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No Whale of a Tale: Legal Implications of *Winter v. NRDC*

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How should courts balance conflicting national security and environmental protection interests? The Supreme Court gave a fact-specific answer in Winter v. Natural Resources Defense Council, finding that the interests of the military outweighed the interests of environmental plaintiffs in this case. Winter is hardly revolutionary—courts have long balanced competing interests when determining equitable relief, and that is precisely what the Court did in Winter, based on the unique circumstances presented. The Supreme Court gave greater deference to military commanders than the lower courts in reviewing a preliminary injunction issued to remedy the Navy’s failure to prepare an environmental impact statement pursuant to the National Environmental Policy Act (NEPA). In doing so, the Winter Court substituted its own judgment regarding the public interest among competing national priorities and unmoored itself from traditional standards of appellate review. While saying very little about the underlying merits of the case, the Court majority held that the district court abused its discretion, and on that basis it vacated two of six mitigation measures imposed under the preliminary injunction.

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Introduction.....	754
I. The Threat to Whales from the Navy's High-Intensity Sonar Training	756
II. In the Lower Courts: <i>Winter v. NRDC</i>	759
III. <i>Winter v. NRDC</i> and its Implications	762
A. The Opinions of the Supreme Court	762
B. Preliminary Injunction Standard	763
C. Balancing the Interests.....	764
D. Proper Remedy	768
E. Unanswered Questions.....	770
Conclusion	772

INTRODUCTION

"Of course, military interests do not always trump other considerations," a five to four majority of the U.S. Supreme Court found in *Winter v. Natural Resources Defense Council* (NRDC) before partially vacating a preliminary injunction issued and affirmed by the lower courts.¹ With this simple phrase, the Supreme Court reiterated the long-held constitutional and statutory principle of law in this country that none of us, even the U.S. military, is above the law.

As this article will argue, the outcome of *Winter* signals no retreat from that critical principle but rests squarely on the majority's fact-based conclusion that the trial court abused its discretion in imposing two of six specific safeguards designed to minimize the harmful impacts of high-intensity military sonar on marine mammals. Concluding that the balance of hardships and considerations of the public interest favored the U.S. Navy, the Court relied heavily on declarations submitted by Naval officers claiming military necessity, as well as its own factual finding, cited repeatedly in the opinion, that training has been ongoing for forty years with "no documented case of sonar-related injury to marine mammals in [the Navy's Southern California training range]."²

In an opinion by Chief Justice Roberts, the majority dispensed with the lower courts' careful balancing by unmooring its analysis from traditional standards of appellate review, ultimately reaching a fact-based result more in line with its own sense of the public interest among competing national priorities. Instead of evaluating the district court's factual findings under the "clearly erroneous" standard, the Justices substituted their own judgment and in doing so may have undermined the decision's impact. The majority disagreed with the lower courts on critical disputed questions of fact—findings based on

1. *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 378 (2008).

2. *Id.* at 375.

the Navy's own estimates of harm³—and concluded that two of the six mitigation measures imposed by the district court unduly interfered with the Navy's ability to train and that the district court's injunction therefore jeopardized national security.⁴ Together with the majority's disregard of critical factual findings by the lower courts regarding environmental harm, the combination of distinctive facts at the heart of the majority opinion—forty years of training in the area, no documentation of harm, and a threat to national security—suggest that *Winter* is likely to be limited in its persuasive and precedential effect.⁵

Regarding the merits of the case, the majority said very little, bypassing the Navy's claims that no environmental impact statement (EIS) was required under the National Environmental Policy Act (NEPA) or that the "alternative arrangements" approved by the White House Council on Environmental Quality (CEQ) as an alternative to preparing an EIS were legal.⁶ Instead, citing its own fact-bound view of the balance of hardships, the Court vacated two mitigation measures imposed by the district court's injunction—a 2200-yard safety zone around a sonar vessel and a six-decibel power-down of sonar when water conditions would allow sonar to travel farther than normal.⁷ The Court

3. *Id.* The majority's reliance on the Navy's claim that there is no evidence that sonar has harmed marine mammals in Southern California disregards the evidence presented to the lower courts and the Navy's own admissions. The Navy itself predicted over 450 injuries to marine mammals and 170,000 instances of significant behavioral disruption in its own environmental assessment (EA) for the project. Further, as noted by the Ninth Circuit, while there have been no documented sonar-related mass strandings in Southern California, "the scientific consensus that [mid-frequency active] MFA sonar may cause injury and death to marine mammals combined with the evidence that such injury, absent a stranding, is difficult to detect—especially in the case of the vulnerable beaked whale—further disproves the suggestion that the harm caused by MFA sonar in the SOCAL exercises is merely speculative." *Natural Res. Def. Council, Inc. v. Winter*, 518 F.3d 658, 696–97 (9th Cir. 2008). Chief Justice Roberts' majority opinion ignores this evidence. See *infra* notes 9–14, 81 and accompanying text.

4. *Winter*, 129 S. Ct. at 381.

5. This is reminiscent of the decision in another high-profile case—the infamous *Bush v. Gore*, which the Justices have failed to cite in even a single majority, concurring, or dissenting opinion since it was decided. *Bush v. Gore*, 531 U.S. 98, 109 (2000) (per curiam). See also Richard L. Hasen, *A Critical Guide to Bush v. Gore Scholarship*, 7 ANN. REV. POL. SCI. 297 (2004). In that case, addressing a matter of intense political controversy—with the outcome of the 2000 presidential election hanging in the balance—the Court majority abandoned its longstanding adherence to principles of federalism when it overturned a decision of the Florida Supreme Court on an issue of well-established state interest and judicial primacy. The Court majority relied on a rationale grounded in, and explicitly limited by, its own assessment of the particular facts presented. *Id.* In *Winter*, the Court majority not only jettisoned traditional standards of appellate review in disputing the trial court's fact-finding, but it ignored the underlying state decision by the California Coastal Commission—the state agency responsible for protection of coastal waters under the Coastal Zone Management Act's cooperative state-federal statutory scheme—out of which the litigation had arisen. In both cases, the Court majorities weakened the precedential force of their ruling by departing from established standards.

6. See Brief for the Petitioners at 22–26, *Winter*, 129 S. Ct. 365 (No. 07-1239) (arguing that CEQ legally issued "'alternative arrangements' for NEPA compliance"), available at <http://www.usdoj.gov/osg/briefs/2008/3mer/2mer/2007-1239.mer.aa.pdf>.

7. See *Winter*, 129 S. Ct. at 378–380.

left in place the majority of mitigation measures imposed by the district court—a significant result given the Navy’s repeated requests, unacknowledged by the Court, that the injunction in its entirety be vacated.⁸ Despite its outcome, *Winter* stands for the proposition that an injunction against the military, under the appropriate circumstances, is indeed the proper remedy to protect the environment and therefore confirms the discretion of federal courts to impose injunctive relief.

Winter should be considered, therefore, neither a license to kill nor a get out of jail free card for military activities undertaken in disregard of environmental laws. It certainly cannot support the view that the *Winter* Court has somehow heralded a new era of judicial deference to claims of military necessity in the face of environmental challenges. Instead, the decision provides the latest affirmation by the Court of its holding in *Weinberger v. Romero-Barcelo*: federal courts, even when considering a claim against the military for an injunction to prevent environmental harm, retain broad discretion to grant or deny the requested relief.⁹

I. THE THREAT TO WHALES FROM THE NAVY’S HIGH-INTENSITY SONAR TRAINING

Winter is the latest in a series of lawsuits brought by NRDC and others against the Navy and/or the National Marine Fisheries Service (NMFS) for alleged violations of NEPA, the Marine Mammal Protection Act (MMPA), the Endangered Species Act (ESA), and the Administrative Procedure Act (APA) in connection with the Navy’s use of high-intensity sonar.¹⁰ High-intensity sonar poses a unique threat to the environment and can induce a range of adverse effects in whales and other marine species, from significant behavioral changes to stranding and death.¹¹ In March 2000, for example, sixteen whales

8. See Petition for a Writ of Certiorari at I, *Winter*, 129 S. Ct. 365 (No. 07-1239) (requesting the Supreme Court to review whether “the preliminary injunction . . . is inconsistent with established equitable principles limiting discretionary injunctive relief”); Brief for the Petitioners, *supra* note 6, at 55 (asking the Supreme Court to vacate the entire injunction and concluding that the “judgment of the court of appeals should be reversed, and the case should be remanded with instructions to vacate the preliminary injunction”).

9. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (affirming a district court’s broad equitable discretion to determine appropriate relief “[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court’s jurisdiction in equity.” Otherwise, “the full scope of that jurisdiction is to be recognized and applied.” (internal citations omitted)).

10. See generally Joel R. Reynolds, *Submarines, Sonar, and the Death of Whales: Enforcing the Delicate Balance of Environmental Compliance and National Security in Military Training*, 32 WM. & MARY ENVTL. & POL’Y REV. 759, 760–70 (2008).

11. See MICHAEL JASNY ET AL., SOUNDING THE DEPTHS II: THE RISING TOLL OF SONAR, SHIPPING AND INDUSTRIAL OCEAN NOISE ON MARINE LIFE 5–12 (2005), available at <http://www.nrdc.org/wildlife/marine/sound/sound.pdf>. There are numerous stranding events associated with military sonar use, including those documented in the Canary Islands (1985–1991, 2002, 2004), Greece (1996, 1997), Virgin Islands (1999), Bahamas (2000), Madeira (2000), Washington (2003), Kauai (2004), North Carolina (2005) and Spain (2006). *Id.* at 8–9.

from at least three species were found stranded in the Bahamas after Navy ships used mid-frequency active (MFA) sonar in the area.¹² Post mortem examinations found hemorrhaging around the dead whales' eyes and ears.¹³ A joint investigation by the Navy and NMFS established with virtual certainty that the strandings were caused by active sonar.¹⁴ Since the incident, the population of beaked whales has largely disappeared.¹⁵ Researchers believe the whales that did not strand either permanently abandoned their habitat or died at sea.¹⁶ Adverse effects are not limited to stranding and death. Sonar may also compromise the ability not just of individual animals but entire populations of marine mammals to navigate, find food, locate mates, avoid predators, and communicate.¹⁷

NRDC first became involved with the issue of sonar in 1995 when the Navy disclosed the development of a high-intensity submarine detection system using low-frequency active (LFA) sonar.¹⁸ In order to detect quieter and harder-to-find foreign submarines at long range, the system was designed to flood literally hundreds of thousands of square miles of ocean with extremely loud, low-frequency sound.¹⁹ This extensive diffusion of high-intensity sound was predicted to cause incidental harm to large numbers of animals.²⁰ When the Navy finalized an EIS in 2002 seeking to deploy LFA sonar in over 75 percent of the world's oceans and NMFS issued a Final Rule granting the Navy an incidental take permit to do so under the MMPA, NRDC and others sued and immediately requested a preliminary injunction.²¹

The district court issued a preliminary injunction in the fall of 2002²² and a permanent injunction a year later.²³ Through court-ordered mediation,²⁴ a settlement was reached that limited the use of LFA sonar to specified regions in the northwestern Pacific Ocean. Five years later, the Navy issued a Final Supplemental EIS, and NMFS issued a new permit authorizing the Navy's global deployment of its LFA sonar.²⁵ When NRDC sued and requested a

12. DEPT OF COMMERCE & SEC'Y OF THE NAVY, JOINT INTERIM REPORT: BAHAMAS MARINE MAMMAL STRANDING EVENT OF 15–16 MARCH 2000 (2001).

13. *Id.*

14. *Id.*

15. See Natural Res. Def. Council v. Winter, 518 F.3d 658, 667 (9th Cir. 2008).

16. Jasny, *supra* note 11, at 11.

17. *Id.* at 7.

18. See U.S. GEN. ACCOUNTING OFFICE, DEFENSE ACQUISITIONS: TESTING NEEDED TO PROVE SURTASS/LFA EFFECTIVENESS IN LITTORAL WATERS, GAO-02-692 (2002).

19. Natural Res. Def. Council v. Evans, 279 F. Supp. 2d 1129 (N.D. Cal. 2003).

20. *Id.*

21. *Id.*

22. Natural Res. Def. Council v. Evans, 232 F. Supp. 2d 1003, 1054 (N.D. Cal. 2002).

23. *Evans*, 279 F. Supp. 2d at 1192.

24. *Id.* at 1191–92.

25. The Navy's Supplemental EIS can be found at <http://www.surtass-lfa-eis.com/Download/index.htm>.

motion for preliminary injunction, the court in February 2008 agreed and once again ordered the parties to meet and confer to determine the scope of an injunction.²⁶ A stipulated settlement agreement was finalized in August 2008, which once again included specific geographic exclusion areas for the use of LFA sonar.²⁷ These cases represent how courts can properly balance the competing public interests in the environment and national security when faced with the Navy's insufficient compliance with environmental laws.

NRDC turned its attention to MFA sonar²⁸ in October 2005, when it sued on behalf of a coalition of environmental groups challenging the Navy's use of MFA sonar during testing and training exercises around the world.²⁹ The parties finalized a settlement agreement in this case in December 2008 under which the Navy committed, among other things, to a schedule of EISs for sonar exercises and ranges around the world and to fund \$14.75 million in new marine mammal and marine ecology research.

In another case, NRDC sought and obtained a temporary restraining order against sonar use in Hawaiian waters as part of the Navy's multinational training exercise—the 2006 Rim of the Pacific (RIMPAC) war games.³⁰ Following court-ordered settlement negotiations, an agreement was reached that required the Navy to implement additional mitigation measures to protect marine wildlife from the impacts of sonar training during the RIMPAC exercise.³¹ Despite the imminent commencement of this multinational exercise, the court once again found that the Navy failed to comply with environmental laws.³² Balancing the competing public interests in the environment and national security, the court issued a temporary restraining order, and the parties agreed on a settlement that allowed the training to proceed in a more environmentally responsible manner.³³ It was in this background of litigation that NRDC turned its attention to the Navy's insufficient compliance with

26. *Natural Res. Def. Council v. Gutierrez*, No. C-07-04771, 2008 WL 360852 (N.D. Cal. Feb. 6, 2008).

27. Stipulated Settlement Agreement Order, *Gutierrez*, 2008 WL 360852 (No. C-07-04771), available at http://docs.nrdc.org/water/files/wat_08081201a.pdf.

28. Whereas LFA sonar operates at frequencies less than 1 kilohertz, MFA sonar operates at frequencies between 1 and 10 kilohertz. MFA sonar is widely deployed throughout the world's navies, including the U.S. Navy. While LFA sonar is potentially more dangerous because of the sonar's broader geographic range, the use of LFA sonar is currently limited to two specific areas in the Pacific Ocean. See Stipulated Settlement Agreement Order, *supra* note 27. Thus, the ubiquitous nature of MFA sonar increases the likelihood of harm relative to LFA sonar. See Jasny, *supra* note 9, at 20–26.

29. Complaint, *Natural Res. Def. Council v. England*, No. CV05-07513 (C.D. Cal. Oct. 19, 2005), available at <http://www.nrdc.org/media/docs/051019.pdf>.

30. Temporary Restraining Order, *Natural Res. Def. Council v. Winter*, No. CV06-4131 (C.D. Cal. July 3, 2006), available at <http://www.nrdc.org/media/docs/060703.pdf>.

31. Settlement Agreement, *Natural Res. Def. Council v. Winter*, No. CV06-4131 (C.D. Cal. July 7, 2006) (on file with author).

32. Temporary Restraining Order, *supra* note 30.

33. *Id.*; Settlement Agreement, *supra* note 31.

environmental laws when conducting naval exercises off the coast of Southern California.

II. IN THE LOWER COURTS: *WINTER V. NRDC*

In March 2007, NRDC and other environmental groups sued the Navy to enjoin a two-year, fourteen-exercise training program planned off the coast of Southern California (SOCAL).³⁴ This time, they were joined in a separate suit by the California Coastal Commission (CCC), which sought to impose mitigating conditions on the Navy's sonar training in the coastal waters of California.³⁵ As in the other sonar-related cases, NRDC claimed the Navy violated NEPA by failing to prepare an EIS and violated the ESA by failing to prepare an adequate Biological Opinion.³⁶ NRDC also claimed that the Navy violated the Coastal Zone Management Act (CZMA) by failing to submit a consistency determination to the CCC regarding the planned sonar exercises in SOCAL.³⁷

In August 2007, the district court granted NRDC's motion for a preliminary injunction against the use of MFA sonar in the remaining exercises in the SOCAL range through January 2009, finding that plaintiffs had demonstrated a likelihood of success on the merits of their NEPA and CZMA claims and had established a "near certainty" of irreparable harm.³⁸ Citing the Navy's own Environmental Assessment (EA), which predicted that the SOCAL exercises would result in over 170,000 instances of harassment, including over 400 permanent injuries to whales, the court concluded that the exercises would have a significant impact on the environment and thus required the preparation of an EIS.³⁹ The court also found that the Navy's proposed mitigation was "woefully inadequate and ineffectual."⁴⁰ Based on the Navy's own estimates of harm, supplemented by scientific studies, declarations from experts, and other evidence, the district court concluded that "the balance of hardships tips in favor of granting an injunction."⁴¹

34. Complaint, *Natural Res. Def. Council v. Winter*, No. CV07-0335 (C.D. Cal. Mar. 22, 2007) (on file with author).

35. As required by the Coastal Zone Management Act, the Navy submitted a consistency determination to the CCC with respect to the non-sonar aspects of the SOCAL exercises. In response, the CCC imposed mitigation measures intended to lessen the impacts of sonar on California's marine wildlife. When the Navy refused to comply with the mitigation measures, the CCC brought suit. Complaint, *Cal. Coastal Comm'n v. U.S. Dep't of the Navy*, No. CV07-01899 (C.D. Cal. Mar. 7, 2007).

36. Complaint, *supra* note 34, at 36–38, 43–44.

37. *Id.* at 40–41.

38. *Natural Res. Def. Council v. Winter*, No. 8:07-cv-00335-FMC-FMOx, 2007 WL 2481037, at *10 (C.D. Cal. Aug. 7, 2007).

39. *Winter*, 2007 WL 2481037, at *6.

40. *Id.* at *9.

41. *Id.* at *10.

The Navy filed an immediate appeal, and the Ninth Circuit Court of Appeals stayed the preliminary injunction pending appeal.⁴² After expedited briefing and a hearing, the Ninth Circuit agreed with the district court that preliminary injunctive relief was appropriate as plaintiffs had shown “a strong likelihood of success on the merits.”⁴³ However, the Ninth Circuit remanded the case to the district court to “narrow its injunction so as to provide mitigation conditions under which the Navy may conduct its training exercises.”⁴⁴ On remand—and after briefing, a hearing, and a tour of a Navy sonar vessel—the district court issued a tailored preliminary injunction that reaffirmed its findings on plaintiffs’ likelihood of success and balance of hardships, as well as imposed six specific mitigation measures.⁴⁵ Agreeing with NRDC, the court found that “[t]he great weight of scientific evidence points to avoidance of marine mammal habitat as the most effective means of minimizing sonar-related injury to marine mammals,” and consequently required the Navy to (1) adopt a twelve-mile coastal buffer zone, barring “the use of MFA sonar in a significant portion of important marine mammal habitat,” and (2) avoid using sonar in the Catalina Basin in part because “the area includes a high density of marine mammals.”⁴⁶ The court also required the Navy to (3) cease the use of MFA sonar when marine mammals are spotted within 2200 yards, (4) power down sonar by six decibels during significant surface ducting conditions, (5) monitor for marine mammals before employing sonar, and (6) monitor for marine mammals before using active dipping helicopter sonar.⁴⁷

The Navy not only appealed immediately to the Ninth Circuit seeking a stay of the injunction, but it also simultaneously sought relief from the executive branch. First, it asked President George W. Bush to invoke the CZMA’s waiver provision. The CZMA authorizes the President to exempt a federal activity from CZMA requirements upon a finding that the activity is “in the paramount interest of the United States.”⁴⁸ For the first time in the CZMA’s history, President Bush issued such an exemption, granting the Navy’s request for relief from the CZMA for its use of MFA sonar during the SOCAL training exercises. Second, the Navy sought a ruling from the White House CEQ to circumvent the district court’s NEPA determinations pursuant to the CEQ’s regulation addressing emergencies.⁴⁹ After one-sided correspondence with the Navy that excluded NRDC, the CEQ determined that the district court’s

42. *Natural Res. Def. Council v. Winter*, 502 F.3d 859 (9th Cir. 2007).

43. *Natural Res. Def. Council v. Winter*, 508 F.3d 885, 887 (9th Cir. 2007).

44. *Id.*

45. *Natural Res. Def. Council v. Winter*, 527 F. Supp. 2d 1216, 1222–23 (C.D. Cal. 2008).

46. *Natural Res. Def. Council v. Winter*, 530 F. Supp. 2d 1110, 1119–1121 (C.D. Cal. 2008).

47. *Id.*

48. 16 U.S.C. § 1456(c)(1)(B) (2006).

49. 40 C.F.R. § 1506.11 (2008) (“Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements.”).

injunction created “emergency circumstances” and ordered “alternative arrangements” permitting the Navy to conduct its training exercises without the mitigation measures imposed by the district court’s injunction.

Based on this executive branch intervention, the Navy moved to vacate the district court’s injunction in its entirety, focusing especially on the 2200-yard shut-down and the six-decibel power-down during surface ducting conditions, which it singled out as the measures most disruptive to its operations.⁵⁰ The district court rejected the Navy’s motion,⁵¹ and the Ninth Circuit affirmed.⁵² In particular, the Ninth Circuit determined that plaintiffs had established a likelihood of success on their NEPA claim and had carried their burden of establishing a “possibility” of irreparable harm. The court emphasized the factual evidence of predicted harm to the environment (under the Navy’s own calculations, the training exercises would result in over 170,000 biologically significant disturbances to marine mammals) and concluded that the district court properly balanced the hardships between the Navy’s ability to train its sailors and the potential harm to marine wildlife.⁵³

Although it rejected the Navy’s motion to vacate the district court’s injunction, the Ninth Circuit issued a partial stay pending Supreme Court review that modified the two conditions of particular concern to the Navy under certain circumstances.⁵⁴ After the Navy filed a writ of certiorari in March 2008, the Supreme Court granted review in June, heard oral arguments in October, and issued an opinion on November 12, 2008.

50. As Plaintiffs argued, the Navy’s claims are disputed by the fact that it has implemented similar mitigation measures in previous training exercises. See Final Comprehensive Overseas Environmental Assessment for Major Atlantic Fleet Training Exercises February 2006 (2006) (prepared for United States Fleet Forces Command in accordance with Chief of Naval Operations Instruction 5090.1B pursuant to Executive Order 12114) (on file with author); Atlantic Fleet Exercises Using Mid-Frequency Sonar Mitigation Chart (2006) (on file with author); see also Sarah J. Dolman, Caroline R. Weir & Michael Jasny, *Comparative Review of Marine Mammal Guidance Implemented during Naval Exercises*, 58 MARINE POLLUTION BULLETIN 465–477 (2009).

51. *Natural Res. Def. Council v. Winter*, 527 F. Supp. 2d 1216 (C.D. Cal. 2008).

52. *Natural Res. Def. Council v. Winter*, 518 F.3d 658 (9th Cir. 2008).

53. *Id.* at 697–98, 703 (concluding that “the district court here carefully balanced the significant interests and hardships at stake to ensure that the Navy could continue to train without causing undue harm to the environment”).

54. The Ninth Circuit modified the 2200-yard shut-down requirement by allowing the Navy to continue the use of sonar at a critical point in an exercise but requiring the Navy to power-down sonar by six decibels if a marine mammal was detected within 1100 yards, with additional power-downs at closer ranges. *Id.* The court also modified the six-decibel power-down requirement during surface ducting conditions by requiring the Navy to power-down its sonar only if a marine mammal was actually detected. *Id.*

III. WINTER V. NRDC AND ITS IMPLICATIONS

A. *The Opinions of the Supreme Court*

The Supreme Court's majority opinion in *Winter v. NRDC* can be reduced to three main holdings. First, the Court reiterated the standard for obtaining a preliminary injunction, rejecting the Ninth Circuit's characterization of the standard.⁵⁵ Second, it held that the lower courts improperly balanced the harm to marine mammals and the harm to the public's interest in national security, particularly given the absence of documented harm after forty years of sonar testing off the Southern California coast.⁵⁶ Third, it found, based on the record in the case, that the injunction posed a credible threat to national security.⁵⁷ The Court held that the district court abused its discretion by issuing the preliminary injunction, and thus vacated the preliminary injunction with respect to the two mitigation measures of particular concern to the Navy.⁵⁸ While the Court undoubtedly deferred to the declarations of senior naval officers, it nonetheless noted that "military interests do not always trump other considerations, and we have not held that they do."⁵⁹ Leaving the district court's remaining protective measures intact, the Court recognized that injunctions against the military are available and appropriate when proper deference is given to military interests.⁶⁰

Chief Justice Roberts' majority opinion was joined by four Justices.⁶¹ Two Justices, Breyer and Stevens, concurred with the majority's holding that the two specific mitigation measures should be vacated, but on different grounds. Writing an opinion joined in part by Justice Stevens, Justice Breyer would have vacated the injunction because "[n]either the District Court nor the Court of Appeals has adequately explained its conclusion that the balance of the equities tips in favor of the plaintiffs. Nor do those parts of the record to which the parties have pointed supply the missing explanation."⁶² Breaking

55. *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 375 (2008).

56. *Id.* at 378, 381.

57. *Id.*

58. *Id.* at 382.

59. *Id.* at 378.

60. *Id.*

61. Chief Justice Roberts delivered the opinion of the Court, in which Justices Scalia, Kennedy, Thomas, and Alito joined. *Id.* at 365.

62. *Id.* at 386 (Breyer, J., concurring in part, dissenting in part). Justice Breyer found: (1) that the evidence supporting the need for the two measures was "weak or uncertain." *Id.* at 383; (2) that the Navy's declarants made a "strong case" that the measures "would seriously interfere with necessary defense training." *Id.* at 384; (3) "[t]he District Court did not explain why it rejected the Navy's affidavit-supported contentions." *Id.*; (4) the Ninth Circuit's effort to supply explanations for rejecting the Navy's contentions was "not sufficient." *Id.* at 385; and (5) "neither the District Court nor the Court of Appeals explained why we should reject the Navy's assertions that it cannot effectively conduct its training exercises under the mitigation conditions imposed by the District Court." *Id.* at 386.

from the majority, Justice Breyer would have instead replaced the vacated district court mitigation measures with the modified conditions imposed by the Ninth Circuit in its February temporary stay order for the remaining Navy exercise.⁶³

In a dissent joined by Justice Souter, Justice Ginsburg would have affirmed the lower courts' opinions and findings, noting that the district court "conscientiously balanced the equities" and did not abuse its discretion in imposing a preliminary injunction.⁶⁴ The likely harm predicted in the Navy's EA, according to Justice Ginsburg,

[could not] be lightly dismissed, even in the face of an alleged risk to the effectiveness of the Navy's 14 training exercises. There is no doubt that the training exercises serve critical interests. But those interests do not authorize the Navy to violate a statutory command, especially when recourse to the Legislature remains open.⁶⁵

B. Preliminary Injunction Standard

The Supreme Court used *Winter v. NRDC* as an opportunity to reiterate the standard for obtaining a preliminary injunction, rejecting the Ninth Circuit's "possibility" of irreparable harm characterization as "too lenient"⁶⁶ and restating its own standard requiring that plaintiffs "demonstrate that irreparable injury is *likely* in the absence of an injunction."⁶⁷ The Court went on, however, to question whether this standard made any difference in the case because, "[a]lthough the [Ninth Circuit] referred to the 'possibility' standard, and cited Circuit precedent along the same lines, it affirmed the District Court's conclusion that plaintiffs had established a 'near certainty' of irreparable harm."⁶⁸

Requiring a *likelihood* of harm as opposed to a *possibility* of harm, the Court clarified the showing of irreparable harm a plaintiff must make in order to obtain a preliminary injunction in federal court. Yet the Court's clarification will likely have minimal impact on the Ninth Circuit. Reciting the showing of harm necessary to obtain injunctive relief, the Ninth Circuit has often noted that despite its possibility of harm formulation "the party seeking injunctive relief must demonstrate a 'fair chance of success on the merits' and a 'significant

63. *Id.* at 386–387.

64. *Id.* at 387 (Ginsburg, J., dissenting).

65. *Id.* at 393.

66. *Id.* at 375 (majority opinion).

67. *Id.* (emphasis in original) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983); *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 441 (1974); *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974)).

68. *Id.* at 376 (citing *Natural Res. Def. Council v. Winter*, 518 F.3d 658, 696–97 (9th Cir. 2008)).

threat of irreparable injury.”⁶⁹ The difference between a significant threat of irreparable injury and likely irreparable injury is one of semantics. Parties able to show a significant risk of irreparable injury are likely also able to show that such harm is likely. Thus, to the extent district courts in the Ninth Circuit have been applying the “significant threat of irreparable injury” standard, it is unlikely the Supreme Court’s ruling will make it more difficult to obtain injunctive relief.⁷⁰ Going forward, therefore, *Winter* will be cited as the Supreme Court’s articulation of the proper preliminary injunction standard. Its impact, however, will only be felt in the few cases in which the threat of harm fails to rise above a mere possibility.

C. *Balancing the Interests*

Although the district court found that plaintiffs had established a “near certainty” of irreparable harm, the Supreme Court majority was not persuaded. Addressing the balance of interests, the majority held that plaintiffs’ interests were “plainly outweighed by the Navy’s need to conduct realistic training exercises to ensure that it is able to neutralize the threat posed by enemy submarines.”⁷¹ While the majority did not question the “seriousness” of plaintiffs’ interests and agreed that plaintiffs’ ecological, scientific, and recreational interests were important, it concluded that, under these circumstances, the balance tipped “strongly in favor of the Navy.”⁷² It reasoned that the possibility of the Navy deploying “inadequately trained” forces that would “jeopardize[] the safety of the fleet” represented greater harm than the harm to plaintiffs’ interests.⁷³ The majority also found that the public interest in the Navy’s training “plainly outweigh[ed] the interests advanced by plaintiffs.”⁷⁴ In doing so, the majority ignored traditional standards of appellate review.

Central to the majority’s opinion is its deference to declarations by senior Navy officers that the use of MFA sonar under realistic conditions is of vital

69. *Dept. of Parks and Rec. for State of Cal. v. Bazaar Del Mundo, Inc.*, 448 F.3d 1118, 1123–24 (9th Cir. 2006) (quoting *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987)).

70. *See, e.g., Electronic Frontier Found. v. Office of the Dir. of Nat. Intelligence*, 542 F. Supp. 2d 1181, 1185 (N.D. Cal. 2008) (holding that “a party seeking a preliminary injunction always must show that a significant threat of irreparable harm exists”); *Valvanis v. Milgroom*, 529 F. Supp. 2d 1206, 1210 (D. Haw. 2007) (holding that the party seeking a preliminary injunction “must demonstrate a significant threat of irreparable injury”); *Walker v. Woodford*, 454 F. Supp. 2d 1007, 1030 (S.D. Cal. 2006) (holding that to obtain a preliminary injunction, “the movant must demonstrate, at a minimum, a significant threat of irreparable injury”); *Liegman v. Cal. Teachers Ass’n*, 395 F. Supp. 2d 922, 925 (N.D. Cal. 2005) (holding that “to justify the grant of injunctive relief a plaintiff must show a significant threat of irreparable injury” (internal quotation omitted)).

71. *Winter*, 129 S. Ct. at 382.

72. *Id.* at 378.

73. *Id.*

74. *Id.*

interest to effective training and thus national defense, as well as the Navy's assertions that it has been training for "40 years with no documented episode of harm to a marine mammal."⁷⁵ The Court accepted the statements contained in the Navy's declarations about harm to its training, finding that the "lower courts failed properly to defer to senior officers' specific, predictive judgments about how the preliminary injunction would reduce the effectiveness of the Navy's SOCAL training exercises."⁷⁶ The majority concluded that the lower courts had "significantly understated the burden the preliminary injunction would impose on the Navy's ability to conduct realistic training exercises, and the injunction's consequent adverse impact on the public interest in national defense."⁷⁷

Judicial deference to the military is neither novel nor extraordinary,⁷⁸ as the lower courts repeatedly acknowledged. For instance, the district court rejected a number of mitigation measures proposed by the plaintiffs' in deference to the Navy, and the Ninth Circuit deferred to the Navy by staying the injunction with respect to the power-down and shut-down conditions.⁷⁹ It is undisputed that military commanders, not federal judges, determine how best to train our forces to defend our nation. Federal judges merely ensure that such training complies with federal law.⁸⁰

75. *Id.* at 381.

76. *Id.* at 368.

77. *Id.* at 377. The majority then detailed several ways in which the lower courts' opinions fell short, including balancing the equities in a "cursory fashion," failing to give "sufficient weight to the views of several top Navy officers" regarding the 2200-yard shut-down, using "backwards" reasoning and "understat[ing] the burden" in evaluating the six-decibel surface ducting power-down, and wrongly concluding that the Navy's use of mitigation measures in the past meant that "more intrusive restrictions pose[d] no threat to preparedness for war." *Id.* at 368, 378–80.

78. *See, e.g.,* *Loving v. United States*, 517 U.S. 748, 768 (1996) (stating that "it would be contrary to the respect owed the President as Commander in Chief to hold that he may not be given wide discretion and authority"); *see also* *Goldman v. Weinberger*, 475 U.S. 503 (1986) (giving "great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest").

79. *Natural Resources Defense Council v. Winter*, 527 F. Supp. 2d 1216, 1223 (C.D. Cal. 2008); *Winter*, 129 S. Ct. at 387 (Breyer, J., concurring in part, dissenting in part).

80. *See, e.g.,* *Washington County v. U.S. Dep't of the Navy*, 317 F. Supp. 2d 626, 633 (E.D.N.C. 2004) (finding the balance of harm "significantly weighted in Plaintiffs' favor" despite the Navy's argument that a preliminary injunction would "deprive the Navy of its mission to protect the interests of the United States and to train its pilots"); *Natural Res. Def. Council v. Evans*, 279 F. Supp. 2d 1129, 1191 (N.D. Cal. 2003) ("A tailored injunction reconciles the very compelling interests on both sides of this case, by enabling the Navy to continue to train with and test LFA sonar as it needs to do, while taking some additional measures to better protect against harm to marine life."); *Makua v. Rumsfeld*, 163 F. Supp. 2d 1202, 1221 (D. Haw. 2001) ("Although the court recognizes the importance of national security and live-fire training, the potential harm to the Army resulting from a brief preliminary injunction will not be significant."); *Cal. Coastal Comm'n v. United States*, 5 F. Supp. 2d 1106, 1112 (S.D. Cal. 1998) (granting preliminary injunction despite Navy arguments that the injunction "may 1) imperil national security . . . or 2) result in loss of or injury to seaman"); *McVeigh v. Cohen*, 996 F. Supp. 59, 61 (D.D.C. 1998) (recognizing that "deference to the military does not deprive courts of their authority to grant equitable relief"); *Found. of Econ. Trends v. Weinberger*, 610 F. Supp. 829, 884

Here, the Supreme Court found that plaintiffs' had not met the evidentiary burden required to obtain a preliminary injunction under federal law. In other words, plaintiffs' did not proffer—or the district court did not cite—enough evidence to tip the balance of interests away from the Navy. While it is true the majority showed great deference to the declarations of senior Navy officers, such deference is not dispositive. As the Court itself acknowledged: “military interests do not always trump other considerations, and we have not held that they do.”⁸¹ The decision in *Winter* simply raises the evidentiary burden for future plaintiffs to challenge military decisions that are supported by the declarations of senior military officials.

Remarkably, the majority never explicitly measured the district court's factual findings against the well-established standard for appellate review of factual findings—that is, whether the court's findings were clearly erroneous.⁸² The majority clearly disagreed with the district court's conclusions, but under well-established precedent mere disagreement is not a sufficient basis for reversal. “The clearly erroneous standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.”⁸³ In other words, the Supreme Court may only review a lower court's factual findings for clear error. When doing so, the Supreme Court, “like any reviewing court, will not reverse a lower court's finding of fact simply because [it] ‘would have decided the case differently. Rather, a reviewing court must ask whether, ‘on the entire evidence,’ it is ‘left with the definite and firm conviction that a mistake has been committed.’”⁸⁴

This is an obvious and important flaw in the *Winter* decision. The majority rejected the district court's finding of irreparable harm and endorsed the Navy's declarations regarding threat to national security without applying traditional appellate review standards. As the majority recognized, the case involved “complex, subtle and professional decisions as to the composition, training,

(D.D.C. 1985) (“Balancing the environmental considerations of NEPA against these defense concerns, this ruling is narrowly tailored to take those matters into account.” (citation omitted)). See also Reynolds, *supra* note 10, at 760–70.

81. *Winter*, 129 S. Ct. at 378.

82. FED. R. APP. P. 52.

83. *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (“The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court.”); see also *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) (“A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”).

84. *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (citing *Anderson*, 470 U.S. at 573 and *U.S. Gypsum Co.*, 333 U.S. at 395); see also *Concrete Pipe and Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993) (“A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing [body] on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” (citing *U. S. Gypsum Co.*, 333 U.S. at 395)).

equipping, and control of a military force.”⁸⁵ Yet the majority failed to recognize—and in so doing ignored Supreme Court precedent—that district courts are uniquely situated to analyze evidence and make determinations of fact even when complex, subtle, and professional decisions are at issue. A district court’s “major role is the determination of fact, and with experience in fulfilling that role comes expertise.”⁸⁶ In *Winter*, the district court not only had fact-finding expertise but also the expertise gained in two additional cases involving the Navy’s use of sonar.⁸⁷ Nonetheless, the majority substituted its own judgment without identifying any clear error in the lower court’s fact finding.

The majority also took on faith the Navy’s assertions that there were no documented episodes of harm to marine mammals in over forty years of training in the area, relying on the Navy’s claim “that this is not a case in which the defendant is conducting a new type of activity with completely unknown effects on the environment.”⁸⁸ These unique but critical facts—and the majority’s willingness to unmoor itself from established appellate review practices by instead substituting its own sense of the public interest among competing national priorities—will likely limit *Winter*’s persuasive force and precedential effect to the circumstances in this case.

The majority’s failure to adhere to the clear error standard is reflected in its analysis and is highlighted in Part I of Justice Breyer’s concurring opinion, which was joined by Justice Stevens. According to Justice Breyer, “the absence of an injunction . . . threatens to cause the very environmental harm that a full reaction EIS might have led the Navy to avoid,” and thus “conditions designed to mitigate interim environmental harm may well be appropriate.”⁸⁹ To determine whether the district court’s conditions were appropriate, Justice Breyer, unlike the majority, closely examined the evidence supporting the lower court’s findings but found that “several features of this case lead me to conclude that the record, as now before us, lacks adequate support for an injunction imposing the two controverted requirements.”⁹⁰ Of particular import, “the District Court did not explain *why* it rejected the Navy’s affidavit-supported contentions.”⁹¹ Therefore, according to Justice Breyer, the district court erred when it failed to offer adequate support for its findings and on that basis voted to vacate the challenged portions of the injunction.

85. *Winter*, 129 S. Ct. at 377 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)).

86. *Anderson*, 470 U.S. at 574.

87. *Natural Res. Def. Council v. England*, No. CV05-07513 (C.D. Cal. Oct. 19, 2005); *Natural Res. Def. Council v. Winter*, No. CV06-4131 (C.D. Cal. June 28, 2006).

88. *Winter*, 129 S. Ct. at 376.

89. *Id.* at 383 (Breyer, J., concurring in part, dissenting in part).

90. *Id.*

91. *Id.* at 384 (emphasis in original).

D. Proper Remedy

Based on the record in this case, the Supreme Court found that the preliminary injunction posed a credible threat to national security. It did not, however, rule that preliminary injunctions are inappropriate remedies in NEPA cases. The majority found that “[g]iven that the ultimate claim is that the Navy must prepare an EIS, not that it must cease training, there is no basis for enjoining such training in a manner credibly alleged to pose a serious threat to national security.”⁹² This finding of a “serious threat to national security” significantly limits *Winter*’s future impact because it is unlikely, now as before, that a court would issue an injunction in a NEPA case that would threaten national security.

Indeed, the decision does nothing to alter the range of remedies available to a court in a NEPA case: injunctions remain available and subject to a court’s equitable discretion. And, echoing its holding in *Weinberger v. Romero-Barcelo*, the Court reaffirmed that because “[a]n injunction is a matter of equitable discretion . . . it does not follow from success on the merits as a matter of course.”⁹³ Thus, as always, a court must examine various factors, including “the balance of equities and consideration of the public interest [when] assessing the propriety of any injunctive relief.”⁹⁴

For the majority in *Winter*, the balance of equities and the public interest did not provide an adequate basis for the two injunctive measures of greatest concern to the Navy—the 2200-yard safety zone around a sonar vessel and the six-decibel power-down during surface-ducting conditions. “We do not discount the importance of plaintiffs’ ecological, scientific, and recreational interest in marine mammals,” the Court stated.⁹⁵ “Those interests, however, are plainly outweighed by the Navy’s need to conduct realistic training exercises . . .”⁹⁶ The majority’s holding was reinforced by its finding that the injunction jeopardized national security and that there had been no documented episode of harm to a marine mammal from sonar in Southern California for the last forty years.⁹⁷ Thus, the majority simply balanced the equities and analyzed the public interest and, based on its assessment of both, determined that the lower courts had abused their discretion in granting and affirming the injunction.

Winter does not depart from the precedent established by the circuits that courts retain their full equitable powers in NEPA cases and can fashion relief for violations of the Act as necessary, including the grant or denial of an

92. *Id.* at 381 (majority opinion).

93. *Id.* (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (“[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law.”)).

94. *Id.*

95. *Id.* at 382.

96. *Id.*

97. *Id.* at 381.

injunction.⁹⁸ The Supreme Court's holding mirrored, for example, the Fourth Circuit's holding in *National Audubon Society v. Navy*.⁹⁹ In that case, plaintiffs challenged the adequacy of the Navy's EIS for its decision to construct a landing field in North Carolina.¹⁰⁰ The Fourth Circuit affirmed the district court's holding that the Navy's EIS was inadequate but vacated the lower court's blanket injunction prohibiting the Navy from taking any action toward placement of the site.¹⁰¹ Analyzing the lower court's actions, the court stated that "[a]s in all injunction cases, a court must balance the harms particular to each case in assessing whether an injunction is justified and how far it should reach."¹⁰² The court's rejection of the blanket injunction was founded on the Navy's claims that the injunction threatened military readiness.¹⁰³ The Fourth Circuit remanded, instructing the lower court to narrow the injunction to permit activities requested by the Navy that did not harm the environment or limit future options in accord with NEPA's purpose.¹⁰⁴

The Supreme Court's holding was also consistent with the Ninth Circuit's recent decision in *Geertson Seed Farms v. Johanns*.¹⁰⁵ In *Geertson*, conventional alfalfa growers sued the Department of Agriculture for deregulating genetically altered alfalfa before issuing an EIS.¹⁰⁶ Plaintiffs sought a permanent injunction against the planting of altered alfalfa until the completion of an EIS.¹⁰⁷ Addressing the scope of any injunction, the Ninth Circuit noted that the "traditional balancing of harms applies in the environmental context."¹⁰⁸ The court also reiterated "that even when a district court finds that a NEPA violation occurred, in unusual circumstances an injunction may be withheld, or, more likely, limited in scope."¹⁰⁹

As the *Winter* court noted, when a court concludes that NEPA has been violated, it "has many remedial tools at its disposal, including declaratory relief or an injunction tailored to the preparation of an EIS."¹¹⁰ Of course, even in *Winter* itself—which only partially vacated the district court's injunction,

98. See, e.g., *Sierra Club v. Hennessy*, 695 F.2d 643, 648 (2d Cir. 1982) ("A violation of NEPA does not necessarily require a reflexive resort to the drastic remedy of an injunction. In such cases, this Court has recognized that it must entertain normal consideration relative to the grant of equitable relief.").

99. *Nat. Audubon Soc'y v. Navy*, 422 F.3d 174 (4th Cir. 2005).

100. *Id.* at 183.

101. *Id.* at 207.

102. *Id.* at 202.

103. *Id.* at 203.

104. *Id.* at 202–207.

105. *Geertson Seed Farms v. Johanns*, Nos. 07-16458, 07-16492, 07-16725, 2009 WL 1782972 (9th Cir. June 24, 2009).

106. *Id.* at *3.

107. *Id.*

108. *Id.* at *4.

109. *Id.* at *5 (quotation and citation omitted).

110. *Natural Res. Def. Council v. Winter*, 129 S. Ct. 365, 381 (2008).

leaving two-thirds of its protective measures in place—an injunction was issued to mitigate environmental impacts pending NEPA compliance. Justice Breyer recognized that the two measures challenged by the Navy may have been appropriate to mitigate interim harm from the Navy’s failure to prepare an EIS.¹¹¹ Finding that the lower court failed to support adequately its balancing of the harms,¹¹² however, Justice Breyer would have “modified conditions imposed by the Court of Appeals in its February stay order reflect[ing] the best equitable conditions that can be created in the short time available before the exercises are complete and the EIS is ready.”¹¹³ Justice Breyer, like the majority, recognized that courts retain their equitable power in NEPA cases to fashion injunctive relief.¹¹⁴ He parted company with the majority when he outlined other equitable conditions for the remainder of the Navy’s exercises—conditions imposed by the Ninth Circuit in its stay order.

The majority held that the district court’s injunction should be vacated to the extent that it is “credibly alleged to pose a serious threat to national security.”¹¹⁵ It further emphasized that “[t]his is particularly true in light of the fact that the training has been going on for 40 years with no documented episode of harm to a marine mammal.”¹¹⁶ Thus, *Winter* stands for the narrow proposition that an injunction found to “jeopardiz[e] national security” should not issue when there is insufficient evidence of harm to the environment.¹¹⁷ It does not stand for the proposition that NEPA-based injunctions are unavailable against the military.¹¹⁸

E. Unanswered Questions

While the majority avoided addressing the underlying merits of plaintiffs’ claims,¹¹⁹ Justice Ginsburg, in her dissent joined by Justice Souter, addressed them directly:

111. *Id.* at 383 (Breyer, J., concurring in part, dissenting in part).

112. *Id.* at 383–86.

113. *Id.* at 387.

114. *Id.* at 382–83.

115. *Id.* at 387.

116. *Id.*

117. *Id.*

118. For arguments to the contrary, see *Hawaii Lawyers: Supreme Court Sonar Decision Sets National Security As Paramount*, PR NEWswire, Dec. 10, 2008, available at <http://news.prnewswire.com/ViewContent.aspx?ACCT=109&STORY=/www/story/12-10-2008/0004940157&EDATE=> (“[T]he Navy and its leaders—not judges—should determine how best to defend our nation.”); Editorial, *The Greens Get Harpooned*, WALL ST. J., Nov. 13, 2008, at A18 (“We are very close to making judges co-Secretaries of Defense.”).

119. *Winter*, 129 S. Ct. at 387. Specifically, the majority did not address whether the Navy violated NEPA by failing to prepare an EIS or whether a demonstration of species-level harm is required for injunctive relief. In addition, the majority opinion did not address the lower courts’ irreparable harm finding or the finding that NRDC was likely to succeed on the merits, instead overturning the two

If the Navy had completed the EIS before taking action, as NEPA instructs, the parties and the public could have benefited from the environmental analysis – and the Navy’s training could have proceeded without interruption. Instead, the Navy acted first, and thus thwarted the very purpose an EIS is intended to serve.¹²⁰

The dissent then highlights one of the fundamental errors in the majority’s holding: the armed services could conceivably avoid complying with NEPA, and thus avoid the informed decision making that NEPA requires, if it alleges that compliance will threaten national security. Congress has never written a military exemption in NEPA, despite providing similar exemptions in other environmental statutes.¹²¹ As Justice Ginsburg observed in her dissent, while the Navy’s training exercises serve critical interests, they “do not authorize the Navy to violate a statutory command, especially when recourse to the Legislature remains open.”¹²²

The dissent also clearly articulated the evidentiary basis for the district court’s finding of a “near certainty” of irreparable harm, noting that “170,000 behavioral disturbances, including 8,000 instances of temporary hearing loss; and 564 Level A harms, including 436 injuries to a beaked whale population numbering only 1,121 . . . cannot be lightly dismissed, even in the face of an alleged risk to the effectiveness” of the Navy’s training exercises.¹²³ Agreeing with the lower courts, the dissent found that “[t]he Navy’s own EA predicted substantial and irreparable harm to marine mammals.”¹²⁴ By contrast, the majority repeatedly cited the Navy’s claim of forty years of sonar training in the region without documented harm in part to justify its balancing of interests in the Navy’s favor.¹²⁵ The majority’s tight embrace of “documented harm”—and unwillingness to examine the merits of the case—discounts the Navy’s own estimations of impacts as well as the district court’s factual findings.

In addition to avoiding the merits of the case, the majority failed to decide whether the White House CEQ could in effect exempt the Navy from complying with the district court’s injunction. Addressing the CEQ approval of “alternative arrangements,” the dissent found that the “CEQ’s hasty decision on

challenged measures on the basis that the district court did not properly balance the harms to the parties and the public interest. *Id.*

120. *Id.* at 387 (Ginsburg, J., dissenting). *See also id.* at 390 (“The Navy’s publication of its EIS in this case, scheduled to occur *after* the 14 exercises are completed, defeats NEPA’s informational and participatory purposes.” (emphasis in original)).

121. *See, e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2621; Coastal Zone Management Act, 16 U.S.C. § 1456(c)(1)(b); Endangered Species Act, 16 U.S.C. § 1536(j); Clean Water Act, 33 U.S.C. § 1323(a); Safe Drinking Water Act, 42 U.S.C. § 300j-6(a); Resource Conservation and Recovery Act, 42 U.S.C. § 6961(a); Clean Air Act, 42 U.S.C. § 7417(b); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9620(j).

122. *Id.* at 393.

123. *Id.*

124. *Id.* at 392.

125. *See, e.g., id.* at 381 (majority opinion).

a one-sided record is no substitute for the District Court's considered judgment based on a two-sided record."¹²⁶ More fundamentally, the "CEQ lacks authority to absolve an agency of its statutory duty to prepare an EIS."¹²⁷ While the majority was able to dispense with any judgment of the CEQ's actions because of its narrower holding on the balance-of-hardships, it passed up an opportunity to address the broader question of whether the CEQ in effect acted as a court of errors by reviewing the district court's findings of fact.

The Supreme Court's opinion leaves unanswered a number of broader questions posed by the Navy's position in this case. Can an agency make findings of fact, as CEQ did in this case, contrary to findings made earlier by an Article III court on the same evidence? What limitations are there on the CEQ's ability to issue "alternative arrangements" under NEPA for "emergency circumstances?" What are the limits of judicial deference to military claims in NEPA cases when, in its view, national security is threatened? The Supreme Court's failure to address such questions undoubtedly reflects the Court's preference for a more focused, fact-specific challenge to the trial court's balancing. Moreover, as several Justices noted during oral argument, the exercises at issue in *Winter* were all but completed by Fall 2008 when the case was heard and decided, thus rendering the underlying dispute virtually moot. Further, the Navy finally accepted its obligation under NEPA and committed to issuing an EIS by January 2009 for future activities in its SOCAL range, including the use of sonar.¹²⁸

CONCLUSION

Stated simply, the Supreme Court decision in *Winter* holds that the Navy's and the public's interest in national security outweighed plaintiffs' and the public's interest in the marine environment, because plaintiffs did not meet the evidentiary burden required to obtain a preliminary injunction. Nevertheless, citing the majority's deference to the declarations of several senior Navy officials, some commentators have hailed a new era of judicial deference to anything falling within the penumbra of national security.¹²⁹ But these commentators rely on a false premise—specifically, the unsupportable assumption that historically the courts have failed to defer to national security interests in their balancing of environmental compliance and essential military

126. *Id.* at 391 (Ginsburg, J., dissenting).

127. *Id.*

128. *Id.* at 387. The Navy did finalize an EIS and issued a record of decision in January 2009 accepting the preferred alternative for training off the coast of Southern California. See Notice of Record of Decision for Southern California Range Complex, 74 Fed. Reg. 5650 (Jan. 30, 2009).

129. See *Hawaii Lawyers: Supreme Court Sonar Decision Sets National Security As Paramount*, PR NEWswire, Dec. 10, 2008, available at <http://news.prnewswire.com/ViewContent.aspx?ACCT=109&STORY=/www/story/12-10-2008/0004940157&EDATE=> ("[T]he Navy and its leaders—not judges—should determine how best to defend our nation."); Editorial, *The Greens Get Harpooned*, WALL ST. J., Nov. 13, 2008, at A18 ("We are very close to making judges co-Secretaries of Defense.").

training. To the contrary, that long history of deference is well documented in the annals of our judicial system. From the Court's own decision in *Weinberger* to countless decisions of lower courts, this history of deference has been integrated into a careful balancing of national security and environmental interests. In those cases where proper balancing dictated, courts have not hesitated to grant requests for injunctive relief against the military to block or modify activities that violate environmental law and threaten environmental harm.¹³⁰ And in some cases specifically involving the generation of undersea noise pollution—including the use of high intensity sonar—these decisions have led to agreements that successfully balance the competing interests of environmental harm and military training.¹³¹

More fundamentally, *Winter* is grounded in the constitutional principle that all of us—including the military—are bound by the law. As the Court has long held, “the military should always be kept in subjection to the laws of the country to which it belongs,” and “[t]he established principle of every free people is that the law shall alone govern; and to it the military must always yield.”¹³² There is nothing in *Winter* that alters that essential principle.

130. See, e.g., ‘Iio’Ulaokalani Coal. v. Rumsfeld, 464 F.3d 1083, 1086 (9th Cir. 2006); Davis v. Mineta, 302 F.3d 1104 (10th Cir. 2002); Citizen Advocates For Responsible Expansion, Inc. (I-Care) v. Dole, 770 F.2d 423 (5th Cir. 1985); I-291 Why? Ass’n v. Burns, 517 F.2d 1077 (2d Cir. 1975); Arlington Coal. On Transp. v. Volpe, 458 F.2d 1323 (4th Cir. 1972); Natural Res. Def. Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972); Foundation of Econ. Trends v. Weinberger, 610 F.Supp. 829, 843–44 (D.D.C. 1985).

131. See Natural Res. Def. Council v. Gutierrez, No. C-07-4771, 2008 WL 360852 (N.D. Cal. Feb. 6, 2008); Natural Res. Def. Council v. Winter, No. CV06-4131 (C.D. Cal. July 3, 2006), available at <http://www.nrdc.org/media/docs/060703.pdf>; Natural Res. Def. Council v. Evans, 364 F. Supp. 2d 1083 (N.D. Cal. 2003); Natural Res. Def. Council v. U.S. Dep’t of the Navy, 857 F. Supp. 734 (C.D. Cal. 1994).

132. Duncan v. Kahanamoku, 327 U.S. 304, 322–23 (1946); see also *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 637 (2006) (Kennedy, J., concurring) (“Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.”).

