

ORIGINAL

In the

Supreme Court of the United States

CASPER W. WEINBERGER, SECRETARY)
OF DEFENSE, ET AL.,)

Petitioners)

v.)

NO. 80-1377

CATHOLIC ACTION OF HAWAII/PEACE)
EDUCATION PROJECT ET AL.)

Washington, D. C.
October 13, 1981

Pages 1 thru 54

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CASPAR W. WEINBERGER, SECRETARY OF :
DEFENSE, ET AL., :

Petitioners, : No. 80-1377

v. :

CATHOLIC ACTION OF HAWAII/PEACE :
EDUCATION PROJECT, ET AL. :

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Washington, D. C.
Tuesday, October 13, 1981

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:03 o'clock a.m.

APPEARANCES:

REX E. LEE, ESQ., Solicitor General of the
United States, Department of Justice,
Washington, D. C.; on behalf of the Petitioners.
NANCY STEARNS, ESQ., New York, New York;
on behalf of Respondents.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Weinberger, the Secretary of Defense, against Catholic Action of Hawaii.

Mr. Solicitor General, you may proceed whenever you are ready.

ORAL ARGUMENT OF REX E. LEE, ESQ.,
ON BEHALF OF THE PETITIONERS

MR. LEE: Mr. Chief Justice, and may it please the Court, this case involves the requirements of the National Environmental Policy Act of 1969, concerning the disclosure of whether nuclear weapons are or are not stored at a particular site. That substantive information, the storage or non-storage of nuclear weapons at a particular site, is a military secret.

In the early 1970's, in response to the objections of local citizens to the alleged storage of nuclear weapons at the Waikele Branch of the Lualualei Naval Magazine on the island of Oahu, the Navy considered moving that storage facility six miles away to the West Loch Branch of that same Lualualei Naval Magazine. The Navy has never confirmed nor denied that nuclear weapons were in fact stored at Waikele.

In 1975, the Navy made an assessment of the effect of that transfer on the environment, and in June of 1977 a portion of that classified document was released to the

1 public as an environmental impact assessment, concluding
2 that the construction of the 48 earth-covered magazines and
3 associated buildings and the provision of security for those
4 buildings would have no significant environmental impact.
5 No mention was made of nuclear weapons storage.

6 In 1978, the Department of the Navy prepared a
7 candidate or generic environmental impact statement dealing
8 with nuclear aspects of Naval systems storage. That
9 candidate statement --

10 QUESTION: Solicitor General --

11 MR. LEE: Yes?

12 QUESTION: -- "candidate", is that a word of art
13 or something?

14 MR. LEE: It is a type of NEPA performance,
15 Justice Brennan, that is recognized by the Council of
16 Environmental Quality. It is to be distinguished from the
17 type thing that was done, say, with respect to the Southwest
18 Energy Study, where you take a series, a single prototype
19 that will be repeated in a number of different instances,
20 such as the Southwest Energy Study dealing with dams along
21 the Colorado River.

22 This one, by contrast, deals with a situation
23 where you have a single circumstance that might be repeated
24 applicable to a generic situation. It seemed particularly
25 appropriate in this instance, given the secret nature of

1 storage at any particular site.

2 That candidate statement did conclude, in general
3 -- it is set forth as Appendix G to the petition for
4 certiorari -- that the nuclear aspects of weapons storage do
5 not constitute an environmental factor per se, but it did
6 not discuss any issues pertaining to nuclear storage at any
7 specific site.

8 This suit was filed in March of 1978, alleging
9 that the West Loch facility would house nuclear weapons, and
10 seeking to enjoin the Secretary of Defense and various Navy
11 officials from expanding the facility until they complied
12 with NEPA, the Endangered Species Act, and the National
13 Historic Preservation Act.

14 The District Court concluded that none of those
15 Acts was offended by the proposed transfer.

16 With regard to both the Historic Preservation Act
17 and the Endangered Species Act, the Court relied on findings
18 that were made in the declassified portion of the 1975
19 assessment that was released to the public as an
20 environmental impact assessment.

21 With respect to NEPA, the District Judge concluded
22 that submission of an environmental impact statement would
23 conflict with the security data provisions of the Atomic
24 Energy Act, and also with the security classification guides
25 prepared jointly by the Department of Defense and the

1 Department of Energy.

2 Under those circumstances, the District Court
3 ruled that defendants have complied with the National
4 Environmental Policy Act to the fullest extent possible
5 within the restrictions of the security classification
6 guides and the Atomic Energy Act.

7 The Court of Appeals reversed. It directed the
8 Navy to prepare a "hypothetical environmental impact
9 statement" which would assess the potential consequences of
10 storage of nuclear weapons at this particular site. It is
11 that judgment of the Court of Appeals that is under review
12 today.

13 The issues in this case affect two statutes and
14 three policies. The primary statute and the primary policy
15 are those of NEPA, which requires Federal decision makers to
16 take environmental factors into account in making their
17 final judgments. The second NEPA objective, which is
18 arguably a separate one, but can also be regarded as totally
19 subsumed within the first, is to make certain kinds of
20 information available to the public for whatever purpose the
21 public wishes to make of it.

22 Both of these objectives contemplate disclosure.

23 QUESTION: Are you saying NEPA is much like FOIA
24 in the second regard, then?

25 MR. LEE: Yes. Indeed, Justice Rehnquist, NEPA

1 expressly ties into FOIA by its incorporation of that
2 document by reference, and the public disclosure provisions,
3 the public disclosure language simply says, disclosure to
4 the public as required by 5 USC, and so forth, which is the
5 Freedom of Information Act.

6 On the face of things, the policy of the Atomic
7 Energy Act, by contrast, and of other classification laws,
8 is the preservation of secrecy of information concerning
9 nuclear weapons, so that on its face you do have a potential
10 tension, and it is well settled law that where you have
11 tension between the National Environmental Policy Act and
12 another statute, that it is NEPA that must yield.

13 But it is the government's position in this case
14 that these statutes and their facially conflicting policies
15 can be largely accommodated to a greater extent than is true
16 in the case of conflict between the National Environmental
17 Policy and most other statutes.

18 The key to this accommodation is the regulations
19 that have been adopted by the Department of Defense that
20 concede -- or, I shouldn't say concede, but take the
21 position that regardless of whether they would be required
22 to have adopted such regulations or not, that the Department
23 of Defense regards NEPA as applicable to all of its
24 activities, including secret activities, with the
25 appropriate secrecy protection being provided by

1 classification applicable to the NEPA documents themselves.

2 This case does have one feature that complicates
3 it and that will not be present in most of these instances
4 where NEPA will be applicable because of the Department of
5 Defense regulations to classified activities of the
6 military, and the feature of this case that distinguishes it
7 is this. The secret is whether nuclear weapons are or are
8 not being stored at a specific site. Therefore, one of the
9 things that cannot be disclosed is whether environmental
10 considerations pertaining to nuclear storage at that site
11 have or have not been considered by the decision-makers,
12 because to reveal that fact would reveal the secret itself.

13 QUESTION: I suppose, Mr. Solicitor General, or I
14 will put it this way: What would be the consequence if the
15 hypothetical was, yes, we are storing nuclear weapons of the
16 highest power at this site, hypothetically?

17 MR. LEE: Yes, sir.

18 QUESTION: Would the inference be drawn from that,
19 then, then you mustn't do it?

20 MR. LEE: I think that the basic approach that the
21 Court of Appeals attempted was a middle ground, and the
22 attempt of the Court of Appeals was to say, well, assume
23 that they might be stored there; then what would be the
24 consequences?

25 The drawbacks of that are that inevitably that

1 does lead to the disclosure of other information that is
2 classified. You sacrifice, Mr. Chief Justice, either the
3 adequacy of the statement, or you sacrifice the information,
4 because if you are going to have a statement which really
5 calls to the attention of the decision-makers what the real
6 risks are here, you have to discuss things like, what kind
7 of weapons will they be, what is their potential, and if
8 there are to be environmental consequences, that depends on
9 such things as the amount of fisionable material, the
10 quality of the material, the security -- the safeguards, the
11 security, and so forth. Much better approach.

12 QUESTION: Wouldn't it be a military secret that a
13 particular facility was capable of storage?

14 MR. LEE: That is not a secret. The reason that
15 it is not a secret is because the type of fencing that
16 necessarily surrounds, necessarily accompanies a nuclear
17 capable facility simply cannot be disguised. But nuclear
18 capability is not a secret; storage at a particular facility
19 is.

20 That brings me to what I consider to be the
21 principle that governs the resolution of this case, and it
22 is a rather simple one. The key, as I say, is the existence
23 of this Department of Defense regulation. If there is in
24 fact no nuclear storage at West Loch, then the fears posited
25 by the Respondents are, of course, groundless. If, on the

1 other hand, West Loch is or is to be a nuclear storage
2 facility, then consistent with Department of Defense
3 regulations, the environmental consequences have been called
4 to the attention of the decision-makers, and they have been
5 taken into account by them.

6 The only problem is that that fact, whether or not
7 the appropriate NEPA document has been prepared and has been
8 called to the attention of the decision-makers, is the very
9 fact that cannot be disclosed.

10 QUESTION: Mr. Lee, would it be the government's
11 position, then, under the Department of Defense regulations,
12 that if indeed storage at a particular site were
13 contemplated, that the Department of Defense would have
14 prepared a specific environmental impact statement which
15 would have been given to the President and the Council on
16 Environmental Quality?

17 MR. LEE: No.

18 QUESTION: No.

19 MR. LEE: Because that would contemplate public
20 disclosure, and that is the part that must -- that must
21 yield, Justice O'Connor.

22 QUESTION: All right. Now, under the Freedom of
23 Information Act, the information would not be available to
24 the public, but how about to the Council on Environmental
25 Quality?

1 MR. LEE: Well, I really am not certain. The
2 public disclosure aspects of it, the public disclosure
3 aspects of it are limited by the same limitation as the
4 Freedom of Information Act. It is not simply that you can't
5 disclose it through Freedom of Information Act purposes. It
6 is that disclosure to the public has the same limitation as
7 does disclosure under the Freedom of Information Act, and it
8 is my understanding that the purposes of filing it with the
9 Council on Environmental Quality is for purposes of public
10 disclosure, but what does happen -- excuse me.

11 QUESTION: I was not sure how to interpret that,
12 and that is why I wanted your views.

13 MR. LEE: Yes. But what does happen -- what does
14 happen is that that classified document, whose very
15 existence must necessarily remain a secret, is made
16 available to the decision-makers who -- those who are
17 ultimately to decide whether or not there will be nuclear
18 storage at the West Loch facility or any other specific --

19 QUESTION: It is not your position that the
20 generic statement which was prepared would satisfy the
21 requirements. Is that correct?

22 MR. LEE: I am not enough of an expert on those
23 kinds of matters to know whether it would satisfy it or not,
24 but that question once again, I think, contains the key to
25 the solution of this case for that reason.

1 I can make an argument that that generic
2 statement, concluding, as it does, that there are no
3 substantial risks from nuclear storage per se, together with
4 the environmental impact assessment that was done pertaining
5 to this particular facility, would be sufficient, but it is
6 neither my background nor my training to know about the
7 sufficiency of the totality of environmental document
8 performance.

9 But those who are directing these kinds of
10 matters, whose stewardship those kinds of matters fall
11 within, do have that within their sphere of expertise, and
12 in the event that the conclusion -- that there is a
13 conclusion that these are not sufficient, then the
14 regulations require that additional documents be prepared
15 and filed.

16 And NEPA really requires no more, and this, I
17 think, is a crucial point. With regard to environmental
18 considerations being taken into effect, they are, the
19 regulations required, and with respect to public disclosure,
20 NEPA expressly exempts from public dissemination, through
21 its incorporation by reference of the public disclosure
22 provisions of the Freedom of Information Act, the
23 dissemination of classified information.

24 Really, this also answers the motivating concerns
25 of the Court of Appeals. The Court of Appeals' very proper

1 concern, which led to what we conclude was clearly an
2 improper kind of approach, was that the public has to
3 receive some assurance that when the decision is made, the
4 decision-maker will have been adequately informed as to the
5 environmental consequences of each alternative, and the
6 Department of Defense regulations give that assurance.

7 The Respondents contend that there is no
8 difference between asking the hypothetical question, well,
9 what would be the possible environmental consequences if a
10 freeway exchange were built in a particular location, and a
11 hypothetical which asks, what would be the possible
12 environmental consequences if nuclear capable storage
13 bunkers were built in a particular location.

14 Well, the question whether nuclear capable storage
15 bunkers are built is not the question that poses the issue.
16 It is whether in fact those nuclear capable facilities do
17 have nuclear warheads stored within them, but the real
18 difference --

19 QUESTION: Mr. Solicitor General --

20 MR. LEE: Yes, sir.

21 QUESTION: -- is that really precisely the
22 question, or is it a question of whether it has been
23 proposed that there be such storage?

24 MR. LEE: I think it is either. I think --

25 QUESTION: Well, is there not a duty to prepare

1 the statement when a proposal is made?

2 MR. LEE: Yes, I think my statement was
3 inaccurate. There is a duty, but the point is that the
4 Department of Defense regulations simply state that to
5 whatever extent NEPA is applicable, it is not rendered
6 inapplicable because of the presence of classified
7 information, of secrets.

8 The obvious difference between a hypothetical
9 discussion of what would happen if nuclear weapons were
10 stored in a particular site and what would happen if a
11 highway were built in a particular place is that whether a
12 highway does or does not exist in a particular location is
13 not a military secret.

14 It may well be that the real complaint, and a
15 complaint raised in a different form, a perfectly legitimate
16 one, is whether that kind of information really should be
17 secret or not. I am sure that lively debate could be
18 generated on that issue, but it is totally beside the point,
19 because the ultimate right of decision on that issue is
20 vested with those who have the responsibility over the
21 safeguarding of nuclear secrets, and those same people have
22 assured that NEPA applies even where classified information
23 is involved.

24 One means of safeguarding, preventing intrusion
25 into governmental secrets in lawsuits that by their nature

1 present the potential for intrusion into military secrets,
2 is for the courts simply not to entertain those lawsuits at
3 all, and there is a precedent coming out of this Court that
4 holds that such suits are not justiciable. It is a century
5 old, Totten versus the United States, dealing with a suit by
6 a spy allegedly hired by President Lincoln to spy during the
7 Civil War, and this Court held that that kind of suit is not
8 justiciable, the rationale being that public policy forbids
9 the maintenance of any suit the trial of which would
10 inevitably lead to disclosure of matters which the law
11 itself regards as confidential.

12 Totten is still good law. It was cited with
13 approval in United States versus Reynolds, and it has been
14 relied upon as the source of two holdings coming out of the
15 Court of Claims within just recent months, and it would be
16 dispositive of this case. Fortunately, however, the Court
17 need not resolve this case on the Totten ground, and the
18 reason, once again, is that the Department of Defense
19 regulations make available another procedure that permits
20 this information to remain secret.

21 I will reserve some time.

22 QUESTION: Mr. Lee --

23 MR. LEE: Oh, excuse me.

24 QUESTION: -- before you sit down, the Trial Court
25 found the placing of nuclear weapons near a major population

1 center to be a major Federal action for purposes of NEPA.

2 Does the government disagree with that?

3 MR. LEE: The government takes no position on
4 that, Justice O'Connor. You are quite right. And the
5 reason that we take no position on it is simply that if --
6 if the District Court is correct, then of course what that
7 means is that an environmental impact statement, as opposed
8 to an environmental impact assessment, is what is required.

9 Parenthetically, I will say once again, referring
10 back to Justice Brennan's earlier question, this is also --
11 an environmental impact assessment is also a document that
12 is recognized as appropriate by CEQ. The difference between
13 an environmental impact assessment and an environmental
14 impact statement is not always a clean, right one, but that
15 is one of the factors that will have to be taken into
16 account in -- in determining the extent of the document that
17 is to be prepared and filed in accordance with Department of
18 Defense regulations.

19 QUESTION: Before you sit down, I am puzzled now.
20 If the government takes no position on whether or not the
21 storage of nuclear weapons in this facility would be a major
22 Federal action, how can we know what the government's
23 position would be with respect to preparation of documents
24 if a proposal to store such weapons were made?

25 MR. LEE: Well, we have not appealed from that

1 aspect of -- of the District Judge's holding, and all I am
2 really saying is that if it is a major Federal action, that
3 it is an environmental impact statement that will have to be
4 filed. If it is not, then it is an environmental impact
5 assessment that will have to be filed.

6 QUESTION: Well, but isn't that conceivably an
7 issue on which reasonable men could differ?

8 MR. LEE: That is correct.

9 QUESTION: Well, then, and supposing judges have a
10 different view than the Department of Defense has? And then
11 there is just no reason to believe that a statement would in
12 fact be prepared.

13 MR. LEE: Well, there --

14 QUESTION: I mean, if the Department of Defense
15 has a different view than the District Judge has.

16 MR. LEE: That is correct. Your statement is
17 accurate, Justice Stevens. There is no reason to believe
18 that a document that would bear the label, environmental
19 impact statement, would be prepared. In fact, the
20 difference between those two is often, as I say, not a fine,
21 bright one, and your question does point out one of the --
22 one of the problems with this kind of approach, which is
23 that there will be instances, there will be instances in
24 which the public will not have the total information that
25 was available to the decision-makers as they made their

1 final judgment on these issues.

2 QUESTION: Well, no, I am not concerned about, at
3 this point -- the thrust of my question is not what becomes
4 public information, but rather what is known to the
5 decision-maker at the time he acts on a proposal, because if
6 it is the view of the Department of Defense that the storage
7 of nuclear weapons near a population center or in this
8 particular facility is not in any event a major Federal
9 action within the meaning of the statute, they have no duty
10 to prepare anything, no statutory duty to prepare anything.

11 QUESTION: Well, they have regulations, though.

12 MR. LEE: Well, they have regulations, and I would
13 assume -- I frankly have never asked that question of these
14 people, but from the fact that there was in 1975 a document
15 as to whose total content we are not aware, that was
16 prepared and submitted, and then a portion of it later was
17 released as an environmental impact assessment.

18 Certainly, the inference is not only there, it is
19 compelled that some kind of NEPA performance was required,
20 and I suppose that the most logical inference to be drawn
21 from that is that they did consider it to be major Federal
22 action, although I don't know that for a certainty.

23 QUESTION: Don't the regulations require --

24 MR. LEE: Well, what the regulations require, what
25 the regulations require is compliance with NEPA. Now, one

1 of the -- But NEPA can be complied with by preparing a
2 document whose purpose is to inquire whether the particular
3 action is major Federal action having a substantial effect
4 on the environment, and in the event that the conclusion is
5 no, that it is not, then it is labeled an environmental
6 impact assessment.

7 QUESTION: Well, in this particular case, if you
8 didn't appeal the finding of a major Federal action, then we
9 must judge this case on the ground that it is a major
10 Federal action, and so must the Department of Defense
11 comport itself. It is bound by the judgment, and so it must
12 have -- you are submitting that -- you say, assuming this is
13 a major Federal action, all of the requirements of NEPA have
14 been satisfied.

15 MR. LEE: I think that is a correct statement.

16 QUESTION: Well, then, you have really changed
17 your position a little bit.

18 MR. LEE: Well --

19 QUESTION: Because you originally said, the United
20 States takes no position on whether it is major Federal
21 action. Now I think you are saying that the District Court
22 has held it is major Federal action, and that is a correct
23 view of the law.

24 MR. LEE: I think that is right.

25 QUESTION: In this case.

1 MR. LEE: Well, it has to be. It has to be,
2 because we haven't -- we haven't appealed from it.

3 CHIEF JUSTICE BURGER: Ms. Stearns?

4 ORAL ARGUMENT OF NANCY STEARNS, ESQ.,
5 ON BEHALF OF THE RESPONDENTS

6 MS. STEARNS: Mr. Chief Justice, and may it please
7 the Court, the question before this Court can be simply
8 put: Is it lawful under the National Environmental Policy
9 Act for the Navy to propose to build nuclear capable weapons
10 storage bunkers in close proximity to three airports without
11 ever examining the various possible consequences of that
12 proposed action, particularly where one such consequence
13 could be an airplane crash which could lead to an accidental
14 explosion which would render downtown Honolulu or its
15 fast-growing suburbs uninhabitable?

16 The question is not, as Petitioners have
17 suggested, either whether or not nuclear weapons are
18 presently in the West Loch bunkers; it is also not, as
19 Petitioners have also suggested, whether or not NEPA
20 requires revelation of military secrets in a publicly
21 available EIS.

22 Recently in their reply brief, and again here
23 today, the Petitioners have suggested something else, which
24 is that they have in fact complied with NEPA. I think that
25 it would be useful to rid ourselves of that possibility from

1 the very beginning.

2 Petitioner's own environmental impact assessment,
3 which did not discuss the possibility of nuclear weapons
4 being stored at West Loch, but considered questions relating
5 to the storage of conventional weapons, itself concluded,
6 and I quote, "It is concluded that the project will have no
7 significant effect on the environment, and will not be
8 environmentally controversial. Preparation of a candidate
9 environmental impact statement" -- excuse me -- yes,
10 "preparation of a candidate environmental impact statement
11 is therefore not considered required."

12 At the trial of this case, several of their
13 witnesses reiterated that this was not major Federal action,
14 it was not environmentally controversial, therefore the EIA
15 was all that was necessary. Their own classification --

16 QUESTION: Ms. Stearns, may I interrupt? I want
17 to be sure I understand precisely what you are saying. They
18 said, it is not environmentally controversial. By that do
19 you mean the construction of the facility as described in
20 the papers, or the storage of nuclear weapons?

21 MS. STEARNS: They do not specifically discuss the
22 storage of nuclear weapons in this document, in the
23 environmental impact assessment. That is one of our
24 concerns.

25 QUESTION: But would you agree that their

1 testimony would be entirely accurate if they have no
2 intention whatsoever of ever storing nuclear weapons there?

3 MS. STEARNS: Your Honor, I can only agree with
4 the Court of Appeals, which said that as long as they are
5 building nuclear capable bunkers, one must assume that one
6 day they might in fact be storing nuclear weapons there.
7 Therefore, the question that triggers the environmental
8 impact statement process is the proposal to build a bunker
9 which is nuclear capable, and that, of course, as
10 Petitioners have conceded, is not a question which is
11 classified or secret in any manner.

12 In the Court of Appeals, the government --

13 QUESTION: I am not sure you have answered my
14 question.

15 MS. STEARNS: If they --

16 QUESTION: What is your view if there never is an
17 intention or never was an intention to actually store
18 nuclear weapons there? Would they have prepared and filed
19 all the necessary documents?

20 MS. STEARNS: If -- if one could be absolutely
21 assured --

22 QUESTION: You are absolutely positive, for the
23 purpose of my question.

24 MS. STEARNS: They very well might have. I have
25 not examined those documents for their adequacy with respect

1 to merely conventional weapons.

2 QUESTION: In any event, you don't challenge them
3 on that hypothesis.

4 MS. STEARNS: Pardon me?

5 QUESTION: In any event, you don't challenge the
6 sufficiency of their documents on the hypothesis that they
7 never intend to store nuclear weapons there.

8 MS. STEARNS: I don't challenge the hypothesis if
9 in fact they never were going to ever even consider putting
10 nuclear weapons in that. However --

11 QUESTION: They will never propose it. The
12 proposal is what triggers the statute.

13 MS. STEARNS: And the proposal is to build a
14 nuclear capable bunker, therefore, by definition, I don't
15 think we can possibly assume that they would never consider
16 using nuclear weapons in those bunkers.

17 QUESTION: Well, my question is, assuming they
18 have decided that they are purely a decoy, they are never
19 going to put actual nuclear weapons there, then do you
20 question the adequacy of the documents on that hypothesis?

21 MS. STEARNS: Then I think we would have to be
22 remanded for trial to determine whether these were capable,
23 whether they were adequate for a non-nuclear facility. That
24 has never been examined in this record, Your Honor.

25 I think we must also say now, however, that

1 although the Petitioners will not confirm nor deny the
2 presence of nuclear weapons, either in West Loch or in
3 Waikele, the place from which they were planning to move the
4 nuclear weapons, we must recognize that there are
5 photographs in this record of Waikele and of nuclear weapons
6 in Waikele, that there are all of the indicia at West Loch
7 of nuclear weapons, and there were indicia at Waikele of
8 nuclear weapons.

9 So, I think that we must go with the court below
10 and say that as long as those bunkers are nuclear capable,
11 we must in fact assume that one day nuclear weapons may be
12 put in those bunkers. It is our position that it will be
13 sooner and not later, but --

14 QUESTION: Is the Navy obliged to tell you every
15 place they have nuclear weapons?

16 MS. STEARNS: Justice Marhsal, I think what we are
17 saying --

18 QUESTION: If so, then Russia will save a whole
19 lot of money. I mean, spy money.

20 MS. STEARNS: Well, more than likely Russia, with
21 their satellites, just like we with our satellites, already
22 knows where our nuclear weapons are.

23 QUESTION: Well, maybe you know. I don't.

24 MS. STEARNS: Pardon me?

25 QUESTION: I said, maybe you know. I don't.

1 MS. STEARNS: No --

2 QUESTION: But I still want to know as to whether
3 or not it is your position that the Navy has to tell you
4 that there are nuclear weapons there.

5 MS. STEARNS: It is our position that whenever
6 they build nuclear capable bunkers, they must in fact
7 prepare an impact statement. Now, that does not necessarily
8 mean that every storage facility that has existed for many,
9 many years has to have an impact statement done now.

10 QUESTION: Do I understand you to say you can't
11 store conventional weapons in a nuclear bunker?

12 MS. STEARNS: That is a question which was never
13 explored in this record. It is not altogether clear to me
14 that you can in fact.

15 QUESTION: It would be very interesting to me. I
16 think you could store trucks in there.

17 MS. STEARNS: Well, Your Honor, there is a
18 difference between storing trucks --

19 QUESTION: Beds. Kitchen material. You can store
20 anything in a bunker.

21 MS. STEARNS: However, it is -- we do have an
22 affidavit that was submitted to the Court of Appeals and was
23 not in the Trial Court record which raises the question of
24 whether you cannot in fact store nuclear -- excuse me,
25 conventional weapons in a nuclear capable bunker, because of

1 the proximity between the various bunkers, and the quantity
2 of conventional explosives, but as I say, and that it might
3 possibly be more dangerous to store conventional weapons
4 close together as these bunkers are placed than nuclear
5 weapons.

6 QUESTION: But could we have a nuclear bunker with
7 nothing in it, with air?

8 MS. STEARNS: We could presumably have a nuclear
9 bunker with nothing in it. However, just as, to take the
10 government's --

11 QUESTION: I think you really want the Navy to
12 tell you where their bunkers are.

13 MS. STEARNS: No.

14 QUESTION: That you think as a citizen you have
15 that right.

16 MS. STEARNS: Justice Marshal, it is not that we
17 want them to tell us where the bunkers are. We have a case
18 before us. We know there are bunkers here. We want to make
19 sure that -- well, we would have liked them prior to
20 building those bunkers, but that is too late, now. We want
21 to make sure that before they store a single nuclear weapon
22 in those bunkers, they do all of the processes mandated
23 under NEPA to ensure that they will not be in danger of
24 having the kind of accident that could spread deadly
25 plutonium across the island of Oahu and make Honolulu

1 uninhabitable, make the suburbs uninhabitable, cause
2 countless numbers of cancer deaths over a period of years.
3 That is what we want to be sure, and we can't be sure at
4 this point that they have taken those factors into
5 consideration.

6 QUESTION: Ms. Stearns, may I ask, the words
7 "capability" and "capable" have been used quite a bit. Is
8 there any definition of a bunker that has the capacity or
9 capability of accommodating nuclear weapons?

10 MS. STEARNS: That has not been defined
11 specifically in this record. Presumably in the District
12 Court it was just assumed that when the government was using
13 the word "nuclear capable" as it appears in their
14 classification guides, that it merely meant that one could
15 store nuclear weapons there, and presumably there are some
16 different factors that have to be taken into account when
17 building a bunker that stores nuclear weapons. As I say,
18 that was not explored.

19 QUESTION: Nuclear weapons certainly are not
20 fungible. I would assume that there must be a wide variety
21 of storage facilities. I wonder also whether we are talking
22 about just a few bases or hundreds of bases. I assume
23 airplanes with nuclear weapons aboard fly in and out of air
24 bases all over the United States from time to time.
25 Submarines with nuclear weapons come into ports. Are the

1 weapons stored there?

2 I haven't read the record, but I was wondering
3 whether the record indicates the magnitude of this problem,
4 and whether or not one knows whether a particular bunker
5 will accommodate a small nuclear weapon that a fighter plane
6 could carry, or whether we are talking about some permanent
7 storage of a significant volume of these weapons.

8 MS. STEARNS: This case is talking about the
9 permanent storage of a significant quantity, because a
10 significant number of bunkers were in fact built for
11 storage. The record does not indicate how many such
12 permanent storage facilities exist throughout the country.
13 That was never raised by either party in the District Court.

14 There have been explorations by private parties,
15 but it was never a factor that was discussed in this -- in
16 this Court, because the way in which the case was litigated
17 at the District Court level was really closer to the pure
18 question of whether or not the Atomic Energy Act bars
19 preparing an EIS because of whether or not it would
20 necessitate confirming or denying the presence of nuclear
21 weapons.

22 QUESTION: Ms. Stearns, what if the government had
23 filed an EIS saying, yes, we do plan to store nuclear
24 weapons here, and they are of such and such magnitude, and
25 fully describe them? Would that have prevented them from

1 going ahead with the action?

2 MS. STEARNS: Prevented them from putting the
3 nuclear weapons in there?

4 QUESTION: Yes.

5 MS. STEARNS: Well, technically, NEPA is a
6 procedural statute, of course.

7 QUESTION: Right.

8 MS. STEARNS: So that the conclusion that they
9 would come to, even assuming they concluded it was a bad
10 idea, there might be processes through the Administrative
11 Procedures Act to challenge that.

12 Of course, the other questions that still remain
13 in this case, and ones that the Court of Appeals remanded,
14 were consideration of that EIS in relationship to the
15 National Historic Preservation Act and the Endangered
16 Species Act, so that it is possible that there might be a
17 conclusion that the Navy was putting the weapons into those
18 bunkers in violation of one of those two other statutes.
19 But of course that is not the question here since we don't
20 have an environmental impact statement at all.

21 With respect to that point, I might only say that
22 in the Court of Appeals, the Navy did suggest that they had
23 met the requirements of NEPA by having prepared this
24 environmental impact assessment, which really only discusses
25 considerations relating to conventional weapons, for

1 example, explosive safety zones and such, and by doing their
2 candidate environmental impact statement, which is a very
3 superficial, general discussion of questions relating to the
4 storage of nuclear weapons, but the Court of Appeals
5 specifically ruled that that EIA, the environmental impact
6 assessment, and the CEIS, the candidate environmental impact
7 statement, were not adequate to meet the requirements of
8 NEPA.

9 I might only point out one of the features of the
10 candidate environmental impact statement, which was
11 supposedly the general examination of the question. In that
12 statement, they made the assertion that plutonium, which, of
13 course, we know is one of the most deadly substances, would
14 not be harmful if it was kept outside of the body. However,
15 they did not explore how one in fact could keep it out of
16 the body, how an entire population could keep from breathing
17 it in if there were an airplane crash that created a fire
18 and explosion and plutonium dispersed throughout the island.

19 QUESTION: Ms. Stearns, which is the more
20 informative, the candidate or the assessment?

21 MS. STEARNS: With respect to questions regarding
22 storage of nuclear weapons, the candidate, but it has such
23 major defects that I feel I must say that that is not very
24 informative, either.

25 QUESTION: I gather the defects that you are

1 pointing out would not appear in a statement itself. Is
2 that it?

3 MS. STEARNS: One would hope they would not. No.
4 A statement would have to look into some of these features
5 specifically, and the statement would have to deal with the
6 one thing neither of these documents dealt with, which is
7 the question of storing nuclear weapons right near major
8 airports.

9 This weapon facility, remember, is one mile from a
10 flight path to the Honolulu International Airport. That
11 airport alone, forgetting for a moment that there are two
12 military airports in that vicinity, that airport alone
13 several years ago had a quarter of a million takeoffs and
14 landings a year. That is a great number of planes. That is
15 all the planes coming to and from the mainland, all the
16 planes going to the Far East, and they are right within a
17 mile of that flight path, and lest we think that, well, no
18 accident will ever happen, we must remember that two serious
19 accidents have occurred with military planes that crashed
20 unmanned, where the pilots had to evacuate, right into the
21 Pearl Harbor area, very near that --

22 QUESTION: But if you stored one in Death Valley,
23 where the little fish is that the Chief Justice's opinion
24 wrote about, you might endanger only the little fish under
25 the Historic Preservation Act, or the Endangered Species

1 Act, and nonetheless be just as much in violation of the
2 NEPA provisions as if you were talking about a major airport
3 and a major flight route.

4 MS. STEARNS: I suppose technically you would. Of
5 course, here we don't have the EIS, and what we are hoping
6 is that when the EIS examines the question, if there is a
7 conclusion that it is too dangerous, then in fact the Navy
8 will decide not to store nuclear weapons there. Up until
9 now they have not, and it would not be necessary to do so.
10 They could find an alternative location. If it were
11 concluded, after full examination and sharing that
12 information with the other appropriate governmental bodies,
13 that it were a bad decision, that it were too dangerous,
14 that decision, of course, need not take place.

15 QUESTION: Does it appear in this record whether
16 or not nuclear bombs can be ignited or triggered by any kind
17 of impact?

18 MS. STEARNS: There is not specific proof they can
19 be. It is not clear under what circumstances there would be
20 a nuclear detonation. We do have substantial information in
21 the record about the effects of a nuclear detonation, which
22 would be catastrophic.

23 QUESTION: Well, that isn't my question. That
24 isn't my question. Is your answer no, it does not appear in
25 the record?

1 MS. STEARNS: It is not -- it is not definitive.
2 However, we do have information in the record about what
3 might happen if the plane crashed into a weapons bunker,
4 which I think is the more realistic danger, and which is
5 horrible enough. The Livermore Lab did a study which
6 indicated that if a plane crashed into a storage bunker,
7 that you could have an explosion and fire that would lead to
8 a dispersal of plutonium.

9 QUESTION: Well, that is a different question.
10 You have said that if you were talking about this bunker as
11 just a non-nuclear storage, that the adequacy of the
12 statement here has not been tried out, and you would have to
13 have a remand.

14 My question to you is, does the record sustain one
15 way or another whether an airplane crash crashing into this
16 bunker could detonate a nuclear bomb.

17 MS. STEARNS: It doesn't make that definitive, but
18 the other problem -- there are two possible dangers with
19 nuclear explosives in a bunker. One is an actual full-blown
20 nuclear detonation, a mushroom cloud, what we all think of
21 as a nuclear detonation. The other, and exceedingly
22 serious, is merely the conventional explosion leading to the
23 dispersal of plutonium which is kept with that or in that
24 weapon. That plutonium would not be there if only
25 conventional weapons were present, and it is the dispersal

1 of plutonium alone that could render, according to the
2 Livermore Labs, 100 square miles uninhabitable. That is a
3 great deal, and that could not happen if it were only
4 conventional weapons.

5 QUESTION: But Ms. Stearns, all this -- I suppose
6 it is possible that one could believe that if the magazine
7 blows up, the entire island will be demolished.

8 Nevertheless, if the Navy prepares the right documents, they
9 could still store the stuff there. They could decide that
10 is a risk worth taking. We are not really interested in
11 that. We are just interested in what they must prepare and
12 file.

13 MS. STEARNS: That is correct. That is absolutely
14 correct. I mean, I do not want to say definitively that
15 they could in fact go on and store them, because I think
16 there might be other procedural routes.

17 QUESTION: Well, there is nothing in this statute
18 to prevent them from doing so.

19 MS. STEARNS: That is correct.

20 QUESTION: They could say there is one chance in
21 1,642,000 and so forth that the thing will blow up, and if
22 it does blow up, the whole island goes. They could still
23 store the stuff there.

24 MS. STEARNS: That is correct, Your Honor. Under
25 NEPA, it would not stop them. There are other statutes.

1 There may be other remedies. But of course that is not the
2 question here, because it is our position that they have not
3 done the --

4 QUESTION: No, the real question here is whether
5 the statute has been triggered by a proposal.

6 MS. STEARNS: That's correct.

7 QUESTION: And you say just building the facility
8 is a sufficient proposal. They don't have to propose
9 actually to store the material there.

10 MS. STEARNS: That's correct. That merely
11 proposing to build a nuclear capable bunker is what triggers
12 the statute. That is a major Federal action. That, of
13 course, is what the District Court found. The Court of
14 Appeals certainly reiterated that, and as this Court has
15 stated, when NEPA is in consideration, one is supposed to go
16 through the process at the earliest possible stage. They
17 should not be spending millions and millions of dollars
18 constructing bunkers if there is no intention, no desire, no
19 possibility of using them. The bunkers are here now. But
20 we do need an EIS, and it is our position that it has not
21 been done, and this belated hint does not make it so.

22 QUESTION: Ms. Stearns, if this Court were to
23 determine that even the existence of a classified
24 environmental impact statement has to be kept secret by
25 virtue of the other legislation, then what relief would you

1 propose?

2 MS. STEARNS: There are several possibilities.
3 One would be, of course, what can be done in other cases
4 where there are classified information, and that is, it
5 could be examined in a court in camera to determine, first
6 of all, whether or not everything had to be classified, and
7 second of all, whether it was adequately prepared. This
8 Court has, of course, dealt with questions before dealing
9 with classified information.

10 However, it is our position that not all of it
11 need be classified, that the reference to the Totten case is
12 an inappropriate reference, because there --

13 QUESTION: Yes, but I want to press you a little
14 bit as to what you are specifically proposing in the event
15 the Court should determine that even the existence of the
16 EIS has to be kept secret.

17 MS. STEARNS: Well, I would suggest two
18 possibilities. First, I would suggest, if there is --
19 either if it has been ordered or if it is exists and it is
20 classified, that it be remanded to the Trial Court and that
21 there be an examination made in a similar fashion to other
22 classified cases where perhaps the attorneys be given
23 security clearances and be able to litigate before the Court
24 whether or not it is an adequate EIS and whether or not in
25 fact everything in that EIS need in fact be classified,

1 because there is significant unclassified information,
2 clearly unclassified information that can be considered
3 publicly.

4 For example, merely the kind of an arc that one
5 can draw around an airport to determine the likelihood of a
6 crash in a particular area. In our record, it indicates
7 that both the state and the city governments in Honolulu and
8 Hawaii feel that such an arc should be drawn, but it has
9 never been drawn. So, we don't know the likelihood of a
10 crash. That is clearly not classified.

11 Additionally, the government is trying to suggest
12 whether they have even done one is classified. Well, of
13 course, as we have already stated, the question of whether a
14 bunker is nuclear capable is not classified. Therefore, it
15 need not be classified whether they have done one.
16 Therefore, what we have should be a document which might be
17 partially classified and partially declassified. The
18 classified portions are in classified annexes, just as the
19 Navy's regulations suggest.

20 And, of course, now is premature to determine
21 which points should be classified and which declassified,
22 but such questions, as I said, as the likelihood of an
23 airplane crash, general discussion of plutonium dispersal,
24 which has on previous occasions been studied by scientists,
25 those factors can be considered and discussed in a public

1 EIS.

2 Let me finally, however, just refer to the Atomic
3 Energy Act question which has been raised by the government,
4 because we feel that, too, is a spurious question.

5 The Petitioners have said that they can neither
6 confirm nor deny the presence of nuclear weapons
7 specifically because of the Atomic Energy Act, and that that
8 prohibits it. That is not true. It may once have been
9 true. That may have once been restricted data under the
10 Act. However, it is now, according to their own
11 classification guides, what they call formally restricted
12 data.

13 What that means is, it is releasable not under the
14 stringent requirements of the Atomic Energy Act, which
15 require two department heads to concur or the President to
16 say that it will not cause an unusual risk. Rather, it can
17 be released to the public, declassified, merely by one
18 agency head or a designee of the agency, and under the
19 Executive Order they specifically say that even when there
20 are occasions that information is properly classified, that
21 the public interest may be paramount and may say that it is
22 appropriate to declassify this information, and therefore,
23 of course, it would be critical that if and when an EIS is
24 prepared, that those standards be applied, and there not be
25 an overclassification of material and overuse of the term

1 "national security", as the Court of Appeals said in the
2 Concerned About Trident case, another NEPA case.

3 When the government in their reply brief tried to
4 suggest that this formally restricted data, this question of
5 presence or absence of nuclear weapons, is still governed by
6 the Atomic Energy Act, they referred to, I believe it was
7 Section 2162(D) of the Act, which says that so long as the
8 information remains restricted data, it can only be given to
9 another nation, if you go through the procedures of the
10 Atomic Energy Act.

11 That is true, but that has nothing to do with
12 whether or not it can be declassified and, as I said, under
13 the Executive Order, which does apply once it is formally
14 restricted data, it can be declassified under the standards
15 of the Executive Order, and of course, then that means the
16 Federal Courts can examine, just as they do under the FOIA,
17 that -- whether or not that classification has been
18 overused. Therefore --

19 QUESTION: Do you think, counsel, that litigants
20 such as the litigant you represent could bring a lawsuit and
21 have the courts tell the Navy to designate and reveal all
22 the ports of the United States into which submarines
23 carrying nuclear weapons come for supplies or come for any
24 other purpose?

25 MS. STEARNS: The first question --

1 QUESTION: The assumption there is that a
2 submarine bearing nuclear weapons coming into the port of
3 New York or San Francisco would produce a comparable risk
4 that you raise here.

5 MS. STEARNS: Chief Justice Burger, the operative
6 question under those circumstances would be whether or not
7 the submarine coming into the port or the ship coming into
8 the port itself constituted major Federal action. We had an
9 entire record to show that storage of nuclear weapons,
10 particularly at this site, was.

11 I do not know whether merely coming to a port
12 would constitute major Federal action. I think that --

13 QUESTION: Well, what kind of action would it be?
14 Who controls the submarines and the aircraft which carry
15 nuclear weapons?

16 MS. STEARNS: Oh, it is certainly Federal action,
17 but the question is, under the mandates of NEPA, does it fit
18 within the concept of major Federal action with a
19 significant effect on the environment. That is what I am
20 saying I would have to examine much more closely than I
21 have. That has not been something I have considered. And
22 it is this whole term which has a gloss to it of major
23 Federal action with a significant effect on the environment
24 or environmentally controversial that is what the court
25 below and the District Court both felt triggered the EIS

1 process.

2 QUESTION: What if the government planned to build
3 a brand-new slip which would accommodate a nuclear
4 submarine, but which could accommodate other Naval vessels,
5 too? Would that be major Federal action?

6 MS. STEARNS: Again, I think that that would have
7 to be studied, because it is not just whether a particular
8 nuclear weapon slips in and out of the port. It really is
9 what all of the surrounding circumstances are, I think.

10 I don't think the very existence of a particular
11 weapon anywhere is necessarily a major Federal action,
12 because that would presumably mean that every time you
13 loaded up a B-52 and did a trial run across the United
14 States, assuming they are still carrying bombs on their
15 trial runs, that it would be major Federal action. I think
16 that is unlikely.

17 There may be a substantial difference between
18 building a new slip and building an entire storage facility,
19 particularly a storage facility located, as ours is, in such
20 a precarious position. It is not clear to me that it would
21 necessarily be a major Federal action.

22 QUESTION: I am not sure why not, though, because
23 it seems to me that the transportation of huge quantities of
24 nuclear weapons might be more hazardous than their storage
25 in one place.

1 MS. STEARNS: Well, it certainly might be in some
2 places. I would think that it might very well be if you
3 have -- for example, if you have this new slip coming in
4 right next to an airport runway. I think that probably
5 would, because the notion is the significant effect on the
6 environment if there were a possibility of an accident.

7 QUESTION: Most of your harbors are near large
8 population centers, and most of your big airports are, too.

9 QUESTION: You keep talking about airplane
10 crashes. What about beside some of the highways I have
11 driven on? There are many more accidents than airplane
12 accidents.

13 MS. STEARNS: I don't want to condone the spots
14 that the Navy or the Air Force or the Army has chosen.

15 QUESTION: Well, that is what worries me about
16 this. You say you can predict how many airplanes are going
17 to crash.

18 MS. STEARNS: We can't predict how many airplanes
19 are --

20 QUESTION: I didn't think you could.

21 MS. STEARNS: No, but what we can do, and it has
22 been done for other airports in Hawaii, is draw an arc which
23 will consider the likelihood of an airplane crash.
24 Similarly, in -- when we are now building nuclear
25 facilities, nuclear energy facilities, we have to consider

1 certain factors, and in fact, as the amicus brief pointed
2 out of the National --

3 QUESTION: You mean, when the Navy wants to decide
4 where they are going to put their weapons, they have to draw
5 arcs to find out how many airplanes have crashed?

6 MS. STEARNS: I think it would probably be a good
7 idea, and I think NEPA mandates that.

8 QUESTION: You do? You do?

9 MS. STEARNS: Yes, I do.

10 QUESTION: I am glad you don't handle the war.

11 MS. STEARNS: Well, this, of course, is not a
12 wartime question.

13 QUESTION: What is it?

14 MS. STEARNS: This is a question of what they are
15 going to do with the weapons in the United States, adjacent
16 to American citizens. It is not a question of what will
17 happen when there is a war and when we are in that war. It
18 merely says that when this sort of decision is raised of
19 storing nuclear weapons in close proximity to a major
20 population and near a major airport, three airports, in
21 fact, that NEPA mandates preparation of an EIS.

22 Thank you very much.

23 QUESTION: Mr. Solicitor General, before you
24 commence, this has been discussed before, but I am not clear
25 on it. The District Judge found that the storage facilities

1 in question are capable of accommodating nuclear weapons.

2 Does the government regard that as secret information?

3 ORAL ARGUMENT OF REX E. LEE, ESQ.,

4 ON BEHALF OF THE PETITIONERS -- REBUTTAL

5 MR. LEE: No, sir, it does not.

6 QUESTION: That is not?

7 MR. LEE: That is not. It could not be kept --

8 QUESTION: My question really gets back as to what
9 the government proposes to do --

10 MR. LEE: That's right.

11 QUESTION: With respect to putting weapons in or
12 not.

13 MR. LEE: That is correct, and the distinction
14 between the proposal to build those that are nuclear
15 capable, that can't be kept a secret because of the fences,
16 and how it in fact proposes to use them.

17 QUESTION: Does the record in this case show how
18 many places, locations in the United States are capable of
19 storing nuclear weapons?

20 MR. LEE: The record does not show that. And may
21 I just add one brief point that will, I hope, clarify a bit
22 my closing comments with regard to what the District Judge
23 found with regard to major Federal action?

24 The correct statement, I believe, is as follows.
25 We do not take the position, as we stated in the reply

1 brief, as to whether this is or is not major Federal
2 action. Now, when the decision-makers face this issue of
3 the adequacy of the environmental document that is submitted
4 to them as it is required to be submitted by the
5 regulations, that is an issue that they will have to resolve.

6 They will start from the premise that the District
7 Judge so found, so determined, but I believe that that
8 determination is not binding on us because of the fact that
9 we won before the District Court and therefore we are under
10 no obligation to appeal, and also because his finding, as
11 you re-read it, was construction and use, and what we have
12 -- what does remain a secret is how these facilities are
13 used, and must remain a secret, and that brings me --

14 QUESTION: Before you leave that, because I think
15 you have changed your position again, if I understand it.

16 MR. LEE: Well, I have simply reaffirmed the
17 position that I was taking.

18 QUESTION: Well, now, what is your position on the
19 question whether the storage of nuclear weapons in this
20 facility would be major Federal action?

21 MR. LEE: Our position is that it may be, it may
22 not be, but that that is an issue that we took -- that the
23 decision-makers are going to have to take into account, the
24 same as anyone else takes it into account, at the time they
25 decide whether what is required is an environmental impact

1 assessment or statement.

2 QUESTION: Well, in other words, your position is
3 that you don't know.

4 MR. LEE: That is correct.

5 QUESTION: So we can be sure that if the
6 Department of Defense has a regulation requiring preparation
7 of a statement whenever major Federal action takes place, we
8 don't know whether they will file such a paper or not.

9 MR. LEE: Well, what we do know is that they are
10 required, that they are required by the --

11 QUESTION: But we don't know how they read the
12 regulation, what they think a major Federal action is.

13 MR. LEE: Well, and that they are required in a
14 case like this at least to do an environmental impact
15 assessment that makes the preliminary inquiry whether or not
16 it is a major Federal action, and that they are required to
17 do by the CEQ guidelines, which in turn are incorporated by
18 reference through the Department of Defense regulations.

19 QUESTION: Yes, but what it all boils down to is,
20 the United States does not know whether or not the storage
21 of nuclear weapons in this facility would be a major Federal
22 action.

23 MR. LEE: Well, I don't know if it is correct to
24 say they do not know. We do not concede for purposes of
25 this litigation, because I think we don't need to, that it

1 is. We took the position before the District Court that --

2 QUESTION: Well, may I say that I think your
3 position would be much stronger if you did concede that.

4 MR. LEE: Well --

5 QUESTION: Well, aren't you bound by --

6 MR. LEE: I don't think --

7 QUESTION: Doesn't this case come here on the --
8 as far as we -- shouldn't we judge this case on the
9 assumption that the finding in this case stands, that this
10 is major Federal action?

11 MR. LEE: I am perfectly willing to have you
12 decide the case --

13 QUESTION: And you say that even if it is, you
14 have satisfied everything that is required.

15 MR. LEE: That is absolutely correct, that even if
16 it is, that it has been satisfied.

17 QUESTION: Well, we are judging this case, not a
18 lot of others that haven't come up here.

19 MR. LEE: That is absolutely correct. The only
20 thing that I am saying is that since we won before the
21 District Court, it is not technically binding on us in that
22 sense.

23 Let me come now to what I believe is the point
24 that ought to govern the final disposition of this case, and
25 it comes out of the exchange about whether the very

1 existence of the environmental impact statement must be kept
2 secret.

3 There is no question that that information is
4 classified. The sources of it are set forth at Page 16 of
5 our brief, and that is a military secret. Now, if you
6 reveal the fact that whatever document, environmental impact
7 assessment, environmental impact statement, or whatever, has
8 discussed that issue, then you reveal the secret.

9 This case is distinct -- indeed, it may be unique
10 -- in that respect.

11 QUESTION: Mr. Lee, I am not even sure that is
12 right, because the statute is triggered by a proposal, and
13 you conceivably, and I am not suggesting that this is the
14 right view of the case --

15 MR. LEE: Right.

16 QUESTION: -- but you could conceivably be under
17 an obligation to prepare a statement, even disclose it
18 whenever a proposal is made. That would not reveal whether
19 or not action was taken on the proposal.

20 MR. LEE: Well, but what you would not want to do,
21 Justice Stevens, is prepare something that was an
22 environmental impact statement that called to the attention
23 -- and make public the fact that it was an environmental
24 impact statement that called to the attention of the
25 decision-makers that there were nuclear weapons to be stored

1 there.

2 QUESTION: I know, but that is going farther than
3 you have to. All you would have to disclose is that a
4 proposal has been made to store weapons there. That is what
5 triggers the statement. It is not the actual storage. And
6 it seems to me that the distinction between building a
7 nuclear capable facility and making a proposal to store
8 something there may not necessarily be the difference
9 between secrecy and no secrecy.

10 MR. LEE: Well, in any event, there is no question
11 that in this case, as in others, you come down finally to a
12 distinction between making the disclosure to the
13 decision-makers and the adequacy of the final judgment and
14 the adequacy of the alternatives that are taken into account.

15 If you did disclose publicly that an environmental
16 impact statement or whatever NEPA document had been
17 disclosed or had been made, then you do disclose the very
18 secret at issue, which is whether nuclear weapons are to be
19 stored at that particular facility.

20 QUESTION: Well, Mr. Lee, it seems you don't rely,
21 then -- I seem to have had a different view from your
22 brief. You really don't rely on what you might have to
23 disclose in addition to whether or not there is a likelihood
24 of nuclear weapons being stored here, namely, information
25 about the weapons. If you were going to really make an

1 assessment, you would have to know an awful lot about the
2 weapons.

3 MR. LEE: That's right.

4 QUESTION: And what their effect is. Now, do you
5 rely on that at all? It doesn't sound like it.

6 MR. LEE: We do rely on it, in rejecting -- There
7 are several approaches that can be taken. We rely on that,
8 in rejecting the approach that the Court of Appeals took,
9 which was for a hypothetical environmental statement.

10 QUESTION: Yes.

11 MR. LEE: And the problem with that hypothetical
12 environmental statement is that it necessarily reveals too
13 much, or it necessarily leads into these kinds of statements.

14 QUESTION: Well, the proposal that Justice Stevens
15 spoke of, if you are just going to -- you are thinking about
16 maybe storing weapons here, and you have to have an
17 environmental impact statement. Now, you say, if you said
18 you had to have one, then you would have to reveal secret
19 information about the weapons?

20 MR. LEE: Well --

21 QUESTION: Is that right, or not?.

22 MR. LEE: Well, if you could have publicly
23 available, as indeed we do, because there was a classified
24 statement that was prepared in 1975, that something was
25 done. What you cannot do is get any assurance that what was

1 disclosed in that was the -- that what was disclosed in that
2 is that nuclear weapons would be stored there, or that the
3 environmental consequences were called to the attention --

4 QUESTION: I know, but it is possible -- can't you
5 disclose -- are you disclosing any more than what you have
6 already disclosed by your fence, that it is a possibility
7 that nuclear weapons will be stored here some time in the
8 future?

9 MR. LEE: Yes.

10 QUESTION: That is all the fence tells you. It
11 tells you at least that, doesn't it?

12 MR. LEE: The fence does tell you that it is
13 nuclear capable.

14 QUESTION: And that it is possible.

15 MR. LEE: And that it is possible.

16 QUESTION: Well, then, now, that much. Why isn't
17 that a -- why doesn't that trigger the requirement of an
18 environmental impact statement? If it does, then what is
19 your objection? Your objection is that --

20 MR. LEE: Making it public.

21 QUESTION: Well, making what public, the
22 possibility?

23 MR. LEE: Making the environmental impact
24 statement public.

25 QUESTION: All right, and you object to that

1 because of what it tells you about the weapons.

2 MR. LEE: That is correct. That is correct.

3 QUESTION: In your original argument you said, the
4 secret in this case is so and so. You didn't say the secret
5 in this case is the characteristics of the weapons.

6 MR. LEE: Well, there are several secrets in this
7 case, and one of them --

8 QUESTION: Well, now you've got a different case.

9 MR. LEE: And one of them, of course, is the
10 nature of the weapons, the security, and so forth, but in
11 addition there is a problem merely with disclosing the fact
12 that these factors have been taken into account or have not,
13 because that implies that there may be storage --

14 QUESTION: Well, suppose you get to the question,
15 then, suppose the case turns on whether or not what you
16 would disclose in the environmental impact statement is
17 secret, and if it is, whether it is subject to judicial
18 review.

19 What would you -- Your colleague on the other side
20 said, well, even if it is secret material in the
21 environmental impact statement, it should be subject to
22 judicial review, with in camera hearings and so on. I take
23 it you didn't want to get into that.

24 MR. LEE: We would prefer an in camera review.

25 QUESTION: I know, you would prefer, but --

1 MR. LEE: No, we would prefer an in camera review
2 procedure to the kind of approach that was taken by the
3 Court of Appeals, but that kind of --

4 QUESTION: Well, is it your position that if it is
5 secret, if what would be in the environmental impact
6 statement is secret, that that is the end of it, and that it
7 should not be subject to judicial review at all?

8 MR. LEE: That is absolutely correct. You do have
9 the threshold inquiries about the adequacy of the procedure
10 that has been followed. Those would be -- those could be
11 subject to in camera review, but we think that the risks of
12 disclosure are sufficiently great that, particularly with
13 adversary type proceedings, the need for appeal, and so
14 forth.

15 QUESTION: And you think your argument today is
16 consistent with your brief, and you don't disavow anything
17 in your brief?

18 MR. LEE: Absolutely not. What I have said here
19 today is that the risks that are attendant upon the Court of
20 Appeals view are the risks that are set forth in our brief,
21 but that in addition, there is the problem that is also
22 discussed in our reply brief, that the mere disclosure of
23 the fact that an environmental statement has been prepared
24 may also disclose the secret at issue.

25 We respectfully submit that the decision of the

1 Court of Appeals should be reversed.

2 CHIEF JUSTICE BURGER: Thank you, counsel. The
3 case is submitted.

4 (Whereupon, at 11:09 o'clock a.m., the case in the
5 above-entitled matter was submitted.)

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Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

CASPER W. WEINBERGER, SECRETARY OF DEFENSE, ET AL., vs.
CATHOLIC ACTIONS OF HAWAII/PEACE EDUCATION PROJECT, ET AL.

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