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1 P R O C E E D I N G S

2 (10:01 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear argument
4 first in Case 07-1239, Winter v. Natural Resources
5 Defense Council. General Garre.

6 ORAL ARGUMENT OF GREGORY G. GARRE

7 ON BEHALF OF THE PETITIONERS

8 GENERAL GARRE: Thank you, Mr.

9 Chief Justice, and may it please the Court:

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

21 First, it is based on an erroneous
22 assessment of the likelihood of success on Respondent's
23 NEPA claim. Second it is based on an erroneous
24 conception of the showing of irreparable injury
25 necessary to secure what this Court has aptly called

1 "the extraordinary and dramatic remedy" of a preliminary
2 injunction. And finally, it fails to take account the
3 vital public interests in conducting the training
4 exercises at issue unencumbered by the injunction's
5 restrictions.

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

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

24 JUSTICE SCALIA: Say it again? I'm not sure
25 I --

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

7 CHIEF JUSTICE ROBERTS: That's the temporary
8 stay pending certiorari, right?

9 GENERAL GARRE: Right.

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

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

23 JUSTICE ALITO: You mentioned the effect on
24 naval operations. On the other side, could you say what
25 the record shows about the number of marine mammals that

1 are likely to be killed or receive actual physical
2 injury if the -- as opposed to some sort of behavioral
3 modification, if the injunction is allowed to continue?

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

14 Now, the environmental assessment also
15 predicted that there would be a much greater number,
16 170,000 over the course of two years, of so-called Level
17 B takes. These are temporary and by definition
18 non-injurious disturbances and that's made clear at
19 pages 258a of the petition appendix and page 175 of the
20 JA, which make clear that these Level B disturbances,
21 the vast majority of the disturbances predicted by the
22 environmental assessment, are temporary and
23 non-injurious.

24 JUSTICE STEVENS: Just as to dolphins?

25 GENERAL GARRE: The vast majority of those

1 disturbances, some almost 90 percent, pertain only to
2 dolphins.

3 JUSTICE STEVENS: And what percentage is
4 that of the total population in the area?

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

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

20 The focus of their claim of irreparable
21 injury -- and keep in mind that that environmental
22 assessment comes against the backdrop of a 40-year
23 history of the Navy's use of MFA sonar in the Southern
24 California Operating Area at the same frequency and, if
25 anything, during more frequent training exercises than

1 have been conducted in recent years.

2 JUSTICE GINSBURG: You didn't mention the
3 564 exposures that were typed Level A in the
4 environmental assessment.

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

14 Now as a policy matter --

15 JUSTICE ALITO: In lay terms, what does that
16 mean? Does it mean an alteration of their swimming
17 pattern, their migration pattern? What does it mean?

18 GENERAL GARRE: In most cases it means that
19 there's an alerting response, they hear the sound and
20 they go in the opposite direction, as one who hears a
21 noise that disturbs them would ordinarily do. It can
22 also mean that they could have some temporary effect on
23 their feeding or breeding patterns, but it's a temporary
24 effect.

25 JUSTICE ALITO: It doesn't necessarily mean

1 that there's a physical injury to them, does it?

2 GENERAL GARRE: No.

3 JUSTICE ALITO: It means that they may just
4 swim in a different direction.

5 GENERAL GARRE: That's right. By definition
6 only a Level A take involves an injurious harm, that is
7 a physical harm which results in permanent damage to
8 tissue.

9 JUSTICE GINSBURG: I thought the 564 number
10 was Level A, which I also thought meant exposure
11 resulting in severe harm.

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

24 Now, the Navy -- there is nothing that
25 prevents an agency from characterizing the particular

1 harm one way or the other as a policy matter for
2 purposes of an environmental assessment.

3 JUSTICE STEVENS: May I ask this question,
4 Mr. Solicitor General. Is it understood, though, that
5 there is a duty to prepare an environmental impact
6 statement?

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

15 CHIEF JUSTICE ROBERTS: Let me follow that.
16 You concede that you have to prepare an EIS in light of
17 the CEQ's emergency circumstances?

18 GENERAL GARRE: Yes, it's one of the
19 alternative arrangements that the Navy agreed to, is
20 that the environmental impact statement which has been
21 under way will be completed by January 2009 with respect
22 to all activities in the Southern California Operating
23 Area. Now, that's not to say that we concede that an
24 environmental impact statement was not required -- was
25 required at the outset. The Navy doesn't concede that.

1 It litigated this case up to the point of the Council
2 for Environmental Quality's determination.

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

10 GENERAL GARRE: Because the Navy devoted its
11 best resources to this and in good faith, as is indicate
12 bide the 293-page environmental assessment, concluded
13 that there would not be a finding of significant
14 environmental impact, and at that point everyone agrees
15 an environmental impact statement is not required.

16 JUSTICE BREYER: Suppose you have to do it.
17 Given all your work so far, how long would it take? You
18 had several months already, so how long? When could you
19 do it by?

20 GENERAL GARRE: It's going to be completed
21 by January 2009, Justice Breyer, under the alternative
22 arrangements that have been approved --

23 JUSTICE BREYER: So we're talking about two
24 months.

25 GENERAL GARRE: Well, at this point we are.

1 The point that the Navy faced in January of 2008, where
2 it had an injunction against its use of sonar in these
3 training exercises and only an environmental impact
4 statement, it faced, as the Council of Environmental
5 Quality found, emergency circumstances in terms of the
6 need to conduct these training exercises.

7 JUSTICE KENNEDY: I take it that you're are
8 here because you find the decision of the Ninth Circuit,
9 and I take it of the district court, prejudicial for the
10 government on an ongoing basis; and what are the
11 principal reasons for that?

12 GENERAL GARRE: Because of its impact on
13 national security, Justice Kennedy.

14 JUSTICE KENNEDY: And what particular
15 errors? The standard for review -- pardon me. The
16 standard for the grant or denial of injunction? What
17 are the principal areas you want to present to us?

18 GENERAL GARRE: I think there are three
19 fundamental flaws, as I indicated. One, we think the
20 Ninth Circuit just got the NEPA claim wrong. The Navy
21 is complying with NEPA through the alternative
22 arrangements and the regulations, but the CEQ found --

23 JUSTICE SOUTER: Where was the statutory
24 authority suspending the obligation to provide an EIS?
25 You mentioned a regulation. Where in the statute does

1 it say that the Council on Environmental Quality can
2 dispense with this requirement?

3 GENERAL GARRE: I think we would point to a
4 couple of things. First, in terms of the statute, NEPA
5 says that the obligations of the statute should be
6 complied with to the fullest extent. And it doesn't
7 specifically say what happens if they are not followed.
8 These are procedural requirements. Secondly --

9 JUSTICE SOUTER: No, but that's not the
10 question I am asking. I am not asking about the
11 consequences of not complying. I am asking what is the
12 statutory authority for the Council on Environmental
13 Quality to dispense with the statutory obligation to
14 prepare it?

15 GENERAL GARRE: Well --

16 JUSTICE SOUTER: That's what -- as I
17 understand it, that's what you're arguing in effect, as
18 an intervening -- as of intervening legal significance.
19 And I want to know what the statutory authority is for
20 that. I don't see it in NEPA.

21 GENERAL GARRE: The statutory authority that
22 we find in NEPA for the CEQ's regulation providing for
23 alternative arrangements is -- first, it's acknowledged
24 by this Court that CEQ has rulemaking authority. The
25 Court acknowledged that in Department of Transportation

1 v. Public Citizen. So we take that as a given.

2 JUSTICE SOUTER: Okay. As a general
3 proposition that's fine, but what's the statutory
4 authority for them to engage in rulemaking authority
5 that dispenses with the government's obligation to
6 comply with an EIS requirement?

7 GENERAL GARRE: Well, let me -- I'll answer
8 the question, but let me be clear: The government's
9 position is that we are complying with NEPA by -- by
10 complying with the alternative arrangements provided by
11 the Council on Environmental Quality.

12 JUSTICE SOUTER: But you -- I mean, the
13 claim is that you weren't complying with it at the time
14 the request for an injunction was brought, and
15 everything else is consequent on that. So I want to go
16 back to the point, in effect, at which the claim was
17 made that the government is not complying. One of your
18 answers to that is right now, as a result of subsequent
19 Council on Environmental Quality action, we're not in
20 the same situation that we were in when the suit was
21 brought. And I want to know what the statutory
22 authority is for the Council on Environmental Quality to
23 take the action with the effect that you claim it has.

24 GENERAL GARRE: And I would point, Your
25 Honor, to the language in NEPA that says it should be

1 complied with to the fullest extent possible --

2 JUSTICE SOUTER: That --

3 GENERAL GARRE: -- and I would --

4 JUSTICE SOUTER: -- seems to cut against
5 you. I am not getting it.

6 GENERAL GARRE: Well, that language, coupled
7 with -- which seems to us to suggest that compliance to
8 the fullest extent possible would depend on the
9 circumstances, coupled with the fact that NEPA doesn't
10 impose, doesn't say what the consequences of
11 noncompliance would be --

12 JUSTICE SOUTER: Okay, but --

13 GENERAL GARRE: -- but other --

14 CHIEF JUSTICE ROBERTS: But why -- I don't
15 know if this is Justice Souter's question, but why CEQ?
16 I mean, NEPA doesn't really give anybody any regulatory
17 authority -- EPA, CEQ. And it seems to me that CEQ is
18 an odd entity to be doing this. They're more or less an
19 office in the White House, rather than a free-standing
20 agency.

21 GENERAL GARRE: Well, this Court has
22 acknowledged in numerous cases, Methow Valley and in the
23 Public Citizen case a few years ago, that NEPA gives CEQ
24 rulemaking authority, and that this Court gives
25 substantial deference to the CEQ's rules.

1 JUSTICE GINSBURG: Rulemaking to do what?
2 To set up an orderly regime for Federal agencies to
3 carry out their obligations under NEPA?

4 GENERAL GARRE: To implement the statute,
5 that's right. And there are a number of important
6 procedural requirements that go far beyond what the
7 statute requires that the CEQ has laid out in its
8 regulations. One of the regulations -- and this has
9 been on the books since 1979 and has been implemented
10 some 40 times. So this isn't something that was made up
11 in this case. It's an established regulatory practice
12 under NEPA that where there are emergency circumstances
13 an agency can come up with alternative arrangements to
14 comply with its NEPA obligations. And here those
15 alternative arrangements were: One, to complete an EIS
16 that is under way for all sonar activities and all other
17 activities by the Navy in the Southern California
18 operating area by January 2009. The Navy is going to
19 meet that goal. Two, to adopt the mitigation measures
20 spelled out in the alternative arrangements. Three, to
21 provide for public participation so that there could be
22 comment on any concerns to marine mammals in the area.
23 And four, to provide for research into harms to marine
24 mammals. These were significant arrangements that the
25 Navy agreed to.

1 JUSTICE GINSBURG: But what good is it if,
2 as I understand it, the whole training program will be
3 over in December, and then the environmental impact
4 statement, which was supposed to come first, is going to
5 come after the whole project is concluded?

6 GENERAL GARRE: Well, it has -- it's
7 important because the environmental impact statement
8 that's going to be completed pertains not only to
9 COMPTUEX and JTF exercises that will be completed in the
10 Southern California Operating Area in the future, but
11 all activities. So that environmental impact statement
12 is going to be very meaningful.

13 JUSTICE SOUTER: Let me -- let me switch
14 back. Chief?

15 Let me switch back in time for a second to
16 the beginning of these exercises. One of the -- I mean,
17 one of the arguments, and you have alluded to it, for I
18 guess the appropriateness of the Council on
19 Environmental Quality's action, if it has any power to
20 act, is emergency circumstances. My understanding, and
21 correct me if I'm wrong on the facts, is that the
22 exercises began in February of 2007. My understanding
23 is that it was in that same month of February 2007 that
24 the Navy produced the EA, the environmental assessment,
25 so that in effect, as I understand it, the Navy

1 disclosed the fact that it would not provide an EIS at
2 just about the same moment that it began the exercises.

3 GENERAL GARRE: I think --

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

20 GENERAL GARRE: For several reasons,
21 Justice Souter. First, there was a gap between when the
22 Navy issued its environmental assessment and when the
23 first training exercises began.

24 JUSTICE SOUTER: Well, it was a gap of less
25 than month, right?

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

4 JUSTICE SOUTER: And how long does it -- how
5 long does it take -- going back to Justice Breyer's
6 question, how long does it take to prepare an
7 environmental impact statement? It takes more than --

8 GENERAL GARRE: Well, I --

9 JUSTICE SOUTER: It takes more than a month,
10 doesn't it.

11 GENERAL GARRE: Sure. Absolutely.

12 JUSTICE SOUTER: Okay.

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

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

17 GENERAL GARRE: It did, and it also knew
18 that it was in the process of finalizing an
19 environmental impact statement that it prepared in good
20 faith, a 293-page statement, which concluded that there
21 would be --

22 CHIEF JUSTICE ROBERTS: An environmental
23 assessment.

24 GENERAL GARRE: An environmental assessment,
25 that's right, with the finding of no significant

1 environmental impact.

2 This Court presumes the regularity of
3 administrative actions. There's no reason for the Navy,
4 particularly on this record, to have assumed that that
5 EA would not have been sustained. The emergency
6 circumstances arose in January 2008, when the district
7 court enjoined the use of MFA sonar in these exercises
8 when the Navy had several exercises.

9 JUSTICE SOUTER: Sure, but they wouldn't
10 have been in the situation in January of 2008 if they
11 hadn't been in the situation I described in February of
12 2007. And it sounds to me as though the Navy played its
13 cards very close to its vest --

14 GENERAL GARRE: Well --

15 JUSTICE SOUTER: -- in 2007.

16 GENERAL GARRE: Well, with respect, I don't
17 think that a 293-page environmental assessment with the
18 kind of detail and support that this assessment has --

19 JUSTICE SCALIA: Look, the problem you face
20 -- and maybe you're being whipsawed -- is that you are
21 effectively estopped from the argument that no EIS is
22 necessary by the fact that you have agreed to these
23 alternative arrangements. But you should not be
24 estopped from arguing that at the time the EA was issued
25 that was not a good faith completion of all the Navy's

1 responsibilities. And that's the argument that is being
2 made against you now. It assumes that the EA wasn't
3 enough. And I'm not sure that we -- that that
4 assumption is valid.

5 GENERAL GARRE: Well, that's right. And as
6 I indicated earlier -- I want to be clear -- the Navy
7 believes that its environmental assessment was not only
8 prepared in good faith, but was appropriate and reached
9 the right conclusions.

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

19 GENERAL GARRE: The other two are: One, the
20 injunction. Even if you agree with Respondents on the
21 likelihood of success of the NEPA claim, it's based on a
22 showing of irreparable injury that is fundamentally
23 flawed. The Ninth Circuit and the district court looked
24 to whether there was irreparable injury under a
25 possibility standard.

1 JUSTICE SOUTER: Didn't both the circuit and
2 the district court, although they mentioned that, in
3 fact find that it was -- I forget what their phrase was
4 -- beyond question.

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

6 JUSTICE SOUTER: "Near certainty."

7 GENERAL GARRE: They did, Justice Souter,
8 and we think --

9 JUSTICE SOUTER: There is no -- there is no
10 harm. I mean, the standard may or may not be bright,
11 but there is no harm to the Navy in this case from --
12 from the use of that standard, I take it.

13 GENERAL GARRE: Well, I don't think that a
14 court could say that, Justice Souter, for a couple of
15 reasons.

16 First, when a lower court applies a
17 fundamentally wrong standard to assess -- to make a
18 determination, this Court usually corrects that legal
19 standard and gives the -- the lower court an opportunity
20 to do it again.

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

25 GENERAL GARRE: And, two, the finding, which

1 is a sentence in the district court decision repeated by
2 the court of appeals, of "near certainty of harm to
3 marine mammals" is utterly belied by the environmental
4 assessment in this case as well as the fact that -- and
5 the Ninth Circuit acknowledged this -- the Navy has been
6 using MFA sonar in the Southern California Operating
7 Area for more than 40 years and no one can point to any
8 harm to marine mammals.

9 JUSTICE KENNEDY: Let me ask you --

10 JUSTICE STEVENS: Mr. Garre, could I ask you
11 a question?

12 GENERAL GARRE: Yes.

13 JUSTICE STEVENS: If this were not a Navy
14 case with all of the implications of the Navy, but an
15 ordinary case in which it was demonstrated that an EIS
16 had to be filed, would it not be normal -- normal action
17 to enjoin the -- the government action until the EIS was
18 filed? Because the -- the very fact that you need an
19 EIS is -- is because you don't know what environmental
20 consequences may ensue. That's the purpose of the EIS.
21 So isn't it the normal practice to enjoin government
22 action until the EIS is filed when it is clear there is
23 a duty to file?

24 GENERAL GARRE: I don't think it is,
25 Justice Stevens. I think it is -- the normal practice

1 is to require someone who seeks the extraordinary remedy
2 of a preliminary injunction to show irreparable injury,
3 a likelihood of irreparable injury.

4 JUSTICE KENNEDY: Would the irreparable
5 injury have to -- and this just repeats
6 Justice Stevens's question. It is the same concern I
7 have.

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

13 GENERAL GARRE: You do.

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

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

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

23 GENERAL GARRE: Well --

24 JUSTICE SCALIA: And -- and the only injury
25 that -- that follows from the mere failure to file an

1 EIS is -- is a procedural injury that affects the entire
2 population.

3 JUSTICE KENNEDY: Then, let's -- let's
4 assume standing. Let's assume standing. Let's -- let's
5 assume people have standing.

6 GENERAL GARRE: I -- I think that that's
7 right, Judge Scalia.

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

19 GENERAL GARRE: Clearly, the purpose of the
20 requirements under NEPA are to ensure that the agency
21 has -- is making an informed decision, and here I don't
22 think there is any question that the Navy was after its
23 293-page assessment.

24 I am not aware of any --

25 JUSTICE SOUTER: But that -- in effect, you

1 are saying the EA is the equivalent to an EIS.

2 GENERAL GARRE: No, I'm not, Justice Souter.

3 I am saying --

4 JUSTICE SOUTER: What is the difference
5 between them? I -- I assume the difference is the EIS
6 is a more comprehensive survey and -- and set of
7 conclusions.

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

9 JUSTICE SOUTER: So that without the EIS,
10 the Navy is acting in -- in a state of -- of some degree
11 of ignorance greater than would be the case if -- if it
12 had done -- done the EIS.

13 GENERAL GARRE: I -- the EIS --

14 JUSTICE SOUTER: And that, I presume, is the
15 harm that the -- that the statute is intended to
16 prevent.

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

19 JUSTICE SCALIA: The EA demonstrates in your
20 view that the EIS would -- would very likely say that
21 this -- this action by the Navy is okay. And since that
22 is the case, there is -- there is no probability of
23 irreparable harm; to the contrary, there is the
24 probability of no irreparable harm because of the EA.

25 GENERAL GARRE: Well, we agree with that.

1 We think it's important, though, to separate out the
2 likelihood of success on the NEPA claim with the
3 distinct question of whether there is irreparable injury
4 and look to the record of whether there is irreparable
5 injury. And we think they have not come close to
6 establishing that. The one final --

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

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

20 JUSTICE STEVENS: The whole theory of the --
21 of the environmental impact statement is that we don't
22 really know what the harm will be. So how can you say
23 that in order to get an injunction against the
24 government action you have to prove irreparable harm?

25 GENERAL GARRE: And it may be easier in some

1 cases than others, Justice Stevens. But I think in this
2 case where you have the record that has been compiled,
3 they cannot -- they cannot --

4 JUSTICE STEVENS: But you're really arguing
5 that an -- that a temporary statement is enough, will
6 always be enough.

7 GENERAL GARRE: We're not taking that
8 position, Justice Stevens. We're taking the position
9 that the record in this case does not show a likelihood
10 of irreparable injury.

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

17 GENERAL GARRE: I think that's right. I
18 think that fundamentally --

19 JUSTICE GINSBURG: I thought that you were
20 not suggesting --

21 JUSTICE STEVENS: But there is a finding
22 that it is necessary, and here we have that finding as I
23 understand it.

24 JUSTICE GINSBURG: And you are not
25 suggesting that -- that there is a probability of

1 success on the claim that you had to file an
2 environmental impact statement.

3 GENERAL GARRE: We -- we are contesting
4 that. And if I could reserve the remainder of my time.
5 And one must -- I can explain, if you would like,
6 Justice.

7 JUSTICE GINSBURG: Yes. I thought you
8 conceded that point.

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

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 GENERAL GARRE: Thank you.

19 CHIEF JUSTICE ROBERTS: Mr. Kendall.

20 ORAL ARGUMENT OF RICHARD B. KENDALL

21 ON BEHALF OF THE RESPONDENTS

22 MR. KENDALL: Mr. Chief Justice, and may it
23 please the Court:

24 The fundamental question in this case is a
25 very traditional question of equity jurisprudence. The

1 fundamental question is whether the district court's
2 factual finding that the injunction will permit the Navy
3 to train and certify its sailors is supported by the
4 evidence. Because if it is supported by the evidence it
5 cannot be clearly erroneous. And if it is not clearly
6 erroneous, it cannot be reversed.

7 JUSTICE ALITO: Isn't there something
8 incredibly odd about a single district judge making a
9 determination on that defense question that is contrary
10 to the determination that the Navy has made?

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

19 Now, what happened here was that the judge
20 was extraordinarily deferential to the Navy. The judge
21 rejected most of the measures that plaintiffs sought,
22 crediting where the evidence was not to the contrary the
23 declarations of the Navy saying, for example, we need to
24 train at night.

25 JUSTICE BREYER: I didn't see evidence to

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

12 I saw no answer to that.

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

22 Now, those two things seem to be quite
23 important. And I just might have missed, which I might
24 have, which is why I'm asking, what the response was by
25 equivalent experts to those points.

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

7 What the court found was that the Navy had
8 trained and certified its troops during those eight
9 SOCAL exercises despite the complete absence of surface
10 ducting conditions. And it was conceded --

11 JUSTICE BREYER: What do you mean, despite
12 the complete absence?

13 MR. KENDALL: Because surface ducting
14 conditions are, as it happens, quite rare.

15 JUSTICE BREYER: That's the whole point.
16 That's why I thought they didn't prove anything. Fine,
17 they went on some exercises and they didn't run into
18 these layered things. So obviously they couldn't have
19 training.

20 MR. KENDALL: Right.

21 JUSTICE BREYER: Now, what they are saying
22 is, when you do run into that situation you've got to
23 train people to deal with it. It doesn't prove much
24 that when you didn't run into it they didn't train
25 people to deal with it. How could they have?

1 MR. KENDALL: Well, the question before the
2 court was balancing the requirement that the Navy comply
3 with the law and the environmental harms against the
4 Navy's interest. And our point --

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

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

17 CHIEF JUSTICE ROBERTS: Well, I thought that
18 would have been the whole ball game until I read your
19 brief. Your brief does not spend a page defending the
20 decision on the merits of the lower courts. Nothing
21 about emergency circumstances or CEQ. Instead, you
22 raise other arguments on which the district court did
23 not rely in finding likelihood of success. So given
24 that, I would have thought we would have a lot more to
25 talk about when it gets to the permanent injunction on

1 the merits.

2 MR. KENDALL: I respectfully disagree. We
3 took the position from the beginning --

4 CHIEF JUSTICE ROBERTS: Oh, yes, yes. You
5 certainly raised those issues. I'm not saying that.
6 What I am saying the district court didn't rely on those
7 in finding likelihood of success.

8 MR. KENDALL: Well, I also disagree on that
9 point. You will find at page 97a of the appendix that
10 was submitted with the petition for certiorari the
11 court's declaration that there was no emergency. You
12 will find --

13 CHIEF JUSTICE ROBERTS: Yes.

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

15 CHIEF JUSTICE ROBERTS: That's what the
16 district court relied on. Where in your brief do I see
17 a defense of the district court's analysis, as opposed
18 to the very coherent argument about Hayburn's case and
19 everything else, issues the district court didn't reach?

20 MR. KENDALL: The district court did reach
21 the question of whether the Navy could train. That
22 negated any emergency under any definition of the term.
23 It doesn't matter whether -- and there was debate about
24 this below -- an emergency can be foreseeable and
25 expected, as Justice Souter was -- his questions were

1 probing, or whether the emergency can be -- must be
2 unexpected. There was debate about that below. But the
3 position that we took and the position that the district
4 court took was there is no emergency.

5 The reason there is no emergency is because
6 the Navy -- the Navy is perfectly able to train under
7 these circumstances.

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

19 So, the basis so far I'm thinking on this
20 one is zero. That's -- because what you have told me is
21 they completed some exercise where they didn't find any
22 layering.

23 MR. KENDALL: There was also prior exercise
24 in Hawaii. You will recall from the brief that we had a
25 prior litigation that resulted in the consent decree in

1 Hawaii. In that consent decree the Navy agreed to train
2 with a surface ducting powerdown. So, they had
3 previously told the same judge that they were capable of
4 training in surface ducting conditions with that
5 powerdown, else they would not have agreed to that
6 decree. There was evidence in the record.

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

11 JUSTICE BREYER: Generalities. You see --
12 of course, I agree with you as a generality. What I am
13 missing here is the specifics, because I am nervous
14 about it, as you can see. And what I am nervous about
15 is that there just wasn't enough on the other side, on
16 your side.

17 MR. KENDALL: If I may proceed then to the
18 safety zone specifics, because that's the other issue.
19 Remember there were a number of injunctive measures that
20 the Navy objected to in the district court that they no
21 longer object to. They ceased to object to them in the
22 court of appeals and they haven't brought them up here.

23 So the next issue is the 2200-yard safety
24 zone. Now, first, why was the safety zone chosen? It
25 was chosen because that is the Navy's preferred method

1 of mitigation. They have always mitigated using safety
2 zones. They have preferred to mitigate using a safety
3 zone that is 1,000 yards. We asked for one that was
4 2,200 yards.

5 The question was, what is the difference in
6 training capability in the two zones? So we looked at
7 that. And where did we look? We looked at the
8 statistics from the after-action reports.

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

13 CHIEF JUSTICE ROBERTS: It would have
14 increased exponentially the area that the Navy had to
15 scrutinize to determine if there were marine mammals
16 there.

17 MR. KENDALL: Incorrect. Incorrect. It
18 would --

19 CHIEF JUSTICE ROBERTS: Well, the
20 increase -- you keep saying it's just 1,000 yards. But
21 it's 1,000 yards of circle. And if I remember high
22 school geometry right, that's a squared increase.

23 MR. KENDALL: But think about how this is
24 being done. The way it's being done is that you have
25 somebody on the deck with binoculars and they are

1 looking straight ahead and they can either look out
2 1,000 yards or out 2,000 yards.

3 CHIEF JUSTICE ROBERTS: And there are people
4 in airplanes?

5 MR. KENDALL: Yes. Yes.

6 CHIEF JUSTICE ROBERTS: Not just straight
7 ahead.

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

14 CHIEF JUSTICE ROBERTS: I guess my question
15 was, that increases the area exponentially that has to
16 be scrutinized. And I don't see why, as you said, that
17 was wrong.

18 MR. KENDALL: Because they argued -- and
19 perhaps I misunderstood, Mr. Chief Justice, that you
20 were referring to their argument -- which is not that
21 the area was exponentially larger and that creates
22 difficulties of observation; they argued it would create
23 an exponentially greater number of shutdowns. And that
24 is mathematically proven false by the after-action
25 reports, because it's one per exercise.

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

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

15 They didn't do it for policy reasons. They
16 did it because that's what the science compels, because
17 beaked whales have stranded repeatedly around the world
18 correlated -- caused by in the views of scientists, and
19 the evidence is overwhelming, by sonar. And the reason
20 that happens especially to beaked whales is because they
21 dive for very long periods of time. And when they dive
22 for very long periods of time, and they are then
23 bombarded with sonar, which by the way in sound
24 intensity, in this courtroom if we had a jet engine and
25 you multiplied that noise by 2,000 times, correcting for

1 water, that's the sound's intensity that would be going
2 on in the water if you were a marine mammal near that
3 source. The beaked whales, the scientists believe,
4 adjust their diving patterns; since they dive down for
5 so long, if they come up too fast, they get the bends so
6 there is evidence of -- when they do the necropsies of
7 these beaked whales, they find hemorrhaging, the
8 embolisms in various parts of the bloodstream and many,
9 many deaths. So there is enormous scientific evidence
10 that there is a greater harm to beaked whales that is
11 caused by sonar and that is precisely why the Navy was
12 compelled in the EA to recognize that evidence.

13 Now, one thing that was said here which I
14 found --

15 JUSTICE ALITO: Where in the record -- this
16 was the question I asked General Garre. Where in the
17 record is there evidence of -- that beaked whales would
18 be killed?

19 MR. KENDALL: The evidence of the prediction
20 of the Level A takes, in the --

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

25 MR. KENDALL: It is in the -- there is a

1 table on page 223 of volume 1 of the joint appendix.
2 And then there are the discussions of beaked whale
3 injuries that General Garre referred to, and what they
4 show is that beaked whales will experience the effects I
5 described. But there is also expert evidence in the
6 record in the form of a number of declarations by
7 scientists who have studied beaked whales for -- for
8 quite some time. The evidence you can find, and it's
9 referred to on page 4 of our brief. Joint appendix
10 600-602, 673-89, 738-41, 760, the supplemental excerpt
11 of record at 180; also joint appendix 601, 666-667,
12 674-76, 680, 685. And there are a few other references
13 on page 4 of our brief.

14 I also wanted to talk about the behavioral
15 changes, because it's --

16 JUSTICE BREYER: This is -- I want to give
17 you a chance to say what's so terrible about what
18 they're doing. I will express a little frustration.
19 Not your fault. But why couldn't you work this thing
20 out? I mean, they are willing to give you quite a lot
21 of conditions, and you say, well, we have got to have
22 more conditions. And you are asking us who know nothing
23 about whales and less about the military to start
24 reading all these documents to try to figure out who's
25 right in the case where the other side says the other

1 side is totally unreasonable. And the issue at law
2 seems to be something that is going to last for two
3 months.

4 So -- so, why? What is so -- what is the
5 important thing here?

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

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

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

19 CHIEF JUSTICE ROBERTS: The other ways it
20 struck me how the district court relied on the fact that
21 the Navy had taken actions to protect marine mammals in
22 the past to say well, there can't be any problem with
23 adding more protection. No good deed goes unpunished.

24 MR. KENDALL: Well, if I can -- if I can
25 answer that this way. We negotiated with the Navy for

1 months and months and months, the Brinpack case, I
2 settled with them. We tried very hard to resolve this
3 case, but keep in mind that the Navy until the district
4 court ruled refused to agree to any measures that we
5 proposed -- any measures. So it was a binary --

6 CHIEF JUSTICE ROBERTS: They had already
7 taken actions unilaterally to protect marine mammals.
8 Now you say that wasn't.

9 MR. KENDALL: Right.

10 CHIEF JUSTICE ROBERTS: But they were taking
11 some actions.

12 MR. KENDALL: That's right. And -- and so
13 we had a litigation that was focused on were there
14 additional actions that should be taken; and there is
15 extensive evidence taken and extensive argument and then
16 the district court ruled. And the correct path, if the
17 Navy was aggrieved by that decision, was a higher court.
18 But instead, in order to avoid the clearly erroneous
19 standard -- and remember, that the clearly erroneous
20 standard as this Court said in the Anderson v. Bessemer
21 City case, says when there are two permissible views of
22 the evidence, the factfinder's choice between them
23 cannot be clearly erroneous.

24 So in order to evade that, and this is
25 typical of the tactics that we experienced and the

1 uncompromising nature of their approach that we
2 experienced, they went to CEQ to try to trump the entire
3 injunctive process. Now that they did without any
4 authority in NEPA --

5 JUSTICE BREYER: How does the basic thing
6 work? Because to a layperson, when I think of the armed
7 forces preparing an environmental impact statement, I
8 think, the whole point of the armed forces is to hurt
9 the environment. I mean --

10 (Laughter.)

11 JUSTICE BREYER: I don't under -- I don't
12 understand how it's supposed to work. Of course they
13 are going to do something that is harmful.

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

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

18 MR. KENDALL: I think the point of the armed
19 forces is to safeguard our freedoms causing the least
20 damage possible to our environment. And this Court has
21 recognized that repeatedly.

22 JUSTICE BREYER: You go on a bombing
23 mission, do they have to prepare an environmental impact
24 statement first?

25 MR. KENDALL: No.

1 JUSTICE BREYER: No.

2 MR. KENDALL: They don't.

3 JUSTICE BREYER: How does it work?

4 MR. KENDALL: We have never, ever contended
5 that any of our proposed restrictions should apply to
6 combat at all, and it doesn't.

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

17 JUSTICE SCALIA: I -- I didn't assert that
18 they are -- that they are the same thing substantively.
19 My -- my only question is whether your assertion of bad
20 faith on -- on the part of the Navy holds water so long
21 as they were doing an EA. If -- you do an EA to see if
22 an EIS is necessary. And you say if there's no -- if
23 there is no significant harm to the environment, you
24 don't even need an EIS.

25 MR. KENDALL: That --

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

6 MR. KENDALL: That focus is not an element
7 of our case. I was simply responding to
8 Justice Breyer's question as, I admit, a somewhat
9 frustrated lawyer who tried to work things out as to why
10 it happened that they weren't worked out.

11 I do want to speak a bit about some of the
12 comments that General Garre made in response to
13 Justice Kennedy and Justice Scalia's questions about--

14 CHIEF JUSTICE ROBERTS: Can I -- can I
15 derail you a little bit to get back to the balance of
16 equities question? As I read the opinions most of the
17 balancing here was done by the Ninth Circuit, not the
18 district court. I found the district court's balancing
19 in only one sentence. The court after all of its
20 prior -- the court is also satisfied that the balance of
21 hardships tips in favor -- favor of granting an
22 injunction. " It goes on. But it's just one sentence.

23 The Ninth Circuit talked about deferring to
24 the district court but in fact it supplied all the
25 balance of the analysis for the balance.

1 MR. KENDALL: Well, I -- with respect I
2 think the district court spoke in several different
3 opinions. So you can -- you can find out what the
4 district court was thinking by looking not only at the
5 injunction, but also at the -- at the responsible
6 district court denying the motion to vacate.

7 CHIEF JUSTICE ROBERTS: Suppose it's still
8 fair to say that on all of those it focused most of its
9 attention on likelihood of success on the merits and
10 irreparable harm rather than a balancing of the
11 equities.

12 MR. KENDALL: Well I would disagree in one
13 respect, which is the court was very focused on which
14 measures to impose and which measures not to impose.
15 There were, you know, at least 10 pages of her
16 injunctive opinion going through that, and each -- and
17 the denial of the motion to vacate did the same thing,
18 because -- after the Ninth Circuit ordered Judge Cooper
19 to issue a tailored injunction, each side briefed very
20 extensively, with a huge amount of supporting evidence,
21 the issue of which measures should be imposed. And
22 Judge Cooper decided that certain measures would not be
23 imposed and certain ones would, and she explained why.
24 And she did that against the background of the harms
25 that were designed to be prevented. And so what I would

1 submit is --

2 CHIEF JUSTICE ROBERTS: I think that's -- I
3 think that's quite right.

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

14 MR. KENDALL: There's a good reason why she
15 didn't balance that. And that gets back to my opening
16 remarks, which is that the premise of that question and
17 why, Mr. Chief Justice, you would be concerned about
18 that is that there would be an exposure to that
19 submarine, that North Korean submarine. But the judge
20 had made a factual finding, and the factual finding she
21 made was that training would not be affected. So, on
22 the one hand, you have a factual finding that there is
23 no harm to the training at all, which means that in the
24 balance the harms to the environment are much heavier.

25 JUSTICE ALITO: Do you -- how much

1 deference, if any, do you think the district court was
2 obligated to give to the Navy on that military issue
3 about whether the training would be effective? Is judge
4 Cooper an expert on antisubmarine warfare?

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

16 CHIEF JUSTICE ROBERTS: Even the district --
17 even the district court recognized, in the words of her
18 opinion, that it would propose "a substantial challenge"
19 -- that's a quote -- for the Navy to shift the regime
20 that she imposed in the injunction.

21 MR. KENDALL: That's right, and it will in
22 fact pose a challenge and the proof is then in the
23 pudding, which is that the Navy has now conducted 13 out
24 of 14 exercises, the last 8 of which had been conducted
25 under this regime as modified by the circuit. And they

1 have not, as they were invited, had to come back and ask
2 for relief despite the fact that they had the
3 opportunity.

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

17 MR. KENDALL: Yes. First, responding to
18 that very point, it's common ground among the litigants
19 and certainly with the court that the interests ascribed
20 by the President and by every other government official
21 with respect to Naval training are of the highest
22 importance. The question was -- and this is the court's
23 factual finding, and the question is whether there was
24 sufficient record evidence to support it, whether she
25 was right that there wouldn't be an adverse effect

1 except for possibly some logistical changes, but no
2 adverse effect in terms of an achievement of the
3 training. If there's no adverse effect, then what the
4 President is speaking to is speaking past what's
5 concerning the court.

6 Now, with respect to irreparable harm, the
7 argument that General Garre made I think mistakenly
8 collapses the normal equity issue in this following
9 sense: Once a plaintiff satisfies Article III, very
10 important, and under the Japan Whaling case, the Lujan
11 v. National Wildlife case, there is no question that
12 these plaintiffs deserve to be in court, and it has
13 never been contested.

14 Then you move to the traditional equity
15 standard for assessing irreparable harm, Hecht v.
16 Bowles, but in the environmental area we have a
17 decision, the Amoco v. Gambell decision.

18 JUSTICE SCALIA: Excuse me. That
19 irreparable harm is the assessment of -- for purposes of
20 the injunction -- refers to the same harm that is the
21 harm which is the basis for standing, is it not?

22 MR. KENDALL: It always does, and the
23 question is somewhat different. And I think,
24 Justice Scalia, if you look at your opinion in the
25 second Lujan case and you think about the imminence

1 requirement of standing there, what irreparable harm
2 adds to that is the traditional need to show that the
3 harm you suffer cannot be quantified in damages or it's
4 difficult to quantify, and that a remedy at law will not
5 achieve the adjustment between the parties that's
6 required. That's what equity does. Equity preserves
7 the positions of the parties.

8 And as this Court said in *Amoco*,
9 environmental injury, by its very nature, can seldom be
10 adequately remedied by money damages and is often
11 permanent or at least of long-lasting duration, i.e.,
12 irreparable; that is *Amoco* at page 545. If such injury
13 is sufficiently likely, therefore, the Court said, the
14 balance of harms will usually favor the issuance of an
15 injunction.

16 Now, there's one other point which was
17 briefly touched on here. Justice Kennedy was asking
18 what the circuits have said. Now, the circuits have
19 said different things about irreparable harm. The
20 leading edge of discussion in the circuits began with
21 then-Judge Breyer on the First Circuit in the
22 *Massachusetts v. Watt* and *Sierra Club v. Marsh* cases,
23 where he pointed out that NEPA itself has, while it's a
24 procedural statute, a substantive purpose, the
25 substantive purpose being informed decisionmaking. And

1 if there is not informed decisionmaking before there is
2 an agency committed to action, a harm has occurred.
3 That's the harm that --

4 JUSTICE SCALIA: That's unfortunately
5 contrary to what our opinions have said, which was quite
6 clearly that procedural --

7 (Laughter.)

8 JUSTICE SCALIA: -- procedural injury is not
9 the kind of injury that gives rise to Article III
10 standing.

11 MR. KENDALL: Can I --

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

15 MR. KENDALL: I was only responding to
16 Justice Kennedy's question as to what the circuits have
17 said. That's the leading edge of what the circuits have
18 said.

19 JUSTICE BREYER: I don't see why you backed
20 down on this.

21 (Laughter.)

22 CHIEF JUSTICE ROBERTS: Mr. Kendall, you
23 wanted to respond to some comments by the Solicitor
24 General. I wanted to make sure that you've had an
25 opportunity to do that. I -- you were derailed by

1 questioning, but I know you responded to some. Are you
2 --

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

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.
16 Mr. Garre, have you one minute remaining.

17 REBUTTAL ARGUMENT OF GEN. GREGORY G. GARRE
18 ON THE BEHALF OF THE PETITIONERS

19 GENERAL GARRE: Thank you,
20 Mr. Chief Justice.

21 First, the Court of Appeals did not
22 adequately consider the balance of equities. It
23 completely disregarded the President's determination of
24 the paramount interests in these exercises. It
25 disregarded the Chief Naval Officer's evidence on the

1 harm of the 2200-yard shutdown, at Pet. App. 344-345A.
2 It disregard the harm as to surface ducting, Pet. App.
3 33 A.

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

9 And finally I think I heard my colleague, my
10 friend, concede that you have to show Article III injury
11 in order to show irreparable injury. They not only have
12 to show irreparable injury to marine mammals, which they
13 haven't; they have to show irreparable injury to
14 themselves, and particularly as to beaked whales, which
15 none of the declarants and none of their members have
16 ever asserted they have seen. They can't possibly
17 establish any irreparable injury from any conceivable
18 harm to beaked whales, even though the record in this
19 case makes clear that all harms to the marine mammals
20 that we have been discussing today are temporary
21 non-injurious harms.

22 We would ask this Court to set aside the
23 decision of the Ninth Circuit, which seriously
24 interferes with critical training exercises that the
25 President, his chief Naval officers have determined to

1 be in the paramount interests of the United States.

2 JUSTICE SCALIA: Can I -- before you sit
3 down. I thought I recalled something in your briefing
4 dealing with the beaching -- your friend made a point
5 regarding the beaching of beaked whales, that very
6 substantially showed that they were caused by sonar.
7 You had something in your briefs about beaching, but I
8 wasn't sure whether it was beaked whales or only
9 dolphins.

10 GENERAL GARRE: It pertains to beaked whales
11 as well. Page 256 of the petition appendix is the
12 National Marine Fisheries Service's determination that
13 the conditions which led to strandings with respect to
14 beaked whales in other parts of the world are not likely
15 to lead to strandings in the Southern California
16 Operating Area. Those conditions are taken into account
17 in the national defense exemption mitigation measures at
18 page 258 of the petition appendix. There have been
19 beachings of beaked whales in Southern California. None
20 have been tied to sonar operations, and that further
21 underscores the absence any injury to any marine mammal
22 in Southern California despite 40 years of the Navy's
23 use of sonar operations in that area.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 The case is submitted.

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