

OF WHALES AND SONAR

Environmental Protection and Naval
Training in Winter v. NRDC

Environmental Law Institute Program

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OVERVIEW

- Winter v. NRDC – important, complex, unusual case – facts and law; I did not work on case
- National security
- Protection marine mammals
- Significant Naval training
- Preliminary Injunctions, opinions by District and Circuit courts
- Action by President, Navy CNO
- Finding of “emergency circumstances” CEQ
- Declarations by respected scientists
- Expedited Supreme Court proceedings

- Substantial number of issues: legal, factual
- Thousands pages briefs, appendices
- Important to U.S., Navy, NRDC, public
- Will discuss several issues argued, not all
- Will include references to last week's Supreme Court oral argument

Petition to review 9th C. decision

- “The Ninth Circuit has affirmed a preliminary injunction that jeopardizes the Navy’s ability to train Sailors and Marines for wartime deployment during a time of ongoing hostilities. The decision poses substantial harm to national security, and improperly overrides the collective judgments of ...the Nation’s top naval officers...”

CEQ authority to find “emergency circumstances”

- D.Ct. found insufficient record support, no deference to CEQ
- 9th C. upheld, no deference
- Souter (and Ginsburg) questioned CEQ authority for finding “What is the statutory authority for them to engage in (this type of) rulemaking ?”
- Alito “...how much deference, if any, do you think the district court was obligated to give to the Navy on that military issue... Is judge Cooper an expert on submarine warfare?”

- Souter “...to the extent there was an emergency, wasn’t the emergency caused by the failure of the Navy to take any timely action?”

CEQ authority - continued

- Kennedy “By the time this case got back to the (district) court...the President made a determination that this was in the paramount interest of the United States. The Defense and Commerce department jointly had made a determination that this is necessary, for the national defense....they certainly must be given great weight by the district court in determining whether to continue the injunction...”

Preliminary Injunction Criteria

- D.Ct. issued PI
- 9th C. upheld
- U.S. claimed error in criteria used by courts

Balance of Equities - PI

- D. Ct. no balancing analysis; 9th C. upheld, added its own analysis
- NRDC: D. Ct. found record support that training not affected by conditions in PI; declarations by scientists
- U.S.: Congress balanced equities in MMPA—military trumps in some cases; must consider national defense findings of President and CNO

Equities - continued

- Roberts: “... at no point ...did the district judge undertake a balancing of the equities putting on one one side the potential for harm to marine mammals that she found...and ...the potential that a North Korean diesel electronic submarine will get within range of Pearl Harbor undetected. Now I think that’s a pretty clear balance.”

Injury to Navy - PI

- D. Ct. “near certainty” of irreparable harm to marine mammals, no irreparable harm to Navy; 9th C. upheld, using possibility of harm
- U.S. claimed irreparable harm to Navy / national security, objected to mere possibility of harm to marine mammals
- Souter “...certainly there’s no harm (to the Navy) in this case, the error was harmless.”

INJURY to Plaintiff - PI

- Need showing of irreparable harm to plaintiff for standing to seek PI
- 9th C. addressed - found sufficient harm for PI
- U.S.: objected, not sufficient injury to plaintiff to support PI

Injury to plaintiff - continued

- Kennedy “...let’s assume people have standing.”
- Breyer “I wouldn’t...”

Injury to plaintiff - continued

- Scalia “...procedural injury alone is not the kind of injury that confers standing”; “irreparable harm...for purposes of the injunction... refers to the same harm that is the harm which is the basis for standing, is it not?”; “The whole country can complain about the failure to issue an EIS. That is not the kind of injury that gives standing.”

Timing

- 9th C. injunction in place pending Supreme Court decision
- Supreme Court argument October 8, 2008
- Next Navy SOCAL training scheduled January, 2009