AFTER THE EPAA: WHAT OIL ALLOCATION AND PRICING AUTHORITIES REMAIN?

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On January 28, 1981, almost seven years after the end of the Arab Oil Embargo, President Reagan signed Executive Order 12287[1] which, with minor exceptions,[2] finally terminated the oil price and allocation program which had been initiated pursuant to the Emergency Petroleum Allocation Act of 1973 ("EPAA")[3] for the purposes of countering that Embargo. While the impact of Executive Order 12287 on the price and supply of crude oil and refined petroleum products is diffused somewhat by several factors, most notably the scheduled expiration of the EPAA itself on September 30, 1981[4] and the previous suspension of controls over most refined petroleum products together with the gradual phase-out of price controls over crude oil by prior Administrations,[5] it did eliminate regulation of crude oil, motor gasoline and propane. Perhaps of greater long-term significance, however, Executive Order 12287 marks the end of an era of intimate and pervasive regulation of crude oil and refined petroleum products.

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[1]"Decontrol of Crude Oil and Refined Petroleum Products," 46 Fed. Reg. 9909 (Jan. 30, 1981). Subsequently, the United States District Court for the District of Columbia denied a motion for preliminary injunction filed by a group of nine Congressmen (Senators Metzenbaum, Biden, Kennedy, Matsunaga, Williams, Pell and Riegle and Representatives Moffett and Sieberling), three States (Minnesota, Rhode Island, and New York), five labor unions (American Federation of Labor-Congress of Industrial Organizations, International Union, UAW, International Association of Machinists and Aerospace Workers, the Oil, Chemical and Atomic Workers, and Service Employees International Union) and six consumer organizations (Consumer Federation of America, Consumers Union of the United States, Inc., National Council of Senior Citizens, Inc., Consumer Energy Council of America, Citizen Labor Coalition, Energy Action Education Foundation, and the National Association for the Advancement of Colored People) to enjoin implementation of Executive Order 12287 and to require DOE to enforce the price and allocation controls in effect at the time the order was issued. Metzenbaum v. Edwards, No. 81-0405 (D.D.C., issued Mar. 4, 1981).

[2]Executive Order 12287 temporarily continued the following elements of the price and allocation regulations:

—all reporting and record-keeping requirements under the EPAA pending elimination or modification by the Secretary of Energy;

—the state "set-aside program" for middle distillates (under which the states can allocate small amounts of distillates—principally No. 2 home heating oil and diesel fuel—to companies experiencing shortages) until March 31, 1981;

—the special allocation program and priority for middle distillates to be used for surface passenger mass transportation through March 31, 1981;

—the "Buy/Sell" lists and orders issued prior to Executive Order 12287, providing for the allocation of crude oil from large refiners to certain small refiners; and

—the allocation program for certain Canadian Petroleum Products through March 31, 1981.

The Secretary of Energy is also authorized to issue entitlements notices covering periods prior to the date of the Executive Order. Exec. Order No. 12287, §§ 2, 3.

[3]Controls were originally imposed pursuant to the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627, *as reprinted in* [1973] U.S. Code Cong. & Ad. News, 93d Cong., 1st Sess., 693-702. The EPAA has been amended on six occasions. *See* Emergency Petroleum Allocation Act—Extension, Pub. L. No. 93-511, 88 Stat. 1608 (1974); Emergency Petroleum Allocation Act of 1975, Pub. L. No. 94-99, 89 Stat. 481 (1975); Pub. L. No. 94-133, 89 Stat. 694 (1975); Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975); Energy Conservation and Production Act, Pub. L. No. 94-385, 90 Stat. 1125 (1976); Energy Security Act, Pub. L. No. 96-294, 94 Stat. 611 (1980). The EPAA is codified at 15 U.S.C. §§ 751-760 (1976 and U.S.C.A. Pamph. 3 Nov. 1980).

[4]EPAA, § 18, 15 U.S.C. § 760g (1976).

[5]*See, e.g.*, 10 C.F.R. § 210.35 (1980); 15 Weekly Comp. of Pres. Doc. 609 (Apr. 1979).

While the comprehensive price and allocation regulations adopted pursuant to the EPAA are now effectively dormant, and soon will expire altogether,[6] there still remains in effect a body of statutory authority which confers on the President the power, in specific circumstances or to meet specific statutorily defined objectives, to impose controls over the distribution and price of oil. The nature of these residual authorities, and the circumstances in which they may be invoked, vary greatly from statute to statute. In general, the authorities fall into two broad categories. Within the first category are authorities which permit the President to allocate crude oil and to take other measures to meet national defense and security requirements. These authorities, which arise under the Defense Production Act of 1950[7] and the Trade Expansion Act of 1962,[8] permit the President under certain circumstances to

(1) allocate crude oil and refined petroleum products, to meet defense requirements;
(2) allocate materials and equipment to maximize energy supplies;
(3) regulate the distribution of crude oil and petroleum products for the civilian market if necessary to mitigate hardships arising from the implementation of the defense allocation programs; and
(4) restrict imports of crude oil and refined petroleum products through quotas or fees and allocate the volumes which are permitted to enter the country among refiners and other importers.

The second category consists of authorities which can only be invoked in a presidentially declared emergency. The statutes conferring these authorities empower the President to take a broad array of actions, including

(1) distribution of oil from the Strategic Petroleum Reserve;[9]
(2) rationing of motor fuels;[10] and
(3) allocation of imported crude oil and petroleum products.[11]

The purpose of this article is to describe these various statutory authorities and to compare them to the authorities conferred by the EPAA.[12] In general, while the diversity and breadth of the powers conferred by these statutes is impressive, they are not comparable to the EPAA for several reasons. First, the statutes typically may be activated only during a presidentially declared emergency period,[13] or

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[6]However, numerous bills have been introduced in Congress which would authorize the President to reimpose price and allocation controls in an emergency and permit certain small and independent refiners to obtain crude oil supplies from the major refiners under certain circumstances. *See, e.g.*, S.409 (sponsored by Senators Johnston, Tower, Cranston, Long, Boren, Hayakawa, Cochran and Kastenbaum), 127 Cong. Rec. S1049-61 (daily ed. Feb. 5, 1981).

[7]50 U.S.C. App. § 2061 *et seq.* (1976 & Supp. I 1977 & Supp. II 1978 & Supp. III 1979). The Defense Production Act was enacted as Pub. L. No. 81-774, 64 Stat. 798 (1950).

[8]19 U.S.C. § 1862(b), as amended (1976). The Trade Expansion Act was enacted as Pub. L. No. 87-794, 76 Stat. 877 (1962). It was amended by the Trade Act of 1974, Pub. L. No. 93-618, § 127(d), 88 Stat. 1993, and in 1980 by the Crude Oil Windfall Profit Tax, Pub. L. No. 96-223, § 402, 94 Stat. 301 (1980).

[9]42 U.S.C. §§ 6231-44 (1976).

[10]*Id.* §§ 6261, 6263.

[11]International Emergency Economic Powers Act of 1977, 50 U.S.C. §§ 1701-1706 (Supp. I 1977).

[12]A number of other statutes provide the President with authority to control oil by means other than allocation and pricing—*e.g.*, through conservation of supplies (Energy Policy and Conservation Act of 1975, 42 U.S.C. § 6201 *et. seq.* (1976)), demand restraint measures (Emergency Energy Conservation Act of 1979, 42 U.S.C. § 8501 *et seq.* (Supp. III 1979)), and prohibitions on the use of oil (and natural gas) in certain types of equipment in an emergency (Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. § 8301, *et seq.* (Supp. III 1979)). Since these statutes do not involve allocation or price controls, a review of these statutes is beyond the scope of this article. Also beyond the scope of this article are statutes according the President certain export control authority. *E.g.*, Export Administration Act, Pub. L. No. 96-72, 91 Stat. 235, 50 U.S.C. App. § 2401 *et seq.* (1979).

to meet certain limited objectives such as national defense requirements.[14] Second, the statutes frequently authorize action only as to selected categories of crude oil and refined petroleum products such as imported oil,[15] oil withdrawn from the Strategic Petroleum Reserve,[16] or motor fuels.[17] Third, Congress has retained the power to review and veto actions of the President pursuant to these authorities.[18] Finally, in certain instances these alternative authorities, absent legislative action, will expire contemporaneously with the EPAA or shortly thereafter.[19]

The fact that this article concludes that the President's remaining price and allocation authorities are less extensive than those conferred by the EPAA does not, however, imply endorsement of legislative action either to extend the EPAA or to enact a similar general price and allocation statute. To the contrary, the seven years in which the EPAA has been operative has convinced the Department of Energy ("DOE") and most commentators, including the authors of this article, that pervasive price and allocation authorities of the kind contained in the EPAA have failed to encourage production or effectively discourage demand, and have even proven counterproductive.[20]

I. BACKGROUND: THE EMERGENCY PETROLEUM ALLOCATION ACT OF 1973, AS AMENDED

A. *General*

The EPAA[21] was passed during the crisis atmosphere which followed the imposition of the Arab Oil Embargo in October of 1973. The EPAA directed the President to inaugurate a "temporary" program "to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system" so as to "minimiz[e] the adverse impacts of such shortages or dislocations on the American people and the domestic economy."[22]

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[13]42 U.S.C. §§ 6231-44 (Strategic Petroleum Reserve), §§ 6261-63 (gasoline rationing), § 6271 (International Energy Program) and 50 U.S.C. §§ 1701-1706 (International Emergency Economic Powers Act).

[14]50 U.S.C. App. §§ 2061. *See* note 73 *infra* and accompaning text.

[15]19 U.S.C. § 232(b); 50 U.S.C. § 1701 *et seq.*

[16]42 U.S.C. §§ 6231-44.

[17]42 U.S.C. §§ 6261-63.

[18]19 U.S.C. § 232(e); 42 U.S.C. § 6239(a); 42 U.S.C. § 6261.

[19]42 U.S.C. § 6263(f); 50 U.S.C. App. § 2166(a).

[20]For example, during the 1979 Iranian oil crisis, DOE's allocation regulations forced suppliers to dispatch petroleum to various regions of the country on the basis of pre-curtailment requirements rather than on actual requirements during the period of shortage occasioned by the crisis.

In declining in 1980 to reimpose controls over middle distillates (primarily home heating oil and diesel fuel), DOE explained that:

> . . . it is our judgment that a reimposition of controls is not warranted at this time. Price and allocation controls do nothing to increase supplies or to reduce demand and can, in fact, be counterproductive to such objectives. Controls do not serve as an incentive to the industry to obtain additional supplies. Moreover, price and allocation controls can restrict industry's ability and willingness to provide supplies expeditiously to areas in which spot shortages may occur.

45 Fed. Reg. 32003 (May 15, 1980). DOE has reiterated this principle in a number of recent studies. *See, e.g., Reducing U.S. Oil Vulnerability: Energy Policy for the 1980's*, DOE/PE-0021, at 6-7, 12 (Nov. 10, 1980) [hereinafter *Reducing U.S. Oil Vulnerability*]; *Staff Working Paper, The Energy Problem: Costs and Policy Options*, at VI-3 to VI-4, VI-14 (DOE Office of Oil Policy and Evaluation, May 23, 1980). This view has been echoed by a variety of other sources. *See, e.g., Comptroller General, Report to the Congress: The Economic and Energy Effects of Alternative Oil Import Policies*, at i-iii (Jul. 24, 1979); *Energy and Security*, at 7-21, 342-45 (D. Deese and J. Nye ed. 1981) [hereinafter *Energy and Security*].

[21]*See* note 3 supra.

[22]EPAA, § 2(b), 15 U.S.C. § 751(b) (1976).

To achieve these ends, the EPAA provided the President[23] with extremely broad authority to allocate oil,[24] whether "produced in or imported into the United States," at prices to be specified by the President.[25]

B. *Description of EPAA as Originally Enacted*

Unlike previous legislation passed by Congress which authorized, but did not require, the President to establish price and allocation controls over oil,[26] the EPAA directed the President to impose price and allocation controls over crude oil and petroleum products. Section 4(a) of the EPAA directed the President, within fifteen days after its enactment, to

> promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation . . . . Except as provided in subsection (e) such regulation shall apply to all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States.[27]

The Congress specified that these regulations were to accomplish, "to the maximum extent practicable," nine general objectives, including the preservation of an economically sound and competitive petroleum industry, equitable distribution of crude oil and refined petroleum products at equitable prices, economic efficiency, and minimization of economic distortion, inflexibility, and unneces-

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[23]The President initially delegated these authorities to the Federal Energy Office. Exec. Order No. 11748, 38 Fed. Reg. 33575 (Dec. 6, 1973). With the creation of the Federal Energy Administration ("FEA") by the Federal Energy Administration Act of 1974, 15 U.S.C. § 761 *et seq.*, the powers of the Federal Energy Office were transferred to the FEA. Exec. Order No. 11790, 39 Fed. Reg. 23185 (June 27, 1974), 3 C.F.R. 157 (1974). These powers were later transferred to the Secretary of the Department of Energy ("DOE") by § 301 of the Department of Energy Organization Act, 42 U.S.C. §§ 7101, 7151 (Supp. II 1978).

[24]Hereinafter referred to as "crude oil and petroleum products" or simply "oil."

[25]EPAA, § 4(a), 15 U.S.C. § 753(a).

[26]The President's authority to control the allocation and price of crude oil and petroleum products antedated the Arab Oil Embargo. Authority to control the price of commodities, including crude oil and petroleum products, was conferred by the Economic Stabilization Act of 1970 ("Stabilization Act"), 12 U.S.C. § 1904, note (1976), and was implemented by President Nixon in 1971. Exec. Order No. 11615, 36 Fed. Reg. 15727 (Aug. 17, 1971). Spurred by threats of serious shortages of gasoline, propane and other petroleum products, Congress amended the Stabilization Act in the winter of 1973, six months before the Embargo, to permit the President to "provide . . . for the establishment of priorities of use and for systematic allocation of supplies of petroleum products including crude oil in order to meet the essential needs of various sections of the Nation and to prevent anticompetitive effects resulting from shortages of such products." Economic Stabilization Act Amendments of 1973, Pub. L. No. 93-28, 87 Stat. 27, § 2(b)(3), codified at 12 U.S.C. § 1904, note, § 203(a)(3)(1976). The Stabilization Act expired on April 30, 1974. Stabilization Act, § 218.

[27]EPAA, § 4(a), 15 U.S.C. § 753(a). The Conferees to the EPAA stressed that:

> [i]t is imperative that the Federal Government now accept its responsibility to intervene in this marketplace to preserve competition and to assure an equitable distribution of critically short supplies. Toward this end, the conference substitute *requires* the President to promptly implement a mandatory allocation program which must be crafted so as to accomplish Congressionally defined objectives."

(Emphasis added). Joint Explanatory Statement of the Committee of Conference, to accompany S. 1570, Rep. No. 93-628, 93d Cong., 1st Sess. (Nov. 10, 1973), *reprinted in* [1973] U.S. Code Cong. & Ad. News, at 2688 [hereinafter *EPAA Conf. Rep.* All subsequent references to *EPAA Conf. Rep.* are to the report as printed in the U.S. Code Congressional & Administrative News]. *See, e.g.* Consumers Union of the United States v. Sawhill, 525 F.2d 1068 (Em. App. 1975) (en banc) (Congress "unequivocally directed [ed] pervasive regulation of the oil industry," although leaving the specific method of implementation to the President. Appendix to Majority Opinion, 525 F.2d at 1072).

sary interference with market mechanisms.[28] Congress recognized, however, that some of these statutory objectives conflicted with others and therefore provided the President with broad discretion to balance these objectives where necessary to achieve the overall goals of the Act.[29] In response to Congress' directive "to compel the allocation of product throughout the various levels of the petroleum industry," the President issued comprehensive allocation regulations on January 15, 1974.[30]

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[28]These objectives were as follows:

(A) protection of public health, safety, and welfare (including maintenance of residential heating, such as individual homes, apartmenets [sic], and similar occupied dwelling units), and the national defense;

(B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);

(C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of exploration for, and production or extraction of, fuels, and required for transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

EPAA, § 4(h)(1), 15 U.S.C. § 753(b)(1).

[29]*See EPAA Conf. Rep.*, at 2688-89.

Consistent with this congressional intent, the courts have accorded the President broad latitude to choose among these objectives and to fashion regulatory programs which serve some, but not all, of these objectives. General Crude Oil Co. v. DOE, 585 F.2d. 508 (Em. App. 1978), *cert. denied*, 440 U.S. 912 (1979); Basin, Inc. v. FEA, 552 F.2d 931 (Em. App.) (FEA has "substantial leeway in attempting to attain the broad objectives of the EPAA," *id.* at 935), *cert. denied*, 131 U.S. 821 (1977); Amtel, Inc. v. FEA, 536 F.2d 1378 (Em. App. 1976); Consumers Union of the United States v. Sawhill, 525 F.2d 1068 (Em. App. 1975) (en banc); Air Transport Assn. v. FEO, 520 F.2d 1339, 1342 (Em. App. 1975).

[30]*EPAA Conf. Rep.*, at 2690. Allocation regulations were issued on January 15, 1974, 39 Fed. Reg. 1924 (Jan. 15, 1974). The heart of these allocation regulations was the supplier purchaser "freeze" rule which generally required a supplier to continue to serve the resellers and consumers who purchased an allocated product from the supplier during the base period. 10 C.F.R. § 211.9. A supplier which could not satisfy its full supply obligations for a particular product was required to distribute its supplies according to the priorities and criteria set forth in the allocation regulations for that product. 10 C.F.R. Part 211 (1980).

DOE has also established alternative standby allocation and price regulations which could be activated in an emergency. Standby Regulation 211-1, 10 C.F.R. Part 211, Subpart L, App. A (1980), Standby Mandatory Crude Oil Allocation and Refinery Yield Control Programs, 45 Fed. Reg. 55371 (Aug. 19, 1980); Standby Regulation 211-2, 10 C.F.R. Part 211, Subpart L, App. A (1980), Standby Product Allocation Regulations, 44 Fed. Reg. 3928 (Jan. 18, 1979).

In addition, Congress required the President to establish price controls over crude oil and petroleum products.[31] These price controls were intended to serve two principal purposes. First, Congress was concerned that the petroleum industry could evade the allocation mechanism simply by charging discriminatory and excessive prices to unwanted customers.[32] Second, Congress wanted the President to reconcile the price control regulations in effect pursuant to the Economic Stabilization Act of 1970 with the objectives of the EPAA.[33] Price regulations were also published on January 15, 1974.[34]

C. *Amendments to the EPAA*

The EPAA has been substantively amended three times: by the Energy Policy and Conservation Act in 1975 ("EPCA"),[35] by the Energy Conservation and Production Act in 1976 ("Conservation and Production Act"),[36] and by the Energy Security Act in 1980.[37] These amendments are briefly summarized below.[38]

1. *EPCA*

EPCA was passed in 1975 in response to one of the permanent results of the Arab Oil Embargo—the sharp increase in the cost of imported oil.[39] This statute amended the EPAA in a number of significant respects.

With regard to wellhead price controls, EPCA generally required the President to subject *all* first sales of domestically-produced crude oil to price controls,[40] including so-called "stripper well oil" (*i.e.*, crude oil from wells producing less than ten barrels per day) which had been exempted from price controls by Section

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[31]EPAA, § 4(a), 15 U.S.C. § 753(a). The price controls adopted by the Federal Energy Office under the EPAA generally retained the pricing system established by the Cost of Living Council during Phase IV of the Economic Stablization Program. *Compare* Phase IV, 6 C.F.R. Part 150, Subpart L (1973) *with* 39 Fed. Reg. 1924-61 (Jan. 15, 1974). Prior to enactment of EPCA, oil produced from a property in amounts equal to or less than the amount produced from that property during the same calendar month of 1972 (so-called "old" oil) could generally be sold at the price prevailing in the field on May 15, 1973, plus $1.35 per barrel. Upper tier oil was not subject to price controls. This second tier included "stripper well" oil, "new" oil (oil from a property which did not produce crude oil in 1972 or oil produced in excess of the volume of oil produced from the property during the corresponding month of 1972), and "released" oil (an amount of old oil which equaled the quantity of "new" oil produced from a property). 10 C.F.R. Part 212 (1975); Energy Policy and Conservation Act, Committee of Conference Report to accompany S. 622, S. Rep. No. 95-516, 94th Cong., 1st Sess. (1975) [hereinafter *EPCA Conf. Rep.*]. This initial pricing system was upheld in Consumers Union of the United States v. Sawhill, 525 F.2d 1068 (Em. App. 1975) (en banc).

The DOE's price control regulations generally establish maximum allowable prices for producers, refiners, and retailers of crude oil and petroleum products. The permissible price is generally tied to the price charged or the profit margin in existence in a base period, generally May 15, 1973. 10 C.F.R. §§ 212.83, 212.93, 212.163 (1980).

[32]The conferees to the EPAA explained that "it does no good to require the allocation of products if sellers are then permitted to demand unfair and unrealistic prices." *EPAA Conf. Rep.*, at 2702.

[33]*EPAA Conf. Rep.*, at 2702.

[34]39 Fed. Reg. 1924-61 (Jan. 15, 1974).

[35]Pub. L. No. 94-163, 89 Stat. 871 (1975).

[36]Pub. L. No. 94-385, 90 Stat. 1125 (1976).

[37]Pub. L. No. 96-294, 94 Stat. 611 (1980).

[38]The EPAA has also been amended on several occasions to extend its effective date. Pub. L. No. 93-511, 88 Stat. 1608 (1974); Pub. L. No. 94-99, 89 Stat. 481 (1975); Pub. L. No. 94-133, 89 Stat. 694 (1975).

[39]From 1973 to 1974, the average world price of oil increased from approximately $3.00 per barrel to $11.00 per barrel, an increase of 230%. A. Alm, W. Colglazier, B. Kates-Garnick, "Coping with Interruptions," *Energy and Security*, at 309. Between October, 1973, and January 1, 1974, the price of OPEC oil increased from $1.77 per barrel to $7.00 per barrel, a price increase of almost four times in the space of less than three months. R. Stobaugh, "After the Peak: The Threat of Imported Oil," *Energy Future*, at 28, 272, n. 32 (R. Stobaugh & D. Yergen ed. 1979) [hereinafter *Energy Future*].

[40]EPCA, § 401, 15 U.S.C. §§ 757, 758.

4(e) of the EPAA. Section 401 of EPCA directed the President to issue regulations, effective until June 1, 1979, which would insure that the "actual weighted average first sale price for all . . . crude oil [produced in the United States] . . . shall not exceed a maximum of $7.66 per barrel."[41] While the President possessed the authority to establish higher ceiling prices for individual categories of crude oil, any such higher prices had to be offset by equivalent reductions in the prices of other categories of crude oil in order to insure that the overall weighted average first sale price did not exceed the statutorily specified composite price ceiling.

EPCA also granted the President a variety of additional powers, including the authority to

(a) exercise the exclusive right to import and purchase crude oil and petroleum products for resale in the United States;[42]
(b) require any refinery to modify its output of residual fuel oil or any refined petroleum product;[43]
(c) in the event of an existing or impending regional or national fuel shortage require persons in the business of importing, producing, refining, marketing or distributing crude oil or petroleum products to accumulate or distribute inventories at a specified rate;[44] and
(d) prohibit "hoarding" by those engaged in the business of producing, refining, distributing or marketing of crude oil or petroleum products in a severe supply interruption.[45]

Finally, EPCA established certain steps for loosening, and ultimately for eliminating, controls on oil. First, it gave the President discretionary authority, subject to congressional review and possible one-House veto,[46] to place price and allocation controls on crude oil and petroleum products. (While the President technically could exempt crude oil from controls, this discretion was severely limited by the requirement that the overall first sale price of domestic crude oil not exceed the composite price index established by EPCA until June 1, 1979.) Second, EPCA made the President's authority "to promulgate, make effective, and amend" the price and allocation regulations issued pursuant to Section 4(a) of the EPAA "discretionary rather than mandatory" on June 1, 1979. Third, EPCA terminated on June 1, 1979, certain limitations on the President's discretion to regulate the price of oil, including the composite first sale price ceiling. Finally, EPCA provided that the authority to issue any regulations or orders under the EPAA would terminate on September 30, 1981 (except with respect to enforcement proceedings involving breaches of the EPAA which occurred prior to September 30, 1981).

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[41]EPCA, § 401(a), adding a new § 8 to the EPAA, 15 U.S.C. § 757. The constitutionality of this new price ceiling was upheld in Mapco Inc. v. Carter, 573 F.2d 1268 (Em. App. 1978), *cert. denied*, 437 U.S. 904 (1978), which rejected claims that the "rollback" in the price of some categories of crude oil occasioned by EPCA violated the Due Process Clause of the United States Constitution and "right to trust the federal government and rely on the integrity of its pronouncements," which plaintiffs unsuccessfully contended was embedded in the Ninth Amendment to the United States Constitution.

[42]EPCA, § 456, adding a new § 13 to the EPAA, 15 U.S.C. § 760b. Any regulation adopted by the President to implement this authority had to be transmitted to Congress and could be vetoed by either House of Congress. *Id.* The President has never exercised this authority.

[43]EPCA, § 457, adding a new § 14 to the EPAA, 15 U.S.C. § 760c.

[44]EPCA, § 458, adding a new § 15 to the EPAA, 15 U.S.C. § 760d.

[45]EPCA, § 459, adding a new § 16 to the EPAA, 15 U.S.C. § 760e.

[46]EPCA, § 551, 15 U.S.C. § 760a. The procedures for congressional review and disapproval are set forth in § 551 of EPCA, 42 U.S.C. § 6421.

2. *Conservation and Production Act*

Eight months later, Congress enacted the Conservation and Production Act, which made two principal changes in the pricing provisions adopted by EPCA. First, the Conservation and Production Act restored the exemption from price controls for stripper well crude oil which had been deleted by EPCA.[47] Second, in order to afford additional production incentives,[48] it increased the flexibility of the President with respect to the pricing of crude oil by deleting the requirement that production incentive price increases not exceed 3% per year.

3. *Energy Security Act*

The Energy Security Act added a new Section 4(f)(1) to the EPAA which empowered the President to allocate crude oil and petroleum products in certain circumstances to facilitate the production of motor fuel[49] comprised, in part, of alcohol.[50]

D. *Termination of Controls*

Following passage of EPCA, controls gradually were removed over residual fuel oil and most refined petroleum products.[51] On April 5, 1979, President Carter announced a program to phase-out price controls over domestic crude oil,[52] once controls became discretionary on June 1, 1979.[53] At the time of President Reagan's decontrol order, therefore, only crude oil, motor gasoline, and propane were subject to allocation or price controls.[54] President Reagan's decontrol order provided that controls over all crude oil and petroleum products, with minor exceptions, would be placed on a standby basis.[55]

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[47]Conservation and Production Act, § 121, adding a new § 8(i) to the EPAA, 15 U.S.C. § 757(i) (1976).

[48]Conservation and Production Act, § 122, amending § 8 of the EPAA, 15 U.S.C. § 757(a). However, the combined incentive and inflation increase could not exceed 10% per year. Hence, the primary value of this amendment was to permit the President to raise the price of crude oil by more than 3% where the inflation rate was less than 7%.

[49]The Energy Security Act defines "alcohol" to be "methanol, ethanol, or any other alcohol which is produced from any source and which is suitable for use in combination with other fuels as a motor fuel." Energy Security Act, § 274; EPAA, § 4(f)(3).

[50]Energy Security Act, § 274; EPAA § 4(f).

[51]10 C.F.R. §§ 210.35, 211.1; 10 C.F.R. Part 212, Subpart C (1980).

[52]*See* note 5 *supra*.

[53]EPAA, § 18, 15 U.S.C. § 760g (1976).

[54]With the exception of the relatively small amount of crude oil still subject to price controls on January 28, 1981, the practical impact of Executive Order 12287 on the price of these products is unclear. At the time of Executive Order 12287, DOE reported that refiners had unrecouped gasoline costs of about $28 billion. If these costs had been passed through in the price of gasoline, as permitted by the price regulations, DOE has calculated that refiners could have increased average gasoline prices by more than 40 cents per gallon before September 30, 1981. Similarly, DOE estimated that unrecouped propane costs would have permitted a 17-cent per gallon increase in costs by September 30, 1981. Further price increases could have been instituted at the retail level. Since only 15% of crude oil was still subject to price controls (and all products other than propane and gasoline were exempt from controls), the price of most crude oil and virtually all refined petroleum products was largely dictated by market forces at the time of Executive Order 12287. With respect to the portion of domestic crude oil for which Executive Order 12287 did not remove controls, however, the order did provide producers with the opportunity to significantly increase their prices. As of December, 1980, the price of lower and upper tier crude oil was $27.06 and $20.04, respectively, below the world market price of oil. Metzenbaum v. Edwards, No. 81-0405 (D.D.C., issued Mar. 4, 1981) (Affidavit of James B. Edwards, Secretary of Energy). It may also have created an economic climate in which substantial price increases were expected and, therefore, more easily made.

[55]*See* note 1 *supra*, and accompanying text.

E. *Summary*

Through a series of statutory extensions, the EPAA was transformed from a short-term emergency response to the Arab Oil Embargo into a prolonged regulatory program which pervaded virtually every phase of petroleum production and distribution within the United States. At its peak, the EPAA regulated the price of virtually all domestic crude oil and petroleum products consumed within the United States. It also provided for the allocation of crude oil and petroleum products sold or exchanged within the United States.

II. CURRENT ALLOCATION AND PRICING AUTHORITY

A. *Authority to Meet National Defense and Security Requirements*

Beginning October 1, 1981, the President will no longer be able, absent some further legislation, to control the price and distribution of crude oil and petroleum products pursuant to the EPAA.[56] However, the President currently possesses substantial authority under the Defense Production Act of 1950 ("DPA")[57] to allocate these substances. While the DPA is also scheduled to expire on September 30, 1981 (except for the power to allocate materials and equipment to maximize energy supplies, which expires on December 31, 1984), it will likely, as it has for the last thirty years, be extended by Congress for another one or two years. The President can also employ his authority under the Trade Expansion Act ("TEA") to restrict imports of crude oil and petroleum products to maintain the national security. Under the TEA, the President can restrict imports by imposing volumetric quotas or import fees and can also allocate imported oil among refiners and importers.

Unlike the EPAA, however, neither the DPA nor the TEA *require* the President to allocate oil. Moreover, neither of these statutes provides direct authority to establish a maximum price for oil. The most important distinction between these statutes and the EPAA, however, relates to the scope of activities intended to be regulated by each. The EPAA erected a comprehensive regulatory scheme applicable to virtually all transactions involving crude oil and petroleum products within the United States. In contrast, the DPA is primarily, but not exclusively, intended to make scarce materials available to the defense industry, while the TEA is intended primarily to regulate imported oil.

1. *Defense Production Act of 1950*

a. *Background and Main Provisions*

The DPA was enacted on September 8, 1950, in the context of, and in response to, the Korean War. It was originally intended to serve the dual short-term purposes[58] of developing and expanding the Nation's military strength, while at the same time stabilizing an economy which had begun to give way to wartime

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[56]EPAA, § 18, 15 U.S.C. § 760g.

[57]*See* note 7 *supra*.

[58]DPA, § 2 (current version at 50 U.S.C. App. § 2062 (1976)). *Accord*, H.R. Rep. No. 2759, 81st Cong., 2d Sess., *reprinted in* [1950] U.S. Code Cong. & Ad. News 3620, 3623; S.Rep No. 470, 82d Cong., 1st Sess., *reprinted in* [1951] U.S. Code Cong. & Ad. News 1584, 1585.

"inflationary pressures."[59] Toward these ends, the President was granted a number of broad and flexible[60] temporary powers to promote the national defense, including, among others, priority and allocation authority, authority to requisition, authority to control prices and wages, and authority to promote expansion of productive capacity and supply.[61] These powers, as they relate to the production, conservation, use, control, distribution, and allocation of energy, were transferred to, and are currently vested in, the DOE.[62]

As originally enacted, the DPA was divided into seven titles.[63] While many of these titles have been modified or repealed, or have expired of their own accord since 1950[64] (including, importantly, the title governing price and wage stabilization which expired in 1953), a number of critical provisions of the original statute have been renewed by subsequent Congresses and remain effective today. Most

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[59]S.Rep.No. 470, 82d Cong, 1st Sess., *reprinted in* [1951] U.S. Code Cong. & Ad. News 1584, 1585.

> The purpose of the Defense Production Act is frequently misunderstood. The DPA creates the framework for *industrial* mobilization to support the national defense. The twin purposes of the DPA are to authorize programs maintaining the health of the defense industrial base and to minimize the effect of such programs on the civilian economy. Broad authority is given to the President to carry out programs to achieve these purposes.

S.Rep. No. 387, 96th Cong., 2d Sess. 63, *reprinted in* [1980] U.S. Code Cong. & Ad. News 3638, 3639.

[60]Congress viewed the DPA as conferring great powers on the President:

> The powers granted in this bill are great. Their very flexibility, so necessary to accomplish our purposes without harm, raises the possibility of abuse. Your committee considered the possibility of limiting the powers or imposing arbitrary restrictions on the President. Your committee did not adopt this negative view.

S. Rep. No. 470, 82d Cong., 1st Sess., *reprinted in* [1951] U.S. Code Cong. & Ad. News 1584, 1596. *Accord*, Scanlan, 27 Notre Dame L. 192-93, and accompanying n. 38 (1951).

[61]H.R. Rep. No. 2759, 81st Cong., 2d Sess., *reprinted in* [1950] U.S. Code Cong. & Ad. News 3620, 3621. The DPA "was not particularly novel in scope or kind, but was, on the whole, merely an up-to-date reflection and compilation of the statutory mechanisms of World War II." Scanlan, 27 Notre Dame L. 1 (1952). *See generally* Scanlan, *The Defense Production Act of 1950*, 5 Rut. L. Rev. 518 (1951).

The constitutionality of the DPA was challenged in U.S. v. Excel Packing Co., 210 F.2d 596, 597-98 (10th Cir.), *cert. denied*, 348 U.S. 817 (1954). Finding that the DPA was passed under the war powers of Congress "primarily . . . to promote the national defense" during the existence of a national emergency and a state of war, 210 F.2d at 598, the United States Court of Appeals for the Tenth Circuit upheld the statute.

[62]Exec. Order No. 11790, § 4, authorized the FEA to:

> . . . exercise the authority vested in the President by the Defense Production Act of 1950, as amended, except Section 708 thereof, as it related to the production, conservation, use, control, distribution, and allocation of energy, without approval, ratification, or other action of the President or any other official of the executive branch of the Government.

39 Fed. Reg. 23785 (June 27, 1974). Subsequently this authority was delegated to the Secretary of Energy by Executive Order 12038, 43 Fed. Reg. 4957 (Feb. 7, 1978). The Secretary of Energy has delegated this authority to the Administrator of the Economic Regulatory Administration (Amendment No. 1 to DOE Delegation Order No. 0204-4).

[63]The seven titles were as follows: Title I (priorities and allocation), Title II (requisition authority), Title III (expansion of productive capacity), Title IV (price and wage stabilization), Title V (settlement of labor disputes), Title VI (control of consumer and real estate credit), and Title VII (general provisions).

[64]Following are the public laws which have amended, extended or terminated portions of the DPA: Pub. L. No. 82-69, 65 Stat. 110 (1951); Pub. L. No. 82-96, 65 Stat. 131 (1951); Pub. L. No. 82-429, 66 Stat. 296 (1952); Pub. L. No. 83-94, 67 Stat. 121 (1953); Pub. L. No. 83-95, 67 Stat. 129 (1953); Pub. L. No. 84-94, 69 Stat. 186 (1955); Pub. L. No. 84-119, 69 Stat. 225 (1955); Pub. L. No. 84-295, 69 Stat. 580 (1955); Pub. L. No. 84-632, 70 Stat. 408 (1956); Pub. L. No. 85-471, 72 Stat. 241 (1958); Pub. L. No. 86-560, 74 Stat. 282 (1960); Pub. L. No. 87-305, 75 Stat. 667 (1961); Pub. L. No. 87-505, 76 Stat. 112 (1962); Pub. L. No. 88-343, 78 Stat. 235 (1964); Pub. L. No. 89-318, 79 Stat. 1310 (1965); Pub. L. No. 89-482, 80 Stat. 235 (1966); Pub. L. No. 90-370, 82 Stat. 270 (1968); Pub. L. No. 91-151, 82 Stat. 856 (1969); Pub. L. No. 91-300, 84 Stat. 367 (1970); Pub. L. No. 91-371, 84 Stat. 694 (1970); Pub. L. No. 91-379, 84 Stat. 796 (1970); Pub. L. No. 92-45, 85 Stat. 38 (1971); Pub. L. No. 92-325, 86 Stat. 390 (1972); Pub. L. No. 93-323, 88 Stat. 280 (1974); Pub. L. No. 93-367, 88 Stat. 419 (1974); Pub. L. No. 93-426, 88 Stat. 1167 (1974); Pub. L. No. 94-42, 89 Stat. 232 (1975); Pub. L. No. 94-72, 89 Stat. 399 (1975); Pub. L. No. 94-100, 89 Stat. 483 (1975); Pub. L. No. 94-152, 89 Stat. 810 (1975); Pub. L. No. 96-41, 93 Stat. 325 (1979); Pub. L. No. 95-37, 91 Stat. 178 (1977); Pub. L. No. 96-77, 93 Stat. 588 (1979); Pub. L. No. 96-188, 93 Stat. 3 (1980); Pub. L. No. 96-225, 94 Stat. 310 (1980); Pub. L. No. 96-250, 94 Stat. 371 (1980).

recently, these provisions were extended to September 30, 1981 by the Energy Security Act.[65]

The portions of the current provisions of the DPA which may provide the authority to carry out certain of the programs and activities which were authorized by the EPAA are briefly summarized below.

i. *Declaration of Policy*

Section 2 of the DPA, which contains the statute's declaration of policy, was recently modified by the Energy Security Act specifically to designate energy as a strategic and critical material and to establish, as a national objective, the goal of "assur[ing] domestic energy supplies for national defense needs."[66]

ii. *Allocation Authority*

Section 101(a) of the DPA currently provides the President with the authority "to allocate materials and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense."[67] The scope of this broad allocation authority was clarified and limited by Congress in 1953 with the addition of a new subsection to Section 101:

> (b) The powers granted in this section shall not be used to control the general distribution of any material in the civilian market unless the President finds (1) that such material is a scarce and critical material essential to the national defense, and [68] (2) that the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship.[69]

In the case of energy materials and energy-producing equipment, the President's authority to allocate is considerably broader. This is because Congress, in EPCA, added yet another provision to Section 101 which provided additional allocation authority to the President:

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[65]Energy Security Act, § 105(b) (to be codified in 50 U.S.C. App. §§ 2095, 2096). The Energy Security Act modified the DPA as well as extending it. Most importantly, the Energy Security Act added several new sections to the DPA to empower the President to expedite the development of synthetic fuel for defense purposes through federal assistance programs. *Id.*

[66]Section 2 now reads as follows:

> In view of the present international situation and in order to provide for the national defense and national security, our mobilization effort continues to require some diversion of certain materials and facilities from civilian use to military and related purposes. It also requires the development of preparedness programs and the expansion of productive capacity and supply beyond the levels needed to meet the civilian demand, in order to reduce the time required for full mobilization in the event of an attack on the United States *or to respond to actions occurring outside of the United States which could result in the termination or reduction of the availability of strategic and critical materials, including energy, and which would adversely affect the national defense preparedness of the United States. In order to insure the national defense preparedness which is essential to national security, it is also necessary and appropriate to assure domestic energy supplies for national defense needs.*

DPA, § 2, 50 U.S.C. App. § 2062, *as amended by* Energy Security Act, § 102. (Energy Security Act amendment to § 2 is indicated in italics.)

[67]DPA, § 101(a)(2), 50 U.S.C. App. § 2071(a)(3). The constitutionality of this section was upheld in U.S. v. K.&H. Packing & Food Corp., 102 F. Supp. 26 (W.D.N.Y. 1951).

[68]As initially drafted, the word "or" would have been used instead of "and." In making this change, Congress intended that the President be required to meet both conditions. For the Senate discussion of this point, see 99 Cong. Rec. 5102 (1953) (remarks of Sen. Ferguson).

[69]DPA, § 101(b), 50 U.S.C. App. § 2071(b). The House Banking Committee Report on § 101(b) made clear that "use of the allocation power to ration at the retail level consumer goods for household or personal use is expressly prohibited." H.R. Rep. No. 2759, 81st Cong., 2d Sess., *reprinted in* [1951] U.S. Code Cong. & Ad. News 3620, 3636. The House Report also made clear that the President's allocation authority could only be invoked "upon a finding that the action is necessary or appropriate to promote the national defense." *Id.* at 3636.

> (c)(1) Notwithstanding any other provision of this Act, the President may, by rule or order, require the allocation of . . . supplies of materials and equipment in order to maximize domestic energy supplies if he makes the findings required by paragraph (3) of this subsection.

Paragraph 3, referred to in the above quotation, provides that the President can distribute supplies of materials (including raw materials) and equipment to maximize domestic energy supplies only if the President finds that

> (A) such supplies are scarce, critical, and essential to maintain or further (i) exploration, refining, transportation, or (ii) the conservation of energy supplies, or (iii) for the construction and maintenance of energy facilities; and
>
> (B) maintenance or furtherance of exploration, production, refining, transportation or conservation of energy supplies or the construction and maintenance of energy facilities cannot reasonably be accomplished without exercising the authority specified in paragraph (1) of this subsection.[70]

Thus, the President can allocate supplies of materials and equipment (other measures being inadequate) where they are scarce, critical, and essential to maintain or further energy production, refining, or transportation, to enhance conservation, or to maintain or construct energy facilities.

b. *Analysis of Presidential Authority Over Crude Oil and Petroleum Products Under the DPA*

It seems clear for several reasons that the authority conferred on the President by the DPA over crude oil and petroleum products is narrower than the authority conferred by the EPAA. First, the DPA was designed to serve, with one exception,[71] only national defense purposes, as compared with the EPAA, which serves a wide variety of statutory objectives, only one of which is the protection of national defense needs.[72] Second, the most important authority which the DPA confers—allocation authority—cannot be used to distribute oil in the marketplace except in very limited circumstances. Third, the DPA provides no authority to establish price controls on crude oil and petroleum products.

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[70]DPA, § 101(c), 50 U.S.C. App., § 2071(c), *as amended by* EPCA, § 104. The President's authority under § 101(c) will expire on December 31, 1984, pursuant to § 104(b)(1) of the EPCA, and is not affected by the expiration of other provisions of the DPA "unless Congress by law expressly provides to the contrary." EPCA, § 104(b)(2). Section 101(c) requires the President, among other things, to coordinate with any allocation program concurrently in effect under § 101(a) of the DPA.

[71]The exception involves the use of the President's allocation authorities to maximize energy supplies, discussed in greater depth in the text surrounding notes 98-107 *infra*.

[72]The DPA is specifically designed to accord the needs of the national defense the highest priority. By contrast, the EPAA accords the needs of the national defense no higher priority than a number of other objectives. *Compare* EPAA, § 4(a) *with* DPA, § 101. The regulations promulgated under the EPAA, however, have elevated national defense needs to the highest allocation priority (along with various other uses designated as priority uses by the EPAA). 10 C.F.R. §§ 211.26; 211.103(b); 211.123(b); 211.143(b); 211.163(b); 211.183(b); 211.203(b) (1980). As a result, the allocation programs conducted under the two statutes, to the extent that they both ensure that national defense needs are met before most other needs, have been similar. One main difference between the two programs is that defense contractors have been accorded preferred treatment under the DPA, but not under the EPAA. *See* note 79 *infra*. Furthermore, Department of Defense requirements are merged with some non-defense requirements in the highest EPAA priority; whereas they alone would occupy, with other defense requiements, the highest priority under the DPA.

i. *Limitation of DPA Authority to National Defense and Defense-Related Activities*

The overriding limitation on the President's allocation authority under the DPA is the requirement that actions taken under the statute must be substantially related to the national defense.[73] No such limitation exists under the EPAA. Indeed, Section 4(b)(1)(A) of the EPAA provides that regulations promulgated under the EPAA need only provide "to the maximum extent practicable"[74] for the national defense as one objective among a diverse array of statutory objectives.

Importantly, the term "national defense" has been confined over the years in the DPA to a relatively narrow, specific meaning. Initially, "national defense" was defined as

> . . . the operations and activities of the armed forces, the Atomic Energy Commission, or any other Government department or agency directly or indirectly and substantially concerned with the national defense, or operations or activities in connection with the Mutual Defense Assistance Act of 1949, as amended.[75]

This definition was substantially amended in 1953 and, with one subsequent minor change,[76] now reads as follows:

> . . . programs for military and atomic energy production or construction, military assistance to any foreign nation, stockpiling, space, [77] and directly related activity.[78]

Defense contractors are included within the scope of the term "military production or construction."[79]

The purpose of the 1953 amendment to the definition was to restrict further the President's powers under the statute. Under the original definition, it was feared that the President had the authority to accord preferential treatment to government agencies with interests having no direct connection with the defense effort.[80] It was determined that this authority should be limited[81] and that "prefer-

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[73]"The entire act [DPA] is expressly intended to provide for the national defense and the various powers it gives the President must be used by him in the interests of the national defense." 99 Cong. Rec. 4863 (1953) (remarks of Sen. Capehart).

[74]*See* text surrounding notes 28-29 *supra*.

[75]DPA, § 702(d) (1950) (current version at 50 U.S.C. App. § 2152(d) (1976)). For a description of the intentions of the Senate Banking Committee with regard to the scope of the term "national defense," see 99 Cong. Rec. 4864 (1953) (remarks of Sen. Capehart).

[76]In 1970, the definition was amended to add "space" to the list of programs covered by the DPA. S. Rep. No. 890, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 3768, 3772.

In 1980, an attempt was made in the Congress to delete the word "atomic" from the definition in order "to include in the definition of national defense programs all types of energy production or construction." H.R. Rep. No. 165, 96th Cong., 2d Sess. 23, *reprinted in* [1980] U.S. Code Cong. & Ad. News 3847, 3969 (referring to § 4(a) of H.R. 3930). The definition would then have read as follows:

> (f) The term "*national defense means programs for* military and *energy production* or construction, military assistance to any foreign nation, stockpiling, space, and directly related activity.

(Emphasis has been added.) This amendment to the definition of "national defense," which would have greatly expanded the term as it concerns energy programs, was not adopted. Arguably, this suggests an intent on the part of Congress to prevent the use of the DPA to further general energy production or construction objectives.

[77]The term "space" refers to exploration of outer space. *See* note 76 *supra*.

[78]DPA, § 702(d), 50 U.S.C. § 2152(d). For a discussion of the scope of the definition of "national defense" see S. Rep. No. 890, 91st Cong., 2nd Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 3768, 3772.

[79]The Economic Regulatory Administration ("ERA") of DOE has asserted that it "does have the authority under the DPA to authorize priority ratings for defense contractors." 44 Fed. Reg. 63110 (Nov. 2, 1979). However, its current regulations (10 C.F.R. Part 221) are limited to the Department of Defense. ERA has stated its intention to issue a separate rulemaking to establish priority ratings "for defense contractors and other defense entities." 45 Fed. Reg. 76433 (Nov. 19, 1980).

[80]99 Cong. Rec. 4863 (1953) (remarks of Sen. Ferguson).

[81]*Id.*

ential consideration" should be restricted "to facilities which are an integral part of military and atomic energy programs, and to those which are for our foreign aid, which is part of our national defense."[82]

The DOE (which was delegated certain of the President's authorities under the DPA) recognized in a recent rulemaking that the DPA offers more restricted powers over energy than the EPAA:

> The Defense Production Act was enacted in 1950 to ensure the timely production and delivery of materials necessary for the national defense. The general purposes of the DPA always have been national defense related . . . . It is evident, therefore, that the DPA is more strictly committed to meeting national defense needs than is the EPAA.[83]

Unlike the EPAA, then, the DPA confers broad powers, including powers over energy, but only in a limited context. The precise scope and nature of these powers are discussed in greater detail below.

ii. *Allocation Authority*

(A) *Section 101(a) of the DPA*

The "national defense" limitations on the President's powers under the DPA in general are also applicable to his allocation powers under Section 101 of the DPA in particular. Although often described (somewhat loosely) as giving the President very general and broad powers,[84] Section 101(a) (as the DOE has pointed out)[85] in fact expressly limits the President's allocation authority to allocations "necessary or appropriate to promote the national defense."[86] In this regard, the

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[81] *Id.*

[82] *Id.* Apparently, since the original definition of "national defense" contained the concept of defense-related activities, many persons had sought priority treatment on the basis that activities in which they were engaged were encompassed within that term. As a result, the government was forced to make determinations "of degrees of essentiality among various parts of the economy in relation to a master plan of national requirements." *Id.* Congress felt that the definition of "national defense" should be changed so that "administrators will not be pressured into making grants to segments of our economy not connected with the war effort." *Id.*

[83] 45 Fed. Reg. 76431, at 76432 (Nov. 19, 1980). The Federal Emergency Management Agency (which also has certain authorities under the DPA pursuant to Executive Order 10480, § 101, and Executive Order 12148, § 1-103 and 5-202), echoed DOE's position in a statement establishing "policy" guidance which it issued on July 1, 1980:

> § 322.2 Policies.
>
> (a) Authority of title I of the Defense Production Act of 1950, as amended, to control the distribution and use of materials and facilities, shall not be used except to require preference in the performance of contracts and orders and to allocate materials and facilities to accomplish the following:
>
> (1) Direct military and atomic energy programs.
>
> (2) Other programs and activities which are related to the military and atomic energy programs and which are certified by the Department of Defense or the Department of Energy and specifically authorized by the Federal Emergency Management Agency.
>
> (3) Deliveries, production, and construction in industry required to fulfill direct military and atomic energy programs and the related programs and activities authorized under paragraph (a)(2) of this section.
>
> (4) The general distribution in the civilian market of materials found to be scarce and critical pursuant to the provisions of section 101(b) of the Defense Production Act of 1950, as amended, and approved by the Director of the Federal Emergency Management Agency under section 201(b) of Executive Order 10480, as amended.

45 Fed. Reg. 44578 (Jul. 1, 1980) (to be codified in 44 C.F.R. § 322.2).

[84] *E.g., Defense Production Act Amendments of 1953: Hearings on S. 1081 Before the House Committee on Banking and Currency*, 83d Cong., 1st Sess. 69 [hereinafter *Hearings on S. 1081*] (statement of Craig R. Shaeffer, Assistant Secretary of Commerce); *id.* at 76, 79 (statement of Henry Kaltenbach, General Counsel, National Production Authority).

[85] 45 Fed. Reg. 76411, 76432 (Nov. 19, 1980).

[86] DPA, § 101(a), 50 U.S.C. App. § 2071(a). *Accord*, S. Rep. No. 138, 83rd Cong., 1st Sess. 15 (1953).

Senate Banking Committee, in describing the initial bill which became the DPA, explicitly stated that the allocation authority was intended to be used only to promote the national defense:

> The standards laid down by the act for the use of these [allocations and priorities] powers are general—to promote the national defense by meeting the requirements of military programs in support of our national security and foreign policy objectives and by preventing undue strains and dislocations upon wages, prices, and production or distribution of materials for civilian uses, within the framework, as far as practicable, of the American System of competitive enterprise. . . . Your committee stated in 1950, and wishes to repeat again, the main guiding principle in the use of these powers:
>
> > "However, while these powers are broad and are intended to be used broadly, *it is the intent of the committee that they should be used only where necessary or appropriate to promote the national defense. They should not be used to accomplish purposes, however meritorious, which bear no relation to national defense. Your committee expects that careful attention should be given in exercising these powers to assert that their exercise will be so confined.*"[87]

Thus, Section 101(a) provides broad authority to serve a limited objective—maintenance of the national defense. The President may allocate any material or facility to serve this objective, but cannot, under Section 101(a), allocate a product for any other objective.

(B) *Section 101(b) of the DPA*

Assuming that a national defense nexus can be found, the President's allocation authority is further confined by Section 101(b) of the DPA which, as noted *supra*, provides that such authority should not be used "to control the general distribution of any material in the civilian market"[88] unless the material is scarce and essential to the national defense and unless national defense requirements for the material cannot be met without creating significant dislocations and hardships in the civilian market. In enacting Section 101(b), Congress expressly contemplated that the President's authority to allocate in the civilian market would be permitted to be invoked only "in very rare cases"[89] with regard "to a handful of materials."[90] One Senator put it bluntly: "This limited definition makes it clear beyond dispute or misinterpretation that no controls over our entire industry are intended."[91]

The legislative history of Section 101(b) reflects a dominant congressional intention that the President's allocation authority be substantially restricted vis-a-

[87]S. Rep. No. 1599, 82d Cong., 2d Sess., *reprinted in* [1952] U.S. Code Cong. & Ad. News 1789, 1975-96.

[88]DPA, § 101(b), 50 U.S.C. App. § 2071(b).

[89]99 Cong. Rec. 5091 (1953) (remarks of Sen. Ferguson).

[90]*Id.*

[91]*Id.* The Senate Banking Committee made clear that § 101(b) was intended to prevent the President from allocating products in the civilian market except in very limited circumstances:

> [I]n the proposed extension of the priorities and allocation authority the committee has taken cognizance of the conditions which exist today and has proposed that the powers not be used to control the general distribution of any material in the civilian market except in special cases where otherwise, because of demands for national defense of a scarce and critical material, there would be a significant dislocation in the civilian market resulting in appreciable hardship. Nickel at present provides an excellent illustration of the need of authority to provide for equitable distribution of available civilian supplies. It is estimated that during 1953 the military, AEC, and stockpile will take more than one-half of the total supply. These requirements are so heavy as to make it necessary to apportion, as equitably as possible, the residual supply among civilian uses.

H. R. Rep. No. 516, 83d Cong., 1st Sess., *reprinted in* [1953] U.S. Code Cong. & Ad. News 1747, 1751.

vis the civilian market to situations in which the supply of a "scarce and critical"[92] material is severely curtailed because of the demands for the material by the specific programs (*e.g.*, defense, atomic energy, stockpiling) enumerated within the definition of the term "national defense."[93] In other words, the thrust of Section 101(b) is to remove authority from the President to allocate in the civilian market except, for example, in the unusual case in which the demands of a military program (or a directly related program) for a particular material are so great that unless the remaining small supply of the material is allocated in the civilian market substantial hardship would result.[94]

Where the supply of a material is curtailed because of demands outside of the defense sector, Section 101(b) would not permit the President's allocation authority to be invoked to allocate the material in the civilian market. Moreover, it is questionable whether the allocation authority could be invoked where, for example, only a small percentage of the total supply of a scarce and critical material has been diverted for national defense purposes.[95] Thus, the President would not appear to have the authority under Section 101(a) to allocate crude oil and refined petroleum products in the civilian market unless one or more of the specific national defense programs had placed extremely heavy demands on available oil supplies.[96]

However, while Section 101(b) limits the President's power under Section 101(a) to control the "general distribution" of a material, the Senate Banking Committee, in the course of reviewing the DPA in 1956, asserted that actions taken by the President which do not reach the level of control over general distribution are not restricted by Section 101(b):

> [T]he restrictions of section 101(b) only apply to controls over the general distribution of a material in the civilian market. *Other uses of the* priority and *allocation powers* than control over the general distribution in the civilian market *are not restricted in any way by section*

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[92]S. Rep. No. 2237, 84th Cong., 2d Sess., *reprinted in* [1953] U.S. Code Cong. & Ad. News 2930, 2939. It should be noted that the President would have to make a finding that crude oil and refined petroleum products are "scarce and critical" materials. As previously noted, § 106 of the Energy Security Act specifically designated "energy" (including crude oil and refined products) as a "strategic and critical" material, but not a "*scarce* and critical" material (emphasis added). As a result, § 106 of the Energy Security Act does not automatically provide the basis for the finding required in § 101(b)(1) of the DPA.

[93]For further useful discussion supporting this point, see *Hearings on S. 1081*, at 55, 56 (testimony of Messrs. Betts, Member of Banking Committee, and Houston, Acting Chairman of the Munitions Board).

[94]*Accord, id.* at 69 (statement of Craig R. Sheaffer, Assistant Secretary of Commerce). *See* 99 Cong. Rec. 4863 (1953) (remarks of Sen. Capehart).

[95]*See generally* 99 Cong. Rec. 4769 (1953) (remarks of Sen. Capehart).

[96]One writer has recently concluded that the scope of the President's authority under § 101(b) is dependent on the interpretation given to the term "national defense."

> Essentially, as applied to oil, Subsection (b) means that the President could not allocate oil on a general basis unless the effort to provide for national defense needs would create significant dislocation in the markets. The critical question is how broadly the term national defense would be interpreted. Although the military utilizes a relatively small amount of petroleum directly, when this amount is combined with that used by others engaged in national defense activities, *e.g.*, defense contractors, the volumes might be significant enough to justify a finding that allocation for national defense purposes required allocation in the civilian sector to avoid disruption of markets.

Goodwin, *Scheduled End of U.S. Controls Muddies Oil Picture*, Legal Times of Washington, Jan. 19, 1981, at 42, col. 1. For the time being, DOE has not yet promulgated regulations affording priority treatment to defense contractors. Should DOE do so (and it has indicated such an intent), the impact of the allocation program could be widened considerably. *See* note 79 *supra*, and accompanying text.

> *101(b), for example end use restrictions,* a set aside for independent small business, inventory restrictions, and similar controls falling short of control over the general distribution in the civilian market.[97]

If this assertion is correct, then it would appear that the President could use his allocation authority under the DPA to place end-use restrictions on oil, such as a prohibition on the use of No. 2 fuel oil as boiler fuel or to establish a set-aside program for the civilian market. However, if applied too widely, end-use-restrictions (by diverting supplies to preferred users through prohibitions on the use of fuels by disfavored users) effectively could be considered to approach general distributions in the civilian market. To the extent that end-use restrictions do approach such general distributions, they would, arguably, be prohibited by Section 101(b) of the DPA. Moreover, even if end-use restrictions did not cross the bounds established by Section 101(b), any such restrictions would still be required to meet national defense purposes under Section 101(a), since Section 101(b) does not confer any affirmative allocation authority.

Assuming the findings required by Section 101(b)(1) and (2) are made, and if allocation is necessary to promote the national defense, then Section 101(a) empowers the President to allocate materials on whatever basis he sees fit. Under such circumstances, Section 101 does not specificially confine the President's discretion to decide *how* to allocate, in what *quantities* to allocate, and to *whom* to allocate.

(C) *Section 101(c) of the DPA*

Section 101(c) of the DPA—which, as noted above, permits the President, "[n]otwithstanding any other provision of this Act," to allocate materials and equipment in the civilian market in order to increase domestic energy supplies—was initially contained in Section 105 of S. 622, entitled the Standby Energy Authorities Act of 1975. According to the Senate Interior Committee report on S. 622, Section 105, among other things, would have authorized

> . . . the President to allocate supplies of materials and equipment associated with the production of energy supplies to the extent necessary to maintain and increase the production and transport of fuels. . . . *This provision was included in the title in an attempt to remedy critical shortages and misallocations of pipes, pumps, drilling rigs and roofbolts, which are currently plaguing energy producers.*
>
> It is not the intent of the committee that this power be used generally or indiscriminately to abrogate contractual agreements. The authority granted may not be exercised unless the President finds that supplies of material and equipment are scarce, critical and essential to energy exploration and production, and that the maintenance or furtherance of such exploration and production cannot reasonably be accomplished without exercising the authority granted.[98]

Subsequently, Section 105 was transferred essentially verbatim to the DPA, becoming, as indicated, new DPA Section 101(c). According to Senator Proxmire, the purpose of the transfer of Section 105 to the DPA was to prevent "duplicated

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[97]S. Rep. No. 2237, 84th Cong., 2d Sess., *reprinted in* [1956] U.S. Code Cong. & Ad. News 2930, 2938 (emphasis added).

[98]S. Rep. No. 26, 94th Cong., 1st Sess. 34 (1975) (emphasis added).

and overlapping priority allocation systems for energy and national defense."[99] His proposed answer to the problem was to move Section 105 to the DPA in order

> . . . to take our existing and working allocation system and broaden it to include domestic energy supplies, while at the same time to provide the authority to reconcile different claims on a basis that will best serve the total national interest, rather than just one aspect of it.[100]

It is important to note that, because of the "notwithstanding" language in the first sentence of Section 101(c)(1), the President is not limited by Section 101(b) of the DPA in allocating materials and equipment to maximize domestic energy supplies. In other words, the President *does* have the authority to allocate materials in the civilian market to maximize energy supplies (provided he makes the findings contained in Section 101(c)(3)),[101] and the authority is *not* contingent on the existence of a national defense nexus.[102]

To date, the allocation authority contained in Section 101(c) has only been used to provide assistance in making hard-to-get materials and equipment available to programs or projects found by the DOE to maximize domestic energy supplies "by furthering the domestic exploration, production, refining, transportation or conservation of energy supplies or construction and maintenance of energy facilities . . . ."[103] Importantly, the Section 101(c) allocation authority has been used "passively," *i.e.*, only in response to applications made to DOE by "[p]ersons who believe that they perform work associated with a program or project which may qualify as an eligible energy program or project and wishing to receive assistance . . . ."[104] The Section 101(c) allocation authority has not been used "affirmatively," *i.e.*, to allocate materials and equipment on DOE initiative alone.

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[99]121 Cong. Rec. 5364 (1975) (remarks of Sen. Proxmire (D.-Wisc.)). The original § 105 of S. 622, he said, established a priorities and allocation system for energy, but failed to coordinate this system with the ongoing priorities and allocation system for national defense under the DPA. Senator Proxmire argued that if § 105 were enacted as initially proposed, the two systems would compete with one another, and there would be no mechanism for resolving the conflicts which would result.

[100]*Id.*

[101]*See* note 70 *supra*, and accompanying text.

[102]This point was made in a colloquy between Senators Jackson and Proxmire.

> *Mr. Jackson.* . . .
>
> The purpose of the Senator's specific language that I read from his amendment is that allocation of material for energy production would not require the defense findings that I read from the Defense Production Act, subsection (b) of Title I, Section 2071, is that correct?
>
> *Mr. Proxmire.* The manager of the bill is correct; that is right. . . .
>
> *Mr. Jackson.* I am sure that the Senator agrees with me that the whole thrust of this particular authority is to deal with the problem that we face in the energy area, and that we would not want whoever is going to administer this to be encumbered with a requirement that they would have to make a finding and a showing that it was tied to the defense section from which I read, from the United States Code, under subsection (b) in both categories (1) and (2).
>
> *Mr. Proxmire.* The Senator is absolutely correct. . . .

121 Cong. Rec. 5364-65 (1975).

[103]10 C.F.R. § 216.2 (1980).

[104]10 C.F.R. § 216.3 (1980). When such applications are made, DOE determines first whether the program or project will maximize domestic energy supplies and then whether the materials or equipment necessary for the program or project are "critical and essential." 10 C.F.R. § 216.1(b). (Exec. Order No. 11912 (Apr. 13, 1976), Defense Mobilization Order No. 13, 41 Fed. Reg. 43720 (Sep. 22, 1976), and Department of Commerce, Bureau of Domestic Commerce, Regulation No. 4, 41 Fed. Reg. 52331 (Dec. 1, 1976), delegated these functions to the FEA. DOE currently exercises these functions pursuant to § 301(a) of the Department of Energy Organization Act of 1977, 42 U.S.C. § 7151 (Supp. I 1977).) Subsequently, the Department of Commerce determines whether the materials or equipment are "scarce" and whether the program or project cannot be carried out without exercise of the allocation authority. Assuming all necessary findings are made by DOE and the Department of Commerce, the applicant is granted the right to use so-called "priority ratings" under the Defense Materials System and the Defense Priorities System established by the Department of Commerce.

However, while the legislative history of Section 101(c) focuses on the allocation of equipment needed to maintain energy production,[105] the language of Section 101(c) is broad enough to permit "affirmative" allocation. For example, pursuant to Section 101(c)(3), DOE could find that crude oil is "scarce, critical, and essential to maintain . . . refining . . . of energy supplies" and that maintenance of refining could not "reasonably be accomplished" without the allocation of crude oil. DOE arguably could then allocate crude oil among refineries "in order to maximize domestic energy supplies."[106]

Fashioning an argument which would permit the allocation of refined petroleum products is more problematical, because allocation can proceed only where necessary to maximize energy supplies. Motor gasoline, diesel fuel, or distillate fuel oil, however, could be allocated to the extent that they run engines or heat buildings used in connection with energy exploration, production, transportation or in connection with building or maintaining oil rigs, refineries, and the like.

Arguably, since Section 101(c) provides for the allocation of supplies where "such supplies are . . . essential to . . . further . . . conservation of energy supplies," allocation might also be made to end-users who adopt advanced conservation measures during a time of scarcity, on the theory that such allocation will "maximize domestic energy supplies" by providing for the most efficient use of available supplies. There is lacking in the legislative history of Section 101(c), however, any explanation of what Congress intended by providing for the "conservation of energy supplies." Moreover, what legislative history does exist concerning Section 101(c) in general strongly suggests that Congress intended the allocation authority to be used only to *increase* supplies (for example, by providing parts, such as pipes and rigs, needed to develop energy supplies effectively)[107] and not merely to use existing supplies more effectively. While the language of Section 101(c) is loosely drawn, the principal purpose of the provision appears to have been to provide materials and equipment to producers, refiners, or energy transporters, with conservation intended to be encouraged only in instances of real scarcity. Given the context in which it is used, "conservation" seems to have been intended to apply only as to exploration, development, refining, transportation, and similar functions.

On the whole, the DPA provides more limited allocation authority over crude oil and refined petroleum products to the President than the EPAA. For the most part, allocations of oil in the civilian market can only occur when the demands of the national defense have siphoned off large quantities, leaving very little for civilian use, or when oil will be used in connection with activities or projects intended to increase domestic energy supplies.[108]

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[105] *See* note 98 *supra*, and accompanying text.

[106] *Accord*, Goodwin, *Scheduled End of U.S. Controls Muddies Oil Picture*, Legal Times of Washington, Jan. 19, 1981, at 42, col. 1. The Conference Report to the EPCA makes clear that one of the purposes of the statute was to "maximize domestic *production* of energy . . ." S. Conf. Rep. No. 516, 94th Cong., 1st Sess. 116, *reprinted in* [1975] U.S. Code Cong. & Ad. News 1956, 1957 (emphasis added). And of course, § 105 of the Energy Security Act makes clear that the President has no authority under the DPA to ration gasoline among classes of end-users. On this point, a colloquy between Senators Domenici and McClure attempts to suggest that the DPA would actually *prohibit* gasoline rationing. 126 Cong. Rec. S8476 (daily ed. June 26, 1980) (remarks of Sens. McClure and Domenici).

[107] *See* note 98 *supra*, and accompanying text.

[108] It is not clear what authority DOE believes it possesses under the DPA. DOE has implied that it has the authority under the DPA to allocate products also subject to the EPAA:

> Finally, as we stated in the preamble to our Notice of Proposed Rulemaking on the DPA regulations, it is not our intention to use the DPA for products still subject to EPAA controls, *e.g.*, gasoline.

45 Fed. Reg. 76432 (Nov. 19, 1980).

iii. *Pricing Authority*

Title IV of the DPA, which specifically empowered the President to establish price controls on materials, expired in 1953, and Congress intentionally did not renew it because of the improved domestic economic situation at that time.[109] The President has no express authority under any of the remaining titles of the DPA over prices and wages. It seems clear that because the President's authority to control prices was initially contained in a separate title in the DPA, and because Congress permitted this title to expire, Congress never intended the President's allocation authority to be used to establish ceilings on prices or implicitly to encompass authority over prices and wages as well.[110]

c. *Conclusions*

As authority for control over the allocation of oil—including crude oil, residual fuel oil, and refined petroleum products—the DPA is far more limited than the EPAA. The exercise by the President of his allocation authority under the DPA is generally confined by the requirement that there exist a substantial connection to the furtherance of the national defense. Specifically, the President's allocation authority may only be used in the first instance to ensure that the military and other specific programs have access to critical materials and supplies. Extension of allocation controls beyond the defense sphere may only occur for the purposes of shielding the civilian sector from the shortages and adverse consequences which could ensue from fulfillment of the primary goal of the DPA to maintain the defense sector. (The only exception to this restriction on the President's allocation authority involves the use of that authority to "maximize" domestic energy supplies.) Thus, the authority under the DPA to allocate products for non-defense purposes is ancillary to the authority to allocate for purposes of meeting national defense needs. The DPA no longer provides authority to the President to control prices of materials and equipment, either with regard to the defense sector or the civilian sector. Viewed in proper perspective, therefore, the DPA accords the President substantially less flexibility and far fewer options concerning the general control of crude oil and refined petroleum products than the EPAA.

2. *Trade Expansion Act of 1962*

a. *General*

Section 232(b) of the TEA[111] provides the President with the authority to restrict imports of articles to the extent necessary to protect the national secur-

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[109]H.R. Rep. No. 516, 83d Cong., 1st Sess., *reprinted in* [1953] U.S. Code Cong. & Ad. News 1747, at 1750, 1757.

[110]*But see Goodwin, Scheduled End of U.S. Controls Muddies Oil Picture*, Legal Times of Washington, Jan. 19, 1981, at 42, col. 3.

Regulations which have been promulgated by various federal agencies to implement the allocation provisions of the DPA have included some indirect limitations on prices. For example, DOE's final rules establishing a priority for the supply of crude oil and petroleum products to the Department of Defense contain a provision prohibiting a supplier from discriminating against an order on which a priority rating has been placed "*by charging higher prices*, by imposing terms and conditions for such orders or contracts different from other generally comparable orders . . . or by other means," (Emphasis added.) This provision apparently has been adopted to maintain the integrity of the allocation system by preventing suppliers from discriminating against users intended to be protected by the DPA. For additional examples, see 32 C.F.R. Part 631, § 7(b); *id.* Part 632, § 8(a); *id.* Part 634, §§ 6(b), 10(a)(1).

[111]*See* note 8 *supra*.

ity.[112] This authority has been relied upon by each of the previous six Administrations as a principal, albeit generally unsuccessful, means by which to combat excessive imports of foreign crude oil and petroleum products. The means selected to restrict imports have varied significantly over this period, ranging from fixed, volumetric ceilings on imports to the imposition of import licenses and fees. The TEA authorizes the President to allocate the volumes of oil which are permitted to enter the country among importers. At the present time, however, there are no effective restrictions on imports currently in place under the TEA.

b. *Statutory and Regulatory Background*

i. *The TEA and Its Predecessors*

Section 232(b) of the TEA currently requires the Secretary of Commerce ("Secretary")[113] to make an investigation at the "request of the head of any department or agency, upon application of any interested party, or upon his own motion . . . to determine the effects on the national security of imports of the article which is the subject of such request, application or motion.[114] The Secretary is required to report his findings and recommendations to the President within one year after beginning an investigation, and, if the President concurs with this finding, he is directed to "take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security."[115] The TEA has been held to confer authority on the President to restrict imports in the "broadest terms."[116] However, Congress recently acted to fashion a legislative "check" on Presidential initiatives under the TEA to restrict imports of crude oil and petroleum products. Section 402 of the Crude Oil Windfall Profit Tax Act added a new Section 232(e) to the TEA providing for congressional disapproval of actions taken by the President to restrict oil imports by joint resolution of Congress.[117]

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[112]The substantive authority contained in § 232(b) of the TEA originated in § 7 of the Trade Agreements Extension Act of 1955, Pub. L. No. 86, ch. 154, 69 Stat. 166 (1955), which added a new subsection (b) to § 2 of the Act of July 1, 1954, Pub. L. No. 464, ch. 445. The 1955 amendment permitted the President to adjust "imports of articles" if he found that the articles were being imported in such quantities as to endanger the national security. The Act of July 1, 1954 was further amended by § 8 of the Trade Agreements Extension Act of 1958, Pub. L. No. 85-686, 72 Stat. 673, to permit the President to adjust imports where either the quantities or circumstances of its importation endangered the national security. For simplicity, except where noted otherwise, references to the TEA in this article include the Trade Agreement Extension Act of 1955 and the Trade Agreement Extension Act of 1958.

[113]Prior to the issuance of Reorganization Plan No. 3 of 1979, § 5(a)(1)(B), 44 Fed. Reg. 69274 (Dec. 3, 1979), the functions performed by the Secretary of Commerce were vested in the Secretary of Treasury.

[114]In the course of the investigation, the Secretary is required to consult with various officials including the Secretary of Defense, "[i]f it is appropriate and after reasonable notice." The Secretary must also hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to the investigation. 19 U.S.C. § 1862(b).

[115]19 U.S.C. § 1862(b).

[116]Pancoastal Petrol. Ltd. v. Udall, 348 F.2d 805, 807 (D.C. Cir. 1965). *Accord*, Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548, 570-71 (1976) [hereinafter *Algonquin SNG*]; Texas American Asphalt Corp. v. Walker, 177 F. Supp. 315, 326-28 (S.D. Tex. 1959).

[117]Pub. L. No. 96-223, § 402 (1978). This power was invoked just two months later to disapprove an import fee proposed by President Carter. 126 Cong. Rec. H4534-35 (daily ed. June 5, 1980); 126 Cong. Rec. S6376-6386 (daily ed. June 6, 1980).

ii. *Operation of the TEA*

During the past twenty-two years, the powers conferred by the TEA were exercised to establish quotas on the volume of oil permitted to enter the United States (1959 to 1973),[118] to erect a license-fee system in which import fees were assessed on each barrel of imported oil entering the country above certain historical levels (1973 to 1979),[119] and as an instrument of foreign policy to prohibit importation of crude oil and petroleum products produced by certain nations (beginning in 1979).[120] During the effective period of the import quotas, oil generally could not enter the country except pursuant to a license and allocation order issued under the mandatory oil import program by the Secretary of Interior.[121] Under the subsequent license fee program, volumes of imported oil which were exempt from the import fee were allocated among importers.[122] Diverse criteria were used to allocate imported oil among refiners and other importers over this period, including, *inter alia:*

(1) plant storage, output or input levels,[123]
(2) historic levels of imports,[124]
(3) the size of the refiner (with smaller refiners receiving a relatively higher percentage of requirements),[125]
(4) the effect of allocations on unemployment in the region served by the importer,[126]
(5) exceptional hardship, special circumstances or error,[127] and
(6) the types of products to be processed or produced by the importer.[128]

[118]Proclamation 3279, 24 Fed. Reg. 1781 (March 12, 1959).

[119]Proclamation 4210, Imports of Petroleum and Petroleum Products, 9 Weekly Comp. of Pres. Doc. 406 (Apr. 18, 1973); Proclamation 4341, Imports of Petroleum and Petroleum Products, 11 Weekly Comp. of Pres. Doc. 78 (Jan. 23, 1975). The lawfulness of this license-fee system was upheld by the Supreme Court in *Algonquin SNG*. The subsequent invocation of the TEA to impose an import fee which could only be passed through in the price of motor gasoline, whether refined from domestic or imported oil, however, was held to exceed the power conferred on the President by the TEA. Independent Gasoline Marketers Council, Inc. v. Duncan, 492 F.Supp. 614 (D.D.C. 1980) [hereinafter *Independent Gasoline Marketers*].

[120]By Proclamation 4702, 44 Fed. Reg. 65581 (Nov. 14, 1979), the President responded to the seizing of the American Embassy in Tehran and the capture of the Americans within the Embassy, by prohibiting the importation of crude oil produced in Iran, except for crude oil loaded on maritime vessels prior to November 13, 1979 or unfinished oil or finished products refined from such crude oil in possessions or free trade zones of the United States.

[121]Proclamation 3279, *supra* note 118, at § 1(a); 177 F. Supp. at 325.

[122]Proclamation 4210, *supra* note 119, at § 4(b).

[123]Proclamation 3279, *supra* note 118, at § 3(b); Proclamation 4210, *supra* note 119, at § 4(b)(1); 10 C.F.R. §§ 213.4, 213.9 (1980).

[124]Proclamation 3279, *supra* note 118, at § 3(b); Proclamation 4210, *supra* note 119, at § 4(b)(2), (4); Atlantic Refining Co. v. Standard Oil Co., 304 F.2d 387, 390 (D.C. Cir. 1962); Skelly Oil Co. v. Russell, 436 F.2d 910, 917 (D.C. Cir. 1970).

[125]304 F.2d at 390, 391; Murphy Oil Corp. v. Hickel, 439 F.2d 417, 423 (8th Cir. 1971).

[126]Proclamation 3279, § 3(b)(2), as amended. 25 Fed. Reg. 13945 (1960); 26 Fed. Reg. 507, 811 (1961); 27 Fed. Reg. 9683, 11985 (1962); 28 Fed. Reg. 4077, 5931 (1963); 30 Fed. Reg. 15459 (1965); 32 Fed. Reg. 5919, 10547, 15701 (1967); 33 Fed. Reg. 1171 (1968).

[127]Proclamation 3279, *supra* note 118, at § 4; Proclamation 4202, 9 Weekly Comp. of Pres. Doc. 295-96 (Mar. 23, 1973); Proclamation 4210, *supra* note 119, at § 5(b).

[128]10 C.F.R. § 213.11 (1980) (Secretary can allocate fee-exempt licenses to importers who will refine heavy oil); 10 C.F.R. §§ 213.17, 213.18 (1980) (allocations available to importers who will supply No. 2 oil to specified regions from Jan. 1, 1973 to Apr. 30, 1973); Gulf Oil Corp. v. Hickel, 435 F.2d 440 (D.C. Cir. 1970).

At the present time, however, the TEA is essentially dormant. The quota program was terminated in 1973,[129] while import fees have been suspended since 1979.[130]

c. *Analysis of the President's Authority Under the TEA*

While the TEA has been applied to reduce imports of crude oil and petroleum products for over twenty years, court decisions assessing the scope of the President's authority under the TEA are relatively rare. The two leading decisions on the scope of the President's authority are *Algonquin SNG v. Federal Energy Administration* and *Independent Gasoline Marketers, Inc. v. Duncan.*

In *Algonquin SNG*, the Supreme Court upheld the use of import fees (which had been imposed by Presidents Nixon and Ford) as a permissible means of curtailing oil imports. In its decision, the Supreme Court, reversing the decision of the United States Court of Appeals for the District of Columbia Circuit,[131] held that it could "find no support in the language of the statute for [plaintiffs'] contention that the authorization to the President to 'adjust' imports should be read to encompass only quantitative methods—*i.e.*, quotas—as opposed to monetary methods—*i.e.*, license fees—of effecting such adjustments."[132] Based on its reading of the legislative history of Section 232(b) and the "broad language" of that section, the Court concluded that the TEA authorized adoption of import fees to reduce imports.[133] Importantly, however, the Court went to some lengths to warn, in *dicta*, that the TEA did not necessarily authorize actions which only remotely affect imports.[134]

In *Independent Gasoline Marketers*, the other leading case on the President's authority under the TEA, the U.S. District Court for the District of Columbia held that the imposition of an import fee coupled with the requirement that the fee be passed through solely in the price of motor gasoline, whether derived from imported or domestic oil, was unlawful. The court reasoned that, while the imposition of the import fee alone was lawful under *Algonquin SNG*, the requirement that the fee be passed through only in the price of gasoline transformed the fee

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[129]Proclamation 4210, *supra* note 119.

[130]45 Fed. Reg. 85817 (Dec. 30, 1980); Proclamation 4655, 44 Fed. Reg. 21243 (Apr. 10, 1979); Proclamation 4412, 41 Fed. Reg. 1037 (Jan. 3, 1976). The prohibition on imports from Iran remains effective. *See* note 120 *supra*. This, however, has not had any discernible effect on the total amount of oil imports into the United States.

[131]The Court of Appeals had found the use of an indirect means, such as import fees, to restrict imports to be unlawful. Algonquin SNG, Inc. v. FEA, 518 F.2d 1051 (D.C. Cir. 1975). The court did not reach the two other principal issues raised by the plaintiffs—that the Secretary of Treasury had failed to comply with the procedural requirements of § 232(b) of the TEA and that the Government had improperly failed to file an Environmental Impact Statement. 518 F.2d at 1054, 1062. For a critique of the court's decision which proved to be quite prophetic, *see* 89 Harv. L. Rev. 432 (1975).

[132]426 U.S. at 548.

[133]426 U.S. at 570-571. Plaintiffs also challenged the issuance of fee-exempt licenses in *Algonquin SNG* on the grounds that the amount of oil exempted under this mechanism varied from region to region in contravention of Article I, Section 8, clause 1 of the United States Constitution which requires that import duties be uniform throughout the United States. The Court declined to address this issue on the merits because the plaintiffs had not themselves sought certiorari of the court of appeal's decision. This failure, the Supreme Court held, precluded plaintiffs from seeking modification of the lower court's decision, which had not ruled on this issue.

[134]A final word is in order. Our holding today is a limited one. As [plaintiffs] themselves acknowledge, a license fee as much as a quota has its initial direct impact on imports, albeit on their price as opposed to their quantity . . . . As a consequence, our conclusion here, fully supported by the relevant legislative history, that the imposition of a license fee is authorized by Section 232(b) *in no way compels the further conclusion that any action the President might take, as long as it has even a remote impact on imports, is also so authorized.*

426 U.S. at 571 (emphasis added).

from a permissible measure designed to discourage imports into an impermissible general conservation program designed to "impose general controls on domestically produced goods."[135] More specifically, the district court found that the purpose of this import fee program was "primarily to lower domestic gasoline consumption" by raising the price of "both domestic and imported gasoline" by 10 cents per gallon.[136] This purpose, the court concluded, rendered the fee unlawful because the TEA did not authorize adoption of a program whose primary goal was to reduce the consumption of gasoline derived from both imported and domestic sources and which had only a "collateral effect on the retailing of foreign oil."[137]

While the full extent of the President's authority to restrict imports of crude oil and petroleum products has not been completely resolved by the courts, the *Algonquin SNG* and the *Independent Gasoline Marketers* decisions, read together, support the proposition that the President has broad flexibility to develop measures to reduce imports so long as the primary purpose and regulatory impact of such measures is confined to imported articles rather than domestic goods.[138] However, with the addition of Section 232(e) of the TEA by Congress in 1980, Congress has pared this broad discretion somewhat by providing for congressional review and possible veto of oil import restrictions.[139] This legislative veto power was employed, within a few months after its passage, to veto the import fee program initiated by President Carter to restrain the use of motor gasoline.[140]

To the extent that import restrictions are in place, the courts have held that the President has "wide discretion" to allocate the volumes of imported oil which the President permits to enter the country under the TEA.[141] The broad language and purposes of the TEA to protect the national security, the repeated inclusion of such distribution measures in presidential proclamations issued under the TEA and the apparent acquiescence of Congress in these measures over a twenty-year span (during which time it twice amended the TEA to restrain the President's authority in other respects)[142] lends substantial support for the conclusion that

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[135]492 F. Supp. at 618.

[136]*Id.* at 616.

[137]*Id.* at 617. The court also noted that Congress had explicitly withheld the authority to impose a fee on gasoline from the President in EPCA, which prohibits the adoption of "any tax, tariff or user fee" or "provision respecting the price of petroleum products" in a conservation contingency plan. *Id.* at 620, citing to 42 U.S.C. 6262(a)(2). The President filed an appeal of this decision; the appeal, however, was subsequently withdrawn when Congress overwhelmingly passed a resolution disapproving Proclamation 4744, which had placed this fee into effect. *See* note 117 *supra.*

[138]*Accord,* 348 F.2d at 807.

[139]Pub. L. No. 96-223, § 402 (to be codified in 19 U.S.C. § 1862(e)).

[140]126 Cong. Rec. H4602 (daily ed. June 5, 1980); 126 Cong. Rec. S6376 (daily ed. June 6, 1980).

[141]177 F. Supp. at 326-28. (Allocation based on prior oil import levels was not so arbitrary and capricious as to exceed the "wide discretion" conferred by the TEA or the Due Process Clause. *Id.* at 326.) The courts have repeatedly upheld administrative actions under these proclamations which have denied or limited allocations. *See* Apex Oil Co. v. FEA, 443 F.Supp. 647 (D.D.C. 1977); Murphy Oil Corp. v. Hickel, 439 F.2d 417 (8th Cir. 1971); Skelly Oil Co. v. Russell, 436 F.2d 910 (D.C. Cir. 1970); Gulf Oil Corp. v. Hickel, 435 F.2d 440 (D.C. Cir. 1970). This authority may, however, in the case of fee-exempt licenses, be confined by other consitutional constraints. In *Algonquin SNG,* the Supreme Court refused to address the merits of plaintiff's contentions that the fee-exempt license system produced non-uniform import duties contrary to Article I, Section 8, clause 1 of the Constitution on the basis of a procedural technicality. 426 U.S. at 560, n. 11. No other court has expressly addressed this issue. Thus, it is unclear whether a fee-exempt system which produced non-uniform impacts on states would be constitutional.

[142]Pub. L. No. 93-618, § 127(d) (providing additional procedural requirements before the President can act to adjust imports); Pub. L. No. 96-223, § 402 (providing for congressional veto actions to adjust imports of crude oil and petroleum products).

Congress intended that the President be empowered to allocate imported oil to refiners, petrochemical plants and other importers free of the restrictions otherwise established by the TEA.

Thus, the TEA permits the President, subject to congressional review and possible veto, to impose quotas or a tariff to reduce imports whenever the President concludes that imports pose a threat to national security.[143] The President, as a corollary to his power to reduce imports, can also allocate volumes which are permitted to enter the country within the quotas or free from the tariff. Subject to the issue reserved in *Algonquin SNG* concerning the uniform tariff provisions of Article I, Section 8, clause 1 of the United States Constitution, this would allow the President to allocate oil to importers, as in the past, on the basis of a wide variety of factors, including size (under the TEA small refiners were entitled to receive a relatively larger percentage of their total requirements), historical import levels, the nature of the product to be processed or produced, and the existence of special circumstances or extreme hardship. These allocation criteria resemble in many respects the allocation system in effect under the EPAA. The crude oil allocation regulations established by the EPAA, for instance, provided for allocations of crude oil to small refiners without adequate access to other crude oil supplies.[144] In conjunction with the Federal Energy Administration Act ("FEAA"), the EPAA was used to provide additional volumes of oil where necessary to alleviate special hardship or inequity[145]—factors quite similar to those used to allocate oil under the TEA.

B. *Authority To Meet Emergency Situations*

Over the course of the last decade, Congress has enacted a number of statutes which have granted the President authority to take certain actions during a national emergency. A number of these statutes could be used by the President to exercise certain types of control over oil. For example, one statute gives the President emergency authority to allocate oil in order to enable the United States to meet its obligations under the International Energy Program. EPCA and the Emergency Energy Conservation Act of 1979 give the President emergency authority to develop standby programs for the stockpiling of crude oil and for gasoline rationing. Together, these statutes represent an effort to provide the President with a diversified range of measures which could be used in an emergency to ameliorate injury to the Nation's economy from a severe shortfall of oil.

However, the programs authorized by these statutes do not presently, and likely will not for the foreseeable future, provide significant protection from a cutoff of imported oil supplies to the United States. This is the result, in large part, of the substantial delays which have been encountered in developing these programs and, to a lesser extent, from the statutory limitations placed on the operation of these programs by Congress.

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[143]DOE and others have suggested that this power could be used at the outset of an embargo or other sudden shortfall to create a "disruption tariff," to be applied to imported oil so as to capture some of the price increases occasioned by the shortage. *Energy and Security*, at 280; *Reducing U.S. Oil Vulnerability*, at III-6 to III-11.

[144]10 C.F.R. § 211.65 (1980).

[145]FEAA, § 7(i)(D), 15 U.S.C. § 766(b); 10 C.F.R. Part 205, Subpart B (1980); Marathon Oil Co. v. Department of Energy, 482 F. Supp. 651 (D.D.C. 1979).

In addition to these statutes, Congress has also accorded the President wide-ranging authority to regulate oil imports in an emergency under the International Emergency Economic Powers Act of 1977. This statute could be used to mitigate the economic impacts of an embargo in a manner similar to the TEA. It differs from the TEA, however, in that it can only be employed during a presidentially-declared emergency and not, as under the TEA, as a means of forestalling threats to the national security.

1. *International Energy Program*

a. *Background*

In 1974, the United States and 15 other nations developed an International Energy Program ("IEP") and established an International Energy Agency ("IEA") as a means of responding to, and hopefully deterring, future oil embargoes such as the one placed into effect in 1973 by members of the Organization of Petroleum Exporting Countries.[146] The terms of the IEP and the authorities of the IEA were set forth in a document entitled "Agreement on an International Energy Program" ("IEP Agreement").[147] Currently, 21 nations are signatories to the IEP Agreement.[148]

The IEP Agreement is a very lengthy and complicated document, containing a preamble, ten chapters,[149] 76 articles, and an "Annex." The primary purposes of the IEP Agreement, contained in the preamble, have been described as follows:

> —To promote secure oil supplies on reasonable and equitable terms.
>
> —To take common, effective measures to meet oil supply emergencies by developing an emergency self-sufficiency in oil supplies, restraining demand, and allocating supplies among member countries on an equitable basis.
>
> —To promote cooperative relations with oil-producing countries and with other consuming countries including those of the developing world.
>
> —To play an active role in relation to the oil industry by establishing a comprehensive international information system and a permanent framework for consultation with oil companies.
>
> —To reduce dependence on imported oil by undertaking long term cooperative efforts on conservation of energy, on accelerated development of alternative sources of energy, and on research and development in the energy field.[150]

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[146]For an informative discussion of the events leading up to the formulation of the IEP, see *Standby Energy Authorities Legislation: Hearings on S. 620 and S. 622 Before the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 86-87 (1975) [hereinafter *Hearings on S. 620*] (Statement of Thomas O. Enders, Assistant Secretary of State for Economic and Business Affairs). For a slightly different version of the events surrounding the creation of the IEP and the IEA, see Woodliffe, *A New Dimension To International Co-operation: The OECD International Energy Agreement*, 24 Int'l and Comp. L. Q. 525, 526 (1975) [hereinafter *Woodliffe*]. This article provides an extensive discussion of the terms and objectives of the IEP, and of the organization and powers of the IEA.

[147]27 U.S.T. 1685, T.I.A.S. No. 8278 (Nov. 18, 1974). For an extensive selection of source materials on the IEP Agreement, see *International Energy Program: Hearings on International Energy Program Before the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 2d Sess. 1 (1974) [hereinafter *IEP Hearings*].

[148]Austria, Belgium, Canada, Denmark, Greece, Iceland (minor participant), Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States, West Germany.

[149]Chapter I: Emergency Self-Sufficiency; Chapter II: Demand Restraint; Chapter III: Allocation; Chapter IV: Activation; Chapter V: Information System on the International Oil Market; Chapter VI: Framework for Consultation with Oil Companies; Chapter VII: Long Term Co-operation on Energy; Chaper VIII: Relations with Producer Countries and with other Consumer Countries; Chapter IX: Institutional and General Provisions; Chapter X: Final Provisions. IEP Agreement, *supra* note 147.

[150]Willrich and Conant, *The International Energy Agency: An Interpretation and Assessment*, 71 Am. J. of Int'l L. 199, 200-201 (1977) [hereinafter *Willrich*].

In essence, the IEP Agreement institutes a coordinated mechanism by which to resolve a future energy crisis.[151] The IEP Agreement represents the belief of the participating nations that the burdens resulting from such a crisis can best be dealt with by marshalling and sharing the resources of each member of the group, and that the most effective way of resisting "the monopoly of OPEC world oil . . . is through development of countervailing power."[152]

b. *Main Provisions*

Members of the IEA agree to three basic commitments in the event of an embargo: (1) to increase oil stockpiles; (2) to reduce demand; and (3) to share oil.[153]

i. *Emergency Reserves*

Under the IEP Agreement, each participating country has an "emergency reserve commitment," which is an obligation to maintain reserves of crude oil and petroleum products sufficient to sustain consumption for 60 days with no net oil imports. The Governing Board, the highest decision-making authority of the IEA, can extend the time to 90 days. The "emergency reserve commitment can be satisfied using oil stocks, fuel-switching capacity, and/or stand-by oil production."[154]

ii. *Restraint on Oil Demand*

Each participating country must promulgate measures designed to restrain its "final consumption" by an amount equal to seven percent (or, if necessary, by an amount equal to ten percent) of final consumption during the previous year.[155]

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[151] In negotiating the international energy program our firm objective was to reduce immediately our vulnerability to supply interruptions such as that which we experienced last winter. We have accomplished this with an emergency oil-sharing program. That program commits the 18 countries in the International Energy Agency to build up emergency stocks and take coordinated demand restraint and oil-sharing measures in the event of a new embargo. The emergency program assures protection for countries singled out for a selective embargo, as we were in 1973. In addition, special protection is provided for our east coast, which is particularly dependent on imports and, thus, even more vulnerable to an interruption in supply. The program consists of the following three interrelated commitments:

To build common levels of emergency reserves, measured in terms of ability to live without imports of petroleum for specified periods of time;

To develop prepositioned demand restraint programs which will enable us in the event of a supply interruption immediately to cut oil consumption by a common rate;

To allocate available oil in an emergency, both domestic production and continuing imports, in order to spread the shortfall evenly among the member countries.

Energy Conservation and Oil Policy: Hearings on S. 620 Before the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess. 309 (1974) [hereinafter *Oil Policy Hearings*] (statement of Julius L. Katz, Deputy Assistant Secretary for Economic and Business Affairs, Department of State). For further helpful discussion of the IEP, see *id.* at 308-309, 333-336, 349-354.

[152] *Willrich*, at 203. For a detailed discussion of the benefits of the oil-sharing program, see *Hearings on S. 620*, at 88 (statement of Thomas O. Enders). Another description of the benefits to the United States of the IEP Agreement is contained in the *Report of Investigation of Effect of Petroleum Imports and Petroleum Products on the National Security Pursuant to Section 232 of the Trade Expansion Act, as Amended* (statement of David R. MacDonald, Ass't. Secretary of the Treasury for Enforcement, Operations and Tariff Affairs), *id.* at 105.

[153] H.R. Rep. No. 510, 96th Cong., 1st Sess. 4, *reprinted in* [1979] U.S. Code Cong. & Ad. News 2055, 2056.

[154] IEP Agreement, art. 3. For a fuller description of the "Emergency Self-Sufficiency" provisions of the IEP Agreement, see *Woodliffe*, at 528, and *Willrich*, at 206.

[155] IEP Agreement, arts. 5 and 14.

iii. *Oil Sharing*

The heart of the IEP Agreement is Chapter IV, which concerns the sharing of oil by the participating countries under certain oil supply emergencies. This chapter addresses two types of emergency situations: first, emergencies in which the group of participating countries as a whole experiences at least a 7% reduction in oil supplies as compared to consumption in the preceding year; second, emergencies in which one or more participating countries or a "major region" of one or more countries (but not the group as a whole) experiences such a reduction.

In the first type of emergency situation, a decision is made as to whether each participating country has an allocation right from the group of countries as a whole or an allocation obligation to the group as a whole, depending on a complex formula which measures the relative need of each member country for additional oil supplies, after demand-restraint measures and drawdown of oil reserves are taken into account.[156] In the second type of emergency situation, once the affected country absorbs a portion of the reduction in supplies (up to seven percent of its total consumption for the previous year); the affected country has an allocation right from the other participating countries.[157]

In principal, therefore, a portion of the United States' own domestic oil production could be siphoned off to fulfill any allocation obligations it might have under the IEP Agreement. One federal official has stated the opinion, however, that "[i]n practice, . . . only under the most extreme emergency situation would the United States ever be called upon to share any of its domestic production with the other IEA countries."[158]

iv. *Activation of System*

The IEP Agreement establishes a complicated system which must be followed before any of the emergency measures, including the oil-sharing measures, can actually be put into effect.[159] This system requires findings to be made as to the existence of an oil supply shortfall and requires a review of those findings by various decision-making bodies within the IEA. Under the system, the earliest that implementation of the emergency measures could occur, as a general rule, is 23 days following the date on which the intial findings of a supply shortfall have

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[156]IEP Agreement, art. 7. For a full description of the oil allocation system, when the group as a whole has been affected, see *Willrich*, at 207, and *Woodliffe*, at 529-30.

[157]IEP Agreement, art. 8. The allocation system where one member of the group has been affected is described by *Willrich*, at 207, and by *Woodliffe*, at 530.

> The program can be triggered during a 7% shortage among all the countries. A selective trigger of 7% in a single country can also activate the program. When the program is activated, the general purpose is to equalize shortages among the countries on a consumption basis. In other words, supplies would be shared so that each country would suffer the same percentage reduction in available supplies. If a single country reaches a 7% shortfall, then the other countries must contribute oil to equalize the shortfall.

H.R. Rep. No. 510, 96th Cong., 1st Sess. 5, *reprinted in* [1979] U.S. Code Cong. & Ad. News at 2057-58. For additional discussion of the allocation system under the IEP Agreement, see *IEP Hearings*, at 21-22 (Statement of Julius L. Katz).

For additional discussion of the allocation system under the IEP Agreement, see *IEP Hearings*, at 21-22 (Statement of Julius L. Katz).

[158]*Hearings on S. 620*, at 88 (statement of Thomas O. Enders). *Accord, Legislation on the International Energy Agency: Hearings Before the Subcomm. on International Organizations and on International Resources, Food and Energy of the House Comm. on International Relations*, 94th Cong., 1st Sess. 13 (1975) [hereinafter *Legislation on the IEA*] (statement of Melvin Conant, Assistant Administrator for International Energy Affairs, Federal Energy Administration).

[159]IEP Agreement, arts. 12-22. For a fuller description of the IEP Agreement activation process, see *Willrich*, at 210.

been made.[160] Activation of the emergency measures tends to be automatic, provided the appropriate findings and procedures have been followed.[161]

As currently structured, the IEP Agreement would not permit the United States, unilaterally, to block decisions of the IEA as a whole or the various decision-making bodies within the IEA. But, the United States and Japan together (or the United States and any two of several nations—Canada, West Germany, Italy, or the United Kingdom) could block any or all of the following decisions, among others: a decision "on the practical procedures for the allocation of oil and modalities for the participation of oil companies therein";[162] a decision not to activate emergency measures;[163] and a decision to deactivate emergency measures.[164] The United States in tandem with these countries could not, however, block a decision to activate the IEP.

c . *Implementation of the IEP Agreement through the EPCA*

Article 6 of the IEP Agreement requires each participating country to "take the necessary measures in order that allocation of oil will be carried out." In the case of the United States, Section 251 of EPCA provides the authority to allocate the Nation's domestic oil supplies in accordance with the IEP Agreement. It provides, in pertinent part:

> (a) The President may, by rule, require that persons engaged in producing, transporting, refining, distributing, or storing petroleum products, take such action as he determines to be necessary for implementation of the obligations of the United States under Chapters III and IV of the international energy program insofar as such obligations relate to the international allocation of petroleum products. Allocation under such rule shall be in such amounts and at such prices as are specified in (or determined in a manner described by) such rule. Such rule may apply to any petroleum product owned or controlled by any person described in the first sentence of this subsection who is subject to the jurisdiction of the United States, including any petroleum product destined, directly or indirectly, for import into the United States or any foreign country, or produced in the United States. . . .[165]

Thus, Section 251 of the EPCA provides the President with the authority to fulfill the obligations of the United States under the oil-sharing and activation chapters of the IEP Agreement. In this connection, the President is empowered under the EPCA to commit domestically produced oil, as well as imported oil, to the international allocation program established by the IEP Agreement. Apparently, the President has complete discretion to determine the price of any oil committed to the program, and can order the Nation's petroleum industry to do whatever is necessary to make the oil available for the international allocation program.[166]

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[160]*Willrich*, at 210.

[161]*Hearings on S. 620*, at 88 (statement of Thomas O. Enders). *Accord*, *Woodliffe*, at 535.

[162]IEP Agreement, art. 6(4).

[163]IEP Agreement, art. 19.

[164]IEP Agreement, art. 24. A number of other decisions could also be blocked with these voting combinations. They are listed in IEP Agreement, art. 62. *See Willrich*, at 211; *Woodliffe*, at 534, 536.

[165]EPCA, § 251, 42 U.S.C. § 6271.

[166]While the President can initially establish prices for the oil made available to the international oil-sharing program, he cannot, of course, force any of the participating countries to purchase oil at these prices. In this connection, the IEA is working to develop a "standby mechanism . . . to settle pricing disputes between IEA member countries and private firms over oil supplies delivered during oil emergencies." *Inside D.O.E.*, January 30, 1981, at 3.

It should be noted, however, that while the President's authority under Section 251 of the EPCA is far-reaching, it is generally anticipated that the international oil allocation program would work primarily through the voluntary cooperation of the oil companies.[167] Indeed, Section 252 of the EPCA specifically provides for voluntary agreements among oil companies to implement the IEP Agreement emergency measures.[168]

d. *DOE Regulations Implementing Section 251 of the EPCA*

The President has generally delegated his authorities under Section 251 of the EPCA to DOE.[169] On May 14, 1979, DOE promulgated regulations, entitled "Standby Mandatory International Oil Allocation" regulations, to implement these authorities.[170]

DOE's implementing regulations exist on a standby basis until the President makes the determination that an "international energy supply emergency exists."[171] Under these regulations, once the President has made such a determination,[172] DOE will simply issue supply orders to the petroleum industry to fulfill any allocation obligations which the United States has incurred under the IEP Agreement.[173] Each supply order will contain a statement of "pertinent facts," the legal support for the order, and a description of the actions which the recipient must take "including, but not limited to, distributing, producing, storing, transporting, or refining oil."[174] The regulations provide that the price of oil subject to

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[167]*Accord, Oil Policy Hearings*, at 311 (statement of Frank G. Zarb, Administrator, Federal Energy Administration); *Legislation on the IEA*, at 13 (statement of Melvin Conant, Assistant Administrator for International Energy Affairs, Federal Energy Administration); *Willrich*, at 208; *Woodliffe*, at 530; H.R. Rep. No. 510, 96th Cong., 1st Sess. 10, *reprinted in* [1979] U.S. Code Cong. & Ad. News 2055, 2063. The IEP Agreement itself establishes within the IEA "a permanent framework for consultation within which one or more Participating Countries may, in an appropriate manner, consult with and request information from individual oil companies on all important aspects of the oil industry . . ." IEP Agreement, art. 37. Section 252 of the EPCA, 42 U.S.C. § 6272 (Supp. III 1979), authorizes DOE to prescribe regulations under which the petroleum industry "may develop and carry out voluntary agreements, and plans of action, which are required to implement the allocation and information provisions of the international energy program." For further discussion of this area, see *Willrich*, at 208-09; *Woodliffe*, at 531-32; H. R. Rep. No. 510, 96th Cong., 1st Sess. 5 *reprinted in* [1979] U.S. Code Cong. & Ad. News 2057-58. In this connection, in 1979, both Italy and Sweden briefly reached the 7% IEP trigger. Rather than invoking the IEP, the IEA informally requested some of the oil companies voluntarily to reschedule oil shipments to these nations. *Energy and Security*, at 416.

[168]For a detailed description of what actions the oil companies could take to implement the oil-sharing measures of the IEP Agreement, see *Oil Policy Hearings*, at 352-54 (excerpts of letter dated March 28, 1971 from Dept. of Justice to Hon. Arthur F. Simpson, Administrator, General Services Administration). For a full discussion of the voluntary agreements and anti-trust exemptions provisions of the EPCA, see H. Rep. No. 510, 96th Cong., 1st Sess. 4-6, *reprinted in* [1979] U.S. Code Cong. & Ad. News 2055, 2056-58.

[169]DOE Organization Act, 42 U.S.C. §§ 7101 *et seq.* (Supp. I 1977 & Supp. II 1978 & Supp. III 1979); Exec. Order No. 11790, 39 Fed. Reg. 23785 (1974); Exec. Order No. 12009, 42 Fed. Reg. 46267 (1977).

[170]44 Fed. Reg. 27972 (May 14, 1979).

[171]10 C.F.R. § 218.10 (1980). This term is defined to mean

> . . . any period (a) beginning on any date that the President determines allocation of petroleum products to nations participating in the IEP is required by Chapters III and IV of the IEP and (b) ending on a date on which he determines such allocation is no longer required.

10 C.F.R. § 218.3 (1980).

[172]It is expected that any determination made by the President as to the existence of an international energy supply emergency would merely reflect the decision reached by the IEA that the emergency mechanism established by the IEP Agreement should be activated because a 7% reduction in oil supplies has occurred with respect to one or more of the countries participating in the IEP. In other words, once the emergency measures of the IEP Agreement have been triggered, then by definition an international energy supply emergency exists; therefore, the President's "determination" that such an emergency exists would, under the terms of the IEP, presumably be a "rubber stamp" decision rather than a decision based upon an independent investigation of the international oil situation by the Executive Branch.

[173]10 C.F.R. § 218.10(b) (1980).

[174]10 C.F.R. § 218.11(a) (1980).

a supply order will be "based on the price conditions prevailing for comparable commercial transactions at the time the supply order is served."[175]

In principle, then, once the President has triggered the operation of the Standby Mandatory International Oil Allocation regulations by determining the existence of an international energy supply emergency, DOE has the authority to determine which firms will supply which petroleum products to whom and under what conditions. DOE has the authority to place the entire emergency allocation burden on some firms, but not others.

In practice, the petroleum industry should be confronted with few surprises if the emergency oil-sharing program is activated. This is because the petroleum industry, through the voluntary agreements provided for in Section 252 of the EPCA,[176] has aleady worked out the details of the actions required to implement the United States' obligations under the IEP Agreement.[177] Indeed, one of the criticisms of the emergency oil-sharing mechanism is that too much control over the actual operation of the mechanism has been left with the oil companies.[178]

e. *Conclusions Concerning Allocation and Pricing Authority Under IEP Agreement and the EPCA*

While Section 251 of the EPCA sets forth allocation and pricing authorities which seem very broad, these authorities are dormant until the IEP Agreement emergency mechanisms are called into play. If, within the group of participating nations, no oil shortages should occur due to supply interruptions or the like, the President would have no authority under Section 251 of the EPCA to allocate, and establish prices for, the Nation's domestic oil.

Since Section 251 expressly limits the President's authorities over allocation and pricing of oil to situations in which the United States must fulfill its obligations under Chapters III and IV of the IEP Agreement, those authorities cannot be used outside of the IEP Agreement context. Thus, the President could not, for instance, utilize his Section 251 authorities for the general control over the distribution and pricing of crude oil and petroleum products.

However, an emergency which triggers the IEP and leads to the diversion of the United States' oil supplies to other countries would likely be of sufficient severity to permit invocation of the President's powers under the DPA and TEA to protect national defense and security. Activation of the IEP would also permit the President to institute additional measures, including rationing and distribution of oil from the Strategic Petroleum Reserve, as will be discussed below.

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[175]10 C.F.R. § 218.12 (1980). The regulations implementing § 251 of the EPCA contain a detailed mechanism for review of a supply order where the recipient of the order has a dispute with its provisions. 10 C.F.R. § 218.30 *et seq.* (1980). Additionally, the regulations provide that no recipient of a supply order will be required to perform any actions under the order "unless the firm to which the oil is to be provided in accordance with such supply order has agreed to a procedure for the resolution of any dispute related to the terms and conditions of the sale undertaken pursuant to the supply order." 10 C.F.R. § 218.10(c) (1980).

[176]Section 252 of the EPCA has been implemented by the regulations contained in 10 C.F.R. Part 209 (1980).

[177][T]he IEA has left the operation of the emergency sharing system to the [oil] companies. They have developed the procedures manuals, tested the system in mock situations, and have established a working group of oil supply experts, known a [sic] the Industry Supply Advisory Group (ISAG), to operate the program.

H.R. Rep. No. 510, 96th Cong., 1st Sess. 5, *reprinted in* [1979] U.S. Code Cong. & Ad. News, 2055, 2058. For a more detailed description of the petroleum industry under the IEP. *see id.* at 2057, 2063.

[178]*Accord*, H.R. Rep. No. 510, 96th Cong., 1st Sess. 10, reprinted in [1979] U.S. Code Cong. & Ad. News 2055, 2063.

2. *Strategic Petroleum Reserve*

a. *Overview and Purpose*

Title I, Part B of EPCA[179] requires the DOE[180] to establish a Strategic Petroleum Reserve ("SPR") for the storage of petroleum products to be available for use in a severe supply interruption[181] or to meet the United States' obligations under the IEA.[182] EPCA provided that design, construction and filling of the SPR must proceed in compliance with a Strategic Petroleum Reserve Plan ("SPR Plan") which was to be submitted to Congress no later that December 15, 1976 and was to become effective only if not disapproved by either House of Congress.[183] The SPR Plan was transmitted to Congress on February 16, 1977, and became effective, in the absence of a congressional veto, on April 18, 1977.[184]

EPCA further provides that drawdown and distribution of crude oil from the SPR can only proceed if a presidential finding is made that a severe supply interruption has occurred or if drawdown and distribution is required under the IEP, and must conform to the provisions of a "Distribution Plan" submitted to Congress.[185] In addition, the EPCA authorizes the Secretary to issue rules for the allocation of petroleum withdrawn from the SPR at prices specified in the regulations. The price levels and allocation procedures adopted by DOE are required to be "consistent with the attainment, to the maximum extent practicable, of the objectives specified in section 4(b)(1)" of the EPAA.[186]

b. *Current Status of the Reserve*

Actual storage of oil in the SPR has lagged far behind the schedule established in the SPR Plan. The SPR Plan establishes a storage goal of 500 million

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[179]*See* note 9 *supra.*

[180]EPCA initially delegated the responsibility for development of the SPR to the Administrator of the FEA. 42 U.S.C. § 6233. These functions were subsequently transferred to the Secretary of the DOE by § 301 of the Department of Energy Organization Act, 42 U.S.C. § 7151 (Supp. II 1978). References to DOE in this section include the FEA.

[181]Section 3(8) of EPCA, 42 U.S.C. § 6202, defines a "severe energy supply interruption" to mean

> 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 an interruption in the supply of imported petroleum products or from sabotage or an act of God.

[182]EPCA, §§ 156, 158; 42 U.S.C. §§ 6236, 6238. In addition, § 156 of EPCA authorized, but did not require, the DOE to (a) compel refiners and other importers of petroleum products to establish strategic reserves and (b) to investigate and recommend legislation to establish other forms of strategic reserves.

[183]42 U.S.C. § 6234(b).

[184]Committee on Interior and Insular Affairs, 95th Cong., 1st Sess., Strategic Petroleum Reserve Plan (Comm. Print 1977). The SPR Plan has been amended three times since then. Amendment No. 1, which was transmitted to Congress on May 25, 1977, and became effective on June 20, 1977, accelerated the development schedule for the SPR to 500 million barrels by the end of 1980. Federal Energy Administration Strategic Petroleum Reserve Plan, "Amendment No. 1: Acceleration of the Development Schedule," Energy Action No. 12 (1977). Amendment No. 2 provided for the expansion of the SPR to 1 billion barrels by the end of 1985. It did not, however, disturb the 500 million barrel goal established in Amendment No. 1 for the end of 1980. This amendment became effective on June 13, 1978. Department of Energy, "Amendment No. 2: Expansion of the Strategic Petroleum Reserve," Energy Action No. 1 (1978). Amendment No. 3, which became effective on November 15, 1979, established a distribution plan for crude oil withdrawn from the SPR during a severe supply interruption or in response to activation of the IEP. Department of Energy, Strategic Petroleum Reserve Plan. "Amendment No. 3: Distribution Plan for the Strategic Petroleum Reserve" Energy Action No. 5 (1979) ("Distribution Plan").

[185]EPCA, § 161(d), 42 U.S.C. § 6241(d).

[186]EPCA, § 161(e), 42 U.S.C. § 6241(e). Final allocation and price regulations were published on August 19, 1980. 45 Fed. Reg. 55374 (Aug. 19, 1980). These regulations are codified at 10 C.F.R. Part 220.

barrels of oil by the end of 1980, and one billion barrels by 1985.[187] By the fall of 1980, however, the total size of the SPR was less than 100 million barrels, only one-fifth the scheduled level.[188]

Concern about the continued suspension of deliveries of oil to the SPR prompted Congress, in Title VIII of the Energy Security Act,[189] to direct the President to fill the SPR at an annual rate of at least 100,000 barrels per day or more.[190] In order to assure adherence to this requirement, Congress prohibited the President from selling the United States' share of crude oil from Naval Petroleum Reserve No. 1 unless the President complied with the minimum storage rates established in the Energy Security Act.[191] Deliveries resumed in October of 1980 at slightly more than the statutory rate of 100,000 barrels per day.[192]

Subsequently, Congress adopted additional legislation which required the President to undertake acquisition, transportation, and injection activities to fill the SPR "at a level sufficient to assure that crude oil storage in the Strategic Petroleum Reserve will be increased to an average annual rate of at least 300,000 barrels per day or sustained average annual daily rate of fill which would fully utilize appropriated funds."[193]

The delays experienced in filling the SPR made it impossible for the SPR to be filled to (or even to approach) the 1980 target of 500 million barrels, and now make it highly unlikely, if not impossible, for the SPR to be filled up to the one billion barrel target set for 1985.[194] However, if the average fill rate of 300,000 barrels of oil per day recently mandated by Congress could be achieved, the 500 million barrel target, which would provide a drawdown capability of more than 3.5 million barrels per day, could be reached by the middle of this decade.[195]

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[187]Purchases of crude oil for the SPR were suspended in 1979 in response to the Iranian oil crisis, and remained suspended until the fall of 1980. Department of Energy "Strategic Petroleum Reserve, Annual Report," DOE/RA-00471, at v., 45 (Feb. 16, 1980) [hereinafter *SPR Annual Report*]; *Energy and Security*, at 327. *See Reducing U.S. Oil Vulnerability*, at 30. Injections resumed at the end of 1980 and the total size of the SPR as of February, 1981 is apparently approximately 114 million barrels—still only slightly more than one-fifth of the 1980 target. BNA, Daily Report for Executives, at A-8 (Feb. 10, 1981).

[188]Prior to resumption of storage injections the SPR had a drawdown capability of approximately 1 million barrels per day. 45 Fed. Reg. 48965, 48967 (Aug. 20, 1979); *SPR Annual Report*, at v.; *Energy and Security*, at 327.

[189]Pub. L. No. 96-294. Title VII amended EPCA by establishing a new § 160.

[190]The Energy Security Act also directed the President to issue regulations within sixty days after enactment of that Act to provide entitlements benefits which would have "the same effect as allocating lower tier crude oil to the Government for storage" in the SPR. Energy Security Act, § 805. With the demise of the entitlements program pursuant to Executive Order 12287, 46 Fed. Reg. 9909 (Jan. 30, 1981), this provision is now effectively moot.

[191]Congress was insistent about the need to resume deliveries to the SPR. The conferees to the Energy Security Act, for instance, declared "in the strongest possible terms their insistence that the President commence and continue filling the SPR as mandated in this Act. The Strategic Petroleum Reserve should be regarded as a national security asset of paramount importance." Conference Report, at 316.

[192]*Reducing U.S. Oil Vulnerability*, at V-C-9 to V-C-17; 46 Fed. Reg. 3368 (Jan. 14, 1981). By January, 1981 DOE had entered into contracts for the delivery of crude oil to the SPR at an average rate of 100,364 barrels per day for the period October 1, 1980 through September 30, 1981. "Obtaining Crude Oil for the Strategic Petroleum Reserve by Exchange of Naval Petroleum Reserves of Crude Oil," Final Rule, 46 Fed. Reg. 3367 (Jan. 14, 1981). The fill rate has apparently increased recently to between 130,000-160,000 barrels per day. BNA, Daily Report for Executives, at A-8 (Feb. 10, 1981).

[193]Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 96-514, 94 Stat. 2957 "Department of Energy, Strategic Petroleum Reserve" (1980).

[194]Amendment No. 2, at 3; *Energy and Security*, at 327, 399.

[195]The SPR storage facilities are being developed in three phases. Once the Phase I and Phase II storage facilities are completed and filled, the size of the SPR will be approximately 538 million barrels. This will provide a drawdown capability of about 3.5 million barrels per day, which would be slightly more than half of the average daily quantity of crude oil and petroleum products imported into the United States in 1980 of 6.7 million barrels. *SPR Annual Report*, at 7, 31-33; Department of Energy, Energy Information Administration, Weekly Petroleum Status Report, unnumbered p. 1, (Jan. 2, 1980); 44 Fed. Reg. 48696-7 (Aug. 20, 1979). Because of transportation and storage constraints, the maximum physical fill rate is approximately 300,000 barrels per day. *Energy and Security*, at 327; *Reducing U.S. Oil Vulnerability*, at V-C-9-17.

c. *Analysis of Drawdown and Distribution Provisions*

i. *Restrictions on Drawdown of the SPR*

The Secretary is permitted to drawdown and distribute crude oil from the SPR only under certain narrowly-defined circumstances. Section 161 of EPCA provides that "no drawdown and distribution of the Reserve . . . may be made, unless the President has found that implementation of . . . [the] Distribution Plan is required by a severe energy supply interruption or by obligations of the United States under the international energy program."[196] Section 161(b) further provides that drawdown and distribution of the SPR must be in accordance with the Distribution Plan submitted to Congress.[197] Section 161(e) sets forth additional provisions regarding the criteria for drawdown and distribution of the SPR where DOE chooses to allocate SPR oil:

> The Secretary may, by rule, provide for the allocation of any petroleum product withdrawn from the Strategic Petroleum Reserve in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such rules. Such price levels and allocation procedures shall be consistent with the attainment, to the maximum extent practicable, of the objectives specified in Section 4(b)(1) of the Emergency Petroleum Allocation Act of 1973.[198]

ii. *The Distribution Plan*

DOE states in the Distribution Plan that the

> primary purpose of the SPR sales and distribution process in most instances will be to provide crude oil to the U.S. refiners, on a timely basis, to substitute for lost imports. *The SPR oil distribution process is intended primarily to supplement national petroleum supplies rather than to assure equitable access to petroleum by specific U.S. refiners or other users.*[199]

Consistent with this primary objective, the Distribution Plan focuses almost exclusively on the means by which crude oil will be distributed to refiners. The Distribution Plan appears to assume that subsequent allocation of petroleum products produced from the SPR oil will be governed by DOE's Standby Crude Oil Allocation Regulations, which were adopted pursuant to the EPAA.[200] The procedures for allocation of petroleum products after the EPAA expires is only briefly addressed in the Distribution Plan:

> Unavailability of general allocation authority will result in primary reliance upon normal market operations for the equitable distribution of crude oil and products. Inequities that may develop can be alleviated through various methods of selling SPR crude oil, including the use of price competition for the selection of buyers, the pro rata apportionment of buy rights among refiners, or a specific SPR allocation system designed to respond to problems of inequitable access to crude oil.[201]

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[196]EPCA § 161(d), 42 U.S.C. § 6241(d).
[197]EPCA § 161(b), 42 U.S.C. § 6241(b).
[198]EPCA § 161(c), 42 U.S.C. § 6241(c).
[199]Distribution Plan, at 4-5 (emphasis added). This point is repeated throughout the Distribution Plan. *See* Distribution Plan, at 15, 16, 25.
[200]Distribution Plan, at 15-18; 10 C.F.R. Part 211, App. A.
[201]Distribution Plan, at 18.

Thus, the Distribution Plan provides only a very rough outline of the procedures and criteria to be followed in distributing SPR oil following expiration of the EPAA. The primary option is the sale of SPR oil on the open market, with allocation options discussed only in very general terms.

iii. *Allocation Regulations*

DOE has amplified, to some extent, the allocation alternatives in regulations issued in 1980.[202] To the extent that DOE chooses to distribute SPR crude oil pursuant to the allocation regulations, it is required by Section 161(e) of EPCA to do so in a manner consistent with the objectives of the EPAA. Consistent with this statutory mandate, DOE has incorporated in the SPR program, two programs—The Buy/Sell Program and the Standby Crude Oil Allocation Regulations—which were originally developed pursuant to the EPAA. While DOE reserves the right under the SPR regulations to initiate still other allocation procedures, the regulations specify that these alternative procedures must be consistent with the objectives of the EPAA.[203]

Thus, DOE has adopted a relatively cautious approach to fulfilling the requirements of Section 161(e) of EPCA; this approach closely adheres to the regulatory provisions adopted pursuant to the EPAA.[204] Most importantly, DOE has chosen, for the time being at least, not to exercise its full authority under EPCA to control the distribution of SPR crude oil. DOE has limited its allocation activities solely to the distribution of SPR crude oil to refiners. It has not, although it clearly appears to be authorized to do so, attempted to extend the reach of its authority to refined petroleum products produced from SPR oil by, for instance, requiring refiners, as conditions of obtaining SPR oil, to produce certain types of petroleum products or serve certain classes of users.[205] The approaches discussed by DOE for allocation of SPR crude oil are briefly summarized below.

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[202]45 Fed. Reg. 55374 (Aug. 19, 1980).

[203]10 C.F.R. § 211.65; 44 Fed. Reg. 48696, 48699 (Aug. 20, 1979).

[204]An interesting legal issue is posed by DOE's allocation regulations. It is at least arguable that DOE's selection of one of these allocation options in an emergency could be challenged in court on the basis that the mechanism chosen, within the context of the particular emergency conditions, violated the EPAA mandate, incorporated in § 161(e) of the EPAA, to fulfill the objectives of the EPAA "to the maximum extent practicable." In the event of a severe, protracted shortage, for instance, distribution of SPR crude oil solely to small refiners on the Buy/Sell list might be held to contravene the overall objectives of the EPAA, including the protection of public health, safety, and welfare, and the national defense, the allocation of crude oil to refiners to maintain full capacity, the promotion of economic efficiency, and the equitable distribution of crude oil. While DOE has broad authority to balance each of these regulatory objectives, an allocation program which enables small refiners to obtain a disproportionately large percentage of crude oil compared to other refiners and which discriminates against regions and users not served by small refiners could well be held to run afoul of the EPAA, as incorporated in § 161(e) of the EPCA.

[205]EPCA provides the President with broad authority to distribute SPR oil in an emergency, subject to the requirement, *inter alia*, that the distribution be consistent with the provisions of the Distribution Plan. EPCA, § 161(b). Distribution of SPR oil to refiners who agree to produce certain products or serve certain classes of users would appear to be consistent with this statutory authority and, in fact, under some circumstances, might be required in order to satisfy the requirement of § 161(e) that the allocation procedures "be consistent with the attainment, to the maximum extent practicable, of the objectives specified in section 4(b)(1)" of the EPAA. DOE has intimated in the current Distribution Plan that it has the authority to control the subsequent distribution of petroleum products from the SPR, although it has stated that it would not ordinarily do so. Distribution Plan, at 15-16, 33.

In order to control distribution to the user level, however, it may be necessary to amend the Distribution Plan to specifically list this as an option. While DOE did retain general authority in the Distribution Plan to allocate SPR oil on the basis of criteria to be announced at the time of the shortage, the vagueness of DOE's discussion of post-EPAA allocation to end-users in the Distribution Plan and the assurances by DOE in the Distribution Plan that it would not ordinarily exercise this power make it difficult to believe that Congress approved this specific option when it chose not to veto the Distribution Plan. An amendment, of course, would be subject to review and possible veto by Congress.

(A) *Buy/Sell Program*

Under this option, the Secretary can allocate crude oil to refiners which would qualify as buyers under the EPAA Buy/Sell Program. During the effective period of the EPAA, this program basically required large refiners to sell crude oil to small and independent refiners which did not have adequate supplies of crude oil.[206] The SPR would be deemed to be a "seller" under this mechanism with the crude oil then distributed to qualifying small refiners under the program.[207]

(B) *Standby Mandatory Crude Oil Allocation Program*

Crude oil would be available under this alternative to *all* refiners to the extent necessary to assure that each refiner is able to operate its plant or plants at the uniform national utilization rate to be calculated monthly by DOE.[208]

(C) *Other*

DOE has also reserved the right to allocate crude oil to refiners pursuant to different criteria which would be announced in a Notice of Sale to be published at the time that drawdown of the SPR is contemplated.[209] DOE noted in its Notice of Proposed Rulemaking[210] that this alternative would permit DOE to "target SPR crude oil directly at special shortage problems, such as regional product supply imbalances," or distribute SPR oil on a pro rata basis.[211]

DOE, through amendments to its Distribution Plan and regulations, could adopt still other allocation alternatives, including, conceivably, provisions for the allocation of refined petroleum products produced from SPR crude oil. While Congress would have to acquiesce to any amendment to the Distribution Plan, pursuant to Section 154 of EPCA, this would not seem likely to be a serious obstacle since the last three amendments to the SPR Plan have been routinely accepted by Congress.[212] To the extent that the allocation provisions adhere to the general end-use priorities contained in the EPAA, such action would also appear to comply with Section 161(e) of EPCA.

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[206]10 C.F.R. § 211.65 (1980).

[207]This proposal was criticized by many commentators during the rulemaking on the allocation regulations because it provides for allocation of crude oil only to certain small refiners. The DOE, however, retained this option in the belief that application of the Buy/Sell Program might be appropriate during a "moderate interruption of short duration at a time when the physical ability to draw down the SPR would be limited." 45 Fed. Reg. 55374 (Aug. 19, 1980).

[208]Standby Mandatory Crude Oil Allocation and Refinery Yield Program, Special Rule No. 10, 10 C.F.R. Part 211, Subpart C, App. A, § 211-1. Under this standby program, SPR oil would be distributed among all refiners to "assure that all domestic refiners would operate their refineries at . . . the same national utilization rate." 44 Fed. Reg. 48696, 48699 (Aug. 20, 1979). The primary problem identified by DOE with respect to this option is the requirement that utilization rates be calculated anew each month. The logistical and other problems associated with distribution of these volumes would, DOE states, require more time to resolve than provided in the standby regulations. 44 Fed. Reg. at 48699.

[209]44 Fed. Reg. at 48696, 48700.

[210]*Id.* at 48696.

[211]The Distribution Plan similarly noted that crude oil could be distributed to refiners who have a "willingness or ability to direct refined products to regions experiencing severe product shortages." Distribution Plan, at 6. DOE also indicated that it could issue so-called "buy rights" to "eligible refiners" under this option. As described by DOE, refiners would obtain certain "buy rights" which would be calculated on the basis of the crude oil runs to stills of each refiner during the specified base period. Refiners would then be free either to purchase SPR crude oil up to the volume committed by the "buy rights" or to sell those rights to others in a "white market." 45 Fed. Reg. 55374, 55375 (Aug. 19, 1980).

[212]*See* note 184 *supra*.

If substantial volumes of SPR crude oil were available in an emergency, the SPR program could advance many of the objectives of the EPAA. Allocation of crude oil to refiners serving regions experiencing the greatest shortages in an emergency, for instance, arguably would achieve a number of EPAA objectives, including preservation of public health, safety, and welfare, maintenance of a competitive and sound petroleum industry, and equitable distribution of crude oil.[213] Similarly, distribution of SPR crude oil pursuant to the Buy/Sell Program arguably would further the EPAA objectives of "preserving the competitive viability of . . . small refiners,[214] while distribution of this supply pursuant to the Standby Crude Oil Allocation Regulations would serve still other EPAA objectives.[215]

d. *Pricing of SPR Oil*

In the event that DOE chooses to allocate SPR oil, DOE's regulations and the Distribution Plan provide for the sale of SPR oil at a uniform price to purchasers. In general, that price will be tied to the average landed cost to all refiners of similar quality imported crude oil sold during the month.[216] Alternatively, DOE can, under the Distribution Plan, distribute crude oil outside the allocation regulations through competitive sales.[217]

Since the pricing mechanism under the allocation program is tied to market prices rather than to regulated prices, it might be possible to argue that this provision breaches the requirement, imposed by Section 4 of the EPAA, incorporated in the SPR Plan by Section 161(e) of EPCA, that DOE control the price of oil to achieve, to the maximum extent practicable, various statutory objectives. Even if the sale of SPR oil pursuant to the allocation regulations were challenged on this ground, however, the chances of success on the merits of such a suit would be small. DOE has defended market pricing of SPR oil as a necessary means to discourage undue reliance on SPR oil by buyers, prevent depletion of the SPR, and encourage conservation. These goals appear to be consistent with the overall objectives of the EPAA, since they provide for equitable pricing by avoiding an unfair subsidy to users served by refiners with greater access to SPR oil, minimize

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[213]EPAA, § 4(b)(1)(A), (D), (F).

[214]EPAA, § 4(b)(1)(D).

[215]These objectives could include the equitable distribution of crude oil, protection of public health, safety, and welfare and the national defense, to the extent that these uses are dependent on refiners who would obtain crude oil under this program, and the allocation of suitable types, grades and quality of oil to permit refiners to operate at full capacity. EPAA, § 4(b)(1)(A)-(F).

[216]Section 220.32 of DOE's regulations provides that "[t]he sales prices of SPR crude oil shall not be significantly higher or significantly lower than the highest and lowest prices, respectively, in comparable sales of allocated [sic] crude oil in the month of sale." It is not clear to what DOE is referring when it speaks of "allocated" crude oil as the benchmark to be used in pricing SPR oil. The benchmark is intended to be tied to imported oil prices. 10 C.F.R. § 220.32(a) (1980). Imported oil is not currently subject to the SPR program or other DOE allocation authority (although the President does have authority to allocate imported crude oil under the TEA, *see* text surrounding notes 141-42 *supra*.

[217]Distribution Plan, at 7-8; 10 C.F.R. § 220.1; 45 Fed. Reg. 55374 (Aug. 19, 1980). DOE recognized in the preamble of the final allocation regulations that "the overwhelming majority of respondents" preferred the use of allocation rather than competitive bidding, because of the "fear" that the price for SPR oil in an emergency would be so high that it would exclude many potential buyers from the SPR system and would create upward pressure on crude prices in general. Nonetheless, DOE retained this option without further discussion.

interference with the marketplace, protects public health and other uses favored by the EPAA by conserving SPR supplies for as long as possible, and encourage economic efficiency.[218]

e. *Role of SPR Program in a Future Emergency*

Unlike allocation controls which merely redistribute the shortfall, the SPR has the potential materially to reduce the severity of a shortage by providing a substantial additional supply of crude oil in an emergency.[219] The SPR provides a potentially flexible and effective response to a cut-off of oil imports which can be implemented with a minimum of delays. SPR crude oil, furthermore, can be targeted, within the constraints of the existing transportation system, to regions experiencing the most severe shortages or to refiners capable of producing the petroleum products in greatest demand.[220] Distribution of SPR crude oil can occur almost immediately after the onset of a shortage and can be adjusted, within the limits of the maximum distribution rate, to respond to variations in the intensity and the expected length of the shortage. By enhancing the United States' ability to withstand an interruption without extreme dislocations, a credible SPR can also serve as a powerful deterrent to the initiation of an embargo. For these reasons, accelerated development of the SPR should be a paramount objective of national energy policy.[221]

Even if development of the SPR is accelerated, however, flaws in the Distribution Plan may impair the effectiveness of the SPR in mitigating the adverse impacts of a shortfall. In the case of the Buy/Sell Program, SPR oil would be available only to small refiners, leaving larger refiners and their customers to fend for themselves. As recognized by DOE, this is not likely to be a viable option in a serious shortfall.[222] The Standby Crude Oil Allocation Program, in contrast, attempts to equalize the supplies available to all refiners, as measured against refinery capacity. It does not, directly control the subsequent production and distribution of petroleum products produced from the SPR oil to assure that essential end-user requirements are served. While DOE retains the discretion to fashion additional distribution schemes in an emergency, the development of

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[218]Distribution Plan, at 34-37; 45 Fed. Reg. 55374-76 (Aug. 19, 1980). EPAA, § 4(b)(1), 15 U.S.C. § 753(b)(1)(A)(D), (F), (H), (I) (1976). In analogous circumstances, regulations under the EPAA which permitted producers to sell crude oil at market prices were upheld. *See* 525 F.2d at 1071.

[219]*Energy and Security*, at 326-27.

[220]44 Fed. Reg. 48696, 48700 (Aug. 20, 1979).

[221]Even with the elimination of price controls over crude oil, which increases the cost of the oil purchased to fill the SPR, most analyses have concluded that filling of the SPR is still cost effective. Assuming a fill rate of 180,000 barrels per day, the cost of filling the reserve during the next five fiscal years has been calculated to be $20.4 billion. *Congressional Budget Office: Reducing the Federal Budget: Strategies and Examples, Fiscal Years 1982-1986*, at 50-51 (Feb. 1981) [hereinafter *Reducing the Federal Budget*]. Notwithstanding these costs, the Congressional Budget Office ("CBO") observed that "[t]he benefits of the SPR would be sizeable if oil supplies should be disrupted in the future. CBO analysis suggests that each barrel of Strategic Reserve oil might save up to several hundred dollars in lost GNP." *Id.* at 50. In order to provide for expansion of the SPR, while reducing federal outlays, however, the CBO recommended consideration of private financing of the SPR through the sale of shares in the SPR to the public which could be traded and which could be redeemed when SPR oil was sold during a disruption. *Id.*

DOE has estimated that each barrel withdrawn from the SPR would be worth $45.00 in GNP savings. Total savings to the economy during a massive interruption could be up to $18.9 billion. *Reducing U.S. Oil Vulnerability*, at II-A-6 to II-A-9. Other commentators have also concluded that the SPR should be promptly developed. *Energy and Security*, at 273-74. ("A large strategic petroleum reserve is the most potent domestic measure for dealing with supply interruptions." *Id.* at 326.)

[222]45 Fed. Reg. 55374 (Aug. 19, 1980).

alternative schemes is likely to be severely hampered if, as contemplated by the regulations, DOE must await the onset of an emergency.

While allocation of SPR oil to essential end-users may not be appropriate in most cases (for instance, where curtailment of essential requirements, such as defense or essential public services,[223] is not imminent), the omission of a provision to assure service in severe shortfalls to selected users, such as defense requirements, could be a weakness in the current system and may seriously frustrate DOE's efforts to comply with both the statutory mandate to achieve, to the maximum extent possible, the objectives of the EPAA and the overall objective of the SPR to "provide limited protection from the short-term consequences of interruption in supplies of petroleum products."[224]

3. *Motor Gasoline Rationing*

Perhaps the best known, and most ephemeral, of the remaining standby programs which may be implemented by DOE in an energy emergency is the motor gasoline rationing program. This program permits DOE to distribute, through a system of rationing coupons, motor gasoline and diesel fuel to end-users. Because the authority to implement this program expires, along with the EPAA, on September 30, 1981,[225] it is unlikely that this program will, or can, ever be implemented.

a. *Statutory Background*

As originally enacted, Sections 201 and 203 of the EPCA required the President to transmit to Congress a proposed rationing contingency plan for motor gasoline and diesel fuel which was to be consistent with the objectives of the EPAA. The plan was to provide:

> (A) for the establishment of a program for the rationing and ordering of priorities among classes of end-users of gasoline and diesel fuel used in motor vehicles, and
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> (B) for the assignment of rights, and evidence of such rights, to end-users of gasoline and such diesel fuel, entitling such end-users to obtain gasoline or such diesel fuel in precedence to other classes of end-users not similarly entitled.[226]

The plan was to be transmitted to Congress within 180 days of enactment of EPCA. Before being placed into effect, EPCA required that three steps be taken. First, the President was required to submit the plan to Congress. Only if both

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[223]Allocations of petroleum products for defense requirements, of course, could be provided under the DPA. *See* note 67 *supra*, and accompanying text. However, other users protected by the EPAA, such as public health and safety requirements, do not enjoy similar protection under the DPA.

[224]42 U.S.C. § 6241(a).

[225]Congress provided in EPCA that "all authority to carry out any rationing contingency plan shall expire on the same date as authority to issue and enforce rules or orders" under the EPAA. EPCA, § 203(f), 42 U.S.C. § 6263(f). The President's authority to issue rules and orders under the EPAA expires on September 30, 1981. EPAA, § 18.

[226]*See* note 10 *supra*.

Houses approved the plan, was it to become effective on a standby basis. Second, the President, before implementing the plan, was required to find that rationing was required by a severe supply interruption[227] by the IEP. Third, the President was required to transmit this finding to Congress, which could veto the activation order by majority vote of either House.

In 1979, Congress rejected the gasoline rationing plan submitted under the initial two-House approval mechanism contained in EPCA.[228] Following this veto, Congress passed the Emergency Energy Conservation Act of 1979 ("EECA"),[229] which amended EPCA to remove the *two*-House *approval* requirement and to substitute instead a *one*-House *veto* provision.[230] Under this amended provision, the rationing plan would become effective on a standby basis unless one House affirmatively acted to veto it. Subsequently, the President submitted a motor gasoline rationing plan which became effective on a standby basis when Congress did not veto the plan within the statutorily specified period.[231]

b. *Analysis of Gasoline Rationing Program*

There is almost no likelihood that gasoline rationing will ever be placed into effect absent substantive modifications by Congress to the underlying statutory authority, for two reasons. First, as noted, Section 203(f) of EPCA[232] provides that "all authority" to carry out a rationing contingency plan expires when the authority to issue rules or orders under the EPAA expires on September 30, 1981. Since DOE has estimated that it will require twelve to fifteen months to complete the pre-implementation process, which is still far from finished, and at least 90 additional days to place the plan in operation after an activation order is issued, there is little or no chance that the current plan could be implemented before the statutory authority expires.[233]

Second, while the EECA removed one of the principal obstacles to establishment of a standby rationing plan—the requirement that both Houses approve the plan—it ironically added a condition which dramatically reduces the likelihood that the plan will ever be activated. The EECA established a revised definition of "severe supply interruption" for purposes of rationing contingency plans, which requires the President to find, before implementing rationing, that a national

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[227]EPCA, § 3(8).

[228]125 Cong. Rec. H 3018 (daily ed. May 10, 1979).

[229]Pub. L. No. 96-102, 42 U.S.C. § 8501 *et seq.* (Supp. III 1979).

[230]EECA, § 203(b); EPCA, *as amended*, 42 U.S.C. § 6261(d)(1); S. Conf. Rep. No. 96-366, 96th Cong., 1st Sess., at 26-27.

[231]S.J. Res. 185, 126 Cong. Rec. S10297 (daily ed. Jul. 30, 1980); H.J. Res. 575, 126 Cong. Rec. H6775 (daily ed. Jul. 30, 1980). This plan is found in DOE's regulations at 10 C.F.R. Part 570.

[232]42 U.S.C. § 6263(f).

[233]The pre-implementation process is far from finished and has been assigned a low priority by the current Administration. *See* "U.S. to Cut Funds for Rationing," N.Y. Times, Feb. 23, 1981, § D, at 3, col. 13. "Progress Report to Congress on the Standby Motor Fuel Rationing Plans, Sec. 6.3.4," 45 Fed. Reg. 41352, 41377 (June 18, 1980). A number of commentators have suggested that, in lieu of rationing, the price of petroleum be allowed to float with oil company profits captured by a federal tax. *Energy and Security*, at 308, 339-42; 125 Cong. Rec. S10288 (Jul. 30, 1980) (letter from David A. Stockman, (R-Mich.) (Mr. Stockman is currently Director of the Office of Management and Budget)). Any congressional decision with respect to extension of rationing must be linked to a decision on whether to allow price controls to be imposed in an energy emergency. In the absence of controls over the price of oil in an emergency, rationing would appear to be unnecessary since higher prices would serve to dampen demand until equilibrium between supply and demand is attained.

energy supply shortage has arisen which will result, or is likely to result, in a daily shortfall "in an amount equal to 20 percent or more of projected daily demand" for gasoline, diesel fuel, and No. 2 heating oil supplies, unless express congressional approval is granted to ration at a lower level of shortfall. Moreover, the President must also find that the shortage cannot be corrected by other measures, including conservation measures under Title II of the EECA.[234] Since the EECA refers to a "national energy supply shortage" and requires a finding that the shortage will have a major adverse impact or "national health of safety or the national economy,"[235] this provision appears to require a 20% *national* shortfall in supplies of gasoline, diesel fuel, and No. 2 heating oil in order for gasoline rationing to be implemented. Since a 20% shortfall is almost three times the shortfall experienced during the Iranian oil crisis in 1979, when long gasoline lines and major supply disruptions were experienced in many regions of the country,[236] this standard virtually assures that rationing will not be imposed except during the most catastrophic national shortage (or in an international shortage which triggers the IEP). Thus, motor gasoline rationing as an emergency response measure, absent legislative amendment, is currently nonviable.

4. *International Emergency Economic Powers Act of 1977*

a. *Description*

The International Emergency Economic Powers Act of 1977 ("IEEPA")[237] provides wide ranging authority to the President. This statute was, for instance, the source of President Carter's authority to block all official Iranian assets in the United States.[238] Section 1702 of the IEEPA provides that when the President has declared the existence of a national emergency in response to "an 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,"[239] he may

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[234]EECA, § 103(e)(3)(A), 42 U.S.C. § 6261(d)(3) (Supp. III 1979). The revised definition of "severe energy supply interruption" reads as follows:

> For purposes of [implementing a rationing plan]—
> (A) The term "severe energy supply interruption" means a national energy supply shortage which the President determines—
> (i) has resulted or is likely to result in a daily shortfall in the United States of gasoline, diesel fuel, and No. 2 heating oil supplies for a period in excess of 30 days (including reductions as a result of an allocation away from the United States under the international energy program) of an amount equal to 20 percent or more of projected daily demand for such supplies;
> (ii) is not manageable under other energy emergency authorities, including any energy conservation contingency plans approved under subsection (b) of this section and any emergency conservation authority available under title II of the Emergency Energy Conservation Act of 1979;
> (iii) is expected to persist for a period of time sufficient to seriously threaten the adequacy of domestic stocks of gasoline, diesel fuel, and No. 2 heating oil; and
> (iv) is having or can reasonably be expected to have a major adverse impact on national health or safety or the national economy."

The EECA also added detailed procedures for calculating the estimated daily shortfall. In essence, the EECA requires the President to develop a base period figure, adjusted to reflect seasonal variations and "normal growth in demand" for these fuels. EECA, § 103(e)(3)(B); EPCA § 201(d)(3)(B), 42 U.S.C. § 6261(d)(3)(B) (Supp. III 1979).

[235]*See* note 234 *supra*.

[236]*Energy and Security*, at 339.

[237]*See* note 11 *supra*.

[238]Exec. Order No. 12170, 44 Fed. Reg. 65729 (Nov. 14, 1979).

[239]50 U.S.C. § 1701(a) (Supp. III 1979). In a sense, the IEEPA is both a national security and an emergency authority, since the powers it confers can be called into play in a national emergency arising from a threat to the national security.

> . . . under such regulations as he may prescribe, by means of instructions, licenses, or *otherwise*—
>
> . . .
>
> (B) investigate, *regulate*, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, *importation* or exportation *of*, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, *any property in which any foreign country or a national thereof has any interest;* by any person, or with respect to any property, subject to the jurisdiction of the United States.[240]

In essence, then, during a national emergency the President is empowered under the IEEPA to regulate "any property" in which "any foreign country" or a foreign national has "any interest" to the extent that such property is subject to United States jurisdiction.

b. *Analysis of Authority Under the IEEPA*

On its face, the wide language of Section 1702 clearly encompasses the authority to regulate the importation of foreign oil. Although the IEEPA has not, to date, been used for this purpose, its predecessor, Section 5(b) of the Trading With the Enemy Act ("TWEA"),[241] has been broadly used to regulate imports. In 1971, for example, President Nixon used the TWEA as authority for the imposition of a surcharge in the form of a ten percent ad valorem supplemental duty on all dutiable articles.[242]

Because Section 1702 of the IEEPA was taken almost verbatim from Section 5(b) of the TWEA, the cases which have analyzed the TWEA are of special importance in assessing the scope of the President's authority under the IEEPA (particularly since the IEEPA itself has yet to be closely scrutinized by the courts). The most extensive and most useful evaluation of the TWEA appears in *U.S.* v. *Yoshida International Inc.*,[243] in which the United States Court of Customs and Patent Appeals upheld President Nixon's surcharge on dutiable items.

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[240]50 U.S.C. § 1702(a)(1)(B) (Supp. III 1979) (emphasis has been added).

[241]Until its amendment by the IEEPA in 1977, § 5(b) of the Trading with the Enemy Act of 1917 ("TWEA"), 40 Stat. 415 (Oct. 6, 1917), *as amended*, had contained certain of the Presidential authorities now contained in § 1702(a)(1) of the IEEPA. Section 5(b) of the TWEA had initially given the President certain authorities "[d]uring the time of war or during any other period of national emergency declared by the President. . . ." The IEEPA split the TWEA § 5(b) authorities in two. It left in § 5(b) of the TWEA the President's authorities "during the time of war." At the same time, it removed from the TWEA the President's authorities "during any other period of national emergency" and placed these authorities in § 203 of the IEEPA (now codified at 50 U.S.C. § 1702(a)(1)). For further discussion of the purposes and provisions of the IEEPA, see [1977] U.S. Code Cong. & Ad. News 4540-4545.

The purpose of splitting the authorities was apparently to make any exercise of the authorities during a national emergency subject to the National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976). This Act represented "an effort by the Congress to establish clear procedures and safeguards for the exercise by the President of emergency powers conferred upon him by other statutes." Specifically, Congress was concerned with "safeguarding" the Nation against indiscriminate declarations of a national emergency by a President seeking to make use of emergency powers afforded by literally hundreds of statutes. [1976] U.S. Code Cong. & Ad. News 2289. For additional discussion of the purposes and provisions of the National Emergencies Act, see *id.* at 2288-2310.

It should be noted that the language of § 5(b) of the TWEA and § 203 of the IEEPA are virtually identical. The two most important differences between § 5(b) of the TWEA and § 203 of the IEEPA are, first, that the TWEA applies during a wartime situation while the IEEPA applies during a national emergency, and, second, that the TWEA permits the President to take title to foreign property while the IEEPA does not. On this latter point, see Code Cong. & Ad. News 4543; Electronic Data Systems Corporation Iran v. Social Security Organization of the Government of Iran, et al., Docket No. CA3-79-0218-F, at 21 (N.D. Tex., decided Feb. 12, 1981).

[242]Proclamation 4074 (Aug. 15, 1971), 7 Weekly Comp. of Pres. Doc. 1174-75 (Aug. 23, 1971).

[243]526 F.2d 560 (Cust. and Pat. App. 1975).

In general, the *Yoshida* court found Congress' delegation of authority in Section 5(b) to be flexible, broad, and extensive. Quoting approvingly from a number of cases, the court held that the TWEA constitutionally conferred on the President "far-reaching" authority, great "discretion and freedom," and the power to take "drastic" action.[244] The court found the language of Section 5(b) to be so clear as to make it "uncontestable" that the President had the power under the TWEA to regulate importation[245] by various means;[246] the court made plain, however, that Congress in Section 5(b) had not delegated to the President " 'the full and all-inclusive power to regulate foreign commerce,' "[247] and that the power conferred by the TWEA could not be used by the President except in the context of a war or a national emergency.[248]

The crucial question for the *Yoshida* court was not whether the President had the authority to regulate importation under the TWEA, but what means of execution of this authority were permissible.[249] To assess the legality of the surcharge chosen by the President in this case, the court undertook a three-part analysis involving review of the following: first, the nature of the action taken by the President in implementing the statute;[250] second, the relationship of the action taken to other statutes to determine the possibility of congressional intent to preempt the area;[251] and third, the relationship of the action taken to the emergency declared.[252]

As to the first aspect of the analysis, the appeals court found the surcharge acceptable because of its "limited nature," *i.e.*, because it did not extend to all imports, because it was a temporary measure, and because it did not attempt to "supplant the entire tariff scheme of Congress . . . ."[253] As to the second aspect of the analysis, the court found that "the surcharge did not run counter to any explicit legislation"[254] providing procedures prescribed by Congress for dealing with a national emergency of the type confronting the President in 1971. Finally, as to the third aspect of the analysis, the Court found that the surcharge bore a "reasonable relation to the power delegated and to the emergency giving rise to the action."[255]

Based on the scope of the President's authority under the TWEA, as outlined in the *Yoshida* decision, the President's authority under the IEEPA to regulate imported oil would appear to be substantial; it would be analogous to his authority under the TEA, discussed above, and would include, among other things, the authority to allocate and set prices, impose surcharges or taxes, or even prohibit

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[244] The court quoted, respectively, from South Puerto Rico Sugar Co. Trade Corp. v. United States, 334 F.2d 622, 632 (Ct. Cl. 1964), United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936), and Nielsen v. Secretary of the Treasury, 424 F.2d 833, 843 (D.C.Cir. 1970). *Accord*, 526 F.2d at 573, 578.

[245] 526 F.2d at 573.

[246] *Id.* at 576.

[247] *Id.* at 574, 582.

[248] *Id.* at 573, 581.

[249] *Id.* at 574.

[250] "Each Presidential proclamation or action under § 5(b) must be evaluated on its own facts and circumstances." *Id.* at 577.

[251] *Id.* at 578.

[252] *Id.* at 578-80.

[253] *Id.* at 577-78.

[254] *Id.* at 578. "The existence of limited authority under certain trade acts does not preclude the execution of other, broader authority under a national emergency powers act." *Id.*

[255] *Id.* at 578-580.

the importation of foreign oil.[256] Of course, whatever action the President chooses to take under the IEEPA with respect to the regulation of foreign oil would need to be a reasonable and appropriate response to the particular nature of the declared national emergency.[257] Presumably, the more severe the emergency, the more wide-ranging the President's response under the IEEPA could be.[258]

The primary limitation on the President's authority under the IEEPA is that the authority can only be invoked if the President declares a national emergency. Section 202 of the IEEPA[259] establishes the parameters for such a declaration. Pursuant to this section, the President can only declare a national emergency in the face of an extraordinary foreign threat to the "national security, foreign policy, or economy."[260] The other important limitation on the President's authority is that any action taken must be with respect to property in which any foreign country or foreign national has any interest. Thus, for example, with regard to imported oil, once such oil is purchased and becomes the sole property of a United States company or a United States citizen, it would appear that the President's authority under the IEEPA ceases to operate. Determining precisely when a foreign country ceases to have "any interest" in imported oil, and thus when the President's authority under the IEEPA terminates, is a substantial, and as yet unresolved, legal issue.

c. *Conclusions Concerning the President's Authority Under the IEEPA*

From a legal point of view, the IEEPA provides the President with far-reaching authority to regulate imported oil where necessary to meet problems arising in the context of a national emergency. From a practical point of view, however, the usefulness of the IEEPA to the Executive Branch as a device for regulating oil in an emergency may be somewhat limited because the President has delegated his authority under the IEEPA to the Secretary of the Treasury,[261] and has not delegated any authority to the DOE. As a result, there is no detailed regulatory framework in place under the IEEPA for dealing with problems involving foreign oil in an emergency.[262] Thus, while the President could certainly, in an emergency, issue a proclamation under the IEEPA establishing a very general rule on imported oil—such as a surcharge on all oil imports of the type declared by President Nixon on dutiable articles in 1971—he would not have any comprehensive emergency regulatory plan and integrated structure dealing with foreign oil to call upon under the IEEPA.

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[256]To the extent that a foreign oil company owns supplies of crude oil products in the United States, it would appear that the President has the authority under the IEEPA to order that company, for example, to allocate its oil to particular refineries for processing.

[257]*Accord*, 526 F.2d at 576.

[258]*See id.* at 573.

[259]50 U.S.C. § 1701 (Supp. III 1979).

[260]It should be noted that the declaration, once made, is generally not reviewable by the courts because it is considered a political decision. 526 F.2d at 579. However, such a declaration will be scrutinized, and can be terminated, by Congress under procedures established by the National Emergencies Act of 1976, Pub. L. No. 95-223, 91 Stat. 1626, 50 U.S.C. § 1601-1651 (1976). Specifically, Congress can terminate a national emergency declared by the President by concurrent resolution passed by both Houses. 50 U.S.C. §§ 1622(a)(1), 1622(b).

[261]Presidential Memorandum dated February 12, 1942; 7 Fed. Reg. 1409.

[262]Currently, the only regulations which have been issued under the IEEPA pertain to the control of Iranian assets. 31 C.F.R. Part 535. The regulations which currently exist under the TWEA pertain primarily to foreign assets control involving North and South Vietnam, Cambodia, and North Korea (31 C.F.R. Part 500), to the shipment of certain types of merchandise to designated Communist countries (31 C.F.R. Part 505), banking (31 C.F.R. Part 121), and transactions in foreign exchange, transfers of credit, and exports of currency (31 C.F.R. Part 128).

III. CONCLUSION

The statutory authorities discussed in this article provide the President with a wide range of powers to control the allocation and price of various categories of crude oil and refined petroleum products to meet national defense or security requirements or to counter an emergency shortfall of oil supplies. They do not, however, either individually or collectively, provide the panoply of price and allocation authorities conveyed by the EPAA. However, it does not necessarily follow that general price and allocation legislation is required to enable the President effectively to respond to an oil supply emergency. Indeed, events of the last seven years—including reduced domestic oil production, Government subsidization of oil imports, and increased national consumption of refined petroleum products, all of which were the result of EPAA controls—suggests that a repetition of this type of response to a future oil shortage should be avoided.[263] Nonetheless, there are some deficiencies in the post-EPAA emergency preparedness system which warrant congressional review and may call for some legislative action.

First, the sheer number of statutes which remain in effect following expiration of the EPAA, the differing scope and nature of the authorities conveyed, and the variety of conditions in which they may be invoked, will make it difficult to meld these various authorities into an integrated program. These statutes were enacted by Congress over a thirty year period to redress specific, and generally quite narrow, problems which were then confronting the country. As an almost inevitable consequence of this process, the resulting authorities create, at best, a patchwork regulatory structure.

Second, unlike the EPAA, the group of statutes which have been reviewed in this article generally prohibit the President from exercising controls unless certain stringent findings are made. Because these findings vary from statute to statute, it would be difficult for the President to activate all of his authorities simultaneously even in a severe energy shortage.

Third, these statutory problems are compounded by the administrative delays which have plagued efforts to fashion an effective emergency preparedness program since the Arab Oil Embargo. To cite one particularly crucial example, the SPR is currently only a small fraction of the size projected to be attained by the end of 1980.

In short, there is now a crucial need to assign a higher priority to emergency planning to assure that there is an effective emergency response mechanism in place for truly severe shortages which cannot be fully accommodated by the free market.

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[263] *See* note 20 *supra*.