to submarine cables crossing coral reefs. As the FCC is an agency captured by an allegedly regulated interest—the telecommunication industry—which views itself as “green,” the degradation of Florida’s near shore coral reefs by the FCC will continue unabated until a federal judge puts an end to the abuse.130

The perverse nature of these relationships between federal

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Group [PEER] said rules should be revised to ensure that compliance with Endangered Species Act and National Historic Preservation Act weren’t “unlawfully delegated” to carriers and fiber cable-laying companies. PEER charged that laxness by FCC had led to damage to coral reefs in Caribbean and tidal ponds in New England. “The FCC is establishing a practice of eva-
agencies and their constituent industries has reached obscene levels of non-enforcement in the affairs of the U.S. Army Corps of Engineers. Just prior to the Corps leveraging the 9-11 death of American citizens to fluff its federal budget allocations, it was nailed by the Inspector General of the U.S. Army for lying to Congress in its budget projections to do the same. The same tendencies appear in Secretary Norton's Department of the Interior, where ranchers determine grazing policies, timber companies determine park forest policy, and outfitters and concessionaires determine parks.

Id.

The FCC has affirmed its environmental rules as they apply to submarine cables, fiber-optic lines, and radio frequencies that require the construction of wireless communications towers. In a separate statement, Commission Michael J. Copps . . . said the [PEER] petition and the record in the proceeding "raise many important questions about the Commission process of fulfilling our congressionally mandated environmental responsibilities . . . ."


The Federal Communications Commission . . . defended its practice of allowing industry applicants to determine the environmental impact of installing telecommunications equipment . . . .

. . . PEER cited two examples from 1996 where FCC-approved projects subsequently caused environmental damage—the installation of submarine fiber optic line along coral reefs in the U.S. Virgin Islands, and the dredging of a streambed in Scarsmont, Maine. The group also noted possible future environmental harm from future cable landing sites in Florida.


"It appears the MegaHeads are getting a clear signal on this one: reform or litigate," said PEER General Counsel Dan Meyer. "The Commission is trying to waddle through on this one, taking small steps when it should take up the matter of its failed environmentalism with general rulemaking. It has landed itself in this mess because it culturally does not see itself as subject to the nation's environmental laws."


The Army's Inspector General rocked the Corps with a 168-page report concluding that high-ranking officers had collaborated in distorting the most costly study in Corps history, manipulating data to show benefits exceeding costs.

. . . .

Recently the Corps sought to justify major projects with forecasts of future barge traffic on major rivers without the recommended review.

Id.
policies.\textsuperscript{132}

C. The Manipulation of Science is Now the Primary Activity of Captured Administrative Agencies

"This is like Enron all over again," said Kent Wilkinson, a senior BLM appraiser in Utah who gave a host of documents and e-mail messages to \textit{The Washington Post}. "They're cooking the books, and it's all to the detriment of the public."\textsuperscript{133}

1. The "Whoring" of Science

To maintain the Big Lie of high environmental standards and low environmental compliance and enforcement, the American government effectively turns its environmental agencies over to industry coalitions, which, in turn, devise strategies to vitiate enforcement of the environmental laws. The one slim, tenuous thread that could undo this pattern of deception is science and the use of science by federal employees required to produce findings before the decision is made whether to enforce environmental laws. After observing the combination of war-time talent and organizational skills which produced the atomic bomb, physicist and author C.P. Snow wrote a cogent piece on the relationship between science and the government, questioning the ability of the scientific method to retain its integrity under the pressures of the political process.\textsuperscript{134} Time would prove his predictions all too correct. As American institutions of learning became more and more dependant on federal funding through the Great Society reforms of President Lyndon B. Johnson, money entered the equation by providing a fiscal incentive to the corrupting tendencies of the political process. All of these forces combine in the agency environmental review, decision, and enforcement process created by \textit{Chevron}.

The "whoring" of science through the political process has created a Green movement term for the scientists who—much like attorneys—sell their positions for hire. They are called: "biostitutes."


\textsuperscript{134} C.P. Snow, \textit{Science and Government} (1961).
The leader of this professional genre is Secretary of the Interior, Gale Norton:

Among the most flagrant examples was how she handled a request for information from Sen. Frank H. Murkowski (R-Alaska). The senator had asked Norton several questions about the proposed opening of the “1002 Area,” or coastal plain, of the Arctic National Wildlife Refuge to oil development. Appropriately, Norton turned to her professional staff . . . to prepare written responses, based on the best scientific evidence, to his questions . . . . But Norton’s letter did not faithfully report her staff’s findings. In referring to the 130,000-strong Porcupine caribou herd that has become a symbol of the refuge, Norton’s letter said that “concentrated calving occurred primarily outside the 1002 Area in 11 of the past 18 years.” Flat wrong. As her staff told her, there have been “calving concentrations within the 1002 Area for 27 out of the last 30 years.” 135

Norton is a lawyer, trained in the salon of the Mountain States Legal Defense Fund, a rightward-leaning institution. She understands candor. Had Murkowski been a judge, and his committee a tribunal, the Secretary would have been liable for Rule 11 sanctions. There was either a lack of due diligence on her part, or a direct attempt to lie in a congressional inquiry. And yet there was no general outrage over such a lie, in the same way there was outrage over President Clinton’s alleged lie regarding an Oval Office dalliance. And the reason is pretty direct; Gale Norton lied to protect the Big Lie: the disconnect between American environmental law and the lack of enforcement of that law. Norton’s lie allows Americans to continue their standard of living without paying the true cost of that lifestyle. President Clinton’s lie undermined another of our Big Lies regarding the fidelity we think we see in the “Great Father” elected as an icon, or idol, to sit in the White House. One lie was acceptable because it reinforced our self-delusion; the other was unacceptable because it laid bare the myths we would rather believe.


Lieberman, a Connecticut Democrat, is fanning the flames of the controversy over the incorrect and allegedly biased information that Norton provided to the Senate on drilling in the Alaska National Wildlife Refuge. He’s followed up on the allegations of an environmental group that Norton lied to senators in order to bolster her case for drilling.

Gale Norton’s dishonesty to Congress is not necessarily a product of a corrupt character. Like many Americans and nearly all Beltway players, her ethics are situational. The end of combating some fantasy-evil—Big Government—gives her comfort that her lie is necessary for the public good. This is the rule, rather than the exception, in both Washington, D.C. and across the nation. In the last year, Bush political appointees have manipulated the scientific and economic findings of numerous agency staffs in order to justify wasteful and destructive projects that they believe will benefit the public good.

2. When Does “Packaging” Become “Spin” and “Spinning” Become “Lying”? Avoiding Enforcement By Denying the Facts

In January of 2002, the Army Corps of Engineers found itself lying to Congress to justify a massive dredging project on the Mississippi River that would primarily benefit the barge industry. Corps officials exaggerated the supposed benefits from the $1 billion dredging project and attempted to justify its expense by claiming that the project was vital to national security. This crass attempt to exploit 9-11 for bureaucratic aggrandizement may seem especially craven, but it is not a lone incident.

There are many other instances wherein political appointees have attempted to manipulate agency processes for dubious reasons. Land appraisals in Utah by the Bureau of Land Management, for example, have recently been shown to be influenced by political considerations to the detriment of the public good.

136. Mike Ferullo, Environmental Groups Push for Investigation of Norton Letter on Drilling in Arctic Refuge, BNA, Oct. 29, 2001 (“The Senate Governmental Affairs Committee should investigate whether Interior Secretary Gale Norton attempted to mislead Congress about the impact of oil drilling on caribou herds in the Arctic National Wildlife Refuge, environmental groups said . . ..”).

137. Associated Press, Engineers Hustle to Finish the Mississippi River Study, TELEGRAPH HERALD (Dubuque, Iowa), Jan. 3, 2002, at A5 (“The study, already eight years and $56 million in the making, was halted last year after the Pentagon confirmed a whistle-blower’s allegations that top corps officials had skewed data to justify $1 billion in lock-and-dam improvements. Three corps officials were reprimanded.”).

138. Barb Arland-Fye, Corps to Release Interim Mississippi River Navigation Report, QUAD-CITY TIMES (Davenport, Iowa), Jan. 2, 2002 (“But a flap has developed over the scenario analysis, to the dismay of Corps officials. They say an inaccurate report is circulating to the effect that the agency is stressing the Mississippi’s role in national security in an effort to justify $1 billion worth of lock improvements.”).


Politicization of the BLM’s appraisal process has lead to the “develop-
The land trade at the San Rafael Swell was presented to Congress as an even swap, with the state and federal lands worth $35 million apiece. But coal, oil and natural gas deposits make the federal land worth about $100 million more, according to federal appraisers and the Appraisal Foundation. Congress was told the exchange is environmentally benign, even though government biologists say some of the federal land is habitat for endangered species.\textsuperscript{140}

If Congress chose to make a transfer for unequal value, it would have been lawful to do so. Proponents of the transaction, however, chose to support a transaction and merely label it "for equal value" even when the values differed by about $100 million. When a federal employee disclosed as much, the transaction was subject to the rigors of legislative process. The proposed bill stalled in the final days of the last Congress.\textsuperscript{141} Blocking this malfeasance

\begin{quote}
ment of management ‘culture’ that frequently supercedes written guidance and an administration that fosters controversy,” and “pressures to change or to ignore, qualified market value opinions in order to create the erroneous appearance that land exchanges or transactions are conducted at market value . . . ”
\end{quote}

\textit{Id.}


\textsuperscript{141} Greg Burton, \textit{BLM’s Appraisal Processes Blistered; Unequal Land Swaps in Utah Costly to Feds, Report Alleges; Report is Critical of Swaps Between SITLA and BLM}, \textit{Salt Lake Trib.}, Oct. 11, 2002, at C1; Brian Stempel, \textit{Utah Land Transfer Passes, Wildfire Bill Could Go Straight to Floor}, \textit{10 Env’t & Energy Daily} No. 9, Sept. 13, 2002. As one editorial noted:

But the problems with the Utah appraisals are especially troubling. The whistleblowers claim that the federal parcels were undervalued deliberately, based on appraisals that ignored significant mining potential. The credibility of their claims is supported by extensive documentation—and also by the efforts of higher BLM officials to suppress the complaints. Rep. Chris Cannon, a Utah Republican who is pushing for the monument designation, has worsened matters by suggesting that the critics be “slapped hard” for their disclosures. Congress needs to look closely at the whistleblowers' case in considering Cannon's bill.

by senior Bush Administration officials and their networks back in Utah was a hero of the modern environmental movement, BLM Appraiser Kent Wilkinson. It was Kent's organized resistance under the nation’s whistleblower laws which outed this fiscal corruption. Rather than following federal standards for land appraisals, BLM appraisers have bowed to local political pressure and negotiated land swaps which, if approved, would result in large losses to the federal government and the public. In their rush to force the San Rafael deal, proponents of the exchange became accessories to the trampling of a number of federal laws. Substantive environmental review was lacking in many areas.

142. Berman, supra note 139. The BLM-commissioned Appraisal Foundation draft report—leaked last week by two environmental groups—details numerous “deficiencies and appraisal function discontinuities” in the BLM’s appraisal process and says non-appraisal advocacy and bias in the appraisal function “seriously erode the BLM’s ability to apply appraisal standards and to consistently uphold the public trust assigned to them by law.” Id.

143. The inability of states to cut through parochial local interests has been no more evident than in the state-federal land exchange program, where political pressure on federal offices within specific states has led to a near-criminal conveyance of public property at prices well below their value. Dan Berman, BLM Continues Review of Land Exchanges, Centralizes Approval Process, LAND LETTER, Jan. 30, 2003. American environmental hero, Kent Wilkinson, brought this tragedy to the attention of the U.S. Office of Special Counsel under the Nation’s whistleblower laws—without those laws, Kent would have had a much more difficult time spotlighting the malfeasance. Berman, supra note 139; see also Lee Davidson, San Rafael Land Swap Gets a Bit of New Life, DESERET NEWS, Oct. 12, 2002, at A1; Burton, supra note 141; Lee Davidson, Review Accuses BLM of Land-swap Politics, DESERET NEWS, Oct. 11, 2002, at B2; Cat Lazarof, Independent Auditors Denounce BLM Land Swaps, ENVTL. NEWS SERV., Oct. 14, 2002.

144. Brian Stempeck, Natural Resources: BLM Employee Botched Utah Land Transfer, Audit Says, GREENWIRE, Dec. 4, 2001, at http://www.eenews.net/Greenwire.htm (“[T]he project’s lead appraiser developed an ‘alternative approach’ for negotiating with land owners. . . . ‘We concluded that [his approach] was inherently risky and could not be effectively controlled to protect the integrity of the appraisal process and preclude any appearance of wrongdoing . . . .’”); see also Donna Kemp Spangler, 2 Groups Want BLM Official Out, DESERET NEWS, Dec. 3, 2001, at B1 (“Dave Cavanaugh after the latest audit found him sidestepping federal standards for land trades in Utah.”). Similar pressures have occurred with respect to marine conservation. Corps deference to powerful local business interests has largely left beach renourishment projects under-reviewed for environmental impact. Only occasionally do environmental groups—such as PEER—achieve small victories on the margins. See Henry A. Stephens, Stanbridge Surveys Access, VERO BEACH PRESS J., Feb. 1, 2003.

145. See Brent Israelsen, BLM Lists Risks of Land Deal, SALT LAKE TRIB., Aug. 31, 2002, at A1: A large proposed land exchange between the state of Utah and the U.S. government could jeopardize endangered species, big-game habitat, historical and archaeological sites and paleontological resources in the Book Cliffs of eastern Utah. Removing 122,000 acres of lands from federal ownership in Uintah
The 2002 San Rafael land exchange controversy highlighted the disarray into which our national environmental policies have fallen over the past two years. But many in Washington and throughout the nation already suspected the weakening leadership within the headquarters of agencies such the Bureau of Land Management. Like the drive to exempt the Pentagon from the nation's environmental laws, parochial nest-feathering efforts such as the Utah land exchange scandals will continue for the remainder of congressional activity in 2003 and 2004. The need to control the flow of information to the public was immense in the Clinton White House, but the process was malleable, more akin to a working of a press that no one thought they could control. Often, the message would move independent of the spin, and staff would go scrambling. The Bush White House, by comparison, is "Secret City," regardless of whether the matter is national security or the formerly more open arenas of domestic policy. This has led to suspicions of back-door deals at every level of the U.S. Department of the Interior's senior management, especially in their relations with Congress.

Though repeating an editorial in full seems extravagant, the concerns of the *Salt Lake Tribune* ought to be concerns of all Americans as their interests are acted upon, or against, inside the Beltway. In the Bush Administration's reengineering of the gov-

County also could "significantly impact" a herd of wild mustangs. Those opinions were expressed in a series of internal memorandums issued by the Vernal field office of the U.S. Bureau of Land Management (BLM) as "feedback" to the proposed San Rafael land exchange.

*Id.*


Incensed that a federal Bureau of Land Management appraiser claimed knowledge of "gross mismanagement" within the agency concerning the proposed San Rafael land swap, the Third District congressman branded the appraiser "insubordinate." Cannon also barked, "I want to make sure they (federal employees) get slapped hard, because they're acting inappropriately."

The Salt Lake-based appraiser, Kent Wilkinson, was so shaken by the congressman's attack, he sought whistle-blower protection in the federal Office of Special Counsel. Wilkinson's exposure to retribution is especially acute because not only does he have a congressman on his case, he's got to worry about his BLM superiors who'd sacrifice one of their own to curry favor in congressional corridors.

Is that possible, you ask?

Already the BLM's chief negotiator said a list of concerns about the swap
ernment, the change in political climate has heavy-booted overtones.

What really surprised many old hands in the circles of western lands activists was the venomous nature of Utah Congressman Chris Cannon (R-Utah) toward federal employees making lawful, protected disclosures to the U.S. Office of Special Counsel. Kent Wilkinson was advised to file preemptively in order to gain the sanctuary afforded by Title 5, which still gives limited protection against Congressional pressure.

compiled by subordinates was intended only for "internal discussion" and doesn't constitute a finding of facts. Looks like a muzzle being clamped on. Congressmen who want federal employees "slapped hard" for revealing alleged mismanagement might reconsider their remarks because federal law bars retribution against those who expose government impropriety. This is a hard-won piece of federal legislation achieved on the ruined careers of many courageous employees.

Why was Cannon so upset? Because he and other representatives are maintaining, against evidence to the contrary, that the federal-state land swap proposal is a fair deal; about $35 million, give or take, each way.

But BLM appraisers, led by Wilkinson, disagree.

As a preliminary step to preserving the 1-million acre San Rafael Swell as a national monument, the state would deed 108,000 acres of state land in the Swell in exchange for 135,000 acres of federal land outside it. Negotiators call the swap even. However, critics say the federal government could be the loser by nearly $100 million.

Why? Mineral values on the federal land include an estimated $44 million to $64 million in oil shale deposits.

This is where Wilkinson ended up in Cannon's sights. Wilkinson, attacked for doing the job he is paid to do, filed a "disclosure" with the Office of Special Counsel spelling out his knowledge of alleged "gross mismanagement" within the BLM on the land swap deal. If the deal stinks, it shouldn't go forward, even if, as Cannon says, there are enough votes to push the swap bill through Congress next month. Key Democrats are concerned about the fairness of it all. Taxpayers should be equally concerned.

Cannon's remarks were inappropriate. Intimidation and retribution are absolutely unacceptable; that's not what public office is about. Instead of throwing his weight around, Cannon should be thankful that a federal employee cares so much to protect the interests of the taxpayers.

Wilkinson also could be saving Cannon from the profound embarrassment of backing a bad deal.

If there's any slapping to be done, it should be one that brings Cannon to his senses.

Id.


Dan Meyer, Wilkinson's attorney, caught wind of Cannon's remark to the newspaper last week and said, "The (federal) employee ranks in Utah are not
This manipulation of science, and the information supporting it, is nothing new to Washington. The Beltway is going through a crisis in what it knows, how its knowledge is vulnerable, and vulnerable to what threats. The same “rush to novelty” which blinded Wall Street in the 1990s also blinded our national security élite. By following the likes of CIA Director John Deutch on a chase after emerging and ill-defined technology threats, Beltway insiders lost sight of actual, known vulnerabilities left unattended for a decade or more—like the failures of our non-proliferation policy, our counter-terrorism policy, and our Levant policy—vulnerabilities which were allowed to successfully challenge us.148 The same manipulation of science is now being used to undermine our environmental security in the same manner it was allowed to undermine our national security. Because we wanted a “peace dividend” in the 1990s, we deluded ourselves into a shift of our national security priorities. By denying the science underlying our environmental security—through the vitiation of the environmental assessment, impact, and enforcement process—we repeat the environmental parallel of the national security failure which produced the Second Resource War (that is, the Second Gulf War).

This is supported by the rejection of accountability at all levels of government. A decade ago, one could have viewed the loss of accountability in American society—primarily viewed through the

(Cannon’s) private prison farm. He’s not the big daddy.” Cannon told The Salt Lake Tribune that BLM appraisers who complain publicly about the land swap are insubordinate. He said one threatened to hurt him politically if the bill passed a House subcommittee. Meyer, who works for the Washington, D.C.-based Public Employees for Environmental Responsibility, fears potential retribution against Wilkinson by BLM administrators hoping to curry favor with the congressman. Id.; Brent Israelsen, BLM Agent Seeks Safety for Talking, SALT LAKE TRIB., Aug. 20, 2002, at D1. For background, see Michael Grunwald & Juliet Eilpern, U.S. Ignored Appraisers In Land Deal With Utah; BLM Experts Called Swap A $100 Million Giveaway, WASH. POST, Aug. 19, 2002, at A01; John Andrews, Letter to the Editor, Critics of Land Deal Protecting Their Turf, SALT LAKE TRIB., July 28, 2002 (criticizing federal employees as protecting their own bureaucracy).

148. See Paul Mann, Cyber-Threat Expands With Unchecked Speed, AVIATION WK. & SPACE TECH., July 8, 1996, at 63, 64 (identifying CIA Director, John Deutch’s ranking of cyber warfare as “a close third behind the threats from weapons of mass destruction (WMD) and the proliferation and terrorist use of nuclear, biological, and chemical . . . weapons”); see also Walter Laqueur, Postmodern Terrorism, FOREIGN AFF., Sept.-Oct. 1996, at 9 (claiming cyber warfare will be more destructive than either chemical or biological weapons). But see Larry Sequist, The Ten-Foot Tall Electron: Finding Security in the Web, in THE INFORMATION REVOLUTION AND NATIONAL SECURITY: DIMENSIONS AND DIRECTIONS 68, 75 (Stuart J.D. Schwartzstein ed., 1996) (arguing that societies will survive any impacts that information warfare might cause).
failures of the armed services—as a product of one professional community’s internal crisis, perhaps in response to its rejection by the American people following the Vietnam debacle. But following the 1990s, American society has been let down time and time again. Witness the Savings & Loan scandal, the turmoil of the Clinton Presidency, the Enron scandal, the MCI-WorldCom scandal, and the continued health care crisis (rooted, in part, to the cost escalation in response to accountability issues related to the way American society handles malpractice suits). Given this failure of accountability society-wide, one may consider asking whether it is because more is revealed now rather than sixty years ago or, even more important, whether Americans changed post-1964.149 A nation of those not tied by the binds of common defense—against national and environmental threats—is a nation of Cheneys, Wolfowitzes, Perles, and others who served themselves rather than a nation during the Vietnam war. A nation of citizens who have other priorities is also a nation which will privatize the public interests, and which will allow its élite to shift costs to the disenfranchised, the disempowered, and the dispossessed. It is a nation of consumers making rational choices regarding their own needs, including who would be better placed between the Iraqi bullet and themselves when consumption of foreign resources drives us to war.

So much for the national security implications of American conceit, what of environmental security? The conceit saturates our failing environmental security. A nation that no longer honors the public environmental interest will vitiate the clauses of its environmental statutes which protect those federal public employees who communicate violations of regulation, rule, or law.150 The same goes for state public employees who do the same.151 These efforts of judges are then crafted into sharp and biting tools in the privatization of our environmental security, the transformation of environmental security into resource extraction and redistribution. With the flow of environmental intelligence now in jeopardy, the Bushlets arriving in State Houses across the country are mounting the final assault on the sacrifice of the American standard of living.

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151. See R.I. Dep’t. of Envtl. Mgmt. v. United States, 304 F.3d 31 (1st Cir. 2002).
for the profits of their political donors.  

Similar stories regarding the manipulation of information are emerging from the National Forest Service ("NSF"). Research scientists in some NFS districts report experiencing pressure from upper managers to change research to better support political appointees' bureaucratic goals. Apart from the fact that this results in bad science, these types of decisions are trading effective long-term forest management for short-term political gains.

IV. BUSH ADMINISTRATION'S MODUS OPERANDI

From cradle to grave this problem of running order through chaos, direction through space, discipline through freedom, unity through multiplicity, has always been, and must always be, the task of education, as it is the moral of religion, philosophy, science, art, politics and economy, but a boy's will is his life, and he dies when it is broken, as the colt dies in harness, taking a new nature in becoming tame. Rarely has this boy felt kindly toward his tamers. Between him and his master it has always been war.

A. Attacks on the Pattern of Environmental Legislation

In the passage above, Henry Adams framed what could be adopted as the modus operandi for life inside the Beltway. Presidents choosing other goals of governance do so at their own peril. Despite the interruption of the Second World War, President

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152. See Stephanie Ebbert, State Workers Chafe at Press Ban, BOSTON GLOBE, Jan. 19, 2003, at B1 (reporting Massachusetts Governor Romney's letter to Massachusetts environmental police officers prohibiting them from speaking to the news media on any policy matters); Tim Craig, Ehrlich Transition Concerns Activists; Some Say His Actions Belie Pledge to Aid Environment; "The Tables Have Turned," BALT. SUN, Dec. 15, 2002, at 1B (reporting Maryland Governor Ehrlich's decision to exclude representatives of mainstream environmental advocacy organizations from a transition committee reviewing environmental issues).

153. Wire Report: Bush Watch, EMS Tipsheet, ENVTL. MEDIA SERVICES, Aug. 28, 2001 ("Another disturbing trend reported by PEER: Forest Service research scientists in the Northwest surveyed by the organization say their work is constantly compromised by political pressure, that long-term research is being sacrificed for short-term bureaucratic priorities and that they fear for their jobs if they speak out."); see also Erik Robinson, Politics Sway Forest Research, Scientists Say, VANCOUVER COLUMBIAN, Aug. 8, 2001, at C3 ("The research station is really responsible for doing research that is to guide how our forest are going to be managed. The type of research they do and the quality of the research they do have a huge impact on how our public forests are going to be managed." (quoting Lea Mitchell, Director, Washington PEER)).

Franklin D. Roosevelt demonstrated his willingness and determination to address both environmental and national security issues when he continued New Deal Programs, setting "the stage for the environmental . . . protection programs of the 1970s" even after national priorities shifted from economic recovery to war.\textsuperscript{155} By placing many jobless Americans in the Civilian Conservation Corps in positions working to prevent the erosion and destruction of terrestrial areas, the President showed how protecting the environment could bolster the American economy during economic slowdowns. Following the establishment of the New Deal Programs, Roosevelt implemented more environmental legislation such as the Migratory Bird Hunting Stamp Act of 1934\textsuperscript{156} and the Establishing Deer Flat Migratory Waterfowl Refuge of 1937 by an executive order.\textsuperscript{157} The integration of national economic security and environmental preservation was one facet of Roosevelt's New Deal legacy, which found no greater expression than in the passage of the Sikes Act of 1949.\textsuperscript{158}

The post-Roosevelt era American leadership continued his national balancing of environmentalism and national security. For example, the Truman Administration established the Water Pollution Control Act of 1948,\textsuperscript{159} a forerunner of the Clean Water Act of 1972.\textsuperscript{160} Then in the late 1960s, the federal government took the primary role as environmental leader when President Richard Nixon signed the National Environmental Policy Act of 1969 (NEPA).\textsuperscript{161} NEPA was the keystone for a "modern federal regulatory infrastructure for environmental protection."\textsuperscript{162} Although environmental statutes and federal regulatory agencies had been put forward or created since the early 1900s, the quantity of environmental statutes passed during the 1960s and 1970s marked the advent of the federal government's role as the primary institutional

\textsuperscript{157} Exec. Order No. 7655, 2 C.F.R. 1453 (1949).
\textsuperscript{162} See Percival, supra note 155, at 34.
force for the protection of the environment. Given the Department of Defense’s assault on environmental laws in 2001 and 2002, it is interesting to note that the majority of those environmental laws were passed during the most active phase of the Cold War while the nation was concurrently engaged in the Vietnam War.

Examples of the statutes signed during the Republican Nixon and Ford Administrations include the Clean Air Act and the Estuary Protection Act in 1970; the Coastal Zone Management Act and the Marine Mammal Protection Act in 1972; the Endangered Species Act (ESA) in 1973; the Safe Drinking Water Act in 1974; and the Federal Land Policy and Management Act in 1976. These statutes defined new roles for older agencies such as the Bureau of Land Management (BLM), the National Oceanic and Atmospheric Administration (NOAA), and the United States Fish and Wildlife Service (FWS), founded in the years following President Theodore Roosevelt’s placing of environmental and conservation issues at the forefront of national priorities.

While the New Deal legacy remained a bipartisan, and either respected or tolerated, foundation of Washington politics, national security policy was implemented without disregarding environmental concerns. Indeed, Great Society initiatives under President Lyndon Johnson—such as the National Historic Preservation Act of 1966 and the National Environmental Policy Act of 1969—were matched by President Richard Nixon’s own environmental successes. With the Right Wing’s coup against the Republican Party’s center and left in 1974 and 1980, however, the environmental agenda followed Governor Nelson Rockefeller, Mayor John

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169. Percival, supra note 155, at 34.
Lindsey, and Senators Hugh Scott, Charles Percy, and Charles Mathias out of the Republican Party (or out of active Republican politics).

The Reagan Revolution emphasized economic or "public choice" (free market) solutions to alleged environmental concerns, a trend which would continue in centrist Administrations such as those of George H. W. Bush and even, though to a lesser extent, Bill Clinton.172 For example, the Reagan Administration helped corporate America avoid the constraints of the environmental statutes by establishing a Task Force for Regulatory Relief.173 This group offered industry executives an exclusive, directed platform to oppose regulations they felt should be relaxed or repealed.174 Reagan's new federal regulatory programs undermined the environmental agencies' enforcement capabilities and set the precedent for federal agencies—such as the Department of Defense—to begin exempting their activities from the environmental laws. The roots of the current Defense Department antagonism toward the environment stretch back to the Ford Administration, but the anger and rage of these senior national security executives toward the environment is a product of the Reagan 1980s.

There is a strange coincidence in the current Washington debate over the need, or lack thereof, to exempt the Department of Defense from environmental laws. The senior civilian military leaders advising the President on this course come to the debate as anti-environmental hawks, who, for the most part, have never served this country in uniform. They were getting law and business degrees, establishing careers and families, while the black, brown, and/or patriotic were fighting in Southeast Asia. It is odd that our environmental and national security are being compromised by those with little actual, outside-the-Beltway experience with either.

The current President's father struck a balance between market and rule-oriented environmental regulation.175 The Clinton Administration moved beyond this balance, by placing the environment back at the center of the nation's agenda—as had Theodore Roosevelt, Lyndon B. Johnson, and Richard Nixon. The newest Bush Administration has attempted to remove the environment

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172. Percival, supra note 155, at 41-42.
173. Id. at 36.
174. Id. at 37.
from the nation’s agenda and destroy any balance the first Bush Administration may have achieved. To understand the shift that occurred from father to son with the election of George W. Bush, one has to recognize the diametrically opposite manner in which both assumed office.

George H. W. Bush came from a long line of Republicans who were rewarded for their loyalty and service by being given their moment to run for the highest office. For Bush, this required over a decade of accommodation with members of his own political party who were not quite clubmen. Robert Dole was offered a similar honor with the nomination to run against Bill Clinton in 1998, even as many Republicans understood the doom of his candidacy. But George W. did not come to office in this manner. His candidacy was the product of an initiative by disenfranchised Republican Beltway lobbyists. Isolated from power for eight years, they worked through the Republican governors to find a candidate to remove the Clinton-Gore team from the role of gatekeepers; gates that lead, not coincidentally, to the public pork those lobbyists needed to build their client bases.

As such, the very interests who wish to despoil the environment were the kingmakers in Election 2000. Like the Reagan era, the resulting Presidency has sponsored attacks against the nation’s environmental laws, which are often bars to the pork. Find the lobbyist who launched his or her career by avoiding national service, track his or her current accounts, and you will find many of them plotting to despoil the nation’s environmental resources. Again, the hypothetical whore who sent someone else to take his bullet in 1968 will not think twice about selling off the nation’s assets to further the career launched on someone else’s death in Southeast Asia.

These same interests opportunistically—and one could assert unpatriotically—have used 9-11 as a means of advancing their rollback of the nation’s environmental successes under the Roosevelts, Johnson, Nixon, Clinton, and the first Bush. In such Washington circles, our soldiers, sailors, marines, and aircrews are pawns in the manipulation of global energy and defense equipment/services markets. Our warriors are being treated as bagmen.

The Bush Administration has not only declared war against Osama Bin Laden, it has also declared war on the environment. Unlike Bush’s predecessors—including his own father, who managed to balance the environmental and military concerns—this Ad-
Administration has sought strategic sacrifice of the environment. This move against the environment predates 9-11, but the energy industry base of the present Administration asserted its control over the President soon after the attacks.

The first substantial use of the crisis against the environment came exactly a month after the attack in New York when President Bush appealed to the nation for support of his energy proposal to drill in the Artic National Wildlife Refuge (ANWR). The appeal was based on national security. Her own U.S. Fish & Wildlife Service “warned in two internal reports that opening the refuge to development might put the US out of compliance with the five-nation International Agreement for the Conservation of Polar Bears and would negatively impact the 135,000 Porcupine caribou herd.” Bush’s plan demonstrated his Administration’s willingness to compromise American foreign relations and risk the lives of Arctic wildlife in exchange for a few months supply of oil and increased drilling opportunities for Houston-based energy companies.

Unlike President Jimmy Carter in 1979, our current President made no appeal for a National Energy Policy based on conservation. Despite Bush’s pleas to Congress to support his plan under the “fight the war against terrorism” theme, his bill failed; the Democratic Senate checked this use of the war against the environment.

The Bush Administration, having lost the ANWR battle against the environment, commenced a broader campaign against the Endangered Species Act of 1973. Since the Bush Administration cannot simply eradicate this statute, it has used the courts and the federal regulatory agencies as surrogates for what should be an open, public, and debated legislative battle on Capitol Hill. During the first two years of the Administration, the campaign against the ESA has matured to include, in part, the following:

- The Everett, Washington Riverfront Project. Because the Federal Highway Administration wanted to meet its deadline to acquire the $3 million in federal funds to begin construction of a highway immediately, Representative Don Young (R-AK), Chairman of the House Transportation and Infrastructure Committee, pressured National Marine Fisheries Service (“NMFS”) chief Bill Hogarth to quickly complete a biological opinion needed for the City of Everett’s


• The ESA Delisting of Endangered Salmon Stocks. The NMFS is currently reviewing “24 ESA listings of West Coast salmon and steelhead, including Puget Sound chinook” which are native to the Columbia and Snake rivers. “Dick Surdi, who heads the [NMFS’s] task force on reauthorization of the Magnuson [-Stevens Fishery Conservation and Management Act], said the No. 1 problem with fisheries management today is a lack of data and understanding of the resources . . . . ‘We’re not able to do all the stock assessments that we would like to do. We don’t have all the economic or social information we’d like, to do the impact analyses.’”

• Trumpeter Swans. The U.S Fish & Wildlife Service authorized the hunting of the rare trumpeter swans and plans to open nine new hunting programs and ten new fishing programs in the National Wildlife Refuge (NWR) System.

• The 2003, 2004 Defense Authorization Bills. DOD used the annual defense budget authorization bill to seek military exemptions from environmental statutes, across the board. This initiative was underway at the same time PEER revealed that “live-fire training in the right whale habitat [Gulf of Maine] poses dangers for one of the most critically endangered wild populations on earth.”

• California Desert Conservation Area. BLM failed to comply with a court order regarding the desert grazing agreement which would help save endangered desert tortoises.

These examples, and other actions small and large, create a pattern of Administration neglect. Though the Bush Administration’s rule-bound decisions on arsenic in drinking water were probably the most graphic example of the current disregard for a clean environment, the campaign against the ESA has been the most persistent, and most stealthy, of its priorities. The skirmishers rarely reach a courtroom, and when they do present themselves before a

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judge, the effort is more symbolic than judicial. Courts are now used as a threat rather than as a means of enforcing the law:

With $3 million in federal funds about to slip away, jeopardizing development of 205 acres of city-owned property along the Snohomish River, Everett powered up its political lobbying machine. It scored a pivotal supporter in U.S. Rep. Don Young, chairman of the House Transportation and Infrastructure Committee. The Alaska Republican last spring called the head of National Marine Fisheries Service, Bill Hogarth, urging him to speed up an environmental study needed for Everett's project. Within a month, the Fisheries Service issued a biological opinion showing that a $16.5 million railroad overpass near estuary wetlands and a salmon stream wouldn't harm Chinook or their habitat. Everett barely made its deadline for Federal Highway Administration funds, and began construction last summer.185

The Everett failure speaks volumes about the realities of post-Reagan Washington, D.C. Fiscal conservatism has yielded to pork barrelimg akin to the old tax-and-spend rhetoric used in the early 1980s to alienate Speaker of the House Thomas "Tip" O'Neill and the New Deal coalition. Indeed, as former Democrats have left for Republican circles, they have taken with them their penchant for hog belly and race politics. The spiraling deficits created by post-Reagan-era Republicans are simply the natural expression of their control: conservatives in the 1960s, 1970s, and 1980s argued for deficit-cutting because they did not control the budget. The most recent uptick in deficit projections belies the lack of fiscal restraint in the Republican Party's platform. But just as importantly, the Everett failure underscores the ability of such trading to undermine the very law itself. Representative Don Young was engaged in activities that may have subverted a statutory regime enacted by the United States Congress. This new desire to except agency operations from the law has become the norm in almost every area of federal decision-making activity.186

186. Military in Death Valley, GREEN EARTH JOURNAL, Oct. 10, 2001, at http://www.greenjournal.com/articles.asp?article_key=343 ("The Air Force has appointed itself lead agency [for a project on Department of Interior land] to prepare the EA, which is highly unusual."); Editorial, Next: Targets on Tortoises, L.A. TIMES, Aug. 27, 2001, at B10 ("The Endangered Species Act has been up for renewal for several years . . . . Generals and admirals got their jobs by being smart, strategic thinkers. Let them put their talents to conducting realistic training without further endangering rare plants and animals."); Otto Kreisher, Military Seeks Easing of Environmental Laws, SAN DI-
B. Attacks on the Enabling Regulations

Protecting the environment from the federal government itself has become a difficult task for those federal environmental agencies which retain a respect for the legislative mandates of the laws they administer. Although regulatory agencies and activists groups have at times succeeded in upholding the law, the relentless attacks on environmental legislation by the Bush Administration have impeded these agencies from effectively enforcing its regulations. Several examples come to mind: BLM Land Exchange Programs;\textsuperscript{187} BLM Regulations Regarding Off Road Vehicles on Public Lands;\textsuperscript{188} and the “industry-captured-agencies” such as BLM and the FCC.\textsuperscript{189}

C. Attacks On its Own Employees

The most significant change between the Clinton and Bush Administrations has been in the revival of the Reagan-era bashing of federal employees. This trend reared its ugly head early in the Ad-
ministration, and the drums were hitting their hardest right before 9-11:

While the greatest danger most run-of-the-mill federal bureaucrats face is getting lost in a blizzard of paperwork, crushed by a falling watercooler or sleeping through the next round of government buyouts, working in the field for one of the federal land-management agencies has more than its share of real risks and physical challenges, as another summer of rampant wildfires attests. But according to Public Employees for Environmental Responsibility (PEER), threats to federal workers are on the rise from yet another quarter—those backward Western yokels who just don't get the fact that all the federal government wants to do is help.

PEER purports to have documented 70 “attacks” upon federal employees last year—a 30 percent increase over 1999, it says, implying that hatred of the feds is on the rise out West. The group alleges that the agencies being targeted—the U.S. Fish and Wildlife Service (USFW), U.S. Forest Service (USFS), Bureau of Land Management (BLM) and the U.S. Justice Department—aren’t doing enough to monitor and counter the mounting threat from yahoo-Americans. “It’s as if the lessons from Oklahoma City have been forgotten,” PEER National Field Director Eric Wingerter opined in a press release. “Environmental conflicts in the West have grown so severe that federal workers deserve hazardous-duty pay.”

The Bush Administration has isolated the core of environmental enforcement and compliance: federal environmental employees. Avoiding lay-offs and force reductions, the Administration has chosen to reduce the federal work force through attrition, primarily by not replacing middle level managers when they retire. This reduction has been augmented by tougher stances against leaks within agencies; the Administration’s first declaration of war was on the First Amendment. One of the stars of the National Park Service during the Clinton Administration, former Deputy Superintendent Judy Shafer—the second highest ranking official at the Virgin Islands National Park on St. John—was too vocal in her criticism of the Service during its failure to follow through on the President’s designation of the first National Monument in the Caribbean. Sha-

fer was also a hawk on the privatization issues, notably on the topic of commercial fishing of public resources.192

Another component of the Bush Administration's war against the federal employee has been the turning of a blind eye toward attacks against federal employees, many of which may be unreported incidents of domestic terrorism. The diversion of domestic law enforcement resources within agencies such as the U.S. Department of the Interior to activities such as sky marshalling will only increase domestic terrorism, as federal lands go unpatrolled. The "back forty" of many of these facilities and parks will now be open to drug dealers, county supremacists, and other right wing groups.193

This war has a mirror component within the agencies captured by their industrial regulates. Increasingly, federal employees who do speak to the enforcement of federal law find themselves retaliated against, especially when powerful corporate interests are at stake.194 Under the pressure to produce results for campaign do-


193. Suzanne Struglinski, DOJ: Attacks on Federal Workers Increase; Agency Still Not Tracking Problems, Greenwire, Aug. 20, 2001, at http://www.eenews.net/Greenwire.htm ("A lack of money is keeping the Justice Department from tracking violent acts or threats against government workers . . . leaving the agency unable to deny reports that attacks on federal resource managers . . . are on the rise.").


Alire believes that SBA Tower is required by both the Federal Communications Commission and the National Environmental Policy Act to provide an environmental assessment of the cell-tower site. He believes the NEPA form submitted by SBA Towers contains false or incomplete information. SBA attorney Karen Kilgore said NEPA did not apply to SBA since the tower is privately owned and was built on private land.

Id. Superintendent Duane Alire of the National Park Service was subjected to a "midnight transfer" out of Pecos N.H.P. because of his public stand against the telecommunications industry. Like the Park Service employees punished over the Rock Creek N.P. communications tower in Washington, D.C., Alire is one of the unsung heroes of the environmental movement. See also Ben Neary, Cell-tower Company Agrees to Prepare Study, Santa Fe New Mexican, May 27, 2001; Staci Matlock, Report on Cell Tower Due to FCC, Santa Fe New Mexican, June 27, 2001, at PE-1; Wren Propp, Review Sought of Pecos Tower, Albuquerque J., June 28, 2001, at 4; Wren Propp, Views Voice on Tower, FCC Says Impact Study Unsatisfactory, Albuquerque J., Oct. 3, 2001; Wendy Walsh, Pecos Residents Air Grievances over Cellular Tower, Santa Fe New Mexican, Oct. 3, 2001, at B1. As a result, agencies are often cowed into being more timid than they might otherwise have been. Taking the lead in bullying its peer agencies into not ensuring environmental assessment, review and compliance is the U.S. Army Corps of Engineers.

The petition, organized by Public Employees for Environmental Responsibil-
nors among these corporations and for small contractors tied to the federal economy, the Bush Administration has used sub-contracting to bypass the opposition of the federal employee unions and to reduce the size of Big Government.  

So the twin threats of force reduction and personnel discipline have been dangled in front of federal employees since January 2001. The events of 9-11 brought some reprieve, as the Bush Administration adjusted its security posture and needed to move law enforcement and other human resources to cover the international security threat at home. This has impacted both missions (diverting resources away from environmental enforcement and law enforcement operations in support of environmental missions) and weakened agency morale at a critical time. The Administration is completing its war against the federal employee concurrent with its second war against Iraq. The reengineering initially considered to have been the central mission of Secretary Gale Norton's tenure at Interior, for instance, returned with a vengeance following the convening of an all-Republican government in January 2003.  


195. Jim Skeen, Contractors Get Edwards Duties, Suit Says; Workers Charge Compliance Jobs Are Illegally Handed Out, DAILY NEWS OF L.A., June 7, 2000, at A1 (alleging that "officials are illegally turning over to private companies the responsibility for overseeing that the base complies with environmental regulations").

196. Bill McAllister, Interior Dept. May Privatize 3,500 Jobs, DENVER POST, Nov. 28, 2001, at A22 ("Interior Secretary Gale Norton has become the first member of the Bush Cabinet to suggest a major downsizing of her department . . . . Competition spurs better performance, whether it is in sports or the halls of government, Norton declared."); John Heilprin, Wildlife Sanctuaries Need More Money, Less Bureaucracy,
1. Ignoring the Experts

This directed assault on the working environment, and in many cases the actual employment, of federal employees has reached a critical point in the proliferation of gag orders levied against environmentally-sympathetic professionals over the past year. The case of Ranger Robert L. Jackson has been one of critical concern to all those working in the Greater Yellowstone Environment ("GYE"): A watchdog group is seeking an investigation into what it says is a gag order on a Yellowstone National Park ranger who claims elk hunting near the park harms grizzlies. At issue is Bob Jackson, a seasonal ranger who has criticized elk hunting just over Yellowstone's south boundary. The resulting elk kill lure grizzlies into confrontations with hunters, frequently to the bear's detriment, Jackson and his supporters contend. The looming question, unearthed by News columnist Todd Wilkinson and the group Public Employees for Environmental Responsibility, is whether Jackson was gagged by the federal agency.


197. Whitney Royster, Yellowstone Denies Ranger Was Silenced in Debate over Elk Hunting and Grizzlies, JACKSON HOLE NEWS, Oct. 18, 2001; see also Deborah Schoch, Famed Ranger Told to Not Discuss Park, L.A. TIMES, Oct. 11, 2001, at A29 ("The bottom line is that Bob has walked between the outfitters and their loaf of bread, and they're going to punish him through their connections with the Park Service," said Meyer.).

This week, PEER uncovered a draft federal-state study that echoes arguments Jackson made three years ago. "During the 1990s, numbers of hunting-related grizzly mortalities have increased . . .," the study found. "Much of this increase can be attributed to incidents occurring during the early elk harvest . . . in Montana and Wyoming." Encounters with bears, once rare, are a "common occurrence" in the hunting season, it added, and have "become the single largest source of known human-caused grizzly deaths." Why, then, is the National Park Service trying to shut up the man who had the guts to point this out?

Secretary Norton’s Interior Department continued its campaign against Ranger Jackson into the following season of 2002. Their efforts became so brazened that they invited the “whistleblower’s protector”—Senator Charles Grassley (R-IA) into the fray.198

The attack on Ranger Robert L. Jackson followed on the heels of the strategic targeting of those federal employees who work the data, the science, which would best reveal the illegaliies of the Bush Administration’s handling of the nation’s environmental laws. Cartographer Ian Thomas became a pop culture icon worldwide as he pulled back the curtain on the Bush Administration’s early, and ill-fated, efforts to gut the Alaska National Wildlife Refuge. The stripping of Thomas’ employment—he was soon employed within the environmental movement—underscored a central tenet of the Bush Administration’s strategy which will unfold between the swearing in of the all-Republican government in January 2003 and the Presidential election in 2004. The Bush Administration will strike at the voices of those conducting and reporting the science.199

198. Matt Gouras, Ranger’s Early Dismissal Angers Senator, ROCKY MOUNTAIN NEWS, Oct. 16, 2002 (“Sen. Charles Grassley, R-Iowa, said sending Bob Jackson home early smacks of further retaliation and violates the spirit of a settlement the agency reached with him late last year.”); see also Jerry Seper, Grassley Demands Park Service Explain About Whistleblower, WASH. TIMES, Oct. 16, 2002, at A8 (“Sen. Charles E. Grassley, Iowa Republican, demanded in a letter to Interior Secretary Gale A. Norton that she account for the park service’s actions involving Robert Jackson, who was told he would not be rehired and was subjected to a gag order on talking about poaching problems at Yellowstone.”); Associated Press, Senator Seeks Info on Ranger Dismissal, BILLINGS GAZETTE, Oct. 16, 2002; Whitney Royster, Senator Fights for Park Hunting Ranger, JACKSON HOLE LOCAL, Oct. 7, 2002 (“PEER general counsel Dan Meyer said Friday Jackson’s early dismissal is evidence of the dumbing-down of Yellowstone’s Thorofare area. . . . Meyer said, “[The park] seems to be looking for more junior and less confident people, people less likely to shake up the hunting practices.”). Jackson has attracted national attention since 1999, when he started speaking out against hunters who illegally use salt licks to lure elk out of Yellowstone. Elk hunting is banned within the park, but allowed in areas surrounding the park. . . . The Park Service last year issued a gag order, which Jackson signed Aug. 28, which stated that he could talk to the media on his days off and outside of Yellowstone, but he couldn’t express opinions about the park, the Park Service or the duties involved with his job.

Leah Thorsen, Park Service Lifts Gag Order on Ranger Critical of Hunters; Agency Agrees to Clarify Speech Restraints on Employees, WASH. POST, Jan. 22, 2002, at A13 (providing a review of the previous year’s attack on Jackson).

199. Losing a Government Job is Making Ian Thomas Famous, DALLAS MORNING NEWS, May 19, 2001, at 5A; Mapmaking Martyr, GUARDIAN (London, U.K.), Apr. 12, 2001, at A2 (“It turned out that his map was far too clear for his own good. It charted, for all to see, where the Bush administration was going with its environmental
rights of Americans is a central tenet of the new Republican mandate.\textsuperscript{200}

Once again, the national and environmental security paradigm collide, and we see that the Bush Administration—in prosecuting the war—undoes the civil rights, the internal security, of many Americans. We are becoming our own worst enemy, a domestic enemy, as in that memorable phrase from the soldier’s oath to protect the Constitution from all enemies, foreign and domestic.

D. Attacks on Government Parks, Refuges, and Land: Corporate Welfare Through the Commercialization of Public Resources

Once the federal employees have been either reduced or silenced and environmental laws bypassed in favor of the priorities offered by political campaign donors, the Bush Administration will policies and the price it was willing to pay to get there.

Two left-leaning watchdog groups have emerged as the first defenders of biologists who planted false evidence of a rare cat in national forests. Public Employees for Environmental Responsibility (PEER) and the Forest Service Employees for Environmental Ethics say no wrong was committed and that the employees are targets of a political “witch hunt.” “This is a case of right-wing politicians conducting a witch hunt against agency scientists,” said Eric Wingerter, PEER field director.


Public Employees for Environmental Responsibility says the biologists have been caught up in political efforts to undermine the Endangered Species Act. “They’re taking some misinformation and turning it into a campaign against public employees,” said PEER’s Eric Wingerter. “The reason they’re doing it is to create a chilling effect on other scientists working on endangered-species issues.” ... [Now former] Interior spokesman Mark Pfeifle said the department will not be returning the lawmakers’ letters. He said it is PEER that’s injecting politics into the process. “The letter reads like it was written by political hacks whose idea of practicing law comes from watching Judge Judy reruns,” Pfeifle said.

Mike Soraghan, Group Growls over Lynx Flap; PEER Says Requests to Fire Biologists in Study are Illegal, DENVER POST, Jan. 16, 2002, at A7.


According to Public Employees for Environmental Responsibility (PEER), which came to Rasmussen’s defense, he has been ordered not to talk to anyone, especially the press. . . .

“We were told [via the feds] you don’t talk to him . . . . That’s bullshit. Someone who’s not my employer is gonna tell me I can’t talk to someone in the United States?”

Id. (quoting Dennis Riecke, fisheries biologist with the Mississippi Department of Wildlife, Fisheries and Parks).
move to a final solution of the Big Government problem. Remember, of course, that agencies are only a part of Big Government if their legislative mandates are derived from statutes which are not a part of the Republican plan for Larger Government. You can bet the Securities Exchange Commission will be cut as the Federal Communications Commission remains fatly funded; the U.S. Department of Homeland Security will rise amply-funded as the U.S. Department of Interior and the U.S. Environmental Protection Agency are vitiated. For those agencies which survive on the back burner, the final solution will be to shackle their essential mission to privatization efforts. This has the unifying effect of completing the reduction of federal employees and building a base of corporate political donors with the ranks of concessionaires and subcontractors.201

The emerging Republican realignment of the nation's governing coalition seeks to offer resource extraction in exchange for political loyalty and funds. By this theory, the timber companies, Western ranchers and irrigators, mining and drilling interests, and offshore fisheries receive public largesse dispensed from Washington in return for supporting the Republican right. It is the environmental gains of the past thirty years which will pay for their support.202 Even some of the most innocuous of issues carry conno-


202. The Klamath controversy is an excellent example of this trade off, buying special interest support—from the irrigators—with a compromise of our environmental laws. In the Klamath matter, another hero of the modern environmental movement, federal scientist Mike Kelly, stood in the way of the Big Lie sealing this deal.

Last month, Michael Kelly, a federal biologist with the National Marine Fisheries Service, went public with accusations that the administration had ignored his findings that increased water flows were essential to protecting salmon listed under the Endangered Species Act. Kelly, who is seeking protection under the Whistleblower Protection Act, said his bosses yielded to pressure from the administration to lower water flows for fish so that farmers would receive their full allocation of water under a new 10-year water plan. It also turns out that the Bush administration did its unlevel best to squelch three new federal reports that concluded that buying out Klamath Basin farms and leaving their irrigation water in the Klamath River would create a revitalized
tations for the coming Republican realignment of American governance. One of the American right’s core constituencies is comprised of those individuals who do not accept the public ownership of land, particularly in the far West. Every federal decision becomes an issue of Natural Rights. 203

V. REASONS THE STATES CANNOT BE RELIED UPON TO ENFORCE ENVIRONMENTAL LAWS

“Our goal is to address everyone’s concerns,” Somerville said. “Nobody wants to have to renourish the beach. It’s expensive, and it’s not without some environmental impact.” 204

In the quote above, Steve Somerville, director of Broward County Florida’s Department of Planning and Environmental Protection, struggles with the unstated premise of all environmental decisions, not just those involving beach renourishment projects: someone has taken an action which costs the community at large, and does not want to pay the full price of that action. This cost shifting challenge ties together all national and environmental security issues. And though those who have personally avoided a public cost by placing it on another are not barred from understanding the implications of this challenge, they would have to be exceptionally introspective to overcome the blinders of their own actions, say, during the Vietnam War.


204. Bolstad, supra note 128, at 1.
Much litigation, environmental or otherwise, is an act—albeit an imperfect one—of shifting costs which ought to have been more equitably shifted by a precisely-drawn statute. This costing observation is, in part, why states struggle to do right with respect to the environment. State capitols are marketplaces for sale, and they lack detached bureaucracies capable of distilling the public interest from the cacophony of voices who turn out for hearing upon public notice. The closer one is to the economic exploitation of a resource, the less one will see acts of conscience in defense of the environment.205 As with environmental security, so too with domestic and national security. In the 1960s and 1980s, civil rights law was federalized because state governments were unable to ensure due process and equal protection of the laws for all of their citizens. The simply truth is that local authorities—South and North—acquiesced to, or supported, organized bigotry, racism, and violent vigilantism. In the 1980s and 1990s, the emotional heirs to that tradition of violence found refuge in Western and Midwestern states, where they plotted attacks against the federal Government itself.

Think of the Western counties which are openly contemptuous of federal authority and acquiesce to attacks on federal employees—is the President and his Vice willing to place such counties on the list of rogue nations supporting Al-Qaeda? Or does the Bush Administration tacitly support assaults on federal scientists, natural resource managers, biologists, and others who ensure environment assessment, review, compliance, and enforcement? We Americans have our own, home grown "weeds" very similar to Osama Bin Laden's Al-Qaeda. It is just never convenient or polite to recognize your neighbors for what they sometimes are; many Americans still find recourse in locating evil with race—the United Kingdom is home to active terrorist cells targeting the United States, and yet the B-52s are not flying over London.

Though the international threat of terrorism is something Americans can no longer approach in their previous lackadaisical manner—a sloppiness evidenced in both Democratic and Republican foreign policy circles over the past two decades—targeting foreigners engaged in terrorism is no substitute for addressing the

205. Letter to the Editor, PEER Exposes Flawed Policies, SPOKESMAN-REV., Dec. 11, 2001 ("There are few in state government with the necessary courage to oppose their own agency when they see environmental harm being done.").
sources of similar violence at home. And these sources are almost always “local” in nature.

Tolerance of local vigilantism and acts of terror is the reverse side of the same coin tossed when deciding whether to enforce environmental laws, or whether to conduct the law enforcement operations required in support of those laws. A lack of fidelity to the law by public officials encourages a general, public disregard for the law. The states were, and are, unable to overcome the influence of local power élites resistant to legislative change.206 For similar reasons, the states are poor partners to receive federal largesse to enforce federal environmental standards. Lacking effective oversight, states will take the money and not enforce the law.207 Likewise, significant natural resources will be sacrificed to rent seeking, particular in localities which are reluctant to adequately budget for infrastructure which complies with the law.208

206. James Kinsella, State Must Seek Comment on Vineyard Forest Work, CAPE COD TIMES, Oct. 18, 2001; State to Plow Ancient Forest, GREENLINES, Sept. 5, 2001 (detailing State of Massachusetts' mishandling of the forest management plan for Correllus State Forest on Martha's Vineyard); Harrowing Scheme I, GREEN EARTH J., Aug. 28, 2001, at http://www.greenjournal.com/articles.asp?article_key=325; Christopher Dunagan, Continued Beach Traffic Draws Outcry, WEST SOUND SUN, Dec. 16, 2001, at A1 (“Manchester, [Washington] serves as a ‘prime example’ of how the state has failed to protect critical resources. It is one of the few areas in state where beach driving is allowed.”).

207. It is also deceptive to think of states as a whole; they are often several political identities rolled into one political unit.

The attorney for a national public employees' group said Friday he's looking for ways to halt Indian River County's beach-renourishment program as a way to spare the stress on the offshore hardbottom reefs. But it won't be easy, said Dan Meyer, general counsel for PEER, the Public Employees for Environmental Responsibility. "I'm exploring state law," Meyer said from his office in Washington, D.C. "But Florida is still a pro-development jurisdiction. I've got to come up with the goods to back any claim." . . . And that, Meyer said, means he is having to look through Florida law for a rule on which to base a possible complaint. He said he is less familiar with state law than with federal law. "Florida is a shark tank when it comes to local politics," Meyer said. "Florida is like five different states, a very fractious environment."


208. D.F. Weyermann, Town Wants Vast Cavern as Sewer, BOSTON GLOBE, Dec. 23, 2001 (“In parts of the Town, raw sewage sits on playgrounds, and Spencer claims it needs the cave's underground river for effluent discharge from a new sewage plant. The state says the discharge is safe, but the environmentalists say it will kill the cave's wildlife within a year.”).
A. *Michigan: Community Dynamics and Local De-Regulation*

The failed integrity of state environmental enforcement was never more apparent that in the State of Michigan:

In Michigan, for example, the Department of Environmental Quality (DEQ) received a grant from the federal Environmental Protection Agency to evaluate DEQ's wetland mitigation program. Staff members prepared the evaluation, which was critical. Before it was submitted to EPA, DEQ Managers deleted 20 of its 77 pages and issued a press release praising the program.

Before PEER that would have been the end. But members of PEER at DEQ took action. A public records request obtained the full document. The censored portions included recommendations for improvement:

- Deny permits lacking proper documentation.
- Create compliance staff positions to find and act on violations.
- Obtains bonds to assure completion of promised projects.  

There are significant economic pressures on local authorities, pressures unlike the institutional and corporate influence now prevalent inside the Beltway. At the local level, the drive to circumvent environmental laws, to avoid law enforcement in support of those laws, or to abandon environmental compliance programs altogether is a product of local relationships between individuals for the most part. Interests cut through local affiliations, tying together fellow members of churches, fraternal orders, and other organizations. As such, the desire to prevent discord is higher than, perhaps, in Washington, D.C. (where discord can actually be the goal of the local players). In a manner similar to many a tacit segregationist’s desire to avoid the unpleasantness of the civil rights question four decades ago, presently many local officials wish to avoid implementation and enforcement of environmental laws because those laws force

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them to make the hard decisions, choosing between environmental goals or an environmentally offensive status quo.

B. Maine: Bipartisan Anti-Environmentalism

When states are not engaged in the outright falsification or spinning of federal compliance reports and scientific assessments, they engage in commercial development through the reduction of resources to their environmental agencies. This becomes a de facto delegation of environmental regulation to the very commercial interests most likely to damage the environment.210

In Maine, this has adversely impacted the famed Allagash Wilderness Waterway championed by Associate Supreme Court Justice William O. Douglas.

Just when the dust had settled, an environmental group is kicking up more dirt about the Land Use Regulation Commis-

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210. The de facto delegation of federal funds and federal environmental compliance review takes many forms. The U.S. Army Corps of Engineers has—over the course of the past decade—detailed more of its activities to “ Nationwide Permits” (NWPs), instruments which are subjected to cursory and infrequent environmental review. And the review that does take place has become pro forma. The result has become clear. See Henry A. Stephens, Disney Trucks in Sand, VERO BEACH PRESS J., Jan. 12, 2003; Henry A. Stephens, Sand-Mine Owner Protests Bid, VERO BEACH PRESS J., Jan. 8, 2003 (discussing example of the intense financial issues which often surround environmental matters); Henry A. Stephens, County Sticks with Dredge Firm, VERO BEACH PRESS J., Jan. 8, 2003 (discussing how relationships between service providers and local governments often transcend past history of environmental violations). When the Executive Branch fails to adequately manage such agencies, the correct response is to act quickly and decisively to emasculate those subordinates—whether they are in a suit or a uniform—who use the federal budget as a means of creating “fiefdoms.” Alexander Bolton, Bush Wants Corps of Engineers Curbed, THE HILL, Feb. 12, 2003, at 6.

One of the first indicators that this has happened is when agencies such as the Corps begin to bully or ignore other agencies—such as NOAA or the U.S. Fish & Wildlife Service—when they are conducting environmental assessments and reviews.

According to the lawsuit, filed in San Francisco County Superior Court, CDF failed to meet the letter of the state’s Forest Practice Act of 1973 by approving timber-harvest plans that the Central Valley water-quality board did not review. According to the law, a team that includes a regional water board representative must review all timber-harvest plans to analyze potential environmental impacts. But according to PEER, the water board is not reviewing the plans because it doesn’t have enough people to do so. Therefore, any plans approved by CDF are illegal, PEER contends.

sion. Earlier this year, lawmakers dismissed a handful of bills that would have abolished the agency or severely limited its power. This week, the Maine branch of Public Employees for Environmental Responsibility released a survey of LURC employees claiming that the agency is underfunded, understaffed and easily swayed by political power. PEER called for an independent review of the organization. "It is time to properly evaluate the needs of LURC and to begin addressing the enforcement issues raised by the agency's own employees," said Maine PEER director, Tim Caverly. The former manager of the Allagash Wilderness Waterway was fired two years ago after a lengthy public dispute with his supervisors over the management of the river.211

In the case of the Allagash River, one also sees the fundamentally bipartisan nature of this phenomenon; in Maine, the most vocal opponents of the environmentally compliant options on the Allagash waterway are, for the most part, Democrats. As much as the Bush Administration has become the center of the national anti-environment movement, the President's inclinations on this matter are almost more a factor of his desire to reengineer the permanent federal civil service than it is a factor of his dogma. President Bush is passionate about baseball, not the despoiling of the environment. But environmental enforcement in general—as at the local level—requires the making of hard choices regarding the company one keeps.212


212. The presumption that the federal government now defers to local government has left many environmental professionals, such as those within the U.S. Fish and Wildlife Service, hand-cuffed when actual violations of law are about to occur. The result is more negotiation than regulation. This recently was the case with respect to Burrowing Owls, implicated in the extermination of Prairie Dogs in Texas. See Evan Moore, Lubbock Flushes Prairie Dogs from Site, HOUSTON CHRON., Jan. 11, 2003, at 33; Lee Hancock, Lubbock Won't Kill All Animals on Waste Water Farm; Critics May Sue, DALLAS MORNING NEWS, Dec. 12, 2002; Evan Moore, Prairie Dogs Dig a Deeper Chasm, HOUSTON CHRON., Oct. 27, 2002; Amanda Zamora, Suit Challenges Texas Plan to Exterminate Prairie Dogs, WASH. POST, Oct. 8, 2002, at A26; Lee Hancock, Prairie Dogs Get Reprieve, DALLAS MORNING NEWS, Oct. 8, 2002; John Fuquay, Prairie Dogs, Lubbock Handed Reprieve, LUBBOCK AVALANCHE-J., Oct. 8, 2002; Lee Hancock, Decision to Kill Lubbock Prairie Dogs Met with Outrage; Bad Day Down on the Farm, DALLAS MORNING NEWS, Oct. 5, 2002 ("Federal wildlife officials warned that killing prairie dogs would endanger burrowing owls, a federally protected species that nests in prairie dog burrows. City officials said waiting until winter would solve that, reasoning that the birds migrate and the few that remaining could be moved."); see also Dave Mann, Another Bite at the Dogs, AUSTIN CHRON., Sept. 27, 2002.
C. States Are Closer to the Commercial Interests

"For the companies, it's like printing your own money."

As Bill Wolfe of New Jersey's Sierra Club noted, the delegation of substantive federal environmental rules to the states is effectively a move toward self-regulation by American corporations. This is not an evil restricted to the current Bush Administration, but one which arrived on the back of Chevron. As courts deferred to agencies, agencies have differed to their regional offices, who, in turn, defer to their "clients":213 the states who have entered into delegation agreements and the corporations who control much of what passes as environmental regulation by the states. This phenomenon arose early in the last decade, and was perhaps most evident in the restructuring of agencies such as the Federal Communications Commission to the exclusion of a public interest mission separate from the fostering of free markets. The Telecommunications Act of 1996 marked the end of communications regulation in the public interest; environmental agencies have now followed suit.214

This is clearest in the home state of EPA Administrator, former Governor Christie Todd Whitman. Between 1996 and 2001, New Jersey's emissions trading program utilized a methodology lacking standards by which industry compliance could be calculated and compared against previous quarters.215 The fact that the corpo-

213. Theresa Goffredo, 41st Street Project Held for More Study, HERALD (Everett, Wash.), Dec. 4, 2001 (discussing commercial and Endangered Species trade-offs in urban renewal projects adjacent to Chinook waters); Swan Dive, GREEN EARTH J., Sept. 28, 2001, at http://www.greenjournal.com/articles.asp?article_key=325 ("Hunting tundra swan has been legal in Utah since 1962. Utah wildlife officials explain they don't want hunters penalized for killing trumpeter swans by mistake.").

214. The use of public resources as benefits for industries which support the governing elite is an old Washington game. The most recent example of this was the rejection of the public interest in telecommunications regulation during the drafting of the Telecommunications Act of 1996. This renewed interest in federal largesse by an industry sub-group was a precursor to the current realignment efforts of the Bush Administration, which will allocate federal timber, mining, grazing, and fishery rights to secure the political center and right. See Industry Fights Proposal to Protect Coral Reefs, CHARLOTTE OBSERVER, Dec. 19, 2002; Wes Smalling, Environs Sue to Protect Falcon, SANTA FE NEW MEXICAN, Dec. 19, 2002 ("The release also cited a proposal by the U.S. Bureau of Land Management to open Otero Mesa in southern New Mexico to oil and gas drilling as a threat to the aplomado falcon.").


EPA's Inspector General (IG) has expanded its probe into the legality of New Jersey's emission's trading program to include a similar plan in Michigan. . . . Public Employees for Environmental Responsibility (PEER) and the Sierra
rations self-certify their previous quarter's emissions and the lack of standards by which to evaluate that self-certification meant that EPA Region 3 had created a system of complete deregulation with respect to the Clean Air Act. Compounding the incentive to under report and the lack of administrative standards by which the reported emissions could be evaluated, corporations failed to provide EPA with the information necessary to assess ambient conditions and other factors.²¹⁶

Federal judges and administrators have provided states with two powerful devices to aid state effort to circumvent federal environmental laws.²¹⁷ First, the practice of delegating program compli-

Club last year requested the IG review of open market trading plans in New Jersey, Michigan, New Hampshire, and Illinois, arguing that they lacked a uniform, explicit method for calculating emissions credit. Id.; Kathy Hennessy, Pollution Trade-off Program Attack, ASBURY PARK PRESS, Feb. 15, 2001, at A14 (“‘New Jersey has written a pretty good regulation. Every step of the way in a trade there is a notice and signature process. Companies have to quantify their credits.’” (quoting Rick Ruvo, engineer with the Air Programs branch in EPA Region 2)).

Since the 1970s, the state has set separate pollution limits for each of the North Slope's far-flung oil production centers, gas processing plants and other facilities. But environmentalists for years have said the state should take a much broader view, looking at the cumulative pollution from oil production centers. They claim this would hold oil companies more accountable and could reduce pollution. "This is not a new issue," said Mike Frank, a staff attorney with the Anchorage environmental law firm Trustees for Alaska. "Local people on the Slope have commented on the yellow haze over Prudhoe Bay." Bill MacClarence, a longtime DEC air regulator, agrees the state is overdue in revamping its approach. He said he brought up the issue on and off for a decade but the state has stuck with its rules.


²¹⁷ There are exceptions to the rule that states are closer to financial interests and therefore more susceptible to cutting the corners of the environmental laws. The landing of submarine cables in the United States has been subject to federal regulation since the 1920s. To the Federal Communications Commission's great shame, it has persistently ignored the degradation of Florida's offshore coral reefs by its own actions in issuing cable landing licenses. With the FCC unwilling to act, and NOAA and EPA hesitant to intrude upon the FCC's jurisdiction, the State of Florida has begun to assert control over its sovereign submerged lands. See Editorial, Give Relief to the Reefs, PALM BEACH POST, Jan. 4, 2002, at 15A; David Flesher, State Makes Waves over Undersea Cables, SOUTH FLA. SUN-SENTINEL, Dec. 12, 2002, at 3B; Jim Ash, Gov. Bush, Cabinet OK Plan on Cables Around Reefs, PALM BEACH POST, Dec. 12, 2002, at 9A; Ashley Fantz, Bush Gives Agency More Power in Protecting Reefs, MIAMI HERALD, Dec. 12, 2002; Ken Star, Florida Seeking Restrictions on Laying Fiber Optic Cables Near
ance to the states through performance partnership agreements ("PPAs") has raised *Chevron* deference to new levels of environmental avoidance. On the other side of the partnership agreement, the U.S. Supreme Court’s decision in *Seminole Tribe* has gutted enforcement of these agreements through the Whistleblower Protection Act of 1989. The resulting reduction of effective federal jurisdiction has led to new labor activism in the Northeast, and protracted Eleventh Amendment litigation in the South and Midwest.


Dan Meyer, a lawyer for Public Employees for Environmental Responsibility, a watchdog group representing [Bev] Migliore in her legal battle, says that since the 1960s, federal courts have proved far more effective than states in safeguarding civil rights, "If we waited for governors and their attorneys general to enforce civil rights in the South, we’d still have lawful discrimination.”

Ariel Sabar, *Almond Urged to Sign Right-to-sue Bill, Providence J.-Bull.*, July 4, 2001. Absent the Governor’s intervention, the Rhode Island workers were left to the weak protection of the courts.

Barbara Raddatz, a DEM supervisor who claimed she was denied promotions for testifying in Migliore’s case, also attended the hearing and expressed amazement at how long the case has dragged through various courts. “As long as this continues, state employees are terrified to speak up when they see something wrong going on,” she said. “They just look at Bev and see what happens when you do speak up. All this happened to me because I responded to a subpoena and told the truth.” In 1999, Migliore was awarded $843,000, one of the largest judgments of its kind, after convincing an administrative law judge at the U.S. Department of Labor that she was harassed and demoted after complaining that her bosses had softened their enforcement of hazardous-waste cases. During 23 days of hearings, her supervisors sought to portray her as a disgruntled employee, a tantrum-thrower so distraught by a departmental reorganization in 1996 that she refused to obey her superiors. But Judge David W. DiNardi found that Migliore “presented a most compelling
The United States Supreme Court's reshaping of public employee/manager relationship has failed to prevent what state governments claimed was the mischief of the whistleblower protection provisions of the federal environmental statutes. All it has done is intensify the conflict between employees with consciences and managers who, having traded their ethics in some quid pro quo, see those employees as a threat to their own employment or emotional well-being. The general effect of the U.S. Court of Appeals for the Federal Circuit's rule in *Huffman* has been to deny the conscientious employee protection they used to have at federal law. This, in turn, exposes them to local power relationship from which they were previously immune.

D. *States Cannot Be Relied Upon to Protect Environmental Workers Against Vigilantes*

Even more disconcerting than the general state failure to enforce the federal standards for which they are given federal money to enforce is the alarming inattention State governments are paying to acts of vigilante violence against their own employees. This tactic is reminiscent of the tendency by some Southern governments—particularly members of Southern law enforcement offices—to look the other way as citizens' committees committed acts of violence against African-Americans, Jews, and Catholics during the civil rights movement. State and local governments also fail to protect

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221. Tom Steinstra, *Employee Survey Say DFG is a Political Tool*, S.F. CHRON., June 2, 2001, at A7 (“The Department of Fish and Game has been condemned as little more than a political tool of the governor in an independent survey of its 1,600 employees); Tom Charlier, *State Inspector Reassigned After Citing Dangers at PCI Waste Plan*, GO MEMPHIS, Sept. 10, 2001, available at http://www.gomemphis.com (detailing punishment of Tennessee environmental worker reporting violations of hazardous-waste handling practices of Pollution Control Industries).


223. The susceptibility of local and state governments to requests by private interests for actions which undermine the public interest can be seen in the abandonment of the local, federal offices of the Bush Administration to local political forces. Utah's Representative Chris Cannon (R-Utah) can now subject local federal officials to significant pressure. See Chris Smith, *San Rafael Do-Over Chills BLM*, SALT LAKE TRIB., Jan. 19, 2003.
federal workers within their jurisdictions.224

Actions of violence against federal employees reveal an odd, if not slightly creepy, characteristic of the American public's mindset during these current days of war. We have been careful as a nation to avoid overt racism—our historical failing—as we have addressed our collective thoughts and feelings to the 9-11 attack. Unlike the public discourse of the Second World War, we are not looking for a "yellow menace" on the nightly newscast (even though airline profiling in and of itself usually discriminates based on physical features). But what few have noticed is that the act of going to war also did not produce what similar adventures have done in the past: a resurgence of general respect for the federal government and its employees. This is largely because federal politicians—most notably on the right—use "federal bashing" as red meat thrown to the most aggressive corners of their camped followers. The results can be bedlam.225

The failure to back up and protect federal employees can be seen most alarmingly in the policy of the U.S. Department of the Interior. For years, an unacceptable situation was building in California's Imperial Dunes: the U.S. Bureau of Land Management ignored its own rangers' warnings about the lawlessness erupting regularly at off-road vehicle gatherings. Finally, a member of the public was murdered during one of the gatherings. This was a senseless death, and one that teaches us something about the American character. Absent effective law enforcement, Americans will break the law. We are not an orderly, virtuous people at all times, and in all places. And when federal officials, such as Secretary of the Interior Gale Norton, turn a blind eye at events on federal lands, such as those at Imperial Dunes, they cater to the worst


225. Sean Whaley, Public Lands Workers See Rise in Hostility in 2000, LAS VEGAS REV.-J., Aug. 14, 2001, at 4B ("The Nevada BLM incidents included harassing telephone calls made to an air tanker base at Battle Mountain . . . a telephone threat to an employee in the Elko Field Office . . . and a case of intimidation against an employee in Ely . . . ."); Joyce Hedges, Workplace Violence Attacks Against Federal Workers Rising; Assaults and Threats Rose in 2000, BNA OCCUPATIONAL SAFETY & HEALTH REP., Aug. 16, 2001 ("People are angry about restrictions on use of resources." (quoting Jeff Ruch, Executive Director, PEER)); see also, Employee Violence, SCRIPPS HOWARD NEWS SERV., Aug. 20, 2001 ("There were 70 beatings, shootings, threats, and other incidents of violence against federal land managers last year . . . ").
aspects of America's solicitation of violence. The death of that young man in California is as much on the hands of Secretary Norton as it is on the off-road vehicle adherents who were the immediate cause of his death.226

VI. THE CRISIS IN FEDERAL ENVIRONMENTAL POLICY

One must not equate ignorance of error with the lack of error. The lack of demonstration of error in certain fields of inquiry often derives from the nonexistence of methodological research into the problem and merely denotes a less advanced stage of that profession.227

To the extent that the enforcement of our environmental laws depends on acts of free speech, such as whistleblowing, there is a growing crisis is our execution of federal environmental law. If the plan was to use the disclosures of federal and state employees to ensure environmental compliance, it has now been compromised by a failure of the federal courts, most notably the U.S. Supreme Court and the U.S. Court of Appeals for the Federal Circuit. The speech of whistleblowers is great grist for inside the Beltway blood sporting, but it comes at the price of great personal sacrifice from the professional heroes who make the disclosures.228

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228. Brad Knickerbocker, Once the Whistle Blows, Who Follows up with the Reforms?, CHRISTIAN SCI. MONITOR, Dec. 14, 2000, at 18 (“The question now is whether the inherent corruption of the system will triumph or whether needed reforms will be enacted.”).

Jeff Ruch, executive director of PEER, said his group does not have problems with regulations regarding on-duty official speech or off-duty compensated speech. “What they’re talking about is off-duty speech, on any topic related to your work, anything to do with the environment, not for compensation,” he said. “They’re saying that requires prior approval. Our response is, ‘The hell it does!’” Ruch has written Park Service Director Fran Mainella seeking retraction of the memo before managers act on it and violate employees’ free speech rights. “If they don’t retract it, this will likely be litigated,” he said.

The act of disclosing environmental violations is the early warning radar of our national environmental security system. If one takes security seriously and concedes that the intentional poisoning of an aquifer by a federal administrator is just as serious a threat as the exposure of Americans to anthrax—one gets sick and perhaps dies either way—then our information collection regarding the environmental security threat is just as important as our information collection against Al-Qaeda. To do this, Congress passed whistleblower protection clauses in each of the environmental statutes, clauses which have been vitiated in the federal courts. As state employees lost their rights through the 11th Amendment, federal employees lost similar rights through the Federal Circuit Court of Appeals rule in Huffman.

There is an important analog here: a culture which cannot stomach candor in its national security can hardly be expected to foster disclosures of information under the nation's environmental laws in pursuit of environmental security. That the United Nations covered a replica of Picasso's Guernica in order to save Secretary Colin Powell the embarrassment of being compared to Adolf Hitler and Francisco Franco is an insult to the American veterans who volunteered for the Abraham Lincoln Brigade and other units during the Spanish Civil War.229 Following the Bush Administration's war on federal environmental science, and Attorney General John Ashcroft's clothing of "pornographic" statues in the U.S. Department of Justice, one could be forgiven for believing that the Bush Administration is a secrecy cult or, at least, incredibly immature.

But the breakdown of federal whistleblower laws as they support the pattern of environmental legislation enacted since the 1960s is only part of the crisis in federal environmental law. The officials now being nominated to ensure fidelity to the law have reputations for lax enforcement.230

229. March of Folly, HOUSTON CHRON., Feb. 13, 2003, at A40 ("As Powell spoke, drapes covered Pablo Picasso's famous anti-war painting Guernica that hung in the chamber. . . . Powell no doubt recognized that the case for war could not compete with war's stark and terrifying depiction.").

230. See Katherine Q. Seelye, E.P.A. Enforcement Nominee Withdraws, N.Y. TIMES, Sept. 18, 2001, 2001 WL 28004192; John J. Fialka, Nominee for EPA Post Faces Heat over Ohio Cancer-Cluster Probe, WALL ST. J., Aug. 27, 2001, at A16 ("Environmental groups have been accusing Mr. Schregardus of lax enforcement of environmental regulations in Ohio, and Northeastern Democrats are particularly upset because they claim he resisted efforts to clean up emissions from Midwest utility plants. . . .").
It is in the nature of the American individual, however, that some of our fellow citizens remain unflappable in the present culture of cowardice.\footnote{Again, one must understand that the failure of an individual to choose the public, as opposed to the private, interest, in say, a matter of military service indicates that he or she will not necessarily be able to discern the public interest in matters of environmental policy, energy policy, or other areas of government activity. This is why the Bush Administration is so dangerous to the public good: it has aggregated so many decision-makers together who, as a decision-making team, have a history of placing their personal priorities over those of the nation. A nation committing itself to the common defense in the Constitution commits itself to fighting for one another. To the extent that we allow the privileged elite to opt out of the common defense we undermine the credibility of the institutions in which that elite subsequently serve. As such, those making faulted social choices carry the stain of that failure through their lives, slowly weakening the public integrity of our government:}

[\textit{W}]hat some are now calling the “Chicken Hawk” factor . . . could play an important role in the increasingly intense and personalized debate over the Bush administration’s push toward war with Iraq . . . Indeed, the fact that the greatest opposition to the war is centered in the military . . . as well as in the upper reaches of the State Department and among the foreign policy veterans of the first Bush administration . . . has made the hawks extremely sensitive to the question of [the President’s advisors’] own military service, or, rather, lack of it.

“It is interesting to me that many of those who want to rush this country into war and think it would be so quick and easy don’t know anything about war,” observed Sen. Chuck Hagel of Nebraska, a Republican Vietnam veteran whose skepticism about an Iraqi adventure has made him persona non grata to the neoconservatives who are leading the charge, now popularly called Chicken Hawks. According to the \textit{New Hampshire Gazette} (online at \url{www.nhgazette.com}), which maintains a database on the subject, this “is a term often applied to public persons—generally male—who (1) tend to advocate . . . military solutions to political problems, and who have personally (2) declined to take advantage of a significant opportunity to serve in uniform during wartime.”

That description applies to most senior administration officials in their fifties who were subject to the military draft during the Vietnam War. George W. Bush himself, instead of being drafted for the war, received a posting to the Texas National Guard. It was the kind of dodge from military service that, according to Secretary of State and former Joint Chiefs of Staff chairman Colin Powell’s memoirs, was generally reserved for “the sons of the powerful.”

Cheney, however, avoided the uniform altogether, insisting to one inquiring reporter that he “had other priorities in the 1960s than military service.” . . . The record at the sub-cabinet level is worse. Cheney's hawkish and powerful chief of staff, I. Lewis Libby, spent the Vietnam War at Yale and Columbia universities. Rumsfeld’s top deputies in the same age group—Paul Wolfowitz and Peter Rodman—were similarly engaged, while Douglas Feith, the Pentagon’s most enthusiastic war booster, turned 18 only after the draft ended but then opted for law school.

Even more remarkable, the major agitators for war outside the administration also lack direct military experience. Of the 32 prominent signers of a now-famous September 20 letter from the Project for the New America Century . . . to Bush urging him to include Iraq, as well as Syria, Lebanon, Iran,
movement is Ranger Robert L. Jackson. A seasonal employee at Yellowstone National Park for the past thirty years, this Iowa buffalo rancher first stood down outfitter/poachers on the fringe frontier of the Thorofare, and then challenged the federal bureaucrats who violated the First Amendment in order to silence his witnessing of illegal hunting practices on federal lands. 232

Advancing the environmental agenda at this point is not a task for the faint of heart. The spirit of Lyndon Johnson’s and Richard Nixon’s reforms crested some time during the Carter Administration, and the nation’s environmental laws and policy have struggled in the line-up of national policies ever since. But the American people still have a strong, pro-environmental disposition. Their leaders will bend to their wishes when they let them be known. 233

But at the same time, environmentalists are vilified as non-team

and the Palestinian Authority, as targets in the war on terrorism, only three have ever donned a uniform. Indeed, one of the key members of that group, who is also chairman of Rumsfeld’s Defense Policy Board (DPB) and one of the most visible advocates for military action to oust Saddam Hussein, Richard Perle, spent Vietnam at the University of Chicago (alongside Wolfowitz) and later joined the staff of Sen. Henry Jackson, virtually the last Democrat in the Senate to support that war.... Another highly visible hyper-hawk and Perle protégé, Frank Gaffney, head of the Center for Security Policy (CSP), also avoided military service during Vietnam. Powell’s chief deputy, Richard Armitage, a U.S. Naval Academy graduate who served in Vietnam, has reportedly referred to Gaffney, as well as other members of the war party who dodged the draft, as a “pissant.”

Jim Lobe, Chicken Hawks as Cheer Leaders, Foreign Policy in Focus Advisory Committee, at http://globalization.icaap.org/content/v2.2/lobe.html.

232. Cat Lazaroff, Yellowstone Ranger Vindicated Under Whistleblower Laws, ENVTL. NEWS SERV., Jan. 4, 2001 (“Bob Jackson was censured in August by the National Park Service for publicizing the effects that elk baiting in nearby Bridger-Teton National Forest has on the behavior of Yellowstone’s grizzlies.”); Brian Stempeck, Yellowstone: Ranger to Be Reinstated, GREENWIRE, Jan. 3, 2002, at http://www.eenews.net/Greenwire.htm (“The National Park Service reached a settlement agreement with a veteran Yellowstone Park Ranger last week, rehiring the employee and removing a gag order put in place last summer.”).

233. See Mark Hollis, Cable vs. Coral Solution Sought; Fiber-Optic Links Termed Vital to the State, SUN-SENTINEL (Fort Lauderdale), June 13, 2001, at 1D.

Gov. Jeb Bush and the Florida Cabinet surprised some environmental advocates by postponing action on a plan that had reluctant support from some environmentalists.... [T]hat proposal, which would have permanently damaged coral reefs.... is being shelved in favor of a new plan that state officials say will protect the environment....

Id. As progressive and “green” as the State of Florida’s coral/FOC rule-making may seem, one has to remember that the basic premise of the proceeding was one of concession to industry. Although major telecom companies were adamantly opposed to the new draft rule, the proposal on the table as of spring 2003 was still far from PEER’s recommendation of no fiber-optic cables south of Cape Canaveral.
players or pampered fringe elements. Irony follows from this rhetoric in these days of war, as it is often our national security élite and the national media serving as opinion leaders, marshalling the public to war, who are the most pampered of the players in Washington.\textsuperscript{234} This rhetoric can get ugly, as it did over the western land exchange appraisal fracas of 2001 and 2002.\textsuperscript{235} Whether being compared to foreign terrorists or domestic diamondbacks, environmental advocacy groups run a high risk of being declared fellow traveliers with the enemies of the state.\textsuperscript{236}

As our public discourse continues to dissolve into a culture of fear and loathing, the same fear and loathing we have watched domestic terrorists direct at the federal government since the mid-1980s, it is useful to view our environmental security in light of our national security, rather than the other way around. Given our de-

\begin{itemize}
\item \textsuperscript{234} Buried within the Chicken Hawk syndrome is another modern trend away from national service. Along with Washington insiders and members of the national media, Ivy League graduates now serve to a much less extent than their alumni and alumnae predecessors. With the advent of the All-Volunteer Force, the leadership of our military has shifted to other schools, primarily those in the South. The Ivy League élite is taking a powder.

Forty-seven Cornellians from the classes of 1927 to 1971 were honored during Reunion in 1993 at the dedication of the Korean/Vietnam War Memorial in the rotunda of Anabel Taylor Hall at Cornell University. Since then, two additional alumni who were killed during the Vietnam War have been identified. Their names will be added to the memorial at a rededication ceremony June 6 during this year’s Reunion events.

Press release, Cornell University, Memorial Honors Cornellians Who Served Their Country, (Feb. 11, 2003), \textit{at} http://www.news.cornell.edu/releases/Feb03/memorial.rededication.lgk.html.

\item \textsuperscript{235} Donna Kemp Spangler, \textit{2 Groups Want BLM Official Out}, \textit{Deseret News}, Dec. 3, 2001, at B01. When speaking of PEER, the U.S. Bureau of Land Management’s chief appraiser Dave Cavanaugh compared the Washington, D.C.-based public interest group’s accusations of wrongdoing to terrorist attacks: “There’s nothing I can do about it. It is like dealing with terrorist [sic]. You don’t know when or where they will attack. And they can sneak back into your camp. It is just savaging to a person’s reputation.”\textsuperscript{Id.} Cavanaugh was found culpable of land exchange mismanagement by the Department of Interior Inspector General; Tony Perry, \textit{California and the West; Dunes Dispute}, \textit{L.A. Times}, Nov. 26, 2000, at A38 (“The philosophy of the La Verne, California-based association is that tangling with the environmentalists and their attorneys makes as much sense as trying to grab a scorpion or a diamondback.”).

\item \textsuperscript{236} See Opinion, Brad Ullrich, \textit{Greens on the Inside: The FSEEE Influencing Forest Service Policy}, \textit{Blue Ribbon Magazine}, April 2001, at 22.

These groups are getting bolder. PEER is now a co-plaintiff with the Center for Biodiversity, the most radical environmental group in existence today, in a lawsuit against BLM to close down the entire California desert. This has to stop and isn’t going to stop until these groups are forced to change their tactics due to public outrage.

\textit{Id.}
pendence on the international oil markets to sustain not only our own needs but those of our trading partners, it would have been wiser to continue the Clinton Administration’s policy of endless foreign policy feedback loops, lots of talking with no real progress. Talk, after all, takes up peoples time, time that could be used for other purposes, like war. The Bush Administration’s insistence that this war is something other than (1) a failure of our nuclear non-proliferation strategy combined with (2) the political geography of a region upon which the global oil markets depend, and sparked by (3) the failure of our Levant foreign policy has blinded the President and his advisors to the three potential potholes awaiting them.\(^{237}\) It would behoove all planners to remember that we were unsure whether he already had nuclear weapons in 1990. It would be better to operate on less intelligence accurately interpreted than to create fictional realities around more intelligence draw from the Bush Administration’s own spin.\(^{238}\)

The \textit{environmental} security of our troops is tied just as much to the presumptions of our national security policy as the same are connected with respect to every American impacted by the U.S. Department of Defense’s environmental policies, at home. The sum total of our “security” becomes a calculus which follows from the social and economic choices which determine our standard of

\(^{237}\text{If Iraq breaks up following the war, the ensuing regional destabilization could ignite regional wars (a) in the north as Turkey stabilizes its border against Syria to the detriment of the Kurds (screwed by an American President for the \textit{fourth} time: 1972, 1983, 1992, and 2003); (b) in the south as the Saudi regime finally topples under the pressure of the Iraqi destabilization; and (c) in the east as Jordan moves to reclaim the former Hashemite throne in Iraq. The Jordanian move should not be discounted, as it may be the counterweight to Iran’s thrust from the east toward the Al-Shat waterway.}

\(^{238}\text{We are not ready for any of these scenarios and to prevent them either the United States or the United Nations will have to be on station for more than a decade. The second pothole would be the self-destruction of Iraq’s oil fields, and the resulting spike in world oil prices to $80.00 per barrel. The American people are unprepared for $5.00 per gallon at the pump, a change which will trigger huge losses in the suburban housing market and a reversal of the demographic trend toward suburbanization following the creation of the gas subsidy for the American people following the Second World War. The third pothole the Administration is trying to anticipate is an Iraqi withdrawal into their cities, and the subsequent hand-to-hand fighting which will ensue. Recall that our military prowess is predicated on having stand-off weapons, and not on a reputation for savagery on the front lines. Saddam Hussein knows this and will plan on turning the field of battle against us.}

\(^{238}\text{Larry Seaquist, \textit{The People’s Intelligence, Christian Sci. Monitor, Feb. 18, 2003 (“This is the age of (distorted) information. People take on different personalities in e-mails, politicians “spin,” governments deliberately mislead with official—but often covert—propaganda campaigns. Those threatening us are also expert in these arts. We could use some help navigating in this thick info smog.”).} \}
living. To mimic the Book which unites all peoples about to war in the Middle East: Oil begat Gasoline, Gasoline begat Consumption, and Consumption begat War. Someone must fight that war, and he or she may not always be in uniform. The determination of who pays, and who profits, for or from our common defense is the single most important question of our age. And we do not all pay equally, do we? The fire is always warmer when someone else carries the cost of oil.