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**The Rhetoric of <Military Readiness>:
Public Discourse, Whales and Navy Sonar**

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Abstract

*On November 12, 2008, the Supreme Court decided a significant case involving the use of mid-frequency active sonar in the waters off the coast of Southern California. In the decision, *Winter v. NRDC*, the High Court ruled that the Navy's need to conduct military training using active sonar outweighed the interests of environmentalists, who had contended that sonar results in devastating effects on marine mammals. This paper examines the public and legal discourse related to the case, arguing that the Navy invoked an ideograph of <military readiness> that valorized military technology and expertise at the expense of the natural environment. The paper then examines the implications of the case and the use of <military readiness> in public culture.*

For years, the Natural Resources Defense Council (NRDC) and other environmental litigants have challenged the United States Navy over its use of sonar in military exercises. In key legal victories at the district and appellate levels, environmentalists had established "to a near certainty" that the use of sonar in military training exercises "will cause irreparable harm to the environment" (Cooper, 2007, at 33). However, when the case reached the Supreme Court in 2008, the High Court reversed these findings and lifted the ban on sonar. According to the opinion of Chief Justice Roberts in the case, *Winter v. NRDC*, "Of course, military interests do not always trump other considerations, and we have not held that they do. In this case, however, the proper determination of where the public interest lies does not strike us as a close question" (2008, at 35).

By virtue of its standing as an environmental case heard by the Supreme Court, the ruling warrants the scrutiny of environmental communication scholars. Moreover, the decision in the case has grave implications for the well being of cetaceans and the roles of public participation in environmental decision-making. Given that the Court firmly sided with the military in this instance, the case

raises questions about whether appeals to the ideograph of <military readiness> will trump <environmental protection> when military officials assert the two come in conflict. For while the need for <military readiness> seems self-evident, rhetorically it is a highly contested term that resonates culturally with public memories of vulnerability and surprise.

Of course, armed with a different perspective than the one <military readiness> allows, one might challenge the assertion by Roberts of where the public interest lies. In this essay, I argue that official military, legal, and political discourse on the controversy over military sonar and marine mammals have utilized the dominant ideograph of <military readiness> to exploit public anxiety and vulnerability over "surprise" attacks. In doing so, <military readiness> has entrenched a technological psychosis and valorized the ethos of military decision makers through a *locus* of quantity. While focusing on <military readiness> in this context as the "necessary motivations or justifications for action performed in the name of the public" (Condit and Lucaites, 1993, p. xiii), I examine a wide range of rhetorical resources that are implicated in the production and perpetuation of these ideographic boundaries, including legal

decisions, briefs submitted to the Supreme Court, oral arguments before the Supreme Court, congressional hearings, statements by military officials, and naval publications. I combine McGee's ideographic approach with Burke's dramatism and Perelman and Olbrechts-Tyteca's notion of *loci communes* to reveal how the full range of rhetorical resources complemented the Navy's use of <military readiness> in this controversy.

First, I examine the environmental dispute at issue in the *Winter v. NRDC* case. Next, I describe the complicated procedural and legal history of the case. Then I present a diachronic analysis of the <military readiness> ideograph, followed by a close textual reading of the legal decisions and briefs of the case, as well as public statements and justifications made by the Navy in this dispute. Finally, I discuss the broader rhetorical implications of the case.

Whales and Sonar: Environmental Impacts and Legal Challenges

Passive sonar involves listening for the sounds created by others, while active sonar involves the transmission of various sounds and the reading of its echoes as a way of determining the presence of objects. The most common type of sonar in use is mid-frequency active (MFA) sonar, with most systems operating between 3-10 kiloHertz (KHz). MFA sonar is currently installed on nearly 200 American vessels (Jasney, 2005, p. iv). The military is also developing low-frequency active (LFA) sonar, which can detect vessels at greater distances. The Navy insists that both types of sonar are necessary to detect the new generation of diesel-electric submarines, which can operate without making noise and are virtually undetectable using passive sonar systems.

However, active sonar systems also transmit sound at frequencies perceptible to marine mammals and can "physically damage the hearing in cetaceans or cause them to modify their behavior in ways that are detrimental to their well-being" (Buck and Calvert, 2008, p. 2). MFA sonar

"generates piercing underwater sound at extreme pressure levels," causing "devastating" effects to mammals in close proximity to the sonar source (Brief for the Respondents, 2008, p. 3). Sound waves have the potential to vibrate inside the head of a marine mammal, causing massive internal injuries. According to the Navy, an analysis of whales stranded in the Bahamas in 2000 showed three with signs of bleeding in their inner ears and one whale with signs of bleeding around the brain. It "basically rips them apart," remarked Cetacean Society International president Bill Rossiter, describing the effects of resonance on marine mammals (Dooley n.d.). In addition to these effects, scientists have discovered emboli in the lungs and lesions in the liver and kidneys of stranded whales, all symptoms of a severe case of decompression sickness—"the bends"—which occurs when animals try to surface too quickly (Reynolds, 2008, p. 762). When exposed to sonar, marine mammals can experience a wide range of severe physical traumas causing "nervous and cardiovascular system dysfunction, respiratory distress, disorientation, and death" (Brief for the Respondents, 2008, p. 4).

Mass strandings of marine mammals have coincided with military use of active sonar systems in a number of locations. In 1996, twelve Cuvier's beaked whales were stranded in Greece. In 2000, 17 marine mammals were stranded in the Bahamas shortly after the Navy began exercises using MFA sonar. A subsequent study by the Navy and the National Marine Fisheries Service concluded that the sonar exercises contributed to the strandings (Joint Interim Report 2001). Other strandings have been documented in the Canary Islands, the Virgin Islands, Washington State, Hawaii, and North Carolina, all coinciding with military activities (Reynolds 2008).

There is also evidence that once exposed to sonar, marine mammals will alter their migratory habits. After Naval sonar exercises in the Bahamas in 2000, a

group of Cuvier's beaked whales that biologists had recorded for years had virtually disappeared, leading scientists to surmise that the mammals died or "were driven to permanently abandon their habitat" (Jasney, 2005, p. 11). Other effects of MFA sonar on marine mammals include adverse effects on the animals' ability to communicate, breed, and avoid predators. Environmentalists believe that the "ripple effects" of these impacts could seriously damage marine ecosystems (Brief for the Ecological Society 2008).

Several studies have confirmed the consequences of sonar on marine mammals. In its 2004 Report of the Scientific Committee, the International Whaling Commission concluded that the association between sonar and beaked whale deaths "is very convincing and appears overwhelming" (quoted in Jasney, 2005, pp. 6-7). In addition, the Navy's own Office of Naval Research has concluded that the evidence linking whale beaching to sonar is "completely convincing and there is serious issue of how best to avoid/minimize future beaching events" (quoted in Brief of California Coastal Commission, 2008, p. 30)

Although the U.S. military has resisted efforts to stem the use of active sonar systems, the international community has called for the curtailment of sonar. In October 2004, the European Parliament adopted a resolution calling on its members to stop using high-intensity active sonar systems (Dycus, 2005, p. 32). The United Nations also expressed concern about the effects of ocean noise on marine mammals. At a U.N. meeting in 2005, a coalition of more than 120 environmental organizations urged nations to take actions to protect marine mammals from unregulated ocean noise (Buck and Calvert, 2008, p. 12).

In the United States, the statutory mechanism that protects cetaceans is the Marine Mammal Protection Act of 1972, which prohibits anyone from "taking"³ a

marine mammal. However, the Secretary of Defense may "exempt any action or category of actions" from the MMPA if they are "necessary for national defense" (Roberts, 2008, at 15). Tensions between the Navy and environmentalists over the use of sonar had emerged in previous disputes, resulting in a 2006 settlement that allowed training exercises to continue, so long as the Navy implemented "mitigation measures" designed to minimize the effects of MFA sonar on marine mammals. These measures included lookouts on deck to search for whales prior to the start of training exercises, and reduced decibel levels when sailors spotted whales or when inclement weather prevented the sighting of whales (Mongeon, 2008, p. 277).

Despite the settlement agreement, in early 2007 the Navy planned fourteen large-scale training exercises off the coast of Southern California (known as the "SOCAL exercises") in the two-year period from February 2007 to January 2009. The waters off the coast of Southern California "are among the richest and most biologically diverse in the world," containing at least 37 species of marine mammals, including nine of those species listed as threatened or endangered under the Endangered Species Act and others whose entire known range is along this coastline (Brief for the Respondents, 2008, p. 3). Nevertheless, in January 2007, the Navy was granted an exemption from the MMPA for these training exercises, and in February 2007, the Navy completed an Environmental Assessment (EA) of the planned SOCAL exercises, which predicted approximately 170,000 "takes" of marine mammals, an "extraordinary number relative to the size of cetacean populations off Southern California" (Brief for Respondents, 2008, p. 5). Despite the findings of its own assessment, the Navy reasoned that the environmental impact of the SOCAL exercises would be minimal, and declined to

³ As defined by federal law, a "take" means "to harass, hunt, capture, or kill, or attempt to harass,

hunt, capture, or kill any marine mammal." 16 U.S.C. 1362(13).

prepare an Environmental Impact Statement (EIS). In addition, the Navy did not commit to using any of the mitigation measures it had agreed to in the earlier settlement (Mongeon, 2008, p. 278).

In response to the Navy's decision, NRDC and five other environmental plaintiffs⁴ filed suit against the Navy on March 22, 2007, seeking injunctive relief for violations of the National Environmental Protection Act (NEPA), the Coastal Zone Management Act (CZMA), the Administrative Procedure Act (APA), and the Endangered Species Act (ESA). On June 22, 2007, NRDC filed a motion for a preliminary injunction against the Navy, arguing that either the military had to stop using MFA sonar in the SOCAL waters, or put in place the mitigation measures designed to protect marine mammals. On August 6, 2007, the United States District Court for the Central District of California granted a preliminary injunction against the Navy's use of sonar⁵. In granting NRDC's motion for a preliminary injunction, the district court found, among other things, that NRDC had demonstrated probable success on the merits of its claim that the Navy violated NEPA by failing to prepare an EIS prior to the exercises. The Navy quickly filed an emergency motion to stay the injunction, which the United States Court of Appeals for the Ninth Circuit granted on August 31, 2007, pending an expedited appeal.⁶ Stating that the "safety of the whales must be weighed, and so must the safety of our warriors. And of the country," the appellate court criticized the district court for not weighing more explicitly the national security interests of the public, and it also suggested that the preliminary injunction could have been more narrowly

tailored to allow for the resumption of military exercises with mitigation measures.⁷

On November 13, 2007, the appellate court vacated the stay and remanded the case back to the district court so that it could have an opportunity to modify the injunction to include appropriate mitigation measures.⁸ Members of the District Court then read reply briefs submitted by the parties after the remand order, and even toured the *USS Milius* at the naval base in San Diego to enhance their understanding of the Navy's sonar training procedures. Hearing the case again on January 3, 2008, district court Judge Florence-Marie Cooper ordered the Navy to adopt stricter safeguards to protect marine mammals. These mitigation measures included a twelve nautical mile exclusion zone from the California coastline, a shutdown of MFA sonar when a marine mammal ventured within 2200 yards of the source of the emission, pre-exercise monitoring for marine mammals for 60 minutes prior to using MFA sonar as well as monitoring during the exercises, a power down when surface ducting conditions (occurring when temperature differences in adjacent layers of water causes sound to travel at greater distances) are detected, the prohibition of sonar use in the Catalina Basin, and other measures.⁹ The Navy then filed an emergency motion to stay the preliminary injunction, which the district court denied on January 14, 2008.¹⁰

Seeking to circumvent the court's order, the Navy made its case before the executive Council on Environmental Quality (CEQ), presenting it with a "one-sided portion of the district court record, containing only the Navy's evidence and arguments" and without the presence of NRDC attorneys (Brief for the Respondents, 2008, p. 11). Citing the Navy's assertion of "emergency circumstances," the CEQ approved "alternative arrangements" on

⁴ The other plaintiffs in the case were the Fund for Animal Welfare, the Cetacean Society International, the League for Coastal Protection, the Ocean Futures Society, and Jean-Michel Cousteau. For simplicity, I refer to the case by the lead plaintiff, the NRDC.

⁵ *NRDC v. Winter*, 2007 U.S. Dist. LEXIS 57909, at 33.

⁶ *NRDC v. Winter*, 502 F.3d 859.

⁷ *NRDC v. Winter*, 502 F.3d 859, at 864.

⁸ *NRDC v. Winter*, 508 F.3d 885.

⁹ *NRDC v. Winter*, 530 F. Supp. 2d 1110.

¹⁰ *NRDC v. Winter*, 527 F. Supp. 2d 1216.

January 15, 2008, permitting the Navy to continue its exercises while it completed its EIS. On the same day, President George W. Bush signed an executive order that exempted the Navy from the provisions of the CZMA regulating its use of MFA sonar in the SOCAL exercises. In light of those developments, the appellate court remanded the case again to the district court on January 16, 2008, to determine what effect the executive actions had on the original preliminary injunction. On February 4, 2008, the district court left the injunction in place, noting that CEQ's approval of "alternative arrangements" was invalid because the Navy's "emergency" was a "creature of its own making," given that the military had planned the routine exercises well in advance and should have produced "adequate environmental documentation in a timely fashion, via the traditional EIS process or otherwise."¹¹ The Navy filed a notice of appeal two days later, this time taking issue with just two of the six mitigation measures imposed by the district court—the 2200-yard shutdown and the power-down during surface ducting conditions.

On February 27, 2008, the appellate court affirmed the district court's decision and left the injunction in place, arguing that it was narrowly-tailored to balance the public interests in the natural environment and a well-trained Navy. Still, "acting out of an abundance of caution," the Ninth Circuit court modified the injunction so that the Navy need only reduce, not suspend, its use of sonar in the 2200-yard zone if marine mammals are detected at a "critical point in the exercise," and power-down during surface-ducting conditions only when observers detect a marine mammal within a specified distance of the source of the sonar.¹²

Unsatisfied with this legal result, the Navy appealed the case, and the Supreme Court granted certiorari on June 23, 2008,

and heard oral arguments on October 8, 2008. On November 12, 2008, the high court announced a ruling in the case, coming down "solidly on the side of national security" by reversing the judgment of the U.S. Court of Appeals for the Ninth Circuit and lifting the judicial restrictions on the use of MFA sonar in submarine training exercises off the coast of Southern California (Liptak, 2008, p. A24).¹³

<National Security> and <Military Readiness> as Ideographs

Ideographs, writes Michael Calvin McGee, are "one-term sums of an orientation" that "exist in real discourse, functioning clearly and evidently as agents of political consciousness" (1980, p. 7). They are "historically and culturally grounded commonplace rhetorical terms that sum up and invoke identification with key social commitments" (Cloud, 2004, p. 288). An analysis of ideographs involves an account of the ways that rhetors "dip into, add to, and reshape the shared cultural stock" generated by these widely used and near-universal terms and phrases (Cloud, 1998, p. 389).

McGee suggests that critics analyze both the diachronic and synchronic aspects of ideographs (McGee 1980). The diachronic structure of an ideograph "represents the full range and history of its usages for a particular rhetorical culture" (Condit and Lucaites, 1993, p. xiii). It calls for an identification of those situations where the ideograph is invoked and a description of the salient features of its use in those circumstances. A synchronic analysis of ideographs examines how rhetors make use of them presently, especially when they compete with opposing ideographs, in a situation where the hallowed term constantly reorganizes itself "to accommodate specific circumstances while maintaining its fundamental consonance and unity" (McGee, 1980, p. 14). Rhetors engage in

¹¹ *NRDC v. Winter*, 527 F. Supp. 2d 1216, at 30.

¹² *NRDC v. Winter*, 518 F.3d 658.

¹³ *Winter v. NRDC*, 172 L. Ed. 2d 249.

struggles to define the boundaries of any given ideograph, but they are often constrained by the dominant understanding of the ideograph in a public culture. Celeste Michelle Condit argues that a rhetorical critic develops an understanding of persuasive discourse by examining the interaction and development of ideographs with narratives and characterizations (1987, pp. 3-4). The stories that a culture tells and the depictions it provides of particular agents, acts, scenes, purposes, and agencies helps to generate a dominant world view around a given set of ideographs.

A full accounting of the diachronic origin of <military readiness> is beyond the scope of this essay. However, appeals to <military readiness> have been invoked at strategic times throughout American history. It is widely perceived that the “ability to be ready to fight or conduct military operations successfully” is one of the most important purposes of the military (Laird, 1980, p. 1). George Washington, in his first Annual Address to Congress, declared, “To be prepared for war is one of the most effectual means of preserving peace.” With respect to maritime readiness in particular, Theodore Roosevelt observed, “the only way in which a navy can ever be made efficient is by practice at sea, under all the conditions which would have to be met if war existed” (Brief for the Petitioners, 2008, p. 48). And while Chief Justice Roberts cited both of these statements in his opinion in *Winter*, McGee (1980) urges critics to look for touchstones that serve as cultural precedents for ideographs. In particular, iconic events are those seminal moments “which seem to acquire a mythic status within the culture” (Leavy, 2007, p. 3) and generate opportunities for ideographic construction and refinement. In the context of American <military readiness>, one moment stands out as iconic: the December 7, 1941, attack on Pearl Harbor.¹⁴ While

implied throughout much of the discourse in *Winter* over enemy use of diesel-electric submarines, Roberts made explicit reference to the Pearl Harbor analogy in oral arguments before the Court on October 8, 2008. At “no point,” complained the Chief Justice, “did the district judge undertake a balancing of the equities, putting on the one side the potential for harm to marine mammals...and putting on the other side the potential that a North Korean diesel electric submarine will get within range of Pearl Harbor undetected. Now, I think that’s a pretty clear balance” (Oral Arguments, 2008, p. 48).

As Michael Slackman observes, “There is little argument...that the Pearl Harbor attack was a dramatic event which in the space of a few hours plunged the United States into the most destructive war of the twentieth century and changed forever the way most Americans viewed the world around them” (1990, p. vii). Although research has confirmed that American officials had numerous warnings that a Japanese attack was pending (Wohlstetter 1962; Posner 2005; Wirtz 2006), Pearl Harbor has achieved mythic status in American culture as a moment when America was caught by surprise. “In the popular view,” writes Richard K. Betts, “the Japanese attack on Hawaii was a true ‘bolt out of the blue,’ without warning, and a pure example of unprovoked perfidy” (1982, p. 42).

One of the many cultural “lessons” that some derived from the Pearl Harbor attack was the need for constant vigilance against the strategic vulnerability that comes with complacency. Although competing narratives of the attack have circulated for decades, the dominant public memory of the event falls within the “infamy framework” that harkens back to rhetorical

September 11, 2001, attacks on the World Trade Center and Pentagon, especially considering the comparisons that public officials have made between Pearl Harbor and 9/11. Both events resonate as examples of the lack of military preparedness, but Pearl Harbor is more relevant to the public justification of MFA sonar, given that it relies upon fears of enemy utilization of advanced military technologies.

¹⁴ An extended version of this essay includes a diachronic analysis of the uses of <military readiness> after the

traditions of the American frontier (Rosenberg 2003, pp. 12-13). According to this tradition, diabolical forces will exploit weak, feminized, and complacent publics, but salvation for the Nation is available through retributive, masculine uses of military power.

The <military readiness> ideograph thrives in this rhetorical context because it offers an antidote to the perceived vulnerability of surprise attacks. Pearl Harbor serves as an iconic touchstone, “a singular moment in modern American history” when “penetration of our borders by a hostile force...had the effect on the country that a burglary has on the family home: people never felt quite as safe again” (Jennings and Brewster, 1998, p. 239). Pearl Harbor is constructed in public memory as a cautionary tale, and combined with <military readiness> it serves as a narrative reminding citizens to stay vigilant against surprise attacks, to utilize superior American technology to uncover and thwart potential surprises, and to heed the warnings of military officials while rejecting policies that might impede military preparedness (especially when they are promoted by those who are ignorant of strategic dangers). This rhetoric functions to “persuade us of war’s necessity, but then [we] forget that it is a rhetoric” (McGee, 1980, p. 6).

Analysis

Even before NRDC had initiated the legal action that led to the Supreme Court decision in *Winter v. NRDC*, the military had rehearsed <readiness> in other environmental contexts by affixing the rhetorical label of “encroachment” on any regulation that allegedly hindered military preparedness. Speaking during congressional hearings in 2001, Army Lt. Gen. Larry Ellis testified, “readiness is critical to our ability to perform the missions assigned to us and to do so efficiently and with minimum casualties” (quoted in Bethurem, 2002, p. 122).

When NRDC and the other environmental plaintiffs challenged the use of MFA sonar in training exercises off the coast of Southern California, the military utilized <military readiness> in a variety of legal and public contexts. In a statement before the Senate Environment and Public Works Committee on April 2, 2003, Rear Admiral Jonathan W. Greenert, the deputy commander of the Navy’s Pacific fleet, warned of “new ultra quiet diesel-electric submarines armed with deadly torpedoes and cruise missiles” that could only be detected by sailors who could “train realistically with the latest technology, including next-generation passive and active sonars” (pp. 244-45). Claiming, “military readiness requirements and environmental protection are out of balance,” Greenert urged lawmakers to support the Navy’s perspective. In a declaration on “The Impact of Environmental Extremism on Military Readiness,” the Senate Republican Policy Committee railed against “burdensome...environmental laws and lawsuits which prevent the military from fully achieving readiness,” and singled out lawsuits that prevented the Navy from using “sonar to track the newer, ultra-quiet submarines operated by China, North Korea, and Iran” (U.S. Senate Republican Policy Committee, 2003, p. 1). According to the Secretary of the Navy Donald C. Winter in his 2008 Posture Statement, “the most critical readiness issue relates to the Navy’s ability to train using active sonar...The inability to train effectively with active sonar literally puts the lives of thousands of Americans at risk” (p. 11).

Kenneth Burke (1984) has identified the technological psychosis as the prevailing orientation of modern society. While Burke examined a range of psychoses, the technological perspective emerged as dominant: “in and about all these, above them, beneath them, mainly responsible for their perplexities, is the technological psychosis,” the drive “to control for our purposes the forces of

technology, or machinery” (p. 44). Floyd D. Anderson and Lawrence J. Prelli (2001) explain that such an orientation typically features a pentadic ratio of agency-purpose or agency-scene as dominant: “Indeed, the central motivation locked within technological discourse is agency-purpose; its strict instrumentalism not only transforms acts, agents, and scenes into terms of agency, but even purposes themselves become meaningful only when nearly synonymous with agency” (p. 80). Subordinated in this vocabulary of motives are perspectives that feature agent, act, or scene.

In the *Winter* case, the Navy’s appeal of the preliminary injunction centered on its objection to two of the mitigation measures imposed by the district court: the 2200-yard shutdown requirement and the power-down requirement during surface ducting conditions. These requirements were hardly onerous, given the Navy’s experience conducting exercises with restrictions similar to the ones mandated by the district court. For example, the settlement between the Navy and NRDC that the parties reached shortly before the Navy’s “Rim of the Pacific” exercise off the coast of Hawaii in 2006 had similar stipulations (Fletcher, 2008, at 35-40). Following these exercises, the Navy issued an “after action report” that recorded a total of 472 hours of MFA sonar use with only eight hours of lost time due to the mitigation measures. Furthermore, NRDC presented evidence that the effect of widening the safety zone to 2200 yards would have been only one additional shutdown or power down for each exercise (Oral Arguments, 2008, p. 37), and also pointed out that the Navy certified its sonar technicians even when they had not practiced under surface ducting environments, given the infrequency of those conditions.

Still, the Navy objected to the mitigation measures on the grounds that they would inhibit readiness. In its brief, the government claimed the 2200-yard shutdown requirement “would cripple the

Navy’s ability to conduct realistic pre-deployment training and to assess a strike group’s capabilities” (Brief for the Petitioners, 2008, p. 13). The Navy also submitted numerous declarative statements in support of this argument. Vice Admiral Locklear, Commander of the U.S. Third Fleet, stated that the 2200-yard shutdown zone would “jeopardize the training and readiness” of strike groups. Rear Admiral Bird argued that training in surface ducting conditions was “critical to effective training.” And Admiral Roughead and Rear Admiral Branch contended that both requirements would create an unacceptable risk and profoundly affect national security (Statements quoted in Fletcher, 2008, at 50).

<Military readiness> functioned to highlight the importance of agency (MFA sonar) in fulfillment of the larger purpose of national security. The discourse worked to draw attention to the need for training and proficiency in a complex technology to counter the technological advancements (diesel-electric submarines) of adversaries. When drawing upon the diachronic meanings of <readiness> generated by the Pearl Harbor narrative, one perceives the enemy as being capable and willing to use technological advances to exploit American vulnerabilities. Regulations that limit the use of MFA sonar—such as the 2200-yard shutdown zone and the surface ducting requirements—became impediments to the successful mastery of agency in the service of the dominant ideograph. Thus, responding to litigants who claimed that surface ducting conditions were rare, Roberts asserted in *Winters* that the “reasoning is backwards” and that, if anything, “it is especially important for the Navy to be able to train under these conditions when they occur” (2008, at 41-42). Terminologies featuring agents (whales), scene (the environment) and act (the injunction) became subordinated to agency (sonar) and purpose (readiness).

In *The New Rhetoric: A Treatise on Argumentation*, Chaim Perelman and Lucie

Olbrechts-Tyteca identify *loci communes* as those categories (“common places”) of a general nature that advocates use to advance argumentative claims (1969, pp. 83-85). Environmental advocates have frequently invoked a *locus* of quality, particularly appeals to the irreparable, to argue on behalf of the uniqueness, precariousness, and timeliness of the natural environment (Cox 1982). But Perelman and Olbrechts-Tyteca note, “each *locus* can be confronted by one that is contrary to it” (85). The NRDC and its allies have used appeals to the irreparable to highlight the uniqueness of the species of marine mammals near the California coastline, the sensitivity of these animals to MFA sonar, and the urgent need to forestall the Navy’s use of sonar in these waters. The Navy and its allies have responded with an ideograph of <military readiness> that shifts emphasis to a *locus* of quantity, imposing difficult threshold requirements on environmental litigants while valorizing deference to military authorities.

To obtain a preliminary injunction, litigants must demonstrate a combination of probable success on the merits of its claim, the possibility of irreparable harm, and they must show that the balance of hardships tips in their favor. The lower courts found that NRDC had satisfied these requirements. However, in its brief, the government argued that a preliminary injunction was “an extraordinary and drastic remedy,” and suggested the lower courts erred in holding that litigants need only show a “mere possibility” of irreparable harm to justify granting an injunction, as opposed to the more stringent standard of a “likelihood” of irreparable injury. In its ruling in *Winter*, the Supreme Court agreed the “possibility” standard was too lenient, and instead affirmed the need for plaintiffs to demonstrate irreparable injury was *likely* in the absence of an injunction.

Aside from establishing a more challenging threshold of proof for environmental litigants, the shift from *possibility* to *likelihood* facilitated a rhetorical

transition from a *locus* of quality to a *locus* of quantity, “which affirm that one thing is better than another for quantitative reasons” (Perelman and Olbrechts-Tyteca, 1969, p. 85). This was apparent in the Navy’s oft-repeated claim that it had trained in SOCAL waters for 40 years without any evidence of marine mammal fatalities. In oral arguments, Solicitor General Garre stressed, “the Navy has been using MFA sonar in the Southern California Operating Area for more than 40 years and no one can point to any harm to marine mammals” (Oral Arguments, 2008, p. 23). The apparent persuasiveness of this claim was confirmed by the frequency by which it appears in Roberts’s majority decision—five times. “The Navy emphasizes that it has used MFA sonar during training exercises in SOCAL for 40 years,” wrote Roberts in one of these examples, “without a single documented sonar-related injury to any marine mammal.” (2008, at 14)

This rhetorical maneuver is an example of the *argumentum ad ignorantiam* fallacy, or the “appeal to ignorance,” which uses an opponent’s inability to disprove a conclusion as proof of the conclusion’s correctness (Engel, 1994, p. 227). It challenges environmentalists to produce bodies as proof of irreparable harm; otherwise, no harm is presumed to exist. There are obvious problems to this reasoning. Since the injuries occur to marine mammals while they are in the water, many whales “are dying in substantially larger numbers” than scientists realize, given that most of the dead animals do not strand on shore where people can count them (Jasney, 2005, p. v). Beaked whales, in particular, are sensitive to sonar but difficult to detect. A 2007 study by the National Marine Fisheries Service revealed, “in 90% of beaked whale stocks a decline in population of 50% over a 15-year period would go undetected as a decline at all” (Fletcher, 2008, at 31). Non-fatal injuries would be even harder to detect. It is also unclear from the record whether the Navy has been using MFA sonar over the past 40

years at the same power level, frequency, and duration as it does in the current exercises. In addition, in its “after action reports,” the Navy documented a number of marine mammal deaths in SOCAL waters following exercises using MFA sonar, but the reports did not disclose whether necropsies were performed on the carcasses to determine the cause of the deaths or whether they were linked to sonar use (Fletcher, 2008, at 28-29).

<Military readiness> accentuates the *locus* of quantity by celebrating the expertise of military officials. Writing about a similar ideograph of <necessity>, Marouf Hasian Jr. argues, “necessitous circumstances are treated as a priori facts that inform the decisions made by elites who have the special training in the handling of these affairs. This is one of the reasons why we hear so much about civilian ‘deference’ during times of war” (2005, p. 11).¹⁵ In the legal and public rhetoric of <military readiness>, especially measured quantitatively and constrained by a technological psychosis emphasizing agency, deference is granted to military experts to assess both threats and capabilities. During oral arguments, for example, several justices questioned the ability of a district court judge to render an informed judgment on military strategy. “Isn’t there something incredibly odd about a single district judge making a determination on that defense question that is contrary to the determination that the Navy has made?” asked Justice Alito in a question to NRDC attorney Kendall (Oral Arguments, 2008, p. 30). When Kendall replied that the district judge made a factual determination in the case, Alito pressed a similar question later in the oral arguments: “Is Judge Cooper an expert on antisubmarine warfare?” he asked (Oral Arguments, 2008, p. 49). Even Justice

Breyer conceded during oral arguments, “Look, I don’t know anything about this. I’m not a naval officer...[and]... I know that district judge doesn’t know about it, either” (Oral Arguments, 2008, p. 35). This deference to military authority was reflected in the majority opinion in *Winters*, as well. Wrote Roberts: “We accept 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” (2008, 34)

Writing about the rhetoric of nukespeak, Edward Schiappa (1989) argues that military experts use strategies of domestication and bureaucratization to make the discourse about nuclear weapons paradoxically familiar and inaccessible to public audiences. In a similar way, <military readiness> encourages simplification through a narrative of surprise and vigilance, combined with deference to authorities perceived to be capable of understanding strategic military doctrine. The fact that members of the district court visited a naval ship relegated their experiences to those of tourists and reinforced a presumed dependence on military experts to decipher and explain the complexities of military technology. Alito’s question about Judge Cooper’s knowledge of ASW further diminished her stature as a credible authority, even though she carefully crafted mitigation measures based on her extensive knowledge of the facts in the case. <Military readiness> functioned to juxtapose a masculine ethos of military experience with a feminized, sentimental pathos for marine mammals.

Conclusion

In their attempts to dismiss evidence linking MFA sonar to the deaths and injuries of marine mammals, the Navy and its proponents have resorted to absurd arguments, such as the claim that marine mammals are not affected by sonar because they spend most of their time out of the water, or that whales “just swim in a different direction” when they hear the noise

¹⁵ While similar, the ideographs of military <necessity> and <readiness> are distinct in many ways, since <readiness> places emphasis on future action to prevent perceived vulnerabilities, especially with respect to the marshaling of military technology to reduce strategic uncertainties.

produced by sonar (Oral Arguments, 2008, pp. 8-9). Perhaps realizing that the scientific case linking military sonar with cetacean mortalities and injuries has “progressed well beyond the point of finding a smoking gun” (Parsons et. al., 2008, p. 1255), the Navy has relied increasingly on rhetorics emphasizing <military readiness> to show that “national security can trump marine mammal protection” (Brief for the Petitioners, 2008, p. 35). In this essay, I have demonstrated that this ideograph constitutes public audiences as victims vulnerable to surprise attack, whose best option relies on deference to military authorities to protect them with technology that should be used without constraints.

There are several “potential consequences of public adherence to a particular vocabulary of motives” (Cloud, 1998, p. 389). From a legal standpoint, *Winter v. NRDC* raises several troubling prospects. First, military officials are certain to invoke <military readiness> with renewed vigor when confronted with situations that “encroach” on military training, and there are numerous instances where they believe this is the case (Dycus 1996; Burke 2008; Babcock 2007; Yap 2004). Second, as mentioned earlier, environmental advocates will need to establish a “likelihood” of irreparable harm in future cases to warrant an injunction against damaging practices. Thus, even though the military faced no threshold of proof when it asserted its harms in *Winter* (there was no discussion of the likelihood of an attack by diesel-electric submarines, and such harms were assumed plausible based only on the declarative statements of military authorities), advocates will be faced with a high threshold in future cases where they seek injunctive relief against environmental harms. Third, the case has potentially significant implications for public participation in environmental decisions. When it enacted NEPA in 1969, Congress created a process that, for the first time, involved “the public in environmental decision making in a comprehensive

manner” (Cox, 2006, p. 93). NEPA requires agencies to prepare an EIS when significant environmental impacts result from proposed actions. But the Navy avoided the requirement for public comment by only completing an environmental assessment (EA) of its SOCAL exercises.¹⁶ An EIS wasn’t scheduled for completion until the conclusion of those exercises. While some suggested the scope of *Winter* is limited (Eubanks 2009), if a similar pattern is followed in future cases, the public will either be left out of deliberations or allowed to participate only after the environmental harms have occurred.

Rhetorically, advocates working within the existing legal framework are constrained by <military readiness> and often do not challenge it directly. Although he noted that “the Navy cannot be the judge of its own cause” and that “deference does have its limits,” NRDC attorney Kendall admitted that Naval training was “of the highest importance” (Oral Arguments, 2008, p. 50). Constrained by the coercive dimensions of ideographic adherence, advocates working in the court system might rely heavily on the precautionary principle, with preference given to the probable (harm to whales) over the improbable (reduced readiness as a result of mitigation measures). However, while this balancing of risk was persuasive to the lower courts, the Supreme Court decision in *Winter* makes this option difficult. This is perhaps the reason why NRDC settled recently a separate lawsuit against the Navy over sonar, agreeing to a proposal requiring the Navy to spend \$14.75 million over three years on marine mammal research, but does not include any of the additional measures to protect animals when the

¹⁶ An EIS has far more stringent requirements than an EA. An EIS must “[r]igourously explore and objectively evaluate all reasonable alternatives” to the agency’s action (Amici Curiae Brief for Defenders, 2008, pp. 36-37), which in this case would have meant examining and evaluating the effects of implementing mitigation measures. In addition, the EIS allows for an “early and open process” for public comment on the proposed action (Amici Curiae Brief for Defenders, 2008, p. 36).

military uses sonar ("Navy Settles," 2008, p. A13).

In countering a scientific, military, and technological orientation, Kenneth Burke (1984) urges critics to adopt a dialectical process that seeks counterstatements to prevailing perspectives. In a similar move, Kevin Michael DeLuca (1999) draws upon the work of Laclau and Mouffe to suggest "antagonism chains" that might "challenge and transform the hegemonic discourse of modern society (p. 45). Such options might not be available in legal venues constrained by the decorum of precedent, but they would be available to advocates in the larger public sphere who might rearticulate <military readiness> in ways that challenged the presumed linkage between security, technology, and the domination of nature. Already, once dominant appeals to national security are encountering pressure points, as issues concerning detainees and warrantless wiretapping reveal the excesses of ideographic commitments.

In a revealing moment during the oral arguments before the Supreme Court on October 8, 2008, Justice Breyer stated, "To a layperson, when I think of the armed forces preparing an environmental impact statement, I think, the whole point of the armed forces is to hurt the environment" (Oral Arguments, 2008, p. 44). The transcript notes there was laughter in the courtroom, indicating perhaps that the comment was intended as a joke to make a larger point about procedural requirements under NEPA. But if we might allow ourselves the pleasure to look back at this comment from the perspective of citizens liberated from <military readiness>, might we say that Justice Breyer was on to something?

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