

Government Contracts Advisory

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Navy v. Whales Has Broader Implications For Deference To Executive Branch Statements Of National Security

Chief Justice John Roberts, joined by four other U.S. Supreme Court Justices, sided squarely with the Navy last week in an opinion reversing a preliminary injunction that the Court found would have jeopardized national defense by restricting Navy training exercises involving the use of sonar in the presence of marine mammals (whales) off the coast of Southern California. In so doing, the Supreme Court emphasized the deference which must be given to DOD/Executive Branch statements of national security interests, an emphasis which has implications in a number of other contexts. The opinion, *Winter v. Natural Resources Defense Council, Inc.*, No. 07-1239, can be found at <http://www.supremecourt.us/opinions/08pdf/07-1239.pdf>.

Case Background

Environmental groups filed suit on the theory that the Navy's ongoing antisubmarine sonar training program harms marine mammals, such as whales, dolphins, and sea lions. They claimed that the training should be enjoined pending the Navy's completion of a full environmental impact statement. Although the President expressly determined that continuation of the training exercises was "essential to national security," slip op. at 8, the U.S. Court of Appeals for the Ninth Circuit upheld a preliminary injunction that would have required the Navy to follow certain "mitigation measures," including shutting down MFA sonar when a marine mammal is spotted within 2,200 yards of a vessel, and powering it down during significant surface ducting conditions.

In a lucid and forcefully worded opinion authored by Chief Justice Roberts, the Supreme Court held 5-4 that "[t]he Court of Appeals was wrong." Slip op. at 2. Quoting George Washington's first Annual Address to Congress ("To be prepared for war is one of the most effectual means of preserving peace."), the opinion begins by explaining that because potential adversaries possess more than 300 modern diesel-electric submarines that pose a threat to Navy vessels, "[a]ntisubmarine warfare is currently the Pacific Fleet's top war-fighting priority." Slip op. at 1, 2. As a result, "[t]he Navy conducts regular training exercises under realistic conditions to ensure that sonar operators are thoroughly skilled in its use in a variety of situations." *Id.* at 3. Further, "[t]he waters off the coast of Southern California (SOCAL) are an ideal location for conducting integrated training exercises." *Ibid.*

Irreparable Harm Standard

Although the Ninth Circuit acknowledged that nothing in the record demonstrates that marine mammals have been harmed, *id.* at 1, the court of appeals held that where there is a strong likelihood of success on the merits of a case, "a preliminary injunction may be entered based only on a 'possibility' of irreparable harm." *Id.* at 11. But the Supreme Court agreed with the Navy that "the Ninth Circuit's 'possibility' standard is too lenient." *Id.* at 12. Instead, the Supreme Court reaffirmed that its "frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Ibid.* This rejection of the Ninth Circuit's very lax preliminary injunction standard represents a significant setback to public interest groups, which traditionally view the Ninth Circuit as a friendly forum for suits challenging both private and governmental activities that potentially harm their members' environmental, recreational, and aesthetic interests.

Judicial Deference To Military Judgments

But the Supreme Court's preliminary injunction analysis did not stop there. The Court's majority opinion also emphasizes the "balance of equities" and the "public interest," *id.* at 10, and holds that "even if

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plaintiffs have shown irreparable injury from the Navy's training exercises, any such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors." *Id.* at 13. More specifically, the Court explained that the lower courts had "significantly understated . . . the injunction's consequent adverse impact on the public interest in national defense." *Id.* at 14. The Court emphasized in this regard that "the record contains declarations from some of the Navy's most senior officers, all of whom underscored the threat posed by enemy submarines and the need for extensive sonar training to counter this threat," and "that realistic training cannot be accomplished under the . . . restrictions imposed by the [preliminary injunction]." *Id.* at 14-15.

The Supreme Court held that "[t]he 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 exercises." *Id.* at 17. In concluding that "[t]he lower courts did not give sufficient weight to the views of several top Navy officers," *id.* at 18, the Court, based on the Navy declarations, discussed in detail the manner in which the preliminary injunction would significantly interfere with the training exercises, thereby "jeopardizing national security." *Id.* at 23. The Court explained that "[t]his case involves 'complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force,' which are 'essentially professional military judgments.'" *Gilligan v. Morgan*, 413 U.S. 1, 13 (1973). We 'give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.' *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)." *Id.* at 14.

Balancing The Equities

Thus, the Court "conclude[d] that the balance of equities and consideration of the overall public interest in this case tip strongly in the favor of the Navy." *Id.* at 16. Weighing "possible injury . . . to an unknown number of the marine mammals" against "forcing the Navy to deploy an inadequately trained antisubmarine force [that] jeopardizes the safety of the fleet" did "not strike [the majority] as a close question." *Ibid.*

Conclusion

Defense contractors should review the *Winter* opinion, which presents a strong case for allowing the U.S. military to train its personnel on use of mission-critical defense systems and other military equipment without undue interference from environmental groups. In addition, the opinion underscores the importance of declarations and other evidentiary materials provided by the military in suits that implicate national defense interests. Such suits are not limited to actions brought against the federal government and its officials, but also encompass certain types of tort, product liability, breach of contract, and other actions against private contractors. The government sometimes will intercede in private party actions to assert the state secrets privilege or to seek an order to protect classified information. But in other situations, such as where a contractor defendant seeks to assert the political question doctrine, government contractor defense, or other constitutionally or statutorily based jurisdictional defenses or immunities, it often is desirable, if not essential, to obtain and make part of the evidentiary record, direct statements from the military. *Winter* is the latest Supreme Court case to emphasize the deference or substantial weight that such evidence should be afforded by courts.

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