A Whale of a Tale: The Supreme Court Sets a New Trend Favoring National Security over Environmental Concerns. Winter v. NRDC

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Valuing one group’s interests over another is a fundamental decision that must be made in almost every case heard by a member of the judiciary. When formulating a decision, a judge must consider all interests, including the public at large. However, a judge must do so within the framework of the judicial system while also taking care to observe the history and past decisions of American courts. In *Winter v. NRDC*, environmental advocates argued that the value of protecting marine mammals was of the utmost importance and that the Navy should have considered the harmful biological effects that sonar training can have on animals, such as dolphins and beaked whales.² The Navy argued that even though marine mammals could potentially be injured by the use of sonar during submarine training exercises, a prepared military is required to meet the United States’ ongoing need for protection from foreign threats.³ This note examines the Supreme Court’s decision in *Winter v. NRDC* and how the Court reconciled the different interests of environmental advocates and the armed forces.

II. FACTS AND HOLDING

The Natural Resources Defense Council (hereinafter “NRDC”), the Plaintiff, argued that the Navy’s use of mid-frequency active (hereinafter “MFA”) sonar during anti-submarine warfare practice exercises in the Southern California (hereinafter “SOCAL”) operating area is harmful to the thirty-seven species of marine mammals that share the SOCAL waters with the Navy.⁴ The NRDC contended that MFA sonar can harm marine

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² *Id.* at 371.
³ *Id.* at 370-71.
⁴ *Id.* at 371.
A WHALE OF A TALE

life by causing "permanent hearing loss, decompression sickness, and major behavioral disruptions," including mass-strandings of marine mammals. The NRDC partially based its claim on the failure of the Navy to prepare an Environmental Impact Statement (hereinafter "EIS") as required by the National Environmental Policy Act (hereinafter "NEPA"). The NRDC argued that the harm caused to marine mammals in the waters of SOCAL far outweigh the Navy's use of MFA sonar.

The Navy, the Defendant, contended that anti-submarine warfare is the "Pacific Fleet's top war-fighting priority," and that the SOCAL waters are an ideal location to conduct integrated training exercises for anti-submarine warfare. Although the actions of the Navy could potentially violate the Marine Mammal Protection Act (hereinafter "MMPA"), the Secretary of Defense may exempt the armed forces from compliance with the MMPA if their activity "is necessary for national defense." Under the MMPA, the Secretary of Defense may exempt from compliance with the MMPA any actions by the armed forces that are "necessary for national defense." The Navy argued that the use of MFA sonar during practice exercises is necessary for the Navy so that its sonar operators are fully trained and prepared for antisubmarine warfare. The Navy also contended that there has not been a "documented sonar-related injury to a marine mammal" in its 40 years of MFA sonar use.

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5 Id. Studies have shown that mass-strandings occur when a marine mammal becomes disoriented due to damage to their auditory systems, which in turn causes the marine mammal to surface too quickly. See MICHAEL JASNY ET AL., SOUNDS THE DEPTHS II: THE RISING TOLL OF SONAR, SHIPPING AND INDUSTRIAL OCEAN NOISE ON MARINE LIFE 7 tbl.1.2 (2005), available at http://www.nrdc.org/wildlife/marine/sound/sound.pdf. The fast surfacing has been shown to cause decompression sickness, resulting in internal bleeding within the animal's brain. Id. at 7, 10. It has also been shown that beaked whales are particularly susceptible to these injuries, id. at 6, a main concern in the NRDC brief.

6 Winter, 129 S. Ct. at 372-73.

7 Id. at 371.

8 Id. at 370-71.

9 Id. at 371. The MMPA prohibits any attempts to harass or kill any marine mammal. 16 U.S.C. §§ 1362(13), 1372(a) (2006).


12 Id. at 366.
The National Environmental Policy Act requires a federal agency to prepare an EIS if agency action will affect the “human environment.” \(^{13}\) Prior to the extensive preparation of an EIS, an agency may prepare a shorter environmental assessment (hereinafter “EA”). \(^{14}\) If an agency finds the action to have no significant impact on the environment, the agency is not required to prepare an EIS. \(^{15}\) In January 2007, the Secretary of Defense exempted the Navy’s activities in the SOCAL waters from compliance with the MMPA, but required that the Navy undertake mitigating procedures to protect the environmental effects that MFA sonar may have on marine mammal species. \(^{16}\) A month later, the Navy released an EA finding that the full preparation of an EIS was unneeded because the submarine training exercises would have minimal impact on the environment, according to findings within the EA. \(^{17}\)

Following the issuance of the exemption from the MMPA and the subsequent EA, the NRDC filed suit in the District Court for the Central District of California, arguing that the Navy violated the NEPA, the Endangered Species Act (hereinafter “ESA”), and the Coastal Zone Management Act (hereinafter “CZMA”) when the Navy employed MFA sonar in the waters of SOCAL. \(^{18}\) The NRDC argued that an EIS should

\(^{13}\) 42 U.S.C. § 4332(C) (2006).

\(^{14}\) 40 C.F.R. §§ 1508.9(a), 1508.13 (2008).

\(^{15}\) Id.

\(^{16}\) Winter, 129 S. Ct. at 371-72; Required mitigating procedures included “(1) training lookouts and officers to watch for marine mammals; (2) requiring at least five lookouts with binoculars on each vessel to watch for anomalies on the water surface (including marine mammals); (3) requiring aircraft and sonar operators to report detected marine mammals in the vicinity of the training exercises; (4) requiring reduction of active sonar transmission levels by 6 dB if a marine mammal is detected within 1,000 yards of the bow of the vessel, or by 10 dB if detected within 500 yards; (5) requiring complete shutdown of active sonar transmission if a marine mammal is detected within 200 yards of the vessel; (6) requiring active sonar to be operated at the ‘lowest practicable level’; and (7) adopting coordination and reporting procedures." Id.

\(^{17}\) Id. The Navy did acknowledge that there would be a low level of harm caused to marine mammals, including a prediction of eight physical injuries to dolphins per year. Id. The Navy also predicted 274 possible injuries to beaked whales per year. Id. The Navy contended that most of these injuries could be avoided if the Navy complied with the mitigations standards set forth in the Secretary of Defense’s exemption order. Id.

\(^{18}\) Id. at 372; see also 16 U.S.C. §§ 1456(c)(1)(A), 1538(a)(1)(B) (2006).
have been completed prior to the commencement of the submarine training exercises because the sonar has been shown to have the capability of harming marine mammal species.\textsuperscript{19} The district court granted the NRDC a preliminary injunction, which prohibited the Navy’s use of MFA sonar in the SOCAL area.\textsuperscript{20} The district court based its decisions on two Acts cited by the Plaintiffs, the NEPA and the CZMA.\textsuperscript{21} The court reasoned that a preliminary injunction was appropriate because the NRDC had “demonstrated a probability of success on their claims” and without an injunction, there existed a “possibility of irreparable harm to the environment.”\textsuperscript{22} The Navy appealed to the Ninth Circuit, which affirmed the preliminary injunction, but remanded to the district court to narrow its broad preliminary injunction to allow for the continued use of the SOCAL area for sonar exercises. The new injunction placed additional mitigating conditions on the Navy designed to further protect marine mammals susceptible to harm from the Navy’s MFA sonar.\textsuperscript{23} The narrowly tailored injunction allowed for the exercises in the SOCAL area to continue if the new conditions could be met and followed by naval personnel.\textsuperscript{24}

The Navy accepted the injunction in part, but rejected and appealed two of the additional mitigating conditions present in the new injunction.\textsuperscript{25} The Navy first challenged a condition that required the complete power down of MFA sonar when a marine mammal was spotted within 2,200 yards of a ship, which was increased from the current

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\textit{Winter}, 129 S. Ct. at 372.
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\textit{Id. at 373.}
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\textit{Id. On remand, the six conditions imposed by the District Court were: “(1) imposing a 12-mile ‘exclusion zone’ from the coastline; (2) using lookouts to conduct additional monitoring for marine mammals; (3) restricting the use of ‘helicopter-dipping’ sonar; (4) limiting the use of MFA sonar in geographic ‘choke points’; (5) shutting down MFA sonar when a marine mammal is spotted within 2,200 yards of a vessel; and (6) powering down MFA sonar by 6 dB during significant surface ducting conditions, in which sound travels further than it otherwise would due to temperature differences in adjacent layers of water. \textit{Id.}
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accepted radius of 200 yards.\textsuperscript{26} The second challenged condition added by the district court was that the Navy would power down MFA sonar by 6 decibels during significant surface ducting conditions.\textsuperscript{27}

The Navy appealed the ruling of the district court to the President of the United States and the Council on Environmental Quality (hereinafter "CEQ") because the executive branch, at its discretion, may exempt an agency from compliance with the two separate controlling Acts that the district court had relied upon.\textsuperscript{28} The part of the ruling based on the CZMA was appealed to the President of the United States.\textsuperscript{29} The President stated that the naval activities in SOCAL were "essential to national security" and granted the Navy an exemption from the CZMA, citing a section that allows the President to grant an exemption if the activity is "in the paramount interest of the United States."\textsuperscript{30} The Navy simultaneously appealed the part of the ruling based on the NEPA to the CEQ.\textsuperscript{31} The CEQ may exempt an individual government agency from compliance with the NEPA in "emergency circumstances."\textsuperscript{32} The CEQ exempted the Navy from compliance with the NEPA, stating that the injunction created a "significant and unreasonable risk" in regards to the preparedness of the naval strike groups.\textsuperscript{33}

With the two newly acquired exemptions from the controlling Acts, the Navy moved for a vacatur of the prior district court and circuit court decisions.\textsuperscript{34} The district court and circuit court refused to vacate its decisions, basing its refusal on the courts' doubt as to the lawfulness of the CEQ's determination of "emergency circumstances."\textsuperscript{35} The circuit court ruled that there was likely no emergency because the circumstances of the injunction were predictable.\textsuperscript{36} The circuit court also stated that the EA,  

\textsuperscript{26} Id. at 373, 378.  
\textsuperscript{27} Id. at 373.  
\textsuperscript{28} Id. at 373-74.  
\textsuperscript{29} Id.  
\textsuperscript{30} Id. (quoting 16 U.S.C. § 1456(c)(1)(B) (2006)).  
\textsuperscript{31} Id.  
\textsuperscript{32} Id. n.3 (quoting 40 C.F.R. § 1506.11 (2008)).  
\textsuperscript{33} Id.  
\textsuperscript{34} Id. at 374.  
\textsuperscript{35} Id.  
\textsuperscript{36} Id. (citing NRDC v. Winter, 518 F.3d 658, 681 (9th Cir. 2008)).
which the CEQ and Presidential decisions were based upon, was “cursory, unsupported by cited evidence, or unconvincing.” The Navy was then granted a writ of certiorari to the United States Supreme Court on a motion to vacate the lower court’s decisions.

The United States Supreme Court issued a narrow ruling in Winter v. NRDC, refusing to address the merits of the case, but reversing the lower courts’ decisions and remanding. Specifically, the court held that (1) the granting of a preliminary injunction was an abuse of discretion because the standard for an injunction should be that irreparable harm was “likely” and not the lower court’s standard of “possibility” of irreparable harm, and (2) the United States’ interest in deploying prepared naval personnel far outweighed the potential environmental impacts on marine mammals.

III. LEGAL BACKGROUND

A. National Environmental Policy Act and Possible Exemptions

In 1969, Congress passed the NEPA which requires all federal agencies to prepare an EIS when an agency action will significantly affect the “human environment.” The goal of the NEPA is to focus government and public attention on the environmental effects of a proposed action and require a government agency to consider mitigating or alternative procedures that can be undertaken to limit the impact that the actions will have on the environment. Through its interpretation of the NEPA, the CEQ has provided for the preparation of a preliminary EA prior to requiring an EIS to determine whether an action will significantly

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37 Id. (quoting NRDC v. Winter, 518 F.3d at 693).
38 Id. at 375-76.
affect the human environment. If the EA shows that the agency’s actions will “not have a significant effect on the human environment,” then there is no need for the preparation of an EIS.

Courts have recognized three possible exemptions from the NEPA requirement of preparation of an EIS. The first, as previously addressed, is the preparation of an EA, which exempts an agency if the agency finds that its actions will not have a significant impact on the environment. Second, Congress may also pass a statute exempting a specific federal agency from NEPA requirements, which usually arises when there is a substantial national interest to not require an agency to fulfill the requirements of the NEPA. The final alternative for an agency that wishes not to comply with NEPA requirements, even when the agency is required to prepare an EIS, is to petition the CEQ, stating that compliance with the NEPA is not possible because of “emergency circumstances.”

Under the pertinent regulation, the CEQ may arrange for alternate or limited NEPA requirements to “control the immediate impacts of the emergency.” If an agency’s action is not needed to be exempted to control the emergency, then the agency is still required to comply with NEPA requirements.

B. The Coastal Zone Management Act and Possible Exemption

The CZMA of 1972 was enacted to encourage states to implement

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41 40 C.F.R. §1508.13. An Environmental Assessment is a less burdensome document that provides a brief overview of the environmental impact of the actions. See 40 C.F.R. §1508.9.
42 40 C.F.R. §1508.13.
43 See supra text accompanying notes 41-42.
45 40 C.F.R. § 1506.11.
46 Id.
47 Id.
voluntary state management programs for its coastal areas. If a state has implemented a coastal zone management program, a federal agency must comply with that state’s program to the fullest extent possible if the agency’s actions could affect natural resources within that state. Congress has created a procedure for attaining an exemption to the CZMA if a federal agency will not or cannot comply with a state management program. Pursuant to Congressional statute, after a decision by a federal court, the President of the United States may exempt an agency from complying with a state management program if the agency’s activity is in the “paramount interest of the United States.”

C. Standard for Preliminary Injunction

When deciding whether to grant a preliminary injunction, a court must consider four distinct but related factors before making its final judgment. The four factors are whether: (1) the plaintiff is likely to succeed on the merits of the case; (2) the plaintiff is likely to suffer irreparable harm; (3) when considering the interests of both parties, the interests of the plaintiff are more important than defendant’s interests; and (4) a preliminary injunction is in the interest of the general public. The Supreme Court has described a district court’s analysis on whether to issue a preliminary injunction as flexible and discretionary. In deciding whether a preliminary injunction is appropriate in cases where the lack of an injunction may result in irreparable harm to the environment, the Court has stated that if the injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction.

1. Likelihood of Success on the Merits

The first factor to be considered by a court in deciding a preliminary injunction is whether the party will likely succeed on the merits. In *Munaf v. Geren*, the movants were seeking a preliminary injunction to prevent their transfer from United States' custody to Iraqi custody because of crimes committed in Iraq. The district court and circuit court granted the preliminary injunction, basing its decision on whether the issue of jurisdiction was substantial and ignoring the merits of the case. The Supreme Court reversed the lower courts' decisions and held that a district court abuses its discretion if it grants a preliminary injunction without determining first whether the movants have a likelihood of success on the merits.

2. Likelihood of Irreparable Harm

The second factor to be considered is whether a plaintiff is likely to suffer irreparable harm if a preliminary injunction is not granted. The Supreme Court has held that a required factor to be considered by a court when deciding whether to grant a claim for equitable relief is whether there is a "likelihood of substantial and immediate irreparable injury." The Supreme Court has held that equitable relief is not issued as a right, and granting an injunction is within the Court's discretion once the Court has weighed the interests of both parties and the interests of the general public. In contrast, the Supreme Court has held that in environmental cases where the lack of an injunction may result in irreparable harm and

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55 *Munaf*, 128 S. Ct. at 2219.
56 *Id.* at 2214.
57 *Id.* at 2219.
58 *Id.*
59 *See* City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983).
injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction.  

3. Balancing of the Interests of Both Parties

The third factor for determining whether a preliminary injunction is appropriate is that the interests of the moving party substantially outweigh the interests of the non-moving party. In *Amoco Production Co. v. Gambell*, Alaskan native villages sought an injunction against the Secretary of Interior to prevent the selling of oil and gas leases in Alaska before using the required statutory procedures for use of Native lands. The Supreme Court held that a district court “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested [equitable] relief.” The Court stated that the injury to the moving party in *Amoco* would be minimal because the Secretary of Interior’s actions would likely not result in the pollution of the waters in Alaska that the statute was designed to protect. The Court held that even when there is likelihood of irreparable harm, the interests of both parties, as well as the general public’s interest, should be balanced to determine if equitable relief is appropriate, and that it is up to the discretion of the district court in determining that issue.

4. Balancing of the Interests of the General Public

The final factor to be considered by a district court when ruling on whether a preliminary injunction should be granted is how such a grant will affect the interests of the public at large. In *Yakus v. United States*, the Supreme Court held that if a preliminary injunction could possibly affect the interests of the public, the Court may withhold its ruling on an

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62 *Amoco*, 480 U.S. at 545.
63 See *Yakus*, 321 U.S. at 440.
64 480 U.S. at 535.
65 Id. at 542.
66 Id. at 544-45.
67 Id. at 543.
68 See id. at 542.
injunction, even if all the other factors have been satisfied, and wait to grant equitable relief following a decision on the merits of the case.69 The Court said that withholding a grant of preliminary injunction in this case is appropriate even if it places a burden on the moving party.70 The Court held that due consideration must be given to the interests of the public, and that the interests of the parties involved are not the single interests to be considered.71

D. Deference to Military Authority's Judgment

The Supreme Court has acknowledged that the judiciary is "ill equipped to determine the impact . . . that any particular intrusion upon military authority might have" and that great deference should be given by the courts to the "professional judgment of military authorities."72 The Supreme Court has defined "professional military judgments" as a "complex, subtle and professional decision as to the composition, training and equipping, and control of a military force."73 In Goldman v. Weinberger, the plaintiff, a Jewish man in the Air Force, was seeking equitable relief because an Air Force regulation prevented him from wearing a yarmulke while on duty.74 The plaintiff argued that the regulation was a violation of the First Amendment.75 The Air Force argued that there was a strong legitimate interest in uniformity of dress and that allowing an accommodation for the plaintiff would undermine

70 Id.
71 Id.
73 Gilligan v. Morgan, 413 U.S. 1, 10 (1973). The Court stated that judgments regarding the military should be left to branches that are beholden to the electoral process and that "it is difficult to conceive of an area of governmental activity in which the courts have less competence." Id.; see also Boumediene v. Bush, 128 S. Ct. 2229, 2276-77 (2008) (stating that "neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people.").
74 475 U.S. at 504.
75 Id.
those interests. The Court stated that even when there is a constitutionally protected right, such as the free exercise clause protected by the First Amendment, courts “must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.”

IV. INSTANT DECISION

A. Majority Opinion

Chief Justice Roberts, joined by four members of the Supreme Court, ruled that the district court’s preliminary injunction was inappropriate. Chief Justice Roberts also stated that since the equitable remedy provided was inappropriate, the Court did not need to decide the merits of the case of whether the Navy should have been required to prepare an EIS.

The first issue the Supreme Court addressed was whether the district court had applied the incorrect standard for determining a preliminary injunction. The Court outlined the four factors that must be considered for granting a preliminary injunction, which are: “[the plaintiff] is likely to succeed on the merits; [the plaintiff] is likely to suffer irreparable harm in the absence of preliminary relief; that the balance of equities tips in [the plaintiff’s] favor; and that an injunction is in the public interest.” The Supreme Court agreed with the Navy’s argument that the lower court erred in applying a standard of “possibility” of suffering irreparable harm. The Court stated that it has reiterated the standard many times, explaining that irreparable harm must be deemed to be “likely.” The Court held that issuing an injunction based on the

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76 Id. at 506.
77 Id. at 507.
79 Id. at 376.
80 Id. at 374-75.
81 Id. (citing Munaf v. Geren, 128 S. Ct. 2207, 2218-19 (2008)).
82 Id. at 375.
83 Id. (citing Los Angeles v. Lyons, 461 U.S. 95, 103 (1983)).
"possibility" standard is inconsistent with Court precedent, which has recognized the "extraordinary" nature of the remedy.\textsuperscript{84}

The Supreme Court also held that the district court erred in not reconsidering the likelihood of irreparable harm that would result subsequent to the four new restrictions that the Navy did not challenge.\textsuperscript{85} In a second decision by the district court, after being requested by the circuit court to narrow the previously decided preliminary injunction, the district court placed six additional specific requirements to protect the interests of the Plaintiff.\textsuperscript{86} The Navy accepted four of the new conditions but challenged the other two in appeal.\textsuperscript{87} The Supreme Court stated that the district court failed to review the effects that the new requirements would have on the interests of the Plaintiff, and that this failure was a significant error in the district court’s final decision prior to this case.\textsuperscript{88}

The Supreme Court then weighed the interests of the general public. The Court used a balancing test to determine the most important factors of public concern, analyzing both military and environmental interests, but reiterated the traditional judicial maxim by stating that equitable relief is an "extraordinary remedy" and must never be awarded as of right.\textsuperscript{89} Balancing public interests, the Court found that the case tipped strongly in favor of national security and that conducting training exercises under realistic conditions was most important to the public.\textsuperscript{90} In regards to the other traditional factors used in determining a preliminary injunction, the Court held that where there are significant military and environmental interests at odds with one another, it is appropriate for a court to ignore the traditionally considered factors of whether an action will likely cause irreparable harm.\textsuperscript{91} The Court held that because the interests of the Navy are of utmost importance to the general public, even

\textsuperscript{84} Id. at 375-76.
\textsuperscript{85} Id. at 376; see supra note 24.
\textsuperscript{86} Winter, 129 S. Ct. at 373.
\textsuperscript{87} Id.; see supra note 24.
\textsuperscript{88} Winter, 129 S. Ct. at 376.
\textsuperscript{89} Id.
\textsuperscript{90} Id at 378.
\textsuperscript{91} Id.; but cf. id. at 378 ("Of course, military interests do not always trump other considerations, and we have not held that they do.").
if there was a likelihood of irreparable harm, the preliminary injunction should not have been granted by the district court.92

The Court next balanced the equities of both parties, separate from the public concern. In weighing the interests of both parties, the Supreme Court recognized the Plaintiff’s interest in protecting the marine mammals in the SOCAL area, but held that the Navy being forced to deploy an unprepared anti-submarine force was a more important interest and should take precedence over the interests of the Plaintiff.93 The Court also cited the President’s statements that the need for training the Navy’s troops in the use of active sonar is “essential to national security.”94

The Supreme Court stated that the district court also erred in not fully weighing the interests of both parties when the court failed to defer to naval officers’ predictions of the potential burden of an injunction against the Navy’s training exercises.95 The Court found that the district court’s only discussion of determining public interest was in a single sentence and that this amounted to a cursory and unsatisfactory analysis.96 The Supreme Court summarized by finding that the district court failed to perform a sufficient analysis or fully consider the concerns of naval officers, and, for further support, cited the Ninth Circuit’s holding, which stated “[t]he district court did not give serious consideration to the public interest factor.”97

The Supreme Court then considered the two challenged requirements imposed by the district court in its preliminary injunction and how the requirements would potentially affect public interest and national security.98 The Supreme Court held that increasing the shutdown range of MFA sonar to 2,200 yards would be unduly burdensome on the Navy and would hinder the ability of the Navy to conduct realistic training exercises.99 The Court stated that any burden on these training exercises

92 Id.
93 Id. at 377-78.
94 Id. at 378.
95 Id.
96 Id.
97 Id. (citing NRDC v. Winter, 502 F.3d 859, 863 (9th Cir. 2007)).
98 Id. at 378-80.
99 Id. at 379.
would result in leaving Navy "strike groups more vulnerable to enemy submarines." The lower courts argued that the infrequency of spotting marine mammals and the fact that the Navy had previously agreed to power down MFA sonar during exercises, showed that the additional requirement was not unduly burdensome. The Navy responded by stating that the voluntary power downs were at "tactically insignificant times" in its training exercises. The Navy further contended that if a power down was required at an important time in the exercise then it would possibly result in the inability of the Navy to certify personnel for combat. The Court further held that the lower courts should have deferred in its analysis to the concerns of the naval officers. Even though there was a low likelihood of having to power down MFA sonar, it could still result in an undue burden in stopping the Navy from certifying its anti-submarine crews.

The Court also held that the lower courts should have included naval officers' predictions of the burden of imposing a required reduction in MFA sonar by six decibels during significant surface ducting conditions. The Court stated that the Ninth Circuit understated the burden caused by this additional requirement and that the reduction in decibels would result in unrealistic conditions.

The Court found that the injury to the Plaintiff was the speculative harm of a few marine mammals, and that the harm against deploying unready sailors to protect the nation was a far superior interest. The Court held that when considering a case between substantial military interests compared with speculative environmental interests, a court does not have to consider the factor of whether there is a likelihood of irreparable harm because military interests are ordinarily paramount to the public interest. The Court held that in these types of cases, it is likely

100 Id. at 380.
101 Id. at 379.
102 Id.
103 See id.
104 Id.
105 Id. at 380.
106 Id.
107 Id. at 382.
108 Id. at 378.
that entering an injunction would be an abuse of discretion so it vacated the lower court’s additional requirements to the extent that the requirements had not been accepted by the Navy.\textsuperscript{109}

\textbf{B. Dissenting Opinion}

In the dissenting opinion, Justice Ginsburg, joined by Justice Souter, found that the district court was correct in awarding a preliminary injunction because the remedy allowed for the mitigation of harm until the Navy could complete an EIS.\textsuperscript{110} The dissent argued that when deciding a claim for equitable relief, there has always been great discretion and flexibility given to the lower courts and no strict standard should exist for specific cases.\textsuperscript{111} The dissent also argued that the imposition of a preliminary injunction met a sliding standard that could be determined by the lower court, and the NRDC made the required showing to justify an equitable remedy.\textsuperscript{112}

One of the dissent’s criticisms of the majority was that NEPA requirements exist to compel a federal agency to consider the affects of its actions upon the environment, and an EIS should be completed by all agencies so that the agencies make fully informed decisions.\textsuperscript{113} The dissent further noted that the purpose of requiring an agency to prepare an EIS is to allow the agency to apply findings derived during the preparation of the EIS to its decision making process.\textsuperscript{114} The dissent contended that the Navy “thwarted” the purpose of an EIS because the Navy commenced training exercises prior to the completion of an EIS.\textsuperscript{115} The Navy started training exercises in the SOCAL area based on an EA, which stated that the exercises would not have a significant environmental impact.\textsuperscript{116} The dissent stated that if the Navy would have completed an EIS prior to

\textsuperscript{109} Id. at 382.
\textsuperscript{110} Id. at 387.
\textsuperscript{111} Id. at 391-92.
\textsuperscript{112} Id. at 392.
\textsuperscript{113} Id. at 389.
\textsuperscript{114} Id.
\textsuperscript{115} Id. at 387.
\textsuperscript{116} Id. at 387-88.
commencing its exercises in SOCAL, the district court may not have had to introduce additional mitigating circumstances because there would have been a full consideration of environmental impacts and concerns.117

In the dissent, the justices also argued that the CEQ determination of “emergency circumstances” was one-sided, and that the CEQ did not have the authority to grant an agency an exemption from preparing an EIS.118 The dissent stated that the CEQ’s exemption from NEPA requirements did not consider any materials from NRDC, on which the district court had relied.119 The dissent also stated that even though the CEQ’s regulations are given “substantial deference,” the CEQ has never been empowered to fully eliminate an agency’s requirement to prepare an EIS.120 The dissenting justices argued that because the CEQ does not have the power to eliminate the requirements under NEPA, the ruling by the CEQ is without substance or merit.121

The dissent concluded by analyzing the importance of the Plaintiff’s interests and the need to protect those interests from further harm.122 The dissent argued that the irreparable harm that would be caused by sonar use in the SOCAL area is very high.123 It also stated that the majority downplayed the findings of the Navy’s EA, and sonar usage would result in harm to a substantial portion of the beaked whales and dolphins in those areas.124 The dissent completed its analysis by stating that when comparing the interests of both parties, and the interests of the public, along with the history of the litigation, the preliminary injunction and additional mitigating requirements were not an abuse of discretion by the district court.125

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117 Id. at 389-90.
118 Id. at 391.
119 Id. at 390. The dissent also stated that there was “little independent analysis” made by the CEQ. Id.
120 Id. at 391 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 355 (1989)).
121 Id.
122 Id. at 392-93.
123 Id. at 392-93.
124 Id. at 392.
125 Id. at 393.
Although decided on a very narrow issue, Chief Justice Roberts’ opinion in *Winter v. NRDC* sets a clear tone regarding any further legal conflicts between the interests of environmental advocates and the armed forces. The ruling may also impact future litigation by allowing the executive branch to bypass environmental regulations by citing military and public interests in national security. The majority opinion also states that courts may disregard the traditional factors of “likelihood of success” and “irreparable injury” when one of the parties is the military and the case outcome could affect national security.

Through the Court’s ruling, it is clear that the executive branch need only cite pressing national security concerns to avoid congressional requirements. The Supreme Court narrowly ruled that the district court abused its discretion in not properly balancing the equitable interests of the parties. The Supreme Court avoided the chance to rule on whether the Navy’s disregard for the requirement to prepare an EIS under the NEPA was appropriate, essentially condoning the Navy’s actions when acting within the interests of national security.

The district court had attempted to address this issue in its second ruling when it narrowly tailored its injunction to incorporate mitigating procedures that would protect the interests of the environmentalists and vindicate the spirit of the NEPA, but also allow the Navy to continue the SOCAL training exercises. Because the Navy had acted inappropriately by not completing an EIS prior to commencing the SOCAL training exercises, the district court was forced to use its judgment in crafting mitigating requirements until an EIS could be completed. This judgment was appropriate given the circumstances and could have been avoided had the Navy properly prepared the required EIS and determined its own mitigating procedures for protecting the marine mammal wildlife while still conducting the SOCAL training exercises. The purpose of the NEPA is to require government agencies to conscientiously consider the environmental impact of the agencies’ actions, and the Navy’s avoidance

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126 *Id.* at 376.
127 *Id.* at 376, 378.
128 *Id.* at 372-73
and disregard for the preparation of an EIS defeated the spirit of the NEPA. in trying to cure the Navy’s violation of the NEPA, the district court may have reached too far with the two requirements challenged by the Navy, but the district court evaluated both sides’ interests and appropriately used the flexible discretion that is available in fashioning equitable remedies.

In reviewing the district court’s decision, the Supreme Court limited its decision to a very narrow ruling and clearly stated that the military interests and national security were of paramount importance in this case and that the district court had failed to fully consider those interests. This decision sets a clear policy that favors military interests over other groups’ interests. This will make it exceedingly difficult for advocates to protect the environment through legal means. The Court went on to say that the case at bar was not a “close question” but mentioned that “military interests do not always trump other considerations.” Although this may be true, the majority opinion makes it abundantly clear that military interests will be hard to defeat when seeking equitable relief because of judicial deference to military opinion and a strong policy set by this Court to favor the military’s interests.

The decision in Winter v. NRDC also will likely have far reaching ramifications for many other protected natural resources that are situated next to military bases and training grounds. Missouri has two separate, large military bases that are in close proximity to state and national

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131 Winter, 129 S. Ct. at 370. Chief Justice Roberts quotes George Washington as saying “[t]o be prepared for war is one of the most effectual means of preserving peace.” Id. During oral argument, Chief Justice Roberts created a hypothetical to balance the interests of both parties, where a North Korean diesel electric submarine has gotten near Pearl Harbor undetected and on the other side the potential harm to a marine mammal. Oral argument at 48, Winter, 129 S. Ct. 365 (No. 07-1239). Chief Justice Roberts concluded that this was a clear case in favor of the military and the District Court never considered this analysis. Id.
132 Winter, 129 S. Ct. at 378.
133 See id.
Whiteman Air Force Base, in particular, is the home of the Air Force's stealth bomber plane, “the B-2 Spirit” and is directly adjacent to a state park. Prior to Winter, if the military wanted to avoid the requirements of the NEPA, it would obtain from Congress a statutory exemption from NEPA requirements. This provided congressional oversight and a determination by a branch of the government which was prepared to evaluate the importance of national security versus environmental interests of the United States. After the decision in Winter, if a military base decides to undergo training actions that affect the natural resources or endangered species of Missouri, it is free from complying with environmental statutory requirements without the fear of being forced to stop by a decision of a federal court. If the military chooses not to complete an EIS, a district court will likely have its hands tied by the decision in Winter. In deciding whether to grant equitable relief, a court will have to give the military interests extreme deference, even if of irreparable harm is guaranteed to be caused by the military’s actions. This decision will clearly affect environmental advocates trying to protect our nation’s natural resources because an environmental advocate’s primary remedy is injunctive relief due to the nature of the interest being protected.

Another potential impact on litigation involving requests for injunctive relief against the armed forces is Chief Justice Roberts’ creation of a new balancing test for determining whether equitable relief is appropriate when there is a conflict between environmental and military interests. The majority states that a court may disregard the traditional

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134 One such base, Fort Leonard Wood, is within only a few dozen miles of Mark Twain National Forest. See Fort Leonard Wood, http://www.globalsecurity.org/military/facility/fort-leonard-wood.htm (last accessed Aug. 30, 2009) (stating Fort Leonard Wood is “adjacent to the Mark Twain National Forest”).
136 Winter, 129 S. Ct. at 390 (Ginsburg, J., dissenting).
137 Damages are usually inappropriate because environmentalists are usually attempting to prevent or slow the destruction of specific natural resources. Amoco Production Co. v. Gambell, 480 U.S. 531, 545 (1987).
factors of "likelihood of success" and of "irreparable injury" when there is a public and naval interest in "effective, realistic training of its sailors." The Court stated that considering these factors alone is enough to deny injunctive relief. The Supreme Court has stated, in past precedent, that the four traditional factors should be considered together and not be applied individually on a case by case basis. Departing from the normal standard, the majority opinion has created a new standard for litigation that involves military interests and national security by only requiring the balancing of the particular party’s interests and the interests of the general public. Not considering all the factors together may possibly affect future litigation because the degree of the irreparable harm could be extreme, but that factor does not need to be evaluated by the Court pursuant to Winter.

VI. CONCLUSION

Because the new standard for preliminary injunctions will make it easier for the military to prevail in these types of cases by citing the necessity of national security, the recent decision of the Supreme Court in Winter v. NRDC is a great loss for advocates who are trying to protect the environment from the actions of the United States military. The Supreme Court’s new standard may even potentially foreclose many potential remedies from being used to vindicate the interests of citizens who are trying to protect the United States’ natural resources and native species for current use and observation, as well as for future generations. The ruling also essentially condones the Navy’s disregard for the core requirement of the NEPA, which is the preparation of an EIS. The purpose of the NEPA was to require an agency to make decisions with full information, including the environmental impact of the agency’s actions. The Court has essentially allowed an agency to bypass this requirement by citing “national security” or “emergency” conditions. By allowing the Navy to avoid the completion of an EIS prior to commencing naval training

138 Winter, 129 S. Ct. at 376.
139 Id.
140 See supra Legal Background, Part III.A-D.
141 See Winter, 129 S. Ct. at 376.
exercises that have been conceded by the Navy to be harmful to marine mammals, the Supreme Court sends a clear message that when deciding whether injunctive relief should be granted against the military, the Court should give extreme deference to the position and interests of the armed forces.

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