



November 13, 2008

SUPREME COURT ALLOWS NAVY TO CONTINUE USE OF SONAR (*Winter v. Natural Resources Defense Council*)

The Washington Legal Foundation (WLF) scored a major victory yesterday when the U.S. Supreme Court reversed a lower court ruling by the U.S. Court of Appeals for the Ninth Circuit that upheld an injunction severely restricting the Navy's use of sonar on its submarines during scheduled training exercises in the Pacific Ocean off the coast of Southern California. In a 6-3 decision written by Chief Justice Roberts, the Court ruled that the lower court's standard for issuing an injunction against the Navy was too lax and did not give proper deference to the President's determination as Commander-in-Chief that these training exercises were vital to the national security.

The lower court had agreed with environmental groups that even though there was *no* evidence of any sonar-related harm to marine mammals over the last 40 years, there was a possibility that the sonar *might* harm such marine mammals. The Supreme Court ruled, however, that the proper standard should be likelihood of harm, not remote harm. Even so, the Court found that any harm to the marine mammals would be outweighed by national security concerns in balancing the public interest, and thus, an injunction, which is an extreme remedy, should not have been issued.

In its brief filed on behalf of itself, Rear Admiral James J. Carey, U.S. Navy (Ret.), the National Defense Committee, and the Allied Educational Foundation, WLF argued that the restriction on the Navy's use of sonar will have a significant detrimental impact on our nation's military readiness during this time of war as well as violate the separation of powers by intruding upon the President's power as Commander in Chief. In this case, the President invoked his authority both under the Constitution and the relevant statutes that the use of sonar was "essential to national security"; in addition, the President's Council on Environmental Quality ruled that emergency circumstances existed justifying exemptions from NEPA.

WLF's brief was drafted with the *pro bono* assistance of Andrew G. McBride, Thomas R. McCarthy, Andrew M. Miller, and William R. Dailey of the Washington, DC law firm of Wiley Rein LLP. Because of the importance of this case, the Supreme Court heard this argument on October 8, 2008, and issued its opinion relatively quickly so that the planned training exercises for December can go forward.

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