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## Executive Authority in Energy Emergencies: A Modern Examination of Sources of Power and Their Weaknesses

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*There can be little doubt that the legislative mechanisms Congress relies upon, when healthy, are slowing and becoming riddled with political and partisan issues, with many, including the President, openly questioning the efficacy and health of the body. With efficacy in question and doubts rising, perhaps now more than ever a clear path towards response in any emergency is needed. Yet, in an intergovernmental arena like energy law, where vertical and horizontal separation of powers questions perforate the field, an even greater understanding is mandated. If questions surrounding the effectiveness of the Legislature call for any action, should they not call for lucid understanding of the Federal Government's ability to respond should a crisis break out? What mechanisms and tools does our hobbled Federal Government still hold? What frameworks and structures lie dormant to allow the weakened federal organism to intervene and make de facto law for the health and safety of its citizens? This Article focuses on the powers of the Oval Office in responding to an energy emergency and attempts to elucidate methods, their application, and their legality in a crisis. The Article first addresses the need for energy action and relevant precedent, then details the capabilities of a malfunctioning federal government and the sources of authority for the President to employ. Second, the Article delves into real world application and precedent, as well as the weaknesses and vulnerabilities these actions impose on the political and legal actors that implement them. Last, this Article addresses the weaknesses that these routes face. This Article uses precedent and theory examinations in tandem with black letter law to illustrate the powers of the presidency in response to an energy emergency. This Article is perhaps one of the first modern, large-scale aggregations and assessments of Presidential energy emergency response mechanisms and their weaknesses.*

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## I. INTRODUCTION

In the throes of the California Energy Crisis, when state and federal governmental agencies were scrambling to stabilize markets to help Californians afford their power, President Clinton stepped in, wielding the power of the Executive Branch to respond and invoking an antiquated wartime emergency statute; President Clinton cited his responsibility, as President, to keep NASA and military facilities operating as basis for this action.<sup>1</sup> Through the chaotic previous response, with state and federal secretaries contradicting each other, the President provided the loudest voice in the room and responded swiftly in an energy emergency.<sup>2</sup> As admirable as President Clinton's foray was, was it legal? Can it be reproduced? Can Americans assume the President has the authority to respond unilaterally in an energy crisis? Can a reasonable observer truly believe that Executive is capable of responding efficiently and legally in an energy disaster? What if a pressing need comes up to appropriate funds to a nuclear plant, yet Congress cannot manage to do so? If modern American society cannot trust the Legislature to put aside

<sup>1</sup> Steven Ferrey, *Soft Paths, Hard Choices: Environmental Lessons in the Aftermath of California's Electric Deregulation Debacle*, 23 VA. ENVTL. L.J. 251, 287 (2004).

<sup>2</sup> *See id.*

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partisan differences, what is to be done in these situations? This Article aggregates numerous bodies of jurisprudence and scores of statutes and case law to effectively clarify existing paths for various actors within the Executive Branch to protect the citizens of the country and continue to manage the energy functions and responsibilities of the federal government.

A more cynical reader may argue this article describes the future of energy management at the federal level, given increasing political animosity and partisanship, as Congress seems increasingly incapable to function healthily. Yet, this Article's goal is not to provide fodder for politicians. This Article attempts to clear the way and illustrate a clear path to disaster response. As Congress unyieldingly underperforms and raises questions about the efficacy of the body, the utility of this Article has wide-reaching potential.

Part II of this Article briefly employs a historic example involving a waste disposal accident in order to show the applicable value of the aggregated theories and response mechanisms detailed throughout this Article. Perhaps in an attempt to give teeth to what can be perceived as an issue lying on the metaphorical "back-burner" of numerous current constitutional concerns, Part II utilizes this hypothetical to make obvious the danger the murky legal status of non-legislative solutions in the wake of an energy crisis or situation. For, without a clear function of the aggregated concepts and legal paths, what good can this Article truly be to a malfunctioning government?

Parts III-VII dive in to individual schools of thought and sources of authority regarding federal authority. First, the innate powers within the Executive Branch vested from the Constitution are explored, followed by pertinent agency and prosecution powers of the presidency. Then, legislation and statutory authority for action are assessed. Broken apart for ease of analysis, the statutory sections, non-energy, and energy sections, work to clarify the tools handed to the Executive Branch from Congress itself. Next, the *Youngstown* school of jurisprudence is employed to briefly encapsulate and apply the notion of extra-constitutional inter-branch authority to act; application and elucidation prove insightful given the functional troubles from the Legislative Branch. Each one of these subsections deploys case law analysis and hypothetical development and application.

Subsequently, Part VIII examines case studies as precedent and discusses theories while previously mentioned theories are applied; the purpose of this examination is not to

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praise or criticize given gubernatorial or presidential administrations, but to provide solid footing for executive action in an emergency. The precedential works to demonstrate the theoretical concepts listed above in practice and grant further applicable value to the argument of this Article.

Finally, Part VIII makes a distinct, substantive shift to address weaknesses in the paths argued. Concerns used are by no means superficial or frivolous, yet the abilities mentioned stand their ground and maintain integrity, despite the listed vulnerabilities. The vulnerabilities involved are entwined with separation of powers concepts, both vertical (between states and the federal government) and horizontal (among federal branches of government). Part VIII proves the opportunity to understand each source of authority's liability, individually, and grasp the vulnerabilities each of these individualized legal authorities may engender if deployed by a President.

The Article's purpose is not to call partisan actors to action, with new abilities in hand. Lengthy discussion is dedicated to the fears and weaknesses these actions ought to entail, in an effort to allay any readings that inspire absolute encouragement. These paths and authorities ought to be employed in the most abject of emergencies. Our Constitution was not designed to be able to capably contemplate and respond to energy management and emergencies deprived of legislation. Yet, for all the constitutional concerns these actions entail, unclear and unanalyzed forms of authority can perhaps play a rather large risk in the face of emergency themselves.

## II. REASONS FOR INTERVENTION

Why does any of this matter? What good is exploring murky areas of law if a better understanding of these issues, in practice, stands to bring no benefit? This section proves essential, as some critics would be skeptical of the role of the President in energy disasters altogether, as many energy regimes are born from statehouses and outside federal jurisdiction. Below, a brief recapitulation of an example to be discussed later and a circumscribed discussion iterating the reasons for presidential response mechanisms brings this paper's discussion to life as it illustrates the need for and application of executive power to energy law.

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Modern domestic natural gas production has increased significantly, and usually observers and industry participants primarily point to the utilization of hydraulic fracturing (“fracking”).<sup>3</sup> Fracking involves high-pressure injection of water underground to act as a catalyst for oil and gas to move more freely and thus become more available to access.<sup>4</sup> Groundwater contamination and release of air pollutants and methane are commonly pointed to as significant dangers, posing risks to residents near the fracking sites.<sup>5</sup> Regulatory schemes for fracking are usually relegated to statehouses and out of the federal government’s hands.<sup>6</sup>

In 2012, rural Dimock Township in Susquehanna Pennsylvania leapt onto the front pages of newspapers as heavy contaminants and materials were found in the ground water, and residents noticed brown liquid coming out of faucets.<sup>7</sup> Dimock is near a fracking site connected to the Marcellus Shale, and the high amounts of arsenic and various other chemicals were near universally attributed to the local fracking operations.<sup>8</sup> The fracking company, Cabot Oil and Gas, has continued to deny any responsibility.<sup>9</sup> The EPA led the response with mitigation efforts, and some legal prosecution followed to compensate residents from both the federal and state governments.<sup>10</sup> Yet, was this truly the only recourse?

As Americans saw arsenic in their water from the result of fracking and yearned for further relief, could the President not have stepped in further? Does our republic offer no aid to the citizens struggling through this crisis? Americans could have used a stronger response beyond water treatment centers, groundwater testing, and some regulatory retaliation. Beyond the optics of a President swooping in to stand up for the environment and Americans, real further relief could have been deployed in this dramatic situation. Yet, how could the President have responded to the matter? Are these responses even

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<sup>3</sup> Philip P. Cristaldi III, *Have We Been Looking at This All Wrong? Fracking and the BLM's Proposed Regulations: A Different Idea to Promote Safe Operations*, 8 FED. CTS. L. REV. 21, 22 (2014).

<sup>4</sup> *Id.* at 25–26.

<sup>5</sup> *Id.* at 32–33.

<sup>6</sup> See Amanda C. Leiter, *Fracking as a Federalism Case Study*, 85 U. COLO. L. REV. 1123, 1125–27 (2014).

<sup>7</sup> See Jared B. Fish, *The Rise of Hydraulic Fracturing: A Behavioral Analysis of Landowner Decision-Making*, 19 BUFF. ENVTL. L.J. 219, 237 (2012).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

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constitutionally permissible? This Article moves to answer these questions and more below.

### III. REPURPOSED PRESIDENTIAL POWERS

The President is vested with numerous routes to access substantive ability to step in to the energy arena, despite the extensive role of statehouses in the creation of regulatory regimes. Below, the following sections elucidate of the abilities lying within in the Oval Office, meant for other areas but able to be repurposed or employed in an energy disaster. Commonly used and well-known authority is explored in tandem with constitutional theory for response. For ease of understanding the following sections are broken into War Powers, the Oath of Office, the Bully Pulpit, and the Emergency Session.

#### A. War Powers and Foreign Relations

The Supreme Court has made clear that given the rare binary choice between national security and environmental or energy compliance, national security comes out the victor, especially during wartime.<sup>11</sup> When the nation is in need, and the Executive requires a proper constitutional perch on which to rest its authority to act, but cannot find legislative or otherwise clear authority, what is to be done? The President can point to the dormant abilities of her office, to provide for the national interest and act as the Commander in Chief, and can find there heightened authority in enforcement regimes.<sup>12</sup> The following subsection briefly discusses the aforementioned powers and how these powers can be applied to the Article's premise. The bulk of the concerns surrounding War Powers, Foreign Relations, the War Powers Resolution, and the President revolve around congressional blessing. This section proceeds presuming that the gridlocked Congress is unwilling or unable to approve clearly of the President's actions, or requested action, or that the Congress is refusing to grant authority and that the President is moving forward without approval.

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<sup>11</sup> See *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 33 (2008).

<sup>12</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 329 (1936).

Often discussed and usually associated with the infamous War Powers Resolution of 1973, the President's quasi-dormant wartime capabilities can, at times, exceed the normal constitutionally vested powers of the office.<sup>13</sup> The President's war powers capabilities have grown substantively in the last century and have been significantly emboldened by international and domestic precedent alike.<sup>14</sup> The notorious resolution itself was in response to Congress' relatively small role during the Vietnam War, and meant to curtail the broadening scope of Presidential authority.<sup>15</sup> The Resolution remains contentious and since its passage, each President has individually deemed it an unconstitutional infringement of the office's authority.<sup>16</sup>

Returning to the capabilities themselves, a slew of legal questions are raised by the seldom understood, semi-fluid, and often over-utilized abilities of the President during wartime.<sup>17</sup> Yet, scholars, often in tandem with the actors of the Executive branch, agree that the President's abilities to ensure safety and protect the national interests during times of war are heightened, and the exact scope of these wartime abilities is unclear.<sup>18</sup> In addition, the President is vested vast power in foreign relations as the Commander in Chief at the helm of the military and armed forces.<sup>19</sup>

How can the President use the dynamic abilities of her office in response to an domestic energy situation? Perhaps in a darker future, an ISIS-inspired terrorist detonates an explosive device at a fictitious nuclear facility near Vancouver, close to the American border. The chaos and resulting panic threatens Americans near the border. Canada is calling for extensive American aid. Half of Congress is standing in such ardent opposition, given the politics and relationship with the Canadian Prime Minister that they refuse to support any relief in any form. The President promptly orders the Department of Defense

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<sup>13</sup> See Brendan Flynn, *The War Powers Consultation Act: Keeping War Out of the Zone of Twilight*, 64 CATH. U. L. REV. 1007, 1008-15 (2015).

<sup>14</sup> See Curtis A. Bradley & Jean Galbraith, *Presidential War Powers As an Interactive Dynamic: International Law, Domestic Law, and Practice-Based Legal Change*, 91 N.Y.U. L. REV. 689, 719 (2016).

<sup>15</sup> See generally Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 104-07 (1984).

<sup>16</sup> Eric Talbot Jensen, *Future War and the War Powers Resolution*, 29 EMORY INT'L L. REV. 499, 520 (2015).

<sup>17</sup> See generally David A. Simon, *Ending Perpetual War? Constitutional War Termination Powers and the Conflict Against al Qaeda*, 41 PEPP. L. REV. 685, 746 (2014).

<sup>18</sup> Jensen, *supra* note 16, at 520-22.

<sup>19</sup> U.S. CONST. art. II, §2, cl. 1.



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to fly any prepared and able technicians, nurses, humanitarians, or aid workers to the site on Department of Defense planes. The President calls a military tribunal to order, dedicated to Canadian–American nuclear relief. The President orders the Department of Defense to coordinate efforts to find the terrorist. The President allocates to the Canadian relief effort any available funds from the Department of Energy, Department of the Interior, or any other pertinent agency.

A motivated President in the above situation could theoretically perform each act requested of Congress to respond to an energy disaster, utilizing the vested powers as the leader and caretaker of the national security interests. The President’s administration argues that the terror attack near the border justifies the military and defense action. The more interesting facet of the hypothetical is the wealth of authority that the President could use to justify the actions. The Department of Justice’s Office of Legal Counsel (OLC) could posit that the nature of the relief effort—aiding an ally and responding to a nearby terror attack—is an archetypal situation arising during wartime, or quasi-wartime given the nature of the War on Terror and ISIS conflict, and within the typical role of the President. Here, Congress fails to perform what may seem like a universally agreeable and institutionally simple task, yet the President can take the place of the Congress to provide international relief methods, task forces, and appropriations.

### B. The Bully Pulpit

Above, discussion about potential constitutional powers regarding foreign affairs, utilizing the role of Commander in Chief, worked to demonstrate the President’s abilities at the helm of the resolute desk to make policy in times of emergency. The President holds less legally concrete but very real power through communication. The President has wildly influential abilities, as the nation’s chief diplomat, to respond to an energy crisis through communicative means. Discussion exploring the tools that the head of state has to react and help citizens in peril during an energy crisis works to show the dormant but steadfast abilities of Executive.

Critics and fans alike have given the moniker “Tweeter in Chief” to President Trump,<sup>20</sup> given his proclivity for candid, habitual tweeting.<sup>21</sup> Perhaps tweeting is just a modern day manifestation of President Roosevelt’s Bully Pulpit,<sup>22</sup> or the second President Roosevelt’s Fireside Chats;<sup>23</sup> nevertheless, it disseminates a message instantaneously and uses the abilities that the modern day presidency has to distribute information and communicate around the world. Conceivably a simplistic tool, the President’s vantage point can be uniquely applied in any given emergency. The President could single-handedly start a crowd-sourced donation aggregator such as “go-fund me,”<sup>24</sup> and tweet a link to it alongside a sympathetic message regarding the potential disastrous economic repercussions of a theoretical wind-farm’s malfunctioning, causing blackouts and the need for appropriated disaster funds; immediately crowd-sourced donations could begin flowing in. Congress could not meet to gather funds so rapidly, yet the President’s vantage point allows information dissemination and relief efforts to begin immediately. The President can devote press conference after press conference, tweet after tweet, interview after interview, to urge people to stay away from a potentially dangerous nuclear site, or to avoid downed power lines in a given area.

This ephemeral subsection is a intentionally brief description and application of the abilities of the President’s vantage point to disseminate and articulate a message to the American people. Part VIII later employs this response mechanism when discussing methods that President Obama used to respond to the Deepwater Horizon oil spill. Countless variations exist. Be it the usual forms, such as picking up the oval office phone and using influence to communicate, speeches on the international stage, or garnering media headlines, the variations are near endless and historically have taken many forms.

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<sup>20</sup> Josh Dawsey, *John Kelly's Big Challenge: Controlling The Tweeter In Chief*, POLITICO (Aug. 4, 2017), <https://www.politico.com/story/2017/08/04/trump-john-kelly-challenge-twitter-241343>.

<sup>21</sup> *Id.*

<sup>22</sup> Christopher Honeyman, *The Physics of Power*, 87 MARQ. L. REV. 872 (2004); Sanford Levinson & Jack M. Balkin, *Democracy and Dysfunction: An Exchange*, 50 IND. L. REV. 281, 314 (2016).

<sup>23</sup> Richard E.D. Schwartz, *Franklin D. Roosevelt's Psychological Contribution to the United Nations*, 33 SYRACUSE J. INT'L L. & COM. 213 (2005).

<sup>24</sup> See Panel Discussions, *Crowdfunding: From Social Enterprise to Sec Regulations*, 17 J. BUS. & SEC. L. 139, 210 (2016); Susan Loeb, *Go Fund Me, Please: Crowdsourcing for Bail As an Insufficient Surety*, 44 Hofstra L. Rev. 1319, 1219–24 (2016).

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### C. The Oath

“Before he enter on the execution of his office, he shall take the following oath or affirmation: —‘I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.’”<sup>25</sup>

The Oath of Office plays a peculiar role throughout this Article, weaving throughout much of the arguments and theories. This subsection, however, uses the Oath to show the *internal* and specifically executive-based powers and authorities it distributes, which, while touched on later, deserves elucidation in this particular subsection. A burgeoning body of research has developed in modern constitutional jurisprudence and study focusing on the merits and abilities stored within the constitutional oath of office.<sup>26</sup> Much of the theory and concept regarding the Oath emanate from scholarship, as markedly little case law exists deeply examining the powers and duties of the Presidential Oath.<sup>27</sup> The following subsection applies the concept of the presidential obligation to defend and protect the Constitution on a potential method of action in an energy emergency.

One prominent theory is that the Oath places a duty on the President to maintain the integrity of the Constitution.<sup>28</sup> Professor Driesen argues, “While other officeholders need merely pledge their “support” for the Constitution, the President must promise to “preserve, protect and defend” it.”<sup>29</sup> Professor Richard Re notes the complicated theory behind the oath and the shifting constraints and burdens the oath distributes; “On the theory

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<sup>25</sup> U.S. CONST. Art. II, §1, cl. 8.

<sup>26</sup> See generally Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 509 (2012); Neal Devins, Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100 (2015); Ellen S. Pryor, *Mapping the Changing Boundaries of the Duty to Defend in Texas*, 31 TEX. TECH L. REV. 869, 871 (2000).

<sup>27</sup> Bruce Peabody, *Imperfect Oaths, the Primed President, and an Abundance of Constitutional Caution*, 104 NW. U.L. REV. COLLOQUY 12, 26 (2009).

<sup>28</sup> *Id.*

<sup>29</sup> David M. Driesen, *Toward A Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 86 (2009).

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that obligation should not outpace capacity, the President's unique responsibilities may suggest comparably unique powers.”<sup>30</sup>

So, what exact steps should be taken if the presidential oath obligates a duty to defend and maintain the governmental mechanisms and structures emanating from the Constitution, but one of the branches of government is malfunctioning in a time of crisis? If constitutional organs begin to falter, due to an energy emergency of such magnitude that it cripples branches or subgroups of government, the President has an obligation to step in, with, or without, explicit authority. There is an argument to be posited that the President can use extralegal methods and tools at her disposal in an effort to protect and defend the Constitution and the governmental bodies it gives birth to. If a power emergency becomes so extreme that a state government cannot function properly for a prolonged period of time—state offices closed, school doors locked, taxes not levied, no other inherent activities of the state government can occur—can the President step in? Is such action not within the penumbra of her duty to defend the governmental organisms emanating from the Constitution? Powers are handily delegated to the states in an effort to care for their people, yet, if the federal government is in such disarray that it cannot function, does our Constitution provide no help? At this point, is it not the *duty* of the President to step in and protect the governmental mechanisms fashioned from the Constitution in the same way the President must defend the Office of the presidency and its own inherent integrity? Does the Oath suggest that the severity of defending the Constitution warrants potentially extralegal methods of defense and protection? Could the President send in the Departments of Defense and Interior to build the federal government back up, to force rehabilitation of the constitutional organism, even if the actions may skirt the precise legal boundaries? Perhaps utilization of the Oath creates more questions than concrete answers; yet, there is undoubtedly dormant potential for action within it.

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<sup>30</sup> Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299, 338–39 (2016).

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#### D. The Emergency Session

“[H]e may, on extraordinary occasions, convene both Houses”<sup>31</sup>

The following subsection explains another ability of the presidency that may not be immediately thought of when responding to an energy crisis. The premise of this Article is that Congress is unable or unwilling to respond, legislatively, to an energy disaster. This subsection does not attempt to depart from that premise; rather, this subsection explains the abilities and benefits that calling an emergency session could hold. The President, of course, is not solely reliant on the Congress to access the tools within the Executive Branch to respond. President Lincoln governed for three months through executive order, in the throes of the Civil War, before calling an Emergency Session.<sup>32</sup>

Essentially, calling the Special Session, an instrument dormant in the President’s tool belt, eradicates “politics as usual.” Indeed, the gravitas and moment that would accompany any President calling an emergency session would likely be substantive. President Truman called the most recent emergency session in 1948.<sup>33</sup> In the throes of public outcry and with citizens in despair, the President’s action, calling the session, forces the legislators back to D.C. and places the spotlight on the Legislature in an unusual way. A tool this seldom used would at the very least draw large swaths of attention in an extraordinary manner to the energy disaster and to the Legislature’s response. Thus, it appears that this could break the logjam by shuffling the individual governmental actors out of the political paralysis or individualized despondency that acted as the catalyst for the gridlock this Article was prefaced on. Perhaps the emergency session is not so much a tool to respond directly to a crisis, but rather a tool, lying dormant, to obligate the Legislature to respond.

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<sup>31</sup> U.S. CONST. art. II, § 3, cl. 2.

<sup>32</sup> Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 24 (2002).

<sup>33</sup> *Turnip Day Session*, UNITED STATES SENATE, [https://www.senate.gov/artandhistory/history/minute/Turnip\\_Day\\_Session.htm](https://www.senate.gov/artandhistory/history/minute/Turnip_Day_Session.htm) (last visited Nov. 28, 2018).

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#### IV. ADMINISTRATIVE AND PROSECUTORIAL PRESIDENTIAL POWER

Shifting now to focus on the role the Executive has as the enforcer of duly enacted law and the role of the administrative agencies, through the lens of responding to an energy emergency. The following sections focus on agencies and the non-enforcement doctrine. First, the non-enforcement doctrine and the Take Care Clause, which occupy curious corners of constitutional jurisprudence, will be dissected and applied to this Article's argument;. Then, administrative relief and agency response mechanisms are illustrated and assessed in an effort to show the President's capabilities as head of the administrative state and how she could work to provide relief in an energy disaster.

##### A. Non-Enforcement and the Take Care Clause

“[H]e shall take care that the laws be faithfully executed”<sup>34</sup>

When examining enforcement of duly enacted law, the Take Care Clause weaves through analysis and discussion.<sup>35</sup> Most agree that the President has the ability to disregard duly enacted law through the innate prosecutorial discretion of the office of the presidency, the enforcer of duly enacted law.<sup>36</sup> In *United States v. Armstrong*, a case focused primarily on exploration of criminal law concepts and the abilities that law enforcement agents hold to prosecute at will, the court described the President's staff as “designated by statute as the President's delegates to help him discharge his constitutional responsibility to ‘take Care that the Laws be faithfully executed.’”<sup>37</sup> Thus, each prosecutorial actor of the Executive Branch has been anointed by this opinion to act as the President's arm in enacting and implementing non-enforcement regimes.

New life has been shot into enforcement scholarship following President Obama's controversial Deferred Action for Parents of Americans (DAPA) Program.<sup>38</sup> Some discord

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<sup>34</sup> U.S. CONST. art. II, §3, cl. 5.

<sup>35</sup> *Printz v. United States*, 521 U.S. 898, 922 (1997).

<sup>36</sup> *Id.*

<sup>37</sup> 517 U.S. 456, 464 (1996).

<sup>38</sup> Steve Freiss, *Obama's policy strategy: Ignore laws*, Politico (June 6, 2012)

<http://www.politico.com/story/2012/06/obamas-policy-strategy-ignore-laws-077486>.

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followed the enforcement of bans on same-sex marriage as well.<sup>39</sup> The following subsections work to briefly illustrate the capacity the President has to selectively enforce law, beginning with analysis of prosecutorial discretion concepts and finishing with exploration of the relationship between unconstitutional law and the presidency.

### *1. Prosecutorial Discretion*

Few constraints exist to force the President's or an executive agent's hands towards prosecution.<sup>40</sup> Indeed, much of the discretionary ability lies dormant within the investiture of the office.<sup>41</sup> The concept surrounds the idea that the agents at hand, prosecuting individual matters, understand the factors at play better and have a firmer grasp at vital facts surrounding cases.<sup>42</sup> Thus, the Judiciary or Legislative Branch may not be as well suited to step in to an unfamiliar arena, and historically the two have restrained themselves from entering the fray.<sup>43</sup> Without doubt, a rapid halt of prosecution of certain matters could make a substantive impact in an emergency and equate to traditional non-enforcement.

Of course, prosecutorial agents are still bound by the archetypal requirements of bringing suit.<sup>44</sup> Limits and requirements typically emanate from statutes, regulations, and case law. "In the ordinary case, 'so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.'"<sup>45</sup> "It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions."<sup>46</sup>

Perhaps most useful is the wide discretion and leeway given by the Judiciary to the Executive and the agents. It should come as no surprise that the courts have acknowledged

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<sup>39</sup> See Norman R. Williams, *Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage*, 154 U. PA. L. REV. 565, 567 (2006).

<sup>40</sup> *Wayte v. United States*, 470 U.S. 598, 607 (1985).

<sup>41</sup> Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protecting After United States v. Armstrong*, 34 AM. CRIM. L. REV. 1071, 1072 (1997).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

<sup>45</sup> *Armstrong*, *supra* note 37, at 464.

<sup>46</sup> *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965).

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their setbacks and limits when restraining themselves from intervening in prosecutorial matters.<sup>47</sup> Emphasized frequently is the ability to gather facts and specialized resources in individualized fields that prosecutors hold better than the court system.<sup>48</sup> “The Executive’s decision not to enforce, “involves a complicated balancing of a number of factors which are peculiarly within its expertise.”<sup>49</sup> Thus, this insulates selective enforcement, hinging on prosecutorial discretion, from judicial intervention in a very tangible manner.

How can this tool be used in disaster? President Clinton, in the example listed in Part II, could have authorized Attorney General Janet Reno to immediately accelerate prosecution to all available actors involved in the California Energy Crisis and “throw the book” at them. Indeed, a selective prosecution and enforcement regulatory scheme could have been installed to respond. The Department of Justice could even begin utilizing the most antiquated of statutes in an effort to react. The applications could be endless; employing the converse, the President could incentivize private entities, or nonprofits facings legal entanglements with the federal government to initiate recovery and relief efforts in an energy disaster by indicating the Department of Justice would cease enforcement of pertinent charges levied against the parties if they act rapidly to begin aid in the energy crisis.

The President and the Executive branch as a whole are granted a substantively large leeway as prosecutors to begin and cease prosecutorial regimes as they see fit. Though there are restraints, the judiciary grants substantial slack to the prosecutors of the Executive Branch. This, as duly illustrated, could be deployed effectively in an energy crisis.

## 2. Unconstitutional Law

Touched on previously in multiple subsections, the President is vested with an ability, and perhaps duty, to defend the Constitution,<sup>50</sup> and thus, ignore law repugnant to it. What does this mean in the realm of non-enforcement? Discussion took place examining when the President could justify extralegal means to act in a crisis due to the duty to protect

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<sup>47</sup> Armstrong, *supra* note 37, at 465.

<sup>48</sup> Heckler v. Chaney, 470 U.S. 821, 831 (1985).

<sup>49</sup> *Id.* at 831.

<sup>50</sup> U.S. CONST. art. II, §1, cl. 8.



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the Constitution. If there is to be emphasis on the duty of the President to keep constitutional organs safe, does enforcement of unconstitutional law then harm the Constitution? Below, brief summarizations of the ability, followed by prompt application, are employed in an effort to make clear a unique facet of non-enforcement canon.

Colloquially, the obligation to ignore unconstitutional law is known as the “duty to disregard.”<sup>51</sup> This will be touched on later as this tool is both an instrument at the hands of the President and a vulnerability as well. What was once a matter circumscribed to examination within the courts and the academy has seen a rapid rise in controversy and popularity.<sup>52</sup> Traditionally riddled with concerns, this ability sees steadfast arguments from proponents and critics alike. For example, how can the Constitution birth the court system, and then grant the Executive, explicitly delineated from the judiciary, the inherent ability to interpret what is and what is not constitutional? Does the Take Care Clause knowingly bestow interpretation and enforcement powers? How can a President faithfully defend the Constitution and what is held to be constitutionally valid law if the President believes it to be repugnant to the Constitution? If a President has a multitude of problems with the validity of a statute, and begins an enforcement regime regardless, is this bad faith, and thus a violation of the Take Care Clause? The concepts appear relentlessly difficult to reconcile. It appears that the vesting of the enforcement ability must mandate some form of interpretation, and an absolutist ideal of the President being unable to interpret the law to be enforced seems infeasible at best.

What is unconstitutional law that may be pertinent to this Article’s argument? Imagine during the response to the Deepwater Horizon oil spill, if the damage had been far worse and the Americans living along the Gulf of Mexico were suffering far more severely than they had. If President Obama had a relief package, approved by a Republican Congress happy to help but attempting to achieve a political win, and which appeared as an emergency relief bill but in fact limited the Agencies and his own relief capability in an effort to curtail “big government overreach,” perhaps President Obama could have used his ability to interpret the law, to deem it unconstitutional, and in turn, not enforce it.

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<sup>51</sup> *Lockyer v. City & Cty. of San Francisco*, 33 Cal. 4th 1055, 1119–20, 95 P.3d 459, 499 (2004); Jordan E. Pratt, *Disregard of Unconstitutional Laws in the Plural State Executive*, 86 Miss. L.J. 881, 893–94 (2017).

<sup>52</sup> See generally *id.*

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Perhaps President Obama, in this hypothetical, refuses to enforce what he views as a bad faith separation of powers violation dressed as an energy emergency relief bill. President Obama's OLC would posit that this sham relief package is unconstitutionally attempting to restructure the administrative state under the guise of an energy emergency relief bill and that President Obama's duty to interpret unconstitutional law barred him from enforcing or enacting portions of it.

Messy, unclear, and at times problematic, the ability to cease enforcement of unconstitutional law has seen a great deal of attention in the last decade.<sup>53</sup> Indeed, it appears this ability raises more questions than it answers. While the exact extent and limits of the ability seem ripe for clarification from the Supreme Court, what is understood presently can be applied to this Article's argument.

### B. Administrative Actions

Moving now to the agencies and the administrative state, the President enjoys a complex and intricate control over the larger part of the regulatory and administrative framework. Below, a brief description of a prototypical usage of the administrative powers in an energy crisis is used to further this Article's posited argument. This section examines *only* dormant theoretical powers of agencies and application of those powers. Other tools, such as statutory emergency provisions, are discussed Parts V and VI.

The President also holds vast power over the agencies, their structure, and their management. A brief, applicable, and well-known example would be Executive Order 13212.<sup>54</sup> President George W. Bush commanded his administration to create an interagency task force dedicated to expediting review of current energy projects.<sup>55</sup> This task force was housed within the Department of Energy itself and held a tangled relationship with it.<sup>56</sup> Below, the capability to do so and further applicability will be

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<sup>53</sup> See generally *id.*

<sup>54</sup> Exec. Order No. 13,212, 66 FR 28,357 (May 18, 2001).

<sup>55</sup> *Id.*

<sup>56</sup> See Elizabeth Glass Geltman, *Inquiry into the Implementation of Bush's Executive Order 13211 and the Impact on Environmental and Public Health Regulation*, 27 *FORDHAM ENVTL. L. REV.* 225, 231 (2016).

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explored. The formal executive agencies and independent agencies are delineated into two distinct sections for ease of analysis.

### 1. The Executive Agencies

The following subsection is dedicated to purely executive agencies; analysis of the agency capabilities that are wholly under executive control, and then later independent agencies, proves enlightening. The Administrative Procedure Act looms ominously over discussion and analysis of almost any agency's abilities, in crisis or not.<sup>57</sup> Typical utilization of agency power comes with the implementation and drafting or repeal of rules and regulations.<sup>58</sup> These agency rules require steadfast compliance with the administrative law framework for implementation, drafting, notice and comment, and implementation can, undoubtedly, be a long-term procedure.<sup>59</sup> Other powers lying within an agency include mandating long-term commitments, policy guidance, proposals, and using enabling and regulatory statute loopholes—as well as a relative bully pulpit localized to each agency.<sup>60</sup>

First, relief and response agencies extant within the administrative state warrant examination. The Department of Homeland Security (DHS), christened by the Homeland Security Act of 2002,<sup>61</sup> holds vast power to respond to disasters;<sup>62</sup> there is a strong argument for experience in disaster relief and emergency management as prerequisites for leadership roles within the Department.<sup>63</sup> The Act aggregated several divisions and units, previously dispersed within the federal government, to make a centralized agency for better response and management.<sup>64</sup> The Act also has DHS absorb the Federal Emergency

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<sup>57</sup> Babette E.L. Boliek, *Agencies in Crisis? An Examination of State and Federal Agency Emergency Powers*, 81 FORDHAM L. REV. 3339, 3346 (2013).

<sup>58</sup> See generally *id.*

<sup>59</sup> *Id.* at 3346–47.

<sup>60</sup> *Id.*

<sup>61</sup> Pub. L. No. 107-296, 116 Stat. 2135 (2002).

<sup>62</sup> See generally *id.*

<sup>63</sup> Nick Miroff, *Kirstjen Nielsen, Trump's Nominee To Lead Homeland Security, Sails Through Confirmation Hearing*, THE WASHINGTON POST (Nov. 8, 2017), [https://www.washingtonpost.com/world/national-security/kirstjen-nielsen-trumps-nominee-to-lead-homeland-security-sails-through-confirmation-hearing/2017/11/08/1b8ca08e-c4ad-11e7-84bc-5e285c7f4512\\_story.html?utm\\_term=.5e0009f259d3](https://www.washingtonpost.com/world/national-security/kirstjen-nielsen-trumps-nominee-to-lead-homeland-security-sails-through-confirmation-hearing/2017/11/08/1b8ca08e-c4ad-11e7-84bc-5e285c7f4512_story.html?utm_term=.5e0009f259d3); Andrew Harnik, *Senate Confirms Kirstjen Nielsen To Head Homeland Security*, CBS NEWS, (Dec. 5, 2017), <https://www.cbsnews.com/news/senate-confirms-kirstjen-nielsen-to-head-homeland-security/>.

<sup>64</sup> See Pub. L. No. 107-296, 116 Stat. 2135 (2002).

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Management Agency (FEMA).<sup>65</sup> Each of these groups has disaster relief and emergency response innately within their foundation and core.<sup>66</sup> Though it may be elementary to point out, both groups, innately, have vast administrative authority and broad ability to manage disasters.

Returning to traditional agency action and response, an agency may put aside the notice-and-comment rules from the Administrative Procedure Act if compliance with the Act is “impracticable, unnecessary, or contrary to the public interest.”<sup>67</sup> Thus, in a disaster, an Agency has a theoretical ability to ignore the Administrative Procedure Act. Yet, what is peculiar is the relatively unique position that the emergency regulation has with regard to judicial review. Perhaps they enjoy an enhanced durability from judicial interference, as the judiciary generally feels uncomfortable weighing factors prompting action during emergency or national crisis.<sup>68</sup> While the potential consequences of careless or even less-than-meticulous agency action are grave, the Supreme Court noted that in an emergency “[p]rotection of the health and safety of the public is a paramount governmental interest, which justifies summary administrative action. Indeed, deprivation of property to protect the public health and safety is ‘[o]ne of the oldest examples’ of permissible summary action.”<sup>69</sup>

Application of the emergency capabilities of the agencies proves intriguing, yet just as practical to an executive trying to respond to a crisis. If a rush on propane, for domestic use, developed following power outages in Hawaii and Guam, and private companies immediately started transporting, recklessly, mass amounts of propane tanks from around the country to the islands, the President has the ability to use the agencies in this energy crisis. Assuming safety and proper usage were an issue, combined with tracking and price gouging, the Department of Energy and the Department of Transportation in tandem could use 5 U.S.C. § 553(b)(3)(B) to suspend traditional notice and comment procedural

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<sup>65</sup> Michael Davis et al., *Environmental Protection After A Disaster: A Right or A Privilege?*, NAT. RESOURCES & ENV'T, Spring 2006, at 15, 19–20.

<sup>66</sup> See generally 6 U.S.C. § 317 (2012).

<sup>67</sup> 5 U.S.C. § 553(b)(3)(B) (2012).

<sup>68</sup> See generally David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2570 (2003).

<sup>69</sup> *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 300(1981) (quoting *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599 (1950)).

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requirements.<sup>70</sup> The two departments could mandate that the transporters of propane, and the sellers mark the propane tanks meant for consumers as clearly as possible to avoid harm. This hypothetical assumes that distinct variants of traditionally used and safe propane were being shipped to the islands in a rush, but had insufficient labels and warnings, which led to injuries as residents assumed they were safe for usage on backyard grills. Traditional notice-and-comment would be time consuming and delayed, potentially leading to civilian injury or financial ruin; public safety could obligate the agencies to step in to protect the public. In the given hypothetical, the President would have used the executive agencies' traditional rule-making role to respond to citizens in an energy crisis.

## 2. The Independent Agencies

Intentionally apolitical and intended to be as detached from the penumbra of Executive influence as possible, independent agencies have garnered criticisms and been denounced as the “unconstitutional fourth branch of government.”<sup>71</sup> FEMA was an independent agency before the 2002–03 administrative restructuring and ended up under DHS's executive influence.<sup>72</sup> This particular subsection grapples with what exactly the Executive can do during a crisis if it tries to employ the independent agencies. As such, the full capabilities and utility of independent agencies cannot be fully explored, as they are segregated from the realm of presidential influence. Brief discussion of the relevant potential and later application does prove insightful and merits examination.

Traditionally, one would imagine the pertinent statutes would be examined for each of the many independent agencies to understand precisely what a President can do in an emergency to use the individual independent agency. Indeed, the design and blueprint of an independent agency is largely what protects it from Presidential influence.<sup>73</sup> Yet, the President still has a valid set of tools to use. The President can, at times, remove heads or

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<sup>70</sup> 5 U.S.C. § 553(b)(3)(B) (2012).

<sup>71</sup> William H. Hardie III, *The Independent Agency After Bowsher v. Synar-Alive and Kicking*, 40 VAND. L. REV. 903, 914–15 (1987).

<sup>72</sup> Elaine C. Kamarck, *When First Responders Are Victims: Rethinking Emergency Response*, 1 HARV. L. & POL'Y REV. 97, 98–99 (2007); Elizabeth F. Kent, *"Where's the Cavalry?" Federal Response to 21st Century Disasters*, 40 SUFFOLK U. L. REV. 181, 181–82 (2006).

<sup>73</sup> Brian D. Feinstein, *Designing Executive Agencies for Congressional Influence*, 69 ADMIN. L. REV. 259, 272–73 (2017).

members of independent agencies' boards or governing bodies at will.<sup>74</sup> The only real remedy against this is statutory language in the individual statutes barring the President from doing so.<sup>75</sup> A study by Dean Revesz and Kirti Datla found that of the eighty-one agencies studies, only twenty-three had language insulating the heads from Presidential removal.<sup>76</sup>

Another tool the President has is control over litigation and procedural matters on which the independent agencies rely.<sup>77</sup> Litigation control for most Executive matters is, by default, granted to the Department of Justice, and the independent agencies are not substantive exceptions.<sup>78</sup> Thus, Congress must specify when creating an agency that the new agency may litigate matters on its own.<sup>79</sup> For example, the Federal Communications Commission, an Independent Agency, must turn to the Department of Justice for adjudicatory matters, regardless if the Agency is acting in a manner contrary to policy preferences of the President.<sup>80</sup>

The President has the duty to appoint new members to independent agency commissions.<sup>81</sup> In order to enact policy preferences the President can, essentially, refuse to nominate anyone and in some cases leave an agency without a chair or members.<sup>82</sup> This potentially implicates procedural rules for moving forward within an agency's decision-making protocols, such as quorums or other requirements for agency action approval.<sup>83</sup>

While the above listed tools may seem a bit diluted compared to the gravitas of Presidential powers from sections above, the ability and results of influencing independent

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<sup>74</sup> Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 786–87 (2013).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 799–800.

<sup>78</sup> 28 U.S.C. § 516.

<sup>79</sup> *Id.*

<sup>80</sup> See generally 47 U.S.C. § 151–62; See Charles N. Steele & Jeffrey H. Bowman, *The Constitutionality of Independent Regulatory Agencies Under the Necessary and Proper Clause: The Case of the Federal Election Commission*, 2 YALE J. REG. 363, 373–378 (1987).

<sup>81</sup> See generally Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 915–21 (2009).

<sup>82</sup> Steele & Bowman, *supra* note 80.

<sup>83</sup> *Id.*

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agencies could generate substantial results in practice. The hypothetical below proves useful for understanding application.

Imagine the following, briefly. A spate of accidents at universities involving nuclear material grip the nation; college campuses as well as parents of victims are incensed. State university presidents and chancellors are struggling with their roles, as they are now thrown into the national spotlight, and no clear response regime is in place. The situation is ripe for presidential involvement. The Nuclear Regulatory Commission (NRC), independent of the Executive, is refusing to move towards more safety regulations regarding civilian usage of nuclear material. The makeup of the current NRC is primarily former academics that do not want to discourage academic research and exploration on campuses. The President, of opposite policy preference, facing political pressure and desperate to influence the NRC, instructs her Department of Justice to cease any pending and future litigation efforts for all NRC matters. In addition to the litigation control, the President records video messages for Facebook to immediately start spreading her message of how ineffective she believes the NRC to be. The President promptly hobbles the NRC and her loyal supporters began picketing outside of the NRC Headquarters in Rockville, Maryland. Congress is unable or unwilling to come to their defense, afraid of the President's now-incensed loyalists. The NRC Chairman, facing the potential of her agency's reputation in tatters and efficacy ruined while eating up tax dollars and failing to accomplish her own policy goals, bows to the President's policy demands and begins implementing stricter nuclear material regulation.

While not absolute and not often seen, the tools listed above work to illustrate the variety of means at the President's disposal. Though the institutional design of independent agencies as a whole may prove resistant to executive influence from the usual methods, there are still substantive paths to lobby them from the Oval Office. Thus, it cannot truly be claimed that independent agencies, are free from executive influence altogether. Again, the precise gradient and manner that the President may lobby or push these agencies vary a reasonable observer must assume a President in crisis would likely stretch any abilities found to their individual extremes. In an emergency, the President can, depending on the certain statutory authority, use independent agencies.

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## V. STATUTORY SCHEMES

Analysis and employment of legislative schemes and environmental statutes now prove critical to gaining firmer understanding of presidential emergency response. From the chaos of environmental disasters, many of the landmark environmental statutes have been developed and promptly christened.<sup>84</sup> The importance these statutes and legislative mechanisms play cannot be overstated in responding to an energy crisis. Indeed much of energy law surrounds environmental law.<sup>85</sup> The following subsections focus primarily on exemptions to existing statutory schemes and their legislatively crafted mechanisms relevant to the President's emergency response. Exemptions are provided in many of the landmark environmental statutes; while these are powerful tools, they pose challenges as they rely on Executive a great deal. The following subsections work to (1) provide and explain pertinent statutes in existence at the hands of the federal government and (2) apply the individual statutory schemes to a potential energy crisis.

### A. NEPA

The National Environmental Policy Act (NEPA), often hailed as the “environmental Magna Carta,”<sup>86</sup> provides a substantive framework for environmental policy and protection. NEPA works chiefly to (1) mandate that an agency, before taking action, consider “environmental impact,” and (2) obligates the agency to inform the public at large that the environmental impact was considered before the agency took action.<sup>87</sup> NEPA acts more often as a procedural barricade restricting new action, rather than as a punitive watchdog statute.<sup>88</sup> For this Article's purposes, the substantial tests and requirements native to NEPA will not be discussed in full.

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<sup>84</sup> Michael B. Gerrard, *Emergency Exemptions from Environmental Laws After Disasters*, NAT. RESOURCES & ENV'T, Spring 2006, at 10.

<sup>85</sup> See Lincoln L. Davies, *Beyond Fukushima: Disasters, Nuclear Energy, and Energy Law*, 2011 B.Y.U. L. REV. 1937, 1982 (2011).

<sup>86</sup> Brian Clark Howard, *48 Environmental Victories Since the First Earth Day*, NAT'L GEOGRAPHIC, (Apr. 18, 2018), <https://news.nationalgeographic.com/2016/04/160422-earth-day-46-facts-environment/>.

<sup>87</sup> Brian LaFlamme, *Nepa's Procedural Requirements: Fact or Fiction? Kuff v. United States Forest Service*, 7 MO. ENVTL. L. & POL'Y REV. 16 (1999).

<sup>88</sup> *Id.*



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There are tools to get around NEPA's compliance mandates in a disaster, fortuitously for the beleaguered. NEPA's implementing regulations allow an agency to circumvent the Environmental Impact Statement mandates in an "emergency," and head to the Presidential Council on Environmental Quality it creates for further alternative guidance.<sup>89</sup> Notably, President Carter signed Executive Order 12114, specifically allowing exemptions from environmental review if the disaster is outside of the geographical borders, territories, and possessions of the United States.<sup>90</sup>

Time can be precious in a crisis, and these procedural exemptions are substantively critical in assessing the federal government's ability to respond during an energy crisis. If a nuclear disaster were to occur, requiring long term cleanup efforts localized to the disaster site, the Environmental Protection Agency, the Department of Interior, and the Department of Energy would likely need to be on scene. Instead of complying with NEPA before for the agency presence, action, and regulatory schemes can be implemented in the irradiated area, the agencies could approach the Presidential Council on Environmental Quality to circumvent the impact assessment and reporting demanded by NEPA.

## B. CERCLA

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), also known as the "Superfund," is the primary regulatory mechanism for cleaning up contamination from hazardous waste.<sup>91</sup> CERCLA is particularly adept at responding to substance and material releases.<sup>92</sup> CERCLA equips the President with the ability and obligation to respond to these disasters, and implies Presidential involvement in response.<sup>93</sup> Notably, CERCLA seldom obligates action; rather, it instead authorizes response initiatives from the federal government.<sup>94</sup>

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<sup>89</sup> 40 C.F.R. § 1506.11.

<sup>90</sup> Exec. Order No. 12,114, 44 F.R. 1957 (1979).

<sup>91</sup> See John J. Lyons, *Deep Pockets and CERCLA: Should Superfund Liability Be Abolished?*, 6 STAN. ENVTL. L.J. 271, 271 (1987); Kathleen Chandler Schmid, *The Depletion of the Superfund and Natural Resource Damages*, 16 N.Y.U. ENVTL. L.J. 483, 487-90 (2008).

<sup>92</sup> Davis et al., *supra* note 65, at 17.

<sup>93</sup> 42 U.S.C. § 9604(a) (2012).

<sup>94</sup> Davis et al., *supra* note 65, at 17.

CERCLA has two distinguished exemptions for non-compliance: for an “Act of God”<sup>95</sup> and acts of war.<sup>96</sup> CERCLA, generally, focuses on releases of harmful substances that pose great health risks, and many of these can be seen in potential energy emergencies. Though it may be counterintuitive to imagine overlap between typical energy disasters and the prototypical CERCLA situations, CERCLA nonetheless has broad applicability in energy emergencies. If several large-scale power plants go down, and there is evidence of some emission of chemicals and working materials on site, CERCLA can “kick-in.”<sup>97</sup> The power emergency is undoubtedly within the penumbra of an energy crisis, the release of material is likely enough for CERCLA to take effect, and noncompliance regimes can be instituted. The President can act with broad authority and direct the executive agents to instantly act in an investigatory and response capacity. If the cause of the power plant going down was miraculous enough for it to be considered an act of god, the exemptions can be applied and used to work for timely and helpful response from Executive.

### C. The Clean Water Act

The Clean Water Act (CWA), originally an amalgamation of piecemeal legislative packages passed over a long period, was finally given its formal name in 1977.<sup>98</sup> The CWA’s primary goal is to maintain and restore the integrity of the nation’s waters and institute statutory schemes to do so.<sup>99</sup> To put it briefly, the CWA is largely a regulatory permitting scheme, allowing the federal government to monitor, control, and standardize measured discharges of pollutants into navigable waters. The CWA has inspired troves of jurisprudence and scores of law review articles, but for this Article’s argument, however, only a limited explanation is needed.

The National Pollution Discharge Elimination System (NPDES) permits that the CWA requires can be procedurally intricate and cumbersome to obtain. There are emergency tools born within the CWA, however. The CWA grants exemptions for the

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<sup>95</sup> 42 U.S.C. § 9607(b)(1) (2012).

<sup>96</sup> 42 U.S.C. § 9607(b)(2) (2012).

<sup>97</sup> 42 U.S.C. § 9607(a) (2012).

<sup>98</sup> Pub. L. No. 95-217, 91 Stat. 1566 (1977)

<sup>99</sup> *See generally id.*

mandated permits for a multitude of reasons. Perhaps the broadest is an “Act of God.”<sup>100</sup> In addition, exemptions are granted if great demand is placed upon the Army Corps of Engineers.<sup>101</sup>

If a fictitious pumped-hydroelectric storage plant that the greater Seattle area’s power grid relies on were rendered useless due to an abnormal and completely aberrant drought, perhaps the CWA’s emergency provisions could be of use.<sup>102</sup> If nearby companies had the resources to begin releasing slurry or industrial byproduct, primarily water but containing some chemical waste, potentially pollutants, that had been barred by the CWA previously, the Act of God waivers within the CWA could be used to allow the release of the water mixture into the dam. The releases would help to restore the dam’s efficacy and restore power to citizens of the Pacific Northwest.

#### D. The Clean Air Act

Succinctly, the Clean Air Act (CAA) mandates the regulation of the release of pollutants into the air.<sup>103</sup> This is accomplished through the implementation and utilization of National Ambient Air Quality Standards (NAAQS).<sup>104</sup> The methods employed to limit releases that endanger the public health and welfare are primarily delegated to the EPA.<sup>105</sup> The CAA focuses on both stationary and mobile sources and emphasizes regulation of (1) the sources of pollution and (2) the maintenance of air quality standards.<sup>106</sup>

The Clean Air Act has nine individualized exemptions within it, many of which were utilized during the aftermath of Hurricane Katrina.<sup>107</sup> The President can determine the need to relax emission standards—and potentially waive them—when a matter of

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<sup>100</sup> 33 U.S.C. § 1321(a)(12) (2012).

<sup>101</sup> 33 C.F.R. § 337.7 (2018); 33 C.F.R. § 325.2 (2018).

<sup>102</sup> See Mark Mininberg, *Hazardous Substance Spills: What and When to Tell the Government (and Others)*, 63 CONN. B.J. 69, 79–80 (1989).

<sup>103</sup> See generally 42 U.S.C. § 7412 (2012).

<sup>104</sup> Arnold W. Reitze, Jr., *The Intersection of Climate Change and Clean Air Act Stationary Source Programs*, 43 ARIZ. ST. L.J. 901, 913 (2011).

<sup>105</sup> Rich Raiders, *How EPA Could Implement A Greenhouse Gas Naaqs*, 22 FORDHAM ENVTL. L. REV. 233, 235 (2011).

<sup>106</sup> *Id.*

<sup>107</sup> Gerrard, *supra* note 84, at 13.

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national security is at hand.<sup>108</sup> The President can also choose to exempt the Defense Department's vehicles from CAA restrictions due to national security concerns.<sup>109</sup>

Rather than use the hypothetical and discussion method of analysis and explanation, pertinent precedent at the state level proves just as insightful. As touched on above, there is some capacity for Executive to rush or even waive federal permit approval and processing in an emergency.<sup>110</sup> A sterling example from a Governor grappling with air quality regulation in the throes of an energy crisis proves illuminating for CAA analysis and application. The following example is explored in much detail later, but pertains to this subsection's larger argument as well. An energy emergency was declared in California in 2001;<sup>111</sup> Governor Davis employed executive orders to attempt to combat the crisis and facilitate energy production.<sup>112</sup> California had its own air pollution and emission regulatory scheme that functionally mirrors and enhances the CAA,<sup>113</sup> and Governor Davis ordered expedited permitting review and slacked restrictions on permits and air pollution restrictions,<sup>114</sup> all in an effort to encourage production and ameliorate the crisis.<sup>115</sup>

#### E. Miscellaneous Statutory Emergency Powers

It may be easily understood that in a true crisis, troves of remote and antiquated statutory means from all sorts of subfields may be used by a nation in trouble. In tandem with the environmental legislation above, various other statutory regimes can see their requirements adjusted or waived in the throes of a crisis; indeed, these warrant examination as well. A President in a crisis may reach for far-ranging, colorful, or archaic statutes to apply; briefly, this subsection provides a sample of such emergency exemptions. Application assessment and hypothetical deployment is not necessary to grasp the utility of the statutes listed below.

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<sup>108</sup> 42 U.S.C. § 7412(h)(i)(4) (2012).

<sup>109</sup> 42 U.S.C. § 7588(e)(2012).

<sup>110</sup> Gerrard, *supra* note 84, at 13.

<sup>111</sup> Arnold W. Reitze, Jr., *State and Federal Command-and-Control Regulation of Emissions from Fossil-Fuel Electric Power Generating Plants*, 32 ENVTL. L. 369, 432 (2002).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *See id.*

<sup>115</sup> *Id.*

The Marine Protection Research and Sanctuaries Act provides, in an emergency, to allow for offshore dumping of material.<sup>116</sup> The National Historic Preservation Act, landmark archival legislation meant to preserve landmarks, buildings, or various sites of archaeological or historical value, grants disaster waivers.<sup>117</sup> The Coastal Zone Management Act hands power to the President to single-handedly begin action that may conflict with state law if the President or Secretary of Commerce determines a matter of national security is at hand and warrants the action.<sup>118</sup> The Endangered Species Act allows some “takes,” the killing or harming of listed endangered species, in the wake of a declared disaster.<sup>119</sup> As mentioned above, application of these statutory regimes and exceptions is likely obvious and requires little exploration of how the federal government could use or employ these emergency exceptions when attempting to combat an energy disaster.

#### F. The Stafford Act

No discussion of emergency response would be complete without analysis and exploration of the Stafford Act. The Stafford Act, a series of amendments to the Disaster Relief Act of 1974,<sup>120</sup> has broad application and capability outside of the energy or environmental realms.<sup>121</sup> Dispersing legal authority to act in times of emergency more broadly, but more narrowly, the Stafford Act codifies and regulates the delivery of support; be it logistical, fiduciary, or technology based, to individualized locales in the throes of a disaster.<sup>122</sup>

The Governor of an affected area must (1) respond to an emergency, (2) employ the state’s existing response agenda, and (3) request aid from the federal government.<sup>123</sup> Following this, the President declares a “major disaster” or “emergency.”<sup>124</sup> After the Presidential Declaration, resources appropriated by congress through the agencies or in

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<sup>116</sup> 33 U.S.C. § 1412(a)(2012).

<sup>117</sup> 16 U.S.C. § 470h-2(j) (2012).

<sup>118</sup> 16 U.S.C. § 1456(c) (2012).

<sup>119</sup> 16 U.S.C. § 1536(p) (2012); 42 U.S.C. § 5159 (2012).

<sup>120</sup> See generally 42 U.S.C. §§ 5121-5207 (2012).

<sup>121</sup> See generally *id.*

<sup>122</sup> See generally *id.*

<sup>123</sup> See *id.*

<sup>124</sup> *Id.*

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other forms begin to flow to the affected locales with the guidance of the President and Congress. The Stafford Act allows disaster or emergencies to be broadly applied to matters from forest fires to disease outbreaks. FEMA works in tandem through the execution of emergency response and plays a large role on the ground responding to individual crises and disasters. Applications towards energy emergencies are countless and do not warrant extensive illustration.

The Stafford Act holds a peculiar relationship with NEPA, which was discussed alone in a previous subsection. Notably, the Stafford Act grants NEPA waivers and exemptions for immediate responses and relief efforts to affected disaster areas.<sup>125</sup> While NEPA contains its own exemptions to be applied, this further subset of exemptions to the “environmental Magna Carta” could prove vital in an energy emergency when the federal government may not have the procedural capital to intricately examine environmental impacts and comply with the mandates of NEPA.

## VI. ENERGY AND EMERGENCY LEGISLATION

Moving away from statutes specific to the environment and towards energy and emergency statutes, this paper begins to explain the legislative abilities flowing from these statutes. Outside of dormant power within the Constitution for the President, as illustrated above, there is substantial extant statutory ability. This Article posits the dormant abilities within the Executive Branch of the federal government to use existing authority in applicable, perhaps aberrant methodologies to respond to an energy emergency. The bulk of this application and analysis involves employing authorities and legislation not designed for energy matters at all. Specifically, the following section discusses exactly how these programs and mechanisms can be employed in the wake of an energy emergency.

### A. The Natural Gas Policy Act of 1978

The Natural Gas Policy Act (NGPA), signed into law by President Carter, gave FERC the ability to regulate gas transmission and wholesale sale of natural gas.<sup>126</sup> The

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<sup>125</sup> 42 U.S.C. § 5159 (2012).

<sup>126</sup> See Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (1978).

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NGPA bolsters the previously existing Natural Gas Act of 1938.<sup>127</sup> The federal government witnessed the chaos of the gas shortages of the 1970s and had relatively little regulatory control at the time.<sup>128</sup> The Natural Gas Wellhead Decontrol Act of 1989 would later change some portions of the NGPA, removing price limits on most wholesale sales of natural gas in order to encourage competition, but much of it remains intact.<sup>129</sup>

This subsection now moves to illustrate how the NGPA could be used in an emergency. The NGPA allows the President to declare a natural gas emergency and appropriate funding and resources to a specified area, with the aid of the Department of Energy, to meet requirements and mandates for the market.<sup>130</sup> The President is handed emergency purchasing authority for natural gas.<sup>131</sup> In addition, allocation and dissemination authority is given to the President to disperse natural gas in an emergency as well.<sup>132</sup> Ninety days after termination of the emergency, the President must report to Congress regarding the exercise of emergency authority under the act.<sup>133</sup> Finally the NGPA contemplates federalism and preemption issues: “Any order issued pursuant to this subchapter shall preempt any provision of any program for the allocation, emergency delivery, transportation, or purchase of natural gas established by any State or local government if such program is in conflict with any such order.”<sup>134</sup> The rote applicability of the NGPA is perhaps so obvious it need not warrant application to hypothetical energy disasters to be understood in full.

#### B. The Defense Production Act of 1950

The Defense Production Act of 1950 (DPA) was born in the midst of Cold War defense and energy concerns just as the Korean War was taking off. Primarily, the DPA provides authority for the President to allocate services and resources, establish guidance

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<sup>127</sup> *Id.*

<sup>128</sup> See U.S. ENERGY ADMIN., OFFICE OF THE HISTORIAN, *Oil Embargo 1973-1974*, <https://history.state.gov/milestones/1969-1976/oil-embargo> (last visited Nov. 25, 2018).

<sup>129</sup> *Id.*

<sup>130</sup> See generally 15 U.S.C. §§ 3361-3364 (2012).

<sup>131</sup> 15 U.S.C. §3362 (2012).

<sup>132</sup> 15 U.S.C. §3363 (2012).

<sup>133</sup> 15 U.S.C. §3364 (2012).

<sup>134</sup> *Id.*

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and orders, and manage civilian affairs when responding to situations pertinent to the national security or defense interests. The DPA codified semi-fluid executive authority.

Multiple portions of the DPA pertain immediately to power and energy demands.<sup>135</sup> President Truman employed the DPA to regulate the steel and mining industries in the throes of the Korean War. Throughout the Reagan and first Bush Administrations, the breadth of the DPA was widened as the Department of Defense began to regulate new technologies and innovations using the DPA's authority.<sup>136</sup> Indeed, the DPA itself even allocates power to the President to monitor and assess whether adequate energy supplies exist for the defense and contractual obligations of the country.<sup>137</sup> An excerpt below immediately pertaining to energy policy within the DPA proves particularly illuminating:

(c) Domestic energy; materials, equipment, and services

(1) Notwithstanding any other provision of this chapter, the President may, by rule or order, require the allocation of, or the priority performance under contracts or orders (other than contracts of employment) relating to, materials, equipment, and services in order to maximize domestic energy supplies if he makes the findings required by paragraph (3) of this subsection.

(2) The authority granted by this subsection may not be used to require priority performance of contracts or orders, or to control the distribution of any supplies of materials, services, and facilities in the marketplace, unless the President finds that--

(A) such materials, services, and facilities are scarce, critical, and essential--

(i) to maintain or expand exploration, production, refining, transportation;

(ii) to conserve energy supplies; or

(iii) to construct or maintain energy facilities; and

(B) maintenance or expansion of exploration, production, refining, transportation, or conservation of energy supplies or the construction and maintenance of energy facilities cannot reasonably be accomplished without exercising the authority specified in paragraph (1) of this subsection.<sup>138</sup>

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<sup>135</sup> 50 U.S.C. § 4511(2012).

<sup>136</sup> Ferrey *supra* note 1, at 287.

<sup>137</sup> 50 U.S.C. § 4511.

<sup>138</sup> *Id.*



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A multitude of obvious applications exist for the usage of the provision listed above. Domestic energy production can be immediately altered by Presidential action if the national security interest calls for it.<sup>139</sup> If that emergency may be related to armed conflict around the world, or perhaps uncontrollable rolling blackouts in areas surrounding key military bases, the President has ample, and at times unequivocal authority to step in utilizing not just the dormant foreign powers and Commander in Chief abilities within the Oval Office, but the statutory authority vested within the Defense Production Act.<sup>140</sup>

### C. The Emergency Planning and Community Right-to-Know Act of 1986

The Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) focuses on localized emergency and crisis response planning and management.<sup>141</sup> The EPCRA amended CERCLA, but is also a distinct legislative package and holds delineated policy goals, chiefly to encourage municipal and local planning for disasters.<sup>142</sup> The EPCRA, in an effort to force pertinent parties to work together, mandates creation of Local Emergency Planning Committees (LEPCs). Made up of interested parties from government officials to private industry leaders to citizens, LEPCs must in turn report to State Emergency Planning Committees (SEPCs).<sup>143</sup> The EPCRA also contains requirements, modified by the SEPC's and LEPC's findings and individualized regulations, regarding local hazardous material storage and usage.<sup>144</sup>

Moving to the most relevant part of the statute regarding energy, the EPA monitors what are known as Toxic Release Inventories (TRIs).<sup>145</sup> The EPCRA mandates that each localized hazardous material facility submit reports to the EPA on TRIs.<sup>146</sup> The EPA regulates and manages known TRIs and noncompliance.<sup>147</sup> The EPA brought power plants

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> See generally 42 U.S.C. §§ 11001-11050 (2012).

<sup>142</sup> *Id.*

<sup>143</sup> Krista Green, *An Analysis of the Supreme Court's Resolution of the Emergency Planning and Community Right-to-Know Act Citizen Suit Debate*, 26 B.C. ENVTL. AFF. L. REV. 387, 388 (1999).

<sup>144</sup> See David J. Abell, *Emergency Planning and Community Right to Know: The Toxics Release Inventory*, 47 SMU L. REV. 581, 582-86 (1994).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

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and electricity companies into the TRI fold at the start of the first Bush Administration.<sup>148</sup> While this may seem intuitive, this expansion hands the federal government more power to control regulatory burdens placed upon power plants and industries. The EPA has substantial discretionary authority under the EPCRA to relax TRI requirements in certain instances.<sup>149</sup>

The Administrator, on his own motion or at the request of a Governor of a State (with regard to facilities located in that State), may apply the requirements of this section to the owners and operators of any particular facility that manufactures, processes, or otherwise uses a toxic chemical listed under subsection (c) of this section if the Administrator determines that such action is warranted on the basis of toxicity of the toxic chemical, proximity to other facilities that release the toxic chemical or to population centers, the history of releases of such chemical at such facility, or such other factors as the Administrator deems appropriate.<sup>150</sup>

“[O]r such other factors as the Administrator deems appropriate” proves perhaps the most useful in assessing the potential for utilizing the EPCRA in an energy emergency.<sup>151</sup> This provision hands discretionary power to the EPA administrator, who continues to serve at the pleasure of the President.<sup>152</sup> By allowing the Administrator to selectively apply the EPCRA requirements, this section could enable an additional executive presence in the energy markets by forcing regulatory compliance burdens on any given producer.<sup>153</sup> Conversely, the EPA Administrator is also given discretionary power to ameliorate the compliance burden. Whether through modification of reporting frequency for TRIs or revision and elimination of certain chemicals or materials listed as TRIs, the Administrator, and the President, have power to substantively reduce regulatory burdens.<sup>154</sup> If there were evidence that jumpstarting energy production in a certain locale

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<sup>148</sup> See Alec Zaccaroli, *Utilities Should Begin Preparing Now for Release of TRI Data, Officials Say*, 29 ENV'T REP. (BNA) 1847, 1847 (Jan. 22, 1999).

<sup>149</sup> 42 U.S.C. §1123(b)(2) (2012).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Richard J. Pierce, Jr., *The Inherent Limits on Judicial Control of Agency Discretion: The D.C. Circuit and the Nondelegation Doctrine*, 52 ADMIN. L. REV. 63, 94 (2000).

<sup>153</sup> See generally *id.*

<sup>154</sup> *Id.*

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could resolve an energy crisis, the President could substantively ease regulatory burdens on power production plants within the scope of his power under the EPCRA.

#### D. The Federal Power Act

The Federal Power Act (FPA), technically extant from 1920 on, has been amended numerous times and was originally designed to be a catalyst for hydroelectric dam creation and development.<sup>155</sup> Notably, this was the first large-scale foray by the federal government to enter the hydroelectric power arena,<sup>156</sup> which had been previously delegated solely to the states.<sup>157</sup> The FPA created the Federal Power Commission (FPC), which would later become FERC.<sup>158</sup> The FPA's scope is wide; it disperses vast authority for FERC to act in its capacity as an agency to regulate rates and pricing for electricity.<sup>159</sup>

Yet, the FPA does have noteworthy caveats and provisions for emergencies and disasters. The FPA hands the ability to FERC to declare a power emergency under the Federal Power Act (FPA).<sup>160</sup> FERC, or alternatively the Department of Energy, may order relief actions during the emergency.<sup>161</sup>

“During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority, either upon its own motion or upon complaint, with or without notice, hearing, or report, to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest . . . .”<sup>162</sup>

In renewing or reissuing an order under subparagraph (A), the Commission shall consult with the primary Federal agency with expertise in the environmental

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<sup>155</sup> See generally 16 U.S.C. §824 (2012).

<sup>156</sup> Gifford Pinchot, *The Long Struggle for Effective Federal Water Power Legislation* 14 GEO. WASH. L. REV. 9, 19 (1945).

<sup>157</sup> *Id.*

<sup>158</sup> Joel B. Eisen, *Ferc's Expansive Authority to Transform the Electric Grid*, 49 U.C. DAVIS L. REV. 1783, 1790 (2016).

<sup>159</sup> *Id.*

<sup>160</sup> 16 U.S.C. §824a(c) (2012).

<sup>161</sup> *Id.*

<sup>162</sup> 16 U.S.C. § 824a(c)(1) (2012).

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interest protected by such law or regulation, and shall include in any such renewed or reissued order such conditions as such Federal agency determines necessary to minimize any adverse environmental impacts to the extent practicable. The conditions, if any, submitted by such Federal agency shall be made available to the public. The Commission may exclude such a condition from the renewed or reissued order if it determines that such condition would prevent the order from adequately addressing the emergency necessitating such order and provides in the order, or otherwise makes publicly available, an explanation of such determination.”<sup>163</sup>

The excerpts above illuminate the energy emergencies contemplated within the FPA. These provisions apply handily to a plethora of applicable situations. FERC can take emergency control of facilities, aid in delivery and dispersal of energy, or a vast number of other actions it deems fit.<sup>164</sup> In the throes of a power crisis in California, FERC initiated responses and action using this portion of the FPA’s authority in tandem with the Secretary of Energy; this will be explored in a later subsection.

## VII. QUASI-LEGAL AUTHORITY: YOUNGSTOWN REVISITED

Until now, this Article has focused largely on tangible abilities of the presidency. This following section deploys argument that the President can use extra-legal authority to respond to an energy emergency. Thorough exploration of a potential methodology for employment of constitutionally vested or statutorily granted power has been used above. The following section works to explore the lesser-known theories for reaction to energy emergencies. Specifically explored are the methodologies available for the President to buck enacted law, or act without authority, as discussed through the lens of the famous *Youngstown Sheet and Tube Company v. Sawyer* case. *Youngstown*, one of the most critical cases in all Supreme Court separation of powers jurisprudence, sees Justice Jackson’s “zone of twilight” theory born from a concurring opinion.<sup>165</sup> Justice Black writes for the majority, and iterates a similar yet distinct notion discussing Separation of Powers and potential deviation from quasi-legal action or duly enacted law.<sup>166</sup> While both theories

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<sup>163</sup> 16 U.S.C. §824a(c)(4)(B) (2012).

<sup>164</sup> See generally *id.*

<sup>165</sup> See Elizabeth Bahr & Josh Blackman, *Youngstown's Fourth Tier: Is There A Zone of Insight Beyond the Zone of Twilight?*, 40 U. MEM. L. REV. 541, 542–45 (2010).

<sup>166</sup> *Id.*

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warrant examination, the Court has since wholeheartedly incorporated and utilized Justice Jackson's concurrence far more.<sup>167</sup>

#### A. Justice Jackson and the Functionalist Approach

In *Youngstown*, Justice Jackson posits through his concurrence that the President's authority and constitutionally dispersed power are not stolid and inert; rather these abilities are in a state of fluctuation and more dynamic.<sup>168</sup> This approach places the emphasis on the functional nature of the powers of the office, rather than the demarcated, "clear-cut," formalistic approach. Jackson delineates three distinct lanes of extra-legal Presidential authority: (1) when Congress distinctly hands power and authority over to the President, be it express or implied; (2) the notorious "zone of twilight," when constitutional Presidential authority is unclear and congressional authorization is unclear in addition; and (3) when Congress expresses its will and the President acts in defiance.<sup>169</sup>

Exploring the first route, legal scholars have heralded this path as the strongest and perhaps most steadfast option to utilize the often open-ended authority of the office of the presidency.<sup>170</sup> Justice Jackson argues that authority is at its maximum as the President is utilizing the full weight of her own office and of the Congress in the absence of enabling law.<sup>171</sup> This path has obvious applicability to energy disasters. Congress is increasingly unable to function to its previous potential and could very well be unable to pass pertinent law in the throes of a crisis. The President, Majority Leader, and Speaker of the House could, in tandem, use their bully pulpits to disseminate an unequivocal message of authorization of Presidential authority, despite traditional statutory and legal barriers to efficiently responding to a disaster.

Jackson's second lane, the "zone of twilight," holds great potential as well. The zone of twilight assumes the authority to act is unclear.<sup>172</sup> In this instance, Congress has

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<sup>167</sup> *Id.* at 555.

<sup>168</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (Jackson, J., concurring) (1952).

<sup>169</sup> *Id.* at 635-39.

<sup>170</sup> See generally Bahr & Blackman, *supra* note 167 at 564.

<sup>171</sup> *Youngstown*, 343 U.S. at 585.

<sup>172</sup> See Patricia L. Bellia, *Executive Power in Youngstown's Shadows*, 19 CONST. COMMENT. 87, 105 (2002).

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not given a clear denial or approval to act, and the two branches may share authority on a given issue.<sup>173</sup> This theory remains fact-specific and mandates assessment as to where the two branches have made their preferences clear, as well as analysis of the current state of the perennial ebb and flow of power between the two. Curiously, this lane is premised on the notion that the President *may in fact* act outside the realm of the formalistic view of the vested powers, and the subsequent embrace of this theory leads scholars to conclude the President has at least some ability in the eyes of the Supreme Court to depart from her traditionally granted power.<sup>174</sup>

Being so innately fact-specific, the zone of twilight is metaphorically yearning for hypothetical application. Indeed, ample scholarship is dedicated to testing the limits of this theory, and there are arguments to be made that this middle path could be applied to energy policies and emergencies. Consider another hypothetical. If geothermal energy development and research accelerates, with unclear guidance from Congress and minimal interest from Executive, resulting in plants and facilities opening in North Dakota, Idaho, and Montana, perhaps an eventual energy emergency could occur. Feasibly, local grids had become so dependent on the energy from these plants, which have little oversight or guidelines, that when an energy emergency comes, and each shut down, the residents and locals are devastated. Here, the zone of twilight may prove relevant. Both parties have vested interests, Congress' interstate commerce abilities, and the President's foreign powers tools (due to nearby military bases and cross-border Canadian energy reliance); this situation would be ideal for a President to step in and employ the functionalist's zone of twilight path to respond. However, as traditionally mentioned, this acquiescence from the Legislature threatens to erode the current balance of power between the two branches.<sup>175</sup>

The third path warrants the least examination. When Congress makes clear its opinion and the President acts in blatant defiance, the President can only rely on her inherent vested authority, and cannot borrow from the sister branch.<sup>176</sup> No complex

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<sup>173</sup> *Id.* at 100.

<sup>174</sup> *Id.* at 105.

<sup>175</sup> *See generally*, Bahr & Blackman, *supra* note 167, at 568–69.

<sup>176</sup> Belia, *Supra* note 174, at 100.

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analysis is particularly required, as the authority can only be examined from Executive's vested powers alone. Any given energy disaster's legal authority and analysis to which this could be applied would mirror analysis of any other utilization of solely executive authority.

### B. Justice Black and the Formalist Approach

Moving on to the other wing of *Youngstown*, Justice Black's formalistic approach to Separation of Powers warrants some consideration in tandem with the more popular concurrence. These two distinct schools of jurisprudence have critics and supporters, each decrying the other's issues and heralding their own school's superiority. Though Justice Jackson's functionalist theory is more well-known and more often used, the formalism approach demands illustration when exploring legal routes for the President to respond to an energy emergency.

Justice Black, writing for the majority in *Youngstown*, does iterate a sort of quasi-zone of twilight notion by observing Congress can imply authorization for the President to act.<sup>177</sup> Yet Justice Black still demanded clear authority: "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."<sup>178</sup> Rifling through sources diligently for any formal authority to rationalize or explain the President's actions and failing, Justice Jackson emphasized the necessity for clear authority for President Truman's actions and deemed them unconstitutional.<sup>179</sup> By demarcating the only capabilities for Presidential action in any arena, Justice Black confines this view of separation of powers to the immediately available and unequivocally constitutional sources of authority, namely: (1) the President's authority, and (2) Congress' authority.<sup>180</sup> This reading of the Constitution mandates narrow interpretation of the Vesting Clause and the authority it distributes.

Because of the constricted view that formalists take in separation of powers, the application of this school of jurisprudence in a given energy emergency proves relatively

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<sup>177</sup> *Id.*

<sup>178</sup> *Youngstown*, 343 U.S. at 585.

<sup>179</sup> *Id.*

<sup>180</sup> *See generally id.*

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elementary. Much like the third prong in Justice Jackson's concurrence, this school requires perhaps superficial analysis to prove conclusive. Merely, assessing the obvious sources of constitutional authority within the Executive Branch or delegation to the Executive Branch proves decisive in attempting to determine how or if a President may act in responding to a given energy crisis.

Indeed, it appears that the functionalist approach holds far more utility when hunting for extra-legal manners of responding to an energy crisis. The nature of emergency mandates the consideration of some degree of procedural compromise. Path One or Path Two of Justice Jackson's functional approach would undoubtedly yield more efficient response results in a crisis. If the President were to rely on Jackson's third path, or the formalist approach, the response is not extra-legal in nature at all, but narrowly tailored to the perceived parameters of the Oval Office and the powers delegated to it by Congress.

#### VIII. MATERIAL AND THEORETICAL APPLICATIONS

Spirited effort and substantive explanation in an attempt to explore the potential authority and routes for Presidential response to an energy emergency has been employed above. The applicable value of such routes cannot be assumed wholly through conceived hypotheticals designed intentionally for the purposes of elucidating complex theories, authorities, and usages of federal powers. Below, Part VIII begins exploring previous energy emergencies in the domestic arena. Analysis below covers the actual response from the President and the rest of the federal government that these individual emergencies elicited, and the varied theoretical responses that these emergencies could have produced. Brief summaries of each emergency, along with pertinent facts and the application of theoretical and actual constitutional methods to respond, illustrate the utility of this Article as a whole beyond purely theoretical insights. For, what good are potential theoretical utensils of federal authority if they would, in practice, fail to garner real world legitimate application?



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### A. The Aliso Canyon Gas Leak

October 23, 2015, a gas leak was discovered emanating from an underground gas storage facility within the Santa Susana mountain range.<sup>181</sup> It is estimated 97,100 metric tons of methane and 7,300 metric tons of ethane were released into the atmosphere because of this leak.<sup>182</sup> Believed to be the worst gas leak in American history, the event also resulted in the creation of a larger carbon footprint than the Deepwater Horizon Oil Spill.<sup>183</sup> Residents first began noticing headaches, nosebleeds, and periodic nausea.<sup>184</sup> Over 11,000 people had to be relocated because of the gas leak.<sup>185</sup>

The state administrative response has been substantial and speedy.<sup>186</sup> Within two days of discovery, a dozen agencies had been on the ground getting involved in responding to the leak.<sup>187</sup> Governor Jerry Brown declared a state of emergency, while also ordering enhanced scrutiny and safety inspections in similar sites.<sup>188</sup> Thorough speculation has centered on the long-term health risks that those who were exposed to the leak now face. Senators Dianne Feinstein and Barbara Boxer sent letters requesting President Obama's EPA as well as the Departments of Justice and Transportation investigate possibilities for

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<sup>181</sup> Wiemond Wu, *Ab 2748: Like Lead and Methane Gas, Causation Issues Continue to Lurk*, 48 U. PAC. L. REV. 514, 517 (2017); See Herman Trabbish, *Historic Los Angeles methane leak puts natural gas emissions under scrutiny*, UTILITY DIVE (Dec. 21, 2015) <https://www.utilitydive.com/news/historic-los-angeles-methane-leak-puts-natural-gas-emissions-under-scrutiny/411060/>.

<sup>182</sup> Helen Thompson, *California Gas Leak Spewed Massive Amounts of Methane*, SCIENCE NEWS (Feb. 25, 2016), <https://www.sciencenews.org/blog/science-ticker/california-gas-leak-spewed-massive-amounts-methane>.

<sup>183</sup> Tim Walker, *California Methane Gas Leak 'More Damaging Than Deepwater Horizon Disaster'*, THE INDEPENDENT (Jan. 2, 2016), <https://www.independent.co.uk/news/world/americas/california-methane-gas-leak-more-damaging-than-deepwater-horizon-disaster-a6794251.html>.

<sup>184</sup> Paul Blake, *How Many Cars And Burping Cows Equal The California Gas Leak?*, BBC NEWS (Jan. 11, 2016), <http://www.bbc.com/news/world-us-canada-35258036>.

<sup>185</sup> Matt McGrath, *California Methane Leak 'Largest in US History'*, BBC NEWS (Feb. 26, 2016) <https://www.bbc.com/news/science-environment-35659947>.

<sup>186</sup> See generally Steve Scauzillo, *3 Years Since the Aliso Canyon Gas Leak, Almost Half the Wells in the Storage Field Near Porter Ranch are Shut Down*, L.A. DAILY NEWS (Oct. 22, 2018) <https://www.dailynews.com/2018/10/22/3-years-since-the-aliso-canyon-gas-leak-almost-half-the-wells-in-the-storage-field-near-porter-ranch-are-shut-down/>.

<sup>187</sup> Walker, *supra* note 183.

<sup>188</sup> Tony Barboza, *Brown Declares State of Emergency at Porter Ranch Amid Massive Gas Leak*, LOS ANGELES TIMES, (Jan. 6, 2016) <https://www.latimes.com/local/lanow/la-me-ln-brown-declared-emergency-at-porter-ranch-amid-massive-gas-leak-20160106-story.html>.

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federal responses to the leak.<sup>189</sup> Over three months after the reported date of discovery, state actors announced the leak had been plugged.<sup>190</sup>

Though recourse is beginning to crystalize through the governmental system, there may have been a multitude of additional opportunities for the President to step in. President Obama may have been able to declare an emergency under the Stafford Act; this would have afforded a wealth of resources—logistical, scholarly, or monetary—to California to aid relief. In addition, President Obama could have instructed his prosecutors and others within the Department of Justice to “ramp-up” their investigation and prosecutions, to seek all legal remedies and pursue any federal statutes to bring relief to the victims under the Take Care Clause and the doctrine of prosecutorial discretion. Perhaps if the CAA or CWA could have been used to respond, the President might have taken advantage of their exemptions or emergency response mechanisms.

On January 6, 2017, the EPA opened for comment a potential new rule expanding EPCRA’s coverage to adjust, modify, and increase reporting requirements under the TRA for natural gas facilities;<sup>191</sup> common sense dictates that the Aliso leak played a somewhat motivational role. Exactly what President Trump and his EPA intend to decide regarding this rule has become markedly unclear. Regardless, in this tragic energy-related disaster, the President held vast dormant and often under-utilized power to intervene and respond.

### B. The Pennsylvania Marcellus Shale Spill

In April of 2011, while Chesapeake Energy had a fracking operation underway for the Marcellus Shale Formation, one of their gas wells in rural Northern Pennsylvania erupted and began spewing, for a period uncontrollably, gallons of toxic used water.<sup>192</sup>

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<sup>189</sup> Brian Melley, *Boxer, Feinstein To Seek Federal Review Of Los Angeles Gas Leak*, ORANGE CTY. REGISTER (Jan. 29, 2016) <http://www.oregister.com/2016/01/29/boxer-feinstein-to-seek-federal-review-of-los-angeles-gas-leak/>; Sarah D. Wire, *Feinstein, Boxer To Call For Federal Review Of Porter Ranch-Area Gas Leak*, L.A. TIMES (Jan. 29, 2016) <http://www.latimes.com/politics/la-pol-ca-porter-ranch-senators-review-20160129-story.html>.

<sup>190</sup> Barboza, *supra* note 188.

<sup>191</sup> See generally Addition of Natural Gas Processing Facilities to the Toxics Release Inventory (TRI), 82 Fed. Reg. 1651 (proposed Jan. 6, 2017) (to be codified at 40 CFR pt. 372).

<sup>192</sup> Seamus McGraw, *Pennsylvania Fracking Accident: What Went Wrong*, POPULAR MECHANICS (Apr. 21, 2011) <http://www.popularmechanics.com/science/energy/a6597/pennsylvania-fracking-accident-what-went-wrong-5598621/>.

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Though seven families were asked to evacuate as a result, there were no injuries reported; the incident left thousands of gallons of toxic water above ground.<sup>193</sup> Perhaps most notably, the discharge created a stark paragon of the fracking accidents and malfunctions of which activists and concerned citizens continue to warn.

The reaction to the rapid discharge has raised questions. Emergency responders were flown in from Texas more than thirteen hours after the site was reported to be malfunctioning.<sup>194</sup> The Pennsylvania Department of Environmental Protection has largely administered response and recovery efforts, aimed acutely at Chesapeake Energy and their—according to some—questionable response coordination.<sup>195</sup> Fracking still plays a large role in Pennsylvania, with 12,000 permits and 6,000 fracking wells approved between 2011 and 2015.<sup>196</sup> However, in 2015 Governor Tom Wolf notably froze the issuance of new permits within state parks.<sup>197</sup>

While the response has been largely held within state boundaries, there are remaining concerns regarding what the federal government and President Obama in particular, could have done. The President could perhaps have used the Superfund and attempted to employ his authority to have the site added to the National Priorities List (NPL), allowing increased long-term resources from the federal government.<sup>198</sup> The NPL has a set formula for placement, utilizing a hazard ranking system (HRS) as well as administrative mechanisms,<sup>199</sup> but the President could have accelerated the process and used the bully pulpit among other managerial tools to attempt to aid the placement of the eruption on the list.

The President may have been able to make an argument for increased authority for the federal government in this instance, based on the geography of Leroy Township.

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<sup>193</sup> *Id.*

<sup>194</sup> Nicholas Kusnetz, *Response to Pa. Gas Well Accident Took 13 Hours Despite State Plan for Quick Action*, PROPUBLICA (Apr. 26, 2011), <https://www.propublica.org/article/response-to-pa-gas-well-accident-took-13-hours-despite-state-plan-for-quick>.

<sup>195</sup> *Id.*

<sup>196</sup> *Pennsylvania and Fracking*, EARTHJUSTICE, <https://earthjustice.org/features/pennsylvania-and-fracking> (last visited Nov. 25, 2018).

<sup>197</sup> *Id.*

<sup>198</sup> *Superfund*, U.S. ENVTL PROT. AGENCY, <https://www.epa.gov/superfund> (last visited Nov. 25, 2018).

<sup>199</sup> *Superfund Cleanup Process*, U.S. ENVTL PROT. AGENCY, <https://www.epa.gov/superfund/superfund-cleanup-process> (last visited Dec. 8, 2017).

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Bradford County, home of Leroy Township, straddles the border of Upstate New York. An argument can be made that the incident was interstate in nature because the effects of the accident spread to the State of New York and likely fell within the jurisdiction of the New York State Department of Environmental Conservation. Indeed, if a successful argument was made that this incident could be in the federal government's arena, even Congress' enhanced legitimacy would be given to any Presidential foray in response. The situation seems rife with inter-state commerce effects and concepts, further cementing federal authority on the matter. If there is not resolute authority on cross-border energy disasters, the *Youngstown* opinion may prove insightful. Adopting the functionalist approach, one pulling heavily from Jackson's concurrence, could lead the Office of Legal Counsel or White House Counsel to begin examining what the Legislature has said regarding authority in similar situations. President Obama may have had extra-legal, quasi-constitutional authority in this particular incident, depending on the Administration's interpretation of previous iterations of congressional intent or authorization.

### C. The California Electricity Crisis

The following example and its subsequent jurisprudence can unequivocally boast substantively studied repercussions and corollaries. The California Electricity Crisis, called the Power Crisis or Energy Crisis as well, proves intriguing as the nature of the response involves the federal government working in tandem with the State. Indeed several of the examples of potential authority to act were employed by the federal government. Notably, this section does not devote much time to hypothetical or theoretical extension of responses from the President as the actual response was so notable, and pertinent examination proves illuminating enough for this Article's purpose and argument.

Energy supply shortages, caused by a multitude of complex factors and exacerbated afterwards by many more, caused mass blackouts, market chaos, and the eventual restructuring of the California energy market.<sup>200</sup> Governor Gray Davis would eventually

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<sup>200</sup> Alan Ramo, *California's Energy Crisis- the Perils of Crisis Management and A Challenge to Environmental Justice*, 7 ALBANY L. ENVTL. OUTLOOK J. 1, 2 (2002).

declare an emergency<sup>201</sup> and an emergency session of the state legislature would be called to order.<sup>202</sup> After the state emergency was declared, the agencies at play in California were entitled to drop procedural safeguards and begin acting in an emergency capacity to stabilize the markets.<sup>203</sup> Though precise blame is difficult to place in response, California largely failed to ameliorate the chaos of the crisis, prompting criticisms from residents and politicians alike.<sup>204</sup>

The crisis, born in April of 2000, had not passed by December, at which point the Federal Government entered the fray and attempted to respond.<sup>205</sup> The California Independent Systems Operator (CISO), tasked with monitoring prices and regulating the energy market, requested that FERC lift prices and limitations on energy rates at wholesale.<sup>206</sup> An emergency order was promulgated from U.S. Secretary of Energy Bill Richardson, which required previously unrequired energy sellers on the west coast to begin selling energy to California, in the throes of the Crisis.<sup>207</sup> Secretary Richardson used § 202(c) of the FPA to force energy sellers to enter the California market,<sup>208</sup> arguing that the energy emergency allowed the order compelling sellers.<sup>209</sup>

President Bill Clinton invoked war time powers and employed them in a noteworthy manner as well.<sup>210</sup> President Clinton used the DPA and forced additional out-of-state energy sellers to sell energy to California utility companies.<sup>211</sup> As California was teetering into insolvency, in tandem with localized utilities, President Clinton argued that the federal national security interest in California was so strong that the potential for abject loss of power became a national security issue—particularly with NASA facilities and

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *See id.*

<sup>204</sup> *See id.*

<sup>205</sup> Joseph P. Tomain, *The Past and Future of Electricity Regulation*, 32 ENVTL. L. 435, 441 (2002).

<sup>206</sup> *See Id.*; Christian Berthelson, *Power Stays On, But State's Darkest Days May Lie Ahead / Rolling blackouts could still hit, officials warn*, S.F. CHRONICLE (Dec. 9, 2000), <http://www.sfchronicle.com/news/article/Power-Stays-On-But-State-s-Darkest-Days-May-Lie-2723133.php>.

<sup>207</sup> Ferrey, *supra* note 1, at 287.

<sup>208</sup> Susan E. Taylor, *Energy Emergency Powers in A National Interconnected System*, NAT. RESOURCES & ENV'T, Summer 2006, at 43–44.

<sup>209</sup> *Id.*

<sup>210</sup> Ferrey, *supra* note 1, at 285.

<sup>211</sup> *Id.* at 286.

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military installations inside the state.<sup>212</sup> Following President Bush's inauguration, some portions of the Clinton Administration's previous actions were continued, in addition to Vice-President Cheney being appointed to the head of an inter-agency task force dedicated to the California Energy Crisis.<sup>213</sup> Complications and litigation followed some of the federal action, particularly FERC's involvement, yet each of the forays from the federal government have been held to be legitimate.<sup>214</sup>

#### D. The Deepwater Horizon Oil Spill

On April 20, 2010, eleven people lost their lives after a wellhead blowout on the Macondo Prospect, operated by British Petroleum (BP), in what became the largest marine oil spill in history.<sup>215</sup> The spill discharged 210 million gallons of oil into the ocean by the end of the lengthy episode.<sup>216</sup> By 2011, a U.S. Government study had determined that inadequate precautionary and safety systems combined with systematic issues and defective cement installation helped lead to the spill.<sup>217</sup> This particular example proves intriguing, as it is in nature both an environmental and pollution based crisis, as well as significantly pertaining to energy. Like the California Energy Crisis above, this section will focus primarily on factual response patterns rather than employing hypotheticals.

Of course, the traditional legal recourse and litigation-based methodologies of recovery demand some explanation as well. A slew of charges were brought by the Department of Justice against BP and led to substantial settlements and payments of fines for the rampant gross negligence and misconduct. Five people were convicted of various

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<sup>212</sup> *Id.*

<sup>213</sup> *See generally Id.*; Paul Van Slambrouck, *President vs. Governor Over California's Power*, CHRISTIAN SCIENCE MONITOR (Jan. 31, 2001), <https://www.csmonitor.com/2001/0131/p1s2.html>.

<sup>214</sup> *See generally* Ferrey *supra* note 1, at 286-90.

<sup>215</sup> Leila Monroe, *Restructure and Reform: Post-Bp Deepwater Horizon Proposals to Improve Oversight of Offshore Oil and Gas Activities*, 5 GOLDEN GATE U. ENVTL. L.J. 61 (2011).

<sup>216</sup> *See id.*

<sup>217</sup> Adam Martin, *BP Mostly, but not Entirely, to Blame for Gulf Spill*, THE ATLANTIC (Sep. 14, 2011), <https://www.theatlantic.com/national/archive/2011/09/bp-mostly-not-entirely-blame-gulf-spill/337965/>.

crimes.<sup>218</sup> By 2015, BP had agreed to pay 18.7 billion U.S. Dollars in fines.<sup>219</sup> The investigatory capacity of the federal government was used as well, both in Executive and legislative branch, through agencies and committees;<sup>220</sup> numerous departments, divisions, and agencies launched individualized investigations into the blowout.<sup>221</sup>

Moving towards the other examples of federal action in responding to the emergency, numerous response and mitigation efforts prove intriguing. Shortly following the announcement of the event, President Obama commanded the Secretaries of Homeland Security and the Interior, as well as the EPA and NOAA administrators, to the Gulf Coast to assess the disaster firsthand.<sup>222</sup> The Department of the Interior enforced a long-term moratorium on new drilling permits, and shortly after the announcement of the blowout President Obama announced the immediate halt.<sup>223</sup> The Department of Energy, led by Dr. Stephen Chu, attempted to aid efforts to plug the ongoing leak.<sup>224</sup> Secretary Chu and President Obama employed the resources of the Agency to assemble a wide-ranging panel.<sup>225</sup> The EPA also played a large role, as expected, in cleanup and supervision of the efforts.<sup>226</sup> Likewise, pertinent agencies and divisions, like the National Oceanic and

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<sup>218</sup> Clifford Krauss & John Schwartz, *BP Will Plead Guilty and Pay Over \$4 Billion*, N.Y. TIMES (Nov. 15, 2012), <https://www.nytimes.com/2012/11/16/business/global/16iht-bp16.html>.

<sup>219</sup> Terry Wade & Kristen Hayes, *BP Reaches \$18.7 Billion Settlement Over Deadly 2010 Spill*, REUTERS (July 3, 2015), <https://www.reuters.com/article/us-bp-gulfmexico-settlement/bp-reaches-18-7-billion-settlement-over-deadly-2010-spill-idUSKCN0PC1BW20150702>

<sup>220</sup> *Anadarko and Mitsui executives set to testify*, UPSTREAM ONLINE (July 9, 2010), <https://www.upstreamonline.com/live/1108095/anadarko-and-mitsui-executives-set-to-testify>; *Attorney General Eric Holder on Gulf Oil Spill*, U.S. DEP'T OF JUSTICE (June 1, 2010), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-gulf-oil-spill>.

<sup>221</sup> *Deepwater Horizon Marine Casualty Investigation Report*, Office of the Mar. Adm'r (August 17, 2011), [http://www.iadc.org/wp-content/uploads/2016/04/Republic\\_of\\_the\\_Marshall\\_Islands\\_DEEPWATER\\_HORIZON\\_Marine\\_Casualty\\_Investigation\\_Report-Low\\_Resolution.pdf](http://www.iadc.org/wp-content/uploads/2016/04/Republic_of_the_Marshall_Islands_DEEPWATER_HORIZON_Marine_Casualty_Investigation_Report-Low_Resolution.pdf).

<sup>222</sup> *Statement by the President on the Economy and the Oil Spill in the Gulf of Mexico*, OFFICE OF THE PRESS SEC'Y (April 30, 2010), <https://obamawhitehouse.archives.gov/realitycheck/the-press-office/statement-president-economy-and-oil-spill-gulf-mexico>.

<sup>223</sup> See Robert Painter, *Major Changes to the Minerals Management Service and Off-Shore Drilling Regulation in the Aftermath of the Deepwater Horizon Explosion*, HOUSTON LAWYER, Sept./Oct. 2010, at 28, 31-32, [https://issuu.com/leosur/docs/thl\\_septoct\\_2010](https://issuu.com/leosur/docs/thl_septoct_2010); See Nicholas Johnston & Hans Nichols, *New Offshore Oil Drilling Must Have Safeguards, Obama Says*, BLOOMBERG (1 May 2010); Noah Brenner, *Judge Denies Stay in Moratorium Ruling*, UPSTREAM (June 24, 2010).

<sup>224</sup> James Quinn, *Barack Obama Sends Nuclear Experts to Tackle BP's Gulf of Mexico Oil Leak*, THE TELEGRAPH (May 14, 2010), <http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/7726142/Barack-Obama-sends-nuclear-experts-to-tackle-BPs-Gulf-of-Mexico-oil-leak.html>.

<sup>225</sup> *Id.*

<sup>226</sup> John C. Cruden et al., *The Deepwater Horizon Oil Spill Litigation: Proof of Concept for the Manual for Complex Litigation and the 2015 Amendments to the Federal Rules of Civil Procedure*, 6 MICH. J. ENVTL.

Atmospheric Administration (NOAA), have also funded and supervised extensive studies and research on the long-term and short-term consequences of the spill.<sup>227</sup> President Obama also used the Bully Pulpit and made numerous speeches<sup>228</sup> to activate volunteer involvement and awareness of the emergency in the gulf.<sup>229</sup>

While not every reaction to President Obama's response was complimentary, and Senator Rand Paul notably even accused the President of being "un-American" in his response to the disaster,<sup>230</sup> most observers can agree the President mobilized the federal government rapidly to respond. Indeed this disaster's response utilizes numerous tools that a purely energy-related crisis might employ, despite being largely an environmental disaster. Short of employing purely the FPA or DPA, the reaction by President Obama and the rest of the federal government parallels many tools used for energy-only emergencies. Exploration of these response mechanisms proves insightful to better understand their individualized consequences and effectiveness in real-world employment.

## IX. WEAKNESSES AND VULNERABILITIES

What good are these authorities, when needed to be deployed by the federal government, if no obvious understanding of the anticipated liabilities and weakness is garnered? The following section attempts to dissect primary anticipated counterarguments to the paths of emergency response described above. First, separation of powers

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& ADMIN. L. 65, 132 (2016); See Elisabeth Rosenthal, *In Standoff With Environmental Officials, BP Stays With an Oil Spill Dispersant*, N.Y. TIMES (May 24, 2010), <http://www.nytimes.com/2010/05/25/science/earth/25disperse.html?hpw>.

<sup>227</sup> Stephen L. Tatum, Jr. & Henrik Strand, *The Deepwater Horizon Oil Spill: A Review of the Historic Civil and Criminal Liabilities, and Resulting Funding Streams, from America's Worst Environmental Catastrophe*, 47 TEX. ENVTL. L.J. 153, 172 (2017); See Louis Sahagun, *Toxins Released By Oil Spills Send Fish Hearts Into Cardiac Arrest*, L.A. TIMES (Feb. 13, 2014), <http://www.latimes.com/science/sciencenow/la-sci-sn-tuna-hearts-oil-spill-toxins-20140213-story.html#ixzz2tbQVLgXI>; Dahr Jamail, *BP Dispersants 'Causing Sickness'*, AL JAZEERA (Oct. 29, 2010), <http://www.aljazeera.com/indepth/features/2010/10/20101027132136220370.html>.

<sup>228</sup> *Full text of President Obama's BP Oil Spill speech*, REUTERS (June 15, 2010), <https://www.reuters.com/article/2010/06/16/us-oil-spill-obama-text-idUSTRE65F02C2010061615> (last visited Nov 19, 2017).

<sup>229</sup> *Id.*

<sup>230</sup> Associated Press, *Rand Paul: Obama BP criticism "un-American"*, MSNBC (May 21, 2010), [http://www.nbcnews.com/id/37273085/ns/politics-decision\\_2010/t/rand-paul-obama-bp-criticism-un-american/](http://www.nbcnews.com/id/37273085/ns/politics-decision_2010/t/rand-paul-obama-bp-criticism-un-american/).



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weaknesses are addressed and broken apart into the horizontal, inter-branch concerns and then into vertical matters regarding federalism; separation of powers remains a valid concern. Next, the Oath of Office is examined along with the arguments that stem from the various participant actors; these include defense of province and the duty to defend or obey law and disregard the *Youngstown* notions.

### A. Separation of Powers

“Obviously, then, the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts.”<sup>231</sup>

The following subsections delineate the two branches of cooperative federalism and separation of powers concerns. First, the pertinent horizontal separation of powers jurisprudence and concerns are examined. Next, the vertical separation of powers vulnerabilities are discussed, primarily federalism, the tenth amendment, and other state issues relevant to weaknesses in the abovementioned emergency response authorities.

#### 1. Horizontal

The following subsections work to show the conflict and potential innate weaknesses in Presidential emergency response from an inter-branch level. Indeed, at times one branch has so exceeded their authority and entered the realm of another's that recourse is needed to rectify the overreach. Elucidation of the nature of the conflicts and relevant precedent proves necessary to understand weaknesses in response regimes. First, the Presentment Clause is explored; next, the revocation of authority is dissected.

##### *i. The Presentment Clause*

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with

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<sup>231</sup> Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–60 (1992).

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his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law<sup>232</sup>

As one can deduce simply from the quote above, the Presentment Clause designates an unyielding blueprint for the adoption and creation of new law.<sup>233</sup> The eminence and thoroughness of this Clause has seldom caused confusion, yet it has been a tool in separation of powers jurisprudence, notably causing issues with the federal attempt to create a line-item veto.<sup>234</sup> Tension and vulnerabilities are tied to the Presentment Clause and non-enforcement regimes.

In *Clinton v. New York*, an act of Congress handed President Clinton the authorization to demarcate certain provision of a bill as “canceled,” and then promptly sign it into law.<sup>235</sup> The Court held this allowed the President to “amend acts of Congress.”<sup>236</sup> “What has emerged in these cases from the President’s exercise of his statutory cancellation powers, however, are truncated versions of two bills that passed both Houses of Congress. They are not the product of the ‘finely wrought’ procedure that the Framers designed.”<sup>237</sup> Eventually, the Court would hold that this delegated cancellation ability treaded on the Presentment Clause and allowed the President to create a “functional equivalent of a partial repeal even if a portion of the section is not canceled.”<sup>238</sup> The *Clinton* opinion crystallizes an additional perch for separation of powers formalists by iterating that the President is not to make the law she is to enforce.<sup>239</sup> Particularly repulsive to the Court was the notion of an existing law “whose text was not voted on by either House of Congress or presented to the President for signature.”<sup>240</sup>

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<sup>232</sup> U.S. CONST., art. I, § 7, cl. 2–3.

<sup>233</sup> *See id.*

<sup>234</sup> *Clinton v. New York*, 524 U.S. 417, 440–41 (1998).

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 439.

<sup>237</sup> *Id.* at 440.

<sup>238</sup> *Id.* at 441.

<sup>239</sup> *Id.* at 446–47.

<sup>240</sup> *Id.* at 448.

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Moving towards how this applies, this could prove disastrous for the President in an emergency response because the Court created another school of actionable separation of powers jurisprudence. Opponents could argue that a wide-ranging non-enforcement regime from the President in an effort to respond could effectively make a new legislative scheme by nullifying duly enacted law. Particularly intriguing is the usage of the word “cancellation,” as an instant and absolute non-enforcement regime could parallel cancellation. Could a court allow the “finely wrought”<sup>241</sup> mechanisms and procedures to be cast aside willfully and knowingly? Even more troubling is the enhanced scope of a non-enforcement regime; *Clinton* emphasized cancellation of a recently passed bill on the desk of the President,<sup>242</sup> distinguishing a circumscribed time frame. With a risky non-enforcement regime, the President in an emergency could reach back to laws from the foundation of the Republic and begin this theoretical quasi-cancellation in reaction to energy emergencies.

Despite this, some insulation from these criticisms rests innately within the Oval Office. A President’s defense is likely two-fold. First, the President could argue she was acting in a crisis and the regulatory and legal mechanisms preventing unconstitutional non-enforcement, like White House Counsel and the OLC, are unable to adequately function in time and the interest in preserving the well-being of the Nation’s citizens and constitutional organs (State Governments, Military Installations, etc.) far outweigh the interest in moving forward on steadfast legal ground. Next, the President could argue that the Executive is vested with near absolute prosecutorial discretion and leeway from the Take Care Clause to change enforcement regimes at her pleasure. The President can argue that she answers to no governmental organ, perhaps only to the Supreme Court, in regards to prosecutorial decisions, leaving censure or impeachment as the only real recourse for congressional critics. The White House can emphasize that if there is discord in the enforcement of duly-enacted law, the legislative body retains the capability to repeal that law altogether.

*ii. Revocation of Authority*

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<sup>241</sup> *Id.* at 440.

<sup>242</sup> *Id.*

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Hardened and crafted into the sacrosanct pillar of separation of powers, Justice Jackson's concurrence in *Youngstown* hammers the relevance of congressional consent to act and the abilities it hands to the President. However, what happens when Congress attempts to take it back from a recalcitrant executive?

The Authorization for Use of Military Force Against Terrorists (AUMF), is a sterling, and ever-politically-pertinent, example of congressional consent to Presidential action.<sup>243</sup> Much discussion and precedent have been provided delving into the inherently bound relationship that military powers and emergency response authority share in Presidential power jurisprudence. Passed shortly after the September 11th terror attacks, the AUMF codifies clear congressional consent for the President to begin armed movements in combatting terror efforts.<sup>244</sup> Since the passage of the bill, there have been periodic calls, varied in nature, to repeal or modify the AUMF instead of reauthorizing it in its current form.<sup>245</sup>

What happens when it is repealed? What if the consent was given and the Congress revokes it? If in executing response to an energy disaster, and employing powers typically bearing requirement of congressional blessing the Congress revokes said blessing, the President would be left crippled and subject to judicial intervention. Such intervention could rely on both the nature of the War Powers Act, any sort of pertinent quasi-AUMF pertaining to energy response utilizing military force, or the Zone of Twilight Jurisprudence. This has been relatively rare, and thus the President need not worry too desperately. Even if this does happen, speedy compliance would likely not be expected while non-compliance altogether is not outside of the scope of reason.

## 2. Vertical

Inter-branch disputes are remarkable and at times carry lethal force to a singular branch's policy initiatives in regards to either branch's contested actions. Not to be left out, Federalism concerns—the vertical separation of powers schemes—can also hold vast

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<sup>243</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>244</sup> *Id.*

<sup>245</sup> Charlie Savage, *Will Congress Ever Limit the Forever-Expanding 9/11 War?*, N.Y. TIMES (Oct. 28, 2017), <https://www.nytimes.com/2017/10/28/us/politics/aumf-congress-niger.html>.

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consequences and equip actors with real tools to bring down potentially unconstitutional structures. Below, several distinct subsections illustrate the tools at hand for state actors to call into question the legality of the President's theoretical emergency response measures.

*i. Preemption and Preexisting State Regulatory Schemes*

Most regulation of energy, and energy crisis response, happens at the state level,<sup>246</sup> away from the federal government—aside from the role the federal government plays in electricity regulation, that is. While the occupation of this regulatory area normally insulates the state government from some degree of federal intrusion, it also hands states a tool to combat unwanted response. Both in legal and practical terms, conflicting regimes and longstanding state doctrine may pose risk to the President.

The majority of complex energy regulatory regimes are born from individual statehouses,<sup>247</sup> not the federal government. Consequentially, each state has substantive differences in unique institutional designs and powers dispersed to individual actors. Many states have preexisting emergency response bureaus with current task forces and units ready to deploy.<sup>248</sup> This means, for purposes of the argument, that the practical on-the-ground response can be vastly different. In addition, it means parties in play, perhaps a negligent fracking conglomerate or corrupt utility companies, answer to two masters and must pick, in situations where the aforementioned two masters orders' conflict, which to yield to.

Other than the elementary invocation of the Supremacy Clause, there is little, practically, to stop state actors from responding in varied ways to an energy disaster and against the logistical wishes of the President. Surely responding as effectively as possible in an area of shared jurisdiction, when the qualities of lives are in danger, should be enough to motivate cooperation. Yet, as politicians' animosity grows, it is not outside of the realm of foreseeability to imagine state actors purposefully bucking the President's response

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<sup>246</sup> Melissa Powers et. al., *Quick Fixes or Real Remedies? The Benefits and Limitations of Climate and Energy Fast Policy*, 8 SAN DIEGO J. CLIMATE & ENERGY L. 67, 71 (2017); Jonathan H. Adler, *Climate Balkanization: Dormant Commerce and the Limits of State Energy Policy*, 3 LSU J. ENERGY L. & RESOURCES 153, 154 (2014).

<sup>247</sup> *Id.*

<sup>248</sup> See generally Jason Mazzone, *The Commandeerer in Chief*, 83 NOTRE DAME L. REV. 265, 271 (2007).

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regiment and instituting their own, contrary to the wishes of the President or her response team.

While these tools are invaluable to state actors, opposing the President's response, they also come with a substantive caveat. State actors can certainly resist and complicate Presidential response, yet, it appears, not infinitely and not absolutely. Congress can make new law to essentially overrule the opposing state regimes running contrary to the President's response actions.<sup>249</sup> The Supreme Court, in *Altria Group, Inc. v. Good*, opined, "we have long recognized that state laws that conflict with federal law are 'without effect.'"<sup>250</sup> Indeed, in an area of shared federal and state authority once the congress passes law and makes clear the intention to override state regimes, the Supremacy Clause kicks in and renders the state regime defunct, according to modern preemption doctrine.<sup>251</sup>

*ii. The Take Care Clause and Special Solitude*

The Take Care Clause has been extensively discussed throughout this Article's argument and exposition. The following example provides a curious instance of the nature of federalism and the aforementioned clause though. Elucidating the following example and applying the jurisprudential precedent to a theoretical energy emergency where the Take Care Clause is employed proves insightful to better understand potential liability engendered if over-utilized.

President Obama's controversial Deferred Action for Parents of Americans (DAPA) program was an attempted immigration reform, largely executed through the Executive Branch alone—regardless of political or policy merits.<sup>252</sup> Of course, the program instantly garnered not only political criticisms, but legal challenges as well. Twenty-six state attorneys general argued that DAPA was in open discord with both the Take Care

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<sup>249</sup> See generally 148 AM. JUR. TRIALS 211 (2017).

<sup>250</sup> *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008).

<sup>251</sup> See generally 148 AM. JUR. TRIALS 211 (2017).

<sup>252</sup> See e.g., Memorandum from Jeh Johnson, Sec'y, Dep't of Homeland Sec., to Leon Rodriguez, Dir., USCIS, et al. 3–4 (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf); Memorandum from Janet Napolitano, Sec'y, Dep't of Homeland Sec., to David Aguilar, Acting Commissioner, U.S. Customs and Border Patrol, et al. 1 (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

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Clause and the Administrative Procedure Act (APA).<sup>253</sup> Plaintiffs claimed the President knowingly ceased to faithfully execute laws through knowing and selective enforcement regarding immigration.<sup>254</sup> What is perhaps most curious about this matter is the extension of standing granted to States to challenge non-enforcement on the basis of the Take Care Clause.<sup>255</sup> Indeed, a quasi-special-solicitude, akin to the oft-noted status discussed in the seminal *Massachusetts v. EPA* case, was extended to the plaintiffs and eventually affirmed by the Supreme Court.<sup>256</sup> The Fifth Circuit, whose decision was affirmed by an evenly divided Supreme Court, noted that the Plaintiffs were acting upon their quasi-sovereign interests in bringing suit and were not considered normal litigants for their separation of powers claim.<sup>257</sup>

Many of these arguments could apply to state actors looking to challenge the President's emergency response, relying on whatever individual motivations they may hold. The *Texas v. United States* case that brought DAPA down acts as sterling precedent, handing States standing to challenge a non-enforcement regime initiated by the President. Beyond non-enforcement and the Take Care Clause, there could be a larger argument made that the over-employment of the many exemptions listed in the statutory schemes above would create a de facto non-enforcement regime. While the President is vested with the power to grant exemptions in many legislative schemes, opponents could argue that the Executive was so heavily utilizing so many different exemptions that the President was not complying with duly enacted law, but intentionally skirting it and instituting a non-enforcement plan under the guise of faithfully employing the exemptions listed in the statutes. Plaintiffs could liken this to the DAPA initiative in an effort to engender a similar ruling. This is bolstered by the relatively rare usage of the exemptions themselves. The *Texas* decision hands a stark tool to state actors of various inclinations to bring challenges against executive action; energy disaster response is no different.

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<sup>253</sup> *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016).

<sup>254</sup> *See generally id.*

<sup>255</sup> *See e.g.* *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016); *Texas*, 809 F.3d at 146.

<sup>256</sup> *Texas*, 136 S. Ct. at 2271 (2016).

<sup>257</sup> *Id.* at 152.

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## B. The Oath of Office

Discussed above, the Oath of Office creates a potential emergency response avenue for utilization by the President; yet, simultaneously, it provides a tool for detractors to use in order to argue against the legality or authority of the potential energy emergency response. The obligation to obey the law and respect the Constitution is commonly held to flow from the Oath of Office. Extensive discussion and elucidation to the intricacies of the Oath and the *authority* it grants has been provided. Yet, for purposes of this Article, its merits are two-fold. While it may disperse positive authority to actors, it also hands the ability, potentially, to combat or potentially take down perceived unconstitutional governmental action. The following subsections include, first, the defense of province and office that the Oath mandates, and second the duty to defend and obey duly enacted law. While the two may seem elementary at first glance, the potential for giving merit to criticism of presidential action in energy emergency response is clear. Thus, the illustration and understanding of these schools of potential legal criticisms cannot be emphasized enough.

### 1. Defense of Province

Within each branch of government, each actor, by their Oath of Office, becomes advocates for the defense and integrity of its province and mechanisms.<sup>258</sup> Beyond political territorialism, there is some impetus and obligation placed on these actors to fight for the integrity and territory of their branch. The nature of this concept will prove problematic for the application of certain emergency authorities and mechanisms.

No actor vested with constitutional authority would happily enforce law that degrades the integrity of his or her office,<sup>259</sup> especially the President.<sup>260</sup> Utilizing this reasoning, if the constitutional actors are not to allow, by Oath, destruction of the integrity of their individual offices, there must be a coequal obligation not to enforce law caustic to

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<sup>258</sup> Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1623–28 (2008).

<sup>259</sup> *Id.*

<sup>260</sup> *See generally id.*



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their individualized offices.<sup>261</sup> The sworn officials have made monumental vows to defend the Constitution from the moment they enter office.

So how does this apply to energy emergencies? Defense of province, as a challenge, is perhaps least effective when applied to Justice Jackson's Functionalist approach in the *Youngstown* concurrence. Likely members of opposing persuasions could band together, despite being in a minority, if the President used path one or two from Justice Jackson's concurrence, and make a formalistic argument relying on the Oath they took to defend the integrity of the Constitution. As a result, allowing or enabling the President to degrade the Legislature's province would be in direct violation of that Oath. Angry legislators could argue that *not* bringing suit and allowing the President to approach separation of powers as a functionalist in an emergency would equate to de facto enabling of the wearing away of the powers of the Legislature by setting the precedent of allowing the President to infer intent from the Legislature as whole.

Beyond the *Youngstown* concept, another potential application of the defense of province argument surrounds the invocation of foreign affairs powers by the President in responding to an energy emergency. This is not just a theory discussed and then applied: President Clinton, as mentioned above, deployed the concept of these powers in responding to the California Energy Crisis when he argued that the integrity of the Military and NASA bases was at risk. Of course, the President is vested with substantive authority and wide-ranging control of the armed forces and foreign relations,<sup>262</sup> yet Congress is certainly still vested with control and rights regarding foreign affairs.

Over-employment of this specific concept could garner criticism and eventual suit from legislators furious at the President for invoking seemingly absolute power by nature of her role as Commander in Chief. The Legislature still ratifies treaties, draws sanctions, and appropriates funds for foreign policy initiatives. The President manages the crisis, but Congress must fund and offer their own quasi-approval.<sup>263</sup> If Congress staunchly disagreed with the President's energy crisis response, which utilizes the foreign affairs powers and

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<sup>261</sup> *Id.*

<sup>262</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>263</sup> Adam Shinar, *Constitutions in Crisis: A Comparative Approach to Judicial Reasoning and Separation of Powers*, 20 FLA. J. INT'L L. 115, 122 (2008).

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military in a manner that causes them to feel their office's integrity has been eroded, they could reallocate funds and immediately bring home the armed services officers responding on the ground.

Finally, the last notion centers primarily on the President's inherent ability to interpret law. Mentioned above was the concept regarding the obligation for the President to *faithfully* enforce duly enacted law she believes to be constitutional, which of course results in the President acting in a quasi-judicial capacity and interpreting law in a potentially troublesome manner. If, in responding to a fracking emergency, the President finds unconstitutional an old law still being enforced in the wake of the disaster, the President may cease enforcement based on her interpretive abilities. As one might assume, this leaves the judiciary in a peculiar position. Each judge and justice have sworn oaths to protect the integrity of their branch just the same, and it could easily be posited that the interpretive ability being deployed by the President equates to erosion of their supreme interpretation of the law, thus motivating the judicial branch of government to step in and intervene.

These individual weaknesses may appear more daunting than they are, however. To use a colloquialism, "the pendulum swings both ways." If the duty to defend the integrity of the constitutional organisms, particularly their branch, is read from the Constitution by branch actors, it must also be inferred that each actor has the duty to defend the integrity of *all* the Constitution's organisms. In addition, many skeptics to these vulnerabilities would find the language from *Youngstown* applicable, particularly the "ebb and flow" dicta, when describing the balance of power between the branches. One could posit that the nature of separation of powers demands habitual and timeless give-and-take within the branches, and that in response to the energy disaster at hand, the President is taking power that will eventually flow back to the original branch after adequate response to the crisis. However, this would likely alarm most reasonable observers, cynical of politician's ability to return power happily.

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## 2. Obligation to Obey the Law and the Duty to Defend

Another form of opposition to the Presidential paths of emergency response elucidated above may lie in the oft-discussed “duty to defend.”<sup>264</sup> This theory posits that the various governmental enforcers have a staunch obligation to obey and defend the law as written and commonly interpreted. This could prove troublesome to a President stretching well-construed theaters of authority or employing quasi-constitutional methods to respond, like the Zone of Twilight.

The Constitutional designation of the duty to defend and obligation to obey stems from Article II, Section 1, Clause 8 of the Constitution. The Oath, previously discussed, has the President swear to “*protect and defend*” the Constitution.<sup>265</sup> The sworn Executive, Judicial, and Legislative actors must defend the all branches of government, pursuant to of Oath; the President must also work to defend the integrity of *all* branches of government the Constitution creates.

How can this apply to a President responding to an energy disaster? Particularly applicable to mentioned extra-constitutional theories of responding in an emergency, critics can argue the oath contradicts the judicially construed Zone of Twilight authority if the President employs such methodologies of response. In addition, a wide-scale non-enforcement regime rolled out in response to an emergency could be challenged as blatant desertion of duly enacted law, thus becoming a *de facto* shirking of the duty to defend and obey duly enacted law. Each of these has firm counterarguments, however. The President could posit enforcement is constitutionally vested in tandem with the Oath, and the jurisprudence behind prosecutorial discretion enables a non-enforcement regime in response. In addition, the embrace of Justice Jackson’s concurrence in *Youngstown* and the growth of Zone of Twilight jurisprudence judicially insulate the President’s actions if these methods are employed.

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<sup>264</sup> Prakash, *supra* note 268, at 1629.

<sup>265</sup> U.S. CONST. art. II, § 1, cl. 8.

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### C. Exemptions

Perhaps another method to buck a President's response regime is to challenge the terminology used by the President in assuming authority. Lengthy discussion of statutory schemes and their individualized compliance exemptions was employed above. Many of these exemptions pertain to specific situations when granting non-compliance or exceptions.

Opponents of the President's response efforts could argue that the drought, mentioned in Part IV, Subpart C's hypothetical, that the President had been arguing was an "Act of God," was not actually an Act of God at all. What if these opponent actors begin to litigate this or employ political means to challenge the President's response authority and legality? What if there had been studies available showing periodic droughts? The terminology in employing exemptions is critically specific and compliance must be as well.

Before utilizing these exemptions, a President would be well advised to instruct OLC or any other pertinent agencies to commission studies and responses on what precisely the pertinent exemption is, legally. Something that laypeople may assume to be an "Act of War" for purposes of CERCLA's §9607(b)(2) exception<sup>266</sup> may not be an act of war to the Congress or to a Court. If a President remains reticent to utilize these exemptions until falling within the category of a listed exemption is certain, the President could likely insulate herself from the legal vulnerabilities that inappropriate utilization of an exemption could cause.

### X. CONCLUSION

This Article has provided extensive and steadfast sources of authority for Presidential energy emergency response. The Article has provided hypotheticals and precedent for which argument applies. Part II and VIII work to illustrate, in tandem, the deployment of these methods in both conceived hypotheticals and tragic real-world accidents requiring governmental response. Through employing these hypotheticals,

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<sup>266</sup> 42 U.S.C. § 9607(b)(2)(2012).

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applicable value of the methodologies discussed can be witnessed. The historical precedents provided may not have seen each individual method employed, but undoubtedly the remaining methods hold great utility.

Parts III and IV assessed and applied the numerous facets of vested presidential authority. Aggregating War Powers, the Bully Pulpit, the Oath of Office, and the Emergency Session, both enforcement, non-enforcement, and administrative response were examined as well. Part III dove headfirst into the weighty abilities of the Oval Office and their intricacies. Part III and IV may carry the most utility to a politicized and divided federal government with a President obligated to respond to an energy emergency, as the methods discussed lie solely within the executive penumbra—usually.

The various statutory schemes discussed in Part V and VI are invaluable tools. These two sections work together to show the nature of the Legislative blessing provided for some forms of federal response. Indeed, much of the mentioned authority lies on theoretical ground or is housed purely within the Executive branch. Thus, inter-branch cooperation should be used when possible, and the statutory schemes, christened by Congress, surely are closer to cooperation than a President acting alone and seeking no congressional consent or advice.

Theory plays a substantive part in assessment as well. Part VI worked to illustrate the manner in which extralegal power can be used and when it is acceptable for the President to use such power. Though not as concrete or tangible as vested Presidential authority or statutory schemes, the *Youngstown* theories give insight into the separation of powers notions that may be pertinent in emergency response. Keen understanding of both Functionalism and Formalism, while they may seem steeped in jurisprudence and ivory-tower-born concepts, is vital to grasping potential methods of disaster management. The very real weight these concepts carry to the courts illustrates the merit of analyzing and understanding their nature.

While Part IX presents illustration and demonstration to potential vulnerabilities that some of the paths mentioned above incur, Part IX by no means implies the employment of these methods is unconstitutional. Instead, Part IX posits ways for a President in crisis to avert potentially legal challenges, especially from partisan political actors. Not meant to further fuel partisanship, but for efficient and durable disaster

response, Part IX's vulnerability assessment works to make clear that while these paths for authority are steadfast, rarely are they absolute in nature and untouchable by opposing parties.

There can be little to no doubt that regardless of how strong any given effort's authority is, there will be detractors. For efficient and effective response efforts, this Article seeks to implore the President not to sully herself by engaging in abject efforts to polarize and politicize response. This would likely only foment further discord and potentially expose her relief efforts to congressional challenges, which, as mentioned, can bear substantive weight.

This Article is perhaps the first recent assessment and aggregation of emergency response mechanisms and weaknesses. As the congressional machines slow, there can be little doubt of the importance of executive authority. There is no uncertainty: noticeable ebb and flow of power between the branches is occurring, and there is even an argument to be made that the Imperial presidency is waning. This Article leaves little question that despite the vast role states play in energy regulation and management, the President has swaths of authority to act and can be a decisive and helpful figure in an energy emergency.