

In my Monday [post](#), I raised the possibility that the Administration would invoke national security to allow oil companies to push whales, sea turtles, and other species in the Gulf of Mexico toward extinction. That would involve using an obscure provision of the Endangered Species Act (ESA), that's never been used before. I really hoped I was wrong, but you can usually count on the Trump Administration to pick the most environmentally destructive option. That's what they've done here.

According to a [DOJ filing](#), "[o]n March 13, 2026, the Secretary of War notified the Secretary of the Interior that the Secretary of War found it necessary for reasons of national security to exempt from the ESA's requirements all Gulf of America oil and gas exploration and development activities." It's difficult but not impossible to challenge the government on issues of national security. I want to sketch some possible lines of attack on Hegseth's actions.

By way of background, the Endangered Species Act provides rigorous protections for endangered species, but the statute also contains an escape hatch. It establishes the Endangered Species Committee, which can exempt a proposed action from the statute. Normally, these exemptions require meeting some demanding standards and complying with elaborate procedures. But section 7(j) of the statute says that the Committee must grant an exemption for any agency action "if the Secretary of Defense finds that such exemption is necessary for reasons of national security." My [previous post](#) contains a lot more detail about all of this.

Although my focus is on the legal issues, the political situation is also worth a mention. On the one hand, given the Iran war's impact on gas prices, the public may find "drill, baby, drill" an appealing position right now. On the other hand, the public could associate this with the unpopular war. Killing off whales isn't a particularly appealing look for the oil industry, particularly when the public is aware of how much money Big Oil is raking in due to the war. The politics could matter: imagine a letter-writing campaign by grade school kids who don't want Hegseth and the oil companies to kill whales.

With that as background, here are some possible arguments. In an area without direct precedent, it's hard to be sure how judges might react. I've put asterisks by the arguments that might especially benefit from further development.

Is Hegseth's Action Judicially Reviewable?

I would expect the government to make two arguments against any judicial review of Hegseth's finding that unrestrained drilling in the Gulf is necessary for national security. The first is based on the political question doctrine, which holds that some issues are delegated by the Constitution to another branch of government, not the judiciary. The alternative government argument is that the finding is unreviewable because it is "committed to agency discretion" under the Administrative Procedure Act. Both arguments really come down to the idea that there are no standards for a court to apply because Hegseth has unlimited legal discretion.

This claim is probably strongest in terms of whether Hegseth is factually correct about his national security claim. Even there, courts in recent decisions have seemed willing to require at least some minimum rationality to support a national security decision. On the other hand, it doesn't seem to apply as much to statutory arguments or procedural ones. If Hegseth's finding falls outside the bounds of the statute, or if either he or the Endangered Species Committee has not followed required procedures, then his exemption request lacks legal force and cannot trigger the Committee's duty to issue an exemption.

Hegseth's current action shows the danger of disallowing judicial review. Today the exemption is claimed for one industry in one area. Tomorrow, it could be another industry nationwide, or a waiver for all activity in certain parts of the country. In the absence of judicial review, this would essentially make the application of the Endangered Species Act depend on the whims of the Secretary of Defense.

Does Hegseth's Finding Comply with the ESA?

Hegseth's action is unprecedented in the 50+ years that the Endangered Species Act has been on the books, so we're only beginning to think about the potential litigation issues. But here are some arguments that are worth considering:

A High Threshold for "Necessity." The exemption must not only support national security but must be "necessary." Given the high priority that the statute gives to protecting endangered species, this suggests that the Secretary must specifically find that there is no feasible alternative way of protecting national security. That seems unlikely in this case since there are lots of places where we could expand drilling.

A Possible Nexus Requirement. It seems notable that the statute designates the Secretary of Defense, not the President, to make the national security finding.

This could suggest that Congress contemplated national security issues with direct ties to military operations rather than general issues that would be more in the President's domain. (Thus, where the statute says "any agency action," this might mean any agency action regarding a military activity.) Otherwise, why wouldn't the President rather than the Defense Department be charged with making the decision?

***Limitation to Specific Actions.** The statute provides for the Committee to grant exemptions only for specific proposed actions. Section 7(j) says that the Secretary of Defense can demand an exemption for an "action." This can be read to refer to pending agency actions, not future actions (particularly those that have not even been proposed as yet.) The exemption requested by the Secretary seems to go beyond any specific action now pending before the Interior Department. It also seems to involve a permanent exemption for future actions, which may go beyond the statute.

***The Major Questions Doctrine.** As with the statute that the Court considered in its recent tariff ruling, the Endangered Species Act contains elaborate procedures and restrictions on exemptions. If the statute is interpreted as broadly as the Administration claims, there would be no limit on the Administration's ability to grant itself exemptions. Trump's executive orders have already made national security claims about AI, mining, and expansion of fossil fuels — and even, in the case of one tariff action, for the furniture industry. Justice Scalia said once that Congress does not hide elephants in mouseholes, and this unprecedented use of § 7(j) seems to fit that description.

This argument is particularly strong because two of the important Supreme Court cases applying the major questions doctrine were rather similar to Hegseth's freewheeling use of the ESA exemption. The two cases ([Nebraska v. Biden](#) and [MCI v. ATT](#)) blocked agency efforts to use general language about waiving or modifying statutory rules to carve huge holes in statutory requirements. Similarly, here, Hegseth is trying to use a power to exempt specific proposed agency actions into a broad tool for removing a whole region from the statute's coverage.

Claims Involving Other Statutes.

NEPA. NEPA does not contain a national security exception. Hegseth's action seems to be a major federal action significantly impacting the environment. This raises the question of whether an environmental impact statement was required.

The Department of the Interior did do an impact statement on Gulf oil drilling, but it may or may not have covered the sweeping exemption of all current and future activities that Hegseth seems to be demanding. Given the Supreme Court's antipathy to NEPA, I'm a dubious about whether this argument would succeed, but that doesn't mean that it's wrong.

Administrative Procedure Act (procedure). Depending on the phrasing, Hegseth's finding might not fall under an exemption from rulemaking procedures covering military and foreign affairs functions. If not, he would presumably claim that there was "good cause" not to delay his action until a full-blown notice and comment process was complete. However, this might not justify refusal to allow notice and comments after the fact, using an interim final rule.

****Administrative Procedure Act (substance).*** Regardless of the procedural issues, Hegseth's action should be reviewable under the APA's "arbitrary and capricious" standard, which would make it possible to argue that his analysis left out some crucial factor or considered a factor not authorized by law (that is, something that didn't really relate to national security). No doubt a court would be deferential in applying this analysis, given that national security is involved, but Hegseth shouldn't get a free ride. Judging by DOJ's description, his demand for an exemption seems to go well beyond any concrete national security need.

****Mitigation Measures.*** Section 7(j) gives the Committee no option but issuing an exemption, assuming that Hegseth's request was legally valid. However, under section 7(h), an order granting an exemption must contain mitigation measures that are "necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned." Hegseth's finding (if valid) requires the Committee to issue an exemption, but it may not override this provision.

The text of the statute says that Hegseth may demand an exemption, but under the statute, the decision on mitigation measures seems to be separate from the decision on whether to grant an exception. Congress could have said that the Committee must issue an exemption "on the terms and conditions proposed by the Secretary." It didn't say that. If the Committee does still have the duty to consider mitigation, additional proceedings would be needed to consider the scope of any mitigation measures.

In short, Hegseth's use of the § 7(j) exemption is a bold, aggressive move, much like the decision to go to war against Iran. As with the war itself, however, the legal and political aftermath may prove a lot messier than the Administration is anticipating.