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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first today in Case 07-1239, Winter v. Natural Resources Defense Council.

General Garre.

ORAL ARGUMENT OF GEN. GREGORY G. GARRE

ON BEHALF OF THE PETITIONERS

GENERAL GARRE: Thank you, Mr.

Chief Justice, and may it please the Court:

The ability to locate and track an enemy submarine through the use of mid-frequency active sonar is vitally important to the survival of our naval strike groups deployed around the world and therefore critical to the nation's own security. In this case, the Ninth Circuit affirmed a preliminary injunction that places serious restrictions on the Navy's use of MFA sonar in training exercises that, in the judgment of the President and his top naval, officers are in the paramount interests of the United States. That injunction is fundamentally flawed for three principal reasons.

First, it is based on an erroneous assessment of the likelihood of success on Respondent's NEPA claim. Second, it is based on an erroneous

1 conception of the showing of irreparable injury
2 necessary to secure what this Court has aptly called
3 "the extraordinary and dramatic remedy" of a preliminary
4 injunction. And finally, it fails to take account the
5 vital public interests in conducting the training
6 exercises at issue unencumbered by the injunction's
7 restrictions.

8 JUSTICE GINSBURG: General Garre, when you
9 address the injunction, do you mean the injunction as
10 originally ordered by the district court or are you
11 taking account of the modifications made by the Ninth
12 Circuit, and would you say that the three points you
13 just made would apply as well to the injunction as
14 modified?

15 GENERAL GARRE: Certainly we would,
16 Justice Ginsburg. Obviously our position on the NEPA
17 claim is the same with respect to any aspect of the
18 injunction. So too with the risk of irreparable harm,
19 which we think Respondents haven't shown. The Ninth
20 Circuit did modify the injunction by issuing a partial
21 stay. And it's important to keep in mind that its
22 modifications were tied only to a stay. It didn't
23 actually modify the injunction. So even if this Court
24 thought that those modifications were appropriate, it
25 would have to vacate the Ninth Circuit decision.

1 JUSTICE SCALIA: Say it again? I'm not sure
2 I --

3 GENERAL GARRE: The Ninth Circuit framed its
4 modifications in terms of a partial stay of its decision
5 affirming the district court's preliminary injunction.
6 That stay and therefore those modifications remain in
7 effect only until this Court issues its decision in this
8 case.

9 CHIEF JUSTICE ROBERTS: That's the temporary
10 stay pending certiorari, right?

11 GENERAL GARRE: Right.

12 CHIEF JUSTICE ROBERTS: I think what
13 Justice Ginsburg was talking about -- and she can
14 correct me if I am wrong -- were the modifications from
15 the initial preliminary injunction and the modified
16 preliminary injunction.

17 GENERAL GARRE: Well, yes, we are here
18 complaining about the restrictions on the 2200-yard
19 shutdown requirement, where if a marine mammal comes
20 within 2200 yards of a naval vessel, part of one of
21 these strike groups, it has to shut down sonar
22 operations, as well as the 75 percent powerdown
23 requirement when significant surface ducting conditions
24 are present regardless of the presence of marine
25 mammals.

1 JUSTICE ALITO: You mentioned the effect on
2 naval operations. On the other side, could you say what
3 the record shows about the number of marine mammals that
4 are likely to be killed or receive actual physical
5 injury if the -- as opposed to some sort of behavioral
6 modification, if the injunction is allowed to continue?

7 GENERAL GARRE: The record -- and here I'm
8 referring to the environmental assessment and the
9 opinion of the National Marine Fisheries Services in the
10 petition appendix and the joint appendix -- indicates
11 that no marine mammal will be killed as a result of
12 these exercises. The environmental assessment predicted
13 that there would be eight instances of injurious harm.
14 These eight instances would take place only with respect
15 to a common species of dolphins of which there are
16 hundreds of thousands in the Southern California
17 Operating Area.

18 Now, the environmental assessment also
19 predicted that there would be a much greater number,
20 170,000 over the course of two years, of so-called Level
21 B takes. These are temporary and by definition
22 non-injurious disturbances, and that's made clear at
23 pages 258a of the petition appendix and page 175 of the
24 JA, which make clear that these Level B disturbances,
25 the vast majority of the disturbances predicted by the

1 environmental assessment, are temporary and
2 non-injurious.

3 JUSTICE STEVENS: Just as to dolphins?

4 GENERAL GARRE: Well, the vast majority of
5 those disturbances, some almost 90 percent, pertain only
6 to dolphins.

7 JUSTICE STEVENS: And what percentage is
8 that of the total population in the area?

9 GENERAL GARRE: Well, I think that the
10 statistics I have indicate that there are more than I
11 think 500,000 dolphins on the western coast there. As
12 to -- the number may be actually a little bit lower in
13 the Southern California Operating Area. But this is --
14 no one suggests that is in any way a threatened species.

15 With respect to the species that are
16 endangered, threatened, or even strategic under the
17 Marine Mammal Protection Act, the National Marine
18 Fisheries Services concluded there would be no adverse
19 harm on the population level or with respect to annual
20 recruitment rates, with respect to those endangered or
21 threatened species in the biological opinion that the
22 district court sustained and that Respondents are not
23 challenging on appeal.

24 The focus of their claim of irreparable
25 injury -- and keep in mind that that environmental

1 assessment comes against the backdrop of a 40-year
2 history of the Navy's use of MFA sonar in the Southern
3 California Operating Area at the same frequency and, if
4 anything, during more frequent training exercises than
5 have been conducted in recent years.

6 JUSTICE GINSBURG: You didn't mention the
7 564 exposures that were typed Level A in the
8 environmental assessment.

9 GENERAL GARRE: With respect to beaked
10 whales, Justice Ginsburg, that's correct. Those
11 disturbances are temporary, non-injurious disturbances.
12 And that's important. Let me give you the page cites to
13 the record on that because it's an important point. JA
14 178 to 180, JA 185 to 188, and JA 198 to 200 discuss
15 each species of the beaked whales and explain that the
16 harms that are predicted in the environmental assessment
17 are non-injurious, temporary harms.

18 Now, as a policy matter --

19 JUSTICE ALITO: In lay terms, what does that
20 mean? Does it mean an alteration of their swimming
21 pattern, their migration pattern? What does it mean?

22 GENERAL GARRE: In most cases, it means that
23 there's an alerting response, they hear the sound and
24 they go in the opposite direction, as one who hears a
25 noise that disturbs them would ordinarily do. It can

1 also mean that they could have some temporary effect on
2 their feeding or breeding patterns, but it's a temporary
3 effect.

4 JUSTICE ALITO: It doesn't necessarily mean
5 that there's a physical injury to them, does it?

6 GENERAL GARRE: No.

7 JUSTICE ALITO: It means that they may just
8 swim in a different direction.

9 GENERAL GARRE: That's right. By definition
10 only a Level A take involves an injurious harm, that is
11 a physical harm which results in permanent damage to
12 tissue. The --

13 JUSTICE GINSBURG: I thought the 564 number
14 was Level A, which I also thought meant exposure
15 resulting in severe harm.

16 GENERAL GARRE: It is confusing,
17 Justice Ginsburg. The Navy as a policy matter described
18 for purposes of the environmental assessment the Level B
19 takes with respect to beaked whales as Level A takes
20 because the Navy acknowledged that there is uncertainty
21 about the effects of sonar on beaked whales. But when
22 you look at what the environmental assessment says as to
23 the actual injuries that the National Marine Fish and
24 Wildlife Service and the Navy predicted based on the
25 best science available to them and to us today, they are

1 non-injurious, temporary exposures, and that is made
2 clear at the portions of the JA that I mentioned.

3 Now, the Navy -- there is nothing that
4 prevents an agency from characterizing a particular harm
5 one way or the other as a policy matter for purposes of
6 an environmental assessment. But when it --

7 JUSTICE STEVENS: May I ask this question,
8 Mr. Solicitor General. Is it understood, though, that
9 there is a duty to prepare an environmental impact
10 statement?

11 GENERAL GARRE: Yes, there is, because we're
12 not here arguing that, at this point, that we had no
13 duty to prepare an environmental impact statement
14 because of the intervening event of the Council for
15 Environmental Quality's emergency circumstances
16 alternative arrangements determination. That's the
17 pertinent administrative event for purposes of
18 Respondents' claim.

19 CHIEF JUSTICE ROBERTS: I didn't follow
20 that. You concede that you have to prepare an EIS in
21 light of the CEQ's emergency circumstances?

22 GENERAL GARRE: Yes, it's one of the
23 alternative arrangements that the Navy agreed to, is
24 that an environmental impact statement which has been
25 under way will be completed by January 2009 with respect

1 to all activities in the Southern California Operating
2 Area. Now, that's not to say that we concede that an
3 environmental impact statement was not required -- was
4 required at the outset. The Navy doesn't concede that.
5 It litigated this case up to the point of the Council
6 for Environmental Quality's determination.

7 CHIEF JUSTICE ROBERTS: Why didn't you -- I
8 mean, you emphasize the level of detail and
9 comprehensiveness of the environmental assessment that
10 the Navy prepared. Why didn't you just make -- why
11 didn't you just go ahead and do an EIS from the outset
12 if you were going to engage in such effort with respect
13 to the environmental assessment?

14 GENERAL GARRE: Because the Navy devoted its
15 best resources to this and in good faith, as is
16 indicated by the 293-page environmental assessment,
17 concluded that there would not be a finding of
18 significant environmental impact, and at that point
19 everyone agrees an environmental impact statement is not
20 required.

21 JUSTICE BREYER: Suppose you have to do it.
22 Given all your work so far, how long would it take? You
23 had several months already, so how long? When could you
24 do it by?

25 GENERAL GARRE: It's going to be completed

1 by January 2009, Justice Breyer, under the alternative
2 arrangements that have been approved by the CEQ.

3 JUSTICE BREYER: So we're talking about two
4 months.

5 GENERAL GARRE: Well, at this point we are.
6 Now, the point that the Navy faced in January of 2008,
7 where it had an injunction against its use of sonar in
8 these training exercises and only an environmental
9 impact statement, it faced, as the Council on
10 Environmental Quality found, emergency circumstances in
11 terms of the need to conduct these training exercises.

12 JUSTICE KENNEDY: I take it that you're here
13 because you find the decision of the Ninth Circuit, and
14 I take it of the district court, prejudicial to the
15 government on an ongoing basis; and what are the
16 principal reasons for that?

17 GENERAL GARRE: Because of its impact on
18 national security, Justice Kennedy.

19 JUSTICE KENNEDY: And what particular
20 errors? The standard of review -- pardon me. The
21 standard for the grant or denial of injunction?

22 GENERAL GARRE: Well --

23 JUSTICE KENNEDY: What are the principal
24 areas you want to present to us?

25 GENERAL GARRE: I think that there are three

1 fundamental flaws, as I indicated. One, we think the
2 Ninth Circuit just got the NEPA claim wrong. The Navy
3 is complying with NEPA through the alternative
4 arrangements and the regulations, that the CEQ found --

5 JUSTICE SOUTER: What is the statutory
6 authority for suspending the obligation to provide an
7 EIS? You mentioned a regulation. Where in the statute
8 does it say that the Council on Environmental Quality
9 can dispense with this requirement?

10 GENERAL GARRE: I think we would point to a
11 couple of things. First, I think in terms of the
12 statute, NEPA says that the obligations of the statute
13 should be complied with to the fullest extent. And it
14 doesn't specifically say what happens if they are not
15 followed. These are procedural requirements.
16 Secondly --

17 JUSTICE SOUTER: No, but that's not the
18 question I am asking. I am not asking about the
19 consequences of not complying. I am asking what is the
20 statutory authority for the Council on Environmental
21 Quality to dispense with the statutory obligation to
22 prepare it?

23 GENERAL GARRE: Well --

24 JUSTICE SOUTER: That's what -- as I
25 understand it, that's what you're arguing in effect, as

1 an intervening -- as of intervening legal significance.
2 And I want to know what the statutory authority is for
3 that. I don't see it in NEPA.

4 GENERAL GARRE: The statutory authority that
5 we find in NEPA for the CEQ's regulation providing for
6 alternative arrangements is -- first, it's acknowledged
7 by this Court that CEQ has rulemaking authority. The
8 Court acknowledged that in Department of Transportation
9 v. Public Citizen. So we take that as a given.

10 JUSTICE SOUTER: Okay. As a general
11 proposition that's fine, but what's the statutory
12 authority for them to engage in rulemaking authority
13 that dispenses with the government's obligation to
14 comply with an EIS requirement?

15 GENERAL GARRE: Well, let me -- I'll answer
16 the question, but let me be clear: The government's
17 position is that we are complying with NEPA by -- by
18 complying with the alternative arrangements provided by
19 the Council on Environmental Quality.

20 JUSTICE SOUTER: But you -- I mean, the
21 claim is that you weren't complying with it at the time
22 the request for an injunction was brought, and
23 everything else is consequent on that. So I want to go
24 back to the point, in effect, at which the claim was
25 made that the government is not complying. One of your

1 answers to that is right now, as a result of subsequent
2 Council on Environmental Quality action, we're not in
3 the same situation that we were in when the suit was
4 brought. And I want to know what the statutory
5 authority is for the Council on Environmental Quality to
6 take the action with the effect that you claim it has.

7 GENERAL GARRE: And I would point, Your
8 Honor, to the language in NEPA that says it should be
9 complied with to the fullest extent possible --

10 JUSTICE SOUTER: That --

11 GENERAL GARRE: -- and I would --

12 JUSTICE SOUTER: -- seems to cut against
13 you. I am not getting it.

14 GENERAL GARRE: Well, that language, coupled
15 with -- which seems to us to suggest that compliance to
16 the fullest extent possible would depend on the
17 circumstances, coupled with the fact that NEPA doesn't
18 impose -- doesn't say what the consequences of
19 noncompliance would be --

20 JUSTICE SOUTER: Okay, but --

21 GENERAL GARRE: -- but other --

22 CHIEF JUSTICE ROBERTS: But why -- I don't
23 know if this is Justice Souter's question, but why CEQ?
24 I mean, NEPA doesn't really give anybody any regulatory
25 authority -- EPA, CEQ. And it seems to me that CEQ is

1 an odd entity to be doing this. They're more or less an
2 office in the White House, rather than a free-standing
3 agency.

4 GENERAL GARRE: Well, this Court has
5 acknowledged in numerous cases, Methow Valley and in the
6 Public Citizen case a few years ago, that NEPA gives CEQ
7 rulemaking authority, and that this Court gives
8 substantial deference to the CEQ's rules.

9 JUSTICE GINSBURG: Rulemaking to do what?
10 To set up an orderly regime for Federal agencies to
11 carry out their obligations under NEPA?

12 GENERAL GARRE: To implement the statute,
13 that's right. And there are a number of important
14 procedural requirements that go far beyond what the
15 statute requires that the CEQ has laid out in its
16 regulations. One of the regulations -- and this has
17 been on the books since 1979 and has been implemented
18 some 40 times. So this isn't something that was made up
19 in this case. It's an established regulatory practice
20 under NEPA that where there are emergency circumstances
21 an agency can come up with alternative arrangements to
22 comply with its NEPA obligations. And here those
23 alternative arrangements were: One, to complete an EIS
24 that is under way for all sonar activities and all other
25 activities by the Navy in the Southern California

1 Operating Area by January 2009. The Navy is going to
2 meet that goal. Two, to adopt the mitigation measures
3 spelled out in the alternative arrangements. Three, to
4 provide for public participation so that there could be
5 comment on any concerns to marine mammals in the area.
6 And, four, to provide for research into harms to marine
7 mammals. These were significant arrangements that the
8 Navy agreed to.

9 JUSTICE GINSBURG: But what good is it if,
10 as I understand it, the whole training program will be
11 over in December, and then the environmental impact
12 statement, which was supposed to come first, is going to
13 come after the whole project is concluded?

14 GENERAL GARRE: Well, it has -- it's
15 important because the environmental impact statement
16 that's going to be completed pertains not only to
17 COMPTUEX and JTF exercises that will be completed in the
18 Southern California Operating Area in the future, but
19 all activities. So that environmental impact statement
20 is going to be very meaningful.

21 JUSTICE SOUTER: Let me -- let me switch
22 back. Chief?

23 Let me switch back in time for a second to
24 the beginning of these exercises. One of the -- I mean,
25 one of the arguments, and you have alluded to it, for I

1 guess the appropriateness of the Council on
2 Environmental Quality's action, if it has any power to
3 act, is emergency circumstances. My understanding, and
4 correct me if I'm wrong on the facts, is that the
5 exercises began in February of 2007. My understanding
6 is that it was in that same month of February 2007 that
7 the Navy produced the EA, the environmental assessment,
8 so that in effect, as I understand it, the Navy
9 disclosed the fact that it would not provide an EIS at
10 just about the same moment that it began the exercises.

11 GENERAL GARRE: I think --

12 JUSTICE SOUTER: And I guess my question is,
13 to the extent that there was an emergency, wasn't the
14 emergency created by the failure of the Navy to take any
15 timely action? I am assuming in my question that the
16 Navy had decided before February 1st, 2007, that it was
17 going to have these exercises. So it sounds to me as
18 though that, if there is an emergency, it's one that the
19 Navy created simply by failing to start an EIS
20 preparation in a timely way which it tried in effect to
21 sort of neutralize by keeping everybody in the dark
22 until the last moment. So, why -- why shouldn't we say
23 that -- even assuming the Council on Environmental
24 Quality can somehow dispense with the statute, why
25 shouldn't we say that there was no emergency here except

1 one which was created by the Navy's apparently
2 deliberate inattention?

3 GENERAL GARRE: For several reasons,
4 Justice Souter. First, there was a gap between when the
5 Navy issued its environmental assessment and when the
6 first training exercises began.

7 JUSTICE SOUTER: Well, it was a gap of less
8 than month, right?

9 GENERAL GARRE: I believe -- I believe
10 that's right, but there was a gap and there's no -- I
11 don't think there can be any --

12 JUSTICE SOUTER: And how long does it -- how
13 long does it take -- going back to Justice Breyer's
14 question, how long does it take to prepare an
15 environmental impact statement? It takes more than --

16 GENERAL GARRE: Well, I --

17 JUSTICE SOUTER: It takes more than a month,
18 doesn't it?

19 GENERAL GARRE: Sure. Absolutely.

20 JUSTICE SOUTER: Okay.

21 GENERAL GARRE: But I don't think --

22 JUSTICE SOUTER: And the Navy knew more than
23 the 1st -- earlier than the 1st of February that it was
24 going to engage in these exercises, didn't it?

25 GENERAL GARRE: It did, and it also knew

1 that it was in the process of finalizing an
2 environmental impact statement that it prepared in good
3 faith, a 293-page statement, which concluded that there
4 would be --

5 CHIEF JUSTICE ROBERTS: An environmental
6 assessment.

7 GENERAL GARRE: An environmental assessment,
8 that's right, with the finding of no significant
9 environmental impact.

10 This Court presumes the regularity of
11 administrative actions. There's no reason for the Navy,
12 particularly on this record, to have assumed that that
13 EA would not have been sustained. The emergency
14 circumstances arose in January 2008, when the district
15 court enjoined the use of MFA sonar in these exercises
16 when the Navy had several exercises --

17 JUSTICE SOUTER: Sure, but they wouldn't
18 have been in the situation in January of 2008 if they
19 hadn't been in the situation I described in February of
20 2007. And it sounds to me as though the Navy played its
21 cards very close to its vest --

22 GENERAL GARRE: Well --

23 JUSTICE SOUTER: -- in 2007.

24 GENERAL GARRE: Well, with respect, I don't
25 think that a 293-page environmental assessment with the

1 kind of detail and support that this assessment has --

2 JUSTICE SCALIA: Look, the problem you face
3 -- and maybe you're being whipsawed -- is that you are
4 effectively estopped from the argument that no EIS is
5 necessary by the fact that you have agreed to these
6 alternative arrangements. But you should not be
7 estopped from arguing that at the time the EA was issued
8 that was not a good faith completion of all the Navy's
9 responsibilities. And that's the argument that is being
10 made against you now. It assumes that the EA wasn't
11 enough. And I'm not sure that we -- that that
12 assumption is valid.

13 GENERAL GARRE: Well, that's right. And as
14 I indicated earlier -- I want to be clear -- the Navy
15 believes that its environmental assessment was not only
16 prepared in good faith, but was appropriate and reached
17 the right conclusions.

18 JUSTICE BREYER: That's exactly what
19 Justice Kennedy started to ask. I mean, I said why
20 doesn't this thing go away after two months? I mean,
21 you've done it anyway, and Justice Kennedy said because
22 you want a holding from the Court that will help you in
23 other cases because you think what the court below did
24 here was wrong. And you said "three reasons," and you
25 got out the first one, and I would like to hear the

1 other two.

2 GENERAL GARRE: The other two are: One, the
3 injunction. Even if you agree with Respondents on the
4 likelihood of success on the NEPA claim, it's based on a
5 showing of irreparable injury that is fundamentally
6 flawed. The Ninth Circuit and the district court looked
7 to whether there was irreparable injury under a
8 possibility standard. We think that the case law --

9 JUSTICE SOUTER: Didn't both the circuit and
10 the district court, although they mentioned that, in
11 fact find that it was -- I forget what their phrase was
12 -- beyond question, that the --

13 JUSTICE GINSBURG: Near -- "near certainty."

14 JUSTICE SOUTER: "Near certainty."

15 GENERAL GARRE: They did, Justice Souter,
16 and we think --

17 JUSTICE SOUTER: There is no -- there is no
18 harm. I mean, the standard may or may not be right, but
19 there is no harm to the Navy in this case from -- from
20 the use of that standard, I take it.

21 GENERAL GARRE: Well, I don't think that a
22 court could say that, Justice Souter, for a couple of
23 reasons.

24 First, when a lower court applies a
25 fundamentally wrong standard to assess -- to make a

1 determination, this Court usually corrects that legal
2 standard and gives the -- the lower court an opportunity
3 to do it again.

4 JUSTICE SOUTER: Well, we -- we may, but so
5 far as the case is concerned, we may -- and we
6 frequently do -- say there -- there -- that certainly
7 there's no harm in this case, the error was harmless.

8 GENERAL GARRE: And, two, the finding, which
9 is a sentence in the district court decision repeated by
10 the court of appeals, of "near certainty of harm to
11 marine mammals" is utterly belied by the environmental
12 assessment in this case as well as the fact that -- and
13 the Ninth Circuit acknowledged this -- the Navy has been
14 using MFA sonar in the Southern California Operating
15 Area for more than 40 years and no one can point to any
16 harm to marine mammals.

17 JUSTICE STEVENS: Mr. Garre, could I ask you
18 a question? If this were not a Navy case with all the
19 implications of the Navy, but an ordinary case in which
20 it was demonstrated that an EIS had to be filed, would
21 it not be normal -- normal action to enjoin the -- the
22 government action until the EIS was filed? Because the
23 -- the very fact that you need an EIS is -- is because
24 you don't know what environmental consequences may
25 ensue. That's the purpose of the EIS. So isn't it the

1 normal practice to enjoin government action until the
2 EIS is filed when it is clear there is a duty to file?

3 GENERAL GARRE: I don't think it is,
4 Justice Stevens. I think it -- the normal practice is
5 to require someone who seeks the extraordinary remedy of
6 a preliminary injunction to show irreparable injury, a
7 likelihood of irreparable injury.

8 JUSTICE KENNEDY: Would the irreparable
9 injury have to -- and this just repeats
10 Justice Stevens's question. It is the same concern I
11 have.

12 Let's assume an EIS is required; let's
13 assume it hasn't been prepared; let's assume the
14 government project is going to proceed. You still have
15 to show irreparable harm before you can get the
16 injunction?

17 GENERAL GARRE: You do.

18 JUSTICE KENNEDY: Do you have authority for
19 that in the -- are the circuits unanimous on that point?

20 GENERAL GARRE: Well, I don't have authority
21 for that precise proposition because I don't --

22 JUSTICE SCALIA: Well, yes, you do, but it
23 may not be in the circuits. Our cases say that
24 procedural injury alone is not the kind of injury that
25 confers standing; that there has to be some concrete

1 harm.

2 GENERAL GARRE: Well --

3 JUSTICE SCALIA: And -- and the only injury
4 that -- that follows from the mere failure to file an
5 EIS is -- is a procedural injury that affects the entire
6 population.

7 JUSTICE KENNEDY: Then, let's -- let's
8 assume standing. Let's assume standing. Let's -- let's
9 assume people have standing.

10 GENERAL GARRE: I -- I think that that's
11 right, Justice Scalia.

12 JUSTICE BREYER: Well, I wouldn't -- look,
13 you have an EIS for the reason that the agency itself,
14 once it reads it, might decide to do something else.
15 That's the whole point of an EIS. So if the agency goes
16 ahead with the action before reading the EIS, it becomes
17 committed to that course of action, and the chances that
18 the EIS will lead it to back up are the same as the
19 chances that any big agency will back up once it's
20 committed to a course, namely a lot lower. And that I
21 always thought was the whole harm that the EIS is there
22 to stop.

23 GENERAL GARRE: Clearly, the purpose of the
24 requirements under NEPA are to ensure that the agency
25 has -- is making an informed decision, and here I don't

1 think there is any question that the Navy was after its
2 293-page assessment.

3 I am not aware of any authority that
4 suggests --

5 JUSTICE SOUTER: No, but that -- in effect,
6 you are saying the EA is the equivalent to an EIS.

7 GENERAL GARRE: No, I'm not, Justice Souter.
8 I am saying --

9 JUSTICE SOUTER: What is the difference
10 between them? I -- I assume the difference is the EIS
11 is a more comprehensive survey and -- and set of
12 conclusions.

13 GENERAL GARRE: That's right, but then --

14 JUSTICE SOUTER: So that without the EIS,
15 the Navy is acting in -- in a state of -- of some degree
16 of ignorance greater than would be the case if -- if it
17 had done -- done the EIS.

18 GENERAL GARRE: I -- the EIS --

19 JUSTICE SOUTER: And that ignorance, I
20 presume, is the harm that the -- that the statute is
21 intended to prevent.

22 GENERAL GARRE: But it is not a likely --
23 they have not shown a likelihood of irreparable injury.

24 JUSTICE SCALIA: The EA demonstrates in your
25 view that the EIS would -- would very likely say that

1 this -- this action by the Navy is okay. And since that
2 is the case, there is -- there is no probability of
3 irreparable harm; to the contrary, there is a
4 probability of no irreparable harm because of the EA.

5 GENERAL GARRE: We agree with that. We think
6 it's important, though, to separate out the likelihood
7 of success on the NEPA claim with the distinct question
8 of whether there is irreparable injury and look to the
9 record of whether there is irreparable injury. And we
10 think they have not come close to establishing that.
11 The one final --

12 JUSTICE KENNEDY: Are there any authorities
13 in the circuits which would indicate that irreparable
14 injury is not required when there's standing, when an
15 EIS is required, when an EIS has not been prepared, and
16 when the government is ready to proceed? There is
17 always irreparable injury before you can get an
18 injunction? That's what all the circuits say?

19 GENERAL GARRE: Justice Kennedy, I haven't
20 completed that -- that research with respect to all the
21 circuits, but I am confident in saying I am not aware of
22 a decision in which a court has said that the
23 irreparable injury requirement does not have to be met
24 or is automatically met.

25 JUSTICE STEVENS: But the whole theory of an

1 -- of an environmental impact statement is that we don't
2 really know what the harm will be. So how can you say
3 that in order to get an injunction against the
4 government action you have to prove irreparable harm?

5 GENERAL GARRE: And it may be easier in some
6 cases than others, Justice Stevens. But I think in this
7 case where you have the record that has been compiled,
8 they cannot -- they cannot --

9 JUSTICE STEVENS: But you're really arguing
10 that an -- that a temporary statement is enough, will
11 always be enough.

12 GENERAL GARRE: We're not taking that
13 position, Justice Stevens. We're taking the position
14 that the record in this case does not show a likelihood
15 of irreparable injury. If I could --

16 JUSTICE SCALIA: In all -- in all of these
17 cases it is controverted, or in most of them, whether an
18 EIS is either necessary -- is even necessary. So if the
19 mere allegation that it was necessary gives rise to an
20 allegation of irreparable harm, you are going to get a
21 preliminary injunction in all cases?

22 GENERAL GARRE: I think that's right. I
23 think that fundamentally --

24 JUSTICE GINSBURG: I thought that you were
25 not contesting --

1 JUSTICE STEVENS: But there is a finding
2 that it is necessary, and here we have that finding, as
3 I understand it.

4 JUSTICE GINSBURG: And you are not
5 contesting that -- that there is a probability of
6 success on the claim that you had to file an
7 environmental impact statement.

8 GENERAL GARRE: We -- we are contesting
9 that. And if I could reserve the remainder of my time.
10 And one must -- I can explain, if you would like,
11 Justice.

12 JUSTICE GINSBURG: Yes. I thought you
13 conceded that point.

14 GENERAL GARRE: If I misspoke, I apologize.
15 My point was that the administrative determination that
16 is at issue now in evaluating the NEPA claim is the
17 finding of alternative arrangements. The Navy has never
18 conceded that it was required to do an EIS at the
19 outset. It simply has agreed to live with the
20 alternative arrangements approved by the Council on
21 Environmental Quality.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 GENERAL GARRE: Thank you.

24 CHIEF JUSTICE ROBERTS: Mr. Kendall.

25 ORAL ARGUMENT OF RICHARD B. KENDALL

1 ON BEHALF OF THE RESPONDENTS

2 MR. KENDALL: Mr. Chief Justice, and may it
3 please the Court:

4 The fundamental question in this case is a
5 very traditional question of equity jurisprudence. The
6 fundamental question is whether the district court's
7 factual finding that the injunction will permit the Navy
8 to train and certify its sailors is supported by the
9 evidence. Because if it is supported by the evidence it
10 cannot be clearly erroneous. And if it is not clearly
11 erroneous, it cannot be reversed.

12 JUSTICE ALITO: Isn't there something
13 incredibly odd about a single district judge making a
14 determination on that defense question that is contrary
15 to the determination that the Navy has made?

16 MR. KENDALL: Justice Alito, I submit not,
17 and here is why. This was an issue of fact. The
18 question was whether, in light of the Navy's past
19 training, which was abundantly shown in the record,
20 their post-complaint, during the litigation, lawyer-
21 crafted declarations were sufficiently persuasive to
22 undo all that evidence that showed that the Navy had
23 repeatedly used safety zones.

24 Now, what happened here was that the judge
25 was extraordinarily deferential to the Navy. The judge

1 rejected most of the measures that plaintiffs sought,
2 crediting where the evidence was not to the contrary the
3 declarations of the Navy saying, for example, we need to
4 train at night.

5 JUSTICE BREYER: I didn't see evidence to
6 the contrary on two important points. The first was
7 that the Navy had affidavits which says -- they say -- I
8 read them. Maybe I just missed the contrary. But they
9 said that: You are requiring us, judge, to turn the
10 sonar down to six decibels or up to six, whatever,
11 whenever we had to run into a situation called layering
12 of different temperature levels. And we tell you, as
13 naval officers, that that's just where submarines like
14 to hide. And we also tell you that if we can't train
15 people to do that they will miss out on an important
16 part of how to find these submarines.

17 I saw no answer to that.

18 The second thing they said was that: We're
19 willing to turn off the sonar if there's any marine
20 mammal that comes within 500 yards, which is a quarter
21 of a mile, about. But you insist that we turn off the
22 sonar when any animal comes within a mile and a quarter.
23 And that's quite a big distance more. A lot of animals
24 come in there, and if we have to turn off the sonar all
25 those times, we are not going to be able to get much

1 training done.

2 Now, those two things seem to be quite
3 important. And I just might have missed, which I might
4 have, which is why I'm asking, what the response was by
5 equivalent experts to those points.

6 MR. KENDALL: Justice Breyer, the response
7 in the record appears in the after-action reports of the
8 eight prior exercises in Southern California. There
9 were four from the series that we challenge and four
10 after-action reports, prepared earlier ones. And you
11 will find those in the joint appendix at 326 to -45.

12 What the court found was that the Navy had
13 trained and certified its troops during those eight
14 SOCAL exercises despite the complete absence of surface
15 ducting conditions. And it was conceded --

16 JUSTICE BREYER: What do you mean, despite
17 the complete absence?

18 MR. KENDALL: Because surface ducting
19 conditions are, as it happens, quite rare.

20 JUSTICE BREYER: That's the whole point.
21 That's why I thought they didn't prove anything. Fine,
22 they went on some exercises and they didn't run into
23 these layered things. So obviously they couldn't have
24 training.

25 MR. KENDALL: Right.

1 JUSTICE BREYER: Now, what they are saying
2 is, when you do run into that situation you've got to
3 train people to deal with it. It doesn't prove much
4 that when you didn't run into it they didn't train
5 people to deal with it. How could they have?

6 MR. KENDALL: Well, the question before the
7 court was balancing the requirement that the Navy comply
8 with the law and the environmental harms against the
9 Navy's interest. And our point --

10 CHIEF JUSTICE ROBERTS: Well, with one
11 important qualification. The question was the balance
12 of those equities on a preliminary basis. In other
13 words, before we reach a final decision, we're going to
14 prevent the Navy from engaging in the sonar exercises
15 that they think are necessary. Not even after we have
16 decided they were wrong, just because we think there is
17 a likelihood that they might be wrong.

18 MR. KENDALL: That's quite right. And of
19 course, in this litigation that was the whole ball game,
20 because by the time you had reached trial in this case
21 all of the exercises --

22 CHIEF JUSTICE ROBERTS: Well, I thought that
23 would have been the whole ball game until I read your
24 brief. Your brief does not spend a page defending the
25 decision on the merits of the lower courts. Nothing

1 about emergency circumstances or CEQ. Instead, you
2 raise other arguments on which the district court did
3 not rely in finding likelihood of success. So given
4 that, I would have thought we would have a lot more to
5 talk about when it gets to the permanent injunction on
6 the merits.

7 MR. KENDALL: I respectfully disagree. We
8 took the position from the beginning --

9 CHIEF JUSTICE ROBERTS: Oh, yes, yes. You
10 certainly raised those issues. I'm not saying that.
11 What I am saying is the district court didn't rely on
12 those in finding likelihood of success.

13 MR. KENDALL: Well, I also disagree on that
14 point. You will find at page 97a of the appendix that
15 was submitted with the petition for certiorari the
16 court's declaration that there was no emergency. You
17 will find --

18 CHIEF JUSTICE ROBERTS: Yes.

19 MR. KENDALL: But that's the question.

20 CHIEF JUSTICE ROBERTS: That's what the
21 district court relied on. Where in your brief do I see
22 a defense of the district court's analysis, as opposed
23 to a very coherent argument about Hayburn's Case and
24 everything else, issues the district court didn't reach?

25 MR. KENDALL: The district court did reach

1 the question of whether the Navy could train. That
2 negated any emergency under any definition of the term.
3 It doesn't matter whether -- and there was debate about
4 this below -- an emergency can be foreseeable and
5 expected, as Justice Souter was -- his questions were
6 probing, or whether the emergency can be -- must be
7 unexpected. And there was debate about that below. But
8 the position that we took and the position that the
9 district court took was there is no emergency.

10 The reason there is no emergency is because
11 the Navy -- the Navy is perfectly able to train under
12 these circumstances.

13 JUSTICE BREYER: That's what I can't --
14 look, I don't know anything about this. I'm not a naval
15 officer. But if I see an admiral come along with an
16 affidavit that says -- on its face it's plausible --
17 that you've got to train people when there are these
18 layers, all right, or there will be subs hiding there
19 with all kinds of terrible weapons, and he swears that
20 under oath. And I see on the other side a district
21 judge who just says, you're wrong, I then have to look
22 to see what the basis is, because I know that district
23 judge doesn't know about it, either.

24 So, the basis so far I'm thinking on this
25 one is zero. That's -- because what you have told me is

1 they completed some exercise where they didn't find any
2 layering.

3 MR. KENDALL: There was also prior exercise
4 in Hawaii. You will recall from the brief that we had a
5 prior litigation that resulted in the consent decree in
6 Hawaii. In that consent decree the Navy agreed to train
7 with a surface ducting powerdown. So, they had
8 previously told the same judge that they were capable of
9 training in surface ducting conditions with that
10 powerdown, else they would not have agreed to that
11 decree. There was evidence in the record.

12 The problem that the judge had is that the
13 Navy cannot be judge of its own cause. Deference does
14 have its limits. And this judge was in a position of
15 reviewing facts of prior exercises and what the Navy --

16 JUSTICE BREYER: Generalities. You see --
17 of course, I agree with you on the generality. What I
18 am missing here is the specifics, because I am nervous
19 about it, as you can see. And what I am nervous about
20 is that there just wasn't enough on the other side, on
21 your side.

22 MR. KENDALL: If I may proceed then to the
23 safety zone specifics, because that's the other issue.
24 Remember there were a number of injunctive measures that
25 the Navy objected to in the district court that they no

1 longer object to. They ceased to object to them in the
2 court of appeals and they haven't brought them up here.

3 So the next issue is the 2200-yard safety
4 zone. Now, first, why was the safety zone chosen? It
5 was chosen because that is the Navy's preferred method
6 of mitigation. They have always mitigated using safety
7 zones. They have preferred to mitigate using a safety
8 zone that is 1,000 yards. We asked for one that was
9 2,200 yards.

10 The question was, what is the difference in
11 training capability in the two zones? So we looked at
12 that. And where did we look? We looked at the
13 statistics from the after-action reports.

14 Now, in this case we had helpful information
15 to use, because the after-action reports reveal that the
16 effect of widening the safety zone would have been at
17 most one more shutdown or powerdown each exercise.

18 CHIEF JUSTICE ROBERTS: It would have
19 increased exponentially the area that the Navy had to
20 scrutinize to determine if there were marine mammals
21 there.

22 MR. KENDALL: Incorrect. Incorrect. It
23 would --

24 CHIEF JUSTICE ROBERTS: Well, the
25 increase -- you keep saying it's just 1,000 yards. But

1 it's 1,000 yards of a circle. And if I remember high
2 school geometry right, that's a squared increase.

3 MR. KENDALL: But think about how this is
4 being done. The way it's being done is that you have
5 somebody on the deck with binoculars and they are
6 looking straight ahead and they can either look out
7 1,000 yards or out 2,000 yards.

8 CHIEF JUSTICE ROBERTS: And there are people
9 in airplanes?

10 MR. KENDALL: Yes. Yes.

11 CHIEF JUSTICE ROBERTS: Not just straight
12 ahead.

13 MR. KENDALL: There are people in airplanes
14 and they are looking down and they can see as much as
15 they can see within that area. And if they see a marine
16 mammal, there will be a shutdown or a powerdown; and if
17 they don't see it, there won't be one. You can only
18 shut down or power down when you see one.

19 CHIEF JUSTICE ROBERTS: Well, I guess my
20 question was, that increases the area exponentially that
21 has to be scrutinized. And I don't see why, as you
22 said, that was wrong.

23 MR. KENDALL: Because they argued -- and
24 perhaps I misunderstood, Mr. Chief Justice, that you
25 were referring to their argument -- which is not that

1 the area is exponentially larger and that creates
2 difficulties of observation; they argued that it would
3 create an exponentially greater number of shutdowns.
4 And that is mathematically proven false by the
5 after-action reports, because it's one per exercise.

6 And this judge, keep in mind, had been
7 listening to the Navy make factual assertions from the
8 very beginning. And the factual assertions that the
9 Navy made at the start of this case about the nature of
10 the environmental harms were completely disproven by the
11 EA and by the expert evidence that was brought to bear.
12 And there are a number of statements that General Garre
13 made that I think I should address.

14 One of them in answer to questions from
15 Justice Ginsburg had to do with the Level A takes on
16 beaked whales. The Navy tries to dismiss those by
17 saying we only graded the effects on beaked whales as
18 Level A because we did that as a matter of generous
19 policy.

20 They didn't do it for policy reasons. They
21 did it because that's what the science compels, because
22 beaked whales have stranded repeatedly around the world,
23 correlated -- caused by in the views of scientists, and
24 the evidence is overwhelming, by sonar. And the reason
25 that happens especially to beaked whales is because they

1 dive for very long periods of time. And when they dive
2 for very long periods of time, and they are then
3 bombarded with sonar -- which by the way in sound
4 intensity, in this courtroom if we had a jet engine and
5 you multiplied that noise by 2,000 times, correcting for
6 water, that's the sound's intensity that would be going
7 on in the water if you were a marine mammal near that
8 source. The beaked whales, the scientists believe,
9 adjust their diving patterns; since they dive down for
10 so long, if they come up too fast, they get the bends,
11 and so there is evidence of -- when they do the
12 necropsies of these beaked whales, they find
13 hemorrhaging, the embolisms in various parts of the
14 bloodstream, and many, many deaths. So there is
15 enormous scientific evidence that there is a greater
16 harm to beaked whales, that it is caused by sonar and
17 that is precisely why the Navy was compelled in the EA
18 to recognize that evidence.

19 Now, one thing that was said here which I
20 found --

21 JUSTICE ALITO: Where in the record -- this
22 was the question I asked General Garre. Where in the
23 record is there evidence of -- that beaked whales would
24 be killed?

25 MR. KENDALL: The evidence of the prediction

1 of the Level A takes, in the --

2 JUSTICE ALITO: Well, what does Level A take
3 -- maybe can you put this in lay terms. Let's start
4 with kill. Where is the evidence that beaked whales
5 would be killed?

6 MR. KENDALL: It is in the -- there is a
7 table on page 223 of volume 1 of the joint appendix.
8 And then there are the discussions of beaked whale
9 injuries that General Garre referred to, and what they
10 show is that beaked whales will experience the effects I
11 described. But there is also expert evidence in the
12 record in the form of a number of declarations by
13 scientists who have studied beaked whales for -- for
14 quite some time. The evidence you can find -- and it's
15 referred to on page 4 of our brief -- joint appendix
16 600-602, 673-89, 738-41, 760; the supplemental excerpt
17 of record at 180; also joint appendix 601, 666-67,
18 674-76, 680, 685. And there are a few other references
19 on page 4 of our brief.

20 I also wanted to talk about the behavioral
21 changes, because it's --

22 JUSTICE BREYER: This is -- I'm going to
23 give you a chance to say what's so terrible about what
24 they're doing. I will express a little frustration.
25 Not your fault. But why couldn't you work this thing

1 out? I mean, they are willing to give you quite a lot
2 of conditions, and you say, well, we have got to have
3 more conditions. And you are asking us who know nothing
4 about whales and less about the military to start
5 reading all these documents to try to figure out who's
6 right in a case where the other side says the other side
7 is totally unreasonable. And the issue at law seems to
8 be something that is going to last for two months.

9 So -- so, why? What is so -- what is the
10 important thing here?

11 MR. KENDALL: The important thing here is
12 that the Navy is focused on having it its way or no way.

13 CHIEF JUSTICE ROBERTS: Well, that's very
14 unfair. There were six conditions imposed by the
15 district court. The Navy didn't even appeal four of
16 them. They gave up on four out of the six issues.
17 That's not insisting on having it their way.

18 MR. KENDALL: No -- I agree, although the
19 reason I believe that they conceded those is that the
20 record was -- was so overwhelming on each of those
21 points, they hadn't even put in evidence to suggest that
22 those measures would cause them any problem. They
23 simply didn't have the declaration --

24 CHIEF JUSTICE ROBERTS: And even the other
25 way -- it struck me how the district court relied on the

1 fact that the Navy had taken actions to protect marine
2 mammals in the past to say, well, there can't be any
3 problem with adding more protections. No good deed goes
4 unpunished.

5 MR. KENDALL: Well, if I can -- if I can
6 answer that this way: We negotiated with the Navy for
7 months and months and months. The RIMPAC case, I
8 settled with them. We tried very hard to resolve this
9 case, but keep in mind that the Navy until the district
10 court ruled refused to agree to any measures that we
11 proposed -- any measures. So it was a binary --

12 CHIEF JUSTICE ROBERTS: They had already
13 taken actions unilaterally to protect marine mammals.
14 Now, you say that wasn't enough.

15 MR. KENDALL: Right.

16 CHIEF JUSTICE ROBERTS: But they were taking
17 some actions.

18 MR. KENDALL: That's right. And -- and so
19 we had a litigation that was focused on were there
20 additional actions that should be taken; and there is
21 extensive evidence taken and extensive argument and then
22 the district court ruled. And the correct path, if the
23 Navy was aggrieved by that decision, was a higher court.
24 But instead, in order to avoid the clearly erroneous
25 standard -- and remember, that the clearly erroneous

1 standard as this Court said in the Anderson v. Bessemer
2 City case, says when there are two permissible views of
3 the evidence, the factfinder's choice between them
4 cannot be clearly erroneous.

5 So in order to evade that -- and this is
6 typical of the tactics that we experienced and the
7 uncompromising nature of their approach that we
8 experienced -- they went to CEQ to try to trump the
9 entire injunctive process. Now, that they did without
10 any authority in NEPA --

11 JUSTICE BREYER: How does the basic thing
12 work? Because to a layperson, when I think of the armed
13 forces preparing an environmental impact statement, I
14 think, the whole point of the armed forces is to hurt
15 the environment. I mean --

16 (Laughter.)

17 JUSTICE BREYER: So I don't -- I don't
18 understand how it's supposed to work. Of course they
19 are going to do something that is harmful.

20 MR. KENDALL: You know, the whole point of
21 the armed forces, I think is to --

22 JUSTICE BREYER: You see the point, I am
23 trying to give you a -- overstating it.

24 MR. KENDALL: I think the point of the armed
25 forces is to safeguard our freedoms causing the least

1 damage possible to our environment. And this Court has
2 recognized that repeatedly.

3 JUSTICE BREYER: You go on a bombing
4 mission, do they have to prepare an environmental impact
5 statement first?

6 MR. KENDALL: No.

7 JUSTICE BREYER: No.

8 MR. KENDALL: They don't.

9 JUSTICE BREYER: How does it work?

10 MR. KENDALL: And we have never, ever
11 contended that any of our proposed restrictions should
12 apply to combat at all, and it doesn't.

13 This training was planned for a very long
14 time. Had -- there were questions earlier,
15 Justice Scalia I think raised a question about is the EA
16 as good as the EIS? There is a big, big difference.
17 There are really two, between an EA and an EIS. The
18 substantive difference is that an EA doesn't have the
19 same alternatives analysis that an EIS has, and the
20 procedural difference, which in a country that values
21 transparency and ideas and exchange with the public, is
22 the notice and comment that an EIS requires.

23 JUSTICE SCALIA: I -- I didn't assert that
24 they are -- that they are the same thing substantively.
25 My -- my only question is whether your assertion of bad

1 faith on -- on the part of the Navy holds water so long
2 as they were doing an EA. If -- you do an EA to see if
3 an EIS is necessary. And you say if there's no -- if
4 there is no significant harm to the environment, you
5 don't even need an EIS.

6 MR. KENDALL: Bad faith is not an element --

7 JUSTICE SCALIA: And that's how they
8 started. That's step one, and many agencies do that.
9 They are authorized to do that. I don't know why you
10 have to attribute bad faith to the Navy simply because
11 it began with an EA.

12 MR. KENDALL: Bad faith is not an element of
13 our case. I was simply responding to Justice Breyer's
14 question as, I admit, a somewhat frustrated lawyer who
15 tried to work things out as to how it happened that they
16 weren't worked out.

17 I do want to speak a bit about some of the
18 comments that General Garre made in response to
19 Justice Kennedy's and Justice Scalia's questions about
20 --

21 CHIEF JUSTICE ROBERTS: Can I -- before you
22 do that, can I derail you a little bit to get back to
23 the balance of equities question? As I read the
24 opinions most of the balancing here was done by the
25 Ninth Circuit, not the district court. I found the

1 district court's balancing in only one sentence. "The
2 court, after all of its prior" -- "the court is also
3 satisfied that the balance of hardships tips in favor --
4 favor of granting an injunction." It goes on. But it's
5 just one sentence.

6 The Ninth Circuit talked about deferring to
7 the district court, but in fact it supplied all the
8 analysis of the balance.

9 MR. KENDALL: Well, I -- with respect, I
10 think the district court spoke in several different
11 opinions. So you can -- you can find out what the
12 district court was thinking by looking not only at the
13 injunction, but also at the -- at the response of the
14 district court denying the motion to vacate.

15 CHIEF JUSTICE ROBERTS: Suppose it's still
16 fair to say that on all of those it focused most of its
17 attention on likelihood of success on the merits and
18 irreparable harm rather than a balancing of the
19 equities.

20 MR. KENDALL: Well, I would disagree in one
21 respect, which is the court was very focused on which
22 measures to impose and which measures not to impose.
23 There were, you know, at least 10 pages of her
24 injunctive opinion going through that, and each -- and
25 the denial of the motion to vacate did the same thing,

1 because -- after the Ninth Circuit ordered Judge Cooper
2 to issue a tailored injunction, each side briefed very
3 extensively, with a huge amount of supporting evidence,
4 the issue of which measures should be imposed. And
5 Judge Cooper decided that certain measures would not be
6 imposed and certain ones would, and she explained why.
7 And she did that against the background of the harms
8 that were designed to be prevented. And so what I would
9 submit is --

10 CHIEF JUSTICE ROBERTS: I think that's -- I
11 think that's quite right.

12 My question, though, is that at no point
13 that did the district judge undertake a balancing of the
14 equities, putting on the one side the potential for harm
15 to marine mammals that she found -- and that's your
16 point about the record -- and putting on the other side
17 the potential that a North Korean diesel electric
18 submarine will get within range of Pearl Harbor
19 undetected. Now, I think that's a pretty clear balance.
20 And the district court never entered -- never went into
21 that analysis.

22 MR. KENDALL: There's a good reason why she
23 didn't balance that. And that gets back to my opening
24 remarks, which is that the premise of that question and
25 why, Mr. Chief Justice, you would be concerned about

1 that is that there would be an exposure to that
2 submarine, that North Korean submarine. But the judge
3 had made a factual finding, and the factual finding she
4 made was that training would not be affected. And so, on
5 the one hand, you have a factual finding that there is
6 no harm to the training at all, which means that in the
7 balance the harms to the environment are much heavier.

8 JUSTICE ALITO: Do you -- how much
9 deference, if any, do you think the district court was
10 obligated to give to the Navy on that military issue
11 about whether the training would be effective? Is judge
12 Cooper an expert on antisubmarine warfare?

13 MR. KENDALL: No. Judge Cooper, like all
14 judges, has to sift through the evidence of experts, and
15 Judge Cooper gave great weight to the Navy on everything
16 that the Navy said. But there was a place where she had
17 to stop because, after all, she's a judge, and where she
18 had to stop was where the evidence belied the
19 declarations. And, you know, this Court has had in a
20 number of decisions to confront the question of whether
21 wartime exigencies force the courts to suspend their
22 powers of judgment. I submit that what happened here is
23 that this court didn't, and that's what --

24 CHIEF JUSTICE ROBERTS: Even the district --
25 even the district court recognized, in the words of her

1 opinion, that it would pose "a substantial challenge" --
2 that's a quote -- for the Navy to shift to the regime
3 that she imposed in the injunction.

4 MR. KENDALL: That's right, and it will in
5 fact pose a challenge, and the proof has been in the
6 pudding, which is that the Navy has now conducted 13 out
7 of 14 exercises, the last 8 of which have been conducted
8 under this regime as modified by the circuit. And they
9 have not, as they were invited, had to come back and ask
10 for relief despite the fact that they had the
11 opportunity.

12 JUSTICE KENNEDY: But by the time this case
13 got back to the court -- to the district court a second
14 time, the President had made a determination that this
15 was in the paramount interest of the United States. The
16 Defense and Commerce Department jointly had made a
17 determination that this is necessary for the national
18 defense. And it seems to me, even if those
19 determinations don't resolve the EIS statement, they
20 certainly must be given great weight by the district
21 court in determining whether to continue the injunction.
22 If you could comment on that, incorporate it also in
23 what you were going to say about Mr. Garre's argument
24 with reference to the standard.

25 MR. KENDALL: Yes. First, responding to

1 that very point, it's common ground among the litigants
2 and certainly with the court that the interests ascribed
3 by the President and by every other government official
4 with respect to Naval training are of the highest
5 importance. The question was -- and this is the court's
6 factual finding, and the question is whether there was
7 sufficient record evidence to support it, whether she
8 was right that there wouldn't be an adverse effect
9 except for possibly some logistical changes, but no
10 adverse effect in the conduct and achievement of the
11 training. If there's no adverse effect, then what the
12 President is speaking to is speaking past what's
13 concerning the court.

14 Now, with respect to irreparable harm, the
15 -- the argument that General Garre made I think
16 mistakenly collapses the normal equity issue in this
17 following sense: Once a plaintiff satisfies Article
18 III, very important, and under the Japan Whaling case,
19 the Lujan v. National Wildlife case, there is no
20 question that these plaintiffs deserve to be in court,
21 and it has never been contested.

22 Then you move to the traditional equity
23 standard for assessing irreparable harm, Hecht v.
24 Bowles, but in the environmental area we have a
25 decision, the Amoco v. Village of Gambell decision.

1 JUSTICE SCALIA: Excuse me. That
2 irreparable harm that is the assessment of -- for
3 purposes of the injunction -- refers to the same harm
4 that is the harm which is the basis for standing, does
5 it not?

6 MR. KENDALL: It always does, and the
7 question is just somewhat different. And I think,
8 Justice Scalia, if you look at your opinion in the
9 second Lujan case and you think about the imminence
10 requirement of standing there, what irreparable harm
11 adds to that is the traditional need to show that the
12 harm you suffer cannot be quantified in damages or it's
13 difficult to quantify, and that a remedy at law will not
14 achieve the adjustment between the parties that's
15 required. That's what equity does. Equity preserves
16 the positions of the parties.

17 And as this Court said in Amoco,
18 environmental injury, by it's very nature, can seldom be
19 adequately remedied by money damages and is often
20 permanent or at least of long-lasting duration, i.e.,
21 irreparable; that is Amoco at page 545. If such injury
22 is sufficiently likely, therefore, the Court said, the
23 balance of harms will usually favor the issuance of an
24 injunction.

25 Now, there's one other point which was

1 briefly touched on here. Justice Kennedy, you were
2 asking what the circuits have said. Now, the circuits
3 have said different things about irreparable harm. The
4 leading edge of discussion in the circuits began with
5 then-Judge Breyer on the First Circuit in the
6 Massachusetts v. Watt and Sierra Club v. Marsh cases,
7 where he pointed out that NEPA itself has, while it's a
8 procedural statute, a substantive purpose, the
9 substantive purpose being informed decision-making. And
10 if there is not informed decision-making before there is
11 an agency committed to action, a harm has occurred.
12 That's the harm that the --

13 JUSTICE SCALIA: That's unfortunately
14 contrary to what our opinions have said, which was quite
15 clearly that procedural --

16 (Laughter.)

17 JUSTICE SCALIA: -- procedural injury is not
18 the kind of injury that gives rise to Article III
19 standing.

20 MR. KENDALL: Can I --

21 JUSTICE SCALIA: The whole country can
22 complain about the failure to issue an EIS. That is not
23 the kind of injury that gives standing.

24 MR. KENDALL: I was only responding to
25 Justice Kennedy's question as to what the circuits have

1 said. That's the leading edge of what the circuits have
2 said.

3 JUSTICE BREYER: I don't see why you backed
4 down on this.

5 (Laughter.)

6 CHIEF JUSTICE ROBERTS: Mr. Kendall, you
7 wanted to respond to some comments by the Solicitor
8 General. I wanted to make sure that you've had an
9 opportunity to do that. I -- you were derailed by
10 questioning, but I know you responded to some. Are you
11 --

12 MR. KENDALL: That's very kind. I think
13 there's just one other point perhaps I should make,
14 which is there was some discussion of whether NEPA
15 actually authorizes CEQ to conduct this kind of
16 examination of a district court's ruling. I submit that
17 there is nothing anywhere in NEPA and certainly not in
18 the "fullest extent possible" language which gives that
19 authority. This Court has already decided that point in
20 the Flint Ridge case, where it said that NEPA does not
21 give way unless there is an irreconcilable conflict
22 between NEPA and another statute. They have pointed to
23 no such thing.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.
25 Mr. Garre, have you one minute remaining.

1 REBUTTAL ARGUMENT OF GEN. GREGORY G. GARRE
2 ON THE BEHALF OF THE PETITIONERS

3 GENERAL GARRE: Thank you,
4 Mr. Chief Justice.

5 First, the Court of Appeals did not
6 adequately consider the balance of equities. It
7 completely disregarded the President's determination of
8 the paramount interests in these exercises. It
9 disregarded the Chief Naval Officer's evidence on the
10 harm of the 2200-yard shutdown, at Pet. App. 344-345a.
11 It disregard the harm as to surface ducting, Pet. App.
12 333a.

13 Justice Alito, there is -- the EA says,
14 quote, on page 200 of the JA, "No serious injury or
15 mortality of any marine mammal species is reasonably
16 foreseeable because of these exercises." Page 170 makes
17 clear that that applies to beaked whales as well.

18 And, finally, I think I heard my colleague,
19 my friend, concede that you have to show Article III
20 injury in order to show irreparable injury. They not
21 only have to show irreparable injury to marine mammals,
22 which they haven't; they have to show irreparable injury
23 to themselves, and particularly as to beaked whales,
24 which none of their declarants and none of their members
25 have ever asserted that they have seen. They can't

1 possibly establish any irreparable injury from any
2 conceivable harm to beaked whales, even though the
3 record in this case makes clear that all harms to the
4 marine mammals that we have been discussing today are
5 temporary, non-injurious harms.

6 We would ask this Court to set aside the
7 decision of the Ninth Circuit, which seriously
8 interferes with critical training exercises that the
9 President, his chief naval officers have determined to
10 be in the paramount interests of the United States.

11 JUSTICE SCALIA: Can I -- before you sit
12 down. I thought I recalled something in your briefing
13 dealing with the beaching -- your friend made a point
14 regarding the beaching of beaked whales, that very
15 substantially showed that they were caused by sonar.
16 You had something in your briefs about beaching, but I
17 wasn't sure whether it was beaked whales or only
18 dolphins.

19 GENERAL GARRE: It pertains to beaked whales
20 as well. Page 256 of the petition appendix is the
21 National Marine Fisheries Service's determination that
22 the conditions which led to strandings with respect to
23 beaked whales in other parts of the world are not likely
24 to lead to strandings in the Southern California
25 Operating Area. Those conditions are taken into account

1 in the national defense exemption mitigation measures at
2 page 228 of the petition appendix. There have been
3 beachings of beaked whales in Southern California. None
4 have been tied to sonar operations, and that further
5 underscores the absence of any injury to any marine
6 mammal in Southern California despite 40 years of the
7 Navy's use of sonar operations in that area.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 The case is submitted.

10 (Whereupon, at 11:05 a.m., the case in the
11 above-entitled matter was submitted.)

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