Winter 2014

U.S. Military Accountability For Extraterritorial Environmental Impacts: An Examination Of Okinawa, Environmental Justice, And Judicial Militarism

Alan Ramo
Golden Gate University School of Law, alan_ramo@att.net

Recommended Citation
28 Tul. Envtl. L.J. 53 (2014)

U.S. Military Accountability for Extraterritorial Environmental Impacts: An Examination of Okinawa, Environmental Justice, and Judicial Militarism

Alan Ramo*

Local resistance to the relocation of a U.S. military base to a bay threatening an endangered sea mammal off the coast of the island of Okinawa raises important issues regarding the extraterritoriality of U.S. environmental laws, the role of the courts in reviewing military operations, and ultimately environmental justice. These issues are being played out in an island community that for centuries has tried to survive by balancing the great powers of China, Japan, and the United States. Okinawans now find themselves a minority subject to discrimination in Japan and still suffering from the impacts of the legacy of U.S. occupation and continued use of U.S. bases on their culture, economy, and environment.

Federal courts continue to inconsistently sort out the extraterritoriality of U.S. laws, including environmental laws. Already one federal court has applied the National Historical Preservation Act to this controversy in Okinawa. Strong arguments remain that the National Environmental Policy Act and the Endangered Species Act should also apply to the U.S. military's actions in Okinawa. Although the modern United States Supreme Court has reversed earlier cases and given great deference to military operations, a form of judicial militarism, environmental justice demands and case law allows these environmental laws to shape U.S. military conduct on Okinawa and protect its environment.

 Professor Alan Ramo is the Co-Director of Golden Gate University School of Law's Center for Urban Environmental Law and was formerly the school's Acting Dean and Co-Founder and Director of its Environmental Law and Justice Clinic. He received his B.A. from Stanford University, his J.D. from Boalt Hall, U.C. Berkeley School of Law, and is a member of the State Bar of California. Professor Ramo wishes to thank Nicholas Yost, Dentons law firm partner, for his advice and Tulane Professor Oliver Houck for his encouragement in developing this Article.

> But the Pentagon is not yet sovereign. The military is simply another administrative agency, insofar as judicial review is concerned.
>
> —Honorable William Douglas[1]

> *Environmental Justice* opposes military occupation, repression and exploitation of lands, peoples and cultures, and other life forms.
>
> —Principles of Environmental Justice[2]

> But my job is to teach these natives the meaning of Democracy and they're going to learn Democracy if I have to shoot every one of them.
>
> —Fictional Col. Wainright Purdy III[3]

---

1. Parisi v. Davidson, 405 U.S. 34, 51 (1972) (Douglas, J., concurring) (citing Comment, *Military Trial of Civilian Offenses: Drumhead Justice in the Land of the Free*, 43 S. CAL. L. REV. 356, 377-78 (1970)).

2. First Nat'l People of Color Envtl. Leadership Summit, Washington, D.C. (Oct. 24-27, 1991); *The Principles of Environmental Justice (EJ)*, ENVTL. JUST. RESOURCE CENTER, http://www.ejnet.org/ej/principles.pdf (last updated Apr. 6, 1996).

I. INTRODUCTION

A renewed battle over the proposed relocation of the United States Marine Corps Air Station (MCAS) Futenma on the island of Okinawa, Japan, raises a web of issues regarding the U.S. military's environmental and, in particular, its environmental justice obligations abroad. It also raises profound issues about the role of the courts in overseeing military operations. To some extent, one can collapse these issues into the extraterritoriality of U.S. environmental laws. All of these questions focus upon an extremely endangered mammal barely surviving near a proposed military base expansion on an island that for hundreds of years has tried to find some autonomy and balance among competing great powers.

What makes Okinawa such an interesting setting is its historical and judicial context. Okinawa has now "reverted" to Japan after U.S. occupation and centuries of influence and control by China and Japan. However, the United States continues to operate bases in Okinawa as a legacy of World War II and its dominant, nearly colonial, occupation of Okinawa. Bases remain in Okinawa because of perceived security threats from North Korea and China and the history of conflict in Southeast Asia. It thus remains a major force on the island.[4]

For that reason, the ability of U.S. courts to oversee U.S. military operations is a critical question for the Okinawans. Federal courts continue to inconsistently sort out the extraterritoriality of U.S. laws, including environmental laws. Already, one federal court has applied the National Historical Preservation Act (NHPA) to this controversy in Okinawa.[5] Strong arguments remain that the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA) should also apply to the U.S. military's actions in Okinawa.

The modern United States Supreme Court has reversed earlier decisions and given great deference to military operations, establishing what this Article charges is a kind of "judicial militarism." Thirty-two years ago, Justice Douglas could write the words quoted at the beginning of this Article calling the U.S. military just another administrative agency during the unpopular Vietnam War. Today, Chief Justice Roberts has no

---

3. JOHN PATRICK, THE TEAHOUSE OF THE AUGUST MOON act 1, sc. 1, at 13 (1957).

4. This Article's author became acquainted with Okinawa's history, environmental challenges, and struggle for self-determination and justice while serving there as a staff attorney for a nonprofit antiwar center representing U.S. military personnel during the latter years of the Vietnam War.

5. Okinawa Dugong v. Rumsfeld, No. C 03-4350 MHP (N.D. Cal. Mar. 2, 2005).

hesitation to hold that military preparedness in the absence of a war is a sufficient basis to trump environmental laws even in U.S. coastal waters.[6]

Nevertheless, this Article suggests that the text of binding U.S. environmental statutes, properly interpreted case law, and policy based upon environmental justice standards allows U.S. environmental laws to shape U.S. military conduct on Okinawa and protect its environment. Part II of this Article provides a very brief overview of Okinawa's history. Part III discusses the U.S. military occupation and Okinawa's reversion to Japan. Part IV focuses on the political and legal conflict surrounding the relocation of the MCAS Futenma. Part V examines the extraterritoriality of two applicable U.S. environmental laws. Part VI attempts to reconcile the law of extraterritoriality, the demands of environmental justice in Okinawa, and what I describe as the philosophy of judicial militarism in the federal courts.

II. OKINAWAN HISTORY

"[T]he postwar 'Okinawa problem' was produced by events set in train long ago by accidents of geography and history."[7] Okinawa is the largest island of Japan's Okinawa Prefecture's more than 160 islands, known as the Ryukyu Islands or archipelago.[8] Known as the "Keystone of the Pacific," it is located strategically, often to its peril, between Japan, China, Taiwan, and South and North Korea.[9]

"The Ryūkyūan are an indigenous group of people[]."[10] Okinawa currently has 1.4 million people in the Prefecture.[11] The people speak distinct languages. Okinawans have their own political, cultural, and religious traditions, while incorporating cultural traditions imported from China and Japan.[12]

---

6. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008).

7. GEORGE H. KERR, OKINAWA, THE HISTORY OF AN ISLAND PEOPLE 3 (Tuttle Publ'g 2000). Kerr's text was first published in 1958, *id.*, at the request of the island's U.S. military civil administrator and may reflect U.S. policy bias as a result, but it is a seminal detailed history.

8. *Okinawa Information*, KADENA AIR BASE (Oct. 15, 2012), http://www.kadena.af.mil/library/factsheets/factsheet.asp?id=7287. The island is 67 miles long and can be as little as two miles and as large as seventeen miles wide. *Id.*

9. *Id.* It is closer to Manila, Taipei, Shanghai, and Seoul than Tokyo. Minority Rights Grp. Int'l, *World Directory of Minorities and Indigenous Peoples—Japan: Ryukyuans (Okinawans)*, REFWORLD (2008), http://www.refworld.org/type,countryrep,mrgi,jpn,49749cfdc,0.html.

10. Minority Rights Grp. Int'l, *supra* note 9.

11. *Okinawa's Population Estimated To Exceed 1.4 Million*, RYUKYU SHIMPO (Aug. 31, 2011), http://english.ryukyushimpo.jp/2011/09/09/2816/.

12. Minority Rights Grp. Int'l, *supra* note 9. These languages are considered part of the Japonic language family, which also includes Japanese, while the Japanese consider these languages dialects. *Id.*

The Okinawan people have a long history of delicately balancing their position between China and Japan, and eventually the United States.[13] In 1372, the Okinawa kingdom peacefully accepted China's supremacy, which practically meant that it had a formal trading relationship with the Chinese empire and paid it tribute.[14] Japan became increasingly interested in Okinawa and was making its own demands on Okinawa for tribute by 1480.[15]

The restoration of imperial authority in Japan and Japan's emergence as a world power in the nineteenth century resulted in part from Western powers opening up trade and concessions in China and elsewhere in Southeast Asia. In the midst of this period came the United States' Commodore Matthew Perry and his war ships, which stopped at Okinawa.[16] Meanwhile, Okinawa continued to pay tribute to China, and Okinawa's king secretly asked for China's help to ward off Japan.[17]

Technically, Okinawa remained a separate kingdom until the Japanese annexed the Ryukyu Islands in 1879, deposed the king, and took over administrative responsibilities.[18] With Japanese annexation, Okinawans found themselves perceived as a distinct minority in a larger country and discriminated against officially—through the banning of their language—and other less official methods:[19] "From this point on, the treatment of the Ryūkyūans is one which many indigenous peoples around the world are familiar with: loss of traditional forms of government and control over land and resources, as well as steps to supplant their distinct cultural and spiritual beliefs."[20]

Japan's assertion of its "mythical homogeneity" exacerbated the problem, as Okinawans were already perceived as being "strange" .and

---

13. KERR, *supra* note 7, at 3. Prior to the first brief American occupation of Okinawa in 1854 by Commodore Matthew Perry, it was a community "maintained without arms through a period of 450 years, a nation of courteous officials, farmers, fishermen, and traders." *Id.*

14. *Id.* at 66. While generally Okinawa was a peaceful nation, there is a history on the island of competing kingdoms engaged in intrigue and succession conflicts. Okinawa was finally unified in 1429. *Id.* at 15, 86.

15. *Id.* at 140. Japan did successfully invade in 1609 and exercise effective economic control thereafter, though the Chinese did their best to maintain their influence with the elite. *See id.* at 158, 166.

16. *Id.* at 354.

17. *Id.* at 370.

18. *Id.* at 10. Japan "peacefully," though with a garrison of troops ready, abolished the kingdom, in part to preempt an expected visit by former U.S. President Ulysses Grant (who was feared to be interested in helping the Okinawans). *Id.* at 382-83, 387.

19. Steve Rabson, *Being Okinawan in Japan: The Diaspora Experience*, ASIA-PAC. J.: JAPAN FOCUS (Mar. 19, 2012), http://www.japanfocus.org/-Steve-Rabson/3720 ("At that time signs excluding Korean and Okinawan workers were everywhere in Osaka." (citation omitted)).

20. Minority Rights Grp. Int'l, *supra* note 9.

"wrong."[21] Japan denies any notion that there is a separate Okinawan ethnicity that is subject to discrimination.[22]

The great catastrophe for Okinawa was the Japanese military mobilization and occupation in World War II. Okinawa formed the outer defense line for Japan.[23] Local people "were forced to suffer great privation in yielding their meager stores to the occupying forces."[24]

Okinawa's geography led to the horrific battle for Okinawa; it was part of the United States' island-skipping strategy to bring the war to mainland Japan. In eighty-two days, 12,000 American servicemen, 90,000 Japanese military men, and 62,000 Okinawans died.[25]

While Okinawans had some awareness of a growing danger, "[t]o the very last the government refused to disclose the gravity of Japan's war position or to alert the public to the imminence of disaster."[26] According to the Congressional Research Service, "Many Okinawans remember this battle as a dark episode in a long history of the Japanese central government sacrificing Okinawa for the good of the mainland."[27]

Okinawans directly connect Japan's annexation and discrimination with the U.S. military bases in Okinawa.[28] As stated by the Congressional Research Service analysts: "The attitudes of native Okinawans toward U.S. military bases are generally characterized as negative, reflecting a tumultuous history and complex relationships with 'mainland' Japan and with the United States."[29]

---

21. Rabson, *supra* note 19.

22. Minority Rights Grp. Int'l, *supra* note 9.

23. KERR, *supra* note 7, at 463. The Japanese military built airfields, and "three full divisions of Japanese soldiers (more than the total local population) were quartered there at the war's end." *Id.*

24. *Id.*

25. *Id.* at 5 ("[T]he great majority were civilians caught helplessly between opposing armies."). The Congressional Research Service suggests the deaths of civilians may have been much higher, in the 40,000-100,000 range. EMMA CHANLETT-AVERY & IAN E. RINEHART, CONG. RESEARCH SERV., R42645, THE U.S. MILITARY PRESENCE IN OKINAWA AND THE FUTENMA BASE CONTROVERSY 3 (2012) (citing SABURO IENAGA, THE PACIFIC WAR, 1931-1945, at 185 (Random House, Inc., 1978)).

26. KERR, *supra* note 7, at 466.

27. CHANLETT-AVERY & RINEHART, *supra* note 25, at 4.

28. Minority Rights Grp. Int'l, *supra* note 9 ("At present, the United States' military presence and the discriminatory policies of the Japanese government that facilitate the US military occupation of the islands dominate the time and energy of most politically active groups in Okinawa.").

29. CHANLETT-AVERY & RINEHART, *supra* note 25, at 3.

III. U.S. MILITARY OCCUPATION AND REVERSION

The post-war history and status of U.S. forces in Okinawa are critical elements in determining the application of U.S. environmental laws to the U.S. military base siting in Okinawa. After World War II, the U.S. military occupied Okinawa as enemy territory (captured at great cost) and wanted to retain control.[30] The war left the Okinawan society and its infrastructure destroyed.[31] The U.S. military took over the existing Japanese military bases and built many more, sometimes by seizing the land.[32]

After years of indecision within the U.S. government about how to preserve its control over Okinawa, the United States signed a peace treaty with Japan in 1951, which determined Okinawa's future.[33] In article 3 of the treaty, the United States established its total control over Okinawa, though technically Japan retained title, so Okinawa would not be legally considered a colony or U.S. territory: "[T]he United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters."[34] The United States proceeded to rule Okinawa, in most respects, like a colony.[35]

The United States strengthened its military hold on Okinawa while bringing investment and aid, producing a fast-growing economy.[36] This base-dependent economy, however, also created dysfunctions in Okinawan society. Bases physically displaced agricultural land and absorbed agricultural laborers.[37] Okinawan base communities developed catering to military personnel, causing significant damage to Okinawan

---

30. NICHOLAS EVAN SARANTAKES, KEYSTONE, THE AMERICAN OCCUPATION OF OKINAWA AND U.S.-JAPANESE RELATIONS 22 (2000); *see* United States v. Ushi Shiroma, 123 F. Supp. 145, 148 (D. Haw. 1954) ("The United States has . . . acquired, and still retains, what may be termed a 'de facto sovereignty' [over Okinawa]." (quoting Cobb v. United States, 191 F.2d 604, 608 (9th Cir. 1951) (alteration in original))).

31. SARANTAKES, *supra* note 30, at 31.

32. CHANLETT-AVERY & RINEHART, *supra* note 25, at 4 ("The United States paid locals for the acquired land, but in some cases this purchase reportedly involved deception or outright coercion, using bulldozers and bayonets to evict unwilling residents.").

33. *See* Treaty of Peace, U.S.-Japan, art. 14, Sept. 8, 1951, 3 U.S.T. 3169.

34. *Id.* art. 3; *see Ushi Shiroma*, 123 F. Supp. at 148 (citing San Francisco Conference on Japanese Peace Treaty: Statement by John Foster Fulles, 25 DEP'T ST. BULL. 447, 452-59 (1951)); KERR, *supra* note 7, at 7.

35. SARANTAKES, *supra* note 30, at 61.

36. *See id.* (citing U.S. OFFICE OF THE FED. REGISTER, PUBLIC PAPERS OF THE PRESIDENT OF THE UNITED STATES: DWIGHT D. EISENHOWER, 1960-61 ¶ 198, at 513 (2005)); *Text of Eisenhower's Report to the Nation on Far East Trip*, N.Y. TIMES, June 28, 1960, at 4).

37. SARANTAKES, *supra* note 30, at 69.

women.[38] "An air force analysis estimated that 90 percent of all the bars catering to Americans were fronts for organized prostitution."[39] Okinawan sources report a survey conducted in 1969 finding that 7,400 women worked in the sex industry.[40]

Meanwhile, U.S. military and civilian administrators ruled Okinawa. Slowly, Okinawa was given the ability to elect local and regional officials. Okinawans were becoming a force of their own with frequent massive protests, including antiwar protests, as the United States became embroiled in Vietnam.[41]

Eventually, the saga of diplomatic and political machinations in the United States and Japan over what to do about Okinawa culminated in 1971 when Japan and the United States adopted a 1972 treaty reverting administrative control to the Japanese.[42] Articles II and III of the treaty assured that Okinawa was subject to the security treaties and agreements previously signed in 1960 and 1953 allowing continued U.S. base operations. The 1960 security treaty provided, "[T]he United States of America is granted the use by its land, air and naval forces of facilities and areas in Japan."[43] The 1960 Status of Forces Agreement stated, "Within the facilities and areas, the United States may take all the measures necessary for their establishment, operation, safeguarding and control."[44]

At the time of reversion, the Japanese legislature separately passed a resolution calling for base reduction in Okinawa.[45] However, the U.S. bases remained, and only slowly has the United States reduced its presence. "The main island of Okinawa comprises 0.6% of Japan's land area and is smaller than Long Island, yet it hosts 74% of the [U.S.]

---

38. In 1974, the author personally observed run-down communities adjacent to the bases, typical of what one would find in third-world communities impacted by the U.S. military, with cheesy disco clubs, cheap restaurants and women soliciting.

39. SARANTAKES, *supra* note 30, at 73.

40. Suzuyo Takazato, *Violence Against Women Under Long-Term U.S. Military Station in Okinawa*, JCA-NET 11-12, http://www.jca.apc.org/wsf_support/2004doc/WSFJapUSBaseRepoFinalAll.pdf (last visited Sept. 18, 2014).

41. SARANTAKES, *supra* note 30, at 195. One protest resulted in the cessation of bombing runs from the Kadena Air Force Base during the Vietnam War. *Id.*

42. *See* Agreement Concerning the Ryukyu Islands and the Daito Islands, U.S.-Japan, at 564, June 17, 1971, 23 U.S.T. 446; *see also* SARANTAKES, *supra* note 30, ch. 29.

43. Treaty of Mutual Cooperation and Security, U.S.-Japan, art. VI, Jan. 19, 1960, 11 U.S.T. 1632.

44. Agreement Under Article VI of the Treaty of Mutual Cooperation and Security, Regarding Facilities and Areas and the Status of the United States Armed Forces in Japan, U.S.-Japan, art. III, para. 1, Jan. 19, 1960, 11 U.S.T. 1652 [hereinafter 1960 Status of Force Agreement].

45. SARANTAKES, *supra* note 30, at 192.

military bases in Japan."[46] About half of the 38,000 U.S. military personnel stationed in Japan are in Okinawa.[47] As recently as 2012, there were an additional 50,000 U.S. residents.[48]

The Okinawans now find themselves balancing being a minority in Japan while continuing to be subject to the legacy of occupation by a superpower, the United States. These dynamics of Okinawan life are fueling the controversy and opposition to the MCAS Futenma relocation.

IV. THE MCAS FUTENMA RELOCATION CONFLICT

A. Background

After a particularly heinous rape of a twelve-year-old Okinawan girl in 1995, Japanese and U.S. authorities, operating as the bilateral Security Consultative Committee (SCC) (created under the nations' security treaty), formed a Special Action Committee on Okinawa (SACO) with the purpose of reducing the burden of the United States' presence on Okinawa.[49] The SEC recommended twenty-six initiatives, including the relocation of the MCAS Futenma off Okinawa's east coast and the return of the original base's land to Okinawa once replacement facilities were constructed. In 1996, SACO created the Futenma Implementation Group (FIG) to develop these plans.[50]

The MCAS Futenma is currently located in Ginowan City. As often happens with U.S. overseas military bases, social and economic conditions led to an influx of urban development to the point that the city now surrounds the base.[51] Japanese officials, driven by objections from Okinawans concerned with their safety (fears of aircraft crashes were confirmed in 2004) and tired of the noise, pollution, and crime, called for

---

46. Japan Culture NYC, *Nago Mayor Says US Bases "a Legacy of Misery" in Okinawa*, ROCKET NEWS 24 (May 24, 2014), http://en.rocketnews24.com/2014/05/24/nago-mayor-says-us-bases-a-legacy-of-misery-in-okinawa/.

47. CHANLETT-AVERY & RINEHART, *supra* note 25, at 8.

48. *Okinawa Information*, *supra* note 8.

49. Sangwon Yoon, *Okinawa Mayor Invokes Sea Cow Deaths To Stop U.S. Base*, BLOOMBERG NEWS (May 21, 2014), http://Bloomberg.com/news/2014-05-21/Okinawa-mayor-invokes-sea-cow-deaths-to-stop-u-s-base.html; *see* Okinawa Dugong v. Gates, 543 F. Supp. 2d 1082, 1085 (N.D. Cal. 2008).

50. Okinawa Dugong v. Rumsfeld, No. C 03-4350 MHP, slip op. at 2 (N.D. Cal. Mar. 2, 2005) (discussing *The SACO Final Report on Futenma Air Station*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN § 1.c (Dec. 2, 1996), http://www.mofa.go.jp/region/n-america/us/security/96saco2.html).

51. Yoshio Shimoji, *The Futenma Base and the U.S.-Japan Controversy: An Okinawan Perspective*, ASIA-PAC. J.: JAPAN FOCUS (May 3, 2010), http://www.japanfocus.org/site/make_pdf/3354.

the closure of the base and its relocation.[52] U.S. authorities saw the value in removing its air activities to a less-congested area.

However, in December 1996, the SCC members approved replacing the MCAS Futenma with an offshore sea-based facility (SBF) somewhere off the east coast of Okinawa. The SCC created FIG, a bilateral Japan-U.S. committee under the SCC's supervision, to implement the plan.[53] The United States Department of Defense (DOD) funded FIG at around $4 million a year.[54] In 1997, while the Japanese government was charged with selecting the specific site, the DOD provided the specific parameters for the new base. Pursuant to those requirements, the governor of Okinawa designated the precise SBF site in 1999—an area in Henoko Bay that would become a landfill, adjacent to Camp Schwab, located next to a town in the North called Nago.[55]

Nago has been described as "a tourist town with beautiful beaches and a pineapple park. Its waters are home to gorgeous coral and seagrass beds."[56] Part of the municipality is a fishing hamlet known as Henoko.[57] During the Vietnam War, 150 to 200 "G.I. bars" operated in the "entertainment" area of Henoko, "with many also functioning as second-floor brothels."[58] More recently, only sixteen bars remain, and Henoko has been described as a sleepy hamlet, with its residents engaged partly with agriculture and fishing but mainly subsisting on income from the base through land rentals and employment, construction projects, and small family stores.[59]

---

52. Martin Fackler, *In a City on Okinawa, Mayor's Re-Election Deals a Blow to Marine Base Relocation Plan*, N.Y. TIMES, Jan. 20, 2014, at A6.

53. *Dugong*, No. C 03-4350 MHP, slip op. at 2 (discussing *The SACO Final Report on Futenma Air Station*, *supra* note 50, § 1.c).

54. *Id.* at 3 (citing DEP'T OF THE NAVY, FY1999 AMENDED BUDGET ESTIMATES: JUSTIFICATION OF ESTIMATES 16 (1998)).

55. *Henoko Ordnance Ammunition Depot*, GLOBALSECURITY.ORG, http://globalsecurity.org/military/facility/henoko.htm (last visited Sept. 28, 2014). Targeting the bay next to Camp Schwab could not have been much of a surprise, given the Marine Corps' prior efforts to expand into the bay. *Id.* In 1962, the military had a plan to build a military port and actually began blasting and drilling in the waters to expand the bay. Steve Rabson, *Henoko and the U.S. Military: A History of Dependence and Resistance*, ASIA-PAC. J.: JAPAN FOCUS (Jan. 23, 2012), http://www.japanfocus.org/site/make_pdf/3680. Protests by local fishermen warded off that idea. *Id.*

56. Japan Culture NYC, *supra* note 46.

57. Fackler, *supra* note 52, at A6.

58. Rabson, *supra* note 55 ("Aside from admonitions by chaplains, the military did little to discourage the widespread patronage of prostitutes. In fact, official policies had the effect of encouraging it.").

59. *Id.* (citation omitted).

Nearby, there is still an unspoiled coastline.[60] The landfill would likely destroy the area's coral reef and potentially damage nearby habitat, including the few remaining seagrass beds in the area. These seagrass beds are fed on by the endangered Okinawa dugong, a cousin of the U.S. manatee. The Okinawa dugong is isolated and genetically distinct, with only 50 of them still surviving off Okinawa's coast.[61]

The Okinawa dugong is quite a symbol for U.S. insensitivity to Okinawans. It is associated with Okinawa's creation mythology, folklore, and rituals of traditional Okinawan culture.[62] Its main predators are humans.[63] The Japan Ministry of the Environment has listed it as endangered and as a protected "natural monument" on the Japanese Register of Historic Places, Places of Scenic Beauty and/or Natural Monuments under its "Law for the Protection of Cultural Properties."[64]

Nago actually held a referendum on whether to support the relocation in 1997. A majority of the residents voted against the proposal.[65] However, the national government used its financial and political resources to change the mind of local officials, including a succession of town mayors.[66] Local construction, bars, and restaurant businesses looked forward to the economic benefits of a larger base. Nevertheless, in 1998, 78% of Henoko residents signed a petition circulated by an antibase organization opposing the base.[67]

Given these economic incentives and political pressures, the then current Nago mayor accepted the site location in 1999, a month after the

---

60. Yoon, *supra* note 49.

61. *See* John Roach, *Rare Japanese Dugong Threatened by U.S. Military Base*, NAT'L GEOGRAPHIC NEWS (Aug. 23, 2007), http://news.nationalgeographic.com/news/pf/61082026.html. The Okinawa dugong is related to Southeast Asia's dugongs, which can be found from Japan to Australia. *Id.*

62. Okinawa Dugong v. Rumsfeld, No. C 03-4350 MHP, slip op. at 12 (N.D. Cal. Mar. 2, 2005) (citing Declaration of Isshu Maeda in Support of Plaintiff's Opposition to Defendants' Motion To Dismiss at 2-6, *Dugong*, No. C 03-4350 MHP [hereinafter Declaration of Isshu Maeda]).

63. Roach, *supra* note 61.

64. *Dugong*, No. C 03-4350, slip op. at 5 (quoting Declaration of Masayuki Yonaha in Support of Defendant's Motion To Dismiss at 3, *Dugong*, No. C 03-4350 MHP).

65. Miyume Tanji, Report, *U.S. Court Rules in the "Okinawa Dugong" Case, Implications for U.S. Military Bases Overseas*, 40 CRITICAL ASIAN STUD. 475, 476 (2008); *see also* CHANLETT-AVERY & RINEHART, *supra* note 25, at 10 (citing WILLIAM L. BROOKS, ASIA-PACIFIC POLICY PAPERS SERIES NO. 9, THE POLITICS OF FUTENMA BASE ISSUE IN OKINAWA: RELOCATION NEGOTIATIONS IN 1995-1997, 2005-2006, at 20 (2010)).

66. Tanji, *supra* note 65, at 476. A G7 summit costing 1.3 billion yen was held in Nago. A "Northern Districts Development Fund" was funded with 100 million yen. *Id.*

67. Rabson, *supra* note 55 (citation omitted).

governor signed off on it.[68] In August 2000, a "Consultative Body of Futenma Relocation" was established to provide a specific plan for the relocation.[69] The body included local and national officials. In 2002, it approved the decision to relocate the Marine Air Station and its assets to the Henoko district (offshore from the Marines' Camp Schwab).[70]

The United States and Japan made additional changes to the design, agreeing in 2006 on a V-shaped runway partially built on a landfill that extends into the bay.[71] But by then, Okinawans and the U.S. environmental groups had joined together to stop the base.

B. Okinawan Activists and U.S. Environmentalists Successfully Sue in Federal Court Under the NHPA

A coalition of Okinawan and Japanese environmental peace groups and activists, along with a U.S. environmental organization represented by U.S.-based Earthjustice, came together behind a U.S. legal strategy to stop the Futenma relocation to the Okinawa coast.[72] The complaint, filed in 2003, initially entitled *Okinawa Dugong v. Rumsfeld*,[73] focused upon the DOD's failure to carry out the requirements of the NHPA.[74] Specifically, the complaint charged that in locating the new site in dugong habitat, the DOD failed to consider the impacts of the base relocation upon the Okinawa dugong.[75]

Congress enacted the NHPA to preserve "the prehistoric and historic resources of the United States and of the international

---

68. *Dugong*, No. C 03-4350 MHP, slip op. at 3 (citing Declaration of John D. Hill in Support of Defendants' Motion To Dismiss at 3, *Dugong*, No. C 03-4350 MHP).

69. Okinawa Dugong v. Gates, 543 F. Supp. 2d 1082, 1085 (N.D. Cal. 2008) (citing Motion for Summary Judgment ex. 15, art. xxv, *Gates*, 543 F. Supp. 2d 1082 (No. C 03-4350 MHP)).

70. *Id.* (citing Motion for Summary Judgment ex. 13, *Gates*, 543 F. Supp. 2d 1082 (No. C 03-4350 MHP)).

71. *Id.* at 1086 (citing Motion for Summary Judgment ex. 19, *Gates*, 543 F. Supp. 2d 1082 (No. C 03-4350 MHP)). Each runway would be 1,600 meters in length plus 200 meters as "overrun" areas. *Id.*

72. *Id.* at 1083. The complaint also lists the Okinawa Dugong as one of the plaintiffs, hence the name of the case, but the court dismissed it as a plaintiff per Ninth Circuit precedent that the APA only allows suits by persons. *Id.* at 1093 (citing Cetacean Cmty. v. Bush, 386 F.3d 1169 (9th Cir. 2004)). The plaintiffs were the Center for Biological Diversity, Turtle Island Restoration Network, Japan Environmental Lawyers Federation, Save the Dugong Foundation, Dugong Network Okinawa, Committee Against Heliport Construction, Save Life Society, Anna Koshiishi, Takuma Higashionna, and Yoshikazu Makishi. Complaint for Declaratory and Injunctive Relief at 1, *Dugong*, No. C 03-4350 MHP.

73. *See Dugong*, No. C 03-4350 MHP, slip op. at 1.

74. 16 U.S.C. § 470a-2 (2012).

75. Complaint for Declaratory and Injunctive Relief, *supra* note 72, at 2.

community of nations."[76] While originally directed towards federal actions within the United States, a more recent amendment, section 402 of the NHPH, applies to any federal undertaking of an action outside the United States that "may directly and adversely affect a property . . . on the World Heritage List or on the applicable country's equivalent of the National Register."[77] If a property is so affected, the federal agency carrying out the action must take into account "the effect of the undertaking on such property for purposes of avoiding or mitigating any adverse effects."[78]

The DOD first attacked the complaint on statutory grounds, questioning whether "historical preservation" applied to a living animal.[79] The statute's section explicitly allowing extraterritoriality refers to actions affecting "a property."[80] The judge, Marilyn Hall Patel, determined that the animal was indeed "property," as that term is used in the statute, because it was listed under Japan's equivalent of our National Register; therefore, Judge Patel determined that it was entitled to protection under the NHPA.[81]

As the court explained, the Okinawa dugong is listed as a "natural monument" under Japan's "Cultural Resources Protection Law" and the NHPA is explicit in its extraterritoriality to assure United States compliance with the Convention Concerning the Protection of the World Cultural and Natural Heritage.[82] The court recognized that the Convention, and the NHPA's corresponding amendments intended to come under the Convention, appreciated that cultures vary, so inevitably, what each country lists as culturally important will vary.[83] As the court put it, "To require identical definitions of culture would eviscerate section 470a-2's explicit recognition of 'equivalent' foreign lists."[84] That

---

76. 16 U.S.C. § 470-1(b)(2).

77. *Id.* § 470a-2.

78. *Id.*

79. Okinawa Dugong v. Rumsfeld, No. C 03-4350 MHP, slip op. at 9 (N.D. Cal. Mar. 2, 2005).

80. 16 U.S.C. § 470a-2.

81. *Dugong*, No. C 03-4350 MHP, slip op. at 12 (mentioning 16 U.S.C. § 470a-2). While this decision has received some commentary questioning its validity, the court's analysis is a good example how a U.S. law can be artfully applied extraterritorially without interfering with foreign policy or military necessity. *See* Lauren Jensen Schoenbaum, *The Okinawa Dugong and the Creative Application of U.S. Extraterritorial Environmental Law*, 44 TEX. INT'L L.J. 457, 471-73 (2009).

82. *Dugong*, No. C 03-4350 MHP, slip op. at 17.

83. *Id.* at 10-11 (citing Declaration of Thomas F. King, Ph.D. in Support of Plaintiffs' Opposition to Defendants' Motion To Dismiss at 21, *Dugong*, No. C 03-4350 MHP [hereinafter Declaration of Thomas F. King]).

84. *Id.* at 11.

is, Congress, by explicitly requiring deference to another nation's list of protected cultural properties, was accepting that what another country considers to be culturally important may be different than what the United States considers to be culturally important.

The court further noted that practically, the approaches by Japan and the United States to what is a culturally significant property resulted in the same bottom line protection. Japan's listing of the Okinawan dugong under its monument law was recognition of its historical and cultural significance.[85] The United States had listed locations because of their role as habitat for historically important animals.[86] The fact that Japan chose to list the actual animal was not deemed a significant difference.[87]

The court then examined whether this approach was consistent with the NHPA's specific definition of "property," which includes the word "object." "Object" is defined by the applicable regulations as "a material thing of functional, aesthetic, cultural, historical or scientific value that may be, by nature or design, movable yet related to a specific setting or environment."[88] With this definition, the court then had no trouble finding that the Okinawa dugong is a "material thing" that has "functional, aesthetic, cultural, historical or scientific value" and, in particular, a special cultural significance in Okinawa.[89]

Applying this regulatory definition of "object," Judge Patel cited uncontroverted evidence that in Okinawan creation mythology, the Okinawa dugong is considered the ancestor of human beings. In traditional Okinawan folklore, "the dugong is revered as a 'female mermaid spirit,' worshiped at special shrines as a deity responsible for successful fishing expeditions, and feared as an 'ocean spirit' capable of creating tsunamis."[90] Other evidence described how shamans and Henoko Bay residents sang songs about the Okinawa dugongs.[91] Therefore, the court found that the Okinawa dugong is "movable yet related to a specific setting or environment," that is, Henoko Bay, and,

---

85. *Id.* at 12 (citing Declaration of Isshu Maeda, *supra* note 62, at 2-6).
86. *Id.* at 11 (citing Declaration of Thomas F. King, *supra* note 83, at 8-9, 16-17).
87. *Id.* (citing Declaration of Thomas F. King, *supra* note 83, at 9).
88. National Register of Historic Places, 36 C.F.R. § 60.3(j)-(2013).
89. *Dugong*, No. C 03-4350 MHP, slip op. at 14 (quoting Declaration of Isshu Maeda, *supra* note 62, at 2-10).
90. *Id.* (citing Declaration of Isshu Maeda, *supra* note 62, at 3, 9).
91. *Id.* (citing Declaration of Isshu Maeda, *supra* note 62, at 10).

ultimately, that it is an object deserving of consideration under the NHPA.[92]

Based upon the above-described analysis, the court found the Okinawan dugong to be a protected property under the NHPA.[93] The court then had to determine whether the U.S. military in its activities prior to 2005 had undertaken an action that threatened the Okinawan dugong. The DOD tried to claim that the project was really being carried out solely by the Japanese and was barred by the Act of State Doctrine.[94] The court rejected the argument:

> It would amount to a legal absurdity for this court to hold that, as a matter of law, a facility constructed on behalf of and for the use of the United States is not a federal undertaking, given the statute's explicit inclusion of any "project, activity, or program . . . carried out by or on behalf of the agency.[95]

Judge Patel's decision is noteworthy for its sensitivity to Okinawan culture and Japanese laws in interpreting a congressional mandate that federal agencies respect international cultural resources. In that respect, it applied a concept of the environmental justice doctrine, which "demands that public policy be based on mutual respect and justice for all peoples" and provides a key for how U.S. courts and the military should be required to proceed in the future.[96]

However, even with this initial decision, the court noted that questions still remained as to whether the United States was in fact continuing to undertake the project, its potential impact to the Okinawan dugong, and whether the United States had properly consulted and considered the fate of the species.[97] These questions are central to whether the court would be able to continue to assure U.S. military compliance with the NHPA without compromising military necessity or foreign policy.

Three years later, in 2008, Judge Patel again reviewed the DOD compliance in *Okinawa Dugong v. Gates*[98] and had the opportunity to focus upon what the project may mean for the Okinawa dugong. Once again, the DOD argued that this was really a project by the Japanese and

---

92. *Id.* (quoting Memorandum of Points and Authorities in Support of Plaintiff's Opposition to Defendants' Motion To Dismiss ex. 3, at 129-30, *Dugong*, No. C 03-4350 MHP).
93. *Id.* at 17 (mentioning National Historic Preservation Act, 16 U.S.C. § 470a-2).
94. *Id.* at 28.
95. *Id.* at 23 (quoting 16 U.S.C. § 470w(7)).
96. *The Principles of Environmental Justice (EJ)*, *supra* note 2.
97. *Dugong*, No. C 03-4350 MHP, slip op. at 22, 26 (mentioning 16 U.S.C. § 470a-2).
98. 543 F. Supp. 2d 1082, 1112 (N.D. Cal. 2008) (mentioning 16 U.S.C. § 470a-2).

the court was imprudently meddling in a foreign country's affairs.[99] The court, after reviewing additional discovery, nevertheless found that the DOD had undertaken the project and that its actions could be reviewed without interfering with a foreign government:

> [T]he United States has been substantially involved in the design and site selection for the FRF, will continue to monitor and oversee the construction of the facility to ensure that it meets U.S. requirements, and will have exclusive authority to operate the facility once it is completed .... This court's review is directed solely at [the] DOD's compliance with the NHPA.[100]

As to the impacts on the Okinawa dugong, the NHPA does not require a showing that undertaking a project will actually destroy a "property" before finding a violation. According to the court, all that is needed is a showing that an adverse effect "may" impact, either "directly or indirectly, any of the characteristics" of a property and that these impacts were not properly considered.[101]

The court easily found that the proposed military facility operating in or near a bay with Okinawa dugong feeding grounds (and where they have been observed) would potentially cause adverse impacts.[102] The impacts ranged from destruction of the Okinawa dugong due to contamination of the seagrass to collisions with boats, "as well as long-term immune and reproductive damage resulting from exposure to toxins and acoustic pollution."[103] The court, based upon the NHPA's explicit requirements and legislative history, ruled that the DOD had to generate and consider information on how the project would affect the Okinawa dugong, develop alternatives or mitigations if necessary, consult with Japan, and do it all before approving the activity.[104]

It is astonishing that, according to the court, the DOD only superficially considered the Okinawa dugong, even after the case was filed in 2003.[105] The DOD claimed it had inadequate information and that there was better seagrass in other locations, and therefore, it could

---

99. *Id.* at 1097-98 (quoting Defendants' Memorandum in Support of Cross-Motion for Summary Judgment at 24, *Gates*, 543 F. Supp. 2d 1082 (No. C 03-4350 MHP)).

100. *Id.* at 1098-99.

101. *Id.* at 1101-02 (quoting 36 C.F.R. § 800.5(a)(1)).

102. *Id.* at 1102.

103. *Id.*

104. *Id.* at 1108 (quoting National Historic Preservation Act, 16 U.S.C. § 470a-2).

105. *Id.* ("The current record contains no evidence that a single official from the DOD with responsibility for the FRF has considered or assessed the available information on the dugong or the effects of the FRF.").

wait for the Japanese who would do their own analysis.[106] However, the court placed the responsibility for compliance with the NHPA squarely upon the DOD and required that if it did not have the information, it needed to get it, study it, and recommend appropriate mitigation.[107] Further, all of this analysis needed to proceed and be concluded well before the eve of construction and before there was an irretrievable allocation of resources.[108]

Particularly revealing of the DOD's approach was a DOD document admitting that the base would cause environmental impacts and suggesting that the Japanese just needed to exercise political will over the "use" of these arguments.[109] Judge Patel nailed the implications of this statement squarely in her opinion:

> Insofar as these statements suggest that DOD need not concern itself with environmental impacts because they are unavoidable and are simply an expedient used by opponents to obstruct the FRF, these statements evince at best, plain ignorance of, and at worst, complete defiance of DOD's obligation to consider the impacts of the FRF on the dugong. The court is unconvinced that DOD has expressed concern for, let alone taken steps to consider the effects of the FRF on the dugong.[110]

The decision in *Gates* is a model for how environmental laws can be applied extraterritorially without interfering with foreign policy, as further discussed in Parts V and VI below. However, while dealing a temporary blow to the base's relocation, Japan and the DOD continued to press ahead.

C. The U.S. Military and Japanese National Government Strike Back

In August 2009, the opposition party, the Democratic Party of Japan (DPJ), swept into power with its leader and then prime minister, Hatoyama Yukio, promising to relocate the MCAS Futenma outside of Okinawa.[111] In 2010, Inamine Susumu also campaigned for Mayor of Nago, opposing the base in Henoko, and won.[112]

---

106. *See id.* at 1109-10 (quoting Declaration of Stephen Getlein in Support of Defendants' Motion To Dismiss at 3-4, *Gates*, 543 F. Supp. 2d 1082 (No. C 03-4350 MHP)).

107. *Id.* at 1111.

108. *Id.* at 1112 (citing 16 U.S.C. § 470a-2).

109. *Id.* at 1108 ("[T]he environmental issues are primarily a question of political will since any option will affect the environment and opponents will use environment-based arguments to advance their cause." (citation omitted)).

110. *Id.*

111. Rabson, *supra* note 55.

112. *Id.*

But in May 2010, Hatoyama broke his promise. He claimed that he had changed his mind about the need for the base for deterrence, though later, after he resigned, he claimed that was a rationalization.[113] The U.S. military and Japan renewed their agreement to build the MCAS Futenma off of Henoko. By December 2013, the governor of Okinawa, with full and unqualified U.S. support, reportedly approved the project[114] after there were "sweeteners" added.[115]

Already, Okinawans have filed a lawsuit to stop the project in Okinawa, and the *Gates* suit has been revived in San Francisco in the United States District Court for the Northern District of California, addressing the DOD's failure to properly analyze project impacts and consult with the public.[116] The mayor of Nago was as resistant as ever, promising to block construction permits[117] and telling a crowd in New York City in May 2014:

> [W]e believe that in 69 years after the war, we have suffered enough under the presence of the US military bases. We have no more capacity to accept a new base on the island. And as a result, the anti-base movement has grown strong. Eighteen years later nothing has changed at Futenma airbase; it is still exactly the same.[118]

V. EXTRATERRITORIALITY OF NEPA AND THE ESA AS IT AFFECTS OKINAWA

While the court's opinions in the *Dugong* and *Gates* opinions were well supported, it is striking how limited the decisions are. A battle over a significant U.S. base siting in prime habitat for an endangered species, filling in a bay, and affecting the social and economic life of a community dependent, at least in part on fishing, is narrowly being addressed under a U.S. law that requires consideration of the species only in terms of its cultural significance as a historical property. More apt in this situation would seem to be a law like NEPA, which requires a broad

---

113. *Id.*

114. Erik Slavin, Chiyomi Sumida & Jon Harper, *Okinawa Governor Signs Off on Long-Delayed Futenma Relocation*, STARS & STRIPES (Dec. 27, 2013), http://www.stripes.com/news/okinawa-governor-signs-off-on-long-delayed-futenma-relocation-1.259407.

115. Chiyomi Sumida, *Okinawa Suit Filed To Stop Work on New Camp Schwab Runway*, STARS & STRIPES (Jan. 15, 2014), http://www.stripes.com/news/okinawa-suit-filed-to-stop-work-on-new-camp-schwab-runway-1.262085 (citing Travis J. Tritten & Chiyomi Sumida, *Okinawa Rakes in Concession as Futenma Decision Looms*, STARS & STRIPES (Oct. 24, 2013), http://www.stripes.com/news/Okinawa-rakes-in-concessions-as-futenma-decision-looms-1.248432).

116. First Supplemental Complaint for Declaratory and Injunctive Relief at 3, Ctr. for Biological Diversity v. Hagel, No C-03-4350 (MHP) (N.D. Cal. filed July 31, 2014).

117. Yoon, *supra* note 49.

118. Japan Culture NYC, *supra* note 46.

comprehensive analysis of environmental impacts, and the ESA, which requires actual protection of endangered animals.[119]

NEPA generally requires that each federal agency, when carrying out a major federal action[120] significantly affecting the quality of the human environment,[121] must provide a detailed statement on all of the action's environmental impacts,[122] adverse environmental effects that cannot be avoided, and alternatives.[123] The agency must also evaluate potential mitigation measures.[124] If an agency fails to fully analyze or consider a project's potential impacts, a court may enjoin the project.[125] NEPA, if applicable to the United States' Okinawa base siting, would be able to address its broad range of impacts, including social and economic impacts, to the extent that they relate to the environmental impacts.[126]

The ESA's thrust is the conservation of endangered and threatened species.[127] It requires, with some notable exceptions, including so-called incidental takes, that each federal agency "insure that any action . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species."[128] The ESA specifically prohibits, though again with some exceptions, the harming or killing of any endangered species.[129]

The Okinawa dugong is listed as protected under the ESA.[130] Thus, the application of NEPA and the ESA to the Okinawa base siting could have a profound impact on the DOD's decision making. As discussed below, the federal case law regarding U.S. environmental laws' extraterritoriality is somewhat inconsistent. However, an argument can

---

119. *See* Schoenbaum, *supra* note 81, at 462-66 (recommending that the United States use NEPA and the ESA to evaluate the impacts on the Okinawa dugong).

120. "Action" may include policies, plans, programs, or projects. 40 C.F.R. § 1508.18(b) (2013).

121. Case law requires the analysis when substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998) (quoting National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(c)).

122. The statement is normally a fully comprehensive Environmental Impact Statement (EIS). 40 C.F.R. § 1502.4.

123. 42 U.S.C. § 4332(2)(C) (2012).

124. 40 C.F.R. § 1502.14(f).

125. *See Blue Mountains Biodiversity Project*, 161 F.3d at 1216.

126. 40 C.F.R. § 1508.14; *see* Alan Ramo, *Environmental Justice as an Essential Tool in Environmental Review Statutes: A New Look at Federal Policies and Civil Rights Protections and California's Recent Initiatives*, 19 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 41, 48-52 (2013).

127. 16 U.S.C. § 1531(c)(1) (2012).

128. *Id.* § 1536(a)(2).

129. *Id.* § 1538(a)(1)(B).

130. 50 C.F.R. § 17.11(h) (2013).

be made that NEPA and the ESA do apply to the Okinawa base relocation.

A. *In Spite of Conflicting Case Law, NEPA and the ESA Should Apply to Washington-Based Environmental Decision Making Affecting Okinawa*

Federal court decisions addressing extraterritoriality of U.S. laws all claim to adhere to the basic presumption against the extraterritoriality of U.S. law: "It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"[131] This presumption rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign, matters.[132] "Thus, 'unless there is the affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect, 'we must presume it is primarily concerned with domestic conditions.'"[133]

Yet when federal courts apply these seemingly straightforward principles, extraterritoriality analysis becomes quite complex and inconsistent. For example, in 1993, the United States Court of Appeals for the District of Columbia Circuit ruled that the presumption does not apply to NEPA in *Environmental Defense Fund v. Massey*.[134] The court found that NEPA did apply to a proposal to incinerate wastes in an open landfill at a U.S. research station in Antarctica. The court distinguished Antarctica as a "global common," analogous to outer space.[135] The court noted that the Supreme Court had recently found that the primary purpose of the presumption is "to protect against unintended clashes between our laws and those of other nations which could result in international discord."[136] The court then identified three situations when the presumption does not apply: (1) where Congress expresses its intention that it does apply, (2) where adverse effects will occur in the United States, and (3) where the conduct to be regulated occurs in the United States.[137]

---

131. EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991) (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)).

132. Smith v. United States, 507 U.S. 197, 204 n.5. (1993).

133. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010) (quoting *Aramco*, 499 U.S. at 248).

134. 986 F.2d 528, 532 (D.C. Cir. 1993).

135. *Id.* at 529 (citing Beattie v. United States, 756 F.2d 91, 99 (D.C. Cir. 1984)).

136. *Aramco*, 499 U.S. at 248 (citing McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20-22 (1963)).

137. *Massey*, 986 F.2d at 531 (quoting *Aramco*, 499 U.S. at 248).

Focusing on the third exception, the court noted that NEPA regulates the decision-making conduct of administrative agencies that is normally carried out in the United States: "Because the decisionmaking processes of federal agencies take place almost exclusively in this country and involve the workings of the United States government, they are uniquely domestic."[138] As a result, "NEPA would never require enforcement in a foreign forum or involve 'choice of law' dilemmas."[139] It was on this basis that the court held that the extraterritoriality presumption does not apply to NEPA.[140]

Admittedly, the court found that "Antarctica's unique status in the international arena further supports our conclusion that this case does not implicate the presumption against extraterritoriality."[141] However, the court noted this distinction after already concluding that the presumption does not apply to NEPA decision making in the United States. The *Massey* court pinpointed the language in *Aramco* that states that the presumption applies only "beyond places over which the United States has sovereignty or *some measure of legislative control*."[142] The *Massey* court cited with approval the D.C. Circuit's assumed approval of NEPA's extraterritoriality in *Sierra Club v. Adams*, which involved a highway in Panama and Colombia with major federal funding. The court found no foreign policy interests or competing sovereign interests preventing the U.S. agency from applying NEPA to its Antarctica activities.[143]

Yet soon afterwards, a district court in the same circuit seemed to rule otherwise in *NEPA Coalition of Japan v. Aspin*.[144] In that case, plaintiffs sought environmental impact studies for certain U.S. military installations in Japan.[145] The district court in the D.C. Circuit, relying upon the Supreme Court case *Foley Bros. v. Filardo*,[146] held that the presumption against the extraterritorial application of statutes limited NEPA's application to U.S. military bases in Japan.[147] The court noted

---

138. *Id.* at 532 (citing Mary A. MacDougall, *Extraterritoriality and the Endangered Species Act of 1973*, 80 GEO. L.J. 435, 445 (1991)).

139. *Id.* at 533.

140. *Id.*

141. *Id.*

142. *Id.* (quoting *Aramco*, 499 U.S. at 248).

143. *Id.* (citing Sierra Club v. Adams, 578 F.2d 389 (D.C. Cir. 1978)).

144. 837 F. Supp. 466, 468 (D.D.C. 1993).

145. *Id.* at 466-67. The brief memorandum opinion fails to delineate which bases were involved, but they appear to be related to Tokyo Bay on the mainland. *See* Thomas E. Digan, Comment, *NEPA and the Presumption Against Extraterritorial Application: The Foreign Policy Exclusion*, 11 J. CONTEMP. HEALTH L. & POL'Y 165, 167 n.17 (1994) (citations omitted).

146. 336 U.S. 281, 285 (1949).

147. *Aspin*, 837 F. Supp. at 467.

that the U.S. bases were operated pursuant to a treaty and the 1960 Status of Forces Agreement. In these circumstances, the court found no evidence that Congress explicitly intended NEPA to apply internationally where there was a security relationship between the United States and a sovereign power.[148] The court distinguished *Massey* based upon Antarctica's different international status; however, it never fully addressed *Massey*'s primary rationale that NEPA only regulates U.S. agency decision making that takes place within the United States.

Later, in 2005, the D.C. district court in *Basel Action Network v. Maritime Administration* held that NEPA does not apply to the high seas due to lack of "legislative control," thereby distinguishing *Massey*.[149] The court questioned the continuing power of *Massey*. The court noted that a month after *Massey*, the Supreme Court in *Smith v. United States* applied the presumption against extraterritoriality to a federal statute's effect in Antarctica.[150] Four months later in *Sale v. Haitian Centers Council, Inc.*, the Supreme Court found that the presumption against extraterritoriality has "special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility."[151] However, neither case cited *Massey* nor addressed *Massey*'s third exception.

In 2005, the United States Court of Appeals for the Ninth Circuit in *ARC Ecology v. United States Department of the Air Force* also confronted the issues of extraterritoriality when evaluating the application of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[152] to former U.S. bases in the Philippines.[153] In that case, primarily Filipino citizens and two U.S. nonprofits petitioned under CERCLA to have the United States Air Force conduct a preliminary assessment of the former Clark Air Force Base and Subic Naval Bases' potential to release toxins into the environment.

The court first held that the language of CERCLA does not indicate congressional intent to apply to foreign claimants, citing *Sale* and its specific language upholding a presumption against extraterritoriality involving military affairs.[154] The Ninth Circuit case found that CERCLA

148. *Id.* at 468.

149. 370 F. Supp. 2d 57, 72 (D.D.C. 2005) (citing Smith v. United States, 507 U.S. 197, 204 n.5 (1993)).

150. *Id.* (quoting Envtl. Def. Fund v. Massey, 986 F.2d 528, 534 (D.C. Cir. 1993)).

151. 509 U.S. 155, 188 (1993) (citing United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936)).

152. 42 U.S.C. §§ 9601-9675 (2012).

153. 411 F.3d 1092 (9th Cir. 2005).

154. *ARC Ecology*, 411 F.3d at 1098 n.3 (citing *Sale*, 509 U.S. at 188).

did not apply because at the time of filing suit, the bases had been under the exclusive control of the Philippines government for ten years.[155] The court also found a number of statutory clauses to be inconsistent with extraterritoriality, such as providing venue in the district where the violation occurred.[156]

Yet the *ARC Ecology*, *Basel Action Network*, and *Aspin* courts overlooked the Supreme Court's 2004 decision in *Rasul v. Bush*, which found that no presumption of extraterritoriality applied to the U.S. base in Guantanamo, Cuba.[157] The Court found that the habeas statute applied to those suspected terrorists detained in the Guantanamo Bay Naval Base because the United States exercises "'complete jurisdiction and control' . . . and may continue to exercise such control permanently if it so chooses."[158]

As discussed above in Part IV.B, in 2008, a district court in the Ninth Circuit in the *Gates* case found that the NHPA's text required extraterritoriality for the Okinawa base siting. Additionally, while looking at the same treaties and intergovernmental relationships between the United States and Japan reviewed in the *Aspin* case, the court found no foreign policy concerns interfering with court jurisdiction. The court noted, consistent with *Massey*, that it was only focused upon the DOD actions and obligations.[159]

Applying these cases to Okinawa is not as straightforward as one would hope. Okinawa is not the Philippines, as occupation of its bases continues, nor is it Guantanamo, Cuba, as governance has technically reverted back to Japan. As detailed above in Part II, Okinawa is not just another part of mainland Japan. The original U.S.-Japan peace treaty, as discussed above in Part III, did give the United States "de-facto sovereignty," as one federal court put it.[160] The subsequent U.S.-Japan security agreements gave the United States de facto authority over

---

155. *Id.*

156. *Id.* at 1100 (citing 42 U.S.C. § 9659(b)(1); Smith v. United States, 507 U.S. 197, 202-03 (1993); EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 256 (1991)).

157. 542 U.S. 466, 484 (2004) (citing 28 U.S.C. § 2241).

158. *Id.* at 480 (quoting Agreement for the Lease (Subject to Terms To Be Agreed upon by the Two Governments) to the United States of Lands in Cuba for Coaling and Naval Stations, U.S.-Cuba, art. III, Feb. 16, 1903, T.S. No. 418).

159. Okinawa Dugong v. Gates, 543 F. Supp. 2d 1082, 1099 (N.D. Cal. 2008); *see also* Friends of the Earth v. Mosbacher, 488 F. Supp. 2d 889, 908-09 (N.D. Cal. 2007) (following *Massey* and upholding the extraterritorial application of NEPA where the decision on a project significantly affecting the domestic environment is made within the United States and where the government agency may have control over the project's operation).

160. United States v. Ushi Shiroma, 123 F. Supp. 145, 149 (D. Haw. 1954) (quoting Treaty of Peace, *supra* note 33, art. 3).

Okinawa, similar to the situation in Guantanamo,[161] and as discussed above in Part III, U.S. control over the base relocation in terms of funding and control is similar to the situation in *Adams*.

The Supreme Court itself has not applied the presumption where the United States maintains sovereignty or "some measure of legislative control."[162] As detailed in the *Gates* case, as discussed in Part IV.B, the DOD is effectively controlling the site relocation decision in Okinawa. In addition, the *Massey* court's focus on where the decisions are made, as described above, applies to the DOD's decision about the MCAS Futenma relocation. Key decisions were made at the very senior level of the U.S. government, including by then U.S. Secretary of Defense Donald Rumsfeld and U.S. Secretary of State Condoleezza Rice.[163]

Further, this is a case where the federal district court already has found that the NHPA can be applied to the base relocation without any interference with foreign policy or military affairs, thus distinguishing the *Sale* case. The *Gates* decision has not been appealed, and the U.S. military has proceeded, as discussed above in Part IV, to live with delay by further considering its decision along with Japan. If the application of the NHPA in Okinawa has not been problematical as to foreign policy or military affairs, the policy reasons relied upon by the *Aspin* court for applying the extraterritoriality presumption to NEPA appear to vanish.

B. Even Under a Recent U.S. Supreme Court Decision Focusing the Presumption Against Extraterritoriality on the Statutory Text, NEPA and the ESA Should Apply to the Okinawa Base Relocation

Justice Scalia, with at least four other judges, attempted to constrain deeper analysis of the application of the presumption in his majority opinion in *Morrison v. National Australia Bank Ltd.*[164] He stated, "When a statute gives no clear indication of an extraterritorial application, it has none."[165] He argued that "divining what Congress would have wanted" as

---

161. 1960 Status of Force Agreement, *supra* note 44. Japan is given more authority to secure service personnel who have committed off-base crimes, but in Cuba, no service personnel are allowed in Cuba proper.

162. EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991) (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)); *see* John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351 (2010).

163. *Gates*, 543 F. Supp. 2d at 1086 (discussing Office of the Spokesman, *Japan Roadmap for Realignment Implementation*, U.S. FORCES JAPAN (May 1, 2006), http://www.usfj.mil/Documents/UnitedStates-JapanRoadmapforRealignmentImplementation.pdf).

164. 561 U.S. 247 (2010).

165. *Id.* at 255.

to extraterritoriality is mere "judicial-speculation-made-law" and made it clear that this applies in all cases.[166]

Although Justice Scalia seemed to be requiring explicit extraterritorial statutory language, he backed off, denying that he was adopting a "clear statement rule" and allowing textual analysis beyond simply looking for the words "this law applies abroad."[167] Further, Scalia seemed to endorse what many commentators are now calling the "focus" theory of the presumption.[168] That is, if the focus of congressional intent is on the activity that is the subject of the claim, then the presumption does not lie. In *Aramco*, the focus was on domestic employment.[169] In *Morrison*, it was on domestic sales of securities.[170] With a NEPA violation, as discussed in *Massey*, the focus—as the Supreme Court has said many times—is agency decision making and its procedural requirements.[171]

NEPA has no "clear statement" that says it applies to U.S. agency projects abroad. However, Congress is quite specific, as noted by the *Massey* court discussed above in Part V.A, that NEPA is directed to the agency decision-making process, not its ultimate wisdom or impacts. NEPA's whole structure focuses upon U.S. agency decision making and the specific procedures involving the preparation of its environmental impact analysis, as discussed at the beginning of this Part.[172]

Further, Congress clearly had policy goals to protect the world's environment with NEPA. The statute speaks of "man's activity on the interrelations of all components of the natural environment," [173] presumably referring to all people of the world. It speaks to the "critical importance of restoring and maintaining environmental quality to the overall welfare and development of man."[174]

The statute also specifically includes the goals of assuring that all "Americans" are safe and that our "national heritage" is protected.[175]

---

166. *Id.* at 261.

167. *Id.* at 265 (quoting *Aramco*, 499 U.S. at 261 (internal quotation marks omitted)).

168. *E.g.*, Erick D. Rigby, *Think Locally, Act Globally: The Presumption Against Extraterritorial Application of American Statutes and § 7(a)(2) of the Endangered Species Act*, 50 DUQ. L. REV. 859, 889 (2012) (referencing *Morrison*, 561 U.S. at 247).

169. *Aramco*, 499 U.S. at 255.

170. *Morrison*, 561 U.S. at 266.

171. *See* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 558 (1978) ("[NEPA] is to insure a fully informed and well-considered decision.").

172. *See id.* (citing National Environmental Policy Act of 1969, 42 U.S.C. § 4332; Aberdeen & Rockfish R.R. Co. v. Students Challenging Agency Procedures (SCRAP), 422 U.S. 289, 319 (1975)).

173. 42 U.S.C. § 4331(a) (2012).

174. *Id.*

175. *Id.* § 4331(2), (4).

Furthermore, the statute states that Congress recognizes that "each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment."[176]

Moreover, NEPA explicitly references world impacts:

> [A]ll agencies of the Federal Government shall—. . . recognize the worldwide and long-range character of environmental problems and, *where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment.*[177]

Based upon the above-quoted section, Congress seems to be directing U.S. agencies in their NEPA decision making to have a global perspective consistent with U.S. foreign policy. That decision making is exactly what is at issue in Okinawa.

Other tools of statutory construction suggest NEPA's extraterritoriality. The Council on Environmental Quality (CEQ), an executive office entity charged under NEPA with coordinating and overseeing the nation's environmental policies,[178] issues the fundamental regulations implementing NEPA.[179] Pursuant to its authority, the CEQ's chairman issued a memorandum determining that NEPA's reference to the "human environment" includes other nations.[180] Courts are to give the CEQ's interpretation substantial deference.[181]

Justice Scalia may have wanted to close the door on a deeper analysis of when the presumption applies. But with a statute like NEPA, the considerations identified by the *Massey* case might still apply, as discussed above, if they illuminate textual analysis in "context" when there is no clear statement as permitted by *Morrison*.[182]

---

176. *Id.* § 4331(c).

177. *Id.* § 4332(2)(F) (emphasis added).

178. *Id.* §§ 4342, 4344.

179. 40 C.F.R. §§ 1500-1508 (2013).

180. Russell W. Peterson, Memorandum on the Application of the EIS Requirement to Environmental Impacts Abroad of Major Federal Actions (Sept. 24, 1976), National Environmental Policy Act, 42 Fed. Reg. 61,068 (Dec. 1, 1977).

181. Andrus v. Sierra Club, 442 U.S. 347, 358 (1979) (citing Warm Spring Dam Task Force v. Gribble, 417 U.S. 1301, 1309-10 (1974)). President Carter did issue Executive Order 12114, further refining and restricting how agencies were to implement NEPA internationally; however, the Order is considered ineffective by many commentators and without legal authority. *See* Karen A. Klick, Note, *The Extraterritorial Reach of NEPA's EIS Requirement After* Environmental Defense Fund v. Massey, 44 AM. U. L. REV. 291 (1994).

182. Morrison v. Nat'l Austl. Bank, Ltd., 561 U.S. 247, 265 (2010) ("Assuredly context can be consulted as well. But whatever sources of statutory meaning one consults to give 'the most

The ESA brings an additional array of arguments to bear. Like NEPA, there is no explicit language regarding extraterritoriality. However, also like NEPA, the text reveals that Congress's ambitions had global implications. The United States Court of Appeals for the Eighth Circuit summarized the key language in its decision in *Defenders of Wildlife v. Lujan*.[183] For example, "the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction."[184] In listing species to be protected under the ESA, to assure species conservation, the Secretary of the Interior is required to consider species protected by any other country and to inform that country if the species is to be listed.[185] Numerous species outside of the United States have been so designated.[186]

Pursuant to this language, the Secretary of Interior issued a final rule on January 4, 1978, requiring U.S. agencies to ensure that their activities and programs do not jeopardize endangered species in foreign countries, thus confirming its extraterritoriality.[187] When a new secretary in 1983 tried to reverse course and eliminate extraterritoriality, the Eighth Circuit in *Defenders of Wildlife* struck it down for violating the statute.[188]

Although the Supreme Court reversed the circuit court's decision, it dodged the issue of extraterritoriality. Instead, it reversed and dismissed the case with its famous holding on standing.[189] As a result, the extraterritoriality of the ESA "remains unsettled and academics have debated *Lujan* from various angles."[190] Current United States Department of the Interior regulations continue to limit the consultation requirement to federal actions "in the United States or upon the high seas."[191] However, no case law has challenged the Eighth Circuit's analysis in *Defenders of Wildlife* directly, and the court's statutory analysis still seems sound even in light of *Morrison*.

---

faithful reading' of the text . . . ." (quoting EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 280 (1991)).

183. 911 F.2d 117 (8th Cir. 1990), *rev'd on other grounds*, 504 U.S. 555 (1992).

184. Endangered Species Act of 1973, 16 U.S.C. § 1531(a)(4) (2012).

185. *Id.* § 1533(b)(1)(B)(i)-(ii), (b)(5)(B).

186. *Lujan*, 911 F.2d at 119 (citing Defenders of Wildlife v. Hodel, 851 F.2d 1035, 1040 (8th Cir. 1988)).

187. Interagency Cooperation—Endangered Species Act of 1973, 43 Fed. Reg. 874, 875 (Jan. 4, 1978) (codified at 16 C.F.R. pt. 402).

188. *Lujan*, 911 F.2d at 125.

189. Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992).

190. Rigby, *supra* note 168, at 860 (discussing 16 U.S.C. § 1536(a)(2)).

191. 50 C.F.R. § 402.01(a) (2013).

C. *A Separate Line of Cases Sustaining the ESA's Authority Under the Commerce Clause Strengthens the ESA's Extraterritoriality*

An additional line of cases sustaining the ESA's authority under the Commerce Clause also supports rejecting the presumption's application to the ESA. Federal judges have repeatedly found that Congress recognized the importance of protecting biodiversity to assure the continuing and future "availability of a wide variety of species to interstate commerce."[192] As the House Report accompanying the ESA put it, by pushing species towards extinction, "we threaten their—and our own—genetic heritage. The value of this genetic heritage is, quite literally, incalculable."[193]

Thus, what happens globally with endangered species does affect what happens locally, placing the impacts within our own border. Applying the ESA to U.S. projects taking place beyond our borders is, in that sense, not extraterritorial because the ultimate effects are local. Using an analogous approach, the Ninth Circuit applied CERCLA to a Canadian company whose release of hazardous substances eventually travelled to a river in the United States and threatened further contamination, finding no issue of extraterritoriality.[194]

One might argue that the fate of the Okinawa dugong, given its marginal numbers located in a distant shoreline, will never impact U.S. interstate commerce. The courts, however, consider biodiversity's potential future benefits in ESA analysis.[195] The Senate Report accompanying the ESA stated no animal could be said to be de minimis for purpose of biodiversity for if "a species is lost, its distinctive gene material, which may subsequently prove invaluable to mankind in improving domestic animals or increasing resistance to disease or

---

192. Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1050 (D.C. Cir. 1997) (quoting H.R. REP. NO. 93-412, at 4-5 (1973)); *see* San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163, 1176 (9th Cir. 2011) (citing United States v. Bramble, 103 F.3d 1475, 1481 (9th Cir. 1996); Tenn. Valley Auth. v. Hill, 437 U.S. 153, 178-79 (1978)) ("The ESA protects the future and unanticipated interstate-commerce value of species."); *see also* GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622, 640 (5th Cir. 2003) ("[O]ur analysis of the interdependence of species compels the conclusion that regulated takes under [the] ESA do affect interstate commerce."); Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1066-67 (D.C. Cir. 2003).

193. *In re* Delta Smelt Consol. Cases, 663 F. Supp. 2d 922, 941 (E.D. Cal. 2009) (quoting H.R. REP. NO. 93-412, at 4 (1973)) *aff'd*, 638 F.3d 1163 (9th Cir. 2011)).

194. Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1079 (9th Cir. 2006).

195. Conservation Force v. Manning, 301 F.3d 985, 994 n.8 (9th Cir. 2002) (quoting *Nat'l Ass'n of Home Builders*, 130 F.3d at 1052). Judge Wald in *National Ass'n of Home Builders* referred to a species' "option value," 130 F.3d at 1053, while Judge Henderson cited the "interconnectedness of species and ecosystem." *Id.* at 1059 (Henderson, J., concurring).

environmental contamination, is also irretrievably lost."[196] Further, the Supreme Court in *Gonzales v. Raich*, a decision upholding the regulation of locally grown marijuana,[197] determined, "[W]hen 'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'"[198]

The Supreme Court and various circuits have held that the presumption against extraterritoriality gives way when activities outside U.S. borders affect activities within U.S. borders.[199] Admittedly, the Supreme Court has now rejected the traditional "effects" test in *Morrison*.[200] However, as Justice Stevens pointed out and Scalia seemingly has concurred, what was once the effects test may still be relevant if Congress's intent, as shown through text and legislative documents, were to address those local effects.[201]

In sum, Congress intended the ESA to address the loss of biodiversity by even one endangered species because those impacts could affect interstate commerce and the future health and survival of the American people. It sought to address those impacts by regulating the decisions of U.S. agencies that cause those impacts. U.S. law should therefore be applied to protect the Okinawa dugong.

VI. RECONCILING EXTRATERRITORIALITY, ENVIRONMENTAL JUSTICE, AND JUDICIAL MILITARISM WITH OKINAWA

As discussed above, there are considerable legal arguments for applying NEPA and the ESA to the Okinawa base relocation. NEPA and the ESA's extraterritoriality is bolstered by the nation's commitment over the past twenty years to the principles of environmental justice. At the same time, a modern "Judicial Militarism" in the federal courts gives great deference to the U.S. military. Resolving these two seemingly opposed doctrines is key to achieving justice in Okinawa.

---

196. *Nat'l Ass'n of Home Builders*, 130 F.3d at 1051 (quoting S. REP. NO. 91-526, at 3 (1969)).

197. 545 U.S. 1 (2005).

198. *Id.* at 17 (quoting United States v. Lopez, 514 U.S. 549, 558 (1995)).

199. Knox, *supra* note 162, at 392-93 nn.250, 260-261. The *Massey* court noted these cases, mostly involving patent, antitrust, or trademark laws, in its decision. Envtl. Def. Fund, Inc. v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993) (citing Steele v. Bulova Watch Co., 344 U.S. 280 (1952); United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945); Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984); Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968)).

200. Morrison v. Nat'l Austl. Bank, Ltd., 561 U.S. 247, 261 (2010).

201. *Id.* at 279 (Stevens, J., concurring) (quoting Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 177 (1993)).

A. *Applying NEPA and the ESA to the Okinawa Base Siting Is Consistent with the Environmental Justice Doctrine Incorporated into Federal Decision Making*

On the federal level, "environmental justice" is an executive branch doctrine ultimately based on the United States Constitution's guarantee of "equal protection" and various federal laws.[202] It has been left undisturbed by Congress and administrations of different political parties for the past twenty years.

Environmental justice as a doctrine began with a social protest movement in the 1980s.[203] The United States Environmental Protection Agency (EPA) under the George W. Bush Administration began reporting and documenting the problem in the United States.[204] The social movement reached a national consensus in what was declared to be a "People of Color Environmental Leadership Summit" in 1991.[205] That Summit was notable for not only the convening of national activists, but also for its articulation of the "Principles of Environmental Justice."[206] These Principles have a global perspective and mark that activists had gathered "to begin to build a national and international movement of all peoples of color to fight the destruction and taking of our lands and communities."[207] Many of the principles reflect this international theme.[208]

---

202. U.S. CONST. amend. XIV, § 1; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2012); National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2012); *see* Memorandum on Environmental Justice, 30 WEEKLY COMP. PRES. DOC. 279, 280 (Feb. 11, 1994). The author has comprehensively examined the federal doctrine in Ramo, *supra* note 126.

203. Dollie Burwell & Luke W. Cole, *Environmental Justice Comes Full Circle: Warren County Before and After*, 1 GOLDEN GATE U. ENVTL. L.J. 9, 10 (2007).

204. *See Environmental Equity, Reducing Risk for All Communities (EPA 230-R-92-008)*, U.S. ENVTL. PROT. AGENCY 2-3 (June 1992), http://www.epa.gov/compliance/ej/resources/reports/annual-project-reports/reducing_risk_com_vol2.pdf.

205. Robert D. Bullard, *Environmental Justice in the 21st Century*, ENVTL. JUST. RESOURCE CENTER, http://www.ejrc.cau.edu/ejinthe21century.htm (last visited Sept. 4, 2014) ("The [Summit] was probably the most important single event in the movement's history.").

206. *The Principles of Environmental Justice (EJ)*, *supra* note 2.

207. *Id.*

208. Key international principles include:

> 2. Environmental Justice demands that public policy be based on mutual respect and justice for all peoples, free from any form of discrimination or bias.... 5. Environmental Justice affirms the fundamental right to political, economic, cultural and environmental self-determination of all peoples.... 10. Environmental Justice considers governmental acts of environmental injustice a violation of international law.... 15. Environmental Justice opposes military occupation, repression and exploitation of lands, peoples and cultures, and other life forms.

Id.

The movement culminated in President Clinton's environmental justice executive order addressing "disproportionately high and adverse human health or environmental effects" on "minority" and "low-income populations" in the United States and its territories.[209] The executive order was followed by numerous reports and policies adopted by federal agencies to implement the order.[210] The EPA defined "environmental justice" broadly as

> the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. . . . *Fair treatment* means that no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies."[211]

President Clinton identified NEPA as a key tool for environmental justice in his memorandum accompanying his executive order.[212] The EPA has affirmed the relationship between NEPA and environmental justice.[213] Given the disproportionate impacts from military bases in Okinawa on its minority population, discussed in Parts III and IV above, NEPA as well as the ESA seem essential to comprehensively address the environmental justice impacts from the Okinawa base relocation.

B. A Modern "Judicial Militarism" Nevertheless Gives Great Deference to the Military

Opposed to the application of environmental justice principles through the extraterritorial use of NEPA or the ESA for the U.S. Okinawa base siting is the increasingly powerful doctrine of great judicial deference in military matters, a kind of "judicial militarism." Historically, as described above, foreign policy concerns were a factor driving the principle against the extraterritoriality of U.S. statutes. Added to this historical wariness is a more modern capitulation to military

---

209. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994). The full title is Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations. *Id.*

210. *E.g.*, Dep't of Def., *Strategy on Environmental Justice*, DENIX (Mar. 24, 1995), http://www.denix.osd.mil//references/upload/DoD-Environmental-Justice-Strategy-24-Mar-1995.pdf.

211. *Environmental Justice*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/environmentaljustice/basics/index.html (last updated May 24, 2012).

212. Memorandum of Environmental Justice, *supra* note 202, at 280.

213. *Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses*, U.S. ENVTL. PROT. AGENCY § 1 (Apr. 1998), http://www.epa.gov/environmentaljustice/resources/policy-ej-guidance-nepa-epa0498.pdf.

considerations in the context of a culture where "Americans are enthralled with military power."[214]

The aftermath of the Vietnam War was a crucial time for the country as it reconsidered its attitude towards the military. As Boston University Professor Andrew J. Bacevich, a Vietnam Veteran, put it: "The new American militarism made its appearance in reaction to the 1960s and especially to Vietnam."[215]

For most Americans, the Vietnam War was seen as a disaster that should never be repeated, and it is no surprise that Senator McGovern's campaign theme for President in 1972 was that the United States should come home.[216] The neoconservatives learned a different lesson. For them, "military power—not merely adequate, but superior power—was for the United States a sine qua non."[217] Vietnam was a disaster because the military was restrained and not allowed to do its job. As President Reagan put it: "They came home without a victory not because they'd been defeated, but because they'd been denied permission to win."[218]

As this post-Vietnam militarism evolved, the U.S. military emphasized the need to intervene with overwhelming force, without undue interference from civilian institutions.[219] Perpetual military preparedness around the world was the preeminent strategy, with bases in more than 100 countries[220] and an isolated voluntary military firmly supported, if not participated in, by the general public.[221]

Supreme Court decisions involving the military reflected these political dynamics and changes. In the 1950s and '60s, the Court had no hesitation in reigning in military jurisdiction, noting its anti-democratic characteristics. In *Reid v. Covert*, the Supreme Court, in a 6-2 decision, held that military criminal jurisdiction overseas during times of peace does not extend to civilian dependents, upholding the civilian court's

---

214. ANDREW J. BACEVICH, THE NEW AMERICAN MILITARISM: HOW AMERICANS ARE SEDUCED BY WAR 1 (2013).

215. *Id.* at 5-6 (citing Norman Podhoretz, *Making the World Safe for Communism*, COMMENTARY (Apr. 1, 1976), http://www.commentarymagazine.com/article/making-the-world-safe-for-communism/).

216. *Id.* at 74.

217. *Id.* (citing Norman Podhoretz, *The Neo-Conservative Anguish over Reagan's Foreign Policy*, N.Y. TIMES, May 2, 1982, (Magazine), at 30).

218. *Id.* at 107 (quoting Ronald Reagan, *Remarks on Presenting the Medal of Honor to Master Sergeant Roy P. Benavidez*, AM. PRESIDENCY PROJECT (Feb. 24, 1981), http://www.presidency.ucsb.edu/ws/?pid=43454).

219. *Id.* at 48, 51-52.

220. *Id.* at 17 (citing CHALMERS JOHNSON, THE SORROWS OF EMPIRE, MILITARISM, SECRECY, AND THE END OF THE REPUBLIC 154 (2004)).

221. *Id.* at 22-23.

ability to issue a writ of habeas corpus.[222] Justice Black, in a plurality opinion for the Court, which included Chief Justice Warren and Justices Douglas and Brennan, stated, "Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections."[223] Justice Black went further by noting the Founders' Constitution's healthy distrust of the military, "a necessary institution, but one dangerous to liberty if not confined within its essential bounds. Their fears were rooted in history. They knew that ancient republics had been overthrown by their military leaders."[224] Justice Black also rejected that Cold War tensions and the need for military preparedness were sufficient bases for the expansion of military jurisdiction where there was no actual conflict.[225]

Similarly, the Supreme Court restricted jurisdiction over discharged soldiers,[226] civilian overseas employees,[227] and even those in the service where their crimes are not "service connected."[228] By 1972, the Supreme Court was even willing to assert civilian judicial control over a serviceman claiming to be a conscientious objector facing a court-martial for refusing to board a plane to Vietnam.[229] The Court in *Parisi v. Davidson* unanimously found no reason to restrain civilian jurisdiction out of "comity" for a pending military court-martial.[230] Justice Douglas's concurrence in *Parisi* is a bold assertion of the need for civilian courts "to keep the military within bounds."[231] According to Justice Douglas: "[T]he Pentagon is not yet sovereign. The military is simply another administrative agency, insofar as judicial review is concerned."[232]

But once the Nixon appointees Justice William Rehnquist and Chief Justice Warren Burger were on the Court, and with the new conservative doctrine that the Vietnam disaster was a result of civilian meddling in the military's affairs, the tide began to shift towards judicial militarism. With Justice Rehnquist participating, Chief Justice Burger in a 5-4 decision in

---

222. 354 U.S. 1, 39-40 (1957).
223. *Id.* at 21.
224. *Id.* at 23-24.
225. *See id.* at 35.
226. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 15 (1955) (quoting U.S. CONST. art. I, § 8, cl. 14).
227. McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 287 (1959).
228. O'Callahan v. Parker, 395 U.S. 258, 272-73 (1969).
229. Parisi v. Davidson, 405 U.S. 34, 45 (1972).
230. *Id.* at 46. Notably the new Justice Rehnquist, appointed by President Nixon, did not participate in the case.
231. *Id.* at 49 (Douglas, J., concurring).
232. *Id.* at 51 (citing Comment, *supra* note 1, at 377-78).

Laird v. Tatum upheld a military domestic intelligence-gathering program from a challenge,[233] arguing that there was no justiciable controversy because the mere existence of the program did not constitute a present or future harm.[234]

Justice Douglas vehemently dissented: "Our tradition reflects a desire for civilian supremacy and subordination of military power."[235] He further emphasized the difference between judicial deference in peacetime to a time of declared war: "In times of peace, the factors leading to an extraordinary deference to claims of military necessity have naturally not been as weighty. This has been true even in the all too imperfect peace that has been our lot for the past fifteen years—and quite rightly so, in my judgment."[236]

By 1974, the Supreme Court's new majority fully embraced and articulated this shift towards a judicial militarism. In a 6-2 decision, Justice Rehnquist for the Court in *Parker v. Levy* upheld the court-martial of an Army Captain for statements against the Vietnam War.[237] The Captain argued that the application of a Uniform Code of Military Justice provision prohibiting "conduct unbecoming an officer and a gentleman"[238] to political statements was improper as unconstitutionally vague.

Justice Rehnquist's reasoning was dramatically different from the prior court decisions described above. He spoke of the different "military community."[239] He then concluded that a lesser standard of scrutiny applies to the military society than to civilian society "[b]ecause of the factors differentiating military society from civilian society."[240]

In one fell swoop, the military went from being just another administrative agency to a "society" entitled to deference as long as it is not arbitrary. Thus even First Amendment protections must be adjusted for the military given that "the different character of the military

---

233. 408 U.S. 1 (1972).

234. *See id.* at 13-16. Justice Burger still feels the need to defend the civilian jurisdiction of the courts over the military, noting the "traditional and strong resistance of Americans to any military intrusion into civilian affairs" and "our traditional insistence on limitations on military operations in peacetime." *Id.* at 15.

235. *Id.* at 19 (Douglas, J., dissenting).

236. *Id.* at 20 (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 193 (1962)). Notably, those years include the time during the Vietnam War.

237. 417 U.S. 733 (1974).

238. 10 U.S.C. § 933 (2012).

239. *Parker*, 417 U.S. at 752.

240. *Id.* at 756.

community and of the military mission requires a different application of those protections."[241]

This trend continued in a series of key decisions authored by Justice Rehnquist. In *Goldman v. Weinberger*, a 5-4 split-court upheld Air Force regulations prohibiting a Rabbi on active duty in a health clinic from wearing a Yarmulke.[242] Justice Rehnquist again wrote of the greater deference given the military "to accomplish its mission:"[243] "[C]ourts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."[244] He complained of courts being "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."[245]

This sweeping deference to the military was new and was properly identified by Justice Brennan in dissent: "The Court, however, evades its responsibility by eliminating, in all but name only, judicial review of military regulations that interfere with the fundamental constitutional rights of service personnel."[246] Or as Justice O'Connor stated in dissent, "It is entirely sufficient for the Court if the military perceives a need for uniformity."[247]

One year later, Justice Rehnquist led the charge to overrule *O'Callahan v. Parker* in *Solorio v. United States*, which gave the military jurisdiction over service personnel committing non-service connected charges.[248] Justice Rehnquist repeated that courts are "ill-equipped" to address military matters and that judicial deference is at its "apogee" when addressing rules and regulations of the Armed Forces.[249]

C. Judicial Militarism Has Impacted but Not Eliminated the Application of NEPA and the ESA to the Military

The Supreme Court's modern deference to the military is having significant impact upon environmental laws. In *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, Justice Rehnquist for the Court exempted the Navy from preparing an environmental impact statement (EIS) under NEPA before completing weapons storage

241. *Id.* at 758.
242. 475 U.S. 503 (1986).
243. *Id.* at 507 (citing Chappel v. Wallace, 462 U.S. 294, 300 (1983)).
244. *Id.* (citing *Chappel*, 462 U.S. at 305).
245. *Id.* (quoting *Chappel*, 462 U.S. at 305).
246. *Id.* at 515 (Brennan, J., dissenting).
247. *Id.* at 528 (O'Connor, J., dissenting).
248. 483 U.S. 435, 448 (1987) (citing *Chappel*, 462 U.S. at 305).
249. *Id.* at 447 (quoting Goldman v. Weinberger, 475 U.S. 503, 508 (1986)).

facilities in Hawaii that could store nuclear weapons.[250] The Navy had done an environmental impact assessment (EIA), finding no significant impacts, but had failed to evaluate the impacts from storing nuclear weapons because the Navy never reveals if or where it is storing nuclear weapons.[251] The Ninth Circuit suggested that the Navy do a hypothetical EIS to evaluate whether or not nuclear weapons were stored at the site.[252]

Justice Rehnquist found that the Freedom of Information Act's (FOIA) exception for government secrets applied: "Congress intended that the public's interest in ensuring that federal agencies comply with NEPA must give way to the Government's need to preserve military secrets."[253] Justice Rehnquist rejected the circuit court's attempt to accommodate NEPA to military secrecy through a hypothetical EIS: "[W]e have held that 'public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which law itself regards as confidential, and respecting which it will not allow the confidence to be violated.'"[254]

In *Weinberger v. Romero-Barcelo*, the Court found that the Navy was subject to the federal Clean Water Act and therefore needed a permit before discharging bombs in a training exercise in the ocean near an island off of Puerto Rico.[255] However, the Court also endorsed the district court's refusal to give an injunction to stop the bombing: "[B]ecause of the importance of the island as a training center, 'the granting of the injunctive relief sought would cause grievous, and perhaps irreparable harm, not only to Defendant Navy, but to the general welfare of the Nation.'"[256]

More recently the Supreme Court took a more aggressive step in *Winter v. Natural Resources Defense Council, Inc.*[257] Chief Justice Roberts, a former clerk to Justice Rehnquist,[258] wrote for a five-vote majority holding that a preliminary injunction to stop the Navy from sonar training off the Southern California coast in a manner to protect marine mammals was inappropriate.[259] Justice Roberts framed the case

250. 454 U.S. 139 (1981).

251. *Id.* at 141.

252. *Id.* at 140-41 (citing Catholic Action of Haw./Peace Educ. Project v. Brown, 643 F.2d 569, 572 (9th Cir. 1980)).

253. *Id.* at 145.

254. *Id.* at 146-47 (quoting Totten v. United States, 92 U.S. 105, 107 (1876)).

255. 456 U.S. 305, 306-07, 320 (1982).

256. *Id.* at 310 (quoting Barcelo v. Brown, 478 F. Supp. 646, 707 (D.P.R. 1979)).

257. 555 U.S. 7, 26 (2008).

258. *Biographies of Current Justice of the Supreme Court*, SUP. CT. U.S., http://www.supremecourt.gov/about/biographies.aspx (last visited July 7, 2014).

259. *Winter*, 555 U.S. at 24.

as one involving military professional judgment, and once so framed, he discussed the doctrines of great deferral and the inadequacy of the courts to determine the case:

> This case involves "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force," which are "essentially professional military judgments." We "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." As the Court emphasized just last Term, "neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people."[260]

Justice Roberts accepted without questioning the Navy's declarations that the district court's restrictions on sonar training in this area of the ocean would jeopardize its "realistic training" exercise that "is of the utmost importance to the Navy and the Nation."[261] He concluded that the balance of equities therefore "tip strongly in favor of the Navy":

> For the plaintiffs, the most serious possible injury would be harm to an unknown number of the marine mammals that they study and observe. In contrast, forcing the Navy to deploy an inadequately trained antisubmarine force jeopardizes the safety of the fleet. Active sonar is the only reliable technology for detecting and tracking enemy diesel-electric submarines, and the President—the Commander in Chief—has determined that training with active sonar is "essential to national security."[262]

Notice how Justice Roberts converted a single training program in one area of the ocean with restrictions into "an inadequately trained antisubmarine force" that "jeopardizes the safety of the fleet." He did this based on what he characterizes as the "credibly alleged" claim of a threat to national security.[263]

Yet even with this great deference, none of these cases found environmental law to be inapplicable to the U.S. military, nor did the military make that claim. As described above, in *Catholic Action of Hawaii/Peace Education Project*, the Navy did perform an EIA pursuant to NEPA, and the court merely reconciled the FOIA and NEPA. The Navy also was required to obtain a Clean Water Act permit in *Romero-Barcelo*. The Navy in *Winters* did do an EIA, and the Court never

---

260. *Id.* (quoting Gilligan v. Morgan, 413 U.S. 1, 10 (1973); Goldman v. Weinberger, 475 U.S. 503, 507 (1986); Boumedine v. Bush, 553 U.S. 723, 797 (2008)).

261. *Id.* at 25.

262. *Id.* at 26 (quoting Appendix to the Petition for a Writ of Certiorari at 232a, *Winter*, 555 U.S. 7 (No. 07-1239)).

263. *Id.* at 32-33.

reached the issue of whether it needed to do an EIS, only addressing whether an injunction was appropriate. None of these cases preclude applying environmental law to the U.S. military.

D. Judicial Militarism Should Be Questioned; However, in Okinawa, NEPA and the ESA Do Not Conflict with Military Necessity and Should Apply

This evolution in deferral to the military's claims of military necessity is daunting for those challenging military authority. However, the historical and ideological roots of this great deferral doctrine may well be worth questioning. There are many reasons to question the political stance that the failure in Vietnam had anything to do with civilian interference with the U.S. military.[264] This questioning may be ripe now as the United States confronts its post-Iraq withdrawal debacle, suggesting that U.S. military misadventures may have more to do with fundamental policy failure than with too much civilian restraint on the military.[265] Judicial militarism is not a constitutional doctrine and should not be of service to political agendas to eliminate the post-Vietnam syndrome and encourage foreign military intervention.

Yet, even with the full force of this modern capitulation to the "military society," none of these cases weighing military necessity and environmental protection hold the military to be immune from environmental statutes. The key, given the current court's militaristic paradigm, is to show that there is no real conflict between asserting environmental laws' extraterritorially and military necessity.

There is no dispute that Okinawa still provides a strategic value to the U.S. military, given conflicts with North Korea and China.[266] However, it is a different matter as to the "number of marines necessary

---

264. Based upon the so-called "Pentagon Papers," it is far more likely the war's failure resulted from bad policy conducted with too little transparency about trying to suppress a war of independence conducted by determined people. *See* DANIEL ELLSBERG, SECRETS: A MEMOIR OF VIETNAM AND THE PENTAGON PAPERS 249-55 (2002).

265. See Peter Beinart, *Obama's Disastrous Iraq Policy: An Autopsy*, ATLANTIC (June 23, 2014, 12:48 PM), http://www.theatlantic.com/international/archive/2014/06/obamas-disastrous-iraq-policy-an-autopsy/373225/, and Fareed Zakaria, *Who Lost Iraq? The Iraqis Did, with an Assist from George W. Bush*, WASH. POST (June 12, 2012), http://www.washingtonpost.com/opinions/fareed-zakaria-who-lost-Iraq-the-Iraqis-did-with-an-assist-from-george-w-bush/2014/06/12/35c5a418-F25c-11e3-914c-1fbd0614e2d4_Story.html, for examples of this questioning from different perspectives.

266. CHANLETT-AVERY & RINEHART, *supra* note 25, at 2 ("The U.S. military presence in Japan, and particularly Okinawa, allows it to fulfill its obligations under the 1960 Treaty of Mutual Cooperation and Security to not only defend Japan but to maintain security in the Asia-Pacific region.").

to maintain stability" and their specific location.[267] At least three key U.S. senators in 2011 and 2012 questioned the realignment plan and wondered why the MCAS Futenma operations were not consolidated with the Air Force's Kadena Air Base.[268]

In the case of the Okinawan dugong, where the U.S. military and Japan have taken almost a decade to resolve the location of the MCAS Futenma, there is no immediate necessity for rushing a decision, which allows for a full environmental analysis to be conducted. The problem was not that military necessity prevented the DOD from considering the impacts to the dugong. The DOD claimed it was willing and in fact did consider the impacts with a variety of studies, but they did so in a patently flawed manner.[269]

Further, the United States and Japan have recognized that applying U.S. environmental laws to U.S. bases is consistent with their national interests. The SCC on September 11, 2000, issued a "Joint Statement of Environment Principles," noting "the increasing importance of protecting the environment."[270] The goal is to prevent "pollution on facilities and areas the use of which is granted to the U.S. armed forces."[271] The methodology for protection is "selecting the more protective standards from relevant U.S. and Japanese laws and regulations."[272] Both countries recognized that there was no conflict with domestic Japanese laws in picking more stringent U.S. laws for compliance: "[U.S. armed forces in Japan] environmental standards generally meet or exceed those set by relevant laws and regulations of Japan."[273]

The illusion that there is a conflict between military necessity and base siting arose in a case related to the situation in Okinawa, though

---

267. *Id.*

268. *Id.* at 11 (referring to Carl Levin, Chairman of the Armed Services Committee; John McCain, ranking minority member of that committee; and Jim Webb, Chairman of the Foreign Relations Subcommittee on East Asian and Pacific Affairs).

269. Okinawa Dugong v. Gates, 543 F. Supp. 2d 1082, 1109-11 (N.D. Cal. 2008).

270. *Joint Statement of Environmental Principles*, MINISTRY FOREIGN AFF. JAPAN (Sept. 11, 2000), http://www.mofa.go.jp/region/n-america/us/security/environment.html.

271. *Id.*

272. *Id.*

273. *Id.* The United States and Japan more recently reaffirmed these principles in a joint press statement, pledging again to use "the more protective of U.S. standards, generally applied and enforced Japanese national standards, or any applicable international agreement standards." *Joint Announcement on a Framework Regarding Environmental Stewardship at U.S. Armed Forces Facilities and Areas in Japan*, U.S. EMBASSY JAPAN (Dec. 23, 2013), http://japan.usembassy.gov/e/p/tp-20131225-01.html. In addition, both countries agreed to negotiate new agreements based upon "taking environmental measures around the U.S. Armed Forces facilities and areas to improve further environmentally friendly living conditions of both local communities and those with in the U.S. Armed Forces facilities and areas." *Id.*

significantly, it occurred in a U.S. territory, thereby avoiding the extraterritoriality issue. Part of the realignment of Okinawa's U.S. bases involves sending 9,000 Marines to Guam.[274] The Navy chose a site for a firing range that is sacred to the indigenous people of Guam and listed on the National Register of Historic Places. Local activists and the National Trust for Historic Preservation sued under NEPA, the NHPA, and the Coastal Zone Management Act. They argued that there were alternative sites reasonably available, among other arguments.[275]

Negotiations during the Guam case were soon met by claims of military necessity, with at least one military official looking at the plaintiffs' activists and lawyers and reportedly saying, "[I]f we don't put it there, your children will die."[276] Yet, the Navy eventually agreed to do a supplemental EIS and evaluate additional alternatives. After a two-year evaluation, the Navy found an available alternative site at an existing Air Force base that will not affect sacred land.[277]

The fact that Guam is a territory and Okinawa is a former de facto colony should not be a significant determinant in balancing environmental values with military necessity. Congress's essential message in both NEPA and the ESA is that protecting environmental values nationally and internationally is consistent with the national interest. That insight is what led the CEQ to issue its memorandum supporting NEPA extraterritoriality:

> We believe that by taking account of likely impacts abroad before deciding on a proposal for action, federal agencies can obtain the same benefits of NEPA review that accompany the development of projects or actions—with domestic impacts. Moreover, we believe such analyses can be accomplished without imposing U.S. environmental standards on other countries, and without interfering with the execution of foreign policy. To the contrary, such analysis and disclosure can provide useful information to cooperating governments. Finally, if agencies undertake these analyses in cooperation with involved foreign governments, U.S. agencies can promote

274. Order Denying Defendants' Motion for Voluntary Remand and Stay at 2, Guam Pres. Trust v. Gregory, No. 10-00677, 41 Envtl. L. Rep. 20,221 (D. Haw. 2011).

275. *Id.* at 4.

276. Conversation with Nicholas Yost, Plaintiffs' Lawyer (Feb. 25, 2014). Nicholas Yost is the former CEQ general counsel and the recipient of the American Bar Association's 2010 Award for Distinguished Achievement in Environmental Law and Policy. *Nicholas C. Yost*, DENTONS, http://www.dentons.com/en/nicholas-yost (last visited Sept. 6, 2014).

277. Matthew M. Burke, *New Navy Report Could Clear Way for Marines' Move from Okinawa to Guam*, STARS & STRIPES (Apr. 18, 2014), http://www.stripes.com/news/new-navy-report-could-clear-way-for-marines-move-from-okinawa-to-guam-1.278611.

international approaches to environmental protection as recommended in the Stockholm Declaration and elsewhere.[278]

The same could be said in regard to the principles of environmental justice. If Okinawa was a legal U.S. territory, there would be no question that Okinawans are a minority population that have not been given "fair treatment" because they "bear a disproportionate share of the negative environmental consequences" resulting from the U.S. base siting decisions.[279]

Respecting the Okinawan population and its cultural and environmental heritage is not antithetical to military interests or foreign policy. There is no need for an immediate relocation, as discussed above, implicating the injunction issues addressed in *Winters* and *Romero-Barcelo*. The United States has agreed with Japan to "delink" the base relocation from its other plans for withdrawing troops from Okinawa.[280] It will be years before the expansion can be built, and there are no immediate training exercises.[281] There is no valid military or foreign policy reason to avoid applying U.S. environmental laws to the Okinawa base relocation.

VII. CONCLUSION

The conflict over the MCAS Futenma relocation is an opportunity for the U.S. military to address long-standing environmental justice issues in Okinawa. Applying U.S. environmental laws to the DOD's decisions regarding base locations in Okinawa enhances rather than undermines foreign policy and military interests. The commitment to environmental justice is particularly apt given Okinawa's cultural and social history, its occupation and postoccupation status after reversion, and its continued disproportionate burden from the U.S. military's bases and operations.

The core value in environmental justice, mutual respect between decision-makers and the community affected, can lead to a better solution. It can also be an example of how preserving one endangered

---

278. Russell W. Peterson, Memorandum to Heads of Agencies on Applying the EIS Requirement to Environmental Impacts Abroad (Sept. 24, 1976), 42 Fed. Reg. 61,068 (Dec. 1, 1977).

279. *Environmental Justice*, *supra* note 211.

280. Sec'y of Def. et al., *Joint Statement of the Security Consultative Committee*, MINISTRY FOREIGN AFF. JAPAN (Apr. 27, 2012), http://www.mofa.go.jp/region/n-america/us/security/scc/pdfs/joint_120427_en.pdf ("[T]he Ministers decided to delink both the relocation of the III Marine Expeditionary Force (MEF) personnel from Okinawa to Guam and resulting land returns south of Kadena Air Base from progress on the Futenma Replacement Facility.").

281. Slavin, Sumida & Harper, *supra* note 114.

species, the Okinawa dugong, is intimately related to building a sustainable human community. The U.S. federal courts, by properly applying principles of extraterritoriality and asserting their constitutional role in reviewing military activities, are in a position to assure justice for Okinawans.