Winter v. NRDC: Whose Interests, Which Preferences? Untangling the Legal Web Surrounding MFA Sonar

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> The public interest in conducting training exercises with active sonar under realistic conditions plainly outweighs the interests advanced by the plaintiffs. Of course, military interests do not always trump other considerations, and we have not held that they do. In this case, however, the proper determination of where the public interest lies does not strike us as a close question.
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> -Chief Justice John Roberts (Winter v. NRDC,129 S. Ct. 365 (2008)[1]

I. The Case in Brief. In its first case of the 2008-2009 term, the Supreme Court heard oral arguments surrounding a conflict between the Navy and environmental groups that had been building for over half a decade. Although *Winter v. NRDC* dealt specifically with mitigating the effects of Mid-Frequency Active (MFA) sonar on marine mammals off the coast of Southern California, previous conflicts had also arisen from the Navy's Surveillance Towed Array Sensor System (SURTASS) Low-Frequency Active (LFA) sonar.[2] Under a majority opinion penned by Chief Justice John Roberts, the court ruled that the Ninth Circuit had incorrectly weighed the balance of equities between national security and species protection.

In many respects, *Winter* was decided long before General Gregory Garre and Richard Kendall set foot in the courtroom to argue in defense of the Navy and the Natural Resource Defense Council (NRDC). Although the legal nuances of the case are many and debatable, the court did not reach the merits of the case primarily because the balance of equities between military preparedness and the personal and professional interests of environmentalists "does not strike [the members of the court] as a close question." (*Winter* 2008, 18)

As Chief Justice Roberts mentions in his opinion, the procedural history of *Winter* is quite complicated. In addition to the specialists' arguments being presented both by the Navy (about sonar technology, stealth submarine technology, etc.) and by NRDC (about marine mammal and other ocean life), the case is also pertinent to four federal laws: the Marine

[1] The *Winter* case is available in full at the following web page: http://www.supremecourtus.gov/opinions/08pdf/07-1239.pdf

[2] The District Court for the Northern District of California heard challenges over LFA sonar, but the Navy settled its disputes from *NRDC v. Gutierrez* in August of 2008. The settlement included the Navy's agreement to limit the scope of its LFA sonar program to certain geographical regions, rather than the worldwide scope that was originally anticipated.

Mammal Protection Act of 1972 (MMPA), the National Environmental Policy Act of 1969 (NEPA), the Coastal Zone Management Act (CZMA) of 1972, and the Endangered Species Act (ESA) of 1972.

The relevant clauses and interpretations of each relevant law will be addressed below, but the short version of *Winter*'s legal history is as follows: the Secretary of Defense permissibly exempted the Navy from the MMPA's prohibition on "taking" marine mammals (pursuant to a number of specified conditions); the Navy performed an environmental assessment (EA) as required under NEPA and asserted that no full environmental impact statement (EIS) would be required; and the plaintiffs then sued the Navy for violating the CZMA and the ESA and were granted a preliminary injunction which the Supreme Court then overturned. A month later, on December 27, the Navy and the plaintiffs reached a settlement to engage in cooperative rather than litigious actions.[3]

Before delving into the stakeholder analyses and legislative history in depth, however, a proper understanding of *Winter*'s history and likely legacy requires a closer look at the judicial process, the history and justification of the Navy's programs, and an explanatory background on oceanic noise pollution more generally. It will also be helpful to lay out the different stakeholders to *Winter*, and what they each stand to gain or lose.

A. The Judicial Process. Under the U.S. common law system, Supreme Court decisions carry particular importance because of *stare decisis*, the legal principle under which judges are obligated to follow the precedents established by prior decisions from higher courts. As the highest court in the land, the Supreme Court has, since the jurisdiction-setting case *Marbury v. Madison*, held the power to make or break other legal precedents.

[3] For which see http://www.ens-newswire.com/ens/jan2009/2009-01-05-091.asp and http://www.environmental-expert.com/resultEachPressRelease.aspx?cid=27289&codi=43006&level=0&idproducttype=8, last accessed April 18, 2009.

Although the myriad questions concerning allocation of jurisdiction and legal process are too varied and esoteric to properly address here, the following passage should help to clarify the basics of the American judicial system:

> [The federal judicial system] has three principal levels: the district courts, the court of appeals, and the Supreme Court. There are also such special courts of limited jurisdiction as the Court of Federal Claims, the Court of International Trade, and the Tax Court. Although there is no system of administrative courts, there are many federal administrative tribunals that have adjudicatory functions but that are not properly courts.
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> The District courts are the trial courts of general jurisdiction for both civil and criminal matters, including admiralty (maritime) cases. They also review the decisions of some federal administrative agencies. There are some 90 district courts located throughout the fifty states and the District of Columbia…
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> Appeals from a district court are generally heard in the court of appeals for the circuit in which the district is located, though in rare instances appeal may be directly to the Supreme Court. There are thirteen such circuits, eleven comprising geographical divisions of the state and including a number of districts, a twelfth for the District of Columbia, and a thirteenth that reviews cases from specialized federal courts. (Farnsworth 1996, 38-39)

As happened with the *Winter* case, then, a court case proceeds from the district court to the appellate court to the Supreme Court (jurisdiction and standing permitting). The large majority of cases do not make it to the Supreme Court.

B. MFA Sonar. The Navy has used mid-frequency active (MFA) sonar since World War II to track submarines, especially 'quiet' diesel subs that run on batteries, and which passive sonar cannot detect. (Passive sonar only receives sound waves, whereas active sonar actively emits them.) MFA sonar is functional for a range of up to 10 nautical miles (nm), and, according to the Navy, "is the only reliable way to identify, track, and target submarines."[4] See **Figure 1** (Appendix A) for a visual outlay of sonar charts, which require substantial time and practice to read properly.

[4] http://www.navy.mil/oceans/sonar.html, last accessed on April 18, 2009. Of its MFA program, the Navy says the following: "Active sonar is critical for locating and tracking submarines. It is used sparingly, however, because it also allows an enemy submarine to pinpoint the position of the ship emitting the sound. To put Navy active sonar use in perspective, it is important to note that, of the U.S. Navy's approximately 280 surface ships, only about 58% are equipped with mid-frequency active sonar. About half of these ships are underway at any given time, and for each ship, active sonar is turned on only a small percentage of the time (during certain types of training and maintenance activities)."

Mid-frequency active sonar should also be distinguished both from high-frequency active (HFA) and the above-mentioned SURTASS LFA sonar. Generally, higher frequency equals shorter sound waves. High frequency sonar (>10 KHz) is therefore used, according to the Navy site, "for determining water depth, hunting mines, and guiding torpedoes." MFA sonar is used for medium-range tracking of submarines, and LFA sonar is used for longer-range[5] surveillance and other forms of tracking. LFA sonar is also used in scientific research intended to map the ocean floor and in various climate studies. **Figure 2** (Appendix A) presents a visual representation of LFA sonar systems, and **Figure 3** maps the scale of anthropogenic ocean noise.

C. The Sources of Oceanic Noise Pollution. The sources of oceanic noise pollution, however, extend well beyond sonar and the navy. In 2003 and 2004, the Pew Ocean's Commission report and the U.S. Commission on Ocean Policy were released. Both reports called for "ecosystem based management", a noticeably different emphasis, unsurprisingly, from previous studies funded by the Office of Naval Research (ONR) or by commercial fishing interests. (Stocker 2007) As Stocker notes, however, there is a truly vast range of anthropogenic activities that create oceanic sound: "from deep-water vessels to acoustical modems, and from fish finding sonars to seismic airgun exploration" (Stocker 2007, 268-9) In addition to these more esoteric sources, there remains the constant, ubiquitous blather from fishing trawlers, oil tankers, and supertankers like the *Jahre Viking* and the Maersk class ships.

Whereas ambient ocean noise levels hover between 55-85 decibels, **Figure 3** (Appendix A) demonstrates that human-created noise runs a broad spectrum above the ambient level. It should be kept in mind that the decibel scale, like the Richter scale, is logarithmic.

[5] A distinct but related project the Acoustic Thermometry of Ocean Climate (ATOC) project was similarly opposed by animal protection organizations.

D. The Relevant Laws.[6] Before delving into stakeholder analysis and legislative history, it is necessary to understand some rudimentary features of the environmental laws in question. Although the 9th Circuit Court allowed the District Court's preliminary injunction, which was based in part on the ESA and the CZMA, to stand, the Supreme Court ruling never reached the merits of the case and thus never examined whether the injunction was applied lawfully under any of these specific laws. A brief examination of NEPA and CZMA is nonetheless merited, while keeping in mind that the **Endangered Species Act** (ESA)[7] and definitions of "take" and "harassment" under the **Marine Mammal Protection Act** (MMPA) were also relevant to the outcome of *Winter*.

The **National Environmental Policy Act** (NEPA)[8] requires Environmental Assessments (EAs), and possibly Environmental Impact Statements (EIS), for any government action that has the potential to cause environmental harm. The crux of the litigation before *Winter* is that the Navy performed an EA with a Finding of No Significant Impact (EA-FONSI), which precluded the need, in the Navy's view, to carry out a full EIS. The Navy's EA-FONSI "estimated 564 instances of harassment that would physically injure a marine mammal (Level A harassment), and nearly 170,000 instances of harassment that would disrupt the behavior of a marine mammal (Level B harassment), including over 8000 instances of temporary hearing loss." (Kalaskar 2009)

Without a full EIS, however—and as NRDC *et al* argued—the causal link between beaked whale mass strandings and various other adverse affects to oceanic life would remain tenuous. The California District Court agreed with this view, granting a preliminary injunction on the basis that the Navy had failed to prepare an EIS.

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[6] The diversity and length of all of the relevant laws, cases, and rulings makes it infeasible to append them all to the end of this paper. Instead, I am providing extensive and easily accessible links to the relevant documents.
[7] The text of the ESA is available at http://www.nmfs.noaa.gov/pr/pdfs/laws/esa.pdf.
[8] Implemented and enforced by the Environmental Protection Agency (EPA) at http://www.epa.gov/Compliance/nepa/.

The **Coastal Zone Management Act** (CZMA)[9] requires that federal agencies engaging in actions that will "affect any coastal use or resource" submit a Consistency Determination (CD) to the relevant state agency (in this case, the California Coastal Commission [CCC]). In the Navy's case, the CD submitted to the CCC both neglected to mention its proposed sonar operations and failed to incorporate mitigation measures required by the CCC under the California Coastal Management Plan (CCMP), the implementing plan for the CZMA. Although the Navy justified its omissions on the grounds that its actions would not have a significant effect on the coastal zone, it seems apparent that their improper filing of the CD led in part to the *Winter* litigation. (see "Green Trumps the Blue and Gold" 2008)

II. Stakeholders. As should be clear from the legal and political framing of the case so far, three distinct groups of stakeholders have an interest in the outcome of *Winter*: the nonhuman denizens of the world's oceans, the national security community, and the environmental and animal advocacy communities. Of course, in a more abstract sense, everyone who benefits from the global economy has an interest in whether and how oceanic commerce is regulated, just as everyone who benefits from the ecosystem services provided by intact ecosystems benefits. But for the purposes of this examination the previous three groupings suffice.

The simple act of listing all of the submitted Amicus Briefs before the Supreme Court relating to *Winter* gives the reader a clear idea of who the stakeholders are for the petitioners and respondents:

- The Brief for the California Forestry Association, the American Farm Bureau Federation, the American Forest & Paper Association, CropLife America, and the National Association of Home Builders in Support of Petitioner
- Brief for the Pacific Legal Foundation in Support of Petitioner

[9] The text of the CZMA is available at http://coastalmanagement.noaa.gov/about/czma.html#anchor203914.

- Brief for the Navy League of The United States – Honolulu Council, Admiral Thomas B. Hayward, Admiral Ronald J. Hays, Admiral R.J. "Zap" Zlatoper, Vice Admiral Peter M. Hekman, Vice Admiral Robert K.U. Kihune, Rear Admiral Richard C. Macke, Rear Admiral Lloyd "Joe" Vasey, Rear Admiral George Huchting, Rear Admiral Stephen R. Pietropaoli, the Navy League of the United States, Military Affairs Council of the Chamber of Commerce of Hawaii, Southwest Defense Alliance, San Diego Regional Chamber of Commerce, and the San Diego Military Advisory Council in Support of Petitioner
- Brief for the Washington Legal Foundation, Rear Admiral James J. Carey, U.S. Navy (Ret.), the National Defense Committee, and Allied Education Foundation in Support of Petitioner
- Brief for the Ecological Society of America in Support of Respondent
- Brief for Defenders of Wildlife, the Humane Society of the United States, the Center For Biological Diversity, Oceana, Inc., Sierra Club, the Wilderness Society, the Animal Legal Defense Fund, and Greenpeace, Inc. in Support of Respondent
- Brief for Law Professors Michael C. Small, Jonathan D. Varat, and Adam Winkler in Support of Respondent
- Brief for California Assembly Member Julia Brownley and California Senator Christine Kehoe in Support of Respondent

All of the above groups break either into the environmental/animal protection/limits on executive power or national security/commerce/development camps. There is, however, one important stakeholder group that is not captured by the above list: the ocean inhabitants themselves. I will begin with the effects of MFA and other noise pollution on marine mammals and other ocean life, and will then move on to address the other stakeholder groups in turn.

A. The Effects of Oceanic Noise Pollution on Marine Life: the Victims. Although the *Winter* ruling focuses specifically on beaked whales, oceanic noise pollution has been shown to adversely affect a wide range of ocean dwellers. In truth, although we have varying degrees of evidence that ocean noise hurts whales, fish, turtles, and other ocean life, we simply *do not know* whether the majority of oceanic noise pollution is or is not harmful to a wide range of oceanic life, and how. (*Ocean Noise and Marine Mammals* 2003) This is not to say that scientific evidence demonstrating harm does not exist. It does, and the Parsons *et al* (2006) article makes the accumulated evidence in the case of whales eminently clear. Furthermore, as Joel Reynolds, senior attorney for the NRDC, writes,

> Environmental enforcement has been responsible for millions of dollars in research on noise in the ocean. The Marine Mammal Research Program under Scripps' Acoustic Thermometry of Ocean Climate project in 1995, the ONR-funded Scientific Research Program regarding Low Frequency Active sonar in 1997, and, most recently, almost $15 million in new research on both marine mammal acoustics and basic ecology under a settlement with the Navy in December 2008 – all of

> these have been undertaken or expanded in direct response to environmental advocacy, as Dr. Tyack, who was involved in both the ATOC and LFA research initiatives, can attest. (Reynolds 2009)

Nonetheless, as the title to Parsons *et al*'s 2008 piece implies ("Navy sonar and cetaceans: just how much does the gun need to smoke before we act?"), determining causality for different levels of adverse effects has been extremely complicated. A mass stranding of three whale species in March 2000 pointed to MFA sonar as "the most likely cause of the strandings", with evidence based primarily in postmortem analysis of how beaked whales appear to get the "bends"[10] when they surface too rapidly after becoming disoriented due to the barrage of sound. (Parsons *et al* 2008). Parsons *et al* also point out that "it is widely accepted that carcass detection rates can be quite low in wild populations of terrestrial animals, and thus the discovery of a single body should always be considered indicative of a wider problem."

In addition to the effects on beaked whales, short-finned pilot whales, minke whales, and pygmy killer whales have also been found stranded, with a necropsy of one of the pygmy killer whales revealing cranial tissue hemorrhaging. (Parsons *et al* 2008) A whole range of mass strandings has been documented around the world coterminously and in the same regions as ongoing Naval sonar programs, but firm causation has been near impossible to establish.

Aside from the fatal effects of mass stranding, however, a number of lower-level adverse effects on animal behavior have also been catalogued in a range of different whale species, including decreases in sightings, changes in vocalization patterns, alternations in singing behaviors, and temporary spates of silence. (Parsons *et al*, 2008, citing various sources) Other adverse effects include hearing loss in the form of temporary or permanent 'threshold shifts', resonance effects including internal hemorrhaging, masking effects obscuring noise from potential predators, and behavioral changes such as the alteration of normal migration routes.

[10] The scientific speculations over the causes of strandings are too detailed and diverse to properly examine here. Please refer to Parsons *et al* p. 1250 for a good explication of the topic.

B. The Interests of National Security and Commerce: the Petitioners. As the introductory passage on MFA sonar described, military and national security stakeholders have a powerful interest to limiting the number of mitigation measures placed to control or curb the navy's use of MFA sonar in military preparedness training. This is indirectly evidenced by the Navy's reticence to include MFA sonar in its CD to the CCC as mandated by the CZMA, its finding of an EA-FONSI rather than the need for an EIS proper as mandated by NEPA, and its communications with the CEQ and the President as a way to circumvent the legal process.

Less apparent, however, is why groups like the National Association of Home Builders (NAHB) would file an amicus brief for the petitioners (the Navy). The reason for this apparent incongruity, as is true for most Supreme Court cases, is that precedents set by the Supreme Court often have wide-ranging and unexpected effects. One of the more direct and expected effects, however, is the precedent that a lower barrier to set preliminary injunctions would allow. Along with the NAHB,[11] then, groups like the California Forestry Association (CFA) argued that the standard under which preliminary injunctions should be issued should be one of extraordinary circumstances in which a drastic emergency measure is required. In the petitioners' eyes, mass strandings were not drastic enough. (Or, what's more accurate, mass strandings were not relevant to their specific interests, whether they be logging rights or development contracts.)

One notable group in support of the petitioners is the Pacific Legal Foundation (PLF), a California-based legal organization established to support pro-business causes. According to vice president David Stirling, *Winter* presents an opportunity for the Supreme Court to overturn the

[11] In the case of the NAHB, Duane Desiderio responded to the ruling with following: "The favorable ruling assists builders in resisting disruptive preliminary and permanent injunctions when environmental groups file suit challenging land-use activities and business operations grounded on undefined and unknown injuries to wildlife. NAHB's participation in this matter is now complete." (Available at http://www.nahb.org/generic.aspx?genericContentID=103152, last visited April 20, 2009)

ESA's status as a 'super statute', citing various examples in his support.[12] (Stirling 2008) A personal communication with Steven Gieseler, the PLF lawyer who wrote the Amicus Brief in support of the petitioners, confirms the organization's intent to shift power away from environmental statutes when he writes that "the main reason for [my satisfaction with the opinion's balancing test] is that such tests had been off limits in environmental cases in recent history." (personal correspondence, April 16, 2009)

C. The Interests of Environmental Protection: the Respondents. Just as the petitioners' supporters fielded a range of motives, the respondents were concerned about issues ranging from species protection to limits on presidential power. Whereas the petitioners frame the issue as a case of "the Navy knows best and the environmentalists are saying they can't protect us", the environmentalist respondents frame the issue as follows: "both national security and marine mammals can thrive as long as the Navy follows these mitigation measures." I will address the views and concerns of two different kinds of petitioners: the marine mammal protection community, and the separation of powers community.

The most obvious stakeholders are the respondents themselves, the NRDC and its co-respondents: the International Fund for Animal Welfare (IFAW), the Cetacean Society International, the League for Coastal Protection, and the Ocean Futures Society and its founding president, Jean-Michel Cousteau. The two most prominent legal figures in the respondents' camp are Joel Reynolds, NRDC senior attorney, and Richard Kendall, NRDC co-counsel and oral argument presenter. Their views on the outcome of the case will be addressed in Section III.

[12] In a recent *Washington Times* op-ed, Stirling cites "some of the better-known examples of this disturbing trend towards [elevating species preservation above all other socially beneficial public interests]: drilling halted for domestic sources of oil and natural gas because of listed species; timber harvests stopped in the name of the northern spotted owl, causing overgrown forests to be threatened by catastrophic wildfire; shutting off passage of river water to households and farmers during drought conditions for the benefit of fish; stopping construction of hurricane barrier gates out of concern for shrimp and shell fish - gates that would have protected New Orleans from Katrina's deadly storm surge." (Stirling 2008)

In addition to the actual respondents, a range of watchdog organizations have an interest in the outcome of the case, precisely because it has the potential to effect environmental and animal policy more generally. Although Naomi Rose, Humane Society International (HSI) marine mammal expert, is not a plaintiff, she knows the plaintiffs well and was able to clarify some of their goals to me in a personal communication. Unlike what the some of the Amicus Briefs favoring the petitioner claim, Dr. Rose asserts that "the original litigation was intended to ensure adequate protection for marine mammals during sonar exercises – to ensure the Navy actually met the standards of our laws…The Navy must train with sonar – we all know that. The intention was NEVER to stop sonar training. But when the Navy trains with sonar, they have to protect the environment – the law says so." (personal correspondence, April 6, 2009)

Additionally, to give just one example among many of how Supreme Court cases inevitably involve more stakeholders than the issues on their face would seem to merit, I turn to the separation of powers argument. In the case of *Winter*, arguing for marine mammal protection happened to coincide with arguing against excessive presidential war powers. Specifically, the respondents argue in their briefs that the NEPA waiver signed by President Bush was illegal.

In "'Winter v. NRDC': Limit the President's Emergency Power", Victor Hansen and Lawrence Friedman argue that the president's decision to exempt the Navy from CMZA coverage (see **Appendix B** or section III for chronological details) unlawfully expands the president's war powers, insofar as the "emergency" provision required to justify the President's actions "may include any foreseeable event that portends significant harm to the public". In other words, by arguing that the need for continued MFA Sonar training constitutes an "emergency", Hansen and Friedman claim that all U.S. citizens are stakeholders to *Winter*, at least in the sense that the balance of power between the three branches of government is at stake.

III. Legislative History and Outcome. Having established the lay of the legal land and the different interest groups in question, I can now map the regulatory and judicial chronology of the *Winter v. NRDC* case. I begin with a brief outline and explanation of the events of 2007-2008 (available in list form in **Appendix B** with complete legal citations). Next, I look at the text of the oral proceedings of the Supreme Court on the *Winter* case, looking in particular at the balance of equities and standing arguments. A concluding passage on the outcome of *Winter* will peruse some relevant legal blogs to ascertain the likely legacy of this case.

A. District and Circuit Court Cases. As outlined in the judicial process passage above, *Winter's* route to the Supreme Court was preceded by rulings at the District and Appellate levels. In the case of *Winter*, the District Court was the California Central District Court and the Appellate Court was the Ninth Circuit Court of Appeals. The following chronological outline is drawn mostly from the CRS report by Alexander (2008), and from the www.onthedocket.org case reference for *Winter v. NRDC*.

The first decision in the MFA litigation was issued by a California Central District Court in August of 2007. In a ruling from District Judge Florence-Marie Cooper, the court granted a preliminary injunction to alter the mitigation measures for the remaining training exercises in the Navy's schedule for any marine mammals coming closer than 2,200 yards of a ship or within 12 miles of the coast. (see **Appendix C** for a complete list of mitigation measures) The plaintiffs had argued that the Navy's actions had violated the ESA, NEPA, and CZMA. The court agreed that success was likely under CZMA and NEPA, but not under ESA.

The second decision in the MFA litigation occurred after the Navy appealed the injunction, at which point the case was heard by the three-judge panel at the Ninth Circuit Court of Appeals, which, following a stay—i.e., a temporary hold on the injunction—remanded the

case to the district court with instructions to refit the injunction to the circumstances. Of the District Court case, Circuit Judge Betty Binns Fletcher wrote "the district court here carefully balanced the significant interests and hardships at stake to ensure that the Navy could continue to train without causing undue harm to the environment." ("Divided court backs Navy" 2008)

Next, on January 3, 2008, the District Court issued a new preliminary injunction barring MFA training unless a range of mitigation measures were taken. A week later, on January 10, the Navy asked the Council on Environmental Quality (CEQ) to provide alternative measures under emergency provisions of NEPA that would let them conduct the remaining training exercises. On January 15, the CEQ provided a list of alternate measures. On the next day, President Bush exempted the navy from CZMA compliance by executive order, stating that "the use of mid-frequency active sonar in these exercises is in the paramount interest of the United States."[13]

In light of the above developments, the District Court reexamined the injunction on February 5, finding that the CEQ had acted "arbitrarily and capriciously" in declaring an emergency when none existed. Then, on February 29, the Ninth Circuit Court rejected the Navy's appeal of the preliminary injunction, agreeing with the District Court that the CEQ had overstepped its bounds. The Ninth Circuit court also modified the list of mitigation measures (**Appendix C**). The Navy then petitioned the U.S. Supreme Court.

B. Supreme Court Review. Although the Supreme Court was tasked with two items—determining whether the CEQ had acted within its authority and whether the granting of an injunction based on NEPA was appropriate, the majority decision[14] penned by Chief Justice John

[13] As the Hansen and Friedman piece indicates, many were upset by the president's attempted override. See, for example, the following NRDC press release, "Bush Attempts Illegal Override of Court Order Protecting Whales from Sonar." Available at http://www.nrdc.org/media/2008/080116.asp.

[14] The ruling has variously been recorded as 5-4 or 6-3. The following passage explains why there has been some confusion on the matter: "The vote was 6-3, with Justices Alito, Scalia, Thomas and Kennedy joining an opinion written by Chief Justice Roberts. Justice Breyer filed an opinion concurring in part and dissenting in part, in which Stevens joined as to the concurrence. Ginsburg and Souter dissented outright." (Slater 2008)

Roberts did not reach the merits of the case. Instead, they ruled that the "balance of public interests" weighed strongly on the side of the Navy. The dissenting opinion, written under Justice Ginsberg, found that the balance of interests came down on the side of protecting marine mammals so long as the Navy's mitigation measures were not unreasonably onerous. Because a detailed analysis of the *Winter* opinion would require substantially more space than I am allotted, I will instead use revelatory passages from the oral arguments to explain the thrust of the analysis that won out in the opinion penned by Chief Justice Roberts.

In addition to Oral arguments by Mr. Garre (for the Navy) and Mr. Kendall (for NRDC), the crucial documents under Supreme Court review included:

-the opinion of the 9th Circuit court
-the letter from CEQ Chairman Connaughton to Navy Secretary Winter providing alternative measures
-the petitioner's brief (Winter)
-the respondent's briefs (NRDC and California Coastal Commission)
-the collected Amicus Briefs (as listed above)

Additionally, I attempted to ascertain whether the brief writers were specifically targeting Justice Kennedy, given his crucial role as a swing justice, but to no specific avail.[15]

Oral Arguments. The oral proceedings[16] before the Supreme Court took place on October 8, 2008, with General Gregory G. Garre, the Solicitor General for the Department of Justice, speaking on behalf of the petitioners (the Navy), and Richard B. Kendall, a Los Angeles-based attorney, speaking on behalf of the respondents (NRDC *et al*).

[15] Steven Gieseler, a lawyer for the PLF, did have the following to say: "I'm not specifically aware of any attempts on either side to specifically target Justice Kennedy. Colloquially, there are many half-jokes of sorts, among those who practice in the Supreme Court, that "you're writing the brief for one person" in some of the higher-profile cases where an ideological split is suspected. But in this case in particular I just don't know." (personal correspondence, April 16, 2009) Michael Jasny, a lawyer for NRDC, said the following: "We looked closely at prior opinions of all the justices, not just Justice Kennedy, and we tried to promote arguments that would work for a court that – after all – has ruled against the environment in literally every NEPA case that has come before it. " (personal correspondence, April 12, 2009)

[16] The oral proceedings are available in full at the following web page: http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-1239.pdf

General Garre's argument hinges on the view that the injunction is invalid primarily because it is based upon a "risk of irreparable harm which we think Respondents haven't shown." (Oral Arguments 4) Garre goes to great length to demonstrate that most of the disturbances are "temporary, non-injurious disturbances" (Oral Argument 8), but since the Navy didn't yet do a full EIS,[17] it's hard to see how this is reliable information. The oral arguments contain a number of astute points, but the following comment by Justice Souter encapsulated much of the criticism: "to the extent that there was an emergency, wasn't the emergency created by the failure of the Navy…to start an EIS preparation in a timely way?" (Oral Argument 18) In Garre's view, the NRDC "has not shown a likelihood of irreparable injury" (Oral Argument 26), but, as Justice Stevens points out, "the whole theory of the environmental impact statement is that we don't really know what the harm will be," (Oral Argument 27) not to mention that an EA doesn't require the same level of alternatives analysis as does an EIS.

In contrast, the core of Richard Kendall's argument is that "the reason there is no emergency is that the Navy…is perfectly able to train under these circumstances." (Oral Argument 35) This is the crux of the issue, for just as Justice Breyer responds "I don't know anything about this. I'm not a Naval officer", none of the Justices can properly assess either the risks to the Naval operation or the risks to the oceanic fauna. Much of the remaining argument is spent discussing the relative burdens placed by the different mitigation measures, and the extent to which they are or are not necessary or feasible. In the end, the Roberts' majority sided with Garre's view and Ginsburg's dissent sided with Kendall's view.

[17] The following interchange between Roberts and Garre is revelatory: "CHIEF JUSTICE ROBERTS: why didn't you just go ahead and do an EIS from the outset if you were going to engage in such effort with respect to the environmental assessment?

GENERAL GARRE: Because the Navy devoted its best resources to this and in good faith, as is indicated by the 293-page environmental assessment, concluded that there would not be a finding of significant environmental impact, and at that point everyone agrees an environmental impact statement is not required." (Oral Argument 11)

Indeed, the tone and content of the subsequent majority opinion can be correctly guessed at by merely reading the following three passages from the oral argument:

> ROBERTS: …at no point did the district judge undertake a balancing of the equities, putting on one side the potential for harm to marine mammals that she found…and putting on the other side the potential that a North Korean diesel electric submarine will get within range of Pearl Harbor undetected. Now, I think that's a pretty clear balance. And the district court never entered – never went into that analysis. (Oral Argument 48)
> KENNEDY: By the time this case got back to the…district court a second time, the President had made a determination that this was in the paramount interest of the United States. The Defense and Commerce Department Jointly had made a determination that this is necessary for the national defense. And it seems to me, even if those determinations don't resolve the EIS statement, they certainly must be given great weight by the district court in determining whether to continue the injunction. (Oral Argument 50)
> GARRE: [The respondents] not only have to show irreparable injury to marine mammals, which they haven't; they have to show irreparable injury to themselves, and particularly as to beaked whales, which none of the declarants and none of their members have ever asserted they have seen. They can't possibly establish any irreparable injury from any conceivable harm to beaked whales. (Oral Argument 55)

C. Outcome of *Winter*. As Naomi Rose put it, the Supreme Court's ruling "made neither side happy – and made each side possibly just about equally unhappy."[18] (personal correspondence, April 6, 2009) In other words, the Supreme Court could have ruled that the Navy had the right to violate environmental laws, but they didn't. And they could have ruled that the environment deserves consideration even when national security is in question, but they didn't. That being said, the most obvious and potentially problematic standard that was set by *Winter* is a limited one: the deference by the Supreme Court to the military's definitions of what constitutes "good enough" in setting mitigation standards to deal with a range of environmental concerns.

A writer from the blog "the Volokh Conspiracy" raises another important point about the legacy of *Winter* when the author writes that "while *Winter* was a fascinating case, I don't think it will have much impact outside of the national security context." (Adler 2008) In other words, *Winter* may not even apply to other human-wildlife context issues more generally, given that its purview deals specifically with NEPA review of military actions. Thus, although the case's

[18] For some relevant passages by Reynolds and Kendall on how the Supreme Court's ruling isn't all bad for marine mammal protection, see http://enewsusa.blogspot.com/2008/11/high-court-rules-in-winter-navy-v-nrdc.html.

potential legacy might appear quite broad given the content—national security trumps whale life —its actually legal applicability in future case law may be quite limited.

Another blogger has summed up quite well what does and does not seem to matter about the *Winter* case, and it deserves citing in full:

> Why does the Court take a case like this? The case concerns, at its base, the issue whether the Navy must complete an environmental impact statement under NEPA before undertaking certain training exercises. Although it had initially determined that no EIS was required, the Navy ultimately agreed to complete one. It expected the EIS to be ready in January 2009. In the interim, the district and circuit court imposed mitigation measures on sonar training. The Navy sought to challenge two of those mitigation measures. The Court granted certiorari in June 2008 -- seven months before the issue would likely become moot! (This timeframe is the primary reason that Justice Breyer would not remand the case, according to his concurrence). Last week, approximately two months before the Navy EIS is expected, the Court held that the preliminary injunction upon which the mitigation measures rested is unwarranted.
>
> Perhaps the answer is suggested by the striking contrast between the characterization of the injuries suffered on the plaintiffs' side. Chief Justice Roberts' majority opinion stresses the distinction between the injury to marine mammals and the injury to human plaintiffs' interests. The Chief Justice states that "even if MFA sonar does cause a limited number of injuries to individual *marine mammals*, the Navy asserts that plaintiffs have failed to offer evidence of species-level harm that would adversely affect *their* scientific, recreational, and ecological interests. Thus, the majority opinion weighs an interest in sonar use that is deemed vital to national security against "the possible harm to the ecological, scientific, and recreational interests that are legitimately before this Court." Justice Ginsburg, in contrast, highlights the Navy's own estimate that the planned sonar usage could cause permanent physical damage to nearly 1/2 of the Cuvier's beaked whales in the waters off the west coast, as well as significant harm to other species. (available at http://biolaw.blogspot.com/2008/11/winter-v-nrdc.html)

A number of interesting points stand out here. First, after all this effort to *not* do an EIS, the Navy recently acknowledged that it will in fact do one.[19] Second, the passage highlights that the issue presented in *Winter* may be procedurally complex, but it doesn't on the face of it appear to deserve Supreme Court scrutiny, and the court's ruling cites no prior cases to support its position. Third, the author highlights the key from a human-animal studies perspective: under our country's legal rules about standing and jurisdiction, only the human "ecological, scientific, and recreational interests" in marine mammal well-being can count in front of the law.

[19] For a copy of the relevant text of the Federal Register, see http://www.setonresourcecenter.net/register/2006/Dec/21/76639B.pdf.

Beyond all of the esoteric and far-reaching impacts[20] of the *Winter* case, then, one fundamental fact remains, and Chief Justice Roberts spelled it out baldly: only human interests matter in our legal system. Thus, while some would argue that the cautious wording inherent in the majority opinion is a sign that military actions won't always trump environmental ones,[21] the vitriolic nature of the 'balance of interests' argument put forth by Roberts hints that nonhuman animal interests need to find less vital opposing interests against which to get their day in court.

IV. Thoughts and Conclusions. For me, the two take-homes from this whole analysis are: the state of the oceans is in a very poor way, and that the Supreme Court in its current composition is not likely to rule in a friendly way towards nonhuman animal interests when they conflict with human interests. When a *New York Times* editorial from last year concluded that "Surely the Supreme Court has the ability to judge whether the military should be allowed to flout environmental laws with a dubious claim of national security," it seems that they couldn't have been further from the mark; the Roberts opinion didn't think that this was a close decision in any way.

I wondered throughout whether it was tactically wise for the plaintiffs to 'go after' the navy's LFA and MFA programs in the current era of politicization regarding all things military, but this isn't really a critique of any of the watchdog organizations per se; if they don't keep an eye on compliance with the law, who will?

If nothing else, the whole *Winter* fracas serves as a clear indicator that oceanic noise pollution deserves a more prominent place on the international diplomatic table. Stocker (2007)

[20] See, for example, http://www.troutmansanders.com/12-05-2008/ for an analysis of the impact of *Winter* on "the "substantial question of patentability" defense to preliminary injunctions".

[21] For which see the following passage in "Winter Case Spells Cold Climate for Military in the Courts", an op-ed by Jeremy Rabkin in the conservative journal *Human Events*: "The navy won the case -- at least in the form it was put to the Supreme Court. But what's most notable about the Court's decision in *Winter v. NRDC* is how very narrow and cautious it is. Only five justices signed on to the majority opinion by Chief Justice Roberts, which emphasized the rather technical point that the lower courts should have reconsidered their claims, given the navy's willingness to adhere to four of the six restrictions originally imposed by the district court…So far from urging general deference to military considerations, the majority opinion took pains to emphasize that environmental claims might triumph in the next case: "Of course, military interests do not always trump other considerations and we have not held that they do." (Available at http://www.humanevents.com/article.php?id=29514, last visited April 19, 2009)

proposes establishing oceanic noise criteria based on ambient noise levels much like the national ambient air quality (NAAQ) requirements by point sources under the Clean Air Act. While this is an appealing idea in theory, there is clearly a very long way to go before the international community will get behind severe restrictions on its commercial shipping and fishery interests, let alone its core national defense prerogatives. Although there are a range of international regulatory efforts in place to deal with oceanic noise pollution, (See Parsons *et al* at 1253 for a good explanation of ASCOBANS, for example) none of it has nearly enough buy-in from the international community to deal with the range and severity of the problem.

On the national legal front, one blogger puts it quite harshly: "can we expect nothing more of NEPA in the future than more mudplay from the usual NEPA suspects?...Is it becoming, in cases like Winter, little more than an instrument of delay and obstructionism? (Dorf 2008) While my correspondence with Dr. Rose indicates that the marine mammal advocates were themselves loath to get drawn too readily into litigation (personal correspondence, April 6, 2009), it is clear from the various disagreements over the science (see Madin 2009) and the policy of *Winter* that this complicated case wasn't really "solved" by the Supreme Court at all.

As long as the world view typified in Roberts' dismissal of nonhuman animal interests remains the unquestioned norm, however, there is little chance that a critical mass of national stakeholders—let alone the international community—will take this issue more seriously. Dr. Rose is probably right, then, when she says that "the upshot of the ruling…is that the solution is now political, not legal or even scientific." (personal correspondence, April 6, 2009)

Part of the difficulty of drawing broader policy lessons from a case about the effects of the military on the environment is encapsulated nicely by a statement by Justice Breyer. "When I think of the armed forces preparing an environmental impact statement, I think, the whole point

of the armed forces is to hurt the environment." (Oral Argument 44) While Breyer's statement may have drawn amused laughter from the Supreme Court Justices, the point remains: *Winter*'s non-military legacy might be limited precisely because the military is a special case. Or, as Michael Jasny, an NRDC lawyer, put it: "I don't see this case setting a meaningful precedent in favor of erring on the side of military judgment given the highly contextual basis for the decision." (personal communication, April 12, 2009)

Finally, the choice of beaked whales as a focal species underlines the conflicting world views shaping Roberts' versus Ginsburg's 'balance of equities' calculus. The beaked whale spends most of its life in the ocean deep, making it all but impossible for scientists and environmentalists to argue that fundamental human interests are at stake. (The only attempt I found to do so was in Parsons *et al* (2008), where the argument was made that ecosystem services provide national security in the long term; while this is often true—but not necessary for Cuvier's beaked whales in particular—it's hard to take seriously when compared with the sensationalist threat of nuclear stealth subs.) As a result, the whales are bound to lose if anthropocentrism unquestionably carries the day.

Appendix A. Diagrams and Figures

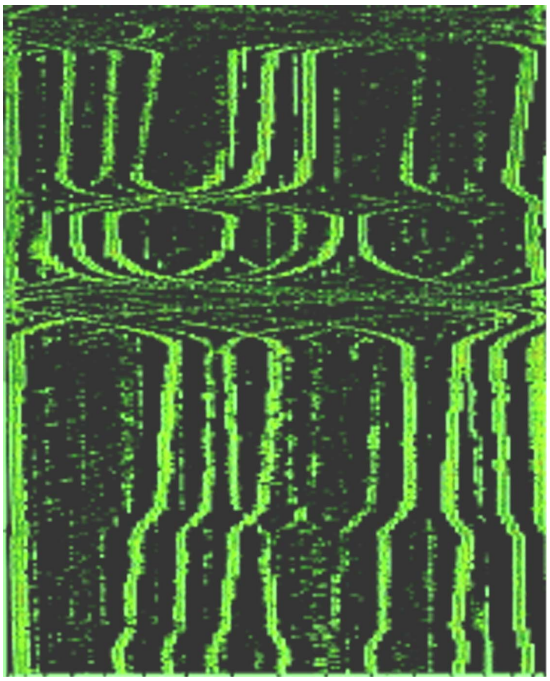

Figure 1 (From http://www.navy.mil/oceans/sonar.html)

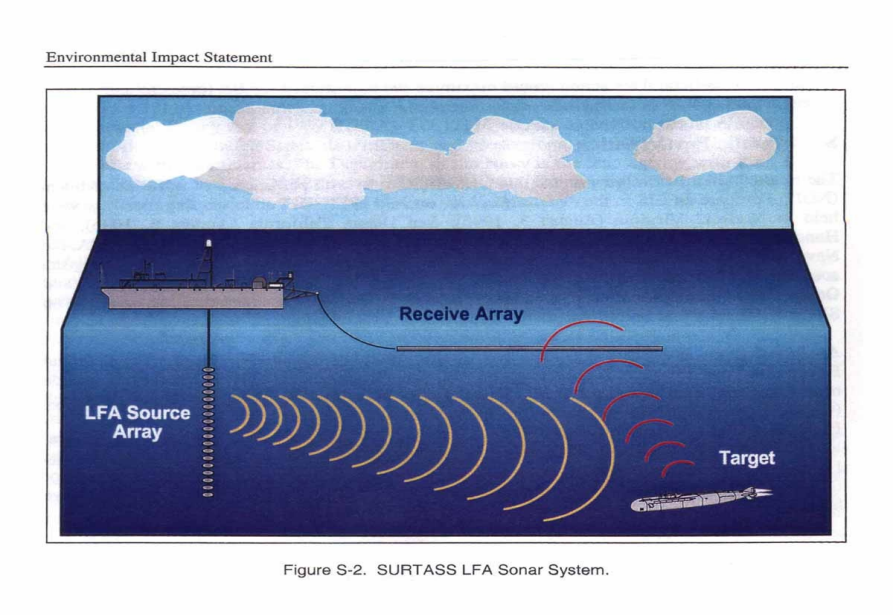

Figure 2. (From http://www.pacificwhale.org/documentSetting/UserFiles/Image/SURTASS%20LFA%20Sonar%20System%202.jpg)

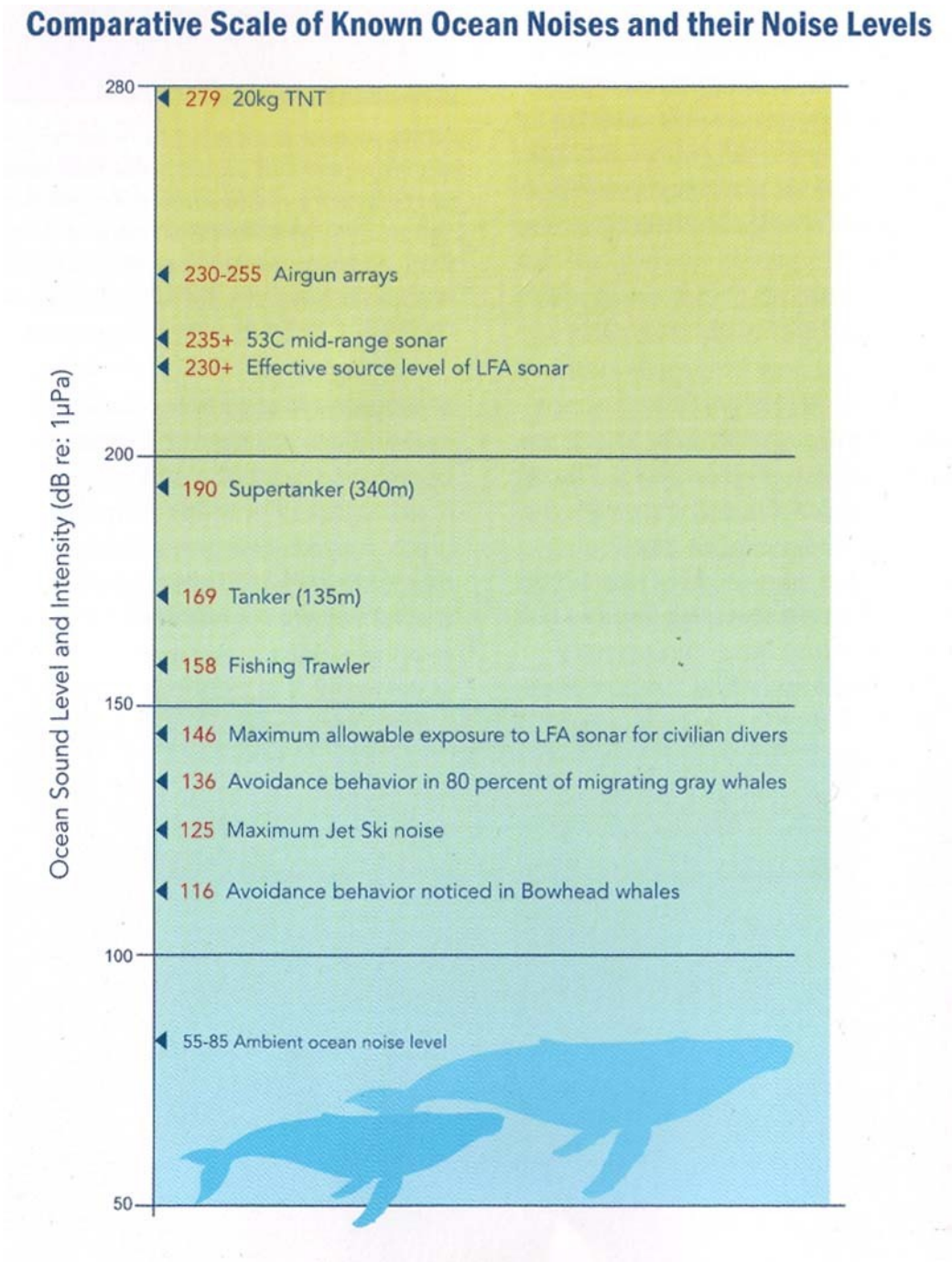

Figure 3 (From http://www.oceancare.org/de/downloads/Silent_Oceans/Drowning-in-Sound_IONC.pdf)

Appendix B (relevant dates, pasted from Alexander 2008, Table 2, CRS-15)

August 7, 2007
Preliminary injunction granted.
NRDC v. Winter, 8:07-cv-00335-FMC-FMOx, 2007 WL 2481037 (C.D. Cal. Aug. 7, 2007)

August 31, 2007
Injunction stayed. NRDC v. Winter, 502 F.3d 859 (9th Cir. 2007)

November 13, 2007
Ninth Circuit dissolves stay. Remands to district court.
NRDC v. Winter, 508 F.3d. 885 (9th Cir. 2007)

January 3, 2008
District court enjoins Navy, but allows training if certain measures are taken.
NRDC v. Winter, 530 F. Supp. 2d 1110 (C.D. Cal. 2008)

January 9, 2008
Navy seeks stay pending appeal.

January 10, 2008
District court issues modified injunction.

January 15, 2008
President exempts Navy from CZMA, pursuant to 16 U.S.C. § 1456(c)(1)(B).

January 15, 2008
CEQ issues alternative arrangements under NEPA for Navy, pursuant to 50 C.F.R. § 1506.11.

January 16, 2008
Ninth Circuit remands to district court to consider Jan. 15 actions.
NRDC v. Winter, 513 F. 3d 920 (9th Cir. 2008)

February 4, 2008
District court finds that CEQ's actions were arbitrary and restores injunction.
NRDC v. Winter, 527 F. Supp. 2d 1216 (C.D. Cal. 2008)

February 19, 2008
Ninth Circuit rejects Navy's motion for a stay.
NRDC v. Winter, 516 F.3d 1103 (9th Cir. 2008)

February 29, 2008
Ninth Circuit affirms preliminary injunction.
NRDC v. Winter, 518 F.3d 658 (9th Cir. 2008)

February 29, 2008
Ninth Circuit modifies two mitigation measures, allowing sonar reduction when at critical point of the exercise and during surface ducting conditions.
NRDC v. Winter, 2008 U.S. App. LEXIS 4458 (9th Cir. Feb. 29, 2008)

March 31, 2008
Navy petitions the U.S. Supreme Court to review the Ninth Circuit decision.
NRDC v. Winter, No. 07-1239 (March 31, 2008)

November 12, 2008
U.S. Supreme Court finds in favor of the Navy.
Winter v. NRDC,129 S. Ct. 365 (2008)

Appendix C (mitigation measures, pasted from Alexander 2008, Table 3, see attached pages CRS 16-17, from Alexander 2008)

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