Litigation Update

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May 10, 2002

FEDERAL JUDGE ISSUES "CEASE FIRE" ORDER HALTING NAVY TRAINING EXERCISES

(*Center for Biological Diversity v. Pirie*)

In a stunning decision that will have a crippling effect on our military's ability to combat terrorism in Afghanistan and elsewhere, a federal judge has issued an injunction against the United States Navy and Marines that bars them from conducting joint live-fire military training exercises on a tiny uninhabited island in the Western Pacific. The court ordered the halt to the training because a few unendangered migratory birds might be harmed during the exercises.

The Washington Legal Foundation (WLF) had filed a brief in the case with the United States District Court for the District of Columbia opposing the lawsuit that was filed by the Center for Biological Diversity (CBD) against the Navy to halt all live-fire training exercises on the small uninhabited island of Farallon de Medinilla (FDM). CBD claims that the bombing of the island results in the unintentional killing of a handful of unendangered migratory sea birds protected by the Migratory Bird Treaty Act (MBTA).

FDM is a 200-acre island in the Commonwealth of the Northern Mariana Islands near Guam. FDM, which has been leased to the United States since 1971, is the only suitable island in the Western Pacific for maintaining the combat readiness of "forward deployed" United States military units. Training entails joint operations involving the Navy and U.S. Marine Corps, including the use of troops, ships, and aircraft. The Navy has taken costly measures to mitigate any environmental harm caused by the training exercises. In addition, the nearby islanders overwhelmingly support the Navy's presence.

WLF argued in its brief that the CBD did not have standing to challenge the military exercises. CBD claims that one of its members is a birdwatcher who lives in Guam, and that if a bird is killed on FDM, that is one less bird that might have flown some 60 miles from FDM to Guam to be observed. WLF argued that this injury was too speculative to constitute standing, especially where there was no showing that the species as a whole is diminishing. In fact, more birds may fly to nearby islands rather than stay on FDM. Indeed, some of the migratory birds in question are very common on the islands. WLF also argued that if the MBTA were applied to the facts in this case, it would unconstitutionally encroach on the President's Commander-in-Chief power under Article II. WLF argued that a federal court cannot issue, in essence, a "cease fire" order to the military. That power resides solely in the hands of the President.

U.S. District Judge Emmet G. Sullivan, a Clinton appointee, brushed aside WLF's standing argument during an earlier court hearing, even though WLF's entire brief on that issue was expressly adopted by the Justice Department as dispositive after the Department initially failed to raise the point in its opening brief. The Court also ignored the serious constitutional arguments presented by WLF, namely, that an interpretation of the MBTA which would so interfere with the President's Commander-in-Chief powers would be unconstitutional under Article II. The judge instead quickly concluded that the Navy was violating the MBTA, and the only remaining issue was the remedy.

In his recent ruling on the remedy, Judge Sullivan stated that the Navy's position was one where it seeks to violate the MBTA "with impunity." But this mischaracterization clearly ignores all the costly and extensive mitigation measures that the Navy has undertaken to ensure that the unendangered birds and habitat are protected. For example, the Navy has produced voluminous environmental impact statements, and has placed certain areas of the island where the birds are found "off-limits" for any bombing. In addition, the birds are shooed off FDM before live ordnance is used.

The judge acknowledged that he had discretion to consider the competing interests between protecting unendangered birds and our national security, but came down on the side of the birds. The judge concluded that Congress did not intend to have any "military necessity" exceptions to the MBTA. But in reading the statute in such a rigid manner, the court ignored WLF's arguments that the MBTA was enacted during World War I in large measure to protect our nation's food supply needs for our troops, because many migratory birds eat insects that devour farm crops. In this case, however, none of the unendangered migratory sea birds eat crop-damaging insects. Thus, WLF argued that Congress, which enacted the MBTA to *help* our troops, would surely not have intended that the law could be used to *harm* our troops by empowering a court to issue a "cease fire" order whenever an activist claims that a bird is being threatened by military activity.

"It is astounding that a bird watcher can run into federal court and get a sympathetic federal judge to order a `cease-fire' against our military forces fighting terrorism, all because of a threat to a handful of birds that aren't even on the endangered species list," said Paul D. Kamenar, WLF's Senior Executive Counsel. "The Washington Legal Foundation will fight this ruling all the way to the Supreme Court," Kamenar added.

WLF is also monitoring several other lawsuits brought by activists environmental groups to stop military exercises and thus, threaten the national security of the United States. Congress is also considering legislation to allow national security concerns to be considered in applying environmental statutes to the military, but activists and their allies in Congress have vowed to oppose any such legislation.

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