COMMENTS

PERMISSION TO POLLUTE: THE UNITED STATES MILITARY, ENVIRONMENTAL DAMAGE, AND CITIZENS' CONSTITUTIONAL CLAIMS

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INTRODUCTION

The United States military establishment is a significant polluter of the air, land, and water. The Cold War demanded enormous consumption of resources so that weapons could be developed and military dominance could be preserved. The Army, Navy, Air Force, and Marines test weapons, build dams and roads, discharge toxic wastes, create noise, and release pollutants into rivers and oceans and air. The United States military is the most powerful and expensive military force that has ever existed, and this environmental damage is one of the by-products.

One strategy employed by the citizens who want to protect the environment and themselves is to sue the government under any one of a number of environmental statutes. In some of these lawsuits, the plaintiffs include claims that the military has violated their federal constitutional rights. Yet the federal courts regularly and summarily dismiss these constitutional claims. The prioritization of military needs over environmental needs may benefit the military in the short term while a particular weapon needs to be tested or personnel need to be trained. In the longer term, however, all Americans are harmed because the environment is itself a source of both health and security.

This Comment examines how and why federal constitutional claims fail when asserted by citizens in lawsuits against the United

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2 Id.
3 See id. at 4.
States military establishment. This Comment is broad in scope, surveying federal cases in which citizens raise constitutional claims regarding various military actions. While not all of these plaintiffs were motivated by their concern for the environment, environmental damage was the result of military action in all of these cases and environmental statutes provided the legal tools to stop the damage. Some cases reach back thirty years, to the beginning of the modern environmental movement. The scope is limited, however, to cases in American courts over military activities occurring inside the territorial United States. Therefore, the scope excludes the environmental pollution that results from actual warfare.  

Three factors make the potential conflicts between the military and the environment increasingly relevant today. First, the current Bush administration has been criticized by congressional Democrats, nonprofit organizations, and other commentators not only for failing to enforce our environmental laws, but also for rolling them back.  

Second, America's war on terrorism and the war with Iraq have created a more militarized world, with more training, troop movement, and weapons testing, all of which increase environmental degradation. Today's weapons are more destructive and more countries have them. National security has been at the forefront of the nation's consciousness since September 11, 2001, and conventional wisdom dictates that national security must clash with environmental protection goals. The memory of past terrorist attacks and the threat of future ones render Americans willing to sacrifice the environment for security, perhaps understandably.  

Third, this is a time of heightened concern for the environment; environmental ills are worsening and environmental consciousness is increasing. The environmental costs of nearly a half century of Cold  

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4 Note that the U.S. Department of Energy, not the Department of Defense, is responsible for manufacturing and managing nuclear weapons, and is thereby excluded from this inquiry.  


8 For instance, the United Nations' Global Environmental Outlook 3 Report finds that deforestation continues, species are declining and going extinct, freshwater is under increasing demand, oceans and coasts are degrading, urban consumption and waste output are up, and environmental disasters are affecting more people. See UNITED NATIONS ENVIRONMENT PROGRAMME, GLOBAL ENVIRONMENTAL OUTLOOK 3 (GEO-3) (2002) available at http://www.grida.no/geo/geo3.  

9 In a CBS News/New York Times Poll conducted in November 2002, sixty-two percent of those polled thought that the federal government should be doing more to regulate the
War preparations have come to light, and the public is less willing to accept environmental costs that would have been accepted without question in an earlier era.10

Part I of this Comment begins with a brief introduction to the general relationship between the military and the environment, and then takes up the analysis of federal cases in which citizens have sued the military for environmental infractions under the Third and Fifth Amendments in Part II. Part III provides a discussion of some of the reasons why these constitutional claims fail. In Part IV the Comment concludes that the courts commit a disservice to all citizens by disregarding their legitimate claims under the Bill of Rights, by both prioritizing what the military claims it needs above the Constitution and by allowing environmental degradation to continue unnecessarily.

I. THE MILITARY AND THE ENVIRONMENT

The military establishment is subject to a panoply of environmental statutes, which can be grouped into a handful of categories.11 One category consists of planning statutes such as the National Environmental Policy Act ("NEPA")12 and the Endangered Species Act ("ESA"),13 which require government agencies to consider the environmental consequences of their actions. Another category consists of prospective statutes such as the Clean Water Act ("CWA"),14 the Clean Air Act ("CAA"),15 the Resource Conservation and Recovery Act ("RCRA"),16 and the Toxic Substances Control Act ("TSCA"),17 which seek to minimize or eliminate pollution before it is created. Finally, there are retrospective statutes such as the Comprehensive

environmental practices of businesses, and fifty-seven percent of those polled thought that the environment was so important that it should be protected regardless of the cost. See PollingReport.com at http://www.pollingreport.com/enviro.htm (last visited Nov. 24, 2003).

10 See DYCUS, supra note 1, at 1.

11 See id. at 36 (describing different environmental statutes and what each regulates). As a body of law, our nation's environmental statutes themselves are powerful and comprehensive. The statutes only become weak through ineffective implementation and enforcement. See Douglas T. Kendall et al., Conservative Judicial Activism and the Environment: An Assessment of the Threat, 32 ENVTL. L. REP. 10835 (2002) (examining how conservative judicial activism undermines environmental protections).


Environmental Response, Compensation and Liability Act ("CERCLA"), which seek to clean up and restore the environment after the damage has been done.

In order to comply with these and other environmental statutes, the Defense of Department ("DoD") has a Deputy Under Secretary for Environmental Security and an entire bureaucratic structure complete with environmental audits, research and development, insertion of environmental performance standards into procurement contracts, training programs to impart environmental awareness to military personnel, and public forums in which to discuss cleanup plans. The DoD issues a "Report on Environmental Compliance" every year, describing the environmental impacts of the various DoD divisions. The DoD also spends between $2.5 and $3 billion on environmental compliance in the territorial United States alone.

Despite the DoD's budgetary commitment to the environment, the relationship between the military and the environment is an inherently tense one. One commentator notes a culture clash:

The two subject matter areas are characterized by radically different institutional and structural contexts. Whereas the national security field involves a highly disciplined, largely secret enterprise mobilized behind unitary goal-oriented missions, frequently beyond the reach of judicial supervision, environmental policy has been made in a relatively transparent setting with a high degree of public consultation and input, with the institution of judicial review playing a catalytic role.

This tension is most starkly expressed by the military's belief that environmental laws do not even apply in wartime. The military requires victory at nearly any cost; the environment bears the burden of that determination.

Yet, according to commentator Stephen Dycus, there is a rising current of environmentalism in the military establishment, a realization that environmental stewardship is part and parcel of national security, not an impediment to it. In 1990, then-Defense Secretary Dick Cheney said that "[d]efense and the environment is not an either/or proposition. To choose between them is impossible in this

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19 For a discussion of all relevant environmental statutes, see generally Dycus, supra note 1, at 36-79.
20 See generally id. 74-79 (describing various DoD programs for compliance with environmental laws).
21 See id. at 75.
22 Id.
24 See Dycus, supra note 1, at 9.
25 Id. at xiii.
real world of serious defense threats and genuine environmental concerns. Some Pentagon officials have expressed the same view, pledging to repair past environmental wrongs and adhere to a stricter code of environmental protection while protecting the country.

Yet the DoD’s most recent authorization bill, sent to President Bush on November 12, 2003, for his signature, provided for military exemptions from the ESA and the Marine Mammal Protection Act, and the Pentagon is pushing this year for further exemptions from the RCRA, CERCLA, and CAA.

Nonetheless, the current Bush administration has taken an either/or stance, prioritizing the struggle against the “Axis of Evil” while rolling back the environmental protection victories of the last thirty years.

Several environmental statutes provide a mechanism for citizens and public interest groups to take enforcement into their own hands when the government fails to enforce the law: the citizen suit. The various citizen suit provisions allow citizens to sue to enforce the terms of these statutes; indeed, Congress recognized that citizen enforcement would be necessary for the statutes to be effectively implemented. There are simply too many statutes and too many polluters for the federal and state environmental protection agencies

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26 Id. at 2 (citing Richard B. Cheney, Address to the Defense and Environment Initiative Forum (Sept. 3, 1990)).
27 Id. (noting the commitment of some defense officials to learn from past mistakes and treat environmental protection as a top priority).
30 See, e.g., Thomas L. Friedman, The War at Home, N.Y. TIMES, Apr. 20, 2003, § 4, at 8 (arguing that the Bush administration’s domestic agenda consists of starving the government of funds for social programs and making the courts unfriendly to those who are not big businesses).
31 The CWA’s citizen suit provision is typical of environmental statutes:
§ 1365 Citizen Suits
(a) Authorization; jurisdiction.
Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—
(1) against any person (including (i) the United States, and (ii) any governmental or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.
32 33 U.S.C § 1365(a) (2000). The statute also provides that the citizen may not file a citizen suit if the Environmental Protection Agency Administrator or the state is already “diligently prosecuting a civil or criminal action.” Id. at § 1365(b).
33 See DYCUS, supra note 1, at 164–65.
to prosecute every case without the supplemental assistance of citizens.

This Comment focuses strictly on the sliver of citizen suits that include a constitutional claim, and is further restricted to those suits in which the court actually addressed the claim instead of dismissing the suit for lack of Article III standing. These constitutional claims are always made in conjunction with statutory claims, but the inverse is not always true; most cases involving statutory claims do not include a constitutional claim. As the following cases suggest, the rarity of these constitutional claims might stem directly from their lack of success in court.

II. JUDICIAL TREATMENT OF CITIZENS' CONSTITUTIONAL CLAIMS

A. The Third Amendment

The citizen petitioners in *Custer County Action Ass’n v. Garvey* asked the Tenth Circuit to reverse orders from the Federal Aviation Administration ("FAA") and the Air National Guard ("ANG"), a component of the United States Air Force, approving the Colorado Airspace Initiative. The Initiative dictated the space for F-16 fighter jets to train under realistic conditions, sometimes below an altitude of 500 feet. The court revealed its attitude towards the petitioners' case in the early part of the opinion: "Petitioners raise an indiscriminate number of statutory and constitutional challenges to the ANG and FAA decisions approving the Initiative." The citizens claimed that the FAA had violated the Federal Aviation Act, FAA regulations, and the Administrative Procedure Act ("APA"); that the ANG and the FAA had violated NEPA and its implementing regulations; and that the ANG and FAA had violated their Third and Fifth Amendment rights.

The court provided twelve pages of reasoning to explain its findings favoring the government on all statutory claims, and then turned to the constitutional claims, spending only a few pages on its de novo review of the Third and Fifth Amendment claims. Regarding the

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35 *Id.* at 1027.

36 *Id.* at 1028–29.

37 *Id.* at 1030.

38 *Id.*

39 *Id.* at 1041–44.
Third Amendment claim, the court began by stating that "[j]udicial interpretation of the Third Amendment is nearly nonexistent . . . . Petitioners argue that '[b]ecause a private party has rights to the airspace above his or her property . . . the United States military may not appropriate such property interests during peacetime without the property owners' consent.' This argument borders on frivolous." Both the brevity of the court's analysis and the judge's condescending language demonstrate that this argument had little chance of success in this court. A less literal interpretation of the Third Amendment could have led to a different outcome. Indeed, if the Third Amendment is to be read this strictly, it loses all of its significance, because unlike the British Redcoats who displaced colonial families from their homes, modern soldiers have their own places to sleep. The court refused to acknowledge that the loud noise from constant flyovers can have the same disruptive effect as having a legion spend the night in one's house.

In Custer County, the Tenth Circuit described and distinguished a different case whose facts did not amount to frivolity. In Engblom v. Carey, striking correction officers were moved out of their staff housing, without their consent, by New York State National Guardsmen who were brought in to work their jobs during the strike. Finding that the rooms in staff housing were the guards' homes, the Second Circuit reversed the lower court's summary dismissal of the plaintiffs' Third Amendment claim. But, in Custer County, the Tenth Circuit stated that the Framers could not have intended for each property owner's property to include all of the airspace above their land. Analogizing to the Fourth Amendment's "legitimate expectation of privacy" doctrine, the court stated that it is "not reasonable to expect privacy from the lawful operation of military aircraft in public navigable airspace," and denied that claim. Here, again, the court made light work of the citizens' claims by taking their argument to an almost absurd logical extreme. The plaintiffs did not demand that every plane flying at any altitude above their homes request

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40 U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.").
41 Custer County, 256 F.3d at 1043 (alteration in original). This is the first time that the Third Amendment, as it applies to the quartering of soldiers, was even judicially interpreted. See Anne Marie C. Petrey, The Second Circuit Review—1981—1982 Term: Constitutional Law: The Third Amendment's Protection Against Unwanted Military Intrusion: Engblom v. Carey, 49 BROOK. L. REV. 857, 858 (1983).
42 677 F.2d 957 (2d Cir. 1982).
43 Id. at 958–61.
44 Id. at 963–64.
45 Custer County, 256 F.3d at 1043.
46 Id.
permission to do so; there is a significant difference between planes flying over homes at 500 feet and at 30,000 feet: the former is exceedingly disruptive, while the latter is not even noticeable.

In *Welch v. United States Air Force*, twenty-eight property owners in Texas contested the Air Force's Realistic Bomber Training Initiative ("RBTI") and filed eleven claims for relief against the United States Air Force and the DoD for trespass, nuisance, and violations of NEPA, and the Fifth and Third Amendments. The Third Amendment claim was summarily dismissed with heavy citations of *Custer County* and *Engblom*: "Defendants argue that Plaintiffs' assertions that the RBTI overflights will involve 'direct invasion' of Plaintiffs' homes are without merit and fail to state any cognizable claim." The court also borrowed the Supreme Court's reasoning in *United States v. Causby*, stating that the modern world cannot use an ancient common law conception of property that extends to "the periphery of the universe." In the modern world, "the air is a public highway. Private claims to public airspace 'would clog these highways'.... 'Common sense revolts at the idea.'" The court granted the defendants' motion to dismiss the Third Amendment claim. Here, again, the court erred in dismissing the case by taking legitimate claims (the planes were flying near the plaintiffs' homes at or near supersonic speeds) and depicting them as petty. The plaintiffs did not want to stop all air travel or hoard the skies—they just wanted to be compensated for that which rendered their homes nearly uninhabitable.

**B. The Fifth Amendment**

The petitioners in *Custer County*, described above, also argued that they were entitled to injunctive relief under the Fifth Amendment because the RBTI, by using the airspace above their properties, constituted "an unauthorized taking of private property without due

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48 Id. at *21.
49 328 U.S. 256 (1946).
50 Welch, 2001 U.S. Dist. LEXIS 21081, at *22 (citing Causby, 328 U.S. at 261); see also Major Walter S. King, The Fifth Amendment Takings Implications of Air Force Aircraft Overflights and the Air Installation Compatible Use Zone Program, 43 A.F. L. REV. 197 (1997) (arguing that the Air Force will have to litigate an increasing number of Fifth Amendment takings claims due to overflights, because once-remote Air Force bases are now in populated areas).
51 See Welch, 2001 U.S. Dist. LEXIS 21081, at *23 (quoting Causby, 328 U.S. at 261) (citations omitted).
52 Id.
53 U.S. CONST. amend. V. The Fifth Amendment provides, in pertinent part, "nor shall private property be taken for public use without just compensation."
In denying this request, the court explained that injunctive relief is only available for unauthorized takings and that unauthorized conduct is ultra vires—that is, "action explicitly prohibited or outside the normal scope of agency responsibilities." The court held that the petitioners' claim could not stand and held for the military since the military's actions did not violate any statutes.

The owners of land in the area of Luke Air Force Base ("Luke") near Phoenix, Arizona, also filed a Fifth Amendment claim in conjunction with claims under NEPA and the Federal Aviation Act in Westside Property Owners v. Schlesinger. Regarding the takings claim, the plaintiffs argued that their property values were reduced by Luke activities such as overflights, and that their communication and enjoyment inside their homes was diminished by noise pollution and fear of crashes. They sought injunctive and declaratory, but not monetary, relief.

In its analysis, the Ninth Circuit said that this claim would normally lack jurisdiction because of sovereign immunity. The plaintiffs tried to claim an exception to the sovereign immunity doctrine by invoking Washington v. Udall, which held that sovereign immunity would not necessarily bar a suit if the government engaged in ultra vires acts. The court rejected this argument, finding that the plaintiffs' position was not so much that Luke's activities were unauthorized but that they were annoying and harmful to property values. As such, sovereign immunity still applied. In a sense, the court was right: the Air Force is obviously allowed to fly. Yet this is too simple, because the Air Force was not just flying, it was making it hard for residents to do simple things like have a conversation, watch television, and sleep in their own homes. The Air Force cannot point to any statute which authorizes it to disrupt the citizens' lives it protects.

Moreover, the court noted an exception to the Washington v. Udall exception: sovereign immunity can exist, even when the government's officers act outside of their statutory authority, if "the relief sought would work an intolerable burden on governmental

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54 Custer County Action Ass'n v. Garvey, 256 F.3d 1024, 1041-42 (10th Cir. 2001).
55 Id. at 1042.
56 Id.
57 597 F.2d 1214 (9th Cir. 1979).
58 Id. at 1218-19.
59 Id. at 1219.
60 Id. Sovereign immunity is defined as a "government's immunity from being sued in its own courts without its consent. Congress has waived most of the federal government's sovereign immunity." BLACK'S LAW DICTIONARY 654 (2d pocket ed. 2001).
61 Washington v. Udall, 417 F.2d 1310 (9th Cir. 1969).
62 Westside Prop. Owners, 597 F.2d at 1219.
functions, outweighing any consideration of private harm. In such cases a party must be denied all judicial relief other than that available in a possible action for damages.\(^6\) The Westside plaintiffs sought an order preventing Luke from operating aircrafts in a way that would deprive them of the use and enjoyment of their real property.\(^4\) The court responded: “Although the cry of ‘national defense’ cannot justify Government illegality, we note that appellants’ requested relief would impinge upon a serious national matter.”\(^6\) The court did not take into account how burdensome the noise pollution was for the plaintiffs or articulate exactly what “serious national matter” was at stake.

Citizens’ efforts to stop Navy training exercises off the coast of Puerto Rico is one of the better known actions against the military, because it has received widespread media attention.\(^6\) Since 1941, the Navy has used Vieques, a small island of fifty-one square miles that is seven miles off of the southeastern coast of Puerto Rico, as a live impact range for all of its war resources.\(^6\) Seventy-three percent of the island’s inhabitants live in poverty and there are inexplicably high rates of cancer.\(^6\) In April 1999, a civilian security guard was killed and four others were injured by two errant bombs.

In the case that began the legal struggle in 1979, the plaintiffs, led by the governor of Puerto Rico, raised a large number of statutory and constitutional claims under the First\(^7\) and Fifth\(^7\) Amendments.\(^7\) In addition, a group of fishermen who lived on Vieques intervened and introduced their own similar claims.\(^7\) The court did not summarize the plaintiffs’ actual arguments for the constitutional claims, instead it just folded them together and dismissed them both at

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\(^6\) Id. (quoting Washington v. Udall, 417 F.2d at 1318).
\(^4\) Id.
\(^6\) Id.
\(^6\) Id.
\(^6\) Id.
\(^6\) Id.
\(^6\) Id.

\(^7\) U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

\(^7\) U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”).

\(^7\) Romero-Barcelo v. Brown, 478 F. Supp. 646 (D.P.R. 1979). These statutory claims included, but were not limited to, claims under NEPA, CWA, CAA, RCRA, ESA, the Marine Protection, Research and Sanctuaries Act of 1972, the Noise Control Act of 1972, and the Coastal Zone Management Act. The trial lasted over three months.

\(^7\) Id. at 650–51.
Finding that the Commerce Clause grants Congress the power to issue restrictions upon "certain areas of the surrounding waters of Vieques," the court held:

Since Plaintiffs have failed to demonstrate that the above restrictions are unreasonable, it is unnecessary for this Court to reach Plaintiffs' Fifth Amendment taking claims. Again, however, Plaintiffs have failed to demonstrate any property interest of theirs which has been invaded, and indeed, they have none, particularly since no one has a property interest capable of being "taken" under the Fifth Amendment, in the fish in the sea.

Finally, the Plaintiffs... allege that the United States military operations on the Island of Vieques constitute a denial of freedom of travel as guaranteed by the First Amendment.... The evidence presented at trial demonstrates clearly that there is no significant restriction on travel or on use of the beaches around Vieques....

The main statutory claim was that the Navy had violated the CWA by discharging pollution, in this case ordnance, into the water without a National Pollution Discharge Elimination System ("NPDES") permit. The court held that the Navy had violated the CWA and required a permit, but finding that the violations were only "technical," declined to enjoin the target practice and instead ordered the Navy to apply for a permit "with all deliberate speed." Although the plaintiffs appealed the case to the First Circuit and the Supreme Court, they did not appeal on their First and Fifth Amendment claims. The plaintiffs were not allowed to express...

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74 The plaintiffs' First Amendment argument provides an interesting counterpoint to the one articulated by the two defendants in United States v. Saade, 652 F.2d 1126 (1st Cir. 1981). In Saade, the defendants, who were part of a group of thirty-five people who interrupted a live target practice with an eleven-boat flotilla, appealed their criminal convictions for unauthorized entry onto the military danger zone on Vieques during naval gunnery practice. The government could not make any arrests on the water because of the weather conditions, but two defendants were recognized and arrested later based on eyewitness accounts. The defendants made a pre-trial motion to dismiss the case by arguing invidious selective prosecution: the government had singled them out for prosecution "in order to deter their exercise of rights protected by the first amendment," since one was the president of the Vieques Fishermen's Association and the other was the attorney for that group. Id. at 1135. The First Circuit upheld the trial court's decision to dismiss the motion because the government had a specific reason for arresting these two defendants that was within the government's discretion, and that the reason had not been to punish the defendants for past political action or prevent future political action. Id. at 1136.

75 U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

76 See Romero-Barcelo, 478 F. Supp. at 700.

77 Id. at 701 (citations omitted).

78 Id. at 708 (quoting Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955)).

79 The cases were appealed in United States v. Puerto Rico, 721 F.2d 832 (1st Cir. 1983), and Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982), in which the Court held that the injunctive...
themselves by demonstrating against the government's activities, and their health and livelihoods were taken away from them by the weapons testing. Yet no matter how much merit these claims theoretically had, the plaintiffs must have seen that no court, not even the highest court in the land, would find merit in them, and so chose to appeal on more pragmatic grounds.

More than twenty litigation-filled years later, the situation on Vieques has not significantly improved. In 2001, citizen plaintiffs combined their claims under RCRA and ESA with equal protection claims, arguing that the DoD chose to conduct its military exercises on Vieques because of its residents' race and national origin. The defendants argued that such claims were time-barred because they went to the military's decision, made in the 1940s, to locate the military base on Vieques, whereas the statute of limitations was six years. The plaintiffs argued that each of the training exercises was a separate violation of their equal protection rights for statute of limitations purposes, not just a continuance of a violation that occurred in the 1940s. The court held that the claims were not barred provided that they were based on training exercises conducted after the statute of limitations expired. However, when appealing the court's dismissal of their RCRA claim with prejudice and their ESA claim without prejudice, the plaintiffs did not include their equal protection claim in their brief, and it was not further considered by the First Circuit. Again, realistically, it would not have done any good.

relief requested by the citizens would cause grievous harm to the Navy and the general welfare of the nation.

82 Water Keeper Alliance v. United States Dep't of Def., 152 F. Supp. 2d 163, 170 (D.P.R. 2001). The opinion states that the claim for denial of the equal protection of the laws is brought under the Fifth Amendment. The Equal Protection clause is vested in the Fourteenth Amendment, which provides that the states shall not "deny any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. Although technically the Fourteenth Amendment only applies to the states, the Supreme Court has adopted a "congruence" principle, interpreting the Fifth Amendment's Due Process Clause to demand equal protection from the federal government as well. See Jesse H. Choper ET AL., CONSTITUTIONAL LAW 1137 (9th ed. 2001).

The Vieques plaintiffs argued that the government's action showed more disregard for their well-being than those who lived elsewhere, because they were Puerto Rican.

83 See Water Keeper Alliance, 152 F. Supp. 2d at 170-71.
84 Id. at 171.
85 Id. at 177.
86 See Water Keeper Alliance v. United States Dep't of Def., 271 F.3d 21 (1st Cir. 2001).
87 Id. at 28.
III. WHY ARE CONSTITUTIONAL CLAIMS REJECTED?

One major reason these citizens lawsuits fail is embodied in the "political question" doctrine. Consider an example from 1971, two years after Congress passed NEPA, when the modern idea of environmental protection was still very new. In *McQueary v. Laird*, citizen plaintiffs living in the five-county area of the Rocky Mountain Arsenal filed a class action lawsuit against the Secretary of Defense and others for violations of their Fifth and Ninth Amendment rights, without invoking any environmental statutes. The complaint challenged the authority and the care with which the defendants stored chemical and biological weapons at the arsenal. The court dismissed the case for want of jurisdiction because none of the statutes relied on by the defendants contained an express waiver of sovereign immunity. Furthermore, no exception to sovereign immunity applied in the instant case because the contested actions were within the officers' statutory authority and were not constitutionally void.

Only during oral arguments (the issue was not briefed) did the plaintiffs argue that the court's jurisdiction could be based on NEPA. The court refused to find jurisdiction in NEPA for claims challenging a military facility's effect on human health and safety via its environmental impacts because there was no precedent for doing so. The court concluded, "[t]he challenges raised by the appellants in this case fall within that narrow band of matters wholly committed to official discretion which, in recognition of the needs involved in national security, do not blend with tests in an evidentiary hearing.

Four years later, the District Court for the District of Columbia picked up this thread and expanded the political question doctrine in its application to military infractions of NEPA, in a case regarding the proposed home port of the Trident submarine called *Concerned About Trident v. Schlesinger*. The court held that the military had the discretion to make the substantive decision to build the Trident

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87 U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

88 449 F.2d 608 (10th Cir. 1971); see also *Nielson v. Seaborg*, 348 F. Supp. 1369 (D. Utah 1972) (granting summary judgment to defendant Atomic Energy Commission on the residents' NEPA claims because nuclear tests were within government's discretion and such discretion was unreviewable because it raised national security issues).

89 *McQueary*, 449 F.2d at 609.

90 Id. at 610.

91 Id. (citing *Dugan v. Rank*, 372 U.S. 609 (1963)).

92 Id. at 612.

93 Id.

94 Id.

because it met the four factors laid out in the Supreme Court’s *Baker v. Carr* decision:

There is a “textually demonstrable... commitment” of the conduct of national defense to the Congress in Article I, § 8, and the President in Article II, § 2. Secondly, the courts are not the proper forum for debate on national security and defense issues. Third, the policy determination to proceed with a particular approach toward national defense is not within the ambit of the court’s expertise or discretion, and, if so undertaken, would be a usurpation of the powers of the Congress and the President who have the duty under the Constitution to develop such policies. Fourth, in light of ongoing international arms limitation negotiations and the large amounts of money already invested in this particular national defense program, there exists an unusual need for adherence to the Trident choice.

So, on the one hand, the days of *McQueary v. Laird* are over: it is clear that NEPA and other environmental statutes apply to national security activities, so much so that courts and litigants now take that fact for granted. On the other hand, the court will often either accept the military’s political question challenge and find that the case is not justiciable as long as the statute has been roughly complied with, or find that the violation does not merit the requested relief because the national security issue at stake is more important than the environmental issue. The *Concerned About Trident* court also comments that even if national security does not hinge upon the completion of the project in question, the amount of money already spent weighs heavily against environmental considerations. This holding creates a perverse incentive for the military, or indeed any federal agency, to

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96 369 U.S. 186 (1962).
97 *Concerned About Trident*, 400 F. Supp. at 482.
98 See *Dycus*, supra note 1, at 16-17. Dycus explains that two sections of NEPA have “qualifying language” that could give defense activities greater latitude under the statute. *Id.;* see 42 U.S.C. § 4331(b) (providing that the government “use all practicable means, consistent with other essential considerations of national policy,” to comply with the statute); 42 U.S.C. § 4332 (providing that the agency conduct environmental review “to the fullest extent possible”).
99 See *Dycus*, supra note 1, at 165 (analyzing cases in which the political question doctrine has been raised); *cf* United States v. United States Dist. Ct., 407 U.S. 297, 320 (1972) (“We cannot accept the Government’s argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society.”); Wisconsin v. Weinberger, 745 F.2d 412, 427 (7th Cir. 1984) (finding fault with the district court’s failure to balance the “weight of the alleged NEPA violation against the harm the injunction would cause the Navy and to this country’s defense. The Navy has emphasized that an ELF submarine communications system . . . . [I]s essential to the national defense and that any delay in its construction is contrary to national defense interests.”); Romero-Barcelo v. Brown, 478 F. Supp. 646, 708 (D.P.R. 1979) (“[U]nder the present circumstances the continued use of Vieques by Defendant Navy for naval training activities is essential to the defense of the Nation and that the enjoining of said activities is not an appropriate relief for the correction of the cited statutory violations.”).
100 See *Concerned About Trident*, 400 F. Supp. at 482–83.
spend massive amounts of money before trying to comply with NEPA, because once the money is spent the court will consider that fact when deciding whether to enjoin the project.

Yet whether the court is inclined to give priority to national security issues, should not the plaintiffs’ invocation of their constitutional rights merit more judicial attention? Even if the constitutional claims do not persuade the court to find for the plaintiffs, the courts fail to give either the citizens or the Constitution any respect in these instances. The cases noted above give these claims short shrift, quickly dismissing them at the end of the opinions, usually without bothering to describe the substance of the claims. The courts also do not indicate that a valid constitutional claim could hypothetically be made if only plaintiffs’ counsel was more competent. While there have been successful citizen suits against the military, there has never been a prevailing constitutional claim.

Does this summary treatment have more to do with the fact that the military is a litigant, arguing that national security is at stake, or with the fact that citizens who interfere in the government’s business by filing citizen suits face a difficult road? A 1980 citizen suit against the United States Army Corps of Engineers, National Sea Clammers Ass’n v. New York, provides both an interesting counterpoint to citizen suits against the military establishment and a possible explanation for the fate of constitutional claims that the cases noted above fail to include. The U.S. Army Corps of Engineers is part of the Army, but ninety-seven percent of its personnel are civilian. Its projects include navigation, flood control disaster response, military construction, and support for defense and federal agencies.

In National Sea Clammers Ass’n, fishermen sued the U.S. Army Corps of Engineers under a number of statutory claims, including the CWA, the Marine Protection, Research and Sanctuaries Act, and the Rivers and Harbors Act, for violations that damaged the seabed off the New Jersey coast and impaired their ability to make their living.
They also raised constitutional claims under the Fifth, Ninth, and Fourteenth Amendments. The plaintiffs argued that they had a constitutional right to a pollution-free environment that they could enforce "by virtue of their special relationship to the environment."107 The district court rejected the claims, and the Third Circuit affirmed, holding that "[i]t is established in this circuit and elsewhere that there is no constitutional right to a pollution-free environment."108 The plaintiffs did not appeal the dismissal of their constitutional claims to the Supreme Court.109

This case indicates that the court's dismissal of constitutional claims in citizen suits against the military may have less to do with national security (since the Army Corps of Engineers is not actually on the front lines of any fighting force) than with a narrow reading of constitutional rights and a strict adherence to legal precedent. More than twenty years later, there is still no constitutional right to a clean environment.110 All of the cases above are decided by judges who mechanically apply the law: the Third Amendment applies only when soldiers are sleeping in your bed; the Fifth Amendment applies only when the Air Force builds an airstrip on your front lawn. If the military says they need to do it this way, who are we to question them? This stagnant treatment of the military and the environment does not take into account the decades-long accumulation of environmental damage that must be addressed at some point. Nor does it take into account the modernization that the other constitutional amendments have undergone. For instance, the First Amendment accommodates the Internet, and the Second Amendment accommodates weapons other than muskets. Perhaps the judiciary may eventually reflect the current trend of environmentalism that is slowly growing in this country.

IV. BALANCING THE NEEDS OF THE MILITARY AND THE ENVIRONMENT

If environmental concerns are ever to be given as much weight as military concerns, current world events suggest that that day is far off. However, regardless of whether this trade-off between environmental

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106 Id. at 1237–38.
107 Id. at 1238.
108 Id.
110 For arguments that there should be a constitutional right to a healthy environment, including proposals on how it should be created, see Janelle P. Eurick, The Constitutional Right to a Healthy Environment: Enforcing Environmental Protection Through State and Federal Constitutions, 11 INT'L LEGAL PERSP. 185 (2001), and Bruce Ledewitz, Establishing a Federal Constitutional Right to a Healthy Environment in Us and in Our Posterity, 68 MISS. L.J. 565 (1998).
and national security serves citizens, are environmental and military security really at odds? Stephen Dycus optimistically argues that while these concepts were once mutually exclusive, that is no longer the case: “with rare exceptions, we can maintain a strong, effective defense without endangering the public health or destroying our natural resources.” He lays out a series of steps that can be taken in the legislative, administrative, financial, diplomatic, and cultural arenas to solidify this merger between environmental and military interests. Yet, he does not describe what circumstances would create the “rare exceptions” where environmental sacrifices must be made. Writing before September 11, 2001, Dycus could not have imagined the current period of heightened militarism that so closely followed the publication of his book in 1996. One imagines that there is less cause for optimism today, and that the definition of a “rare exception” is above all a political question. In the same way that the post-September 11th world has swallowed up many civil liberties and personal freedoms in an effort to maintain national security, so too may environmental protection be increasingly sacrificed. Just as the courts do not hear the constitutional claims of military prisoners being held without trials in connection with terrorist attacks, the courts could continue to disregard the constitutional claims of citizens who bring environmental citizen suits against the military.

One commentator writing more than ten years before September 11th expressed his concerns about judicial deference to the military establishment, quoting Justice Murphy for the proposition that “[w]e should not break faith with this Nation’s tradition of keeping military power subservient to civilian authority.” In the context of weapons testing and tort liability, Professor Barry Kellman examines three cases in which he alleges that the “judiciary, notably the Rehnquist Court, has abdicated its responsibility to review civil matters involving the military security establishment.” The courts can be convinced of military necessity just because the military says that

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111 DYCUS, supra note 1, at 185. Tellingly, the author entitles the last chapter of his book “National Defense vs. Environmental Protection: We Can Have It Both Ways.”

112 Id. at 187-94.

113 Dycus does, however, provide the following idea:

If environmental trade-offs must be made in the interest of national security, or if the environment is to be placed at risk, we want to be informed in advance. We want to be able to say that the environmental harm was unavoidable, that there were no viable alternatives, and that we planned it that way.

Id. at 11.


115 See Barry Kellman, Judicial Abdication of Military Tort Accountability: But Who Is to Guard the Guards Themselves?, 1989 DUKE L.J. 1597, 1597 (quoting Reid v. Covert, 354 U.S. 1, 40 (1956)).

116 Id. at 1598.
the contested program is necessary, without providing substantiation, or indeed, even having any substantiation. Kellman argues that the judiciary should do just the opposite, subjecting military decisions to rigorous scrutiny for compliance with the law, particularly to insure that individuals are not deprived of their constitutional rights. Specifically, the author advocates for an adoption of the test advocated by the Korematsu dissent: the government can only deprive an individual of her constitutional rights when a public danger is ""immediate, imminent, and impending." This test is much more appropriate than simple military "need" because it sets the bar much higher.

CONCLUSION

For the short term, it appears that national security will prevail over environmental security. Such an outcome may be unavoidable, even reasonable, in the eyes of citizens receiving military protection from external threats, whether those threats are real or perceived. However, these same citizens suffer from the loss of environmental quality that the military protection creates. Noise pollution lessens property values and enjoyment of homes, areas of weapons testing and increased cancer rates overlap, and the loss of too many species make some unable to earn a living.

The American environment is a part of this nation’s heritage: our determination to occupy the entire continent shaped our history, our extraction of its natural resources created our wealth, and its agricultural abundance maintained our health. The environment is part and parcel of the American way of life, yet the military that protects our way of life also contributes to its destruction, and is given more latitude to do so by the courts than any other entity, public or private. The Pentagon sought and won exemption from several environmental laws in Congress in 2003, and its efforts continue in 2004. A vice chief of staff for the Army, speaking of the environmental hoops that the Army must jump through, commented, "We’re on a collision course with our national priorities." Exhibiting enormous hubris, he also said, "The Army hosts 170 federally endangered

117 Id. at 1600-01.
118 Id. at 1600-02.
119 Id. at 1601 (citing Korematsu v. United States, 323 U.S. 214, 234 (1944) (Murphy, J., dissenting) (citations omitted)).
120 See DYCUS, supra note 1, at 193.
122 See, supra note 29, and accompanying text.
123 Id. (quoting General John M. Keane).
species on 94 installations. 124 Until the military realizes that the environment hosts *them*, and not the other way around, the conflict between the military and the environment will continue, and the environment (and America) will continue to lose.