WINTER V. NATURAL RESOURCES DEFENSE COUNCIL, INC.

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I. INTRODUCTION

Practicing offensive and evasive techniques in realistic war game exercises is an integral part of training naval units for combat. Because of the threat from enemy submarines, the Department of Defense will not certify strike groups for deployment until they are proficient in detecting submarines with mid-frequency active ("MFA") sonar.[1] MFA sonar works by emitting pulses of sound underwater and measuring the waves bounced back from targets. However, the loud sound is damaging to marine animals. The coast of California, widely considered the best area to conduct training, is home to at least thirty-seven mammal species, nine of which are listed as threatened or endangered.[2] Although the exact level of harm to marine life is difficult to measure, there appears to be, at a minimum, a correlation between training exercises and beaked whale beachings. The suffering of other mammals, too, has been documented, with injuries that include death from ruptured eardrums.[3]

National security and environmental protection are matters of national importance, and lower courts have struggled to balance both interests carefully. In *Winter v. Natural Resources Defense Council* ("*Winter II*"),[4] however, a divided Supreme Court made the task look easy. The Court matter-of-factly concluded that the public interest required that environmental concerns yield to national security.[5] The decision overturned all contested portions of a preliminary injunction issued by the district court,[6] effectively allowing the Navy to finish its now near-complete exercises[7] and mooting the Natural Resources Defense Council's ("NRDC") National Environmental Policy Act[8] ("NEPA") claims.[9] *Winter II* signals a marked shift from lower courts' treatment of NEPA injunctions, raising questions about the availability of restraining orders for NEPA violations in the future. In addition, although the majority in *Winter II* did not address how courts should deal with attempts by the executive branch to exempt agencies from statu-

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[1] Natural Res. Def. Council, Inc. v. Winter, No. 8:07CV00335(FMC), 2007 WL 2481037, at *1 (C.D. Cal. Aug. 7, 2007).

[2] Natural Res. Def. Council, Inc. v. Winter, 518 F.3d 658, 665 (9th Cir. 2008).

[3] Natural Res. Def. Council, Inc. v. Winter, 530 F. Supp. 2d 1110, 1115 (C.D. Cal. 2008).

[4] Winter v. Natural Res. Def. Council, Inc. (*Winter II*), 129 S. Ct. 365 (2008).

[5] *Id.* at 378.

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

[7] As of the decision in *Winter II*, the Navy had just one remaining exercise that it expected to complete by January 2009 at the latest. *Winter II*, 129 S. Ct. at 389.

[8] National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370e (2000).

[9] *Winter II* did not decide the NRDC's ongoing NEPA claim. However, the Navy would complete its exercises before trial, thus the claim was effectively mooted.

tory requirements, its deferential language suggests that such meddling might be acceptable. This issue has been hotly contested in lower courts. *Winter II* may invite increasing deference to executive invocation of national security at the expense of environmental concerns.

II. BACKGROUND

The *Winter II* litigation is the latest in a series of suits by environmental organizations challenging naval sonar use.[10] In *Natural Resources Defense Council, Inc. v. Winter* ("*Winter I*"),[11] the NRDC filed for a temporary restraining order against the Navy's use of MFA sonar in its planned 2006 Rim of the Pacific ("RIMPAC") training exercises.[12] The NRDC claimed, *inter alia*, that the Navy violated NEPA by failing to prepare an environmental impact statement ("EIS"). NEPA requires that federal agencies prepare an EIS for "major federal actions" where an initial environmental assessment ("EA") discloses a significant effect on "the quality of the human environment."[13] After performing an EA, however, the Navy reached a "finding of no significant impact," and did not perform the more thorough EIS.[14]

The district court imposed a temporary restraining order on naval sonar use in RIMPAC because of the likelihood that the NRDC would succeed on the merits and because the balance of harm favored environmental protection.[15] The court found that the available scientific data proved that the Navy had erred in finding no significant impact. The court concluded that the irrevocable and significant documented harm to marine mammals outweighed the temporary harm to the Navy of suspending exercises until completion of an EIS.[16] The parties then reached a settlement agreement under which the Navy could continue sonar use in RIMPAC by implementing additional mitigation measures.[17]

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[10] *See, e.g.*, Ocean Mammal Inst. v. Gates, 546 F. Supp. 2d 960 (D. Haw. 2008); Natural Res. Def. Council, Inc. v. Evans, 279 F. Supp. 2d 1129 (N.D. Cal. 2003); Natural Res. Def. Council, Inc. v. U.S. Dep't of the Navy, 857 F. Supp. 734 (C.D. Cal. 1994).

[11] Natural Res. Def. Council, Inc. v. Winter (*TRO*), No. CV06-4131(FMC) (C.D. Cal. Jul. 3, 2006), *available at* http://www.nrdc.org/media/docs/060703.pdf (order granting preliminary injunction).

[12] Complaint, Natural Res. Def. Council, Inc. v. Winter, No. CV06-4131(FMC) (C.D. Cal. June 28, 2006), *available at* http://docs.nrdc.org/water/wat_06062801A.pdf. RIMPAC refers to the waters surrounding Hawaii, known for their biodiversity.

[13] 42 U.S.C. § 4332(C).

[14] Complaint, *supra* note 12, at 6.

[15] TRO, No. CV06-4131(FMC) at *6 (finding that NRDC passed the sliding-scale temporary restraining order standard requiring a "strong possibility" of irreparable harm when success on the merits was likely).

[16] *Id.*

[17] Settlement Agreement, Natural Res. Def. Council, Inc. v. Winter, No. CV06-4131(FMC) (C.D. Cal. July 7, 2006). Pursuant to this agreement, the Navy agreed to implement additional mitigation measures in order to protect marine mammals and other marine life during the RIMPAC exercise. These measures included (1) refraining from using sonar within twenty-five nautical miles of the Northwestern Hawaiian Islands Marine National Monument;

In February 2007, six months after *Winter I*, the Navy completed an EA for fourteen new training exercises planned between February 2007 and January 2009 in the Southern California Operating Area ("SOCAL Exercises").[18] The Navy found that its exercises would result in 564 "Level A" takes,[19] defined as "any act that injures or has the significant potential to injure" marine mammals "slight[ly] to severe[ly]."[20] Additionally, the Navy predicted approximately 170,000 "Level B" takes, in which marine mammals would be subjected to sound levels between 170 and 195 decibels ("dB").[21] Nevertheless, the Navy issued a finding of no significant impact and did not perform an EIS. Although it evaluated and ultimately proposed limited mitigation measures as part of the EA,[22] the Navy did not consider the measures it employed during RIMPAC, pursuant to the settlement agreement in *Winter I*.

As in *Winter I,* the NRDC moved for a preliminary injunction to prevent the Navy from completing its training exercises until the court could determine whether an EIS was required. The district court applied a sliding-scale injunction test where "the less certain the district court is of the likelihood of success on the merits, the more plaintiffs must convince the district

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(2) requiring all personnel using underwater detection microphones to monitor for marine mammals and report the detection of any marine mammal to watch stations for action; (3) requiring aerial surveillance of marine mammals during sonar drills and reporting of sightings to a designated officer; (4) requiring the Navy to provide at least one dedicated and three non-dedicated marine mammal observers on every surface sonar vessel during all sonar drills, and to add an additional dedicated observer during the three exercises occurring in channels between the islands, and (5) requiring the Navy to publicize a hotline for reporting marine mammal incidents in the Hawaii press. *Id.* at 3–4.

[18] Winter v. Natural Res. Def. Council, Inc. (*Winter II*), 129 S. Ct. 365, 372.

[19] There is some disagreement in the numbers. *Compare* Natural Res. Def. Council, Inc. v. Winter, 527 F. Supp. 2d 1216, 1221 (C.D. Cal. 2008) (466 "level A" takes), *with* Natural Res. Def. Council, Inc. v. Winter, 518 F.3d 658, 668–69 (9th Cir. 2008) (564 "level A" takes). The majority in *Winter II* claimed that the Navy's EA predicted only 280 "level A" takes. *Winter II*, 129 S. Ct. at 372.

[20] *Winter II*, 129 S. Ct. at 383 (Ginsburg, J., dissenting).

[21] Decibels are a logarithmic measurement, such that an increase of 10 dB is equivalent to a tenfold increase in acoustic energy. To put the numbers in perspective, the Occupational Safety and Health Administration requires hearing protection to be used where workers are exposed to a sound level of 90 dB for eight hours or 110 dB for as little as thirty minutes. 29 C.F.R. § 1910.95(a) (2009).

[22] An agency may avoid the EIS requirement by adopting mitigation measures "sufficient to eliminate any substantial questions over the potential for significant impact on the environment." Natural Res. Def. Council, Inc. v. Winter, No. 8:07CV00335(FMC), 2007 WL 2481037, at *6 (C.D. Cal. Aug. 7, 2007) (citing Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 733–34 (9th Cir. 2001)). The Navy's proposed mitigation measures included a "safety zone" of 1000 yards and "visual monitors looking for whales." *Id.* at *6. The district court found that the Navy had "actually reduced their mitigation efforts and adopted measures even less protective than those the Court previously found insufficient" in RIMPAC. *Id*. The Navy "eliminated (1) its provisions requiring power-downs during surface ducting conditions (when sound travels greater distances), at night and in other low visibility conditions (when whales that would be affected are more difficult to see); (2) the twelve nautical mile coastal buffer zone, and (3) additional protection measures during 'chokepoint' exercises." *Id*. Finally, the court concluded that the Navy had failed to consider alternative locations and cumulative impact. *Id*. at *7.

court that the public interest and balance of hardships tip in their favor."[23] The court concluded that the NRDC was likely to win on the merits because the Navy's data in the EA suggested a need for an EIS. Lack of conclusive data was not dispositive due to the difficulty of data collection.[24] The court dismissed the Navy's claim that the EA reflected inflated harm numbers entered in the interest of caution because the higher numbers were designed to compensate for lack of knowledge and the court was "not equipped to evaluate the merits of the contention."[25] Because of the strength of the NRDC's argument on the merits, the district court found the data sufficient to show a "possibility for irreparable harm."[26] It concluded that the risk of irreparable damage outweighed the Navy's more limited harm from the temporary suspension of exercises.[27]

The Navy filed an emergency motion to stay the injunction. The Ninth Circuit allowed the injunction to stand until the district court could lay out mitigation measures under which the Navy could continue using sonar.[28] On remand, the district court outlined six conditions:

> (1) [I]mposing a 12-mile "exclusion zone" from the coastline; (2) using lookouts to conduct additional monitoring for marine mammals; (3) restricting the use of "helicopter-dipping" sonar; (4) limiting the use of MFA sonar in geographic "choke points"; (5) shutting down MFA sonar when a marine mammal is spotted within 2,200 yards of a vessel; and (6) powering down MFA sonar by 6 dB during significant surface ducting conditions, in which sound travels further than it otherwise would due to temperature differences in adjacent layers of water.[29]

The Navy objected to the last two conditions and sought executive relief.[30]

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[23] *Id.* at *2 (quoting Lands Council v. Martin, 479 F.3d 636, 639 (9th Cir. 2007)). The court cited the standard as "[a] preliminary injunction may issue when the moving party demonstrates either '(1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in its favor.'" *Id.* at *2 (quoting Faith Ctr. Church Evangelistic Ministries v. Glover, 480 F.3d 891, 906 (9th Cir. 2007)).

[24] *Id.* at *4.

[25] *Id.* at *5.

[26] *Id.* (finding only a "possibility of irreparable harm" required based on the strength of the argument on the merits).

[27] *Id.* at *10.

[28] In *Natural Resources Defense Council, Inc. v. Winter*, 502 F.3d 859, 864 (9th Cir. 2008), the motions panel upheld the injunction. However, in *Natural Resources Defense Council, Inc. v. Winter*, 508 F.3d 885, 886–87 (9th Cir. 2008), the court granted a temporary injunction that corresponded with a scheduled month-long stop in training.

[29] Winter v. Natural Res. Def. Council, Inc. (*Winter II*), 129 S. Ct. 365, 373 (2008).

[30] The Navy appealed to both the Council on Environmental ("CEQ") and the President for relief, but only the CEQ response is relevant to the NEPA claim discussed here. The President "granted the Navy an exemption from the requirements of the Coastal Zone Management Act of 1972 (CZMA) pursuant to 16 U.S.C. § 1456(c)(1)(B)," but the exemption does not affect the NRDC's NEPA claim. *Winter II*, 129 S. Ct. at 391 n.3 (Ginsburg, J., dissenting).

The Council on Environmental Quality ("CEQ"), an advisory body within the Executive Office of the President charged with overseeing NEPA implementation, responded.[31] In an *ex parte* proceeding,[32] the CEQ held that suspending naval training constituted "emergency circumstances" under 40 C.F.R. § 1506.11[33] because it placed "thousands of Americans directly at risk."[34] Empowered to grant emergency exceptions, the CEQ created "alternative arrangements" through which the Navy could fulfill its NEPA obligations in lieu of an EIS.[35] These alternative measures included (1) providing notice to the public regarding ongoing EIS preparation; (2) committing to continue research on the reactions of marine mammals to MFA sonar; and (3) maintaining the mitigation measures that the Navy had originally proposed.[36] That same day, with the CEQ declaration in hand, the Navy went back to the district court.

The 9th Circuit remanded for the district court to consider the effect of the CEQ letter on its previous order.[37] The district court began by analyzing the type of deference owed to the CEQ.[38] Although a CEQ interpretation of an ambiguous statute is owed *Chevron* deference, the court should not defer to an interpretation that contradicts a statute's plain meaning.[39] Drawing on both precedent and statutory language, the court concluded that the plain meaning of NEPA required that a situation be urgent, sudden, or unexpected to qualify for the emergency exception.[40] The court held that this standard was not met. Litigation had been ongoing for almost a year, and circumstances had not changed significantly during that period. Moreover, the current difficulty was "a creature of [the Navy's] own making, *i.e.,* its failure to prepare adequate environmental documentation in a timely fashion."[41] Finally, the court found that a narrow reading of the emergency exception was consistent with NEPA's lack of a "national security" or "defense" excep-

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[31] A subchapter of NEPA, 42 U.S.C. §§ 4342–4368 (2000), establishes the CEQ. The statute states that the CEQ is made up of three members appointed by the President to oversee the policy goals of NEPA and "recommend national policies to promote the improvement of the quality of the environment."

[32] *Id.*

[33] *Winter II*, 129 S. Ct. at 373.

[34] Letter from the Chairman of the Council on Environmental Quality to Donald Winter (Jan. 15, 2008) (Appendix to the Petition for Certiorari at 239a), *available at* http://www.usdoj.gov/osg/briefs/2007/2pet/7pet/2007-1239.pet.app.pdf.

[35] *Winter II*, 129 S. Ct. at 373 (majority opinion).

[36] Natural Res. Def. Council, Inc. v. Winter, 527 F. Supp. 2d 1216, 1224 (C.D. Cal. 2008).

[37] Natural Res. Def. Council, Inc. v. Winter, 513 F.3d 920 (9th Cir. 2008) (remanding for the district court to consider impact of CEQ and presidential decisions).

[38] *Natural Res. Def. Council, Inc.*, 527 F. Supp. 2d at 1225.

[39] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (holding that courts owe deference to agency decisions only if the federal statute the agency is charged with implementing is ambiguous and the agency's interpretation is reasonable).

[40] *Natural Res. Def. Council, Inc.*, 527 F. Supp. 2d at 1227 (distinguishing cases such as *Valley Citizens for a Safe Env't v. Vest*, No. 91-30077-F, 1991 WL 330963 (D. Mass. May 6, 1991), in which an emergency exception was found appropriate because of actual wartime necessity).

[41] *Id.* at 1228.

tion.[42] The court was concerned that allowing the CEQ to exempt the Navy from its injunction might allow the agency, an executive body, to sit "in review of a decision of the judicial branch," violating the Constitution.[43]

The Ninth Circuit affirmed.[44] The majority agreed with the district court that the CEQ's declaration did not affect the NRDC's likelihood of success on the merits.[45] The majority also agreed that the harm to the environment outweighed the harm to the Navy, despite the testimony of high-ranking naval officers that the district court's proposed mitigation measures would impair the effectiveness of the naval exercises. Additionally, the Ninth Circuit found that the conditions that would trigger the two contested provisions would occur infrequently, militating in favor of granting an injunction.[46] Because the public interest required that both environmental and national security interests be protected, the court concluded that the district court's narrowly tailored mitigation measures were the most effective compromise.[47]

In an opinion by Chief Justice Roberts, a divided Supreme Court reversed.[48] Although the Court did not reach a conclusion on the merits, its discussion of each party's chances of success suggested that the Court was skeptical of the NRDC's arguments.[49] The Court's pro-military slant suggested that it would not have found proof of irreparable injury had it decided the merits. In evaluating the restraining order, the majority rejected the sliding-scale test. Instead, it emphasized that a preliminary injunction requires a "likelihood," not a mere "possibility," of irreparable harm, regardless of the strengths of a plaintiff's arguments on the merits.[50] In addition, the majority emphasized that the district court had not reevaluated the likelihood of irreparable harm in light of the four uncontested mitigation measures.[51]

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[42] *Id.* at 1230 (citing San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n, 449 F.3d 1016, 1035 (9th Cir. 2006) (finding "no 'national defense' exception to NEPA")); *cf.* Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139 (1981) (holding that the NEPA exemption limiting disclosure of classified information, in this case about nuclear weapons, abrogated the need for a "hypothetical" environmental impact statement).

[43] *Natural Res. Def. Council, Inc.*, 527 F. Supp. 2d at 1232.

[44] Natural Res. Def. Council, Inc. v. Winter, 518 F.3d 658 (9th Cir. 2008).

[45] Like the district court, the Ninth Circuit found that the judiciary owed no deference to the CEQ's interpretation because it contravened an unambiguous congressional statute. *Id.* at 680–81. In addition, the circuit echoed the district court concerns regarding arbitrary and capricious decision-making by the CEQ, and about unconstitutional review of the judiciary by the executive. *Id.* at 686. Finally, the circuit found that the appeal to the CEQ actually supported the need for an EIS because the court treated the request for help as "the Navy's concession, by virtue of seeking such approval, that the SOCAL exercises will have a 'significant environmental impact.'" *Id.* at 687.

[46] *Id.* at 700–02.

[47] *See id.* at 702–03.

[48] Winter v. Natural Res. Def. Council, Inc. (*Winter II*), 129 S. Ct. 365 (2008). Chief Justice Roberts delivered the opinion of the Court, in which Justices Scalia, Kennedy, Thomas, and Alito joined. Justice Breyer, joined by Justice Stevens, concurred in part and dissented in part. Justice Ginsburg, joined by Justice Souter, dissented.

[49] *See id.* at 381.

[50] *Id.* at 375–76.

[51] *Id.* at 376.

Rather than apply a sliding scale, the majority balanced relative hardships to each party and considered conflicting public interests, holding that both factors favored the Navy. Because of the "complex, subtle, and professional decisions" at stake, the Supreme Court deferred to the naval officers' testimony.[52] In particular, it found the officers' generalized discussion of the significant threat from enemy submarines persuasive.[53] The Court also accepted that "the use of MFA sonar is 'mission-critical'" and a perishable skill.[54] Finally, the Court was convinced that the Navy could not realistically train under the two challenged restrictions.[55] The Court agreed that an "inadequately trained antisubmarine force jeopardizes the safety of the fleet."[56] Against these concerns, the Court found the NRDC members' desire to "take whale watching trips, observe marine mammals underwater, conduct scientific research on marine mammals, and photograph these animals in their natural habitats" lacking.[57] The majority concluded that the lower courts had erred in discounting the harm to the military posed by the contested mitigation measures. It noted that an injunction was particularly inappropriate where the underlying legal claim was procedural, and where the harmful activity had been continuous for forty years.[58]

Justice Breyer, joined by Justice Stevens, concurred in part, dissented in part, and dissented from the judgment. Although Justice Breyer criticized the majority for minimizing the harm to marine mammals from failure to conduct an EIS,[59] he agreed that the lower courts had failed to consider the relative harms and benefits to both the environment and the Navy from the contested mitigation measures.[60] He concluded that although a remand to consider the effect of the specific mitigation measures would normally be appropriate, in this case the question would be moot.[61] Absent the preliminary injunction, the Navy would complete its exercises before the district court could consider and devise suitable mitigation measures.[62]

In a dissenting opinion joined by Justice Souter, Justice Ginsburg concluded that the Navy's interest in effective training exercises, although high, could not trump NEPA-mandated considerations of environmental harm.[63] Stressing the extensive harm to marine animals from MFA sonar, Justice Ginsburg agreed with the Ninth Circuit that both the public interest and the balance of hardships favored granting a preliminary injunction.[64] Applying the sliding-scale test, Justice Ginsburg found that because of the high

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[52] *Id.* at 377.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.* at 378.
[57] *Id.* at 377.
[58] *Id.* at 381.
[59] *Id.* at 382–83 (Breyer, J., concurring in part and dissenting in part).
[60] *Id.* at 384.
[61] *Id.* at 386–87.
[62] *Id.* at 387.
[63] *Id.* at 389 (Ginsburg, J., dissenting).
[64] *Id.* at 393.

probability that the NRDC would win on the merits, it needed only to have proved "a strong threat of irreparable injury" and it easily met this standard.[65] Second, Justice Ginsburg emphasized that timing is essential to an EIS. Unless the EIS was completed before the exercise, the Navy could not consider its results before acting.[66] As a result, and because the emergency was one of the Navy's own creation, Justice Ginsburg suggested that letting the Navy off the hook for failing to provide an EIS when it knew one was required would set a dangerous precedent.[67] She concluded that had the Navy wanted a waiver, it should have gone through the statutorily prescribed channel of asking Congress, rather than appealing to the Executive.[68]

III. Analysis

The decision in *Winter II* is a troubling example of unquestioned deference to an invocation of military necessity at the expense of the environment. First, the majority's definition of cognizable harm, combined with its demand for detailed data in order to recognize environmental harms, made it inevitable that military interests would prevail in the balance of conflicting harms and public interests. Second, in balancing the public's interest in national security against its environmental interests, the Court rejected the reasoning of the lower courts without laying out a framework for future decisions. Third, the Court undermined the prospects for future injunctions under NEPA by insinuating that discretionary relief is less appropriate when the underlying complaint is based on procedural harm. Finally, the majority gave broad deference to Executive determinations of military necessity, leaving open the possibility that the Executive will stretch the definition of "emergencies" that trigger a NEPA exception. As a result, *Winter II* leaves the status of injunctions for procedural violations of environmental laws by the military in a state of flux.

A. Asymmetric Framing of Hardships

The majority framed the balance of hardships and public interest in terms that favored the military. Although difficulties in documentation preclude exact estimations of harm, the NRDC argued that the harm numbers in the Navy's own EA were sufficiently high to warrant a preliminary injunction.[69] The Court ignored the potential for serious animal and species-level harm and limited its consideration to the harm NRDC members had alleged for standing purposes. The majority described this harm as the impairment

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[65] *Id.* at 392 (citing 11A Charles Alan Wright et al., Federal Practice and Procedure § 2948.3, at 155-56 (2d ed. 1995)).

[66] *See id.* at 389–90.

[67] *Id.* at 387, 390.

[68] *Id.* at 390.

[69] Brief of Respondents at 4-6, *Winter II*, 129 S. Ct. 365 (No. 07-1239).

of "plaintiffs' ability to study and observe the animals."[70] In contrast, the district court in *Natural Resources Defense Council, Inc. v. Evans*,[71] imposing a limited preliminary injunction against the Navy's use of low-frequency sonar, described the NRDC harm as direct injury to the environment rather than indirect injury to NRDC members.

In its brief to the Supreme Court, the NRDC detailed the significant harm that marine mammals would suffer absent an injunction. Sonar can harm marine animals by causing mass strandings, hemorrhaging around the brain, ears, and kidneys, acute changes in the central nervous system, and gas/fat clots in the lungs, liver, and other vital organs.[72] Sonar also harms marine mammals at the species level, displacing habitat and altering behavior, such as "changes in feeding, diving, and social behavior."[73] By only recognizing harm directly felt by NRDC members, the *Winter II* court was able to avoid placing a value on environmental damage, which would have invited controversy. Instead, the Court could trivialize the injury to NRDC members as less long-term, permanent, and worrisome than the direct harm to mammals and mammal species.

In addition, emphasizing harm to the NRDC members attenuated the line of causation from the sonar activity to cognizable injury. Defining harm in relation to scientific and touristic interests made proving harm more difficult because of the gap between harm to mammals and harm to humans interested in watching mammals. Although observational and anecdotal data proved that some harm to mammals was likely despite the lack of exact data, the inexact numbers coupled with the unclear correlation between injury to animals and harm to observing humans did much to undermine the NRDC's ability to demonstrate serious harm.

In contrast, the Court embraced the attenuated potential for harm faced by the military. The Court accepted the military's conclusions that the injunction would decrease naval preparedness[74] without demanding the same specificity of data that the Court had required from the NRDC.[75] In addition, the majority accepted the military's claim that lower preparedness in naval training would have a significant impact on national defense as a whole, yet remained unwilling to recognize similar feedback effects between documented harm to mammals and significant repercussions for environmental health and scientific research. Finally, the majority ignored the circum-

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[70] *Winter II*, 129 S. Ct. at 377–78 (majority opinion).

[71] Natural Res. Def. Council, Inc. v. Evans, 279 F. Supp. 2d 1129, 1188-89 (N.D. Cal. 2003).

[72] Brief of Respondents, *supra* note 69, at 4.

[73] *Id.* The NRDC also cited scientific observations that indicate "sharp declines in commonly seen species over entire exercise areas" with at least some of the animal sightings still significantly lower five years after exercises. *Id.*

[74] *Winter II*, 129 S. Ct. at 377.

[75] Despite the significant documentation and scientific evidence, the Court refers to the harm alleged by the plaintiffs as "possible." *Id.* At the same time, the Court accepts "declarations" from senior military officials as proving the "consequent adverse impact" from imposing an injunction. *Id.*

stances surrounding the Navy's "emergency" by failing to acknowledge the Navy's failure to perform an initial EIS despite the holding in *Winter I* that one was required under similar facts. Nor did the majority consider the Navy's failure to request an exception through the legislature.

These interests are easily framed in more symmetric terms. In her dissent, Justice Ginsburg considered the broader circumstances and context of both military and environmental interests. Her wide lens caused her to evaluate the danger to naval preparedness against the potential for fundamental harm to the environment.[76] Justice Breyer took a different but equally consistent tack of comparing the relative impact of the two mitigation measures. He found that the military had demonstrated injury particular to the two contested mitigation measures and would have remanded in order to quantify the specific impact of the contested mitigation measures on the environment.[77] In contrast, the majority compounded the difficulty of comparing qualitatively different categories of harm by viewing each through a different lens.

B. Policy-Driven Balance of Harms

Despite chastising the lower courts for summarily choosing environmental over military interests,[78] the Supreme Court applied no better metric to reach the opposite result. In its decision, the majority laid out no alternative measuring stick for determining the public interest or the balance of hardships. Instead, the majority summarily concluded that, "[t]he public interest in conducting training exercises with active sonar under realistic conditions plainly outweighs the interests advanced by the plaintiffs."[79] The Court did not engage with considerations of actual need for sonar use in current military action or the responsibility of the military in failing to comply with NEPA. The Court's conclusion that military harm "plainly outweighs" environmental damage suggests that the Court applied the same "we'll know it when we see it" test as the lower courts, just to the opposite effect.

Although balancing tests are always case-by-case determinations and are particularly difficult when compelling interests are present on both sides, the Court could have increased consistency through greater specificity. In *Natural Resources Defense Council v. U.S. Department of the Navy*[80] the district court meticulously outlined its reasons for finding that the balancing test favored imposing a narrowly tailored preliminary injunction prohibiting

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[76] *Id.* at 390 (Ginsburg, J., dissenting). Justice Ginsburg goes on to fit the current naval emergency into the larger context of responsibility for its creation. *See id.* at 391.

[77] *Id.* at 384 (Breyer, J., concurring in part and dissenting in part).

[78] *Id.* at 378 (majority opinion) (criticizing the district court for "address[ing] these considerations in only a cursory fashion" and the Ninth Circuit for failing to properly defer to military arguments).

[79] *Id.*

[80] 857 F. Supp. 734 (C.D. Cal. 1994).

the use of low-frequency sonar. Although recognizing that the potential harm to both sides was serious, the court held that the likelihood of the NRDC's success on the merits combined with the Navy's fault in failing to comply with NEPA despite notice marginally favored the environment.[81] Direct engagement with the issues would have given lower courts more guidance on how to amend the detailed tests they had developed. Guidance was particularly needed because the Supreme Court reached the opposite outcome from the majority of lower courts that have addressed this issue.

The absence of nuanced justification is particularly surprising in light of the majority overturning the reasoning of the district court on an abuse of discretion standard, normally a high bar to cross.[82] In *Geertson Seed Farms v. Johanns*,[83] the Ninth Circuit dismissed a genetically modified alfalfa company's appeal of a NEPA-based injunction entered against the company. Although recognizing that other reasonable conclusions about likelihood of harm existed, the Ninth Circuit affirmed the district court's conclusion because it "was not clearly erroneous."[84] The Ninth Circuit mentioned how the district court had relied on the testimony of the plaintiff alfalfa company's president in reaching its conclusion, the type of credibility assessment that justifies deference to lower courts.[85] Similarly, given the strong arguments on both sides, the first-hand evaluation of military testimony, and the difficulty in quantifying the weight of the factors, the lower courts in *Winter II* could have reasonably held for either side. By reversing without stronger justifications, the majority inappropriately conflated disagreement with abuse of discretion. As a result, higher courts may become more willing to overturn decisions based on differences over policy priorities.

C. Heightened Standard for Injunctions for Procedural Harm

The Supreme Court raised the bar for plaintiffs seeking injunctions on the basis of procedural harm. The majority in *Winter II* suggested that even if the NRDC proved all the normal elements required for a preliminary injunction, an injunction would not be appropriate because of the procedural nature of the underlying claim, set against the possible substantive harm to national security. "Given that the ultimate legal claim is that the Navy must prepare an EIS, not that it must cease sonar training, there is no basis for enjoining such training in a manner credibly alleged to pose a serious threat

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[81] *Id.* at 741 n.13.

[82] *See*, *e.g.*, Koon v. United States, 518 U.S. 81, 99 (1996) (holding deferential abuse of discretion review to be appropriate because the district court was "better positioned" to decide the issue in question (quoting Pierce v. Underwood, 487 U.S. 552, 559-60 (1988))); Natural Res. Def. Council, Inc. v. Sw. Marine, Inc., 236 F.3d 985, 999 (9th Cir. 2000) (holding that a district court has "broad latitude in fashioning equitable relief when necessary to remedy an established wrong").

[83] 541 F.3d 938 (9th Cir. 2008).

[84] *Id.* at 944–45.

[85] *Id.*

to national security."[86] The majority concluded that because an injunction is a matter of equitable discretion, courts should use other remedies to address NEPA violations when an injunction could implicate national security.[87]

NEPA is ineffectual absent meaningful injunctive relief for procedural violations. NEPA imposes an affirmative obligation on agencies to consider environmental impacts before acting. The only means of enforcing the self-policing statute against an agency is through citizen suits under the Administrative Procedure Act.[88] In order for the congressional purpose behind NEPA to be served, timing is crucial. EIS documents issued after the fact will be purely administrative make-work requirements that agencies must complete at some point but need not take into consideration before taking potentially damaging action. The Navy's actions in *Winter II* underscore this conclusion. In *Winter II* the Navy was on notice of its NEPA obligations from *Winter I* but chose to avoid responsibility by submitting inadequate NEPA documents, completing the majority of training exercises before a legal ruling, and appealing to the Executive for a waiver. In light of such blatant disregard, only injunctive relief provides a remedy sufficient to induce future compliance with NEPA.[89]

The Supreme Court has recognized the availability of injunctive relief for procedural violations.[90] In *Amoco Production Co. v. Village of Gambell, AK*,[91] the Court recognized an action for injunctive relief based on a violation of a federal statute requiring consideration of the effect of federal land use on subsistence resources.[92] Even though it ultimately found that an injunction was inappropriate because the injury "was not at all probable,"[93] the Court emphasized that when environmental injury is likely "the balance of harms will usually favor the issuance of an injunction," even when the underlying statute is procedural.[94] Lower courts have uniformly recognized the availability of injunctive relief for NEPA violations in the military context.[95]

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[86] Winter v. Natural Res. Def. Council, Inc. (*Winter II*), 129 S. Ct. 365, 381 (2008).

[87] *See id.*

[88] 5 U.S.C. § 702 (2006).

[89] Note that specific mitigation measures, not the underlying injunction, were challenged in *Winter II*.

[90] *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (considering an action for a procedural NEPA violation but holding that an injunction was not appropriate in the instant case because the injunction was not sufficiently tailored and the lower court had not considered other remedies); Norton v. S. Utah Wilderness Alliance, 542 U.S. 55 (2004) (holding that an injunction until an EIS could be completed was not appropriate because no significant work was left to complete).

[91] Amoco Prod. Co. v. Vill. of Gambell, AK, 480 U.S. 531 (1987).

[92] *Id.* at 544 (specifying that an EIS and an alternate statutorily mandated review found that federal land use would not significantly restrict subsistence uses).

[93] *Id.*

[94] *Id.*

[95] *See, e.g.*, Natural Res. Def. Council v. Evans, 279 F. Supp. 2d 1129 (N.D. Cal. 2003); Natural Res. Def. Council, Inc. v. U.S. Dept. of the Navy, 857 F. Supp. 734 (C.D. Cal. 1994); *see also* Nat'l Audubon Soc'y v. Dep't of the Navy, 422 F.3d 174 (4th Cir. 2005) (upholding an injunction against the Navy for NEPA violations in its decision to construct an aircraft landing training field within five miles of a national wildlife refuge but requiring the injunction be

In other areas, the Supreme Court recognizes the need for flexibility when applying traditional tests to procedural rights. For example, in the context of standing, the Court has held that a procedural right can be asserted, "without meeting all the normal standards for redressability and immediacy."[96] Absent the loosening of requirements, standing would be denied for procedural violations because forced compliance with a mandated process would not necessarily lead to a change in outcome and redress for the injury.[97]

Instead of flexibility, however, the *Winter II* court placed procedural injunctions at a disadvantage. Overturning the sliding-scale test developed by lower courts, the majority required a difficult "likelihood of irreparable harm in the absence of preliminary relief" as a prerequisite for injunctive relief.[98] Procedural violations will rarely meet this standard because procedural statutes do not necessarily change substantive outcomes.

Yet, as the Court recognized in *Amoco*, injunctions for procedural harm might be particularly appropriate in the environmental context because "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration."[99] By emphasizing the need to prove a "likelihood of irreparable harm," however, the majority in *Winter II* raised the bar for environmental injunctions. Because environmental harm is often difficult to document and quantify, this standard will frequently be prohibitively difficult to meet. Dissenting, Justice Ginsburg recognized that, "[b]ecause an EIS is the tool for *uncovering* environmental harm, environmental plaintiffs may often rely more heavily on their probability of success than the likelihood of harm."[100] Absent a temporary injunction for EIS reporting violations, plaintiffs alleging environmental injury may never have sufficient data to continue their cases. Thus, *Winter II* has already been cited as establishing a higher standard for injunctions, proving a bar to injunctive relief in recent cases with inadequate documentation of environmental harm.[101]

D. Deference to Military Necessity

Finally, after *Winter II* it is unclear when, if ever, a court reviewing an environmental claim can disagree with the military's assessment of danger to national security. The majority limited review of military testimony on the

narrowed to permit the Navy to continue in the meantime with certain non-environmentally harmful activity).

[96] Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 n.7 (1992).

[97] *Id.* Note that such flexibility is necessary because the Supreme Court does not recognize the government's failure to comply with the law as an injury. *See*, *e.g.*, Allen v. Wright, 468 U.S. 737, 753–54 (1984).

[98] Winter v. Natural Res. Def. Council, Inc. (*Winter II*), 129 S. Ct. 365, 374–75 (2008).

[99] *Amoco Prod. Co.*, 480 U.S. at 545.

[100] *Winter II*, 129 S. Ct. at 392 (Ginsburg, J., dissenting).

[101] Animal Welfare Inst. v. Martin, 588 F. Supp. 2d 70, 101–02 (D. Me. 2008) (denying injunctive relief to environmental organizations because the harm could not be proved to the necessary "likelihood" standard post-*Winter II*).

potential for military exigencies. The majority "accept[ed] these officers' assertions that the use of MFA sonar under realistic conditions during training exercises is of the utmost importance to the Navy and the Nation" without requiring specific documentation or quantification of the threat.[102] Not only did the Supreme Court disagree with the lower court's logic, overturning the holding that infrequency of occurrence made the training conditions dispensable, but the majority seemed to take issue with the fact that the lower courts questioned the military's statements at all.[103]

Although courts rarely second-guess military conclusions,[104] they police the outer limits of claims of military necessity. In a habeas corpus petition by a Guantanamo Bay detainee, the Supreme Court refused to accept the military's determination of enemy combatant status absent judicial review of its factual basis.[105] The Court rejected the argument that separation of powers prevented all meaningful judicial oversight or second-guessing, even under exigent circumstances. In *Winter II*, however, the Court blithely accepted the Navy's representations without pushing for any similar proof. After *Winter II* it is unclear when, if ever, a court reviewing an environmental claim can disagree with the military's assessment of danger.

As a result, the Court may have created a de facto national security exception to NEPA and similar statutes. Although the courts have consistently held that NEPA does not include a military exception,[106] allowing the CEQ to define "emergency" exceptions broadly does just that. Regardless of how the Supreme Court rules on Executive meddling in the future, the decision by the majority in *Winter II* only increases incentives for the military not to comply with NEPA. If the military can call on courts or the CEQ to invoke the NEPA emergency exception to routine readiness training, NEPA's requirements for the military will lose their teeth.

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[102] *Winter II*, 129 S. Ct. at 377 (majority opinion).

[103] *Id.*

[104] Water Keeper Alliance v. U.S. Dep't of Def., 271 F.3d 21, 34 (1st Cir. 2001) (finding that national security implications distinguished the case from those that imposed injunctions on non-military actors); Nat'l Audubon Soc'y v. Dep't of the Navy, 422 F.3d 174, 207 (4th Cir. 2005) (upholding a limited injunction because "the judiciary must take care not to usurp decision making authority that properly belongs to the Executive or unduly hamper the Executive's ability to act within its constitutionally assigned sphere of control").

[105] Hamdi v. Rumsfeld, 542 U.S. 507, 527-28 (2004) (plurality opinion) (dismissing the government's claim that judicial review of terrorist suspect's detention be limited to the broader detention scheme or, at most, the "factual basis supplied by the Executive to support its own determination").

[106] *See* San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n, 449 F.3d 1016, 1034–35 (9th Cir. 2006) (finding "no 'national defense' exception to NEPA"); *cf.* Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139 (1981) (holding that the NEPA exemption limiting disclosure of classified information, in this case about nuclear weapons, abrogated the need for a "hypothetical" EIS).

IV. Conclusion

Whether or not the Supreme Court reached the right outcome in *Winter II*, the case sets a dangerous precedent for future environmental litigation. Behind the deferential treatment of military expertise, discouragement of procedural injunctions, paucity of structural reasons for overturning the injunction, and divergent framing of military over environmental interests must lie the belief that military concerns are ultimately more important than environmental ones. As the war on terror drags on, agencies' ability to claim a military emergency to avoid procedural obligations under environmental statutes will grow.