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Center for Biological Diversity)	
V.)	No. 15-15695
Ashton Carter)	
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Transcript of the Videotaped Hearing
 Held on March 15, 2017
 at the
 James R. Browning U.S. Courthouse, Court Room 2
 San Francisco, California

Transcribed by: Jessica R. Perry, CSR, RPR

1 MS. BURT: Good morning, Your Honors.
2 May it please the Court, Sarah Burt, on behalf of
3 Plaintiff-Appellants, and many of the Plaintiffs are
4 here from Japan today in the courtroom.

5 JUSTICE MURGUIA: Welcome.

6 MS. BURT: I will keep track of my time,
7 but I'd like to reserve about three minutes for
8 rebuttal, if I may.

9 JUSTICE MURGUIA: Okay.

10 MS. BURT: The District Court in
11 dismissing the Plaintiffs' National Historic
12 Preservation Act claim erred for two reasons. First,
13 the Court misapplied the 9th Circuit's standard for
14 standing in procedural rights cases. And second, the
15 District Court departed from Supreme Court precedent
16 by expanding the Political Question Doctrine to apply
17 to a Court's consideration of the four-part test for
18 injunctive relief.

19 Setting aside for now the issue of
20 injunctive relief, and assuming, for the sake of
21 argument, that it's -- injunctive relief is not on the
22 table, Plaintiffs, nonetheless, have standing.
23 Vacatur of the Department of Defense's findings under
24 the NHPA and remand to the agency would redress the
25 Plaintiffs' procedural harms.

1 As *Lujan versus Defenders of Wildlife* has
2 made clear, procedural rights are special. Once a
3 plaintiff has assert the procedural injury, and the
4 injury in this case is not disputed, then the
5 causation and redressability requirements are relaxed
6 so that a plaintiff must only show that they have a
7 procedural right, which, if exercised, could address
8 their concrete interests, and plaintiffs have met that
9 standard in this case.

10 JUSTICE WATFORD: And that's because
11 the -- what you contemplate the Department of Defense
12 doing after the proper take-into-account process
13 occurs, what is it exactly that you think they might
14 do differently, if that process were to go forward?

15 MS. BURT: Yeah, while, to a certain
16 extent, the process should expose the types of actions
17 that are possible to mitigate any adverse effects, but
18 it is possible that they could make adjustments to the
19 design or operation of the base. And focusing on the
20 operation of the base I think is useful because it's
21 uncontested that the Department of Defense has
22 exclusive control over operations. And so, therefore,
23 going forward, it's feasible to make adjustments to
24 operations to avoid or mitigate harms without
25 reopening any executive agreement with Japan, without

1 undoing the 2006 road map. And so there are steps
2 that the agency could take that might redress that
3 concrete interest.

4 JUSTICE WATFORD: Okay, so you're not --
5 it's not the case that the mere building of the base
6 in the location that's been selected will basically
7 inflict all of the harm that could be inflicted.
8 There's --

9 MS. BURT: Well, clearly the construction
10 is a large part of it. I mean, land filling the bay
11 is going to do huge damage to that habitat, but there
12 are other ways that -- you know, the number of flights
13 coming in and out of the base, the way that runoff is
14 managed, you know, how much it's illuminated, other
15 ways that could impact the Dugong, and it's important
16 to remember that to show redressability is not an all
17 or nothing. It is enough to show that the harms could
18 be partially mitigated. So we don't have to stop
19 construction of the base in order to redress
20 Plaintiffs' harms.

21 JUSTICE WATFORD: Well, that's, I guess,
22 what -- I'm sorry if I'm focused on that too much, but
23 let's say that that were the only way to prevent the
24 harm to the -- to the Dugong, I guess I just -- I find
25 myself thinking that, boy, if that were -- that was

1 the relief that you would have to get from the
2 Department of Defense in order for there to be any
3 benefit for your clients, I could see how maybe that
4 would be a problem for our Court to try to adjudicate
5 that, but you're just saying that's not the case.
6 We -- even if the base gets built in the same
7 location, just the post construction operational
8 adjustments, that would be enough to provide
9 meaningful relief to your clients?

10 MS. BURT: I would answer two things.
11 Yes, the latter, that making adjustments to avoid or
12 mitigate would provide some remedy, but I would also
13 say that it is not impossible for the Department of
14 Defense to decide, after going through the procedures
15 required by the statute, consulting with relevant
16 stakeholders, considering all of the relevant
17 information, they have the power -- they have the
18 ability to say, in light of all this, we are not going
19 to go forward.

20 JUSTICE WATFORD: We're going to build
21 the base somewhere else.

22 MS. BURT: Or we're not going to build
23 the base. I'm not saying that's not a -- excuse me,
24 Your Honor, I don't want to talk over you, but that's
25 a very big ask, and I recognize that, but I just

1 wanted to highlight the difference between can't and
2 won't. Because if it's a matter of won't, if it's
3 just that *a priori*, before going through the
4 procedures, the agency says, you know, it doesn't
5 matter what these procedures turn up. There is no
6 information that -- you know, we're just dead set on
7 building this base, that's different from saying, we
8 can't. We cannot go back in time and undo this
9 treaty, and that is not the case here. The Department
10 of Defense could decide in a change of policy.

11 And I wanted to highlight that it would
12 be the agency, it would be the Department of Defense's
13 call to make. It would not be -- we are not asking
14 this Court, Your Honor, to make that underlying policy
15 decision. We're asking the Court --

16 JUSTICE WATFORD: No, I know, but I guess
17 I just -- it does not seem realistic at all to think
18 that this base is going to be built somewhere else, and
19 I -- I mean, maybe as a technical matter you're right,
20 it's not impossible, but, I mean, we know from what
21 the government has told us, that that just ain't gonna
22 happen. This thing is going to get built there and we
23 have, you know, entered into a binding bilateral
24 agreement which Japan, right, for that to happen and
25 there's all sorts of defense-related considerations

1 that just can't -- it just seems impossible to unravel
2 all of that now. So if it were the case that the mere
3 building of the base in the place where it's going to
4 be built would just inflict all of the harm to the
5 Dugong that could be inflicted, then I would be
6 skeptical that these post-construction operational
7 mitigation measures you're talking about would provide
8 any meaningful relief for your clients, and that would
9 raise a redressability issue, it seems to me.

10 MS. BURT: It would -- I would like to
11 highlight that the requirement of the statute is avoid
12 or mitigate, and that the -- the 9th Circuit's cases
13 on standing are clear that you don't have to redress
14 the harm in its entirety, that partial redress is
15 enough to establish standing. And because the way
16 that the agency --

17 JUSTICE MURGUIA: What would be the
18 partial redressability here?

19 MS. BURT: Would be steps to avoid or
20 mitigate harms to the Dugong that fall short of
21 abandoning construction altogether. So it might be
22 that the number of planes coming in and out can affect
23 how much noise there is, and so if you reduce the
24 number of planes -- various operational measures or
25 steps that could be taken to minimize harm, that would

1 be partial redress, and that would be enough to
2 establish standing.

3 JUSTICE MURGUIA: Well, if we did order
4 the Department of Justice to satisfy its obligations
5 under 402 like you were asking, would that be
6 declaratory or injunctive relief?

7 MS. BURT: Well, the initial step would
8 be a declaration, declaratory relief in the sense that
9 a declaration that the Department of Defense's
10 findings do not comply with the requirements of the
11 statute. There are also, and we requested in our
12 complaint, the standard administrative remedies of
13 vacatur and remand. Those are not injunctive, and so
14 at a minimum we're talking about a declaration that
15 they violated the statute, vacatur and remand to the
16 agency. If we were to succeed on the merits on
17 whether or not they have complied with the statute,
18 then we can get to briefing on the four-part standard
19 for whether injunctive relief should be issued in the
20 case.

21 JUSTICE MURGUIA: And so with respect to
22 injunctive relief, I guess my question, looking at
23 what you're asking for in your pleadings, and it seems
24 like it would require the Court to control access to
25 military bases, as well as altering the terms of

1 access for Japanese nationals on Japanese soil. So
2 doesn't this present a political question under the
3 first Baker factor?

4 MS. BURT: The approach that the District
5 Court took in applying the Baker factor is the
6 Political Question Doctrine to --

7 JUSTICE MURGUIA: I'm not talking about
8 the District Court. Just answer that question for me,
9 please, just on your own without referring to the
10 District Court.

11 MS. BURT: Sure. And my answer is that
12 the familiar four-part test for injunctive relief
13 adequately encompasses -- it guides the Court's
14 discretion and allows the Court to take into
15 consideration political or separation of powers
16 concerns by giving deference to the agency in those
17 third and fourth prongs, in the balancing of the harms
18 and the weighing of the public interest. And so
19 rather than abdicating the Court's Article 3
20 responsibility in favor of the executive, the approach
21 that are the Supreme Court has taken is to go forward,
22 apply the standard, engage in the balancing of harms
23 and the weighing of the public interest, giving
24 deference to the executive with issues of national
25 security and foreign policy arise.

1 And may I just point the Court to *Winter*
2 *versus Natural Resources Defense Counsel*, which was a
3 case challenging the Navy's conduct of security
4 exercises using sonar in the Pacific off the coast of
5 California, and the Court, you know, made a decision
6 on the merits, no Political Question Doctrine problem
7 there, went on to apply the standard for injunctive
8 relief. In that case the Court found that the
9 military and security issues outweighed -- I'm sorry,
10 interests outweighed the Plaintiffs' interests, but
11 the Court specifically said that military interests do
12 not always trump other considerations and we have not
13 held that they do.

14 So to expand -- and, Your Honor, I'm not
15 aware of any other case in which the Political
16 Question Doctrine has been applied not to the
17 underlying legal claim that the Court is being asked
18 to answer, but simply to the request for injunctive
19 relief, and to follow the District Court's approach is
20 to essentially allow military interests to trump,
21 because it bars the Court from even engaging in the
22 balancing of harms and the weighing, which are
23 judicially manageable standards, which is the second
24 Baker prong, and we know that courts do that all the
25 time. And in our briefs we have a long string cite

1 listing many of those cases, but I think Winter really
2 is instructive.

3 JUSTICE WATFORD: Just a question
4 about -- in terms of the relief we were talking
5 earlier about, what realistically might -- the
6 department might do differently, you mentioned purely
7 post-construction operational mitigation measures.
8 If -- is there something else in terms of the
9 construction of the base? Because obviously if that's
10 all that's in play, then there's no, you know, reason
11 for the District Court to contemplate an injunction
12 stopping the construction of the base.

13 MS. BURT: Can I -- may I clarify a
14 point, Your Honor? The injunction that we've
15 requested was not a total -- it was not to enjoin
16 construction of the base in its entirety. It was
17 merely a time limited injunction on the Department of
18 Defense's step in allowing construction to go forward
19 pending the completion of the procedures. So I think
20 that's a meaningful difference.

21 JUSTICE WATFORD: Well, to explain, can
22 I --

23 MS. BURT: (Inaudible).

24 JUSTICE WATFORD: -- a whole new nuance
25 for me.

1 JUSTICE MURGUIA: You need to tell me --
2 or tell us, please, what is the injunctive relief you
3 are seeking? Because I'm quoting you in terms of the
4 base, what you ask for in your papers, what are you
5 asking for in terms of injunctive relief?

6 MS. BURT: So I think that the confusion
7 turns on a fact of the arrangement between the
8 Department of Defense and Japan, which is that the
9 United States has exclusive control over their
10 military bases, and so, therefore, to enter into the
11 base, Camp Schwab, and a certain delineated area in
12 the water around Camp Schwab, requires DoD approval.
13 It essentially requires a permit from DoD.

14 And so that is the injunction that we are
15 requesting. We are asking that DoD not issue any of
16 those permits to allow --

17 JUSTICE MURGUIA: Permits? Permits that
18 allow what?

19 MS. BURT: That allow construction
20 workers from Japan to enter into the base to begin
21 construction, not permanently, just until they have
22 complied with the procedures.

23 JUSTICE WATFORD: Yeah, I know, but if at
24 the end of the day all you could hope for -- if this
25 take-into-account process is successful the way you

1 want it to be, all you can hope for are
2 post-construction operational mitigation measures,
3 then why wouldn't the base -- there would be no reason
4 for the injunctive relief you're seeking, right? You
5 don't need a sort of stay-put order because you're
6 just -- you want something that's going to happen on
7 the back end.

8 JUSTICE MURGUIA: The workers coming on
9 aren't going to affect the flights going over, so, you
10 know, that's the only example that you've given so far
11 of this sort of moderated sort of relief.

12 MS. BURT: And I've endeavored to find
13 some examples of what the Department of Defense could
14 do.

15 JUSTICE WATFORD: During construction?

16 MS. BURT: No, during operation.

17 JUSTICE WATFORD: Well --

18 MS. BURT: I'm sorry, I'd like -- I hope
19 I'm about to answer your question. And that is
20 because that is -- it doesn't raise the problem of
21 reopening the treaty. It doesn't raise the concern.
22 We would like to hold open the possibility that there
23 might be other things that the Department of Defense
24 could do, but those would become evident through the
25 process of examining exactly what the harms will be,

1 exactly what elements of construction and operation
2 will harm the Dugong and what steps might be taken.
3 So I feel it's a little preemptive to have to state
4 exhaustively all -- at this stage, all the possible
5 steps that the Department of Defense could take in
6 order to mitigate harms. I just wanted simply to show
7 that there was at least something, enough to show that
8 there is some element of redressability at this stage.

9 JUSTICE MURGUIA: What would the
10 Department of Defense need to do to comply with
11 Section 402, in your view? I mean, because it seems
12 like it's a very simple take-into-account --

13 MS. BURT: Yes.

14 JUSTICE MURGUIA: -- standard. It seems
15 like there would be some deference to them in that
16 take-into-account standard. I understand they've
17 chosen not to go that route. I'm not sure why, why
18 they haven't just said, hey, we've taken the Dugong
19 into account, but what would they need to do?

20 MS. BURT: My initial reaction, Your
21 Honor, is that I anticipate they will make that
22 argument if we were to get to the merits of the claim
23 as to whether or not they have taken into account. I
24 would argue at this point, we can look back to the
25 District Court's 2008 order where the District Court

1 said that the plain language of Section 402, combined
2 with express legislative purpose reveals clear
3 congressional intent regarding the basic components,
4 and then goes on to list them.

5 Elements of those steps that we feel the
6 Department of Defense has not adequately taken is
7 that, first of all, they did this essentially, if not
8 in secret, then without notifying the public,
9 certainly without notifying us. So there was no
10 opportunity to engage in any of the kind of the public
11 comment process that you would usually see. They did
12 not consult with any of the Plaintiffs in this case,
13 who have made clear their interest as stakeholders --

14 JUSTICE MURGUIA: I know what you want.

15 MS. BURT: Yes.

16 JUSTICE MURGUIA: I want to know what the
17 minimum is required. Are you saying that that's the
18 minimum required, that they have to -- because it
19 looks like you're applying sort of our environmental
20 sort of standards onto this, and I know there's a lot
21 in common, but this is a very different language in
22 402 than what is required in NEPA. So I'm just --
23 what would be the minimum?

24 MS. BURT: The minimum, I think the
25 District Court did a good job of laying those out.

1 The process at a minimum must include identification
2 of protected property, generation, collection,
3 consideration, and weighing of information pertaining
4 to how the undertaking will affect the historic
5 property, a determination as to whether there will be
6 adverse effects, development and evaluation of
7 alternatives that could avoid or mitigate, and that
8 they do this process not on their own in isolation,
9 but they engage the host nation and other relevant
10 private organizations and individuals in a cooperative
11 partnership.

12 I think that's a good place to start.
13 I'm conscious of my time.

14 JUSTICE MURGUIA: Is there enough of a
15 record on appeal to review the merits in determining
16 whether they in fact -- the DoD in fact fulfilled
17 their responsibility under Section 402?

18 MS. BURT: I would like to offer
19 supplemental briefing if the Court thinks that it's
20 going to go that route.

21 JUSTICE MURGUIA: No, I'm just asking.

22 MS. BURT: I don't think so, Your Honor.
23 I think that we need to go through the merits and have
24 the District Court determine what take into account
25 means, how it should be applied in this situation.

1 JUSTICE MURGUIA: Okay, thank you.

2 MS. BURT: I'd like to reserve my time.
3 Thanks.

4 MR. HAAG: May it please the Court, I'm
5 Mark Haag from the Department of Justice, and with me
6 at counsel table is Jonathan McKay from the Navy's
7 office of -- Department of Navy Office of General
8 Counsel.

9 I guess I would start responding to the
10 Court's last question about whether there's enough
11 information in the record. I think the
12 supplemental -- or the Secretary's finding with
13 respect to compliance with Section 402 -- the
14 Secretary made a finding. It's laid out in the
15 excerpts of record. It appears at page 60 through 91
16 or 61 through 90. That's -- that satisfies whatever
17 obligations the Secretary had under Section 402, and
18 that would be a basis for a decision here.

19 Unfortunately, the doctrine of -- I guess
20 it was -- it was -- the practice that the Courts had
21 of assuming jurisdiction and disposing of a case on
22 the merits when there was a tough jurisdictional
23 question is no longer permitted by the Supreme Court.
24 And here there's a justiciability problem that the
25 Court needs to address.

1 JUSTICE MURGUIA: Well, I'm curious,
2 though, why didn't you all submit a more extensive
3 administrative record to the District Court? You had
4 that opportunity and you didn't do that.

5 MR. HAAG: I'm not -- I'm not sure why,
6 Your Honor. I think that some of the questions
7 were -- some of the issues were confidentiality
8 concerns with the government of Japan and the
9 government of Japan not wanting the United States to
10 be revealing certain information and not wanting to
11 get crosswise with the government of Japan's
12 environmental assessment process.

13 I think many of the documents that are --
14 were in -- that are in the government's administrative
15 record are being provided to the Plaintiffs under FOIA
16 at this point have been provided since 2008, but
17 the -- the administrative record was not submitted to
18 the District Court.

19 JUSTICE MURGUIA: Is your position that
20 this case has always presented political questions
21 from the beginning of the lawsuit or that this whole
22 political question emerged only recently? Because it
23 doesn't look like you presented it previously.

24 MR. HAAG: Well, I think we --

25 JUSTICE MURGUIA: I mean, it seems like

1 you've changed your litigation strategy here. I'm
2 trying to figure out what's going on.

3 MR. HAAG: From the -- I think the first
4 time the political question got raised was 2008, but
5 even in 2005, in response to the first motions to
6 dismiss, we raised a number of standing, we raised
7 justiciability, we argued that there was failure to
8 state a claim because Section 402 simply didn't apply
9 to this action. So we've raised related arguments.
10 As the case proceeds, our insight into the legal
11 issues hopefully gets better.

12 JUSTICE MURGUIA: And is it your position
13 the Courts lack power to issue injunction whenever
14 issues of national security or foreign relations are
15 implicated?

16 MR. HAAG: No, of course not, Your Honor.
17 This is -- these are very unique facts, very specific
18 and unusual bilateral arrangement between the two
19 governments. And *Baker v Carr* is very clear that
20 questions about political question are -- issues of
21 political well are to be addressed surgically on a
22 case-by-case basis based on the particular facts of
23 the case. So the mere fact that this involves foreign
24 policy and national defense does not automatically
25 trigger political question. What triggers political

1 question here is the fact that this is an agreement
2 that it took a decade to negotiate from 1996 to 2006,
3 negotiated at the highest levels of the U.S.
4 government and the government of Japan, reaffirmed
5 multiple times from 1996 through last month, when
6 Secretary Mattis was in Japan and met with the Prime
7 Minister of Japan and the Defense Minister and their
8 joint statements mentioned the importance of this
9 project moving forward. So it's a very particular
10 project and a very sensitive issue because of the
11 bilateral nature of the project.

12 I guess I also wanted to address --

13 JUSTICE MURGUIA: It seems -- I'm asking
14 you about your litigating positions because it seems
15 initially, or in the beginning, in the earlier you all
16 argued that 402 didn't apply.

17 MR. HAAG: That's right.

18 JUSTICE MURGUIA: And now -- and I'm just
19 trying to figure out, is Section 402 particularly
20 onerous for you all to comply with? I don't
21 understand. It seems like it's a pretty basic did you
22 take into account the Dugong.

23 MR. HAAG: And it -- you're right, Your
24 Honor, that it is pretty basic and that the what's --
25 what's required -- what the statute provides is rather

1 broad and rather minimal. It's just take into
2 account, and the record shows that the Secretary did
3 do that. The initial position that the agency took in
4 the District Court was that this is a Japanese
5 project. It's being conducted by the government of
6 Japan on sovereign Japanese territory at Japanese
7 expense, and, therefore, it's not -- it's not the
8 Navy's responsibility to do the take-into-account
9 process.

10 But once Judge Patel held otherwise
11 and -- but did not issue a final order, the navy went
12 ahead and carried out a take-into-account process, and
13 that's what we see in the excerpts of record. So we
14 have not abandoned -- we're reserving the right, if
15 the case goes back, to argue that Section 402 should
16 not apply here, but even if it does, the agency has
17 complied with 402.

18 And I guess I would note that CBD's
19 arguments for why the -- as to the reasons that the
20 agency has failed to comply are all based on the
21 assumption that there's a -- there's some obligation
22 to consult with members of the -- with the plaintiffs
23 or with stakeholders, similar to the obligations that
24 apply in the domestic context, but that kind of public
25 notice process is extremely programmatic when you're

1 talking about a project that's taking place in a
2 foreign country under the jurisdiction of another
3 sovereign. You can't -- it creates -- it raises
4 diplomatic sensitivities, and there's no basis in the
5 statute for assuming that that kind of a public
6 comment process applies in the context of Section 402.

7 JUSTICE WATFORD: Well, so far you
8 haven't addressed really the points that I think are
9 before us and that we're going to need to decide,
10 because I, frankly, don't have any interest in trying
11 to reach the merits here. The District Court didn't.
12 So I guess maybe we can start with standing. I'm
13 inclined to think that your position on standing is
14 completely wrong, especially as to just the getting a
15 declaration that the -- that the act hadn't been
16 complied with and remanding for the Secretary or
17 whoever in the Department of Defense would carry out
18 that take-into-account process. How in the world do
19 they not have standing to seek that relief?

20 MR. HAAG: I think that Salmon
21 Spawning -- the Salmon Spawning case provides the
22 answer to that, that any -- to the extent that --
23 because the Court can't order the Secretary to
24 renegotiate the road map --

25 JUSTICE WATFORD: Stop right there.

1 Because let's just focus on the post-construction
2 operational mitigation measures that your opponent
3 alluded to this morning. Talk about that, because
4 that seems like it's totally within the Department of
5 Defense's control. You can't say that, no, there's
6 nothing whatsoever the Department of Defense could do
7 to adjust the operation of the base that's going to be
8 under its control once it's completed, right?

9 MR. HAAG: Well, there is little -- and I
10 think that CBD has overstated this -- the extent to
11 which there's room there, because all -- because the
12 details of these operations have been negotiated, the
13 specific alignment of the runways, the specific types
14 of aircraft and the numbers of aircraft that will be
15 there, the flight paths have all -- were all matters
16 of concern --

17 JUSTICE WATFORD: And the Department of
18 Defense itself is disabled from making any adjustments
19 to those?

20 MR. HAAG: Not any adjustments, Your
21 Honor.

22 JUSTICE WATFORD: Well, that's what I'm
23 saying. So Salmon Spawning, I mean, that's a
24 different situation where there's -- the agency whose
25 conduct is under review doesn't have the power

1 unilaterally to do anything that would affect
2 meaningful relief for the Plaintiffs, but here it
3 seems like the Department of Defense is the agency
4 whose actions are under review, and I don't -- unless
5 you're going to tell us that we'll actually know,
6 given the terms of this bilateral agreement, which are
7 non-negotiable going forward, we can't do anything to
8 get out of the commitments we've already made, then I
9 don't think you have an argument on standing.

10 MR. HAAG: The argument on standing is
11 that any relief that puts the ongoing implementation
12 of this project in doubt or casts a cloud over it
13 interferes with the political prerogatives of the
14 executive branch and is not available, but anything
15 that does not do that, doesn't redress CBD's claims.

16 And I guess on these mitigation points, I
17 think it's also important for the Court to be aware
18 the extent to which mitigation has been addressed in
19 the plans that the two governments have agreed to, the
20 government of Japan conducted an environmental impact
21 statement, it adopt -- which adopts mitigation
22 measures that are intended to minimize the impacts on
23 the Dugong. And of course the whole reason that we're
24 here, that the Dugong is arguably under triggers and
25 obligation to do a Section 402 analysis, is because

1 it's a cultural property or a cultural monument under
2 the law of Japan. So if the government Japan is
3 taking the steps that it's required to under Japanese
4 law to address its --

5 JUSTICE WATFORD: Yeah, but how does
6 that -- I'm just focused on redressability. I hear
7 you, there's a bigger picture here and maybe
8 ultimately nothing changes, and fine, that's not our
9 concern. We have pretty narrow procedural issues
10 before us, and, again, I'm just -- on redressability,
11 this is a procedural injury that they're trying to
12 remedy and they don't have to show that the Department
13 of Defense in fact would make the following five
14 changes. They just have to show that it's possible,
15 and it's -- we're not even talking about the Court
16 compelling the department to adopt any particular
17 mitigation measure. So that's why your allusion to
18 the Political Question Doctrine in this context seems
19 to be completely off point.

20 MR. HAAG: Well, there was a political --
21 there was a procedural injury at issue in one of the
22 claims in Salmon Spawning that the Court said it --

23 JUSTICE WATFORD: (Inaudible).

24 MR. HAAG: -- (inaudible) address.

25 JUSTICE WATFORD: Right.

1 MR. HAAG: Here, I don't think that we --
2 the government does not concede -- for purposes of
3 argument, we are saying there's a procedural injury,
4 that's what they're claiming. I'm not sure Section
5 402 creates any procedural rights in the Plaintiffs
6 here because it does not have the kind of public
7 comment process -- it doesn't call for the kind of
8 public process that, say, NEPA calls for. It's simply
9 an instruction to the Secretary to take something into
10 account.

11 JUSTICE WATFORD: So there's no -- no one
12 would have standing to sue a claiming of violation of
13 the 402 --

14 MR. HAAG: We are -- we are reserving
15 (inaudible) --

16 JUSTICE WATFORD: Okay, but that's not --
17 again, that's not the issue before us right here,
18 right?

19 MR. HAAG: Right.

20 JUSTICE WATFORD: Okay, so -- I don't
21 know, do you have anything else? I mean, I'm wholly
22 unpersuaded by your position, as was the District
23 Court, on redressability with respect to the
24 declaratory relief. Do you have anything else to say
25 on that or should we shift to the injunction?

1 MR. HAAG: Let's shift to the injunction,
2 and if I think of anything else, I'll try to artfully
3 work my way back to it.

4 JUSTICE WATFORD: Okay. So let's just
5 start with the second Baker test with respect to the
6 injunctive relief. Why isn't Winter the full answer,
7 as your opponent argues? It seems to me that that
8 case arose in a very similar posture with very similar
9 interests on both sides, competing interests on both
10 sides, and there was -- I don't even think the
11 government argued Political Question Doctrine as a
12 barrier there and the Court seemed to think that that
13 four-part test was an adequate set of standards that
14 certainly would satisfy the second Baker test. So why
15 is that wrong?

16 MR. HAAG: The difference is that we have
17 a bilateral agreement here. We have the interests and
18 the role of the government of Japan that makes this
19 different from Winter. There was no international
20 agreement, international framework for the exercises
21 that were being challenged there.

22 In weighing -- in applying the injunction
23 standard, the Court would have to weigh the interests of
24 the government of Japan as well as the interests of
25 the United States. So this is just -- this is a more

1 compelling case for application of the --

2 JUSTICE WATFORD: It's more -- a more
3 compelling case for you to win under Winter, I grant
4 you that, but why do -- why is the Court wholly
5 without, whatever the phrase is, judicially manageable
6 and discoverable standards just to make the
7 determination? I don't understand that argument at
8 all.

9 MR. HAAG: Well, the argument is that the
10 Court is not well equipped to determine what's in the
11 public interest when the government of Japan is
12 deciding what's in its interest for a project that's
13 on its sovereign territory, that it's paying for
14 itself, pursuant to a treaty.

15 JUSTICE WATFORD: Okay, I mean, yeah, I
16 hear you. That's your position, okay.

17 MR. HAAG: That's our position, Your
18 Honor. I think we -- we also have a political
19 question here under the first Baker standard because
20 of the -- again, the nature of -- the bilateral nature
21 of the agreement, the high level nature of the
22 agreement. We're talking about an agreement that's
23 been negotiated and endorsed by presidents and
24 secretaries of state and prime ministers and
25 secretaries of defense, defense ministers in Japan.

1 I think those are the -- we have
2 addressed the main points that I wanted to address. I
3 don't know if the Court has other questions.

4 JUSTICE MURGUIA: You have nothing else
5 on injunctive relief?

6 MR. HAAG: You know, I just -- I think
7 that the Political Question Doctrine is supposed to be
8 fact specific and case specific, and the facts here,
9 like the facts in *Corrie v Caterpillar* or *Bank Halt* or
10 a few other cases cited in our brief are cases where
11 the Court just doesn't -- shouldn't go. We don't want
12 courts making decisions about whether the Secretary of
13 Defense has to limit the number of flights into an
14 overseas military base.

15 JUSTICE WATFORD: But that's my point,
16 we're not -- that's not what we're being asked to do.
17 We would never -- I agree with you, I don't think the
18 Court would be in a position to compel specific
19 mitigation measures, but that's not the relief that
20 they're seeking. All they're seeking is, in essence,
21 a stay-put order until you finish what Congress has
22 told you -- not you personally, but the Navy or
23 whoever -- to do, right?

24 MR. HAAG: Well, and the Navy's position
25 is it has done much more than would be the number

1 required under Section 402, but any stay-put order
2 interferes with the ability to move forward on this
3 international -- this high level agreement.

4 JUSTICE WATFORD: That's why you may well
5 probably would win, I'll just say that, you probably
6 would win under the four-factor test in Winter, right,
7 because --

8 MR. HAAG: But even -- but even taking --
9 I mean, this case -- this case has been pending since
10 2003, and we were bottled up in the District Court for
11 five years because Judge Patel declined to issue a
12 final order and then administratively closed the case.
13 So this has gone on for a very long time. In 2003
14 when CBD first came into Court, there was a failure to
15 act claim. The Secretary had not taken any action
16 under Section 402. Between 2008 and the present, the
17 Secretary has done all that. CBD is not content to
18 take yes for an answer, and now they come back and
19 they say, well, you did it, but we don't like the way
20 you do it and now you have to follow all these
21 procedural requirements that are not in the statute.

22 So we've had an awful lot of delay and an
23 awful lot of cloud hanging over the ability to move
24 forward on this project. It's a matter of intense
25 concern to the government of Japan, to the local

1 governments in Okinawa. It's been highly contentious
2 there, and the ability to move forward is critical.

3 JUSTICE WATFORD: That would be maybe a
4 good reason for Congress to exempt certain projects
5 like this one from the scope of the act, but it
6 hasn't, so -- I mean, I don't think the Department of
7 Defense can claim some immunity from congressional
8 regulation in this area, or at least it can, but
9 that's, again, not the question that's before us.

10 MR. HAAG: Well, I mean, that's precisely
11 what the Political Question Doctrine is intended to
12 address. This is not a situation like --

13 JUSTICE WATFORD: But it's not what the
14 Political Question Doctrine is designed to address.
15 If you wanted to argue that Congress doesn't have the
16 authority to intrude into this area of executive
17 branch's military and foreign policy areas, that's
18 just a straight Constitutional question, just like in
19 Suvutowski [phonetic], right?

20 MR. HAAG: Right, well, but I guess
21 that's my point, Your Honor. This is not a case like
22 Suvutowski where there is -- there's a flat out
23 conflict between the executive branch and Congress.
24 Congress says you must allow a citizen to request
25 (inaudible) to be listed on their passport, the

1 executive says, we're not going to do that because we
2 think that's bad foreign policy. At that point the
3 Court needs to weigh in to resolve the international
4 dispute.

5 Here you have the slimmest of
6 instructions, take into account. Congress has been
7 intimately involved in the process of this base -- in
8 this base realignment process to authorize funds for
9 moving service members to Guam to be able to then move
10 the rest of the operations from Futenma to Camp Schwab
11 to accommodate the Japanese who are -- feel
12 overburdened by the number of bases in Okinawa, so
13 Congress is involved in this whole process too, and
14 they have not expressed any discomfort with the
15 Secretary of Defense's compliance with the National
16 Historic Preservation Act here or suggested that
17 something else needs to be done in order for this
18 project to go forward, and they have the opportunity
19 to do that because of their role in the realignment
20 process. So the need for the Court to weigh in in an
21 area of foreign policy and national security is much
22 less than it would have been -- than it was in
23 Suvutowski.

24 I see that my time has expired.

25 JUSTICE MURGUIA: Thank you.

1 MR. HAAG: Thank you.

2 JUSTICE MURGUIA: I'll give you two
3 minutes.

4 MS. BURT: Thank you, Your Honor. I
5 really just have three very brief points. I'd like to
6 start with the suggestion that the National Historic
7 Preservation Act does not grant Plaintiffs any
8 procedural rights that's counter to this Court's
9 holding in *Tyler versus Cuomo*, and that case is
10 discussed in the brief, but it makes clear that the
11 statute does convey procedural rights.

12 Second point, on *Salmon Spawning versus*
13 *Gutierrez*, I'm sure you'll have noticed that both
14 parties in both *Salmon Spawning* -- and I just wanted
15 to focus in on that disagreement, which is the
16 question of which of those three claims is the best
17 analogue for the National Historic Preservation Act
18 claim, and the Department of Defense says it's the
19 first claim. And I wanted to point out why the first
20 claim is different from our National Historic
21 Preservation Act claim, and that is because that first
22 claim was an Endangered Species Act claim. It was a
23 challenge to a no jeopardy finding in a biological
24 opinion, which authorized the Pacific salmon treaty.

25 Unlike the National Historic Preservation

1 Act, the Endangered Species Act is outcome
2 determinative, and that claim regarding the buyout
3 that authorized entry into the treaty was backward
4 looking.

5 Our National Historic Preservation Act
6 claim, like the third claim in Salmon Spawning, which
7 was a claim about the obligation to reinitiate
8 consultation, is prospective. We are asking the
9 Department of Defense to go through the
10 take-into-account process and consider steps that it
11 might take going forward that could avoid or mitigate
12 any adverse effects. And the Court made very clear
13 that it is uncertain whether reinitiation will
14 ultimately benefit the groups, does not undermine
15 their standing, which is the situation we are in here.

16 Lastly, on the question of Suvutowski and
17 the Political Question Doctrine. I just wanted to --
18 my time is up, but I wanted to focus the Court's
19 attention on the political question is about whether
20 the issue, the underlying issue involves the Court in
21 a policy determination, and here it does not. And I
22 would refer you to our briefs, because we discuss that
23 in our briefs.

24 JUSTICE MURGUIA: Thank you very much.
25 Thank you both, Ms. Burt and Mr. Haag, for your very

1 helpful presentations here today on this very
2 challenging case. The *Center For Biological Diversity*
3 *versus Ashton Carter and U.S. Department of Defense*
4 case is now submitted.

5 That concludes our docket for this
6 morning. We'll be adjourned. Thank you all very
7 much.

8 (End of videotaped proceedings.)

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C E R T I F I C A T E

I, Jessica R. Perry, Certified Shorthand Reporter for the State of Hawaii, hereby certify that the videotaped proceedings were transcribed by me in machine shorthand and thereafter reduced to typewritten form; that the foregoing represents to the best of my ability, a true and correct transcript of the videotaped proceedings had in the foregoing matter.

I further certify that I am not attorney for any of the parties hereto, nor in any way concerned with the cause.

DATED this 24th day of March, 2017, in Honolulu, Hawaii.

Jessica R. Perry, CSR, RPR
Hawaii CSR #404