ANTICIPATING *LAMM v. WEINBERGER* II (*ROMER v. CARLUCCI*): THE POLITICAL QUESTION DOCTRINE, MX MISSILES, AND NEPA'S ENVIRONMENTAL IMPACT STATEMENT

INTRODUCTION

> The political question doctrine is a tempting refuge from the adjudication of difficult constitutional claims. Its shifting contours and uncertain underpinnings make it susceptible to indiscriminate and overbroad application to claims properly before the federal courts.

Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1514 (D.C. Cir. 1984).

The political question doctrine as set out by the United States Supreme Court in *Baker v. Carr*[1] established that issues "touching on" foreign affairs are nonjusticiable to the extent that they result from intentional actions by the legislative or executive branches of the federal government.[2] The extent of "touching" required to invoke the doctrine has been the subject of considerable litigation.

Western Solidarity, Inc. v. Reagan[3] presented the Eighth Circuit with an opportunity to construe that doctrine in the context of a recurrent clash between the nation's military defense establishment and the public disclosure requirements of the National Environmental Policy Act of 1969 ("NEPA"). In *Western Solidarity*, the Air Force, per Congressional authorization, began deploying MX missiles into specially-hardened Minuteman III missile silos in Colorado, Wyoming and western Nebraska.[4] Two separate actions were filed to block that deployment on grounds that the Environmental Impact Statement prepared by the Air Force was deficient.[5] The actions were later consolidated and ultimately dismissed by the U.S. District Court for the District of Nebraska.[6] Both plaintiffs appealed.[7]

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1. 369 U.S. 186, 217 (1962).
2. *Id.* at 211-12; *see also infra* notes 40-49 and accompanying text.
3. No. CV84-L-280 (D. Neb. Feb. 20, 1986) *rev'd sub nom.* Romer v. Carlucci, Nos. 86-1458, 86-1517 (8th Cir. May 18, 1988) (WESTLAW, Fed library, CTA8 file). *Western Solidarity* was one of two separate district court actions consolidated in the United States District Court for the District of Nebraska; the other was Lamm v. Weinberger, No. 86-1458 (8th Cir. May 21, 1987). *See infra* notes 145-53 and accompanying text.
4. Lamm v. Weinberger, No. 86-1458 (8th Cir. May 21, 1987) *rev'd sub nom.* Romer v. Carlucci, Nos. 86-1458, 86-1517 (8th Cir. May 18, 1988) (WESTLAW, Fed library, CTA8 file).
5. *Western Solidarity*, No. CV84-L-280, slip op. at 1-4 (D. Neb. Feb. 20, 1986).
6. Western Solidarity v. Reagan, No. CV84-L-280 (D. Neb. Feb. 20, 1986) *rev'd*

The Eighth Circuit took one tentative step toward resolving this case, issuing an opinion on May 21, 1987.[8] However, the Court later held an *en banc* rehearing the following September 15, 1987.[9] This Note is based primarily upon the issues as formulated in the district court opinion; the Eighth Circuit's vacated opinion in *Lamm* will be used for factual and background purposes.

In the years since NEPA was enacted, NEPA-related challenges have been raised against such defense-related activities as the storage of chemical weapons,[10] the construction of an atomic submarine basing facility,[11] the testing of nuclear weapons,[12] the construction of a submarine communication system,[13] the storage of nuclear weapons,[14] and the closing of an Air Force Base.[15] This Note examines those challenges, concluding that proper resolution of *Western Solidarity* requires sound application of the political question doctrine, as articulated by the United States Supreme Court in *Baker v. Carr*.[16]

Courts have resolved those challenges by applying one or both of two aspects of that political question doctrine. Courts have sometimes concluded that they lack authority to intervene because of a respect for the prerogatives of the legislative or executive branch, finding "a textually demonstrable constitutional commitment of the issue to a coordinate political department. . . ."[17] Alternatively, other courts, having found the issue to be within their authority, nonethe-

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sub nom. Romer v. Carlucci, Nos. 86-1458, 86-1517 (8th Cir. May 18, 1988) (WESTLAW, Fed library, CTA8 file). The order accompanies this opinion.

7. *Lamm*, No. 86-1458, slip op. at 9 (8th Cir. May 21, 1987).

8. Lamm v. Weinberger, 819 F.2d 1445, 1445 (8th Cir. 1987).

9. Lamm v. Weinberger, 825 F.2d 176, 176 (8th Cir. 1987) (granting rehearing en banc and vacating opinion). The Eighth Circuit announced its decision on May 18, 1988, as this article went to press. Romer v. Carlucci, Nos. 86-1458, 86-1517 (8th Cir. May 18, 1988) (WESTLAW, Fed library, CTA8 file). That holding, as it relates to justiciability, is discussed *supra* notes 219-28 and accompanying text.

10. McQueary v. Laird, 449 F.2d 608, 609 (10th Cir. 1971); *see infra* notes 91-95 and accompanying text.

11. Concerned About Trident v. Rumsfeld, 555 F.2d 817, 820 (D.C. Cir. 1977); *see infra* notes 121-28 and accompanying text.

12. Committee For Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 796, 797 (D.C. Cir.), *appeal for injunction in aid of jurisdiction denied*, 404 U.S. 917 (1971); *see infra* notes 114-19 and accompanying text.

13. Wisconsin v. Weinberger, 745 F.2d 412, 414 (7th Cir. 1984); *see infra* notes 110-13 and accompanying text.

14. Weinberger v. Catholic Action of Hawaii/Peace Educ. Project, 454 U.S. 139, 141 (1981); *see infra* notes 97-108 and accompanying text.

15. Jackson County v. Jones, 571 F.2d 1004, 1005-06 (8th Cir. 1978); *see infra* notes 129-32 and accompanying text.

16. *See supra* note 1 and accompanying text.

17. Baker v. Carr, 369 U.S. 186, 217 (1962) (holding that the decision to store chemical and biological weapons was a national security concern of the legislative and judicial branches). *See, e.g.*, McQueary v. Laird, 449 F.2d 608, 609 (10th Cir. 1971); *see infra* notes 91-95 and accompanying text.

less have refused to intervene because they could not fashion "judicially discoverable and manageable standards for resolving it."[18]

Western Solidarity, consisting as it does of an administrative challenge to the domestic deployment of an offensive weapons system, presents a juxtaposition of both aspects of the political question doctrine. As such, the case requires the Eighth Circuit to determine both the limits of justiciability with regard to the national security issues involved, and, assuming justiciability, the limits on its power to fashion an appropriate remedy.

This Note will demonstrate that nothing in the political question doctrine precludes either judicial review or injunctive relief in this case. Accordingly, dismissal on political question grounds was based upon a misreading of the intent and content of that doctrine, and the district court holding in *Western Solidarity* was properly reversed by the Eighth Circuit.

BACKGROUND

THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

Enactment of the National Environmental Policy Act of 1969 represented a major achievement for environmentalists.[19] For the first time federal agencies were required to seriously consider the environmental consequences of major projects and to bear the burden of justifying any negative impact.[20] Environmentalists argued that such an explicit statement of governmental policy was necessary in view of the natural political inclination to favor short-term and concrete governmental projects over less-clearly defined environmental goals.[21]

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18. *Baker*, 369 U.S. at 217 (holding that possibility of enjoining construction of military facility must be balanced against national defense concerns). *See, e.g.*, Wisconsin v. Weinberger, 745 F.2d 412, 414 (7th Cir. 1984); *see infra* notes 110-13 and accompanying text.

19. Note, *The National Environmental Policy Act of 1969: A Step in the Right Direction*, 26 ARK. L. REV. 209, 209-10 (1972).

20. *See* 115 CONG. REC. 40416 (1969). "What is involved is a congressional declaration that we do not intend, as a government or as a people, to initiate actions which endanger the continual existence of mankind. . . . If there are to be departures from this standard of excellence they should be exceptions to the rule and the policy. And as exceptions, they will have to be justified in light of public scrutiny. . . ." *Id.* (1969); these are comments of U.S. Senator Henry Jackson, who is a primary sponsor of the legislation. *See also* Comment, *Environmental Law: Judicial Review of Federal Agency Actions Under NEPA*, 28 OKLA L. REV. 866, 874 (1975) (stating that "theoretically, NEPA was primarily enacted to protect the environment from needless deterioration resulting from man's activity).

21. *See* Comment, *National Security and the Environmental Policy Act*, 25 NAT. RESOURCE J. 467, 478-79 (1985). The author observed:

> [T]he NEPA purpose of forcing agencies to consider the environment in their decisionmaking, even when achieved, is not highly visible. A court, when

Essentially, NEPA forces federal agencies to consider and disclose significant environmental effects of major projects undertaken by those agencies.[22] NEPA's primary tool for achieving that end is the Environmental Impact Statement ("EIS"),[23] described as the "action-forcing" mechanism of the Act.[24] An EIS is required to address:

(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[25]

NEPA regulations require that an EIS be prepared "as close as possible to the time the agency is developing or is presented with a proposal"[26] but do not specify precisely when that requirement is triggered. The United States Supreme Court has stated that the triggering event is the time that an actual proposal for action is made[27] and has generally excluded appropriation legislation from that requirement.[28]

Two important, and somewhat contradictory, concepts have

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faced with a clear improvement to national security and an obscure promotion of environmental concerns, might be likely to swing the balance in favor of national security.

Id.

22. 42 U.S.C. § 4332(2)(A) (1982).

23. 42 U.S.C. § 4332(2)(C) (1982).

24. Minnesota Pub. Interest Research Group v. Butz, 541 F.2d 1292, 1299 (8th Cir. 1976).

25. 42 U.S.C. § 4332(2)(C)(i)-(v) (1982).

26. 40 C.F.R. § 1502.5 (1987).

27. Kleppe v. Sierra Club, 427 U.S. 390, 405-06 (1976).

28. Andrus v. Sierra Club, 442 U.S. 347, 364-65 (1979). Although Congress expressly tied the first deployment of MX missiles to the completion of an EIS, the second and third deployments were mandated via appropriations legislation that did not contain that conditional language. Lamm v. Weinberger, No. 86-1458, slip op. at 5-6 (8th Cir. May 21, 1987). The question therefore remains whether the subsequent deployments were also so conditioned. The *Lamm* court reasoned that because the legislation was clearly intended as components of a single program, the conditions applied to subsequent appropriations. *Id.* at 17-18 n.14. Although the United States Supreme Court has held that appropriation legislation cannot generally be construed as sufficiently indicative of Congressional intent to answer such a question, *see e.g.*, *Andrus*, 442 U.S. at 359-61, the Court has also accepted the Ninth Circuit's holding that "[c]ongressional approval or authorization may be found in . . . appropriation statutes, so long as it is demonstrated that Congress had knowledge of the precise action or project at issue and was explicitly and specifically addressing that project," Sierra Club v. Andrus, 610 F.2d 581, 601 (9th Cir. 1979), *rev'd on other grounds sub. nom*, California v. Sierra Club, 451 U.S. 287 (1981).

emerged from judicial construction of the EIS requirement. First, the courts have emphatically declared that preparation of an EIS must be taken seriously.[29] NEPA was never intended, in the words of one court, to be merely a "paper tiger."[30] Similarly, courts have generally held that when NEPA's guidelines are violated, an injunction should be granted, absent countervailing considerations.[31] Historically, the Eighth Circuit ha applied such a balancing approach to determine whether such an injunction should be issued.[32]

At the same time, the courts have relegated NEPA to a procedural posture. NEPA's purpose is to ensure that federal agencies consider the environmental effects of their actions, not to allow courts to impose their views as to the wisdom of those actions, as the Supreme Court has noted:

> NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural. It is to insure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or this Court would have reached had they been members of the decisionmaking unit of the agency.[33]

Moreover, the courts in applying NEPA must yield to Congressional intent to exempt a specific program from NEPA requirements.[34] The Supreme Court has repeatedly held that the EIS

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29. 2 F. GRAD, *Treatise on Environmental Law* § 9.02, at 9-146-9-148 (1987).

30. Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1114 (D.C. Cir. 1971). In construing the phrase "to the fullest extent possible," the *Calvert Cliffs'* court held that "the language . . . does not make NEPA's procedural requirement somehow 'discretionary'. Congress did not intend the Act to be such a paper tiger. Indeed, the requirement . . . sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts." *Id.*

31. Realty Income Trust v. Eckerd, 564 F.2d 447, 457 (D.C. Cir. 1977) (noting that "the presumption is that an action proceeding in violation of NEPA should be enjoined, so that the momentum of additional work and investment does not serve to further bind the agency to its initial decision.") The *Eckerd* court did, however, include national security interests among the listed countervailing factors. *Id.*

32. Environmental Defense Fund, Inc. v. Corps of Eng'rs, 470 F.2d 289, 300 (8th Cir. 1972), *cert. denied*, 409 U.S. 1072 (1972); *see also* Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 528-29 (1974) (noting that "[t]he Eighth Circuit [has] held that NEPA required a good faith balancing of competing interests, and that the action contemplated by the mission agency could be enjoined when its balance was arbitrary. . . . Conceptually there is much force to [that] opinion.").

33. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978). *See also* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-28 (1980) (holding that once procedural compliance has been adjudicated, the Court cannot "interject itself within the areas of discretion of the executive as to a choice of action to be taken.").

34. D. SIEVE & F. FRIEDMAN, *A Practical Guide to Environmental Law* 183 (1987) (noting that "the courts have recognized a limited number of exemptions as a matter of practical construction").

requirement, by its own language and judicial construction, must yield to other statutes.[35] Congress has retained the authority to exempt any legislated action from NEPA scrutiny.[36]

Since its enactment NEPA has succeeded in bringing environmental concerns into the forefront of project-planning by federal agencies.[37] Although the courts have consistently held that the scope of NEPA and its EIS requirement includes the armed forces and the Department of Defense,[38] the defense establishment has argued, with considerable success, that certain projects should be exempt from NEPA.[39] Despite the differing details of particular claims[40] the underlying theory for exemption from NEPA has rested upon some variation of the political question doctrine.[41]

THE POLITICAL QUESTION DOCTRINE OF *BAKER V. CARR* AND ITS APPLICATION TO NATIONAL SECURITY AND FOREIGN AFFAIRS

The Doctrine

In *Baker v. Carr*, the United States Supreme Court set out broad parameters for determining the reach of judicial review into areas that would normally be reserved for legislative and political action, the so-called "political questions."[42] In *Baker*, the Court held that

35. United States v. Students Challenging Regulatory Procedures, 412 U.S. 669, 694 (1973) (holding that NEPA was not intended to supplant other statues); *see also* Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 788 (1976) (stating that "Section 102 recognizes . . . that where a clear and unavoidable conflict in statutory authority exists, NEPA must give way").

36. Environmental Defense Fund, Inc. v. Froehlke, 473 F.2d 346, 355 (8th Cir. 1972) (holding that Congress has the authority to exempt any project from NEPA).

37. D. SIEVE & F. FRIEDMAN, *A Practical Guide to Environmental Law* 171 (1987) (stating "NEPA has had a tremendous impact upon the way governmental decisions affecting the environment are made and the means by which they are implemented."). *See also* J. ARBUCKLE, N. BRYSON, D. CASE, C. CHERNEY, R. HALL, J. MARTIN, J. MILLER, M. MILLER, W. PEDERSEN, R. RANDLE, R. STOLL, T. SULLIVAN, AND T. VANDERVER, *Environmental Law Handbook* 402 (1987) (stating, "Despite its relative brevity . . . NEPA is one of only a few statutes that have had a pervasive effect on the federal decisionmaking process.").

38. *See, e.g.*, *Concerned About Trident*, 555 F.2d at 823 (noting that "there is no support in either the statute or cases for implying a 'national defense' exemption from NEPA").

39. 2 F. GRAD, *Treatise on Environmental Law* § 9.02, at 9-138-9-139 (1987).

40. *See infra* notes 92-134 and accompanying text.

41. *See infra* notes 87-136 and accompanying text.

42. Baker v. Carr, 369 U.S. 186, 217 (1962). *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *Constitutional Law* 100 (1978).

> The political question doctrine . . . hold[ing] that certain matters are really political in nature and best resolved by the body politic rather than suitable for judicial review . . . is a misnomer. It should more properly be called the doctrine of nonjusticiability, that is, a holding that the subject matter is inappropriate for judicial consideration.

Id.

the following criteria would presumptively remove an issue from the purview of the judiciary:

> . . . a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[43]

A finding of nonjusticiable issues, however, does not necessarily preclude all remedies.[44] The appropriate response of a court in some fact situations may not be applicable to others.[45] Moreover, the Supreme Court has held that declaratory relief should be available in nearly every situation.[46] In *Powell v. McCormack*,[47] the Court stated: "When faced with a request for declaratory relief, a court's first consideration should be to determine whether a 'live dispute' exists between the parties."[48] If such a dispute exists, the Court continued, declaratory relief should be a viable option, whether or not any other form of remedy is available or appropriate.[49]

The *Baker* Court also noted that while the foregoing framework would appear to exclude most foreign affairs activities, it would not necessarily exclude all.[50] The Court instead framed the doctrine much more narrowly, stating that it would be incorrect to assume that every issue which merely "touches" upon foreign affairs is nonjusticiable.[51] The Court said a careful reading of earlier holdings indicated that the approach should be to evaluate each case or controversy in terms of a three-part analysis, "in terms of the history of its management by the political branches, of its susceptibility to judicial handling . . . , and of the possible consequences of judicial

43. *Baker*, 369 U.S. at 217.

44. *See* L. TRIBE, *American Constitutional Law* § 3-13, at 97 (2d ed. 1988). "The Supreme Court does not surrender its power of judicial review by holding that, while a particular provision may grant Congress or the Executive authority to act, it is not susceptible of an interpretation which would yield judicially enforceable rights. . . ." *Id.*

45. Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 622 (1976) (noting that "the reasons for denying some remedying any circumstances may not apply to any remedy in any circumstance.").

46. *Id.*

47. 395 U.S. 486 (1969).

48. *Id.* at 517-18.

49. *Id.*

50. *Baker*, 369 U.S. at 211.

51. *Id.*

action."[52]

As the Court later noted in another case construing the doctrine,[53] the Constitution has delegated to the judiciary the role of interpreting statutes, adding that "we cannot shirk this responsibility merely because our decision may have significant political overtones."[54]

The Evolution and Application of the Political Question Doctrine in Issues Involving Foreign Affairs and National Security

In applying the *Baker* guidelines courts have generally looked to the degree of national security involvement and national defense concerns in determining whether the issues are justiciable.[55] When the question is one of "deciding the wisdom, the propriety or the morality" of clearly war-related activities,[56] the courts have deferred to Congress and the President, as was demonstrated during the conflict in Indochina.[57] But even during a conflict courts have become involved if a sufficiently strong judicial peg can be found.[58]

Greenham Women Against Cruise Missiles v. Reagan,[59] a case playing a prominent role both in the Air Force's brief and the district court's opinion in *Western Solidarity*,[60] provides a classic example of the application of the political question doctrine to the conduct of foreign relations in a non-conflict setting. In *Greenham Women*, an American citizen residing in England, two United States Congress-

52. *Id.* at 211-12.

53. Japan Whaling Ass'n v. American Cetacean Soc'y, 106A S. Ct. 2860 (1986).

54. *Id.* at 2866.

55. *In re "Agent Orange" Product Liab. Litig.*, 818 F.2d 204, 206 (2d Cir. 1987) (noting that traditionally "[t]he greater the scope of a military decision and the more far-reaching its effect, the more it assumes the aspects of a political determination, which, in and of itself, is not subject to judicial second-guessing . . .").

56. Holzman v. Schlesinger, 484 F.2d 1307, 1308-09 (2d Cir. 1973) (holding that a request to enjoin military activities in Cambodia was nonjusticiable).

57. R. ROTUNDA, J. NOWAK & J. YOUNG, *Treatise on Constitutional Law* § 2.16, at 188 (1986).

> In connection with the Vietnam War the lower courts generally ruled that the issue of its legality was nonjusticiable, but the Supreme Court either denied certiorari or summarily affirmed. . . . Given the sensitive problems of holding a war to be illegal, most issues relating to the constitutionality of a war may well be nonjusticiable.

Id. See, e.g., DaCosta v. Laird, 448 F.2d 1368, 1370 (2d Cir. 1971), *cert. denied*, 405 U.S. 979 (1972) (declining to adjudicate the propriety of the mode of Congressional authorization of the Vietnam War).

58. Orlando v. Laird, 443 F.2d 1039, 1042 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1972) (holding that the question of whether some form of Congressional authorization was required for the Vietnam War presented a judicially discoverable and manageable issue).

59. 591 F. Supp. 1332 (S.D.N.Y. 1984), *aff'd*, 755 F.2d 34 (2d Cir. 1985).

60. No. CV84-L-280, slip op. at 5-7 (D. Neb. Feb. 20, 1986).

men, and several British women, sought to enjoin the deployment of 96 Ground Launched Cruise Missiles at a United States Air Base in England.[61] The plaintiffs contended that the missiles substantially increased the risk of nuclear was and of nuclear accident, that the deployment constituted a "tortious" injury, that it violated the American plaintiffs' fifth and ninth amendment rights, and that it violated the Congressional plaintiffs' constitutional rights as Congressmen to declare war and to provide for the common defense and welfare.[62] Although the court accepted plaintiffs' contention that their action did not request that the court decide "the wisdom, morality or efficacy of the decision to deploy cruise missiles . . ." but rather to "adjudicate torts, to protect constitutional rights . . . and to enforce the Constitutional mandate of separation of powers,"[63] the court nonetheless found its intervention precluded by the political question doctrine.

Specifically, the court found that although the question as framed by the plaintiffs was within its judicial authority,[64] the remedy sought would be an unacceptable intrusion into the political sphere:

> The nature of the relief . . . [sought] directly impinges upon the foreign policy of the United States. Plaintiffs ask the court to enjoin the deployment of cruise missiles. . . . This relief, if granted, would directly alter the military and foreign policy of the United States. . . . The particular delicacy of foreign affairs weighs against intervention by the court.[65]

Significantly, the *Greenham Women* court observed in a footnote that it was the requested remedy alone that made the issue nonjusticiable.[66] "The remedy sought . . . is distinct from the issues to be adjudicated. . . . [T]he issues . . . emerge from allegations of torts and constitutional violations. . . . [and are] committed to the courts for resolution and thus the case does not present a political question under the first of the *Baker* categories."[67]

The significance of that dichotomy was illustrated by the District of Columbia Circuit's holding in *Ramirez de Arrellano v. Weinberger*,[68] a case in which the issue was ultimately resolved by subse-

61. *Greenham Women*, 591 F. Supp. at 1332.
62. *Id.* at 1332-33.
63. *Id.* at 1336.
64. *Id.* at 1338-39.
65. *Id.* at 1338.
66. *Id.*
67. *Id.* at 1336 n.8.
68. 745 F.2d 1500 (D.C. Cir. 1984), *cert. granted, opinion vacated and remanded*, 471 U.S. 1113 (1985), *original district court order of dismissal aff'd*, 788 F.2d 762 (D.C. 1986).

quent legislation and political developments.[69] Like *Greenham Women*, *Ramirez* also involved national security and foreign affairs issues.[70] However, the *Ramirez* court reversed a lower court finding of nonjusticiability and remanded.[71] At issue was the appropriation of a Honduran cattle ranch by the United States for the purpose of establishing a military training center.[72] The owner of the ranch, an American citizen, claimed the seizure was illegal, with neither constitutional nor statutory authority.[73] The court rejected the government's claim that the issue was a nonjusticiable question of the conduct of foreign affairs, and instead defined the issue much more narrowly.[74] The court said the focus of the plaintiff's complaint was upon the American government's allegedly unlawful expropriation of his pastures for military exercises, and not upon the broader issue of the lawfulness of the nation's foreign policy.[75]

The court further noted that "federal courts historically have resolved disputes over land, even when the United States military is occupying the property at issue . . ."[76], and warned that "[t]he Executive's power to conduct foreign relations free from the unwarranted supervision of the Judiciary cannot give the Executive *carte blanche* to trample the most fundamental liberty and property rights of this country's citizenry."[77] Accordingly, the court held that relief should be within the jurisdiction of the courts.[78]

The Tenth Circuit followed a similar line of reasoning in *McKay v. United States*,[79] a case involving the concededly political question of the manufacture of nuclear weapons and the rights of nearby landowners.[80] The landowners sued for damages allegedly caused to their property by a nuclear weapons manufacturing facility.[81] The district court had entered summary judgment against he landowners, and the

69. Ramirez de Arrellano v. Weinberger, 788 F.2d 762, 763-64 (D.C. Cir. 1986). On remand from the United States Supreme Court, the D.C. Circuit affirmed the original district court dismissal, noting that the departure of all American military personnel from the region removed any justification for equitable relief. *Id.* at 763-64. The court did, however, order the district court to dismiss without prejudice, "so as not to bar reinstatement of the suit in the event the challenged activity resumes." *Id.* at 764.

70. *Ramirez*, 745 F.2d at 1507.

71. *Id.* at 1545.

72. *Id.* at 1506-07.

73. *Id.* at 1505.

74. *Id.* at 1512.

75. *Id.*

76. *Id.* (citing precedent dating back to Meigs v. McClung's Lessee, 13 U.S. (9 Cranch) 11 (1815)).

77. *Ramirez*, 745 F.2d at 1515.

78. *Id.*

79. 703 F.2d 464 (10th Cir. 1983).

80. *Id.* at 465.

81. *Id.*

landowners appealed.[82] The *McKay* court acknowledged that the decision to manufacture such weapons was clearly political and beyond judicial scrutiny,[83] but the court limited the nonjusticiability finding solely to the initial decision.[84] In holding that the issue of damages arising out of that decision is justiciable, the court said that, while there are political aspects involved in opting to build such weapons, those aspects do not "reach beyond" that decision, and therefore cannot insulate the government from liability for damages.[85] The court further noted that:

> Congress and several presidents have . . . determined that antitank explosives, highly explosive photoflash cartridges, and nighttime illuminants (flares) are necessary to national defense. Nevertheless, the Third, Fifth, Eighth and Ninth Circuits have not hesitated to hold the government responsible under the Federal Tort Claims Act for injuries arising out of the production of such hazardous materials.[86]

As the above cases demonstrate, the political question doctrine does not invariably preclude every political decision involving foreign relations from adjudication.[87] Such factors as the degree to which the acts in question represent deliberate foreign policy choices by the executive and legislative branches,[88] the necessary remedy,[89] and the severability of the decision and its consequences[90] all must be considered in making any determination of nonjusticiability.

NEPA, THE COURTS, AND NATIONAL SECURITY-RELATED PROJECTS

NEPA's focus on limiting and disclosing potentially adverse environmental impacts sometimes conflicts with the militiary's need and desire for secrecy and autonomy.[91] In the sense that the military pos-

82. *Id.* at 466-67.
83. *Id.* at 470.
84. *Id.*
85. *Id.*
86. *Id.* The Eighth Circuit case cited was Madison v. United States, 679 F.2d 736, 741 (8th Cir. 1982), which made a similar holding in a suit for injuries arising out of an explosion at an ammunitions plant.
87. Baker v. Carr, 369 U.S. 186, 217 (1962) (noting that "[t]he doctrine . . . is one of 'political questions,' not 'one of political cases.' ").
88. *See supra* notes 55-57 and accompanying text.
89. *See, e.g.*, DaCosta v. Laird, 471 F.2d 1146, 1157 (2d Cir. 1973) (holding that in conducting a war found to be constitutionally authorized, Congress and the President "have taken a position that is not within our power . . . to alter by judicial decree.").
90. *See, e.g., Ramirez*, 745 F.2d at 1512 (finding that a court may, in certain circumstances, impose a remedy that affects American foreign military operations without affecting American foreign policy).
91. Sauber, *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, 806 (1983-84).

ture of the United States affects its relations with other nations,[92] there is no question that such a conflict "touches foreign relations."[93] The question is one of determining whether it so affects those foreign relations that the political question doctrine is applicable.

The military has not been reticent about making such claims, and the courts have sometimes agreed.[94] However, a close examination of the cases reveals that the military's claim to nonjusticiability must be tied to a specific fact setting.[95]

Courts have sometimes found certain national defense projects to be nonjusticiable. In *McQueary v. Laird*,[96] an early test of NEPA's reach, the Tenth Circuit Court of Appeals affirmed dismissal of a challenge to the storage of chemical and biological warfare agents in a military arsenal.[97] Holding that the challenge fell into "that narrow band of matters wholly committed to official discretion . . . ,[98] the court declined to intervene and stated that:

> Public disclosure relating to military-defense facilities creates serious problems involving national security. We hold that NEPA does not create substantive rights in the plaintiffs-appellants here to raise the environmental challenge. . . . In its proprietary military capacity, the Federal Government has traditionally exercised unfettered control with respect to internal management and operation of federal military establishments.[99]

The *McQueary* court, however, specifically refused to recognize a blanket security exemption from NEPA, stating that it was not declaring that federal officers and agencies were exempt from NEPA.[100]

In *Weinberger v. Catholic Action of Hawaii/Peace Education Project*[101] the Supreme Court excused the Navy from preparation of

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92. *See, e.g.*, Greenham Women Against Cruise Missiles v. Reagan, 591 F. Supp. 1332, 1339 (S.D.N.Y. 1984) (noting that "[o]ur relations with foreign countries would be seriously disrupted if the federal courts exercised supervision and control over such critical elements of our foreign policy as the deployment of cruise missiles"). *See supra* notes 55-63 and accompanying text.

93. *Baker*, 369 U.S. at 211.

94. Note, *"Beyond Judicial Scrutiny": Military Compliance With NEPA*, 18 GA. L. REV. 639, 647-48 (1984).

95. 2 F. GRAD, *Treatise on Environmental Law*, § 9.02, at 9-138 (1987).

96. 449 F.2d 608 (10th Cir. 1971).

97. *Id.* at 612.

98. *Id.*

99. *Id.*

100. *Id.* For another early test with a similar result, see Citizens for Reid State Park v. Laird, 336 F. Supp. 783, 788-89, (D. Me. 1972) (holding that a lack of demonstrated environmental risk made an EIS unnecessary, but also noting that "NEPA is a clear mandate to all federal agencies [including the Navy].").

101. 454 U.S. 139 (1981).

an EIS involving the alleged storage of nuclear weapons. *Catholic Action*, however, involved a conflict between a recognized need for military secrecy and the public disclosure aspects of an EIS.[102] In *Catholic Action*, petitioners sought to force the Navy to prepare an EIS discussing the hazards of storing nuclear warheads at its facility in Hawaii.[103] Arguing that it was not possible for security reasons to disclose whether any such warheads were to be stored at the facility, the Navy instead prepared what was termed a "candidate" EIS which addressed the issue in a non-specific manner.[104] The district court rejected a challenge to the adequacy of the "candidate" EIS, holding that in view of the situation the Navy had complied "to the fullest extent possible."[105] However, the Ninth Circuit reversed,[106] holding instead that the Navy should prepare what it termed an "hypothetical" EIS, addressing in detail the consequences to the environment if the weapons were stored at the facility.[107] Because such a statement would not confirm or deny the actual storage of the weapons, the Ninth Circuit Court reasoned that both NEPA and national security could be accommodated.[108]

The Supreme Court reversed, holding that because secrecy considerations made it impossible to determine whether a proposal had actually been made to store such weapons, there had been no triggering of NEPA's EIS requirement.[109] For that reason, the question of compliance was held to be "beyond judicial scrutiny."[110] Although such a holding would seem to "[open] the door to a large, if not boundless 'national security' exemption from NEPA,"[111] that exception appears to be limited to narrow fact situations.[112]

Courts have also refused to intervene when national security

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102. *Id.* at 144.

103. *Id.* at 142.

104. *Id.*a t 141-42.

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

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

107. *Id.*

108. *Id.*

109. Weinberger v. Catholic Action of Hawaii/Peace Educ. Project, 454 U.S. 139, 146 (1981). For discussion of the "triggering" requirement, see *supra* notes 25-28 and accompanying text.

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

111. *Nuclear Weapons and "Secret" Impact Statements: High Court Applies FOIA Exemptions to EIS Disclosure Rules*, 12 ENVTL. L. REP. 10011 (Feb. 2, 1982).

112. *Id.* at 10011; *see also* Sauber, *The Application of NEPA to Nuclear Weapons Production, Storage, and Testing: Weinberger v. Catholic Action of Hawaii/Peace Educational Project*, 11 B. C. ENVTL. AFF. L. REV. 805, 830-31 (1984). Such a fact situation occurred, however, in Foundation of Economic Trends v. Weinberger, 610 F. Supp. 829, 829 (D.D.C. 1985) (holding that the contemplated testing of genetically-altered materials was sufficiently speculative to warrant a *Catholic Action* exemption).

concerns weigh against the issuance of any injunctive relief.[113] In *Wisconsin v. Weinberger*,[114] the appellate court dissolved a district court's injunction involving construction of an advanced extremely low-frequency ["ELF"] submarine communication system.[115] At issue in the case was the demand by the State of Wisconsin that the Navy prepare a supplemental Environmental Impact Statement ["SEIS"] to accompany an earlier EIS that had been issued some four years earlier. The state contended that new information had since been discovered on the effects of the electromagnetic radiation involved.[116] In dissolving the injunction, the Seventh Circuit was careful to note that its action should not be interpreted as endorsement of a blanket national security exemption, but rather as a balancing approach.[117] The court stated that, while there is no national security exemption to NEPA, neither can NEPA be construed as requiring that its procedures be implemented immediately and without taking into account other considerations.[118] Rather, the court said, issuance of an injunction for NEPA violations should be weighed against possible harm to national security, as determined by the legislative and executive branches.[119]

Similarly, the D.C. Circuit refused, on the basis of a balancing test, to enjoin an underground nuclear test. In *Committee for Nuclear Responsibility, Inc. v. Seaborg*,[120] the court expressly noted that it was not at all convinced that the Atomic Energy Commission had complied with NEPA.[121] Instead, the court, presented with an allegedly pressing need for expediency,[122] reluctantly deferred to the specter of unspecified damage to the national security, and refused to block the test.[123] The Supreme Court then denied an appeal from that decision, over a vigorous dissent by Justice William Douglas.[124] In that dissent, Justice Douglas observed that "the courts have consistently held that a defect in the Impact Statement presents a justi-

113. Realty Income Trust v. Eckerd, 564 F.2d 447, 457 (D.C. Cir. 1977) (noting that national security concerns may outweigh other equitable factors).

114. 745 F.2d 412 (7th Cir. 1984).

115. *Id.* at 428.

116. *Id.* at 414.

117. *Id.* at 425.

118. *Id.*

119. *Id.*

120. 463 F.2d 796 (D.C. Cir. 1971).

121. *Id.* at 798 (stating that "[o]ur failure to enjoin the test is not predicated on a conviction that the AEC has compiled [sic] with NEPA").

122. *Id.* (noting the government's claim that adverse weather and technical problems could develop if the testing were delayed, thereby affecting the development of a weapons system, could be deemed critical to national security).

123. *Id.* (stating that "given the meager state of the record before us, we are constrained to refuse an injunction").

124. Committee for Nuclear Responsibility v. Schlesinger, 404 U.S. 917, 917 (1971).

ciable question and is the basis for equitable relief."[125]

In any event, the courts have uniformly refused to grant an automatic exemption for national security claims.[126] In *Concerned About Trident v. Rumsfeld*[127] the court expressly denied the Navy an opportunity to rely on what the court termed "the overused rubric of 'national defense.' "[128] The issue in *Trident* arose when a coalition of environmentalists challenged the adequacy of an EIS that the Navy had voluntarily prepared. The challengers contended that the EIS was deficient in that failed to discuss alternatives to locating the base at Bangor, Washington.[129] In reversing a lower court holding that the EIS was adequate,[130] the D.C. Circuit noted that the sole issue involved was the quality of the EIS and was careful to limit its holding to that ground.[131] According to the court, the plaintiffs' complaint was not concerned with the merits of the decision to base the Trident at Bangor, but rather with the adequacy of the process by which the navy came to make that decision.[132] The sole question was whether or not the EIS had been prepared according the NEPA requirements.[133]

Although the Navy made no specific claim of national security concerns,[134] the *Trident* court suggested that the existence of such concerns would not immunize the project from NEPA.[135] The court stated that "[t]he Navy, just like any federal agency, must carry out its NEPA mandate 'to the fullest extent possible' and this mandate includes weighing the environmental costs of the Trident Program *even though the project has serious national security implications.*"[136]

The Eighth Circuit took a strong stand against any purported general national security exemption in *Jackson County Missouri v. Jones*.[137] In *Jackson County* the court was presented with an EIS-based challenge to an Air Force plan to close most of an Air Force Base and to relocate an Air Force Communications Service detach-

125. *Id.* at 921 (Douglas, J., dissenting).
126. Note, *"Beyond Judicial Scrutiny": Military Compliance with NEPA*, 18 GA. L. REV. 639, 647 (1984).
127. 555 F.2d 817 (D.C. Cir. 1977).
128. *Id.* at 823.
129. *Id.* at 826-27.
130. *Id.* at 820.
131. *Id.* at 823-24 (citations omitted) (emphasis in original).
132. *Id.* at 824.
133. *Id.*
134. *Id.* at 822-23.
135. *Id.*
136. *Id.* at 823 (emphasis added).
137. 571 F.2d 1004 (8th Cir. 1978).

ment and most civilian employees.[138] The challengers, a coalition of civic leaders, individuals, and a labor union, asserted that the Air Force's EIS did not adequately describe the impact that the closure would have on the nearby communities.[139] In affirming the district court finding that the EIS was adequate, the Eighth Circuit Court reiterated that there is not automatic NEPA exemption for defense activities.[140]

Each of these cases, involving a NEPA-based challenge to a military project, represents a specific application of the political question doctrine within the statutory framework of NEPA. As in the broader application of the political question doctrine described above,[141] courts have steadfastly refused to review the wisdom or feasibility of the decision to embark upon the policy, and have limited their review to the narrow issues presented.[142] Although the courts have deferred from attempting to fashion or enforce a remedy that would cleary and demonstrably impair national security,[143] they have not been deterred by any claim of purported defense-related immunity from NEPA.[144]

FACTS AND HOLDING

The MX Missile Project — The Enabling Legislation

In 1984, after years of deliberation and false starts,[145] Congress enacted legislation authorizing deployment of 21 MX missiles, the advanced intercontinental ballistic missile system intended to replace

138. *Id.* at 1005-06.

139. *Id.* at 1006 n.2.

140. *Jackson County*, 571 F.2d at 1007. The court also emphatically rejected a belated Air Force claim for exemption on national security grounds, the Air Force claiming that any delay in the transfer would be harmful. *Id.* The court stated, "At oral argument before this Court, the Air Force asserted for the first time that other and broader national security issues were involved in the proposed relocation. These assertions are unsupported by the record." *Id.* at 1007 n.3. The lower court had reluctantly deferred to similar claims but had also admonished the Air Force to be more prompt in making any similar claims in the future. McDowell v. Schlesinger, 404 F. Supp. 221, 257 (W.D. Mo. 1975).

Interestingly, the Air Force made no such claim when, seven years later, that same district court decided on the merits an EIS-based challenge to a proposed conversion of a tactical air lift wing to a tactical fighter group. *See* Concerned Citizens for the 442d T.A.W. v. Bodycombe, 538 F. Supp. 184, 190 (W.D. Mo. 1982).

141. *See supra* notes 55-90 and accompanying text.

142. *See supra* notes 33-36 and accompanying text.

143. 2 F. GRAD. *Treatise on Environmental Law* § 9.02, at 9-138-9-139 (1987) (stating that "[a]s a practical matter, national security activities are exempt from the EIS requirement, whatever theory a court may adopt to achieve that result.").

144. *See supra* notes 126-40 and accompanying text.

145. H.R. 98-691, 98th Cong., 2d Sess. 4, *reprinted in* 1984-85 U.S. CODE CONG. & ADMIN. NEWS 4174, 4178.

the already deployed Minuteman III missile system.[146] Those MX missiles were to be housed in the already-existing Minuteman III underground silos, which would be "superhardened" to provide additional protection from a nuclear assault.[147] That initial deployment was intended to be the first of a series that would eventually total 100 missiles.[148]

The 1984 authorization act also required the Air Force to prepare a "final environmental impact statement [EIS] in accordance with all terms, conditions, and requirements of the National Environmental Policy Act of 1969 on the proposed deployment and peacetime operations. . . ."[149] In each of the following two years Congress authorized funds for additional deployments of 21 and 12 missiles,[150] respectively. However, neither of those appropriation acts were expressly conditioned upon the NEPA/EIS compliance that had been set out in the 1984 act.[151]

The Air Force completed and presented an EIS within the time set out by the 1984 act, and proceeded to deploy the first ten missiles in hardened silos.[152]

The District Court Decision: Western Solidarity v. Reagan

Soon after the Air Force released its EIS and began preparing for deployment, two separate actions challenging the adequacy of that EIS were filed, in the U.S. District Courts of Colorado and Nebraska.[153] The Colorado challenge, presented by the Governor of the state and officials of several municipalities,[154] was primarily concerned with the adequacy of the EIS' review of the physical environmental effects of the project, including such issues as the hardening of the silos, the transporting of the removed missiles and their replacements, and the necessity of housing and maintaining the missile and construction crews.[155]

The Nebraska challenge was mounted by a coalition of environ-

146. Lamm v. Weinberger, No. 86-1458, slip op. at 3, 4 (8th Cir. June 11, 1987).
147. *Id.* at 7 n.7.
148. *Id.* at 6.
149. *Id.* at 4 n.2.
150. *Id.* at 5.
151. *Id.* at 5-6.
152. *Id.* at 6.
153. *Id.* at 6-7.
154. Richard D. Lamm, Governor of the State of Colorado; City of Boulder, Colorado; Board of County Commissioners of the County of Boulder, Colorado; City of Fort Collins, Colorado; Board of County Commissioners of the County of Larimer in the State of Colorado; City of Loveland, Colorado; and the City and County of Denver, Colorado. *Id.* at 1.
155. *Lamm*, No. 86-1458, slip op. at 7 n.7 (8th Cir. June 11, 1987).

mental and anti-war activist organizations and individuals,[156] and was concerned more with the broader issue of the need for the EIS to deal with consideration of alternative means of defense and modes of deployment.[157] The Nebraska challenge also addressed the alleged failure of the EIS to sufficiently consider the environmental effect of the intentional or accidental use of the missiles.[158]

The two actions each requested mandatory and prohibitory injunctions, and declaratory relief.[159] At the request of the Air Force both actions were consolidated into one action in the U.S. District Court for the District of Nebraska.[160] That court, in ruling on cross-motions for summary judgment, dismissed both actions.[161] According to the court, the decision by Congress to deploy the missiles, as well as any question as to the wisdom of that decision, were not justiciable under the "political question doctrine" as set out in *Baker v. Carr*.[162] Citing a number of cases purporting to apply that doctrine to foreign affairs and national security issues, the District Court held that:

> [t]he relief requested . . . if granted, would affect the foreign policy and military decisions that are delegated to the Executive and Legislative branches of the government. . . . It is . . . unnecessary for [the court] to consider the plaintiffs' arguments . . . on various issues that go to the adequacy of the environmental impact statement supplied by the Air Force.[163]

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156. Western Solidarity, Tri-State MX Coalition, Inc., Nebraskans Opposed to the MX, Nebraska Nuclear Weapons Freeze Campaign, Nebraskans for Peace, Denver Nuclear Weapons Freeze Campaign, Poudre Valley Nuclear Weapons Freeze Campaign, Boulder Womens International League for Peace and Justice, MX Information Center, Black Hills Alliance, Rocky Mountain Farmers Union, Wyoming Outdoor Council National Campaign to Stop the MX, Mobilization for Survival, American Indians Against Desecration, Wyoming State Representative Lynn Dickey, Bishop Bob Gordon Jones, Reverend LaRoy Seaver, Reverend Norman Austin, Reverend Howard Osborn, Reverend Richard Hill, Reverend Joseph Moroney, Reverend Ed Dolinar, Reverend Michael Carr, Reverend Ben Perry, Reverend Joseph Damhorst, (S.J.), Reverend Robert Davidson, Vernal Cross, Leonard Crow Dog, Matthew King, Mark Koons, Mary Ann Buscaj, Norma DeSelms, Kenneth DeSelms, Gene Zimmerman, Helen O'Grady, Andrea Convoy, Mae Kirkbride, Linda Kirkbridge, Roger Byrd, Friends of the Earth, Inc., Committee for a Sane Nuclear Policy, Council for a Livable World, and Environmental Action, Inc. *Id.* at 1-2.

157. *Lamm*, No. 86-1458, slip op. at 6, 7 n.6 (8th Cir. June 11, 1987).

158. *Id.*

159. *Id.* at 7.

160. *Id.* at 6 n.5.

161. *Id.* at 8.

162. *Id. See also Western Solidarity*, No. CV84-L-280, slip op. at 7 (D. Neb. Feb. 20, 1986).

163. *Western Solidarity*, No. CV84-L-280, slip op. at 7 (D. Neb. Feb. 20, 1986).

The Vacated Eighth Circuit Opinion: Lamm v.Weinberger

Colorado and Western Solidarity appealed, and the appeal was heard by a three-judge panel of the Eighth Circuit.[164] The appellants argued that the issue of the adequacy of the EIS was justiciable because it was a challenge, not of "the wisdom, morality, or efficacy of the decision to deploy the missiles . . . . [nor of] tactical or strategic military decisions,"[165] but rather of the adequacy of the EIS as it related to discretionary decisions made by the Air Force within its Congressional mandate.[166] The Air Force, for its part, argued that any interference by the courts would be unacceptable, because the questions of deployment and the EIS were inextricably intertwined.[167] The Air Force also requested that a hearing be held on the merits, if found to be justiciable.[168]

The Eighth Circuit, in a two to one decision[169] held that the district court had erred in dismissing the entire action under the political question doctrine.[170] The court noted that "[T]here is no 'national' defense exemption from NEPA."[171] The court then set out a complex framework for determining justiciability, a framework which would distinguish between Congressional mandate and Congressional authorization.[172] By application of such a framework, the court attempted to draw a fine line between the intent of Congress with regard to NEPA and the reserved authority of the president and Congress to make national security decisions free of unwarranted interference via NEPA.[173]

Accordingly, the court held that the Western Solidarity challenges to the decisions to deploy the MX system instead of some unnamed alternative system, to deploy it within existing missile silos, and not to consider the environmental impact of the use of the missiles were all non-justiciable.[174] The court did, however, hold that the alleged failure of the EIS to consider the possibility of the impact of possible earthquakes was justiciable.[175] The court then held that all five issues raised by the Colorado faction were justiciable.[176] Hav-

164. *Lamm*, No. 86-1458, slip op. at 3 (8th Cir. June 11, 1987).
165. *Id.* at 15.
166. *Id.* at 14.
167. *Id.* at 9.
168. *Id.* at 10.
169. *Id.* at 26 (Conmy, J., concurring in part and dissenting in part).
170. *Id.* at 15.
171. *Id.* at 13.
172. *Id.* at 12-24.
173. *Id.* at 14-15.
174. *Id.* at 15-19.
175. *Id.* at 19-20.
176. *Id.* at 22-24.

ing resolved those issues, the court then declined to rule on the substantive merits of the challenges to the EIS and remanded to the district court for resolution and relief, if so warranted.[177]

As noted above, the court later vacated its *Lamm* opinion, and held an *en banc* hearing on September 15, 1987.[178]

ANALYSIS

The political question doctrine is not bounded by a bright line but by a vague border, determined by the facts and the framing of the issue. Its proper application is as an outer limit to justiciability, not as an opportunity to avoid adjudication.[179] The duty of a court is to hear those cases that are not precluded by the doctrine.[180]

The *Western Solidarity* court held itself to be so precluded.[181] Viewing the issues from a broad foreign policy perspective, the court held that the decision to deploy the MX Missiles, and the mode of that deployment, including environmental concerns, was a deliberate political decision made by the President and Congress.[182] Because enjoining the deployment would appear to contravene that decision, the court found the entire action to be nonjusticiable.[183]

In reaching that decision the court placed great emphasis upon the holding in *Greenham Women*,[184] a case in which the facts bear a certain superficial similarity to those of *Western Solidarity*.[185] Most notably, both involved attempts to enjoin the deployment of nuclear weapons,[186] while ostensibly refraining from any challenge to the "wisdom and morality" of the initial decision to deploy.[187] Moreover, in each case the court held that it was the remedy sought, rather than the wrong alleged, that required a finding of nonjusticiability.[188]

But an important distinction exists regarding the remedy sought in each case. The court in *Greenham Women* found itself presented

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177. *Id.* at 26.

178. *See supra* notes 8-9.

179. *See supra* notes 53-54 and accompanying text.

180. *Id. See also* Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1514 (D.C. Cir. 1984).

181. *See supra* notes 161-63 and accompanying text.

182. *Id.*

183. *Western Solidarity*, No. CV84-L-280, slip op. at 6 (D. Neb. Feb. 20, 1986).

184. *Id.* at 5-7. For a discussion of *Greenham Women*, see *supra* notes 56-64 and accompanying text.

185. *Western Solidarity*, No. CV84-L-280, slip op. at 5-6 (D. Neb. Feb. 20, 1986).

186. *Id.* at 2; *see also Greenham Women*, 591 F. Supp. at 1333.

187. *Lamm*, No. 86-1458, slip op. at 15 (8th Cir. May 21, 1987) (citing plaintiff's brief, *Greenham Women*, 591 F. Supp. at 1336.

188. *Western Solidarity*, No. CV84-L-280, slip op. at 6 (D. Neb. Feb. 20, 1987); *Greenham Women*, 591 F. Supp. at 1338-39.

with alleged wrongs, the purported increased risk of nuclear war[189] and the claimed violation of Constitutional rights,[190] both of which emanated from a Congressional and executive decision to deploy cruise missiles in England.[191] Because the source of the alleged harm was the deployment itself, the court found that any remedy would entail injunction of that deployment.[192] The court denied the request for an injunction,[193] because such an injunction would necessarily interfere with a manifest foreign policy decision,[194] and would in fact be contrary to the expressed intent of the legislative and executive branches.[195]

By contrast, the relief asked of the *Western Solidarity* court was much narrower in scope. At issue was the adequacy of an EIS, expressly mandated by Congress and prepared by the Air Force before deployment of the MX missiles.[196] Plaintiffs contended not that the deployment was wrong in itself, but rather that it was wrong in the light of an allegedly defective EIS.[197] Accordingly, they sought, not to permanently enjoin any deployment, but rather to enjoin deployment until the courts determined that an adequate EIS had been prepared.[198] The *Western Solidarity* court was not asked to fashion a remedy in opposition to express Congressional intent, as was the case in *Greenham Women*, but rather to determine whether that intent was being carried out.[199] The missiles would still be deployed; the only issue before the court was the mode of that deployment, specifically whether it was done in accord with both the mandates of NEPA[200] and of the Congressional authorizing act.[201] Moreover, even the most stringent application of the political question doctrine would not preclude the court from granting the plaintiffs declaratory relief.[202]

In light of the specific issues and limited scope of remedy before the court in *Western Solidarity*, it would seem that the more analogous applications of the political question doctrine are those made in

189. *Greenham Women*, 591 F. Supp. at 1334.
190. *Id.* at 1336.
191. *Id.* at 1333.
192. *Id.* at 1338-39.
193. *Id.* at 1340. That decision was affirmed by 2d Circuit in 755 F.2d 34 (2d Cir. 1985).
194. *Id.* at 1339.
195. *Id.*
196. *Lamm*, No. 86-1458, slip op. at 6-7 (8th Cir. May 21, 1987).
197. *Id.* at 15.
198. *Id.* at 7-8 n.8.
199. *Id.*
200. *Id.* at 8.
201. *Id.*
202. *See supra* notes 46-49 and accompanying text.

Ramirez[203] and *McKay*.[204] The plaintiff in *Ramirez* did not seek to change United States policy toward Central America, or even to prevent military operations in Honduras.[205] His purpose was to ensure that his property rights and his Constitutional rights would be protected as that policy was implemented.[206] The D.C. Circuit, under that characterization, found the case to be justiciable.[207]

Similarly, in *McKay* the Tenth Circuit had no difficulty separating claims for property damages from the broader political issues involved in the manufacturing of nuclear weapons.[208] The court found that the issue of harm to nearby landowners could be resolved and a remedy fashioned without touching upon the decision to build the weapons or even upon the operation of the facility.[209]

The same could be said in *Western Solidarity*. The challengers to the MX deployment did not seek to block or eviscerate the decision to build, place, or even launch such missiles.[210] Their purpose was to ensure the deployment's lawful implementation, and to have their rights protected in the process.[211] Had the *Western Solidarity* court chosen to look to the actual issues presented and remedy requested, the result may well have been different. The *Ramirez* and *McKay* courts, faced with similar situations, had no difficulty finding justiciability under the political question doctrine.

A similar result would seem appropriate with regard to the narrow issue of the adequacy of the MX project's compliance with NEPA's EIS procedure. Courts have repeatedly and emphatically denied any claim that the military has a blanket exemption from NEPA,[212] precluding judicial review only in limited and exceptional situations.[213]

Western Solidarity does not appear to fit into any exceptional situation which would preclude judicial review. The Air Force has made no claim of a need for secrecy, an argument which prevailed in *Catholic Action*, and allowed the Navy to dispense with preparation of any EIS.[214] In addition, no need for expediency has been urged, a claim which convinced the court to allow an atomic explosion in *Sea-*

203. *See supra* notes 68-78 and accompanying text.
204. *See supra* notes 79-86 and accompanying text.
205. Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1512 (D.C. Cir. 1984).
206. *Id.*
207. *Id.* at 1515.
208. McKay v. United States, 703 F.2d 464, 470 (10th Cir. 1983).
209. *Id.*
210. *See supra* notes 196-201 and accompanying text.
211. *Id.*
212. *See supra* notes 127-40 and accompanying text.
213. *See supra* notes 142-44 and accompanying text.
214. *See supra* notes 101-12 and accompanying text.

borg despite the fact that the EIS in that case was admittedly incomplete.[215] Neither is this a situation in which NEPA can be said to be seeking to manage the internal operation of the project, as in the *McQueary* challenge to atomic weapons storage.[216] Nor are the plaintiffs asserting a right to an "automatic" injunctive presumption as in *Wisconsin v. Weinberger* in which the court refused to enjoin construction of a submarine communication system.[217] In the absence of any such reason for exemption, and in the presence of a clear Congressional mandate to prepare an EIS, there was simply no reason why the adequacy of the EIS in *Lamm* should not have been evaluated by the district court against the standards that Congress itself set out.[218] Proper application of the political question doctrine and of NEPA demanded such a result.

SUBSEQUENT HISTORY

On May 18, 1988, as this article went to press, the Eighth Circuit issued the result of its rehearing, *sub nom Romer v. Carlucci*.[219] The Court once again reversed the district court finding of nonjusticiability, with the exception of the environmental groups' request that the EIS requirement be extended to include consideration of alternative basing modes and the environmental impact of wartime use of the missiles.[220] That request, the Court said, went beyond the scope of the statute.[221] The case was remanded for consideration of all other EIS-based claims.[222]

The Court based its justiciability holding primarily upon the U.S. Supreme Court's holding in *Japan Whaling Association v. American Cetacean Society*.[223] In *Japan Whaling Association* the Supreme Court said that the political question doctrine did not preclude the courts from adjudicating every case with political overtones, especially in situations where, as in *Japan Whaling Association*, the issue before the court was one of statutory interpretation.[224] The Eighth

215. *See supra* notes 120-25 and accompanying text.
216. *See supra* notes 96-100 and accompanying text.
217. *See supra* notes 114-17 and accompanying text.
218. *See supra* notes 21-31 and accompanying text (discussing the requirements and purpose of an EIS).
219. Nos. 896-1458, 86-1517 (8th Cir. May 18, 1988).
220. *Id.* at 3.
221. *Id.*
222. *Id.*
223. *Id.* at 33-37; *Japan Whaling Association*, 106 S. Ct. 2860 (1986), is noted in the text of this article at notes 53-54 and accompanying text.
224. *Romer*, Nos. 86-1458, 86-1517, slip op. at 33-37 (8th Cir. May 18, 1988). The issue in *Japan Whaling Association* was whether a writ of mandamus could be issued, compelling the Secretary of Commerce to comply with the Magnuson Fishery Conservation and Management Act (16 U.S.C. § 1801 (1982 ed. & Supp. II 1984), when such

Circuit found a similar situation in the instant case, holding that the district court had been asked merely to review the degree to which the MX Missile system complied with a congressional mandate.[225] The Eighth Circuit said that such a review "would not thwart the Executive Branch but would simply require it to follow congressional directives mandating that its project be completed in an environmentally safe manner. . . . [T]he issues presented to this Court are purely legal ones of statutory interpretation, the resolution of which are a part of our constitutional duty."[226]

With regard to remedies, the Court held that a finding of justiciability necessarily presumed an availability of declaratory relief.[227] But the Court said consideration of more "intrusive" remedies must await the result of the lower court's reconsideration of the MX program's compliance with NEPA's EIS requirement.[228]

CONCLUSION

Had the district court in *Western Solidarity* framed the question as one of statutory compliance, rather than as one of American foreign policy, the necessary result would be a finding of justiciability. Such a holding would be more consistent with decisions properly applying the political question doctrine, both in its broadest sense and in relation to NEPA. The political question doctrine requires careful analysis of the particular facts and statutes involved; its invocation should be predicated upon more than a superficial claim of national security or foreign policy concerns.

The MX program, like all federal projects affecting the environment, military and civilian alike, is subject to NEPA's EIS requirements. In the absence of compelling reasons to the contrary, reasons absent in this case, the adequacy of an EIS was held subject to judicial review. The project, its supporters and its detractors, all deserve their day in court. The district court order dismissing *Western Solidarity, Inc. v. Reagan* was properly reversed.

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compliance would be contrary to an executive agreement between the United States and Japan. *Id.*

225. *Id.* at 37.

226. *Id.* Justice Arnold, dissenting on other grounds, noted that "[t]he case is nothing more than an exercise in statutory interpretation, the kind of work that courts routinely do every day." *Id.* at 40 (Arnold, J., dissenting).

227. *Id.* at 39.

228. *Id.*