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Ian K. London

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WINTER V. NATIONAL RESOURCES DEFENSE COUNCIL: ENABLING THE MILITARY'S ONGOING ROLLBACK OF ENVIRONMENTAL LEGISLATION

INTRODUCTION

Congress passed the National Environmental Policy Act (“NEPA”)¹ in an effort to encourage environmental responsibility in federal agency decision-making.² Recently, NEPA and other environmental laws have been challenged by the military, which has asserted that these laws interfere with combat readiness and, therefore, national security.³ In *Winter v. National Resources Defense Council, Inc.*,⁴ the Court invalidated portions of a preliminary injunction restricting the Navy’s use of high-intensity sonar, finding that the balance of equities and public policy interests favored the Navy’s interest in conducting realistic training exercises.⁵ The Court’s evaluation of the balance of equities and public policy interests, however, was based on its complete deference to the Navy’s factual determinations regarding crucial aspects of the case.⁶

This Comment argues that the Court’s complete deference to the Navy’s factual determinations unfairly tipped the balance of equities and public policy interests in favor of the Navy. This made it impossible for the Court to accurately evaluate the propriety of injunctive relief. While a measure of deference to the military’s professional expertise is desirable, excessive deference undermines other key government objectives.⁷ By so deferring to the Navy’s factual determinations, the Court enabled the military’s ongoing rollback of environmental protection.

Part I of this Comment explains NEPA’s environmental impact statement (“EIS”) requirement, then discusses the standards that courts have used when evaluating the propriety of injunctive relief. Part II summarizes the Court’s opinion in *Winter*, including the facts, procedur-

1. National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. § 4321 (2006).

2. *Id.* § 4331(a):

The Congress, recognizing the profound impact of man’s activity on the interrelations of all components of the natural environment . . . declares that it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

3. Marcilynn A. Burke, *Green Peace? Protecting Our National Treasures While Providing for Our National Security*, 32 WM. & MARY ENVTL. L. & POL’Y REV. 803 *passim* (2008).

4. 129 S. Ct. 365 (2008).

5. *Id.* at 378.

6. *See id.*

7. *See* Burke, *supra* note 3, at 874 (“[W]hile [the Department of Defense] asserts its need for this statutory relief to fulfill its obligation to defend this nation, it may be simultaneously abandoning much of what makes this country worth defending.”).

al history, and opinions. Part III explores three topics: (1) the Court's deference to the Navy's factual determinations; (2) the impact that *Winter* may have on future military compliance with NEPA; and (3) the *Winter* decision in the context of post-9/11 trends in military environmental compliance. This Comment concludes that the *Winter* Court unreasonably deferred to the Navy, that *Winter* threatens to undermine NEPA, and that *Winter* highlights the military's ongoing rollback of environmental legislation in the wake of 9/11.

I. BACKGROUND

A. *The National Environmental Policy Act of 1969*

NEPA requires that every federal agency consider the environmental consequences of a proposed course of action before acting.⁸ To this end, NEPA requires that an agency submit a detailed EIS prior to undertaking any activity that "significantly affect[s] the quality of the human environment."⁹ When the action would result in no significant impact on the environment, NEPA permits agencies to file an environmental assessment ("EA") in lieu of an EIS, or to rely on a categorical exclusion if one applies.¹⁰

Crucially, NEPA does not require a particular substantive result in any case. Nonetheless, in *Robertson v. Methow Valley Citizens Council*,¹¹ the Court noted that NEPA does contain "action-forcing" procedures.¹² First, a timely EIS focuses an agency's attention on the environmental consequences of a proposed project, ensuring that the agency is aware of those consequences before starting the project.¹³ Second, a timely EIS assures the public that the agency has taken environmental consequences into account during the decision-making process.¹⁴ NEPA's implementing regulations also require that the agency accept public input once a draft EIS is released.¹⁵ Third, a timely EIS gives notice to the various other governmental bodies that might have to deal with the project's off-site or secondary consequences.¹⁶

8. 42 U.S.C. § 4331(a)-(b) (2006).

9. *Id.* § 4332(2)(C).

10. See 40 C.F.R. § 1508.9 (2009) (explaining the Council on Environmental Quality's definition of "Environmental Assessment"); *id.* § 1508.13 (explaining the Council on Environmental Quality's definition of "[f]inding of no significant impact"); *id.* § 1501.4(2) (explaining that categorically excluded activities do not normally require an EIS).

11. 490 U.S. 332 (1989).

12. *Id.* at 348-51.

13. *Id.* at 349.

14. *Id.*

15. 40 C.F.R. § 1503.1(a)(4) (2009).

16. *Id.* § 1503.1(a)(1).

B. *The Test for Evaluating the Propriety of Injunctive Relief*

Preliminary injunctions are remedies at equity, issued only where there is a risk of irreparable injury, and where legal remedies would be inadequate.¹⁷ Courts have traditionally evaluated the propriety of injunctive relief by balancing the inconvenience to the non-moving party (should the injunction be imposed) against the risk of irreparable harm to the moving party.¹⁸ Courts also give attention to the public consequences of ordering injunctive relief.¹⁹ Until *Winter*, the Ninth Circuit applied a more flexible standard, and Ninth Circuit courts were able to tailor injunctive relief to fit “the necessities of the particular case.”²⁰ Some have argued that this flexible standard unduly increases the availability of injunctive relief, which has traditionally only been imposed in extraordinary circumstances.²¹

II. *WINTER V. NATURAL RESOURCES DEFENSE COUNCIL*

A. *Facts*

For the last forty years, the Navy has used mid-frequency active (“MFA”) sonar during training exercises off of the southern coast of California (“SOCAL”).²² The MFA sonar system works by emitting high-intensity sound into the ocean depths, and then analyzing the echoes to reveal underwater objects.²³ MFA sonar is currently the only available means of detecting the near-silent submarines deployed by potential military adversaries.²⁴

However, a “rapidly accumulating body of evidence” shows that MFA sonar injures marine mammals, both directly and indirectly.²⁵ The SOCAL waters are home to thirty-seven species of marine mammals.²⁶ Directly, MFA sonar generates energy sufficient to cause cranial hemorrhaging or decompression sickness in these animals.²⁷ Indirectly, MFA sonar harms marine mammals by contributing to underwater noise pollution.²⁸ Because many marine mammals have evolved to depend on sound, any significant increase in underwater noise pollution, such as the

17. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982).

18. *Id.* at 312.

19. *Id.*

20. *Id.*

21. *See Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 375-76 (2008).

22. Brief for the Petitioners at 2, *Winter*, 129 S. Ct. 365 (No. 07-1239), 2008 WL 3285392.

23. *Winter*, 129 S. Ct. at 370.

24. *Id.* at 370-71.

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

26. *Winter*, 129 S. Ct. at 371.

27. Reynolds, *supra* note 25, at 762-63.

28. *Id.* at 760.

use of MFA sonar, impairs marine mammals' breeding, hunting and navigation activities.²⁹

B. Procedural History

In February 2007, the Navy released an EA for an upcoming series of SOCAL training exercises,³⁰ estimating that the exercises would result in over 500 severe and 170,000 minor injuries to marine mammals in SOCAL waters.³¹ Nevertheless, the Navy concluded that this did not amount to the requisite "significant impact" on the environment, and therefore that a full EIS would not be necessary.³²

Plaintiff National Resources Defense Council ("NRDC") filed a complaint against the Navy shortly thereafter, alleging that the Navy violated NEPA by proceeding with the exercises without first preparing an EIS.³³ NRDC sought to compel the Navy to prepare an EIS.³⁴ The district court found the Navy's EA inadequate, and that the EA did not relieve the Navy of its obligation to prepare a full EIS.³⁵ Accordingly, the district court enjoined the Navy's use of MFA sonar until the Navy prepared an EIS.³⁶ On appeal, the Ninth Circuit held that the district court's injunction was too broad, and remanded the case with instructions to impose mitigation provisions that would allow the Navy to continue its exercises.³⁷

On remand, the district court imposed on the Navy a synthesis of six mitigation provisions.³⁸ The Navy challenged two of the six provisions on appeal: the mandatory shutdown of MFA sonar when a marine mammal is sighted within 2200 yards, and the mandatory seventy-five percent reduction in sonar volume during "surface ducting"³⁹ conditions.⁴⁰ While waiting for the appeal, the Navy sought emergency⁴¹ Executive Branch relief from the Council on Environmental Quality ("CEQ"),⁴² which au-

29. *Id.*

30. *Winter*, 129 S. Ct. at 372.

31. *Id.* at 392 (Ginsburg, J., dissenting).

32. *Id.* at 372 (majority opinion).

33. *Winter v. Natural Res. Def. Council, Inc.*, 530 F. Supp. 2d 1110, 1113-14 (C.D. Cal. 2008).

34. *Winter v. Natural Res. Def. Council, Inc.*, 518 F.3d 658, 661 (9th Cir. 2008).

35. *Winter*, 530 F. Supp. at 1116-17.

36. *Id.* at 1115.

37. *Winter*, 129 S. Ct. at 373.

38. *Winter*, 530 F. Supp. 2d. at 1118-21.

39. Surface ducting conditions "occur[] when the presence of layers of water of different temperature make it unusually difficult for sonar operators to determine whether a diesel submarine is hiding below." *Winter*, 129 S. Ct. at 385 (Breyer, J., concurring).

40. *Id.* at 373 (majority opinion). Hereinafter these two provisions will be referred to as "shutdown" and "power-down" provisions.

41. Under NEPA's implementing regulations, agencies may, in emergency circumstances, request the Executive Branch to authorize alternative arrangements that are limited to the scope of the emergency. 40 C.F.R. § 1506.11 (2009).

42. The Council on Environmental Quality is the Executive Branch office that is responsible for overseeing federal compliance with NEPA. 42 U.S.C. §§ 4341-47 (2006).

thorized the Navy to implement alternative arrangements of its own making.⁴³

Alternative arrangements in hand, the Navy asked the Ninth Circuit to vacate the shutdown and power-down provisions.⁴⁴ The Ninth Circuit disregarded the alternative arrangements, finding that emergency circumstances did not exist, and the court upheld the two challenged provisions in the district court's injunction.⁴⁵ The Navy petitioned for certiorari on the issue of whether the district court abused its discretion in imposing the preliminary injunction, and the Supreme Court granted the petition.⁴⁶

C. *Majority Opinion*

Chief Justice Roberts wrote the opinion of the Court, with Justices Scalia, Kennedy, Thomas, and Alito joining.⁴⁷ The majority opinion discussed the propriety of the shutdown and power-down provisions in the district court's preliminary injunction.⁴⁸ As such, it generally avoided addressing whether NEPA required the Navy to prepare an EIS before starting the sonar exercises.⁴⁹ The Court found that the shutdown and power-down provisions in the district court's injunction were an abuse of discretion, because the district court failed to accord sufficient deference to the Navy's factual determinations when evaluating the balance of equities and public policy interests.⁵⁰

First, the Court adjusted the standard the Ninth Circuit used when deciding whether a preliminary injunction would be proper. The Ninth Circuit standard, prior to *Winter*, allowed the court to order an injunction when there was a "possibility" of irreparable harm to the moving party.⁵¹ The Court found this standard to be too lenient, and established that there must instead be a "likelihood" of irreparable harm to the moving party.⁵²

In light of the confusion surrounding this issue, Chief Justice Roberts synthesized precedent to explain a four-part test for evaluating the propriety of injunctive relief: "A plaintiff seeking a preliminary injunction must establish (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief,

43. *Winter*, 129 S. Ct. at 373.

44. *Id.* at 374.

45. *Id.*

46. *Winter v. Natural Res. Def. Council, Inc.*, 128 S. Ct. 2964 (2008) (mem.).

47. *See Winter*, 129 S. Ct. at 371, 382, 387.

48. *Id.* at 374-81.

49. *Id.* at 381.

50. *See id.* at 382.

51. *Id.* at 375.

52. *Id.*

(3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest.”⁵³

Furthermore, the Court found that the lower courts had failed to reconsider the likelihood of harm to the moving party in light of the shut-down and power-down provisions alone.⁵⁴ The Court acknowledged, however, that these errors might ultimately have been harmless:

It is not clear that articulating the incorrect standard affected the Ninth Circuit’s analysis of irreparable harm. Although the court referred to the possibility standard, and cited Circuit precedent along the same lines, it affirmed the District Court’s conclusion that plaintiffs had established a near certainty of irreparable harm.⁵⁵

Second, the Court briefly addressed the merits of the case: whether the Navy’s EA had satisfied its NEPA obligations, without filing an EIS. The Court found that the Navy had met its procedural obligations under NEPA for two reasons: because the Navy’s activities had taken place for forty years, and because the Navy had taken a “hard look at environmental consequences” before launching the SOCAL training exercises.⁵⁶

Third, the Court discussed the balance of equities. The Court emphasized that, because the case involved matters of national security, the Court should grant “great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.”⁵⁷ With this in mind, the Court accepted the Navy’s statement that the shutdown and power-down provisions would degrade the value of the SOCAL training exercises.⁵⁸

The Court found that the Navy’s interest in realistic training exercises outweighed the public’s ecological, scientific, and recreational interests in obtaining a preliminary injunction, and therefore the shutdown and power-down provisions were an abuse of discretion.⁵⁹ The Court found it important that NRDC sued to compel the Navy to prepare an EIS, not to enjoin the Navy from the use of MFA sonar.⁶⁰

Fourth, the Court addressed the Ninth Circuit’s treatment of the public interest element. Once again, the Court stressed the need for deference to the military’s judgment regarding the impact of mitigation ef-

53. *Id.* at 374 (emphasis added).

54. *Id.* at 376.

55. *Id.* (internal quotation marks omitted).

56. *Id.* (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)).

57. *Id.* at 377 (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)).

58. *See id.*

59. *Id.* at 377-78.

60. *Id.* (“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 to national security.”).

forts on the efficacy of training exercises.⁶¹ Specifically, the Court found that the lower courts had not sufficiently deferred to the Navy's judgment regarding the magnitude of the burden imposed by the injunction.⁶² While the Ninth Circuit found that any unreasonable burden on the Navy could later be alleviated by permitting the Navy to request relief on an emergency basis, the Supreme Court disagreed, arguing that it would compromise national security to award the Navy relief only once emergency circumstances have materialized.⁶³

D. Concurring Opinion

Justice Breyer wrote a concurring opinion, in which Justice Stevens joined in part. The concurring opinion found the shutdown and power-down provisions to be an abuse of discretion for five reasons. First, Justice Breyer found that there was no proven need for the two challenged provisions.⁶⁴ In other words, there was no strong evidence establishing the amount of marginal harm attributable to the two specific challenged provisions.⁶⁵

Second, Justice Breyer deferred to Navy officials' assertions that a delay in completing the SOCAL training exercises would have serious ramifications for the Navy's combat readiness.⁶⁶ Third, the concurring opinion found it important that the lower courts did not explain why they rejected the Navy's affidavit-supported assessment of the two challenged provisions' impact on the efficacy of the exercises.⁶⁷ Fourth, Justice Breyer addressed the Ninth Circuit's interpretation of the record, finding fault with the Ninth Circuit's conclusions.⁶⁸ Fifth, Justice Breyer argued that the district court imposed mitigation provisions that made continued exercises impossible, defying the Ninth Circuit's instructions.⁶⁹

The concurrence concluded by suggesting that the Court should have modified the injunction to include the altered shutdown and power-down provisions that the Ninth Circuit imposed pending appeal.⁷⁰ Justice Breyer argued that the provisional measures had "become the status quo," and that the measures were equitable in light of the Navy's ability to conduct its training exercises under them.⁷¹

61. *See id.* at 378-79.

62. *Id.*

63. *Id.* at 380-81.

64. *Id.* at 383 (Breyer, J., concurring).

65. *Id.* at 383-84.

66. *Id.* at 384 ("Taken by themselves, [the Navy's] affidavits make a strong case for the proposition that insistence upon the two additional mitigating conditions would seriously interfere with necessary defense training.").

67. *Id.* at 384-85.

68. *Id.* at 385-86.

69. *See id.* at 386.

70. *Id.* at 387.

71. *Id.*

E. Dissenting Opinion

Justice Ginsburg wrote a dissenting opinion, in which Justice Souter joined. The dissent argued that the lower courts did not abuse their discretion, because the balance of equities favored upholding the preliminary injunction against the Navy.⁷²

First, Justice Ginsburg discussed the case and determined that the plaintiffs were likely to succeed on the merits, in that an EIS was probably required before launching the SOCAL exercises.⁷³ She argued that the EIS is more than a mere procedural device; it forces government agencies to fully consider the impact of their actions on the environment before they act.⁷⁴ As such, failure to prepare a timely EIS defeats NEPA's purpose.⁷⁵ She emphasized that, while NEPA does not require a certain result, NEPA's EIS requirement plays a crucial informational role in the decision-making process.⁷⁶

Justice Ginsburg argued that the Navy could have avoided this suit by simply preparing a sufficient, timely EIS.⁷⁷ The Navy sought favorable relief from the Executive Branch, rather than through the proper legislative channels.⁷⁸ Justice Ginsburg argued that this was "surely not what Congress had in mind when it instructed agencies to comply with NEPA 'to the fullest extent possible.'"⁷⁹ Therefore, because the Navy attempted to shortcut the process, equity demanded that the Navy bear the burden of its procedural failures in the form of a preliminary injunction.⁸⁰

Second, Justice Ginsburg stressed the importance of flexibility in equitable relief.⁸¹ When the likelihood of harm is high, the likelihood that the moving party will succeed on the merits is less important, and vice versa.⁸² The dissent argued that the majority opinion does not reject this "sliding scale" standard.⁸³ Justice Ginsburg found it significant that the Navy itself predicted harm to marine mammals.⁸⁴ In light of this discussion, the dissent would have upheld the preliminary injunction in its entirety.⁸⁵

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

73. *Id.* at 393.

74. *See id.* at 389-90.

75. *Id.* at 390.

76. *Id.* at 389-90.

77. *See id.* at 390.

78. *Id.*

79. *Id.* at 391 (quoting 42 U.S.C. § 4332 (2006)).

80. *See id.* at 391-93.

81. *Id.* at 391 ("Flexibility is a hallmark of equity jurisdiction.").

82. *Id.* at 392.

83. *Id.*

84. *Id.*

85. *Id.* at 393.

III. ANALYSIS

In *Winter*, the Court weighed in on a pre-existing conflict between “the safety and continuation of the Republic and other values we hold dear, among them a healthy environment.”⁸⁶ The Court correctly pointed out that the judiciary is inexperienced with national security issues, and therefore the Court should defer to the military’s judgment regarding national security.⁸⁷ However, the Court’s complete deference to the Navy unfairly tipped the balance of equities and public policy interests in favor of the Navy. More seriously, the Court’s tacit approval of the Navy’s actions in circumventing NEPA could effectively invalidate NEPA as it concerns the military. Finally, the Court’s decision in *Winter* highlights a broader trend: the military has used 9/11 and national security concerns as a pretext for rolling back constraining environmental legislation.

A. The Court’s Complete Deference to the Navy’s Factual Determinations

The Court deferred extensively to the Navy regarding several of the Navy’s key factual determinations. This deference, in aggregate, had the effect of skewing the balance of equities and public policy interests in favor of the Navy. The skewed balance of equities and public policy interests made it impossible for the Court to accurately evaluate the propriety of injunctive relief.

The Court’s deference to the Navy in *Winter* involved the Navy’s factual determinations, rather than the Navy’s interpretations of its own enabling act or regulations. Therefore, the *Chevron*⁸⁸ and *Skidmore*⁸⁹ deference doctrines do not apply. Instead, the Court applied the military deference standard set out in *Goldman v. Weinberger*.⁹⁰ Professor Jonathan Masur assails this type of deference as “judicial abdication,”⁹¹ and contends that it is inconsistent with the body of law requiring some level of judicial inquiry into agency determinations.⁹² Professor Masur asserts that such deference to the military has “overwhelmed the legal strictures established to constrain the operation of executive power.”⁹³ The Court’s

86. Hope Babcock, *National Security and Environmental Laws: A Clear and Present Danger?*, 25 VA. ENVTL. L.J. 105, 107 (2007).

87. *Winter*, 129 S. Ct. at 377.

88. *Chevron* deference dictates that an agency’s interpretation of its enabling act is binding on courts, so long as the enabling act’s language is ambiguous and the interpretation of that language is reasonable. WILLIAM F. FOX, UNDERSTANDING ADMINISTRATIVE LAW 314-15 (5th ed. 2008) (discussing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

89. *Skidmore* deference dictates that an agency’s interpretation of its own regulations is persuasive but not necessarily controlling. *Id.* at 320 (discussing *Skidmore v. Swift*, 323 U.S. 134 (1944)).

90. 475 U.S. 503, 507 (1986) (“[C]ourts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.”).

91. Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441, 515 (2005).

92. *Id.* at 518-19.

93. *Id.* at 445.

complete deference to the military's factual determinations in *Winter* permitted the Navy's version of the facts to determine the balance of equities and public policy interests. The Court's opinion demonstrates the effect of this deference in five different ways.

First, the Court deferred to the Navy's claim that no evidence connected the forty years of SOCAL exercises with a single sonar-related injury to a marine mammal.⁹⁴ Yet, the Navy itself admitted that the exercises would affect approximately 80,000 marine mammals, some of which would be severely injured or killed.⁹⁵ In fact, in 2000, the Navy and NOAA Fisheries conducted an investigation into a mass marine mammal stranding event in the Bahamas.⁹⁶ The report concluded that the seventeen marine mammals were driven onto shore by injuries from underwater acoustic sources.⁹⁷ The report connected those injuries to a series of contemporaneous Navy MFA sonar exercises, and the Navy pledged to be more careful in the future.⁹⁸

The evidence that the use of MFA sonar causes mass marine mammal strandings and deaths is "overwhelming," and the Navy was well aware of it.⁹⁹ It is surprising, then, that the Court deferred to the Navy's assertion that there would be no irremediable damage to the environment. It is difficult to think of an injury less remediable than the death of any number of marine mammals.

By contrast, the Navy's probable injuries in the case of a mid-training sonar shutdown are quite remediable. A mid-exercise MFA sonar shutdown would delay the completion of the exercise, and would undoubtedly raise costs, but it would not make completion of the exercise impossible.¹⁰⁰ The Navy mischaracterized this inconvenience as an irremediable injury, and the effect on marine mammals as negligible. The majority accepted this mischaracterization at face value.

Second, the Court observed that the injunction's shutdown provision would amount to a hundredfold increase in the surface area of the shutdown zone.¹⁰¹ However, at the Navy's urging, the Court disregarded the observation that this MFA sonar shutdown zone is roughly the same size as the Navy's existing long-frequency active ("LFA") sonar shutdown zone.¹⁰² The Court, perhaps humbled by the Navy's chastisement

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

95. Brief for the Petitioners, *supra* note 22, at 9.

96. NAT'L OCEANIC & ATMOSPHERIC ADMIN. & DEP'T OF THE NAVY, JOINT INTERIM REPORT: BAHAMAS MARINE MAMMAL STRANDING EVENT OF 15-16 MARCH 2000, at ii (2001), www.nmfs.noaa.gov/pr/pdfs/health/stranding_bahamas2000.pdf.

97. *Id.*

98. *Id.* at vi.

99. See Reynolds, *supra* note 25, at 762-69 (providing a catalog of other sonar-related stranding events).

100. See *Winter*, 129 S. Ct. at 377; *id.* 384 (Breyer, J., concurring).

101. *Id.* at 379.

102. See *id.* at 379-80.

of the Ninth Circuit, declined to explore the effect on the training exercises of congruent MFA/LFA shutdown zones.¹⁰³ By deferring to the Navy's unsubstantiated claim that MFA sonar and LFA sonar are irreconcilably dissimilar in terms of the effect of the technology on marine mammals,¹⁰⁴ the Court failed to consider a range of factors that could have shown the burden to be smaller than the Navy asserted it to be.

Third, the Court deferred to the Navy regarding the power-down provision. The Court correctly recognized the Navy's important interest in training under surface ducting conditions when they exist.¹⁰⁵ Presumably, however, the conditions that conceal enemy submarines also conceal marine mammals. In other words, when surface ducting conditions exist, the Navy must be just as vigilant in avoiding marine mammals as it is in looking for enemy submarines. As Justice Breyer argued, the Court could have imposed the Ninth Circuit's provisional injunction, requiring the Navy to power down the sonar in proportion to the proximity of marine mammals to the vessel.¹⁰⁶ Justice Breyer's compromise would allow the Navy to continue training, while mitigating the injury to nearby marine mammals.

Fourth, the Court deferred to the Navy regarding the connection between the SOCAL training exercises and national security. The Navy asserted that the injunctions would jeopardize national security.¹⁰⁷ This conclusion was an exaggeration. The injunctions issued by the district court would not make training exercises impossible; they would merely cause delay and disruption.¹⁰⁸ Also, the injunctions applied to training exercises in SOCAL waters, and not to Navy actions generally.¹⁰⁹

The Navy also argued the injunction would create "an unacceptable risk to the Navy's ability to train for essential overseas operations at a time when the United States is engaged in war in two countries."¹¹⁰ This assertion was also an exaggeration. While the United States was indeed at war in Iraq and in Afghanistan, none of the United States' adversaries in those countries fielded a naval force—let alone the advanced "silent submarines" that MFA sonar was designed to detect. The Navy failed to explain the connection between adequate sonar training and combat readiness against these land-based, non-state forces. The Navy failed to explain how a delay in sonar training presented an "unacceptable risk" to

103. "The Ninth Circuit's willingness to strike out on its own in this complicated military and scientific context underscores the degree to which it has failed to defer to the professional military judgment of the Nation's most senior naval officers . . ." Brief for the Petitioners, *supra* note 22, at 53.

104. *Winter*, 129 S. Ct. at 380.

105. *Id.*

106. *Id.* at 387 (Breyer, J., concurring).

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

108. *Id.* at 384 (Breyer, J., concurring).

109. *See id.* at 372-73 (majority opinion).

110. Brief for the Petitioners, *supra* note 22, at 20.

ground forces in Iraq and Afghanistan.¹¹¹ The Navy also failed to explain how the injunction affected the combat readiness of already-deployed forces, other than underlining the importance of fleet-wide integration.¹¹² Professor Burke refers to such unsubstantiated claims as “thought-terminating cliché[s].”¹¹³

Finally, the Court deferred to the Navy regarding the urgent need to dissolve the injunction. The Court vacated the two challenged provisions, effectively handing the Navy the same result that it had sought from the CEQ.¹¹⁴ As Justice Ginsburg points out, however, the “emergency circumstances” under which the Navy obtained the alternative agreements were of the Navy’s own making: had the Navy filed an EIS before launching the SOCAL training exercises, it would not have had to seek emergency relief from the CEQ.¹¹⁵ Justice Ginsburg correctly argued that the Navy should bear the burden of its procedural failures.¹¹⁶

The majority’s eagerness to defer to the Navy’s factual determinations regarding significant aspects of this case could also stem from the suit’s underlying subject matter. The NRDC sought not to permanently enjoin the Navy from use of MFA sonar, but to compel the Navy to prepare an EIS, which at this stage of the case would have been merely a procedural gesture.¹¹⁷ Nevertheless, the Court’s complete deference to the Navy’s factual determinations prevented the Court from accurately evaluating the propriety of injunctive relief.

B. Winter’s Impact on Future Military Compliance with NEPA

The underlying issue in *Winter* was whether the Navy should have prepared an EIS before launching its SOCAL training exercises. The majority opinion focuses on the narrower issue: the propriety of two challenged provisions in the district court’s preliminary injunction. Although the Court generally avoided discussing the merits of the case, during the injunctive relief discussion it did briefly discuss the likelihood that NRDC would prevail on its NEPA claim.¹¹⁸ The Court characterized NEPA as a mere procedural device, and implied that the Navy’s EA satisfied NEPA’s EIS requirement.¹¹⁹

111. See *id.* at 46 (stating that soldiers involved in the SOCAL training exercises conduct missions within Iraq and Afghanistan).

112. *Id.* at 4.

113. Burke, *supra* note 3, at 808.

114. *Winter*, 129 S. Ct. at 373-74.

115. *Id.* at 390 (Ginsburg, J., dissenting).

116. See *id.* at 387.

117. See *id.* at 381 (majority opinion).

118. *Id.* at 382.

119. *Id.* at 376 (“NEPA imposes only procedural requirements to ‘ensur[e] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.’” (alteration in original) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989))).

The assertion that NEPA is a procedural device is technically true in that NEPA does not require any particular result,¹²⁰ but characterizing NEPA as mere procedure ignores the crucial role that NEPA procedures are designed to play in government agencies' decision-making processes. As Justice Stevens noted in *Robertson*, NEPA's EIS requirement ensures that government agencies will make informed decisions regarding whether to undertake a proposed action.¹²¹ In other words, the EIS is a tool to be used *before* the action, to determine *whether* the action will take place.

Justice Ginsburg agrees: "[T]he timing of an EIS is critical. . . . An EIS must be prepared 'early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.'"¹²² Justice Ginsburg characterized the Navy's actions as "short circuit[ing]" its NEPA obligations.¹²³

Chief Justice Roberts' majority opinion argued that NEPA's ultimate objective is to ensure that agencies take a "hard look" at environmental consequences.¹²⁴ The Court argued that the Navy had conducted its SOCAL training exercises for forty years without incident, and the Navy's EA amounted to a hard look at the training exercise's environmental consequences.¹²⁵ Therefore, the Court concluded, the Navy satisfied this objective.¹²⁶

The majority's reasoning is troubling. First, the Court's assertion that the use of MFA sonar should not be enjoined because it has been in use for forty years¹²⁷ is flawed. It would be bad public policy for a practice's history to establish its immunity from injunction. Otherwise, government agencies would have carte blanche to continue any established practice, regardless of harmful environmental impacts.¹²⁸

Second, the Court construes NEPA to require merely that agencies take a hard look at environmental consequences.¹²⁹ However, NEPA unambiguously requires government agencies to prepare an EIS for all

120. *Robertson*, 490 U.S. at 350.

121. *Id.* at 349.

122. *Winter*, 129 S. Ct. at 390 (Ginsburg, J., dissenting) (quoting *Andrus v. Sierra Club*, 442 U.S. 347, 351 n.3 (1979)).

123. *Id.* at 391.

124. *Id.* at 376 (majority opinion) (quoting *Robertson*, 490 U.S. at 350).

125. *Id.*

126. *Id.*

127. *Id.*

128. The Court struck down another long-standing practice during the same term it decided *Winter*: In *Arizona v. Gant*, a Fourth Amendment case involving police officers' right to search an arrestee's vehicle, the court stated that, "[i]f it is clear that a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law enforcement 'entitlement' to its persistence." *Arizona v. Gant*, 129 S. Ct. 1710, 1723 (2009).

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

major federal actions significantly affecting the human environment.¹³⁰ Justices Ginsburg and Stevens have both discussed the importance of preparing an EIS, as opposed to merely taking a hard look.¹³¹ Justices Ginsburg and Stevens have concluded that NEPA's clear procedures, including the EIS, are necessary to effectuate NEPA's purpose.¹³²

The Court's decision suggests that NEPA compliance is arbitrary, so long as agencies take a hard look at the environmental consequences of an activity. If adopted in a future decision, this "hard look" standard would undermine NEPA by permitting agencies to provide post-hoc justification for environmentally destructive activities. Moreover, compared to the clear EIS guidelines,¹³³ this hard look standard is vague. The standard threatens to waste judicial resources by delegating to courts the responsibility to determine, on a fact-intensive case-by-case basis, what constitutes a hard look at an activity's environmental consequences. By contrast, if an agency prepares an EIS, all a reviewing court must do is apply NEPA's EIS requirements and implementing regulations.

Professor Hope Babcock highlights the fact that, while Congress provided for military waiver procedures under many environmental statutes, it did not provide for a waiver procedure to NEPA's EIS requirement.¹³⁴ Despite this omission, NEPA allows the military some flexibility under the Administrative Procedures Act ("APA"). The APA definition of "agency" excludes the exercise of military authority "in the field in time of war," and only agencies as defined by the APA are required to prepare an EIS.¹³⁵ Congress could have provided a waiver to the EIS requirement, but it did not, possibly because the Navy was already exempt from preparing an EIS for wartime field operations. Congress did not exempt the Navy from its obligation to prepare an EIS for domestic training exercises, such as those in SOCAL.

Justice Ginsburg agrees that the EIS requirement is central to NEPA's objectives.¹³⁶ She reasoned that the Navy's failure to file an EIS instigated the action, and therefore that the Court should have upheld the injunction.¹³⁷ This suggested holding is in perfect harmony with envi-

130. 42 U.S.C. § 4332(2)(C) (2006).

131. See *Winter*, 129 S. Ct. at 389-91 (Ginsburg, J., dissenting); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-53 (1989).

132. See *Winter*, 129 S. Ct. at 389 (Ginsburg, J., dissenting); *Robertson*, 490 U.S. at 350.

133. § 4332(2)(C).

134. The Clean Water Act, Clean Air Act, Toxic Substances Control Act, CERCLA, Safe Drinking Water Act, Resource Conservation and Recovery Act, Endangered Species Act, Marine Mammal Protection Act, Coastal Zone Management Act, and National Historic Preservation Act all contain provisions which allow an executive official (usually the President) to waive the military's obligation to comply with these acts in emergency circumstances. Babcock, *supra* note 86, at 110-16.

135. See 5 U.S.C. § 701(b)(1)(G) (2006); § 4332(2)(C).

136. *Winter*, 129 S. Ct. at 389 (Ginsburg, J., dissenting) ("The EIS is NEPA's core requirement.").

137. *Id.* at 387, 390, 393.

ronmental compliance considerations; if the Court showed an inclination to impose preliminary injunctive relief when an agency fails to file an EIS, agencies would be more likely to comply with NEPA. Unfortunately, the Court's decision in *Winter* may prove to discourage agencies from filing NEPA-compliant environmental impact statements.

C. The Military's Post-9/11 Offensive Against Environmental Legislation

Finally, the *Winter* Court's willingness to defer to the Navy's judgment and to allow the Navy to bypass clear NEPA requirements is part of a broader, more troubling trend. Professor Babcock accuses the Department of Defense ("DOD") of manipulating post-9/11 national security concerns to stage an offensive against constraining environmental legislation.¹³⁸

Professor Babcock explains this trend in light of the broader post-9/11 erosion of civil liberties exemplified by the USA PATRIOT Act.¹³⁹ The USA PATRIOT Act, enacted in the months immediately following 9/11, was intended to enhance the government's power to combat terrorist threats, but had the additional effect of eroding civil liberties.¹⁴⁰ Until recently, the military had to resort to various statutory waiver systems to circumvent environmental legislation.¹⁴¹ But military efforts to curtail environmental legislation found new traction in the post-9/11 and post-USA PATRIOT Act reality.¹⁴²

For example, in the years immediately following the 9/11 terrorist attacks, the DOD convinced Congress to exempt the military from key areas of the Migratory Bird Treaty Act ("MBTA"), the Marine Mammal Protection Act ("MMPA"), and the Endangered Species Act ("ESA").¹⁴³ These exemptions were characterized as essential to national security.¹⁴⁴ This trend shows no sign of slowing.¹⁴⁵ In fact, the Navy urged the Court in *Winters* to view the Navy's MMPA exemption as evidence that other environmental regimes should necessarily be subordinated to military

138. "[T]he military is using the 'war on terrorism' as a Trojan horse to get out from under thirty years of constraining environmental laws it has never fully accepted." Babcock, *supra* note 86, at 110. "[T]he 9/11 attacks provided DOD with an opportunity that it seized to get relief from laws that it has resisted for decades." *Id.* at 153.

139. *See id.* at 120-26.

140. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

141. Babcock, *supra* note 86, at 110-16 (describing the waiver processes available to the military under various environmental statutes).

142. Burke, *supra* note 3, at 811.

143. *See id.* at 808; Babcock, *supra* note 86, at 127-30.

144. U.S. Representative Bob Barr, R-GA, advocated for the continued abrogation of environmental legislation, characterizing the debate as a false choice between soldiers "surviv[ing] on the battlefield" and "trampling blades of grass." Burke, *supra* note 3, at 807.

145. Professor Babcock notes that the military has also set its sights on securing exemptions from the Resource Conservation and Recovery Act ("RCRA"), the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), and the Clean Air Act ("CAA"). Babcock, *supra* note 86, at 132.

training.¹⁴⁶ Then-Vice President Dick Cheney referred to the post-9/11 restrictions on civil liberties as “the new normalcy.”¹⁴⁷ These assertions suggest an intent to roll back all constraining environmental legislation, not just MMPA or NEPA, which should have given the Court pause.

With *Winter*, this troubling trend has spread to NEPA. The Court accepted the Navy’s tenuous assertion that the SOCAL training exercises are necessary to ensure military preparedness.¹⁴⁸ Such deference to the Navy’s factual determinations, and willingness to create military exemptions to existing environmental regimes, allows the military to dodge its environmental obligations.

CONCLUSION

While deference to the military’s professional judgment is to a certain extent desirable, it is possible for courts to defer to an unreasonable extent. When a court unquestioningly accepts one party’s characterization of a case, the court simply cannot accurately evaluate the propriety of injunctive relief. In *Winter*, the Court’s complete deference to the Navy’s factual determinations unfairly tipped the balance of equities and public policy interests against the plaintiffs.

The Court’s complete deference to the Navy will likely have an impact far beyond the parties involved. First, the Court’s decision implies that the military can comply with NEPA’s objectives without having to comply with NEPA procedures. Second, the Court’s decision perpetuates the military’s offensive against “constraining” environmental legislation.¹⁴⁹ In *Winter*, the Court missed out on an opportunity to slow this trend, and prevent the military’s rollback of environmental legislation.

*Ian K. London**

146. Brief for the Petitioners, *supra* note 22, at 15.

147. Babcock, *supra* note 86, at 125.

148. See *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 377 (2008).

149. Babcock, *supra* note 86, at 110.

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