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IN CAMERA REVIEW OF CLASSIFIED ENVIRONMENTAL IMPACT STATEMENTS: A THREATENED OPPORTUNITY?

*William R. Mendelsohn**

I. INTRODUCTION

The public has become increasingly aware of the Cold War's tremendous environmental costs to the United States. One of the best known examples of Cold War contamination, the Department of Energy's facility at Rocky Flats, Colorado, reveals not only that the United States government failed to consider the environmental consequences of its actions, but also that the government went so far as to conceal those consequences from the public for decades.¹ Although one may argue that the end of the Cold War should herald the end of such intense secrecy, the perceived threat of such nations as Iraq and Libya has been used to justify the continuation of Cold War secrecy.² The ongoing controversy surrounding the Groom Lake Air Force Base in Nevada shows that the conflict between national security and environmental protection still exists. The facts of this case serve as a brief introduction to how the military still can use national security concerns to delay or avoid compliance with environmental statutes.³

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¹ See Laurent R. Hourclé, *Military Secrecy and Environmental Compliance*, 2 N.Y.U. ENVTL. L.J. 316, 316-17 (1993).

² See *id.* at 318-19.

³ The Groom Lake controversy involves alleged violations of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-92k (1988 & Supp. V 1993). The primary focus of this Comment, however, will be on the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-70a (1988 & Supp. V 1993), but the conflict between national security and environmental interests remains essentially the same regardless of the actual statute involved.

The plaintiffs in the Groom Lake suit, *Frost v. Perry*,⁴ are six former Groom Lake workers and the widow of another former worker.⁵ These plaintiffs claim that the Air Force illegally burned hazardous materials at Groom Lake.⁶ The plaintiffs are seeking damages for exposure to these materials, and an injunction against future burnings.⁷ The Air Force attempted to block the suit by claiming that national security regulations prohibit the Air Force from admitting or denying the existence of the base.⁸ Had the Air Force succeeded with this claim, the inability to establish the existence of the base would have led to a ruling that the court lacked jurisdiction over the site.⁹ The Air Force has since modified this jurisdictional claim by refusing to release the name of the facility because, without its official name, the suit cannot go forward.¹⁰ The Air Force's arguments almost certainly will rely on the United States Supreme Court's decision in *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, which upheld the federal government's claim that national security interests allow the government to avoid disclosing information about activities that might damage the environment.¹¹

In light of such present-day examples as Groom Lake Air Force Base, this Comment seeks to address the government's use of national security claims to conceal environmental abuse, and argues for the use of in camera review to balance competing interests. Section II of this Comment describes the statutory basis for the military's claim

⁴ *Frost v. Perry*, No. CVS-94-00714 (D. Nev. Aug. 8, 1994). The plaintiffs have also filed suit against the Environmental Protection Agency (EPA) for not enforcing relevant environmental regulations. *Doe v. Browner*, No. 94-CV-01684 (D.D.C. Aug. 2, 1994) (cited in *Hazardous Waste: Agency Failed to Enforce Waste Laws at 'Secret' Air Base, Lawsuit Alleges*, 25 *Env't Rep.* 711 (BNA) (Aug. 12, 1994)).

⁵ *Hazardous Waste: Widow, Former Workers Sue Air Force Over RCRA Violations at 'Secret' Base*, 25 *Env't Rep.* 733 (BNA) (Aug. 19, 1994).

⁶ *Id.*

⁷ *Id.*

⁸ See Keith Rogers, *Area 51: Feds Drop "National Security" Defense in Suit*, LAS VEGAS REV.-J., Nov. 11, 1994, reprinted in GREENWIRE, Nov. 15, 1994, available in LEXIS, News Library, Curnws File.

⁹ See Benjamin Wittes, *Secrecy Case Strategy Emerges*, LEGAL TIMES, Nov. 7, 1994, at 14. Of course, it is impossible for a military installation to be truly secret. The people living in the area obviously are aware of military activity at the site. Furthermore, the plaintiffs' counsel was prepared to have staff from the Russian embassy in Washington, D.C. testify that the Russian government also was aware of the site. *Id.* Arguably, the fact that the former Soviet Union, from which the base was supposed to be kept secret, already knows about the base renders current efforts to maintain its secrecy moot. See *id.*

¹⁰ Bruce Shenitz & Sharon Begley, *It Dares Not Speak Its Name*, NEWSWEEK, Feb. 20, 1995, at 55.

¹¹ *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139 (1981).

that national security concerns frequently exempt the military from the provisions of the National Environmental Policy Act (NEPA).¹² Section III examines how the courts have treated this exemption, and how judicial decisions may result in a pre-NEPA situation in which the military could act without regard for environmental consequences.¹³ Section IV discusses one method—in camera review—that may allow the judiciary to ensure that the military is complying with NEPA in those circumstances in which the public cannot.¹⁴ Unfortunately, one appellate court, the Second Circuit, has declined to use in camera review to ensure military compliance with NEPA, and by so doing the Second Circuit has jeopardized one of the few ways through which the public can challenge the military's compliance with NEPA.¹⁵ Section V concludes with a discussion of why courts should be hesitant in excusing the military from NEPA compliance.¹⁶

II. THE STATUTORY BACKGROUND

The environmental effects of proposed agency actions involving national security concerns can create conflicts between NEPA¹⁷ and the Freedom of Information Act (FOIA).¹⁸ In general, NEPA mandates disclosure of an agency action's possible impact upon the environment,¹⁹ while FOIA designates certain types of information that need not be disclosed.²⁰ This section describes how legislators attempted to balance the potential conflict between these statutes.

A. *The National Environmental Policy Act*

Congress enacted NEPA in 1970 in order to encourage a national goal of "us[ing] all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony."²¹ To further this goal, NEPA creates specific duties for all federal agencies.²² NEPA seeks to regulate the federal govern-

¹² 42 U.S.C. §§ 4321–70a. See *infra* section II.

¹³ See *infra* section III.

¹⁴ See *infra* section IV.

¹⁵ See *infra* 146–58 and accompanying text.

¹⁶ See *infra* section V.

¹⁷ 42 U.S.C. §§ 4321–70a.

¹⁸ 5 U.S.C. § 552 (1988).

¹⁹ See 42 U.S.C. § 4332(2)(C).

²⁰ See 5 U.S.C. §§ 552(b)(1)–(9).

²¹ 42 U.S.C. § 4331(a).

²² *Id.* § 4332.

ment's environmental activity by requiring that any "major Federal action" be accompanied by an Environmental Impact Statement (EIS).²³ Congress intended the EIS requirement to force the agency involved to take account of the possible environmental consequences of its planned actions, and to include those consequences in the agency's decision whether to proceed with its planned actions.²⁴ By implication, NEPA serves as an assurance to the general public that federal agencies will take the environment into consideration when contemplating proposed actions.²⁵

NEPA also requires federal agencies to make each EIS available to other agencies in the federal, state, and local governments, as well as to the general public.²⁶ Congress intended this provision to enable other governmental bodies and the public to observe and comment on an EIS.²⁷ Perhaps more importantly, the publication requirement serves to notify the public that the federal government is aware of and responding to the public's environmental concerns.²⁸

B. *The Freedom of Information Act*

Congress passed FOIA in 1967 in order to provide the public with a legal right of access to federal government records.²⁹ FOIA sets out the procedures by which members of the public may exercise their right to acquire information about the federal government.³⁰ The text of FOIA is grounded upon the assumption that citizens have a right to government information.³¹ Within FOIA, however, are a series of exceptions describing those types of information that an agency need not release to the public.³² For the purposes of this Comment, the most important of these exemptions is the exemption for classified materials.³³

²³ *Id.* § 4332(2)(C).

²⁴ *See id.*

²⁵ *See id.*

²⁶ *See* 42 U.S.C. § 4332(2)(C).

²⁷ *See id.*

²⁸ *See id.*

²⁹ *See* *EPA v. Mink*, 410 U.S. 73, 80 (1973).

³⁰ *See* 5 U.S.C. § 552.

³¹ *See id.*

³² *Id.* §§ 552(b)(1)–(9).

³³ *Id.* § 552(b)(1). The decision to classify information is based on Executive Orders that the information should be kept secret in order to protect national defense or foreign policy interests.

Id.

Congress explicitly made NEPA subordinate to FOIA.³⁴ NEPA requires that an EIS “be made available to the President, the Council on Environmental Quality, and to the public,” subject to the provisions and exemptions of FOIA.³⁵ If an agency’s EIS contains classified information, FOIA allows the agency to invoke national security interests in order to refuse to release the EIS to the public.³⁶

The result of NEPA’s deference to FOIA is that any federal agency involved in matters of national security may attempt to use that involvement to avoid complying with NEPA.³⁷ The extent to which such agencies have succeeded is the focus of the following section.

III. JUDICIAL APPLICATION OF NATIONAL SECURITY INTERESTS

Although Congress clearly meant to subject NEPA’s disclosure goals to the constraints of FOIA, it fell to the courts to determine the specific methods by which these statutes were to be integrated and applied. Courts have thus had to struggle with how to apply NEPA and FOIA when an EIS involves some classified information. Specifically, how does the presence of classified information affect the rest of the information in an EIS? Finding the answer to this question requires an understanding of how courts have addressed general issues of national security and executive authority.

A. *The Political Question Doctrine*

The military’s claim that national security concerns can exempt it from complying with environmental statutes originates with the “political question” doctrine. The United States Supreme Court described this doctrine in *Baker v. Carr*, a case involving alleged civil rights violations resulting from Tennessee’s method of apportioning its General Assembly seats among the state’s counties.³⁸ The doctrine describes the principle that the judiciary should not interfere with decisions that are political, rather than legislative, in nature.³⁹ The Court

³⁴ 42 U.S.C. § 4332(2)(C). An agency should make an EIS available to the public “as provided by [FOIA].” *Id.*

³⁵ *Id.*

³⁶ See 5 U.S.C. § 552(b)(1).

³⁷ *But see* McQueary v. Laird, 449 F.2d 608, 612 (10th Cir. 1971). See *infra* notes 67–69 and accompanying text.

³⁸ *Baker v. Carr*, 369 U.S. 186, 187–88, 217 (1962).

³⁹ See *id.* at 217; Douglas E. Baker, Note, *Anticipating Lamm v. Weinberger II (Romer v. Carlucci); The Political Question Doctrine, MX Missiles, and NEPA’s Environmental Impact Statement*, 21 CREIGHTON L. REV. 1245, 1250–51 (1988).

held that the judiciary should refrain from involving itself in a case or controversy that displays "a textually demonstrable constitutional commitment of the issue to a coordinate political department."⁴⁰

The Court did, however, restrict its position by noting that, while the judiciary must be mindful of the political question doctrine, it must not abdicate its duty of statutory interpretation.⁴¹ The Court held that this duty could extend even into the area of foreign policy, which traditionally is considered to be an exclusive power of the executive branch.⁴² The Court held that the fact that a given issue "touches" upon foreign affairs does not mean that the issue is ipso facto non-judicial.⁴³ In a later decision, *Japan Whaling Association v. American Cetacean Society*, the Court expanded upon this idea by noting that "we cannot shirk this responsibility [of statutory interpretation] merely because our decision may have significant political overtones."⁴⁴ The political importance of a given case or controversy is thus of secondary importance to the judiciary's duty to interpret the statute or statutes involved in the dispute.⁴⁵

In addition to an obvious analysis of the actual claims involved, courts have screened cases for political questions by analyzing the type of relief sought by plaintiffs. An example of this "relief-based" analysis is *Greenham Women Against Cruise Missiles v. Reagan*.⁴⁶ The plaintiffs in *Greenham Women* sought to block the deployment of cruise missiles at a United States air base in England.⁴⁷ Among the plaintiffs' claims were that the deployment would increase substantially the risk of nuclear war or nuclear accidents, that the deployment was a tortious injury, and that the deployment violated Congress's right to declare war.⁴⁸ The United States District Court for the Southern District of New York, although possessing the authority to decide the case,⁴⁹ was unable to grant the remedy the plaintiffs

⁴⁰ *Baker*, 369 U.S. at 217.

⁴¹ See *Baker*, *supra* note 39, at 1251-52 (citing *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986) and *Powell v. McCormack*, 395 U.S. 486 (1969)).

⁴² *Baker*, 369 U.S. at 211. The *Baker* Court noted that, while foreign policy would appear to be controlled by the executive branch, courts still have an obligation to determine whether a given case or controversy could be adjudicated without unduly interfering with political decisions. *Id.* at 211-12.

⁴³ *Id.* at 211.

⁴⁴ *Japan Whaling Ass'n*, 478 U.S. at 230.

⁴⁵ See *Baker*, 369 U.S. at 217.

⁴⁶ 591 F. Supp. 1332 (S.D.N.Y. 1984), *aff'd*, 755 F.2d 34 (2d Cir. 1985).

⁴⁷ *Id.* at 1332.

⁴⁸ *Id.* at 1332-33.

⁴⁹ *Id.* at 1336.

sought.⁵⁰ The court determined that the plaintiffs had sought relief that would have had a clear impact upon United States foreign policy.⁵¹ Thus, although the case did not involve a political question as defined by *Baker v. Carr*, the relief the plaintiffs sought would have forced the court to impose itself upon a political question—an impermissible result in the court's view.⁵²

In contrast, the United States Court of Appeals for the Tenth Circuit in *McKay v. United States*, established limits to the protection given to a political question.⁵³ The plaintiffs in *McKay* alleged that the nearby Rocky Flats nuclear weapons plant had damaged their property.⁵⁴ The United States District Court for the District of Colorado granted summary judgment for the government, holding that the decision to produce such weapons was a political question.⁵⁵ The Tenth Circuit upheld that portion of the lower court's decision, but ruled that the issue of damages resulting from a political decision was justiciable.⁵⁶ The court determined that although the plaintiffs could not question the government's decision to produce the weapons or to site their production at the location in question, the political question doctrine would not insulate the government from any resulting damages.⁵⁷ The *McKay* decision thus limited application of the political question doctrine to claims that directly challenged the government's political decisions.⁵⁸ The court reasoned that such claims were premised upon a challenge to a given governmental decision that qualified as a political question, and therefore did not involve actual damages.⁵⁹ The doctrine did not, however, provide protection to the government for claims based upon the non-political repercussions of the government's decision.⁶⁰

If a federal agency made a decision protected by the political question doctrine, would the potential environmental repercussions of that decision be actionable? The *McKay* decision implies that the environmental damages might be actionable, because that decision allows

⁵⁰ *Id.* at 1339.

⁵¹ *Greenham Women*, 591 F. Supp. at 1339.

⁵² *Id.* at 1336 n.8.

⁵³ *McKay v. United States*, 703 F.2d 464, 470-71 (10th Cir. 1983).

⁵⁴ *Id.* at 465.

⁵⁵ *See id.* at 470.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *See McKay*, 703 F.2d at 470.

⁵⁹ *See id.* at 470-71.

⁶⁰ *Id.* at 470.

actions to recover damages for agency activities that are otherwise shielded by the political question doctrine.⁶¹

B. NEPA and National Security

One of the first cases to address the potential conflict between NEPA and national security interests was *McQueary v. Laird*.⁶² The plaintiffs in *McQueary* were a group of local residents who challenged the military's decision to store chemical and biological weapons near the Denver airport.⁶³ The plaintiffs claimed that the storage site was too close to the airport, thereby risking a catastrophic release of the weapons' contents should an aircraft crash into the site.⁶⁴ The United States Court of Appeals for the Tenth Circuit affirmed the United States District Court for the District of Colorado's dismissal of the complaint, noting that the decision of where to locate the storage site was within the government's discretion.⁶⁵ The court reasoned that "[p]ublic disclosure relating to military-defense facilities creates serious problems involving national security," and that the government "has traditionally exercised unfettered control with respect to internal management and operation of federal military establishments."⁶⁶ The court, however, declined to extend a total NEPA exemption to all military activities that involve national security.⁶⁷ The court declared that individuals and agencies acting on behalf of the federal government did not enjoy an automatic exemption from NEPA.⁶⁸ The military thus had to continue to comply with NEPA's EIS requirements, but only if providing an EIS to the public would not adversely affect national security.⁶⁹

The United States Supreme Court addressed the national security exemption to NEPA in the 1981 decision *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, which remains the leading case on this issue.⁷⁰ Like *McQueary*, the controversy in *Catholic Action* involved the general hazard of storing weapons near a civilian air-

⁶¹ *See id.*

⁶² 449 F.2d 608 (10th Cir. 1971).

⁶³ *Id.* at 609.

⁶⁴ *Id.* at 609-10.

⁶⁵ *Id.* at 612.

⁶⁶ *Id.*

⁶⁷ *McQueary*, 449 F.2d at 612.

⁶⁸ *Id.*

⁶⁹ *See id.*

⁷⁰ *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139 (1981).

port.⁷¹ The Navy had decided to consolidate several weapons and ammunition storage sites into a single location on Oahu, Hawaii.⁷² In preparation for this action the Navy produced an Environmental Impact Assessment (EIA), a preliminary document used to determine whether a more formal EIS is necessary under NEPA.⁷³ In its EIA, the Navy concluded that the planned construction of the new storage facility and other attendant structures would not create a level of environmental impact that necessitated an EIS.⁷⁴ Therefore, the Navy did not prepare an EIS.⁷⁵

The Navy's EIA did not, however, discuss the fact that the new storage facility was designed to be capable of storing nuclear weapons.⁷⁶ Because of the separate environmental hazards of nuclear weapons storage, the Navy had prepared a Candidate EIS (CEIS) of the potential environmental impacts of this activity.⁷⁷ A CEIS is the second stage of the Navy's evaluation of an action's potential environmental impact.⁷⁸ The CEIS study, however, was a general-purpose assessment of the environmental risks associated with storing, handling, and moving nuclear weapons.⁷⁹ The CEIS was not written as a specific study of the potential impact of these activities at any particular site.⁸⁰ The CEIS concluded that "the nuclear aspects of weapons storage do not constitute an 'environmental factor' per se, and can be excluded from any assessment prepared under . . . NEPA."⁸¹ Citing the CEIS, the Navy claimed that nuclear weapons storage presented

⁷¹ *Id.* at 142.

⁷² *Id.* at 141.

⁷³ *Id.*; see also Council On Environmental Quality Terminology and Index, 40 C.F.R. § 1508.9 (1994).

⁷⁴ *Catholic Action*, 454 U.S. at 141.

⁷⁵ *Id.*

⁷⁶ See *id.* at 141-42.

⁷⁷ *Id.* at 141.

⁷⁸ See Amy J. Sauber, Note, *The Application of NEPA to Nuclear Weapons Production, Storage, and Testing: Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 11 B.C. ENVTL. AFF. L. REV. 805, 825 n.154 (1984). This CEIS was especially unusual in that, according to the Navy's regulations, it was unnecessary. *Id.* Ordinarily, the Navy would not prepare a CEIS unless the preceding EIA indicated that the prospective action might have a significant environmental impact. *Id.* The preceding EIA for this weapons storage site, however, had determined that the site would not have a significant environmental impact. *Id.* One commentator has suggested that the Navy prepared the CEIS in order to head off the plaintiffs' complaints. See *id.* (citing Annette N. DeBois, *The United States Supreme Court Deals a Severe Blow to NEPA*, 22 NAT. RESOURCES J. 699, 701 n.19 (1982)).

⁷⁹ *Catholic Action*, 454 U.S. at 141-42.

⁸⁰ *Id.* at 142.

⁸¹ Sauber, *supra* note 78, at 825 n.155.

no more of an environmental threat than did the storage of conventional weapons, and thus did not need to be addressed specifically in any NEPA-based study.⁸²

The CEIS's omission of any facts specifically related to the site in question was the result of Navy regulations forbidding the Navy from either confirming or denying the presence of nuclear weapons at a given location.⁸³ These regulations were based on the Department of Defense's Nuclear Weapons Classification Guide, which declared that information about whether a "Nuclear-Capable [storage] Unit" actually has nuclear weapons is classified.⁸⁴ The rationale behind this classification decision was that specific information about the location of nuclear weapons is a national security interest.⁸⁵ Thus the official Navy response to requests for such information was that "it is the policy of the United States government neither to confirm nor deny the presence or absence of nuclear weapons or components on board any ship, station, or aircraft."⁸⁶

The validity of this policy was the focus of *Catholic Action* because the plaintiffs had based their allegations on a claim that the Navy's EIA had failed to take account of the risk of a nuclear accident should an airplane crash into the site.⁸⁷ The plaintiffs were caught in a regulatory paradox which allowed the Navy to admit that the site could store nuclear weapons while simultaneously refusing to state whether it actually planned to store such weapons at the site.⁸⁸

The United States District Court for the District of Hawaii held in favor of the Navy, agreeing that the Navy could not comply with NEPA's EIS requirement when to do so would compromise national security.⁸⁹ The court did, however, agree with the plaintiffs that the storage site was "a major federal action" and thus fell under the reporting guidelines of NEPA.⁹⁰ Because the court could not require full NEPA compliance from the Navy, it declined to issue an injunction blocking construction on the site until the Navy prepared an EIS.⁹¹

⁸² *Id.*

⁸³ *Catholic Action*, 454 U.S. at 141.

⁸⁴ Sauber, *supra* note 78, at 818 (citing Brief for Appellant at Appendix H, Weinberger v. Catholic Action of Hawaii/Peace Educ. Project, 454 U.S. 139 (1981)).

⁸⁵ *See id.* at 819.

⁸⁶ *Id.*

⁸⁷ *Catholic Action*, 454 U.S. at 142.

⁸⁸ *See Sauber, supra* note 78, at 826.

⁸⁹ *Catholic Action of Hawaii/Peace Educ. Project v. Brown*, 468 F. Supp. 190, 193 (D. Hawaii 1979).

⁹⁰ *Id.*

⁹¹ *Id.*

The United States Court of Appeals for the Ninth Circuit reversed the district court's ruling, holding that the Navy's security regulations did not forbid preparation of an EIS.⁹² The court reasoned that an EIS was, essentially, a hypothetical document.⁹³ Because an EIS is concerned with what may happen as a result of a given government action, the court concluded that there was no reason why the Navy could not prepare an EIS documenting what might happen if nuclear weapons were stored at the facility.⁹⁴

The court noted that an EIS need not rely on classified information.⁹⁵ By stipulating that the site was capable of storing nuclear weapons, the Navy had opened the door to inquiries about the possible environmental consequences of this capability.⁹⁶ The court reasoned that the Navy could prepare a study of these consequences without actually revealing any classified information.⁹⁷

Additionally, the court held that a study would be an important part of assuring the public that the Navy was aware of the concerns surrounding nuclear weapons storage.⁹⁸ The court noted that NEPA had an additional purpose—public notification that the federal government is aware of the environmental implications of its actions.⁹⁹ Here, at least implicitly, the court recognized that the existence of an EIS could be as important as the actual results of the EIS.¹⁰⁰

The United States Supreme Court reversed the Court of Appeals' opinion, criticizing that court's decision that the Navy could prepare a "hypothetical" EIS that would comply with NEPA as well as the national security restrictions of FOIA.¹⁰¹ Writing for the majority, Justice Rehnquist declared that the "hypothetical" EIS was "a creature of judicial cloth, not legislative cloth."¹⁰² As such, the concept of a modified EIS existed with absolutely no support in the relevant statutes or regulations, and thus the Court could not consider it to be a valid solution to the conflict between NEPA and the national security exemption of FOIA.¹⁰³

⁹² *Catholic Action of Hawaii/Peace Educ. Project v. Brown*, 643 F.2d 569, 572 (9th Cir. 1980).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *See id.*

⁹⁶ *Id.* at 571.

⁹⁷ *Catholic Action*, 643 F.2d at 572.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *See id.*

¹⁰¹ *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 141 (1981).

¹⁰² *Id.*

¹⁰³ *Id.*

The Court began its analysis with a review of the purpose of NEPA's public disclosure provision.¹⁰⁴ The Court found that the determinative language of NEPA was section 102(2)(C), which states that federal agencies are to publish the results of an EIS "to the fullest extent possible."¹⁰⁵ This section also provides for national security interests by subjecting the publication of an EIS to the guidelines imposed by FOIA.¹⁰⁶ The Court concluded that section 102(2)(C) serves a dual purpose: to require federal agencies to consider the possible environmental consequences of their proposed actions, and to notify the public that the agencies were making such considerations.¹⁰⁷ The Court held, however, that "[p]ublic disclosure of the EIS is expressly governed by FOIA."¹⁰⁸

By emphasizing that FOIA controlled this public notification purpose of section 102(2)(C), the Court was able to drive a wedge between NEPA's two purposes.¹⁰⁹ Although the Court recognized NEPA's dual purpose, the Court reasoned that the two purposes were not inseparable.¹¹⁰ The Court determined that section 102(2)(C) indicated that Congress had envisioned the possibility that an agency might be required to prepare an EIS without having to disclose it to the public.¹¹¹ Using this analysis, the Court held that a given government action might require the preparation of an EIS that would not be made public due to FOIA-based restrictions.¹¹² FOIA's exemptions from section 102(2)(C) of NEPA, the Court concluded, were the result of Congress's recognition that there would be government actions so completely intertwined with national security interests that the agency involved simply could not notify the public of either the action or its possible environmental consequences.¹¹³

The Court's conclusion meant that the circuit court's idea of a hypothetical EIS was not a valid solution to the problem of how to address NEPA's goal of public notification without divulging classified information. The Court determined that the concept of a hypothetical EIS was a departure from the legislative intent behind section 102(2)(C),

¹⁰⁴ *Id.* at 142–43.

¹⁰⁵ *Id.* at 142.

¹⁰⁶ *Catholic Action*, 454 U.S. at 142–43.

¹⁰⁷ *Id.* at 143.

¹⁰⁸ *Id.*

¹⁰⁹ *See id.*

¹¹⁰ *Id.*

¹¹¹ *Catholic Action*, 454 U.S. at 143.

¹¹² *Id.*

¹¹³ *See id.* at 145.

which the Court felt clearly subordinated NEPA to FOIA.¹¹⁴ The Court concluded that an agency's decision to publish an EIS relied on two separate balancing tests:¹¹⁵ a determination of whether national security interests outweighed the public's general claim to government information, and a determination of whether the purposes of FOIA outweighed the purposes of NEPA.¹¹⁶ Under the first test, the government had determined that almost all information regarding nuclear weapons storage was classified.¹¹⁷ Under the second test, the Navy had determined that preparing an EIS required acting against the national interest, as evidenced by the government's decision to classify that information.¹¹⁸

The Court also noted that the only type of EIS that the Navy could have prepared regarding the storage facility was a classified EIS.¹¹⁹ The Court argued that, by preparing a classified EIS, the Navy would be fulfilling its NEPA obligations of considering the environmental impact of its actions.¹²⁰ A classified EIS would be a purely internal document, issued by and for those personnel engaged in planning the storage facility.¹²¹

The Court then turned its attention to the proposed weapons storage site, holding that the Navy was not required to prepare an EIS for the site.¹²² The Court based its holding on what it perceived to be a clear distinction between contemplated and proposed actions.¹²³ Because the Navy had said that the site was capable of nuclear weapons storage without saying whether such storage would take place, the Navy essentially had left that capability as a "contemplated," rather than a "proposed," action.¹²⁴ Because the storage of nuclear weapons was a contemplated action, there was no basis for concluding that the

¹¹⁴ *Id.* at 144.

¹¹⁵ *See id.* at 144-45. In addition to the balancing tests noted by the Court is the initial balancing test of whether a proposed agency action possesses those characteristics that necessitate the preparation of an EIS. *Id.* at 141.

¹¹⁶ *Catholic Action*, 454 U.S. at 144.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 144-45. Much of this analysis was dicta, however, because the Navy had decided that an EIS was not necessary due to a lack of any foreseeable significant environmental consequences. *Id.* at 141.

¹¹⁹ *See id.*

¹²⁰ *Catholic Action*, 454 U.S. at 146.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 146.

Navy had to prepare an EIS for that action.¹²⁵ Implicit in this reasoning was the Court's belief that a contemplated action was merely a potential action, while a proposed action was one that the proposing agency was actively pursuing.¹²⁶

The Court concluded by declaring that the question of the Navy's compliance with NEPA was "beyond judicial scrutiny."¹²⁷ The Navy's regulations regarding non-disclosure of nuclear weapons information had exempted the Navy from NEPA guidelines for any proposed action involving such weapons because the mere fact of the Navy's involvement automatically transformed the proposed action into a contemplated action.¹²⁸ The potential thus existed for any government agency to avoid NEPA scrutiny simply by linking its proposed actions to classified information.¹²⁹ This possibility threatened what even the Court recognized as one of NEPA's primary goals: the publication of information designed to inform and assure the public that the federal government was actively considering the environmental impact of its actions.¹³⁰

Justice Blackmun, joined by Justice Brennan, addressed this threat in his concurring opinion.¹³¹ Although Justice Blackmun agreed with the outcome of the case—that classified information was ipso facto so important to national security that it should not be released to the public as part of an EIS—he differed with the Court's opinion regarding how to address the problem of classified information in an EIS.¹³²

Justice Blackmun noted that the Department of Defense's own regulations stated that the fact that a proposed action involved classified information did not relieve the Department of the duty of complying with NEPA by preparing an EIS.¹³³ Those regulations state, as NEPA itself does,¹³⁴ that the resulting EIS should be available to as many people as possible.¹³⁵ Like the majority, Justice Blackmun

¹²⁵ *Catholic Action*, 454 U.S. at 146.

¹²⁶ See *id.* This reasoning begs the question of why the Navy would bother to describe the facility as "nuclear capable" if it were not planning to use that capability.

¹²⁷ *Id.*

¹²⁸ See *id.*

¹²⁹ See *Catholic Action*, 454 U.S. at 146.

¹³⁰ See *id.* at 143.

¹³¹ *Id.* at 147 (Blackmun, J., concurring).

¹³² See *id.* (Blackmun, J., concurring).

¹³³ *Id.* (Blackmun, J., concurring).

¹³⁴ This refers to NEPA's purpose of disseminating the information of an EIS "to the fullest extent possible." *Id.* at 148 (Blackmun, J., concurring).

¹³⁵ See *Catholic Action*, 454 U.S. at 147-48 (Blackmun, J., concurring).

referred back to the purpose of NEPA's EIS requirement—to force federal agencies to include analysis of a given action's likely environmental consequences in an agency's overall analysis of that action's feasibility.¹³⁶ He remarked, however, that this purpose “is no less true when the public is unaware of the agency's proposals.”¹³⁷

Justice Blackmun argued that the majority had gone too far in its treatment of classified information.¹³⁸ He believed that, where feasible, an agency should prepare an EIS in such a way as to keep the classified information in specific sections which could then be withheld from the public, thereby allowing the public to view at least some of the EIS.¹³⁹ Although he admitted that such a solution was imperfect, Justice Blackmun opined that this action would place some of the EIS in public hands, and, at least partially, fulfill NEPA's goal of public disclosure.¹⁴⁰

Justice Blackmun expressed concern that the majority opinion posed a real threat to the purpose of NEPA, and thus he argued for public disclosure of as much of an EIS as possible.¹⁴¹ As Justice Blackmun noted, preparation of an EIS becomes especially important when the public will be unable to see the EIS due to the involvement of classified information.¹⁴² Because the public will not be able to see or respond to such an EIS, the agency involved bears the especially important burden of ensuring that the public's environmental interests are recognized as part of the agency's overall feasibility study of its proposed action.¹⁴³ Justice Blackmun wrote that any federal agency that was exempted from disclosing an EIS for national security reasons had to do everything possible to ensure that it complied with the letter and spirit of NEPA.¹⁴⁴ In contrast, the majority opinion could

¹³⁶ *Id.* at 148 (Blackmun, J., concurring).

¹³⁷ *Id.* (Blackmun, J., concurring).

¹³⁸ *Id.* at 149 (Blackmun, J., concurring). Justice Blackmun based this argument on a hypothetical agency action involving classified information. *Id.* (Blackmun, J., concurring). He agreed with the majority, however, that the facts of *Catholic Action* did not require the Navy to prepare an EIS at all. *Id.* at 150 (Blackmun, J., concurring).

¹³⁹ *Catholic Action*, 454 U.S. at 149 (Blackmun, J., concurring). See also Council on Environmental Quality Agency Compliance 40 C.F.R. § 1507.3(c) (1994) (stating that “the unclassified portions [of an EIS] can be made available to the public”).

¹⁴⁰ See *Catholic Action*, 454 U.S. at 149 (Blackmun, J., concurring).

¹⁴¹ See *id.* at 148–49 (Blackmun, J., concurring).

¹⁴² *Id.* (Blackmun, J., concurring).

¹⁴³ See *id.* (Blackmun, J., concurring).

¹⁴⁴ See *Catholic Action*, 454 U.S. at 148–49 (Blackmun, J., concurring).

allow such agencies to avoid NEPA compliance by invoking their national security privileges.¹⁴⁵

This result in fact occurred in *Hudson River Sloop Clearwater, Inc. v. Department of the Navy*, in which the United States Court of Appeals for the Second Circuit denied plaintiffs the option of in camera review.¹⁴⁶ *Hudson River* dealt with the Navy's plan to construct a home port on Staten Island, New York, for a battleship and several attendant ships.¹⁴⁷ As in *Catholic Action*, the Navy admitted that several of the ships were capable of holding nuclear weapons, but neither confirmed nor denied whether any of those ships would actually carry nuclear weapons.¹⁴⁸ What made this case different from a simple application of *Catholic Action's* holding was the fact that the plaintiffs—a coalition of environmental groups, members of the New York City Council—and nearby residents, had received information alleging that the Navy did in fact plan to have nuclear weapons at the site.¹⁴⁹

The plaintiffs used this information in their request that the United States District Court for the Eastern District of New York review in camera the Navy's EIS and the Government Accounting Office's report to determine whether the EIS was adequate.¹⁵⁰ That court held that an in camera review would still result in a public disclosure of classified information, and thus declined to perform such review.¹⁵¹ The court reasoned that, while the actual review of the material might preserve its secrecy, the review's outcome might result in a disclosure of classified information.¹⁵² If the court held for the plaintiffs, the result would imply that nuclear weapons would be positioned at the site, thereby releasing precisely that information which the Navy

¹⁴⁵ See *id.* at 147–49 (Blackmun, J., concurring).

¹⁴⁶ *Hudson River Sloop Clearwater, Inc. v. Department of the Navy*, 891 F.2d 414, 423 (2d Cir. 1989).

¹⁴⁷ *Id.* at 416.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 422–23. The information in question was a classified report issued by the United States General Accounting Office (GAO) that had been prepared for New York Congressman Ted Weiss. *Id.* Congressman Weiss, an opponent of the site, then told the plaintiffs about the report's contents. *Id.* at 423.

¹⁵⁰ *Hudson River Sloop Clearwater, Inc. v. Department of the Navy*, No. CV–86–3292, 1989 WL 50794, at *5 (E.D.N.Y. May 4, 1989).

¹⁵¹ See *id.* at *5.

¹⁵² *Id.*

sought to protect.¹⁵³ The court thus saw no alternative but to dismiss the plaintiffs' claims regarding nuclear weapons storage.¹⁵⁴

This analysis was, however, largely ignored by the United States Court of Appeals for the Second Circuit, which instead based its decision to affirm the district court upon what it saw as the plaintiffs' inability to establish a *prima facie* case.¹⁵⁵ This shift in emphasis may have been based on the Second Circuit's desire to bring the decision more into line with the United States Supreme Court's ruling in *Weinberger v. Catholic Action of Hawaii/Peace Education Project*.¹⁵⁶ This is suggested by the Second Circuit's use of the Supreme Court's analysis in basing its decision only on what the plaintiffs could allege, rather than on what the judiciary actually could do.¹⁵⁷ By interpreting the Supreme Court in this fashion, the Second Circuit abandoned its responsibility to ensure that the Navy was complying with federal law.¹⁵⁸

Had the Second Circuit exercised the option of ordering a complete *in camera* review of the facts of the case, it might have given the trial court a better understanding of the facts. This opportunity is the essential benefit of *in camera* review for cases involving classified information—the reviewing court gains access to information denied the plaintiffs and is thus able to stand in for the plaintiffs in making a ruling that supports the general public interest even as it upholds the law. By refusing to order *in camera* review, the Second Circuit abdicated its duty to ensure that the Navy had complied with NEPA.

IV. USING IN CAMERA REVIEW TO RESOLVE THE NEPA-FOIA CONFLICT

Both the majority and concurring opinions in *Catholic Action* address the question of preparing an EIS as having mutually exclusive

¹⁵³ *Id.* The court did note that a judgment for the defendants would result in no disclosure of classified information, but this was more than offset by the risk of disclosure following a ruling for the plaintiffs. *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ See *Hudson River Sloop Clearwater, Inc. v. Department of the Navy*, 891 F.2d 421, 421 (2d Cir. 1989).

¹⁵⁶ See *id.* at 420–21; see also *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139 (1981).

¹⁵⁷ See *Hudson River*, 891 F.2d at 421. See also *infra* note 159 and accompanying text.

¹⁵⁸ See *Hudson River*, 891 F.2d at 424. The Second Circuit concluded its decision by affirming that the Navy generally had to comply with NEPA, but the court simultaneously noted that the circumstances of the case prevented the court from scrutinizing the Navy's compliance. *Id.* This was mere lip service to the goals of NEPA. See *id.*

answers: either an agency must make an EIS public or the presence of classified information renders the EIS a classified document.¹⁵⁹ By doing so, the United States Supreme Court neglected several alternative ways of approaching the problem of an EIS that contains classified information. The Court's failure to address these alternatives may result in an assumption by lower courts that the Court's omission was actually a rejection.

The United States Supreme Court actually did reject the first of these alternatives by dismissing the hypothetical EIS as a "creature of judicial cloth."¹⁶⁰ The Court ignored the fact that an EIS is, by definition, a hypothetical document.¹⁶¹ The purpose of NEPA's EIS regulation is to force agencies to study the possible environmental results of actions that those agencies are considering, and the resulting EIS is thus an analysis of hypothetical environmental results.¹⁶² The Court's distinction between proposed and contemplated actions is a false distinction because at the time of EIS preparation an agency has not yet decided whether to undertake the action considered in the EIS.¹⁶³ The Navy's actual decision to store nuclear weapons at the site would remain a secret, while the EIS would notify the public merely that the Navy was considering such an action.¹⁶⁴

The Court also failed to address the possibility of in camera review for those EISs that involve classified information. In camera review of an EIS with classified information would be comprised of two tests. Under the first test, the court would determine whether an agency has a valid claim to withhold information under FOIA.¹⁶⁵ If the court found that the claim was valid, it would then apply the second test and review the EIS to ensure that the agency actually had complied with NEPA.¹⁶⁶ Courts have granted such a review in those instances in which both parties already are familiar with the classified information.¹⁶⁷

¹⁵⁹ Justice Blackmun's concurrence attempted to mediate between these positions by suggesting partial publication of an EIS involving classified information. See *supra* note 139 and accompanying text. This suggestion simply applied the majority's analysis to individual sections within an EIS, it did not propose a different method of addressing the conflict between NEPA and national security. See *Catholic Action* 454 U.S. at 149 (Blackmun, J., concurring).

¹⁶⁰ *Id.* at 141.

¹⁶¹ Stephen Dycus, *NEPA Secrets*, 2 N.Y.U. ENVTL. L.J. 300, 307 (1993).

¹⁶² *See id.*

¹⁶³ *Id.*

¹⁶⁴ *See id.*

¹⁶⁵ *Id.* at 308.

¹⁶⁶ Dycus, *supra* note 161, at 308.

¹⁶⁷ *Id.* at 308 n.49; *see, e.g., Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130, 1131-32

In most NEPA cases, however, it is unlikely that the plaintiffs will have access to the classified information at issue. Currently, the best available solution for such situations is to hold independent in camera review of an agency's compliance with NEPA.¹⁶⁸ This is an imperfect solution, lacking the benefits of a normal adversarial trial, but it at least imposes some form of outside review of an agency's compliance with NEPA.¹⁶⁹

V. CONCLUSION

The record of decisions involving NEPA-FOIA conflicts generally has shown national security matters to be more important than environmental concerns.¹⁷⁰ This trend accurately reflects Congress's decision to subject NEPA to the strictures of FOIA. However, in following Congress's intent, the courts have paid too much attention to the federal agencies' desire to maintain secrecy at an unknown cost to the environmental well-being of the nation.

This judicially sanctioned silence is especially dangerous because the military's environmental record has been disastrous. Many former military sites are now unusable due to the improper use or disposal of radioactive or toxic materials.¹⁷¹ Alleged activities at sites such as Groom Lake have endangered people as well as the local environment. Arguably, one could defend the military's environmental damage as being the cost of maintaining the United States against aggression. Yet even under this argument, the absence of as formidable a threat as the Soviet Union should require the military to do a better environmental accounting of its actions. The continuing threat of other nations, while still significant, does not require that we pursue mili-

(2d Cir. 1977) (in camera review appropriate where parties to Air Force contract already had access to classified information); *Halpern v. United States*, 258 F.2d 36, 43 (2d Cir. 1958) (in camera review appropriate in patent application case where parties and witnesses were aware of the invention).

¹⁶⁸ See Dycus, *supra* note 161, at 308. Professor Dycus has suggested several possible methods of addressing the conflict between NEPA and national security concerns. *Id.* at 310. These include the creation of special courts authorized to hear such cases. *Id.* This solution would have the advantage of using a court that would, by necessity, develop a strong expertise in balancing environmental concerns with national security. *Id.* Congress also could authorize a "special independent environmental attorney," who would be given the necessary clearances to prosecute such cases on behalf of the government or individual plaintiffs. *Id.*

¹⁶⁹ *Id.* at 309.

¹⁷⁰ See *supra* section III.B.

¹⁷¹ See Sauber, *supra* note 78, at 808-11.

tary supremacy at all costs, including the degradation of our environment.¹⁷²

The judiciary's response to the conflict between NEPA and FOIA has neglected NEPA's goal of environmental accounting. Although Congress intended that an agency not release an EIS if that EIS contains classified materials, Congress did intend all agencies to undertake an EIS whenever the agencies' actions so require. By failing to utilize in camera review, courts have abdicated their responsibility of interpreting and balancing conflicting statutes. There is no real conflict between NEPA's accounting and disclosure goals, because courts have the power to step in and oversee an agency's environmental accounting when national security interests will prevent the public from doing so.¹⁷³

Weinberger v. Catholic Action of Hawaii/Peace Education Project and *Hudson River Sloop Clearwater, Inc. v. Department of the Navy* reveal courts' failure to consider the origins and purpose of NEPA.¹⁷⁴ Congress enacted NEPA in response to complaints that the federal government was not adequately accounting for the environmental consequences of its actions. NEPA was intended to force this accounting and to provide the public with the power to oversee and comment on this accounting. While there may be occasions when the public should be prevented from seeing an EIS, courts always should be prepared to stand in for the public to ensure that the government is complying with NEPA. By failing to do so, courts have permitted federal agencies that use classified information to exploit those materials in order to justify expanded secrecy. These agencies, which the public cannot observe, are those that most require judicial oversight regarding their compliance with NEPA. If courts fail to assess their compliance, no one else can or will.

¹⁷² Hourclé, *supra* note 1, at 318-19.

¹⁷³ See *supra* section IV.

¹⁷⁴ See *supra* section II.A.