

The Burger Court Opinion Writing Database

Weinberger v. Catholic Action of Hawaii/Peace Education Project

454 U.S. 139 (1981)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

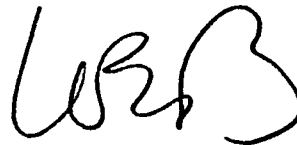
November 12, 1981

RE: 80-1377 - Weinberger v. Catholic Action of Hawaii/
Peace Education Project

Dear Bill:

I join your third draft.

Regards,

A handwritten signature in dark ink, appearing to be 'WB' followed by a large, stylized 'B'.

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 4, 1981

RE: No. 80-1377 Weinberger v. Catholic Action of
Hawaii

Dear Bill:

I fully share Sandra's view expressed in her memorandum to you of November 3. I hope you will revise your opinion accordingly.

Sincerely,

Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 12, 1981

RE: No. 80-1377 Weinberger v. Catholic Action

Dear Bill:

Because I share the views expressed by Harry in his
note to you of November 10, I'll await his writing.

Sincerely,



Justice Rehnquist
cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 18, 1981

RE: No. 80-1377 Weinberger v. Catholic Action, etc.

Dear Harry:

Please join me.

Sincerely,

Bill

Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 10, 1981

80-1377 - Weinberger v. Catholic
Action of Hawaii/Peace Education Project

Dear Bill,

Please join me.

Sincerely yours,



Justice Rehnquist

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 12, 1981

Re: No. 80-1377- Weinberger v. Catholic Action of
Hawaii/Peace Education Project

Dear Bill:

Please join me.

Sincerely,

J.M.
T.M.

Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 10, 1981

Re: No. 80-1377 - Weinberger, Secretary v. Catholic Action

Dear Bill:

Your recirculation of November 6 is more palatable for me than the original. I remain troubled by a few features, however, and, in the hope that you can afford some accommodation, I set forth the things that disturb me:

1. The paragraph beginning at the bottom of page 6 states that the Defense Department's regulations "can fairly be read to require that an EIS be prepared." That observation seems to me to contain two negative pregnant, namely, that the regulations also can be read as not requiring the preparation of such a document, and that, in any event, it is only the regulations that require development of an EIS. I think the statute, as well as both the CEQ and the Defense regulations, requires development of an EIS. It seems to me that the Court should say so flatly.

2. Earlier, on pages 3-4, it is said: "Through the preparation and disclosure of an EIS, the public is made aware that the Agency has taken environmental considerations into account." Is this strictly accurate? It seems to me that the preparation is primarily for the benefit of Agency decision-makers.

3. In light of the SG's position at oral argument, could not the Court well observe that the Navy is bound by the lower court findings to the effect that the storage of nuclear weapons at West Loch is a major federal action?

4. The opinion nowhere notes that classified information, if segregable and disclosable under Executive Order 12065, must be published. Is there any need to say, as the opinion does, page 6, that the Navy "need not" disclose any West Loch EIS? The Government can be told simply that it need not disclose classified materials.

Page 2.

5. I wonder about the necessity of the reference on page 7 to Totten v. United States. That is a controversial case, and here the statutory nondisclosure provisions, it seems to me, are sufficient to dispose of the controversy. Along the same line, I wonder about the need to apply NLRB v. Sears, Roebuck & Co., cited on page 6, to this case. The SG convincingly argued that a hypothetical statement would itself disclose confidential material, and would therefore run afoul of FOIA exemption one. That is enough to dispose of the issue of hypothetical EISS.

6. On page 7, the first paragraph states that the decision to store nuclear weapons at West Loch is what triggers the obligation to prepare an EIS. Is this correct? Is it not the proposal to store that triggers the EIS requirement? It seems to me that the EIS must be prepared before any decision is made.

I hesitate to bother you with all this. My problems seem to center on what appears to me to be misplaced emphasis rather than inaccuracy. If you do not agree, I shall, of course, be content to air my concerns in a brief separate concurrence.

Sincerely,



Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 12, 1981

Re: No. 80-1377 - Weinberger v. Catholic Action

Dear Bill:

I shall probably be writing in this case and expect to have it around within a few days.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a horizontal line underneath.

Justice Rehnquist

cc: The Conference

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

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From: Justice Blackmun

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1377

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL., PETITIONERS *v.* CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[November —, 1981]

JUSTICE BLACKMUN, concurring in the judgment.

The law to be applied in this case is relatively simple and straightforward. If the Navy proposes to engage in a major action that will have a significant environmental effect, it must prepare an environmental impact statement (EIS) addressing the consequences of the proposed activity. If disclosing the contents, or even the existence, of the EIS will reveal properly classified materials, the Navy need not publish the document. If nonclassified data is segregable and properly disclosable under Executive Order No. 12065, it must be released to the public. I write separately because I believe that the Court understates the first and third of these points, and overstates the second.

The Court states rather obliquely that if the Navy proposes to store nuclear weapons, "the Department of Defense regulations can fairly be read to require that an EIS be prepared solely for internal [Navy] purposes." *Ante*, at 6 (footnote omitted). In fact, the Defense Department regulations explicitly declare that "[t]he fact that a proposed action is of a classified nature does not relieve the proponent of the action from complying with the NEPA," although in such a circumstance the required EIS "shall be prepared, safeguarded and disseminated in accordance with the requirements applicable

November 9, 1981

80-1377 Weinberger v. Catholic Action of Hawaii

Dear Bill:

Although my join is unconditional, I suggest that it may be clarifying to change the fourth sentence in the first full paragraph on page 7 to read substantially as follows:

"To say that the West Loch facility is 'nuclear capable' is to say little more than that the Navy has contemplated the possibility that nuclear weapons may at some time be stored there."

You might consider, whether or not you adopt the foregoing language, adding a footnote along the following lines:

"Although the parties have used the term 'nuclear capable', there is no record support for even a general definition of this term. It is common knowledge that the range of nuclear weapons extends at least from the size of those that may be fired as a rocket from a fighter aircraft to intercontinental ballistic missiles. Presumably, environmental considerations would vary substantially depending on the size and other characteristics of particular weapons or warheads, and perhaps the duration of the storage."

Sincerely,

Justice Rehnquist

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 9, 1981

80-1377 Weinberger v. Catholic Action of Hawaii

Dear Bill:

Please join me in your opinion for the Court as
recirculated November 6.

Sincerely,

A handwritten signature in cursive script, appearing to read "L. Powell", written in dark ink.

Justice Rehnquist

lfp/ss

cc: The Conference

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Stevens
 Justice O'Connor

0\$1377H 2-NOV-81 DRB

From: Justice Rehnquist

Circulated: NOV 2 1981

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1377

CASPAR W. WEINBERGER, SECRETARY OF DE-
 FENSE, ET AL., PETITIONERS *v.* CATHOLIC
 ACTION OF HAWAII/PEACE EDUCATION
 PROJECT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE NINTH CIRCUIT

[November —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

The Court of Appeals for the Ninth Circuit held that § 102 (2) (C) of the National Environmental Policy Act of 1969 (NEPA), 42 U. S. C. § 4332 (2) (C) requires the Navy to prepare and release to the public a "Hypothetical Environmental Impact Statement" with regard to the operation of a facility capable of storing nuclear weapons. *Catholic Action of Hawaii/Peace Education Project v. Brown*, 643 F. 2d 569, 572 (CA9 1980). Because we conclude that the "Hypothetical Environmental Impact Statement" is a creature of judicial cloth, not legislative cloth, and that it is not mandated by any of the statutory or regulatory provisions upon which the Court of Appeals relied, we reverse its decision.

The facts relevant to our decision are not seriously controverted. Pursuant to a decision by the Navy to transfer ammunition and weapons stored at various locations on the island of Oahu, Hawaii, to the West Loch branch of the Lualualei Naval Magazine, the Navy prepared an Environmental Impact Assessment¹ (EIA) concerning how the plan

¹ An Environmental Impact assessment is a document prepared by a federal agency in order to determine whether a formal Environmental Impact Statement should be prepared. See 40 CFR § 1508.9 (1981).

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P 1-7

64 k

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

1377H 06-NOV-81 DRB

From: Justice Rehnquist

Circulated: _____

Recirculated: **NOV 6 1981**

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1377

CASPAR W. WEINBERGER, SECRETARY OF DE-
FENSE, ET AL., PETITIONERS *v.* CATHOLIC
ACTION OF HAWAII/PEACE EDUCATION
PROJECT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[November —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

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The facts relevant to our decision are not seriously controverted. Pursuant to a decision by the Navy to transfer ammunition and weapons stored at various locations on the island of Oahu, Hawaii, to the West Loch branch of the Lualualei Naval Magazine, the Navy prepared an Environmental Impact Assessment¹ (EIA) concerning how the plan

¹ An Environmental Impact Assessment is a document prepared by a federal agency in order to determine whether a formal Environmental Impact Statement should be prepared. See 40 CFR § 1508.9 (1981).

pp. 3, 5, 7

0\$1377H 06-NOV-81 DRB

✓ To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

Circulated: _____

Recirculated: NOV 11 1981

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1377

CASPAR W. WEINBERGER, SECRETARY OF DEFENSE, ET AL., PETITIONERS *v.* CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[November —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

The Court of Appeals for the Ninth Circuit held that § 102 (2) (C) of the National Environmental Policy Act of 1969 (NEPA), 42 U. S. C. § 4332 (2) (C), requires the Navy to prepare and release to the public a "Hypothetical Environmental Impact Statement" with regard to the operation of a facility capable of storing nuclear weapons. *Catholic Action of Hawaii/Peace Education Project v. Brown*, 643 F. 2d 569, 572 (CA9 1980). Because we conclude that the "Hypothetical Environmental Impact Statement" is a creature of judicial cloth, not legislative cloth, and that it is not mandated by any of the statutory or regulatory provisions upon which the Court of Appeals relied, we reverse its decision.

The facts relevant to our decision are not seriously controverted. Pursuant to a decision by the Navy to transfer ammunition and weapons stored at various locations on the island of Oahu, Hawaii, to the West Loch branch of the Lualualei Naval Magazine, the Navy prepared an Environmental Impact Assessment¹ (EIA) concerning how the plan

¹ An Environmental Impact Assessment is a document prepared by a federal agency in order to determine whether a formal Environmental Impact Statement should be prepared. See 40 CFR § 1508.9 (1981).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 11, 1981

Re: No. 80-1377 Weinberger, Secretary v. Catholic
Action

Dear Harry:

Thank you for your letter of November 10th regarding my proposed opinion in this case. I can afford you some "accommodation", as you put it, but I frankly feel that some of the suggestions you have made are more in the nature of "stylistic" than substantive, and prefer to retain my own wording unless someone who has already joined the opinion feels I should adopt yours and thereby deprives me of a Court.

To summarize, I think you are entirely correct in your second suggestion regarding the preparation of an EIS, and will therefore eliminate the reference to "preparation" on pages 3-4 as you suggest. With regard to your sixth suggestion, I also agree that it is the proposal to store that triggers the EIS requirement, and will make appropriate changes.

As to the remaining suggestions, I am not inclined to accept them except under "force majeure". As to (1), if it were not for the regulations I think the Navy might fairly argue that NEPA does not apply to its military or national security endeavors. In doing so, it would be supported to some extent by Flynt Ridge Development Co. v. Scenic Rivers Association, 426 U.S. 776, 787-788 (1976), and United States v. SCRAP, 412 U.S. 669, 694 (1973), where the Court said that "NEPA was not intended to repeal by implication any other statute."

I do not think that the issue you mention in (3) needs to be expressly decided, and would prefer not to. With respect to your suggestion contained in paragraph (4), I think that the DOD regulations are explicit on this very point and that a statement to that effect would be redundant

- 2 -

insofar as practical effect. As to your suggestion in paragraph (5), I certainly agree that the opinion could have been written that way, but it seems to me that it can equally well and justifiably be written the way I have written it.

I agree that to the extent we differ, it is not on substantive points of law or inaccurate references to legal documents, but on emphasis. Although I prefer to keep the opinion the way it is so long as it commands a Court, I appreciate your sending me the comments--even though those with which I disagree!

Sincerely,



Justice Blackmun

Copies to the Conference

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0\$1377H 13-NOV-81 DRB

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

Circulated: _____
Recirculated: _____

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-1377

CASPAR W. WEINBERGER, SECRETARY OF DE-
FENSE, ET AL., PETITIONERS *v.* CATHOLIC
ACTION OF HAWAII/PEACE EDUCATION
PROJECT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[November —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

The Court of Appeals for the Ninth Circuit held that § 102 (2) (C) of the National Environmental Policy Act of 1969 (NEPA), 42 U. S. C. § 4332 (2) (C), requires the Navy to prepare and release to the public a "Hypothetical Environmental Impact Statement" with regard to the operation of a facility capable of storing nuclear weapons. *Catholic Action of Hawaii/Peace Education Project v. Brown*, 643 F. 2d 569, 572 (CA9 1980). Because we conclude that the "Hypothetical Environmental Impact Statement" is a creature of judicial cloth, not legislative cloth, and that it is not mandated by any of the statutory or regulatory provisions upon which the Court of Appeals relied, we reverse its decision.

The facts relevant to our decision are not seriously controverted. Pursuant to a decision by the Navy to transfer ammunition and weapons stored at various locations on the island of Oahu, Hawaii, to the West Loch branch of the Lualualei Naval Magazine, the Navy prepared an Environmental Impact Assessment¹ (EIA) concerning how the plan

¹ An Environmental Impact Assessment is a document prepared by a federal agency in order to determine whether a formal Environmental Impact Statement should be prepared. See 40 CFR § 1508.9 (1981).

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice O'Connor

80-1377 - Weinberger v. Catholic Action of
Hawaii/Peace Education Project

From: Justice Stevens

Circulated: NOV 5 '81

Recirculated: _____

JUSTICE STEVENS, concurring.

The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4331 et seq., contains two directives relevant to this case. First, the statute requires that "to the fullest extent possible" all agencies of the federal government shall "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement. . . ." Second, the statute provides that copies of such statement "shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5. . . ." As I read these independent requirements, federal agencies must prepare environmental impact statements in connection with proposals for major federal action even in situations in which the EIS need not be made public. The reason for this is clear: an environmental impact statement is intended to affect the decisionmaking process, and not merely to provide information to the public.

This case concerns the Navy's obligation to prepare an EIS, not its obligation to disclose it. In Kleppe v. Sierra Club, 427

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 12, 1981

Re: 80-1377 - Weinberger v. Catholic
Action of Hawaii/Peace Education

Dear Bill:

Please join me. I, of course, am withdrawing my
separate writing.

Respectfully,



Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 3, 1981

No. 80-1377 Weinberger v. Catholic Action of Hawaii

Dear Bill,

I would join your opinion in the referenced case to the extent it holds that the Navy is not required either to publish an EIS concerning classified matters, or to prepare a "hypothetical" EIS just to have something to publish. I cannot agree, however, with the last two paragraphs of your opinion, in which you go on to conclude that NEPA does not require the Navy to prepare a classified EIS.

As I read NEPA, the statute separately requires that an EIS (1) be prepared, and (2) made public. The language requiring that an EIS be prepared does not exempt military agencies or classified actions, but simply directs that: "to the fullest extent possible ... all agencies of the Federal Government shall include" a detailed EIS "in every recommendation or report on proposals for ... major Federal actions significantly affecting the quality of the human environment." [Emphasis added.] The section requiring that an EIS be made public, §102(2)(C), by contrast, does exempt classified proposals by including Exemptions 1 and 3 of the FOIA by reference. Under the assumption that the West Loch project is a major federal action (as the district court found), I thus conclude that the Navy is required to prepare--but not to publish--an EIS.

I do not understand the Government to have argued to the contrary. The Solicitor General states (Pet. for Cert. 9-10; Brief for Petitioners 13-14) that the Department of Defense conforms to NEPA in its activities, both classified and unclassified. The Department's regulations could not be more straightforward:

The fact that a proposed action is of a classified nature does not relieve the proponent of the action from complying with the requirements of [NEPA as set forth in the Department's implementing regulations]. ... Environmental statements, both draft and final, shall be prepared, safeguarded and disseminated

- 2 -

in accordance with the requirements applicable to classified information

32 C.F.R. § 214.8(i) (1979).

The regulations of the Council on Environmental Quality are to the same effect:

Environmental assessments and environmental impact statements which address classified proposals may be safeguarded and restricted from public dissemination in accordance with agencies' own regulations applicable to classified information.

40 C.F.R. §1507.3(c) (1979).

In the Government's brief, the Solicitor General asserted that the issue in this case is "limited to ... the provisions of NEPA relating to the public development, disclosure and dissemination of environmental impact statements." Brief for Petr. 11 [Emphasis in original.] I would not reach out to address anything more.

Sincerely,



Justice Rehnquist

Copies to the Conference

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 7, 1981

No. 80-1377 Weinberger v. Catholic Action of
Hawaii/Peace Education Project

Dear Bill,

Please join me in the revised opinion in the
referenced case.

Sincerely,

Sandra

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 12, 1981

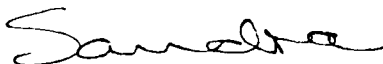
No. 80-1377 Weinberger v. Catholic Action

Dear Bill,

As you know, I have joined your opinion in the referenced case. However, Harry's suggestions concerning the meaning of NEPA and the regulations are consistent with my original memo to you on the subject and I think he is correct. I would prefer to see the opinion recognize directly that both the statute and the regulations require the development of an EIS if the Navy proposes to store nuclear weapons at West Loch.

I believe it would be desirable to have additional Justices join in the majority opinion and, therefore, would encourage you to make the additional changes even though you already have my vote.

Sincerely,



Justice Rehnquist

cc: Justice Blackmun