

NOTE

WINTER V. NRDC: THE NAVY, SUBMARINES, ACTIVE SONAR, AND WHALES—AN ANALYSIS OF THE NINTH CIRCUIT REVIEW AND THE ROBERTS COURT EXTENSION OF THE MILITARY DEFERENCE DOCTRINE*

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I. INTRODUCTION

The waters off the coast of California have long been a training ground for America's naval forces, including carrier strike groups training in preparation for overseas deployments.¹ These waters, however, have become a battleground in a legal struggle between the U.S. Navy and environmental groups claiming the Navy's use of active sonar threatens marine mammals inhabiting the area.² The struggle between the military and these environmental groups has continued for years.³

The latest case seeking to restrain the Navy from training with active sonar is *Natural Resources Defense Council, Inc. v. Winter*.⁴ The Natural Resources Defense Council (NRDC)

1. See Brief for the Petitioners at 2, *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008) (No. 07-1239) [hereinafter Brief for Petitioners] (explaining forty years of medium-frequency active sonar use off the coast of Southern California).

2. See Marcilynn A. Burke, *Green Peace? Protecting Our National Treasures While Providing for Our National Security*, 32 WM. & MARY ENVTL. L. & POLY REV. 803, 826-37 (2008) (describing the background of anti-sonar litigation).

3. See *id.* (outlining environmentalist disputes with the Navy).

4. *Natural Res. Def. Council, Inc. v. Winter*, 518 F.3d 658, 703 (9th Cir.), *rev'd and vacated*, 129 S. Ct. 365 (2008).

contends the Navy failed to meet the requirements of the National Environmental Policy Act of 1969⁵ (NEPA) prior to planning and commencing a series of training exercises over a two-year period.⁶ Both the U.S. District Court for the Central District of California and the U.S. Court of Appeals for the Ninth Circuit have considered the issues underlying this litigation.⁷ The district court issued a preliminary injunction constraining active sonar usage and applying court-ordered mitigation measures, two of which the Navy challenged.⁸ The Navy claimed the measures impinged on its ability to train and certify carrier strike groups for deployment, making them vulnerable to quiet diesel submarines operated by unfriendly nations.⁹

Although the Supreme Court decided the dispute in November 2008,¹⁰ this Note will primarily explore the reasoning and analysis of the Ninth Circuit. This Note argues that the plaintiffs failed to establish the irreparable harm necessary to justify a preliminary injunction against the Navy.¹¹ Furthermore, it argues the Ninth Circuit failed to balance properly the equities of the two parties despite a congressional exemption that prioritized military readiness over marine mammals.¹² This Note primarily contends that the circuit court should have applied the Supreme Court's long-standing military deference doctrine in balancing the competing interests.¹³

Part II of this Note will review the legal and factual backdrops leading up to the Supreme Court decision on this dispute.¹⁴ It will review the lower court decisions as well as the Supreme Court's majority, concurring, and dissenting opinions.¹⁵ Part III will review the requirements for a preliminary injunction

5. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370f (2006 & Supp. I 2007).

6. See Burke, *supra* note 2, at 829–30.

7. See *infra* Part II.B.2 (detailing the procedural posture of the case).

8. See *infra* Part II.B.2.

9. See *infra* Part II.B.2; see also *infra* Part III.C.3 (discussing the Navy's concerns about antisubmarine warfare).

10. See *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 379–82 (2008) (determining the lower courts abused their discretion, failed to give adequate weight to professional naval judgments, and failed to balance the interest in national security over environmental protection).

11. See *infra* Part III.C.

12. See *infra* Part III.C.4.

13. See *infra* Parts III.B, III.C.4 (explaining the military deference doctrine and arguing the doctrine gives greater weight to the Navy's assessment of potential harm).

14. See *infra* Parts II.A, II.B.1.

15. See *infra* Parts II.B.2–4 (relating the procedural posture of the case and discussing the reasoning of the courts).

and argue that the Ninth Circuit failed to properly assess and balance the harms.¹⁶ In doing so, this Note will explore the historical contours of the Supreme Court's military deference doctrine and argue that the failure to apply this doctrine resulted in the misbalancing of the equities.¹⁷ Furthermore, it will argue that the circuit court disregarded Congress's prioritization of military readiness over marine mammal protection.¹⁸ This Note will also examine whether a "legalized" harm, allowed by a statutory exemption, should be the basis for the environmental harm the NRDC alleged.¹⁹ Moreover, it will examine whether the NRDC asserted adequate factual bases to establish Article III standing.²⁰ Finally, Part IV of this Note will outline the role of *Winter v. NRDC* in the future of anti-sonar environmental litigation and its role as an extension of the military deference doctrine.²¹

II. CASE RECITATION

A. *Background: Congressional Statutes*

1. *Coastal Zone Management Act.* The Coastal Zone Management Act of 1972²² (CZMA) provides states the authority to oversee and regulate the activities taking place in their respective coastal zones.²³ The CZMA mandates federal agency cooperation with state environmental policies for coastal zones "to the maximum extent practicable."²⁴ Foreseeing conflicts between state regulatory requirements and federal agencies, Congress created a presidential exemption.²⁵ Upon written

16. See *infra* Parts III.A, III.C.

17. See *infra* Parts III.B–C (describing the development of the Supreme Court's military deference doctrine and arguing the doctrine requires great weight be given to military judgments).

18. See *infra* Part III.C.4.

19. See *infra* Part III.C.4 (arguing the Marine Mammal Protection Act exemption removes legal protection for marine mammals, negating the NRDC's claim of injury).

20. See *infra* Part III.D (examining basic requirements for standing and questioning the sufficiency of the NRDC allegations).

21. See *infra* Part IV (describing *Winter* as a rejuvenation of the military deference doctrine and a guidepost for proper deference to military judgments in environmental litigation).

22. Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451–1466 (2006 & Supp. I 2007).

23. 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, 772 (2008) (quoting S. REP. NO. 92-753, at 1 (1972), reprinted in 1972 U.S.C.C.A.N. 4776, 4776).

24. 16 U.S.C. § 1456(c)(1)(A) (2006).

25. 16 U.S.C. § 1456(c)(1)(B) (2006).

request from the Secretary of Commerce, the President may exempt a federal agency from compliance with state requirements if the President determines “the activity is in the paramount interest of the United States.”²⁶

2. *Marine Mammal Protection Act.* The Marine Mammal Protection Act of 1972²⁷ (MMPA) prohibits the taking of a marine mammal.²⁸ Amongst other things, Congress’s definition of the term “take” includes the harassment or killing of a marine mammal.²⁹ For “military readiness activit[ies],” Level A harassment includes “any act that injures or has the significant potential to injure a marine mammal.”³⁰ Level B harassment includes “any act that disturbs or is likely to disturb a marine mammal . . . by causing disruption of natural behavioral patterns . . . to a point where such behavioral patterns are abandoned or significantly altered.”³¹

Congress added a national defense exemption to the MMPA.³² The Secretary of Defense may exempt an action after conferring with the Secretary of Commerce or the Interior if it is “necessary for national defense.”³³ The exemption lasts two years,

26. *Id.*

27. Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361–1423h (2006 & Supp. I 2007).

28. 16 U.S.C. § 1371(a) (2006).

29. 16 U.S.C. § 1362(13) (2006).

30. 16 U.S.C. § 1362(18)(B)–(C) (2006).

31. 16 U.S.C. § 1362(18)(B)–(D) (2006).

32. 16 U.S.C. § 1371(f) (2006). The national defense exemption was added in the wake of *Natural Resources Defense Council, Inc. v. Evans*, 279 F. Supp. 2d 1129 (N.D. Cal. 2003). See Natalie Barefoot-Watambwa, *Who Is Encroaching Whom? The Balance Between Our Naval Security Needs and the Environment: The 2004 RRPI Provisions as a Response to Encroachment Concerns*, 59 U. MIAMI L. REV. 577, 601–03, 608, 611–12 (2005). The NRDC challenged the Navy’s use of low frequency active sonar (LFA) as violating the MMPA and NEPA. *Evans*, 279 F. Supp. 2d at 1137–38. After the district court issued an injunction, the Navy and the NRDC reached a settlement agreement limiting the use of LFA. Barefoot-Watambwa, *supra*, at 602. The MMPA amendments created a definition of harassment for the military, created the national security exemption, and included new provisions for military readiness activities. *Id.* at 606–09. The amendments resulted from Navy concerns that courts were constraining military activities despite no such intentions in the original act. See *The Impacts of Environmental Laws on Readiness and the Related Administration Legislative Proposal: Hearing on S. 1050 Before the S. Subcomm. on Readiness and Management Support of the S. Comm. on Armed Servs.*, 108th Cong. 110 (2003) (statement of Admiral William J. Fallon, Vice Chief of Naval Operations, U.S. Navy) (“As a result of the inherent structural flaws in the laws themselves as applied to worldwide military readiness activities, the Navy now finds the deployment and operation of one of our most important national security assets constrained by a Federal court [T]he MMPA was originally enacted to protect whales from commercial exploitation and to prevent dolphins and other marine mammals from accidental death or injury during commercial fishing operations and did not address military readiness concerns.”).

33. 16 U.S.C. § 1371(f)(1) (2006).

although additional exemptions may be approved.³⁴ The MMPA requires that notice of the exemption and the reasons for it be given to the House and Senate Armed Services Committees within thirty days.³⁵

3. *National Environmental Policy Act.* The National Environmental Policy Act of 1969³⁶ (NEPA) created a cohesive national policy toward environmental protection.³⁷ In evaluating major federal actions that “significantly affect[] the quality of the human environment,” each agency must prepare a detailed statement including the environmental impact of the action, unavoidable adverse environmental affects, alternatives, short-term versus long-term effects, and irreversible resource commitments.³⁸ Agencies must comply with the requirements of NEPA “to the fullest extent possible.”³⁹

Congress also created an executive agency called the Council on Environmental Quality (CEQ).⁴⁰ The CEQ reviews federal actions for consistency with NEPA and makes recommendations to the President.⁴¹ The NEPA process forces agencies to make informed decisions with an understanding of the environmental consequences.⁴² NEPA is procedural in nature, mandating the process but not the results.⁴³

Unlike the MMPA, NEPA does not include a national security exemption.⁴⁴ However, the CEQ adopted a rule for compliance in the event of emergencies.⁴⁵ The rule allowed agencies to make “alternative arrangements” after consulting with the Council.⁴⁶

34. 16 U.S.C. § 1371(f)(2)–(3) (2006).

35. 16 U.S.C. § 1371(f)(4) (2006).

36. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370f (2006 & Supp. I 2007).

37. 42 U.S.C. § 4321 (2006 & Supp. I 2007).

38. 42 U.S.C. § 4332(2)(C) (2006).

39. 42 U.S.C. § 4332 (2006).

40. 42 U.S.C. § 4342 (2006).

41. 42 U.S.C. § 4344(3) (2006). Generally, the CEQ monitors NEPA compliance. *See* Julie G. Yap, Note, *Just Keep Swimming: Guiding Environmental Stewardship Out of the Riptide of National Security*, 73 *FORDHAM L. REV.* 1289, 1297 (2004) (detailing the creation of the CEQ and its role in overseeing NEPA).

42. 40 C.F.R. § 1500.1(c) (2008).

43. *See* Daniel Inkelas, Note, *Security, Sound, and Cetaceans: Legal Challenges to Low Frequency Active Sonar Under U.S. and International Environmental Law*, 37 *GEO. WASH. INT'L L. REV.* 207, 216 (2005) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)).

44. *See* Yap, *supra* note 41, at 1298 (discussing the well-settled proposition that NEPA applies to the military).

45. 40 C.F.R. § 1506.11 (2008).

46. *Id.*

The alternative arrangements are limited “to actions necessary to control the immediate impacts of the emergency.”⁴⁷

An Environmental Impact Statement (EIS) is not necessary for every agency action.⁴⁸ Absent other agency procedural guidance, the agency must prepare an environmental assessment (EA) to determine whether an EIS is required.⁴⁹ If, after preparing an EA, the agency determines that an EIS is not required, the agency must prepare a “finding of no significant impact.”⁵⁰ When an EIS is required, the report addresses the affected environment, alternative actions, and the environmental consequences of both the action and any alternatives.⁵¹

B. NRDC v. Winter

1. *The Facts*

a. Training Carrier Strike Groups. Prior to the overseas deployment of a carrier strike group, which typically includes an aircraft carrier and five surface combatants, the Navy certifies the strike group via coordinated exercises preparing it for both peacetime and wartime operations.⁵² The carrier strike group must be able to defend itself from all threats and control “the air, surface, and sub-surface space[s]” during combat and humanitarian missions.⁵³

The integrated training phase includes two exercises: the Composite Training Unit Exercise (COMPTUEX) and the Joint Tactical Force Exercise (JTFEX).⁵⁴ The COMPTUEX occurs over three to four weeks and includes training events simulating real world situations, including “the ability to identify and defeat multiple threats including surface, air and, most importantly, submarines.”⁵⁵ The JTFEX occurs over ten days and evaluates the strike group’s ability to operate in a joint forces or coalition combat environment.⁵⁶ At the conclusion of the COMPTUEX and

47. *Id.*

48. *See* 42 U.S.C. § 4332(2)(C) (2006) (requiring Environmental Impact Statements for “major Federal actions significantly affecting the quality of the human environment”).

49. 40 C.F.R. § 1501.4(a)–(c) (2008).

50. 40 C.F.R. § 1501.4(e) (2008).

51. 40 C.F.R. §§ 1502.13–.16 (2008).

52. 2 Joint Appendix at 558, 561, *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008) (No. 07-1239) (Declaration of U.S. Navy Captain Martin N. May).

53. *Id.*

54. *Id.* at 562.

55. *Id.*

56. *Id.*

the JTFEX, the Navy certifies the carrier strike group to deploy.⁵⁷

b. *Antisubmarine Warfare and Active Sonar.* Commander, U.S. Pacific Fleet, identified antisubmarine warfare (ASW) as the fleet's top warfighting priority.⁵⁸ As such, the ability of a strike group to conduct effective ASW is an important part of the COMPTUEX/JTFEX certification.⁵⁹ The Navy conducts ASW using attack submarines, maritime patrol aircraft, helicopters, and surface combatants.⁶⁰ Surface combatants, which comprise the majority of the strike group, conduct ASW using active sonar.⁶¹ Active sonar involves transmitting sound into the water and listening for the sound to return to the source ship after reflecting off the target submarine.⁶² Surface combatants typically utilize medium-frequency active (MFA) sonar, transmitted between 1.0 kHz and 10.0 kHz.⁶³ To utilize MFA sonar effectively, sonar operators must train regularly under realistic conditions.⁶⁴ Conditions affecting MFA sonar include the water temperature, salinity, weather conditions, depth of the water column, type of ocean bottom, and ocean currents.⁶⁵ Because conditions constantly change, the use of MFA sonar to detect submarines is a complex "art" requiring consistent at-sea training to maintain the perishable skills.⁶⁶

Although there is scientific uncertainty surrounding the subject, many people are concerned that MFA sonar can harm marine mammals.⁶⁷ Specifically, scientists and environmentalists

57. *Id.* at 564–65. In the Pacific, the exercises take place in the Southern California (SOCAL) Operating Areas (OPAREAS). *Id.* at 565.

58. Unclassified Declaration of David Yoshihara in Support of Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction at 3, *Ocean Mammal Inst. v. Gates*, 546 F. Supp. 2d 960 (D. Haw. 2008) (No. 07-cv-00254-DAE-LEK), available at <http://www.hawaiiocanlaw.com/files/yoshiharadec.pdf> [hereinafter Declaration of Captain Yoshihara].

59. 2 Joint Appendix, *supra* note 52, at 564–65.

60. See generally Milan Vego, *Patrolling the Deep: Critical Anti-submarine Warfare Skills Must Be Restored*, ARMED FORCES J., Sept. 2008, at 24, 25–26 (explaining assets used to conduct ASW and critiquing their respective abilities to do so effectively).

61. Declaration of Captain Yoshihara, *supra* note 58, at 6.

62. *Id.* at 5.

63. *Id.* at 5–6.

64. *Id.* at 6–7.

65. *Id.* at 7.

66. *Id.* at 6–8.

67. EUGENE H. BUCK & KORI CALVERT, ACTIVE MILITARY SONAR AND MARINE MAMMALS: EVENTS AND REFERENCES 2 (Cong. Research Serv., CRS Report for Congress Order Code RL33133, Feb. 11, 2008), available at <http://www.fas.org/sgp/crs/weapons/RL33133.pdf> (summarizing the interactions between marine mammals and MFA sonar).

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are concerned that active sonar can affect hearing in marine mammals and may cause behavioral modifications.⁶⁸ Marine mammal strandings and deaths, particularly those of beaked whales, have been observed in conjunction with the Navy's use of MFA sonar.⁶⁹

c. The Environmental Assessment. The Navy prepared an EA in compliance with NEPA in February 2007.⁷⁰ The EA evaluated the environmental impact of seven COMPTUEXs and seven JTFEXs that would be conducted from February 2007 through January 2009 in the Southern California Operating Areas (SOCAL OPAREAS).⁷¹ The Navy examined both the physiological and behavioral effects of sonar operation on marine mammals.⁷² The Navy categorized the effects into either Level A or Level B harassment as defined in the MMPA.⁷³ Because there is a great deal of uncertainty about the effects of active sonar on beaked whales, the Navy counted all beaked whale Level B exposures as nonlethal Level A.⁷⁴

In the 293-page EA, the Navy predicted 80,684 annual Level B exposures causing short-term behavioral disruptions without any hearing loss and 4,080 annual Level B exposures causing temporary hearing loss.⁷⁵ Of the 80,684 exposures without hearing loss, 78,877 involved several non-endangered and non-threatened species of dolphins, which the Navy said it could avoid using its mitigation measures.⁷⁶ All but 90 of the 4,080 exposures causing temporary hearing loss involved the same varieties of dolphins.⁷⁷ Thus, the Navy predicted 84,764 annual Level B exposures.⁷⁸

The Navy also predicted 282 annual Level A exposures.⁷⁹ The Level A exposures included 274 Level B exposures to beaked whales, which are neither endangered nor threatened.⁸⁰ Of the

68. *Id.*

69. *Id.*; see also Inkelas, *supra* note 43, at 213–14 (listing historical strandings linked to military sonar).

70. 1 Joint Appendix at 107, 108, Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365 (2008) (No. 07-1239).

71. *Id.* at 117.

72. *Id.* at 157–60.

73. *Id.* at 160–66; see also *supra* Part II.A.2 (describing the MMPA's definitions of Level A and Level B harassment).

74. 1 Joint Appendix, *supra* note 70, at 170.

75. Brief for Petitioners, *supra* note 1, at 8–10.

76. *Id.* at 9.

77. *Id.* at 9–10.

78. See *id.*

79. *Id.* at 10.

80. *Id.*

274, 13 consisted of temporary hearing loss and 261 were expected to cause, at worst, behavioral disruptions.⁸¹ The remaining 8 Level A exposures, which predicted some permanent hearing loss, were to common dolphins, and the Navy asserted that its mitigation measures would prevent those exposures.⁸²

The EA highlighted twenty-nine mitigating measures the Navy would take to reduce the potential for harassment of marine mammals.⁸³ Many of the mitigating measures were developed in conjunction with the National Marine Fisheries Service.⁸⁴ These measures ranged from training personnel and posting lookouts to establishing safety zones with mandatory level reductions or shutdowns of sonar transmissions.⁸⁵ The measures also included checks for marine mammals prior to initiating or re-initiating sonar transmissions, additional precautions and analysis if conditions mirrored those historically known to cause beaked whale groundings and injuries, and a system for the coordination and reporting of any marine mammal incidents.⁸⁶

Although a mass stranding of beaked whales occurred in conjunction with Navy exercises in the Bahamas in March 2000, the Navy distinguished the environmental factors leading to that grounding (such as the existence of a constricted channel with limited exit points) from the much different environment in Southern California.⁸⁷ The EA concluded the conditions present in the Bahamas and other grounding sites were not present in the SOCAL OPAREAS.⁸⁸ The Navy also pointed out that it had conducted training operations in SOCAL for over seventy years, with very consistent use of active sonar for the past thirty to forty years.⁸⁹ During this period there were no instances of marine mammal injury, death, or mass-stranding associated with MFA sonar in the SOCAL OPAREAS.⁹⁰ The Navy concluded the planned exercises would “not have a significant impact or cause significant harm to the environment.”⁹¹ Given that

81. *Id.*

82. *Id.* In comparison to these figures, the Navy asserted that the commercial fishing industry caused 650,000 marine mammal deaths during the 1990s with over 6,000 attributed to U.S. fisheries. *Id.*

83. 1 Joint Appendix, *supra* note 70, at 202–11.

84. *Id.* at 202.

85. *Id.* at 202–08.

86. *Id.* at 208–11.

87. *Id.* at 169–70.

88. *Id.* at 170.

89. *Id.* at 119. That usage was representative of current usage. *Id.*

90. Brief for Petitioners, *supra* note 1, at 11.

91. 2 Joint Appendix at 225, 226, *Winter v. Natural Res. Def. Council, Inc.* 129 S. Ct. 365 (2008) (No. 07-1239).

conclusion, the Navy determined that there was no need to prepare an EIS.⁹² Within a month of the Navy's issuance of the EA, the NRDC sued, seeking injunctive relief and claiming that the Navy had violated NEPA, the Endangered Species Act, and the CZMA.⁹³

In conjunction with the decision not to prepare an EIS, the Navy determined that its exercises would not affect California's coastal zone.⁹⁴ Based on that determination, the Navy submitted a consistency determination to the California Coastal Commission (CCC) for the exercises without taking into account its use of MFA sonar.⁹⁵ The Navy also refused to adopt mitigation measures upon which the CCC insisted.⁹⁶ Just before the Navy issued its EA, the Secretary of Defense issued a national defense exemption from the requirements of the MMPA.⁹⁷ The Secretary exempted military readiness activities using MFA sonar in the SOCIAL OPAREAS for two years.⁹⁸

2. Procedural History

a. *The Original Preliminary Injunction.* The NRDC claimed the Navy violated NEPA by failing to prepare an EIS and by preparing an inadequate EA that did not consider reasonable alternatives to its proposed actions.⁹⁹ The NRDC also alleged the Navy violated the CZMA.¹⁰⁰ The U.S. District Court for the Central District of California granted a preliminary injunction based on the alleged NEPA and CZMA violations.¹⁰¹ The court enjoined the Navy from using any MFA sonar during the fourteen exercises through January 2009.¹⁰²

b. *Initial Ninth Circuit Review.* The U.S. Court of Appeals for the Ninth Circuit granted an emergency stay pending appeal, concluding that the district court had not considered the "public

92. *Id.*

93. *Winter*, 129 S. Ct. at 372; *Natural Res. Def. Council, Inc. v. Winter*, 518 F.3d 658, 703 (9th Cir.), *rev'd and vacated*, 129 S. Ct. 365 (2008).

94. *Natural Res. Def. Council, Inc. v. Winter*, 645 F. Supp. 2d 841, 846 (C.D. Cal.), *stay granted*, 502 F.3d 859 (9th Cir. 2007).

95. *Id.*

96. *Id.*

97. Memorandum from Gordon England, Deputy Sec'y of Def., to Sec'y of the Navy (Jan. 23, 2007), *available at* http://www.navy.mil/oceans/NDE_II.pdf.

98. *Id.*

99. *Winter*, 645 F. Supp. 2d at 847.

100. *Id.*

101. *Id.* at 855.

102. *Id.*

interest in having a trained and effective Navy.”¹⁰³ Upon hearing the appeal, the Ninth Circuit vacated the motion panel’s stay and remanded the matter to the district court.¹⁰⁴ The circuit court directed the district court to enter a new injunction including mitigation measures so the Navy could use MFA sonar but reduce any harmful effects from its use.¹⁰⁵

c. The District Court on Remand. On remand, the district court issued another preliminary injunction against the Navy, imposing numerous mitigation measures.¹⁰⁶ The mitigation measures included requirements that the Navy cease the use of MFA sonar after spotting marine mammals within 2,200 yards and reduce MFA sonar levels by six decibels in the event of surface ducting, a condition in which the density of the water column makes it likely that noise will travel a prolonged distance.¹⁰⁷ The district court later amended its injunction, removing the 2,200 yard shutdown zone for dolphins and porpoises riding bow wakes of ships, and making the six decibel reduction for surface ducting applicable only during “significant” surface ducting conditions.¹⁰⁸

d. Presidential Exemptions and CEQ Emergency Circumstances. After the issuance of the modified injunction, on January 15, 2008, the President exempted the Navy’s use of MFA sonar in the SOCAL OPAREAS from the requirements of the CZMA, concluding that the use of MFA sonar was “essential to national security and in the paramount interest of the United States.”¹⁰⁹ On the same day, the CEQ determined that emergency circumstances justified alternate arrangements to meet the requirements of NEPA.¹¹⁰ The alternate arrangements included the Navy’s existing twenty-nine mitigation measures with slight alterations.¹¹¹ That day, the Navy filed an emergency

103. Natural Res. Def. Council, Inc. v. Winter, 502 F.3d 859, 862, 864–65 (9th Cir.) (internal quotation marks omitted), stay vacated, 508 F.3d 885 (9th Cir. 2007).

104. Winter, 508 F.3d at 887.

105. Id.

106. Natural Res. Def. Council, Inc. v. Winter, 530 F. Supp. 2d 1110, 1118–21 (C.D. Cal. 2008).

107. Id. at 1119–21.

108. 1 Joint Appendix at 228, 236–37, Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365 (2008) (No. 07-1239).

109. Natural Res. Def. Council, Inc. v. Winter, 513 F.3d 920, 921–22 (9th Cir. 2008) (internal quotation marks omitted); see also *supra* Part II.A.1 (describing the mechanics of the CZMA presidential exemption process).

110. Winter, 513 F.3d at 922.

111. 1 Joint Appendix, *supra* note 108, at 238–40.

motion with the Ninth Circuit requesting the preliminary injunction be vacated or partially stayed.¹¹² The circuit court remanded the case to the district court.¹¹³

e. Reconsideration by the District Court. On remand, the district court determined that its preliminary injunction was unaffected by the CEQ's approval of emergency alternative circumstances.¹¹⁴ It concluded that no emergency existed, the CEQ's decision was not subject to judicial deference, and the CEQ's decision was contrary to the intentions of NEPA.¹¹⁵ The district court decided the CEQ's interpretation of "emergency circumstances" violated the plain meaning and ordinary usage of the term "emergency," and improperly exempted "ordinary, planned activities" of agencies from the requirements of NEPA in the interest of national security.¹¹⁶ Furthermore, the court determined that the injunction was necessary, and unless the Navy followed the injunction's mitigation measures, it could not continue its training exercises.¹¹⁷ Following the district court's decision, the Navy filed another emergency motion for a partial stay of the preliminary injunction, arguing that the injunction would prevent it from adequately conducting planned exercises.¹¹⁸ The Ninth Circuit denied the motion, reasoning that it intended to consider the appeal prior to the start of the exercises.¹¹⁹

3. *The Ninth Circuit*

a. Analysis of CEQ Action. The Ninth Circuit affirmed the district court's preliminary injunction.¹²⁰ The court rejected the Navy's argument that the CEQ's action represented a superseding agency action depriving the district court of jurisdiction.¹²¹ The Ninth Circuit reasoned that the district court, in its continuing exercise of jurisdiction, had relied upon the notion that the CEQ's action was invalid and, therefore, had no

112. *Winter*, 513 F.3d at 921–22.

113. *Id.* at 922.

114. *Natural Res. Def. Council v. Winter*, 527 F. Supp. 2d 1216, 1219 (C.D. Cal. 2008).

115. *Id.* at 1219, 1229–31.

116. *Id.* at 1227–28, 1230–31.

117. *Id.* at 1238.

118. *Natural Res. Def. Council, Inc. v. Winter*, 516 F.3d 1103, 1104 (9th Cir.), *aff'd*, 518 F.3d 658 (9th Cir.), *rev'd and vacated*, 129 S. Ct. 365 (2008).

119. *Id.* at 1105–06.

120. *Natural Res. Def. Council, Inc. v. Winter*, 518 F.3d 658, 703 (9th Cir.), *rev'd and vacated*, 129 S. Ct. 365 (2008).

121. *Id.* at 678–79.

effect on jurisdiction.¹²² The court held that the agency's interpretation was not entitled to judicial deference because it was inconsistent with the regulation and statute, and violated the plain meaning of the regulation.¹²³ Concluding that the situation was an emergency of the Navy's making due to its decision not to prepare an EIS, the court criticized the CEQ interpretation as too broad and improperly creating a NEPA national defense exemption.¹²⁴

b. Merits of the NEPA Claim. In examining the NEPA claim, the court reasoned the NRDC need not show significant effects on the environment would occur; rather, it was enough to raise "substantial questions whether a project may have a significant effect' on the environment."¹²⁵ The Ninth Circuit pointed to the Navy's request for alternative arrangements from the CEQ and the Navy's subsequent initiation of an EIS as admissions that there were substantial questions on environmental impact.¹²⁶ The circuit court also rejected the Navy's argument that the district court clearly erred in assessing the effect of MFA sonar on marine mammals in the SOCAL OPAREAS.¹²⁷ The court rejected Navy arguments that Level A harassments were artificially increased by including Level B beaked whale harassments.¹²⁸ The Ninth Circuit also rejected the Navy's argument that the number of Level B harassments was high due to overly conservative assumptions in its analysis.¹²⁹ Addressing the Navy's assertion that forty years of exercises in the SOCAL OPAREAS led to no observable injuries or strandings from MFA sonar, the court reasoned that the Navy had not disproved that there could be unobserved harms and had not explained why the conditions present in the 2000 Bahamas stranding incident were not present in Southern California.¹³⁰ The court called the Navy's conclusions of no adverse environmental impact "cursory, unsupported by cited evidence, or unconvincing."¹³¹

122. *Id.* at 679.

123. *Id.* at 678–83.

124. *Id.* at 680, 684–85.

125. *Id.* at 688 (quoting *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998)).

126. *Id.* at 689.

127. *Id.*

128. *Id.* at 689–91.

129. *Id.* The Navy argued that its mitigation measures would reduce the number of harassments and that many of the harassments would only cause temporary behavioral modifications. *Id.* at 690–91.

130. *Id.* at 692–93.

131. *Id.* at 693.

The circuit court dismissed the Navy's list of standard mitigation measures as a "perfunctory description devoid of supporting data."¹³² The court said the Navy data "overlook[ed] the fact that beaked whales spend much of their time under water, surface infrequently, and are generally difficult to detect."¹³³ Therefore, the court concluded the Navy would not detect beaked whales sufficiently to make mitigation measures effective.¹³⁴ Likewise, the court reasoned that the Navy had not explained why its graduated safety zones worked.¹³⁵

Having determined that the NRDC was likely to prevail on the merits, the court analyzed the "possibility of irreparable harm to [the NRDC's] membership."¹³⁶ The court rejected the Navy's argument that the harm was speculative and that the Navy's own figures overestimated harassments.¹³⁷ The court cited the Navy's estimate of Level A harassments as evidence of irreparable harm.¹³⁸ Thus, the court concluded that the NRDC "demonstrated the possibility of irreparable injury."¹³⁹

c. Balancing the Equities. In reviewing the balance of the hardships, the circuit court examined the Navy's assertion that its ability to train and certify its strike groups would be endangered by the 2,200 yard shutdown requirement and the significant surface ducting power reduction.¹⁴⁰ The court noted that "any negative impact on the Navy's ability to successfully conduct its exercises under the challenged mitigation measures is necessarily speculative because the Navy has never before employed these measures in the context of MFA sonar training."¹⁴¹ Although the Ninth Circuit acknowledged the judgments of Naval officers were entitled to deference, it explained that deference was not absolute and reasoned that the district court had not abused its discretion.¹⁴² The court then endorsed the district court's conclusion that the mitigation measures, although challenging, would not compromise the Navy's ability to train and certify strike

132. *Id.* at 693–94.

133. *Id.* at 694.

134. *Id.*

135. *Id.*

136. *Id.* at 695–96.

137. *Id.* at 696–97.

138. *Id.* at 697.

139. *Id.*

140. *Id.* at 697–98.

141. *Id.* at 698–99.

142. *Id.* at 699.

groups.¹⁴³ The Ninth Circuit determined there was a low likelihood of sighting marine mammals and the additional measures would only cause one additional sonar shutdown per exercise.¹⁴⁴ The court also found that because surface ducts were rare in SOCAL and because the Navy had certified strike groups in the past without training in surface ducting conditions, the power-down measure would not significantly impact training.¹⁴⁵

Balancing the harm to the Navy's training with the harm to the environment, the court concluded that the harm to the environment would likely result whereas the harm to the Navy was speculative and, therefore, the district court did not err in granting the injunction.¹⁴⁶ The Ninth Circuit opined that if the Navy found it would be unable to train its strike groups effectively, then it could request emergency relief from the district court.¹⁴⁷ The Navy's petition for writ of certiorari to the U.S. Supreme Court was granted following the Ninth Circuit's affirmance of the district court rulings.¹⁴⁸

4. *The Supreme Court*

a. *Chief Justice Roberts' Majority Opinion.* In a 5–4 opinion written by Chief Justice Roberts, the Court overruled the Ninth Circuit and vacated the temporary injunction insofar as the Navy challenged it.¹⁴⁹ The Court did not consider the Ninth Circuit's decision that the plaintiffs had shown a likelihood of success on the merits, nor did it consider whether the plaintiffs had shown irreparable injury.¹⁵⁰ Rather, the Court reasoned that any injury was “outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors.”¹⁵¹ The majority opinion explained that both the district court and the Ninth Circuit “significantly understated” the effect of the injunction on the Navy's training and the impact on national defense.¹⁵²

The Court discussed military deference at length, pointing out that many of the Navy's most senior officers had provided declarations explaining the importance of ASW training and the

143. *Id.*

144. *Id.* at 700–01.

145. *Id.* at 701–02.

146. *Id.* at 702–03.

147. *Id.* at 703.

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

149. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 370, 374 (2008).

150. *Id.* at 376.

151. *Id.*

152. *Id.* at 377.

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need for extensive sonar training.¹⁵³ While acknowledging that deference to military interests is not absolute, the Court reasoned that in this case, the public interest in national defense was far greater than the public interest in any environmental impact.¹⁵⁴ Thus, the Court criticized the lower courts for failing to defer to the judgment of senior naval officers on the impact of the injunction upon the ability to train and certify strike groups, and for dismissing the Navy's protests as purely speculative.¹⁵⁵

The Court similarly criticized the lower court's lack of deference to naval opinions that the expanded shutdown zone of 2,200 yards would result in the loss of several days of training.¹⁵⁶ Furthermore, the Court rejected the Ninth Circuit's reasoning on surface ducting, pointing out that the rarity of the condition made it even more important for the Navy to integrate it into its training when possible.¹⁵⁷

The Court evaluated the Navy's actions in light of NEPA's purpose of forcing agencies to make informed decisions.¹⁵⁸ The Court reasoned that in this case the Navy had extensive knowledge of the potential environmental consequences of its activities, including forty years of exercises in the same location without obvious environmental impacts, and impliedly met the NEPA mandate of informed decisionmaking.¹⁵⁹ In any event, the Court described the Navy's 293-page EA as a thorough look at the environmental consequences.¹⁶⁰ Characterizing the injunction as "jeopardizing national security," the Court reversed the Ninth Circuit and vacated the preliminary injunction insofar as the Navy challenged it.¹⁶¹

b. Justice Breyer's Concurring and Dissenting Opinion. Justice Breyer concurred with the majority opinion in part and dissented in part.¹⁶² Justice Stevens joined Justice Breyer in part.¹⁶³ Justice Breyer reasoned that the district court had not properly balanced the harms in its evaluation of the temporary

153. *Id.*

154. *Id.* at 378. The Supreme Court pointed out that the district court only dedicated one sentence to the discussion of balancing the equities. *Id.*

155. *Id.*

156. *Id.* at 379.

157. *Id.* at 380.

158. *Id.* at 376.

159. *Id.*

160. *Id.*

161. *Id.* at 381–82.

162. *Id.* at 382 (Breyer, J., concurring in part and dissenting in part).

163. *Id.*

injunction.¹⁶⁴ Furthermore, he explained that “[n]either the District Court nor the Court of Appeals has adequately explained its conclusion that the balance of the equities tips in favor of plaintiffs.”¹⁶⁵ Justice Breyer concurred in vacating the preliminary injunction to the extent that it was challenged.¹⁶⁶ Nevertheless, he dissented in part, believing that a modified injunction should have been imposed.¹⁶⁷

c. Justice Ginsburg’s Dissenting Opinion. Justice Ginsburg dissented and was joined by Justice Souter.¹⁶⁸ Justice Ginsburg framed the central question of the dispute as whether the Navy was required to prepare an EIS.¹⁶⁹ As such, she believed that the district court properly balanced the equities.¹⁷⁰ Specifically, she argued that the Navy’s publication of an EIS after the exercises defeated the purpose of NEPA, and rather than seeking leave of the CEQ to reach alternate means of compliance, the Navy should have requested leave of Congress to continue with the exercises.¹⁷¹ Concluding that the NRDC would have been successful on the merits, that there would be substantial harm to the environment, and that the balance of interests weighed in favor of the injunction, Justice Ginsburg would have affirmed the Ninth Circuit’s judgment.¹⁷²

III. ANALYSIS

A. *The Court’s View of the Preliminary Injunction as an Equitable Remedy*

A preliminary injunction is remarkable relief that is not suited to every situation.¹⁷³ Moreover, “a court of equity ought not to issue an injunction, even though a plaintiff otherwise makes out a case for it, if the plaintiff’s right to an injunction is overborne by a commanding public interest against it.”¹⁷⁴ Even if

164. *Id.* at 386.

165. *Id.*

166. *Id.*

167. *Id.* at 386–87.

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

169. *Id.*

170. *Id.*

171. *Id.* at 390.

172. *Id.* at 393.

173. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 595 (1952) (Frankfurter, J., concurring) (explaining that a temporary injunction while familiar, is “an extraordinary remedy”).

174. *Id.* at 596.

a federal agency has violated the law, a mere violation of law does not establish the need for injunctive relief.¹⁷⁵ In some instances, the Court has refused to grant an injunction when lower court findings suggest that “the issuance of an injunction would have no effect by way of insuring better compliance in the future and would be unjust to petitioner and not in the public interest.”¹⁷⁶

The Court has established clear criteria to consider in evaluating whether to grant a preliminary injunction.¹⁷⁷ Specifically, a plaintiff seeking a preliminary injunction must demonstrate: (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,” (3) “that the balance of equities tips in his favor,” and (4) “that an injunction is in the public interest.”¹⁷⁸ However, mere injury is not enough to establish grounds for a temporary injunction; rather, the court “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.”¹⁷⁹ In reviewing the issuance of a preliminary injunction, the Court has traditionally invoked the abuse of discretion standard.¹⁸⁰

B. A History of Supreme Court Deference Toward the Military and the Executive and Legislative Branches in Dealing with the Military

The Supreme Court, in reviewing the decisions of military leaders over the last half-century, has deferred frequently to those decisions that are uniquely within the expertise of the military.¹⁸¹ In this context, the Court has deferred to the wisdom of the political branches in an increasingly broad number of matters, including restrictions on free speech, freedom of

175. See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 193 (1978) (“[A] federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of law.”).

176. *Hecht Co. v. Bowles*, 321 U.S. 321, 326 (1944) (internal quotation marks omitted).

177. See *Winter*, 129 S. Ct. at 374.

178. See *id.*

179. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987).

180. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931–32 (1975).

181. See John F. O’Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161, 214–17, 219 (2000) (explaining that the modern era of Supreme Court jurisprudence exhibits an increasingly “flexible military deference doctrine in which the Court granted Congress wide berth in deciding how best to balance the needs of the military society against the civil liberties of the individual servicemember” and “accords special weight to the political branches’ estimation of the discipline and obedience needs of the armed forces”).

religion, and equal protection.¹⁸² Understanding the military deference doctrine is important here, not only for general applicability of the doctrine, but also for lower court analysis of balancing of the harms in light of the military testimony.

Generally, cases involving the military deference doctrine fit into three categories: (1) deference originating from the separation of powers between the political branches and the judiciary; (2) deference originating from the existence of the military as a “separate community” with its own unique culture, laws, traditions, and norms; and (3) deference originating from the judiciary’s perceived lack of competence in the complexities of military affairs.¹⁸³ The Court’s deference to the military closely mirrors its deference to administrative agencies that have developed specialized expertise in the administration of enabling statutes.¹⁸⁴

1. *Korematsu v. United States and Wartime Liberties.* The Court’s deference toward military and civilian decisionmakers during World War II represents the extreme contours of the greater military deference doctrine.¹⁸⁵ In *Korematsu v. United States*, an American of Japanese descent was convicted of violating an exclusion order issued by military authorities pursuant to a congressional grant of authority.¹⁸⁶ Toyosaburo Korematsu challenged the exclusion order and the legality of the Japanese detention program as improperly imprisoning and restricting the movement of citizens based solely on ancestry.¹⁸⁷ Bowing to the judgment of the nation’s wartime military leaders, the Court rejected his challenge and affirmed his conviction.¹⁸⁸

182. See Kirstin S. Dodge, *Countenancing Corruption: A Civic Republican Case Against Judicial Deference to the Military*, 5 YALE J.L. & FEMINISM 1, 4–9 (1992).

183. See John Nelson Ohlweiler, *The Principle of Deference: Facial Constitutional Challenges to Military Regulations*, 10 J.L. & POL. 147, 152–55 (1993) (categorizing the Court’s military deference).

184. See Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1087 (2008) (“As with administrative agencies, courts regularly defer to the military not only on legal authority grounds, but also on the grounds that the military possesses greater expertise than the courts do on questions relating to the armed forces.”).

185. See Dodge, *supra* note 182, at 13 (criticizing judicial deference toward the relocation and internment of Japanese-Americans during World War II).

186. *Korematsu v. United States*, 323 U.S. 214, 215–17 (1944).

187. *Id.* at 221–23.

188. *Id.* at 222–23. The Court reasoned:

To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. . . . [Korematsu] was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion

This era included numerous other cases in which the Court demonstrated its willingness to infringe upon the rights typically enjoyed by its civilian citizens.¹⁸⁹ During the ensuing decades of the 1950s and 1960s, the Court became increasingly less deferential to military matters, and many of the Justices expressed more skepticism toward military regulations.¹⁹⁰

2. *The Burger Court.* The Burger Court during the 1970s renewed the Court's deference toward military decisions and attempted to balance the needs of military society and discipline with fundamental civil liberties.¹⁹¹ In *Gilligan v. Morgan*, the Court considered a request for injunctive relief by Kent State University students against the Governor of Ohio for his use of Ohio National Guard troops.¹⁹² The Court dismissed the case on the basis that there was no justiciable controversy, construing the case as an attempt to marshal judicial power to regulate the activities of the National Guard and to intrude upon the powers of the political branches.¹⁹³ In considering the task of judicial oversight on the military, the Court noted:

Trained professionals, subject to the day-to-day control of the responsible civilian authorities, necessarily must make comparative judgments on the merits as to evolving methods of training, equipping, and controlling military forces with respect to their duties under the Constitution. It would be inappropriate for a district judge to undertake this responsibility in the unlikely event that he possessed requisite technical competence to do so.¹⁹⁴

The Court determined that control of the military rested with the political branches of government who are subject to the electoral process.¹⁹⁵

of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this.

Id. at 223.

189. See, e.g., O'Connor, *supra* note 181, at 186–92; see also *Hirabayashi v. United States*, 320 U.S. 81, 83, 104 (1943) (rejecting a wartime challenge to curfews imposed on Japanese-Americans).

190. See O'Connor, *supra* note 181, at 207–10, 214.

191. *Id.* at 215.

192. *Gilligan v. Morgan*, 413 U.S. 1, 3 (1973).

193. *Id.* at 5–6, 8–12.

194. *Id.* at 8.

195. *Id.* at 10.

[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the [political] [b]ranches.¹⁹⁶

The Court reserved for judicial review any violations of law.¹⁹⁷

Throughout the remainder of the 1970s and 1980s, the Court considered cases involving the intersection of fundamental civil liberties such as freedom of speech, freedom of religious expression, and equal protection, with the harsh and demanding realities of military life, where some freedoms give way to the needs of military discipline and uniformity.¹⁹⁸ In *Greer v. Spock*, the Burger Court considered a request for injunctive relief from citizens who complained that they were not allowed to distribute campaign literature or give speeches on the Fort Dix military reservation in New Jersey.¹⁹⁹ In rejecting the contention that the base restrictions violated the First and Fifth Amendment rights of the respondents, the Court held they had “no generalized constitutional right to make political speeches or distribute leaflets” at Fort Dix.²⁰⁰

The Court reviewed a challenge in the early 1980s alleging that Congress’s choice to exclude women from the registration requirement of the Military Selective Service Act violated the Due Process Clause of the Fifth Amendment.²⁰¹ The *Rostker* Court noted that although it customarily gave deference to congressional decisions, when considering “Congress’ authority over national defense and military affairs, . . . perhaps in no other area has the Court accorded Congress greater deference.”²⁰² Emphasizing that the primary task of supervising the armed forces in its ultimate mission of fighting wars falls to the Congress and the President, the Court concluded that Congress acted within its constitutional authority in excluding women from Selective Service registration.²⁰³ Commentators argue that “*Rostker* stands for the

196. *Id.*

197. *Id.* at 11–12.

198. See O’Connor, *supra* note 181, at 243–48, 264–71 (reviewing numerous landmark cases in the Court’s modern military deference doctrine from the mid-1970s through the 1980s and 1990s).

199. *Greer v. Spock*, 424 U.S. 828, 830–34 (1976).

200. *Id.* at 838–39. The Court noted the “special constitutional function of the military in our national life, a function both explicit and indispensable,” emphasizing the military’s primary duty is fighting or preparing to fight wars. *Id.* at 837–38.

201. *Rostker v. Goldberg*, 453 U.S. 57, 59 (1981).

202. *Id.* at 64–65.

203. *Id.* at 70–71, 82–83.

proposition that the military deference doctrine should apply to any legislation involving congressional judgments as to the needs of the military and national defense.”²⁰⁴

The Burger Court further extended the military deference doctrine in *Goldman v. Weinberger*, in which an Orthodox Jew challenged Air Force regulations that prevented him from wearing his yarmulke while on duty and in uniform.²⁰⁵ The Air Force regulations were held to be constitutional; the Court explained that “review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws . . . designed for civilian society” and that military society is separate from civilian society.²⁰⁶ The Rehnquist Court continued the military deference doctrine, although the 1990s were remarkable for a paucity of cases invoking the doctrine.²⁰⁷

3. *The Roberts Court.* Prior to the *Winter* decision, observers predicted that the Roberts Court was likely to continue this trend of invoking the military deference doctrine.²⁰⁸ In considering a First Amendment challenge to the Solomon Amendment, which withdrew federal funding from any institution of higher education that denied military recruiters equal access to recruit students, the Chief Justice cited *Rostker* for the proposition that judicial deference reaches its high point when Congress legislates in its role of overseeing and maintaining the military.²⁰⁹ In fact, the *Winter* decision served as an extension of the military deference doctrine, providing great weight to the opinions and professional expertise of those in the

204. O'Connor, *supra* note 181, at 266.

205. *Goldman v. Weinberger*, 475 U.S. 503, 505–06 (1986).

206. *Id.* at 506–07, 509–10.

207. See O'Connor, *supra* note 181, at 273–75, 283–84, 289–90 (explaining the continued military deference doctrine, marked by a low point in the 1990s until revived in *Weiss v. United States*, 510 U.S. 163 (1994), where military deference was invoked to define the contours of the Court's due process analysis). The Court also continued to exclaim its reluctance to “intrude upon the authority of the Executive in military and national security affairs.” *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988).

208. See John F. O'Connor, *Statistics and the Military Deference Doctrine: A Response to Professor Lichtman*, 66 MD. L. REV. 668, 703–05 (2007) (examining the composition of the Roberts Court and predicting a continuation of the military deference doctrine).

209. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 58 (2006). The remainder of the Court joined in the Chief Justice's opinion with the exception of Justice Alito, who was not present. *Id.* at 50. However, one commentator hypothesized that Justice Alito also shared an affinity for the military deference doctrine, drawing upon his testimony before the Senate during his confirmation hearings, in which he described his participation in the Reserve Officer Training Corps (ROTC) at Princeton and his dissatisfaction with the school's decision to abolish the ROTC program. O'Connor, *supra* note 208, at 705.

Navy.²¹⁰ In his majority opinion, the Chief Justice explained that the Court “give[s] great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.”²¹¹ Noting that the record contained “declarations from some of the Navy’s most senior officers,” the Chief Justice explained that the Court “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.”²¹² Chief Justice Roberts provided the traditional explanation that deference to the military and its interests does “not always trump other considerations,” but “[i]n this case . . . the proper determination of where the public interest lies does not strike us as a close question.”²¹³

C. The Analysis of Harms by the Ninth Circuit

1. Historical Evidence of Active Sonar Harming Marine Mammals

a. Overview of Effects of Active Sonar on Marine Mammals. The Navy’s EA recognized that “[s]ound exposure may affect multiple biological traits of a marine animal.”²¹⁴ Depending upon several factors, the effects of MFA sonar on marine mammals may include tissue damage, permanent or temporary hearing loss, a form of decompression sickness (although the Navy disputes this mechanism), or behavioral disruptions, such as alterations in how marine mammals feed, dive, and behave socially.²¹⁵ Beaked whales are especially sensitive to MFA sonar, and exposure to MFA sonar may lead to strandings.²¹⁶

b. Historical Injuries and Strandings. Many incidents of marine mammals strandings have been documented as coinciding with naval exercises (both U.S. and foreign) that

210. See *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 377–81 (2008) (explaining the role of deference to military judgments in evaluation of the case).

211. *Id.* at 377 (quoting *Goldman*, 475 U.S. at 507).

212. *Id.*

213. *Id.* at 378.

214. 1 Joint Appendix, *supra* note 70, at 157.

215. *Natural Res. Def. Council, Inc. v. Winter*, 518 F.3d 658, 665 (9th Cir.), *rev’d and vacated*, 129 S. Ct. 365 (2008).

216. *Id.* at 666–67. One study postulated that exposure to MFA sonar may cause strandings of beaked whales because the whales may navigate toward shallower waters to escape the noise and may become stranded if unable to find their way back to deeper waters, and perhaps some of their behavioral responses to sonar may cause tissue damage that in turn causes stranding. *Id.*

utilized some form of active sonar.²¹⁷ Perhaps the best known incident involving U.S. naval forces was the mass stranding in the Bahamas in March 2000.²¹⁸ The Bahamas incident included the death of five Cuvier's beaked whales and one Blainville's beaked whale.²¹⁹ A study of several samples by the Woods Hole Oceanographic Institution concluded that the beaked whales suffered hemorrhages in the inner ears and cranium.²²⁰ The study concluded that the trauma may have contributed to hearing loss, but it "was not immediately lethal."²²¹ Despite the clear implication that active sonar affects marine mammals, MFA sonar is not the only cause of marine mammal strandings.²²² In fact, beaked whale mass strandings occurred long before the development of MFA active sonar.²²³ Based on historical records, beaked whale mass strandings occurred forty-nine times between 1838 and 1999.²²⁴ The largest mass stranding on record took place in New Zealand in the 1870s, involving the stranding of twenty-eight Gray's beaked whales.²²⁵ The effects of sonar on marine mammals require investigation and are not fully understood.²²⁶

2. Evidence of Harm to Marine Mammals in Southern California

a. *The Navy's Environmental Assessment.* The only estimate of harm to marine mammals in the SOCAL OPAREAS

217. See generally BUCK & CALVERT, *supra* note 67, at 3–7, 9, 11.

218. See *id.* at 4 (noting the mass stranding correlating with tactical use of MFA sonar); DONALD L. EVANS, U.S. DEPT. OF COMMERCE & GORDON R. ENGLISH, SEC'Y OF NAVY, JOINT INTERIM REPORT: BAHAMAS MARINE MAMMAL STRANDING EVENT OF 15–16 MARCH 2000, at 2–3, 22, available at http://www.nmfs.noaa.gov/pr/pdfs/health/stranding_bahamas2000.pdf (providing detailed findings of the marine mammal stranding in the Bahamas in March of 2000); DARLENE R. KETTEN, WOODS HOLE OCEANOGRAPHIC INST., BEAKED WHALE NECROPSY FINDINGS FOR STRANDINGS IN THE BAHAMAS, PUERTO RICO, AND MADEIRA, 1999–2002, at 7 (2005), available at <https://darchive.mblwhoilibrary.org/bitstream/1912/287/1/WHOI-2005-09.pdf> (providing detailed findings of incidents in Puerto Rico, the Bahamas, and Madeira).

219. BUCK & CALVERT, *supra* note 67, at 4.

220. KETTEN, *supra* note 218, at 11.

221. *Id.* at 11.

222. See U.S. NAVY, FINAL ATLANTIC FLEET ACTIVE SONAR TRAINING ENVIRONMENTAL IMPACT STATEMENT/OVERSEAS ENVIRONMENTAL IMPACT STATEMENT app. E, at E-27 (2008), available at <http://afasteis.gcsaic.com/docs/FinalOEIS/Appendix%20E,%20Cetacean%20Stranding%20Report.pdf> ("Marine mammal strandings have been a historic and ongoing occurrence attributed to a variety of causes.").

223. *Id.* at E-14.

224. *Id.*

225. *Id.*

226. See 1 Joint Appendix, *supra* note 70, at 155 (admitting that data on effects of underwater sound on marine mammals is incomplete and requires continued investigation).

comes from the Navy's analysis of the subject.²²⁷ The Navy's estimate determined that there would be approximately 80,000 Level B harassments in which marine mammals would suffer either temporary hearing loss or minor behavioral modifications, and fewer than 300 Level A harassments.²²⁸ Out of the Level A harassments, most resulted from a conservative approach that treated all Level B harassments of beaked whales as Level A.²²⁹ The only predicted permanent injury to marine mammals was permanent hearing loss in a handful of common dolphins, species that were neither endangered nor threatened.²³⁰

b. The Navy's Historical Evidence in the SOCAL OPAREAS. The Navy explained there had been no known strandings or documented injuries to marine mammals through over forty years of similar exercises in the SOCAL OPAREAS.²³¹ Although the output from Navy active sonar systems and the scope of the exercises largely remained the same, and the number of training hours decreased since 1992,²³² the Ninth Circuit found there was a likelihood of harm to marine mammals.²³³ The Ninth Circuit also pointed to the Navy's EA as proof of harm despite its admission that the "NRDC has presented no evidence that marine mammals have actually been harmed by the Navy's use of MFA sonar in the Southern California Operating Area over the past forty years."²³⁴ The circuit court then qualified that statement, explaining that "because harm to marine mammals is difficult to detect," some

227. See *Natural Res. Def. Council, Inc. v. Winter*, 518 F.3d 658, 669–71 (9th Cir.), *rev'd and vacated*, 129 S. Ct. 365 (2008) (conducting an inventory of the evidence of specific harm in SOCAL OPAREAS).

228. See *supra* Part II.B.1.c (detailing the Navy's estimates of harm and the applied methodologies).

229. *Supra* Part II.B.1.c.

230. *Supra* Part II.B.1.c.

231. 1 Joint Appendix, *supra* note 70, at 231–32; Brief for Petitioners, *supra* note 1, at 10–11.

232. Brief for Petitioners, *supra* note 1, at 11.

233. *Natural Res. Def. Council, Inc. v. Winter*, 518 F.3d 658, 669–72 (9th Cir.), *rev'd and vacated*, 129 S. Ct. 365 (2008). The evidence that formed the basis of the lower court findings of harm included general physiological effects of MFA sonar on marine mammals. See, e.g., *id.* at 665. The court cited incidents in other regions of the world that were linked to coinciding MFA sonar usage. *Id.* at 666–67. These incidents included the "stranding of twelve beaked whales in Greece in 1996, a stranding of seventeen marine mammals (including fourteen beaked whales) in the Bahamas in 2000, and a stranding of fourteen beaked whales in the Canary Islands in 2002," as well as "a stranding of three beaked whales in the Madeira Islands in 2000." *Id.* at 666. The circuit court also noted a 2004 incident in which 150 to 200 melon-head whales were found in a Hawaiian bay after nearby MFA sonar usage off Hawaii's coast. *Id.* at 667.

234. *Id.* at 669.

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marine mammals may have unknowingly been harmed by MFA sonar use in the SOCAL OPAREAS.²³⁵ Given consistent sonar operation over forty years, it is reasonable to assume that the EA prediction of over 80,000 annual harassments would have been equally as applicable then as it is now.²³⁶ If the Navy's practices harm marine mammals, it would be expected that some indications of harm would emerge over the course of four decades.

c. The NRDC and Its Members. The NRDC explained that its members who would be irreparably harmed included "a docent who takes weekly whale watching trips on the SOCAL range[,] sailors[,] and others who regularly swim with and view the very populations of animals that would be impacted by the SOCAL exercises." They also included "one of the world's leading undersea photographers, who regularly dives, works, and recreates in these waters," not to mention another member who "is a volunteer marine mammal rescuer who has an aesthetic and vocational interest in reducing the number of injured marine mammals she witnesses."²³⁷ The NRDC points out that "the SOCAL exercises would take as much as 25 percent of the eastern Pacific population of endangered blue whales."²³⁸ Extrapolating the NRDC's 25% biennial reduction of these endangered whales over a forty year period, and assuming that each take represented a death, the current stock would represent 0.3% of the total stock from forty years ago.²³⁹ Surely the NRDC's members would have noticed that significant a reduction during their many sojourns with nature.

d. The Supreme Court on Harm in the SOCAL OPAREAS. The Supreme Court took the Navy's forty-year history in the SOCAL OPAREAS into consideration.²⁴⁰ The Court explained that in contrast to typical NEPA situations where agencies lack detailed information on environmental harms absent drafting an EIS, "the plaintiffs are seeking to enjoin—or substantially restrict—training exercises that have been taking place in SOCAL for the last 40 years."²⁴¹ Given the lack of empirical

235. *Id.* at 670.

236. *See* 1 Joint Appendix, *supra* note 70, at 231–32; Brief for Petitioners, *supra* note 1, at 9–10.

237. Brief for Respondent Natural Resources Defense Council, Inc. at 47–48, *Winter*, 129 S. Ct. 365 (No. 07-1239) [hereinafter Brief for Respondent NRDC].

238. *Id.* at 42.

239. This estimate represents a rough calculation by the Author applying the NRDC's statistical assertions.

240. *See Winter*, 129 S. Ct. at 376 (considering the purpose of NEPA, the normal dearth of detailed information, and the Navy's forty years of empirical data).

241. *Id.* The Court contrasts this forty-year history with the ultimate legal claim that

evidence of injuries to marine mammals, a reasonable observer would have concluded that the NRDC failed to establish a likelihood of irreparable harm.

3. *The Submarine Threat and the Navy's Ability to Conduct Antisubmarine Warfare.* The circuit court gave little weight to the threat foreign submarines pose or the critical importance of the Navy's ability to conduct effective antisubmarine warfare via MFA sonar.²⁴² Although the Ninth Circuit acknowledged the Navy's assertion that ASW is the top priority in the Pacific Fleet, it dismissed as overly "speculative" the Navy's protests that the additional mitigation measures of a 2,200 yard shutdown zone and a six decibel reduction in power during significant surface ducting create unacceptable risks of precluding effective training and certification.²⁴³

a. *The Worldwide Submarine Threat.* A detailed discussion of the submarine threat in the Pacific adds credence to the Navy's position. As of 2008, there were almost five hundred submarines in the world.²⁴⁴ One hundred thirty-five were located in Asia and forty-five were in the Middle East.²⁴⁵ Many of those in the Pacific Ocean are near chokepoints that could be used to cut off maritime trade.²⁴⁶

China is rapidly emerging as a submarine power in the Pacific, undertaking building programs to construct indigenous submarines while also importing diesel submarines from Russia.²⁴⁷ Other undersea threats include North Korea and Iran.²⁴⁸ Rather than presenting a passive threat to national

the Navy must prepare an EIS:

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. This is particularly true in light of the fact that the training has been going on for 40 years with no documented episode of harm to a marine mammal.

Id. at 381.

242. See *Natural Res. Def. Council, Inc. v. Winter*, 518 F.3d 658, 664, 676–77, 698–703 (9th Cir.), *rev'd and vacated*, 129 S. Ct. 365 (2008).

243. *Id.* at 664, 698–99.

244. Vego, *supra* note 60, at 25.

245. *Id.*

246. *Id.*

247. See Gabriel Collins et al., *Chinese Evaluations of the U.S. Navy Submarine Force*, NAVAL WAR C. REV., Winter 2008, at 68, 68 (explaining the emergence of China as a submarine power and evaluating an emerging rivalry between the U.S. and China).

248. See John R. Benedict, *The Unraveling and Revitalization of U.S. Navy Antisubmarine Warfare*, NAVAL WAR C. REV., Spring 2005, at 93, 99–100 (citing senior Naval officers discussing the global threats posed by proliferation of quiet diesel submarines and evaluating U.S. ASW capabilities as insufficient to meet the mounting

security, these nations have actively challenged U.S. naval forces, particularly China.²⁴⁹ In October 2006, a Chinese diesel submarine surfaced within torpedo range of the USS Kitty Hawk carrier battle group near Okinawa.²⁵⁰ The submarine had not been detected by U.S. forces prior to surfacing within the strike group's waters.²⁵¹ Although the Chinese insisted that it was an innocent encounter, defense analysts explained that the Chinese submarine was likely "practicing anti-aircraft carrier operations."²⁵² Chinese submarines, capable of carrying torpedoes and anti-ship cruise missiles, are a legitimate threat to carrier strike groups, which would likely become the first line of U.S. response in a military standoff between China and Taiwan.²⁵³ The role of Chinese submarines and the threat they pose to U.S. naval forces operating in the Western Pacific became increasingly visible in November 2007 amidst reports that a Chinese submarine and destroyer stalked a U.S. carrier strike group in the Taiwan Strait for approximately twenty-eight hours.²⁵⁴

b. *The Navy and Its Ability to Conduct ASW.* At a time when the threat from quiet diesel submarines is steadily growing, the U.S. Navy's ability to conduct effective ASW is in turmoil.²⁵⁵ One high-ranking Navy official recently classified U.S. ASW capabilities as "poor or weak" while testifying before Congress.²⁵⁶ Effectively training human operators to combat diesel submarines is an "art and not a science"; it can take years,

threat); see also Otto Kreisher, *As Underwater Threat Re-emerges, Navy Renews Emphasis on ASW*, SEA POWER, Oct. 2004, at 15, 15 (explaining that North Korea has at least twenty-six diesel submarines and Iran has three Russian-made submarines and that the threat is heightened because these submarines operate in shallow, noisy areas where they are difficult to detect).

249. See generally David Lague, *Chinese Submarine Fleet Is Growing, Analysts Say*, N.Y. TIMES, Feb. 25, 2008, at A10 (discussing the Chinese submarine threat, including an incident in 2006 that experts view as an aggressive signal that China will challenge the U.S. Navy in the waters around Taiwan).

250. Andrew S. Erickson & Lyle J. Goldstein, *China's Future Nuclear Submarine Force: Insights from Chinese Writings*, NAVAL WAR C. REV., Winter 2007, at 55, 55; Lague, *supra* note 249.

251. Bill Gertz, *U.S. Presses China on Armed Submarine Encounter*, WASH. TIMES, Jan. 11, 2007, at A3.

252. *Id.*

253. Lague, *supra* note 249.

254. *Report: Chinese Ships Confronted Kitty Hawk*, NAVYTIMES.COM, Jan. 17, 2008 http://www.navytimes.com/news/2008/01/kyo_china_080115/. The incident is shrouded in secrecy, with the Navy denying news reports of the standoff. Patricia Kime, *Environmental Stewards*, SEA POWER, July 2008, at 36, 38–39.

255. See Benedict, *supra* note 248, at 99–100 (detailing the assessments of senior Naval officers on the ability to conduct ASW and the importance of being able to do so).

256. *Id.*

and those skills are highly perishable.²⁵⁷ The global arms market makes the submarine threat even more important.²⁵⁸ The worldwide proliferation of quiet diesel submarines not only threatens U.S. strategic and tactical positions, but also imperils the lives of U.S. sailors.²⁵⁹ To put the potential loss of life in perspective, the loss of one surface warship would result in U.S. deaths comparable to those of the Beirut Marine barracks bombing of 1983 and the loss of an entire aircraft carrier would lead to loss of life on the order of magnitude of the World Trade Center attacks that took place on September 11, 2001.²⁶⁰ These scenarios do not include the threat that mini-submarines pose to port security and homeland security.²⁶¹ Given the proliferation of diesel submarines and the growing number of countries hostile to the United States, the importance of effective ASW bears evaluation beyond the Ninth Circuit's mere lip service.

4. *The Ninth Circuit Erred in Balancing the Harms and Failing to Apply the Supreme Court's Military Deference Doctrine.* The Ninth Circuit failed to balance the harms adequately. Despite forty years of empirical evidence indicating that the risk of harm to marine mammals in the SOCAL OPAREAS was low, and despite admitting that the NRDC presented no evidence to the contrary, the circuit court found that the balance of the equities favored the NRDC rather than the Navy, the nation, and its national security.²⁶² In discussing the relative burdens of the parties, the Ninth Circuit insisted that the NRDC "had only the burden of demonstrating the 'possibility of irreparable injury'" rather than showing that the irreparable injury would occur.²⁶³ The circuit's standard varied from that of the Supreme Court, which requires that the plaintiff show "he is likely to suffer irreparable harm."²⁶⁴ The Court requires plaintiffs to provide

257. Vego, *supra* note 60, at 39. Court-ordered restrictions hamper the already time-consuming development of competent sonar operators. Kime, *supra* note 254, at 39.

258. See Benedict, *supra* note 248, at 101 (explaining that the post-Cold War global marketplace makes submarines readily available to any nation or group with adequate financial resources).

259. See *id.* at 102–03.

260. *Id.*

261. See *id.* at 103 (explaining the real threat of smaller submersibles). Reportedly, Osama Bin Laden tried to buy a small submarine prior to being thwarted by the FBI. *Id.*

262. See *supra* Parts III.C.2–3 (reviewing the proof of harm to marine mammals in the SOCAL OPAREAS and detailing the threat posed by an inability to conduct effective ASW).

263. Natural Res. Def. Council, Inc. v. Winter, 518 F.3d 658, 697 (9th Cir.) (quoting Freecycle Network v. Oey, 505 F.3d 898, 902 (9th Cir. 2007)), *rev'd and vacated*, 129 S. Ct. 365 (2008).

264. Winter, 129 S. Ct. at 374. The Supreme Court acknowledged that the Ninth Circuit's citation of the wrong standard was not necessarily fatal because the district

“substantial proof,”²⁶⁵ explaining that a preliminary injunction should not be granted “unless the movant, *by a clear showing*, carries the burden of persuasion.”²⁶⁶ Although the NRDC did present proof that MFA sonar was linked to marine mammal injuries in other locations, it did not present proof that the same effects were observed in the SOCAL OPAREAS.²⁶⁷ In fact, the Navy distinguished the SOCAL OPAREAS from other areas with documented marine mammal strandings, such as the Bahamas in 2000, based on dramatic differences in bottom topography, the presence of a strong surface duct, and the positioning of multiple surface units.²⁶⁸ Nonetheless, the Ninth Circuit seemingly shifted the burden of persuasion to the Navy.²⁶⁹

Countering this paucity of evidence, the Navy provided affidavits and declarations of senior Naval officers explaining the potential harm to military readiness that would occur in conjunction with the two contested mitigation measures.²⁷⁰ However, the Ninth Circuit dismissed the Navy’s predictions, calling them “speculative” because the Navy had never before used them.²⁷¹ Thus, while allowing the NRDC to speculate on harm to marine mammals in the face of forty years of opposing evidence, the court would not allow the Navy to rely on years of expertise to predict the effects on its training.²⁷²

a. Failure to Defer to Professional Military Judgments. Fundamentally, the Ninth Circuit failed to apply adequately the Supreme Court’s well-developed military deference doctrine.²⁷³ The Court’s historical deference to the military implies that the

court had concluded that there was a “near certainty” of harm. *Id.* at 376. Nevertheless, the Court faulted both lower courts for failing to re-analyze the potential for harm given the Navy’s acquiescence to four of the six imposed mitigation measures. *Id.*

265. See *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam).

266. *Id.* (quoting 11A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2948 (2d ed. 1995)).

267. *Winter*, 518 F.3d at 669.

268. *Id.* at 693.

269. See *id.* at 669–70 (“While NRDC has presented no evidence that marine mammals have actually been harmed by the Navy’s use of MFA sonar in the Southern California Operating Area over the past forty years, the record indicates that because harm to marine mammals is difficult to detect, except in cases of stranding, marine mammals may nonetheless be harmed by the Navy’s use of MFA sonar in the Southern California Operating Area.” (footnote omitted)).

270. *Id.* at 676–77.

271. *Id.* at 698–99.

272. See *supra* Part III.C.2 (discussing the evidence of environmental harm presented by the Navy and the NRDC).

273. See *supra* Parts II.B.3, III.B (describing the Ninth Circuit’s decisions and explaining the military deference doctrine).

military should be given deference when supplying professional military judgments based upon years of military expertise.²⁷⁴ The Supreme Court chided the lower courts for failing to weigh properly the extensive testimony by experienced Naval officers.²⁷⁵ Seemingly, the circuit court ignored the Court's warning in *Gilligan* that federal courts should not intrude upon military judgments on training and maintaining military forces.²⁷⁶ The Ninth Circuit should have given great weight to professional estimates that the injunction threatened the effectiveness of ASW training.

b. Failure to Defer to Congressional and Executive Decisions on the Military. Beyond simply giving weight to professional military judgments, the military deference doctrine also gives great weight to congressional and executive actions pertaining to the military.²⁷⁷ Drawing upon *Rostker*, the Ninth Circuit should have deferred to Congress's judgments on the relative importance of military operations compared to potential harm to marine mammals.²⁷⁸ By creating a military exemption to the MMPA in the wake of *NRDC v. Evans*, Congress provided its judgment on the importance of effective naval training.²⁷⁹ Although Congress values protection for marine mammals, it "also has determined that national security can trump marine mammal protection."²⁸⁰ In the conference report accompanying the National Defense Authorization Act for Fiscal Year 2004,²⁸¹

274. See *supra* Part III.B (documenting the history of the military deference doctrine); see also Brief for Petitioners, *supra* note 1, at 50–51 ("The exercise of professional military judgment, particularly in areas involving predictive assessments of risk, is built upon decades of real-world military experience, and courts simply lack the independent knowledge and expertise needed to evaluate complex military judgments.").

275. See *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 378 (2008) ("The lower courts failed properly to defer to senior Navy officers' specific, predictive judgments about how the preliminary injunction would reduce the effectiveness of the Navy's SOCAL training exercises."). The Court's majority opinion demonstrates, at a minimum, that the military deference doctrine will thrive during the Roberts era. See *supra* Part III.B.3 (tracing the application of the doctrine during the Roberts era and predicting its continued use).

276. See *supra* notes 192–197 and accompanying text (discussing *Gilligan*).

277. See *supra* Part II.B (detailing the military defense doctrine).

278. See *supra* notes 201–204, 209 and accompanying text (proclaiming the significance of *Rostker* in the Court's deference to Congress in its control over the military).

279. See Brief for Petitioners, *supra* note 1, at 34 (explaining that although Congress created protection for marine mammals, it also created a military exemption for activities necessary for national defense).

280. *Id.* at 35.

281. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392 (2003) (codified in scattered titles of U.S.C.).

Congress detailed the changes to the MMPA, explaining that they came about to address deficiencies highlighted in *Evans*.²⁸² The conference report explains, “Such changes would ensure a credible and flexible regulatory process that properly balances the equities associated with military readiness and maritime species protection.”²⁸³ Addressing the creation of military-specific definitions of harassment, “decisions regarding mitigation and monitoring would take into account safety, practicality of implementation, and impact on the effectiveness of a military readiness activity.”²⁸⁴ Clearly, Congress weighed the equities between environmental conservation and military readiness, vested “responsibility for balancing marine mammal protection against military preparedness squarely with the political Branches,” and “provide[d] mechanisms for Congress’s continuing oversight of the Secretary’s exemption authority.”²⁸⁵ As the *Rostker* Court explained, “perhaps in no other area has the Court accorded Congress greater deference” than “in the context of Congress’ authority over national defense and military affairs.”²⁸⁶ The Ninth Circuit should have weighed the right to an injunction against the public interest in national security, which was overtly favored by Congress and the President, representing the branches on which that burden falls.

c. The Absence of a Legally Cognizable Right. In light of the invocation of the MMPA exemption for military readiness activities, it is arguable that any harm to marine mammals while operating under that exemption is not a legal injury.²⁸⁷ According to Black’s Law Dictionary, an injury is “[t]he violation of another’s legal right, for which the law provides a remedy.”²⁸⁸ Although perhaps rudimentary, this basic definition of injury (or, by extension, harm) is consistent with the purpose of a preliminary injunction: to protect legal rights that may be

282. H.R. REP. NO. 108-354, at 668–69 (2003), reprinted in 2003 U.S.C.C.A.N. 1407, 1446–47.

283. *Id.* at 669.

284. *Id.*

285. Brief for Petitioners, *supra* note 1, at 35–36.

286. *Rostker v. Goldberg*, 453 U.S. 57, 64–65 (1981). The argument applies equally as well to deference toward the President, given his grant of the CZMA exemption. *See Dep’t of Navy v. Egan*, 484 U.S. 518, 530 (1988) (“Thus, unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.”); *supra* Part II.A.1 (describing the presidential exemption under the CZMA).

287. *See generally supra* Part II.A.2 (describing the MMPA national defense exemption).

288. BLACK’S LAW DICTIONARY 801 (8th ed. 2004).

irremediably injured in the absence of an injunction.²⁸⁹ In the absence of the military exemption, Congress has created legal property rights in regard to the protection of marine mammals.²⁹⁰ Nevertheless, when the exemption is in effect, Congress has subordinated those rights and removed protections from marine mammals.²⁹¹ Because the Secretary of Defense exempted the planned SOCAL exercises, the protection the marine mammals enjoyed was removed as it pertained to MFA sonar.²⁹² The NRDC originally claimed harm not from the allegedly uninformed decisionmaking of the Navy, but rather from injuries to marine mammals from MFA sonar.²⁹³ The district court and the Ninth Circuit, by enjoining the Navy and affirming the injunction, respectively, sought to prevent harm to those marine mammals.²⁹⁴ Yet, if the law did not protect those marine mammals when the exemption was in place, it is difficult to see how the courts were protecting legally cognizable rights.²⁹⁵ Based on the history and purpose of the exemption and the fundamental purpose of the preliminary injunction, the courts were not protecting legal rights, but rather delving into the domain of the Legislative Branch to make their own policy judgments.²⁹⁶

D. *Standing, Procedural Harms, Zone of Interests, and NEPA*

1. *The Basic Standing Doctrine and NEPA.* Standing is a long-lived doctrine that seeks to ensure that a particular dispute

289. See *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (“An injunction should issue only where the intervention of a court of equity ‘is essential in order effectually to protect property rights against injuries otherwise irremediable.’” (quoting *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919))).

290. See *supra* Part II.A.2 (explaining the protections granted under the MMPA).

291. See *supra* Part II.A.2 (detailing the military exemption process).

292. See *supra* note 97 and accompany text.

293. See *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 370 (2008) (discussing the NRDC’s claims that “the Navy’s sonar training program harmed marine mammals”); Parts II.B.1–2 (explaining at length the Navy’s environmental assessment and the procedural history of the NRDC’s action).

294. See *supra* Parts II.B.2–3 (relating the district court’s grant of the preliminary injunction, the Ninth Circuit’s affirmance, and the reasoning behind those decisions).

295. See Brief for Navy League of the United States as Amici Curiae Supporting Petitioners at 31–34, *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008) (No. 07-1239) (arguing that the MMPA exemption made NEPA inapplicable and allowed the Navy to take marine mammals).

296. See Brief for Petitioners, *supra* note 1, at 36–37 (“Congress’s enactment of Section 1371(f) [of the MMPA] conclusively rejects such judicial balancing of interests where, as here, that section has been invoked to authorize military activity notwithstanding any potential harm to marine mammals.”); see also *id.* at 37 (“[T]he asserted substantive harms to marine mammals on which the district court sought to justify a preliminary injunction under NEPA are precisely those that Congress has determined must give way to considered judgments about national security.”).

meets the Constitution's Article III case or controversy requirement.²⁹⁷ Fundamentally, standing requires that "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."²⁹⁸ The "injury in fact" must be "(a) concrete and particularized and (b) 'actual or imminent, not conjectural or hypothetical.'"²⁹⁹ The Court desires to avoid converting "the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'"³⁰⁰ To that end, Justice Scalia posits that the requirement of a concrete injury in fact establishes standing as an element of the separation of powers.³⁰¹

With respect to the fundamental standing requirement for a suit under NEPA, a purely procedural statute, plaintiffs may not allege a purely procedural injury.³⁰² Rather, a plaintiff can enforce his procedural rights only if the procedures threaten a concrete interest.³⁰³ Nevertheless, standing for procedural rights may be established with an injury in fact that is somewhat less than concrete.³⁰⁴

297. See U.S. CONST. art. III, § 2; *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (explaining the judicial doctrine of standing and its interplay with constitutional requirements).

298. *Allen v. Wright*, 468 U.S. 737, 751 (1984) (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)).

299. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)) (citations omitted).

300. *Valley Forge Christian Coll.*, 454 U.S. at 473 (quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687 (1973)).

301. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 895–97 (1983) (explaining the importance of concrete injury as the "indispensable prerequisite of standing," forcing the courts to address minority concerns rather than majority concerns). Justice Scalia asserted that the role of the judiciary lies in representing the minority, not majority, interests, explaining:

Where the courts, in the supposed interest of all the people, do enforce upon the executive branch adherence to legislative policies that the political process itself would not enforce, they are likely (despite the best of intentions) to be enforcing the political prejudices of their own class. . . . It may well be, of course, that the judges know what is good for the people better than the people themselves; or that democracy simply does not permit the *genuine* desires of the people to be given effect; but those are not the premises under which our system operates.

Id. at 896–97.

302. *Lujan*, 504 U.S. at 573 n.8; *Nat'l Parks & Conservation Ass'n v. U.S. Dep't of Transp.*, 222 F.3d 677, 687 (9th Cir. 2000).

303. *Lujan*, 504 U.S. at 573 n.8.

304. See *id.* at 572 n.7 ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.").

2. *The Questionable Standing of the NRDC.* The NRDC failed to establish standing on two grounds. First, the NRDC failed to establish an injury in fact by failing to show harm to the environment via the Navy's actions.³⁰⁵ Second, even if the NRDC proved injury to the environment from the Navy's actions, that injury did not emerge from a legally cognizable right due to the MMPA exemption.³⁰⁶ As a result, the NRDC was left only with a procedural injury (the Navy's decision to forego preparation of an EIS), and this injury was insufficient to establish standing.³⁰⁷

a. *Failure of the NRDC to Demonstrate Concrete Injury in Fact.* The NRDC failed to establish an injury to the environment from the Navy's actions.³⁰⁸ The Navy prepared a comprehensive EA on the SOCAL exercises and presented forty years of empirical data showing that there was no evidence of harm to marine mammals from the fairly consistent use of MFA sonar.³⁰⁹ Conversely, the NRDC presented no evidence to contradict the Navy's assertions.³¹⁰ Rather, the NRDC presented generalized assertions about the effects of MFA sonar on marine mammals in other portions of the world.³¹¹ Arguably, the NRDC failed to demonstrate concrete injury to the environment.

Even if the NRDC demonstrated harm to marine mammals from the Navy's actions in the SOCAL OPAREAS, the NRDC failed to establish harm to the interests of its members. The NRDC submitted affidavits and declarations claiming that its members enjoyed watching marine mammals on whale watching trips and swimming with animals.³¹² The Ninth Circuit and the NRDC predominantly discussed beaked whales, which are particularly susceptible to MFA sonar.³¹³ Yet the Ninth Circuit

305. See *supra* Part III.C.2 (explaining the lack of proof of injury in the SOCAL OPAREAS from the Navy's use of MFA sonar).

306. See *supra* Part III.C.4.c (noting that the MMPA exemption removes or subordinates legal property rights created by Congress to ensure protection of marine mammals).

307. See *supra* Part III.D.1 (recounting the concrete injury in fact requirement for standing and detailing how a purely procedural injury is insufficient to establish standing).

308. See *supra* Part III.C.2 (detailing the lack of NRDC proof of environmental harm).

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

310. *Natural Res. Def. Council, Inc. v. Winter*, 518 F.3d 658, 669–70 (9th Cir.), *rev'd and vacated*, 129 S. Ct. 365 (2008).

311. See *id.* at 666–67 (detailing physiological damage to marine mammals in other incidents in Greece, the Bahamas, the Canary Islands, and the Madeira Islands).

312. Brief for Respondent NRDC, *supra* note 237, at 47.

313. See *Winter*, 518 F.3d at 665–67 (recounting specific injuries to beaked whales in other regions).

repeatedly explained that beaked whales were rarely seen and were difficult to observe.³¹⁴ These whales are deep divers and spend approximately 80% of their time at these deep depths.³¹⁵ While the Ninth Circuit opined that these characteristics reduce the effectiveness of Navy mitigation measures and undermine the reliability of the Navy's forty years of empirical data, the court did not similarly apply the characteristics to the NRDC's claims of aesthetic injury.³¹⁶ An even-handed application of this information undermines the NRDC's claim of injury and assertion of standing.³¹⁷ If its members never saw the marine mammals and were not likely to see them, they lacked a concrete injury.³¹⁸

b. The NRDC Lacked Standing in Light of No Legally Cognizable Right. Furthermore, the NRDC failed to establish standing because the concrete injury they claimed, harm to marine mammals in the SOCAL OPAREAS, was exempted from the coverage of the MMPA and therefore, was not a legally cognizable interest.³¹⁹ Justice Scalia pointed out, "Standing requires . . . the allegation of some particularized injury to the

314. *Id.* at 670.

315. *Id.* Two species of beaked whales have been observed to dive for periods up to eighty-seven minutes. *Id.* at 694.

316. *See id.* at 669–70, 693–96.

317. *See* Transcript of Oral Argument at 55, *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008) (No. 07–1239) ("They [the NRDC] not only have to show irreparable injury to marine mammals, which they haven't; they have to show irreparable injury to themselves, and particularly as to beaked whales, which none of the declarants and none of their members have ever asserted they have seen."). The prospect that NRDC members have never seen the beaked whales and may never be able to see the beaked whales due to their elusive nature suggests some comparison with the plaintiffs in *Lujan*. In *Lujan*, two plaintiffs had traveled overseas (to Egypt and Sri Lanka) to see endangered species, although one was only able to view the habitat, and not the animals themselves. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992). Both alleged that they were harmed by the U.S. government providing money to foreign governments to develop projects near the sites of the endangered habitats. *Id.* Despite their claims that U.S. actions would harm those animals and thus injure their ability to see and enjoy those species, neither plaintiff had concrete plans to return, but rather amorphous intentions to do so in the future. *Id.* at 563–64. The Supreme Court rejected as insufficient the amorphous injuries of the plaintiffs. *Id.* at 564. Like the *Lujan* plaintiffs, the NRDC members have likely never seen the beaked whales and have not offered evidence demonstrating that they will be able to overcome the elusive nature of the animals to enjoy observing them in nature. Transcript of Oral Argument, *supra*, at 55. As such, their standing is on a similarly precarious footing. *Id.*

318. *See supra* Part III.D.1 (explaining the injury in fact requirement); *see also Lujan*, 504 U.S. at 564 (rejecting proof of injury when plaintiffs had no concrete plans to return to endangered habitats).

319. *See supra* Part III.C.4.b–c (noting that the MMPA exemption removes, or at a minimum, subordinates the legal property rights created by Congress to ensure protection of marine mammals in the SOCAL OPAREAS).

individual plaintiff. But legal injury is by definition no more than the violation of a legal right; and legal rights can be created by the legislature.³²⁰ By creating the MMPA national defense exemption, Congress created an avenue whereby the Secretary of Defense and Secretary of Commerce could either subordinate or remove the legal rights afforded to marine mammals.³²¹ The Secretary of Defense exempted the Navy's activities in the SOCAL OPAREAS for two years.³²² Thus, there was no legal right of protection for marine mammals from MFA sonar in the SOCAL OPAREAS, and the injury claimed by the NRDC was not a legal injury sufficient to convey standing.

IV. CONCLUSION

The Ninth Circuit refused to apply the Supreme Court's well-established policy of deference to uniquely military judgments, as well as to congressional and executive judgments pertaining to their constitutional roles in overseeing the armed forces.³²³ However, the Supreme Court's overruling of the Ninth Circuit and vacating of the preliminary injunction represent a renewal of the Court's military deference doctrine.³²⁴

In fact, *Winter v. NRDC* may even extend the doctrine. For perhaps the first time, the Court determined that federal judges cannot substitute their own assessments of military situations when the military offers professional military judgments on the subject.³²⁵ While many of the other cases in the development of the doctrine examined military judgments impinging upon constitutional rights or purporting to maintain military discipline, the *Winter* Court focused on properly weighing military judgments on purely military matters.³²⁶ The Court recognized that professional military judgments develop over the course of decades of service, and that judges cannot simply

320. Scalia, *supra* note 301, at 885.

321. See *supra* Part III.C.4 (explaining the MMPA exemption).

322. See *supra* notes 97–98 and accompanying text.

323. See *supra* Part III.C (critiquing the failure to give weight to professional military judgments).

324. See *supra* notes 207–213 and accompanying text (discussing the relatively small role the doctrine played during the Rehnquist era and the signals that the Roberts era would embrace the doctrine); *supra* notes 149–161 and accompanying text (highlighting the frequent application of the doctrine in the *Winter* majority opinion).

325. Compare *supra* Part III.B (explaining the historical role of the doctrine), with Part II.B.4.a (relating the Court's frequent application of the doctrine to give weight to the Navy's professional judgments).

326. See *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 377 (2008) (emphasizing the importance of deference to military judgments, recounting declarations of senior Naval officers, and accepting their conclusions).

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dismiss those opinions as speculative.³²⁷ While the history of environmental litigation challenging military actions will no doubt continue, the *Winter* opinion provides a guidepost to future courts to consider the policy judgments made by Congress and the President prioritizing national security over environmental protection.³²⁸ By no means discounting the importance of environmental preservation, the Court reinforced the role of the judiciary in respecting the judgments of the legislative and executive branches in their unique constitutional roles with respect to the military.³²⁹

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327. See generally *id.* (highlighting the experience of the testifying officers while admitting that the judiciary lacks experience with daily national security threats); see also Brief for Petitioners, *supra* note 1, at 50–51 (explaining the extensive time required to develop military experience and contrasting that with the judiciary’s lack of independent knowledge and expertise).

328. See generally *supra* Parts III.B–C (emphasizing the importance of deferring to Congress’s consideration of the relative value of national security and marine mammal protection).

329. See *Winter*, 129 S. Ct. at 377–78 (recognizing the seriousness of environmental concerns, noting that deploying an inadequately trained and certified force jeopardizes safety, and recalling that the Commander in Chief has adjudged training with active sonar to be “essential to national security”).