No. 07-1239

IN THE

Supreme Court of the United States

DONALD C. WINTER, SECRETARY OF THE NAVY, ET AL.,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE THE WASHINGTON LEGAL FOUNDATION, REAR ADMIRAL JAMES J. CAREY, U.S. NAVY (RET.), NATIONAL DEFENSE COMMITTEE, AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal courts to ensure that the United States government is not deprived of the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g.*, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004). More relevantly, WLF has appeared in cases advocating the properly limited application of environmental laws to military training and combat readiness activities. *See, e.g.*, *Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy*, 891 F.2d 414 (2d Cir. 1989) (upholding sufficiency of Navy's environmental impact statement with respect to deployment of nuclear weapons on ships based at port); *Ctr. for Biological Diversity v. Pirie*, 201 F. Supp. 2d 113 (D.D.C. 2002) (enjoining live fire training exercises for violations of Migratory Bird Treaty Act), *dismissed as moot, sub nom.*, *Ctr. for Biological*

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, amici state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. Letters of consent have been lodged with the Clerk.

Diversity v. England, No. 02-5160 & 02-5180, 2003 WL 179848 (D.C. Cir. Jan. 23, 2003).

Rear Admiral James J. Carey, U.S. Navy (Ret.), served 33 years in the U.S. Navy and Naval Reserve, including service in Vietnam. He is a former Chairman of the U.S. Federal Maritime Commission and current Chairman of the National Defense Committee (NDC), which is also joining in this brief. The NDC is a grass roots pro-military organization supporting a larger and stronger military as well as the election of more veterans to the U.S. Congress.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared in this Court on a number of occasions along with WLF in national security cases.

In this case, the lower courts found that the Navy's use of mid-frequency active (MFA) sonar in the Pacific Ocean during its vital training exercises should be severely restricted while the Navy prepares a full environmental impact statement (EIS) to determine the impact of sonar on marine mammals, despite the fact that (1) over the past 40 years in this area, no evidence has been produced showing sonar-related injury to marine mammals; (2) the Council for Environmental Quality (CEQ) invoked the emergency provision of its regulations allowing for alternative EIS compliance; and (3) the President determined that the use of this sonar was

"essential to national security." Amici are concerned that unless the lower court rulings are reversed, those decisions, and others like them, will have a significant detrimental impact on our nation's military readiness and national security as well as violate the separation of powers by intruding upon the President's power as Commander in Chief.

SUMMARY OF ARGUMENT

The paramount obligation of the national government is the defense of the homeland. Concomitant with that obligation is constant and ever improving military readiness, particularly in an era of sophisticated weaponry, global security threats, and foes committed to unconventional tactics. In a time of active conflict on multiple fronts, the urgency and importance of military exercises cannot be overstated and must not be underestimated or trivialized as mere "training." From the Nation's earliest days through our own time, our lawmakers and laws have recognized the paramount importance of military training to military readiness and, therefore, to the national defense. Pet. Br. at 3 (citing, *inter alia*, *The Federalist* No. 24 at 160-62 (Alexander Hamilton)).

Even amidst the urgency of its core task of maintaining the national security, the United States Navy thoroughly assessed, in a 293-page environmental assessment (EA), the potential for damage to marine mammals posed by the use of mid-frequency active (MFA) sonar in the Southern California Operating Area (SOCAL) exercises at issue in this litigation. The conclusions of that

careful study, consistent with the last 40 years of SOCAL exercises of this type, have revealed no evidence of sonar-related injury to any marine mammal.[2] Pet. Br. at 3. The Navy thus determined that, because its SOCAL exercises had no significant impact on the environment, an EIS would not be required. Despite this finding, the Navy engaged in substantial mitigation efforts to minimize any impact MFA sonar might have on the marine environment, including on marine mammals. App. 220a-230a.

Respondents brought suit alleging violations of the National Environmental Protection Act (NEPA), the Coastal Zone Management Act (CZMA), and the Endangered Species Act (ESA), and sought an injunction prohibiting the use of MFA sonar in the Navy's SOCAL military exercises. After an earlier stay and a remand by the Ninth Circuit, the district court, on January 10, 2008, issued the modified preliminary injunction at issue here, which severely restricts the use of sonar in the course of the Navy's SOCAL exercises. The Chief of Naval Operations

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[2] The Navy has, in fact, a special appreciation for dolphins. The Navy's Marine Mammal Program based in San Diego, California, relies on dolphins to detect and mark deep-water sea mines to help protect lives and naval assets. Because of their diving capabilities and sophisticated biosonar system, the Navy-trained dolphins assist Navy personnel in this important mission. For example, in 2003, Navy dolphins detected and helped disarm over 100 anti-ship mines planted by Saddam Hussein's forces in Umm Qar's port. Gasperini, *Uncle Sam's Dolphins,* SMITHSONIAN (Sept. 2003). The Navy's treatment of these dolphins exceeds federal laws governing their acquisition, care and treatment. *See* http://www.spawar.navy.mil/sandiego/technology/mammals/animals.html.

(CNO) determined that these restrictions would put training, deployment, and national security at grave risk. Pet. Br. at 13.

Petitioners have demonstrated persuasively that the Ninth Circuit erred by deferring not, as this Court's well-settled precedents require, to the CEQ's interpretation of the term "emergency circumstances" in its own regulation, but to the district court's interpretation of this purely legal question. Pet. Br. at 27-33. Petitioners have also demonstrated that, in any event, the district court did not properly balance the equities in light of clear congressional determinations in both the Marine Mammal Protection Act (MMPA) and the CZMA that national security concerns take precedence over the environmental concerns at issue here.

But amici submit that the district court's preliminary injunction is defective for a more fundamental reason: it impermissibly intrudes upon the Executive's Commander-in-Chief power. This Court has repeatedly made clear that the Congress may not intrude upon the President's command and deployment of the armed forces. Notably, this authority extends to training exercises, even in peace time. As our Nation currently is in a state of armed hostilities throughout the world, the Composite Training Unit Exercises (COMPTUEXs) and Joint Task Force Exercises (JTFEXs) at issue here fall comfortably within the ambit of the President's core Commander-in-Chief capacity to command the military so as to assure its readiness in the national defense.

Thus, to the extent that NEPA's procedural EIS requirement is read to intrude upon this authority, it is unconstitutional as applied. Indeed, viewing this case through the lens of Justice Jackson's well-known separation-of-powers analysis in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), it is clear that the Executive's power in this instance is at its zenith. A variety of relevant Congressional enactments buttress this view—including the Authorization to Use Military Force enacted in the immediate aftermath of the September 11, 2001 attacks and the Authorization for Use of Military Force Against Iraq Resolution of 2002—both placing the Nation on a war footing; Section 1456(c) of Title 16, which permits the President to exempt federal actions from CZMA compliance if he determines that such exemption is in the "paramount interest of the United States," 16 U.S.C. § 1456(c)(1)(B); and Section 1371(f) of Title 16, which authorizes the Secretary of Defense to exempt from MMPA compliance military activity that is "necessary for the national defense." 16 U.S.C. § 1371(f)(1) (Supp. V 2005). In short, the Ninth Circuit's decision upholds the grant of the drastic remedy of an affirmative preliminary injunction that intrudes upon the core functions of the Commander in Chief.

Importantly, this is not simply an academic exercise. This is a volatile period in world affairs. Our own armed forces are presently involved in two theaters of battle in both Iraq and Afghanistan; the Russian Federation has recently engaged in hostilities with Georgia, our democratic ally in the war on terrorism; and tensions within and among

nuclear powers such as Pakistan and India threaten regional stability in areas vital to our own national interest. At such a time, judicial second-guessing of military priorities (about which the Congress and President agree) represents more than an erroneous legal conclusion or an imprudent preliminary injunction; it constitutes a threat to national security itself. The judgment of the court of appeals should be reversed, and the case remanded with instructions to vacate the preliminary injunction.

ARGUMENT

I. THE USE OF MFA SONAR AS PART OF THE CHALLENGED MILITARY EXERCISES IS INTEGRAL TO NAVY COMBAT READINESS.

Throughout our Nation's history, the Navy has played a vital role in major world events occurring during both times of war and peace. As a maritime Nation, the United States relies on the "Navy's ability to operate freely at sea to guarantee access, sustain trade and commerce, and partner with other nations to ensure not only regional security but defense of our own homeland." App. 314a (statement of Rear Admiral Ted N. Branch). For this reason, it has been recognized that this ability "to operate freely at sea is one of the most important enablers of national power: diplomatic, information, military and economic." App. 315a-316a (statement of Rear Admiral Ted N. Branch). The only way to ensure our Nation's ability to so operate at sea is through naval training. Indeed, it is a Navy maxim that "We train as we will fight so that we will fight as we have

trained." J.A. 576 (statement of Captain Martin N. May).

Antisubmarine warfare has long been a key component of naval warfare. Because submarine detection and antisubmarine warfare require the coordinated efforts of vast numbers of Navy personnel, repeated training in battle conditions is essential to naval readiness. And, in our modern era, advanced technologies enable our enemies to deploy submarines that are capable of carrying long-range weapons while operating in virtual silence, nearly wholly undetectable except through the use of MFA sonar. Thus, antisubmarine warfare training utilizing MFA sonar is an absolute necessity in preparing our Navy to detect and combat enemy submarines.

It goes without saying that, in a time of armed conflict, naval training and readiness are indispensable. Indeed, with American troops currently deployed throughout the world and, specifically, engaged in war in Afghanistan and Iraq, the Navy's role in our national security has never been more important than at the present. Maintaining an effective and proficient Navy, therefore, is of the utmost importance to the United States' national defense and homeland security. It is for this reason that the President determined that "the COMPTUEX and JTFEX, including the use of mid-frequency active sonar in these exercises, are in the paramount interest of the United States." App. 232a.

A. A Well-Trained Navy Has Always Been A Cornerstone Of Our National Defense.

Naval training has undoubtedly been at the center of the U.S. Navy's prior wartime and peacetime successes. Only a well-trained navy could have successfully fought in both the Atlantic and Pacific oceans simultaneously, as the U.S. Navy demonstrated in World War II. During World War II, the U.S. Navy's antisubmarine training was largely responsible for defeating the German submarines that were dangerously close to securing victory in the Battle of the Atlantic. *See* THEODORE ROSCOE & RICHARD G. VOGE, UNITED STATES SUBMARINE OPERATIONS IN WORLD WAR II xviii (Naval Institute Press 1949). It was also the joint training exercises of Operation Tiger that prepared the U.S. Navy and Army for the Normandy Invasion. *See* Operational Archives, Naval Historical Center, Operation Tiger, *available at* http://www.history.navy.mil/faqs/faq20-1.htm (last visited July 23, 2008). Without this preparation, one of the most important battles in world history, D-Day, may have resulted in devastating failure for the United States and its allies.

The Cuban Missile Crisis presented another major world event in which the Navy's readiness was of critical importance to our national security. In 1962, naval forces under U.S. Atlantic Command maintained a month-long naval "quarantine" of the island of Cuba in order to prevent the Soviet Union's deployment of ballistic missiles there. Cuban Missile Crisis, 1962, *available at* http://www.history.navy.mil/faqs/faq90-1.htm (last visited July 23, 2008). The

immediate readiness of the U.S. Navy in these circumstances defused a situation that came as close as the United States and Soviet Union ever came to global nuclear war. *Id.* At a minimum, the Navy blockade was a demonstration of the United States' strength. Naturally, the beneficial effects of naval training did not end with World War II or even the Cold War. Naval training exercises have continued to adequately prepare the Navy for effective and safe military campaigns and have continued to symbolize a strong Nation at the ready to protect its interests at home and abroad.

That a well-trained Navy indicates and symbolizes American strength is not a creation of fantasy. It is a theme well-recognized by our Nation's prior and current enemies. Indeed, the importance of the U.S. Navy was not overlooked by the Japanese in their bombing of Pearl Harbor, nor was the symbolism of a U.S. Navy destroyer lost in al-Qaeda's suicide bombing attack against the *USS Cole*. That the Navy has been a target of strategic and symbolic attacks from our Nation's enemies further demonstrates the need for proper training to ensure the safety and success of the Navy in its vital role of defending the homeland.

Undoubtedly, thorough training is a requisite to an effective Navy. On-the-job training in combat, it follows, "is the worst possible way of training personnel" and can place the success of military missions "at significant risk." App. 278a (statement of Rear Admiral John M. Bird). Consequently, naval training should be performed prior to actual combat to ensure the preparedness and eventual success in

our Navy's military missions. This seemingly obvious statement is, quite possibly, even more relevant to the Navy's mission of defending against enemy submarines.

B. Training For Anti-Submarine Warfare Is A Critical Component Of Naval Readiness.

The Navy is the only service—military or otherwise—that can address the threat from submarines, and any curtailment of its ability to train for this mission would decrease the Navy's ability to handle that threat. App. 315a (statement of Rear Admiral Ted N. Branch). For years, the Navy has employed SONAR to "identify and track submarines, determine water depth, locate mines, and provide for vessel safety." App. 266a (statement of Rear Admiral John M. Bird). The Navy started using SONAR after World War I, and every naval vessel engaged in antisubmarine activity was equipped with sonar systems by the start of World War II. App. 268a. Indeed, as indicated above, antisubmarine warfare was integral to the Navy's successful campaigns against German submarines in World War II.

Antisubmarine warfare is a science in which considerable effort goes into making and maintaining contact with the submarine. App. 354a-356a; *see also* App. 278a ("ASW occurs over many hours or days. Unlike an aerial dogfight, over in minutes and even seconds, ASW is a cat and mouse game that requires large teams of personnel working in shifts around the clock to work through an ASW scenario.")

This fact is even more applicable when quiet, diesel-electric submarines—submarines increasingly utilized by hostile nations—are involved; modern diesel-electric submarines are capable of defeating the best available passive sonar technology by "suppress[ing] emitted noise levels." App. 274a. In addition, the far-reaching range of weapons found on modern submarines make it possible for those submarines to avoid placing themselves within range of passive sonar. App. 274a. As a result, active sonar is necessary to detect the presence of diesel-electric submarines. App. 269a-270a. The Nation's top naval officers agree that the Navy must be able to freely utilize MFAS during antisubmarine warfare training in order to properly defend against the threats posed by diesel-electric submarines. See, e.g., App. 311a-325a, 338a-347a, 350a-357a..

If the Navy were prevented from training with MFAS or other active sonar, and were limited to using passive sonar in certain situations, the survivability of the Navy's antisubmarine missions would ultimately be placed at "great risk." App. 269a (statement of Rear Admiral John M. Bird). "[R]ealistic and repetitive [antisubmarine warfare] training with active SONAR is necessary for our forces to be confident and knowledgeable in the Navy's plans, tactics, and procedures to perform and survive in situations leading up to hostilities as well as combat." App. 277a. Therefore, blanket mitigation measures on MFAS training "would dramatically reduce the realism of [antisubmarine warfare] training" and would be fraught with "severe national security consequences." App. 273a (statement of Rear Admiral John M. Bird).

C. The Navy's Use Of MFA Sonar In The Challenged Military Exercises Is Indispensable To Our National Security In This Time Of Armed Hostilities Across the Globe.

It is clear that the COMPTUEX and JTFEX training exercises are the only way the Navy's Pacific Fleet can gain the realistic training that is necessary, especially during a time of war. These exercises represent the singular opportunity for 6,000-plus Sailors and Marines to train together in a realistic environment prior to deployment and to gain proficiency in MFAS. App. 270a-271a; App. 343a. Anytime a strike group is prevented from becoming fully proficient in MFAS, and therefore cannot be certified as combat ready, national security is negatively affected. App. 271a (statement of Rear Admiral John M. Bird). And, considering the heightened sensibilities in a time of war, any interference creates a severe impact on training and certification of readiness to perform realistic antisubmarine warfare. Because the stakes of antisubmarine warfare are so high, contact with an enemy submarine is not surrendered unless there is an order to do so. App. 355a. Even a few minutes of MFAS shutdown "would be potentially fatal in combat." App. 355a-356a (statement of Vice Admiral Samuel J. Locklear, III). As a result, a single lost contact with the submarine "cripples certification for the units involved" in the exercises. App. 356a; *see also id.* ("It may take days to get to the pivotal attack in antisubmarine warfare, but only minutes to confound the results upon which certification is based."). For these reasons, the Chief of Naval

Operations, who is specifically responsible for organizing, training, equipping, preparing and maintaining the readiness of Navy forces, described COMPTUEX and JTFEX as "indispensable" training exercises. App. 342a (statement of Admiral Gary Roughead).

Unsuccessful naval training in the area of antisubmarine warfare can have far-reaching consequences. As Rear Admiral Ted N. Branch recognized:

> Any restriction or disadvantage imposed on our [antisubmarine warfare] capability that impedes the U.S. Navy's ability to retain control of the sea or project naval forces may . . . result in nothing less than a breakdown of the global system, a significant change in our international standing, and an alteration in our established way of life.

App. 324a. The Navy's Carrier Strike Groups and Expeditionary Strike Groups, the survivability of which is dependent on active sonar, are instruments of national policy "through participation in combat operations . . . , through bilateral exercise participation with partner nations around the world, engagement with officials and civilians of other nations through port visits, and crisis response or humanitarian relief assistance." App. 321a-322a. Furthermore, it is only through maintaining effective antisubmarine warfare capability that the United

States can convince its potential adversaries that they cannot prevail. App. 315a. Potential adversaries in the Asia-Pacific region and the Middle East operate submarines in their navies, App. 270a, and the Arabian Gulf, Strait of Malacca, Sea of Japan, and the Yellow Sea, consistent areas of deployment for Navy strike groups, all contain water less than 200 meters deep. App. 331a. These shallow waters are optimal operating areas for the diesel-electric submarines that "pose the primary threat to the U.S. Navy's ability to perform a number of critically necessary missions essential to both peacetime and wartime operations." App. 271a (statement of Rear Admiral John M. Bird). As a result, "[a]nything short of full [antisubmarine warfare] competency" by the U.S. Navy threatens our national security, by "convey[ing] the message that we may be vulnerable, and may embolden our adversaries." App. 315a (statement of Rear Admiral Ted N. Branch).

Antisubmarine warfare training in Southern California is an absolute necessity for the competency of Navy's Pacific Fleet, as antisubmarine warfare is the Fleet's number one war-fighting priority. App. 270a (statement of Rear Admiral John M. Bird). If the Pacific Fleet were prevented from properly training in Southern California, a deterioration of our Nation's naval and military readiness would surely result. Forty percent of the Navy's active aircraft carriers are homeported on the West coast, *see* App. 317a-318a, and there is no suitable alternative training location available to ships based on that coast. App. 322a. "Sending extra ships to the east coast would place an unacceptable burden on the

port infrastructure that would be required to support them." App. 322a (statement of Rear Admiral Ted N. Branch). If the Navy were forced to make the impractical decision to train West coast ships on the East coast, "[m]aintenance facilities would be over capacity, slowing repairs and dramatically increasing costs." App. 323a. As a result, it is not feasible for West-coast based ships to use the training facilities and ranges on the East coast to achieve MFAS certification. App. 322a. Over 40 years of naval training in Southern California testify to this fact. App. 272a.

In short, the use of MFA SONAR is the only effective means to detect and track enemy submarines. Quick detection of enemy submarines provides intelligence to our Naval commanders and enables successful antisubmarine warfare. Because there is no substitute for the Navy's complex and coordinated strike force training and because there is no suitable location other than Southern California to undertake such training, the Navy's use of MFA SONAR in the challenged COMPTUEX and JTFEX training exercises in Southern California, as recognized by the President, is critical to Navy combat readiness and "essential to national security" in this time of war. App. 232a.

II. THE NINTH CIRCUIT'S RULING VIOLATES THE SEPARATION OF POWERS BY ENCROACHING UPON THE PRESIDENT'S COMMANDER-IN-CHIEF POWER.

Article II, Section 2, of the Constitution provides that the President "shall be Commander in

Chief of the Army and Navy of the United States." The obligation to keep the Nation safe from foreign attack is the very highest duty of the government. As the Constitution itself promises, the "United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion." U.S. Const. art. IV, § 4. The Constitution's allocation of responsibilities, therefore, must be read with the importance of this guarantee in mind. In particular, the designation of the President as Commander in Chief with the primary responsibility for commanding the Nation's response to threats to the national security should not be seen as either accidental or malleable. *See The Federalist* No. 70 (Alexander Hamilton) ("Decision, activity, secrecy, and dispatch will generally characterise the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.").

The Executive's Commander-in-Chief power, at its most basic level, undoubtedly encompasses the authority to direct the movement of the armed forces: "As commander in chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, *and to employ them in the manner he may deem most effectual* to harass and conquer and subdue the enemy." *Fleming & Marshall v. Page*, 50 U.S. (9 How.) 603, 615 (1850) (emphasis added); *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 587 (1952) (acknowledging the "broad powers in military commanders engaged in day-to-day fighting in a theater of war"); *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, (1874) ("[The] President

alone . . . is constitutionally invested with the entire charge of hostile operations."); *The Federalist* No. 74 (Alexander Hamilton) ("Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand."). Indeed, the Commander-in-Chief Clause is a "specific textual commitment of decision-making responsibility in the area of military operations in a theatre of war to the President, in his capacity as Commander in Chief." *DeCosta v. Laird*, 471 F.2d 1146, 1154 (2d Cir. 1973); *see also Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948) (explaining that the Executive "possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs"). "The language of the Constitution makes the President Commander-in-Chief of the Armed Forces and puts no limitation on his power in this capacity. Indeed, the paucity of the words exemplifies the totality of his authority in that respect." *United States v. Smith*, 32 C.M.R. 105, 117 (C.M.A. 1962).[3]

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[3] That certain Executive powers, such as the power to direct the movements and preparation of the armed forces, are exclusive and wholly beyond the reach of Congressional encroachment is well-settled. The pardon power, for example, "flows from the Constitution alone, not from any legislative enactments, and . . . it cannot be modified, abridged, or diminished by the Congress." *Schick v. Reed*, 419 U.S. 256, 266 (1974); *see also United States v. Klein*, 80 U.S. 128, 147-48 (1871) (Because "the executive alone is intrusted [with] the power of pardon; and it is granted without limit," it is "clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law."). To be sure,

This Executive power over the deployment of troops and the methods for doing so is exclusive. As explained by William Howard Taft, "[w]hen we come to the power of the President as Commander-in-Chief it seems perfectly clear that Congress could not order battles be fought on a certain plan, and could not direct parts of the army to be moved from part of the country to another." *See* William Howard Taft, *The Boundaries Between the Executive, the Legislature, and the Judicial Branches of the Government*, 25 Yale L.J. 599, 610 (1916); *see also* Westel Woodward Willoughby, *The Constitutional Law of the United States* 1567 (2d ed. 1929) ("[U]nder his powers as Commander-in-Chief of the Army and Navy, and his general control of the foreign relations of the United States" the President has the "discretionary right constitutionally vested in him, and therefore, not subject to congressional control."). This Court has recognized the exclusivity of this Executive power, explaining that Congress's power "necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. *That power and duty belong*

Congress is entrusted with important powers under Article I, Section 8: "to declare war;" "to raise and support armies;" "to provide and maintain a Navy;" and to make rules for the "Government and Regulation of land and naval Forces," such as by promulgating the Uniform Code of Military Justice. But nothing in those limited grants of authority dilutes the President's sole powers as Commander in Chief—under our Constitution, there remains only one Commander in Chief, not 535. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644 (1952) ("Congress cannot deprive the President of command of the army and navy . . . .") (Jackson, J., concurring).

to the President as commander-in-chief." *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 130 (1866) (emphasis added).

The President's power exclusively to control the movements of military forces, and to direct them as he deems necessary and appropriate to the Nation's defense, flows from the Executive's obligation to defend the homeland from attack. *See* William Howard Taft, *The Presidency: Its Duties, Its Powers, Its Opportunities and Its Limitations* 87 (1916) (explaining that the President's obligation to defend the Nation "grows out, not of any specific act of Congress, but of that obligation, inferable from the Constitution, of the government to protect the rights of an American citizen against foreign invasion"); *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority."); *Campbell v. Clinton*, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring) ("[T]he President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected.") (citations omitted).

Although the exclusive power to direct the deployment of the armed forces flows from the Executive's obligation to defend the Nation against foreign aggressors, this power logically extends to training exercises even in peace time: "Through, or under, his orders, therefore, all military operations in

time of peace, as well as of war, are conducted. He has within his control the disposition of troops, the direction of vessels of war and the planning and execution of campaigns." Westel Woodbury Willoughby, *The Constitutional Law of the United States* 1566 (2d ed. 1929). Indeed, in early 1941, *before* the United States entered World War II, Attorney General Robert H. Jackson concluded that the President's power to order the instruction of British flying students, absent congressional authorization, reflected the President's "supreme command over the land and naval forces" permitted him to "order them to perform such military duties" as he deemed necessary. 40 Op. Att'y Gen. 58, 61 (1941).

In addition, Attorney General Jackson announced that the President's authority "undoubtedly includes the power to dispose of troops *and equipment* in such manner and on such duties as best to promote the safety of the country." *Id.* (citing Corwin, *The President: Office and Powers*, 194-97 (1940); Willoughby, *The Constitutional Law of the United States* (2d ed., 1929)) (emphasis added). General Jackson also opined that "of course the President may order the carrying out of maneuvers or training, or the preparation of fortifications, or the instruction of others in matters of defense, to accomplish the same objective of safety of the country." *Id.* at 62. Notably, he concluded that this power "exist[s] in time of peace as well as in time of war." *Id.* at 61.

In light of the President's obligation to act independently of Congress in order to repel attacks,

it is clear why, both in times of war and peace, the power of the Commander in Chief to direct the movements and exercises of the military forces, including, at a minimum, authorizing the use of MFA sonar, cannot be fettered. For just the same reason that there is a single, supreme power of command to direct troops engaged in the heat of battle, the Framers have entrusted the responsibility and authority to repel and to prepare to repel any foreign attack to the Commander in Chief. As Senator William Fulbright explained, "[a]s Commander-in-Chief of the armed forces, the President has full responsibility, which cannot be shared, for military decisions in a world in which the difference between safety and cataclysm can be a matter of hours or even minutes." J. William Fulbright, *American Foreign Policy in the 20th Century Under an 18th Century Constitution*, 47 Cornell L.Q. 1, 3 (1961). As will be shown below, the exercises in the SOCAL program embody just the sort of strategic judgments for preparedness that are at the core of the Commander-in-Chief power.

Senator Fulbright's wise admonition that the exclusivity of the Executive power over military decisions upon which may hang "the difference between safety and cataclysm" is particularly apt where, as here, a court must weigh the public interest in deciding whether to grant a preliminary injunction of the sort granted here. The exercise of the power of equity here amounts to an extraordinary second-guessing of a determination of the Commander in Chief that the paramount interests of the Nation require certain military training. This is all the more remarkable given that Congress has

clearly placed the President at the zenith of his authority as Commander in Chief with respect to the exercises at issue here.

Justice Jackson's concurrence in *Youngstown* provides the starting point for analyzing the legitimacy of executive claims of authority. There, Justice Jackson famously delineated three zones of analysis, rooted in the "disjunction or conjunction" of the President's will with that of the Congress. 343 U.S. at 635 (Jackson, J. concurring). In Zone I, the President acts "pursuant to an express or implied authorization of Congress," and the executive authority "is at its maximum." *Id.* Justice Jackson described Zone II as a "zone of twilight," for there the President acts without either the express permission or the express opposition of Congress, and the executive is limited to its own "independent" powers. *Id.* at 637. Finally, in Zone III, the President acts contrary to the expressed will of the Congress, and there his power is naturally "at its lowest ebb." *Id.* *Youngstown* itself was a Zone III case, and the court determined that the President did not possess independent authority, over and against the will of Congress, when it came to the seizure of steel mills. *See id.* at 640-43.

Here, unlike the facts in *Youngstown*, Congress authorized hostilities against foreign foes,[4]

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[4] On September 14, 2001, Congress passed a joint resolution authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks" that had taken place on September 11, 2001. 50 U.S.C. § 1541 ("AUMF"). On October 16, 2002,

provided an express statutory exemption in the CZMA for activities deemed by the President to be "in the paramount interest of the United States," and further explicitly expressed its will in the MMPA that the national defense ought to take priority over the protection of marine mammals.

Seen against the background of *Youngstown*, this becomes a much simpler case. Rather than acting in a clash with Congress, the Executive here operates consistent with two separate Congressional authorizations to use military force (the recognition by the AUMF that the hostile attacks of September 11, 2001, placed the Nation on a war footing) and in accord with his statutory power to exempt activities "in the paramount interest of the United States" from the CZMA and with the MMPA's provision for exempting activities "necessary for national defense." And rather than attempting, as in the seizure of the steel mills in *Youngstown*, to usurp an explicit Article I power of the Congress, the President here is exercising a classic power of the Commander in Chief—directing the wartime movements and preparations of the naval forces.

Congress passed a similar resolution authorizing the President "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to—(1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq." Public Law 107–243, § 3(a). As Petitioners have explained, COMPTUEX and JFTEX training is integral to the preparation of Navy men and women who are "deploy[ed] into Iraq and Afghanistan from Navy strike groups." Pet. Br. at 46.

Thus, this case is best and most naturally seen through the lens of *Youngstown*'s Zone I, where the President's authority is at its maximum: the power exercised is a core Commander-in-Chief power. The Congress has placed that power at its zenith by authorizing the President to use military force in connection with the War on Terror and the Iraq War, thereby equipping the Executive with all of the "fundamental incident[s] of waging war," *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004), to be used wherever and whenever necessary and appropriate. The Congress has further codified, in two statutes related to the substantive gravamen of Respondents' complaint (the express exemptions in the CZMA and the MMPA, *see supra*), the very exercise of judgment already committed to the President by the Constitution.

The district court and the Ninth Circuit's decisions suggest that Congress had intended NEPA as a restriction on the President's Commander-in-Chief power even in time of war. If NEPA—a procedural statute imposing no substantive obligations—were to be read that way, the statute is unconstitutional as applied. For while Congress surely has the authority generally to pass laws requiring the executive agencies to have regard for the environmental impact of their plans and policies, the facial validity of NEPA and CZMA (which amici do not challenge) does not translate into the power to interfere with the authority of the Commander in Chief to direct the training and deployment of military forces, particularly in time of war.

As Justice Kennedy has explained, "where the Constitution by explicit text commits the power at issue to the exclusive control of the President, we have refused to tolerate any intrusion by [another] Branch." *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 485 (1989) (Kennedy, J., concurring) (emphasis in original). Because the President's control over military exercises and military campaigns is exclusive, NEPA as applied by the district court and the Ninth Circuit would necessarily violate Article II. *See id.* at 486 ("Where a power has been committed to a particular Branch of the Government in the text of the Constitution, the balance already has been struck by the Constitution itself. It is improper for this Court to arrogate to itself the power to adjust a balance settled by the explicit terms of the Constitution.").

As noted above, just as the President has no authority to appropriate monies or to raise armies, the Congress has no power to "deprive the President of the command of the army and navy." *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring); *see also Union Pac. R.R. Co. v. United States*, 99 U.S. 700, 718 (1878) ("One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."). For the Congress so to restrict the President, even in time of peace, from deploying the armed forces as he sees fit to acquit his solemn responsibility to defend the homeland would be an unacceptable encroachment. For the Congress to do so, as the Ninth Circuit would have it here, in time of war is unthinkable.

This case, however, does not require this Court to reach these constitutional questions, for here the intent of Congress to defer to the Executive in such circumstances is well established by NEPA, *see* 42 U.S.C. § 4331(b) (establishing that NEPA's requirements be "consistent with other essential considerations of national policy"), and the CZMA's provision for the executive to exempt activities "in the paramount interest of the United States" from its requirements, 16 U.S.C. § 1456(c)(1)(B). Amici therefore join with the Solicitor General in urging this Court to reverse the Ninth Circuit on the grounds that it failed to properly defer to the CEQ's reasonable interpretation of NEPA and its own regulations, namely "that 'emergency circumstances' warranted alternative NEPA arrangements under [40 C.F.R.] Section 1506.11." Pet. Br. at 21.

"When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (footnote collecting citations omitted); *see also Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780 (1981); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500-501 (1979); *Machinists v. Street*, 367 U.S. 740, 749-750 (1961). This Court's "reluctance to decide constitutional issues is especially great where, as here, they concern the relative powers of coordinate branches of

government." *Public Citizen*, 491 U.S. at 466; *see also Am. Foreign Service Ass'n. v. Garfinkel*, 490 U.S. 153, 161 (1989) (per curiam).

The decisions below utterly failed to consider the constitutional implications of their reading of NEPA and the CEQ's regulation concerning alternative arrangements in the light of emergencies. Indeed, rather than cautiously interpreting the relevant laws so as to avoid the separation of powers problem naturally inherent in preventing the Executive from undertaking his core Commander-in-Chief responsibilities, the courts below compounded the separation of powers problems. For not only did they fail to properly apply ordinary administrative law principles of deference and the doctrine of constitutional avoidance, but they substituted their own judgment about military matters for those of the executive.

For example, the Ninth Circuit noted that the district court "conclud[ed] that the mitigation measures it imposed would *not* render the Navy unable to retain and certify its strike groups." App. 55a (emphasis in original). This conclusion flies in the face of the Executive's determination that such injunctive relief "undermine the Navy's ability to conduct realistic training exercises that are necessary to ensure . . . combat effectiveness." App. 232a. This Court has on many occasions emphasized its reluctance to interfere with just these sorts of judgments. Indeed, in *Gilligan v. Morgan*, 413 U.S. 1 (1973), this Court explained that "[t]rained professionals . . . necessarily must make comparative judgments on the merits as to evolving methods of

training, equipping, and controlling military forces with respect to their duties under the Constitution." *Id.* at 8. The Court emphasized that "[i]t would be inappropriate for a district judge to undertake this responsibility." *Id.*; *see also Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953); *Burns v. Wilson*, 346 U.S. 137, 142, 144 (1953). Yet, the district court judge essentially usurped this responsibility from our military leaders.

As the court of appeals recounted, the district court judge, in an ostensible attempt to gauge for herself the propriety of the Navy's military exercises utilizing MFA sonar, boarded the destroyer *USS Milius* at the naval base in San Diego, California on January 3, 2008. App. 6a. The district court, having had one day of experience with observing Navy operations on the destroyer, used this venture to supplant the veritable and longstanding experience and expertise of both the Navy and the Executive with its own assessment, concluding that the injunction levied against the Navy should survive. This micromanagement of our military is the height of judicial overreach.[5] And it is fundamentally

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[5] Unfortunately, the courts below in this case have not been the only ones that have audaciously exercised judicial power in halting important military training exercises committed to the Commander in Chief. In *Ctr. for Biological Diversity v. Pirie*, 201 F. Supp. 2d 113 (D.D.C. 2002), *dismissed as moot, sub nom., Ctr. for Biological Diversity v. England*, No. 02-5160 & 02-5180, 2003 WL 179848 (D.C. Cir. Jan. 23, 2003), the district issued an affirmative preliminary injunction that enjoined the Navy and Marines from conducting their planned annual live fire training exercises by Navy aircraft on a remote island in the Pacific Ocean leased by the Navy for those purposes. Those exercises were deemed vital to the combat

inconsistent with our system of separate and coordinate branches of government: "Unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (1988).

Here, the lower courts showed no reluctance to second-guess the Executive determination as to the necessity and nature of military exercises that have been determined by the President to be of "paramount interest" to the Nation. Rather, in an extraordinary zeal to oversee in detail the Executive's compliance with a purely procedural statute, the district and circuit courts have turned on their head ordinary principles of deference as well as deeper principles concerning the separation of powers among all three branches of government. Prudence, as well as the ordinary operation of well-settled principles of administrative law, dictate that this Court walk back from the precipice of constitutional conflict to which the erroneous decisions below have inexorably led. The background principles that this Court has

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readiness of our military in the entire Pacific region, particularly after the terrorist attack on the United States on September 11, 2001. The court ruled that some unendangered common migratory birds would be harmed in violation of the Migratory Bird Treaty Act, despite substantial and costly mitigation efforts by the Navy. In short, a federal judge issued a "cease fire" order to the commander of the *USS Kitty Hawk* battle group, the kind of order exclusively committed to the President and his military commanders; demanded a report back from the commander confirming that the judge's order was carried out; and denied a stay pending appeal.

announced and reaffirmed numerous times in cases upholding the core of the Commander-in-Chief power and the impropriety of both congressional and judicial interference therewith, strongly counsel a reading of NEPA and the CEQ's own regulation that permit the SOCAL exercises to proceed as planned. Fortunately, the text and history of the CEQ's regulation, in light of the procedural nature of NEPA, and against the background scheme of the substantive environmental laws at stake—the MMPA and the CZMA—may most reasonably be construed so as to avoid a constitutional conflict.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Respondents' brief, the Court should reverse the judgment of the court of appeals and remand the case with instructions to vacate the preliminary injunction.

Respectfully submitted,

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