DIALOGUE

GAS, THE GULF, AND THE "GOD SQUAD"

SUMMARY

On March 31, 2026, the federal government convened a high-level meeting of the Endangered Species Committee (known as the "God Squad"), the first in over 30 years. Citing the Secretary of Defense's finding that the Endangered Species Act (ESA) threatens national security by hindering Gulf of Mexico oil and gas exploration, the committee exempted all such activity across the Gulf from ESA protections. The action was immediately challenged in court, with multiple lawsuits alleging deficiencies in both the procedure and substance of the committee's decision, and there is immediate concern about impacts on species such as the Rice's whale. On April 23, 2026, the Environmental Law Institute hosted a panel of leading experts in the ESA, energy law, and national security law to discuss these breaking developments and the legal issues and interests at stake. Below, we present a transcript of that discussion, which has been edited for style, clarity, and space considerations.

Madison Calhoun is Senior Manager of Educational Programs at the Environmental Law Institute.
Rebecca Bratspies (moderator) is the Oliver Houck Chair in Environmental Law at Tulane University Law School.
Pat Parenteau is a Professor of Law Emeritus at Vermont Law School.
Mark Nevitt is an Associate Professor of Law at Emory University School of Law.
Chinonso Anozie is an Assistant Professor of Law at the University of Houston Law Center.

Madison Calhoun: Welcome to the Environmental Law Institute's breaking news webinar on gas, the Gulf, and the "God Squad." Our moderator is Rebecca Bratspies, the Oliver Houck Chair in Environmental Law at Tulane University Law School. We have three wonderful panelists joining her: Chinonso Anozie, who is an assistant professor at the University of Houston Law Center; Pat Parenteau, who is an emeritus professor at Vermont Law School; and Mark Nevitt, who is an associate professor at Emory University School of Law. Rebecca, I will turn things over to you.

Rebecca Bratspies: We're going to start with questions for each of our panelists, then we'll have a discussion and take questions from the audience. I'm going to start with Pat. Section 7 of the Endangered Species Act (ESA)[1] directs federal agencies to conserve threatened and endangered species and to limit the harmful effects on listed species or their critical habitats. Can you give us an overview of the Endangered Species Committee, the so-called God Squad, and the purpose it's intended to serve in the statute?

Pat Parenteau: This all results from the seminal decision by the U.S. Supreme Court in *Tennessee Valley Authority v. Hill*,[2] the Tellico Dam case in which Chief Justice Warren Burger said that ESA §7—the prohibition on agency actions that would jeopardize the continued existence of listed species—admits of no exception, and basically strips the courts of any equitable power they might otherwise have to balance off economic interest versus the interest of the species in habitat preservation.

Burger basically said: "Congress, you created this situation. You're going to have to fix the problem that actions like Tellico Dam, which was 90% complete at the time the case was argued, cannot be completed given the statutory prohibition." The Court said it's up to the U.S. Congress to figure out how to resolve conflicts between endangered species preservation and other federal actions.

So, Congress amended the statute in 1978[3] to create this whole elaborate, baroque really, exemption process. It's all laid out in §7, starting with §7(g) through (h) and then all the way down to (p). The Endangered Species Committee is a cabinet-level body of six senior federal officials. The Secretary of the Interior is the chair of the committee and is empowered to convene the committee to consider applications for exemptions.

It takes a vote of five members of the committee to grant an exemption. There are two different pathways to

1. 16 U.S.C. §1536.

2. 437 U.S. 153 (1978).
3. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751.

exemption. One is under §7(h), which is the conventional pathway, but there's also a specific provision in §7(j) that authorizes the Secretary of Defense to basically request, or demand really, an exemption based on national security implications. That's obviously the focus of the current impaneling of the Endangered Species Committee.

But the point about the exemption process—I was there, so to speak, and I've been the lawyer that's been involved in every single committee proceeding that's occurred since then—was that this was a last-resort mechanism after every opportunity and effort had been expended to avoid jeopardy and to find measures that would accommodate the action under scrutiny but also protect the endangered species.

It was limited to irreconcilable conflicts where there was really no other way other than deciding between the fate of a particular species and the progress of the federal action in question. It was that kind of situation that the exemption process was designed to address. It was designed to force agencies to make every possible effort they could to avoid both the need for an exemption and the potential extinction of a species.

Rebecca Bratspies: We're going to come back and talk in more detail about this particular meeting and what happened there, but first I'd like to ask Mark: Military necessity and national defense are words that have some content, right? They're not just phrases. Can you give us an idea of what the term typically means or at least what it meant in the past compared to how it was used here?

Mark Nevitt: It's a great fundamental question. It might be helpful for me to read §7(j), which is the focus of our discussion: "Notwithstanding any other provision of this chapter, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security."[4]

There are three key words doing a lot of work here. The first word is "shall," which is a mandatory grant of an exemption. The second word is "necessary," and the third is "national security." It is hard to put the term "necessary" or "necessity" into any particular legal bucket, even though it's a common term used throughout American law. The term "necessity" is used in the law of armed conflict, criminal law, and tort law.

People have heard of public necessity. This is not really an easy "plug and play" into any body of law. It's really a national security necessity. The closest analogy may be a similar phrase that the Supreme Court considered in *Winter v. Natural Resources Defense Council*,[5] which relates to the Marine Mammal Protection Act (MMPA),[6] which exempts any action or category from the Act if those actions are "necessary for national defense."[7]

In that context, there was a lot of discussion and affidavits from naval officers who said, look, we actually need this training. We need to use this sonar to ensure the combat effectiveness of strike groups in certain operating areas, relying upon affidavits and sworn statements to examine what, in fact, was necessary. It's a fact-based determination, I think. That's the closest Supreme Court case that we can glom onto or anchor to.

The term "necessary" is not defined in the statute, unfortunately. Of course, you can turn to *Webster's Dictionary*. Those definitions are pretty strict. There, one of the leading definitions of "necessary" means "absolutely needed" or "indispensable."[8]

But let me say a few other words about why this §7(j) invocation[9] is so extraordinary. First, many in the audience know that this is the first time this has ever been invoked using this particular vision of the ESA, which is a very, very powerful protective statute of endangered and threatened species. I'll note that this is a broader invocation of national security and a broader invocation of emergency powers from this particular administration.

You're seeing this in Donald Trump's invocation of an energy "emergency," tariffs, and more widespread emergency invocations throughout policymaking and decisionmaking. I think it's important to think of this in that broader political context—tapping into these national security exemptions that are baked into existing statutes.

The term "national security" is another really important and very, very broad term. The ESA doesn't define it clearly. In fact, it doesn't define it at all. It's defined, broadly, within the *U.S. Code* as "the national defense and foreign relations of the United States."[10] The limited definition the Supreme Court has laid out discussing national security was used in the 1950s and 1960s: "the term 'national security' is used in the Act in a definite and limited sense, and relates only to those activities which are directly concerned with the Nation's safety, as distinguished from the general welfare."[11] So, we don't have a lot to go on. We have *Winter*, the dictionary, and some Supreme Court rulings on these key terms, so we're in uncharted territory.

The last point I want to make is what is unique about this national security finding.[12] If you read the finding, it's pretty broad. It is making three or four different arguments as to why this exemption is needed for national security. It starts with the need for energy independence. Extraction

4. 16 U.S.C. §1536(j).
5. 555 U.S. 7 (2008).
6. 16 U.S.C. §§1361 et seq.
7. *Id.* §1371(f).

8. Merriam-Webster, *Necessary*, https://www.merriam-webster.com/dictionary/necessary (last visited May 12, 2026).
9. Memorandum from Pete Hegseth, Secretary of War, to Doug Burgum, Secretary of Interior (Mar. 13, 2026), https://www.doi.gov/sites/default/files/documents/2026-03/act-exemption-osd070136-26-res-final.pdf (requesting, pursuant to ESA §7(j), that Secretary Doug Burgum convene a meeting of the Endangered Species Committee to grant, pursuant to ESA §7(h), an exemption for Gulf oil and gas activities for reasons of national security).
10. 10 U.S.C. §801(16).
11. Cole v. Young, 351 U.S. 536, 543 (1956).
12. Memorandum from Pete Hegseth, *supra* note 9; Endangered Species Committee, 91 Fed. Reg. 16966 (Apr. 3, 2026) (exempting under ESA §7(h) Gulf of America oil and gas activities, including avoidance or minimization measures described in the National Marine Fisheries Service's (NMFS') 2025 biological opinion and in the U.S. Fish and Wildlife Service's (FWS') 2018 and 2025 consultation decisions).

of energy resources is needed to support operations and readiness. There's sort of a broader disruption in the supply chain. But this is a somewhat problematic argument.

There's more of a macroeconomic argument, particularly because the Secretary himself has said that the United States does not rely upon oil supplies largely from the Strait of Hormuz. We know that the United States is a large energy extractor. So that's just the leading argument, I think, from the national security finding.

A couple of arguments that are made are sort of litigation risk. There's a litigation risk that essentially the prior biological opinion would be vacated. We all know that the U.S. Department of Defense (DOD) is a co-equal federal agency and the Administrative Procedure Act (APA) does provide for judicial review of all agencies. My sense is that the Administration is going to argue a political question or other components that this is not necessarily reviewable, but I think that this is reviewable under the APA.

The last thing that the national security finding mentions is that there's a diversion of federal resources away from the core military mission. There's not a tangible, explicit, particularized impact on training and readiness, which is what you saw in *Winter*, where there were affidavits and statements from the U.S. Navy and senior naval officers saying, look, we need to use this acoustic sonar because we need to train like we fight in a combat-type environment; and here's all the different ways that we need to use this acoustic sonar; and here's how not being able to use that acoustic sonar will impact our military readiness and operations.

This is quite different, relying upon economic security—the litigation, risk, and diversion of federal resources. Whether or not that's a winning argument, we will see. But I do note that with national security, despite being sort of a broadly defined term, courts have shown a willingness not to give a blank check to the Pentagon in other contracts, such as renewable energy development and offshore wind. I think that the Supreme Court or any federal court is going to be looking at what are the tangible, particularized harms—concrete harms—that are impacted here.

I'll stop there, but these terms are not defined in the ESA. This is the first time this §7(j) invocation has ever been invoked. This national security finding is remarkably broad, in my view, relying upon economic security as its primary argument.

Rebecca Bratspies: Thank you for that, and thank you for drawing attention to the fact-based nature of this inquiry. We're definitely going to come back to that. But having talked a little bit about the statute and the committee itself and about the national security rationale, I want to turn to Chinonso and talk about oil exploration in the Gulf.

Oil exploration has been increasing. It's been up every year for the past few years, and it's expected to increase this year as well. The United States is a net exporter of oil and has been increasing exports. Is there any evidence that oil extraction is being hindered in the Gulf?

Chinonso Anozie: The short answer is no. There is no evidence that there is any hindrance when it comes to oil exploration in the Gulf. Like you rightly mentioned, we have been dramatically increasing our oil exploration in the Gulf since 2024. As of now, we're at about 1.8 million barrels per day.[13] This information is from the Energy Information Administration (EIA). That's their focus for this year. In 2024, we were at about 1.7 million barrels per day.[14]

There has been a dramatic increase over the last three or four years, so we have adequate domestic supply. The domestic supply picture is clearly the opposite of scarcity. Even on the global level, EIA projects global oil supply will exceed demand by an average of 3.84 million barrels per day throughout 2026.[15] So, there is nothing hindering oil exploration in the Gulf. As of this year, there are some oil wells that are opening. Multinational companies have been drilling more oil wells. That's what's been increasing oil exploration in the Gulf.

But one can also say that there is at least some decline in onshore production. That decline is a result of low prices. But that is offset by the increase in the Gulf over the years. So there might be a spike in oil price, but it's a geopolitical issue, not an issue of scarcity of supply. There is nothing showing that there's been a decrease or a hindrance in oil exploration in the Gulf.

I also want to make the point that even assuming without considering that there is this energy emergency or we lack independence in energy production, which facts show that the current exemption does not do anything in the short run because this exemption is going to allow oil companies to explore and also open new wells that are probably not close to the current wells that are being drilled, it would take at least two to three years for new oil platforms to come on board. So, to what extent is that going to help the current issues about energy emergency? I don't think that that energy emergency—the facts surrounding that or underlying that—is really sufficient to justify this exemption.

For example, one of the new oil wells that is coming on board is going to explore in deep well water resources. You can drill in formations that have about 20,000 pounds pressure per square inch. So, it is about opening up new oil wells. It has nothing to do with the current production that we have because we have been dramatically increasing over the last two, three, four years.

Rebecca Bratspies: Let's turn our attention to the meeting that happened last Tuesday. When the committee met about the spotted owl in the 1990s, there was a four-week hearing. It involved multiple experts testifying about statistical models. There was a tremendous amount of informa-

13. *Onshore Crude Oil Production on Federal Lands Has Increased in Recent Years*, Energy Info. Admin. (July 28, 2025), https://www.eia.gov/todayinenergy/detail.php?id=65804.
14. *Id.*
15. International Energy Agency, Oil Market Report 4 (2025), https://www.iea.org/reports/oil-market-report-december-2025.

tion and data. One of the things that Mark told us was that national security is a fact-based determination.

The meeting last Tuesday lasted 16 minutes, and there were no outside experts. I will also add that I didn't hear any mention of past oil spills and the damage those did to the ecosystem and to the endangered species, let alone to human interests like the seafood industry, tourism, and human health. I didn't even hear any mention of the endangered species whose fate was being decided.

My question for all three of you is, how do you think those differences are going to play out in the litigation that's already being filed, and more importantly, how does that play out in terms of the integrity of this process?

Pat Parenteau: One of the confusing elements with what the committee has done is they have granted this exemption at the request of Secretary Pete Hegseth under §7(h) even though the national security exemption provision is §7(j). The problem is that §7(h) lays out a very intricate series of steps that must be followed, including an adjudicatory hearing before an administrative law judge. That was what happened in the spotted owl case where I was special counsel to the U.S. Fish and Wildlife Service.[16] I was the owl's lawyer in effect. It was an extensive trial-type hearing with rules of evidence, ex parte limits on communication, and so on.

None of that was done here. Section 7(h) lays out requirements for good-faith consultation, a serious effort to develop alternatives to avoid jeopardy, no commitment of resources that would prejudice the biological opinion or the ultimate decision of the committee, and so on.

None of the steps laid out in §7(h) have been done and, when it comes to §7(j), there are no specific steps other than the Secretary of Defense requesting an exemption that the committee is obligated to grant. So, the problem with evaluating this decision is that it's invoking one provision of the exemption process. It's not following the requirements of that provision, but it's actually granting an exemption, without any conditions, without any stipulations, without any analysis, merely upon the assertion of the Secretary of Defense that national security demands it.

As Mark said, this is certainly new territory. None of the exemption processes that precede it have anything to offer in the way of precedent other than to say that this is not the normal way in which exemptions have been considered and granted.

Ultimately, the issue here boils down to this: there is no violation of §7 as we sit here today and no prospect of a violation of §7. Certainly not a substantive violation such as occurred in the Tellico Dam case where there was a stipulation—which turned out to be wrong—that if you close the gates on the dam, the snail darter goes extinct.[17]

We don't have anything like that here. We don't even have a violation of §7. The only biological opinion with a jeopardy finding we have is on the Rice's whale, a critically endangered whale species with only about 50 or so individuals in the Gulf. But the National Oceanic and Atmospheric Administration (NOAA), which revised the biological opinion as recently as May 2025, concluded that there would be jeopardy to the species primarily from vessel strikes, which is the leading cause of mortality for Rice's whale and right whale and other marine mammals.[18]

But, said NOAA, you can avoid that jeopardy risk by keeping a sharp lookout for whales using sonar and other kinds of electronic and technical devices. When you've determined that there are whales in the vicinity of vessel traffic—and there's a lot of vessel traffic in the Gulf—you need to slow down. So, it's basically a "don't run over the whales" kind of safeguard. Pretty modest, maybe not even adequate, but that was NOAA's conclusion.

The statute is clear. Where there's a "reasonable and prudent alternative" that avoids jeopardy, there is no basis for an exemption. No predicate for an exemption. That's the setup we have. We can talk a little later about where this gets resolved. Which court has jurisdiction? What are the standards that should be used to review both the decision to grant the exemption and Hegseth's decision that national security is implicated here?

Mark Nevitt: Very eloquently said, Pat. I'll just offer that this comes down to a statutory interpretation question: how §7(h) relates to §7(j). Section 7(j) is outside of the §7(h) provisions. My understanding is that the Administration views take §7(j) pretty literally: "The committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security."[19]

My sense is that the so-called God Squad, the environmental committee, views itself as bound by the national security determination. The God Squad apparently believes that the more elaborate procedures that are baked into §7(h) are not important for a national security determination. But again, this is the first time this relationship between §7(h) and §7(j) has been tested, so we'll see how it all plays out. I'll note that I have worked with a lot of national security exemptions throughout my scholarship and my legal career—this is a pretty short 26 words and broad exemption baked into the ESA.[20]

Chinonso Anozie: I will approach it from the oil and gas aspect and look at what happened before. With more exploration in the Gulf, we are reminded about the past accidents that happened there. For example, the *Deepwater Horizon* oil spill. It's not a hypothetical. It's empirical

16. Ethan Rarick, *Owl Versus Logging Hearing Opens*, UPI (Jan. 8, 1992), https://www.upi.com/Archives/1992/01/08/Owl-versus-logging-hearing-opens/2761694846800/.
17. Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978).
18. National Marine Fisheries Service Endangered Species Act Section 7 Biological and Conference Opinion on Bureau of Ocean Energy Management and Bureau of Safety and Environmental Enforcement's Oil and Gas Program Activities in the Gulf of America (2025) (OPR-2022-03526), https://repository.library.noaa.gov/view/noaa/71211 [hereinafter NMFS 2025 Biological Opinion].
19. 16 U.S.C. §1536(j).
20. Mark Nevitt, *Defending the Environment: A Mission for the World's Militaries*, 36 Haw. L. Rev. 27 (2014).

proof of what's going to happen when proper mitigation measures and controls are not put in place before we start drilling. With *Deepwater Horizon*, NOAA was still looking at, as far back as 2023, analyzing samples to look at the impact it still has on marine life.[21]

I also think that this decision externalizes the risk and the cost to other communities and wildlife especially, and also the frontline communities. In situations like this, it's always very important to look at mitigation measures instead of using the national security exemption to grant this widespread oil and gas drilling license to companies.

Rebecca Bratspies: We do have a clarifying question from the audience, about the relationship between §7(j) and §7(h): The request was a §7(j) request, and the relief that was granted was a §7(h) relief. Can you do that? Can you invoke national security without any detailed or specific fact-based justification in order to get a broad exemption under §7(h)?

Pat Parenteau: That's a very good, astute question, and we don't have any answers to that right now. The legislative history of the 1978 amendments creating the exemption process makes it very clear that the national security exemption was added at the last minute in the conference report.[22] Typical, right? The managers from the U.S. House of Representatives, led by Ed Forsythe (R-N.J.), issued a statement to make it clear, once the conference report had been approved, that this exemption on national security was limited to interference with military readiness and military operations. It wasn't simply an economic security rationale, which Mark has described. It was something much narrower than that.

The concern was that you could have a situation where a jeopardy determination resulting in an absolute bar to some form of military operation or military installation could create a real problem. It was that situation that the §7(j) exemption was designed for. But history also makes clear that that determination is subject, as Mark said, to judicial review under the APA, but there is a question about which court has jurisdiction.

At least six lawsuits have been filed, some in the U.S. District Court for the District of Columbia (D.C.), and some in the U.S. Court of Appeals for the D.C. Circuit. In an effort to hedge its bets, the Natural Resources Defense Council filed in both courts simultaneously.[23] So right away, we see that the way that the committee has conflated §7(j) and §7(h) is creating questions about which court has jurisdiction.

Mark Nevitt: It's a great question. I think if you're a plaintiff, you'll focus on the first few words of §7(j), which says "notwithstanding any other provision of this chapter," by saying, that's our statutory hook into §7(h). There has to be some kind of deliberation. It's not a complete blank check.

If you are the Secretary of Defense or "Secretary of War," you're focusing on the latter part of that language, saying the committee *shall grant* an exemption. The Secretary would argue that the committee itself lacks discretion in second-guessing his national security finding. The Secretary of Defense is in charge of the national security and defense of our nation. So, that's how that'll play out. I don't know how it will ultimately cash out, but I think that is a question of statutory interpretation that we'll see.

Rebecca Bratspies: Let's talk about who and what gets lost in this agency action. Let's talk about both the Rice's whale and the other endangered species, but also about the Gulf of Mexico as an ecosystem and as an economic driver for other things besides oil and gas.

Chinonso Anozie: What gets lost, first of all, is the wildlife. That's the most important thing. The endangered species are the ones that are going to suffer because the goal of the ESA and the current biological opinion is to have mitigation measures in place to protect wildlife—the whales and other endangered species—in the Gulf. This national security exemption arguably eliminates all those preexisting mitigation measures. I don't know to what extent they will be able to still rely on the previous 2025 biological opinion.

Secondly, you want to think about the frontline and coastal communities. They are the ones who are going to get some of this risk and some of the cost of this drilling. With the externalities that come from a number of these drilling operations, you want to think about the impacts. These are people who historically have been disproportionately impacted by a lot of these activities, so that raises another significant question as to how this would impact them going forward. You also want to think about the fishermen and the fishing communities. Expanded drilling in the Gulf brings up challenges for a number of those fishing communities and for being able to continue with their activities.

I want to also make the point that this creates a sort of path dependency. If we can use the national security exemption to circumvent some of these ESA mitigation measures, it might create a precedent that this is now the norm—that we have to keep doing this every other time in order to circumvent the provisions of the ESA. I see that as a race to the bottom to what's going to happen going forward in terms of protection of wildlife and protection of endangered species.

Mark talked earlier about the reasons behind the national security exemption, which is the energy independence factor. But that may be a pretext for more drilling in the Gulf. I think there's at least some lack of transparency as to what is going on and that might create institutional mistrust—that when some of these opinions come

21. *Deepwater Horizon 2023 Gulf of Mexico Deep Sea Expedition Season, By the Numbers*, Nat'l Ctrs. for Coastal Ocean Sci. (Mar. 20, 2024), https://coastalscience.noaa.gov/news/deepwater-horizon-2023-gulf-of-mexico-deep-sea-expedition-season-by-the-numbers/.
22. H. Rep. No. 95-1804 (1978) (Conf. Rep.).
23. Complaint for Vacatur and Declaratory Judgment, Natural Res. Def. Council v. Burgum, No. 1:26-cv-1116 (D.D.C. Apr. 1, 2026); Petition for Review, Natural Res. Def. Council v. Burgum, No. 26-1079 (D.C. Cir. Apr. 3, 2026).

out from agencies, people begin to doubt them. In the long run, this could mean increased litigation because people do not have trust in the ESA protecting them or in the agencies and the decisions they make.

So, I think there are a number of things that are getting lost here. I don't know to what extent that would impact how we protect endangered species and frontline communities going forward.

Rebecca Bratspies: I think both you and Mark are directing our attention to the fact that this is not a situation where the military or the Secretary of Defense is saying the military needs to do something. Instead, the Secretary is saying private actors pursuing economic activities need to be free from these ESA reasonable and prudent alternatives. That's an important difference that I think we want to make sure that we name and put explicitly on the table.

Mark, do you want to talk a little bit more about the difference between this and *Winter*?

Mark Nevitt: *Winter* has always been an important case for temporary injunctions throughout civil litigation, but it's a really important case—probably the most important case—to see how this litigation will play out because the MMPA is a very, very analogous statutory provision for national security exemption.

When you read *Winter*, what strikes me is the importance Chief Justice John Roberts placed on how the particularized affidavits and all the different naval officer impacts that limit this acoustic sonar would have on training—here are the specific exercises that were affected; here are the platforms; here are the units that just cannot train adequately; here are the lost training days; here is the specific military readiness degradation that would result; here's why no alternative would substitute.[24] And by the way, the Navy was doing pretty good work on placing mitigating measures to protect marine mammals.

Essentially, the Supreme Court is saying, look, this is really, really important for training for readiness. How do I know that? Because we have a voluminous administrative record from Navy officers telling me this. The Court clearly thought "I'm not a naval officer, and I'm going to give some degree of deference when they say that now" compared to the national security finding that Hegseth put forward in a §7(j) finding.

To be clear, this is a security finding. There may be more with litigation. So, I don't want to get too far ahead of myself on this. But there's absolutely no identification of what military units or platforms are fuel-constrained. We have submarines that are nuclear-powered. We have aircraft carriers that are nuclear-powered. But military aircraft *do rely* upon refined JP-5, the JP-8 aviation fuel that is derived from crude oil. There's nothing in there that makes that connection between the aviation fuel storage and what's happening in the Gulf.

There's no operational scenario listed in the national security finding about which species are being protected that would actually impede a specific military mission. There's no geographic nexus between the listed species or habitat and any military installation or training range. We think that if there's going to be more extraction of oil and gas, there's going to be more vessels, more impact on the endangered species.

The energy independence rationale, which is the leading rationale as I see it in the security finding, is way too macroeconomic. Not operational. It's more generalized. All of this to say, we have more to follow. I don't want to get too far ahead of myself. I think it'll be really important for any federal court to look at the no-kidding operational readiness risks associated with the granting of this §7(j) exemption. They'll be looking a lot to *Winter* as their guide.

Rebecca Bratspies: We have a lot of questions coming in, but I want to make sure we take a step back and talk about the May 2025 biological opinion[25] that we're tossing around here because that was the result of litigation challenging the failure to protect endangered species in the Gulf. I think it's important to understand the trajectory in order to really appreciate the consequences of last week's decision. Pat, how did we get to this May 2025 biological opinion saying "don't run over whales"?

Pat Parenteau: This biological opinion was the result of a challenge brought by a coalition of environmental groups who succeeded in getting a judicial opinion that the prior biological opinion was inadequate. It didn't consider, for example, the oil spill risk that Chinonso was talking about and the fact that the *Deepwater Horizon* spill wiped out one-fifth of the Rice's whale population with one event.

That's what resulted in the latest revised biological opinion in May 2025. Truth be told, there is a lawsuit challenging that revised biological opinion.[26] Hegseth is right that there is the possibility and, in fact, the probability that decisions under the ESA and other environmental statutes that apply—NEPA, for example—will occur and are occurring.

But the idea that the 95th Congress in 1978 created an exemption process to prevent environmental litigation that seeks to enforce the requirements of the ESA is frankly absurd. That can't be a rationale for an exemption. If it were, it would swallow the ESA whole. It would mean anytime the Secretary of Defense is concerned about litigation challenging resource allocation with significant economic trade off—oil production, timber production, water allocation, or something else—the Secretary could invoke national security concerns and demand an exemption.

The other thing to keep in mind here is this is the first time we've seen a programmatic exemption. All the other cases involve discrete, site-specific conflicts between, in

24. Winter v. Natural Res. Def. Council, 555 U.S. 7, 25-27 (2008).

25. NMFS 2025 Biological Opinion, *supra* note 18.

26. Complaint for Declaratory and Injunctive Relief, Sierra Club v. National Marine Fisheries Serv., No. 8:25-cv-1627 (D. Md. May 20, 2025).

the case of Tellico Dam, the last dam on the Little Tennessee River and the Grayrocks Dam that would impact the critical habitat of the endangered whooping crane on the Platte River in Nebraska. And of course, with the spotted owl, timber sales on federal lands in the Coast Range of Oregon.[27]

We've never seen a programmatic exemption saying every kind of activity associated with oil and gas development—whether it's exploration, drilling, or vessel traffic—happening in the Gulf is now exempt from the ESA. Worse, §7(h)(2)(A) specifies that exemptions are meant to be permanent and they cover every species that might be involved, even ones that weren't identified in the biological opinion.

So, the scale of what's being proposed here—that an entire marine ecosystem like the Gulf of Mexico could be exempt from the ESA going forward—is startling to say the least. We would hope that the courts do not accept this draconian interpretation.

Rebecca Bratspies: Let's talk about next steps. The meeting was last Tuesday. Multiple lawsuits have already been filed. Where do we think this case is going to be litigated? What standards is the court going to apply to review the request rather than the granting?

If it had been granted under §7(j), I think probably there wouldn't be standards for evaluating the granting because the statute says "shall." But it was granted under §7(h), which is not a mandatory grant. There are so many interesting legal issues here if we take it away from the potentially catastrophic impacts and just think about the full employment for lawyers involved. Where do we think this is going? What do we think are going to be the key issues?

Mark Nevitt: I'll defer to Pat on exactly what lawsuits are being filed, but a few things to look at. One is the initiator of this exemption. We actually don't know. The determination was made several weeks after the March 13th national security finding. It'll be very helpful to know who initiated this "God Squad" exemption as a fundamental matter. Hopefully, that'll come out during discovery. Because first and foremost, if this was initiated not by the Pentagon but by energy leaders or energy executives, that strikes me as pretextual. That strikes me as deeply problematic for the Administration.

If it was initiated by the Pentagon, then that is a totally different factual matter. It's a traditional APA case. I think the Administration may say that this determination is "committed to agency discretion by law" under §701(a)(2) of the APA.[28] They will argue under the APA that this is basically vested in the Administration as a matter of law, so it's not judicially reviewable. I don't think that's going to necessarily hold water. I think you'll have to look at the administrative record, and that's going to work its way through the discovery process.

Getting into the question that I raised earlier about what exactly is the military training—what is the military readiness issue—this is, at the end of the day, a straight administrative law, environmental law, statutory interpretation case, even though the stakes are high and even though it is relatively unusual. In fact, it's a first in its history.

I'll note that the military is a co-equal federal agency under administrative law. You can sue DOD for a wide variety of matters. There are some exemptions for times of war and for foreign affairs baked into the APA, which I do not believe apply here.

So, you can challenge administrative agency actions. I think there's an open question about who is committing the agency action. Is it the Pentagon? Is it the Secretary of the Interior? Is it both? I'll note that the Pentagon is subject to the APA. This is different from the operational military matter that you're seeing in Iran and elsewhere, which is really not part of the APA and not subject to judicial review.

Rebecca Bratspies: I want to add that we have a precedent for discovery on whether there was undue political interference in these kinds of decisions from the *Portland Audubon* case in the 1990s.[29]

Chinonso Anozie: I want to mention two things. There might be a jurisdictional split here in terms of who reviews the ESA—whether the D.C. Circuit will be reviewing the ESA aspect of that or whether we have a district court separately reviewing headsets on the line security determination. Also, to what extent might the court look at their statutory preconditions that are embedded in the ESA?

I don't think there was any specific agency action that the God Squad came in here to exempt. I don't know if there was a completed consultation in line with this widespread national security exemption. That might also be one of the things that the court might be looking at here.

Like Mark mentioned, if there was a new jeopardy determination and a request—a formal request or a formal exemption application—that's also an issue. Who actually made that? From the reports I've seen, I think it was the oil companies or the multinational companies that asked for this, not the Pentagon.

Pat Parenteau: The normal exemption process is triggered by a biological opinion that finds jeopardy for which there's no reasonable and prudent alternative. We don't have that here. And under §7(h), there are a limited number of parties that can apply for an exemption. One is the action agency. Here, it would be the Bureau of Ocean Energy Management (BOEM). Another is the governor of an affected state—you might think Louisiana—but that didn't happen here. The third is a permit or license applicant. The

27. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 156 (1978); Nebraska v. Rural Electrification Admin., 12 E.R.C. 1156 (D. Neb. 1978).
28. 5 U.S.C. §701(a)(2).
29. Portland Audubon Soc'y v. The Endangered Species Comm., 984 F.2d 1534 (9th Cir. 1993).

oil industry is not a permit or license applicant. That's a defined term in the statute.

It looks to me as if this is what happened. President Trump issued an Executive Order last year,[30] in which he essentially said, "I want Secretary of Interior Burgum to convene the Endangered Species Committee on a quarterly basis," sort of like a bridge club. So, it may be that, in part, Doug Burgum was looking at his to-do list and saying, "I need to convene this committee." Then, either the thought occurred to Burgum or maybe Hegseth himself that maybe what they should be doing is considering an exemption based on national security.

I don't know. I'm speculating. Something happened in the background that is not the conventional way in which the exemption process begins. Whether that was Burgum or Hegseth, one or both of those individuals is, I think, the reason for this truncated process with no public involvement and no fact-finding. Instead, what we have is a 15-minute meeting and a unanimous vote to grant the exemption without any discussion of how the ESA is blocking oil and gas development or how it is impacting military operations. The truth is that there is no evidence that the Act is doing anything of the kind.

In the rush to grant the exemption, the committee didn't even make clear that the safeguards for the Rice's whale would be implemented and, if so, how and when. We don't even know if those very limited protections for the Rice's whale—the reasonable and prudent alternatives that NOAA included in the biological opinion—are actually in place today because the committee didn't address it.

All of these issues are going to have to be sorted out by the courts. To Chinonso's point, maybe there's a distinction between which decision you are reviewing. If you're reviewing the §7(h) grant of an exemption, the statute is clear that that's supposed to go to the courts of appeal. The reason for that is because under §7(h) the committee must act on the basis of information developed though a formal adjudicatory record under §553/§554 of the APA, which is what courts of appeal typically review. We don't have that here.

If this is a hybrid kind of exemption being granted under §7(h), which is what the U.S. Department of Justice (DOJ) argued in response to the lawsuit that the Center for Biological Diversity (CBD) filed in trying to stop the exemption committee from even meeting,[31] it failed in that regard. But DOJ came into that case and said, "oh, by the way, CBD, when and if the committee grants an exemption, you can sue them, but you have to sue them in the court of appeal." And DOJ said that means in either the U.S. Court of Appeals for the Eleventh Circuit or the U.S. Court of Appeals for the Fifth Circuit. You can understand why DOJ would be pointing the oil industry to those two circuits.

It is a muddle, frankly, in terms of what exactly this animal is that the courts are going to be dealing with. Is it a §7(h)? Is it a §7(j)? Is it a hybrid? Is there, in fact, split jurisdiction here, which doesn't make a whole lot of sense? I think that's also a question for the D.C. Circuit, where the coalition of environmental groups represented by the Southern Environmental Law Center sued.[32]

Typically, like in the spotted owl case, it was obvious which court of appeals would have jurisdiction because all of the action was in Oregon in the U.S. Court of Appeals for the Ninth Circuit. But here, you've got a Gulf-wide programmatic decision affecting multiple states, none of which have been involved in this process. The exemption process also includes designation of state representatives to be part of the process. That didn't happen here.

In terms of lawyers' full employment, you betcha. There's all kinds of issues that are going to have to get sorted out. I wouldn't be surprised if we don't see a summary remand coming from one of these courts saying what exactly was the decision here and under what rubric should we be looking at it.

Rebecca Bratspies: I'm going to turn to questions from the audience. Can you speak to the opportunities that might be created if the current exemption is upheld and sets a precedent for a broad interpretation of §7(j)? In other words, how might a future administration use that outcome to more aggressively pursue environmental goals rather than simply lamenting the loss of integrity in the ESA?

I like the optimism that there will someday be an administration that wants to pursue environmental goals. For example, might the future administration use §7(j) to advance clean energy deployment or transmission development in the name of energy independence?

Mark Nevitt: I think it's a really astute question. I think it's really important. Judges should be thinking beyond this particular administration.

One of the few Supreme Court cases defining national security essentially said that national security is used "in a definite and limited sense."[33] It relates only to those activities that are directly concerned with the nation's safety. That's in a different statutory context in the ESA, but still it was a court looking at national security in the middle of the Cold War and being very concerned about that.

Let me give you one example from the Democratic side and one maybe from the Republican side. For the Democratic side, you may be very interested in renewable energy. You may be very interested in climate change as a national security issue. You can tap into pretty broad national secu-

30. Exec. Order No. 14156, Declaring a National Energy Emergency, 90 Fed. Reg. 8433 (Jan. 29, 2025).

31. Center for Biological Diversity v. Burgum, No. 1:26-cv-00940-RC (D.D.C. Mar. 18, 2026). On March 27, 2026, Judge Rudolph Contreras denied the request for an emergency injunction to stop the committee from meeting. Ian Stevenson, *Judge Declines to Halt "God Squad" Meeting*, E&E News (Mar. 27, 2026), https://www.eenews.net/articles/judge-declines-to-halt-god-squad-meeting/.

32. Petition for Review, National Wildlife Fed'n v. Burgum (D.C. Cir. filed Apr. 15, 2026).

33. Cole v. Young, 351 U.S. 536, 543 (1956).

rity powers in fact, if there's no limiting principle laid down by a federal court.

One example would be invocation of the National Emergencies Act[34] to declare climate change a national emergency. President Joseph Biden came very close to doing that prior to the passage of the Inflation Reduction Act.[35] If this macroeconomic, very muscular view, of national security put forth by Secretary Hegseth is seen as a national security, one can imagine that the Pandora's box is open depending on the political preference of a particular party.

If the national security is very broad, climate change could be a national security issue, or renewable energy, invocation of the Defense Production Act,[36] halting fossil fuel extraction on federal lands, and so on. You can run the gamut of all the national security powers that are in the various statutes, and you're off to the races to the Green New Deal through national security emergency powers. That is not something that I think this administration is thinking about. But it could be a reality if there aren't boundaries or principles that are put in place.

Obviously, if you're very maximalist about fossil fuel extraction, you can just see national security throughout environmental law—Clean Air Act (CAA),[37] Clean Water Act (CWA),[38] Safe Drinking Water Act (SDWA),[39] Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[40] and Resource Conservation and Recovery Act (RCRA).[41] Every one of these statutes has national security provisions. They're much like the ESA, but many of these other environmental statutes use a similarly vague term—"in the paramount interest of the United States"—akin to the national security interest of the United States language found in the ESA.

That's why a federal court really needs to be thinking holistically, beyond this particular God Squad invocation of national security, about the ramifications if there is no limiting principle. I would just offer that because, depending on what political valiance you are, this could be a superpower that is invoked for future administrations.

Chinonso Anozie: I totally agree. As Mark was talking, I was thinking about interstate transmission—the grid. That could be another since it's the backbone of any serious clean energy transition. It's also one of the infrastructure projects that have been constrained by the ESA. I think what is going on here will likely be a double-edged sword. We might be thinking very carefully as to how we use it.

Rebecca Bratspies: The ramifications for the idea that we have a system that's based on the rule of law where we have a legislative branch that legislates and an executive branch that administers also seems to be pretty important, and in jeopardy if there can be a magic phrase you can use to just not comply with statutes when you don't feel like it without offering much in the way of justification. (If I might editorialize a bit.)

But along those lines, I'm seeing a lot of questions about the way that a court is going to review this and what kind of standards. Do we think this is going to be an assessment of whether or not the agency—which could potentially be either the Secretary of Defense or the committee—has been arbitrary and capricious? Will courts focus on the evidence presented? Will they apply the ordinary standards for the kinds of documentation that we typically expect from an agency before it makes a decision of consequences for the nation and the national economy?

Pat Parenteau: If the courts view this as a §7(h) exemption even though it's predicated on a §7(j) rationale, then "substantial evidence" is the standard of review because a §7(h) exemption is supposed to be based on an adjudicatory hearing among other requirements. The reason for that is §7(n), which fixes judicial review in the courts of appeal for a §7(h) exemption. Not surprisingly, the committee's order seeks to steer judicial review to either the courts of appeal in either the Fifth or Eleventh Circuit, two of the most conservative courts in the country other than the Supreme Court.[42]

But if the court sees the Hegseth rationale as a final agency action subject to §706 of the APA, then the standard of review is "arbitrary and capricious." That was the standard that was used in the cases that Mark referred to involving the five offshore wind projects that Trump tried to stop. He issued a stop work order based on national security concerns.[43] Judge Royce Lambert in D.C., among other judges, looked at the classified material in camera and in a bench ruling said in effect, "I don't see any national security concerns, so I'm lifting the stop work order."[44]

So, there you go. If it's a §7(h) exemption, it goes to the court of appeals. Substantial evidence based on an adjudicatory record, which we don't have. If it's a §7(j) stand-alone kind of review of Hegseth's determination, it's probably in district court under arbitrary and capricious review. That's my best guess.

Rebecca Bratspies: I have one question that is highly specific. Pat, you mentioned that the oil industry is not a permit or license applicant. Can you discuss that a little more? This question comes from a federal agency employee working on a critical minerals project in which the mining company was granted applicant status. They would like to understand the difference.

34. 50 U.S.C. §§1601 et seq.
35. Pub. L. No. 117-169, 136 Stat. 1818 (2022).
36. Pub. L. No. 81-774, 64 Stat. 798 (1950).
37. 42 U.S.C. §§7401-7671q.
38. 33 U.S.C. §§1251-1387.
39. 42 U.S.C. §§300f et seq.
40. *Id.* §§9601 et seq.
41. *Id.* §§6901 et seq.
42. Endangered Species Committee Order (Mar. 31, 2026), https://www.doi.gov/sites/default/files/documents/2026-03/endangered-species-committee-order.pdf.
43. Press Release, U.S. Department of the Interior, The Trump Administration Protects U.S. National Security by Pausing Offshore Wind Leases (Dec. 22, 2025), https://www.doi.gov/pressreleases/trump-administration-protects-us-national-security-pausing-offshore-wind-leases.
44. Rhode Island v. U.S. Dep't of Interior, No. 1:25-cv-04328-RCL (D.D.C. Jan. 12, 2026).

Pat Parenteau: The term "permit or license applicant" had special meaning in the 1978 amendments because, in Grayrocks, the injunction I obtained was for a CWA §404 permit to build a dam to supply the water for a coal-fired power plant.[45] In the *Pittston* case, which was another attempt to initiate the exemption process, the National Wildlife Federation and Environmental Defense Fund managed to file a lawsuit and stop it; that too involved an applicant for air quality and National Pollutant Discharge Elimination System permits.[46] Both permits, right?

Historically, permit or license applicant means an entity that was denied a federal permit under regulatory laws like the CAA, the CWA, RCRA, or some other federal statute authorizing permits. The oil and gas industry does get drilling permits for exploration and production, but the statute says that you become a permit or license applicant eligible for an exemption only if you've been denied one of those permits based on a biological opinion finding jeopardy. That's what we don't have here.

The MMPA still applies. It does have certain requirements built into it. Nothing quite as stringent as the ESA—no flat prohibition on jeopardy, for example, or adverse modification of critical habitat. But again, the oil companies have not been denied a permit or other authorization under the MMPA or any other federal law.

Rebecca Bratspies: Chinonso, while this litigation plays out in the coming weeks and months, what will you be looking for from the government as they put this exemption into effect? How might it affect future agency rules, approval of new drilling projects, and so on? And how do you interpret the scope of the exemption? Does it potentially apply to future approvals of liquefied natural gas (LNG) export terminals in the Gulf?

Chinonso Anozie: When you look at the national security exemption, I don't think it's circumscribed to the point that it doesn't limit LNG extraction. For example, if you're extracting crude oil, you might run into gas as well. It's not like you need an entirely separate well in order to do that. So, I think my argument would be that definitely it also includes that.

But what I expect the government to be doing going forward is to continue to push this national security exemption, even though I don't agree that it is there. I think America is energy-independent right now. I also think that this emergency is self-imposed because, on the one hand, we are actually stopping renewable energy projects that could also contribute to energy independence in America, and then trying to prop up crude oil. I don't think that really makes sense.

I think going forward you're going to see the government pushing forward with this national security issue in trying to justify why it's the case and trying to justify that with the shortages that we have as a result of the geopolitical conflict, that we're having less and less jet fuel available.

I think if this actually goes through and the courts do not strike it down, it creates a precedent that all the agencies are going to use. I promise you, agencies will love this kind of exemption. They will always rely on the Defense Secretary for a national security exemption.

As a result, a lot more agencies will rely on the national security exemption, which will circumvent ESA mitigation measures significantly. You will see lots of agencies adopting this because it appears to be like a blanket overrule and circumvention of mitigation measures or protection measures for endangered species going forward.

Rebecca Bratspies: Thank you for that clarification. Let's talk for a minute or two about the idea that environmental lawsuits are a national security risk. Chinonso's remarks just made me really think about that. We have a question or two about it from the audience as well.

Are there any boundaries we could put on that so that we could still have law? We have many laws that embed the idea of citizen suits that expect that there will be litigation about agency decisions about the environment. How do we reconcile those things?

Mark Nevitt: In my view, that question was asked and answered in the 1970s, when these statutes applied to all federal agencies and didn't have a specific carve-out for the State Department or other national security-type agencies like DOD. I think that reinforces that we want civilian control of the military, and we want military actions to be accountable, not just to Congress and the executive branch, but also to the judicial branch. Congress was quite thoughtful in recognizing that there are certain circumstances where we may want a little flexibility in how we apply that statute. That's why you see these national security exemptions placed in the statutes.

What is remarkable to me, when you look at environmental law writ large, is just how powerful it is and how it applies to all these national security agencies throughout the federal government. Not just federal law, but also state and local law. This sort of reverse sovereign immunity that's playing out.

All these major environmental statutes—the CWA, CAA, ESA—apply to DOD and other national security agencies in the same manner and to the same extent as any nonfederal entity. And that's the state and local laws as well. That was, I think, an acknowledgement that we needed. It's an "all hands on deck" approach to saving our environment. You can't just carve out certain exemptions for certain agencies because the environment is going to suffer dramatically.

I'll note that I think that's a very weak argument in the national security finding from Secretary Hegseth—making the diversion of federal resources to do litigation a security risk. Of course, we know DOJ will represent the military or any sort of federal agency in federal court. That's just the statutory requirement. Agencies bear the cost of time preparing and gathering records, responding to discov-

45. Nebraska v. Ray, No. CV78-L-90 (D. Neb. July 21, 1978).
46. Pittston Co. v. Endangered Species Comm., 14 E.R.C. 1257 (D.D.C. 1980).

ery, prepping witnesses, and Freedom of Information Act requests. That all takes staff time. Well, guess what? That's called judicial review. That's exactly what Congress anticipated, and it's exactly why the ESA applies.

So, I do think that this question has been asked and answered. I do think that this is a losing argument, which is why I come back to the first thing I said—when you look at the four arguments that the Secretary has put forth, it's really an energy security and energy independence sort of argument. What I would want to know is what role the State Department played in these national security findings, and whether the U.S. Department of Energy was involved.

The Secretary of Defense is not the secretary of everything, so national security has to have some sort of limiting principle. All of this to say, judicial review applies. I'm just not convinced that litigation risk and diversion of federal resources are going to carry any weight whatsoever in a federal court.

Chinonso Anozie: I believe the government aims to foster an environment where lawsuits are seen as disruptive and contrary to oil and gas development, leading to reduced development activities. Consequently, this is linked to national security concerns. But I think in a way that criminalizes, if I could use that word, the citizens' suits rights—the rights of the citizens to challenge a number of these actions. It makes those citizens' suits unlawful to begin with.

I think this problem could also be solved from the getgo because I think a lot of the litigation against a lot of these projects is a result of noncompliance with stated environmental laws. Which is what you can solve with public participation and stakeholder participation before the construction even begins. I think in a way it reduces a lot of this litigation going forward.

There are ways to solve all of this other than having the blanket national security exemption. On the political side, you also look at the fact that if it flips tomorrow, we could use this to stop all crude oil production in the future because of the impact of climate change and national security.

I don't think it's a proper way to approach that since there are ways to mitigate a lot of those lawsuits before they even begin in the first place. I don't think a blanket national security exemption and saying that lawsuits constitute that is the appropriate way to go about it.

Pat Parenteau: Plus to me, it raises separation-of-powers questions. How is it that the Secretary of Defense can determine that environmental litigation constitutes a national security threat such that we will now strip the courts of jurisdiction over a wide swath of cases that haven't even been brought for whatever relief they might be entitled to under the statutes, independent statutes creating the regulatory programs and requirements? I mean that's breathtaking in its assertion of executive branch power to determine what the courts can entertain and what they can't. That seems to me to be something only Congress can do.

Rebecca Bratspies: I think that's a perfect lead-in to the next audience question: The MMPA relies on a national defense exemption standard while the ESA uses national security. Do you anticipate courts interpreting security as a legally broader standard?

Then, there's an explanation following the question that I think is really interesting: I ask because we currently have a unique geoeconomic window. China is suffering from degraded Venezuelan and Iranian oil supplies while the European Union needs domestic U.S. energy to decouple from Iran-Russian oil, which in turn supports Ukraine. Does the broader national security context give the executive branch the legal room to argue that maximizing domestic energy to exploit these dual real-world adversary vulnerabilities qualifies for an ESA national security exemption?

Mark Nevitt: It's a very, very good question. They are exactly right in that national defense has a more tailored definition within the *U.S. Code*, predominantly in the Defense Production Act,[47] which has been used for critical minerals and critical mineral extraction, essentially providing loaning authorities and contractual authorities to basically get at these critical minerals that are used for national security, procurement, and weapon systems. It's a clear connection between the Defense Production Act and national defense.

National security is a deeply problematic term because it does not have a core definition that the four of us could all very succinctly agree upon. And they are exactly right. The insight is very, very, very correct in that there are a lot of different things happening geopolitically where national security interests are relevant.

My hesitation, and I do think it could be an argument that will be made, is that I don't think it's necessarily going to be a winning argument precisely because of something I said earlier. This is energy security, which is really both a DOD and an energy cabinet-level sort of decision in a policymaking department. The State Department, last I checked, has authority for foreign relations of the United States to include geopolitical negotiations, diplomatic negotiations, and so on.

I think it would be a more powerful national security finding if not just one national security agency was involved in this national security finding. What's interesting to me, and I'll end here, is that the ESA provides the Secretary of Defense with this ability to make this determination. That's a statutory piece that Secretary Hegseth has, so his name is signed on that piece of paper.

But we know that national security is just not one department. It's several departments. When the national security is being made so capaciously and so broadly within the finding, I think it would be significantly bolstered if other expert agencies are part of that national security finding themselves. And I haven't seen that necessarily.

47. 50 U.S.C. §4552(14) (2020).

Rebecca Bratspies: I would add that there has to be substance, and details, and specifics about what constitutes national security. Maybe not all of that is for public consumption. But it can't just be that you say national security and, therefore, whatever you ask for happens. There have to be some parameters to that and some evidence that national security is either in jeopardy or would at least be furthered by whatever the proposed decision is. That's what I didn't see; there wasn't any connection between a rationale and an outcome. It seems to me like that's a basic minimum.

We have very little time left, so I'd like everybody to add any final thoughts.

Chinonso Anozie: I'm a very big fan of public participation in a lot of these decisions. I think that's what I've seen from my research as to what goes on when you talk about environmental litigation. There are stakeholders and there are experts in that field, and they're usually the ones who file these lawsuits.

That consultation before you do the actual biological opinion or biological assessment is very necessary because, once you do that and you take care of a number of those concerns, it reduces the chances of having a number of these lawsuits. Then, you wouldn't have to go in to do this blanket national security exemption. That's one of the things I would be championing that government agencies take into account when they are making decisions like this.

Mark Nevitt: I'll close with this idea and thought. We haven't spent a lot of time on this, but a core thing to think about is what has changed since the 2025 biological opinion and the 2018 and 2025 consultations.

The obvious answer to that is the Iran war and the closure of the Strait of Hormuz, which, to be sure, is dramatically causing energy shocks around the world. There's no question about that, particularly for our Asian partners and our European partners who are heavily relying upon that fossil fuel to get through the Strait. We don't exactly know how that's going to play out.

I think that when the Strait opens, and hopefully that is sooner rather than later, much of this energy security rationale fades to the back in my view. The reason why I say that is because there's always been some kind of cognizable national security rationale and the military is an enormous energy consumer.[48] That's been around forever. That's been around since the ESA was adopted in 1973.

In my view, what has changed is this energy disruption, which I think is significant. I do think if this energy disruption continues, the Pentagon will be on stronger legs if they can tie that energy shortage to the lack of JP-5 and Navy aircraft carriers and JP-8 on the Air Force base—that they're suffering somehow and they need more oil or more gas to basically accomplish their combat effectiveness in the war funding.

Of course, we're in ceasefire right now. Things change by the day. If the Strait of Hormuz opens, the national security rationale, I think, falls apart. But if the Strait stays closed and there is a connection between that JP-5 and JP-8 in particular, then the national security rationale actually increases in importance and that should play out in litigation.

Pat Parenteau: I will just add that I think this is a terrible abuse of the exemption process. As a veteran of these processes, I never envisioned the application of the §7(j) national security exemption on a programmatic scale like this. I will say that I think it's backfiring already on the Administration. We just learned yesterday that Rep. Bruce Westerman's (R-Ark.) bill in the House, which was scheduled for a floor vote, was pulled.[49] It was pulled in part because Republican representatives from Florida are concerned about invoking the God Squad to greenlight oil and gas development throughout the Gulf, off the coast of Florida, and so on.

It's an overreach, I think, by the Administration. Not surprising perhaps to some of us. But I think it will fail in the courts; I certainly hope it does. There is a place for the exemption process and, properly done, a decision to exempt critical energy resources. That could include grid enhancement. It could include solar and wind deployments. There could be a day where an exemption is justified. Today is not that day.

48. Mark Nevitt, *On Climate Change, National Security, and Environmental Law*, 44 Harv. Env't L. Rev. 322, 346 (2020).
49. H.R. 1897, 119th Cong. (2026).