

ENERGY EMERGENCIES

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ABSTRACT—Emergency powers are essential to the proper functioning of the government. Emergencies demand swift and decisive action; yet, our system of government also values deliberation and procedures. To enable such agility in a system fraught with bureaucracy, Congress frequently delegates unilateral statutory emergency powers directly to its most nimble actor: the President. The powers Congress delegates to the President are vast and varied, and often sacrifice procedural requirements in favor of expediency. Most scholars and policymakers have come to terms with this tradeoff, assuming that the need to respond quickly is outweighed by any loss of accountability.

This Article challenges this long-standing assumption and is skeptical of the zero-sum framework that suggests accountability and expediency cannot coexist in statutory emergency delegations. Specifically, it develops an Executive Delegations Matrix to better evaluate the different delegation options, demonstrating that accountability and expediency need not be mutually exclusive. This Article then uses emergency *energy* powers to test the viability of the factors favoring unilateral delegations, ultimately finding these factors unpersuasive in the energy-emergency context. Instead of the common knee-jerk reaction to unilateral presidential control over emergencies, this Article finds that Congress can often cultivate a more balanced decision-making framework by providing a greater role for expert agencies. By challenging the assumptions underlying unilateral presidential delegations for energy emergencies, this Article provides a new framework for assessing the world of unilateral presidential delegations more broadly.

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INTRODUCTION 800

I. STATUTORY EMERGENCY POWERS 806

 A. *Advantages of Unilateral Presidential Delegations*..... 809

 B. *Perils of Unilateral Presidential Delegations*..... 816

 C. *An Executive Delegations Matrix* 821

II. PRESIDENTIAL EMERGENCY ENERGY STATUTORY AUTHORITY 830

 A. *General Presidential Emergency Energy Powers*..... 832

 B. *Specific Presidential Emergency Energy Powers* 837

III. REASSESSING THE TRADEOFFS OF UNILATERAL PRESIDENTIAL CONTROL OVER ENERGY EMERGENCIES 843

 A. *Expertise: Expert Energy Agencies*..... 846

 B. *Accountability: Short-Term vs. Long-Term* 858

 C. *Consistency: An Executive Divided* 863

 D. *Expediency: Benefits of Bureaucracy* 867

CONCLUSION 872

APPENDIX A 873

APPENDIX B 883

INTRODUCTION

Nobody likes an emergency. By definition, it suggests that something unexpected or unforeseen has happened.¹ There is little room for hesitation. The response must be “immediate” and “urgent.”² To respond effectively to an urgent need, Congress often defaults to delegating statutory emergency powers directly to the President.³ This allows the President to use her unique position in our government to act unshackled by typical procedural restrictions that constrain agencies and other branches.⁴ For instance, the

¹ *Merriam Webster* defines an emergency as “an unforeseen combination of circumstances or the resulting state that calls for immediate action” or “an urgent need for assistance or relief.” *Emergency*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/emergency> [<https://perma.cc/YP9U-LN2E>].

² *Id.*

³ See Amy L. Stein, *A Statutory National Security President*, 70 FLA. L. REV. 1183, 1203 (2018); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1263 (1988) (“The vast majority of the foreign affairs powers the President exercises daily are not inherent constitutional powers, but rather, authorities that Congress has expressly or impliedly delegated to him by statute.”).

⁴ See, e.g., Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 1–10 (1993) (describing the use of executive orders by different presidents throughout history); Erica Newland, *Executive Orders in Court*, 124 YALE L.J. 2026, 2030–31 (2015) (discussing executive orders and their enforceability); Steven Ostrow, *Enforcing Executive Orders: Judicial Review of Agency Action*

President is not subject to the Administrative Procedure Act (APA) and its attendant rulemaking procedures.⁵ Thus, the President is not subject to *Chevron* deference from reviewing courts,⁶ nor a multitude of other procedural rules.⁷ In delegating statutory emergency powers to the President, Congress often finds that waiving procedural requirements is a worthwhile sacrifice for the sake of assumed benefits like expediency, expertise, accountability, and consistency.

For all its merits, however, this approach is not without consequences. Emergency powers are also subject to abuse.⁸ Without meaningful constraints on a direct presidential delegation, a president is free to declare questionable emergencies to unlock these statutory powers.⁹ Even more controversial is when a president declares questionable emergencies to unlock these powers in direct contradiction of congressional intent.¹⁰ Because emergency powers are so broadly granted and representative procedure is so easily abandoned, the inevitable result can involve unaccountability and aggrandizement of the President.¹¹

Under the Administrative Procedure Act, 55 GEO. WASH. L. REV. 659, 659 (1987) (“[E]xecutive orders have become an important weapon in the arsenal of presidential policymaking.”).

⁵ Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in sections of 5 U.S.C.).

⁶ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984) (“When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions.” (emphasis added)); *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).

⁷ Cf. U.S. CONST. art. I, §§ 5, 7 (discussing congressional procedures of the Legislative Branch, including majorities needed to enact legislation).

⁸ For example, consider President Trump’s failed attempt to bail out the coal industry using emergency powers. See Grid Resiliency Pricing Rule, 82 Fed. Reg. 46,940 (proposed Sept. 29, 2017) (to be codified 18 C.F.R. pt. 35); SHARON JACOBS & ARI PESKOE, *ENERGY EMERGENCIES VS. MANUFACTURED CRISES: THE LIMITS OF FEDERAL AUTHORITY TO DISRUPT POWER MARKETS* 11 (2019), <http://eelp.law.harvard.edu/wp-content/uploads/Energy-Emergencies-vs-Manufactured-Crises-FINAL.pdf> [<https://perma.cc/N2SM-DWU7>] (exploring the potential for “manufactured crises” with regard to emergency energy powers). For an example of President Trump’s use of statutory national security powers under the Immigration and Nationality Act to deny entry to immigrants, see Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 30, 2017) (titled “Border Security and Immigration Enforcement Improvements”), and Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (titled “Protecting the Nation From Foreign Terrorist Entry into the United States”).

⁹ See Stein, *supra* note 3, at 1220–44.

¹⁰ Charlie Savage, *Presidents Have Declared Dozens of Emergencies, but None Like Trump’s*, N.Y. TIMES (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/us/politics/trump-presidency-national-emergency.html> [<https://perma.cc/Q5CC-HEJC>] (describing how President Trump redirected funds to the border wall in direct contradiction of a congressional denial of such funds).

¹¹ Babette E.L. Boliek, *Agencies in Crisis? An Examination of State and Federal Agency Emergency Powers*, 81 FORDHAM L. REV. 3339, 3348–53 (2013) (providing empirical work on the rise of agencies’ use of the “good cause” exception of the Administrative Procedure Act).

Given the constitutional and historical deference to presidents on matters of national security, Congress's delegation of statutory emergency powers to the President can be seen as an expected extension of her Article II powers as Commander in Chief and the nation's sole protector against foreign threats. This might suggest that the President only enjoys such unilateral statutory powers when the nation's national security is threatened. After an exhaustive search through the U.S. Code, however, and contrary to conventional thinking on the scope of a president's emergency powers, this Article demonstrates that this is not the case. In addition to providing the President unilateral powers to act in response to foreign threats, Congress has provided the President unilateral emergency powers in another unsuspecting area: energy.¹²

On one level, this makes sense. Energy emergencies traditionally involved oil, a commodity with important international and geopolitical implications on a global scale.¹³ The United States relies on three fossil fuels (petroleum, coal, and natural gas) for 80% of its energy needs, much of which was historically imported from other countries.¹⁴ Unsurprisingly, therefore, the first generation of emergency energy powers focused on allowing swift responses to shortages of these resources.¹⁵

But on another level, delegating powers to address energy emergencies solely to the President stands as an outlier amongst the many military, foreign-relations, international-trade, and war powers that Congress has

¹² See *infra* Appendix A. The focus on energy emergencies in no way suggests that they are the only area where Congress has delegated broad emergency powers to the President. See *infra* Part II and Appendix B for a complete list.

¹³ On several occasions, past presidents used the Trade Agreements Expansion Act to regulate oil prices and imports in the interest of national security. See, e.g., Proclamation No. 4341, 40 Fed. Reg. 3965 (Jan. 27, 1975) ("I judge it necessary and consistent with the national security to further discourage importation into the United States of petroleum, petroleum products, and related products, in such quantities or under such circumstances as to threaten to impair the national security . . . in order to achieve the above objectives, I determine that a supplemental fee should be imposed on all imports of petroleum and petroleum products . . ."); Proclamation No. 3279, 24 Fed. Reg. 1781 (Mar. 12, 1959) ("I find and declare that adjustments must be made in the imports of crude oil, unfinished oils, and finished products, so that such imports will not so threaten to impair the national security . . ."); see also Anand Toprani, *A Primer on the Geopolitics of Oil*, WAR ON THE ROCKS (Jan. 17, 2019), <https://warontherocks.com/2019/01/a-primer-on-the-geopolitics-of-oil/> [<https://perma.cc/4DSA-HPXU>] (discussing the interrelated nature of the oil market and the international impacts of national oil policies).

¹⁴ *U.S. Energy Facts Explained: Consumption and Production*, U.S. ENERGY INFO. ADMIN. (May 7, 2020) [[hereinafter](https://www.eia.gov/energyexplained/us-energy-facts/) *Energy Facts: Consumption and Production*], <https://www.eia.gov/energyexplained/us-energy-facts/> [<https://perma.cc/M6M6-SPJ9>]; *U.S. Energy Facts Explained: Imports and Exports*, U.S. ENERGY INFO. ADMIN. (Apr. 27, 2020), <https://www.eia.gov/energyexplained/us-energy-facts/imports-and-exports.php> [<https://perma.cc/RJB4-M86H>].

¹⁵ See *infra* Part II.

provided to the President alone.¹⁶ It is particularly jarring when one considers that the nature of an energy emergency has shifted over time, as the United States has enhanced its supply of domestic fossil fuel resources¹⁷ and diversified its electricity portfolio to include more renewable resources.¹⁸ As just one recent example of the changing nature of energy emergencies, the 2019 novel coronavirus disease (COVID-19) pandemic resulted in a *surplus* of a fossil fuel resource, with oil prices plunging to negative \$37 per barrel—a 300% drop with global ramifications.¹⁹ Notably, as energy *surpluses* were not traditionally cause for an emergency, the President has limited statutory authority to address such a scenario.²⁰ Upon closer reflection, future energy emergencies are more likely to involve the nation's electric grid, affected by

¹⁶ *Infra* Appendix B (Strong President/Weak Agency).

¹⁷ In 2016, for the fifth consecutive year, the United States remained the top producer of petroleum hydrocarbons. Linda Doman, *United States Remains the World's Top Producer of Petroleum and Natural Gas Hydrocarbons*, U.S. ENERGY INFO. ADMIN. (June 7, 2017), <https://www.eia.gov/todayinenergy/detail.php?id=31532> [<https://perma.cc/M9ZS-HM27>]. Largely attributable to increased drilling activity in both the Permian region and Federal Offshore Gulf of Mexico, this trend is expected to continue, as forecasts indicate an expected increase in U.S. petroleum production from 15.6 million barrels/day (b/d) in 2017 to 16.7 million b/d in 2018, compared to a projected production capacity by the Organization of Petroleum Exporting Countries (OPEC) of 39.9 million b/d in 2018. *Id.*; Matthew French & Jeff Barron, *U.S. Crude Oil Production Increases Following Higher Drilling Activity*, U.S. ENERGY INFO. ADMIN. (Feb. 21, 2017), <https://www.eia.gov/todayinenergy/detail.php?id=30032> [<https://perma.cc/SYR6-8BCY>]. An estimated 264 billion barrels of oil reserves in existing fields, new projects, and recently discovered locations remain untapped, surpassing reserve volumes of both Russia and Saudi Arabia. Matt Egan, *U.S. Has More Untapped Oil than Saudi Arabia or Russia*, CNN BUS. (July 5, 2016, 12:04 PM), <http://money.cnn.com/2016/07/05/investing/us-untapped-oil/index.html?iid=surge-story-summary> [<https://perma.cc/S8XA-FN36>].

¹⁸ *Electricity Explained: Electricity in the United States*, U.S. ENERGY INFO. ADMIN. (Mar. 20, 2020) [hereinafter *Electricity Explained*], <https://www.eia.gov/energyexplained/electricity/electricity-in-the-us.php#:~:text=The%20three%20major%20categories%20of,geothermal%2C%20and%20solar%20thermal%20energy> [<https://perma.cc/3L2D-7Z27>].

¹⁹ See Catherine Ngai, Olivia Raimonde & Alex Longley, *Oil Plunges Below Zero for First Time in Unprecedented Wipeout*, BLOOMBERG (Apr. 20, 1:59 PM), <https://www.bloomberg.com/news/articles/2020-04-19/oil-drops-to-18-year-low-on-global-demand-crunch-storage-woes> [<https://perma.cc/YN3G-PJSC>] (stating that oil price per barrel at the close of business on April 17 was \$18.27 and fell to negative \$37.63 three days later).

²⁰ See, e.g., Laila Kearney & Timothy Gardner, *Exclusive: U.S. Aims to Lease Space in Emergency Oil Stockpile, After Buying Plan Canceled - Sources*, REUTERS (Mar. 31, 2020, 6:56 PM), <https://www.reuters.com/article/us-global-oil-usa-reserve-exclusive/exclusive-us-aims-to-lease-space-in-emergency-oil-stockpile-after-buying-plan-canceled-sources-idUSKBN21I3NG> [<https://perma.cc/Y8RH-S92B>]. But once that reserve runs out, there is no energy emergency authority to address such a situation, leaving the Trump Administration with only soft-law strategies such as encouraging OPEC+ countries to constrain supply and advocating for states to “fill up every cavity that we have in this country.” *Remarks by President Trump in Meeting with Energy Sector CEOs*, THE WHITE HOUSE (Apr. 3, 2020, 3:18 PM), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-energy-sector-ceos> [<https://perma.cc/LF8F-JY2B>].

natural disasters,²¹ cybersecurity and physical security weaknesses,²² infrastructure deficiencies, or operator and regulatory misjudgments.²³ Such energy emergencies of the future are much more akin to emergencies that can occur in other traditionally domestic sectors such as the environmental, agriculture, employment, and health-care sectors, where Congress has delegated emergency powers to the respective expert agency.²⁴ And while all of these sectors, including energy, can have international implications, they do not necessarily fit easily into a category of national security threats from foreign powers traditionally viewed as being within a president's sole jurisdiction or expertise.

²¹ See, e.g., OFF. OF ELECTRICITY DELIVERY & ENERGY RELIABILITY, U.S. DEP'T OF ENERGY, COMPARING THE IMPACTS OF THE 2005 AND 2008 HURRICANES ON U.S. ENERGY INFRASTRUCTURE 5–10 (2009); James Wagner & Frances Robles, *Puerto Rico Is Once Again Hit by an Islandwide Blackout*, N.Y. TIMES (Apr. 18, 2018), <https://www.nytimes.com/2018/04/18/us/puerto-rico-power-outage.html> [<https://perma.cc/WC9D-CHT9>]; NAT'L ACADS. OF SCIS., ENG'G, & MED., ENHANCING THE RESILIENCE OF THE NATION'S ELECTRICITY SYSTEM 50–70 (2017), <https://www.nap.edu/read/24836/chapter/5#61> [<https://perma.cc/H9E9-P8VW>].

²² See Blake Sobczak, *Experts Assess Damage After First Cyberattack on U.S. Grid*, E&E NEWS (May 6, 2019), <https://www.eenews.net/stories/1060281821> [<https://perma.cc/6V9H-DY6A>]; Christopher Bosch, *Securing the Smart Grid: Protecting National Security and Privacy Through Mandatory, Enforceable Interoperability Standards*, 41 FORDHAM URB. L.J. 1349, 1365–68 (2014); Yi Deng & Sandeep Shukla, *Vulnerabilities and Countermeasures—A Survey on the Cyber Security Issues in the Transmission Subsystem of a Smart Grid*, 1 J. CYBER SEC. & MOBILITY 251, 256–62 (2012); MISSION SUPPORT CTR., IDAHO NAT'L LAB'Y, CYBER THREAT AND VULNERABILITY ANALYSIS OF THE U.S. ELECTRIC SECTOR 2–12 (2016); THOMAS F. MCLARTY III & THOMAS J. RIDGE, CTR. FOR THE STUDY OF THE PRESIDENCY & CONG., SECURING THE U.S. ELECTRICAL GRID 21–25 (2014); David Z. Bodenheimer, *Pulling the Plug on the Nation's Power Grid: Cyberthreats and Homeland Security Challenges*, 2 SCITECH LAW. 4, 4–7 (2006); Zhen Zhang, *Cybersecurity Policy for the Electricity Sector: The First Step to Protecting Our Critical Infrastructure from Cyber Threats*, 19 B.U. J. SCI. & TECH. L. 319, 321 (2013). But see Daniel M. Creekman, *A Helpless America? An Examination of the Legal Options Available to the United States in Response to Varying Types of Cyber-Attacks from China*, 17 AM. U. INT'L L. REV. 641, 654–55 (2002) (discussing cybersecurity threats to the United States but only mentioning energy in passing).

²³ OFF. OF ELECTRICITY DELIVERY & ENERGY RELIABILITY, U.S. DEP'T OF ENERGY, *supra* note 21, at 1–10. See generally TRAVIS FISHER, INST. FOR ENERGY RSCH., ASSESSING EMERGING POLICY THREATS TO THE U.S. POWER GRID (2015), <https://www.instituteforenergyresearch.org/wp-content/uploads/2015/02/Threats-to-U.S.-Power-Grid.compressed.pdf> [<https://perma.cc/4JB7-7N79>] (assessing various emerging threats to the U.S. power grid). Compare Proclamation No. 4341, 40 Fed. Reg. 3965 (Jan. 27, 1975) (focusing on the threat of relying on foreign oil imports), with Exec. Order No. 13,920, 85 Fed. Reg. 26,595 (May 1, 2020) (focusing on the threat of cyberattacks on the U.S. grid).

²⁴ See *infra* Appendix B. Like environmental, agriculture, employment, and health-care emergencies, energy emergencies of the future likely will require specialized expertise and will often be limited to the specific areas of the United States. See *supra* notes 21–23 and accompanying text; see also *infra* Section III.A.1 (comparing environmental emergencies and energy emergencies). Generally, agencies can act on some of these emergency powers independently (Weak President/Strong Agency) and some of them only after a presidential emergency declaration (Strong President/Strong Agency). See *infra* Appendix B.

This Article analyzes these emergency energy powers²⁵ to test the viability of the factors favoring unilateral presidential delegations—namely, expertise, accountability, consistency, and expediency. It challenges the long-standing assumption that accountability must be sacrificed for expediency in times of emergency. By using emergency energy powers to test both the assumptions underlying direct unilateral presidential delegations, as well as the feasibility of constraining a president through intra-executive checks, this Article challenges the widely held belief that emergency responses necessitate unilateral presidential delegations. On the contrary, this Article finds that expertise, accountability, consistency, and expediency often can be achieved without fostering unilateral presidential power. As such, it urges Congress to be more hesitant to cast aside procedural and substantive constraints on the President in addressing emergencies such as those involving energy.

Instead of providing the President with unilateral authority, this Article argues that the nation would often be better served by including expert energy agencies in emergency decisions. Despite popular academic contentions that delegations to executive agencies are irrelevant to a president's exercise of power under a unitary executive theory,²⁶ this Article demonstrates how a shared delegation to the President and an expert agency can result in better decision-making. This Article will further argue that this is particularly true in an area such as energy, with both executive (the Department of Energy) and independent (the Federal Energy Regulatory Commission) agencies at the President's disposal. A technical and complicated sector such as energy deserves to have expert agencies involved in critical emergency decisions, especially when Congress can delegate such shared authority in a way that does not unduly hinder a president's ability to act swiftly in times of emergency.

This Article proceeds in three parts. Part I focuses on Congress's decision to delegate emergency powers directly to the President. It evaluates competing risks and rewards of such unilateral delegations to underscore the stakes accompanying the choice of delegation. It then develops an Executive Delegations Matrix to better evaluate the different Executive Branch delegation options, demonstrating that accountability and expediency need not be mutually exclusive. Part II then analyzes statutory grants of powers that allow energy-emergency determinations to be made, confirming Congress's tendency to delegate directly to the President. It demonstrates the

²⁵ This research took an inclusive approach to identifying emergency energy powers as described *infra* notes 106–109. See *infra* Appendix A for the energy emergency powers and *infra* Appendix B for a full list of emergency powers.

²⁶ See *infra* notes 31–34 and accompanying text.

broad extent of these powers, as well as assesses the conditions that must be met for the delegate to unlock them. The broad discretion Congress provides to the President is not a problem in and of itself. But when it is combined with a president who is not responsive to the historical context for such powers nor to rebukes by the legislature or the Judicial Branch, that broad discretion becomes a problem. Our system of government cannot function solely on trust. Part III then urges a shift from unilateral presidential powers to a more evenhanded sharing of powers within the Executive Branch between both the President and an agency. Specifically, it exposes the vulnerabilities in the assumptions that support unilateral presidential control of energy emergencies, as well as demonstrates how incorporating expert agencies into emergency delegations can reestablish some of the checks and balances so essential to our democracy.

I. STATUTORY EMERGENCY POWERS

Unlike ice cream, emergency powers only come in two flavors: (1) constitutional and (2) statutory. And, as with ice cream, these powers can function individually or together as a “swirl.” Presidents have frequently invoked their constitutional authority under Article II of the Constitution to address emergencies, which is a topic of frequent scholarly discussion.²⁷ But these constitutional powers are augmented where they are accompanied by a more specific grant of statutory authority. Together, this “swirl” has frequently been used to support presidential emergency action.²⁸

This Article concerns these statutory grants of emergency authority. More specifically, it focuses on Congress’s all too frequent choice to delegate such emergency authority wholly and completely to the President alone.²⁹ While such unilateral delegations make sense in a number of contexts, particularly those related to national security matters, there are many situations where the presidency is not the best place to house this power. Although Congress also delegates emergency powers to agencies,

²⁷ See *infra* notes 51–54.

²⁸ See, e.g., Exec. Order No. 10,450, 18 Fed. Reg. 2489 (Apr. 27, 1953) (“[B]y virtue of the authority vested in me by the Constitution and statutes of the United States . . . and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows”); Exec. Order No. 11,157, 29 Fed. Reg. 7973 (Apr. 23, 1971) (“By virtue of the authority vested in me by . . . title 37 [of the] United States Code[] and as President of the United States and Commander in Chief of the Armed Forces of the United States”).

²⁹ BRENNAN CTR. FOR JUST., A GUIDE TO EMERGENCY POWERS AND THEIR USE (2019) [hereinafter BRENNAN REPORT], https://www.brennancenter.org/sites/default/files/legislation/Emergency%20Power_s_Printv2.pdf [<https://perma.cc/EF2S-FEVA>] (identifying 95 of 136 statutory emergency powers that can be used by the President without any restrictions or constraints).

states, and sometimes courts,³⁰ this Article focuses on the federal Executive Branch, particularly the choice between the President and an agency as the delegate of such power to act in times of emergency.

Administrative law scholars have long debated the question of whether it makes a difference if Congress delegates statutory authority to the “President” or to an “Administrator.”³¹ These debates often focus on situations where Congress has delegated authority to an executive agency. In such situations, much of the scholarly attention has focused on the extent, if any, to which an agency can truly exercise this authority independent of the President’s will.³² Many scholars argue the irrelevance of this choice, positing that presidents are running the show, regardless of whether the statutory language actually delegates to the “President” or to an “Administrator.”³³ Consequently, this line of scholarship focuses on how the

³⁰ See, e.g., Margaret H. Lemos, *The Consequences of Congress’s Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 366, 372–80 (2010) (comparing delegations to agencies and courts under Title VII, arguing for “the significance of the choice of delegate,” and analyzing four factors that scholars have theorized inform Congress’s choice: “(1) [political alignment between the recipient of the authority and the Congress], (2) a desire to avoid blame for unpopular decisions, (3) the relative expertise of possible delegates, and (4) the relative flexibility of delegated decisionmaking”); see also 42 U.S.C. § 247(d) (stating that “[i]f the Secretary determines, after consultation with such public health officials as may be necessary, that . . . disease or disorder presents a public health emergency” or “a public health emergency . . . otherwise exists,” then the Secretary may take action (emphasis added)); 7 U.S.C. § 1471(b) (noting that if a governor of a state or a county committee determines a livestock emergency exists, they may petition the Secretary for assistance); 42 U.S.C. § 11001 (noting that the governor of each state shall appoint a state emergency response commission).

³¹ See, e.g., Peter M. Shane, *Chevron Deference, the Rule of Law, and Presidential Influence in the Administrative State*, 83 FORDHAM L. REV. 679, 695 (2014) (arguing “that *Chevron* deference might sometimes be deployed with a welcoming eye to presidential involvement, but only when problems of coordination arise”; otherwise, presidential involvement in an interpretation should be given little weight if unsupported by legal reasoning); Bijal Shah, *Congress’s Agency Coordination*, 103 MINN. L. REV. 1961, 2059 (2019) (arguing coordination statutes between agencies passed by Congress should include delineation to the President to both protect his role as administrator and ensure better review of his actions).

³² See Nina A. Mendelson, *Another Word on the President’s Statutory Authority over Agency Action*, 79 FORDHAM L. REV. 2455, 2458–61 (2011) (arguing that the choice of delegate may not make much difference to agency resistance to presidential supervision and that a statutory delegation to the President, rather than to a “Secretary” or “Administrator,” seems best understood as Congress conveying the power to the President to choose which Executive Branch official will be primarily responsible for implementing that delegation, and delegations to the “Secretary” or “Administrator” as restricting that choice).

³³ See, e.g., *id.*; Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 570–99 (1994); Nathan D. Grundstein, *Presidential Power, Administration and Administrative Law*, 18 GEO. WASH. L. REV. 285, 300 (1950); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2319–20 (2001). See generally Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 118 (1994) (discussing both sides of the unitary executive argument, but ultimately concluding that “[t]he framers did not constitutionalize presidential

courts should interpret statutory grants of power that flow directly to agencies as opposed to the President. Then-Professor, now-Justice Elena Kagan provoked much of this scholarly debate by suggesting that the words of the delegation should not matter.³⁴ She persuasively espoused a unitary executive theory, arguing that any statute that grants power to an executive agency implicitly grants power to the President, as the head of the Executive Branch, to direct that agency.³⁵ This approach triggered strong responses from administrative law scholars, who have argued that Congress's choice of delegation language should make a difference.³⁶ Professors Peter Strauss,³⁷ Kevin Stack,³⁸ Robert Percival,³⁹ and Thomas Sargentich⁴⁰ have countered Justice Kagan's approach with arguments that we should construe statutory delegations, where possible, to increase Executive Branch agency officials' ability to resist presidential control. Although this debate between Justice Kagan and Professor Stack continues to periodically rear its head,⁴¹ this Article instead flips the analysis. Instead of focusing on situations where Congress delegated to an agency, it explores situations where Congress delegated to the President. And instead of focusing on the difficulties that agencies face in resisting presidential influence, it asks whether agencies can be empowered to influence presidential decision-making by expressly including them in a shared delegation of statutory power.

To answer this question, this Part first explores the justifications for unilateral presidential emergency authority, balancing them against the

control over all that is now considered 'executive'; they did not believe that the President must have plenary power over all we now think of as administration").

³⁴ Kagan, *supra* note 33, at 2251.

³⁵ *Id.* ("[S]tatutory delegation to an executive agency official . . . usually should be read as allowing the President to assert directive authority . . . over the exercise of the delegated discretion."); *see also* Mendelson, *supra* note 32, at 2458–59.

³⁶ *See, e.g.*, Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 304–10 (2006) [hereinafter Stack, *Statutory Powers*].

³⁷ *See* Peter L. Strauss, *Overseer, or "The Decider"?: The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 759–60 (2007) [hereinafter Strauss, *Overseer*] ("[W]here Congress has delegated responsibilities to a particular governmental actor it has created, that delegation is a part of the law whose faithful execution the President is to assure. Oversight, and not decision, is his responsibility."); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 667–68 (1984) (arguing that the tensions that exist between the three branches of government should also exist between Congress's and the President's role in agency administration, thereby ensuring one branch does not have total control).

³⁸ *See* Stack, *Statutory Powers*, *supra* note 36, at 316–23.

³⁹ Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2533 (2011).

⁴⁰ Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 ADMIN. L. REV. 1, 7 (2007).

⁴¹ *See, e.g.*, Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 730 (2016).

drawbacks to such choice of delegate. Justifications for unilateral authority include presidential expertise in emergencies, political accountability as an elected government actor, consistency across the Executive Branch as the Commander in Chief, and the ability to act swiftly through executive orders.⁴² But, as I have argued elsewhere, Congress has created serious problems for reviewing courts and those seeking to challenge presidential emergency determinations through their combination of vague terms, undifferentiated deference, and lack of procedural requirements prior to unlocking such broad statutory powers.⁴³ As such, this Part then tests these competing values against existing delegations of emergency powers. Evaluating statutory emergency powers across the entire U.S. Code reveals four categories of executive delegations, each with a different mixture of presidential and agency authorities. This Article then develops an Executive Delegation Matrix to both reflect this taxonomy, as well as the tradeoffs associated with each of these formulations.

A. *Advantages of Unilateral Presidential Delegations*

Although Congress is rarely explicit in its reasoning behind its choice of delegate, scholars have extensively theorized about the justifications for unilateral presidential control.⁴⁴ Unilateral delegations are those that provide the President with sole and absolute authority to make an emergency declaration and subsequently use the attendant emergency powers. The myriad of justifications can be simplified into four categories, each of which is discussed below: (1) expertise; (2) accountability; (3) consistency; and (4) expediency.

1. *Expertise*

A first factor driving Congress to provide the President with unilateral emergency authority may be expertise.⁴⁵ When it comes to emergencies, a term often synonymous with national security, Congress overwhelmingly delegates unilaterally to the President as Commander in Chief.⁴⁶ This choice of delegate often stems from Article II of the Constitution, which establishes

⁴² See *infra* Section I.A.1.

⁴³ Stein, *supra* note 3, at 1197–1220; see also *infra* Section I.A.2.

⁴⁴ See *supra* note 39; *infra* notes 45–47, 49–53, 57–60 and accompanying text.

⁴⁵ William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357, 1366 (2018) (citing Strauss, *Overseer*, *supra* note 37, at 750–53, for his discussion of the expertise-based underpinning of such delegations); Aziz Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887, 911–16 (2012) (exploring the nuances of presidential reliance on expertise).

⁴⁶ See Stein, *supra* note 3, at 1203–20.

the President as Commander in Chief of the armed forces and empowers and restrains the President with the Take Care Clause.⁴⁷ Although there is no guarantee that any one elected president is actually an expert in addressing national security emergencies, such expertise is implied by her having this position.⁴⁸ Some presidents may have had some previous national security or foreign-affairs experience to draw upon,⁴⁹ but other presidents may be encountering these challenges for the first time in their presidential role.⁵⁰ Regardless, the Supreme Court repeatedly has affirmed this formulation of national security exceptionalism in decisions such as *Curtiss-Wright*, providing near absolute deference to the President over foreign affairs and national security.⁵¹ The Supreme Court referenced the inherent power of the President to represent the nation in foreign affairs and to protect security interests as legal reason to defer to the judgment of the President.⁵² Some scholars similarly refer to the presidency as the best place in our system of government to house powers related to national security and foreign affairs.⁵³

⁴⁷ U.S. CONST. art. II, § 2, cl. 1; *id.* art. II, § 3.

⁴⁸ *Ameziane v. Obama*, 699 F.3d 488, 494 (D.C. Cir. 2010) (“[I]t is within the role of the executive to acquire and exercise the expertise of protecting national security.” (internal quotation marks omitted) (quoting *Bismullah v. Gates*, 501 F.3d 178, 187–88 (D.C. Cir. 2007))); Gregory S. McNeal, *The Pre-NSC Origins of National Security Expertise*, 44 CONN. L. REV. 1585, 1589 (2012) (“[O]ne can accept either that Congress (rightly or wrongly) will oftentimes defer to the President’s functional expertise, or one can adopt the view that because of his greater functional expertise the President possesses inherent authority to act in matters of national security.”).

⁴⁹ *See, e.g., Secretaries of State Who Became President*, CNN (Aug. 11, 2016, 11:00 PM), <https://www.cnn.com/2016/08/11/politics/gallery/secretaries-of-state-who-became-president/index.html> [<https://perma.cc/Y32D-EV26>] (listing nine presidents that previously served as Secretary of State); *Presidents*, THE WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/presidents/> [<https://perma.cc/Y859-WY5P>] (elaborating on past U.S. presidents’ backgrounds).

⁵⁰ *See, e.g., Jackie Calmes, Donald Trump: Life Before the Presidency*, UVA MILLER CTR., <https://millercenter.org/president/trump/life-presidency> [<https://perma.cc/4XAE-M6XF>] (detailing President Trump’s career as a business person before becoming president); Lou Cannon, *Ronald Reagan: Life Before the Presidency*, UVA MILLER CTR., <https://millercenter.org/president/reagan/life-before-the-presidency> [<https://perma.cc/5KXT-CAFM>] (detailing President Reagan’s early career as an actor); Russell L. Riley, *Bill Clinton: Foreign Affairs*, UVA MILLER CTR., <https://millercenter.org/president/clinton/foreign-affairs> [<https://perma.cc/8BAB-EUTL>] (“Bill Clinton came into office with relatively little experience in foreign affairs.”).

⁵¹ *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–29 (1936).

⁵² *See* U.S. CONST. art. II; *Curtiss-Wright*, 299 U.S. at 319.

⁵³ *See, e.g., H. Jefferson Powell, The President’s Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 529 (1999) (“I believe that the Constitution is best read to vest the President with primary constitutional authority over the conduct of foreign affairs and the protection of national security . . .”); Heidi Kitrosser, *It Came from Beneath the Twilight Zone: Wiretapping and Article II Imperialism*, 88 TEX. L. REV. 1401, 1410 (2010) (discussing the argument that throughout most of American history, Congress respected presidential exclusivity in foreign affairs or national security); Koh, *supra* note 3, at 1263–64. *But see* Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 267–73 (arguing that judicial responses to exigent national

To the extent that many of the historical emergencies involved war, it may not be surprising that Congress would delegate emergency powers to the President as the wartime expert.

2. *Accountability*

Second, many, including Justice Kagan, argue that presidents are the best recipient of authority because they are politically accountable.⁵⁴ As Professor Kathryn Kovacs has noted, “[Justice] Kagan defended presidential administration on the grounds that the President is more democratically accountable than agencies both because he provides an ‘electoral link between the public and the bureaucracy’ and because he ‘enhances transparency.’”⁵⁵ “[Justice] Kagan argued that the President’s national constituency makes him more responsive to ‘the preferences of the general public, rather than merely parochial interests.’”⁵⁶ Many scholars agree with Justice Kagan that the President is in the best position to design policy reflective of the public’s interests as a whole because her elected status reflects the majoritarian position of the nation.⁵⁷ There is also some

security policies are not exceptional but are “thoroughly imbricated in the larger texture of American public law”).

⁵⁴ Kagan, *supra* note 33, at 2331–32; *see also* Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 60 (2008) (noting that numerous experts “agree that the political responsiveness of bureaucratic policy to the preferences of the national electorate correlates strongly with presidential control of the administration”).

⁵⁵ Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515, 562 (2018) (quoting Kagan, *supra* note 33, at 2331–32).

⁵⁶ *Id.* at 564 (citing Kagan, *supra* note 33, at 2335).

⁵⁷ *See, e.g.*, Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 190 (1986) (“Agency officials, by contrast, are only indirectly accountable . . . For these reasons, a supervisory role by the President should help ensure that discretionary decisions by regulatory agencies are responsive to the public generally.”); Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 508 (1985) (“Presidents are elected presumably because they share the policy preferences of a majority of citizens. It follows that they should be permitted to determine social policy within whatever boundaries Congress has established.”); Watts, *supra* note 41, at 725 (“[P]residential control can help to further positive values—namely, political accountability and regulatory coherence in agency decisionmaking.”); Stephenson, *supra* note 54, at 59 (“Scholars with diverse ideological and methodological commitments have asserted . . . that bureaucratic policy should track majoritarian values . . . imply[ing] the need for presidential control over bureaucratic policymaking, because the president is the institutional actor most responsive to the preferences of a national majority.”). *But see* Sidney A. Shapiro, *Rulemaking Inaction and the Failure of Administrative Law*, 68 DUKE L.J. 1805, 1832–33 (2019) (“Because of the electoral college, a nominee can win the presidency and still lose the popular vote, an anomaly that can prevent the majority of Americans from holding a president accountable for the president’s deregulatory policies.”); Tara Law, *These Presidents Won the Electoral College — But Not the Popular Vote*, TIME (May 15, 2019, 4:58 PM), <https://time.com/5579161/presidents-elected-electoral-college/> [<https://perma.cc/VQA8-MJKY>] (identifying the four presidents in American history—the most recent two being President Donald

agreement with Justice Kagan that presidential control enhances transparency in policymaking, making it more democratically accountable.⁵⁸ As such, unilateral presidential delegations may be explained by the President's political accountability.

3. *Consistency*

Third, others argue that allowing the President sole decision-making authority is the best approach for ensuring policy consistency.⁵⁹ Justice Kagan has argued that “[c]entral presidential oversight could identify and then eliminate the inconsistencies and redundancies that these intersecting delegations introduced into the regulatory process.”⁶⁰ She further argued that the President provides more coherent and less factional leadership than Congress, as her broad jurisdiction over the administrative state allows her to “synchronize and apply general principles to agency action in a way that congressional committees, special interest groups, and bureaucratic experts cannot.”⁶¹ Other scholars agree that the President is in a unique position to coordinate “the sprawling federal bureaucracy,” ensuring both efficiency and efficacy, “since [she] is responsible for executing many statutes at once.”⁶² Justice Kagan further argued that “presidential administration is effective because it lends consistency and dynamism to the process.”⁶³

Coordination benefits from a centralized decision-maker also can be valuable in the case of emergencies, as was seen to be lacking in both the uncoordinated response to the Deepwater Horizon oil spill emergency that leaked 168 million gallons of oil into the Gulf of Mexico,⁶⁴ and the

Trump in 2016 and President George W. Bush in 2000—that won the presidential election but lost the popular vote).

⁵⁸ See Kagan, *supra* note 33, at 2332 (“The Presidency’s unitary power structure, its visibility, and its ‘personality’ all render the office peculiarly apt to exercise power in ways that the public can identify and evaluate.”); Watts, *supra* note 41, at 734 (arguing that “when exerted through overt mechanisms like published presidential directives and public speeches, presidential control can help to promote political accountability and bolster the perceived legitimacy of policy decisions made by unelected agency officials”).

⁵⁹ Kagan, *supra* note 33, at 2340.

⁶⁰ *Id.*

⁶¹ *Id.* at 2339, 2349.

⁶² Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1084 (2013); see also Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1173–81 (2012) (describing “some of the well-established coordination instruments that are uniquely available to the President, including centralized White House review”).

⁶³ Kovacs, *supra* note 55, at 562 (citing to Kagan, *supra* note 33, at 2339).

⁶⁴ Despite having substantial unilateral emergency powers that could have provided a more coordinated response, the Obama Administration deferred to the state and Coast Guard responses, leading to a reliance on outdated emergency management plans, unnecessary delays in responding, a lack of resources to address the spill, and a lack of accountability. See generally Memorandum from R.J. Papp,

scattershot response to the COVID-19 pandemic that started in 2019.⁶⁵ Despite these past failures, some scholars have argued that “[t]he President, as commander-in-chief and centralized decision-maker, is best suited to direct coordinated action in times of extreme emergency within the domestic arena, in exactly the same role that the President assumes in foreign crises.”⁶⁶ Ultimately, delegating emergency powers to the President may be justified in hopes of a more unified, coordinated, and consistent response to such emergencies.

4. Expediency

Lastly, arguments supporting unilateral presidential powers often focus on the need for expediency, particularly with respect to national security matters.⁶⁷ The prevailing wisdom on emergencies is that the government

Jr., Commandant, U.S. Coast Guard, Final Action Memorandum – Incident Specific Preparedness Review (ISPR) Deepwater Horizon Oil Spill (Mar. 18, 2011), <https://www.hsdl.org/?view&did=7347> [<https://perma.cc/3979-C3B5>] (expounding on the issues that hindered the federal government’s effective response to the BP oil spill); *Oil Spills Fast Facts*, CNN (Feb. 26, 2020, 2:09 PM), <https://www.cnn.com/2013/07/13/world/oil-spills-fast-facts/index.html> [<https://perma.cc/X5Q4-TAWC>].

⁶⁵ Despite having substantial unilateral emergency powers that could have provided uniformity, the Trump Administration preferred to let the states address the COVID-19 pandemic on an ad hoc basis, stating that the federal government was merely “a backup” to the states and even going as far as to say that the strategic national stockpile of medical equipment was “not supposed to be state stockpiles that they then use.” *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing*, THE WHITE HOUSE (Apr. 3, 2020, 5:48 PM) [hereinafter *Remarks by President Trump*], <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-17/> [<https://perma.cc/5EFP-YP82>]. This lack of uniformity contributed to a counterproductive dynamic where the federal government preempted the states for protective gear and medical equipment to address the increasing death toll. Christina Jewett & Lauren Weber, *Trump Administration Uses Wartime Powers to Be First in Line on Medical Supplies*, KAISER HEALTH NEWS (Apr. 3, 2020), <https://khn.org/news/trump-administration-uses-wartime-powers-to-be-first-in-line-on-medical-supplies-ppe/> [<https://perma.cc/U27S-C33H>]. As of November 12, 2020, the COVID-19 pandemic had resulted in over 242,787 deaths in the United States. *Coronavirus Resource Center: U.S. Map*, JOHNS HOPKINS UNIV. & MED. (Nov. 8, 2020), <https://coronavirus.jhu.edu/us-map> [<https://perma.cc/4PX8-LTUX>].

⁶⁶ Scott R. Tkacz, *In Katrina’s Wake: Rethinking the Military’s Role in Domestic Emergencies*, 15 WM. & MARY BILL RTS. J. 301, 318 (2006) (arguing the delay in response to Hurricane Katrina could have been prevented if the President had unilateral emergency powers to deploy federal military assistance); see also Megan E. Ball, Note, *Blank Checks: An Analysis of Emergency Actions Warranting Unilateral Executive Action*, 94 NOTRE DAME L. REV. 909, 928 (2018) (arguing agencies should not be allowed to act unilaterally in times of emergency and that emergency situations should be addressed by the President and Congress as has historically been done to ensure consistency and stability).

⁶⁷ See, e.g., John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1676 (2002) (“The centralization of authority in the President is particularly crucial in matters of national defense, war, and foreign policy, where a unitary executive can evaluate threats, consider policy choices, and mobilize national resources with a speed and energy that is far superior to any other branch.”); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (“The nature of transactions with foreign

response cannot be hamstrung by bothersome procedural or substantive requirements⁶⁸ and that the federal executive is in the best position to quickly address national emergencies.⁶⁹ As discussed above, conventional thinking supports the view that the executive is the best branch to handle things quickly.⁷⁰ Scholars focus on expediency as an important justification to delegate solely to the President, arguing that the presidency is the institution most capable of responding with the speed required to be effective.⁷¹ This rationale applies with significant force to emergency delegations.

nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and *dispatch*.” (emphasis added)); James E. Baker, Speech, *What Process Is Due? The Role of Judging in National Security*, 67 RUTGERS U. L. REV. 1523, 1526 (2015) (noting that the pathologies of national security decision-making include secrecy and speed). *Contra* Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CALIF. L. REV. 671, 673, 684 (1998) (arguing expediency is detrimental to foreign policy and that courts should stop being “lulled . . . [by the executive] into a collective fantasy about the nature of the foreign threat” in “the name of expediency”).

⁶⁸ Notably, in a few instances, Congress has even waived procedural requirements for agencies acting during emergencies. See 42 U.S.C. § 5174(f)(3)(J)(i) (“The Administrator of the Federal Emergency Management Agency may waive notice and comment rulemaking with respect to rules to carry out this section, if the Administrator determines doing so is necessary to expeditiously implement this section, and may carry out this section as a pilot program until such regulations are promulgated.” (emphasis added)); 41 U.S.C. § 1707(d) (“The [notice-and-comment] requirements of subsections (a) and (b) may be waived by the officer authorized to issue a procurement policy, regulation, procedure, or form if urgent and compelling circumstances make compliance with the requirements impracticable.” (emphasis added)); see also, e.g., Memorandum from Rosemarie Kelley, Dir., & Karin Leff, Acting Dir., Off. of Enf’t & Compliance Assurance, Env’t Prot. Agency, to Enf’t Dirs. 4 n.3 (May 3, 2018), <https://www.epa.gov/sites/production/files/2018-09/documents/updatedguidanceonemergencyauthorityundersection1431sdwa.pdf> [<https://perma.cc/PV3B-A73A>] (“Administrative and judicial implementation of this authority must occur early enough to prevent the potential hazard from materializing.” (internal quotation marks omitted) (quoting H.R. REP. NO. 93-1185, at 35–36 (1974), reprinted in 1974 U.S.C.C.A.N. 6454, 6488)).

⁶⁹ The COVID-19 pandemic, however, has demonstrated that state executive branches can sometimes be even more nimble than the federal Executive Branch. Over a month after the first death from COVID-19, Washington was the first state to declare a state of emergency on February 29, 2020. Proclamation by the Governor No. 20-05, State of Wash., Off. of the Governor (Feb. 29, 2020), https://www.governor.wa.gov/sites/default/files/20-05%20Coronavirus%20%28final%29.pdf?utm_medium=email&utm_source=govdelivery [<https://perma.cc/8HML-MQZQ>]. Thirteen days later, President Trump issued a national emergency after there were over 1,645 people from forty-seven states infected. *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, THE WHITE HOUSE (Mar. 13, 2020) [hereinafter *Proclamation Concerning the Novel Coronavirus*], <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak> [<https://perma.cc/7H5J-3Z2S>].

⁷⁰ Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1424 n. 213 (2009) (“[B]oth Congress and the judiciary defer to the executive during emergencies because of the executive’s institutional advantages in speed, secrecy, and decisiveness.” (quoting ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 16 (2007))).

⁷¹ See Michele E. Gilman, *Presidents, Preemption, and the States*, 26 CONST. COMMENT. 339, 362 (2010) (noting the relative ease of a president to issue executive orders compared to the legislative process incumbent on Congress); Tkacz, *supra* note 66, at 302 (arguing that, in the wake of Katrina, Congress

Most scholars compare speed of the Executive Branch to the Judicial and Legislative Branches, often observing that the structural features of the presidency renders that office “institutionally best suited to initiate government action,” and that the President’s “decision-making processes can take on degrees of speed, secrecy, flexibility, and efficiency that no other governmental institution can match.”⁷² Unilateral presidential powers are also favored over Congress’s powers when comparing their relative speed of decision-making.⁷³ Congress is often plagued with regulatory gridlock, while the President is able to use executive orders to more swiftly implement her will.⁷⁴ Scholars have repeatedly noted that “the executive branch can move far more quickly than can Congress or the courts.”⁷⁵

Comparing the relative expediency of the President versus agencies within the Executive Branch yields the same critiques. Agencies are traditionally criticized for their bureaucratic burdens and accompanying delays.⁷⁶ As will be discussed in Section III.B.1, agencies are bound by the rulemaking and process requirements of the APA,⁷⁷ in stark contrast to the President’s freedom to implement actions quickly through executive orders.⁷⁸ Accordingly, where urgency is the driving force, congressional delegation of emergency powers to the President is the rational choice. There

should give the President more flexibility in ordering federal troops because the delays were devastating); see also Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1939 (2015) (“[S]peed is necessary in emergencies, foreign or domestic . . .”).

⁷² HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 118–19 (1990).

⁷³ Gilman, *supra* note 71, at 365.

⁷⁴ See generally Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993) (describing the use of executive orders by different presidents throughout history); Erica Newland, Note, *Executive Orders in Court*, 124 YALE L.J. 2026, 2030–32 (2015) (discussing executive orders and their enforceability); Steven Ostrow, Note, *Enforcing Executive Orders: Judicial Review of Agency Action Under the Administrative Procedure Act*, 55 GEO. WASH. L. REV. 659, 659 (1987) (“[E]xecutive orders have become an important weapon in the arsenal of presidential policymaking.”).

⁷⁵ Chesney, *supra* note 70, at 1424 & n.214 (citing POSNER & VERMEULE, *supra* note 70, at 5, 18 (2007)); see also Robert J. Pushaw, Jr., *Defending Deference: A Response to Professors Epstein and Wells*, 69 MO. L. REV. 959, 968 (2004) (contrasting executive efficiency with a judiciary that “by design acts far more slowly than either political branch”).

⁷⁶ Eric Moorman, “A Greater Sense of Urgency”: *EPA’s Emergency Authority Under the SDWA and Lessons from Flint, Michigan*, 47 ENV’T L. REP. NEWS & ANALYSIS 10,786, 10,786 (2017) (criticizing the EPA’s slow response to the Flint water crisis and urging EPA to “invoke its emergency powers earlier and more frequently to effectuate the SDWA’s preventative purpose and protect public health”); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1386–87 (1992).

⁷⁷ Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in sections of 5 U.S.C.); see also *infra* Section III.B. But see sources cited *supra* note 68.

⁷⁸ See *supra* note 73 and accompanying text.

are few other categories more deserving of an expedited response than emergencies. Therefore, relying upon some combination of expertise, accountability, consistency, and expediency rationales, Congress can support its delegations of broad and unilateral powers to the President.⁷⁹

B. *Perils of Unilateral Presidential Delegations*

Congress's choice to delegate unilateral authority to the President may satisfy the values delineated above, but such delegations also have potential negative consequences due to the lack of internal executive agency checks and external checks from the judiciary.⁸⁰ And as pressing as emergencies are, there are certain values that should not be sacrificed, even in times of a national emergency.⁸¹ This Section explores the resulting dilution of checks and balances that compromises the transparency and reviewability of these presidential decisions.

1. *Uninformed Decision-Making*

A first disadvantage of unilateral presidential delegation is that it allows the President to sidestep any input from expert agencies. In most situations, it is unlikely that a president would ever act on her emergency powers without conferring with her relevant advisors.⁸² Yet, merely trusting that a

⁷⁹ See *infra* Part II.

⁸⁰ Kovacs, *supra* note 55, at 566; Susan Rose-Ackerman, Diane A. Desierto & Natalia Volosin, *Hyper-Presidentialism: Separation of Powers Without Checks and Balances in Argentina and the Philippines*, 29 BERKELEY J. INT'L L. 246, 331 (2011) ("As long as US Presidents find ways to act unilaterally under the national security umbrella, the US risks taking on some aspect of hyper-presidentialism.").

⁸¹ See CONG. RSCH. SERV., NATIONAL EMERGENCY POWERS (2020), <https://fas.org/sgp/crs/natsec/98-505.pdf> [<https://perma.cc/D8HM-LQQR>] (noting that "the Constitution makes no allowance for the suspension of any of its provisions during a national emergency"). But see Order on Plaintiff's Petition for Preliminary Injunction & Defendant's Motion to Dismiss, *Binford v. Sununu*, No. 217-2020-CV-00152 (N.H. Super. Ct. Mar. 25, 2020), rejecting plaintiff's motion for preliminary injunction to overturn the Governor's ban on social gatherings under the First Amendment's Freedom of Assembly and Free Exercise Clauses, and Memorandum Order & Opinion at 1, *Legacy Church v. Kunkel*, No. CIV 20-0327-JB-SCY (D.N.M. Apr. 17, 2020), rejecting TRO to overturn the Governor's ban on social gathering to attend Easter mass at church, as two examples of failed challenges on religious liberties and First Amendment grounds during the latest COVID-19 pandemic.

⁸² But see, for example, President Trump contradicting his advisors during a COVID-19 press briefing by suggesting that ingestion of household disinfectants like Lysol could be a treatment for the coronavirus, in direct contravention of his scientific experts, the FDA, the CDC, and the makers of Lysol. *Remarks by President Trump*, *supra* note 65 ("Right. And then I see the *disinfectant*, where it knocks it out in a minute. One minute. And is there a way we can do something like that, *by injection inside* or almost a cleaning . . . So it would be interesting to check that.") (emphasis added); see also Katie Rogers, Christine Hauser, Alan Yuhas & Maggie Haberman, *Trump's Suggestion that Disinfectants Could Be Used to Treat Coronavirus Prompts Aggressive Pushback*, N.Y. TIMES (Apr. 24, 2020), <https://www.nytimes.com/2020/04/24/us/politics/trump-inject-disinfectant-bleach-coronavirus.html>

president will only invoke such powers in true emergencies and confer with advisors beforehand is an ineffectual constraint on a president.⁸³ For too long, the American public has proceeded under the assumption that presidents would only use these emergency powers in the rarest of instances. But previous attempts to stretch the meaning of “emergency” caution against relying on trust and presidential self-restraint.⁸⁴ In reality, a president with a statutory grant of unilateral authority can invoke these powers without conferring with any expert agency. This is particularly odd given that a number of emergencies, such as energy emergencies, are highly technical and arguably warrant feedback and opinions from agencies with particular expertise in the field of the emergency at hand. Agencies are often involved in declaring and responding to emergencies, although sometimes their response is hamstrung by and dependent on an initial presidential declaration of an emergency.⁸⁵ At the very least, Presidents have often recognized the value of soliciting agencies to assist in responding to emergencies.⁸⁶ Without

[<https://perma.cc/4P42-4UTV>] (“[T]he Food and Drug Administration warned that hydroxychloroquine and chloroquine, two drugs that the president has repeatedly recommended in treating the coronavirus, can cause dangerous abnormalities in heart rhythm in coronavirus patients and has resulted in some deaths.”); *Improper Use of Disinfectants*, LYSOL, <https://www.lysol.com> [<https://perma.cc/DW5Q-BFHM>] (“[W]e must be clear that under no circumstance should our disinfectant products be administered into the human body (through injection, ingestion or any other route).”).

⁸³ See, e.g., Evan Kraft, Opinion, *Trump Knows More than the Fed—According to Him*, HILL (Oct. 12, 2018, 1:00 PM), <https://thehill.com/opinion/finance/411110-trump-knows-more-than-the-fed-according-to-him> [<https://perma.cc/JDU7-HNVR>]; Daniel W. Drezner, Opinion, *Trump Says He Knows Everything. So Why Do His Decisions Look So Dumb?*, WASH. POST (May 15, 2019, 9:15 AM), https://www.washingtonpost.com/outlook/2019/05/15/trump-says-he-knows-everything-hes-obviously-wrong/?utm_term=.5456a9bbacbe [<https://perma.cc/E95X-CLEF>].

⁸⁴ Exec. Order No. 13,928, 85 Fed. Reg. 36,139, 36,139 (June 11, 2020) (claiming the International Criminal Court’s (ICC) jurisdiction over war crimes committed in Afghanistan and the prospect of being held accountable for such crimes is an “emergency” under the International Emergency Economic Powers Act (IEEPA) that justifies freezing U.S.-based assets of any foreign ICC personnel who try to exercise jurisdiction over U.S. war crimes and anyone who assists them); Proclamation No. 9844, 84 Fed. Reg. 4949, 4949 (Feb. 15, 2019) (national emergency diverting funds to build a border wall between the United States and Mexico); Exec. Order No. 13,848, 83 Fed. Reg. 46,843 (Sept. 12, 2018) (national emergency regarding interference in U.S. election); Exec. Order No. 13,194, 66 Fed. Reg. 7389 (Jan. 18, 2001) (national emergency prohibiting the importation of rough diamonds from Sierra Leone).

⁸⁵ See *infra* Appendix B; Memorandum on Combatting the National Drug Demand and Opioid Crisis, 82 Fed. Reg. 50,305 (Oct. 31, 2017), <https://www.federalregister.gov/documents/2017/10/31/2017-23787/combating-the-national-drug-demand-and-opioid-crisis> [<https://perma.cc/A7CF-LYYF>] (encouraging the Secretary of Health and Human Services to declare a public health emergency regarding the opioid crisis); Proclamation No. 4807, 45 Fed. Reg. 80,809 (Dec. 8, 1980) (“The Secretary of Agriculture has . . . determined and reported to [President Carter] that a condition exists with respect to peanuts which requires emergency treatment . . .”).

⁸⁶ See, e.g., Press Release, U.S. Dep’t of Lab., Major National Emergency Grant Will Aid Commercial Fisherman (Jan. 10, 2002) (describing that Secretary of Labor granted \$5.9 million out of her discretionary fund to assist in relocating and retraining fisherman and related industry workers as a

explicitly requiring consultation with expert agencies, however, Congress is essentially using unilateral presidential delegations to empower presidents with the ability to make uninformed decisions.

2. *Unbridled Discretion*

Second, the resulting corollary to sidestepping an agency is the inapplicability of the APA, meaning no rulemaking requirements or arbitrary and capricious review. Although all agencies are subject to the APA, the Supreme Court in *Franklin v. Massachusetts*⁸⁷ held that the President is not considered an agency governed by the APA and accordingly that the APA does not apply to presidential action.⁸⁸ As Professor Evan Criddle has noted, the Court recognized that although

“[t]he President is not explicitly excluded from the APA’s purview,” it stressed that “he is not explicitly included, either,” and expressed concern that extending administrative procedure to presidential action could implicate “separation of powers and the unique constitutional position of the President.” In the absence of a particularly clear statement from Congress, the Court reasoned that it should not construe the APA to limit presidential lawmaking. The Court thus construed the APA to categorically exempt presidential lawmaking from the ordinary requirements of administrative procedure.⁸⁹

major part of President Bush’s “Back-To-Work” package); Presidential Exec. Order Amending Exec. Order 13,223, 2017 WL 4707724, at *1 (amending a previous executive order to “provide the Secretary of Defense additional authority to manage personnel requirements”).

⁸⁷ 505 U.S. 788, 800–01 (1992).

⁸⁸ *Id.* at 801. *Accord* Serv. Emps. Int’l Union Loc. 200 v. Trump, 419 F. Supp. 3d 612, 619 (W.D.N.Y. 2019) (noting that, “despite clearly knowing that both the President and OPM may issue ‘civil service rules and regulations’ in drafting § 1103(b)(1), Congress chose only to require that rules and regulations ‘proposed by the Office’ be subject to the APA’s notice-and-comment rulemaking requirements[.]” and finding regulations issued by the President through executive order to not be subject to the APA). In the rare occasions where Congress imposes a notice-and-comment requirement on the President, they involve long-term plans or policies. *See, e.g.*, 42 U.S.C. § 5165c(a), (c) (“The President shall provide for public notice and opportunity for comment before adopting any new or modified policy . . . of the public assistance program”); *id.* § 8451(b) (“[T]he President shall publish in the Federal Register a notice and summary of the proposed report, make copies of such report available, and accord interested persons an opportunity (of not less than 90 days’ duration) to present written comments; and shall make such modifications of such report as he may consider appropriate on the basis of such comments.”).

⁸⁹ Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 198–99 (2011) (alteration in original) (footnotes omitted) (quoting *Franklin*, 505 U.S. at 800–01).

In the aftermath of *Franklin*, courts also have determined that the President's actions "are not reviewable for abuse of discretion under the APA."⁹⁰

Similarly, scholars have consistently noted the deficits in transparency and deliberation when comparing the President and agencies.⁹¹ Professor Kovacs notes that "the President often makes his decisions in a black box with little to no transparency, much less public participation or deliberation" and that the "President has no obligation to solicit feedback . . . and no obligation to reveal who influenced his decision or what information he considered in reaching it."⁹² This means the President could invoke many of these emergency powers based on little more than a whim or a political inclination. Professor Kovacs recognized that even Justice

Kagan acknowledged this danger but thought that judicial review would provide an adequate backstop. [Justice Kagan] contended that *Franklin v. Massachusetts*' holding that the President is not an "agency" under the APA should not apply when the President "step[s] into the shoes of an agency head." Even if that distinction were upheld, however, and enabled some APA suits against the President, applying the rulemaking provisions of the APA to the President would be another battle.⁹³

Thus, without the constraints of the APA, a president's unilateral decision-making could suffer from a lack of transparency and deliberation in her unbridled discretion.

3. *Limited Judicial Review*

In addition to eliminating a requirement of agency expertise and the rulemaking requirements of the APA, unilateral delegations to the President also compromise the reviewability of these presidential decisions. This is because the Judicial Branch often takes a tentative approach to judicial review of the President's actions, according her great deference, particularly where national security is involved.⁹⁴ This leads to at least two negative consequences for external judicial checks on presidential action.

⁹⁰ *Detroit Int'l Bridge Co. v. Canada*, 133 F. Supp. 3d 70, 101 (D.D.C. 2015) (quoting *Franklin*, 505 U.S. at 801); *accord* *Dettling v. United States*, 948 F. Supp. 2d 1116, 1128–29 (D. Haw. 2013); *Ancient Coin Collectors Guild v. U.S. Customs & Border Prot.*, 801 F. Supp. 2d 383, 403 (D. Md. 2011), *aff'd*, 698 F.3d 171 (4th Cir. 2012).

⁹¹ *Gilman*, *supra* note 71, at 362.

⁹² *Kovacs*, *supra* note 55, at 563.

⁹³ *Id.* at 566 (footnotes omitted).

⁹⁴ *But see* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952) (limiting power of the President to seize steel mills even in the face of national security concerns).

First, the Supreme Court has yet to agree upon the proper level of deference for presidential statutory interpretations, as opposed to agency statutory interpretations. The Supreme Court's *Chevron* doctrine governs much of statutory interpretation, providing a two-part test for review of an agency's interpretation of a statute, with significant deference given to the agency.⁹⁵ Whereas the Supreme Court has made clear that *Chevron* and its progeny apply to agency actions, thus providing a standard of review, the courts are very unclear about the standard of review for a president's interpretations. The Supreme Court in *Franklin v. Massachusetts* not only declined to apply the traditional *Chevron* deference to the President's interpretation of a statute—the Court also failed to provide an alternative standard of review.⁹⁶ This leaves a critical void in the jurisprudence, allowing inconsistencies to develop in the doctrine.⁹⁷

Second, the closer the link to national security, the less likely courts are to engage in substantive judicial review. As Professor Stack and I have described elsewhere, this leads to broad deference to a president's statutory actions, particularly where there is no agreement on the relevant standard of review.⁹⁸ For instance, in *Dalton v. Specter*, the Supreme Court noted that “longstanding authority holds that such review is not available when the statute in question commits the decision to the discretion of the President.”⁹⁹ As Professor Kovacs has indicated, even “agencies may ask the President to establish policy himself to avoid the burden of rulemaking and to make it more difficult for adversaries to challenge the policy in court.”¹⁰⁰

Furthermore, some security statutes specifically waive judicial review of presidential emergency powers. Notably, the Defense Production Act specifically provides that neither the President's actions to suspend transactions, nor her findings supporting that decision, are “subject to judicial review.”¹⁰¹ Congress has waived judicial review of the President's

⁹⁵ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984). The Supreme Court in *Chevron* established a two-part test for review of an agency's interpretation of a statute. *Id.* At Step One, the court asks whether “Congress has directly spoken to the precise question at issue.” *Id.* at 842. If not, the analysis proceeds to Step Two, where the court merely asks “whether the agency's answer is based on a permissible construction of the statute.” *Id.* at 843.

⁹⁶ 505 U.S. 788, 800–01 (1992).

⁹⁷ See Stein, *supra* note 3, at 1203–18.

⁹⁸ *Id.* at 1203; Stack, *Statutory Powers*, *supra* note 36, at 267, 299–300.

⁹⁹ 511 U.S. 462, 464, 474 (1994) (finding review unavailable where Congress committed “the decision to the discretion of the President” under 10 U.S.C. § 2687).

¹⁰⁰ Kovacs, *supra* note 55, at 557–58 (documenting examples of presidential actions that may have been inspired in part by a desire to bypass rulemaking).

¹⁰¹ 50 U.S.C. § 4565(e) (“[A]ctions of the President under paragraph (1) of subsection (d) and the findings of the President under paragraph (4) of subsection (d) shall not be subject to judicial review.”).

actions in other contexts, including the ability to finance cleanup of contaminated sites,¹⁰² to compensate government employees injured by hostile action,¹⁰³ and to designate items as defense items for import or export.¹⁰⁴

Judicial review remains the most likely opportunity for providing a check on a presidential statutory interpretation, but the lack of a defined deference standard—combined with historical deference to the executive on national security matters—neutralizes the hope that the judiciary will serve as an effective external constraint.

C. *An Executive Delegations Matrix*

Unfortunately, despite these competing justifications for and against unilateral presidential authority over emergencies, actual delegations often exist in a “black box,” with little in the statute’s text or legislative history to conclusively determine the “why” behind Congress’s choice of delegation.¹⁰⁵ Without explicit guidance to better understand the choice of delegation, this Article undertakes an exhaustive search of the delegations of emergency powers in the U.S. Code to see if there is any discernible pattern that exists to explain this choice. The analysis is primarily focused on provisions that refer to an “emergency” power for the President or an agency head.¹⁰⁶

In a few rare instances, however, Congress has imposed record requirements and an arbitrary and capricious standard to the President. *See, e.g.*, Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9613(j)(1)–(2) (“In any judicial action under this chapter, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court In considering objections raised in any judicial action under this chapter, the court shall uphold the President’s decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.”). As I argue elsewhere, such procedural constraints could be more widely imposed. *See* Stein, *supra* note 3, at 1220–44.

¹⁰² CERCLA, 42 U.S.C. § 9622(b)(2).

¹⁰³ 5 U.S.C. § 5570(d).

¹⁰⁴ 22 U.S.C. § 2778(h). Congress has waived judicial review of agency actions in more limited situations, related to discrete actions such as estimates and reports, 2 U.S.C. § 1571, use of alternate dispute resolutions, 5 U.S.C. § 581, and the establishment of committees, *id.* § 570.

¹⁰⁵ *See* Lemos, *supra* note 30, at 364–66.

¹⁰⁶ Our research was inspired by a Brennan Center report’s identification of national security provisions. *See* BRENNAN REPORT, *supra* note 29. The Brennan Center’s report only focused on the 123 provisions that can be activated by a president’s declaration of a national emergency under one of the four enabling statutes. This does not capture all statutory emergency provisions. For a more comprehensive review, we ran an independent search of the U.S. Code titles in Westlaw and used the following key word search: (“emergency”) /s (“Secretary” OR “Department” OR “Administrator” OR “President”). This keyword search should only generate statutes that include a provision discussing

Specifically, these provisions were reviewed for the nature of the agency–presidential interaction that Congress envisioned, including only those where we could determine whether the agency had a primary, shared, or no responsibility for emergency powers.¹⁰⁷ This culled search resulted in 188 “emergency” provisions that are provided in Appendix B.

The data could be divided and analyzed in a number of ways, an endeavor that is complicated by the fact that some emergency statutory provisions merely “activate” or “unlock” other provisions, some emergency provisions are dependent on such emergency declarations, and some statutory provisions allow for independent emergency powers.¹⁰⁸ Another challenge is defining what is meant by unilateral powers. For purposes of this analysis, unilateral presidential powers are those where the President has sole authority to both activate and implement powers in an emergency. Unilateral agency powers, on the other hand, are only classified as such where the agency has the sole authority to implement emergency powers and they are not dependent on the President to unlock them.

Similarly complicated, some emergency powers are shared by both the President and an agency. For purposes of this Article, any emergency power

emergencies in the same sentence as the President or agency heads. While this search was compared to the Brennan Center’s report to ensure those provisions were captured, it resulted in additional provisions. To ensure we captured as many energy provisions as possible, we then ran additional searches specific to the two primary energy agencies, the Federal Energy Regulatory Commission (FERC) and the Department of Energy (DOE), using the keyword search: (“emergency”) /p (“Secretary of Energy” OR “Department of Energy” OR “Federal Energy Regulatory Commission” OR “FERC” OR “DOE”). See *infra* Appendix B for the results of this search with energy provisions highlighted in grey.

¹⁰⁷ Because of our focus on the interaction between the President and an agency to respond to an emergency (as compared to preparing or recovering from an emergency), statutes were disregarded in our search if they: (1) did not explicitly state which executive entity, the President or the agency, had the power to declare an emergency; (2) did not specify which entity could exercise the emergency power; (3) were “passive” emergency statutes (for example, statutes that automatically waive provisions in an emergency); (4) were no longer good law; or (5) only discussed the establishment of emergency plans. This resulted in a few less provisions than were included in the Brennan Center’s report. Those left out from the Brennan Center’s report most often fell under the first and third caveats, or the emergency declaration power could only be exercised by Congress. We only considered Congress’s delegation, not subsequent delegations. We did not include the temporary emergency provisions contained in the Coronavirus Aid, Relief, and Economic Security (CARES) Act that allows agency administrators to take some temporary action in response to the pandemic and the President’s declaration of a national emergency. See, e.g., 15 U.S.C. § 9008. Notably, this does not cover statutory provisions that only contain the word “emergency” (e.g., National Environmental Policy Act, 42 U.S.C. § 5159) nor *regulations* that provide for emergency powers (e.g., 44 C.F.R. § 10.13).

¹⁰⁸ Some statutory emergency provisions are only activated after the President or relevant Secretary has declared an “emergency” under one of four statutes: the National Emergencies Act, 50 U.S.C. §§ 1601–51, the Public Health Service Act, 42 U.S.C. § 247d, the Robert T. Stafford Disaster Relief and Emergency Assistance Act, *id.* §§ 5121–5208, and the Foreign Assistance Act of 1961, 22 U.S.C. § 2318(a)(1). These four provisions are listed at the end of Appendix B.

that could not always be implemented unilaterally was classified as a “shared power.” That means that shared powers come in many varieties, including joint-consent requirements and consultation requirements. Furthermore, shared powers often involve a sequential ordering of authority, with an agency often being empowered to act only after a presidential declaration of an emergency.

It should be noted that Appendix B contains the citations but not the text or full analysis for some additional provisions. Independent research identified some emergency provisions that were not captured by the initial “emergency” search because Congress used the term “national security” or “imminent and substantial endangerment” instead of “emergency” to justify the powers. The search was expanded to include these provisions,¹⁰⁹ resulting in an additional 185 provisions and bringing the grand total to 373 emergency provisions in the U.S. Code that address federal agency or presidential powers.¹¹⁰ Congress’s diversity of approaches to delegating such emergency powers resulted in four categories—119 that provide unilateral power to the President, 163 that provide unilateral power to an agency, 80 that provide for shared powers, and 11 that provide emergency authority to a nonfederal entity or limit federal executive action.

Numbers do not tell the whole story, however. Although this may sound like Congress delegates more authority to agencies than to the President, the overwhelming majority of substantive powers lie with the President and the overwhelming majority of ministerial powers lie with an agency.¹¹¹ Examples will be discussed below, but to provide a flavor, the President is allowed to unilaterally take control of private facilities, prohibit transactions, and affect liberties, while agencies are allowed to address employment issues, transfers of resources, records, funding, and grant waivers and exemptions to their regulations.

¹⁰⁹ To be more comprehensive, we ran two additional searches using the following key word searches: (“national security”) /s (“Secretary” OR “Department” OR “Administrator” OR “President”) and (“imminent and substantial endangerment”) /s (“Secretary” OR “Department” OR “Administrator” OR “President”). If emergency powers exist that do not use the words “emergency,” “national security,” or “imminent and substantial endangerment” in the text of the provision, it would not have been captured by this search. This process could proceed indefinitely as there are numerous ways that Congress can provide a president power to deal with an emergency without using the search terms identified. See, for example, The Insurrection Act, 10 U.S.C. § 252, which provides the President the power to call federal military to service “as he considers necessary to enforce” federal laws “to suppress” a rebellion. Most would agree that this provision qualifies as an emergency provision, but it is not captured in any of our searches. See *infra* Appendix B for the citations that resulted from these additional searches.

¹¹⁰ The “national security” and “imminent” provisions were sorted into the four quadrants identified in Appendix B. The text of those relevant to energy are included in Appendix A.

¹¹¹ See *infra* Sections I.C.1–I.C.2.

This Section deconstructs Congress's options for delegating emergency executive powers to either the President, an agency, or some mixture of the two, resulting in four possible combinations of presidential/agency powers:¹¹²

- Strong President/Weak Agency (unilateral presidential authority)
- Weak President/Strong Agency (unilateral agency authority)
- Weak President/Weak Agency (nonexecutive authority)
- Strong President/Strong Agency (shared executive authority)

The labels of “strong” and “weak” refer to the literal language of the statute, regardless of whether that entity actually exerts this strength or weakness. Rather, a strong label reflects the power to declare or act upon a declared emergency and a weak label reflects no such power. Each combination assumes certain tradeoffs related to the costs and benefits of presidential and agency powers, and examples of actual statutory provisions for each of the four combinations are provided below.

1. Strong President/Weak Agency (Unilateral Presidential)

Congress often favors the Strong President/Weak Agency combination when delegating substantive emergency powers. 119 of the 373 total emergency powers we found provided unilateral power to the President without any required input from expert agencies.¹¹³ Such Strong President/Weak Agency delegations allow for expedited responses but suffer from the short-term accountability problems that result from a lack of checks and balances and judicial review.¹¹⁴

Not surprisingly, these emergency powers are often prompted by national security concerns. Based on our research,¹¹⁵ we found that almost

¹¹² Kevin M. Stack, *The Priority of Statutory Interpreters Within the Executive Branch: The President, the Agency, and Congress' Choice of Delegate*, 31 ADMIN. & REGUL. L. NEWS 9, 9–10 (2006) (building upon Professor Stack's division of the world of statutory delegations into three distinct categories: (1) mixed agency–President delegations that provide power to the agency with some form of presidential consultation; (2) simple delegations that provide power solely to an agency; and (3) presidential delegations that provide power solely to the President).

¹¹³ See *infra* Appendix B.

¹¹⁴ See *supra* Sections I.A–I.B (discussing the pros and cons of unilateral presidential delegations).

¹¹⁵ For our research method, see *supra* notes 106–109.

all¹¹⁶ of the emergency provisions in Title 10 (Armed Forces),¹¹⁷ Title 22 (Foreign Relations and Intercourse),¹¹⁸ and Title 50 (War and National Defense)¹¹⁹ regarded national security, were dependent on an emergency declaration from the President, and delegated the subsequent emergency powers to the President. Most importantly, these powers are often exceptionally broad with far-reaching effects. For example, Congress has provided that “[w]henver the President finds that the entry of any aliens or of any class of aliens . . . would be detrimental to the interests of the United States, he may [impose] . . . any restrictions he may deem to be appropriate,”¹²⁰ and that “[i]n light of the potential for terrorist use of weapons of mass destruction against the United States, the President shall take immediate action.”¹²¹ Although these national security delegations could be justified by the President’s Article II powers as Commander in Chief,¹²² this rationale does not justify other areas where the President enjoys absolute unilateral emergency powers. As will be discussed below in Part III, although Congress provides the President with unilateral powers to address a few isolated emergencies in areas such as agriculture,¹²³ transportation,¹²⁴

¹¹⁶ There were some exceptions for minor tasks. *See* 10 U.S.C. § 1491(e) (Secretary of Defense may waive any requirements with respect to funeral honors for veterans); 22 U.S.C. § 2703 (Secretary may establish and maintain emergency commissary or mess services in places abroad where, in the judgment of the Secretary, such services are necessary).

¹¹⁷ *See, e.g.*, 10 U.S.C. § 12006(a) (the President may suspend the operation of statutes governing the authorized strengths and distribution of reserve officers in an active status in the armed forces); *id.* § 123b (the President may waive statutory restrictions on using Department of Defense funding); *id.* § 712(a)(3) (the President may detail members of the armed forces to assist any country that he considers it advisable to assist in the interest of national defense); *id.* § 603 (the President may temporarily appoint any qualified person to any officer grade).

¹¹⁸ *See, e.g.*, 22 U.S.C. § 2318(a)(1) (the President can reduce size of military if he deems it necessary); *id.* § 4103 (the President may suspend any provision of this subchapter with respect to any post, bureau, office, or activity of the Department, if the President determines that the suspension is necessary in the interest of national security because of an emergency); *id.* § 8910 (the President may block all transactions in all property and interests in property of a person).

¹¹⁹ *See, e.g.*, 50 U.S.C. § 1515 (the President may suspend the operation of provisions regulating the storage, transportation, disposal, procurement, handling, and testing of chemical and biological weapons, including the prohibition on testing such weapons on human subjects); *id.* § 4560(e) (the President may provide for the establishment and training of a “nucleus executive reserve” for employment in executive positions in government).

¹²⁰ Immigration and Nationality Act § 212, 8 U.S.C. § 1182(f).

¹²¹ 50 U.S.C. § 2311.

¹²² U.S. CONST. art II, § 2, cl. 1.

¹²³ 7 U.S.C. § 5712(c) (“[T]he President may prohibit or curtail the export of any agricultural commodity during a period for which the President has declared a national emergency . . .”).

¹²⁴ 49 U.S.C. § 44908(b) (“The President may waive this subsection if the President decides, and reports to Congress, that the waiver is required because of national security interests or a humanitarian emergency.”).

labor,¹²⁵ and telecommunications,¹²⁶ they pale in comparison to the surprising amount of unilateral power provided to the President to address energy emergencies.¹²⁷

2. *Weak President/Strong Agency (Unilateral Agency)*

To counteract this unilateral presidential power, Congress sometimes delegates emergency powers to an agency without requiring any direct input from the President.¹²⁸ Of the 373 total emergency powers we found, 163 gave almost unilateral power to an agency to act in times of an emergency.¹²⁹ Such Weak President/Strong Agency delegations allow for more involvement of expertise, but suffer from a more bureaucratic path that may limit expediency.

Emergency powers in this quadrant are often highly specific and technical and use the agency's expertise in the area. Our research found that the most prominent areas where agencies have strong delegation and emergency powers were in Title 21 (Food and Drugs) and Title 16 (Conservation).¹³⁰ Most notably, Congress has provided the Secretary of Health and Human Services with the sole authority to determine that a public-health emergency exists,¹³¹ a power that Secretary Azar used to address the COVID-19 pandemic weeks before President Trump declared a

¹²⁵ 29 U.S.C. § 176 (“Whenever in the opinion of the President of the United States, a threatened or actual strike or lockout affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication . . . imperil the national health or safety . . .”); *see also* 46 U.S.C. § 8103(h)(1)–(2) (permitting the President to suspend citizenship and nationality requirements for officers and seamen on documented U.S. vessels during a proclaimed national emergency or “when the needs of commerce require”).

¹²⁶ 47 U.S.C. § 606(c) (stating that the President may, if he deems it necessary in the interest of national security or defense, suspend or amend regulations applicable to stations or devices capable of emitting electromagnetic radiations, etc.).

¹²⁷ *See infra* Appendix A.

¹²⁸ *See* Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 1005 (2001) (“The confirmation process often is used by members of the Senate to obtain assurances from prospective agency heads that they will implement the authorities entrusted to them with some degree of independence from the president’s political preferences.”); Stack, *Statutory Powers*, *supra* note 36, at 268 (arguing that “grants of authority to agency officials alone, absent such conditions, do not authorize the President to act or to bind the discretion of lower-level officials,” but instead that “the statutory grants of authority to an official (alone) should be read as vesting the official with an independent duty and discretion, not a legal duty to the President”).

¹²⁹ *See infra* Appendix B.

¹³⁰ *See infra* Appendix B (Weak President/Strong Agency) and *infra* Section III.A.I for a discussion of the environmental and food-and-drug emergency statutes.

¹³¹ Public Health Service Act § 319, 42 U.S.C. § 247d.

national emergency.¹³² Among other delegations to agency experts in housing and banking,¹³³ Congress also has provided the Secretary of Agriculture with sole authority to “undertake emergency [watershed protection] measures . . . as the Secretary deems necessary to safeguard lives and property from floods”¹³⁴ and the Secretary of Interior with the power to “determine[] that an emergency situation exists . . . to assure the continued viability of a particular fish or wildlife population.”¹³⁵

3. *Weak President/Weak Agency (Nonexecutive)*

The Weak President/Weak Agency delegations reflect the worst of both worlds with respect to a federal response. This would involve emergencies over which the federal executive has no control. Fortunately, such Weak President/Weak Agency delegations are generally only theoretical, as delegations that did not provide the federal Executive Branch with emergency authority would not be effective in responding to national emergencies. Where both presidential and agency Executive Branch delegations are weak or nonexistent, Congress tends to choose to alternatively delegate outside of the Executive Branch to courts or states.¹³⁶ Our search resulted in only eleven provisions that fit this category, all of which provide a nonexecutive entity, such as a state governor, with emergency authority.¹³⁷ Such emergency delegations have proven useful, however, in responding to emergencies that are isolated to one state or emergencies relating specifically to state law issues. For instance, Congress has delegated power to the governor of a state to declare an emergency related to transportation and power plants.¹³⁸

¹³² See *Determination that a Public Health Emergency Exists*, U.S. DEP’T OF HEALTH & HUM. SERVS. (Jan. 31, 2020), <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx> [<https://perma.cc/TDL2-NHH6>]; *Proclamation Concerning the Novel Coronavirus*, *supra* note 69.

¹³³ See *infra* Appendix A.

¹³⁴ 16 U.S.C. § 2203.

¹³⁵ *Id.* § 3126. Additionally, although it is only a *plan* for an emergency (and so not included in Appendix A), Congress also requires the Director of the Office of Science and Technology Policy to “recommend a Federal agency or agencies to be responsible for . . . protecting the United States from a near-Earth object that is expected to collide with Earth.” 51 U.S.C. § 71103(2)(A).

¹³⁶ See Lemos, *supra* note 30, at 370–73 (comparing delegation to courts and agencies); see also 33 U.S.C. § 1364(a) (stating that while the Administrator determines whether any pollution presents an “imminent and substantial endangerment to the health of persons,” the district court has the final say in deciding whether an injunction should be issued to stop the pollution).

¹³⁷ See *infra* Appendix B (Weak President/Weak Agency).

¹³⁸ See 42 U.S.C. § 7410(f)(1) (“Upon application by the owner or operator of a fuel burning stationary source . . . the Governor of the State *in which such source is located* may petition the President to determine that a national or regional energy emergency exists . . .” (emphasis added)); 49 U.S.C. § 5324(a)(2) (stating that emergency powers relating to public transportation are unlocked when “the

4. *Strong President/Strong Agency (Shared Executive)*

That leaves the Strong President/Strong Agency combination as the theoretical sweet spot of emergency delegation tradeoffs. Such delegations may require some more bureaucratic hoops than a unilateral delegation to the President, but the inclusion of an expert agency can lead to an enhanced outcome in terms of a more informed judgment, a more accountable decision-making process, and an avenue for judicial review.¹³⁹ Our research resulted in eighty of these shared delegations, sixty-three of which were analyzed as “emergency” provisions that were categorized for the method of shared power. The bulk of these shared emergency delegations (44/63) reflect an agency authorized to implement authority only after a president has activated it. In many ways, these provisions could still be characterized as unilateral presidential authority because the agency cannot act without approval of the President. But there are also several (11/63) emergency provisions that can be activated by the agency *or* the President.¹⁴⁰ Although this places an agency on more of an equal footing with the President, because either entity can still act unilaterally, neither can provide a check on the other.

One approach to this dilemma could be to develop shared executive frameworks that impose something more akin to joint consent, requiring *each* entity (the President and the agency) to make its own emergency declaration before emergency powers are unlocked under the statute, as Congress did in a public-health statute.¹⁴¹ While providing a useful intra-executive check, the trick here is to formulate a statutory formulation that requires a president to take an expert agency’s findings into account, but not

Governor of a State has declared an emergency and the Secretary has concurred; or . . . the President has declared a major disaster under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act” (citation omitted)).

¹³⁹ See *supra* Sections I.A–I.B. Delegations to agencies do not necessarily mean more procedural requirements, as Congress has occasionally waived notice-and-comment requirements for an agency. See, e.g., sources cited *supra* note 139.

¹⁴⁰ See, e.g., 38 U.S.C. § 1785 (allowing *either* a presidential or Health and Human Services emergency to activate the powers of the Secretary to furnish medical care to those affected by the emergency); 42 U.S.C. § 300ff-83 (allowing the same alternative declaration by the President or the Secretary to declare an emergency and stating that “[t]he term ‘emergency period’ means the period in which there exists . . . an emergency or disaster declared by the President pursuant to the National Emergencies Act or the Robert T. Stafford Disaster Relief and Emergency Assistance Act; *or* . . . a public health emergency declared by the Secretary” (emphasis added)).

¹⁴¹ See 42 U.S.C. § 1320b-5(g)(1) (“[A]n ‘emergency period’ is the period during which, there exists . . . an emergency or disaster declared by the President pursuant to the National Emergencies Act *or* the Robert T. Stafford Disaster Relief and Emergency Assistance Act; *and* . . . a public health emergency declared by the Secretary . . .” (emphasis added) (citations omitted)); cf. 12 U.S.C. § 95(a) (defining an emergency period as “such emergency period as the President of the United States by proclamation may prescribe”).

allow an agency to effectively veto or hold up a declaration or implementation of needed emergency powers.

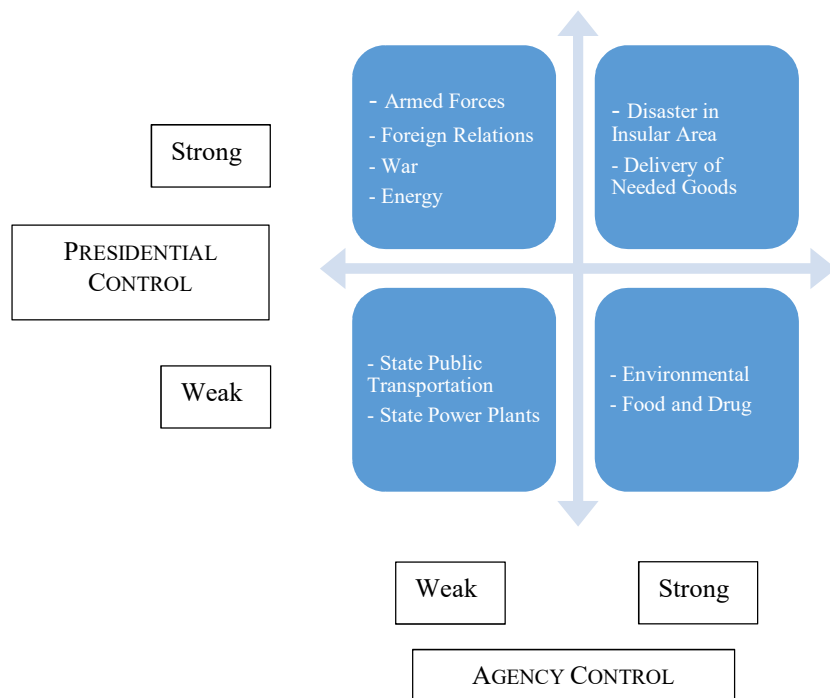
This formulation could result in slower responses, however, suggesting another model may be found in the provisions that require the President and the agency to consult with one another before acting, as Congress did in two key provisions. In the first provision, Congress provided that “[u]pon the declaration by the President of a disaster in an insular area, the President, acting through the Administrator of the Federal Emergency Management Agency, shall assess, *in cooperation with the Secretary* and chief executive of such insular area.”¹⁴² In the second provision, Congress provided that “[w]henver the President *after consultation with and receiving advice from the National Security Resources Board* determines that it is in the interest of the national security for the Government to obtain prompt delivery of any articles or materials . . . he is authorized, *through the head of any Government agency* . . . [to] order for such quantity . . . the President deems appropriate.”¹⁴³ Although few shared powers reflect more of this true partnership model between the President and an agency head, under this true sweet-spot model, the risk of rash unilateral actions is extinguished while expertise, accountability, and judicial review are maintained. Where appropriate, Congress could even waive certain procedural requirements that would otherwise apply to the agency in exchange for the intra-executive check that would occur. This combination is explored in more detail in Part III.

To help visualize these four combinations, I developed an Executive Delegations Matrix, as well as highlighted a few representative examples for each delegation within each of the four quadrants:

¹⁴² 42 U.S.C. § 5204b(a) (emphasis added).

¹⁴³ 50 U.S.C. § 3816(a) (emphasis added) (footnote omitted). This stronger language may make it more difficult for the President to comply with the letter of the consultation requirement while nevertheless ignoring the advice of their expert agencies.

FIGURE 1: SAMPLE SUBJECT MATTERS WITHIN THE EXECUTIVE DELEGATIONS MATRIX



II. PRESIDENTIAL EMERGENCY ENERGY STATUTORY AUTHORITY

Scholars have evaluated general emergency powers in a number of contexts, including the power of states to act in times of crisis,¹⁴⁴ the suspension of constitutional constraints on government action,¹⁴⁵ administrative law adjustments in response to emergencies,¹⁴⁶ small emergencies,¹⁴⁷ accommodating emergencies,¹⁴⁸ an emergency constitution,¹⁴⁹ the check and balances at work on a president's general

¹⁴⁴ Jim Rossi, *State Executive Lawmaking in Crisis*, 56 DUKE L.J. 237, 241–57 (2006).

¹⁴⁵ Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against “Suspending” Judicial Review*, 133 HARV. L. REV. F. 179, 183–87 (2020).

¹⁴⁶ Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1096–97 (2009).

¹⁴⁷ Kim Lane Scheppele, *Small Emergencies*, 40 GA. L. REV. 835, 844–45 (2006).

¹⁴⁸ Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 609–10 (2003).

¹⁴⁹ Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1030–31 (2004) (arguing legislatures should not defer to the executive just because there is an emergency).

emergency powers in times of crisis,¹⁵⁰ and empirical work documenting the rise of federal emergency power and the associated tradeoffs.¹⁵¹ One category of statutory emergency powers that is often overlooked, however, is emergency *energy* powers.¹⁵² Given the fact that future energy emergencies are likely to involve the electric grid, this analysis drills down into emergency energy powers related to the electric grid and refers to them as “emergency grid powers.” As seen in Appendix A, even though Congress has provided the majority of domestic energy emergency powers to expert agencies, it has delegated substantive emergency grid powers to the President, placing them squarely in the Strong President/Weak Agency classification generally reserved for foreign affairs. In fact, almost 50% of all the unilateral emergency grid powers are provided to the President while only 15% of unilateral emergency grid powers are provided to an agency.¹⁵³

Therefore, this Part identifies the primary emergency energy statutory provisions, analyzing the extent of these powers, what is required to unlock these powers, and their past uses. Some of these powers stem from generalized statutes that are broad enough to encompass energy emergencies, which I have labeled “general presidential emergency energy powers,” since all of the general provisions give powers unilaterally to the President. Other emergency energy powers stem from specific energy statutes, which I have labeled “specific presidential emergency energy powers.” These forty-two emergency energy provisions are in Appendix A.¹⁵⁴

¹⁵⁰ See generally Tom Ginsburg & Mila Versteeg, *The Bound Executive: Emergency Powers During the Pandemic* (Univ. of Chi., Pub. L. Working Paper No. 757, 2020), <https://papers.ssrn.com/a=3608974> [<https://perma.cc/XDP4-Q8P7>]; Joshua L. Friedman, *Emergency Powers of the Executive: The President's Authority When All Hell Breaks Loose*, 25 J.L. & HEALTH 265 (2012) (discussing the President's general emergency powers).

¹⁵¹ Boliek, *supra* note 11, at 3349–71; see also Ball, *supra* note 66, at 912.

¹⁵² The search for emergency energy provisions did not include those statutory provisions that addressed emergency planning. Instead, it only included provisions about responding to an actual emergency. See *supra* notes 107–109 for a description of the process for identifying these provisions.

¹⁵³ See *infra* Appendix A.

¹⁵⁴ Notably, this analysis does not include the War Labor Dispute Act, which Congress enacted in 1943 (and repealed in 1947) to provide presidents with statutory authorization to seize businesses or activities stalled by labor controversies. Ludwig Teller, *Government Seizure in Labor Disputes*, 60 HARV. L. REV. 1017, 1017 (1947). These explicit statutory authorities are part of what distinguished President Truman's attempted seizure of the steel industry in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586–87 (1952), which limited the power of the President to seize steel mills—even in the face of national security concerns—in the absence of explicit statutory authority. Relevant to energy, this emergency power was used three times. On May 1, 1943, President Roosevelt seized the soft-coal mines after 500,000 miners went on strike. Exec. Order No. 9340, 8 Fed. Reg. 5695 (May 1, 1943); Peter Kihss, *Seizure of Mines*, N.Y. TIMES, Mar. 6, 1978, at A16. On May 3, 1945, President Truman ordered the Secretary of Interior to seize the anthracite coal mines. Exec. Order No. 9548, 10 Fed. Reg. 5025 (May 3, 1945) (“[B]y virtue of the power and authority vested in me by the Constitution and laws of the United

A. General Presidential Emergency Energy Powers

Included among the broad delegations in generalized statutes that Congress has made to the President in the name of national security,¹⁵⁵ Congress has also delegated substantial authority to the President to ensure sufficient domestic supplies of critical resources, including energy. Two such statutes that contemplate unilateral control over energy resources are discussed here: (1) the Defense Production Act (DPA),¹⁵⁶ and (2) the International Emergency Economic Powers Act (IEEPA).¹⁵⁷ The presidential powers under the DPA can be used upon the requisite conditions below, but the powers under the IEEPA can only be activated upon a national emergency declaration.¹⁵⁸

1. The Defense Production Act

In 1950, Congress enacted the DPA to ensure the security of the United States by supporting “the vitality of the domestic industrial base.”¹⁵⁹ Although it has been invoked by many administrations for various reasons,¹⁶⁰ including addressing the supply of personal protective equipment during the recent COVID-19 pandemic,¹⁶¹ it contains four key provisions that grant the President unilateral authority to prioritize contracts and orders in times of an energy emergency. The first three are found in § 101 and provide for the President to prioritize contracts. Section 101(a)(1) authorizes the President to “require that performance under contracts or orders . . . which he deems necessary or appropriate to promote the national defense . . . take priority.”¹⁶²

States, including Section 9 of the Selective Training and Service Act of 1940 (54 Stat. 892) as amended by the War Labor Disputes Act (57 Stat. 163) . . .”). And on May 21, 1946, he ordered seizure of the bituminous mines to end a forty-day strike. Exec. Order No. 9728, 11 Fed. Reg. 5593 (May 21, 1946); Kihss, *supra*, at A16. The subsequent Labor Management Relations Act does not provide any similar seizure authority for a president. *See generally* 29 U.S.C. § 141. *See also* Teller, *supra*, at 1017.

¹⁵⁵ *See generally* BRENNAN REPORT, *supra* note 29, at 1. *See also* Stein, *supra* note 3, at 1193–95.

¹⁵⁶ 50 U.S.C. § 4501.

¹⁵⁷ *Id.* §§ 1701–06.

¹⁵⁸ *See id.* § 1701(a) (“Any authority granted to the President by section 1702 of this title may be exercised . . . if the President declares a national emergency with respect to such threat.”).

¹⁵⁹ *Id.* § 4502(a)(2).

¹⁶⁰ *See* Eric C. Surette, Annotation, *Construction and Application of the Defense Production Act of 1950*, 50 U.S.C.A. §§ 2061 *et seq.*, and *Its Regulations*, 8 A.L.R. FED. 3D, § 5 (2016) (detailing cases challenging actions taken under the Defense Production Act); CONG. RSCH. SERV., THE DEFENSE PRODUCTION ACT OF 1950, at Summary (2020), <https://fas.org/sgp/crs/natsec/R43767.pdf> [<https://perma.cc/SX65-38KB>].

¹⁶¹ *Memorandum on Order Under the Defense Production Act Regarding 3M Company*, THE WHITE HOUSE (Apr. 2, 2020), <https://www.whitehouse.gov/presidential-actions/memorandum-order-defense-production-act-regarding-3m-company/> [<https://perma.cc/28X3-KZJG>].

¹⁶² 50 U.S.C. § 4511(a)(1).

The DPA defines the “national defense” as “programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity,” meaning the President could use this authority to promote energy production or construction without any reference to foreign nations, war, or typical national security areas.¹⁶³ Section 101(a)(2) then authorizes the President “to allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.”¹⁶⁴ Congress prohibits such reallocations of materials in the civilian market, unless there is no other alternative to preserve the national defense.¹⁶⁵ Lastly, § 101(c) authorizes the President to allocate and prioritize contracts relating to materials, equipment, and services to maximize domestic energy supplies in certain circumstances.¹⁶⁶

Although Congress made this unilateral delegation to the President, it also provided that the President could delegate such powers to the relevant agency.¹⁶⁷ In 1975, the President did just that and delegated this authority to the Department of Energy (DOE).¹⁶⁸ Since then, the agency has used this emergency authority for energy issues only a few times. First, the DOE used the DPA § 101(c) authority in 1975 during the construction of the Trans-Alaska Pipeline to help those building the Pipeline obtain materials on a priority basis.¹⁶⁹ Second, the DOE used the DPA in 2001 “to ensure that

¹⁶³ *Id.* § 4552(14) (emphasis added).

¹⁶⁴ *Id.* § 4511(a)(2).

¹⁶⁵ *Id.* § 4511(b).

¹⁶⁶ *Id.* § 4511(c).

¹⁶⁷ *Id.*

¹⁶⁸ CONG. RSCH. SERV., *supra* note 160, at Summary (“The authorities of the DPA are generally afforded to the President in the statute. The President, in turn, has delegated these authorities to department and agency heads in Executive Order 13603, *National Defense Resource Preparedness*, issued in 2012.”). Functions of the President under the Defense Production Act of 1950 relating to production, conservation, use, control, distribution, and allocation of energy, were delegated to Secretary of Energy. *See* Exec. Order No. 11,790, 39 Fed. Reg. 23,185 (June 25, 1974). This information is also set out as a note under § 761 of Title 15, Commerce and Trade.

¹⁶⁹ JACOBS & PESKOE, *supra* note 8, at 4 (citing COMPTROLLER GEN. OF THE U.S., GOV'T ACCOUNTABILITY OFF., REPORT TO THE CONGRESS: TRANS-ALASKA OIL PIPELINE—PROGRESS OF CONSTRUCTION THROUGH NOVEMBER 1975, at 23–24 (1976)); *see also* Trans-Alaska Pipeline Priorities Assistance for Construction, 39 Fed. Reg. 34,608 (Sept. 23, 1974); Trans-Alaska Pipeline Priorities Assistance for Construction, 40 Fed. Reg. at 26–27 (Dec. 30, 1974); *id.* at 5409; *id.* at 19,238; Trans-Alaska Pipeline Priorities Assistance for Construction, 41 Fed. Reg. 44,476–77 (Oct. 4, 1976); *id.* at 53,391.

emergency supplies of natural gas continued to flow to California utilities, helping to avoid threatened electrical blackouts.”¹⁷⁰

The last DPA emergency provision, § 721, also known as the “Exon-Florio Amendment,” relates to the review of existing contracts and authorizes the President to “suspend or prohibit any covered transaction that threatens to impair the national security of the United States.”¹⁷¹ The President has a certain time limit within which to take such action¹⁷² and Congress only allows the President to take such action if she makes two findings: (1) credible evidence that leads the President to believe that a foreign person’s investment “threatens to impair the national security”; and (2) other laws “do not, in the judgment of the President, provide adequate and appropriate authority for the President to protect the national security.”¹⁷³ Congress, furthermore, demands that the President consider eleven listed factors in making such findings, including “the potential national security-related effects on United States critical infrastructure, including major energy assets” and the “long-term projection of United States requirements for sources of energy and other critical resources and material.”¹⁷⁴ The DPA further created an Executive Branch committee, the Committee on Foreign Investment in the United States (CFIUS), chaired by the Secretary of the Treasury, to review such transactions and submit their recommendations to the President.¹⁷⁵

¹⁷⁰ CONG. RSCH. SERV., *supra* note 160, at 9 (citing *The California Energy Crisis and Use of the Defense Production Act: Hearing Before the Comm. on Banking, Hous., & Urb. Affs.*, 107th Cong. (2001) (DOE ordered natural gas sellers to keep supplying utility Pacific Gas & Electric as it neared insolvency during the state’s energy crisis). President Obama also invoked it to assist the Navy’s Great Green Fleet of biofuel-powered ships in 2012. *See* Press Release, Off. of the Press Sec’y, Fact Sheet: Obama Administration Announces Additional Steps to Increase Energy Security (Apr. 11, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/04/11/fact-sheet-obama-administration-announces-additional-steps-increase-ener> [<https://perma.cc/53LE-DF34>].

¹⁷¹ 50 U.S.C. § 4565(d)(1).

¹⁷² *Id.* § 4565(d)(2).

¹⁷³ *Id.* § 4565(d)(4).

¹⁷⁴ *Id.* § 4565(f)(6), (10). These factors are: domestic production needs; availability of domestic industries to meet national defense requirements; the extent to which foreign control affects the ability to meet national defense requirements; effects on military sales to other countries, domestic international technological leadership, critical infrastructure, and critical technologies; whether it is a foreign-government-controlled transaction; compliance with treaties and the relationship between the United States and the foreign nation; domestic energy needs; and any other factors the President deems “appropriate.” *Id.* § 4565(f).

¹⁷⁵ *The Committee on Foreign Investment in the United States (CFIUS)*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius> [<https://perma.cc/B4Q4-HC94>]; *Ralls Corp. v. Comm. on Foreign Inv.*, 758 F.3d. 296, 301–02 (D.C. Cir. 2014).

This § 721 authority has only been used a few times. President Obama used it once to prohibit foreign investment in a wind farm and once to prevent foreign investment in a semiconductor corporation.¹⁷⁶ President Trump has used it at least twice during his presidency, once to prevent foreign investment in semiconductor corporations¹⁷⁷ and once to prevent foreign investment in a global technology corporation.¹⁷⁸ There also may have been other instances where foreign investors abandoned potential acquisitions of U.S. mining corporations because of early concerns raised by CFIUS.¹⁷⁹

2. *The International Emergency Economic Powers Act (IEEPA)*

Congress also delegated substantial unilateral powers to the President under the IEEPA, a statute that confers broad authority to regulate financial and other commercial transactions involving designated entities, including the power to impose sanctions on individuals and countries.¹⁸⁰ Unlike the DPA, the emergency provisions of the IEEPA may only be activated by a president's declaration of a national emergency.¹⁸¹ Section 203 of the IEEPA provides the President with the sole power to “investigate, regulate, or prohibit” any foreign transactions, foreign transfers of credit or payments, or import or export of currency or securities, and block any transportation,

¹⁷⁶ *Ralls Corp.*, 758 F.3d at 301–02; Press Release, The White House, Presidential Order -- Regarding the Proposed Acquisition of a Controlling Interest in Aixtron SE by Grand Chip Investment GmbH (Dec. 2, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/12/02/presidential-order-regarding-proposed-acquisition-controlling-interest> [<https://perma.cc/W7S2-GKFJ>].

¹⁷⁷ Press Release, The White House, Statement from the Press Secretary on President Donald J. Trump's Decision Regarding Lattice Semiconductor Corporation (Sept. 13, 2017), <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-president-donald-j-trumps-decision-regarding-lattice-semiconductor-corporation/> [<https://perma.cc/399Y-U4X3>] (citing the national security risk as “the potential transfer of intellectual property to the foreign acquirer, the Chinese government's role in supporting this transaction”).

¹⁷⁸ Other Presidential Documents, 2019 C.F.R. 909, 921–22; Press Release, Sec'y Mnuchin, Statement on the President's Decision Regarding Broadcom's Takeover Attempt of Qualcomm (Mar. 12, 2018), <https://home.treasury.gov/news/press-releases/sm0309> [<https://perma.cc/XXA7-XHT8>] (explaining that because of the “sensitivities” of the transaction, the President did not explain his reasoning for blocking the transaction); see also *Timeline: Broadcom-Qualcomm Saga Comes to an Abrupt End* (Mar. 14, 2018, 9:27 AM), <https://www.reuters.com/article/us-qualcomm-m-a-broadcom-timeline/timeline-broadcom-qualcomm-saga-comes-to-an-abrupt-end-idUSKCN1GQ22N> [<https://perma.cc/922N-W84P>].

¹⁷⁹ See Darshak S. Dholakia, *Impact of Growing Global Investment Controls on the Mining Sector*, 63 ROCKY MTN. MIN. L. INST. 20A-1, 20A-5–6 (2017) (discussing how potential acquisitions of mining operations were abandoned after CFIUS raised concerns during review).

¹⁸⁰ 50 U.S.C. § 1702(a)(1).

¹⁸¹ International Emergency Economic Powers Act, Pub. L. 95-223, 91 Stat. 1626 (1977) (codified as amended at 50 U.S.C. § 1701 and 18 U.S.C. § 4565); CONG. RSCH. SERV., *THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE* (2019), <https://fas.org/sgp/crs/natsec/R45618.pdf> [<https://perma.cc/5QN9-BTHP>].

importation, or other actions involving any property in which any foreign country has an interest.¹⁸² Therefore, if a petroleum shortage is sufficiently severe to invoke a presidentially declared national emergency, the IEEPA could be used to control supplies of petroleum products in which foreign countries or foreign nationals have an “interest.”¹⁸³

Congress imposed a few limitations on this power. First, § 202 provides that the President may use this authority only to deal with “any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.”¹⁸⁴ Second, § 204 provides that “[t]he President, in every possible instance, shall consult with the Congress before exercising any of the authorities granted by this chapter and shall consult regularly with the Congress so long as such authorities are exercised.”¹⁸⁵ The House report also suggests that the President is not allowed to regulate wholly domestic transactions.¹⁸⁶

Presidents have frequently relied upon the IEEPA when declaring national emergencies, including for investigating foreign interference in elections,¹⁸⁷ securing the information and communications technology and services supply chain,¹⁸⁸ and even for preventing financial support for international investigations into American war crimes in Afghanistan.¹⁸⁹ In the energy realm, President Obama relied in part on the IEEPA to support

¹⁸² 50 U.S.C. § 1702(a)(1).

¹⁸³ *Id.*

¹⁸⁴ *Id.* § 1701.

¹⁸⁵ *Id.* § 1703(a).

¹⁸⁶ U.S. DEP’T OF JUST., LEGAL AUTHORITIES AVAILABLE TO THE PRESIDENT TO RESPOND TO A SEVERE ENERGY SUPPLY INTERRUPTION OR OTHER SUBSTANTIAL REDUCTION IN AVAILABLE PETROLEUM PRODUCTS 681 (1982) (first citing H.R. REP. NO. 95-459, at 10–11 (1977); and then citing S. REP. NO. 95-466, at 5 (1977)), <https://www.justice.gov/file/23221/download> [<https://perma.cc/DF4T-FNW2>].

¹⁸⁷ See *supra* notes 53–54; see also Exec. Order No. 13,848, 83 Fed. Reg. 46,843 (Sept. 12, 2018) (detailing President Trump’s national emergency declaration regarding foreign interference in the U.S. election).

¹⁸⁸ Exec. Order No. 13,873, 84 Fed. Reg. 22,689 (May 15, 2019) (securing the information and communications technology and services supply chain).

¹⁸⁹ Exec. Order No. 13,930, 85 Fed. Reg. 36,139 (June 11, 2020) (prohibiting the contribution of funds, goods, or services to any foreign person to have “directly engaged in any effort by the ICC to investigate, arrest, detain, or prosecute any personnel of a country that is an ally of the United States without the consent of that country’s government”).

his executive order on cybersecurity.¹⁹⁰ Similarly, President Trump used it to limit petroleum-product imports from Iran,¹⁹¹ and to cut ties with Venezuela in part because Venezuela's leader, Nicolás Maduro, “degrade[s] Venezuela's infrastructure and natural environment through economic mismanagement and confiscatory mining and industrial practices.”¹⁹²

Most recently, President Trump used the IEEPA to issue an executive order prohibiting the acquisition, transfer, or installation of any bulk-power system¹⁹³ electric equipment manufactured or supplied “by persons owned by, controlled by, or subject to the jurisdiction . . . of a foreign adversary” that “poses an undue risk of catastrophic effects on the security or resiliency of United States critical infrastructure or the economy of the United States.”¹⁹⁴ While it is imperative to protect the security of the bulk-power system, the executive order is exceptionally broad and potentially retroactive (it applies to all pending and future transactions).¹⁹⁵ The executive order does recognize that expertise to respond to such emergencies lies in the expert energy agencies, with President Trump delegating his IEEPA authority to respond to the emergency to the Secretary of Energy and requiring the Secretary of Energy to coordinate and consult with other agency heads such as the Secretary of Defense and the Secretary of the Interior.¹⁹⁶

B. Specific Presidential Emergency Energy Powers

Congress has also delegated substantial authority over energy-grid emergencies to the President within specific energy statutes.¹⁹⁷ This Section discusses three such energy statutes: (1) the Federal Power Act, (2) the Natural Gas Act, and (3) the Energy Policy and Conservation Act.

¹⁹⁰ Exec. Order No. 13,694, 80 Fed. Reg. 18,077 (Apr. 1, 2015). He also relied on the National Emergencies Act (NEA) (50 U.S.C. §§ 1601–51), § 212(f) of the Immigration and Nationality Act of 1952 (8 U.S.C. § 1182(f)), and § 301 of Title 3 of the U.S. Code. *Id.*

¹⁹¹ Exec. Order No. 13,846, 83 Fed. Reg. 38,939 (Aug. 6, 2018).

¹⁹² Exec. Order No. 13,850, 83 Fed. Reg. 55,243 (Nov. 1, 2018).

¹⁹³ The “bulk-power system electric equipment” is defined broadly and includes any equipment used in substations, control rooms, or power-generating stations. Exec. Order No. 13,920, 85 Fed. Reg. 26,595 (May 1, 2020).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ See *infra* Appendix A for a full list. A number of emergency energy provisions merely address employment, licensing, inspections, or exchanges of supplies. This Section focuses on the three most substantive emergency energy provisions.

1. *The Federal Power Act*

The Federal Power Act (FPA) provides two specific grants of emergency authority to the President and two such grants to an expert energy agency. The first unilateral FPA emergency delegation to the President appears in § 215A, a provision that Congress added in 2015 as part of the Fixing America's Surface Transportation (FAST) Act.¹⁹⁸ Section 215A provides the President with the sole power to declare a “grid security emergency.”¹⁹⁹ The statute defines a grid-security emergency as “the occurrence or imminent danger of” (1) a “malicious act using electronic communication or an electromagnetic pulse” that disrupts the operation of devices and networks “that are essential to the reliability of” the critical or defense electric infrastructure;²⁰⁰ or (2) a “direct physical attack” on critical or defense electric infrastructure that results in “significant adverse effects on the reliability of critical . . . or defense critical electric infrastructure.”²⁰¹

The President's declaration of such a grid-security emergency is required to unlock the Secretary's authority to then issue orders for emergency measures “to protect or restore the reliability” of critical or defense electric infrastructure during such emergency.²⁰² Congress defined “the Secretary” as “the Secretary of Energy”²⁰³ (also known as the Secretary of the DOE) and has provided the Secretary with significant discretion to address the emergency with measures “as are necessary in the judgment of the Secretary.”²⁰⁴ Congress cabined the President's declaration of a grid emergency with nothing but the statutory definition and a post hoc notification requirement to “congressional committees of relevant jurisdiction.”²⁰⁵ However, it did provide for automatic expiration of grid-security emergency orders after fifteen days, although they are subject to repeated renewals.²⁰⁶ Section 215A has never been invoked.

¹⁹⁸ Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 215A, 129 Stat. 1312, 1774 (2015) (codified at 16 U.S.C. § 824o-1(b)(1)).

¹⁹⁹ *Id.* § 215A, 129 Stat. at 1773 (codified at 16 U.S.C. § 824o-1(a)(7)).

²⁰⁰ 16 U.S.C. § 824o-1(a)(7)(A).

²⁰¹ *Id.* § 824o-1(a)(7)(B).

²⁰² *Id.* § 824o-1(b)(1); *see also* Exec. Order No. 13,744, 81 Fed. Reg. 71,573 (Oct. 13, 2016) (stating that “[t]he Secretary of Energy shall facilitate the protection and restoration of the reliability of the electrical power grid during a presidentially declared grid security emergency”).

²⁰³ 16 U.S.C. § 824o-1(a)(8).

²⁰⁴ *Id.* § 824o-1(b)(1).

²⁰⁵ *Id.* § 824o-1(b)(2). In contrast, Congress requires the DOE to “consult with appropriate governmental authorities in Canada and Mexico,” entities affected by the orders, FERC, and “other appropriate Federal agencies regarding implementation.” *Id.* § 824o-1(b)(3).

²⁰⁶ *Id.* § 824o-1(b)(5)(A)–(B).

The second unilateral FPA emergency delegation to the President appears in § 809. Under § 809, Congress also provides the President with authority to “enter” and “take possession” of any licensed project to manufacture war provisions “or for any other purpose involving the safety of the United States” based solely on the “opinion of the President” that “the safety of the United States demands” it.²⁰⁷ No independent presidential emergency declaration is required,²⁰⁸ and a licensed project under FPA § 809 could include anything from the construction of a power house to the renovation of a dam or power lines.²⁰⁹ To date, this provision has never been used.²¹⁰

The third FPA emergency provision, § 202(c), delegates authority not to the President, but to “the Commission,” defined as the “Federal Power Commission,” the predecessor of the Federal Energy Regulatory Commission (FERC).²¹¹ Interestingly, although the text of § 202(c) refers to “the Commission,” Congress later delegated power to the Secretary of the DOE rather than to FERC.²¹² In § 202(c), Congress provides the DOE with the power to order temporary connections between facilities that generate,

²⁰⁷ *Id.* § 809 (“When in the opinion of the President of the United States, evidenced by a written order addressed to the holder of any license under this chapter, the safety of the United States demands it, the United States shall have the right to enter upon and take possession of any project or part thereof, constructed, maintained, or operated under said license, for the purpose of manufacturing nitrates, explosives, or munitions of war, or for any other purpose involving the safety of the United States, to retain possession, management, and control thereof for such length of time as may appear to the President to be necessary to accomplish said purposes, and then to restore possession and control to the party or parties entitled thereto . . .”). Congress does provide for just compensation to avoid Fifth Amendment violations. *Ga. Power Co. v. 54.20 Acres of Land, Etc.*, 563 F.2d 1178 (5th Cir. 1977), *overruled in part by Ga. Power Co. v. Sanders*, 617 F.2d 1112 (5th Cir. 1980). Notably, because this provision does not reference an “emergency,” it was not captured in Appendix B but was added to Appendix A as another statutory energy emergency provision.

²⁰⁸ 16 U.S.C. § 809.

²⁰⁹ See *id.* § 796(11) (defining the term “project” in the FPA).

²¹⁰ FERC has indicated, however, that it would waive temporary federal use of a facility under § 809 for minor license renewals. *Hydroelectric Relicensing Regulations Under the Federal Power Act*, 54 Fed. Reg. 23,756–61 (May 17, 1989).

²¹¹ Federal Power Act § 202(c), 16 U.S.C. § 824a(c).

²¹² Under § 301(d) of the Department of Energy Organization Act (DOE Act), 42 U.S.C. § 7151(b), the powers previously vested in the Federal Power Commission under the FPA (and other statutes) and not expressly reserved to FERC were transferred to, and vested in, the Secretary of Energy. Although the DOE Act reserved to FERC powers to require interconnection of electric facilities under § 202(b) of the FPA, and DOE has since delegated certain other powers, including those provided by § 202(a) to FERC, § 202(c) authority remains with the Secretary of Energy. *Id.* § 7172(a)(1) (“There are transferred to, and vested in, the Commission the following functions . . . the interconnection, under section 202(b), of [the Federal Power Act], of facilities for the generation, transmission, and sale of electric energy (other than emergency interconnection [which remains with the Secretary of Energy]) . . .”).

transmit, exchange, or deliver electricity.²¹³ However, this power is constrained only when the DOE determines that an emergency exists by reason of five circumstances: (1) a sudden increase in the demand for electric energy; (2) a shortage of electric energy; (3) a shortage of facilities for the generation or transmission of electric energy; (4) a shortage of fuel or water for generating facilities; or (5) other causes.²¹⁴ This authority is only cabined where there is a conflict with environmental laws.²¹⁵ The DOE has only issued seventeen orders under this provision since 1935, traditionally in response to a utility request as opposed to a DOE-initiated order.²¹⁶

The last FPA provision allows FERC to “enter into contracts with public or private power systems for the mutual exchange of unused excess power” to provide “emergency or break-down relief.”²¹⁷ There is no evidence that this narrow provision has ever been used by FERC.

2. *The Natural Gas Act*

The Natural Gas Act (NGA) provides the President with three unilateral powers related to energy emergencies. Like the FPA’s “grid-security emergency” provision, the NGA provides the President with unilateral

²¹³ Federal Power Act § 202(c)(1), 16 U.S.C. § 824a(c)(1). The Commission can order five actions: (1) temporary connections of facilities; (2) generation of electric energy; (3) delivery of electric energy; (4) interchange of electricity; or (5) transmission of electricity.

²¹⁴ Federal Power Act § 202(c), 16 U.S.C. § 824a(c)(1).

²¹⁵ 16 U.S.C. § 824a(c); *see also* Joel deJesus, *New Grid Security Measures for 2016*, PUB. UTILS. FORT., Feb. 2016, at 43 (tailoring DOE’s emergency orders narrowly to the “hours necessary to meet the emergency and serve the public interest” and noting that an entity’s compliance with such order “shall not be considered a violation” of any federal, state, or local environmental law).

²¹⁶ For example, the most frequently used provision is FPA § 202(c). DOE lists eight times that it has issued orders since 2000. *See infra* note 265. Additional orders prior to 2000 include: Carolina Aluminum Co., 2 F.P.C. 998, 998–99 (1941); Duke Power Co., 2 F.P.C. 992, 992 (1941) (detailing the same emergency declaration in North Carolina as *Carolina Aluminum Co.* but issuing different orders in response); Fla. Power & Light Co. 2 F.P.C. 991, 991 (1941) (interconnection in Florida); Puget Sound Power & Light Co., 6 F.P.C. 320, 320 (1947) (interconnection in the Pacific Northwest); Tex. Elec. Serv. Co., 9 F.P.C. 1373, 1373 (1950) (interconnection in Texas); Commonwealth Edison Co., 16 F.P.C. 1145, 1146 (1956) (regarding a previous emergency); Ga. Power Co., 35 F.P.C. 629, 631 (1966) (interconnection in Georgia); Ky. Utils. Co., 70 P.U.R.3d 475 (1967) (interconnections in Kentucky); Cleveland Elec. Illuminating Co., 47 F.P.C. 1412, 1412–13 (1972) (detailing that the Federal Power Commission issued a § 202(c) order requiring interconnection between utility and city); *see also* Long Island Lighting Co., 33 N.R.C. 61 (1991) (acknowledging that, while unused, it could be an alternate authority to justify an order to continue operation of a nuclear plant). DOE rejected finding an emergency during the oil embargo because the agency was able to facilitate successful corporation without declaring an emergency. New Eng. Power Pool Participants, 54 F.P.C. 1375, 1375 (1975).

²¹⁷ Federal Power Act, 16 U.S.C. § 832d(b), *amended by* Department of Energy Organization Act, Pub. L. No. 95-91, § 302(b), 91 Stat. 565, 578–79 (1977).

authority to declare a “natural gas supply emergency.”²¹⁸ But unlike the FPA, which defines a grid security emergency, the term “natural gas supply emergency” is not defined in the NGA. The statute does, however, provide two conditions that the President must meet before making such an emergency declaration: (1) that a severe natural gas supply shortage that endangers the supply of high-priority uses exists or is imminent; and (2) that other alternatives have been exhausted and the President finds that the “exercise of authorities under this section is reasonably necessary . . . to the maximum extent practicable, to assist in meeting natural gas requirements for such high-priority uses.”²¹⁹

The President’s declaration of such a natural gas supply emergency is required to unlock significant statutory authority to (1) prohibit the burning of natural gas by any electric powerplant,²²⁰ (2) authorize the purchase of emergency supplies of natural gas,²²¹ and (3) allocate supplies of natural gas to different entities.²²² Congress also provided that a declaration of a natural gas supply emergency terminates when the President finds that the shortage is no longer imminent or in existence, or when 120 days after the date of the declaration have passed, whichever is earlier.²²³ Congress again allowed for extensions of such emergencies. However, the President is only allowed to renew the emergency every 120 days in seeming perpetuity so long as the President finds that the two conditions required to initially declare the natural gas supply emergency continue to be satisfied.²²⁴

3. *The Energy Policy and Conservation Act*

In the Energy Policy and Conservation Act (EPCA), Congress provides the President with the sole power to take a number of energy conservation measures to respond to an actual or potential shortfall in domestic or international petroleum supplies upon a finding by the President that a “severe energy supply interruption” exists or to fulfill “obligations of the United States under the international energy program.”²²⁵ A “severe energy

²¹⁸ Natural Gas Act, 15 U.S.C. § 717z(a), *amended by* Public Utility Regulatory Policies Act of 1976, Pub. L. No. 95-617, § 607, 92 Stat. 3117, 3171.

²¹⁹ *Id.*

²²⁰ *Id.* § 717z(c).

²²¹ *Id.* § 3362(a).

²²² *Id.* § 3363(a).

²²³ *Id.* § 717z(b)(1).

²²⁴ *Id.* § 717z(a); *id.* § 717z(b)(2).

²²⁵ Energy Policy and Conservation Act (EPCA) § 3(8), 42 U.S.C. § 6202(8); U.S. DEP’T OF JUST., LEGAL AUTHORITIES AVAILABLE TO THE PRESIDENT TO RESPOND TO A SEVERE ENERGY SUPPLY INTERRUPTION OR OTHER SUBSTANTIAL REDUCTION IN AVAILABLE PETROLEUM PRODUCTS 651–52 (1982), <https://www.justice.gov/file/23221/download> [<https://perma.cc/C9QM-4R4U>] (“The IEP,

supply interruption” is defined as a national energy supply shortage that the President determines

- (A) is, or is likely to be, of significant scope and duration, and of an emergency nature;
- (B) may cause major adverse impact on national safety or the national economy; and
- (C) results, or is likely to result, from [] an interruption in the supply of imported petroleum products . . . or [] sabotage . . . or an act of God.²²⁶

This finding unlocks the President’s sole authority to take several measures, a number of which are related to the electric grid. For instance, even though power plants rely on petroleum to power less than 1% of the electric grid, coal provides 23%.²²⁷ A “severe energy supply interruption” would allow the President to take the following steps:

- to “allocate coal (and require the transportation thereof) for the use of any electric powerplant or major fuel-burning installation . . . to insure reliability of electric service or prevent unemployment, or protect public health, safety, or welfare”;²²⁸
- to “prohibit any electric powerplant or major fuel-burning installation from using natural gas or petroleum, or both, as a primary energy source for the duration of such interruption”;²²⁹
- to “drawdown and sell petroleum products” in the Strategic Petroleum Reserve”;²³⁰ and
- to “stay the application of any provision of this chapter, or any rule or order thereunder, applicable to any new or existing electric powerplant, if the President finds, and publishes such finding, that an emergency exists, due to national, regional, or systemwide shortages of coal or other alternate fuels, or disruption of transportation facilities, which emergency is likely

established in 1974 by the Agreement on an International Energy Program (Agreement), to which the United States is a signatory, provides for coordinated action among the 21 members (Participating Countries) in order to decrease their vulnerability to supply disruptions and dependence on imported oil.”).

²²⁶ EPCA § 3(8), 42 U.S.C. § 6202(8); U.S. DEP’T OF JUST., *supra* note 225, at 651–52.

²²⁷ See *Electricity Explained*, *supra* note 18.

²²⁸ 42 U.S.C. § 8374(a).

²²⁹ *Id.* § 8374(b).

²³⁰ *Id.* § 6241(a), (d). This power can also be triggered by a need to meet the obligations of the United States under the international energy program. *Id.* The Strategic Petroleum Reserve is a program requiring storage of up to one billion barrels of petroleum in facilities to “reduce the impact of disruptions in supplies of petroleum products” and to “diminish the vulnerability of the United States to the effects of a severe energy supply interruption.” *Id.* § 6231. President Trump ordered the Strategic Petroleum Reserve to be filled to capacity during the latest COVID-19 pandemic. See *supra* note 20 and accompanying text.

to affect reliability of service of any such electric powerplant.”²³¹

Although these emergency energy powers have been used sparingly to date,²³² relatively recent presidential actions have indicated an increased willingness to call upon national security powers during questionable national emergencies.²³³ Such actions heighten the urgency to reassess the assumptions underlying such delegations of unilateral presidential control.

III. REASSESSING THE TRADEOFFS OF UNILATERAL PRESIDENTIAL CONTROL OVER ENERGY EMERGENCIES

After a review of these delegations of emergency energy authority directly to the President, one might remark on the notable absence of agency involvement in almost all electric grid emergencies, placing these delegations squarely in the upper-left quadrant (Strong President/Weak Agency) of our Executive Delegations Matrix.²³⁴ As discussed in Part I, the four primary justifications for this unilateral control are generally assumed to outweigh any negative impacts on checks and balances and judicial review.

Given the somewhat unusual placement of emergency grid powers in the unilateral presidential powers quadrant of the matrix developed in Part I, this last Part tests the four justifications of expertise, accountability, consistency, and expediency for this type of unilateral presidential control. It concludes that Congress may be able to better realize these values by incorporating expert agencies into these emergency decisions, as they did with a number of provisions, moving toward the upper-right quadrant (Strong President/Strong Agency) of the Executive Delegations Matrix.²³⁵ Although devoid of all the nuances discussed below, Figure 2 provides a simplified snapshot of these power dynamics between the President and an agency and the values that may be realized by the four different combinations. This Part counters the common narrative justifying unilateral presidential control, using energy grid emergencies to demonstrate the

²³¹ 42 U.S.C. § 8374(c).

²³² See *supra* Section II.B.1; *supra* note 215.

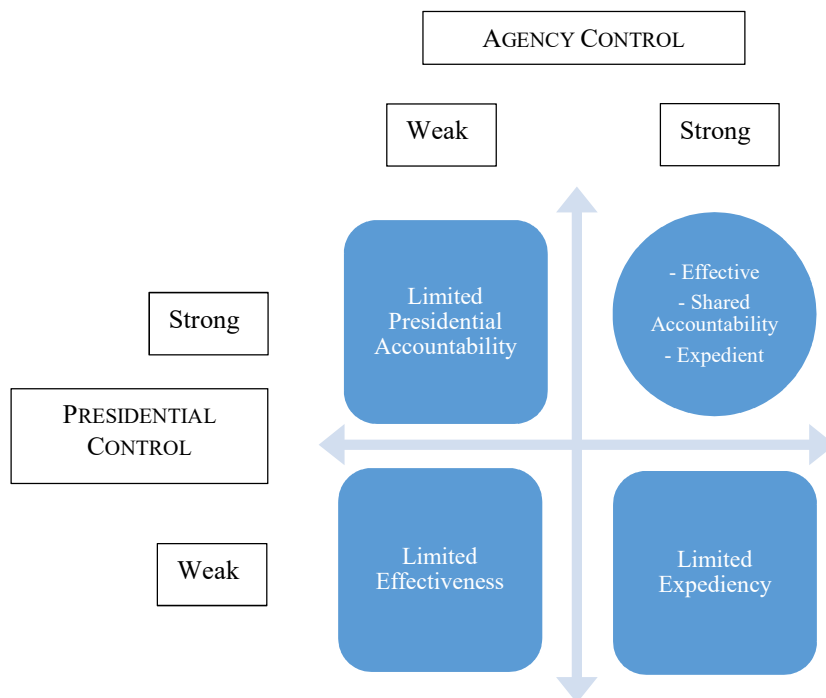
²³³ See, e.g., Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (President Trump’s executive order that denied entry for immigrants stemmed in part from his statutory national security powers under the Immigration and Nationality Act).

²³⁴ See *infra* Appendix A (Strong President/Weak Agency).

²³⁵ See *infra* Appendix B (Strong President/Strong Agency).

important role of an agency delegate,²³⁶ even if the President is the ultimate decision-maker.

FIGURE 2: VALUE TRADEOFFS FOR EXECUTIVE DELEGATIONS MATRIX



Including agencies in emergency energy delegations is not entirely new. A number of emergency statutes provide mixed delegations requiring agency involvement *prior* to the President exercising such authority. As an example, Congress addresses national security issues under the Trade Expansion Act of 1962 (TEA) using a shared delegation.²³⁷ Section 232(b) of 19 U.S.C. § 1862(b) leaves the trigger to unlock emergency powers with the Secretary of Commerce. The Secretary must first investigate and find that a commodity is entering the country “in such quantities or under such circumstances as to threaten to impair the national security.”²³⁸ Only then shall the President take

²³⁶ Even Justice Stephen Breyer has stressed the benefits of depoliticized decision-making by the elite professional experts found in agencies. STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 55–56, 59–61 (1993).

²³⁷ 19 U.S.C. §§ 1801–1991. This provision is reflected in Appendix A.

²³⁸ *Id.* § 1862(c)(1)(A).

such action, and for such time, as he deems necessary “to adjust the imports of the article and its derivatives so that such imports [of the article] will not threaten to impair the national security.”²³⁹ As with the TEA, Congress provides a number of factors for the agency to consider in making its determination that the imports “threaten to impair the national security.”²⁴⁰

Similarly, this Part explores the potential benefits of incorporating a larger role for an expert agency in conjunction with the President, to enhance emergency energy decision-making. First, delegating to an agency has the implicit advantage of imposing a consultation requirement on the President. The President would of course be free to ignore the unique expertise of her energy agencies, but it would slow down any uninformed knee-jerk reactions allowable under direct presidential delegations. It also explores the special case of independent energy agencies and their enhanced resistance to political pressure from the presidency. Second, delegating to an agency triggers the application of the APA, with its rulemaking requirements and corresponding judicial review, therefore enhancing accountability. Third, where a President must wield power through an agency, the President will likely consider the bureaucratic burdens and the depletion of political capital that is needed to massage an agency into doing her bidding.²⁴¹ Because agencies may disagree with the President, there is at least an opportunity for agencies to influence the President’s decision-making. Furthermore, the role of the agency can be tailored to the type of energy emergency to minimize

²³⁹ *Id.* § 1862(c)(1)(A)(ii).

²⁴⁰ *Id.* § 1862(c) (listing the five factors).

²⁴¹ See Kagan, *supra* note 33, at 2298 (“[A] President may face considerable constraints in imposing his will on administrative actors. Their resistance to or mere criticism of a directive may inflict political costs on the President as heavy as any that would result from an exercise of the removal power.”); Percival, *supra* note 39, at 2533 (“Even if the President’s removal authority enables him to fire the heads of executive agencies at will, requiring him to fire a resistant officer and replace him with an officer who will take the action he desires invariably has substantial political costs.”); Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 163–65 (2018) (discussing ways in which bureaucrats resist presidential policy goals); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1512–13 (1992) (discussing administrative agencies’ ability to effectively make law through political decision-making). However, some scholars believe instead that presidential control of agencies is the norm. See Kagan, *supra* note 33, at 2246 (“We live today in an era of presidential administration.”); Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1833–35 (2012) (describing different presidential control theories and how presidential control has emerged since the 1980s with the Reagan Administration). Additionally, the bureaucratic burden and depletion of political capital may depend on the agency the President is attempting to assert control over. See Joshua D. Clinton, Anthony Bertelli, Christian R. Grose, David E. Lewis & David C. Nixon, *Separated Powers in the United States: The Ideology of Agencies, Presidents, and Congress*, 56 AM. J. POL. SCI. 341, 348–50 (2012) (conducting a study on agency ideology and finding that some agencies like the EPA and NLRB are much more liberal than others like the DOD and DHS).

the negative impacts on responsiveness. Particularly, the President would still be able to act unilaterally in the case of acute emergencies but would be subject to more procedural protections when addressing chronic emergencies.²⁴² With these potential positive effects in mind, this Part tests the four justifications (expertise, accountability, consistency, and expediency) against energy emergencies.

A. *Expertise: Expert Energy Agencies*

Although the motivations behind Congress's choice to delegate to agencies or to the President directly are often unclear,²⁴³ as I have demonstrated previously, national security drives many direct presidential delegations.²⁴⁴ The legislative history of these emergency energy delegations is sparse, but a few comments equating an energy emergency to a national security emergency suggest that national security was the driving force of these decisions as well.²⁴⁵ In the House report discussing the DPA, for instance, Congress made the link between energy supplies and national security explicit: "The 'Declaration of Policy' is amended to make it clear that it is necessary and appropriate, indeed essential, 'to assure domestic energy supplies for national defense needs.'"²⁴⁶ The legislative history of § 232(b) of the TEA similarly establishes that increasing the domestic production of oil is a legitimate national security aim.²⁴⁷ Other factors suggest, however, that it is not national security expertise that is most needed in energy emergencies. Instead, this Section demonstrates how the nature of energy emergencies is changing. The prior focus on oil is shifting to a focus on the electric grid, triggering corresponding demands for more technical

²⁴² Stein, *supra* note 3, at 1252–56.

²⁴³ Stack, *Statutory Powers*, *supra* note 36, at 289–90; see Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1036–37 (2006) (discussing possible factors that might be considered by legislators when choosing delegation between agencies and courts).

²⁴⁴ See Stein, *supra* note 3, at 1194 (documenting the President's unilateral power "to reject sanctions, to waive sanctions for 'a significant foreign narcotics trafficker,' to waive the prohibition against involuntary extension of enlistments of military personnel, to waive attachment of foreign property to satisfy judgments, and to deny a request to inspect facilities in the United States" (footnotes omitted) (quoting 21 U.S.C. §1903(g)(1))).

²⁴⁵ One energy exception where Congress reserved its power to trigger the emergency powers is the Atomic Energy Act, which only authorizes the Atomic Energy Commission—now the Nuclear Regulatory Commission—to suspend nuclear licenses, order recapture of nuclear materials, or order the operation of a nuclear facility when "Congress declares that a state of war or national emergency exists," if the Commission finds that "in its judgment such action is necessary to the common defense and security." Atomic Energy Act, 42 U.S.C. § 2138 (emphasis added).

²⁴⁶ H.R. REP. NO. 96-1104, at 187 (1980).

²⁴⁷ See, e.g., 104 CONG. REC. 10,542–43 (June 9, 1958) (statement of Rep. Mills).

expertise, including that of independent energy agencies, to address energy emergencies of the future.

I. Growing Value of Technical Expertise

Although some may argue that the President is an expert in areas of national security,²⁴⁸ the evolving nature of energy emergencies is weakening traditional arguments for unilateral presidential control. The historic fear of a shortage of critical fossil fuels, which has national security implications, is shifting to a fear of electric grid disruptions and widespread blackouts, which are much more insular and domestic, negating the need for a solo Commander in Chief.

Most twentieth-century scholars and policymakers contemplated that an energy emergency would occur due to a shortage of key fossil fuels such as oil and natural gas,²⁴⁹ two primary energy sources that then constituted the majority of U.S. energy consumption, but that were not produced in sufficient amounts domestically.²⁵⁰ The reliance on these imports from foreign nations fueled much of the fear over energy emergencies.²⁵¹ Further, many of these emergency powers were forged during wartime,²⁵² with their uses likely anticipated for similar types of emergencies.

²⁴⁸ See *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018); see also Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CALIF. L. REV. 991, 999 (2018) (discussing the traditional deference to the President on national security issues on the basis of speed, flexibility, and access to knowledge). Professor Shirin Sinnar ultimately argues for less deference to the President but has a thorough discussion of the reasoning behind deference to the executive in national security matters. See *id.*

²⁴⁹ See, e.g., Jeffrey P. Bialos, *Oil Imports and National Security: The Legal and Policy Framework for Ensuring United States Access to Strategic Resources*, 11 U. PA. J. INT'L BUS. L. 235, 270–74 (1989); Earle H. O'Donnell & Laurel W. Glassman, *Energy Emergencies: Constitutional Constraints on State Efforts to Control Oil Supplies and Prices*, 5 ENERGY L.J. 77, 77 (1984); James M. Summers, *The Case for Decontrolling the Price and Allocation of Crude Oil*, 53 TEX. L. REV. 1275, 1276 (1975); DEP'T OF JUST., LEGAL AUTHORITIES AVAILABLE TO THE PRESIDENT TO RESPOND TO A SEVERE ENERGY SUPPLY INTERRUPTION OR OTHER SUBSTANTIAL REDUCTION IN AVAILABLE PETROLEUM PRODUCTS (1982).

²⁵⁰ *Oil Dependence and U.S. Foreign Policy 1850–2017*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/timeline/oil-dependence-and-us-foreign-policy> [https://perma.cc/39D3-7LJG].

²⁵¹ See, e.g., Joseph Mamounas, *Controlling Foreign Ownership of U.S. Strategic Assets: The Challenge of Maintaining National Security in a Globalized and Oil Dependent World*, 13 LAW & BUS. REV. AMS. 381, 382–83, 404 (2007); Tracey A. LeBeau, *Energy Security and Increasing North American Oil and Gas Production*, 16 NAT. RES. & ENV'T 193, 193 (2002); Matthew E. Chen & Amy Meyers Jaffe, *Energy Security: Meeting the Growing Challenge of National Oil Companies*, 8 WHITEHEAD J. DIPL. & INT'L RELS. 9, 18–20 (2007); Surya Gablin Gunasekara, *A Sticky Situation: Oil Sands, Alternative Fuels, Energy Security, and the EISA Section 526 Petroleum-Procurement Problem*, 3 GEO. WASH. J. ENERGY & ENV'T L. 248, 248–50 (2012).

²⁵² See Natural Gas Act, 15 U.S.C. § 717z (passed first in 1978, three years after the Vietnam War); IEPPA, 50 U.S.C. § 1702 (passed first in 1977, two years after the end of the Vietnam War); EPCA, 42 U.S.C. § 6202 (passed first in 1975, the same year the Vietnam War ended); Federal Power Act,

However, twenty-first-century scholars have different energy-emergency concerns. Although the United States still relies on oil, coal, and natural gas for approximately 80% of domestic energy consumption,²⁵³ our fears of a shortage have been tempered by increasing domestic production of both resources.²⁵⁴ For the first time in decades, the United States has become a net exporter of oil, alleviating peak oil concerns.²⁵⁵ And developers in the early 2000s applied hydraulic fracturing technology to previously economically unrecoverable natural gas shale formations to usher in a natural gas supply boom.²⁵⁶

With fossil fuel supplies now in abundance domestically, energy emergencies of today will instead generally focus on the reliability of the electric grid.²⁵⁷ Grid-reliability emergencies can be caused by many sources, including operator error;²⁵⁸ inadequate planning; cybersecurity attacks;²⁵⁹ natural disasters;²⁶⁰ physical disruptions to the generation, transmission, or distribution facilities; physical attacks on energy infrastructure²⁶¹ market structure,²⁶² or even an overgrown tree.²⁶³ The increasing automation of the grid heightens these concerns, creating millions of hackable points. These

16 U.S.C. § 824o-1 (passed first in 1920, in the midst of World War I); Earle H. O'Donnell & Laurel W. Glassman, *After the EPAA: What Oil Allocation and Pricing Authorities Remain?*, 2 ENERGY L. J. 33, 41 (1981) (“The DPA was enacted on September 8, 1950, in the context of, and in response to, the Korean War.”).

²⁵³ *Energy Facts: Consumption and Production*, *supra* note 14.

²⁵⁴ *Id.* (finding that the U.S. domestic production is now greater than energy consumption).

²⁵⁵ *See id.*; *supra* note 18 and accompanying text.

²⁵⁶ ZHONGMIN WANG & ALAN KRUPNICK, RES. FOR THE FUTURE, US SHALE GAS DEVELOPMENT: WHAT LED TO THE BOOM? (2013).

²⁵⁷ One notable exception was the energy emergency of April 2020 when the COVID-19 shutdown resulted in a surplus of oil with no place for storage. *See supra* note 19 and accompanying text.

²⁵⁸ *See* OFF. OF ELECTRICITY DELIVERY & ENERGY RELIABILITY, *supra* note 21, at 1–10.

²⁵⁹ *See* sources cited *supra* note 22.

²⁶⁰ *See* sources cited *supra* note 21.

²⁶¹ *See* Rebecca Smith, *Assault on California Power Station Raises Alarm on Potential for Terrorism*, WALL ST. J. (Feb. 5, 2014), <https://www.wsj.com/articles/assault-on-california-power-station-raises-alarm-on-potential-for-terrorism-1391570879> [<https://perma.cc/2QJN-X85W>]; MCLARTY & RIDGE, *supra* note 22, at 25–36; Avi Schnurr, *Vulnerability of National Power Grids to Electromagnetic Threats: Domestic and International Perspectives*, 34 ENERGY L.J. 1, 6, 18 (2013); U.S. ENERGY INFO. ADMIN., *ELECTRIC POWER MONTHLY WITH DATA FOR APRIL 2020* (2020), https://www.eia.gov/electricity/monthly/epm_table_grapher.php?t=epmt_b_1 [<https://perma.cc/J2XQ-L9D4>].

²⁶² Robert Walton, *ERCOT Calls 2 Energy Emergencies in One Week, 3rd in 5 Years*, UTIL. DIVE (Aug. 16, 2019), <https://www.utilitydive.com/news/ercot-calls-2nd-energy-emergency-this-week-3rd-in-5-years/561065/> [<https://perma.cc/24YN-5NE9>].

²⁶³ JR Minkel, *The 2003 Northeast Blackout—Five Years Later*, SCI. AM. (Aug. 13, 2008), <https://www.scientificamerican.com/article/2003-blackout-five-years-later/> [<https://perma.cc/E2S4-KQXA>].

concerns are further exacerbated by an ever-increasing reliance on technology across our society, with every cell phone, computer, military installation, and refrigeration-and-cooling system dependent on electricity. While rolling blackouts are disruptive, an extended loss of electricity could be catastrophic.²⁶⁴ If history is any example, the instances where emergency-energy authority has been used more frequently have surrounded technical issues about the amount of generation or transmission capacity available on the grid.²⁶⁵

Recent events reflect the changing nature of an energy emergency. For instance, an energy emergency in Montana erupted when additional energy resources were needed to address wildfires.²⁶⁶ On the flip side, wildfires created an energy emergency in California, where rolling blackouts were instituted to address threatened damage to the electric grid.²⁶⁷ And an energy

²⁶⁴ Alyssa Flores, *California Begins Rolling Blackouts for the First Time in 19 Years, Stage 3 Emergency Declared*, ABC30 (Aug. 15, 2020), <https://abc30.com/electricity-power-flex-alert-demand/6371510/> [<https://perma.cc/VDV4-9NWL>]; DEP'T OF ENERGY, STRATEGIC SPECTRUM PLAN 21 (2007) (“DOE published a total cost estimate of about \$6 billion dollars as attributable to the 2003 power outage.”); OFF. OF ELEC. DELIVERY & ENERGY RELIABILITY, U.S. DEP'T OF ENERGY, *supra* note 21, at 6 (noting that for a power company in New Orleans, blackouts result in a cost of “\$260 to \$325 million and a loss of customer revenue estimated at \$147 million”); James Wagner & Frances Robles, *Puerto Rico Is Once Again Hit by an Islandwide Blackout*, N.Y. TIMES (Apr. 18, 2018), <https://www.nytimes.com/2018/04/18/us/puerto-rico-power-outage.html> [<https://perma.cc/HHB6-NVC3>] (discussing the costs of Hurricane Maria on Puerto Rico—close to \$2.5 billion).

²⁶⁵ DOE's use of § 202(c) since 2000 includes: 12/14/00 emergency order to address California energy crisis; 8/16/02 order requiring the Cross-Sound Cable to continue operating; 8/14/03 order requiring the Cross-Sound Cable to continue operating in response to a blackout; 8/24/05 order requiring the operation of the Potomac River generating station; 9/28/05 order authorizing CenterPoint Energy to temporarily connect electricity lines to restore power to Entergy Gulf States in response to Hurricane Katrina; 9/14/08 order authorizing CenterPoint Energy to temporarily connect electricity lines to restore power to Entergy Gulf States in response to Hurricane Ike; 4/14/07 order authorizing a state-owned utility in Oklahoma to operate its generating unit as needed to provide dynamic reactive power support; 6/16/07 order authorizing PJM Interconnection to direct operation of generation units under strictly limited conditions for reliability purposes. *DOE's Use of Federal Power Act Emergency Authority Archived*, OFF. OF ELEC., <https://www.energy.gov/oe/does-use-federal-power-act-emergency-authority-archived> [<https://perma.cc/7X5Q-6H47>] (prior to 2015); *DOE's Use of Federal Power Act Emergency Authority Archived*, OFF. OF ELEC., <https://www.energy.gov/oe/services/electricity-policy-coordination-and-implementation/other-regulatory-efforts/does-use> [<https://perma.cc/V5E9-UCWK>] (after 2015); see also Jeff St. John, *Legal Considerations for DOE's Leaked Coal and Nuclear Bailout Plan*, GREEN TECH MEDIA (June 6, 2018), <https://www.greentechmedia.com/articles/read/legal-doe-leaked-coal-and-nuclear-bailout-plan#gs.ovo3wb> [<https://perma.cc/XSV6-QVXY>].

²⁶⁶ MTN News, *Governor Declares State of Energy Emergency as Wildfires Flare*, MISSOULA CURRENT (July 28, 2019), <https://missoulacurrent.com/outdoors/2019/07/montana-wildfires-emergency/> [<https://perma.cc/AL9N-PL94>].

²⁶⁷ The California Public Utilities Commission approved public-safety power-shutoff rules for the big three utilities. *De-Energization (PSPS)*, CAL. PUB. UTILS. COMM'N, <https://www.cpuc.ca.gov/deenergization/> [<https://perma.cc/SS93-VLUC>] (“The State's investor-owned electric utilities, notably Pacific Gas and Electric Company (PG&E), Southern California Edison, and

emergency was caused by the first malicious “cyber event” that disrupted grid operations in the western United States.²⁶⁸ Additionally, prior presidential administrations have used statutory emergency energy powers to successfully address hurricanes,²⁶⁹ pandemics,²⁷⁰ and terrorist attacks.

Arguments that the President is more qualified to address energy emergencies are also weakened when one sees how Congress has made its delegate decisions with respect to *environmental* emergencies. Congress has delegated almost all environmental emergency powers to the Environmental Protection Agency (EPA), an agency with well-recognized and specific expertise in environmental matters, with its emergency powers as follows:²⁷¹

- Safe Drinking Water Act (SDWA)’s “Emergency Powers”: “[T]he Administrator . . . may take such actions as he may deem necessary in order to protect the health” of persons upon receipt of information about a drinking water contaminant that may present an “imminent and substantial endangerment.”²⁷²
- Clean Water Act (CWA)’s “Emergency Powers”: “[T]he Administrator” may take any actions necessary to address water pollution presenting “an imminent and substantial endangerment” to public health or welfare.²⁷³
- Clean Air Act (CAA)’s “Emergency Powers”: The EPA may take actions necessary to abate air pollution presenting an “imminent and substantial endangerment to public health or welfare.”²⁷⁴

San Diego Gas & Electric (SDG&E), may shut off electric power . . . to protect public safety under California law . . .”).

²⁶⁸ Sobczak, *supra* note 22.

²⁶⁹ See Proclamation No. 7924, 70 Fed. Reg. 54,227 (Sept. 8, 2005) (declaring national emergency for Hurricane Katrina and suspending labor laws); *see also* BRENNAN REPORT, *supra* note 29, at 1 (noting that emergency declarations under the Disaster Relief Act have been issued on average nine times annually between 1974 and 2014).

²⁷⁰ *Proclamation Concerning the Novel Coronavirus*, *supra* note 69; Proclamation No. 8443, 3 C.F.R. 148 (Oct. 23, 2009).

²⁷¹ *See, e.g.*, *Helping Hand Tools v. U.S. Env’t Prot. Agency*, 848 F.3d 1185, 1199 (9th Cir. 2016) (observing court’s obligation to “defer to EPA agency expertise”); *Ohio Valley Env’t Coal. v. Horinko*, 279 F. Supp. 2d 732, 756 (S.D.W. Va. 2003) (“[T]he court will defer to the EPA’s reasonable interpretations . . . in light of the EPA’s particular knowledge and expertise in this area.”); *Texas v. U.S. Env’t Prot. Agency*, 690 F.3d 670, 677 (5th Cir. 2012) (“Our review is most deferential to the EPA’s fact findings, particularly where those findings relate to the EPA’s evaluation of scientific data for which the Agency possesses technical expertise.”); *U.S. Sugar Corp. v. Env’t Prot. Agency*, 830 F.3d 579, 636 (D.C. Cir. 2016) (“Our conclusion is driven, in large part, by the deference we owe the EPA when it determines how best to meet the technical challenges in its area of expertise.”).

²⁷² Safe Drinking Water Act: Emergency Powers § 1431(a), 42 U.S.C. § 300i(a).

²⁷³ Clean Water Act §§ 311, 504(a), 33 U.S.C. § 1364.

²⁷⁴ Clean Air Act Amendments of 1977 § 113, 42 U.S.C. § 7603.

- Solid Waste Disposal Act (SWDA)'s "Imminent Hazard" Powers: The EPA may take actions necessary to address the "disposal of any solid waste or hazardous waste [that] may present an imminent and substantial endangerment to health or the environment."²⁷⁵
- Toxic Substances Control Act (TSCA)'s "Emergency Powers": The EPA has the right of first refusal to take actions necessary to address asbestos in schools that pose "an imminent and substantial endangerment" to human health or the environment.²⁷⁶

Congress similarly delegated powers to address any public health and safety emergencies related to mining operations to the Department of the Interior.²⁷⁷ The Surface Mining Control and Reclamation Act (SMCRA), unlike the FPA, NGA, and EPCA, provides the *agency* with the sole power to determine whether a coal-mining "emergency exists constituting a danger to the public health, safety, or general welfare" and "no other person or agency will act expeditiously to restore, reclaim, abate, control, or prevent the adverse effects of coal mining practices."²⁷⁸ Even though coal is used to power the electric grid, these emergency powers relate to the environmental and public health and safety hazards that can result from mining operations that extract coal from the land, as opposed to supply issues of coal.²⁷⁹

Administered by the Office of Surface Mining Reclamation and Enforcement (OSMRE), and often delegated to the states to enforce (with oversight from OSMRE), the SMCRA delegates to the OSMRE expansive authority to enter and take actions to "restore, reclaim, abate, control, or prevent the adverse effects of coal mining" and protect public health and safety to respond to an emergency.²⁸⁰ This expansive authority resulted in three related emergency authorities for the Secretary of Interior: to (1)

²⁷⁵ Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6973.

²⁷⁶ Toxic Substances Control Act, 15 U.S.C. § 2648.

²⁷⁷ For a comprehensive assessment of the many avenues that the Department of Interior can use to address national emergencies, see generally William G. Myers III & Karen E. Mouritsen, *The Department of the Interior's Role in National Emergencies*, 16 NAT. RES. & ENV'T 177 (2002).

²⁷⁸ 30 U.S.C. § 1240(a).

²⁷⁹ See, e.g., *Pendleton v. United States*, 47 Fed. Cl. 480, 481 (2000). The Office of Surface Mining (OSM) conducted its own investigation, determined that a landslide had occurred, that the potential existed for further damage, and that the emergency warranted remediation. *Id.*

²⁸⁰ 30 U.S.C. § 1240(b).

acquire land in response to a coal emergency,²⁸¹ (2) spend funds to respond to a coal emergency,²⁸² and (3) suspend coal-mining exploration activities.²⁸³

Congress similarly delegates substantial environmental emergency authorities to other agencies with expertise in their respective areas.²⁸⁴ In fact, the only environmental statute identified that delegates directly to the President to address an *environmental* emergency is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), where the President is authorized to act for the removal of imminent hazardous-substance releases²⁸⁵ and seek remedial relief to address those releases.²⁸⁶ In those situations, the President is cabined by the national contingency plan developed by the EPA²⁸⁷ in making such authorizations.²⁸⁸

Interestingly, even national security concerns did not motivate a change in delegation. Congress delegated the power to address contaminated drinking water under the SDWA to *the agency*, even where the source of the contaminant is “a threatened or potential terrorist attack (or other intentional act designed to disrupt the provision of safe drinking water or to impact adversely the safety of drinking water supplied to communities and

²⁸¹ *Id.* § 1237.

²⁸² *Id.* § 1240(a).

²⁸³ *Id.* § 1411(b)(2).

²⁸⁴ *See, e.g.*, 49 U.S.C. § 20104 (delegating emergency authority to the Secretary of Transportation to decide whether an unsafe condition or practice causes an emergency situation involving a hazard of death, personal injury, or significant harm to the environment and to immediately order restrictions and prohibitions as necessary); Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1714(e) (delegating emergency authority to the “Secretary” or relevant congressional committee to withdraw land after determining that an emergency exists and that “extraordinary measures must be taken to preserve values that would otherwise be lost”); Federal Mine Health and Safety Act of 1977, 30 U.S.C. § 811(a) (authorizes the Secretary of Labor to promulgate additional “mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines”). Another example is the Occupational Safety and Health Act, where Congress perceived the industrial-safety problem to be so severe that it provided for an abbreviated procedure for summary promulgation of safety standards.

²⁸⁵ CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1); *see also* 42 U.S.C. § 7412(r)(9)(A) (allowing the President to act after an agency designation of “imminent and substantial endangerment”).

²⁸⁶ CERCLA § 106, 42 U.S.C. § 9606.

²⁸⁷ CERCLA § 105, 42 U.S.C. § 9605 (providing that “the President shall, after notice and opportunity for public comments, revise and republish the national contingency plan for the removal of oil and hazardous substances”). However, the President has delegated primary authority under this section to the EPA. *See* Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987) (reprinted in 42 U.S.C. § 9615).

²⁸⁸ 42 U.S.C. § 9604(a)(1); *A&W Smelters and Refiners, Inc.*, 6 E.A.D. 302, at *5 (EAB 1996) (“On January 14, the three truckloads from Mexico were returned to the United States. Because A&W did not assume responsibility for these truckloads, and the four being released by the United States, the Region considered them abandoned, and exercised its emergency response authority under CERCLA to arrange for these truckloads to be transported to a nearby RCRA-approved hazardous waste treatment . . .” (footnotes omitted)).

individuals).²⁸⁹ Similarly, Congress delegated power to the Secretary of Defense to determine if there is an imminent threat to a chemical facility from a terrorist threat.²⁹⁰ These delegations suggest that in certain circumstances, subject-matter expertise may trump even national security expertise.

To confirm our suspicions about the uniquely unilateral delegations in the energy sector, we explored all of the emergency provisions in the U.S. Code.²⁹¹ Our findings confirm both the general exclusion of expert agencies in emergencies related to the electric grid, as well as the general inclusion of expert agencies in other similarly technical sectors. For instance, similar to energy emergencies, food-and-drug and pandemic emergencies are often national in scope²⁹² and arguably require the same level of expediency required to address an energy emergency. Nevertheless, in all eight of the emergency provisions related to food and drugs, Congress instead decided to vest the power to declare an emergency not to the President, but to the expert agency, the Food and Drug Administration.²⁹³ Even within the twenty energy emergency provisions that provide unilateral authority to an agency, only two address the electric grid. The remaining eighteen provisions address personnel, funding, public health and safety, environmental protection, and agreements to store oil in the Strategic Petroleum Reserve.²⁹⁴ In fact, except in the area of foreign relations and armed forces, our research failed to turn up any other area of law with as much unilateral presidential power in emergencies as energy.²⁹⁵

There may be an argument that energy emergencies have the potential to have more national impact than environmental emergencies, thus justifying presidential expertise. Even though an energy emergency may be confined to a local area, the interconnected nature of the grid means there is a higher risk of cascading effects, leading to potentially national impact.²⁹⁶

²⁸⁹ Safe Drinking Water Act § 1431(a), 42 U.S.C. § 300i(a).

²⁹⁰ 6 U.S.C. § 624.

²⁹¹ See *supra* notes 106–108.

²⁹² See *Proclamation Concerning the Novel Coronavirus*, *supra* note 69; *Food Safety During Emergencies*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/food/recalls-outbreaks-emergencies/food-safety-during-emergencies> [<https://perma.cc/TFK7-8GHV>].

²⁹³ 21 U.S.C. § 2225; *id.* § 360bbb; *id.* § 360bbb-3; *id.* § 360eee-1; *id.* § 371; *id.* § 379; *id.* § 379e; *id.* § 829.

²⁹⁴ See *infra* Appendix A (Weak President/Strong Agency).

²⁹⁵ Our research resulted in one emergency statute in telecommunications, one in labor, and two in agriculture. For comparison, there were fourteen statutes in foreign relations and intercourse. See *infra* Appendix A.

²⁹⁶ See MISSION SUPPORT CTR., IDAHO NAT'L LAB'Y, *supra* note 22, at 10 (noting that “bulk power in the U.S. is still currently delivered throughout an interconnected, interdependent, and in many areas

Whereas local environmental pollution, such as that caused by coal, is also interconnected, its cascade effect may be more gradual.²⁹⁷ A second reason may be because environmental emergencies are perceived as requiring more expertise than energy emergencies.²⁹⁸ Perhaps there is something about the science of hydrology and contaminant paths that appears less accessible than the science of electrons. Regardless of the reason, although some energy emergencies may involve foreign interference justifying presidential action, many of them require a technical expertise that the President lacks.²⁹⁹ Thus, despite these critiques, as the nature of energy emergencies continues to evolve from wartime anxiety over our inability to fuel our own transportation and electricity needs to peacetime concerns about widespread grid blackouts, the need for a national security expert diminishes and the need for a technical grid expert increases.

2. *The Special Case of Independent Agencies*

A second factor that cuts in favor of involving agencies is the fact that one of our expert agencies, FERC, is an independent agency whose involvement could increase the President's legitimacy in her decision-making and the transparency of such decisions. This is worth discussing, because in addition to bureaucratic concerns, many critics too quickly dismiss the possibility that agencies can have any meaningful impact on a president's decision-making.³⁰⁰ For those supporters of a unitary executive, including an executive agency would have minimal effect. The President will implement her will, whether it be through her own hand or through her agency pawn. This supports the need for involving an independent agency.

Although there are a number of expert energy agencies, including the Department of Energy (DOE), the Federal Energy Regulatory Commission (FERC), the Department of Interior (DOI), and the newest addition, the

aging grid" in assessing vulnerabilities from cyber and physical electric grid attacks); see also J.B. Ruhl, *Governing Cascade Failures in Complex Social-Ecological-Technological Systems: Framing Context, Strategies, and Challenges*, 22 VAND. J. ENT. & TECH. L. 407 (2019).

²⁹⁷ See Debbie Elliott, *5 Years After BP Oil Spill, Effects Linger and Recovery Is Slow*, NPR (Apr. 10, 2015, 3:47 AM), <https://www.npr.org/2015/04/20/400374744/5-years-after-bp-oil-spill-effects-linger-and-recovery-is-slow> [https://perma.cc/RH4N-ARWB].

²⁹⁸ Tracey L. Cloutier, *Joined at the Hip: The Nondelegation Doctrine and the Principle of Deference—The Struggle for Power Has the EPA Caught in the Middle*, 7 TEX. WESLEYAN L. REV. 63, 87 (2000).

²⁹⁹ Kovacs, *supra* note 55, at 565 (noting that "the President lacks the expertise of agencies").

³⁰⁰ See, e.g., McGarity, *supra* note 76, at 1428–36 (describing how presidents have actually impeded agency decision-making by imposing various review requirements and filtering communication with the President through the Office of Management and Budget).

Cybersecurity and Infrastructure Security Agency (CISA),³⁰¹ the DOE appears to be chosen for purposes of energy emergencies rather than FERC. The DOE has been designated as the Sector-Specific Agency (SSA) for energy, indicating a specialized expertise in the field.³⁰² And as discussed above, one of the only emergency energy powers Congress delegated to an agency under FPA § 202(c) eventually ended up with the DOE. The DOE may have become the expert agency of choice again because of its status as an executive agency as opposed to an independent agency.³⁰³ As discussed below, historically FERC, unlike the DOE, has not hesitated to oppose actions and deny rules it deems to be imprudent, even if the actions and rules directly further presidential policy objectives.³⁰⁴ Scholars have documented the limited ability of executive agencies to withstand presidential directives as well as the strong removal powers retained by presidents to deal with recalcitrant executive agencies, as opposed to independent agencies.³⁰⁵

Although there is limited delegation to the DOE, as discussed above, even more interesting, perhaps, is the fact that Congress has rarely delegated any emergency energy authority to FERC. FERC is an independent expert energy agency tasked with regulating the bulk of the federal portion of the electric grid, with a mission to “[a]ssist consumers in obtaining economically

³⁰¹ Congress created a new agency within the Department of Homeland Security to address cybersecurity emergencies, the Cybersecurity and Infrastructure Security Agency (CISA), although its role appears to be mainly information-gathering, risk assessment, and coordination, rather than having any actual authority to respond to energy emergencies. See CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, <https://www.dhs.gov/CISA> (last visited Nov. 3, 2020). The main responsibilities of CISA include: accessing, receiving, and analyzing information on cybersecurity threats; assessing key resource and critical infrastructure vulnerabilities; and developing a comprehensive plan to secure key resources and critical infrastructure. 6 U.S.C. § 652.

³⁰² *Federal Authorities*, OFF. OF CYBERSECURITY, ENERGY SEC., & EMERGENCY RESPONSE, <https://www.energy.gov/ceser/activities/energy-security/emergency-preparedness/federal-authorities> [<https://perma.cc/57SZ-HPEV>].

³⁰³ Sharon B. Jacobs, *The Statutory Separation of Powers*, 129 YALE L.J. 378, 381 (2019) (“One important way in which Congress has designed agencies to resist presidential encroachment is by vesting all administrative authority on a given matter in an independent, bipartisan commission.”).

³⁰⁴ See *infra* Section III.C for a discussion of the DOE and FERC’s responses to President Trump’s coal-industry bailout plan.

³⁰⁵ See, e.g., Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1138 (2000) (“The critical element of independence is the protection—conferred explicitly by statute or reasonably implied—against removal except ‘for cause.’”); see also Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 769 (2013) (arguing there is “a broad set of indicia of independence: removal protection, multimember structure, partisan balance requirements, budget and congressional communication authority, litigation authority, and adjudication authority”).

efficient, safe, reliable, and secure energy services at a reasonable cost.”³⁰⁶ FERC is composed of up to five commissioners appointed by the President, each serving five-year terms with equal vote on regulatory matters.³⁰⁷ FERC also maintains oversight of the North American Electric Reliability Corporation (NERC), the “international regulatory authority whose mission is to assure the effective and efficient reduction of risks to the reliability and security of the grid,” and which is responsible for approving and enforcing reliability standards.³⁰⁸ While the NERC’s area of responsibility spans outside the United States, it has been certified as the nation’s Electric Reliability Organization by FERC.³⁰⁹ “No other federal government entity [besides FERC] has authority relevant to the day-to-day provision of reliable electric service.”³¹⁰ Despite its energy expertise, the only provision where FERC retains emergency energy power relates to hydropower.³¹¹ Beyond FPA § 202(c)’s initial delegation to FERC, Congress did not contemplate the inclusion of FERC in assessing energy emergencies.³¹² One theory for this choice of delegation is the more limited control that the President has over

³⁰⁶ *About FERC*, FED. ENERGY REGUL. COMM’N, <https://www.ferc.gov/about/what-ferc/overview> [<https://perma.cc/CP4X-TFKV>].

³⁰⁷ *Meet the Commissioners*, FED. ENERGY REGUL. COMM’N, <https://www.ferc.gov/about/commission-members> [<https://perma.cc/748J-TJSW>].

³⁰⁸ *About NERC*, N. AM. ELEC. RELIABILITY CORP., <https://www.nerc.com/AboutNERC/Pages/default.aspx> [<https://perma.cc/7C2A-CPVY>].

³⁰⁹ *Electric Reliability*, FED. ENERGY REGUL. COMM’N, <https://www.ferc.gov/industries-data/electric/electric-reliability> [<https://perma.cc/5YC3-Y6DL>]. The Energy Policy and Conservation Act of 2005 gave FERC authority to select a national Electric Reliability Organization. Order Certifying North American Reliability Corporation as the Electric Reliability Organization and Ordering Compliance Filing, 116 FERC ¶ 61,062 (2006). The Electric Reliability Organization is tasked with developing and enforcing standards to ensure the reliability of our nation’s grid. *Id.*

³¹⁰ JACOBS & PESKOE, *supra* note 8, at 4.

³¹¹ 16 U.S.C. § 803(b) (“[E]xcept when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of an installed capacity in excess of two thousand horsepower without the prior approval of the Commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct.”). As described in Section II.B.1, even though Congress originally provided FERC with § 202(c) emergency authority, Congress later reorganized the provision to delegate this power to the DOE. This provision does not appear in our Appendix because the passive voice makes it unclear whether the President or the agency has this emergency power. *See supra* note 107.

³¹² *See, e.g.*, 8 U.S.C. § 1379(4) (requiring the Attorney General and the Secretary of State to consult with the Secretary of Treasury and report to Congress every two years describing the “implications of the technology standard” to confirm identity); 16 U.S.C. § 1536(a)(2) (requiring every federal agency to consult with the Secretary of the Interior before taking any action to insure that their actions are “not likely to jeopardize . . . endangered species or threatened species”); 49 U.S.C. § 32902(i) (requiring the Secretary of Transportation to consult with the Secretary of Energy in prescribing regulations for average fuel-economy standards).

independent agencies. Scholars have analyzed various aspects of independent agencies,³¹³ including FERC,³¹⁴ suggesting that the President would need to exert even more political capital into getting an independent agency to do his bidding. As such, the President may have an easier time controlling the DOE than FERC. Due to the limited legislative history explaining Congress's choice, it is unclear whether the delegations to the DOE are a tacit acquiescence to the President or whether such delegations are just a byproduct of historical delegations.³¹⁵ To include FERC in the energy emergency decision-making process, therefore, may enhance the legitimacy of the President's energy emergency actions, without jeopardizing her ability to swiftly respond to emergencies.³¹⁶

³¹³ See, e.g., Geoffrey P. Miller, *Introduction: The Debate over Independent Agencies in Light of Empirical Evidence*, 1988 DUKE L.J. 215, 215 (introducing a symposium titled "The Independence of Independent Agencies"); Datla & Revesz, *supra* note 305, at 780–81 (assessing the President's power over independent agencies); Jonathan L. Entin, *Synecdoche and the Presidency: The Removal Power as Symbol*, 47 CASE W. RES. L. REV. 1595, 1601 (1997) (describing independent agencies as "somewhat less susceptible to direct presidential control than are executive branch agencies"); Strauss & Sunstein, *supra* note 57, at 203 (describing independent agencies as "somewhat remote from presidential direction"); Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 609 (1989) (noting that "[d]espite the theoretical interest inherent in the constitutional issues, no one has comprehensively assessed the impact on [independent] agency policymaking of whatever insulation from direct presidential supervision such agencies enjoy"); Peter L. Strauss, *supra* note 37, at 589 (describing the President's influence as reaching "somewhat more deeply into the top layers of bureaucracy at an executive agency than at an independent commission"); Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 27–32 (2013) (describing the vast array of devices for presidential control of independent agencies).

³¹⁴ Jacobs, *supra* note 303, at 382; Jason Pinney, *The Federal Energy Regulatory Commission and Environmental Justice: Do the National Environmental Policy Act and the Clean Air Act Offer a Better Way?*, 30 B.C. ENV'T AFFS. L. REV. 353, 398 (2003) (discussing FERC's independence generally and how it has held on to its autonomy).

³¹⁵ In 2006, when Congress transferred FERC's FPA powers to the DOE, the sudden change in delegation may have reflected the desire of a Republican-controlled Congress to appease the Bush Administration. The Bush Administration was known for exercising tight control over agency policy decisions. See Richard J. Pierce, Jr., *Saving the Unitary Executive Theory from Those Who Would Distort and Abuse It: A Review of The Unitary Executive by Steven G. Calabresi and Christopher S. Yoo*, 12 U. PA. J. CONST. L. 593, 601 (2010) (reviewing STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008)). Vice President Dick Cheney would often call agencies and persuade them to make a decision that reflected the Administration's policy preferences. *Id.* Lemos, *supra* note 30, at 415 ("On its face, that finding might seem to call into question the general assumption that agencies are more susceptible to presidential influence than are courts. It bears emphasis, however, that the EEOC is an independent agency. Independent agencies tend to be governed by a bipartisan commission over which the President has only limited removal authority—and, hence, limited means of control.").

³¹⁶ Zhen Zhang, *Cybersecurity Policy for the Electricity Sector: The First Step to Protecting Our Critical Infrastructure from Cyber Threats*, 19 B.U. J. SCI. & TECH. L. 319, 341–43 (2013) (arguing that FERC should have emergency powers over cybersecurity); David W. Opderbeck, *Cybersecurity and Executive Power*, 89 WASH. U. L. REV. 795, 797 (2012) ("Cybersecurity has been described as 'a major

B. Accountability: Short-Term vs. Long-Term

A second justification for unilateral presidential control is accountability. But accountability is a loaded term. For instance, Justice Kagan, in her discussion of the unitary executive, appeared to focus on the electoral process as a check on the President.³¹⁷ However, there is a large body of scholarship that disagrees with Justice Kagan's assertion that presidential authority is more politically accountable than its appointed-agency counterparts.³¹⁸ Specifically, critics of this view assert that, in reality, the President will not necessarily reflect majoritarian preferences on policy issues any more than agency heads.³¹⁹

Further, the justification of accountability is undermined when the temporal nature of holding a president accountable is considered. If the public has to wait for a four-year term to end to hold the President accountable, so much time could pass between a disputed presidential action and the electoral means to hold that president accountable that it could render the cause-and-effect component meaningless. The President is unlikely to be

national security problem for the United States.” (quoting CTR. FOR STRATEGIC & INT’L STUD., SECURING CYBERSPACE FOR THE 44TH PRESIDENCY I (2008))). Notably, this theory may not always play out in practice when the majority of the independent FERC commissioners have been appointed by the sitting president. President Trump has appointed all four of the current FERC commissioners. *Meet the Commissioners*, FED. ENERGY REGUL. COMM’N, <https://www.ferc.gov/about/commission-members> [<https://perma.cc/443M-5QEN>]. Recent FERC decisions consistently fall in line with the Trump Administration’s policy decisions. *See, e.g.*, Order Issuing Certificate and Approving Abandonment, 170 FERC ¶ 61,045 (2020); Scott DiSavino, *U.S. FERC Sides with PennEast Natgas Pipeline New Jersey Eminent Domain Case*, REUTERS (Jan. 30, 2020, 2:32 PM), <https://www.reuters.com/article/us-usa-penneast-new-jersey/u-s-ferc-sides-with-penneast-natgas-pipeline-new-jersey-eminent-domain-case-idUSKBN1ZT2VH> [<https://perma.cc/VLM2-DC52>]; *see also* JACOBS & PESKOE, *supra* note 8, at 24–25 (discussing how a previous DOE employee that worked closely on the DOE’s coal bailout plan was nominated and confirmed as a new FERC commissioner and how his “appointment provides DOE with an ally in any such proceeding and raises the possibility that FERC itself might raise rates for baseload plants through its regulation of RTO market rules”).

³¹⁷ Kagan, *supra* note 33, at 2331–33.

³¹⁸ *See, e.g.*, Stephenson, *supra* note 54, at 53, 63 (observing that “the critics of strong presidentialism may outnumber the proponents” and that “a moderate degree of bureaucratic insulation from political control alleviates rather than exacerbates the counter-majoritarian problems inherent in bureaucratic policymaking”).

³¹⁹ PETER M. SHANE, MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 146, 161 (2009); Kovacs, *supra* note 55, at 564 (“The fact that the President need not win a majority of the vote to be elected (or reelected) further undermines his potential democratic accountability.”); Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REGUL. 549, 558 (2018) (noting that “[a]ccording to Shane, presidential administration becomes a means to use information control to thwart accountability when politically advantageous”); *see also* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 493–94 (2003) (questioning the normative value of majoritarianism).

able to connect the causal chain between the prior act and the political consequences after an extended period of time, and any ties to the electoral result will be confounded by a number of other variables. In this sense, unilateral delegations to presidents actually leave them *unaccountable* in the long-term.

Therefore, our focus should shift to short-term accountability with more immediate consequences. This Section demonstrates how incorporating an agency in the emergency determination could impact two areas: (1) triggering the APA and its accompanying procedural requirements and judicial review, which will then assist courts in reviewing (2) the interpretation of ambiguous statutory terms. Each of these is discussed below.

I. Administrative Procedure Act Requirements

The most important way that including an agency in the decision-making process enhances the short-term accountability is in triggering the APA. As discussed above, presidents can avoid the APA, its rulemaking requirements, and corresponding judicial review.³²⁰ As Justice Kagan has noted, “Presidential action occurring under a direct regulation usually is insulated from legal challenge, except when the challenge is constitutional in nature.”³²¹ Challenges to presidential uses of unilateral emergency authority would prove much more difficult against a sitting president, not only because of the traditionally strong deference given to presidents in national security situations,³²² but also because of the strength of executive privilege³²³ and preclusion.³²⁴ Furthermore, as discussed above, courts are often hesitant to review a president’s actions, particularly where national security is concerned.³²⁵

Agencies, on the other hand, are generally bound by procedural rules under the APA’s rulemaking and adjudication provisions, which provide notice-and-comment opportunities to encourage public engagement in agency decision-making, promote agency transparency, and ensure due

³²⁰ See *supra* Section II.B.

³²¹ Kagan, *supra* note 33, at 2368.

³²² Stein, *supra* note 3, at 1219.

³²³ See, e.g., Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1392–93 (1974); see also *In re Sealed Case*, 121 F.3d 729, 729 (D.C. Cir. 1997) (“White House produced certain documents but withheld others under deliberative process privilege and presidential communications privilege.”).

³²⁴ See *Dalton v. Specter*, 511 U.S. 462, 476 (1994) (“How the President chooses to exercise the discretion Congress has granted him is not a matter for our review.”).

³²⁵ See *supra* Part II; Stein, *supra* note 3, at 1185.

process protections in the adjudicative context.³²⁶ Critics of unilateral presidential delegations also argue that agency rulemaking procedures can be more transparent than presidential directives, further enhancing accountability.³²⁷ Acknowledging that there is less concern when Congress delegates to an agency because judicial review is applicable, even Justice Kagan admits that “given the difficulty of controlling the exercise of discretion delegated to the President . . . rule of law values may counsel extra hesitation in allowing the delegation in the first instance.”³²⁸ Her view of “presidential administration” focuses more on direct delegations to an agency and therefore only teeters on the edge of the focus of this Article—direct delegations to a president.

The APA also empowers courts to review agency actions. Notably, it directs reviewing courts to “compel agency action unlawfully withheld or unreasonably delayed” and to “hold unlawful and set aside agency action, findings, and conclusions” that violate the law or are otherwise “arbitrary [and] capricious.”³²⁹ As a Congressional Research Service report explains:

Pursuant to this mandate, courts are authorized to review agency action in a number of contexts. First, courts will examine the statutory authority for an agency’s action and will invalidate agency choices that exceed these limits. In addition, a court may examine an agency’s discretionary decisions, or discrete actions with legal consequences for the public. Finally, courts may also review

³²⁶ 5 U.S.C. § 553 (rulemaking); *id.* § 554 (adjudication). *But see* sources cited *supra* note 68.

³²⁷ Mashaw & Berke, *supra* note 319, at 611 (“[T]o the degree that administration action is motivated by political considerations emanating from the White House, there is a necessary loss of transparency compared with agency action carried out through normal administrative procedures.”); *id.* at 612 (“Presidential administration tends by its very nature to limit the actors who are engaged in policy discussions and conceal the real motivations and considerations behind the administrative policies.”); *id.* (“Agency rulemaking processes are arguably the most open and deliberative of any processes in American federal governance. And to that degree, presidential administration is antithetical to . . . democratic accountability”); Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 896 (2017) (“A problem inside the executive, however, is that legal understandings can change in secret—through unpublished, sometimes close-hold decisions that prevent public notice or democratic feedback as to those altered understandings.”); Watts, *supra* note 41, at 686 (“Yet other tools [of presidential control], including more veiled OMB review and behind-closed-door communications, may undermine transparency and the rule of law, taint agency science, and cast doubt on the legitimacy of agencies’ decisions.”).

³²⁸ Kagan, *supra* note 33, at 2369 (citing *Ethyl Corp. v. Env’t Prot. Agency*, 541 F.2d 1 (D.C. Cir. 1976)).

³²⁹ 5 U.S.C. § 706; *see* JARED P. COLE, CONG. RSCH. SERV., AN INTRODUCTION TO JUDICIAL REVIEW OF FEDERAL AGENCY ACTION (2016), <https://fas.org/sgp/crs/misc/R44699.pdf> [<https://perma.cc/Y74H-KQXX>].

an agency's compliance with statutory procedural requirements, such as the notice-and-comment rulemaking procedures imposed by the APA.³³⁰

Opponents seeking to challenge agency actions face potential roadblocks related to preclusion, jurisdiction, standing, exhaustion, and ripeness, which slow the decision-making process for apt judicial deliberation.³³¹ But at least they have a valid basis for judicial review.

When the DOE issues emergency orders under FPA § 202(c), for instance, it provides a basis for judicial review of the DOE's "justifications for intervention."³³² FPA § 313(b) provides for judicial review³³³ and opponents would likely be able to seek relief under traditional rules.³³⁴ As just one example, the parties to the FPA § 202(c) emergency mandated electricity sales were denied a FERC refund due to the compulsory nature of the sales.³³⁵ These parties challenged the methods and information FERC used to determine what satisfies a § 202(c) exemption.³³⁶ Despite the difficulties in suing agencies, they pale in comparison to the challenges associated with challenging presidential emergency energy findings.³³⁷ As such, application of the APA therefore has the potential to enhance both procedural rigor and strengthen judicial review of emergency determinations.

³³⁰ COLE, *supra* note 329, at Summary.

³³¹ Richard L. Hughes, *Roadblocks to Judicial Review of Department of Energy and Federal Energy Regulatory Commission Administrative Actions*, 22 TULSA L. REV. 601, 601 (1986).

³³² JACOBS & PESKOE, *supra* note 8, at 11.

³³³ 16 U.S.C. § 8251(b); Hughes, *supra* note 331, at 603 ("The legislative history of the DOE Organization Act provides expressly for judicial review through 'Title V—Administrative Procedures and Judicial Review.'" (quoting S. REP. NO. 95-164, *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 854, 897–900)); 16 U.S.C. § 823a(d)(B).

³³⁴ *See, e.g.,* Hunter v. Fed. Energy Regul. Comm'n, 527 F. Supp. 2d 9, 14 (D.D.C. 2007) ("The four factors which courts in this Circuit consider when determining whether a plaintiff is entitled to injunctive relief are whether: (1) there is a substantial likelihood that the plaintiff will succeed on the merits of its claims; (2) the plaintiff would suffer irreparable injury if the defendants are not enjoined; (3) an injunction would not substantially injure other interested parties; and (4) the public interest favors issuing an injunction.").

³³⁵ Pub. Utils. Comm'n of the State of Cal. v. Fed. Energy Regul. Comm'n, 462 F.3d 1027, 1065 (9th Cir. 2006).

³³⁶ *See id.* at 1064–65 (granting motion to strike with respect to § 202(c) transactions); *see also* PPL Wallingford Energy LLC v. Fed. Energy Regul. Comm'n, 419 F.3d 1194, 1195 (D.C. Cir. 2005) (vacating and remanding orders made by FERC that rejected power companies' agreement to provide electric power with ISO New England on a cost-of-service basis).

³³⁷ Stein, *supra* note 3, at 1203–18.

2. *Ambiguous Statutory Terms*

As discussed in my prior work, this short-term accountability is even more necessary when statutory terms are not well defined. This can lead to a troublesome ripple effect, where a president can take liberties to interpret undefined terms in a way that is favorable to her purpose and not easily subject to dispute, which can lead to a court reviewing a president's statutory interpretation with uncertain deference.³³⁸ As such, one ambiguous term can destabilize an entire statutory purpose. Many of the statutes, including the NGA, the DPA, and the Atomic Energy Act, fail to include any definition of what constitutes an energy emergency to unlock a president's powers. Even where Congress does include a relevant definition, many of the embedded emergency terms are often left undefined. Even though the FPA defines a "grid security emergency,"³³⁹ for instance, there is still much ambiguity within the definition. What does it mean to be "imminent"? What are "significant adverse effects on reliability"?³⁴⁰ This suggests that accidental grid emergencies would not trigger this authority. What about a cybersecurity attack? That does not appear to satisfy the "direct physical attack," but could it be regarded as a "malicious act using electronic communication"?³⁴¹ Or does it fall through the cracks of the FPA?

Similarly, the EPCA provides a definition of a "severe energy supply interruption" and conditions many emergency powers on the President determining that the definition is satisfied.³⁴² But at what threshold can a president determine that there is a "national energy supply shortage," what is a "significant" scope and duration, and what are "adverse impacts"?³⁴³ We are no strangers to undefined terms in statutes, but the stakes are quite high where the meaning of the term is not about the scope of regulation, but about the power to shut down an entire industry or facility.

The definitional ambiguity might be justified by the benefits of flexibility; however, these potential benefits also come with attendant costs, including uncertain deference provided to a statutory president.³⁴⁴ As just one example, the Trump Administration has also attempted to stretch the concept

³³⁸ *Id.*

³³⁹ *See supra* notes 201–202.

³⁴⁰ Federal Power Act § 215A (as amended), 16 U.S.C. § 824o-1(a)(7)(B).

³⁴¹ 16 U.S.C. § 824o-1(a)(7).

³⁴² *See, e.g.*, 42 U.S.C. § 8511 (conservation targets); *id.* § 8374(a) (coal allocation); *id.* § 8374(b) (natural gas or petroleum prohibitions).

³⁴³ *Id.* § 6202(8).

³⁴⁴ *See Stack, Statutory Powers, supra* note 36, at 267, 299–300.

of an energy emergency to bail out a failing coal industry.³⁴⁵ What is to stop presidents from continuing to expand the definition of an energy emergency to unlock statutory powers for nonemergency purposes? Could climate change qualify as an energy emergency?³⁴⁶

As such, even those who argue for the benefits of broad and vague powers in a time of crisis contemplate adding useful limiting criteria.³⁴⁷ The problem of undefined statutory terms left to be interpreted by a president is even more troublesome when one understands the dearth of clarity on judicial review of such presidential statutory interpretations. As Professor Stack and I separately address elsewhere, there is a lack of judicial consensus on the standard of review to apply to such situations.³⁴⁸ In short, by providing more clarity in the relevant terms, Congress would constrain the amount of discretion that the President would have to interpret the term however they see fit. Accordingly, more concrete definition and prescriptive preconditions that must be satisfied prior to unlocking such powers could enhance short-term accountability by bolstering the judiciary's ability to review the President's actions.

C. Consistency: An Executive Divided

As a starting place, it is not clear how important policy consistency actually is for emergencies. In fact, emergencies are often the place where there is deviation from the norm—special circumstances justify special accommodations. But perhaps even more important is the unappreciated benefit that can come from inconsistency. In this sense, there are benefits of

³⁴⁵ Grid Resiliency Pricing Rule, 82 Fed. Reg. 46,940 (proposed Sept. 29, 2017) (to be codified at 18 C.F.R. pt. 35).

³⁴⁶ Dan Farber, *Using Emergency Powers to Fight Climate Change*, LEGAL PLANET (Jan. 14, 2019), <https://legal-planet.org/2019/01/14/using-emergency-powers-to-fight-climate-change/> [<https://perma.cc/PEW4-ZYDS>]; Ball, *supra* note 66, at 923 (concluding that “our constitutional structure, especially with a view toward legal and structural stability, necessitates that this [climate-change emergency] power belongs to the President or Congress, and not the executive agencies”). *But see* John Schwartz & Tik Root, *Could a Future President Declare a Climate Emergency?*, N.Y. TIMES (Jan. 16, 2019), <https://www.nytimes.com/2019/01/16/climate/climate-national-emergency-hot-water.html> [<https://perma.cc/Y7C5-ADHS>] (noting that most emergency powers “cut the other way” and would be unsuitable for climate change because they “allow the president to temporarily suspend environmental protections . . . [as] in the case of a national emergency that requires a quick surge in energy production”).

³⁴⁷ PAUL N. STOCKTON, RESILIENCE FOR GRID SECURITY EMERGENCIES: OPPORTUNITIES FOR INDUSTRY–GOVERNMENT COLLABORATION 20 (2018), <https://apps.dtic.mil/dtic/tr/fulltext/u2/1059491.pdf> [<https://perma.cc/6XAV-TH9P>] (arguing that both the imminence of an attack and the potential consequences of the attack should be two criteria the President considers before declaring a “grid security emergency”).

³⁴⁸ *See* Stein, *supra* note 3, at 1203–04; Stack, *Statutory Powers*, *supra* note 36, at 299–300.

disagreement between the President and an agency, as the resulting friction can sometimes result in an agency changing a president's mind. Even though many of the disagreements between a president and her agencies often remain internal and confidential to the administration, there are a number of instances where agencies have publicly disagreed with a president. In 2005, Assistant Federal Drug Administration (FDA) Commissioner Susan F. Wood resigned in protest of the FDA's decision to delay final ruling on over-the-counter accessibility of the morning-after pill.³⁴⁹ In another instance, former Secretary of State Rex Tillerson stated that he had to disagree with President Trump repeatedly and tell him that his actions violated the law.³⁵⁰ Additionally, former Secretary of Homeland Security Kirstjen Nielsen disagreed with President Trump when he asked her to close the southern border.³⁵¹ Most recently, during the COVID-19 pandemic, President Trump's scientific advisors have diplomatically, yet repeatedly, contradicted the President during publicly televised official White House briefings.³⁵²

In some of these examples, the agencies caved to presidential pressure.³⁵³ In others, the agency actors appear to have convinced the

³⁴⁹ Marc Kaufman, *FDA Official Quits over Delay on Plan B*, WASH. POST (Sept. 1, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/31/AR2005083101271.html> [<https://perma.cc/N78S-XY5C>].

³⁵⁰ Caitlin Oprysko, *'It Violates the Law': Tillerson Vents About Having to Repeatedly Push Back Against Trump*, POLITICO (Dec. 7, 2018, 9:28 AM), <https://www.politico.com/story/2018/12/07/tillerson-spills-on-trump-1048884> [<https://perma.cc/PTZ3-N69C>].

³⁵¹ Stephen Collinson, *DHS Secretary Kirstjen Nielsen's Ouster Exposes Trump's Immigration Crisis*, CNN (Apr. 8, 2019, 9:45 AM), <https://www.cnn.com/2019/04/08/politics/donald-trump-kirstjen-nielsen-immigration/index.html> [<https://perma.cc/J3NE-NUBW>]. Additional cases of disagreement with President Trump include White House counsel Don McGahn refusing to fire Robert Mueller in 2017, Grace Segers, *McGahn, Wary of "Saturday Night Massacre," Refused Trump Order to Fire Mueller*, CBS NEWS (Apr. 18, 2019, 3:14 PM), <https://www.cbsnews.com/news/mueller-report-white-house-counsel-don-mcgahn-refused-trump-order-to-fire-mueller-wary-of-saturday-night-massacre/> [<https://perma.cc/VGC6-PB85>], and disagreement by ICE on President Trump's proposal to take apprehended migrants crossing the border to sanctuary cities, Rachael Bade & Nick Miroff, *White House Proposed Releasing Immigrant Detainees in Sanctuary Cities, Targeting Political Foes*, WASH. POST (Apr. 11, 2019, 10:55 PM), https://www.washingtonpost.com/immigration/white-house-proposed-releasing-immigrant-detainees-in-sanctuary-cities-targeting-political-foes/2019/04/11/72839bc8-5c68-11e9-9625-01d48d50ef75_story.html?utm_term=.37f53a02f44e [<https://perma.cc/8CH4-4YPY>].

³⁵² See, e.g., Libby Cathey, *Trump Versus the Doctors: When the President and His Experts Contradict Each Other*, ABC NEWS (Apr. 24, 2020, 6:55 PM), <https://abcnews.go.com/Politics/trump-versus-doctors-president-experts-contradict/story?id=70330642> [<https://perma.cc/5RQ3-AFMV>] (detailing transcript contradictions between the President and his top infectious-disease experts on testing capacity, virus resurgence, and treatments using hydroxychloroquine and household disinfectants).

³⁵³ Secretary of Defense Mattis signed an order to remove troops from Syria despite disagreeing. He later resigned because of a difference in views. Nancy A. Youssef & Gordon Lubold, *Mattis, Blindsided by Trump's Syria Decision, Resigned Days Later*, WALL ST. J. (Dec. 21, 2018, 9:38 PM),

President to abandon his initial push. For example, the EPA Deputy Administrator during the Nixon Administration reported that he was called to the White House in an effort to drop an enforcement action against a company which had supported President Nixon in the election.³⁵⁴ The incident was leaked, and after congressional hearings, the White House backed off and the EPA Administrator, William Ruckelshaus, said he would resign if EPA decisions were overruled due to political considerations.³⁵⁵ Similarly, during the George W. Bush Administration, large numbers of legal officials in the CIA, FBI, and Justice Department threatened to resign, forcing the Administration to make significant changes to its surveillance program.³⁵⁶

Another recent example of agency resistance can be found in President Trump's efforts to bail out the failing coal industry. After pressure from coal-industry CEOs to invoke FPA § 202(c),³⁵⁷ President Trump directed his Energy Secretary to use his authority to pressure FERC to bail out the failing coal industry;³⁵⁸ the DOE complied with the President's request by issuing a Notice of Proposed Rulemaking for a market rule relying on FPA §§ 205 and 206 and submitting its request to FERC.³⁵⁹ However, FERC resisted, providing an example of both an executive agency's acquiescence (the DOE) and an independent agency's resistance to a president's desires (FERC).³⁶⁰ In response, coal CEOs again pushed the President and DOE to invoke § 202(c) and the White House directed the DOE to explore this issue further,³⁶¹

<https://www.wsj.com/articles/mattis-blindsided-by-trumps-syria-decision-resigned-days-later-11545446308> [<https://perma.cc/QA3N-J43F>].

³⁵⁴ Percival, *supra* note 39, at 2498.

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 2524–28.

³⁵⁷ JACOBS & PESKOE, *supra* note 8, at 21–22.

³⁵⁸ *Id.* at 16–17.

³⁵⁹ Grid Resiliency Pricing Rule, 82 Fed. Reg. 46,940, 46,941 (proposed Sept. 29, 2017) (to be codified at 18 C.F.R. pt. 35).

³⁶⁰ Memorandum from FERC (May 29, 2018), <https://www.documentcloud.org/documents/4491203-Grid-Memo.html> [<https://perma.cc/R63D-ELLF>].

³⁶¹ *Statement from the Press Secretary on Fuel-Secure Power Facilities*, THE WHITE HOUSE (June 1, 2018), <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-fuel-secure-power-facilities/> [<https://perma.cc/3KE5-S8NX>]; see Letter from Rick C. Giannantonio, Gen. Couns., FirstEnergy Sols. Corp., to James Richard Perry, Sec'y of Energy, U.S. Dep't of Energy 31 (Mar. 29, 2018), <https://statepowerproject.files.wordpress.com/2018/03/fes-202c-application.pdf> [<https://perma.cc/KC9W-X6M5>] (requesting invocation of FPA § 202(c) and an emergency order “directing (i) the subject baseload nuclear and coal-fired generators to enter into contracts . . . with PJM . . . to generate, deliver, interchange, and transmit electric energy, capacity, and ancillary services . . . and (ii) PJM to pay . . . reasonable cost-based rates that provide for full cost recovery consistent with ratemaking standards and principles or as otherwise necessary to ensure continued operations”).

resulting in a leaked DOE proposal that would have relied on FPA § 202(c) and the DPA.³⁶² As a result of FERC's strong opposition to the bailout plan and the potential use of FPA § 202(c) and the DPA, neither were invoked.³⁶³ Had there been no independent agency involvement, President Trump could have made the unilateral decision to implement this bailout.

Further, this was not the first time that FERC tempered an overzealous request to invoke FPA § 202(c) authority. In 1973, Arab members of the Organization of Petroleum Exporting Countries (OPEC) imposed an oil embargo against the United States in retaliation for the U.S. decision to resupply the Israeli military.³⁶⁴ The oil embargo placed immense pressure on oil supplies, and local utilities requested the Federal Power Commission (FPC) (FERC's predecessor) to issue an FPA § 202(c) order to facilitate cooperation between domestic oil companies.³⁶⁵ The FPC rejected the § 202(c) request, finding the agency was already able to facilitate successful cooperation without declaring an emergency.³⁶⁶ Although the agency was not tempering a request from the President, it does show the power of the agency to withstand pressure.

These examples of agencies flexing their muscles against a strong president can be countered by the numerous times that agency officials have been removed for failing to fall in line with a president's preferences. President Trump alone has removed numerous high-profile officials for registering disagreement.³⁶⁷ Although these removals have other deleterious effects on the healthy functioning of an administration, they also have important signaling effects to the public on the degree to which a president's actions may be out of line with other informed experts and demonstrate the potential benefit of agency involvement in former unilateral presidential decisions.³⁶⁸

³⁶² See JACOBS & PESKOE, *supra* note 8, at 23.

³⁶³ Jeff St. John, *FERC Commissioners Agree: No Grid Emergency Exists to Justify Coal, Nuclear Bailout*, GREEN TECH MEDIA (June 12, 2018), <https://www.greentechmedia.com/articles/read/ferc-commissioners-agree-no-grid-emergency-exists#gs.uAKGntk> [<https://perma.cc/9GCQ-25GD>].

³⁶⁴ *New Eng. Power Pool Participants*, 54 F.P.C. 1375, 1375–76 (1975).

³⁶⁵ *Id.*

³⁶⁶ *Id.* at 1375. The D.C. Circuit later affirmed the Commission's decision to decline to exercise its emergency powers. *Richmond Power & Light v. Fed. Energy Regul. Comm'n*, 574 F.2d 610, 614 (D.C. Cir. 1978).

³⁶⁷ Jan Diehm, Sam Petulla & Zachary B. Wolf, *Who Has Left Trump's Administration and Orbit?*, CNN (Oct. 21, 2019), <https://www.cnn.com/interactive/2017/08/politics/trump-admin-departures-trnd/> [<https://perma.cc/R95J-SUNE>].

³⁶⁸ See, e.g., Huq, *supra* note 313, at 4; Patricia L. Bellia, *PCAOB and the Persistence of the Removal Puzzle*, 80 GEO. WASH. L. REV. 1371 (2012).

D. Expediency: Benefits of Bureaucracy

The last justification for unilateral delegation is expediency. The bureaucracy generated by including an agency in the decision-making process is often viewed as a negative.³⁶⁹ But delegating to an agency also creates a buffer between a crisis and an overzealous president. For those who believe agencies are merely pawns of the President, this additional layer of authority should have minimal impact. But for those who believe that agencies can resist the President, the impact would only make a difference where perhaps it should. In most times of emergency, there should be no disagreement between the energy agencies and the President. But where agencies (especially those beholden to the President) and the President disagree, this disagreement should raise red flags and perhaps the resulting delay is necessary and beneficial.

This Section encourages a contrarian view of agency bureaucracy as a positive internal check on a president. Other scholars have had a similar response to the inclusion of agencies in statutory delegations. Professor Stack has spent the last decade expertly exploring the nuances of the “statutory President,” focusing on complicated and necessary questions of deference, reviewability, and contingent delegations.³⁷⁰ As part of this work, he argues that delegation to an agency, as opposed to the President, “creates a check on the President’s claims of authority internal to the executive branch.”³⁷¹

Gillian Metzger argued recently that the fundamental features of the administrative state—“bureaucratic oversight, expertise, professionalism, structural insulation, procedural requirements, and the like . . . hold[] the key to securing accountable, constrained, and effective exercises of executive power.” In particular, the structure of the federal bureaucracy helps to “forestall presidential aggrandizement.”³⁷²

These arguments suggest that the bureaucratic burdens of agency involvement are worth the cost, but they acknowledge that payment will still be due. Involving agencies in these emergency decisions will necessarily

³⁶⁹ Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 846–47 (2014).

³⁷⁰ Kevin M. Stack, *The Constitutional Foundations of Cheney*, 116 YALE L.J. 952, 1013–14 (2007); Stack, *Statutory Powers*, *supra* note 36, at 304–10; Kevin M. Stack, *The Reviewability of the President’s Statutory Powers*, 62 VAND. L. REV. 1171, 1172–73 (2009); Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 553 (2005) (“The only potential constitutional source of procedural constraint on presidential orders is the Fifth Amendment’s Due Process Clause.”).

³⁷¹ Stack, *supra* note 112, at 10.

³⁷² Kovacs, *supra* note 55, at 559 (footnotes omitted) (quoting Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 78 (2017)).

increase the transaction costs by including more people in the decision-making process, triggering procedural requirements with which the agency must comply, and increasing the amount of time that may be required to reach a consensus.

To mitigate these bureaucratic costs, Congress could structure the relationship between the President and the agency more thoughtfully. For instance, as I have argued elsewhere, Congress could subject the agency to differing degrees of scrutiny, depending on the type of emergency being faced.³⁷³ I proposed a sliding scale for different types of emergencies, from acute (discrete, specific incidents capable of identification) to chronic (generalized threats with indistinct beginnings and ends or those recognized as perpetual) emergencies, with corresponding procedural requirements.³⁷⁴ This idea is not entirely new. Section 3 of the Energy Emergency Preparedness Act of 1982 (EEPA) also adopted a sliding scale for triggering presidential authority. It divides “the threshold standards for activation of the President’s statutory authorities”³⁷⁵ into three categories: “(i) situations involving limited or general war, international tensions that threaten national security, and other Presidentially declared emergencies; (ii) events resulting in activation of the international energy program; and (iii) events or situations less severe than those described in clauses (i) and (ii).”³⁷⁶ Where energy emergencies are not acute, Congress can require the President to document the justifications for unlocking these powers.³⁷⁷ Professor Kathryn Watts and I have both argued for application of administrative law doctrines to help enhance accountability and control over unbridled executive authority.³⁷⁸ While she focused on tools to enhance transparency and

³⁷³ Stein, *supra* note 3, at 1252–56.

³⁷⁴ *Id.* at 1253.

³⁷⁵ Memorandum from Theodore B. Olson, Assistant Att’y Gen., Off. of Legal Counsel, to the President on Legal Authorities Available to the President to Respond to a Severe Energy Supply Interruption or Other Substantial Reduction in Available Petroleum Products 648 (Nov. 15, 1982), <https://www.justice.gov/file/23221/download> [<https://perma.cc/5T8W-TLSW>].

³⁷⁶ Energy Emergency Preparedness Act of 1982 § 272(a)(3)(B), 42 U.S.C. § 6282, *repealed by* Act of Nov. 9, 2000, Pub. L. 106-469, §104, 114 Stat. 2029, 2033.

³⁷⁷ See Stein, *supra* note 3, at 1252–56. For example, immigration has been a chronic problem and yet President Trump was able to invoke emergency powers without complying with any procedural prerequisites. See *supra* note 8. Under my proposed approach, during chronic emergencies like immigration, Congress would require the President to document why immigration is an emergency and why addressing it requires the use of emergency powers. See Stein, *supra* note 3, at 1253.

³⁷⁸ See *id.* at 1245–52; Stack, *Statutory Powers*, *supra* note 36, at 299–300; Kovacs, *supra* note 55, at 563 (agreeing with Peter Shane “that presidential administration ‘breeds an insularity, defensiveness, and even arrogance within the executive branch that undermines sound decision making, discounts the rule of law, and attenuates the role of authentic deliberation in shaping political outcomes’” (quoting SHANE, *supra* note 319, at 25)).

process,³⁷⁹ I focused on procedural constraints to augment the record for judicial review.³⁸⁰

There are already a number of examples where Congress requires an agency to make factual findings before unlocking environmental emergency powers. For instance, in evaluating the Occupational Safety and Health Agency (OSHA)'s use of emergency authority, Congress required that OSHA must first make two explicit findings. OSHA must find not only a danger *of* exposure or even some danger *from* exposure, but also a grave danger from exposure necessitating emergency action.³⁸¹ Similarly, to issue an emergency regulation under the Endangered Species Act (ESA), the EPA must publish in the Federal Register “detailed reasons why such regulation is necessary” and give actual notice to appropriate state agencies of the regulation.³⁸² To issue an emergency standard under The Mine and Safety Act, the Secretary of Labor must determine “that miners are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful, or to other hazards, and . . . that such emergency standard is necessary to protect miners from such danger.”³⁸³ And before the EPA can unlock its SDWA emergency authority, it “must explain and document, as necessary, why the ordered action is needed even if state or local governments may have taken or are taking actions to protect public health,” and the EPA region must consult with The Office of Enforcement and Compliance Assurance.³⁸⁴

Just as Congress often requires that *agencies* make specific findings that must be satisfied prior to unlocking emergency powers, presidents too should be required to make specific findings where time and circumstances allow it. Courts have argued that even imminent hazards should be subject to judicial review to ensure that “the emergency action was [not] taken without adequate determining principle or was unreasoned.”³⁸⁵ However, imposing factual finding requirements on a president during a crisis may not sit well with many. And it may not always alter the substantive outcome.³⁸⁶ It is

³⁷⁹ Watts, *supra* note 41, at 683.

³⁸⁰ Stein, *supra* note 3, at 1229.

³⁸¹ Fla. Peach Growers Ass'n v. U.S. Dep't of Lab., 489 F.2d 120, 130 & n.16 (5th Cir. 1974).

³⁸² 16 U.S.C. § 1533(b)(7).

³⁸³ Int'l Union v. Mine Safety & Health Admin., 823 F.2d 608, 610 (D.C. Cir. 1987) (quoting 30 U.S.C. § 811(b)).

³⁸⁴ Kelley & Leff, *supra* note 68.

³⁸⁵ Nor-Am Agric. Prods., Inc. v. Hardin, 435 F.2d 1151, 1165 (7th Cir. 1970).

³⁸⁶ See High Country Conservation Advocs. v. U.S. Forest Serv., 52 F. Supp. 3d 1174, 1181 (D. Colo. 2014) (“The National Environmental Policy Act is one of our country’s foundational environmental statutes. The law, however, does not prescribe any substantive environmental standards per se. Rather

possible, for instance, that a president faced with documenting her reasons for invoking emergency authority may merely check the boxes facially without actually documenting her true reasoning. But in certain circumstances, the findings may play an important role in subsequent judicial review.³⁸⁷ By providing a written record with justifications for invoking the emergency power, a president would not only enhance transparency with the public, but may provide a court with a record for review.³⁸⁸ And it may be these actions on the margins that are a step in the right direction to help guide a president towards the proper outcome.

Furthermore, mere involvement of an agency does not necessarily mean a slower response. In fact, in situations where Congress has provided both the President and an agency head with emergency powers, the agency is sometimes the more responsive and more expedient delegate. In both the H1N1 and COVID-19 pandemics, for instance, the Secretary of Health and Human Services declared a public-health emergency long before the presidents declared a “national emergency.”³⁸⁹

Courts have also recognized the need for agencies to act swiftly in response to an emergency, noting the need to “ensure that the [EPA’s] power under the Act remains ‘relatively untrammelled’” so “that [the] EPA can act promptly and effectively when a threat to public health is imminent.”³⁹⁰

NEPA is a procedural statute designed to ensure public participation and transparent decision-making by federal agencies.”); *Citizens for Smart Growth v. Sec’y of Dep’t of Transp.*, 669 F.3d 1203, 1211 (11th Cir. 2012) (“The requirements of NEPA are purely procedural and do not mandate any specific outcome; agencies may make a decision that preferences other factors over environmental concerns as long as they have first adequately identified and analyzed the environmental impacts.”).

³⁸⁷ See *Trump v. Hawaii*, 138 S. Ct. 2392, 2420–24 (2018).

³⁸⁸ See *supra* note 88 for examples where Congress imposed such procedural requirements on a president.

³⁸⁹ See *Proclamation Concerning the Novel Coronavirus*, *supra* note 69 (stating that the virus was first discovered in China in December 2019, on January 31 the Secretary declared a public-health emergency, and on March 13 the President declared a national emergency). The delay between the first COVID-19 case reported in the United States and the President’s response was about six weeks. For H1N1, the delay was almost six months. Angelo Fichera, *Flawed Comparison on Coronavirus, H1N1 Emergency Timelines*, FACTCHECK.ORG (Mar. 31, 2020), <https://www.factcheck.org/2020/03/flawed-comparison-on-coronavirus-h1n1-emergency-timelines/> [<https://perma.cc/9VM6-F8K6>]; see also Eric Lipton, David E. Sanger, Maggie Haberman, Michael D. Shear, Mark Mazzetti & Julian E. Barnes, *He Could Have Seen What Was Coming: Behind Trump’s Failure on the Virus*, N.Y. TIMES (May 4, 2020), <https://www.nytimes.com/2020/04/11/us/politics/coronavirus-trump-response.html> [<https://perma.cc/8NBC-3V4D>].

³⁹⁰ *Trinity Am. Corp. v. U.S. Env’t Prot. Agency*, 150 F.3d 389, 395 (4th Cir. 1998) (citing a 1974 House report describing Congress’s intention that the EPA Administrator retain broad emergency powers); see Eric Moorman, “A Greater Sense of Urgency”: *EPA’s Emergency Authority Under the SDWA and Lessons from Flint, Michigan*, 47 ENV’T L. REP. NEWS & ANALYSIS 10786, 10787–88 (2017) (citing *Trinity*, 150 F.3d 389); *W.R. Grace & Co. v. U.S. E.P.A.*, 261 F.3d 330, 339 (3d Cir.

Congress has done the same, often waiving rulemaking procedures for agencies when delegating emergency powers to mimic the expedited process that exists for the President. A number of these examples are below:

- The Endangered Species Act (ESA) provides that if there exists an “emergency posing a significant risk to the well-being of any species of fish or wildlife or plants,” the Secretary is given the authority under the ESA to bypass ESA and APA rulemaking procedures and issue immediate regulations.³⁹¹
- The Mine Act allows the Secretary of Labor to issue emergency health and safety standards “without regard to the Administrative Procedure Act.”³⁹²
- The EPCA waives the thirty-day comment period for any proposed rule or regulation where the President finds that such waiver is necessary to act expeditiously during an emergency affecting the national security of the United States.³⁹³
- The Disaster Relief Act waives the requirements of the APA where the President commands the Administrator of the Federal Emergency Management Agency (FEMA) to establish a threshold for eligibility for disaster relief,³⁹⁴ and the FEMA Administrator may waive notice-and-comment rulemaking for establishing criteria for the approval of applications for hazard-mitigation assistance.³⁹⁵

In a similar way, by using acute and chronic distinctions, Congress would be able to maintain the same level of responsiveness when the emergency is deserving of the expedience of unilateral presidential action, but would be able to demand more of a president where the emergency is chronic and loosely defined. In summary, this last Part demonstrates how the theorized justifications for unilateral presidential control actually support the involvement of expert energy agencies in emergency energy determinations.

2001) (“Thus, it is well established from the legislative history and case law that SDWA confers on the EPA broad authority to address present and future harm that may substantially threaten the health of persons who use public water systems.”).

³⁹¹ Environmental Species Act (ESA), 16 U.S.C. § 1533(b)(7). In such a case, the listing only lasts 240 days and expires if the agency does not adopt a final rule using standard rulemaking procedures. *Id.*

³⁹² *Int’l Union v. Mine Safety & Health Admin.*, 823 F.2d 608, 610 (D.C. Cir. 1987) (citing 30 U.S.C. § 811(b)).

³⁹³ 42 U.S.C. § 6393(a)(2)(A).

³⁹⁴ *Id.* § 5189(b)(2) (“[T]he President shall direct the Administrator to . . . immediately establish a threshold for eligibility [for disaster relief] under this section in an appropriate amount, without regard to chapter 5 of title 5.”).

³⁹⁵ *Id.* § 5170c.

CONCLUSION

This Article embarked on a journey to explore the President's authority to act in times of an energy emergency. In evaluating a number of statutory provisions regarding energy security, a disturbing pattern emerges. These provisions paint a picture of the President empowered to operate without meaningful oversight, guidance, judicial review, or counsel by her agency experts. The amorphous nature of emergencies, the lack of energy expertise unique to the President, and the potential for abuse of these powers suggest that Congress should more sparingly delegate emergency energy powers directly to the President.

Using statutory energy emergencies, this Article demonstrates that the nation would be better served by including expert energy agencies in these decisions, and that expertise, accountability, consistency, and expediency can be achieved without fostering unilateral presidential power. Despite unitary-theory contentions that delegations to executive agencies are irrelevant to the President's exercise of power, this Article demonstrates how a shared delegation to the President and an expert agency can result in better decision-making, particularly in an area such as energy with both executive (the Department of Energy) and independent (the Federal Energy Regulatory Commission) agencies at the President's disposal. A technical and complicated sector such as energy deserves to have expert agencies involved in critical emergency decisions, which can be done without unduly hindering the President's ability to act swiftly in times of emergency.

APPENDIX A

Emergency Energy Powers ³⁹⁶ <i>Strong President/Weak Agency</i> ³⁹⁷ “Emergency”					
Citation	U.S.C. Title Name	Label	Declaration	Powers	Emergency Powers
1) 15 U.S.C. § 3362(a)	Commerce and Trade	Grid	President	President	“During any natural gas supply emergency declared under section 3361 of this title, the President may, by rule or order, authorize any interstate pipeline or local distribution company served by any interstate pipeline to contract, upon such terms and conditions as the President determines to be appropriate (including provisions respecting fair and equitable prices), for the purchase of emergency supplies of natural gas”
2) 15 U.S.C. § 3363(a)	Commerce and Trade	Grid	President	President	“In order to assist in meeting natural gas requirements for high-priority uses of natural gas during any natural gas supply emergency declared under section 3361 of this title, the President may, by order, allocate supplies of natural gas under subsections (b), (c), and (d) to . . . (1) any interstate pipeline [and] . . . (2) any local distribution company”
3) 15 U.S.C. § 717z(c)	Commerce and Trade	Grid	President	President	“During a natural gas emergency declared under this section, the President may, by order, prohibit the burning of natural gas by any electric powerplant or major fuel-burning installation if the President determines that—(1) such powerplant or installation had on September 1, 1977 (or at any time thereafter) the capability to burn petroleum products without damage to its facilities or equipment and without interference with operational requirements; (2) significant quantities of natural gas which would otherwise be burned by such powerplant or installation could be made available before the termination of such emergency to any person served by an interstate pipeline for use by such person in a high-priority use; and (3) petroleum products will be available for use by such powerplant or installation throughout the period the order is in effect.”

³⁹⁶ Appendix A contains all the emergency energy powers identified in our search of the U.S. Code using Westlaw, *see supra* notes 106–109, which are organized based on the Executive Delegations Matrix quadrant they best fit in, *see infra* note 397; *supra* Figures 1 and 2, then by search term. Statutes that were not picked up by our U.S. Code search, but were found in more general searches, are organized under “Miscellaneous.” The energy provisions are labeled to reflect the area of energy the statute governs (e.g., Grid, Nuclear, Funding, etc.).

³⁹⁷ The Executive Delegations Matrix quadrants are labeled and defined as such:

- Strong President/Weak Agency (unilateral presidential authority): Delegations where the President can act unilaterally to both declare the emergency and address the emergency. Several delegations in this category include a concurrent delegation to Congress to declare an emergency, often in times of war. Because we focused on executive delegations, Congress’s delegations to itself are not reflected in the “Declaration” or “Powers” columns.
- Weak President/Strong Agency (unilateral agency authority): Delegations where the agency can act unilaterally to both declare and address an emergency. Some delegations require agencies to consult with other agencies; these delegations are reflected as unilateral agency authority because the emergency declaration and powers do not require presidential action.
- Strong President/Strong Agency (shared executive authority): Delegations in this category come in all shapes and sizes but all share at least one common feature: Congress contemplated a potential role for both the President and the agency in the emergency. Some require the President and the agency to consult with one another to declare and address an emergency, some allow either entity to declare or address an emergency, and some require that one entity declare the emergency and the other address the emergency.
- Weak President/Weak Agency (nonexecutive authority): Delegations where the President or the agency is required to consult with a nonexecutive entity to declare or address an emergency. Nonexecutive entities could be state governments, local governments, or other countries.

4)	22 U.S.C. § 3224a	Foreign Relations and Intercourse	Funding	President	President	<p>"That, notwithstanding any other provision of law, that none of the funds made available to the Secretary of Energy under any other authorization or appropriation Act shall be used, directly or indirectly, for the repurchase, transportation or storage of any foreign spent nuclear fuel (including any nuclear fuel irradiated in any nuclear power reactor located outside of the United States and operated by any foreign legal entity, government or non-government, regardless of the legal ownership or control of the fuel or the reactor, and regardless of the origin or licensing of the fuel or the reactor, but not including fuel irradiated in a research reactor, and not including fuel irradiated in a power reactor if the President determines that (1) use of funds for repurchase, transportation or storage of such fuel is required by an emergency situation, (2) it is in the interest of the common defense and security of the United States to take such action, and (3) he notifies the Congress of the determination and action"</p>
5)	42 U.S.C. § 6202(8)	The Public Health and Welfare	Petroleum	President	President	<p>"The term 'severe energy supply interruption' means a national energy supply shortage which the President determines—(A) is, or is likely to be, of significant scope and duration, and of an emergency nature; (B) may cause major adverse impact on national safety or the national economy; and (C) results, or is likely to result, from (i) an interruption in the supply of imported petroleum products, (ii) an interruption in the supply of domestic petroleum products, or (iii) sabotage, an act of terrorism, or an act of God."</p>
6)	42 U.S.C. § 6212a(d)(1)	The Public Health and Welfare	Trade	President	President	<p>"The President may impose export licensing requirements or other restrictions on the export of crude oil from the United States for a period of not more than 1 year, if . . . the President declares a national emergency and formally notifies the declaration of a national emergency in the Federal Register"</p>
7)	42 U.S.C. § 6393 (a)(2)(A)	The Public Health and Welfare	Procedural	President	President	<p>"Notice of any proposed rule, regulation, or order . . . [issued under the Energy Policy and Conservation Act] which is substantive and of general applicability shall be given by publication of such proposed rule, regulation, or order in the Federal Register. In each case, a minimum of 30 days following the date of such publication . . . shall be provided for opportunity to comment, except that the 30-day period . . . may be . . . waived entirely, if the President finds that such waiver is necessary to act expeditiously during an emergency affecting the national security of the United States."</p>
8)	42 U.S.C. § 8374(a)(1), (c), (d)(1)	The Public Health and Welfare	Grid	President	President	<p>"[T]he President may . . . allocate coal (and require the transportation thereof) for the use of any electric powerplant or major fuel-burning installation . . . [and] may . . . stay the application of any provision . . . or . . . rule . . . applicable to any new or existing electric powerplant [for up to ninety days or for the duration of the emergency, whichever is shorter,] if the President finds, and publishes such finding, that an emergency exists, due to . . . shortages of coal or other alternate fuels, or disruption of transportation facilities, which emergency is likely to affect reliability of service of any such electric powerplant."</p>
9)	50 U.S.C. § 1701(a)	War and National Defense	Trade	President	President	<p>"Any authority granted to the President by section 1702 of this title may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat."</p>

"National Security"					
Citation	U.S.C. Title Name	Label	Declaration	Powers	Emergency Powers
10) 15 U.S.C. § 784(a)-(b)	Commerce and Trade	Procedural	President	President	"The Administrator is authorized and directed to establish and maintain a file which shall contain information concerning every transaction, sale, exchange or shipment involving the export from the United States to a foreign nation of coal, crude oil, residual oil or any refined petroleum product . . . Upon request of any committee of Congress or the head of any Federal agency, the Administrator shall promptly provide any information maintained in the file and a report thereon to such committee, or agency head, except where the President finds such disclosure to be detrimental to national security."
11) 19 U.S.C. § 1862 (c)(3)(A)(i)	Customs Duties	Trade	President	President	"[I]f the action taken by the President under paragraph (1) is the negotiation of an agreement which limits or restricts the importation into, or the exportation to, the United States of the article that threatens to impair national security . . . the President shall take such other actions as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security. The President shall publish in the Federal Register notice of any additional actions being taken under this section by reason of this subparagraph."
12) 22 U.S.C. § 6727	Foreign Relations and Intercourse	Nuclear	President	President	"Consistent with the objective of eliminating chemical weapons, the President may deny a request to inspect any facility in the United States in cases where the President determines that the inspection may pose a threat to the national security interests of the United States."
13) 50 U.S.C. § 4565(d)(1)	War and National Defense	Contracts	President	President	"Subject to paragraph (4), the President may take such action for such time as the President considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States."

Miscellaneous					
Citation	U.S.C. Title Name	Label	Declaration	Powers	Emergency Powers
14) 16 U.S.C. § 809	Conservation	Grid	President	President	"When in the opinion of the President of the United States, evidenced by a written order addressed to the holder of any license under this chapter, the safety of the United States demands it, the United States shall have the right to enter upon and take possession of any project or part thereof, constructed, maintained, or operated under said license, for the purpose of manufacturing nitrates, explosives, or munitions of war, or for any other purpose involving the safety of the United States, to retain possession, management, and control thereof for such length of time as may appear to the President to be necessary to accomplish said purposes, and then to restore possession and control to the party or parties entitled thereto"
15) 50 U.S.C. § 4511(c)(1)	War and National Defense	Contracts	President	President	"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."

<i>Weak President/Strong Agency</i>					
"Emergency"					
Citation	U.S.C. Title Name	Label	Declaration	Powers	Emergency Powers
1) 16 U.S.C. § 824a(c)	Conservation	Grid	Agency	Agency	"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."
2) 16 U.S.C. § 832a(b)	Conservation	Grid	Agency	Agency	"The administrator is authorized to enter into contracts with public or private power systems for the mutual exchange of unused excess power upon suitable exchange terms for the purpose of economical operation or of providing emergency or break-down relief."

3)	30 U.S.C. § 1237(b)	Mineral Lands and Mining	Funding	Agency	Agency	<p>“In addition to the authority to acquire land under subsection (d) of this section the Secretary is authorized to use money in the fund to acquire land by purchase, donation, or condemnation, and to reclaim and transfer acquired land to any State or to a political subdivision thereof, or to any person, firm, association, or corporation, if he determines that such is an integral and necessary element of an economically feasible plan for the project to construct or rehabilitate housing for persons disabled as the result of employment in the mines or work incidental thereto, persons displaced by acquisition of land pursuant to this section, or persons dislocated as the result of adverse effects of coal mining practices which constitute an emergency as provided in section 1240 of this title or persons dislocated as the result of natural disasters or catastrophic failures from any cause.”</p>
4)	30 U.S.C. § 1240(e)	Mineral Lands and Mining	Funding	Agency	Agency	<p>“The Secretary is authorized to expend moneys from the fund for the emergency restoration, reclamation, abatement, control, or prevention of adverse effects of coal mining practices, on eligible lands, if the Secretary makes a finding of fact that—(1) an emergency exists constituting a danger to the public health, safety, or general welfare; and (2) no other person or agency will act expeditiously to restore, reclaim, abate, control, or prevent the adverse effects of coal mining practices.”</p>
5)	30 U.S.C. § 811(b)(1)	Mineral Lands and Mining	Safety	Agency	Agency	<p>“The Secretary shall provide, without regard to the requirements of chapter 5 of title 5, for an emergency temporary mandatory health or safety standard to take immediate effect upon publication in the Federal Register if he determines (A) that miners are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful, or to other hazards, and (B) that such emergency standard is necessary to protect miners from such danger.”</p>
6)	42 U.S.C. § 7914(f)(2)	The Public Health and Welfare	Safety	Agency	Agency	<p>“The Commission may, pursuant to such license or by rule or order, require the Secretary or other Federal agency having custody of such property and minerals to undertake such monitoring, maintenance, and emergency measures necessary to protect public health and safety and other actions as the Commission deems necessary to comply with the standards of section 2022(a) [regarding safety regulations of radioactive materials at inactive uranium tailings and depository sites] of this title. The Secretary or such other Federal agency is authorized to carry out maintenance, monitoring and emergency measures under this subsection, but shall take no other action pursuant to such license, rule or order with respect to such property and minerals unless expressly authorized by Congress after November 8, 1978.”</p>

7)	42 U.S.C. § 2113(b)(5)	The Public Health and Welfare	Safety	Agency	Agency	<p>“The Commission may, pursuant to a license, or by rule or order, require the Secretary or other Federal agency or State having custody of such property and materials to undertake such monitoring, maintenance, and emergency measures as are necessary to protect the public health and safety and such other actions as the [Atomic Energy] Commission deems necessary to comply with the standards promulgated pursuant to section 2114 of this title [regarding management of any radioactive waste]. The Secretary or such other Federal agency is authorized to carry out maintenance, monitoring, and emergency measures, but shall take no other action pursuant to such license, rule or order, with respect to such property and materials unless expressly authorized by Congress after November 8, 1978.”</p> <p>“The Secretary shall ensure that agreements to store petroleum products for foreign governments or their representatives do not impair the ability of the United States to withdraw, distribute, or sell petroleum products from the Strategic Petroleum Reserve in response to an energy emergency or to the obligations of the United States under the Agreement on an International Energy Program.”</p>
8)	42 U.S.C. § 6247a(c)	The Public Health and Welfare	Strategic Petroleum Reserve	Agency	Agency	<p>“When the Secretary determines, or when the Committee on Natural Resources of the House of Representatives or the Committee on Energy and Natural Resources of the Senate notifies the Secretary, that an emergency situation exists and that extraordinary measures must be taken to preserve values that would otherwise be lost, the Secretary notwithstanding the provisions of subsections (c)(1) and (d) of this section, shall immediately make a withdrawal and file notice of such emergency withdrawal with both of those Committees.”</p>
9)	43 U.S.C. § 1714(g)	Public Lands	Environmental	Agency	Agency	<p>“After September 18, 1978, no holder of any oil and gas lease issued or maintained pursuant to this subchapter shall be permitted to flare natural gas from any well unless the Secretary finds that there is no practicable way to complete production of such gas, or that such flaring is necessary to alleviate a temporary emergency situation or to conduct testing or work-over operations.”</p>
10)	43 U.S.C. § 1334(f)	Public Lands	Environmental	Agency	Agency	<p>“Whenever, after consultation with and advice from the Secretary of Energy, the Federal Energy Regulatory Commission determines that an emergency shortage of natural gas is threatening to cause severe economic or social dislocation in any region of the United States and that such region can be serviced in a practical, feasible, and efficient manner by royalty, net profit share, or purchased gas obtained pursuant to the provisions of this section, the Secretary of the Interior may allocate or conduct a lottery for the sale of such gas, and shall limit participation in any allocation or lottery sale of such gas to any person servicing such region, but he shall not sell any such gas for more than its regulated price, or, if no regulated price applies, less than its fair market value.”</p>
11)	43 U.S.C. § 1353(c)(2)	Public Lands	Grid	Agency	Agency	<p>“Whenever, after consultation with and advice from the Secretary of Energy, the Federal Energy Regulatory Commission determines that an emergency shortage of natural gas is threatening to cause severe economic or social dislocation in any region of the United States and that such region can be serviced in a practical, feasible, and efficient manner by royalty, net profit share, or purchased gas obtained pursuant to the provisions of this section, the Secretary of the Interior may allocate or conduct a lottery for the sale of such gas, and shall limit participation in any allocation or lottery sale of such gas to any person servicing such region, but he shall not sell any such gas for more than its regulated price, or, if no regulated price applies, less than its fair market value.”</p>

12)	49 U.S.C. § 60117(o)(1)-(2)	Transportation	Safety	Agency	Agency	<p>“If the Secretary determines that an unsafe condition or practice, or a combination of unsafe conditions and practices, constitutes or is causing an imminent hazard, the Secretary may issue an emergency order described in paragraph (3) imposing emergency restrictions, prohibitions, and safety measures on owners and operators of gas or hazardous liquid pipeline facilities without prior notice or an opportunity for a hearing, but only to the extent necessary to abate the imminent hazard. . . . Before issuing an emergency order under paragraph (1), the Secretary shall consider, as appropriate, the following factors: (i) The impact of the emergency order on public health and safety. (ii) The impact, if any, of the emergency order on the national or regional economy or national security. (iii) The impact of the emergency order on the ability of owners and operators of pipeline facilities to maintain reliability and continuity of service to customers.”</p>
“National Security”						
	Citation	U.S.C. Title Name	Label	Declaration	Powers	Emergency Powers
13)	15 U.S.C. § 4624	Commerce and Trade	Personnel	Agency	Agency	<p>“The Secretary of Energy may authorize temporary exchanges of personnel between the national laboratories of the Department of Energy and any domestic firm or any consortium referred to in section 4622 of this title that is participating in the Initiative. The exchange of personnel shall be subject to such restrictions, limitations, terms, and conditions that the Secretary of Energy considers necessary in the interest of national security.”</p>
14)	42 U.S.C. § 2297h-10(e)	The Public Health and Welfare	Nuclear	Agency	Agency	<p>“Notwithstanding subsection (d)(2) of this section, the Secretary may transfer or sell enriched uranium . . . to any person for national security purposes, as determined by the Secretary.”</p>
15)	42 U.S.C. § 2297h-10a(c)(8)(A)	The Public Health and Welfare	Nuclear	Agency	Agency	<p>“The downblending of highly enriched uranium not of weapons origin may be counted for purposes of paragraph (2)(B), subject to verification under paragraph (10), if the Secretary of Energy determines that the highly enriched uranium to be downblended poses a risk to the national security of the United States.”</p>
16)	43 U.S.C. § 1351(b)(1)	Public Lands	Procedural	Agency	Agency	<p>“The Secretary shall disapprove a plan . . . if operations threaten national security or national defense; or . . . if the Secretary determines, because of exceptional geological conditions in the lease areas, exceptional resource values in the marine or coastal environment, or other exceptional circumstances, that (i) implementation of the plan would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), to the national security or defense, or to the marine, coastal or human environments, (ii) the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time, and (iii) the advantages of disapproving the plan outweigh the advantages of development and production.”</p>

17)	50 U.S.C. § 2656(b), (d)	War and National Defense	Procedural	Agency	Agency	<p>"In this section, the term 'significant atomic energy defense intelligence loss' means any national security or counterintelligence failure or compromise of classified information at a facility of the Department of Energy or operated by a contractor of the Department that the Secretary considers likely to cause significant harm or damage to the national security interests of the United States. . . . The Secretary of Energy and the Committees on Armed Services of the Senate and House of Representatives shall each establish such procedures as may be necessary to protect from unauthorized disclosure classified information"</p>
18)	50 U.S.C. § 2675(b)	War and National Defense	Procedural	Agency	Agency	<p>"No records of the Department of Energy that have not as of October 5, 1999, been reviewed for declassification shall be subject to automatic declassification unless the Secretary of Energy certifies to Congress that such declassification would not harm the national security."</p>
19)	50 U.S.C. § 2747(e)	War and National Defense	Funding	Agency	Agency	<p>"The Secretary of Energy may use any funds available to the Department of Energy pursuant to a DOE national security authorization, including funds authorized to be appropriated for advance planning, engineering, and construction design, and for plant projects, to perform planning, design, and construction activities for any Department of Energy national security program construction project that, as determined by the Secretary, must proceed expeditiously in order to protect public health and safety, to meet the needs of national defense, or to protect property."</p>
20)	50 U.S.C. § 2792(a)(1)	War and National Defense	Funding	Agency	Agency	<p>"No funds authorized to be appropriated or otherwise made available to the Department of Energy in any fiscal year after fiscal year 1997 for weapons activities may be obligated or expended for activities under the Department of Energy Laboratory Directed Research and Development Program, or under any Department of Energy technology transfer program or cooperative research and development agreement, unless such activities support the national security mission of the Department of Energy."</p>

Strong President/Strong Agency					
"Emergency"					
Citation	U.S.C. Title Name	Label	Declaration	Powers	Emergency Powers
1) 16 U.S.C. § 8240-1(b)(1)	Conservation	Grid	President	Agency, President	"Whenever the President issues and provides to the Secretary a written directive or determination identifying a grid security emergency, the Secretary may, with or without notice, hearing, or report, issue such orders for emergency measures as are necessary in the judgment of the Secretary to protect or restore the reliability of critical electric infrastructure or of defense critical electric infrastructure during such emergency. As soon as practicable but not later than 180 days after December 4, 2015, the Secretary shall, after notice and opportunity for comment, establish rules of procedure that ensure that such authority can be exercised expeditiously."
2) 30 U.S.C. § 1411(b)(2)	Mineral Lands and Mining	Safety	Agency, President	Agency	"Notwithstanding paragraph (1), if the President by Executive order determines that immediate suspension of exploration activities is necessary for the reasons set forth in section 1411(a)(2)(B) of this title or the Administrator determines that immediate suspension of activities is necessary to prevent a significant adverse effect on the environment or to preserve the safety of life and property at sea, the Administrator is authorized, notwithstanding any other requirement of this chapter, to issue an emergency order requiring any United States citizen who is engaged in exploration before June 28, 1980, to immediately suspend exploration activities."
3) 42 U.S.C. § 6241(a), (d)	Public Health and Welfare	Strategic Petroleum Reserve	President	Agency	"The Secretary may drawdown and sell petroleum products in the Reserve only . . . [after] the President has found drawdown and sale are required by a severe energy supply interruption or by obligations of the United States under the international energy program."
4) 42 U.S.C. § 6272(d)(2)	Public Health and Welfare	Procedural	President	Agency	"Any voluntary agreement or plan of action entered into pursuant to this section shall be submitted in writing to the Attorney General and the Federal Trade Commission 20 days before being implemented; except that during an international energy supply emergency [as determined by the President], the Secretary, subject to approval of the Attorney General, may reduce such 20-day period."
"National Security"					
Citation	U.S.C. Title Name	Label	Declaration	Powers	Emergency Powers
5) 19 U.S.C. § 1862(c)(1)(A)	Customs Duties	Trade	Agency, President	President	"Within 90 days after receiving a report submitted under subsection (b)(3)(A) of this section in which the Secretary finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the President shall—(i) determine whether the President concurs with the finding of the Secretary, and (ii) if the President concurs, determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security."

<i>Weak President/Weak Agency</i>						
"Emergency"						
Citation	U.S.C. Title Name	Label	Declaration	Powers	Emergency Powers	
1) 16 U.S.C. § 824a-1(a)	Conservation	Grid	Agency, Nonexecutive	Agency	"The Commission may, on its own motion, and shall, on application of any person or governmental entity, after public notice and notice to the Governor of the affected State and after affording an opportunity for public hearing, exempt electric utilities, in whole or in part, from any provision of State law, or from any State rule or regulation, which prohibits or prevents the voluntary coordination of electric utilities, including any agreement for central dispatch, if the Commission determines that such voluntary coordination is designed to obtain economical utilization of facilities and resources in any area. No such exemption may be granted if the Commission finds that such provision of State law, or rule or regulation—(1) is required by any authority of Federal law, or (2) is designed to protect public health, safety, or welfare, or the environment or conserve energy or is designed to mitigate the effects of emergencies resulting from fuel shortages."	
2) 42 U.S.C. § 2160(b)(1)	The Public Health and Welfare	Nuclear	President	Agency, Nonexecutive	"[T]he Secretary of Energy may not enter into any subsequent arrangement for the retransfer of any such material to a third country for reprocessing, for the reprocessing of any such material, or for the subsequent retransfer of any plutonium in quantities greater than 500 grams resulting from the reprocessing of any such material, until he has provided the Committee on Foreign Affairs of the House of Representatives and the Committee on Foreign Relations of the Senate with a report containing his reasons for entering into such arrangement and a period of 15 days of continuous session (as defined in section 2159(g) of this title) has elapsed. <i>Provided, however,</i> [t]hat if in the view of the President an emergency exists due to unforeseen circumstances requiring immediate entry into a subsequent arrangement, such period shall consist of fifteen calendar days"	

APPENDIX B

Emergency Powers ³⁹⁸ <i>Strong President/Weak Agency</i>					
"Emergency"					
Citation	U.S.C. Title Name	Independent or Dependent? ³⁹⁹	Declaration	Powers	Emergency Powers
1) 5 U.S.C. § 5303(b)(1)	Government Organization and Employees	Dependent	President	President	"If, because of national emergency or serious economic conditions affecting the general welfare, the President should consider the pay adjustment which would otherwise be required by subsection (a) in any year to be inappropriate, the President shall—(A) prepare and transmit to Congress before September 1 of the preceding calendar year a plan for such alternative pay adjustments as he considers appropriate, together with the reasons therefor; and (B) adjust the rates of pay of each statutory pay system, in accordance with such plan, effective on the same day as the increase under subsection (a) would otherwise take effect."
2) 5 U.S.C. § 5304a(a)	Government Organization and Employees	Dependent	President	President	"If, because of national emergency or serious economic conditions affecting the general welfare, the President should consider the level of comparability payments which would otherwise be payable under section 5304 in any year to be inappropriate, the President shall—(1) prepare and transmit to Congress, at least 1 month before those comparability payments (disregarding this section) would otherwise become payable, a report describing the alternative level of payments which the President instead intends to provide, including the reasons why such alternative level is considered necessary; and (2) implement the alternative level of payments beginning on the same date as would otherwise apply, for the year involved, under section 5304."
3) 7 U.S.C. § 1743(a)	Agriculture	Dependent	President	President	"[C]ommodity set-aside shall be reduced by disposals made in accordance with the directions of the President as follows: . . . [d]onation, sale, or other disposition for disaster relief purposes in the United States or to meet any national emergency declared by the President. . . ."

³⁹⁸ Appendix B contains all the statutory provisions generated by our search of the U.S. Code. *See supra* notes 106–109. Similar to Appendix A, the statutes are organized based on the quadrant they best fit in the Executive Delegations Matrix. *see supra* notes 396–397, then by search term ("emergency," "national security," or "imminent and substantial endangerment"), *see supra* notes 106–109. As the primary focus of this Article is on emergency powers, direct quotes are provided for the "emergency" search results, and citations are provided for the "national security" and "imminent and substantial endangerment" provisions. A full table, with statutory text for all results, is on file with the author. The energy provisions from Appendix A that were generated by our search of the U.S. Code are repeated in Appendix B and highlighted in grey.

³⁹⁹ Statutes labeled "Dependent" require an emergency declaration under one of the four statutes listed in the "Emergency Provisions that Activate Other Statutes" Table (see below). For example, unless the statute states otherwise, a "national emergency" power requires a presidential emergency declaration under the National Emergencies Act; thus, the powers are dependent on this declaration. Statutes labeled "Independent" do not require an emergency declaration or finding under one of the four statutes listed in the "Emergency Provisions that Activate Other Statutes" Table; thus, these statutes contain an independent emergency declaration power.

5)	10 U.S.C. § 1107(a)(1)	Armed Forces	Independent	President	President	<p>"In the case of the administration of a product authorized for emergency use under section 564 of the Federal Food, Drug, and Cosmetic Act to members of the armed forces, the condition described in section 564(e)(1)(A)(ii)(III) of such Act and required under paragraph (1)(A) or (2)(A) of such section 564(e), designed to ensure that individuals are informed of an option to accept or refuse administration of a product, may be waived only by the President only if the President determines, in writing, that complying with such requirement is not in the interests of national security."</p>
6)	10 U.S.C. § 12304(a)	Armed Forces	Dependent	President	President	<p>"[W]hen the President determines that it is necessary to augment the active forces for any named operational mission or that it is necessary to provide assistance referred to in subsection (b) [concerning emergency situations], he may authorize the Secretary of Defense and the Secretary of Homeland Security . . . without the consent of the members concerned, to order any unit, and any member not assigned to a unit organized to serve as a unit of the Selected Reserve . . . or any member in the Individual Ready Reserve mobilization category and designated as essential under regulations prescribed by the Secretary concerned, under their respective jurisdictions, to active duty for not more than 365 consecutive days."</p>
7)	10 U.S.C. § 12305(a)	Armed Forces	Dependent	President	President	<p>"[T]he President may suspend any provision of law relating to promotion, retirement, or separation applicable to any member of the armed forces who the President determines is essential to . . . national security"</p>
8)	10 U.S.C. § 8103	Armed Forces	Dependent	President	President	<p>"The President, during a war or national emergency, may suspend any provision of the preceding sections of this chapter [concerning distribution of grade requirements for the Navy]."</p>
9)	10 U.S.C. § 12006(a)	Armed Forces	Dependent	President	President	<p>"In time of war, or of national emergency declared by Congress or the President, the President may suspend the operation of any provision of section 12003, 12004, or 12005 of this title [governing the authorized strengths and distribution of reserve officers in an active status in the armed forces]."</p>
10)	10 U.S.C. § 12243	Armed Forces	Dependent	President	President	<p>"In time of war, or of emergency declared after May 29, 1954, by Congress or the President, the President may suspend the operation of any provision of law relating to promotion, or mandatory retirement or separation, of permanent reserve warrant officers of any armed force."</p>

11)	10 U.S.C. § 123a(a)(1)-(2), (c)	Armed Forces	Dependent	President	President	“[T]he President may waive any statutory end strength [limitation prescribed by law for any military or civilian component of the armed forces or of the Department of Defense] with respect to that fiscal year. . . . [T]he President may waive any statutory limit that would otherwise apply during the period . . . on the number of members of a reserve component who are authorized to be on active duty . . . if the President determines the waiver is necessary to provide assistance in responding to the major disaster or emergency.”
12)	10 U.S.C. § 123b(a), (c)	Armed Forces	Dependent	President	President	“The President may waive the operation of subsection (a) [stating that “[n]o funds appropriated to the Department of Defense may be used to support a strength level of members of the armed forces assigned to permanent duty ashore in nations outside the United States at the end of any fiscal year at a level in excess of 203,000”] if the President declares an emergency.”
13)	10 U.S.C. § 527	Armed Forces	Dependent	President	President	“In time of war, or of national emergency declared by Congress or the President after November 30, 1980, the President may suspend the operation of any provision of section 523, 525, or 526 of this title.”
14)	10 U.S.C. § 603(a)	Armed Forces	Dependent	President	President	“In time of war, or of national emergency declared by the Congress or the President after November 30, 1980, the President may appoint any qualified person (whether or not already a member of the armed forces) to any officer grade in the Army, Navy, Air Force, or Marine Corps, except that appointments under this section may not be made in grades above major general or rear admiral.”
15)	10 U.S.C. § 978(e)	Armed Forces	Dependent	President	President	“In time of war, or time of emergency declared by Congress or the President, the President may suspend the provisions of subsection (a) [concerning drug and alcohol use dependency testing prior to enlistment].”
16)	14 U.S.C. § 724(c)	Coast Guard	Dependent	President	President	“If at the end of any fiscal year there is in effect a declaration of war or national emergency, the President may defer the effectiveness of any end-strength limitation with respect to that fiscal year prescribed by law for any military or civilian component of the Coast Guard Reserve, for a period not to exceed 6 months after the end of the war or termination of the national emergency.”

17)	14 U.S.C. § 2125	Coast Guard	Dependent	President	President	<p>"In time of war, or of national emergency declared by the President or Congress, the President may suspend any section of this chapter relating to the selection, promotion, or involuntary separation of officers. Such a suspension may not continue beyond six months after the termination of the war or national emergency."</p>
18)	15 U.S.C. § 3362(a)	Commerce and Trade	Independent	President	President	<p>"During any natural gas supply emergency declared under section 3361 of this title, the President may, by rule or order, authorize any interstate pipeline or local distribution company served by any interstate pipeline to contract, upon such terms and conditions as the President determines to be appropriate (including provisions respecting fair and equitable prices), for the purchase of emergency supplies of natural gas"</p>
19)	15 U.S.C. § 3363(a)	Commerce and Trade	Independent	President	President	<p>"In order to assist in meeting natural gas requirements for high-priority uses of natural gas during any natural gas supply emergency declared under section 3361 of this title, the President may, by order, allocate supplies of natural gas under subsections (b), (c), and (d) to—(1) any interstate pipeline [and] . . . (2) any local distribution company"</p>
20)	15 U.S.C. § 717z(e)	Commerce and Trade	Independent	President	President	<p>"During a natural gas emergency declared under this section, the President may, by order, prohibit the burning of natural gas by any electric powerplant or major fuel-burning installation if the President determines that—(1) such powerplant or installation had on September 1, 1977 (or at any time thereafter) the capability to burn petroleum products without damage to its facilities or equipment and without interference with operational requirements; (2) significant quantities of natural gas which would otherwise be burned by such powerplant or installation could be made available before the termination of such emergency to any person served by an interstate pipeline for use by such person in a high-priority use; and (3) petroleum products will be available for use by such powerplant or installation throughout the period the order is in effect."</p>
21)	18 U.S.C. § 793(a)	Crimes and Criminal Procedure	Dependent	President	President	<p>"Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, files over, or otherwise obtains information concerning . . . [a] place connected with the national defense owned or constructed [by the United States] . . . or any prohibited place so designated by the President by proclamation in time of war or in case of national emergency . . . [shall be fined or imprisoned]."</p>

22)	19 U.S.C. § 2253(a)(1)(A)	Customs Duties	Independent	President	President	<p>“After receiving a report under section 2252(f) of this title containing an affirmative finding regarding serious injury, or the threat thereof, to a domestic industry, the President shall take all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.”</p>
23)	19 U.S.C. § 2436(c)	Customs Duties	Independent	President	President	<p>“If, at any time, the President finds that there are reasonable grounds to believe, with respect to imports of an article which is the product of a Communist country, that market disruption exists with respect to an article produced by a domestic industry, he shall request the Commission to initiate an investigation under subsection (a) [of this section]. If the President further finds that emergency action is necessary, he may take action under sections 2252 and 2253 of this title referred to in subsection (b) of this section as if an affirmative determination of the Commission had been made under subsection (a).”</p>
24)	19 U.S.C. § 2603(b)	Customs Duties	Independent	President	President	<p>“Subject to subsection (c) [of this section], if the President determines that an emergency condition applies with respect to any archaeological or ethnological material of any State Party, the President may apply the import restrictions set forth in section 2606 of this title with respect to such material.”</p>
25)	20 U.S.C. § 79	Education	Dependent	President	President	<p>“The President is authorized and directed to set aside within the Canal Zone an area in Gatun Lake known as Barro Colorado Island in which the natural features shall, except in event of declared national emergency, be left in their natural state for scientific observation and investigation.”</p>
26)	22 U.S.C. § 2776(b)(1)	Foreign Relations and Intercourse	Independent	President	President	<p>“If the President states in his certification that an emergency exists which requires the proposed sale in the national security interest of the United States, thus waiving the congressional review requirements of this subsection, he shall set forth in the certification a detailed justification for his determination, including a description of the emergency circumstances which necessitate the immediate issuance of the letter of offer and a discussion of the national security interests involved.”</p>
27)	22 U.S.C. § 2776(b)(1)	Foreign Relations and Intercourse	Independent	President	President	<p>“If the President states in his certification that an emergency exists which requires the proposed sale in the national security interest of the United States, thus waiving the congressional review requirements of this subsection, he shall set forth in the certification a detailed justification for his determination, including a description of the emergency circumstances which necessitate the immediate issuance of the letter of offer and a discussion of the national security interests involved.”</p>

28)	22 U.S.C. § 2151p(c)(2)	Foreign Relations and Intercourse	Independent	President	President	<p>"The President may establish exceptions from the requirements of this subsection for emergency conditions and for cases in which compliance with those requirements would be seriously detrimental to the foreign policy interests of the United States."</p>
29)	22 U.S.C. § 2348a(c)	Foreign Relations and Intercourse	Independent	President	President	<p>"If the President determines that, as the result of an unforeseen emergency, the provision of assistance under this part in amounts in excess of funds otherwise available for such assistance is important to the national interests of the United States, the President may (1) exercise the authority of section 2360(a) of this title to transfer funds available to carry out part IV of this subchapter for use under this part without regard to the 20-percent increase limitation contained in such section, except that the total amount so transferred in any fiscal year may not exceed \$15,000,000; and (2) in the event the President also determines that such unforeseen emergency requires the immediate provision of assistance under this part, direct the drawdown of commodities and services from the inventory and resources of any agency of the United States Government of an aggregate value not to exceed \$25,000,000 in any fiscal year."</p>
30)	22 U.S.C. § 2753(d)(2)(A)	Foreign Relations and Intercourse	Independent	President	President	<p>"Except as provided in subparagraph (B), unless the President states in the certification submitted pursuant to paragraph (1) of this subsection that an emergency exists which requires that consent to the proposed transfer become effective immediately in the national security interests of the United States, such consent shall not become effective until 30 calendar days after the date of such submission and such consent shall become effective then only if the Congress does not enact, within such 30-day period, a joint resolution prohibiting the proposed transfer."</p>
31)	22 U.S.C. § 2761(d)	Foreign Relations and Intercourse	Independent	President	President	<p>"The President may extend such sixty-day period to one hundred and twenty days if he determines that emergency requirements of the purchaser for acquisition of such defense articles or defense services exceed the ready availability to the purchaser of funds sufficient to pay the United States in full for them within such sixty-day period and submits that determination to the Congress together with a special emergency request for the authorization and appropriation of additional funds to finance such purchases under this chapter."</p>
32)	22 U.S.C. § 2762(b)	Foreign Relations and Intercourse	Independent	President	President	<p>"The President may, if he determines it to be in the national interest, issue letters of offer under this section which provide for billing upon delivery of the defense article or rendering of the defense service and for payment within one hundred and twenty days after the date of billing. This authority may be exercised, however, only if the President also determines that the emergency requirements of the purchaser for acquisition of such defense articles and services exceed the ready availability to the purchaser of funds sufficient to make payments on a dependable undertaking basis"</p>

33)	22 U.S.C. § 2796a(b)	Foreign Relations and Intercourse	Independent	President	President	<p>“The President may waive the requirements of this section (and in the case of an agreement described in section 2796b of this title, may waive the provisions of that section) if he states in his certification, that an emergency exists which requires that the lease or loan be entered into immediately in the national security interests of the United States. If the President states in his certification that such an emergency exists, he shall set forth in the certification a detailed justification for his determination, including a description of the emergency circumstances which necessitate that the lease be entered into immediately and a discussion of the national security interests involved.”</p>
34)	22 U.S.C. § 3224a	Foreign Relations and Intercourse	Independent	President	President	<p>“That, notwithstanding any other provision of law, that none of the funds made available to the Secretary of Energy under any other authorization or appropriation Act shall be used, directly or indirectly, for the repurchase, transportation or storage of any foreign spent nuclear fuel (including any nuclear fuel irradiated in any nuclear power reactor located outside of the United States and operated by any foreign legal entity, government or nongovernment, regardless of the legal ownership or control of the fuel or the reactor, and regardless of the origin or licensing of the fuel or the reactor, but not including fuel irradiated in a research reactor, and not including fuel irradiated in a power reactor if the President determines that (1) use of funds for repurchase, transportation or storage of such fuel is required by an emergency situation, (2) it is in the interest of the common defense and security of the United States to take such action, and (3) he notifies the Congress of the determination and action”</p>
35)	22 U.S.C. § 4103(c)	Foreign Relations and Intercourse	Dependent	President	President	<p>“The President may by Executive order suspend any provision [related to labor-management relations] of this subchapter with respect to any post, bureau, office or activity of the Department [of State]”</p>
36)	22 U.S.C. § 7622(d)(4)(C)(i)	Foreign Relations and Intercourse	Independent	President	President	<p>“The President may suspend the application of subparagraph (A) with respect to a fiscal year if the President determines that an international health emergency threatens the national security interests of the United States.”</p>
37)	22 U.S.C. § 8512(b)(3)(A)	Foreign Relations and Intercourse	Independent	President	President	<p>“At such time as the President determines that a person in Iran, including an Iranian diplomat or representative of another government or military or quasi-governmental institution of Iran (including Iran’s Revolutionary Guard Corps and its affiliates), satisfies the criteria for designation with respect to the imposition of sanctions under the authority of the International Emergency Economic Powers Act, the President shall take such action as may be necessary to freeze, as soon as possible” (citation omitted)</p>

38)	22 U.S.C. § 9405(b)(1)	Foreign Relations and Intercourse	Independent	President	President	<p>"The President may, in accordance with the International Emergency Economic Powers Act . . . , block all transactions in all property and interests in property of a person on the list required by subsection (a) if such property and interests in property are in the United States, come within the United States, or are or come within the possession or control of a United States person." (citation omitted)</p>
39)	22 U.S.C. § 2318(a)(1)	Foreign Relations and Intercourse	Dependent	President	President	<p>"If the President determines and reports to the Congress in accordance with section 2411 of this title that—(A) an unforeseen emergency exists which requires immediate military assistance to a foreign country or international organization; and (B) the emergency requirement cannot be met under the authority of the Arms Export Control Act . . . or any other law except this section; he may direct, for the purposes of subchapter II of this chapter, the drawdown of defense articles from the stocks of the Department of Defense, defense services of the Department of Defense, and military education and training, of an aggregate value of not to exceed \$100,000,000 in any fiscal year." (citation omitted)</p>
40)	29 U.S.C. § 176	Labor	Independent	President	President	<p>"Whenever in the opinion of the President of the United States, a threatened or actual strike or lockout affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe."</p>
41)	37 U.S.C. § 1009(e)(1)	Pay and Allowances of the Uniformed Services	Dependent	President	President	<p>"If, because of national emergency or serious economic conditions affecting the general welfare, the President considers the pay adjustment which would otherwise be required by this section in any year to be inappropriate, the President shall prepare and transmit to Congress before September 1 of the preceding year a plan for such alternative pay adjustments as the President considers appropriate, together with the reasons therefor."</p>
42)	40 U.S.C. § 3147	Public Buildings, Property, and Works	Dependent	President	President	<p>"The President may suspend the provisions of this subchapter [concerning wage-rate requirements] during a national emergency."</p>
43)	42 U.S.C. § 217	The Public Health and Welfare	Dependent	President	President	<p>"In time of war, or of emergency proclaimed by the President, he may utilize the Service to such extent and in such manner as shall in his judgment promote the public interest. In time of war, or of emergency involving the national defense proclaimed by the President, he may by Executive order declare the commissioned corps of the Service to be a military service."</p>

44)	42 U.S.C. § 6202(8)	The Public Health and Welfare	Independent	President	President	<p>"The term 'severe energy supply interruption' means a national energy supply shortage which the President determines—(A) is, or is likely to be, of significant scope and duration, and of an emergency nature; (B) may cause major adverse impact on national safety or the national economy; and (C) results, or is likely to result, from (i) an interruption in the supply of imported petroleum products, (ii) an interruption in the supply of domestic petroleum products, or (iii) sabotage or an act of God."</p>
45)	42 U.S.C. § 6212a(d)(1)(A)	The Public Health and Welfare	Dependent	President	President	<p>"The President may impose export licensing requirements or other restrictions on the export of crude oil from the United States for a period of not more than 1 year, if— (A) the President declares a national emergency and formally notifies the declaration of a national emergency in the Federal Register"</p>
46)	42 U.S.C. § 6393 (a)(2)(A)(ii)	The Public Health and Welfare	Dependent	President	President	<p>"Notice of any proposed rule, regulation, or order . . . [issued under the Energy Policy and Conservation Act] which is substantive and of general applicability shall be given by publication of such proposed rule, regulation, or order in the Federal Register. In each case, a minimum of 30 days following the date of such publication . . . shall be provided for opportunity to comment; except that the 30-day period . . . may be . . . waived entirely, if the President finds that such waiver is necessary to act expeditiously during an emergency affecting the national security of the United States."</p>
47)	42 U.S.C. § 8374(a)(1), (c), (d)(1)	The Public Health and Welfare	Dependent	President	President	<p>"[T]he President may . . . allocate coal (and require the transportation thereof) for the use of any electric powerplant or major fuel-burning installation [and] may . . . stay the application of any provision . . . or . . . rule . . . applicable to any new or existing electric powerplant [for up to ninety days or for the duration of the emergency, whichever is shorter,] if the President finds, and publishes such findings, that an emergency exists, due to . . . shortages of coal or other alternate fuels, or disruption of transportation facilities, which emergency is likely to affect reliability of service of any such electric powerplant."</p>
48)	46 U.S.C. § 8103(b)(1)	Shipping	Dependent	President	President	<p>"The President may . . . suspend any part of this section [concerning citizenship and nationality requirements for officers and seamen] during a proclaimed national emergency"</p>
49)	47 U.S.C. § 606(c)	Telecommunications	Dependent	President	President	<p>"Upon proclamation by the President that there exists war or a threat of war, or a state of public peril or disaster or other national emergency, or in order to preserve the neutrality of the United States, the President, if he deems it necessary in the interest of national security or defense, may suspend or amend, for such time as he may see fit, the rules and regulations applicable to any or all stations or devices capable of emitting electromagnetic radiations"</p>

50)	49 U.S.C. § 44908(b)	Transportation	Independent	President	President	“The President may waive this subsection if the President decides, and reports to Congress, that the waiver is required because of national security interests or a humanitarian emergency.”
51)	50 U.S.C. § 1515	War and National Defense	Dependent	President	President	“After November 19, 1969, the operation of this chapter, [regarding chemical and biological weapons] or any portion thereof, may be suspended by the President during the period of any war declared by Congress and during the period of any national emergency declared by Congress or by the President.”
52)	50 U.S.C. § 3809(e)	War and National Defense	Dependent	President	President	“[T]he President may assign additional armed forces personnel to the Selective Service System during a time of war or national emergency declared by Congress or the President.”
53)	50 U.S.C. § 4511(e)(1)	War and National Defense	Independent	President	President	“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.”
54)	50 U.S.C. § 98f(a)	War and National Defense	Dependent	President	President	“Materials in the stockpile may be released for use, sale, or other disposition—(1) on the order of the President, at any time the President determines the release of such materials is required for purposes of the national defense; (2) in time of war declared by the Congress or during a national emergency”
55)	50 U.S.C. § 4560(e)	War and National Defense	Dependent	President	President	“[T]he President may provide] for the establishment and training of a nucleus executive reserve for employment in executive positions in Government”
56)	50 U.S.C. § 1701(a)	War and National Defense	Dependent	President	President	“Any authority granted to the President by section 1702 of this title may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.”
57)	50 U.S.C. § 1431	War and National Defense	Dependent	President	President	“The President may authorize any department or agency of the Government which exercises functions in connection with the national defense, acting in accordance with regulations prescribed by the President for the protection of the Government, to enter into contracts or into amendments or modifications of contracts heretofore or hereafter made and to make advance payments thereon, without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever he deems that such action would facilitate the national defense.”

58) 50 U.S.C. § 4531(d)(1)(B)	War and National Defense	Dependent	President	President	“The requirements of subparagraph (A) [concerning limits on federal guarantees relating to any domestic industrial-base shortfall] may be waived—(i) during a period of national emergency declared by Congress or the President; or (ii) upon a determination by the President, on a nondelegable basis, that a specific guarantee is necessary to avert an industrial resource or critical technology item shortfall that would severely impair national defense capability.”				
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“National Security”												
	10 U.S.C. § 1301	15 U.S.C. § 784	22 U.S.C. § 2347c	22 U.S.C. § 2378-1	22 U.S.C. § 2780	22 U.S.C. § 6301	22 U.S.C. § 6727	22 U.S.C. § 9269b	33 U.S.C. § 1323	50 U.S.C. § 3047	50 U.S.C. § 2363	50 U.S.C. § 4612
1 U.S.C. § 112b												
5 U.S.C. § 5317	10 U.S.C. § 8679	15 U.S.C. § 8815	22 U.S.C. § 2348	22 U.S.C. § 2378a	22 U.S.C. § 2796	22 U.S.C. § 6446	22 U.S.C. § 7207	22 U.S.C. § 9411	42 U.S.C. § 6274	50 U.S.C. § 3381	50 U.S.C. § 4517	50 U.S.C. § 4613
5 U.S.C. § 7103	14 U.S.C. § 1151	19 U.S.C. § 1862(c)(3)(A)	22 U.S.C. § 2364	22 U.S.C. § 2754	22 U.S.C. § 2797b	22 U.S.C. § 6713	22 U.S.C. § 7430	22 U.S.C. § 9528	42 U.S.C. § 7412	50 U.S.C. § 4305	50 U.S.C. § 4565(d)(1)	
5 U.S.C. app. 2 § 6	15 U.S.C. § 640	21 U.S.C. § 1903	22 U.S.C. § 2370	22 U.S.C. § 2763	22 U.S.C. § 2798	22 U.S.C. § 5605	22 U.S.C. § 8425	22 U.S.C. § 9530	42 U.S.C. § 7671c	47 U.S.C. § 305	50 U.S.C. § 4611	
10 U.S.C. § 1107	15 U.S.C. § 713d-1	22 U.S.C. § 2295a	22 U.S.C. § 2371	22 U.S.C. § 2767	22 U.S.C. § 3424	22 U.S.C. § 5854	22 U.S.C. § 8606	28 U.S.C. § 1610	42 U.S.C. § 8871			
											TOTAL	60
“Imminent and Substantial Endangerment”												
42 U.S.C. § 9606											TOTAL	1

<i>Weak President/Strong Agency</i> "Emergency"						
Citation	U.S.C. Title Name	Independent or Dependent?	Declaration	Powers	Emergency Powers	
1) 6 U.S.C. § 321(a)	Domestic Security	Independent	Agency	Agency	"At the direction of the Secretary (in connection with an actual or threatened terrorist attack, major disaster, or other emergency in the United States), the Nuclear Incident Response Team shall operate as an organizational unit of the Department. While so operating, the Nuclear Incident Response Team shall be subject to the direction, authority, and control of the Secretary."	
2) 6 U.S.C. § 624(c)(1)	Domestic Security	Independent	Agency	Agency	"[I]f the Secretary determines that there is an imminent threat of death, serious illness, or severe personal injury, due to a violation of this subchapter or the risk of a terrorist incident that may affect a chemical facility of interest, the Secretary—(A) shall consult with the facility, if practicable, on steps to mitigate the risk; and (B) may order the facility, without notice or opportunity for a hearing, effective immediately or as soon as practicable, to—(i) implement appropriate emergency security measures; or (ii) cease or reduce some or all operations, in accordance with safe shutdown procedures, if the Secretary determines that such a cessation or reduction of operations is the most appropriate means to address the risk."	
3) 7 U.S.C. § 136p	Agriculture	Independent	Agency	Agency	"The Administrator may, at the Administrator's discretion, exempt any Federal or State agency from any provision of this subchapter [of the Environmental Pesticide Control Act] if the Administrator determines that emergency conditions exist which require such exemption. The Administrator, in determining whether or not such emergency conditions exist, shall consult with the Secretary of Agriculture and the Governor of any State concerned if they request such determination."	
4) 7 U.S.C. § 1471(a)	Agriculture	Independent	Agency	Agency	"The Secretary shall provide emergency feed assistance under this subchapter for the preservation and maintenance of livestock in any State or area of a State where, because of disease, insect infestation, flood, drought, fire, hurricane, earthquake, storm, hot weather, or other natural disaster, the Secretary determines that a livestock emergency exists The Secretary shall provide emergency feed assistance under this subchapter for the preservation and maintenance of livestock, to livestock producers that—(A) conduct farming, ranching, or aquaculture operations in any county contiguous to a county where the Secretary has determined, under subsection (a) of this section that a livestock emergency exists, and (B) are otherwise eligible for assistance under this subchapter."	
5) 7 U.S.C. § 8401(g)(1)(E)	Agriculture	Independent	Agency	Agency	"Upon request of the Secretary of Health and Human Services, after the granting by such Secretary of an exemption under 262a(g)(3) of title 42 pursuant to a finding that there is a public health emergency, the Secretary of Agriculture may temporarily exempt a person from the applicability of the requirements of this section with respect to an overlap agent or toxin, in whole or in part, to provide for the timely participation of the person in a response to the public health emergency." (footnote omitted)	

6)	12 U.S.C. § 1715d(q)(1)	Banks and Banking	Independent	Agency	Agency	“Notwithstanding any other provision of this section, except subsection (n), if the Secretary determines that there is a substantial need for emergency stimulation of the housing market, the Secretary is authorized to make and enter into contracts to make periodic assistance payments, to the extent of not to exceed 75 per centum of the authority available pursuant to subsection (b)(1), on behalf of homeowners”
7)	12 U.S.C. § 2705(b)	Banks and Banking	Independent	Agency	Agency	“Emergency mortgage relief payments shall be made under this section only with respect to a mortgage which meets the requirements of section 2702 of this title and only on such terms and conditions as the Secretary may prescribe, subject to the provisions of section 2703 of this title.”
8)	15 U.S.C. § 766(a)(2)	Commerce and Trade	Independent	Agency	Agency	“The review required by paragraph (1) of this subsection may be waived for a period of fourteen days if there is an emergency situation which, in the judgment of the Administrator, requires making effective the action proposed to be taken at a date earlier than would permit the Administrator of the Environmental Protection Agency”
9)	15 U.S.C. § 781(k)(2)(A)	Commerce and Trade	Independent	Agency	Agency	“The Commission, in an emergency, may by order summarily take such action to alter, supplement, suspend, or impose requirements or restrictions with respect to any matter or action subject to regulation by the Commission or a self-regulatory organization under the securities laws, as the Commission determines is necessary in the public interest and for the protection of investors— (i) to maintain or restore fair and orderly securities markets (other than markets in exempted securities)”
10)	15 U.S.C. § 780-5	Commerce and Trade	Independent	Agency	Agency	“The appropriate regulatory agency shall consult with and consider the views of the Secretary prior to approving or amending a rule or regulation under this paragraph, except where the appropriate regulatory agency determines that an emergency exists requiring expeditious and summary action and publishes its reasons therefor. If the Secretary comments in writing to the appropriate regulatory agency on a proposed rule or regulation that has been published for comment, the appropriate regulatory agency shall respond in writing to such written comment before approving the proposed rule or regulation.”
11)	15 U.S.C. § 78s(b)(5)	Commerce and Trade	Independent	Agency	Agency	“The Commission shall consult with and consider the views of the Secretary of the Treasury prior to approving a proposed rule filed by a registered securities association that primarily concerns conduct related to transactions in government securities, except where the Commission determines that an emergency exists requiring expeditious or summary action and publishes its reasons therefor.”
12)	16 U.S.C. § 832d(b)	Conservation	Independent	Agency	Agency	“The administrator is authorized to enter into contracts with public or private power systems for the mutual exchange of unused excess power upon suitable exchange terms for the purpose of economical operation or of providing emergency or break-down relief.”

NORTHWESTERN UNIVERSITY LAW REVIEW

13)	16 U.S.C. § 1371(e)(5)(C)(i)	Conservation	Independent	Agency	Agency	<p>“The requirement for notice and opportunity for public comment in subparagraph (B) shall not apply in the case of a suspension of permission to take if the Secretary determines that an emergency exists which poses a significant risk to the well-being of the species or stock concerned.”</p> <p>“If the Secretary finds that the incidental mortality and serious injury of marine mammals in the yellowfin tuna fishery in the eastern tropical Pacific Ocean is continuing to have a significant adverse impact on a stock or species, the Secretary may extend the emergency regulations for such additional periods as may be necessary.”</p> <p>“[I]f the Secretary applies such prohibition after he finds, and publishes his finding, that an emergency exists posing a significant risk to the well-being of such species and that the prohibition must be applied to protect such species. The Secretary’s finding and publication may be made without regard to the public hearing or comment provisions of section 553 of title 5 or any other provision of this chapter; but such prohibition shall expire 90 days after the date of its imposition unless the Secretary further extends such prohibition by publishing notice and a statement of justification of such extension.”</p>
14)	16 U.S.C. § 1413(c)(4)	Conservation	Independent	Agency	Agency	<p>“There shall be established in the Treasury a special rural fire disaster fund that shall be immediately available to and used by the Secretary to supplement any other money available to carry out this section with respect to rural fire emergencies, as determined by the Secretary. The Secretary shall determine that State and local resources are fully used or will be fully used before expending money in the disaster fund to assist a State in which one or more rural fire emergencies exist. There are hereby authorized to be appropriated such sums as may be needed to establish and replenish the disaster fund established by this subsection.”</p>
15)	16 U.S.C. § 1535(g)(2)(B)(ii)	Conservation	Independent	Agency	Agency	<p>“[I]f the Secretary need not consult with such committee regarding funds to be expended under emergency conditions that the Secretary may determine.”</p>
16)	16 U.S.C. § 2106(f)	Conservation	Independent	Agency	Agency	<p>“The Secretary of Agriculture is authorized to make payments to agricultural producers who carry out emergency water conservation or water enhancing measures (including measures carried out to assist confined livestock) during periods of severe drought as determined by the Secretary.”</p>
17)	16 U.S.C. § 2109(c)	Conservation	Independent	Agency	Agency	<p>“If the Secretary determines that an emergency situation exists and that extraordinary measures must be taken for public safety or to assure the continued viability of a particular fish or wildlife population, the Secretary may immediately close the public lands, or any portion thereof, to the subsistence uses of such population and shall publish the reasons justifying the closure in the Federal Register. Such emergency closure shall be effective when made, shall not extend for a period exceeding sixty days, and may not subsequently be extended unless the Secretary affirmatively establishes, after notice and public hearing, that such closure should be extended.”</p>
18)	16 U.S.C. § 2202	Conservation	Independent	Agency	Agency	
19)	16 U.S.C. § 3126(b)	Conservation	Independent	Agency	Agency	

20	16 U.S.C. § 410cc-32(3)	Conservation	Independent	Agency	Agency	“The Commission may request funds from the Secretary to . . . take any action the Commission considers necessary to provide owners of property with national historical or cultural significance within the park or preservation district with emergency assistance for the purpose of preserving and protecting their property in a manner consistent with the purpose of this subchapter”
21	16 U.S.C. § 410r-9(a)(3)	Conservation	Independent	Agency	Agency	“The Secretary may allow use of Hurricane Hole by sailing vessels during emergencies, subject to such terms and conditions as the Secretary determines to be necessary.”
22	16 U.S.C. § 545b(d)(5)(C)	Conservation	Independent	Agency	Agency	“Except during an emergency, as determined by the Secretary, the Secretary shall consult with the Oregon State Department of Fish and Wildlife before issuing any regulation under this subsection.”
23	16 U.S.C. § 2203	Conservation	Independent	Agency	Agency	“The Secretary of Agriculture is authorized to undertake emergency measures, including the purchase of floodplain easements, for runoff retardation and soil-erosion prevention, in cooperation with landowners and land users, as the Secretary deems necessary to safeguard lives and property from floods, drought, and the products of erosion on any watershed whenever fire, flood, or any other natural occurrence is causing or has caused a sudden impairment of that watershed.”
24	16 U.S.C. § 824a(c)(1)	Conservation	Independent	Agency	Agency	“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.”
25	19 U.S.C. § 2492(d)(3)	Customs Duties	Independent	Agency	Agency	“The Secretary of Transportation may provide for such exceptions from paragraphs (1) and (2) [concerning the President’s authority to suspend foreign air carrier service to or from the United States] as the Secretary considers necessary to provide for emergencies in which the safety of an aircraft or its crew or passengers is threatened.”
26	19 U.S.C. § 2497(e)(1)	Customs Duties	Independent	Agency	Agency	“The Secretary shall use up to \$50,000,000 per year from the Trust Fund to provide emergency relief to eligible producers of livestock, honey bees, and farm-raised fish to aid in the reduction of losses due to disease, adverse weather, or other conditions, such as blizzards and wildfires, as determined by the Secretary, that are not covered under subsection (b), (c), or (d).”
27	19 U.S.C. § 3391(h)(1)	Customs Duties	Independent	Agency	Agency	“[I]f at any time the Secretary of Agriculture determines that the implementation of the Agreement has caused low-income migrant or seasonal farmworkers to lose income, the Secretary may make available grants, not to exceed \$20,000,000 for any fiscal year, to public agencies or private organizations with tax-exempt status under section 501(c)(3) of title 26, that have experience in providing emergency services to low-income migrant or seasonal farmworkers. Emergency services to be provided with assistance received under this subsection may include such types of assistance as the Secretary determines to be necessary and appropriate.”

28)	21 U.S.C. § 360bbb(a)	Food and Drugs	Independent	Agency	Agency	“The Secretary may, under appropriate conditions determined by the Secretary, authorize the shipment of investigational drugs or investigational devices for the diagnosis, monitoring, or treatment of a serious disease or condition in emergency situations.”
29)	21 U.S.C. § 360bbb-3(a)(1)	Food and Drugs	Independent	Agency	Agency	“[T]he Secretary may authorize the introduction into interstate commerce, during the effective period of a declaration under subsection (b) of this section, of a drug, device, or biological product intended for use in an actual or potential emergency (referred to in this section as an ‘emergency use’).”
30)	21 U.S.C. § 360ccc-1(a)(3)(A)	Food and Drugs	Dependent	Agency	Agency	“[T]he Secretary shall . . . (i) establish a process by which an authorized manufacturer, repackager, wholesale distributor, or dispenser may request a waiver from any of the requirements set forth in this section, which the Secretary may grant if the Secretary determines that such requirements would result in an undue economic hardship or for emergency medical reasons, including a public health emergency declaration pursuant to section 247d of title 42”
31)	21 U.S.C. § 371(e)(3)	Food and Drugs	Independent	Agency	Agency	“[T]he Secretary shall specify in the order the date on which it shall take effect, except that it shall not be made to take effect prior to the ninetieth day after its publication unless the Secretary finds that emergency conditions exist necessitating an earlier effective date, in which event the Secretary shall specify in the order his findings as to such conditions.”
32)	21 U.S.C. § 379(c)(2)	Food and Drugs	Dependent	Agency	Agency	“The written agreement to provide information to the foreign government under this subsection shall include a commitment by the foreign government to protect information exchanged under this subsection from disclosure unless and until the sponsor gives written permission for disclosure or the Secretary makes a declaration of a public health emergency pursuant to section 247d of title 42 that is relevant to the information.”
33)	21 U.S.C. § 379s(b)(5)(C)(iii)	Food and Drugs	Independent	Agency	Agency	“[T]he Secretary may not act by order on such proposal until the advisory committee has made a report and recommendations to him under clause (i) of this subparagraph and he has considered such recommendations, unless the Secretary finds that emergency conditions exist necessitating the issuance of an order notwithstanding this clause.”
34)	21 U.S.C. § 829(a)	Food and Drugs	Independent	Agency	Agency	“Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule II, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act . . . , may be dispensed without the written prescription of a practitioner, except that in emergency situations, as prescribed by the Secretary by regulation after consultation with the Attorney General, such drug may be dispensed upon oral prescription in accordance with section 503(b) of that Act. . . .” (citations omitted)

35)	22 U.S.C. § 2669	Foreign Relations and Intercourse	Independent	Agency	Agency	<p>“The Secretary of State may use funds appropriated or otherwise available to the Secretary to . . . (h) directly procure goods and services in the United States or abroad, solely for use by United States Foreign Service posts abroad when the Secretary of State, in accordance with guidelines established in consultation with the Administrator of General Services, determines that use of the Federal Acquisition Service or otherwise applicable Federal goods and services acquisition authority would not meet emergency overseas security requirements determined necessary by the Secretary, taking into account overseas delivery, installation, maintenance, or replacement requirements, except that the authority granted by this paragraph shall cease to be effective when the amendment made by section 2711 of the Competition in Contracting Act of 1984 takes effect and thereafter procurement by the Secretary of State for the purposes described in this paragraph shall be in accordance with section 3304(a)(2) of title 41”</p>
36)	22 U.S.C. § 2679d	Foreign Relations and Intercourse	Independent	Agency	Agency	<p>“A determination by the Department to use procedures other than competitive procedures under section 3304 of title 41 in order to meet emergency security requirements, as determined by the Secretary or the Secretary’s designee, including physical security upgrades, protective equipment, and other immediate threat mitigation projects, shall not be subject to challenge by protest under either subchapter V of chapter 35 of title 31 or section 1491 of title 28.”</p>
37)	22 U.S.C. § 2703(b)	Foreign Relations and Intercourse	Independent	Agency	Agency	<p>“The Secretary may establish and maintain emergency commissary or mess services in places abroad where, in the judgment of the Secretary, such services are necessary temporarily to insure the effective and efficient performance of official duties and responsibilities.”</p>
38)	22 U.S.C. § 5605(b)(2)(F)(iii)	Foreign Relations and Intercourse	Independent	Agency	Agency	<p>“The Secretary of Transportation may provide for such exceptions from clauses (i) and (ii) as the Secretary considers necessary to provide for emergencies in which the safety of an aircraft or its crew or passengers is threatened.”</p>
39)	24 U.S.C. § 34	Hospitals and Asylums	Independent	Agency	Agency	<p>“[H]ospitalization and dispensary service may be provided at naval hospitals and dispensaries outside of the continental limits of the United States and in Alaska, to the officers and employees of any department or agency of the Federal Government, to employees of a contractor with the United States or his subcontractor, to the dependents of such persons, and in emergencies to such other persons as the Secretary of the Navy may prescribe”</p>
40)	25 U.S.C. § 1684(c)	Indians	Independent	Agency	Agency	<p>“On request by the Attorney General, the Secretary of the Interior, or the Secretary of Health and Human Services, the Secretary of the Treasury shall transfer from the Fund to the Attorney General, the Secretary of the Interior, or the Secretary of Health and Human Services, as appropriate, such amounts as the Attorney General, the Secretary of the Interior, or the Secretary of Health and Human Services determines to be necessary to carry out the emergency plan under subsection (f).”</p>
41)	25 U.S.C. § 3805(c)(4)(B)	Indians	Independent	Agency	Agency	<p>“[I]f the Secretary determines that an emergency circumstance exists with respect to an Indian dam, subparagraph (A)], the requirement that the Secretary report expenditures,] shall not apply with respect to that Indian dam.”</p>

42)	29 U.S.C. § 3244(e)	Labor	Independent	Agency	Agency	<p>"In emergency situations, if the Secretary determines it is necessary to protect the integrity of the funds or ensure the proper operation of the program or activity involved, the Secretary may immediately terminate or suspend financial assistance, in whole or in part, to the recipient, if the recipient is given prompt notice and the opportunity for a subsequent hearing within 30 days after such termination or suspension."</p>
43)	30 U.S.C. § 1257(h)	Mineral Lands and Mining	Independent	Agency	Agency	<p>"In addition to the authority to acquire land under subsection (d) of this section the Secretary is authorized to use money in the fund to acquire land by purchase, donation, or condemnation, and to reclaim and transfer acquired land to any State or to a political subdivision thereof, or to any person, firm, association, or corporation, if he determines that such is an integral and necessary element of an economically feasible plan for the project to construct or rehabilitate housing for persons disabled as the result of employment in the mines or work incidental thereto, persons displaced by acquisition of land pursuant to this section, or persons dislocated as the result of adverse effects of coal mining practices which constitute an emergency as provided in section 1240 of this title or persons dislocated as the result of natural disasters or catastrophic failures from any cause."</p>
44)	30 U.S.C. § 1240(a)	Mineral Lands and Mining	Independent	Agency	Agency	<p>"The Secretary is authorized to expend moneys from the fund for the emergency restoration, reclamation, abatement, control, or prevention of adverse effects of coal mining practices, on eligible lands, if the Secretary makes a finding of fact that—(1) an emergency exists constituting a danger to the public health, safety, or general welfare; and (2) no other person or agency will act expeditiously to restore, reclaim, abate, control, or prevent the adverse effects of coal mining practices."</p>
45)	30 U.S.C. § 811(b)	Mineral Lands and Mining	Independent	Agency	Agency	<p>"The Secretary shall provide, without regard to the requirements of chapter 5 of title 5 for an emergency temporary mandatory health or safety standard to take immediate effect upon publication in the Federal Register if he determines (A) that miners are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful, or to other hazards, and (B) that such emergency standard is necessary to protect miners from such danger."</p>
46)	38 U.S.C. § 703(f)(1)	Veterans' Benefits	Independent	Agency	Agency	<p>"The Secretary, upon determining that an emergency situation exists and that such action is necessary for the effective conduct of the affairs of the Department, may use Government-owned, or leased, vehicles to transport employees to and from their place of employment and the nearest adequate public transportation or, if such public transportation is either unavailable or not feasible to use, to and from their place of employment and their home."</p>

47)	42 U.S.C. § 2113(b)(5)	The Public Health and Welfare	Independent	Agency	Agency	<p>“The Commission may, pursuant to a license, or by rule or order, require the Secretary or other Federal agency or State having custody of such property and materials to undertake such monitoring, maintenance, and emergency measures as are necessary to protect the public health and safety and such other actions as the [Atomic Energy] Commission deems necessary to comply with the standards promulgated pursuant to section 2114 of this title [regarding management of any radioactive waste]. The Secretary or such other Federal agency is authorized to carry out maintenance, monitoring, and emergency measures, but shall take no other action pursuant to such license, rule or order, with respect to such property and materials unless expressly authorized by Congress after November 8, 1978.”</p>
48)	42 U.S.C. § 6247a(c)	The Public Health and Welfare	Independent	Agency	Agency	<p>“The Secretary shall ensure that agreements to store petroleum products for foreign governments or their representatives do not impair the ability of the United States to withdraw, distribute, or sell petroleum products from the Strategic Petroleum Reserve in response to an energy emergency or to the obligations of the United States under the Agreement on an International Energy Program.”</p>
49)	42 U.S.C. § 7914(f)(2)	The Public Health and Welfare	Independent	Agency	Agency	<p>“The Commission may, pursuant to such license or by rule or order, require the Secretary or other Federal agency having custody of such property and minerals to undertake such monitoring, maintenance, and emergency measures necessary to protect public health and safety and other actions as the Commission deems necessary to comply with the standards of section 2022(a) [concerning the safety of uranium mill tailings sites and depository sites] of this title. The Secretary or such other Federal agency is authorized to carry out maintenance, monitoring and emergency measures under this subsection, but shall take no other action pursuant to such license, rule or order with respect to such property and minerals unless expressly authorized by Congress after November 8, 1978.”</p>
50)	43 U.S.C. § 1334(i)	Public Lands	Independent	Agency	Agency	<p>“After September 18, 1978, no holder of any oil and gas lease issued or maintained pursuant to this subchapter shall be permitted to flare natural gas from any well unless the Secretary finds that there is no practicable way to complete production of such gas, or that such flaring is necessary to alleviate a temporary emergency situation or to conduct testing or work-over operations.”</p>
51)	43 U.S.C. § 1353(c)(2)	Public Lands	Independent	Agency	Agency	<p>“Whenever, after consultation with and advice from the Secretary of Energy, the Federal Energy Regulatory Commission determines that an emergency shortage of natural gas is threatening to cause severe economic or social dislocation in any region of the United States and that such region can be serviced in a practical, feasible, and efficient manner by royalty, net profit share, or purchased gas obtained pursuant to the provisions of this section, the Secretary of the Interior may allocate or conduct a lottery for the sale of such gas, and shall limit participation in any allocation or lottery sale of such gas to any person servicing such region, but he shall not sell any such gas for more than its regulated price, or, if no regulated price applies, less than its fair market value.”</p>

52)	43 U.S.C. § 1714(e)	Public Lands	Independent	Agency	Agency	<p>“When the Secretary determines, or when the Committee on Natural Resources of the House of Representatives or the Committee on Energy and Natural Resources of the Senate notifies the Secretary, that an emergency situation exists and that extraordinary measures must be taken to preserve values that would otherwise be lost, the Secretary notwithstanding the provisions of subsections (c)(1) and (d) of this section, shall immediately make a withdrawal and file notice of such emergency withdrawal with both of those Committees.”</p>
53)	44 U.S.C. § 3553(h)(1)(A)	Public Printing and Documents	Independent	Agency	Agency	<p>“[I]n response to a known or reasonably suspected information security threat, vulnerability, or incident that represents a substantial threat to the information security of an agency, the Secretary may issue an emergency directive to the head of an agency to take any lawful action with respect to the operation of the information system, including such systems used . . . for the purpose of protecting the information system from, or mitigating, an information security threat.”</p>
54)	46 U.S.C. § 53107(b)(1)	Shipping	Independent	Agency	Agency	<p>“An Emergency Preparedness Agreement under this section shall require that a contractor for a vessel covered by an operating agreement under this chapter shall make commercial transportation resources (including services) available, upon request by the Secretary of Defense during a time of war or national emergency, or whenever the Secretary of Defense determines that it is necessary for national security or contingency operation”</p>
55)	49 U.S.C. § 114(g)(1), (3)	Transportation	Independent	Agency	Agency	<p>“Subject to the direction and control of the Secretary of Homeland Security, the Administrator, during a national emergency, shall have the following responsibilities [regarding coordination of transportation and working with other agencies] The Secretary of Homeland Security shall prescribe the circumstances constituting a national emergency for purposes of this subsection.”</p>
56)	49 U.S.C. § 20104(a)(1)	Transportation	Independent	Agency	Agency	<p>“If, through testing, inspection, investigation, or research carried out under this chapter, the Secretary of Transportation decides that an unsafe condition or practice, or a combination of unsafe conditions and practices, causes an emergency situation involving a hazard of death, personal injury, or significant harm to the environment, the Secretary immediately may order restrictions and prohibitions, without regard to section 20103(e) of this title, that may be necessary to abate the situation.”</p>
57)	49 U.S.C. § 60117(o)(1)–(2)	Transportation	Independent	Agency	Agency	<p>“If the Secretary determines that an unsafe condition or practice, or a combination of unsafe conditions and practices, constitutes or is causing an imminent hazard, the Secretary may issue an emergency order described in paragraph (3) imposing emergency restrictions, prohibitions, and safety measures on owners and operators of gas or hazardous liquid pipeline facilities without prior notice or an opportunity for a hearing, but only to the extent necessary to abate the imminent hazard. . . . Before issuing an emergency order under paragraph (1), the Secretary shall consider, as appropriate, the following factors: (i) The impact of the emergency order on public health and safety. (ii) The impact, if any, of the emergency order on the national or regional economy or national security. (iii) The impact of the emergency order on the ability of owners and operators of pipeline facilities to maintain reliability and continuity of service to customers.”</p>

Strong President/Strong Agency
"Emergency"

Citation	U.S.C. Title Name	Independent or Dependent?	Declaration	Powers	Emergency Powers
1) 5 U.S.C. § 6391(b)	Government Organization and Employees	Dependent	President	Agency, President	"In the event of a major disaster or emergency, as declared by the President, that results in severe adverse effects for a substantial number of employees, the President may direct the Office of Personnel Management to establish an emergency leave transfer program under which any employee in any agency may donate unused annual leave for transfer to employees of the same or other agencies who are adversely affected by such disaster or emergency."
2) 7 U.S.C. § 1332(c)	Agriculture	Dependent	Agency, President	Agency	"If, after the proclamation of a national marketing quota for wheat for any marketing year, the Secretary has reason to believe that, because of a national emergency or because of a material increase in the demand for wheat, the national marketing quota should be terminated or the amount thereof increased, he shall [initiate an] investigation to be made [and] . . . [i]f, on the basis of such investigation, the Secretary finds that such action is necessary, he shall immediately proclaim such finding and the amount of any such increase found by him to be necessary and thereupon such national marketing quota shall be so increased or terminated."
3) 7 U.S.C. § 1371(b)	Agriculture	Dependent	Agency, President	Agency	"If the Secretary has reason to believe that, because of a national emergency or because of a material increase in export demand, any national marketing quota or acreage allotment for cotton, or rice should be increased or terminated, he shall cause an immediate investigation to be made [and] . . . [i]f, on the basis of such investigation, the Secretary finds that such increase or termination is necessary, he shall immediately proclaim such finding (and if he finds an increase is necessary, the amount of the increase found by him to be necessary) and thereupon such quota or allotment shall be increased, or shall terminate, as the case may be."

4)	7 U.S.C. § 1427(a)(a), (c)-(d)	Agriculture	Dependent	President	Agency	<p>"[T]he Secretary of Agriculture may under the provisions of this Act establish, maintain, and dispose of a separate reserve of inventories of not to exceed 75 million bushels of wheat, feed grains, and soybeans for the purpose of alleviating distress caused by a natural disaster . . . [and] [e]xcept when a state of emergency has been proclaimed by the President or by concurrent resolution of Congress declaring that such reserves should be disposed of, the Secretary shall not offer any commodity in the reserve for sale or disposition." "The Secretary is also authorized to dispose of such commodities only for (1) use in relieving distress (A) in any State, the District of Columbia, Puerto Rico, Guam, or the Virgin Islands of the United States, (B) in connection with any major disaster or emergency determined by the President . . . and (C) in connection with any emergency determined by the Secretary to warrant assistance under section 1427 [which also requires presidential emergency declaration] . . . or (2) use in connection with a state of civil defense emergency as proclaimed by the President or by concurrent resolution of the Congress in accordance with title VI of The Robert T. Stafford Disaster Relief and Emergency Assistance Act." (citation omitted)</p>
5)	7 U.S.C. § 1961(a)	Agriculture	Dependent	Agency, President	Agency	<p>"The Secretary shall make and insure loans under this subchapter . . . where the Secretary finds that the applicants' farming, ranching, or aquaculture operations have been substantially affected by . . . a natural disaster in the United States, or a major disaster or emergency designated by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act . . ." (citation omitted)</p>
6)	7 U.S.C. § 624(b)	Agriculture	Independent	Agency	President	<p>"In any case where the Secretary of Agriculture determines and reports to the President with regard to any article or articles that a condition exists requiring emergency treatment, the President may take immediate action under this section without awaiting the recommendations of the International Trade Commission, such action to continue in effect pending the report and recommendations of the International Trade Commission and action thereon by the President."</p>
7)	10 U.S.C. § 1104(d)	Armed Forces	Dependent	President	Agency	<p>"Members of the armed forces on active duty during and immediately following a period of war, or during and immediately following a national emergency involving the use of the armed forces in armed conflict, may be provided health-care services by the Department of Veterans Affairs . . ."</p>

NORTHWESTERN UNIVERSITY LAW REVIEW

8)	10 U.S.C. § 1491(e)(1)	Armed Forces	Dependent	Agency, President	Agency	<p>“The Secretary of Defense may waive any requirement . . . [with respect to funeral honors for veterans] when the Secretary considers it necessary to do so to meet the requirements of war, national emergency, or a contingency operation or other military requirements. The authority to make such a waiver may not be delegated to an official of a military department other than the Secretary of the military department and may not be delegated within the Office of the Secretary of Defense to an official at a level below Under Secretary of Defense.”</p>
9)	10 U.S.C. § 2632(a)(2)	Armed Forces	Dependent	President	Agency	<p>“Transportation that may be provided under this subsection is assured and adequate transportation by motor vehicle or water carrier as follows: . . . Transportation to and from their places of employment for persons attached to, or employed in, a private plant that is manufacturing material for that department, but only during a war or a national emergency declared by Congress or the President.”</p>
10)	10 U.S.C. § 620(d)	Armed Forces	Dependent	President	Agency	<p>“Under regulations prescribed by the Secretary of the military department concerned, a reserve officer who is ordered to active duty (whether voluntarily or involuntarily) during a war or national emergency and who would otherwise be placed on the active-duty list may be excluded from that list as determined by the Secretary concerned. Exclusion of an officer from the active-duty list as the result of action by the Secretary concerned under the preceding sentence shall expire not later than 24 months after the date on which the officer enters active duty under an order to active duty covered by that sentence.”</p>
11)	10 U.S.C. § 871 art. 71(b)	Armed Forces	Dependent	President	Agency	<p>“[I]n the case of a commissioned officer, cadet, or midshipman, . . . the Secretary, Under Secretary, or Assistant Secretary [of the military department concerned] . . . may commute . . . a [court martial] sentence of dismissal to reduction to any enlisted grade. A person so reduced may be required to serve for the duration of the war or emergency and for six months thereafter.”</p>
12)	10 U.S.C. § 1076a(c)(2)(A)	Armed Forces	Dependent	President	Agency	<p>“During a national emergency declared by the President or Congress and subject to regulations prescribed by the Secretary of Defense, the Secretary may waive, in whole or in part, the charges otherwise payable by a member of the Selected Reserve of the Ready Reserve or a member of the Individual Ready Reserve under paragraph (1) for the coverage of the member alone under the dental insurance plan established under subsection (a)(1) if the Secretary determines that such waiver of the charges would facilitate or ensure the readiness of a unit or individual for deployment.”</p>
13)	10 U.S.C. § 12302(a), (c)	Armed Forces	Dependent	President	Agency	<p>“[A]n authority designated by the Secretary concerned may, without the consent of the persons concerned, order any unit, and any member not assigned to a unit organized as a unit, in the Ready Reserve . . . to active duty for not more than 24 consecutive months”;</p> <p>“[n]ot more than 1,000,000 members of the Ready Reserve may be on active duty, without their consent, under this section at any one time.”</p>

14)	10 U.S.C. § 2208(l)(2)	Armed Forces	Dependent	Agency, President	Agency	“The Secretary of Defense may waive the notification requirements [for advance billing of a customer of a working capital fund] of paragraph (1)—(A) during a period of war or national emergency; or (B) to the extent that the Secretary determines necessary to support a contingency operation.”
15)	10 U.S.C. § 2350j(e)(3)(A)	Armed Forces	Dependent	President	Agency	“A military construction project under subsection (d) may be carried out without regard to the requirement in paragraph (1) and the limitation in paragraph (2) if the project is necessary to support the armed forces in the country or region in which the project is carried out by reason of a declaration of war, or a declaration by the President of a national emergency pursuant to the National Emergencies Act . . . that is in force at the time of the commencement of the project.” (citation omitted)
16)	10 U.S.C. § 2461(e)	Armed Forces	Dependent	President	Agency	“The provisions of this section [concerning the conversion of Department of Defense civilian employees to contractors] shall not apply during war or during a period of national emergency declared by the President or Congress.”
17)	10 U.S.C. § 2662(a), (f)	Armed Forces	Dependent	Agency, President	Agency	“The reporting requirement set forth in subsection (a) shall not apply with respect to a real property transaction [by a Defense Agency] otherwise covered by that subsection if the Secretary concerned determines that the transaction is made as a result of any of the following: . . . A declaration of a national emergency by the President pursuant to the National Emergencies Act . . . [or a] declaration of an emergency or major disaster pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act”
18)	10 U.S.C. § 2808(a)	Armed Forces	Dependent	President	Agency	“In the event of a declaration of war or the declaration by the President of a national emergency . . . that requires use of the armed forces, the Secretary of Defense, without regard to any other provision of law, may undertake military construction projects, and may authorize Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law that are necessary to support such use of the armed forces.”
19)	10 U.S.C. § 708(d)(1)	Armed Forces	Dependent	President	Agency	“In time of war, or of national emergency . . . the Secretary [of military department] concerned may cancel any [educational] leave of absence granted [to a member of the armed forces under § 708].”
20)	10 U.S.C. § 8624	Armed Forces	Dependent	President	Agency	“In time of war or during a national emergency declared by the President, such persons as the Secretary of the Navy authorizes by regulation may be transported and subsisted on naval vessels at Government expense.”
21)	12 U.S.C. § 95(a)	Banks and Banking	Independent	President	Agency, President	“[T]o relieve interstate commerce of the burdens and obstructions resulting from the receipt on an unound or unsafe basis of deposits subject to withdrawal by check, during such emergency period as the President of the United States by proclamation may prescribe, no member bank of the Federal Reserve System shall transact any banking business except to such extent and subject to such regulations, limitations and restrictions as may be prescribed by the Secretary of the Treasury, with the approval of the President.”

22)	14 U.S.C. § 331	Coast Guard	Dependent	President	Agency	"In time of war or national emergency, the Secretary [of the department in which the Coast Guard is operating] may order any regular officer on the retired list to active duty."
23)	14 U.S.C. § 359	Coast Guard	Dependent	President	Agency	"In times of war or national emergency, the Commandant [of the Coast Guard] may order any enlisted member on the retired list to active duty."
24)	14 U.S.C. § 636(a)	Coast Guard	Dependent	President	Agency	"Such commissioned and warrant officers of the Coast Guard as may be designated by the Commandant may, pursuant to rules prescribed by the Commandant, exercise the general powers of a notary public in the administration of oaths for the following purposes: . . . execution, acknowledgment, and attestation of instruments and papers, and all other notarial acts in time of war or national emergency . . ."
25)	14 U.S.C. § 2779(a)	Coast Guard	Dependent	President	Agency	"Whenever the Secretary determines that it is necessary for the effective conduct of the affairs of the Coast Guard, he may, at reasonable rates of fare fixed under regulations to be prescribed by him, provide assured and adequate transportation by motor vehicle or water carrier to and from their places of employment for persons attached to, or employed by, the Coast Guard; and during a war or during a national emergency declared by Congress or the President, for persons attached to, or employed in, a private plant that is manufacturing material for the Coast Guard."
26)	16 U.S.C. § 1536(p)	Conservation	Dependent	President	Agency, President	"In any area which has been declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act, the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 405 or 406 of the Disaster Relief and Emergency Assistance Act, and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection." (citations omitted)
27)	16 U.S.C. § 440	Conservation	Dependent	President	Agency	"The Secretary of the Interior may, in case of a national emergency, close . . . Fort McHenry and it may be used for any and all military purposes during the period of the emergency and for such period of time thereafter, as the public needs may require."
28)	16 U.S.C. § 6401	Conservation	Dependent	President	Agency	"Exceptions to this section may be allowed under terms prescribed by the heads of Federal agencies: (1) during time of war or national emergency [or] . . . (2) when necessary for reasons of national security, as determined by the President . . ."

29)	16 U.S.C. § 824o-1(b)(1)	Conservation	Independent	President	Agency, President	“Whenever the President issues and provides to the Secretary a written directive or determination identifying a grid security emergency, the Secretary may, with or without notice, hearing, or report, issue such orders for emergency measures as are necessary in the judgment of the Secretary to protect or restore the reliability of critical electric infrastructure or of defense critical electric infrastructure during such emergency. As soon as practicable but not later than 180 days after December 4, 2015, the Secretary shall, after notice and opportunity for comment, establish rules of procedure that ensure that such authority can be exercised expeditiously.”
30)	17 U.S.C. § 710(a)	Copyrights	Dependent	Agency, President	Agency	“If, on or before December 31, 2021, the Register of Copyrights determines that a national emergency declared by the President under the National Emergencies Act . . . generally disrupts or suspends the ordinary functioning of the copyright system under this title, or any component thereof, including on a regional basis, the Register may, on a temporary basis, toll, waive, adjust, or modify any timing provision (including any deadline or effective period, except as provided in subsection (c)) or procedural provision contained in this title or chapters II or III of title 37, Code of Federal Regulations, for no longer than the Register reasonably determines to be appropriate to mitigate the impact of the disruption caused by the national emergency.” (citation omitted)
31)	19 U.S.C. § 1318	Customs Duties	Dependent	President	Agency, President	“Whenever the President shall by proclamation declare an emergency to exist by reason of a state of war, or otherwise, he may authorize the Secretary of the Treasury to extend during the continuance of such emergency the time herein prescribed for the performance of any act, and may authorize the Secretary of the Treasury to permit, under such regulations as the Secretary of the Treasury may prescribe, the importation free of duty of food, clothing, and medical, surgical, and other supplies for use in emergency relief work. . . . [T]he Secretary of the Treasury, when necessary to respond to a national emergency declared under the National Emergencies Act . . . is authorized to take the following actions on a temporary basis: (A) Eliminate, consolidate, or relocate any office or port of entry of the Customs Service; (B) Modify hours of service, alter services rendered at any location, or reduce the number of employees at any location. (C) Take any other action that may be necessary to respond directly to the national emergency or specific threat.” (citation omitted)
32)	20 U.S.C. § 1087c(1)(2)	Education	Dependent	President	Agency	“A borrower of a loan made under this part shall be eligible for a deferment during any period . . . during which the borrower—(i) is serving on active duty during a war or other military operation or national emergency; or (ii) is performing qualifying National Guard duty during a war or other military operation or national emergency”
33)	20 U.S.C. § 1098bb(a)	Education	Dependent	Agency, President	Agency	“[T]he Secretary of Education . . . may waive or modify any statutory or regulatory provision applicable to the student financial assistant programs under [the Higher Education Relief Opportunities for Students Act of 2003] . . . as the Secretary deems necessary in connection with a war or other military operation or national emergency.”

34)	30 U.S.C. § 1411(b)(2)	Mineral Lands and Mining	Independent	Agency, President	Agency	<p>"Notwithstanding paragraph (1), if the President by Executive order determines that immediate suspension of exploration activities is necessary for the reasons set forth in section 1416(a)(2)(B) of this title or the Administrator determines that immediate suspension of activities is necessary to prevent a significant adverse effect on the environment or to preserve the safety of life and property at sea, the Administrator is authorized, notwithstanding any other requirement of this chapter, to issue an emergency order requiring any United States citizen who is engaged in exploration before June 28, 1980, to immediately suspend exploration activities."</p>
35)	31 U.S.C. § 5302(b)	Money and Finance	Independent	President	Agency	<p>"However, a loan or credit to a foreign entity or government of a foreign country may be made for more than 6 months in any 12-month period only if the President gives Congress a written statement that unique or emergency circumstances require the loan or credit be for more than 6 months."</p>
36)	31 U.S.C. § 3727(d)	Money and Finance	Dependent	President	Agency, President	<p>"[A] contract with the Department of Defense, the General Services Administration, the Department of Energy (when carrying out duties and powers formerly carried out by the Atomic Energy Commission), or other agency the President designates may provide, or may be changed without consideration to provide, that a future payment under the contract to an assignee is not subject to reduction or setoff."</p>
37)	33 U.S.C. § 2293(a)	Navigation and Navigable Waters	Dependent	President	Agency	<p>"[T]he Secretary, without regard to any other provision of law, may (1) terminate or defer . . . [any] Army civil works project that he deems not essential to the national defense, and (2) apply the resources of the Department of the Army's civil works program, including funds, personnel, and equipment, to . . . authorized civil works, military construction, and civil defense projects that are essential to the national defense."</p>
38)	35 U.S.C. § 181	Patents	Dependent	President	Agency	<p>"Whenever the publication or disclosure of an invention . . . might . . . be detrimental to the national security," the Commissioner of Patents may order the invention "kept secret and the publication of the application or the grant of a patent withheld . . . for the duration of the national emergency and six months thereafter."</p>
39)	37 U.S.C. § 403(b)(7)(A)	Pay and Allowances of the Uniformed Services	Dependent	President	Agency	<p>"Under the authority of this paragraph, the Secretary of Defense may prescribe a temporary increase in the rates of basic allowance for housing otherwise prescribed for a military housing area or a portion of a military housing area if the military housing area or portion thereof . . . is located in an area covered by a[n emergency] declaration of the President . . ."</p>
40)	38 U.S.C. § 1785(a)	Veterans' Benefits	Dependent	Agency, President	Agency	<p>"During and immediately following a disaster or emergency referred to in subsection (b), the Secretary may furnish hospital care and medical services to individuals responding to, involved in, or otherwise affected by that disaster or emergency." "A disaster or emergency referred to in this subsection is any disaster or emergency as follows: A major disaster or emergency declared by the President under the Robert T. Stafford [Act] . . . [or a] disaster or emergency . . . is activated by the Secretary of Health and Human Services . . ." (citations omitted)</p>

41)	38 U.S.C. § 3703(d)(3)(A)	Veterans' Benefits	Dependent	President	Agency	<p>“Any real estate housing loan (other than for repairs, alterations, or improvements) shall be secured by a first lien on the realty. In determining whether a loan is so secured, the Secretary may either disregard or allow for subordination to a superior lien created by a duly recorded covenant running with the realty in favor of either of the following: (i) A public entity that has provided or will provide assistance in response to a major disaster as determined by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act” (citation omitted)</p>
42)	38 U.S.C. § 3720(f)	Veterans' Benefits	Dependent	President	Agency	<p>“Whenever loss, destruction, or damage to any residential property securing loans guaranteed, insured, made, or acquired by the Secretary under this chapter occurs as the result of a major disaster as determined by the President under the Disaster Relief and Emergency Assistance Act the Secretary shall (1) provide counseling and such other service to the owner of such property as may be feasible and shall inform such owner concerning the disaster assistance available from other Federal agencies and from State or local agencies, and (2) pursuant to subsection (a)(2) of this section, extend on an individual case basis such forbearance or indulgence to such owner as the Secretary determines to be warranted by the facts of the case and the circumstances of such owner.” (citation omitted)</p>
43)	38 U.S.C. § 8111A(a)	Veterans' Benefits	Dependent	Agency, President	Agency	<p>“During and immediately following a period of war, or a period of national emergency declared by the President or the Congress that involves the use of the Armed Forces in armed conflict, the Secretary may furnish hospital care, nursing home care, and medical services to members of the Armed Forces on active duty. . . . During and immediately following a disaster or emergency [declared by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act or established by the National Disaster Medical System under the Public Health Service Act], the Secretary may furnish hospital care and medical services to members of the Armed Forces on active duty responding to or involved in that disaster or emergency.”</p>
44)	40 U.S.C. § 8722(b)(2)	Public Buildings, Property, and Works	Dependent	President	Agency	<p>“Paragraph (1) [concerning consultation between agencies and the Commission] does not apply to projects within the Capitol grounds or to structures erected by the Department of Defense during wartime or national emergency within existing military, naval, or Air Force reservations, except that the appropriate defense agency shall consult with the Commission as to any developments which materially affect traffic or require coordinated planning of the surrounding area.”</p>
45)	40 U.S.C. § 545(b)	Public Buildings, Property, and Works	Dependent	President	Agency	<p>“Under regulations the Administrator prescribes, disposals and contracts for disposal may be negotiated without regard to subsection (a), but subject to obtaining competition that is feasible under the circumstances, if . . . necessary in the public interest . . . during the period of a national emergency declared by the President or Congress, with respect to a particular lot of personal property”</p>
46)	40 U.S.C. § 905	Public Buildings, Property, and Works	Dependent	President	Agency	<p>“The procedures prescribed in sections 903 and 904 of this title [concerning notice to local government and prospective purchasers before purchase or sale of real property] may be waived during a period of national emergency proclaimed by the President.”</p>

47)	42 U.S.C. § 5177(a)	The Public Health and Welfare	Dependent	Agency, President	Agency	<p>"The Secretary of Agriculture may make grants to public agencies or private organizations with [50 (c)(3)] status . . . that have experience in providing emergency services to low-income migrant and seasonal farmworkers where the Secretary determines that a local, State or national emergency or disaster has caused low-income migrant or seasonal farmworkers to lose income, to be unable to work, or to stay home or return home in anticipation of work shortages."</p>
48)	42 U.S.C. § 5204b	The Public Health and Welfare	Dependent	President	Agency, President	<p>"Upon the declaration by the President of a disaster in an insular area, the President, acting through the Administrator of the Federal Emergency Management Agency, shall assess, in cooperation with the Secretary and chief executive of such insular area, the capability of the insular government to respond to the disaster"</p>
49)	42 U.S.C. § 6241	The Public Health and Welfare	Independent	President	Agency	<p>"The Secretary may drawdown and sell petroleum products in the Reserve only when . . . the President has found drawdown and sale are required by a severe energy supply interruption or by obligations of the United States under the international energy program."</p>
50)	42 U.S.C. § 6272(d)(2)	The Public Health and Welfare	Independent	President	Agency	<p>"Any voluntary agreement or plan of action entered into pursuant to this section shall be submitted in writing to the Attorney General and the Federal Trade Commission 20 days before being implemented; except that during an international energy supply emergency [as determined by the President], the Secretary, subject to approval of the Attorney General, may reduce such 20-day period."</p>
51)	42 U.S.C. § 1320b-5(b), (g)(1)	The Public Health and Welfare	Dependent	Agency, President	Agency	<p>"[T]he Secretary is authorized, subject to the provisions of this section, to temporarily waive or modify the application of, with respect to health care items and services furnished by a health care provider (or classes of health care providers) in any emergency area (or portion of such area) during any portion of an emergency period, the requirements of subchapters XVIII, XIX, or XXI of this chapter, or any regulation thereunder (and the requirements of this subchapter other than this section, and regulations thereunder, insofar as they relate to such subchapters), pertaining to [various healthcare requirements]. . . . [A]n 'emergency period' is the period during which, there exists . . . an emergency or disaster declared by the President pursuant to the National Emergencies Act . . . or the Robert T. Stafford Disaster Relief and Emergency Assistance Act [and] . . . a public health emergency declared by the Secretary pursuant to section 247d of this title." (citations omitted)</p>

52)	42 U.S.C. § 300ff-83(a)	The Public Health and Welfare	Dependent	Agency, President	Agency	<p>"In an emergency area and during an emergency period, the Secretary [of Health and Human Services] shall have the authority to waive [provisions of HIV Health Care Services Program] to improve the health and safety of those receiving care under [the Program] and the general public" "The term 'emergency period' means the period in which there exists—an emergency or disaster declared by the President pursuant to the National Emergencies Act or the Robert T. Stafford Disaster Relief and Emergency Assistance Act, or a public health emergency declared by the Secretary" (citations omitted)</p>
53)	43 U.S.C. § 1341(c)	Public Lands	Dependent	President	Agency	<p>"All leases issued under this subchapter, and leases, the maintenance and operation of which are authorized under this subchapter, shall contain or be construed to contain a provision whereby authority is vested in the Secretary, upon a recommendation of the Secretary of Defense, during a state of war or national emergency declared by the Congress or the President of the United States after August 7, 1953, to suspend operations under any lease; and all such leases shall contain or be construed to contain provisions for the payment of just compensation to the lessee whose operations are thus suspended."</p>
54)	43 U.S.C. § 155	Public Lands	Dependent	President	Agency	<p>"Notwithstanding any other provisions of law, except in time of war or national emergency hereafter declared by the President or the Congress, on and after February 28, 1958 the provisions hereof shall apply to the withdrawal and reservation for, restriction of, and utilization by, the Department of Defense for defense purposes of the public lands of the United States, including public lands in the Territories of Alaska and Hawaii"</p>
55)	46 U.S.C. § 57521	Shipping	Dependent	President	Agency	<p>"A charter under this chapter shall provide that during a national emergency proclaimed by the President or a period for which the President has proclaimed that the security of the national defense makes it advisable, the Secretary of Transportation may terminate the charter without cost to the United States Government on such notice to the charterer as the President determines."</p>
56)	46 U.S.C. § 70051	Shipping	Dependent	Agency, President	Agency, President	<p>"Whenever the President by proclamation or Executive order declares a national emergency [for selected reasons], or whenever the Attorney General determines that an actual or anticipated mass migration of aliens en route to, or arriving off the coast of, the United States presents an urgent circumstance requiring an immediate Federal response, the Secretary [of Transportation] may make, subject to approval of the President, rules and regulations governing the anchorage and movement of any vessel, foreign or domestic, in the territorial waters of the United States, may inspect such vessel at any time, place guards thereon, and, if necessary . . . to secure such vessels from damage or injury, or to prevent damage or injury to any harbor or waters of the United States, or to secure the observance of the rights and obligations of the United States, may take, by and with the consent of the President, . . . full possession and control of such vessel and remove therefrom the officers and crew thereof and all other persons not specially authorized by [the Secretary] to go or remain on board thereof."</p>

57)	46 U.S.C. § 7507(a)	Shipping	Dependent	Agency, President	Agency	"[T]he Secretary of the department in which the Coast Guard is operating may . . . extend for not more than one year an expiring license or certificate of registry . . . if the Secretary determines that the extension is required to enable the Coast Guard to eliminate a backlog in processing applications for those licenses or certificates of registry or in response to a national emergency or natural disaster, as deemed necessary by the Secretary"
58)	46 U.S.C. § 8301(d)	Shipping	Dependent	President	Agency	"The Secretary [of the department in which the Coast Guard is operating] may . . . suspend [provisions related to masters and officers of merchant vessels] during a national emergency proclaimed by the President"
59)	46 U.S.C. § 56102(a)(1)	Shipping	Dependent	President	Agency	"During war, or a national emergency declared by Presidential proclamation, a person may not, without the approval of the Secretary of Transportation . . . place under foreign registry a vessel owned in whole or in part by a citizen of the United States or a corporation incorporated under the laws of the United States or of a State"
60)	46 U.S.C. § 56301	Shipping	Dependent	President	Agency	"During a national emergency declared by Presidential proclamation, or a period for which the President has proclaimed it that the security of the national defense makes it advisable, the Secretary of Transportation may requisition or purchase, or requisition or charter the use of, a vessel owned by citizens of the United States, a documented vessel, or a vessel under construction in the United States."
61)	46 U.S.C. § 56309	Shipping	Dependent	Agency, President	Agency, President	"During any period in which vessels may be requisitioned under this chapter, the President is authorized and empowered through the Secretary of Transportation to purchase, or to requisition, or for any part of such period to charter or requisition the use of, or to take over the title to or possession of, for such use or disposition as he shall direct, any merchant vessel not owned by citizens of the United States which is lying idle in waters within the jurisdiction of the United States and which the President finds to be necessary to the national defense."
62)	47 U.S.C. § 308(e)	Telecommunications	Dependent	Agency, President	Agency	"[I]n cases where the Federal Communications Commission or the President has found there to be an emergency, or during continuance of war, [t]he Commission may grant construction permits and station licenses, or modifications or renewals thereof [without following normal licensing procedure], . . . but no authorization so granted shall continue in effect beyond the period of the emergency or war requiring it"

63)	51 U.S.C. § 20143(b)(2)	National and Commercial Space Programs	Dependent	President	Agency	"The Administration may also transfer amounts among accounts for the immediate costs of recovering from damage caused by a major disaster (as defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)) or by an act of terrorism, or for the immediate costs associated with an emergency rescue of astronauts."				
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"National Security"											
U.S.C.	7 U.S.C.	15 U.S.C.	22 U.S.C.	35 U.S.C.	40 U.S.C.	42 U.S.C.	49 U.S.C.	49 U.S.C.	49 U.S.C.	50 U.S.C.	
§ 112a	§ 5677	§ 78m	§ 2652c	§ 181	§ 501	§ 9620	§ 44302	§ 44303	§ 44306	§ 3324	50 U.S.C. § 3816
5 U.S.C. § 5374	7 U.S.C. § 4001	19 U.S.C. § 1862 (c)(1)(A)									
										TOTAL	16
"Imminent and Substantial Endangerment"											
42 U.S.C. § 9628										TOTAL	1

Weak President/Weak Agency						
"Emergency"						
Citation	U.S.C. Title Name	Independent or Dependent?	Declaration	Powers	Emergency Powers	
1) 7 U.S.C. § 1471b(e)(1)	Agriculture	Independent	Nonexecutive	Agency	"Whenever the Governor of a State determines that a livestock emergency due to a natural disaster exists in the State, or a county committee established under section 590h(b) of title 16 determines that such an emergency exists in the county, the Governor or county committee may submit a request for a determination by the Secretary of a livestock emergency in such State or county and for emergency livestock feed assistance under this subchapter."	
2) 10 U.S.C. § 712(e)	Armed Forces	Dependent	Nonexecutive	President	"Upon the application of the country concerned, the President, whenever he considers it in the public interest, may detail members of the Army, Navy, Air Force, and Marine Corps to assist in military matters . . . in North America, Central America, or South America . . . Cuba, Haiti, or Santo Domingo; and . . . during a war or a declared national emergency, any other country that he considers it advisable to assist in the interest of national defense."	

NORTHWESTERN UNIVERSITY LAW REVIEW

3)	16 U.S.C. § 1383a(g)(2)	Conservation	Independent	Agency	Agency, Nonexecutive	<p>"If the Secretary finds, based on the information received from the programs established under subsections (c), (d), (e), and (f) . . . that the incidental taking of marine mammals in a fishery is having an immediate and significant adverse impact on a marine mammal population stock or, in the case of Steller sea lions and North Pacific fur seals, that more than 1,350 and 50, respectively, will be incidentally killed during a calendar year, the Secretary shall consult with appropriate Regional Fishery Management Councils and State fishery managers and prescribe emergency regulations to prevent to the maximum extent practicable any further taking. Any emergency regulations prescribed under this paragraph"</p>
4)	16 U.S.C. § 667(g)	Conservation	Independent	Agency	Agency, Nonexecutive	<p>"For the purpose of meeting emergency situations caused by adverse weather conditions or other factors destructive of important wildlife resources, the States are authorized, upon the request of the State fish and game authority or other State agency having similar authority and a finding by the Secretary of the Interior that any area of the United States is threatened with serious damage or loss to resident game birds and other resident wildlife from starvation, to requisition from the Commodity Credit Corporation grain acquired by the Corporation through price support operations."</p>
5)	16 U.S.C. § 824a-1(a)	Conservation	Independent	Agency, Nonexecutive	Agency	<p>"The Commission may, on its own motion, and shall, on application of any person or governmental entity, after public notice and notice to the Governor of the affected State and after affording an opportunity for public hearing, exempt electric utilities, in whole or in part, from any provision of State law, or from any State rule or regulation, which prohibits or prevents the voluntary coordination of electric utilities, including any agreement for central dispatch, if the Commission determines that such voluntary coordination is designed to obtain economical utilization of facilities and resources in any area. No such exemption may be granted if the Commission finds that such provision of State law, or rule or regulation . . . is required by any authority of Federal law, or . . . is designed to protect public health, safety, or welfare, or the environment or conserve energy or is designed to mitigate the effects of emergencies resulting from fuel shortages."</p>
6)	23 U.S.C. § 127(h)(1), (i)(1)(A)	Highways	Dependent	President	Agency, Nonexecutive	<p>"[T]he Secretary, in consultation with the Secretary of Defense, may waive or limit the application of any vehicle weight limit established under this section with respect to the portion of Interstate Route 95 in the State of Maine between Augusta and Bangor for the purpose of making bulk shipments of jet fuel to the Air National Guard Base at Bangor International Airport during a period of national emergency in order to respond to the effects of the national emergency. . . . Notwithstanding any other provision of this section, a State may issue special permits during an emergency to overweight vehicles and loads that can easily be dismantled or divided if . . . the President has declared the emergency to be a major disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act" (citation omitted)</p>

7)	42 U.S.C. § 2160(b)	The Public Health and Welfare	Independent	President	Agency, Nonexecutive	<p>"With regard to any special nuclear material exported by the United States[...] the Secretary of Energy may not enter into any subsequent arrangement for the retransfer of any such material to a third country for reprocessing, for the reprocessing of any such material, or for the subsequent retransfer of any plutonium in quantities greater than 500 grams resulting from the reprocessing of any such material, until he has provided the Committee on Foreign Affairs of the House of Representatives and the Committee on Foreign Relations of the Senate with a report containing his reasons for entering into such arrangement and a period of 15 days of continuous session (as defined in section 2159(g) of this title) has elapsed. <i>Provided, however,</i> [t]hat if in the view of the President an emergency exists due to unforeseen circumstances requiring immediate entry into a subsequent arrangement, such period shall consist of fifteen calendar days. . . ."</p>
8)	42 U.S.C. § 7410(f)	The Public Health and Welfare	Dependent	Nonexecutive, President	President	<p>"Upon application by the owner or operator of a fuel burning stationary source, and after notice and opportunity for public hearing, the Governor of the State in which such source is located may petition the President to determine that a national or regional energy emergency exists of such severity that . . . a temporary suspension of any part of the applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) may be necessary, and . . . other means of responding to the energy emergency may be inadequate. . . . If the President determines that a national or regional energy emergency of such severity exists, a temporary emergency suspension of any part of an applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) adopted by the State may be issued by the Governor of any State covered by the President's determination under the condition specified in paragraph (2) and may take effect immediately."</p>
9)	49 U.S.C. § 5324(b)	Transportation	Independent	Agency, Nonexecutive, President	Agency	<p>"The Secretary may make grants and enter into contracts and other agreements (including agreements with departments, agencies, and instrumentalities of the Government) for . . . capital projects to protect, repair, reconstruct, or replace equipment and facilities of a public transportation system operating in the United States or on an Indian reservation that the Secretary determines is in danger of suffering serious damage, or has suffered serious damage, as a result of an emergency; and . . . eligible operating costs of public transportation equipment and facilities in an area directly affected by an emergency. . . ." "The term 'emergency' means a natural disaster affecting a wide area (such as a flood, hurricane, tidal wave, earthquake, severe storm, or landslide) or a catastrophic failure from any external cause, as a result of which . . . the Governor of a State has declared an emergency and the Secretary has concurred; or . . . the President has declared a major disaster under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act. . . ." (citation omitted)</p>

"National Security"										
None										
"Imminent and Substantial Endangerment"										
15 U.S.C. § 2648	42 U.S.C. § 300j-19a								TOTAL	0
									TOTAL	2

Emergency Provisions that Activate Other Statutes ⁴⁰⁰					
Citation	Statute Name	U.S.C. Title Name	Declaration	Emergency Provision	
1) 22 U.S.C. § 2318(a)(1)	Foreign Assistance Act of 1961	Foreign Relations and Intercourse	President	"If the President determines and reports to the Congress in accordance with section 2411 of this title that . . . an unforeseen emergency exists which requires immediate military assistance to a foreign country or international organization; and . . . the emergency requirement cannot be met under the authority of the Arms Export Control Act . . . or any other law except this section; he may direct, for the purposes of subchapter II of this chapter, the drawdown of defense articles from the stocks of the Department of Defense, defense services of the Department of Defense, and military education and training, of an aggregate value of not to exceed \$100,000,000 in any fiscal year." (citation omitted)	
2) 42 U.S.C. § 247d(e)	Public Health Service Act	The Public Health and Welfare	Agency	"If the Secretary [of Health and Human Services] determines, after consultation with such public health officials as may be necessary, that . . . a disease or disorder presents a public health emergency; or . . . a public health emergency, including significant outbreaks of infectious diseases or bioterrorist attacks, otherwise exists, the Secretary may take such action as may be appropriate to respond to the public health emergency, including making grants, providing awards for expenses, and entering into contracts and conducting and supporting investigations into the cause, treatment, or prevention of a disease or disorder . . ."	
3) 42 U.S.C. § 5122(1)	Robert T. Stafford Disaster Relief and Emergency Assistance Act	The Public Health and Welfare	President	"Emergency" means any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States."	
4) 50 U.S.C. § 1621(a)	National Emergencies Act	War and National Defense	President	"With respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency."	

⁴⁰⁰ Statutes in this Table activate many other statutes in this Appendix. These statutes operate as the "declaration" power for any statute that is labeled "Dependent."