# NOTE

# The Constitutionality of Oakland's Nuclear Free Zone Ordinance

On November 8, 1988, fifty-seven percent of the voters in the City of Oakland, California approved "Measure T,"[1] establishing Oakland as a Nuclear Free Zone (NFZ).[2] One of the broadest such ordinances in the United States,[3] its provisions regulated the development and use of nuclear weapons, nuclear reactors, and hazardous materials. Included in its regulatory net was any "person," defined to include both governmental agencies and private parties.[4] Unlike many similar measures that are largely symbolic in nature,[5] Oakland's ordinance had "real teeth."[6] The enforcement of its provisions would have resulted in substantial curtailment and restriction of private and military use of nuclear materials and weapons in Oakland.

On September 6, 1989, the United States Department of Justice filed suit against the City of Oakland, challenging the constitutionality of the

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1. *Who's in Charge? Oakland's Nuclear-Free Law Creates a Foreign-Policy Tower of Babel*, L.A. Daily J., June 29, 1989, at 6, col. 1 [hereinafter *Who's in Charge?*].

2. Oakland, Cal., Ordinance 11062 C.M.S. (Nov. 8, 1988) [hereinafter "Ordinance"]. "Measure T," the Oakland Nuclear Free Zone Act, was passed by initiative. The petition drive was spearheaded by the "Nuclear Free Oakland Campaign," a local citizens' group. *Oakland Activists Move to Intervene*, The New Abolitionist, Nov. 1989, at 1, col. 1. The term "nuclear free zone," or "NFZ," is one of common usage. The term encompasses a wide variety of forms of legislation, referenda, and resolutions throughout the world. The term may be misleading as many "nuclear free zones" are not nuclear *free*, per se, and do not intend to be. For example, some NFZs may restrict the presence of nuclear weapons but allow nuclear reactors, or vice versa. For lists of NFZs throughout the world, and examples of the wide variety of legislation existing under the umbrella title "nuclear free zone," see *Nuclear Free Zones in the United States*, The New Abolitionist, Nov. 1989, at 12.

3. *Oakland Suit a Threat to Other Nuke-Free Zones*, L.A. Daily J., Sept. 1, 1989, at 1, col. 4 [hereinafter *Oakland Suit a Threat*].

4. Ordinance, *supra* note 2, §§ 4-9. Section 11 defines "person" to be "any natural person, corporation, college, or university, laboratory, institution, governmental agency, or other entity." *Id.* at § 11.

5. The New Abolitionist, the newsletter for Nuclear Free America, lists Nuclear Free Zones in the United States. Some are not legally binding; others take effect only if a Soviet sister city is declared an NFZ. *See Nuclear Free Zones in the United States*, *supra* note 2, at 12.

6. *Who's in Charge?*, *supra* note 1, at 6, col. 1.

NFZ ordinance.[7] The complaint charged the city with violations of the War Powers Clause[8] and the Supremacy Clause[9] and alleged statutory preemption under the Atomic Energy Act[10] and the Hazardous Materials Transportation Act.[11]

More than 160 cities and counties across the United States have become NFZs.[12] The suit against Oakland, however, constituted the first federal government challenge to a local NFZ ordinance.[13] Because Oakland's ordinance as enacted was one of the most "sweeping" in the nation, the outcome of this suit likely will affect the future of similar measures throughout the United States.[14] Prior to this suit, case law dealing with the constitutional questions raised by NFZs was scant[15] and did not provide a clear analytical framework for predicting the outcome of the suit.

The district court ended all speculation on August 23, 1990, when it granted the government's motion for partial summary judgment.[16] The order stripped the Ordinance of most of its power, allowing only minor provisions to remain in effect.[17] While this decision impacts directly only on Oakland's ordinance, a discussion of the case law and an analysis of the decision are useful to an evaluation of the future of NFZs throughout the country.

Part I of this Note addresses the purposes and provisions of Oakland's NFZ ordinance as enacted, and explains why the Department of Justice targeted Oakland for its "test case."[18] To illustrate some of the potential constitutional issues raised by NFZs, Part II discusses four of

7. United States v. City of Oakland, No. C89-3305 TEH (N.D. Cal. filed Sept. 6, 1989) (complaint for declaratory and injunctive relief) [hereinafter "Complaint"]. Note that the case was originally assigned to Judge Henderson (TEH) and later transferred to Judge Vukasin (JPV).

8. U.S. CONST. art. I, § 8, cls. 11-16.

9. U.S. CONST. art. VI, cl. 2.

10. 42 U.S.C. §§ 2011-2296 (1988).

11. 49 U.S.C. §§ 1801-1813 (1988). Other causes of action outside the scope of this Note include violation of the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, the Enclave Clause, U.S. CONST. art. I, § 8, cl. 17, and the Property Clause, U.S. CONST. art. IV, § 3, cl. 2, and preemption concerning the reporting of classified and sensitive unclassified information.

12. *Nuclear Free Zones in the United States, supra* note 2, at 12.

13. *Justice Department Files Suit Against Oakland NFZ Law*, The New Abolitionist, Nov. 1989, at 1, col. 1.

14. *Oakland Suit a Threat, supra* note 3, at 1, col. 4.

15. *See* Fossella v. Dinkins, 130 Misc. 2d 52, 494 N.Y.S.2d 1012 (Sup. Ct. Richmond County), *aff'd*, 110 A.D.2d 227, 494 N.Y.S.2d 878, *aff'd on other grounds*, 66 N.Y.2d 162, 485 N.E.2d 1017, 495 N.Y.S.2d 352 (1985); Arthur D. Little, Inc. v. Commissioner of Health and Hospitals, 395 Mass. 535, 481 N.E.2d 441 (1985).

16. United States v. City of Oakland, No. C-89-3305 JPV (N.D. Cal. Aug. 23, 1990) (memorandum of opinion and order granting plaintiff's motions for partial summary judgment) [hereinafter Memorandum of Opinion].

17. *Id.* at 13-14; *see infra* note 164 and accompanying text.

18. *Oakland Suit a Threat, supra* note 3, at 1, col. 4.

the Justice Department's causes of action in the Oakland case: violation of the War Powers Clause and the Supremacy Clause, and statutory preemption by the Atomic Energy Act[19] and the Hazardous Materials Transportation Act.[20] Part III discusses the case law on this issue prior to the district court's decision in *United States v. City of Oakland*. Part IV applies the reasoning used in the above cases to Oakland's ordinance. Part V discusses and critiques the actual district court opinion in light of the discussion of earlier case law. Part VI suggests some additional considerations a court may take into account and concludes that although Oakland's ordinance was subject to constitutional constraints, a court emphasizing both the use of local police power and the reluctance of courts to find preemption may uphold an ordinance equally broad in the face of a constitutional challenge.

## I. The Ordinance

### A. Background

Proponents of Oakland's NFZ ordinance describe Alameda County, of which Oakland is county seat, as a "hub of the nuclear weapons complex."[21] The area serves such facilities as Lawrence Livermore National Laboratory (a major center for atomic bomb research),[22] Alameda Air Station, Oakland Army Base, Mare Island Naval Shipyard in nearby Vallejo,[23] and Concord Naval Weapons Station.[24] Additionally, Alameda is home port for one-third of the Navy's fleet of nuclear-powered surface warships.[25] Indeed, the Navy has long been a major presence in the entire San Francisco Bay Area.[26]

This relationship is significant for two reasons. First, such significant military and nuclear presence likely fueled the drive for the initiative with such a potentially strong NFZ. Residents of Oakland are more aware than those of many other cities of the presence of nuclear materials and weapons in their area. Second, that same significant military and nuclear presence was apparently the motivation behind the suit against Oakland. In its complaint, the Department of Justice acknowledged the considerable movement of nuclear materials through Oakland, stating that "[b]ecause several naval shore facilities located in and around Oak-

19. 42 U.S.C. §§ 2011-2296 (1988).

20. 49 U.S.C. §§ 1801-1813 (1988).

21. *Federal Judge Throws Out Oakland Nuclear Free Law*, San Francisco Chron., Apr. 28, 1990, at A1.

22. *The Nuclear-Free Skirmish Verging on an All-Out War*, Chicago Tribune, Mar. 30, 1990, at 23 [hereinafter *The Nuclear-Free Skirmish*].

23. *Federal Judge Throws Out Oakland Nuclear Free Law*, *supra* note 21, at A1.

24. Complaint, *supra* note 7, at 6.

25. *The Nuclear-Free Skirmish*, *supra* note 22, at 23.

26. *The Navy and The Bay Area—Shipmates for 144 Years*, San Francisco Chron., Jan. 26, 1990, at A16.

land are directly affected, the Ordinance seriously undermines the ability of the United States Navy to supply, repair[,] and maintain fleet units operating throughout the Pacific region."[27]

### B. Findings Enumerated in the Ordinance

Section three of the Ordinance sets forth in six paragraphs the reasons for its adoption.[28] Each paragraph illustrates that Oakland intended the Ordinance to be an exercise of the city's police power, aimed at accomplishing such goals as the protection of Oakland's "economic well-being,"[29] the elimination of threats to public health and safety,[30] and the rechannelling of City funds to "needed human services."[31]

Specifically, paragraphs (a) and (b) contain findings that nuclear weapons and other hazardous radioactive materials are an intolerable danger to Oakland's economic well-being, to the environment, and to the health and safety of Oakland residents.[32]

Paragraph (c) states the finding that nuclear reactors pose similar threats of exposure to radioactivity through the routine handling of nuclear materials, and that the residents of Oakland are specifically threatened by nearby Rancho Seco nuclear power plant and nuclear reactors aboard Navy ships berthed in the San Francisco Bay.[33]

Paragraph (d) expresses the finding that the production of nuclear weapons is the major driving force of the nuclear fuel cycle,[34] and that each stage of that cycle poses serious risks to public health and safety.[35]

Paragraph (e) contains a finding that money invested by the city in businesses participating in nuclear weapons work helps support the arms race, diverts funds from needed human services, and is not a responsible use of city funds.[36]

Finally, paragraph (f) expresses the general desire by the people of Oakland to end the arms race. It calls on the city to exercise its police power authority to eliminate threats to the public health and safety due to the presence of nuclear weapons work, nuclear reactors, and hazard-

27. Complaint, *supra* note 7, at 2.

28. Ordinance, *supra* note 2, § 3. (All references to sections of the Ordinance refer to the Nuclear Free Zone Act as enacted by voter initiative in 1988, not to any version of the Ordinance that remained following the district court decision).

29. *Id.* § 3(a).

30. *Id.* § 3(a)-(d), (f).

31. *Id.* § 3(e).

32. *Id.* § 3(a), (b).

33. *Id.* § 3(c).

34. The Ordinance defines the nuclear fuel cycle as including "mining, refining, nuclear reactors, food irradiation plants, waste storage, transportation[,] and reprocessing facilities." *Id.* § 3(d).

35. *Id.* § 3(d).

36. *Id.* § 3(e).

ous radioactive materials in Oakland, and to stop making investments or contracts that contribute to the nuclear arms race by benefitting businesses participating in nuclear weapons work.[37]

### C. Purposes, Prohibitions, and Regulations Set Forth in the Ordinance

The purpose of the Ordinance, to make Oakland a nuclear free zone, is set forth in section two.[38] The City proposed to accomplish this task by

a. Prohibiting the production of nuclear weapons[39] in Oakland;
b. Regulating the transportation of nuclear weapons and hazardous radioactive materials[40] through Oakland and informing the citizens of Oakland before such transportation takes place;
c. Banning the storage or reprocessing of hazardous radioactive materials in Oakland;
d. Prohibiting City contracts with or the investment of City funds[41] in any business that knowingly engages in nuclear weapons work;[42] and
e. Prohibiting nuclear reactors[43] in Oakland.[44]

Unlike many other NFZs, the Oakland ordinance includes the regulation of nuclear weapons, nuclear reactors, *and* hazardous radioactive

37. *Id.* § 3(f).

38. *Id.* § 2. Specific prohibitions and regulations intended to fulfill this purpose are set forth in §§ 4-8 of the Ordinance.

39. "Nuclear weapon" is defined as

> any device, the intended explosion of which results from the energy released by reactions involving atomic nuclei, either fission or fusion or both. Nuclear weapon includes the means of transporting, guiding, propelling, triggering, or detonating the weapon. [It] also includes any component of a nuclear weapon, i.e., any device radioactive of [sic] non-radioactive, the primary intended function of which is to contribute to the operation of a nuclear weapon . . . .

*Id.* § 11(c).

40. "Hazardous radioactive material" is defined as

> any radioactive isotope(s) resulting from the operation of, or intended for use in, nuclear fission reactors or nuclear weapons; the refined products of spent nuclear fission reactor fuel that are themselves radioactive; the radioactive components of nuclear fission reactors . . . ; or the tailing or similar debris resulting from the mining of uranium or other radioactive elements . . . .

*Id.* § 11(g).

41. Prohibiting city contracts with businesses doing nuclear weapons work is a complex issue outside of the scope of this Note. For a thorough discussion, see Borchers & Dauer, *Taming the New Nuclear Free Zone*, 40 HASTINGS L.J. 87 (1988).

42. "Nuclear weapons work" is defined as "any work that has as its purpose the development, testing, production, possession, maintenance or storage of nuclear weapons, the components of nuclear weapons, or any secret or classified research or evaluation of nuclear weapons." Ordinance, *supra* note 2, § 11(d). A "nuclear weapons maker" is any person who knowingly engages in such nuclear weapons work. *Id.* § 11(e).

43. "Nuclear reactor" is defined as "any device that has as its purpose the release of energy from non-explosive reactions involving the fission of atomic nuclei." *Id.* § 11(f).

44. *Id.* § 2(a)-(e).

materials. The Ordinance does not exempt the federal government from its provisions.[45] Because of this breadth of coverage and the failure to exclude the federal government from its restrictions and prohibitions, the Ordinance had the potential to violate the Constitution's Supremacy Clause and the constitutional grant of war powers to the federal government, as well as the possibility of preemption by federal statutes.[46]

## II. The Causes of Action in *United States v. City of Oakland*

### A. Constitutional Preemption Under the Supremacy Clause

The Supremacy Clause provides that the Constitution and the laws of the federal government constitute the supreme law of the land and are binding on the states.[47] Local legislation must give way to federal law in any area over which Congress has expressly or impliedly occupied the field by exercising exclusive authority.[48] When a particular local law is an exercise of traditional police powers, such as concern for public health and safety, the courts will make an "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[49] Part B will discuss this doctrine of federal preemption as it relates to the constitutional grant of war powers to the federal government.[50] Part C will discuss statutory preemption by both the Atomic Energy Act[51] and the Hazardous Materials Transportation Act.[52]

45. For an example of an NFZ more narrowly tailored and specifically exempting the federal government from its provisions, see, *e.g.*, CHICAGO, ILL., MUNICIPAL CODE ch. 202 (1986). The Chicago ordinance was designed to phase out over a period of two years all nuclear weapon-related activities by *private* parties within Chicago. *Id.* chs. 202.1(a), 202.2(a). The ordinance was wholly symbolic; over 300 Chicago firms doing work for the federal government have been formally surveyed since the ordinance was passed, and none of them is engaged in nuclear weapons work. *The Nuclear-Free Skirmish*, *supra* note 22, at 23.

46. *See* Note, *Local Nuclear-Free Zone Legislation: Force of Law or Expressions of Political Sentiment?*, 22 U.S.F. L. REV. 561, 562 n.4 (1988).

47. U.S. CONST. art. VI, § 2 provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

48. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947).

49. Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 206 (1983) (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

50. U.S. CONST. art. I, § 8, cls. 11-16.

51. 42 U.S.C. §§ 2011-2296 (1982 & Supp. II 1984).

52. 49 U.S.C. §§ 1801-1813 (1988).

### B. The Traditional Scope of Federal Preemption by the Constitutional Grant of War Powers to the Federal Government

The Constitution grants to the federal government the power to "provide for the common Defence[,] . . . [to] raise and support Armies, . . . [to] provide and maintain a Navy[,] . . . [and to] make Rules for the Government and Regulation of the land and naval Forces."[53] These powers traditionally have been interpreted as "broad and sweeping."[54]

*United States v. Tarble*[55] is one of the earliest cases dealing with this broad power to provide for the common defense. In *Tarble's Case*, a minor was discharged from the Army for having enlisted without his father's consent.[56] The Supreme Court held that the federal government's control over the subject of raising armies was "plenary and exclusive,"[57] and that "[n]o interference with the execution of this power of the national government in the formation, organization, and government of its armies by any state officials could be permitted without greatly impairing the efficiency [of], if it did not utterly destroy, this branch of the public service."[58]

A more recent case, *United States v. O'Brien*,[59] involved the public burning of selective service registration cards. The Court held that the "constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping."[60] According to the Court, this gave Congress the power to require registration and cooperation even if it results in "incidental limitations on First Amendment freedoms."[61]

This "broad and sweeping" standard became the measure of subsequent war powers analyses.[62] In the absence of express language, however, courts will not presume that Congress has exercised its broad and sweeping war powers to preempt local law.[63] Courts generally are reluctant to infer preemption;[64] courts prefer a finding of no preemption be-

53. U.S. CONST. art. I, § 8, cls. 1, 12-14.
54. United States v. O'Brien, 391 U.S. 367 (1968).
55. 80 U.S. (13 Wall.) 397 (1871).
56. *Id.* at 397.
57. *Id.* at 408.
58. *Id.*
59. 391 U.S. 367 (1968).
60. *Id.* at 377.
61. *Id.* at 376.
62. *See* Rostker v. Goldberg, 453 U.S. 57, 65 (1981) (gender-based draft registration held not violative of Fifth Amendment because of deference of courts to Congress's war powers); Schlesinger v. Ballard, 419 U.S. 498, 510 (1975) (Congress has "broad constitutional power" to raise and regulate armies and navies).
63. Caldwell v. Parker, 252 U.S. 376, 385 (1920); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 237 (1947).
64. City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 643 (1973); Exxon Corp. v. Governor of Md., 437 U.S. 117, 132 (1978).

cause Congress can then overrule that finding by appropriate express legislation if it determines that a state has misused its authority.[65]

Most cases interpreting the war powers involve soldiers and recruiting for military service.[66] The reasoning presented in those cases was used by the courts in both *Fossella v. Dinkins*[67] and *Arthur D. Little, Inc. v. Commissioner of Health and Hospitals*,[68] two cases dealing with the same constitutional issues as the Oakland case. Neither case involved soldiers or military recruiting. As discussed below in Part III, however, the courts did adopt the traditional analysis used in the older soldier cases.

### C. Statutory Preemption by the Atomic Energy Act and the Hazardous Materials Transportation Act

Federal statutory preemption of local law can be demonstrated in either of two general ways: (1) if Congress evidences an intent to occupy a given field, any local law within that field is preempted; or, (2) local law is preempted to the extent that it actually conflicts with federal law, such as when compliance with both the federal and local law is physically impossible, or when the local law stands as an obstacle to the accomplishment of Congress's purposes and objectives.[69]

In its suit against Oakland,[70] the Department of Justice contended that the Ordinance was preempted by the Atomic Energy Act[71] and the Hazardous Materials Transportation Act.[72] The government argued that these statutes give the federal government exclusive authority in the

65. Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 216 (1983); Agency Rent-a-Car, Inc. v. Connolly, 686 F.2d 1029, 1038 (1st Cir. 1982).

66. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981) (Congress may base draft registration on gender); Schlesinger v. Ballard, 419 U.S. 498 (1975) (Congress has "broad constitutional power" to raise and regulate army); United States v. O'Brien, 391 U.S. 367 (1968) (public burning of draft card illegal); Selective Draft Law Cases, 245 U.S. 366 (1918) (compulsory military service permissible).

67. 130 Misc. 2d 52, 494 N.Y.S.2d 1012 (Sup. Ct. Richmond County), *aff'd*, 110 A.D.2d 227, 494 N.Y.S.2d 878, *aff'd on other grounds*, 66 N.Y.2d 162, 485 N.E.2d 1017, 495 N.Y.S.2d 352 (1985). The constitutional issue was addressed in the Supreme Court and in the Appellate Division of the Supreme Court. The Court of Appeals, the highest court in New York, decided the case on the basis of state law. The constitutional issue, therefore, is not precedent; the analysis used, however, is relevant here.

68. 395 Mass. 535, 481 N.E.2d 441 (1985).

69. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984) (citing *Pacific Gas & Elec. Co.*, 461 U.S. at 203-04).

70. Complaint, *supra* note 7.

71. 42 U.S.C. §§ 2011-2296 (1988).

72. 42 U.S.C. §§ 1801-1813 (1988). The Justice Department also claims preemption under Executive Order No. 12356, which concerns reporting of classified and sensitive unclassified information; this preemption claim is outside of the scope of this Note and will not be discussed here.

fields and that Oakland's ordinance interfered with the exercise of that exclusive authority.[73]

### *1. The Atomic Energy Act*

Under the Atomic Energy Act (AEA),[74] individual states and the federal government cooperate in the regulation of nuclear energy.[75] State regulation is permitted only for purposes "other than protection against radiation hazards."[76] The Act has been interpreted as permitting states to exercise their traditional economic and other police powers[77] in such areas as decisions on generating capacity and the need for nuclear facilities,[78] while Congress expressly preempts the field of nuclear *safety* regulation.[79]

Two recent Supreme Court cases, *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*[80] and *Silkwood v. Kerr-McGee Corp.*,[81] address the scope of permissible state regulation under the AEA. In both cases the local legislation in question was upheld on the grounds that it did not interfere with the Nuclear Regulatory Commission's exclusive authority to regulate safety aspects of radiation.[82] These cases illustrate how legislation can be drafted and interpreted to avoid a charge of preemption.

In *Pacific Gas & Electric*,[83] the Court held that the AEA did not preempt a California statute prohibiting the construction of any new nuclear power plants until adequate storage facilities were available.[84] Although the moratorium could be construed as having been motivated by safety concerns, the statute's stated purpose was an economic one: the prevention of heavy costs that would result from a lack of storage space for nuclear waste.[85] The Court considered these economic factors to be a

73. Complaint, *supra* note 7, at 21, 24-26.

74. 42 U.S.C. §§ 2011-2296 (1988).

75. *Id.* § 2021. The Nuclear Regulatory Commission ("NRC") is the federal agency charged with the regulation of nuclear energy. *Id.*

76. *Id.* § 2021(k). Section (k) provides that "[n]othing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards."

77. The police power is that power inherent in the states to prescribe reasonable regulations necessary to preserve the public order, health, safety, and morals. 16A AM. JUR. 2D *Constitutional Law* § 363 (1979).

78. Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 205, 212 (1983); *see also* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

79. *Pacific Gas & Elec.*, 461 U.S. at 205, 212; *see* Jones v. Rath Packing, 430 U.S. 519 (1977).

80. 461 U.S. 190 (1983).

81. 464 U.S. 238 (1984).

82. 42 U.S.C. § 2021(k) (1982).

83. 461 U.S. 190 (1983).

84. *Id.* at 197-98.

85. *Id.*

legitimate concern of the state, and found the statute to be outside of the federally occupied area of nuclear safety.[86]

In *Silkwood*,[87] the Court upheld an Oklahoma statute allowing punitive damages claims for radiation injuries. Although this local legislation arguably comes much closer to regulating in the federally occupied field of nuclear safety, the Court held that the AEA does not prohibit state tort laws allowing recovery for injuries from exposure to radiation.[88] The Court found ample evidence that when Congress enacted the AEA it had no intention of forbidding state tort law remedies for those suffering injuries from exposure to radiation in a nuclear power plant.[89] The AEA provides no federal remedy, and legislative history indicates that Congress assumed that state tort remedies would be available.[90] The AEA, therefore, leaves the power to provide legal remedies for injured citizens to the individual states.[91]

Both cases indicate that while Congress expressly intended to occupy the field of nuclear safety, the Court found no preemption when the local legislation served some legitimate economic or police power goal,[92] despite a tangential relationship to nuclear safety. The economic and other traditional police power concerns expressed in these cases[93] were sufficient to avoid federal preemption by the AEA.

### 2. *The Hazardous Materials Transportation Act*

The Hazardous Materials Transportation Act (HMTA)[94] authorizes the federal government to promulgate regulations to "protect the nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce."[95] The primary purpose of the HMTA is to provide for uniform national regulations, thereby preventing a multiplicity of possibly conflicting state and local regulations in the area of hazardous materials transportation.[96] The Act expressly discusses the scope of preemption of state regulation: a state regulation will not be preempted if it affords an equal or greater level of protection as the federal regulation and does not unduly burden commerce.[97] Case law implements this policy by upholding state and local

86. *Id.* at 213, 216.
87. 464 U.S. 238 (1984).
88. *Id.* at 256.
89. *Id.* at 251.
90. *Id.*; S. REP. No. 296, 85th Cong., 1st Sess. 9 (1957).
91. *Silkwood*, 464 U.S. at 254-55.
92. *See supra* notes 77-79 and accompanying text.
93. *Silkwood*, 464 U.S. 238; Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1980).
94. 49 U.S.C. §§ 1801-1812 (1988).
95. *Id.* § 1801.
96. National Tank Truck Carriers, Inc. v. Burke, 608 F.2d 819, 824 (1st Cir. 1979).
97. 49 U.S.C. § 1811(b).

regulation in the area of the transportation of hazardous materials when: (1) it is possible to comply with both the state and federal regulations; and (2) the state regulation is at least as strict as that of the federal government.[98]

Unlike the AEA, which preempts the entire field of nuclear safety regulation by allowing state and local regulation only by negative implication (that is, only for purposes "*other than* protection against radiation hazards"),[99] the HMTA does not call for complete preemption of all state regulations in the area of hazardous materials transportation. It provides, rather, that only inconsistent state regulations and regulations unduly burdening commerce are preempted;[100] all others are allowed to remain in effect.[101]

## III. Current Case Law

*Fossella v. Dinkins*[102] and *Arthur D. Little, Inc. v. Commissioner of Health and Hospitals*[103] are two state cases directly discussing the constitutionality of local legislation as it affects the implementation of defense policy in a particular locale. The two cases come to opposite conclusions concerning the constitutionality of the local legislation at issue in each case. In *Fossella*, a proposed New York City charter amendment would effectively have precluded the military from establishing any nuclear facility in New York City. The court held that the amendment was invalid because it violated the constitutional grant of war powers to the federal government.[104] To the contrary, *Arthur D. Little* held that a regulation to ban military testing and storage of chemical warfare agents within the City of Cambridge did not conflict with the federal war powers.

98. *See* National Tank Truck Carriers, Inc. v. Burke, 535 F. Supp. 509 (D.R.I. 1982) (state requirement that vehicles transporting liquefied natural gas have two-way radios, vehicle inspection, and other safety features not preempted); National Tank Truck Carriers, Inc. v. City of New York, 677 F.2d 270 (2d Cir. 1982) (city regulations governing routing of hazardous gases transported by tank truck not preempted).

99. 49 U.S.C. § 2021(k) (emphasis added).

100. The Secretary of the Department of Transportation has the power specifically to exempt even inconsistent regulations from the HMTA. 49 U.S.C. §§ 1806, 1811.

101. 49 U.S.C. § 1811(b); *see* National Tank Truck Carriers, Inc. v. Burke, 608 F.2d 819, 820 (1st Cir. 1979).

102. 130 Misc. 2d 52, 494 N.Y.S.2d 1012 (Sup. Ct. Richmond County), *aff'd*, 110 A.D.2d 227, 494 N.Y.S.2d 878, *aff'd on other grounds*, 66 N.Y.2d 162, 485 N.E.2d 1017, 495 N.Y.S.2d 352 (1985). For ease of reference, this Note will refer to the New York Supreme Court decision (130 Misc. 2d 52, 494 N.Y.S.2d 1012) as *Fossella I* and the New York Supreme Court Appellate Division decision, affirming *Fossella I*, as *Fossella II* (110 A.D.2d 227, 494 N.Y.S.2d 878).

103. 395 Mass. 535, 481 N.E.2d 441 (1985).

104. Again, in *Fossella*, the constitutional issue was not reached in the highest court, and is not precedent in New York. *See supra* note 67.

### A. *Fossella v. Dinkins*

In *Fossella*, the New York Supreme Court and its Appellate Division both invalidated a proposed amendment to the New York City charter, on the grounds that the amendment would unconstitutionally conflict with the federal government's authority to provide for the common defense. The proposed amendment would have restricted New York City's power to approve use of city property or monies for military nuclear weapons facilities.[105] The amendment would have precluded the military from establishing any nuclear facility within New York's city limits, effectively creating a nuclear-weapons-free zone.[106]

#### *1. The Courts' Analyses*

In striking down the proposed amendments, both the trial court and the appellate court rest their analysis on two primary assumptions. The first assumption is that the only effect and purpose of the proposed amendment was to obstruct the federal government's activities because of disagreement with national defense policies.[107] The courts held that in such a case, the local government "may not legislate, by referendum or otherwise, in such fashion as to hinder the effectuation of national security objectives."[108] The second assumption is that the constitutional grant of power to the federal government to raise and maintain an army and navy and to provide for the common defense is so "broad and sweeping"[109] that it tolerates no qualification or limitations.[110] This power is so plenary that local concerns, no matter how justified or legitimate, cannot be allowed to interfere with it.[111] The court in *Fossella II* stated that

> [a] state or a political subdivision of a state may not hinder the Federal government's deployment of conventional or nuclear weapons within its territory simply because of a concern—perceived in good faith as it might be—that the presence of such weapons would be a danger to the local population.[112]

#### *2. Proposed Test*

The Appellate Division sets forth a test for determining whether a local law "hinder[s] the Federal government" [113] and is therefore unconstitutional. The test is two-pronged: (1) if the local legislation "com-

105. *Fossella II*, 110 A.D.2d at 229-29, 494 N.Y.S.2d at 879-80.
106. *Fossella I*, 130 Misc. 2d at 56, 494 N.Y.S.2d at 1016.
107. *Id.* at 58, 494 N.Y.S.2d at 1017.
108. *Id.* at 56, 494 N.Y.S.2d at 1016.
109. *Fossella II*, 110 A.D.2d at 230, 494 N.Y.S.2d at 880 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).
110. *Id.*
111. *Id.* at 229-30, 494 N.Y.S.2d at 880.
112. *Id.* at 230, 494 N.Y.S.2d at 880.
113. *Id.*

pletely frustrates a Federal purpose," and also (2) "if it 'impairs the efficiency of [defense-related] agencies . . . .' "[114] Thus, any local legislation with the purpose and effect of obstructing the accomplishment and execution of Congress's defense objectives would conflict with the federal government's plenary war powers and therefore would violate the Constitution.[115]

### B. *Arthur D. Little, Inc. v. Commissioner of Health and Hospitals*

*Arthur D. Little, Inc. v. Commissioner of Health and Hospitals,*[116] a Massachusetts case, stands in sharp contrast to the *Fossella* decisions. In *Arthur D. Little,* the highest court in Massachusetts held that a municipal regulation concerning chemical warfare agents was not preempted by the constitutional allocation of war and defense powers to the federal government.[117] The regulation prohibited the testing, storage, transportation, and disposal within the City of Cambridge of certain chemical warfare agents.[118]

Unlike the *Fossella* courts' conclusion that the constitutional grant of war powers to the federal government is so plenary as to preclude any local legislation,[119] the court in *Arthur D. Little* begins from the premise that not every regulation having some incidental effect on a defense program is per se invalid.[120] The court's preemption analysis significantly emphasizes the state's great latitude in exercising its police powers[121] and the reluctance of courts to find preemption.[122] Because preemption is not generally a favored result, state laws should be upheld unless a clear conflict with federal law is shown by "hard evidence of conflict."[123] The United States Supreme Court's reluctance to overturn state laws "deeply rooted in local feeling and responsibility," particularly those designed to protect the public health and welfare, was emphasized by the court.[124]

For the premise that not every regulation having some incidental effect on a defense program is per se invalid, the *Arthur D. Little* court

114. *Id.* at 230, 494 N.Y.S.2d at 881 (quoting Davis v. Elmira Savings Bank, 161 U.S. 275, 283 (1896)).

115. *Id.* at 231, 494 N.Y.S.2d at 881.

116. 395 Mass. 535, 481 N.E.2d 441 (1985).

117. *Arthur D. Little,* 395 Mass. at 547, 481 N.E.2d at 449.

118. *Id.* at 537, 481 N.E.2d at 443.

119. *Fossella II,* 110 A.D.2d at 230, 494 N.Y.S.2d at 880.

120. *Arthur D. Little,* 395 Mass. at 547, 481 N.E.2d at 449.

121. *Id.* at 546, 481 N.E.2d at 449; *see* Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190 (1983).

122. *Arthur D. Little,* 395 Mass. at 545-46, 481 N.E.2d at 448.

123. *Id.* at 545, 481 N.E.2d at 448 (quoting Kargman v. Sullivan, 552 F.2d 2, 6 (1st Cir. 1977)).

124. *Id.* (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243-44 (1959)).

relies on *DeCanas v. Bica*.[125] In *DeCanas*, state laws concerning aliens were not per se preempted despite exclusive federal power over the field of immigration.[126] *DeCanas* supports the proposition that when local legislation in question would have nothing more than a speculative and indirect impact[127] on the federal field—here national defense—the local law is not automatically preempted.[128]

The court found that Cambridge's municipal regulation had only a speculative and indirect impact on national defense policy.[129] Despite the regulation's prohibitions on the use or implementation of chemical warfare agents within Cambridge city borders, the court held that it did not interfere impermissibly with national defense.[130] Essentially, the government remained free to test chemical warfare agents in other cities or on its own military bases,[131] and Cambridge was held to have the right under its police powers to require that such testing take place outside Cambridge city limits.[132]

## IV. Application to Oakland's Ordinance

As the discussion of the different holdings in the *Fossella* and *Arthur D. Little* cases indicates, the outcome of the Department of Justice's constitutional challenge to Oakland's NFZ ordinance[133] was far from certain. The reasoning used by the *Fossella* courts would likely lead to a different result than that reached by the *Arthur D. Little* court's reasoning. Part A below analyzes the Oakland ordinance using the *Fossella* courts' reasoning; Part B subjects the ordinance to an *Arthur D. Little*-type analysis.

### A. Applying *Fossella* Reasoning to Oakland's Ordinance

One assumption relied upon by the *Fossella* courts in their analysis is that the sole purpose and effect of the proposed New York City charter amendment was to obstruct the federal government's activities because of disagreement with national defense policies.[134] The amendment's effective result would have been to block the military from establishing a nu-

125. 424 U.S. 351 (1976).
126. *Id.* at 355.
127. *Arthur D. Little*, 395 Mass. at 547, 481 N.E.2d at 449 (quoting DeCanas v. Bica, 424 U.S. 351, 355 (1976)).
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. Complaint, *supra* note 7.
134. Fossella I, 130 Misc. 2d 52, 494 N.Y.S.2d 1012, 1017 (Sup. Ct. Richmond County 1985).

clear weapons facility in New York City.[135] Essentially, a local government measure would have blocked a national defense policy decision to locate a nuclear weapons facility in New York. This sort of local and direct impediment to national defense policy was held unconstitutional in the face of the grant of the war powers to the federal government.[136]

Oakland's ordinance can be distinguished from that involved in *Fossella*. The three regulations in the Oakland ordinance that would affect defense policy do not have as their "only [product] a temporary obstacle in the path of concerted federal action designed to provide for the common defense of the nation"[137] as did the *Fossella* ordinance. The relevant regulations are (1) the prohibition of the production of nuclear weapons in Oakland;[138] (2) the banning of the storage or reprocessing of hazardous radioactive materials in Oakland;[139] and (3) the regulation of the transportation of nuclear weapons and hazardous radioactive materials through the city.[140] The first two sections would not necessarily inhibit defense policy because although the military has many facilities in Oakland and the immediate surrounding area,[141] activities taking place at those facilities would not be affected by any City of Oakland ordinance. The third section—regulating the transportation of hazardous radioactive materials—similarly would not result in the kind of obstacle to national defense policy encountered in the *Fossella* case. The Ordinance merely required adequate notification of planned movement of such materials on Oakland streets. Thus, Oakland has placed no transportation *prohibition* obstructing the military's enactment of its defense policy.

A court that applied the first prong of the *Fossella* courts' reasoning might, therefore, still find that the Oakland ordinance was not facially invalid as it would not directly obstruct national defense policy.

The second assumption of the *Fossella* courts is that the broad and sweeping war powers preclude the exercise of local police power.[142] Any court using this type of reasoning with the same strength of conviction as the *Fossella* courts would hold that Oakland's ordinance must fail as unconstitutional. Under such an analysis, not even legitimate local police power objectives[143] may interfere with the power to provide for the common defense.[144] The Oakland ordinance would likely fail under this sec-

135. *Id.* at 56, 494 N.Y.S.2d at 1016.
136. Fossella II, 110 A.D.2d 227, 230-31, 494 N.Y.S.2d 878, 881 (1985).
137. *Fossella I*, 130 Misc. 2d at 56, 494 N.Y.S.2d at 1016.
138. Ordinance, *supra* note 2, § 2(a).
139. *Id.* § 2(c).
140. *Id.* § 2(b).
141. *See* Complaint, *supra* note 7, at 3-7; *see also supra* notes 21-26 and accompanying text.
142. Fossella II, 110 A.D.2d 227, 229-30, 494 N.Y.S.2d 878, 880 (1985).
143. *See* Ordinance, *supra* note 2, § 3.
144. *Fossella II*, 110 A.D.2d at 229, 494 N.Y.S.2d at 880.

ond assumption. Any local interference, however tangential and for whatever police power purposes, would likely be considered an unconstitutional infringement of the broad and sweeping war powers.

### B. Applying *Arthur D. Little* Reasoning to Oakland's Ordinance

The premise utilized in *Arthur D. Little*[145] is that not every regulation having some incidental effect on a defense program is per se invalid.[146] The court may well construe the regulations and prohibitions affecting the military as having such an "incidental" effect.[147] Those provisions—the prohibition on nuclear weapons production in Oakland,[148] the ban on the storage or reprocessing of hazardous radioactive materials in Oakland,[149] and the regulation of the transportation of nuclear weapons and hazardous radioactive materials through the city[150]—would not result in a total prohibition of the military's activities. Other sites are available, such as the military's own facilities, and transportation through Oakland is only regulated, not prohibited.[151] If merely an incidental effect were found, the Ordinance would survive a test of facial invalidity, and a court would proceed to a preemption analysis.

In its preemption analysis, the *Arthur D. Little* court looked to both the state's latitude to exercise its police powers[152] and to the reluctance of courts to find preemption.[153] The findings in section three of the Ordinance express the police power objectives of the Ordinance.[154] They include protecting Oakland's economic well-being,[155] its environment,[156] and the health and safety of its residents.[157] In this type of analysis, these objectives would be an appropriate use of the police powers to protect " 'the lives, limbs, health, comfort, and quiet of all persons.' "[158]

The *Arthur D. Little* court expressed great hesitation toward finding preemption.[159] When, as here, the local legislation is " 'deeply rooted in

145. 395 Mass. 535, 481 N.E.2d 441 (1985).
146. *Id.* at 547, 481 N.E.2d at 449.
147. *See* Ordinance, *supra* note 2, § 3.
148. *Id.* § 2(a).
149. *Id.* § 2(c).
150. *Id.* § 2(b).
151. *See supra* note 40 and accompanying text.
152. Arthur D. Little, Inc. v. Commissioner of Health and Hospitals, 395 Mass. 535, 545-46, 481 N.E.2d 441, 448 (1985).
153. *Id.*
154. Ordinance, *supra* note 2, § 3(a)-(e).
155. *Id.* § 3(a)-(c).
156. *Id.*
157. *Id.* § 3(a)-(e).
158. Arthur D. Little, Inc. v. Commissioner of Health and Hospitals, 395 Mass. 535, 546, 481 N.E.2d 441, 449 (1985) (quoting Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985)).
159. *Id.* at 545-46, 481 N.E.2d at 448.

local feeling and responsibility' "[160] and is designed to protect the public health and welfare, that reluctance is particularly strong.[161] Such legislation carries a heavy presumption of validity and only rarely is it preempted by federal law.[162] If a court were to find the impact of Oakland's ordinance to be "speculative and indirect,"[163] then the Ordinance could likely withstand constitutional challenge.

## V. The District Court Opinion

### A. The Court's Order

In an opinion filed August 23, 1990, the district court granted partial summary judgment to the government, enjoining enforcement of all substantive provisions of the Ordinance.[164] The court declared

> those portions of the Ordinance that prohibit nuclear weapons work; that regulate the use or transportation of nuclear weapons and hazardous radioactive materials; that prohibit, with some exceptions, Oakland from contracting with, or investing in nuclear weapons makers . . . facially unconstitutional and invalid, in violation of the War Powers Clauses of the United States Constitution.[165]

The court further declared

> those portions of the Ordinance that restrict transportation of nuclear weapons or other hazardous radioactive materials [and] that regulate the military applications of atomic energy and the safety aspects of nuclear development . . . preempted by the Hazardous Materials Transportation Act [and] the Atomic Energy Act . . . .[166]

### B. The Court's Analysis

The court found the Ordinance, as a whole, to be "so comprehensive, so complete, so all-encompassing that it cannot help but conflict with the rights and authority of the federal government."[167] The *City of Oakland* court applied reasoning similar to that used by the courts in

160. *Id.* at 546, 481 N.E.2d at 448 (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243-44 (1959)).

161. *Id.*, 481 N.E.2d at 448-49.

162. *Id.*, 481 N.E.2d at 449.

163. *Id.* at 547, 481 N.E.2d at 449.

164. Memorandum of Opinion, *supra* note 16, at 13-14. Two minor provisions were excepted from the injunction. The two excepted sections were § 7(b), relating to investment by the City of Oakland in United States Treasury securities, and § 9(a), requiring the posting of signs on city streets at the city boundary. Ordinance, *supra* note 2, §§ 7(b), 9(a).

165. Memorandum of Opinion, *supra* note 16, at 13; *see* Ordinance, *supra* note 2, § 2.

166. Memorandum of Opinion, *supra* note 16, at 13 (citations omitted); *see* Ordinance, *supra* note 2, § 2.

167. Memorandum of Opinion, *supra* note 16, at 4-5.

*Fossella v. Dinkins.*[168] The court emphasized that when a conflict exists between the federal government and the states, the federal government, if acting within its bounds, is supreme.[169] Defense policy, the court continued, is clearly within the zone of authority granted to the federal government.[170] As such, the City of Oakland must sacrifice self-determination in the area of defense policy in furtherance of national democracy.[171] Drawing on history to illustrate this point, the court referred to this nation's Civil War: "[i]f we learned any lesson from that war, it is that localities that have views that differ from those of the nation as a whole may not exempt themselves from the duly enacted law of the nation."[172]

*1. Unconstitutionality Under the War Powers Clauses*

Relying on *United States v. Tarble*[173] and citing *Fossella v. Dinkins,*[174] the court held that states and localities may not enact legislation that impedes or hinders national defense.[175] According to the court, the provisions of Oakland's ordinance had the "purpose and effect [of] interfer[ing] with the federal government's constitutional responsibility and authority to provide for the common defense."[176] Because exercise of the war powers and provision for the common defense are exclusively within federal power,[177] the court found the impediment caused by the Ordinance unconstitutional under the War Powers Clause.[178]

The court also determined that the Ordinance's interference with the federal government would be small and would not, in and of itself, pose an insurmountable risk to national security.[179] Despite this insignificant effect, the court concluded that the Ordinance was so broad that it would "clearly interfere with United States defense policy directly and substantially."[180] Based on this conclusion, the analysis used in *DeCanas v. Bica,*[181] which held that local regulations should be upheld if they have "some purely speculative and indirect impact" on an exclusive federal

168. Fossella v. Dinkins, 130 Misc. 2d 52, 494 N.Y.S.2d 1012 (Sup. Ct. Richmond County), *aff'd,* 110 A.D.2d 227, 494 N.Y.S.2d 878, *aff'd on other grounds,* 66 N.Y.2d 162, 485 N.E.2d 1017, 495 N.Y.S.2d 352 (1985).

169. Memorandum of Opinion, *supra* note 16, at 5.

170. *Id.* at 6.

171. *Id.*

172. *Id.*

173. 80 U.S. (13 Wall.) 397 (1871).

174. 130 Misc. 2d 52, 494 N.Y.S.2d 1012 (Sup. Ct. Richmond County), *aff'd,* 110 A.D.2d 227, 494 N.Y.S.2d 878, *aff'd on other grounds,* 66 N.Y.2d 162, 485 N.E.2d 1017, 495 N.Y.S.2d 352 (1985).

175. Memorandum of Opinion, *supra* note 16, at 7.

176. *Id.*

177. *Id.*

178. *Id.* at 10.

179. *Id.* at 9.

180. *Id.*

181. 424 U.S. 351 (1976).

power,[182] does not save the Ordinance in the court's view.

The court also distinguished *Arthur D. Little, Inc. v. Commissioner of Health and Hospitals.*[183] The court found the regulation at issue in *Arthur D. Little* was much narrower than Oakland's broad ordinance.[184] The court held that the *Arthur D. Little* regulation was a relatively narrow public health and safety regulation, whereas Oakland's ordinance was broad and "expresse[d] a general disapproval of nuclear weapons [and was] clearly designed to interfere with, and encourage change in[,] federal nuclear policy."[185]

### 2. *Preemption by HMTA and AEA*

The *City of Oakland* court found that both the HMTA[186] and the AEA[187] preempted the Ordinance.[188] The court recognized two basic principles of preemption. First, a presumption exists against federal preemption of state law.[189] Second, absent an intent by the federal government to occupy a particular field, an actual conflict between state and federal law must exist for the state law to suffer preemption.[190] Despite the recognition of these principles, the court found preemption by both the HMTA and the AEA. The court held that the restrictions on the transportation of nuclear weapons or other hazardous radioactive materials were inconsistent with the HMTA and the regulations issued thereunder.[191] Under the HMTA, local regulations inconsistent with the regulations promulgated under the HMTA were preempted.[192] The court held that the Ordinance provisions regulating the military applications of atomic energy and the safety aspects of nuclear development were preempted by the AEA.[193] The court simply cited two cases[194] to support its conclusion of preemption, and did not factually support its conclusion that the Ordinance regulates the safety aspects of nuclear development. Such regulation of safety aspects need not necessarily lead

182. *Id.* at 354-55.
183. 395 Mass. 535, 481 N.E.2d 441 (1985).
184. Memorandum of Opinion, *supra* note 16, at 9.
185. *Id.*
186. 49 U.S.C. §§ 1801-1812 (1988).
187. 42 U.S.C. §§ 2011-2296 (1988).
188. Memorandum of Opinion, *supra* note 16, at 11, 13.
189. *Id.* at 11.
190. *Id.* (citing Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984)).
191. *Id.* at 11. The court cited a Department of Transportation Inconsistency Ruling finding that the provisions of the Ordinance that apply to the transportation of hazardous materials are inconsistent with the HMTA. Inconsistency Ruling No. IR-30, 55 Fed. Reg. 9678 (1990).
192. *See supra* notes 99-101 and accompanying text.
193. Memorandum of Opinion, *supra* note 16, at 11.
194. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 250 (1984); Stokes v. Bechtel North American Power Corp., 614 F. Supp. 732, 739-41 (N.D. Cal. 1985).

automatically to preemption. As was indicated in *Pacific Gas & Electric*,[195] for example, other traditional police power motivations may be shown that save the regulation from preemption.[196] The court did not discuss the extent to which Oakland's ordinance may have been permissibly motivated.

## VI. Additional Considerations

In a future case involving an NFZ, several other considerations exist that might be taken into account by a court in addition to those considered by the *Fossella*, *Arthur D. Little*, and *City of Oakland* courts.

First, Oakland is uniquely situated in terms of its proximity to a variety of nuclear military facilities.[197] Because of this proximity, the Navy transports nuclear and hazardous material through Oakland on a regular basis.[198] This places the Oakland ordinance in a decidedly different position than the legislation involved in *Arthur D. Little*. In *Arthur D. Little*, the court pointed out that "nothing in the record suggests that the densely populated city of Cambridge is somehow uniquely suited to research on chemical warfare agents."[199] In fact, the court found no indication in the record that the research being conducted in Cambridge could not as effectively be conducted outside of the city limits.[200] The significant military presence surrounding Oakland and the resulting convenience, if not necessity, of transporting nuclear and hazardous materials through Oakland may have made the court more inclined to find that Oakland, unlike Cambridge, is "uniquely suited" to a military nuclear presence. Based on this finding, Oakland cannot exercise its police powers to the detriment of the nuclear presence. Other NFZs, therefore, may or may not suffer preemption depending on a factual determination of the locality's suitability for a military presence.

Second, a court may take into consideration the present political climate—the thawing of the "Cold War"[201]—and the resulting political state of relative peace between the "super powers." In *United States v. Madison County Board of Education*, [202] the Fifth Circuit held that the federal government could not exercise its war powers to bring about the desegregation of state public schools.[203] The court stated that "[t]he consequences of any attempted direct exercise of the war power outside of

195. 461 U.S. 190 (1983).

196. *See supra* notes 83-93 and accompanying text.

197. Complaint, *supra* note 7, at 3-7.

198. *Id.*

199. Arthur D. Little, Inc. v. Commissioner of Health and Hospitals, 395 Mass. 535, 547, 481 N.E.2d 441, 449 (1985).

200. *Id.*

201. *See* Morrow, *Gorbachev: The Unlikely Patron of Change*, TIME, Jan. 1, 1990, at 42.

202. 326 F.2d 237 (5th Cir. 1964).

203. *Id.* at 243.

military bases without any authorization by Congress and *during peacetime* are so extreme as to be unthinkable."[204] Courts have held that the War Powers Clauses give Congress the right to act differently in wartime than in peacetime.[205] In this time of peace, a court may weigh the federal government's and a locality's competing claims differently than in a time of war or greater international tension. Although the *City of Oakland* court did not take such considerations into account, a continued climate of peace and resulting public sentiment away from a military state of mind may make NFZs incidental beneficiaries to the end of the "Cold War."

A third consideration not discussed in either *Fossella, Arthur D. Little,* or the *City of Oakland* case is the meaning of the phrase to "provide for the common Defence."[206] In each case, the court presumed that the building and storage of nuclear weapons, and the ability to do so freely without local interference, was part of "providing for the common defense."[207] A small but vocal minority[208] would argue strongly that nuclear weapons hinder, not aid, the common defense of the nation. Three attorneys who authored an opinion letter concerning the legality of Marin County, California's NFZ ordinance[209] argued that

> it might be difficult to demonstrate that nuclear weapons provide any sort of "common defense." Since nuclear weapons can never be used without the threat of mutual assured destruction, and there is current evidence to support the fact that even limited use would render this planet uninhabitable, nuclear weapons appear to actually be injurious to the "common defense."[210]

Were such an argument adopted by a court, many of the arguments that Oakland's ordinance or any NFZ ordinance interferes with the federal government's power to provide for the "common defense" would lose much of their strength. The argument contains a logical flaw, however, and likely would not be adopted by a court. The argument *itself,* if adopted, would result in a judicial interference with a federal policy decision on how best to provide for the common defense. Given the current judicial deference to such policy decisions, no debate of the validity of this policy will be considered by a court. Public sentiment on the undesirability of nuclear weapons appears to be growing,[211] however, and

204. *Id.* (emphasis added).

205. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 353-56 (2d ed. 1988).

206. U.S. CONST. art. I, § 8, cl. 1.

207. *See* Complaint, *supra* note 7, at 16; Arthur D. Little, Inc. v. Commissioner of Health and Hospitals, 395 Mass. 535, 546, 481 N.E.2d 441, 449 (1985); Fossella I, 130 Misc. 2d 52, 55, 494 N.Y.S.2d 1012, 1015 (1985).

208. *See generally* The New Abolitionist, Nov. 1989.

209. Legal Opinion Letter, Marin Nuclear Free Zone Ordinance, Oct. 21, 1986, at 6.

210. *Id.*

211. *See Nuclear Free Zones in the United States, supra* note 2, at 12.

such an argument may carry more weight in the future as perceptions of providing for the "common defense" change.

## VII. Conclusion

Oakland's NFZ ordinance was the subject of the first federal suit brought against a local NFZ measure. The Ordinance's provisions were broad and included in their regulatory net the activities of the federal government along with those of private parties. The potential result of enforcement of the Ordinance was a real change for government and private nuclear work in Oakland.

The outcome of the *City of Oakland* case largely depended upon the legal theory chosen by the court. Using much the same reasoning—and even language—of the *Fossella*[212] courts, the district court emphasized the pervasiveness of the federal war powers. It is likely that any NFZ with any substantive provisions subjected to this legal theory will be held unconstitutional. If, however, a court evidences a reluctance to find preemption, and accepts as legitimate a locality's exercise of its police power, then even an ordinance as broad as Oakland's may withstand constitutional attack.

The *City of Oakland* court found no genuine issues of material fact and awarded summary judgment to the federal government.[213] The issues, therefore, were not fully developed in a trial setting. The impact of the court's decision will nonetheless be felt on NFZs around the country. The city of Oakland has decided not to appeal the decision of the district court.[214] Such litigation is expensive. Other localities contemplating the enactment of NFZ ordinances containing the same kind of "real teeth" power as that of Oakland's ordinance may, in light of the Oakland case, be deterred from doing so, such deterrence emanating from the real threat of incurring the wrath of a federal government and buoyed by the result in *United States v. City of Oakland*.

*By Christina White Nevins**

212. Fossella v. Dinkins, 130 Misc. 2d 52, 494 N.Y.S.2d 1012 (Sup. Ct. Richmond County), *aff'd*, 110 A.D.2d 227, 494 N.Y.S.2d 352, *aff'd on other grounds*, 66 N.Y.2d 162, 485 N.E.2d 1017, 495 N.Y.S.2d 352 (1985).

213. Memorandum of Opinion, *supra* note 16, at 4.

214. *Death of No-Nuke Law Assailed by Activists*, Oakland Tribune, Sept. 26, 1990, at C1, col. 4.

* B.A., Wells College, 1983; Member, Third Year Class. The author dedicates this Note to her husband, David Nevins, and her parents, with thanks for their invaluable encouragement and support.