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Landon Wade Magnusson

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# Forget the Whales: Expanding the Twilight and Diminishing the Nadir of *Youngstown*

## I. INTRODUCTION

Moments into then-Judge Samuel Alito's 2006 confirmation hearings, members of the Senate Judiciary Committee promptly directed their discussion toward the limits of presidential powers.<sup>1</sup> Very recently, it had been discovered that the executive administration had conducted warrantless electronic surveillance of American citizens, "intentionally bypassing the secret federal court that is supposed to oversee [such] sensitive investigations."<sup>2</sup> Referring to the surveillance program as an exposed abuse of executive power, Republican Senator Arlen Specter remarked that such a system put the vital "equilibrium established by our constitutional system" at stake.<sup>3</sup> Of course, this dialogue inevitably led to a discussion of Justice Jackson's famous concurrence in *Youngstown Sheet & Tube v. Sawyer*,<sup>4</sup> very often recognized as the system used to delimit presidential power. Taking a cue from his future chief justice, who more than three months earlier in his own confirmation hearings endorsed Jackson's concurrence by stating that it "set the framework for consideration of questions of executive power in times of war and with respect to foreign affairs,"<sup>5</sup> Justice Alito signaled his understanding of the matter by stating that "no person in this country, no matter how high or powerful, is above the law."<sup>6</sup>

However, only two years after making those statements, both Justices found themselves in a majority which would rewrite the boundaries set in *Youngstown* when the Executive was faced by one of its most unlikely opponents to date—the beaked whale. In *Winter v.*

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1. ADAM LIPTAK, *A QUICK FOCUS ON THE POWERS OF A PRESIDENT*, N.Y. Times, JAN. 10, 2006, AT A1.

2. Josh Meyer, *Leak in Domestic Spy Program Investigated*, L.A. TIMES, Dec. 31, 2005, at A1. This "secret" federal court is the FISA Court, established by the Foreign Intelligence Surveillance Act in 1978, which is comprised of eleven district court judges that "have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States." 50 U.S.C. § 1803(a)(1) (2006).

3. Liptak, *supra* note 1, at A1.

4. 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

5. Liptak, *supra* note 1, at 16 (quoting Chief Justice John G. Roberts during his confirmation hearing).

6. Liptak, *supra* note 1, at 16.

*Natural Resources Defense Council, Inc.*,<sup>7</sup> the Executive (in the incarnation of the United States Navy) is pitted against Congress's champion, a few hundred Pacific cetaceans protected from potentially harmful government practices through a Congressional statute.<sup>8</sup> At the end of the bout, the Executive was the branch left standing, and the results of this confrontation may have caused serious changes to the constitutional balance of power. First, the Supreme Court opened a new avenue of presidential power by allowing the Executive to seek the protection of independent emergency powers even if such an emergency is caused by the Executive's own neglect or disregard for the law. Second, the Supreme Court significantly lowered the threshold which triggers emergency executive powers by deferring to the Executive for determinations of necessity. Although the parameters of presidential power had been previously set in place, *Winter* effectively expanded those powers, both broadening *Youngstown's* zone of twilight, and diminishing its nadir.<sup>9</sup>

This Note will analyze and explore *Winter* and its implications by first setting the stage with a brief explanation of executive emergency and commander-in-chief powers, including their relation to the *Youngstown* taxonomy. Then, this Note will frame the issue by providing a factual background to *Winter* and the disputed statute. Finally, this Note will explain the holding of *Winter* and how it introduced an expansion of executive power.

## II. LIMITS TO PRESIDENTIAL POWER

Article II of the Constitution vests “*The executive Power*” in the President of the United States<sup>10</sup> and makes him, or her, the “Commander in Chief of the Army and Navy.”<sup>11</sup> This investiture grants powers that are both vast and fluid to a single branch of the government. The vastness of these powers confers a broad reach upon the Executive, allowing it to act in the best interests of the people in areas where the Constitution has

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7. 129 S. Ct. 365 (2008).

8. In this case, the Navy sought to use mid-frequency active (“MFA”) sonar during submarine-warfare training exercises. The use of this sonar arguably causes serious injuries to whales and other marine mammals, “including permanent hearing loss, decompression sickness, and major behavioral disruptions.” *Id.* at 371. The respondents filed their petition for an injunction with the hopes of providing protection for the beaked whales in that region by requiring the government to fulfill certain statutory requirements that they had overlooked. *Id.* at 371–73. These statutory requirements, including the mandatory filing of an Environmental Impact Statement, are detailed *infra* Part III.

9. See *infra* notes 19–25 and accompanying text (providing a description of what is meant by the “twilight” and “nadir” of executive powers).

10. U.S. CONST. art. II, § 1, cl. 1 (emphasis added).

11. *Id.* § 2, cl. 1.

barred its co-equal branches from operating. The fluidity of these powers makes them adaptable to situations as they arise, inherently endowing the Executive with the authority to create adequate and immediate remedies for emergency situations. Nevertheless, this authority to act swiftly and decisively does have boundaries. This section will sketch the blurry limits of those boundaries as they existed before *Winter* by briefly defining the inner limits of those powers as they are found in Justice Jackson's tripartite classification. This section will subsequently delve into the outer reaches of executive power by specifically examining the broad commander-in-chief powers, especially in dealing with emergencies, before moving on to consider the case at issue.

#### A. *Youngstown Limitations*

In 1951, a war had been raging on the Korean Peninsula for more than eighteen months<sup>12</sup> when “a dispute arose between the steel companies and their employees over [the] terms and conditions that should be included in new collective bargaining agreements.”<sup>13</sup> After multiple failed attempts to come to an agreement, the steelworkers threatened a nation-wide strike.<sup>14</sup>

President Truman recognized the Korean Crisis as an emergency and deemed that a “work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, [adding] to the continuing danger of our soldiers, sailors, and airmen engaged in combat in the field.”<sup>15</sup> Under these circumstances, and citing his powers as Commander-in-Chief as authorization to take drastic measures for the protection of the Union,<sup>16</sup> the President issued an executive order directing the Secretary of Commerce to take possession of most of the Nation's steel mills in order to keep them running.<sup>17</sup>

Although the majority opinion of the Court, penned by Justice Black, would clearly set a precedent in denying President Truman such an interpretation of executive powers, it is Justice Jackson's concurrence that lives on by effectively delineating a three-category system for measuring the constitutionality of executive action.<sup>18</sup> In the first category

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12. See BURTON IRA KAUFMAN, *THE KOREAN CONFLICT* 3 (1999).

13. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952).

14. *Id.* at 582–83.

15. Exec. Order No. 10,340, 3 C.F.R. 65–66 (1953).

16. *Id.*

17. *Id.*

18. *Youngstown*, 343 U.S. at 635–39 (Jackson, J., concurring). See, e.g., Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 62 (2002) (“Despite the numerous opinions issued in *Youngstown* upholding the importance of a system of checks and balances, Justice Jackson's concurrence may have been the most important, as

of Jackson's classification, the "zenith" of executive power, a President acts "pursuant to an express or implied authorization of Congress."<sup>19</sup> Accordingly, the Executive's powers are at their maximum because the inherent powers granted to the Executive by the Constitution are fully supplemented by the approbation of Congress and the strength of his own Article I powers.<sup>20</sup> In the second or intermediate category, known as the "zone of twilight," the President "and Congress may have concurrent authority," or, to put it more simply, "[the authority's] distribution is uncertain."<sup>21</sup> Here, Justice Jackson admits, is a place where the extent of either branch's constitutional authority truly depends on the circumstances and not on any "abstract theories of law."<sup>22</sup> The third and final category of Justice Jackson's taxonomy, which may be termed as the nadir of presidential authority, occurs when "the President takes measures incompatible with the expressed or implied will of Congress."<sup>23</sup> In this category, the President may only rely "upon his own constitutional powers minus any constitutional powers of Congress over the matter."<sup>24</sup>

After *Youngstown*, the Supreme Court found that Justice Jackson's dicta provided a functional scale for its own analysis<sup>25</sup> and officially followed it.<sup>26</sup> Since that decision, Jackson's approach has been employed in multiple opinions.<sup>27</sup> However, its interpretation has begun to evolve in order to fill analytical gaps.<sup>28</sup> In *Winter*, although it is certainly clear that *Youngstown* stood for the idea that the Executive may not independently

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it is perhaps the most thorough judicial evaluation of the use of presidential directives, and it is often relied upon." (citation omitted).

19. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

20. *Id.* at 635–36.

21. *Id.* at 637.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) (stating that the court has found Justice Jackson's analysis to be "analytically useful").

26. *Id.* at 661 ("Justice Jackson, . . . in his concurring opinion in *Youngstown*, . . . brings together as much combination of analysis and common sense as there is in this area . . ."); see also Thomas A. O'Donnell, Note, *Illumination or Elimination of the "Zone of Twilight"?: Congressional Acquiescence and Presidential Authority in Foreign Affairs*, 51 U. CIN. L. REV. 95, 99 (1982) (stating that the Supreme Court had ignored Justice Jackson's classifications until *Dames & Moore*); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 441 n.165 (2007) ("A majority of the Court adopted Justice Jackson's approach in *Dames & Moore v. Regan* . . .").

27. See, e.g., *INS v. Chadha*, 462 U.S. 919, 962 (1983) (Powell, J., concurring); *Morrison v. Olsen*, 487 U.S. 654, 694 (1988); *Misretta v. United States*, 488 U.S. 361, 381 (1989); *Clinton v. New York*, 524 U.S. 417, 473 (1998) (Breyer, J., dissenting).

28. Michael J. Turner, Comment, *Fade to Black: The Formalization of Jackson's Youngstown Taxonomy by Hamdan and Medillin*, 58 AM. U. L. REV. 665, 690 (2009) (arguing that post-*Hamdan* and *Medillin*, Justice Jackson's concurrence has come to resemble much more the majority opinion of Justice Black).

legislate and invade the jurisdiction of Congress,<sup>29</sup> the Supreme Court gave Justice Jackson's analysis an evolutionary shove as it attempted to remedy the fact that it "did not contemplate calling for an examination of implied presidential authority under the imminent danger doctrine."<sup>30</sup>

### B. *The Commander-in-Chief*

Following the chaotic years under the Articles of Confederation and during the drafting process, the Framers acknowledged the need for a strong executive who could act decisively in times of emergency.<sup>31</sup> History had already proven to them that a powerful executive in troubling times was an absolute requirement for effective government. As students of the Classics, they recognized that Rome was effectively able to fight off the "assaults of ambition, of faction, and of anarchy" by taking "refuge in the absolute power of a single man."<sup>32</sup> They understood that:

Among all the other Roman institutions, [the dictatorship] truly deserves to be considered and numbered among those which were the source of the greatness of such an empire, because without a similar system cities survive . . . only with difficulty. . . . When a republic lacks such a procedure, it must necessarily come to ruin by obeying its laws or break them in order to avoid its own ruin.<sup>33</sup>

Consequently, "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."<sup>34</sup> Although Congress maintains the power "to declare war,"<sup>35</sup> "to raise and support armies,"<sup>36</sup> "to provide for and maintain a Navy,"<sup>37</sup> and to make rules for the "Government and Regulation of land and naval Forces,"<sup>38</sup> the Executive, as President, maintains sole command of the military.<sup>39</sup>

29. *Youngstown*, 343 U.S. at 588–89.

30. Saby Ghoshray, *False Consciousness and Presidential War Power: Examining the Shadowy Bends of Constitutional Curvature*, 49 SANTA CLARA L. REV. 165, 184 (2009).

31. THE FEDERALIST NO. 74, at 407 (Alexander Hamilton) (E.H. Scott ed., 1898) ("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.").

32. THE FEDERALIST NO. 70, at 384 (Alexander Hamilton) (E.H. Scott ed., 1898).

33. NICCOLÒ MACHIAVELLI, DISCOURSES ON LIVY 95 (Julia Conaway Bondanella & Peter Bondanella trans., Oxford Univ. Press 2003) (1531).

34. *United States v. Smith*, 32 C.M.R. 105, 117 (C.M.A. 1962).

35. U.S. CONST. art. I, § 8, cl. 11.

36. *Id.* at cl. 12.

37. *Id.* at cl. 13.

38. *Id.* at cl. 14.

39. See *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring) ("Congress cannot deprive the President of the command of the army and navy.").

These broad powers supposedly grant the President supreme authority over all matters concerning the defense of the United States.<sup>40</sup> Logically, since the defense of a nation consists of more than retaliation in the face of an attack, this would infer that the President also maintains that same supremacy in times of peace in preparing the armed forces for the defense of the nation.<sup>41</sup> Indeed, before the Japanese attack on Pearl Harbor and the subsequent entrance of the United States into World War II, Attorney General Robert H. Jackson declared that 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.”<sup>42</sup> As maintained by Attorney General Jackson, the powers of the Commander-in-Chief “exist in time of peace as well as in time of war.”<sup>43</sup>

However, constitutional powers contestably grant the Executive broad authority to act unilaterally in times of emergency, sometimes even bending the boundaries set by the Constitution.<sup>44</sup> Arguably, many of the Framers expected there to be moments where the Executive would need to act out of necessity, for the preservation of the Union, and implicitly left this license to the President’s branch.<sup>45</sup>

This concept of unhindered executive action in times of emergency has been ratified through both presidential practice and Supreme Court jurisprudence. During one of America’s darkest hours, President Abraham Lincoln took some constitutionally questionable measures in order to preserve the Union.<sup>46</sup> Understanding the responsibility of his office and the weight of self-preservation, Lincoln explained that he made those extra-constitutional decisions because he “felt that measures, otherwise unconstitutional, might become lawful, by becoming

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40. See William Howard Taft, *The Boundaries Between the Executive, the Legislative and the Judicial Branches of the Government*, 25 YALE L.J. 599, 610 (1916) (“When we come to the power of the President as Commander-in-Chief it seems perfectly clear that Congress could not order battles to be fought on a certain plan, and could not direct parts of the army to be moved from one part of the country to another.”).

41. WESTEL WOODBURY WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* 1566 (2d ed. 1929) (“Through, or under, his orders, therefore, all military operations in times 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.”).

42. *Training of British Flying Students in the United States*, 40 Op. Att’y Gen. 58, 62 (1941).

43. *Id.* at 61.

44. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 426 (1934) (“While emergency does not create power, emergency may furnish the occasion for the exercise of power.”).

45. THE FEDERALIST NO. 41, at 225 (James Madison) (E.H. Scott ed., 1898) (“It is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions.”).

46. President Lincoln argued that under the “Take Care Clause,” he had the authority to suspend certain constitutional rights in order to preserve the Union. Michael P. Kelly, *Fixing the War Powers*, 141 MIL. L. REV. 83, 112 n.135 (1993).

indispensable to the preservation of the constitution, through the preservation of the nation.”<sup>47</sup> More recently, the administration of President George W. Bush also maintained its ability to play the emergency card, even in spite of Congressional restraints, “when[ever] there is a ‘belief that an attack might be imminent.’”<sup>48</sup>

The Supreme Court has been less explicit concerning this position; nevertheless, it has remained clearly supportive. Clearly recognizing the requirement of decisive action in times of immediate necessity, especially during an impending invasion, the Court has declared that the Executive “is not only authorized but bound to resist by force . . . without waiting for any special legislative authority.”<sup>49</sup> Even when employing Justice Jackson’s *Youngstown* dicta, then-Justice Rehnquist recognized that the tripartite taxonomy could be an oversimplification of matters, meaning that simply because the President acts contrary to congressional mandate does not necessarily mean that his actions are unconstitutional.<sup>50</sup> This is especially true in cases “involving responses to international crises the nature of which Congress can hardly have been expected to anticipate in any detail.”<sup>51</sup> Common sense simply cannot require a doctrinaire interpretation of the Constitution when such would transform it into a “suicide pact.”<sup>52</sup>

In spite of a common-sense need for flexibility to the Constitution, common sense also requires that that such flexibility not extend to the point of abuse. Therefore, it would appear that executive emergency powers fit into Justice Jackson’s nadir, being an inherent power that is available in spite of congressional disapproval, yet confined to the rarest of circumstances. Unfortunately, as demonstrated below, *Winter* broadens those circumstances, effectively diminishing the nadir and expanding the twilight of Jackson’s taxonomy.

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47. Letter from President Abraham Lincoln to Sen. Albert Hodges (Apr. 4, 1864), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, at 585 (1989). Interestingly, former Pakistani President Pervez Musharraf, whom many consider a modern executive who abused his powers in office, cited Abraham Lincoln’s “suspension of some rights during the American Civil War as justification for his own state of emergency” in 2007. David Rohde, *Pakistani Sets Emergency Rule, Defying the U.S.*, N.Y. TIMES, Nov. 4, 2007, at A14.

48. Alan Clarke, *Creating a Torture Culture*, 32 SUFFOLK TRANSNAT’L L. REV. 1, 3–4 (2008) (citing Greg Miller, *Waterboarding is Still an Option; The White House Calls the Technique Legal, Stumping Critics*, L.A. TIMES, Feb. 7, 2008, at A1) (explaining that the President reserves the right to use harsh interrogation techniques, contrary to any Congressional mandate, when he or she feels that the use of such techniques would be in the best interest of the nation).

49. *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862).

50. *See Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981).

51. *Id.*

52. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). *See also* RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 1–15 (2006).

## III. WHALES SHMALES, THERE'S A NATION TO DEFEND!

Understanding this new change in the constitutional balance of powers will best be done by first obtaining some background to *Winter* through examining the statute at issue and then moving on to describe the case and its holding. Therefore, this section will begin by explaining the history and purpose of the National Environmental Policy Act of 1969 through an examination of its language and legislative history. Then the section will dive directly into *Winter* to explain the Supreme Court's holding, as well as its reasoning, and the following section will address the implications of its holding.

A. *The National Environmental Policy Act of 1969*

In 1969, after taking note of “[t]he public’s growing concern . . . seen in the form of citizen indignation and protest over the actions or, in some cases, the lack of action of Federal agencies . . . [that] have contributed to environmental decay and degradation,”<sup>53</sup> Congress recognized that when it had established some federal policies, it had “no body of experience or precedent for . . . consideration of environmental factors . . . .”<sup>54</sup> Until that point, environmental policy had essentially been “established by default and inaction.”<sup>55</sup> Therefore, desiring to “restore public confidence in the Federal Government’s capacity to . . . maintain and enhance the quality of the environment,”<sup>56</sup> Congress passed the National Environmental Policy Act (NEPA). Henceforth, it would be “the continuing policy of the Federal Government . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony.”<sup>57</sup>

To accomplish this objective, the Act requires that, among other things, federal agencies prepare and file an Environmental Impact Statement (“EIS”) for any “major Federal action[] significantly affecting

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53. S. REP. NO. 91-296, at 8 (1969). The Senate Report specifically cites the Santa Barbara oil spill of 1969 as an example of government negligence. *Id.* The spill occurred as a result of human error as well as the fact that the drilling company had been “granted a waiver by the United States Geological Survey that allowed [it] to use a shorter casing on the [drilling] pipe than Federal Standards prescribed.” Keith C. Clarke & Jeffrey J. Hemphill, *The Santa Barbara Oil Spill: A Retrospective*, 64 YEARBOOK OF THE ASS’N OF PACIFIC COAST GEOGRAPHERS 157, 158 (2002), available at <http://www.geog.ucsb.edu/~kclarke/Papers/SBOilSpill1969.pdf>. The casing was supposed to reinforce the pipe in order to prevent blow-outs. *Id.* The oil spill led to significant community and government action. See S. REP. NO. 91-296 at 8.

54. S. REP. NO. 91-296 at 19.

55. *Id.* at 5.

56. *Id.* at 8.

57. National Environmental Policy Act of 1969, 42 U.S.C. § 4331(a) (2006).

the quality of the human environment.”<sup>58</sup> These reports should detail any adverse effects, both temporary and permanent, that a proposed federal action would create as well as propose more environmentally friendly alternatives to that action.<sup>59</sup> Because some “actions—often actions having irreversible consequences—are undertaken without adequate consideration of, or knowledge about, their impact on the environment,”<sup>60</sup> this new federal requirement was supposed to ensure that “the environmental impact of [any] proposed action [had] been studied and that the results of the studies [had] been given consideration”<sup>61</sup> before any final decision is taken.<sup>62</sup>

It is important to note that the Act does not proscribe any federal activities that could be harmful to the environment. In fact, it merely requires that details about “any adverse environmental effects which cannot be avoided should the proposal be implemented,”<sup>63</sup> be included in the EIS. Congress clearly understood that some actions, in the interest of the people, would have to be taken—regardless of their impact on the environment.<sup>64</sup> Indeed, it should therefore be clear that the intended purpose of the required EIS is to “serve practically as an important contribution to the decision-making process,”<sup>65</sup> not as an ultimate impediment to the execution of federal actions.

#### B. *Winter v. Natural Resources Defense Council*

However, the Navy failed to comply with NEPA when it was to commence training exercises in March 2007 off the coast of California, so the EIS became a barrier. Anxious to begin its training and not wanting to wait for the completion of an EIS, the Navy determined that, based on data already collected concerning the environmental effect of its exercises,<sup>66</sup> it could proceed with its training without filing an EIS.<sup>67</sup>

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58. 42 U.S.C. § 4332(2)(C).

59. *Id.*

60. S. REP. NO. 91-296 at 9.

61. *Id.* at 20.

62. Justice Ginsburg made certain to point out the fact that the EIS is supposed to be completed and filed before any other action has taken place so that it might serve its important advisory role. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 390 (2008) (Ginsburg, J., dissenting).

63. 42 U.S.C. § 4332(2)(C)(ii) (2006).

64. S. REP. NO. 91-296 at 20 (implying that some actions will be taken in spite of their environmental impact by declaring that an “action leading to . . . adverse environmental effects [must be] justified by other considerations of national policy and those other considerations must be stated in the finding”).

65. 40 C.F.R. § 1502.5 (2009) (“The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made.”).

66. *Winter*, 129 S. Ct. at 372.

Nonetheless, when the Navy's actions were challenged, a United States District Court held that the Navy's findings were inadequate and that its actions violated NEPA.<sup>68</sup> The court enjoined the Navy from continuing its exercises without filing an EIS unless it significantly adjusted those exercises to mitigate their impact if they were to continue without filing an EIS.<sup>69</sup> The Navy sought relief from the Executive, which granted it, finding that the continuation of the Navy's training exercises was a necessity and believing that the mitigating actions were too restrictive to fully simulate real combat situations.<sup>70</sup>

Immediately, the Executive, in the form of the President, declared "that continuation of the exercises . . . was 'essential to national security.'" <sup>71</sup> The Council on Environmental Quality ("CEQ"), an office within the Executive,<sup>72</sup> determined that the District Court's injunction created an emergency, interpreting the President's declaration to mean that the strictures on training would "undermine the Navy's ability . . . to ensure the combat effectiveness of . . . strike groups."<sup>73</sup> The CEQ, through the power of the Executive, authorized the Navy to implement practice arrangements alternative to those mandated by the judiciary so that it could continue its training exercises in spite of the judgment.<sup>74</sup>

Although the Navy never conceded that it had a responsibility to file an EIS under NEPA,<sup>75</sup> its key argument was no longer focused on the statute when the case reached the Supreme Court. In oral argument, the Navy claimed that, in light of the emergency circumstances created by the district court's injunction, the Executive Branch's authorization

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67. *Natural Res. Def. Council, Inc. v. Winter*, No. 8:07-cv-00225-FMC-FMOX, 2007 WL 2481037 at \*4 (C.D. Cal. Aug. 7, 2007); *Winter*, 129 S. Ct. at 372. Instead of filing an EIS, the Navy filed an Environmental Assessment. *Id.* This is a "concise public document" which is supposed to "[b]riefly provide sufficient evidence for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9(a) (2009). If a federal agency, when filing an Environmental Assessment, finds that there should be no significant environmental impact caused by any proposed federal action, an EIS is not required. *See Id.* § 1508.13 (2009). However, as was noted by Justice Ginsburg, "by definition, an [Environmental Assessment] alone does not satisfy an agency's obligation under NEPA if the effects of a proposed action require preparation of a full EIS." *Winter*, 129 S. Ct. at 388 n.1 (Ginsburg, J., dissenting).

68. *Winter*, 2007 WL 2481037 at \*6, \*11.

69. *See id.* at \*11.

70. *Winter*, 129 S. Ct. at 373.

71. *Id.* at 373, 378 (citation omitted).

72. 42 U.S.C. § 4342 ("There is created in the Executive Office of the President a Council on Environmental Quality . . . [which shall be] composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate.").

73. *Winter*, 129 S. Ct. at 373 (quotation marks omitted) (citing the petitioner's brief).

74. *Id.* at 373-74.

75. Transcript of Oral Argument at 29, *Winter*, 129 S. Ct. 365 (No. 07-1239) ("The Navy has never conceded that it was required to do an EIS at the outset. It simply has agreed to live with the alternative arrangements approved by the Council on Environmental Quality.").

permitted the Navy to continue its training without interruption.<sup>76</sup> The majority of the Court agreed.<sup>77</sup>

With a tone clearly expressing a deep sense of urgency,<sup>78</sup> Chief Justice Robert's majority opinion completely bypasses the merits of the case, refusing to even address whether the Navy violated NEPA.<sup>79</sup> According to the Chief Justice, two other very significant issues controlled the matter. First, the injunction prohibited the Navy from "conduct[ing] realistic training exercises to ensure that it is able to neutralize the threat posed by enemy submarines."<sup>80</sup> Second, the Executive, through statements made by the Navy, the CEQ, and the President himself, recognized that the forced interruption of these exercises created a national defense emergency.<sup>81</sup> As it was thus parsed down, the majority recognized that the Navy's interests in continuing its training clearly outweighed any environmental interests served by complying with NEPA.<sup>82</sup> Therefore, since a court sitting in equity does not necessarily have to rule in favor of the party that would win on the merits,<sup>83</sup> the Court found in favor of the Navy. In sum, because any injury caused by the Navy's failure to comply with the statute "is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors," the Navy did not need to conform with NEPA's requirements.<sup>84</sup>

#### IV. IMPLICATIONS: *WINTER*'S EXPANDING EMERGENCY

Although Framers, such as Alexander Hamilton, viewed the emergency prerogative of the dictators of the Roman Republic with favor, it has always been evident that it was the abuse of those temporary and yet expansive emergency powers that led to the demise of the Roman Republic and the creation of the Roman Empire.<sup>85</sup> Consequently, none of

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76. *Id.* at 10 ("[W]e had no duty to prepare an environmental impact statement because of the intervening event of the Council for Environmental Quality's emergency circumstances alternative arrangements determination.").

77. *Winter*, 129 S. Ct. at 376.

78. Chief Justice Robert's opinion was heavily garnished with words such as "critical," *id.* at 370, "mission critical," *id.* at 371, and "threat," *id.* at 382, granting the whole of his opinion a sense of urgency as he addressed the facts of the case.

79. *Id.* at 381 ("Given that the ultimate legal claim is that the Navy must prepare an EIS, not that it must cease sonar training, there is no basis for enjoining such training in a manner credibly alleged to pose a serious threat to national security.").

80. *Id.* at 382.

81. *Id.* at 373-74.

82. *Id.* at 382.

83. *Id.* at 381.

84. *Id.* at 376.

85. Joseph E. Olson & David B. Kopel, *All the Way Down the Slippery Slope: Gun Prohibition in England and Some Lessons for Civil Liberties in America*, 22 *HAMLIN L. REV.* 399,

the Framers believed that the Constitution should ever grant the Executive absolute and unfettered authority.<sup>86</sup> Unfortunately, the Supreme Court in *Winter* took a step in that direction when it erroneously stretched the normal boundaries of emergency executive powers. First, the Court expanded the legal definition of emergency in a manner that would allow the Executive to seek the protection of “self-made” emergencies. Second, it significantly lowered the bar for emergency powers by deferring to the judgment of the Executive for the determination of necessity.

#### *A. Ransoming the Public for Power*

The circumstances necessitating the Navy training exercises at issue were not an emergency under either NEPA or the common law. In 1978, the CEQ, which has the authority to issue regulations interpreting NEPA,<sup>87</sup> promulgated a regulation allowing the federal government to act “without observing the provisions of [the] regulation[.]” when “emergency circumstances make it necessary.”<sup>88</sup> This regulation would seem to be a codification of the implicit emergency powers of the Executive, as pertaining to NEPA. However, neither the regulation itself, nor any judicial interpretations of the statute have provided a definition for emergency circumstances. This requires an interpreter to look to the common law, as well as at general practice under the statute to discover its significance.

Under the common law, an emergency is “an unforeseen combination of circumstances that calls for immediate action without time for full deliberation.”<sup>89</sup> Using this definition, emergencies require both unpredictability and immediate action. Though the District Court’s injunction in *Winter* may have created a necessity that called for immediate action, the injunction was not an unforeseeable event. NEPA has been in effect since 1969, and “training exercises [] have been taking place in [Southern California] for the last 40 years.”<sup>90</sup> Moreover, the Navy has “described the ability to operate MFA sonar,” a key component

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411 (1999) (stating that it was through a claim of temporary emergency powers that Julius Caesar was able to become dictator for life).

86. David Luban, *On the Commander in Chief Power*, 81 S. CAL. L. REV. 477, 530 (2008) (“[N]one of the framers . . . advocated dictatorial powers for the executive, even in wartime.”).

87. 42 U.S.C. § 4342 (2006) (stating that the CEQ has authority “to formulate and recommend national policies to promote the improvement of the quality of the environment”).

88. 40 C.F.R. § 1506.11 (2009).

89. BLACK’S LAW DICTIONARY 523 (6th ed. 1990); 57 AM. JUR. 2D *Municipal, etc., Tort Liability* § 397 (2008) (“An emergency is a sudden or unexpected event or combination of circumstances calling for immediate action.”).

90. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 376 (2008).

of its training exercises, “as a “highly perishable skill” that must be repeatedly practiced under realistic conditions.”<sup>91</sup> Under circumstances where the Navy should reasonably foresee its need to conduct future exercises and where the Navy has always had to comply with the statute in order to conduct those exercises, it is not reasonable to conclude that the Navy could not have foreseen the necessity of preparing an EIS.

Additionally, general tort law requires governmental entities that seek the protection of emergency doctrines to not have created or contributed to the emergency in question.<sup>92</sup> This is another instance where the Supreme Court has stretched the definition of emergency in order to accommodate the Executive. Because of the foreseeability of the need to file an EIS, the District Court’s emergency-creating injunction could have been avoided if the Navy had properly followed procedure from the beginning. It was only because of the Navy’s negligence or reckless disregard for the law, that the emergency was created.<sup>93</sup>

The Executive’s previous record in making alternative arrangements for NEPA compliance confirms the common law requirements of an emergency. Other occasions where alternative arrangements have been made include disasters such as: wildfires in San Diego, grasshopper infestations in Arizona, Hurricane Katrina relief, and even an impending war in the Persian Gulf.<sup>94</sup> In the past, each time the Executive exercised its power to go beyond the boundaries of the statute, it was the result of an unforeseeable circumstance that required immediate action and was not the direct result of previous executive action.

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91. *Id.* at 377.

92. 57 AM. JUR. 2D *Municipal, etc., Tort Liability* § 397 (2008). This is immensely similar to the equitable “clean hands” doctrine. In cases of equity, such as this one, where a party seeks injunctive relief, it is necessary that the party approaching the court come with “clean hands.” Because the “clean hands” doctrine is such a fundamental concept of equity jurisprudence, *Richards v. Tibaldi*, 726 N.W.2d 770 (Mich. Ct. App. 2006), “he who has done iniquity cannot have equity,” *Sorum v. Schwartz*, 411 N.W.2d 652, 655 (N.D. 1987). Consequently, in many jurisdictions, failing to have clean hands results in a complete bar to claims in equity. *E.g.* *Wilson v. Brown*, 897 S.W.2d 546, 549–50 (Ark. 1995). However, this doctrine, although comparable to this case in that it should not allow the Navy to claim the protection of an emergency doctrine, is not applicable in this situation. It was the Natural Resources Defense Council that petitioned the Northern District of California for equitable relief, and not the United States Navy. Therefore, the Navy is not asking for its own form of equitable relief, but a reversal of the lower courts’ decision to grant equitable relief to its adversary.

93. The Ninth Circuit also caught on to this manufactured emergency, though only as a reason for why the Navy should not prevail on the merits. It did not, however, address the implications of the principle. *Natural Res. Def. Council, Inc. v. Winter*, 518 F.3d 658, 681–82 (9th Cir. 2008).

94. NEPA, *Alternative Arrangements Pursuant to 40 C.F.R. Section 1506.11-Emergencies*, [http://www.nepa.gov/nepa/eis/alternative\\_arrangements\\_Chart\\_092908.pdf](http://www.nepa.gov/nepa/eis/alternative_arrangements_Chart_092908.pdf) (last visited Mar. 30, 2009).

Under the circumstances, “if the Navy sought to avoid its NEPA obligations, its remedy [laid] in the Legislative Branch.”<sup>95</sup> However, under this new definition of emergency powers handed down by the Court, the Executive no longer needs the Legislature. Hypothetically, the public safety, put in danger only through the Executive’s reckless disregard for the law, may be ransomed again with emergency power.

*B. The Executive Will Necessarily Favor the Executive*

According to the Navy, the declaration that the Navy’s training exercises were “essential to national security” and that the injunction would “create[] a significant and unreasonable risk” to the American people,<sup>96</sup> combined with CEQ’s alternative arrangements, “eliminated the injunction’s legal foundation.”<sup>97</sup> Although the Supreme Court refused to specifically rule on whether the Executive’s actions actually relieved the Navy of its obligations,<sup>98</sup> the Court used those very same statements from the Executive to vacate the lower court’s injunction and effectively rule that the circumstances did not require the Navy to comply with the Act.<sup>99</sup>

Admittedly, “neither the Members of [the Supreme] Court nor most federal judges,” nor the author of this Note for that matter, “begin the day with briefings that may describe new and serious threats to our Nation and its people.”<sup>100</sup> Moreover, the Executive is probably the most qualified of all the branches of government to make determinations concerning emergencies and the imminence of dangerous attacks on the American people.

However, deferring to the Executive by granting it unfettered review of its own policies completely abolishes the boundaries found in Justice Jackson’s nadir. Indeed, without independent review, “the false pretext of imminent danger” creates an additional zenith of executive power.<sup>101</sup> Yet, unlike Jackson’s zenith,<sup>102</sup> here the Executive reaches this summit of power independently. The resulting effects on the separation of powers are vast. In practice, an Executive could claim “emergency” or

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95. *Winter*, 129 S. Ct. at 391 (Ginsburg, J. dissenting).

96. *Id.* at 373.

97. *Id.* at 388 (Ginsburg, J., dissenting).

98. *Id.* at 381 (stating that the Court was not addressing the merits of the plaintiff’s claims).

99. *Id.* at 376.

100. *Boumediene v. Bush*, 128 S.Ct. 2229, 2276–77 (2008).

101. Saby Ghoshray, *False Consciousness and Presidential War Power: Examining the Shadowy Bends of Constitutional Curvature*, 49 SANTA CLARA L. REV. 165, 184 (2009).

102. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (stating that for the President to be at the zenith of his powers, he necessarily has to act with the approbation of the legislature).

“necessity” to justify any actions contrary to the law whenever it felt that such actions were prudent.<sup>103</sup>

Additionally, affording the Executive the prerogative to interpret the extent of its own emergency license will necessarily lower the threshold for a constitutionally permissible suspension of the normal balance of powers. When it comes to the use of executive-executed emergency powers, an Executive will be faced with two choices: First, it could refrain from exercising emergency powers at the risk of an emergency actually occurring, and then call upon those powers anyway in order to remedy the situation. Alternatively, the Executive might mitigate risks by exercising the power immediately at the expense of the constitutional balance of powers. Obviously, the latter choice leads to a propensity to call upon emergency powers even when necessity would not require them.<sup>104</sup>

Prior to *Winter*, the Supreme Court had already taken a position on this issue: “a state of war,” the most severe of emergencies, “is not a blank check for the President.”<sup>105</sup> However, in “giv[ing] great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest,”<sup>106</sup> the Supreme Court disregards *Youngstown*’s boundaries of presidential power and

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103. Interestingly, this idea was proposed years before *Winter* went to the Supreme Court, and was often used to justify the abuses of the Bush Administration. See John C. Yoo, *With “All Necessary and Appropriate Force,”* L.A. TIMES, June 11, 2004, at B13 (“General criminal laws are usually not interpreted to apply to either [the President or the military], because otherwise they could interfere with the president’s constitutional responsibility to manage wartime operations.”).

104. A very similar dichotomy has been explored in free speech jurisprudence when considering principles of prior restraint. Scholars recognize that professional censors have a propensity toward adverse decision. For example, when a censor’s role is to examine material and determine that it is unobjectionable before it is released to the general public, that censor is encountered with two choices. First, the censor may be lenient toward the material, at the risk that it will actually be offensive to the public, causing general harm and putting that censor’s job at risk. Second, the censor may choose to take a more conservative approach by censoring anything that is remotely objectionable, protecting the public from any faint risk of harm preserving her own job. Obviously, the incentives lie in favor of increased censorship. See Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 657 (1955). In order to protect constitutional freedoms, the Supreme Court is very wary of state structures that have a propensity to create perverse incentives. See, e.g., *Freedman v. State of Maryland*, 380 U.S. 51, 58 (1965) (allowing government film censorship “only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system”). It follows that in order to protect constitutional structures, such as the separation of powers, the Court should likewise be wary of broad doctrines that have that same tendency to lead to abuses of power.

105. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (quoting *Youngstown Sheet & Tube*, 343 U.S. at 587).

106. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 377 (2008) (citing *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)). Interestingly, the case that Justice Roberts cites to justify his position of deference to the executive branch [i.e. the military] involved the necessity of allowing the military the independence to create regulations for its own members and not to take actions outside of its own sphere contrary to enacted law. See *Goldman*, 475 U.S. at 507–08. Regrettably, citing that decision erroneously creates a false standard of deference to military operations, placing them beyond the reach of ordinary law.

cedes its important role of exercising judicial review to the Executive.<sup>107</sup> This, essentially, grants the Executive *carte blanche* in determining when, and to what extent, he or she may rely on emergency circumstances to justify his or her actions. Such a ruling is a blank check for abuse.

## V. CONCLUSION

It may be tempting to brush *Winter* aside because the Supreme Court did not reach a decision on the merits due to the nature of the suit, but one should remember that fifty years ago, another case, more explicitly concerning the limits of presidential powers, sought after the same remedy.<sup>108</sup> Both cases occurred during a period when the United States was at war.<sup>109</sup> In each case, the Executive's actions were directly contrary to congressional will.<sup>110</sup> Most importantly, in both situations, because of emergency circumstances, the Executive Branch justified its actions as necessary in defense of the public good.<sup>111</sup>

Nevertheless, in *Winter*, the Supreme Court departs from the standard set half a century ago in *Youngstown*. By finding in favor of the Navy, the Court altered the accepted Jackson taxonomy by expanding its zone of twilight, and diminishing its nadir. *Winter* accomplished this by first revising the definition of an emergency—eliminating its requirement of unforeseeability and permitting an Executive to seek the protection of emergency powers for manufactured emergencies caused by the reckless disregard of the law or negligence of that Executive. Second, the *Winter* decision allows the Executive to “be the judge in [its] own case,”<sup>112</sup>

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107. See generally *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

108. Compare *Winter*, 129 S. Ct. at 372 (stating that the respondents had sought an injunction against the Navy), with *Youngstown*, 343 U.S. at 584–85 (1952) (stating that the steel companies sought an injunction against the Secretary of Commerce restraining the enforcement of President Truman's order).

109. Compare *Winter*, 129 S. Ct. at 376–77 (referring to the hostile circumstances abroad to justify the denial of the respondent's injunction), with *Youngstown*, 343 U.S. at 590–91 (appendix) (referring to the Korean Conflict as a necessary reason for permitting the President to seize the steel factories).

110. Compare *Winter*, 129 S. Ct. at 390 (Ginsburg, J., dissenting) (stating that the Navy's publication of its EIS, scheduled after the completion of its exercises, defeats the purpose of NEPA), with *Youngstown*, 343 U.S. at 586 (stating that five years prior to the President Truman's executive order, Congress had already rejected granting a government authorization for the seizure of private property in the event of an emergency).

111. Compare *Winter*, 129 S. Ct. at 373 (stating that the President considered the Naval exercises to be “essential to national security”), with *Youngstown*, 343 U.S. at 583 (stating that President Truman believed that the continued availability of steel was of capital importance to the security of the United States).

112. According to the old maxims of law, making an individual a judge in his own case was a direct violation of due process, or the law of the land. Essentially, it meant that a judge was not

deferring to [it] for a determination of when emergency circumstances are present, creating an incentive for Executives to call upon those powers more often and under circumstances that are less than public emergencies.

During their confirmation hearings, Chief Justice Roberts and Justice Alito firmly declared their concurrence with Justice Jackson's *Youngstown* opinion. Ironically, two years later, they were possibly accomplice to one of the most significant expansions of executive power to date.

*Landon Wade Magnusson\**

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supposed to have any personal interests in a case, but was supposed to be a neutral arbiter. For more discussion, see JOHN V. ORTH, *DUE PROCESS OF LAW* 11 (2003).

\* J.D. Candidate, April 2010, J. Reuben Clark Law School, Brigham Young University.