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OFFICE OF GENERAL COUNSEL

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MARCH 4, 1983

The Honorable James A. McClure  
Chairman, Committee on Energy  
and Natural Resources  
United States Senate



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The Honorable John Warner  
Chairman, Subcommittee on Energy  
and Mineral Resources  
Committee on Energy and Natural  
Resources  
United States Senate

The Honorable Henry M. Jackson  
United States Senate

The Honorable Bill Bradley  
United States Senate

Dear Mr. Chairman:

In your August 11, 1982, letter you requested that we analyze documents to be prepared by the administration under the Energy Emergency Preparedness Act of 1982. One of these documents is a legal memorandum, "Legal Authorities Available to the President to Respond to a Severe Energy Supply Interruption or Other Substantial Reduction in Available Petroleum Products," prepared by the Office of Legal Counsel, Department of Justice (November 15, 1982).

Our review and analysis of the Department of Justice legal memorandum accompanies this letter. In general, the memorandum is a complete and accurate discussion of the statutes available to the President in various kinds of oil emergencies. However, our review suggests several general observations not contained in the memorandum that may be instructive to Congress. In addition, we have developed a more detailed presentation than the memorandum's concerning the specific Presidential authorities available in the three categories of situations described in the Act.

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Our report discusses our general observations and provides in Appendix A what we believe is a more detailed picture of Presidential authorities to act in the situations described in this statute. Staff of our Office of General Counsel will be available to discuss any matters covered in our review.

Sincerely yours,

*Harry R. Van Cleve*  
Harry R. Van Cleve  
Acting General Counsel

ANALYSIS OF DEPARTMENT OF JUSTICE  
MEMORANDUM CONCERNING PRESIDENT'S STATUTORY  
AUTHORITIES IN OIL CRISES

I. Background

The purpose of this report is to analyze and to comment on a memorandum of law, "Legal Authorities Available to the President to Respond to a Severe Energy Supply Interruption or Other Substantial Reduction in Available Petroleum Products", prepared by the Office of Legal Counsel, Department of Justice (November 15, 1982). The General Accounting Office received a congressional request to analyze the Department of Justice's legal memorandum.

Section 3 of the Energy Emergency Preparedness Act of 1982 (EEPA), Pub. L. No. 97-229, approved August 3, 1982, 96 Stat. 248, required the President to submit to the Congress a memorandum of law, describing the nature and extent of his authorities under existing law to deal with various kinds of oil crises. The memorandum was to be prepared by the Attorney General, in consultation with the Secretary of Energy, and submitted to the Congress no later than November 15, 1982.<sup>1</sup> It is a prerequisite for the comprehensive energy emergency response procedures the President was required to submit under EEPA to Congress by December 31, 1982.<sup>2</sup>

One of the principal purposes of EEPA is to assure that as a supplement to reliance on the the free market, the Federal government has adequate authority and procedures to cope with the consequences of future serious petroleum shortages resulting from reductions in imports. EEPA was enacted after the President had vetoed S. 1503, 97th Congress, the proposed Standby Petroleum Allocation Act of 1982. In that bill, the

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<sup>1</sup> Section 3 of EEPA added a new Part C to Title II of the Energy Policy and Conservation Act (EPCA), classified to 42 U.S.C. § 6281 et seq.

<sup>2</sup> Section 272(b) of EPCA, as added by Section 3 of the EEPA.

Congress adopted an approach toward oil emergencies which was similar to the one embodied in the Emergency Petroleum Allocation Act, Pub. L. No. 93-159. This act, which expired on September 30, 1981, had provided the President with broad authority to allocate and set the price of petroleum products in the aftermath of the 1973-74 oil crisis.

S. 1503 would have given the President discretionary standby authority to allocate and, if necessary, to control the prices of petroleum products in future serious oil import emergencies. State laws and regulations providing for allocation and price control would have been preempted. In contrast, EEPA does not increase the authorities of the Federal government to deal with oil emergencies or supersede State authorities.<sup>3</sup> Instead, it requires the president to submit to Congress an inventory of existing Presidential authorities and comprehensive response procedures for implementation of his existing authorities, together with recommendations for additional statutory authorities the President may need.

## II. Scope of Review

In our review, we examined the laws, legislative histories, cases, and other documents referred to, or cited in, the memorandum of law. In addition, we looked at other laws, regulations, court cases, and written legal materials, including articles, to identify other Presidential authorities which should have been included in the memorandum. We were able to identify only one minor statute which the memorandum did not include. We did not request or review any of the materials which the Department of Justice used in preparing its memorandum.

## III. Major Parts

In general, the Department of Justice memorandum is a complete and accurate discussion of the statutes available to the President in various oil emergencies. However, our review of the memorandum points to several general observations that we believe are informative to the Congress. In addition, we have developed a more detailed presentation of the specific Presidential authorities available in the three categories of situations described in EEPA.

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<sup>3</sup> Section 272(d) of EPCA, as added by Section 3 of EEPA.

Our review of the Justice Department's memorandum disclosed that the different statutes do not use common terms or language to trigger the authorities. Different statutory criteria activate the President's authorities so that a particular oil crisis will have to satisfy--and may often do so--a number of different statutes. For example, "a severe energy supply interruption" is the key to utilization of certain provisions of the Energy Policy and Conservation Act, 42 U.S.C. § 6201 et seq., the Emergency Energy Conservation Act, 42 U.S.C. § 8501 et seq., and the Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. § 8301 et seq. On the other hand, authorities under the Defense Production Act of 1950, 50 U.S.C. App. § 2061 et seq., are generally only available in connection with national defense and defense preparedness activities. Similarly, the International Emergency Economic Powers Act, 50 U.S.C. § 1701 et seq., and the Trade Expansion Act of 1962, 19 U.S.C. § 1801 et seq., may be activated as a result of national security considerations.

What emerges from the memorandum is a legislative mosaic of discretionary statutory authorities, many of which are not specifically targeted to cope with oil crises. These authorities do not include: (1) authority to allocate and control prices of petroleum products in the civilian market and (2) an express statutory preemption of State and local laws affecting these areas.

In addition, relying on statutory authorities which have different triggers and which are not aimed specifically at oil emergencies may result in implementation problems. For example, a particular crisis may fit the statutory conditions for a "severe energy supply interruption", but may not amount to a defense-related emergency. This would mean that the President would have authority to establish demand restraint measures, but could not use the Executive Manpower Reserve, which is available only in defense-related emergencies. Also, the role of State and local regulatory programs is left unclear. This may set the stage for a spate of litigation at the beginning of a crisis concerning the scope of Federal preemption of State and local regulatory activities.

Our review revealed several other important points that warrant highlighting for Congress. These points are:

1. No general authority to allocate and control prices  
Except to the limited extent provided in Section 101(b) of the Defense Production Act, 50 U.S.C. § 2071(b), the President does not have general authority to allocate and control the prices of petroleum products in the civilian market during any of the situations referred to in the memorandum of law. Section 101(b) provides that the President may control the general distribution of materials (e.g. oil) in the civilian market only if he finds that (1) a material is a "scarce and critical material essential to the national defense" and (2) defense needs cannot be met without causing "significant dislocation" and "appreciable hardship" in such market.

2. Expiration of certain presidential authorities in 1983  
Three of the statutes discussed in the memorandum--the Defense Production Act (DPA), the Emergency Energy Conservation Act (EECA), and the Export Administration Act of 1979 (EAA)--will expire if not renewed or extended in 1983. DPA expires on March 31, EECA on July 1,<sup>4</sup> and EAA at the end of September. The DPA and export control statutes have been extended or reenacted periodically. EECA will first be considered for renewal this year. If it is not renewed, formal development and implementation of standby energy conservation plans and measures will only be authorized under the Energy Policy and Conservation Act. This act does not give the States the same role in restricting demand that is presently available under EECA.

3. Department of Energy conflict-of-interest provisions  
Although the conflict-of-interest provisions of the Department of Energy Organization Act (42 U.S.C. § 7211-7218) are briefly discussed, the memorandum does not point out the possible impact they may have on the employment of persons from the private sector under section 710 of DPA, 50 U.S.C. App. § 2160. Section 710 provides two authorities for the employment of persons from the private sector to plan for or to deal with defense-related emergencies. Subsection (b) allows the President to employ, in an advisory capacity and without

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<sup>4</sup> Only Part C, Title II, of EECA, which amended Section 202 of EPCA, 42 U.S.C. 6262, would continue in existence. This provision concerns State or local contingency plans to conserve energy in buildings.

compensation, "persons of outstanding experience and ability." Subsection (e) authorizes the President to establish and train "a nucleus executive reserve [Executive Reservists] for employment in executive positions in Government during periods of emergency."

In light of certain of the conflict-of-interest provisions in the Department of Energy Organization Act, planned reliance on the use of private sector persons to implement any substantial part of the Department of Energy's energy emergency responsibilities may be hindered. Particularly important are those statutory provisions (1) requiring divestiture of financial holdings in any energy concern and (2) prohibiting any official relationship with any energy concern by a Department supervisory employee or one authorized to make comparable decisions. Those most affected would be Executive Reservists who are activated to perform in supervisory or comparable decisionmaking positions and persons employed under Section 710(b) in a decision-making capacity. It is not clear how these conflict-of-interest provisions would be implemented, when coupled with the limited Secretarial waiver authority and other provisions of the Department of Energy Organization Act.

#### 4. Potential Litigation Over Implementation

There are potential implementation difficulties arising from (1) the absence of explicit Federal preemption for key energy programs, and (2) possible litigation over the Justice Department's interpretation of certain of the energy emergency statutory provisions.

Although the memorandum carefully sets forth the legal theory and case law of Federal preemption, the difficulty and consequences of applying the principle in emergency circumstances are not fully developed. The Federal Government may prevail in establishing case-by-case Federal preemption on the basis of Federal statutes that do not contain an explicit preemption provision. The Government also may establish State violations of prohibitions under the Commerce Clause of the Federal Constitution even absent a Federal statute. However, the remedies may be too little and too late. The Federal Government's responsibilities may be most critical at the beginning of any energy emergency crisis, yet at that time its authority may be open to challenge.

In addition, oil industry lawyers have informally advised the Administration that if the Government attempts to implement certain of the energy emergency statutory authorities in the manner in which the Justice Department has

construed them in its memorandum, elements in the private sector will institute litigation to enjoin implementation. An example is the Administration's construction of section 251 of the EPCA, 42 U.S.C. § 6271, so as to permit limited domestic petroleum allocation. Such litigation could impede fulfillment of the obligations of the United States under the International Energy Program. The International Energy Program is an agreement among Western developed countries to deal with oil supply interruptions and to lessen these nations' dependence on imported oil. Clarifying legislation now, before an international energy emergency occurs requiring implementation of section 251, might merit consideration.

5. The Congressional limitations on Presidential authority in National Emergency Act not applicable to most statutes available in oil emergencies

The limitations on executive authority which Congress included in the National Emergencies Act (NEA), 50 U.S.C. § 1601 et seq., are not applicable to most of the statutes giving the President authority in serious oil emergencies. The NEA applies to laws that authorize the exercise of special or extraordinary power during a period of national emergency which the President has formally declared. Under the NEA, Congress has an opportunity every 6 months to terminate a presidentially declared national emergency and such an emergency terminates at the end of 1 year unless the President continues it in effect.

Of the major statutes discussed in the memorandum of law, only the International Emergency Economic Powers Act, 50 U.S.C. § 1701 et seq., requires a formal Presidential declaration of national emergency which would be subject to the NEA. In other statutes the word "emergency" is utilized in different contexts. For example, the definition of "severe energy supply interruption" in EPCA refers to an energy supply shortage of "an emergency nature". The Disaster Relief Act defines "emergency" in terms of natural catastrophes or their consequences. 42 U.S.C. § 5122(i). However, the NEA would not apply to these statutes.

6. EPCA and EECA availability in national defense and national security situations

EEPA requires the memorandum of law to distinguish among three types of situations. The first of these concerns situations involving national defense and national security, i.e., "limited or general war, international tensions that



threaten national security, and other Presidentially declared emergencies."

The memorandum's list of statutory authorities available in factual situations related to national defense and national security ought to include the demand restraint measures under both EPCA and EECA, as well as the authority to draw-down oil from the Strategic Petroleum Reserve and to increase oil and gas production on Federal lands and in States under EPCA. These EPCA and EECA authorities are triggered by a "severe energy supply interruption". In both cases, the term can refer to a national energy supply shortage, which among other things, the President determines may have a major adverse impact on national security<sup>5</sup> and which may likely result from an interruption in the supply of petroleum products.

We recognize, that not every severe energy supply interruption will necessarily involve the national defense or national security. However, the national defense or national security will be impacted by many situations involving a severe energy supply interruption.

7. Utilization of alternate energy sources (gas, coal, and electricity) during a serious petroleum crisis

The memorandum does not fully discuss the extent and significance of the President's authorities (or lack of authorities) to require the substitution, or arrange for the utilization, of alternate energy sources--principally coal, natural gas and electricity--during a serious petroleum crisis. No general statute provides the Federal government with authority to order the utilization of available alternate energy sources during a shortage of one or more particular energy sources.

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<sup>5</sup> "National safety" is the term used in EPCA. It might encompass more than just "national security."

Many of the energy statutes tend to be limited to one energy source.<sup>6</sup>

Generally, the Federal government has statutory authority to deal with emergency-type situations involving a particular energy source, e.g., electricity, oil, or gas. However, these authorities do not have a common trigger. Each authority is available when an emergency situation exists or is imminent with respect to that particular energy source. For example, at the beginning of an oil crisis, under existing law only the authorities triggered by an oil emergency become available for use by the President. These deal primarily with oil. However, by the operation of the market, oil users will tend to switch to gas, electricity or coal to the extent these fuels may meet their particular needs. If the crisis becomes more severe, increased demands for electricity might become so great that electricity becomes sufficiently scarce to activate the electricity emergency authorities under subsection 202(c) of the Federal Power Act, 16 U.S.C. § 824a(c). Similarly, if instead the demands for natural gas increased to create a shortage of natural gas, natural gas emergency authorities under sections 301 to 304 of the Natural Gas Policy Act, 15 U.S.C. §§ 3361-3364, could be activated.

The significant point is that the emergency authorities associated with each energy source are activated at a different time and for a different reason, and only after the emergency has spread to the particular energy source. During an oil crisis, the President does not have statutory authority to take actions from the beginning of the crisis, which might limit the crisis to oil by affecting the use trends of other fuels so that shortages may not disproportionately develop with respect to any other energy source.

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<sup>6</sup> One important exception during an oil crisis is found in the Powerplant and Industrial Fuel Use Act of 1978. Under subsection 404(b) of this Act, 42 U.S.C. § 8374(b), the President may prohibit electrical utilities and major fuel-burning installations from using natural gas, as well as oil, during a severe energy supply interruption. In addition, under subsection 404(a) of the Act, 42 U.S.C. § 8374(a), the President, by order, may allocate coal for the use of any electric powerplant or major fuel-burning installation.

8. Additional International Obligations

Under Articles 52 and 61 of the Agreement on an International Energy Program, decisions of the Governing Board of the International Energy Agency are binding on participating countries. These may include decisions which impose new obligations not already specified in the Agreement as well as those applying provisions of the Agreement. An example of a Governing Board decision of particular legal significance is the adoption of the Emergency Management Manual. The Manual sets forth the obligations and procedures for implementing the international oil emergency sharing system.

9. Statutory authority to act in several instances not in President

The memorandum discussed several statutes that provide authority to governmental entities other than the President, i.e., secretaries of departments or independent regulatory commissions. Departmental secretaries are subject to Presidential direction and control, but independent regulatory commissions, such as the Federal Energy Regulatory Commission (FERC) and the Interstate Commerce Commission (ICC), are not.

Authorities granted to departments include: (1) Section 202(c) of the Federal Power Act, 16 U.S.C. § 824a(c), (Secretary of Energy) concerning emergency authorities with respect to electrical energy, (2) the Magnuson Act, 50 U.S.C. § 191, (Secretary of Transportation) relating to the regulation of the movement of vessels in U.S. territorial waters during a Presidentially declared emergency; and (3) Section 36 of the Mineral Lands Leasing Act, 30 U.S.C. § 192, (Secretary of Interior) involving payment in kind of royalties under oil and gas leases.

Authorities granted to independent regulatory agencies include: (1) sections 210 and 211 of the Federal Power Act, 16 U.S.C. § 824i and § 824j (Federal Energy Regulatory Commission) concerning respectively the physical connection of electric facilities and wheeling transmission services; (2) section 7 of the Natural Gas Act, 15 U.S.C. § 717f, (Federal Energy Regulatory Commission) involving expansion of gas transportation facilities; and (3) Interstate Commerce Act, as amended, 49 U.S.C. § 10928 and § 11123, (Interstate Commerce Commission) relating respectively to temporary service of new motor and water carriers and priority movement of commodities by rail during an emergency.

#### IV. Listing of Authorities by Emergency Situation

EEPA requires the memorandum of law to distinguish among:

"(i) situations involving limited or general war, international tensions that threaten national security and other Presidentially declared emergencies, (ii) events resulting in activation of the international energy program and, (iii) events or situations less severe than those described in clauses (i) and (ii)."

The memorandum lists the statutes only by the numbered general categories. However, the first and third categories include several kinds of situations. For example, the first category covers wars, international tensions threatening national security, and other Presidentially declared emergencies. The statutory authorities are not matched to each of the situations in a category. Thus, it is hard to tell whether the same statute does or may apply to each event in a category. The third category could include several different levels of oil supply interruptions, related natural gas emergencies and other kinds of events affecting U.S. energy resources.

To provide Congress with a more detailed picture of the authorities the President may have to act in these types of situations, we have prepared Appendix A. It is a descriptive breakdown of the laws that the President may be able to utilize in each different event. Appendix A also includes a discussion of what authorities the President lacks under each event.

This analysis illustrates that in each situation the President will have to rely for his authority on statutes with different terms to trigger their provisions. Many of these "triggers" will encompass the particular event. For example, under DPA the "national defense needs" trigger probably always covers war and national security situations. But, this is not always the case under the other statutes. For example, an element of a "severe energy supply interruption" under EPCA is its major adverse impact on national security ("national safety"). But, another element prescribes that the interruption result from an imported oil

shortage. Thus, while wars or international tensions threatening national security may occur, they do not always result in an interruption of imported oil. Consequently, the trigger under EPCA may not be legally activated in every war or national security situation.

We conclude that most of the time in category (i) situations--concerning national defense and national security--most statutes discussed in the memorandum will be available to the President. But, many of the statutes will not be available for category (iii) situations--less severe events or situations.

APPENDIX A

Statutory Authorities to Deal With Severe Energy Supply Interruptions or Other Substantial Reductions in Available Petroleum Products

INTRODUCTION

This Appendix groups and describes by specific event or situation the statutory authorities listed in Part III ("Triggers for Exercise of Statutory Authorities") of the Department of Justice legal memorandum submitted to Congress on November 15, 1982, pursuant to Section 272(a) of the Energy Policy and Conservation Act, as added by Section 3 of the Energy Emergency Preparedness Act of 1982, Pub. L. No. 97-229, approved August 3, 1982, 96 Stat. 248, classified to 42 U.S.C. § 6282. This presentation should provide Congress with a clearer picture of the authorities the President has to deal with serious petroleum shortages resulting from certain specific events or situations. Under each specific event the authorities the President lacks are also mentioned.

The events and situations included in this Appendix are those set out in Section 272(a), i.e., (i) limited or general war, international tensions that threaten national security, and other Presidentially declared emergencies; (ii) activation of the International Energy Program (IEP); and (iii) less severe events or situations. We have divided the last group into (1) severe energy supply interruptions and (2) authorities with respect to other energy resources.

Presidential authorities under each event or situation are depicted by types of authorities. The types of authorities listed represent the major types of authority the President has under the statutes discussed in the Department of Justice legal memorandum. These types of authority are: (1) allocation and price controls of petroleum products; (2) import and export controls of such products; (3) personnel authorities; (4) demand restraint measures; (5) priority for contracts, orders, and supplies relating to petroleum products; (6) increasing domestic crude oil production; (7) petroleum reserves; (8) establishment and maintenance of energy-related facilities; and (9) other statutes. Several statutes that are applicable in all situations are discussed under "miscellaneous statutes" at the end of the Appendix.

Several statutes included in the Appendix provide authority respectively to the Federal Energy Regulatory Commission and the Interstate Commerce Commission. Both of these bodies are independent regulatory commissions and are not legally responsible to the direction of the President as are heads of departments. They have only been included in this Appendix because they are discussed in the Department of Justice legal memorandum. We have also added one statute which did not appear in the legal memorandum, 10 U.S.C. § 4742 (See discussion at I.H1(c)).

In one important respect, we have treated the International Energy Program differently than the other two types of situations because it involves a specific event. The other two types of situation each concern several events. Although the same format has been followed for the IEP, we have not included any discussion of statutes other than those triggered by the U.S. obligations under the IEP. We recognize, however, that other statutory authorities discussed in the memorandum of law might be available to the President in fact situations which will involve the IEP.

This analysis illustrates in each situation that the President will have to rely for his authority on statutes with different terms to trigger their provisions. Many of these "triggers" will encompass the particular event. For example, under the Defense Production Act the "national defense" needs trigger probably always covers war and national security situations. But, this is not always the case. Some triggers may not always be activated in time of war and national security situations. For example, an element of a "severe energy supply interruption" under the Energy Policy and Conservation Act is its major adverse impact on national security ("national safety"). But, another element prescribes that the interruption result from an imported oil shortage. Thus, while international tensions threatening national security may occur, they do not always result in an interruption of imported oil. Consequently, the trigger under this Act may not be legally activated in every war or national security situation.

We conclude that most of the time in situations included in (i) above--concerning national defense and national security--most statutes discussed in the memorandum will be available to the President. But, many of the statutes will

not be available for situations in (iii) above--less severe events or situations.

## I. Limited or General War

### A. Allocation and Price Control of Petroleum Products

#### 1. Defense Production Act

(a) General Allocation- The President has authority to allocate materials, including petroleum products, when necessary or appropriate to promote the national defense. 50 U.S.C. App. § 2071(a). He may control the general distribution of a material in the civilian market only if he finds that (1) the material is a "scarce and critical material essential to the national defense" and (2) defense needs cannot be met without causing "significant dislocation" and "appreciable hardship" in the civilian market. 50 U.S.C. App. § 2071(b). It is unclear whether the President has authority to impose price controls on the petroleum products so allocated.

(b) Enhancing Domestic Energy Supplies- The Defense Production Act also contains a provision allowing the President to allocate supplies of materials and equipment to maximize domestic energy supplies under certain carefully defined circumstances. 50 U.S.C. App. § 2071(c). This section is not limited only to defense-related activities as are the other parts of the DPA. It is available to the President, if he can make certain findings regarding the scarcity and essentiality of the supplies of materials and equipment. The term materials includes "raw materials" and "products". This provision may arguably authorize the allocation of petroleum products to enhance domestic energy supplies.

2. Trading with the Enemy Act- In time of war, the President may control property which is subject to the jurisdiction of the United States and in which a foreign country or national has an interest. This authority applies both to wholly domestic and international transactions. 50 U.S.C. App. § 5.



B. Import and Export Controls of Petroleum Products

1. Trading with the Enemy Act- In time of war, the President may control property which is subject to the jurisdiction of the United States and in which a foreign country or national has an interest. This authority applies both to wholly domestic and international transactions. 50 U.S.C. App. § 5.

2. Export Administration Act- The President may establish export controls on any goods and technology to further the foreign policy interests of the United States and to protect the economy from the drain of scarce resources. 50 U.S.C. App. § 2406. (The pursuit of war would, of course, be a U.S. foreign policy interest.)

Certain limitations are placed on the export of refined petroleum products, 50 U.S.C. App. § 2406(e) and on Alaskan crude oil transported by pipeline over Federally-granted rights of way, 50 U.S.C. App. § 2406(d). (Separate statutes make the provisions of the EAA applicable to (i) petroleum products from the Naval Petroleum Reserves, 10 U.S.C. § 7430(e); (ii) oil and gas from the Outer Continental Shelf, 43 U.S.C. § 1354(a); and (iii) crude oil transported over Federally-granted rights of way, 30 U.S.C. § 185u).

3. Energy Policy and Conservation Act- The President may restrict exports of energy supplies, including petroleum products, and materials or equipment related to energy production and utilization to carry out the purposes of the Act. He is required to use this authority to establish restrictions on the export of crude oil and natural gas produced in the United States. (The President may exempt from such restrictions certain exports which are consistent with the national interest and the Act's purposes. He must also consider the national interest as it relates to certain kinds of transactions.) 42 U.S.C. § 6212.

The trigger for the use of this authority is not war, but the authority would be available to the President in time of war.

4. Trade Expansion Act- The President has authority to adjust the imports of a particular commodity which threatens the national security. The Secretary of Commerce must find that a particular article or commodity is entering

the United States under such circumstances and in such quantity to threaten to impair the national security. Such a finding may reflect the need to have sufficient domestic production and industrial capacity to meet U.S. defense requirements. 19 U.S.C. § 1862(b). Measures the President adopts must have an initial and direct effect on the imported commodity.

The trigger for the use of this authority is not war, but the authority would be available to the President in time of war.

C. Personnel Authorities

1. Defense Production Act

(a) Outstanding Individuals- The President may employ persons of outstanding experience and ability to serve without compensation in advisory positions in government when such employment is related to national defense and national defense preparedness. This authority is subject to several limitations, including: (1) no other person is available for the position on a full-time salaried basis; (2) the person selected has the outstanding experience and ability required by the job; and (3) the individual cannot be appointed to a policy-making post. 50 U.S.C. App. § 2160(b). Federal conflict of interest and anti-trust laws are applicable to the activities of such persons.

(b) Executive Reserve- The President may establish and train an Executive Reserve for employment in government during "periods of emergency" that "would adversely affect the defense preparedness of the United States." 50 U.S.C. App. § 2062 and 2160(e).

(c) Voluntary Agreements- The President has authority to approve voluntary agreements among private parties to develop defense preparedness programs and to expand productive capacity and supply beyond civilian needs. A precondition for his approval is a Presidential finding that conditions exist which may be a direct threat to U.S. national defense and its preparedness programs. The Attorney General must indicate that the purpose of the agreement cannot be achieved without any agreement or by an agreement with less anti-competitive

effects. An anti-trust defense is available only for domestic activities to develop or carry out such an agreement. 50 U.S.C. App. § 2158. Such a defense is not available under the authority for voluntary agreements to carry out the International Energy Program or other international arrangements relating to petroleum products to which the U.S. is a party. 50 U.S.C. App. § 2158a(o).

2. Foreign Assistance Act- An agency of the United States may furnish assistance, services and commodities to friendly countries on an advance-of-funds basis when the President determines that this will be consistent with and in furtherance of the purposes of the Foreign Assistance Act. Such assistance, services and commodities must help to promote international economic and political stability. 22 U.S.C. § 2346, § 2357, and § 2393.

D. Demand Restraint Measures

1. Energy Policy and Conservation Act and Emergency Conservation Act of 1979- In the event of war, no statute included in the Department of Justice memorandum of law specifically covers this category. However, the demand restraint measures provided for in the Energy Policy and Conservation Act and the Emergency Energy Conservation Act of 1979 may be available.

Demand restraint measures in both statutes may be utilized in connection with severe energy supply interruptions (or the U.S. obligation under the International Energy Program). This term is defined in a similar manner in each statute. It can refer to a national energy supply shortage, which among other things, the President determines may have a major adverse impact on national security ("national safety" is the term used in EPCA) and which may likely result from an interruption in the supply of imported petroleum products.

These conditions might be satisfied when the United States is engaged in a major or limited war. The Department of Justice memorandum fails to include both of these statutes in its list of laws which provide the President with authority during wars, international tensions that threaten national security, and other Presidentially declared emergencies.

EPCA provides authority for the President to establish energy conservation contingency plans to restrict the public and private use of energy. 42 U.S.C. §§ 6261 and 6262. EECA grants the President authority to establish energy conservation targets and to approve State plans to carry out demand restraint measures to reach them. 42 U.S.C. §§ 8511-8513.

E. Priority for Contracts, Orders and Supplies Relating to Petroleum Products

1. Defense Production Act- The President may require that contracts or orders necessary or appropriate to promote the national defense take priority over performance under any other contracts or orders. The same limitations that apply to the President's authority to allocate materials attach to this authority. (See the discussion in I.A.1.(a) above.) 50 U.S.C. App. § 2071(a).

F. Increasing Domestic Crude Oil Production

1. Naval Petroleum Reserves Production Act- The President approves the Secretary of Energy's finding that oil production from the Naval Petroleum Reserves is needed for the national defense; but actual production must be authorized by a joint resolution of Congress, 10 U.S.C. § 7422(b)(2). (A temporary emergency rate of production could be approved under this authority to produce for the national defense.)

2. Energy Policy and Conservation Act- This statute assigns to the President authority to order oil production on Federal lands, and under certain circumstances in States, at the maximum efficient rate (MER) or temporary emergency rate. 42 U.S.C. § 6214. However, with the exception of MER production on Federal lands, the event that triggers this authority is a severe energy supply interruption. (The definition of this term and its appropriate use during war situations has been previously discussed under I.D.1. above.)

G. Petroleum Reserves

1. Energy Policy and Conservation Act- The President has authority to establish a Strategic Petroleum Reserve which may be utilized during severe energy supply interruptions and to meet the United States obligations under the International

Energy Program. 42 U.S.C. § 6241. (See discussion in I.D.1. above.)

H. Establishment and Maintenance of Energy-related Facilities

1. Federal Power Act-

(a) Temporary Connection and Exchange of Facilities- During a war, the Secretary of Energy has authority to order the temporary connection of facilities and the generation, delivery, exchange or transmission of electric power provided it will serve the public interest. 16 U.S.C. § 824a(c).

(b) Physical Connection of Facilities- The Federal Energy Regulatory Commission may, pursuant to an application, or on its own motion, order the physical connection of any cogeneration facility, small power production facility or transmission facilities with the facilities of another electric utility. 16 U.S.C. § 824i. This authority is available to the Commission at all times and not only in the event of war.

(c) Wheeling of Power- FERC may order any electrical utility to provide transmission services, including enlarging transmission capacity, to another utility, geothermal power producer or power marketing agency. 16 U.S.C. 824j. (This authority is available to the FERC under all circumstances.)

2. Magnuson Act- The President has authority to safeguard from destruction, loss or injury vessels, harbors, and ports and waterfront facilities and to govern the movement of foreign vessels in U.S. waters. The President must find that the security of the United States is endangered by reason of actual or threatened war, insurrection or invasion. U.S.C. § 191.

3. Systems of Transportation- During time of war, the President through the Secretary of the Army may take possession and assume control of any systems of transportation for any purpose related to the war. He may exclude other traffic as far as necessary. 10 U.S.C. § 4742. (This provision was not included in the Department of Justice legal memorandum.)

## I. Other Statutes

1. Outer Continental Shelf Lands Act- During time of war, the United States has the right of first refusal to purchase all or any part of any mineral produced from the Outer Continental Shelf at market price. 43 U.S.C. 1341(b).

Miscellaneous statutes which apply to all situations are discussed at the end of this Appendix.

### Authorities Lacking in Event of War

The President does not have unlimited powers to allocate crude oil or other petroleum products within the civilian market. However, the Defense Production Act gives him such allocation authority, when defense needs seriously affect the civilian market. It is unclear whether he may impose price controls on the oil products allocated under the DPA. He has authority to establish demand restraint measures and crude oil production at a temporary emergency rate during a severe energy supply interruption, which may or may not exist during a war situation.

## II. International Tensions that Threaten to Impair the National Security

### A. Allocation and Price Controls of Petroleum Products

#### 1. Defense Production Act-

(a) General Allocation- The President has authority to allocate materials, including petroleum products, when necessary or appropriate to promote the national defense. 50 U.S.C. App. § 2071(a). National security includes national defense and military preparedness, which are the key concerns of the DPA. However, he may control the general distribution of a material in the civilian market only if he finds that (1) the material is a "scarce and critical material essential to the national defense" and (2) defense needs cannot be met without causing "significant dislocation" and "appreciable hardship" in the civilian market. 50 U.S.C. App. § 2071(b). It is unclear whether the President has authority to impose price controls on the petroleum products so allocated.

(b) Enhancing Domestic Energy Supplies- The Defense Production Act also contains a provision allowing the President to allocate supplies of materials and equipment to maximize domestic energy supplies under certain carefully defined circumstances. 50 U.S.C. App. § 2071(c). This section is not limited only to defense-related activities as are the other parts of the DPA. It is available to the President, if he can make certain findings regarding the scarcity and essentiality of the supplies of materials and equipment. The term materials includes "raw materials" and "products". This provision may arguably authorize the allocation of petroleum products to enhance domestic energy supplies.

2. International Emergency Economic Powers Act- The President may control property which is subject to United States jurisdiction and in which a foreign country or national has an interest. The President must first declare a national emergency due to an unusual and extraordinary threat, at least partly outside the United States, to the national security. The legislative history discloses that the statute is to regulate international economic transactions and not purely domestic ones. 50 U.S.C. § 1702. (The statute closely resembles the Trading With the Enemy Act, which applies only in wartime.)

B. Import and Export Controls

1. International Emergency Economic Power Act- See II.A.2. above.

2. Export Administration Act- The President may establish export controls over any goods and technology to further the foreign policy interests of the United States and to protect the U.S. economy from the drain of scarce resources. 50 U.S.C. App. § 2406. Certain limitations are placed on the export of refined petroleum products, 50 U.S.C. App. § 2406(e) and on Alaskan crude oil transported by pipeline over Federally-granted rights of way, 50 U.S.C. App. § 2406(d). (Separate statutes make the provisions of the EAA applicable to (i) petroleum products from the Naval Petroleum Reserves, 10 U.S.C. § 7430(e); (ii) oil and gas from the Outer Continental Shelf, 43 U.S.C. § 1354(a); and (iii) crude

oil transported over Federally-granted rights of way, 30 U.S.C. § 185u).

3. Trade Expansion Act- The President has authority to adjust the imports of a particular commodity which threatens the national security. The Secretary of Commerce must find that a particular article or commodity is entering the United States under such circumstances and in such quantity to threaten to impair the national security. Such a finding may reflect the need to have sufficient domestic production and industrial capacity to meet U.S. defense requirements. 19 U.S.C. § 1862(b). Measures the President adopts must have an initial and direct effect on the imported commodity.

4. Energy Policy and Conservation Act- The President may restrict exports of energy supplies, including petroleum products, and materials or equipment related to energy production and utilization to carry out the purposes of the Act. He is required to use this authority to establish restrictions on the export of crude oil and natural gas produced in the United States. (The President may exempt from such restrictions certain exports which are consistent with the national interest and the Act's purposes. He must also consider the national interest as it relates to certain kinds of transactions.) 42 U.S.C. § 6212.

The trigger for the use of this authority is not "international tensions that threaten national security." However, this authority may be available to the President in such an event.

### C. Personnel Authorities

1. Defense Production Act- National security is really a part of national defense and military preparedness, which are the key concerns of the DPA.

(a) Outstanding Individuals- The President may employ persons of outstanding experience and ability to serve without compensation in advisory positions in government when such employment is related to national defense and national defense preparedness. This authority is subject to several limitations, including: (1) no other person is available for the position on a full-time salaried basis; (2) the person



selected has the outstanding experience and ability required by the job; and (3) the individual cannot be appointed to a policy-making post. 50 U.S.C. App. § 2160(b). Federal conflict of interest and anti-trust laws are applicable to the activities of such persons.

(b) Executive Reserve- The President may establish and train an Executive Reserve for employment in government during "periods of emergency" that "would adversely affect the defense preparedness of the United States." 50 U.S.C. App. § 2062 and 2160(e).

(c) Voluntary Agreements- The President has authority to approve voluntary agreements among private parties to develop defense preparedness programs and to expand productive capacity and supply beyond civilian needs. A precondition for his approval is a Presidential finding that conditions exist which may be a direct threat to U.S. national defense and its preparedness programs. The Attorney General must indicate that the purpose of the agreement cannot be achieved without any agreement or by an agreement with less anti-competitive effects. An anti-trust defense is available only for domestic activities to develop or carry out such an agreement. 50 U.S.C. App. § 2158. Such a defense is not available under the authority for voluntary agreements to carry out the International Energy Program or other international arrangements relating to petroleum products to which the U.S. is a party. 50 U.S.C. App. § 2158a(o).

2. Foreign Assistance Act- An agency of the United States may furnish assistance, services and commodities to friendly countries on an advance-of-funds or reimbursement basis when the President determines that this will be consistent with and in furtherance of the purposes of the Foreign Assistance Act. Such assistance, services and commodities must help to promote international economic and political stability. 22 U.S.C. § 2346, § 2357, and § 2393.

D. Demand Restraint Measures-

1. Energy Policy and Conservation Act and the Emergency Energy Conservation Act of 1979- With respect to international tensions threatening national security, no statute included in the Department of Justice memorandum of law covers this category. However, the demand restraint measures provided in these statutes may be available.

memorandum of law covers this category. However, the demand restraint measures provided in these statutes may be available.

Demand restraint measures in both statutes may be utilized in connection with severe energy supply interruptions (or the United States obligations under the International Energy Program). This term is defined in a similar manner in each statute. It refers to a national energy supply shortage, which, among other things, the President determines may have a major adverse impact on national security ("national safety" is the term used in EPCA) and which may likely result from interruption in the supply of imported petroleum products.

These conditions might be satisfied when the United States faces a serious international crisis. The Department of Justice memorandum fails to include both of these statutes in its list of laws which provide the President with authority during war, international tensioning threats national security and other Presidentially declared emergencies.

EPCA provides authority for the President to establish energy conservation contingency plans to restrict public and private use of energy. 42 U.S.C. §§ 6261 and 6262. EECA grants the President authority to establish energy conservation targets and to approve State plans to carry out demand restraint measures to reach them. 42 U.S.C. §§ 8511-8513.

E. Priority for Contracts, Orders and Supplies  
Relating to Petroleum Products

1. Defense Production Act- The President may require that contracts or orders necessary or appropriate to promote the national defense take priority over performance under any other contracts or orders. "National security" is really a part of national defense and military preparedness, which are the key concerns of this statute. The same limitations that apply to the President's authority to allocate materials attach to this authority. (See the discussion in II A.1(a) above.) 50 U.S.C. App. §2071(a).

F. Increasing Domestic Crude Oil Production-

1. Naval Petroleum Reserves Production Act- The President approves the Secretary of Energy's finding that oil production from the Naval Petroleum Reserves is needed for the national defense; but actual production must be authorized by a joint resolution of Congress, 10 U.S.C. § 7422(b)(2). (A temporary emergency rate of production could be approved under this authority to produce for the national defense.)

2. Energy Policy and Conservation Act- The statute assigns to the President authority to order production at the maximum efficient rate (MER) and the temporary emergency rate on Federal lands and under certain circumstances in States. 42 U.S.C. § 6214. However, with the exception of MER production on Federal lands, the event that triggers this authority is a severe energy supply interruption. The definition of the term and its appropriate use during international tensions threatening national security has been previously discussed under II.D.1. above.

G. Petroleum Reserves

1. Energy Policy and Conservation Act- The President has authority to establish a Strategic Petroleum Reserve which may be utilized during severe energy supply interruptions (and to meet the United States obligations under the International Energy Program). 42 U.S.C. § 6241. See discussion in II.D.1. above.

H. Establishment and Maintenance of Energy Related Facilities

1. Federal Power Act

(a) Physical Connection of Facilities- The Federal Energy Regulatory Commission may, pursuant to an application, or on its own motion, order the physical connection of any cogeneration facility, small power production facility or transmission facilities with the facilities of another electric utility. 16 U.S.C. § 824i. This authority is available to the Commission at all times and not only in the event of a national security emergency.

(b) Wheeling of Power- FERC may order any electrical utility to provide transmission services, including enlarging

transmission capacity, to another utility, geothermal power producer or power marketing agency. 16 U.S.C. 824j. (This authority is available to the FERC under all circumstances.)

2. Magnuson Act- The President has authority to safeguard from destruction, loss or injury vessels, harbors and ports, and waterfront facilities and to govern the movement of foreign vessels in U.S. waters. The President must find that that security of the United States is endangered by reason of disturbances or threatened disturbances of U.S. international relations. 50 U.S.C. § 191.

### I. Other Statutes

No specific statutes fall under this category. Miscellaneous statutes which apply in all situations are discussed at the end of this Appendix.

#### Authorities Lacking During International Tensions Affecting National Security

The President does not have unlimited powers to allocate crude oil or other petroleum products within the civilian market. However, the Defense Production Act gives him such allocation authority, when defense needs seriously affect the civilian market. It is unclear whether he may impose price controls on the oil products allocated under the DPA. He may establish demand restraint measures and crude oil production at a temporary emergency rate during a severe energy supply interruption which may or may not exist during a period of international tensions affecting national security.

### III. Other Presidentially Declared Emergencies

This section of the Appendix refers to statutes requiring a Presidential declaration of emergency in events or situations not covered under Sections I and II of this Appendix. Presidential declarations of emergency are different from Presidential findings of an emergency or emergency conditions. (In this connection, see the National Emergencies Act. 50 U.S.C. § 1601 et seq.) For these reasons, only two statutes are listed which specifically require a Presidential declaration of emergency. Both of them, the International Emergency Economic Powers Act and the Magnuson Act, have been previously included in Section II.

A. Allocation and Price Control of Petroleum Products

1. International Emergency Economic Powers Act- The President may control property which is subject to United States jurisdiction and in which a foreign country or national thereof has an interest. The President must first declare a national emergency due to an unusual and extraordinary threat, at least partly outside the United States, to United States foreign policy or its economy. The legislative history discloses that the statute is to regulate international economic transactions and not purely domestic ones. (The statute closely resembles the Trading With the Enemy Act, which applies only in war time.)

B. Import and Export Controls

1. International Emergency Economic Powers Act- (See the discussion in III A.1 above.)

Note: Neither the Export Administration Act, the Trade Expansion Act nor the Energy Policy and Conservation Act restrictions on imports and exports are triggered through a presidential declaration of emergency. (For more information see B. in sections I and II above.)

C. Personnel Authorities

None. The Defense Production Act is not activated through a Presidential declaration of emergency. However, situations that lead the President to declare a Presidential emergency may also amount to "periods of emergency" during which the Executive Reserve can be employed. 50 U.S.C. App. § 2160(e).

D. Demand Restraint Measures

None. Neither the Energy Policy and Conservation Act nor the Emergency Energy Conservation Act require a Presidential declaration of emergency to be utilized. However, under EPCA, the President must determine that a severe energy supply interruption is, or is likely, to be of an emergency nature. 42 U.S.C. § 6202(8)(A). (The same term under EECA does not require such a determination.)

E. Priority of Contracts Orders, Supplies  
Relating to Petroleum Products

None. Only section 101 of the Defense Production Act, 50 U.S.C. App. § 2071, authorizes the President to require priority performance under certain contracts or orders. This statutory authority may be used by the President even in non-emergencies and does not require a Presidential declaration of an emergency to be activated.

F. Increasing Domestic Crude Oil Production

None. The surge production provisions of neither the Naval Petroleum Reserves Production Act nor the Energy Policy and Conservation Act is triggered by a Presidential declaration of emergency. 10 U.S.C. § 7422(b)(2) and 42 U.S.C. § 6214. (See also the discussion in D. above.)

G. Petroleum Reserves

None. The President has authority under the Energy Policy and Conservation Act to establish a Strategic Petroleum Reserve which will be utilized during severe energy supply interruptions (and to meet the United States obligations under the International Energy Program). (See also the discussion in D above.)

H. Establish and Maintain Energy-related Facilities

1. Magnuson Act- The Secretary of Transportation has authority to govern the movement of any vessel, foreign or domestic, in U.S. waters and to prevent any damage or injury to U.S. harbors and waters. The President must declare a national emergency by reason of threatened war, insurrection or invasion, or of a disturbance or a threatened disturbance of U.S. international relations. 50 U.S.C. § 191.

2. Federal Power Act- None. The Federal Energy Regulatory Commission's authority with respect to the physical connection of electrical facilities, 16 U.S.C. § 824i, and the wheeling of power, 16 U.S.C. § 824j, do not require a Presidential declaration of emergency to be utilized.

I. Other statutes

None of the other statutes mentioned in the Department of Justice's memorandum of law are triggered through a Presidential declaration of national emergency. (However, it is interesting to note that under the Clean Air Act, the President can be asked to determine that a national energy emergency exists that justifies the suspension of a State implementation plan.) 42 U.S.C. § 7410(f).

A discussion of miscellaneous statutes applicable to all situations is found at the end of the Appendix.

Authorities Lacking During Other Presidentially Declared Emergencies

For the most part, Presidential authorities to deal with severe energy supply interruptions or other substantial reductions in the amount of petroleum products available in the United States are not triggered through Presidential declarations of national emergency. Only two of the statutes discussed in the memorandum are so activated, the International Emergency Economic Powers Act and the Magnuson Act. This means that most of the significant legislation discussed in the Department of Justice memorandum--e.g., the Defense Production Act and the Energy Policy and Conservation Act--are not limited by the procedures of the National Emergencies Act which applies only to Presidentially-declared emergencies. Under this statute, Congress sought to check Presidential power by imposing limits on Presidentially declared emergencies: (1) Congress is required to consider terminating the emergency every six months and (2) emergencies terminate automatically after one year unless extended. In the case of EPCA, Congress can check Presidential power through its approval of contingency conservation plans and amendments to plans for the Strategic Petroleum Reserve.

#### IV. International Energy Program<sup>1</sup>

##### A. Allocation and Price Controls of Petroleum Products

##### 1. Energy Policy and Conservation Act

(a) International Allocation- Under section 251 of EPCA the President, by rule, may authorize and, if necessary, order international allocation of petroleum products by companies participating in the Voluntary Agreement and subject to the jurisdiction of the United States, in such amounts and at such prices as may be necessary to fulfill our obligations under the International Energy Program. 42 U.S.C. § 6271. Use of this authority is limited to international energy supply emergencies and may be invoked only after the activation of the International Energy Agency's emergency sharing system, which requires an IEA group or single member country petroleum shortfall of 7 percent or more when compared with the consumption needs in a base period of the previous four quarters of a year. The Departments of Justice and Energy contend that section 251 also provides authority for limited domestic allocation of petroleum to facilitate voluntary industry participation in the international allocation system by insuring a "fair sharing" of the allocation burden among participating U.S. companies. There is considerable opposition within the petroleum industry and among some major petroleum users to use of section 251 as authority for any domestic allocation. Litigation would probably result if section 251 were used for this purpose.

(b) Voluntary Allocation- Pursuant to the rule transmitted by the President to the Congress under section 251 of EPCA, 42 U.S.C. § 6271, U.S. companies, through the the International Energy Agency, may voluntarily allocate oil internationally among IEA member countries with the protection of a limited antitrust defense and a breach of contract defense under section 252 of EPCA, 42 U.S.C. § 6272, as long as company actions are undertaken to carry out a Government-approved voluntary agreement or plan of action and are not undertaken for the purpose of injuring competition. 42 U.S.C. § 6272.

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<sup>1</sup> For an explanation of different treatment given to IEP see the Introduction.



(c) Strategic Petroleum Reserve Allocation- Under section 161 of EPCA the Secretary of Energy may, by rule, provide for the allocation of any petroleum product withdrawn from the Strategic Petroleum Reserve in amounts and at prices specified in such rules. This must be preceded by a Presidential finding that implementation of the Distribution Plan of the Strategic Petroleum Reserve Plan is required by obligations of the United States under the International Energy Program. 42 U.S.C. § 6241.

B. Import and Export Controls

1. Energy Policy and Conservation Act- Subsection 251(d) of this statute provides that neither (1) the Presidential rule prohibiting the export of crude oil required by section 103 of the statute, 42 U.S.C. § 6212, nor (2) subsection 28(u) of the Mineral Leasing Act of 1920, 30 U.S.C. § 185(u), shall preclude the allocation and export to other countries of petroleum products produced in the United States, if the President, by rule, determines that such actions are necessary for implementation of the obligations of the United States under the International Energy Program. 42 U.S.C. § 6271(d).

2. Export Administration Act of 1979- Subsection 7(d)(3) of this statute authorizes the export of oil to any country pursuant to the International Emergency Oil Sharing Plan of the International Energy Agency, notwithstanding the prohibitions contained in other provisions of section 7 on the export of domestically produced crude oil transported by pipeline under the Trans-Alaska Pipeline Authorization Act or any other provision of law. 50 U.S.C. App. § 2406(d)(3).

C. Personnel Authorities

None.

D. Demand Restraint Measures

1. Energy Policy and Conservation Act- Sections 201 and 202 of the statute authorize the President to activate any standby energy conservation contingency plan, previously transmitted to the Congress and approved by each House of Congress, in order to fulfill obligations of the United States under the International Energy Program. 42 U.S.C. §§ 6261 and 6262.

2. Emergency Energy Conservation Act- Section 212 of the Act provides that whenever the President finds, with respect to any energy source, that actions to restrain domestic energy demand are required in order to fulfill the obligations of the United States under the International Energy Program, he may establish monthly emergency conservation targets for any such energy source for the Nation generally, for each State, and for Federal agencies. 42 U.S.C. § 8511. Thereafter Federally-approved State emergency conservation plans and/or the standby Federal conservation plan are activated to meet or exceed the emergency conservation targets.

E. Priority for Contracts, Orders and Supplies Relating to Petroleum Products

None.

F. Increasing Domestic Crude Oil Production

None.

G. Petroleum Reserves

1. Energy Policy and Conservation Act- Section 161 of this statute authorizes the drawdown and distribution of petroleum from the Strategic Petroleum Reserve after the President has found that implementation of the Distribution Plan of the Strategic Petroleum Reserve Plan is required by obligations of the United States under the International Energy Program. 42 U.S.C. § 6241.

H. Establishment and Maintenance of Energy-Related Facilities

None.

I. Other Statutes

None.

Authorities Lacking With Respect to the International Energy Program

The President lacks clear statutory authority to implement even a limited program of domestic allocation of petroleum. Such a program may be necessary to facilitate

voluntary industry participation in the international oil allocation system by insuring a "fair sharing" of the allocation burden among U.S. companies participating in the Voluntary Agreement.

#### V. Less Severe Events and Situations

The statutes originally listed under this heading in the Department of Justice memorandum have been placed into two groups which will explain the circumstances in which they would be utilized. These groups are: (1) severe energy supply interruptions and (2) authorities with respect to other energy resources.

##### i. Severe Energy Supply Interruptions

The term "severe energy supply interruption" is defined in a similar way under both the Energy Policy and Conservation Act and the Emergency Energy Conservation Act, although the EECA definition is broader. The latter encompasses all energy sources and all types of U.S. energy supply interruptions, including supplies of imported petroleum products. The former's definition is closely tied to petroleum import interruptions. Under both statutes, a severe energy supply interruption is a national energy supply shortage (1) of significant duration and scope, (2) which may cause adverse impact on national security or the national economy, and (3) results from an interruption in the supply of imported petroleum products or from sabotage or an act of God.

#### A. Allocation and Price Controls of Petroleum Products

1. Energy Policy and Conservation Act- Under section 161 of the statute the Secretary of Energy may, by rule, provide for the allocation of any petroleum product withdrawn from the Strategic Petroleum Reserve in amounts and at prices specified in such rules. This must be preceded by a Presidential finding that implementation of the Distribution Plan of the Strategic Petroleum Reserve Plan is required to ameliorate a "severe energy supply interruption." 42 U.S.C. § 6241.

2. Powerplant and Industrial Fuel Use Act- During a severe energy supply interruption, as defined by the Energy

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Policy and Conservation Act, the President may (1) allocate coal for the use of any power plant or major fuel burning installation. 42 U.S.C. § 8374(a), and (ii) prohibit the use of petroleum (or natural gas) as a primary energy source by an electric power plant or a major fuel burning installation. 42 U.S.C. § 8374(b).

(Note: The Defense Production Act contains a provision allowing the President to allocate supplies of materials and equipment to maximize domestic energy supplies under certain carefully defined circumstances. 50 U.S.C. App. § 2071(c). This section is not limited only to defense-related activities as are the other parts of the DPA. It is available to the President, if he can make certain findings regarding the scarcity and essentiality of the supplies of materials and equipment. The term materials includes "raw materials" and "products". This provision may arguably authorize the allocation of petroleum products to enhance domestic energy supplies.)

**B. Import and Export Controls of Petroleum Products**

1. Energy Policy and Conservation Act- The President may restrict exports of energy supplies, including petroleum products, coal, and gas and materials or equipment related to energy production and utilization to carry out the purposes of the Act. He is required to use this authority to establish restrictions on the export of crude oil and natural gas produced in the United States. (The President may exempt from such restrictions certain exports which are consistent with the national interest and the statutes purposes. He must also consider the national interest as it relates to certain kinds of transactions.) 42 U.S.C. § 6212.

Although the basis for restricting exports is not a severe energy supply interruption, this authority would be available in that circumstances.

**C. Personnel authorities**

No specific authorities to employ or hire individuals, as under the Defense Production Act, are available to deal with severe energy supply interruptions. The statute's

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personnel authorities only apply in defense related situations. 50 U.S.C. App. §§ 2158 and 2160(b) and (e). Thus, the Executive Reserve could only be activated in defense-related emergencies.

D. Demand Restraint Measures

1. Energy Policy and Conservation Act- The President has authority to establish energy conservation contingency plans to restrict the public and private use of energy. The plans would become operative during a severe energy supply interruption which under the statute would, in most instances, be a situation resulting from an imported oil shortage. 42 U.S.C. §§ 6261 and 6262.

2. Emergency Energy Conservation Act- The President has authority to set monthly energy conservation targets with respect to an energy source for which a severe energy supply interruption exists. Energy sources may include oil, as well as gas, coal, and electricity. The statute is thus broader in scope than the Energy Policy and Conservation Act. 42 U.S.C. §§ 8511-8513.

3. Powerplant and Industrial Fuel Use Act- The President may prohibit the use of petroleum or natural gas as a primary energy source by any electric power plant or major fuel burning installation. 42 U.S.C. § 8374(b).

E. Priority for Contracts, Orders and Supplies Relating to Petroleum Products

None.

(Note: The Defense Production Act also contains a non-defense related provision giving the President the authority to require the priority performance of contracts and orders concerning supplies of equipment and materials in order to maximize domestic energy supplies. 50 U.S.C. App. § 2071(c). See Note on this statute in paragraph A above.)

F. Increasing Domestic Crude Oil Production

1. Energy Policy and Conservation Act- This statute assigns to the President authority to order production of oil

and gas on Federal lands at the temporary emergency production rate during a severe energy supply interruption. Under certain circumstances, he may require production at both this rate and the maximum efficient rate of production from wells in States during such an interruption. The statute does not apply to the Naval Petroleum Reserves. 42 U.S.C. § 6214.

G. Petroleum Reserves

1. Energy Policy and Conservation Act- The President has authority to establish a Strategic Petroleum Reserve which may be utilized during periods of severe energy supply interruptions. 42 U.S.C. § 6241.

H. Establish and maintain energy-related facilities

None.

(Note: The Defense Production Act provides for allocation and priority performance of contracts and orders of materials and equipment to maximize domestic energy supplies in non-defense related situations. This includes authority with respect to supplies of materials and equipment essential to the construction and maintenance of energy facilities. 50 U.S.C. App. § 2071(c). See discussion at A and E above.)

I. Other statutes

See discussion of miscellaneous statutes at end of this Appendix.

Authorities Lacking During Severe Energy Supply Interruptions

The President lacks general allocation and price control authority in such situations. (However, a non-defense related provision of the DPA may provide authority to allocate oil in order to maximize domestic energy supplies.) Import control authority would probably make no sense since severe energy supply interruptions in most situations will be caused by import shortages. The President does not have the authority (a) to activate the Executive Manpower Reserve to cope with these situations, and (b) to require priority for

contracts, orders and supplies of petroleum products, since the DPA only applies to defense-related situations.

ii. Authorities with respect to other energy resources

This subsection groups various other statutory authorities affecting non-petroleum energy resources which might be available when the supply of available petroleum is substantially reduced. It follows the scheme utilized elsewhere in the Appendix.

A. Allocation and Price controls

1. Natural Gas Policy Act- The President has authority to allocate supplies of natural gas during any natural gas supply emergency. The President may declare such an emergency, if a severe natural gas shortage exists or is imminent in the United States or any region thereof which endangers the gas supply for high priority users and other alternatives have been exhausted. 15 U.S.C. §§ 3361 and 3363. (Note: This authority may be of little help during most petroleum product shortages unless it also coincides with, or causes, a severe natural gas shortage.)

2. Defense Production Act- Section 101(c) of the DPA, 50 U.S.C. App. § 2071(c), would allow the President to allocate supplies of materials and equipment in order to maximize the production of coal, natural gas or electricity ("energy supplies") during a serious petroleum product shortage. Gas and electricity could also be allocated as materials to maximize coal, gas and electricity production. This section is not limited to defense-related activities as are other parts of the DPA. It is available to the President if he can make certain findings regarding the scarcity and essentiality of the materials and equipment.

3. Federal Power Act- See also discussion of Federal Power Act authorities under H.2 below.

B. Import and Export Controls

1. Natural Gas Act- Under section 3 of the Natural Gas Act, exports and imports of natural gas may be barred when not consistent with the public interest. 15 U.S.C. § 717b.

2. Federal Power Act- The Secretary of Energy has authority to decline to issue an order for the transmission of electricity to a foreign country when it would impair the sufficiency of electrical supplies in the U.S. 16 U.S.C. § 824a(e).

C. Personnel Authorities

None.

(Note: the authorities available under the Defense Production Act can only be utilized in the defense-related situations. 50 U.S.C. App. § 2160(b) and (e).

D. Demand Restraint Measures

1. Public Utility Regulatory Policies Act- Under Section 607 of this statute the President may prohibit the burning of natural gas by any electrical power plant or major fuel-burning installation which has the capability to burn petroleum products. This authority is only available after the President has declared a natural gas supply emergency, which is defined similarly to such an emergency under the Natural Gas Policy Act. 15 U.S.C. § 717z. As indicated in connection with the discussion of this statute in A. above, the use of this authority may be of limited value in oil shortage situations.

E. Priority Contracts, Orders, and Supplies

1. Defense Production Act- Section 101(c) of the DPA, 42 U.S.C. § 2071(c), gives the President authority to require the priority performance of contracts or orders concerning supplies of equipment and materials to maximize domestic energy supplies. (See discussion of this statute at A. above.)

2. Natural Gas Policy Act- During any Presidentially declared natural gas emergency, the President may authorize any interstate pipeline or local distribution company served by an interstate pipeline to contract for the purchase of supplies of natural gas and may require a pipeline to transport such gas. But, this authority is of limited use in petroleum product shortages. (See the discussion in A. above.) 15 U.S.C. § 3362.



F. Increasing Domestic Energy Production

1. Energy Policy and Conservation Act (Gas)- The President may require natural gas to be produced at the maximum efficiency rate (MER) on Federal lands. Under certain circumstances, he can order the production of natural gas at the temporary emergency rate (TER) on Federal land and at the MER and TER from non-Federal fields. 42 U.S.C. § 6214. (With respect to the Naval Petroleum Reserves, natural gas is included within the definition of petroleum 10 U.S.C. § 7420(3). See discussion at I.F.1.)

2. Federal Power Act (Electricity)- The Secretary of Energy, may, during an emergency, order, on its motion, a temporary inter-connection of facilities and such generation, delivery, interchange, or transmission of electricity, provided that it will meet the public interest. (Such an emergency could be caused by a sudden increase in demand for electricity brought about by an oil shortage.) 16 U.S.C. § 824a(c).

(Note: The Justice Department memorandum contains no statutory provision giving the President authority to order an increase in the production of coal.)

G. Energy Reserves

The Department of Justice memorandum contains no statutory provisions which give the President authority to establish a public or private reserve for gas, coal or electricity or other energy source. Under the Energy Policy and Conservation Act, the Administrator of the Federal Energy Administration was to submit a report on natural gas and coal reserves. 42 U.S.C. § 6238.

H. Establish and Maintain Energy-Related Facilities

1. Natural Gas Act- The Federal Energy Regulatory Commission has authority to order natural gas companies to construct or extend facilities so that gas can be sold to local distribution companies. 15 U.S.C. § 717f.

(a) Temporary connection and exchange of facilities-  
See F.2. above.

(b) Physical connection of facilities- The Federal Energy Regulatory Commission may, on its own motion, order the physical connection of any cogeneration facility, small power production facility or the transmission facilities of any electric utility with another utility, Federal power-marketing agency (BPA), etc. 16 U.S.C. § 824i.

(c) Wheeling of power- FERC may order any electrical utility to provide transmission services, including enlarging transmission capacity, to another utility, geothermal power producer, or power marketing agency. 16 U.S.C. 824j.

#### I. Other Statutes

We encountered no statutes in the memorandum of law that could be discussed here. Also, see the miscellaneous statutes applicable in all situations at the end of this Appendix.

#### Authorities Lacking to Cope with Petroleum Product Shortages

As a general rule, the President lacks broad authority to allocate gas and electricity during oil emergencies. He may allocate coal, if there is a severe energy supply interruption. If an oil emergency coincides with a gas emergency, he may be able to allocate gas under the Natural Gas Policy Act. Under the Federal Power Act, some electricity allocation may take place. Coal and gas exports can be halted under the Energy Policy and Conservation Act.

#### Miscellaneous Statutes

Several statutes included in the Department of Justice memorandum would be available under each situation described in Appendix A and do not fit under any of the types of authority the President has. However, in one instance, one of these statutes has been included under the "other statutes" heading because it could also become operative on the basis of the particular situation, i.e. the Outer Continental Shelf Lands Act which is available "during time of war". The following statutes are available under each situation:

1. Outer Continental Shelf Lands Act- The President, whenever he prescribes, may purchase at market price all, or any part, of the production of any mineral from the Outer Continental Shelf. 43 U.S.C. § 1341(b).

2. Minerals Lands Leasing Act- The Secretary of the Interior may demand that royalties accruing to the United States under an oil and gas lease be paid in kind. 30 U.S.C. § 192.

3. Clean Air Act- Upon determining that a national or regional energy emergency exists, the President may temporarily suspend or modify a states air pollution control program. The Governor of the concerned state must petition for such a change. 42 U.S.C. § 7410(f).

4. Interstate Commerce Act-

(a) Temporary Transportation Authority- The Interstate Commerce Commission has the authority to grant a motor carrier of property or a water carrier temporary authority to provide transportation to a place which has no such carrier capable of meeting its needs. This Section would permit such carriers to move petroleum products on a temporary basis. 49 U.S.C. § 10928.

(b) Priority Rail Movement- The Commission may give a priority order for the rail movement of particular commodities when a failure in traffic movement creates an emergency situation having a substantial adverse effect on United States rail service in the U.S. or a substantial region of the country. 49 U.S.C. § 11123.

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