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## NOTES

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# BLANK CHECKS: AN ANALYSIS OF EMERGENCY ACTIONS WARRANTING UNILATERAL EXECUTIVE ACTION

*Megan E. Ball\**

### INTRODUCTION

Climate change, like terrorism, demands a response warranted by what it is: an emergency. At least, this is the argument put forth by President Barack Obama during both terms of his presidency characterizing the failure of the American people to reduce and remove the threat of climate change as a “betray[al] [of] our children and future generations.”<sup>1</sup> In order to combat “one of [the] greatest challenges of our time,” President Obama released the 2013 President’s Climate Action Plan (“CAP”),<sup>2</sup> outlining in detail the steps the administration intended to take to curb the impact of environmental changes and to ensure the United States was taking steps to be a global leader in the fight against climate change. In particular, the CAP focused on decreasing the emission of Greenhouse Gases (“GHGs”)—specifically carbon, hydrofluorocarbons (“HFCs”), and methane—into the atmosphere, as these GHGs have been identified as a leading cause of rising atmospheric temperatures.<sup>3</sup> The alarming tone of these scientific conclusions have led

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1 President Barack Obama, Inaugural Address by President Barack Obama (Jan. 21, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama>.

2 THE EXEC. OFFICE OF THE PRESIDENT, THE PRESIDENT’S CLIMATE ACTION PLAN 5 (2013) [hereinafter CLIMATE ACTION PLAN].

3 See *Climate Change Indicators: Greenhouse Gases*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/climate-indicators/greenhouse-gases> (last updated Feb. 22, 2017).

some politicians to argue strongly for the enforcement—or perhaps just forcing—of compliance with the measures modern scientists believe will remedy, or at least slow, the tide of climate change.<sup>4</sup>

The tone of the CAP, although not nearly as apocalyptic, is urgent and firm regarding the President's obligations to promote technologies and policies for alternative energy sources and reduction of the emission of GHGs.<sup>5</sup> In particular, the CAP insists that hydrofluorocarbons must be reduced and that the Environmental Protection Agency (EPA) must use its authority under the Clean Air Act (CAA) to accomplish this goal.<sup>6</sup> Rather than presenting the work of the EPA as a policy recommendation from the administration, it reads as a directive in stating that the EPA “*will* use its authority,” to prohibit certain uses of HFCs and encourages the use of “climate-friendly chemicals” in their wake.<sup>7</sup>

In an effort to promote and accomplish the policy directive of the administration, the EPA promulgated the “Protection of Stratospheric Ozone: Change of Listing Status for Certain Substitutes Under the Significant New Alternatives Policy Program,” known commonly as the “2015 Rule,” which regulates the use of HFCs by manufacturers.<sup>8</sup> This action was taken because HFCs are a potent GHG used in the production of many everyday products such as “aerosols, refrigeration, automotive air conditioners, and foams.”<sup>9</sup> The particular attention paid to HFCs by the Obama administration was related to the projected increase of nearly doubled usage of HFCs by 2020.<sup>10</sup>

Through the 2015 Rule, the EPA drew upon section 612 of the CAA to assert that the EPA, through its statutorily granted authority to require all manufacturers to replace ozone-depleting substances with safe substitutes, could regulate the use of HFCs by manufacturers beyond their initial replace-

4 See, e.g., *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1169 (E.D. Cal. 2007) (“Ongoing scientific research into the area of climate science has produced a continuous stream of analytical documents that, over recent time, point with increasing alarm to the rapidity of evolution of measurable changes in climate instability and evince a growing consensus that human-caused greenhouse gas emissions must be curtailed more rather than less and sooner rather than later.”).

5 CLIMATE ACTION PLAN, *supra* note 2, at 4 (stating that the President “remains firmly committed” to the goals outlined in the CAP because “climate change is no longer a distant threat”).

6 *Id.* at 10.

7 *Id.* (emphasis added). This Note operates under the assumption that the CAP is not an executive order; although there may be an argument that due to the directive grammatical format, it should be considered as such because executive orders are a matter of substance, not form.

8 Protection of Stratospheric Ozone: Change of Listing Status for Certain Substitutes Under the Significant New Alternatives Policy Program, 80 Fed. Reg. 42,870 (July 20, 2015) (to be codified at 40 C.F.R. pt. 82) [hereinafter The 2015 Rule].

9 Final Brief for Respondent at 6, *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017) (No. 15-1328) [hereinafter Brief for Respondent].

10 CLIMATE ACTION PLAN, *supra* note 2, at 10.

ment of ozone-depleting substances as well.<sup>11</sup> In particular, the argument relied upon the utilization of the Significant New Alternatives Policy (SNAP) Program to accomplish this regulation.<sup>12</sup> Title VI of the CAA, the location of section 612(a), charges the EPA with administration over the requirements for manufacturers to replace ozone-depleting substances with specifically identified “safe substitutes.”<sup>13</sup> Additionally, through section 612(c) Congress mandated that the EPA publish a list of “safe substitutes” and those prohibited from use by manufacturers so that manufacturers could readily comply with the demands of section 612(a). Initially after the enactment of Title VI of the CAA, the EPA listed HFC as a safe substitute because the substance is non-ozone depleting and was thus readily used by manufacturers. However, in 2009 after another decade of research, the EPA concluded that although HFCs are not ozone depleting, they are a “potent” GHG with an extremely high Global Warming Potential (GWP).<sup>14</sup> This designation as a GHG means the release of HFCs likely contributes to climate change and “may reasonably be anticipated to endanger public health and welfare.”<sup>15</sup> Therefore, through the 2015 Rule the EPA used their authority under section 612(c) to remove HFCs from the safe substitute list. This removal of HFC was uncontested within the EPA’s statutorily granted authority and specifically occurred “in response to the CAP” expectations.<sup>16</sup>

This is where the agreement on the permissibility of this agency action ends. The 2015 Rule went one step further than just removing HFCs from the safe substitute list, but also required all current manufacturers who had already replaced ozone-depleting substances with HFCs to discontinue the use of HFC and to replace the HFC in their manufacturing process *again* with a secondary replacement chemical from the updated safe substitutes list.<sup>17</sup> When challenged, the EPA relied upon section 612 to argue in support of their actions under the 2015 Rule: that the CAA granted the Agency the authority to suspend the use of HFCs in *all* circumstances of their present use by industry because the word “replace” does not apply solely to the first

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11 The Clean Air Act, Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified as amended in scattered sections of 42 U.S.C.). The Clean Air Act is discussed in more depth in Part I.

12 42 U.S.C. § 7671k(c) (2012).

13 *Id.* § 7671k(b)(2), (c).

14 The 2015 Rule, *supra* note 8, at 42,879, 42,888. Global Warming Potential is defined as “a measure of how much energy the emissions of 1 ton of a gas will absorb over a given period of time, relative to the emissions of 1 ton of carbon dioxide (CO<sub>2</sub>).” *Greenhouse Gas Emissions: Understanding Global Warming Potentials*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/ghgemissions/understanding-global-warming-potentials> (last updated Feb. 14, 2017).

15 See Brief for Respondent, *supra* note 9, at 7.

16 The 2015 Rule, *supra* note 8, at 42,942.

17 This initial replacement under the EPA’s jurisdiction is what may be thought of as a first generation replacement. See Joint Brief of Petitioners at 10–12, *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017) (No. 15-1328) [hereinafter Brief for Petitioner].

generation replacement of ozone-depleting substances, but also to those substitutes instituted in the wake of those ozone-depleting materials as well.<sup>18</sup>

During this public comment period for the 2015 Rule in 2014, the EPA received at least 227 comments on the proposed rule, some of which expressed concern both about the feasibility and legal authority of the Agency to take the actions suggested.<sup>19</sup> One of the public commenters was Mexichem Fluor, Inc., a global leader in the development, manufacture, and supply of fluoroproducts, whose comment raised concern about the inability of section 612 to confer regulatory authority to the EPA beyond the initial replacement of ozone-depleting substances.<sup>20</sup> However, this comment, amongst others, did not stall the passage of the 2015 Rule. As the effects of the 2015 Rule directly injured Mexichem Fluor by preventing the further use of HFC, a fluoroproduct, the company brought suit against the EPA.

This Note discusses the separation of powers issues raised in the D.C. Circuit by then-Judge, now Justice Kavanaugh in Mexichem Fluor's suit. Specifically, this Note analyzes the federal government's approach to climate change, overreach of the EPA to act beyond its statutorily granted authority, and the EPA's reliance upon President Obama's executive directives as the justification for its overreach. Part I of this Note provides a broad introduction of the CAA and the importance of the policy motivations for the later addition of Title VI to the Act. Part II discusses in more depth the decision in *Mexichem Fluor v. EPA* and why the 2015 Rule prompts separation of powers concerns. In Part III, this Note explores the constitutional framework for the separation of powers amongst the three branches of government during ordinary events. Alternatively, Part IV looks at the constitutional framework for emergency powers by the President in the historical and modern contexts and provides an example of emergency powers delegated to an agency. Part V discusses the ramifications of providing a blank check to an executive agency in an emergency, but ultimately provides three alternative actions an agency could take while maintaining the constitutional separation of powers. Finally, Part VI discusses the current status of the *Mexichem* decision and its role in Kavanaugh's recent appointment to the United States Supreme Court. This Note concludes that just as the Supreme Court has held in the arena of terrorism, the standard procedures of constitutional governmental action should be followed in response to climate change because our separation of powers doctrines both provide stability and strengthen the nation's ability to respond to crises and emergencies.<sup>21</sup>

## I. THE CLEAN AIR ACT

Throughout the late 1960s it was widely recognized by the American public that the quality of air breathed by the average person in the United

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18 See Brief for Respondent, *supra* note 9, at 20.

19 See *id.* at 10–11.

20 See Brief for Petitioner, *supra* note 17, at 18–19.

21 See *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring).

States was subpar, largely due to the boom of industrial development and growth in the use of cars during the previous century.<sup>22</sup> For many years, both industrial factories and cars burned fossil fuels and released the byproducts directly into the air. At the time, even if the problem was recognized, there was no federal law that could have been invoked to regulate either the automobile industry or industrial development more broadly. Rather, common-law nuisance or state regulations were relied upon to manage the issue from the legal perspective.<sup>23</sup> However, by the 1960s there was an almost universal consensus that something must be done to address the problem of air pollution. Congress responded by enacting the Clean Air Act in 1970 to create a federal law that would be promulgated through uniform, national standards but implemented through a balance of both state and federal authority.<sup>24</sup> The CAA was considerably revised in the Clean Air Act Amendments of 1990 (“1990 Amendments”),<sup>25</sup> which provided the EPA with a much broader grant of statutory authority to regulate air pollution and set the tone for its modern province.<sup>26</sup>

Aligned with the overall mission of the EPA: “[T]o protect human health and the environment,” the ongoing goals of the CAA are to decrease ambient air pollutants, reduce the release of toxic chemicals that have been linked to human illnesses, and to phase out the creation and use of ozone-depleting chemicals.<sup>27</sup> In order to achieve these objectives, the CAA uses a series of programs and provisions to monitor ambient air quality through various permitting procedures. While the CAA and its amendments raise a variety of legal issues, the question of proper constitutional agency action through the 2015 Rule is confined to the EPA’s reliance upon Title VI for its authority.

Title VI of the CAA was adopted as a part of the 1990 Amendments and directly responded to the Montreal Protocol, a product of the Vienna Convention for the Protection of the Ozone Layer.<sup>28</sup> Title VI of the CAA addresses the EPA’s authority as it relates to stratospheric ozone protection

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22 See *History of Reducing Air Pollution from Transportation in the United States*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/air-pollution-transportation/accomplishments-and-success-air-pollution-transportation> (last updated Apr. 19, 2018).

23 See J.B. RUHL ET AL., *THE PRACTICE AND POLICY OF ENVIRONMENTAL LAW* 164–65 (4th ed. 2017); see also ENVTL. PROTECTION AGENCY, *THE PLAIN ENGLISH GUIDE TO THE CLEAN AIR ACT 2* (2007), <https://www.epa.gov/sites/production/files/2015-08/documents/peg.pdf> [hereinafter *THE PLAIN ENGLISH GUIDE*].

24 RUHL ET AL., *supra* note 23, at 166 (“Much of the CAA can be understood as a product of . . . ‘cooperative federalism,’ as a dynamic balance between federal standard setting and state implementation.”).

25 Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (codified as amended in scattered sections of 42 U.S.C.).

26 See *THE PLAIN ENGLISH GUIDE*, *supra* note 23, at 2.

27 *Id.* at 4.

28 *1990 Clean Air Act Amendment Summary: Title VI*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/clean-air-act-overview/1990-clean-air-act-amendment-summary-title-vi> (last updated Jan. 4, 2017).

and an increased recognition of the importance of ozone's preservation.<sup>29</sup> The Montreal Protocol is an international agreement that was finalized in 1987 and ratified by the United States in 1988.<sup>30</sup> It binds each of the Protocol signees to the goal of "phasing out the production and consumption of ozone-depleting substances" and has been amended four times, most recently in 2016.<sup>31</sup> Ever since the initial adoption, the United States has been a global leader under the Protocol in its efforts to reduce ozone depletion by taking strong domestic action to phase out ozone-depleting substances.<sup>32</sup> This long-lasting success of the United States stems directly from the introduction and enforcement of Title VI, which itself echoes the Protocol by "requir[ing] the phaseout of the production, use, and consumption of certain substances that contribute to depletion of the earth's stratospheric ozone layer."<sup>33</sup> The direct action by Congress in both adopting the Montreal Protocol and taking action toward its implementation through Title VI highlights the elevated importance the legislature has given to the protection of the ozone layer.

The basic mechanics of Title VI require the EPA first to identify substances containing various chemical compounds known to have a depletory effect on ozone, and then to break down this list of substances into two different classes based upon their potency.<sup>34</sup> Title VI then lays out various timelines and reporting requirements for phasing out the uses of both classes of ozone-depleting substances, as well as important provisions specifically regarding motor vehicle air conditioning units.<sup>35</sup> The Significant New Alternative Policy is the process through which the EPA reviews potential substitutes for both classes of ozone-depleting substances within a framework that compares the potential risks associated with the potential substitute.<sup>36</sup> The criteria used by SNAP does not require a substitute to be risk free, but rather under section 612 of Title VI, the EPA must prohibit the use of any particular substitute for a class I or class II substance if there is another available option that presents a lesser overall risk to human health and the environment.<sup>37</sup> There are five different types of criteria used by the EPA under SNAP to determine "the acceptability of new substitutes," with the ultimate aim of pos-

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29 42 U.S.C. §§ 7671–7671q (2012).

30 *The Montreal Protocol on Substances that Deplete the Ozone Layer*, U.S. DEP'T OF STATE, <https://www.state.gov/e/oes/eqt/chemicalpollution/83007.htm> (last visited Nov. 27, 2017).

31 *Id.* The United States has participated in and adopted each of the four amendments. *Id.*

32 *Id.*

33 RUHL ET AL., *supra* note 23, at 167.

34 42 U.S.C. § 7671a.

35 *Id.* at §§ 7671b–7671j.

36 *Overview of SNAP*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/snap/overview-snap> (last updated June 14, 2017) [hereinafter *Overview of SNAP*].

37 42 U.S.C. § 7671k(c).

ing the lowest risk to human health and the environment.<sup>38</sup> Further, a SNAP determination is not an ultimatum, but the EPA may assign one of four different designations for the classification of a substitute.<sup>39</sup> While the SNAP program is intended to provide a smoother process for industry to transition to more environmentally safe alternatives, the EPA found in this statutory framework what it claimed to be an ambiguity such that within the 2015 Rule there was an open question as to the extent of the reach of the “replacement power” provided in this portion of the CAA: the replacement of a replacement.

## II. IMPETUS FOR ANALYSIS: *MEXICHEM FLUOR v. EPA*

The August 2017 D.C. Circuit Court decision in *Mexichem Fluor, Inc. v. EPA*<sup>40</sup> arose from the EPA’s interpretation of their own authority to act under the section 612 SNAP program within the 2015 Rule.<sup>41</sup> The opinion raises a series of concerns regarding the efficacy of executive agencies acting with practical autonomy in times of emergency, especially when using an argument of presidential authority as their authorization to act.<sup>42</sup> In writing the majority opinion, Kavanaugh compared the alarmist language used by the EPA to support its policy concerns for promulgating the 2015 Rule—specifically the portion about replacing HFCs with further replacements—as reminiscent of the calls for the necessity of urgency in responding to terrorism in the wake of 9/11. In other words, the basic premise of this argument is a policy rationale that the traditional avenues of bicameralism and presentment, as well as proper delegation of legislative authority to the executive, can be bypassed in emergency circumstances. Although the bulk of the majority opinion is spent discussing that HFCs, by definition, are not ozone-depleting substances and therefore go beyond the statutory grant of section 612, this statutory interpretation argument is not the focus of this Note. Rather, this Note considers the parallels drawn by Kavanaugh between terrorism and climate change, highlighting both as examples of universal and time-sensitive matters. Additionally, this Note expands this syllogism to explore the separation of powers issues that would arise if the EPA’s reasoning were taken to its logical end.

This comparison of climate change and terrorism is an almost passing remark buried in the middle of the majority opinion where Kavanaugh emphasizes the important implications of a decision favoring the EPA. By juxtaposing the EPA actions in response to threats of global climate change in the *Mexichem* case with the weighty decisions made by the George W. Bush

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38 *Overview of SNAP*, *supra* note 36. These criteria include the atmospheric effects, an exposure assessment, toxicity data, flammability, and other environmental impacts like ecotoxicity or local air quality impacts. *Id.*

39 *Id.* The four classifications are acceptable, acceptable subject to use conditions, acceptable subject to narrowed use limits, and unacceptable alternative.

40 866 F.3d 451 (D.C. Cir. 2017).

41 *Id.* at 453.

42 *See* Brief for Petitioner, *supra* note 17, at 5, 32, 42.



administration in responding to global threats of terrorism, Kavanaugh illuminates this overlap by calling upon Justice Breyer's concurrence in *Hamdan v. Rumsfeld*.<sup>43</sup> In context, Kavanaugh simply states that the separation of powers issues present in the *Mexichem* case, specifically those regarding the EPA's authority to regulate under section 612, graft onto the argument presented by Justice Breyer in the context of the war against al-Qaeda.<sup>44</sup> In the *Hamdan* concurrence, Justice Breyer states that "war is not a blank check for the President" to act without Congressional approval, echoing the often-recalled *Youngstown Steel* tripartite analysis called upon by the judiciary to determine the strength of the executive's action originally argued by Justice Jackson.<sup>45</sup> Kavanaugh not only cites and quotes the *Hamdan* decision in his *Mexichem* opinion, but also completes the comparison by stating that "[s]o too, climate change is not a blank check for the President."<sup>46</sup> By implication, the threat of climate change is likewise not a blank check for executive agency action.<sup>47</sup>

It is important to note that the decision in *Mexichem* was not a policy objection to the EPA's regulation of HFCs due to their impact on climate change. In fact, the majority opinion sympathizes heavily with the EPA's policy objective in light of the importance of climate change issues.<sup>48</sup> Further, the petitioners do not deny that the EPA could likely find other legal grounds for achieving their goal of regulating those HFCs currently in use by industry as a replacement for a class I or class II substance.<sup>49</sup> In this way, the suit itself could be seen as more akin to a stalling mechanism for *Mexichem* to allow them to continue production in the short term, rather than a full-hearted argument that the EPA lacks all authority to regulate the consumption of HFCs currently in use by industry. To this point, Justice Breyer highlights in *Hamdan* that there are no structural blocks preventing the President, or any agency, from returning to Congress when it has determined that their actions will go beyond the grounds of their authority and requesting legislation authorizing their proposed actions.<sup>50</sup> So too, here there are not presently any structural roadblocks preventing the EPA from requesting an extension of its regulatory power under Title VI to include second generation replacements. Therefore, the failure of the EPA in *Mexichem* was not premised on the reasonability of the policy objective at play, but rather

43 *Mexichem Fluor*, 866 F.3d at 460–61 (citing *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring)).

44 *Id.* at 460.

45 *Id.* at 460–61 (citing *Hamdan*, 548 U.S. at 636 (Breyer, J., concurring)). The *Youngstown Steel* analysis is discussed in further detail in Section III.B.

46 *Id.* at 461.

47 *Id.* ("Section 612(c) 'does not authorize EPA to review substitutes for substances that are not themselves' covered ozone-depleting substances.").

48 *Id.* at 461 ("However much we might sympathize or agree with EPA's policy objectives, EPA may act only within the boundaries of its statutory authority.").

49 Brief for Petitioner, *supra* note 17, at 11. For example, a proposed area of authority is section 6 of the Toxic Substances Control Act.

50 *Hamdan*, 548 U.S. at 636 (Breyer, J., concurring).

boiled down to an Agency's complete reliance upon a grant of authority from a source constitutionally unauthorized to provide it: the President.

### A. *The Chevron Analysis*

As the subject of this suit was an executive Agency's interpretation of a federal statute, the court was required to look at the statute through a *Chevron* analysis to determine if the Agency's understanding warranted deference by the court. Although the *Chevron* analysis of the *Mexichem* decision is largely beyond the scope of this discussion of autonomous action by executive agencies during emergency scenarios, it is an important element of modern separation of powers jurisprudence. Presently, the courts must rely upon deference to agency interpretation of either federal statutes or their own regulations so long as Congress has not spoken clearly in the alternative and the agency's interpretation is reasonable.<sup>51</sup> This approach, which allows agencies a good deal of autonomy, illustrates the ways in which some scholars argue that executive agencies bend the traditional roles—and rules—set out in the Constitution for the three branches of government, and leaves open the question of if/when agencies might act constitutionally in an emergency.<sup>52</sup>

In *Mexichem*, Kavanaugh did engage in the requisite, albeit brief, *Chevron* analysis to determine if the EPA's interpretation of section 612 in the 2015 Rule warranted deference. After reasoning that the text of section 612 is "sufficiently clear" and not ambiguous, Kavanaugh determined that in accordance with *Chevron* step one, the EPA's interpretation was not entitled to deference as there was not ambiguity in the statutory grant of authority, and therefore the court need not defer to the EPA's interpretation.<sup>53</sup>

The lengthy dissent in *Mexichem*, written by Judge Wilkins, argues that the majority was largely incorrect due to its *Chevron* analysis. Judge Wilkins contends that the word "replace" in the context of section 612 of the CAA is open to multiple meanings, and is thus definitionally ambiguous, unlike the majority's holding. As such, the dissent argues that the court ought to have proceeded to a *Chevron* step two analysis to look at whether the EPA's interpretation was reasonable.<sup>54</sup>

## III. THE STATUS QUO OF CONSTITUTIONAL SEPARATION OF POWERS

Under ordinary circumstances, the constitutional framework for the separation of powers amongst the three distinct branches of the United States government does not provide necessity as a rationale for actions deviating

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51 See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

52 This topic is discussed in more detail in Section III.A.

53 *Mexichem Fluor*, 866 F.3d at 459 ("Put simply, EPA's strained reading of the term 'replace' contravenes the statute and thus fails at *Chevron* step 1.").

54 *Id.* at 464–65 (Wilkins, J., concurring in part and dissenting in part).

from the established structure.<sup>55</sup> While it is true that the Constitution expressly contemplates three branches of the federal government, our modern governmental system includes what Justice Scalia coined as a “new [b]ranch” of government: the executive and independent agencies.<sup>56</sup> The discussion of the constitutionality of the extent and power of agencies in the present day, even under ordinary circumstances, is a nuanced and highly politicized debate. The stakes of these debates are only heightened in an emergency situation. For the purposes of this Note, a high level of generality is sufficient to discuss the ordinary modes of operation in the federal government as outlined by the constitutional commitment to a separation of powers. This discussion will demonstrate that necessity has not been held by the Court to be a sufficient explanation for autonomous executive action. In order to discuss fully the extent of the executive branch, I will begin with a conversation about presidential power and then extend the conversation to the executive agencies.

### A. *Presidential Powers of the Executive Branch*

The President derives his/her powers either directly or implicitly from the Constitution,<sup>57</sup> or through statutory grants of authority from Congress. It would be an injustice to the entire field of constitutional studies to attempt to accurately summarize all of the nuances of Article II here; however, there are some notable elements that help to demonstrate unilateral presidential actions, regardless of emergency circumstances. One theory of presidential constitutional power under Article II is the “strong unitary executive” approach. Alexander Hamilton argued for this understanding throughout the *Federalist Papers* as he explained the rationale of the Founders in their decisions surrounding the structure of the Constitution and how it should be interpreted moving forward.<sup>58</sup> Derived from the Article II Vesting Clause, the unitary executive premise argues that the President is given *all* powers

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55 However, it is true that the Constitution does provide Congress, but not the executive, with the power “[t]o make all Laws which shall be *necessary and proper* for carrying into Execution the foregoing Powers . . .” U.S. CONST. art. I, § 8, cl. 18 (emphasis added). Yet the Supreme Court has held numerous times that this grant of necessity is hemmed by the requirement that the action be proper. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 324–25 (1819) (“*Necessary* powers must here intend such powers as are *suitable* and *fitted* to the object; such as are *best* and *most useful* in relation to the end proposed.”); *see also* *Printz v. United States*, 521 U.S. 898, 923–24 (1997); *New York v. United States*, 505 U.S. 144, 158–59 (1992).

56 *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

57 U.S. CONST. art. II (Commander in Chief, pardon power, Take Care Clause, appointment power, removal power, treaties power, recess appointments, adjourn or convene Congress, veto power (found in Article I), and delivery of the State of the Union address).

58 *See, e.g.*, THE FEDERALIST NOS. 70, 76 (Alexander Hamilton).

traditionally vested within the executive in the common law, hemmed only by those powers explicitly delegated to Congress.<sup>59</sup>

In general, history has favored this unitary executive theory of presidential power because it is often more efficient and effective for the nation to speak with one unified voice, particularly in volatile situations like emergencies. In addition to the ambiguous executive powers contained within the Vesting Clause, there are nine major powers of the President expressly included in the Constitution: Commander in Chief, pardon power, Take Care Clause, appointment power, removal power, treaties power, recess appointments, adjourn or convene Congress, veto power, and delivery of the State of the Union address.<sup>60</sup>

There are three presidential powers that are relevant to a President's ability to act and react to emergent scenarios: the Take Care Clause, Commander-in-Chief Power, and the ability to promulgate executive orders. Although the President maintains a great deal of unilateral power in all of the powers given him/her by the Constitution, they are beyond the argument of this Note. In general, the President is given wide deference to act in the field of foreign affairs or with war powers in order to present a unified front to foreign countries; yet, even still this power can be tailored by powers given explicitly to Congress.<sup>61</sup> For domestic issues, the President can rely upon inherent executive powers as well as the Take Care Clause, which provides a lot of leeway for presidential action so long as it can arguably be considered a part of the faithful execution of the law.<sup>62</sup>

### B. *Executive Power Exercised Through Agencies*

In addition to the President, the executive branch includes numerous executive agencies deriving their authority from legislative delegations of power. There are open questions about the nebulous concept of executive power being divided between the President and the executive agencies; but what is clear throughout constitutional law is that agencies are only empowered to make rules consistent with the law that was enacted through the processes of bicameralism and presentment.<sup>63</sup> All agency action must be authorized statutorily in order for that agency to have the jurisdiction to regulate any particular action; a well-intentioned policy objective—even if scientifically correct—does not authorize an agency to act.<sup>64</sup> An agency must have a law justifying its action.

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59 See U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).

60 See generally U.S. CONST. arts. I–II.

61 See U.S. CONST. art. I, § 8 (establishing that Congress has the power to act outside of its expressly delegated authority when doing so would be “necessary and proper” to fulfill the aims expressly delegated under the Constitution); see generally *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189 (2012).

62 U.S. CONST. art. II., § 3.

63 *INS v. Chadha*, 462 U.S. 919, 952–54 (1983).

64 *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014).

Broadly, it would be fair to say that supporters of the robust agency model praise the proliferation of agencies because of their efficiency and their ability to allow specialists to review, create, and control policy within their given area of expertise rather than leaving Congress to grapple with complicated and technical topics.<sup>65</sup> Critics of extensive agency delegation argue that the current proliferation of agency power is contrary to the Constitution's separation of powers scheme because agencies are free from most meaningful checks or balances against their actions after the initial legislative delegation of authority. As long as an agency acts within its statutory authority, there are no institutional checks on its action beyond the cursory, judicial *Chevron* review. Agencies are frequently vested with both the duty to create regulations as well as to enforce them, thus frequently practicing both law-making and enforcement authority, despite those powers belonging explicitly to other branches.<sup>66</sup>

In spite of these concerns of unwieldy autonomy, the practice of delegating power to agencies has flourished and is currently a key part of the operation of the United States governmental system. The omnipresent reality of agency action can make it difficult for scholars, practitioners, and courts alike to recall that the Constitution does not contemplate the specific existence of the hundreds of executive agencies currently in operation, so all of their authority must be derived from delegations of authority from another branch.<sup>67</sup> The EPA, for example, was not considered by the Founding Fathers when the Constitution was written, so all of its authority must be derived elsewhere.<sup>68</sup>

It is a fundamental principle of the separation of powers that the executive branch does not have legislative authority, either of its own volition or as delegated by a presumably well-intentioned but constitutionally imprecise

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65 See generally JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938). It should be noted that Landis' views represent a rather extreme promotion of the administrative state, not necessarily the norm.

66 In arguing against the constitutionality of the Sentencing Commission in the *Mistretta* dissent, Justice Scalia asserted that the impact of the majority decision would not be about the extent of agency power, but "about the creation of a new Branch altogether, a sort of junior-varsity Congress." *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

67 See generally Clyde Wayne Crews, *Nobody Knows How Many Federal Agencies Exist*, COMPETITIVE ENTERPRISE INST. (Aug. 26, 2015), <https://cei.org/blog/nobody-knows-how-many-federal-agencies-exist>.

68 The EPA was created through Congressional approval under the encouragement of President Richard Nixon on December 2, 1970 through the passage of Reorganization Plan Number 3. *The Guardian: Origins of the EPA*, U.S. ENVTL. PROTECTION AGENCY, <https://archive.epa.gov/epa/aboutepa/guardian-origins-epa.html> (last updated Sept. 6, 2016). Created from various committees and administrations previously in existence, the EPA centralized these various environmental initiatives into a single body, pulling "three federal Departments, three Bureaus, three Administrations, two Councils, one Commission, [and] one Service." *Id.* President Nixon appointed William D. Ruckelshaus as the first EPA Administrator. *Id.*

Congress.<sup>69</sup> Finally, although it may seem too elementary, it is important to explicitly state that the “President is not an agency,” and that this simple truth has been confirmed by the Supreme Court on two occasions.<sup>70</sup> In conclusion, there are two clear and distinct elements of the Article II executive branch: the President and the executive agencies.<sup>71</sup>

### C. *As Applied to Mexichem*

In the context of the 2015 Rule, the EPA grounds its authority for action in the President’s 2013 CAP, which presents a number of issues.<sup>72</sup> The EPA’s grant of statutory authority to regulate under section 612, while properly granted through the appropriate channels by Congress, makes clear that any additions to this authority would likewise require congressional approval as an amendment to the law.<sup>73</sup> It is also clear that any President is freely allowed to give suggestions, recommendations, or urgings to Congress or the agencies to express their commitment to a particular cause; however, these discussions do not have the force of law.<sup>74</sup> Here, President Obama’s CAP was an appropriate means of expressing his commitment to the prevention of further digression of climate change activity to Congress and the EPA; nevertheless, it does not have weight as legal authority, which arguably an executive order might. The EPA rightfully understood the President’s tone in the CAP, but mistakenly believed it to be a grant of unilateral authority to act in whatever way necessary to achieve the goal presented regardless of existing

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69 See Leanna M. Anderson, Note, *Executive Orders, “The Very Definition of Tyranny,” and the Congressional Solution, the Separation of Powers Restoration Act*, 29 HASTINGS CONST. L.Q. 589, 590 (2002). However, this proposition is somewhat complicated by the President’s authority to issue executive orders, which critics argue effectively allows the President to legislate with little to no meaningful judicial check. *Id.* at 592–93.

70 Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1108 & n.39 (2009).

71 This confusion of boundaries between the Presidency and agencies arises in the context of agency power because the APA is less than clear in its definition of what constitutes an agency under its jurisdiction. According to the APA, its authority, as defined by Congress within the statute, only explicitly excludes the Court and Congress from the “authority of the government of the United States,” and is silent about the President. *Id.* at 1108 (quoting 5 U.S.C. § 551(1) (2006)).

72 Brief for Respondent, *supra* note 9, at 8.

73 It is not unprecedented that Congress would approve this expansion of authority. The CAA was amended in both 1977 and 1990. In both circumstances, the EPA’s authority was greatly increased; for example, the addition of Title VI to the CAA through the 1990 Amendments gave the EPA authority to take various different steps to prevent the depletion of the ozone layer. *Highlights of the 1990 Clean Air Act Amendments*, U.S. ENVTL. PROTECTION AGENCY, <https://archive.epa.gov/epa/aboutepa/highlights-1990-clean-air-act-amendments.html> (last updated Oct. 4, 2016).

74 The caveat to this understanding is the executive order, which is interpreted with the force of law. However, the next President, without many structural barriers to prevent them, can easily overturn standing executive orders. See Kristen Bialik, *Obama Issued Fewer Executive Orders on Average than Any President Since Cleveland*, PEW RESEARCH CTR. (Jan. 23, 2017), <http://www.pewresearch.org/fact-tank/2017/01/23/obama-executive-orders/>.

law. This understanding is incorrect as a matter of statutory interpretation and constitutional law, even under the guise of necessity in an emergency.

#### IV. POWERS IN THE EMERGENCY CONTEXT

An important caveat to most rules or standards of conduct is an emergency situation. The word “emergency” invokes the need for immediate action, without time for negotiation or conversation. The Constitution explicitly prepares for some contingency scenarios, like the fact that although Article I provides Congress alone with the power to declare war, the Article III courts have recognized that in certain circumstances the President, using the Article II Commander-in-Chief power, ought to be able to take military action without a congressional declaration of war.<sup>75</sup> This scenario is confirmed especially in the event that the President is acting against enemy forces or to repel an attack.<sup>76</sup> The question of who and how to respond to emergencies becomes increasingly less clear, however, when agencies stand poised as the best candidate for action. This is the circumstance considered by the D.C. Circuit in *Mexichem*, where the EPA was implicitly arguing that the time-pressing and universal nature of climate change warranted allowing the EPA to act autonomously, whether or not regulation of HFCs was warranted under section 612.

Legal scholar Adrian Vermeule’s work explores the role of executive agencies in emergencies.<sup>77</sup> His arguments are largely premised upon the reality that most administrative law is based upon “open-ended standards or adjustable parameters,” like the standards of review for agency decisions: arbitrary and capricious, reasonableness, and clarity of the statute.<sup>78</sup> Vermeule argues that these relatively low standards of review, coupled with discretion for agency interpretations such as *Chevron*, allow the courts a great deal of discretion to adjust their scrutiny at any time. This particular characteristic is especially poignant when responding to how an agency has acted in an emergency scenario.<sup>79</sup> In one piece, Vermeule sets forth the legal theories of Carl Schmitt, who argues that emergencies cannot realistically be governed through highly specified rules—like a fire drill, for instance—but rather must be handled through after-the-fact standards, which allow for more case-by-case analysis.<sup>80</sup> At most, Schmitt argues that a legal system can “specify *who* will have the power to act during an emergency, but not what

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75 See generally *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

76 *The Prize Cases*, 67 U.S. (2 Black) 635, 691–93 (1863); see *supra* notes 57–62 and accompanying text.

77 Vermeule, *supra* note 70, at 1097–98.

78 *Id.* at 1097; see also *id.* at 1105 (“[T]he good cause standard is an adjustable parameter that can be invoked by an agency, and interpreted broadly by a court, in circumstances of perceived emergency.”).

79 See *id.* at 1097 (“[C]ourts can and do adjust during perceived emergencies to increase deference to administrative agencies.”).

80 *Id.* at 1101.

counts as a valid exception,” to the normal rule of law.<sup>81</sup> This difficulty of defining what constitutes an emergency or exception as well as determining who has the authority to choose the definition is the gray area that gives environmentalists a justification for pursuing autonomous agency action in the fight against climate change. Climate change poses immediate dangers and imminent harm, a phenomenon that can arguably be defined as an emergency (albeit a more long-term, overarching emergency). This same argument, as previously discussed, was proliferated in the context of terrorism and war powers after the September 11, 2001, attacks.<sup>82</sup>

Importantly, however, Vermeule and Schmitt both agree that the key legal preparation for emergency is the determination of who has the power to act when an emergency strikes—a question that can be settled before an emergency occurs. On the question of climate change, this determination is of particular constitutional significance. I argue that our constitutional structure, especially with a view toward legal and structural stability, necessitates that this power belongs to the President or Congress, and not the executive agencies.

In order to arrive at this conclusion, this Section explores both the historical and present-day approaches to emergency powers of the President and demonstrates that in some circumstances the President has historically been empowered to act by the Constitution. When he or she is so empowered, the President may then utilize this power to compel agency action through an executive order.<sup>83</sup>

#### A. *Historical Approach to Emergency Powers of the President*

It is universally accepted that the President has discretion to act unilaterally in certain circumstances and even retains emergency powers in the realm of foreign affairs and war powers. For a broader view of how presidential powers are determined and measured by the Court when they are not explicitly addressed, the analysis of the Supreme Court in the 1952 decision in *Youngstown Sheet & Tube Co. v. Sawyer*<sup>84</sup> is illustrative. The various interpretations of the Court between the majority and the concurrences illustrate the difficulty for Article III courts in determining the power and extent of executive powers, even within a wartime context.

The most enduring element of the *Youngstown Steel* decision is the tripartite framework of Justice Jackson’s concurrence, which provides a helpful methodology for courts to determine when the executive has potentially acted beyond its constitutional power.<sup>85</sup> Accordingly, Justice Jackson set out three categories of executive action: (1) when the President acts with specific

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81 *Id.* at 1103 (emphasis added).

82 *See id.* at 1100.

83 Executive orders have been held by the D.C. Circuit Court of Appeals to be binding upon agency action. *See generally* *Sherley v. Sebelius*, 644 F.3d 388 (D.C. Cir. 2011).

84 343 U.S. 579 (1952).

85 *Id.* at 634–55 (Jackson, J., concurring).



statutory authorization by Congress, (2) when the President acts when there is silence from Congress, and (3) when the President takes actions contrary to Congressional acts. If the President acts under specific statutory authorization from Congress, the action is presumed to be valid, thus category one of the *Youngstown Steel* framework provides the strongest executive power.<sup>86</sup> Conversely, when the President acts contrary to Congress, the executive power is at its “lowest ebb” and the Court may approach the action very critically.<sup>87</sup> When the President acts with neither a congressional grant nor denial, however, Justice Jackson deemed the President to be acting in the “zone of twilight,” which requires a fact-dependent analysis to determine if the actions taken by the executive were constitutional.<sup>88</sup>

In *Youngstown Steel*, the Court determined that President Truman was acting in category two of Justice Jackson’s framework, or the zone of twilight, because Congress had not expressly granted or denied the power to seize the steel mill industry.<sup>89</sup> Yet, even in the context of the Korean War, the Supreme Court held that the government’s arguments of necessity, or in another sense emergency, were insufficient to warrant autonomous executive action. It is clear both from the majority opinion and Justice Jackson’s concurrence that an argument of necessity, even in the context of war, was insufficient to justify executive overreach. Importantly, *Youngstown Steel* also set the precedent that when the Article III branch determines that the executive branch has acted with powers beyond its discretion, even during a time of war, the executive must cease the unconstitutional action and comply with the check of its power.

Although it is likely true that the present-day use of the *Youngstown Steel* framework far exceeds the precedential value of a concurring decision, it is frequently invoked as an interpretative lens in the academic study of the executive branch powers, especially in the context of foreign affairs.<sup>90</sup> An open question remains concerning how the *Youngstown Steel* analysis for actions of *the executive* applies to the *entire executive branch*, specifically executive agencies.

### B. *A Lack of Consensus: The Modern Approach to Emergency Power*

In the modern context, discussion of the emergency powers frequently arises in debates surrounding the appropriate response to terrorism and active threats made against the country. This conversation surrounds questions as to which branch or department of the government is best suited to

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86 *Id.* at 635.

87 *Id.* at 637–38.

88 *Id.* at 637. In the circumstance where a President has acted in a category two scenario, the “actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.” *Id.*

89 *Id.* at 588–89 (majority opinion).

90 See, e.g., Patricia L. Bellia, *Executive Power in Youngstown’s Shadows*, 19 CONST. COMMENT. 87 (2002); David H. Moore, *Taking Cues from Congress: Judicial Review, Congressional Authorization, and the Expansion of Presidential Power*, 90 NOTRE DAME L. REV. 1019 (2015).

act in order to mitigate injury while maintaining constitutional order, as illustrated by the work of Vermeule.<sup>91</sup> Unlike the context of an environmental crisis, the executive—via the President—is given explicit authority to act in the case of a foreign affairs or war time emergency in Article II of the Constitution.<sup>92</sup> In this way, the EPA’s actions regarding climate change are wholly different than the President’s decisions regarding terrorism and prisoners of war. Yet, Kavanaugh illustrates the point of intersection between the blank checks of power withheld from the EPA in *Mexichem* and those withheld from the President in *Hamdan*. To illustrate the connection underwriting this link, it is imperative to understand a fundamental divide in modern legal theory as to how emergency scenarios ought to be studied, regardless of the emergency’s topic, urgency, or severity.

As Professor Wayne McCormack explains, there are two different approaches, at least academically, as to how emergency scenarios ought to be considered jurisprudentially.<sup>93</sup> These two schools of thought regarding the allowance of variance to constitutional norms in emergency actions are labeled the “no” camp and the “maybe” camp.<sup>94</sup> The “no” camp advocates for following ordinary constitutional procedures, even in the face of an emergency scenario.<sup>95</sup> Justice Breyer, like Kavanaugh, firmly defends the “no” camp in his *Hamdan* concurrence, with the belief that an emergency scenario does not constitute an appropriate excuse to override constitutional norms and, in fact, refusing to follow the democratic structural norms weakens the United States’ ability to respond.<sup>96</sup> In the alternative, the “maybe” argument is based on the idea that emergencies require immediate responses, and Congress or the Court has the ability to retroactively approve illegal actions taken during an emergency to remedy any preexisting constitutional concerns.<sup>97</sup> This view aligns with that of Carl Schmitt in Professor Vermeule’s analysis.

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91 See *supra* notes 76–83 and accompanying text.

92 This authority is grounded in the express provisions of the Constitution through the Commander-in-Chief power as well as the ambassador appointment and treaty powers. U.S. CONST. art. II § 2; see also *The Prize Cases*, 67 U.S. (2 Black) 635, 691–92 (1863).

93 Wayne McCormack, *Emergency Powers and Terrorism*, 185 MIL. L. REV. 69 (2005).

94 *Id.* at 73–74.

95 *Id.* at 73 (“Most advocates for the ‘No’ position tend to argue that it is important for constitutional norms to remain fixed, even if officials will violate those norms without consequence during emergencies.”).

96 *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring) (“Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation’s ability to deal with danger. To the contrary, that insistence strengthens the Nation’s ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means.”).

97 See McCormack, *supra* note 93, at 73; see also Bruce Ackerman, Essay, *The Emergency Constitution*, 113 YALE L.J. 1029, 1030–31 (2004) (“[T]he self-conscious design of an emergency regime may well be the best available defense against a panic-driven cycle of permanent destruction.”).

This debate was actively ignited and debated amongst academics in the early 2000s after 9/11.<sup>98</sup>

It is not only Justice Breyer's concurrence that argues for the "no" camp. In the *Hamdan* majority, the Court addressed several questions surrounding the jurisdiction of a military commission to assess an al-Qaeda prisoner of war's habeas corpus proceedings. Although there are important differences in the types of conflict and deviation requested by the President in *Hamdan* versus the EPA in the 2015 Rule, the *Hamdan* decision illustrates the Court's reluctance to support deviations from constitutional requirements, despite the gravity of the situation. Importantly, even in the context of the "danger posed by international terrorism," the Court held that it was "not evident . . . [that the threat of international terrorism] should require . . . any variance" from ordinary military commission proceedings or procedures.<sup>99</sup> The Court further argued that the standard for deviation from the ordinary rules would require a showing of impracticability by the agency in question.<sup>100</sup> Although the President argued in *Hamdan* that the danger to the United States presented by international terrorism made the application of the military commission's rules and principles impracticable, the majority disagreed.<sup>101</sup> It is clear that even for the most functionalist of justices, like Justices Stevens and Breyer, the clear and pressing threat of international terrorism alone is not sufficient to allow the President, or an executive agency, to act contrary to the ordinary procedures of constitutional authority.

On the other hand, the "maybe" camp's position holds a very real functionalist appeal that is intuitively enticing because it allows the perceived threats of an emergency situation to be addressed immediately by the executive and leaves the difficult questions of whether the action was appropriate to be answered later. This approach is counter to the established processes that were painstakingly written into the Constitution and defended repeatedly by the Court. For instance, the conscious use of processes like bicameralism, presentment, delegation of authority, and the commitment to a written Constitution illustrate that these procedures were all elements of the process used to maintain the functioning of the United States' federal separation of

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98 See Ackerman, *supra* note 97, at 1030–31; David Cole, Essay, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753, 1785 (2004); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1021–24 (2003); Laurence H. Tribe & Patrick O. Gudridge, Essay, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801, 1867 (2004); Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273.

99 *Hamdan*, 548 U.S. at 623–24.

100 *Id.* at 624 (stating that "[t]he absence of any showing of impracticability" makes the President's argument "particularly disturbing").

101 *Id.* at 622 ("[T]he President's determination that 'the danger to the safety of the United States and the nature of international terrorism' renders it impracticable 'to apply in military commissions . . . the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts,' . . . is, in the Government's view, explanation enough for any deviation from court-martial procedures." (citation omitted)).

powers structure. Therefore, despite the safety valve that a “maybe” perspective provides in terms of unforeseen emergency scenarios, when the government considers how it will respond to emergencies, it should operate within the ordinary procedures of constitutional authority. The guise of necessity is an insufficient mask for overriding the ordinary separation of powers, even in hindsight.

### C. *Emergency Powers in the Context of an Executive Agency*

It would be inaccurate to argue that emergency powers of an executive agency are a constitutional impossibility. Congress foresaw the benefit of tasking a particular agency with specific emergency powers and explicitly put in place a mechanism to address some emergencies through the Federal Emergency Management Agency (FEMA). FEMA was created specifically to provide both a rapid and congressionally specified response to natural disasters and avoid unnecessary bureaucratic slowdown in the moment of a catastrophe.<sup>102</sup> FEMA is an executive agency created by an executive order of President Carter to amalgamate all of the various disaster response mechanisms of the federal government into a single entity.<sup>103</sup> Yet, despite this important move toward efficiency in responding to emergencies, it is imperative to note that FEMA itself cannot act until the President declares a state of emergency and initiates the statutory mechanism for agency action.<sup>104</sup> A further development in FEMA’s role in emergency response occurred in 2003 when it became a part of the United States Department of Homeland Security in order to “help communities face the threat of terrorism” and provide a “coordinated approach to national security from emergencies and disasters—both natural and man-made.”<sup>105</sup>

While it is clear that Congress has delegated some emergency powers to FEMA, there are two important caveats that factor into this analysis of executive agency emergency powers. First, FEMA is *only* given the jurisdiction to respond to emergencies when the President has declared a state of emergency; FEMA’s delegation of emergency authority is contingent upon presidential declaration.<sup>106</sup> Second, the circumstance in which FEMA is invoked are those events that are both rapidly developing and rapidly concluding, such as terrorism and natural disasters. The emphasis is placed on recovery after an emergency has occurred and plans for how to best execute a support effort. These factors of FEMA’s response mechanism leave open the question of when and how an agency ought to properly respond to a longer-term threat, especially those that could still be considered an emergency, in some respects, due to the magnitude, scale, or relative time pressure. Although

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102 See *About the Agency*, FEMA, <https://www.fema.gov/about-agency> (last updated Mar. 26, 2018).

103 *Id.*

104 *Id.*

105 *Id.*

106 42 U.S.C. § 5170 (2012).

technically these longer-term emergencies *could* arguably be within the mission of FEMA, it would be impractical for all emergency preparation and response to fall to one agency when the very purpose of the administrative state is to allow a vast group of particular experts to deliberate and respond to the needs of the country on their topic of expertise.<sup>107</sup>

Although it would clearly be quite efficient to allow executive agencies to act in the occasion of an emergency within their field of expertise, without a grant of authority from Congress or the President, a blank check of this sort would be contrary to the separation of powers doctrines that guide the functioning of the federal government. In order to best protect the nation in times of emergency, both those immediately present and the more long-term, following the standard rule of law will in the end be more efficient and a better safeguard of liberty. Just as in the circumstance of a fire drill at a school, when the procedure is widely known and practiced, all parties understand their role and the province of their authority in a time of crisis. So too when the federal government follows the rule of law in times of emergency, rather than shortcutting for a perceived time decrease, does it provide stability and a clear line of authority for action. Therefore, all actions of any executive agency, even in a time of emergency, must be derived in a grant of delegated authority from Congress or the President and be not contrary to established law.

## V. BLANK CHECKS AND ALTERNATIVE RESPONSES

Climate change, like terrorism, demands a response warranted by what it is: an emergency. However, the response to both climate change and terrorism ought to be guided by the separation of powers doctrines through which both the Court and the Constitution have clearly designated a constitutional protocol for the federal government's response and exercise of lawmaking powers: bicameralism, presentment, and a delegation of authority to agencies.<sup>108</sup> Although appealing, the "blank check" mentality in which either the President or an agency would be free to act in accordance with the necessity of the situation is a bad idea in both the terrorism and climate change contexts. This argument that emergency situations or claims of necessity are insufficient to warrant unilateral executive agency action acknowledges both the challenge presented by limiting the quickest option for action, bypassing Congress, as well as the reality that there are several alternative constitutional mechanisms that could be used by the agency in order to acquire appropriate authority for the desired action. Of these possible mechanisms, the three that may be effective in the context of regulating HFCs would include (1) a

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107 *About the Agency*, *supra* note 102 (during the Obama administration, FEMA's mission was "to support our citizens and first responders to ensure that as a nation we work together to build, sustain and improve our capability to prepare for, protect against, respond to, recover from and mitigate all hazards") (on file with author).

108 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952) ("The Founders of this Nation entrusted the lawmaking power to the Congress alone in *both* good and bad times." (emphasis added)).

request by the EPA for an explicit statutory grant of authority from Congress, (2) the issuance of an executive order that provides authorization, without contravening established law,<sup>109</sup> or (3) the EPA's use of a different statutory authority from which to derive their actions. This Section will briefly explore each of these possible solutions for the EPA's desire to regulate HFCs in the context of a climate change emergency and a response to a possible counterargument. Although these solutions are presented in light of the EPA, they would be reasonable methods for any executive agency to respond to an emerging or long-term emergency.

#### A. *Requesting a Grant of Authority from Congress*

There are no structural constitutional barriers that prevent any agency from asking Congress directly for a statutory grant of authority or for an expansion of their preexisting statutory authority. In the context of *Mexichem*, it would not be beyond the power of the EPA to request a statutory expansion or amendment to the CAA, or perhaps even an entirely new piece of legislation that could allow for the regulation of any HFCs currently in use by industry, whether or not it is the replacement of an ozone-depleting substance. As of present, it is true that "Congress has not yet enacted general climate change legislation," but the prospect of such legislation that addresses the global problem head-on is not beyond the realm of possibilities and has been raised, as the threat of climate change has become increasingly acknowledged as imminent.<sup>110</sup> Kavanaugh's opinion denying the EPA's ability to regulate HFCs under the 2015 Rule clearly leaves open the possibility that HFCs should, perhaps even ought, to be regulated; however the current statutory basis claimed by the EPA was an insufficient source for the actions taken.<sup>111</sup> The *Mexichem* opinion leaves wide open the possibility that under a proper statutory basis the EPA would be empowered and likely even encouraged to assert its authority in responding to the consistent, emergent threat of climate change.

However, it is true that this alternative for action does not override the consistent concern for emergency action: the slow response time of Congress. Further, it is true that the grant of authority requested by the EPA, here or in the case of any agency action, is contingent upon congressional partisans reaching a compromise and moving forward, an event of decreas-

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109 In this way, if, assuming *arguendo*, President Obama's Climate Action Plan of 2013 was interpreted to be an executive order, the EPA was still not authorized to act in the way that it did through the 2015 Rule. This is because as the Court ruled in *Mexichem*, the 2015 Rule was contrary to the statutory text of the CAA, and therefore was not enforceable as an executive order. *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 464 (D.C. Cir. 2017), *cert. denied sub nom. Nat. Res. Def. Council v. Mexichem Fluor, Inc.*, 866 F.3d 451 (2018).

110 *Id.* at 460.

111 *Id.* ("Although we understand and respect EPA's overarching effort to fill that legislative void and regulate HFCs, EPA may act only as authorized by Congress. Here, EPA has tried to jam a square peg (regulating non-ozone-depleting substances that may contribute to climate change) into a round hole (the existing statutory landscape).").

ing occurrence. Yet, despite the potentially slow nature of an agency receiving a congressional grant of authority, such a grant results in a firm assurance that there is no question of the agency's power to respond if or when an emergency scenario does arise.

*B. Issuing a Valid Executive Order*

A second possible way of extending the EPA's authority to regulate and respond to climate change would be through the execution of a valid executive order from the President. Like asking Congress for an additional grant of statutory authority, the President may choose to empower the executive agencies to act, through an executive order so long as the content of the grant of power is not inconsistent with established law.<sup>112</sup> In the context of HFCs, even assuming *arguendo* that President Obama's CAP could be considered an executive order, it only instructed the EPA, and by extension, gave the EPA permission to use the SNAP portion of the CAA to remove HFCs from the safe alternatives list; it did not empower the wholesale regulation of HFCs.<sup>113</sup> However, neither the CAP nor the decision in *Mexichem* precludes the current or future Presidents from promulgating a much wider executive order that would allow for the regulation of all HFCs presently in use. It is likely that an executive order could be enacted much more rapidly than a new or expanded statutory grant from Congress as it only requires the action of the President. However, an executive order could just as rapidly be dismantled when the next administration comes into power.<sup>114</sup> Though in the face of an emergency, the ability for an executive order to be promulgated rapidly could negate a lot of the bureaucratic backlog preventing immediate action, it also raises questions of the efficacy of unilateral legislating by the President and relying on such potentially problematic grounds for emergency protocol. Therefore, for a short-term emergency action, an executive order stands as perhaps the most efficient way for an executive agency to expand the scope of its power without violating the constitutional separation of powers, but in the context of longer-term emergencies there are concerns regarding a meaningful check on the President exercising independent legislative power, when such power belongs to Congress.

*C. Using Other Authority: Toxic Substance Control Act*

Finally, another way that the EPA could regulate HFCs presently in use by industry or the "replacements of replacements" would be to draw upon other statutory authority already given to the Agency by Congress. For instance, Kavanaugh in the *Mexichem* majority opinion specifically cites to the EPA's authority under the Toxic Substances Control Act, which allows the EPA to "directly regulate non-ozone-depleting substances that are causing harm to the environment," and would likely include the production and use

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112 See generally *Sherley v. Sebelius*, 644 F.3d 388 (D.C. Cir. 2011).

113 CLIMATE ACTION PLAN, *supra* note 2, at 10.

114 See Bialik, *supra* note 74.

of HFCs.<sup>115</sup> The *Mexichem* opinion also cites to at least four other statutory grants of authority from Congress to the EPA that could possibly be drawn upon by the EPA to assert its authority to regulate the uses of HFCs, especially given the growth of scientific evidence that links the use of HFCs to the proliferation of GHGs and, ultimately, harmful climate change.<sup>116</sup> It is clear that although the court in *Mexichem* did *not* find that the EPA was empowered to regulate HFCs beyond the replacement of ozone-depleting substances under the 2015 Rule, this holding does not “in any way cabin those [other] expansive EPA authorities” from accomplishing the same or similar tasks.<sup>117</sup> In the context of an emergency, such as climate change, where the importance of urgency is paramount, *Mexichem*’s discussion of several alternatives for grants of authority to authorize the desired agency action represents a reminder to executive agencies to consider all alternatives before acting.

#### D. Efficiency Counterargument

It is clear that the strongest counterargument to the line of reasoning against executive agencies having unilateral emergency action is largely premised on the efficiency of the response by the federal government. The crux of this argument is based upon the time-tested reality that Congress was intentionally structured to take action slowly and that consensus is difficult to obtain. Ordinarily, these structural speed bumps are praised for helping to prevent Congress from passing heavily partisan bills or rapidly changing the face of the United States government. However, in the context of an emergency, this stalling is unwelcome. One could easily imagine a scenario in which a specialized executive agency, like the Center for Disease Control and Prevention, would be best equipped to respond to a rapidly emerging crisis such that any time spent consulting with the President or Congress could drastically delay the success of the response.<sup>118</sup> In such times of panic, it would seem reasonable to the average person that following the proper procedure is no longer of the utmost import, rather the emphasis ought to be on the lives at stake.

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115 *Mexichem Fluor*, 866 F.3d at 460 (citing to 15 U.S.C. §§ 2601–29 (2012)).

116 *Id.* (citing 42 U.S.C. § 7408 (National Ambient Air Quality Standards program); *id.* § 7412 (Hazardous Air Pollutants program); *id.* §§ 7470–92 (Prevention of Significant Deterioration program); *id.* § 7521 (section 202 of the CAA) as examples of the EPA’s statutory authority to regulate harmful substances released into the air).

117 *Id.*

118 The Ebola outbreak in West Africa and the United States in 2016 provided an epidemic emergency in the United States because the disease is highly contagious and lays dormant for twenty-one days before a patient will show symptoms. In 2016, the CDC had to respond rapidly to the outbreak in order to prevent further exposure. Thankfully, the CDC was able to contain the exposure in the United States and the death toll to only four diagnosed cases and one death through their quick response time. See *2014–2016 Ebola Outbreak in West Africa*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vhf/ebola/history/2014-2016-outbreak/index.html> (last updated Dec. 27, 2017).



The Court does recognize that there could be a scenario in which there is insufficient time for the President or an executive agency to consult with Congress before action must be taken. In these circumstances, where the response does require such immediate action, the judicial or legislative processes could deal with the consequences of any violation of the separation of powers in hindsight. This is not to say that all executive agencies should adopt an “ask for forgiveness, not permission” attitude in regard to emergency action. If such an attitude were the appropriate posture for an executive agency in any circumstance, then surely the Court would recognize it as such in one of the most pressing emergency scenarios: terrorism. Yet the Court has remained confident that even in the face of terrorism, “[w]here . . . no emergency prevents consultation with Congress, judicial insistence upon that consultation [of the President with Congress] does not weaken our Nation’s ability to deal with danger,”<sup>119</sup> but rather remains one of the United States’ strongest global powers. If the compromise of constitutional integrity is not justified to protect against terrorism, it cannot be justified in the context of agency regulation of climate change.

## VI. CURRENT STATUS OF *MEXICHEM* AND ENDURING IMPACT

Although an en banc hearing before the D.C. Circuit was denied in January 2018, the decision in *Mexichem* has hardly been put to rest. First, in the literal sense, on June 25, 2018, the National Resource Defense Council filed for writ of certiorari before the Supreme Court on the same question presented to the D.C. Circuit: Whether section 612 of the CAA permits the EPA to prohibit the use of dangerous, but non-ozone depleting substitutes (like HFCs), by any person, including “product manufacturers who began using such substitutes before EPA placed them on the prohibited list?”<sup>120</sup> The Natural Resource Defense Council, who intervened on behalf of the EPA in the circuit decision, argued that Kavanaugh’s majority opinion “guts not only the HFC rule; [but] rewrites the fundamentals of Section 612,” and thus makes “the agency . . . powerless to stop companies” from using HFCs or similarly harmful, but non-ozone depleting chemicals.<sup>121</sup> As this Note has argued, the powerlessness argument, although compelling rhetoric, is a severe misunderstanding of federal governmental powers at play—if the EPA is not empowered to regulate HFCs under section 612 specifically, this does not prevent, wholesale, the regulation of these substances by another means or method. Both popular media and the petition for a writ of certiorari fail to explicitly highlight that at the heart of the disagreement between Kavanaugh’s majority and Judge Wilkin’s dissent is *not* a disagreement about the merits of protecting the environment or manufacturers, but rather about the appropriate level of deference that ought to be given to federal agencies and

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119 *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring).

120 Petition for Writ of Certiorari at i, *Nat. Res. Def. Council v. Mexichem Fluor, Inc.*, 866 F.3d 451 (D.C. Cir. 2017) (No. 18-2).

121 *Id.* at 4–5.

the merits of the *Chevron* doctrine's ambiguity trigger. As the petition for certiorari was denied, this continues to be an open question.<sup>122</sup>

The *Mexichem* decision also remained an active topic as the case became the subject of national headlines during the nomination of Brett Kavanaugh to the Supreme Court of the United States. The decision was frequently used to label Kavanaugh as a "foe" of the environment and a harsh critic of *Chevron* deference. Although one of these labels may be apt, it was the backlash from environmental groups that gained the most traction with popular media outlets.<sup>123</sup> This environmental tide against Kavanaugh's nomination was most vocally led by the Sierra Club. The Sierra Club highlighted several of Kavanaugh's opinions regarding the EPA.<sup>124</sup> Yet, most jurisprudentially sophisticated sources, like the law firm Gibson Dunn, correctly categorized the majority opinion in *Mexichem*, amongst other EPA related decisions, as an illustration of administrative law and the dramatic effect of differing views on *Chevron* deference within the judiciary.<sup>125</sup> Although it is undeniable that there are environmental effects closely linked to the decision in *Mexichem*, the majority opinion provides a greater insight into how Kavanaugh's administrative law and separation of powers jurisprudence will affect the Supreme Court rather than a "disaster for public lands."<sup>126</sup>

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122 *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 464 (D.C. Cir. 2017), *cert. denied sub nom.* Nat Res. Def. Council v. *Mexichem Fluor, Inc.*, 866 F.3d 451 (2018).

123 See, e.g., *Environmental Groups Troubled by Supreme Court Pick Brett Kavanaugh's Record*, CBS NEWS (Aug. 6, 2018), <https://www.cbsnews.com/news/environmental-groups-troubled-by-supreme-court-pick-brett-kavanaughs-record/>; Michael Garry, *Judge in HFCs Case Nominated for U.S. Supreme Court*, MEDIUM (July 10, 2018), <https://medium.com/naturalrefrigerants/judge-in-hfcs-case-nominated-for-u-s-supreme-court-a0cfc174348f>; Fatima Hussein, *Brett Kavanaugh's Quotes Reveal His Stance on the Environment*, BLOOMBERG (July 10, 2018), <https://news.bloombergenvironment.com/environment-and-energy/brett-kavanaughs-quotes-reveal-his-stance-on-the-environment>; Juan Carlos Rodriguez, *What Enviro Lawyers Need To Know About Kavanaugh*, LAW360 (July 10, 2018), <https://www.law360.com/articles/1061483/what-enviro-lawyers-need-to-know-about-kavanaugh>; David G. Savage, *Judge Kavanaugh Could Give Conservatives the Vote They Need to Rein in EPA Rules on Climate Change*, L.A. TIMES (July 23, 2018), <http://www.latimes.com/politics/la-na-pol-kavanaugh-environment-20180723-story.html#>; Julia Stein, *How Would a Justice Kavanaugh Approach Environmental Cases?*, LEGAL PLANET (Aug. 7, 2018), <http://legal-planet.org/2018/08/07/how-would-a-justice-kavanaugh-approach-environmental-cases/>.

124 SIERRA CLUB, FIVE EXAMPLES OF BRETT KAVANAUGH'S EXTREME RECORD ON THE ENVIRONMENT, <https://www.sierraclub.org/sites/www.sierraclub.org/files/blog/Kavanaugh%20SCOTUS%20Fact%20Sheet.pdf> (last visited Sept. 12, 2018).

125 *President Trump Nominates Judge Brett Kavanaugh To Supreme Court*, GIBSON DUNN, (July 10, 2018), <https://www.gibsondunn.com/president-trump-nominates-judge-brett-kavanaugh-to-supreme-court/>.

126 *Kavanaugh Appointment to Supreme Court Could be Disaster for Public Lands*, WILDERNESS Soc'y (July 13, 2018), <https://wilderness.org/press-release/kavanaugh-appointment-supreme-court-could-be-disaster-public-lands>.

## CONCLUSION

The emergency threats of neither terrorism nor climate change warrant a blank check for executive agencies to act unilaterally. Despite the overwhelming desire to allow for the quickest response to any potential emergency, it would be a dangerous precedent to give such autonomous powers to the unchecked fourth branch of the government. As demonstrated in this Note, although executive agencies rely upon delegations of authority from the legislative or executive branches for their power, beyond cursory judicial checks, the agencies are largely left to operate autonomously within their statutorily granted power. If an agency, like the EPA, were granted the ability to act by whatever means the agency deemed necessary in an emergency scenario, it is likely to result in an inefficient response as several moving parts of the federal government would be acting chaotically rather than in constitutionally designed concert. Contravening the structural designs of the Constitution would result in a less efficient response, even if action could be taken more rapidly. The guise of necessity is an insufficient mask for overriding the ordinary separation of powers by executive agencies or any governmental branch, even in hindsight.

And yet, the EPA's ultimate goal of regulating the use of HFCs by industry aligns with many of the policy objectives of both the Obama and Trump administrations for reducing the United States' global environmental impact. Neither the majority opinion in *Mexichem*, the separation of powers doctrines, nor this Note disagree with the merit of the objective that the EPA was attempting to achieve through the 2015 Rule and would all actively encourage the further regulation of HFCs. However, this objective of the EPA, as well as any objective from an executive agency that would require an extension of their statutorily granted power, ought to be reached by any number of different routes that properly align with constitutional design. For the regulation of HFCs or another more long-term emergency scenario, the most logical methods include requesting an additional grant of authority directly from Congress, waiting for a valid executive order to be issued that does not contravene present law, or to use a different grant of statutory authority given to that agency to authorize the agency's actions. While it is likely true that these proposed actions do not represent the quickest response time by the federal government to an emergent situation, the selection of one of these options would be the most insulated from a separation of powers issue and provide an efficient response. Like Justice Jackson's first category of executive power, following one of the suggested routes will provide the executive agency with the argument of an affirmative grant of authority that aligns with the basic principles of bicameralism, presentment, and a valid delegation of power to the agency.

So while it is true that climate change and terrorism warrant a vigorous response by the federal government, in neither case should that result in a blank check of power granted to an executive agency. Rather, if lack of action taken in the arena of climate change is one of America's greatest failures, then the onus to act cannot be attributed to an executive agency with-

out the autonomous power to act. If such a failure exists, the obligation to act lies with the branches that the Constitution authorizes to act: the President and Congress.

