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The Executive Power-Grab Playbook

Identifying a Litigation Strategy to Defend State Authority

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Across energy, environmental regulation, infrastructure, and public lands matters, the Trump Administration has deployed novel legal interpretations, executive orders, and aggressive administrative actions to displace traditional areas of state authority. While each of these actions may initially appear distinct, they reflect a recurring, coordinated pattern. Disputes over a pipeline, an offshore wind project, or a power plant are often better understood as pieces of a broader strategy to concentrate decision-making authority within the presidency at the expense of Congress, the states, and other institutions. Recognizing that recurring pattern gives litigators a common playbook against which to develop a coordinated strategy.

Sometimes the Administration asserts novel authority with preemptive effect to advance its preferred policy outcomes. In other instances, particularly where its preferred policy is deregulation, it claims that federal law neither authorizes nor requires regulation of the very conduct it insists falls within federal domain. States are thus told they may not regulate because the matter is exclusively federal, while the federal government simultaneously contends that it cannot—or will not—regulate or enforce existing law, often invoking emergency, national-security, or foreign-affairs rationales to avoid scrutiny. The result is not merely expanded executive authority, but a regulatory vacuum in which neither sovereign provides the public protections Congress intended.

The Administration's strategy consists of four mutually reinforcing elements. Although they do not appear identically in every case, the recurrence of one or more elements in many cases reveals a common approach—a playbook—to expand executive authority.

Examining this strategy across a broad range of cases and developing a cohesive response is essential to preserve state authority because the outcome in one case often shapes how courts will evaluate similar issues in the future. This is particularly important as this Administration pursues novel legal arguments that, if successful, could have lasting consequences for state authority and constrain future administrations. Litigators should utilize opportunities to situate each dispute within the broader context of the Administration's evident legal strategy to ensure that courts recognize that seemingly discrete controversies are often part of a coordinated effort to reshape federal law and the relationship between federal and state governments.

The Executive Power-Grab Playbook

1	**Manufacture predicate for extraordinary executive authority** →	**Assert an emergency or national security or foreign affairs prerogative to justify extraordinary executive action and expanded discretion**
2	**Assert novel legal interpretation** →	**Rely on the manufactured predicate to advance new statutory and constitutional arguments**
3	**Insulate action from scrutiny or review** →	**Claim actions are not reviewable or invoke deference doctrines to discourage judicial scrutiny**
4	**Displace state authority and leave regulatory vacuum** →	**Assert sweeping preemption or exclusive federal authority to deny states' regulatory roles; simultaneously deregulate or not enforce federal regulations**

1 Manufacture the Predicate for Extraordinary Executive Authority

Emergency Powers

The Administration's strategy to expand executive authority often begins with the assertion of an emergency. President Trump invoked the National Emergencies Act to declare a national energy emergency on his first day in office, forming the basis for many subsequent pro-fossil and anti-renewable energy actions.[1] The Energy Emergency Executive Order (E.O.) 14156 claims that inadequate domestic energy production, transportation, refining, and generation capacity create "an unusual and extraordinary threat" to the nation's economy, national security, and foreign policy. It directs agencies to invoke emergency authorities to accelerate energy infrastructure development, while singling out "dangerous State and local policies" in the Northeast and West Coast as contributing to the asserted emergency. The Administration has invoked this declaration to support a host of executive actions, including attempts to cancel offshore wind projects and the recent decision to exempt all oil and gas development in the Gulf of Mexico from the Endangered Species Act.

Genuine emergencies may justify a broader range of governmental action and warrant greater judicial deference to executive judgments. However, courts need factual context to distinguish true emergencies from pretextual invocations of emergency authority. As the Supreme Court recognized when rejecting the Trump Administration's emergency powers justification for its sweeping "Liberation Day" tariffs, "'[e]mergency powers,' after all, 'tend to kindle emergencies.'"[2] Litigants can provide that context by showing how the asserted emergency compares with the circumstances Congress contemplated and with the government's use of the same authority in other cases.

National Security & Foreign Affairs

Unlike emergency powers, which are generally based in statute, the president's national security and foreign affairs powers are often rooted in Article II of the Constitution. Courts generally afford the Executive Branch greater deference in these matters due to institutional expertise and access to information unavailable to the judiciary.[3] Accordingly, judicial deference is greatest when the action falls within the Executive's traditional constitutional responsibilities, such as military affairs, diplomacy, or the admission of foreign nationals, and weakest when the government is regulating ordinary domestic economic or regulatory matters.

The Administration has repeatedly invoked national security or foreign affairs in ordinary domestic regulatory or economic disputes, to claim greater judicial deference, limit factual scrutiny, and justify departures from otherwise applicable statutory and procedural constraints. Courts have not simply deferred, however, and litigators have succeeded by showing the agency skipped its own deliberative process, by using public statements to rebut the presumption of regularity, and by flagging over- or under-breadth or recycled boilerplate rationales as evidence of pretext.[4]

2 Assert Novel Legal Interpretations

After recasting an ordinary domestic policy preference as an emergency or matter of national security or foreign affairs, the Administration uses that predicate to expand its legal authority. The recurring pattern involves not just a novel reading of the statute, but the repurposing of statutory authorities to accomplish objectives that Congress never assigned to the Executive. The Administration often argues that because an interpretation arises in the context of an emergency, it is entitled to judicial deference; however, as deference principally concerns factual and policy judgments, it does not displace the judiciary's independent judgment regarding questions of statutory authority, preemption, and constitutional limits. [5]

In several matters, the Administration does more than read a statute aggressively: it claims authority that the statute's text, structure, history, and purpose were never meant to confer. Invoking an emergency, national security, or diplomacy implication may affect how a court reviews factual or policy judgments, but these labels do not give the Executive authority that Congress did not confer.

This approach is also asymmetric. The Administration claims expansive statutory authority when taking action to promote fossil fuel development or other policy preferences, while asserting that federal authority is narrow or nonexistent when regulation would constrain that policy. The result is an approach that expands executive power when useful and contracts it when regulation would stand in the way.

3 Insulate the Action from Scrutiny or Review

The Administration's next move is often to insulate its actions from meaningful judicial scrutiny. It generally does so in two ways: asking courts to presume that executive officials acted properly and in good faith and asserting that the challenged action is not reviewable at all due to the President's constitutional authority or discretion delegated by the statute.

Courts generally afford executive action a presumption of regularity, assuming that public officials have "properly discharged their official duties."[6] But the presumption is not irrebuttable. Courts may look behind the government's stated rationale where there is a "strong showing of bad faith or improper behavior,"[7] or where the record indicates that the agency's explanation is pretextual rather than genuine.[8] Courts reviewing many of this Administration's actions have indeed recognized that the presumption may be overcome where executive action appears "untethered to the facts" or "not conceived in good faith."[9]

A challenged action should not always be viewed in isolation. The practical point is to test an asserted emergency or national-security justification against both the record in the case and relevant evidence of the broader pattern. Repeated emergency declarations, procedural irregularities, inconsistent explanations, unsupported factual assertions, and a growing body of judicial decisions questioning the Administration's good faith can provide relevant context for evaluating whether a particular justification is genuine – and whether the presumption of regularity should shield it from closer scrutiny.

The Administration also pairs claims of deference and regularity with jurisdictional and review-limiting arguments designed to foreclose scrutiny altogether. Whether framed as a presumption of regularity, deference to executive judgment, a claim that an action is committed to presidential discretion, or a jurisdictional bar, the objective is the same: to prevent courts from conducting the ordinary judicial inquiry necessary to determine whether the Executive has acted within the bounds established by the Constitution and Congress.

4 Displace State Authority and Leave a Regulatory Vacuum

The final move is often an expansive claim that the federal action preempts state authority. These claims extend beyond conflicting state statutes to consent decrees, pipeline-safety oversight, environmental review, and other exercises of traditional state authority.

The Supremacy Clause provides that federal law prevails over state law when the two conflict.[10] But because States are independent sovereigns within the federal system, courts often hesitate to preempt state laws, particularly in areas of traditional state authority.

Properly applied, preemption requires more than a generalized federal interest in uniformity or an assertion that a subject implicates national concerns. The government must identify federal law with preemptive force and show why the doctrine is satisfied—whether because Congress expressly displaced state law, state and federal requirements actually conflict, or Congress created a sufficiently comprehensive federal scheme to occupy the field.

The Administration's recent preemption arguments repeatedly depart from those principles. In the same cases in which it invokes emergency or security rationales to expand federal authority or avoid ordinary scrutiny, the federal government argues that state regulation in the same area is preempted based on generalized assertions of federal prerogative. But generalized "one voice" reasoning, untethered from a specific statutory conflict, executive agreement, or comprehensive federal regulatory scheme, does not establish either conflict or field preemption.

Federal law preempts state law only when:

1. **Express preemption:** Congress expressly provides that federal law displaces state law and defines scope of displacement.
2. **Implied preemption:** Preemption may also arise without an express statutory provision:
   - **Conflict preemption:** State law conflicts with federal law, including:
     - **Impossibility preemption:** impossible to comply with both federal and state law; or
     - **Obstacle preemption:** state law is an obstacle to accomplishment of Congress's purposes and objectives.
   - **Field preemption:** federal regulation is so pervasive, or federal interest so dominant, that Congress can have left no room for state regulation, even absent direct conflict.

That distinction matters especially in areas of traditional state police power, including public health, safety, and welfare. Courts have repeatedly required more than generalized appeals to foreign policy, national security, or regulatory uniformity before displacing such state authority. The federal government therefore must identify the federal law that actually displaces state authority and explain why the governing preemption doctrine applies.

The deeper structural problem emerges when pairing these preemption claims with the Administration's position in other contexts that federal law does not authorize meaningful regulation of the same conduct. The paradigmatic example is the contrast between the Administration's arguments in *Suncor v. Boulder*, where the federal government argues that federal law precludes state-law claims seeking relief for climate-change harms,[11] and the U.S. Environmental Protection Agency's simultaneous argument that it lacks authority under federal law to regulate climate-forcing greenhouse-gas emissions.

This recurring pattern is a preemption bait-and-switch. When the Administration seeks to promote fossil fuels or other favored policies, it claims expansive federal authority. When federal regulation would constrain those policies, it instead argues that federal authority is limited or nonexistent. And when States attempt to fill the resulting gap, the federal government argues that state action is preempted because the field is federal. The result is not a coherent transfer of regulatory responsibility from the States to the federal government, but a regulatory vacuum: federal authority is invoked to displace state protections and disclaimed when it would require federal action thereby leaving the public wholly unprotected.

The Playbook in Practice

The four elements described above do not necessarily arise in the same form—or even all appear—in every case. But viewing individual disputes through this framework can reveal connections that are less apparent when each executive action is considered in isolation. Two recent energy cases illustrate how the elements can build on one another, and how identifying the broader pattern can help shape litigation strategy.

Sable Pipeline: From "National Defense" to Displacement of State Law

The dispute over Sable Offshore Corporation's pipelines provides perhaps the clearest example of the Playbook operating from beginning to end. Sable acquired an offshore oil operation and associated pipelines off the California coast that had been shut down for roughly a decade. After state regulators and courts prevented Sable from restarting the pipelines without complying with applicable state-law requirements and a judicial consent decree, Sable sought federal intervention. In March 2026, the Department of Energy (DOE) invoked the Defense Production Act to order operation of the pipelines.

1. **Manufacture an emergency predicate.** DOE framed the pipeline restart as a matter of national defense. It cited California's large military presence, declining in-state oil production, reliance on imported crude, and limited pipeline infrastructure. But DOE identified no military fuel shortage, no defense customer requiring Sable's oil, and no mechanism ensuring that Sable's crude would ever reach military users. DOE also invoked the broader "energy emergency," but the connection remained similarly attenuated: the Administration relied on generalized concerns about California energy policy rather than identifying an emergency that Sable's particular pipeline could remedy.

2. **Use that predicate to assert novel statutory authority.** DOE then invoked Defense Production Act sections 101(a) and (c)—authorities principally concerned with prioritizing contracts and allocating scarce materials—to compel operation of the pipeline itself. The statute authorizes prioritization of orders and contracts and allocation of resources, not the restart of a dormant pipeline where there are no applicable contracts or orders to prioritize.

3. **Attempt to insulate the action from review.** Once DOE asserted this expanded authority, the government argued that courts had little or no power to scrutinize its exercise. It characterized the Order as presidential action outside the Administrative Procedure Act and argued, alternatively, that DOE's determinations were committed to agency discretion. Thus, the same assertion of extraordinary presidential and national-security authority that helped justify the action also became a basis for attempting to shield it from ordinary judicial review.

4. **Use the resulting federal action to displace state authority.** Finally, the asserted Defense Production Act authority became the basis for claiming that federal law displaced California's environmental, land-use, pipeline-safety, and judicial requirements.

Viewed together, the arguments reinforce one another: the national-security predicate supports the expansive statutory interpretation; that expanded authority supports arguments for heightened deference and limited review; and the resulting federal action is then invoked to displace state law. This case, *California v. Wright*, No. 26-3396 (C.D. Cal.), is ongoing.

Campbell Coal Plant: Turning an Emergency Backstop into a Long-Term Regulatory Tool

DOE's use of section 202(c) of the Federal Power Act to prevent retirement of the J.H. Campbell coal plant in Michigan illustrates a similar pattern in a different statutory setting—and how the pattern can break down when a court scrutinizes each step. Consumers Energy had spent years planning Campbell's retirement and replacement in coordination with Michigan regulators and the regional grid operator, MISO. Shortly before the plant was scheduled to retire, however, DOE invoked section 202(c), a rarely used emergency provision, to require Campbell to remain operating.

1. **Invoke an emergency predicate.** The Campbell Order followed the Administration's declaration of a nationwide "energy emergency" and its direction to agencies to use emergency authorities to increase energy production. DOE invoked section 202(c)'s more specific emergency authority based on potential reserve-margin shortfalls in the summer months and coming years.

2. **Use that predicate to expand a discrete statutory authority.** Section 202(c) provides an expedited mechanism for responding to electricity emergencies outside the Federal Power Act's ordinary regulatory processes. DOE sought to extend that discrete authority beyond acute, temporary emergencies and use successive 90-day orders to address longer-term resource adequacy concerns. In doing so, DOE attempted to transform a temporary emergency backstop into an alternative mechanism for making planning decisions ordinarily addressed through utilities, state regulators, and regional grid operators, in consultation with FERC and NERC.

3. **Seek reduced scrutiny of the emergency determination.** DOE argued that Congress entrusted the Secretary with determining when a section 202(c) emergency exists and sought substantial judicial latitude for that determination. The claimed breadth of the Secretary's emergency discretion thus supported not only DOE's expanded view of section 202(c), but also its argument for reduced judicial scrutiny of the predicate on which that expansion depended.

4. **Use the expanded authority to displace state and institutional decision-making.** Consumers Energy had developed a multi-year retirement and replacement plan under Michigan regulatory supervision, and MISO had determined that Campbell was not needed to satisfy its reliability criteria. DOE nevertheless issued its Order *sua sponte* and contrary to the utility's established plan. Although this was not conventional preemption of a state law, DOE's approach asserted federal emergency authority to override decisions produced through the state and regional institutions ordinarily responsible for generation and resource planning.

The court rejected the strategy. The D.C. Circuit refused to accept the premises necessary for the asserted expansion of authority.[12] It did not treat DOE's invocation of an emergency as dispositive of whether the statutory predicate existed, nor did it accept that the Secretary's discretion permitted DOE to transform section 202(c) into a mechanism for addressing long-term resource adequacy. Instead, the Court tested the asserted emergency against the statutory text, section 202(c)'s historical role, and the Federal Power Act's broader allocation of authority.

The Campbell case therefore illustrates both how the elements of the Playbook can reinforce one another and how litigators can disrupt that progression. A broad emergency predicate supported a broad reading of statutory authority; the asserted breadth of executive discretion supported an argument for reduced judicial scrutiny; and the expanded authority enabled DOE to override decisions produced through ordinary state and regional planning processes. But when the Court independently tested the claimed emergency and statutory authority, the chain broke down: the emergency label could not supply authority Congress had not conferred, and DOE could not turn a temporary federal backstop into a standing power over long-term electricity planning.

Additional Examples

The Sable Pipeline and the Campbell coal plant are not the only two instances. The same pattern recurs across a range of other matters, such as:

***Washington v. Trump*, No. 25-869 (W.D. Wash.) —** E.O. 14156 declared a national energy emergency based on asserted inadequate energy supply and high prices, even as the Administration took actions restricting new energy generation and infrastructure. Agencies then relied solely on the emergency declaration to adopt dramatically compressed emergency procedures for environmental review. However, the agencies never explained how the declaration satisfies the regulatory pre-requisites necessary to invoke their emergency procedures. The compressed procedures cuts states and state expertise out of the standard permitting process and will result in environmental degradation. The government claims that the agencies' decision to institute emergency procedures is not reviewable under the Administrative Procedure Act and that the emergency declaration is a political question and entirely unreviewable.

***California v. United States*, No. 25-4966 (N.D. Cal.) —** EPA had long treated Clean Air Act section 209(b) waivers as adjudicatory orders, including the waivers at issue in this case, but reversed course and submitted them to Congress as "rules" under the Congressional Review Act. That change in label enabled Congress to use the Congressional Review Act's expedited procedures to disapprove the waivers, which the government relies on to claim that this action is entirely unreviewable. EPA is now using this same approach against other existing waivers, transforming a procedural reclassification into a mechanism for broadly displacing California's longstanding authority to adopt its own vehicle-emissions standards.

***Anthropic PBC v. U.S. Dep't of War*, No. 26-1996 (N.D. Cal.); No. 26-1049 (D.C. Cir.) —** The Department declared an urgent national-security threat shortly after giving Anthropic an ultimatum in contract negotiations, allowing it to bypass procedures that would otherwise apply. It then used that claimed emergency to invoke rarely used supply-chain authorities against Anthropic based largely on the company's refusal to remove restrictions on how its technology could be used. When Anthropic challenged the action, the government argued that courts should defer to its national-security judgment and raised arguments that would limit when and where the action could be reviewed. The courts have responded differently, but the district court rejected the idea that national security should prevent meaningful judicial scrutiny and questioned whether the government's actions matched its stated rationale.

***National Association for the Advancement of Colored People v. X.AI Corp.*, No. 26-74 (N.D. Miss.) —** The U.S. Department of Justice (DOJ) sought to intervene in a Clean Air Act citizen suit challenging unpermitted gas turbines powering X.AI Corp.'s data centers, arguing that the facilities support AI tools important to national security and should not be disrupted. It then advanced a novel reading of the Clean Air Act: although the statute expressly gives the federal government a right to intervene in citizen suits, DOJ argues that this also gives it the power to dismiss a properly filed suit over the plaintiff's objection. And it seeks to insulate that decision from review, arguing that the decision not to enforce is committed to Executive Branch discretion and that the court has no role in reviewing the government's reasons for dismissal.

***Air Alliance Houston v. Trump*, No. 25-01852 (D.D.C.)—** The President's Proclamation 10914 asserted that new pollution-control requirements could force coal plants to close, threatening grid reliability and national security, and invoked Clean Air Act section 112(i)(4) to exempt dozens of plants from those requirements. But section 112(i)(4) requires findings that compliance technology is unavailable and that an exemption serves the national-security interest. Rather than make those findings plant by plant, the Proclamation relied on generalized conclusions even though many exempted plants already meet some of the requirements. The challengers therefore argue that the Proclamation transforms a narrow, source-specific exemption into broad authority to suspend pollution requirements across the coal fleet.

Endangered Species Committee, Order Regarding Gulf of America Oil & Gas Activities Litigation — The Secretary of Defense invoked a never-before-used provision of the Endangered Species Act to declare a sweeping exemption for Gulf oil and gas activity "necessary for reasons of national security," based on the risk that ongoing litigation could disrupt domestic energy production—not an identified military fuel shortage. The Endangered Species Committee then relied on that finding to exempt decades of oil and gas activity from ordinary Endangered Species Act protections without the consultation and adjudicatory process that ordinarily precedes an exemption. Challengers argue that this transforms a narrow national-security provision into a categorical bypass of the Act's usual procedures, even though existing consultation processes had allowed Gulf drilling to continue with protections for endangered species. The government has also argued that the Secretary's national-security determination is committed to his discretion and cannot be judicially reviewed.

Conclusion

The cases and examples discussed here are not isolated disputes over energy, environmental regulation, infrastructure, or public lands. Together, they reveal a recurring, coordinated strategy: create a predicate for extraordinary executive authority, reinterpret statutes to serve preferred ends, insulate those actions from meaningful judicial review, and displace state authority while disclaiming federal regulatory responsibility. Recognizing that pattern allows litigators to respond to each case on its own terms while also showing courts the broader consequences of accepting the Administration's theories. The aim is not only to preserve a particular state law or defeat a particular federal action, but to preserve the constitutional balance of authority among Congress, the Executive Branch, and the States.

References

[1] Executive Order 14156 (Jan. 20, 2025).

[2] *Learning Resources, Inc. v. Trump*, 607 U.S. 229, 247 (2026) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring)); *see also id.* (again citing *Youngstown* for the proposition that "emergencies can 'afford a ready pretext for usurpation' of congressional power").

[3] *See Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988); *Holder v. Humanitarian L. Project*, 561 U.S. 1, 34–35 (2010).

[4] *See, e.g., Nat'l Treasury Emps. Union v. Trump*, 780 F. Supp. 3d 237, 254–57 (D.D.C. 2025) (fact sheet undercutting stated rationale); *African Cmtys. Together v. Noem*, 820 F. Supp. 3d 48, 66–67 (D. Mass. 2026) (recycled rationale evidence of pretext); *Nat'l Tr. for Historic Pres. v. Nat'l Park Serv.*, No. CV 25-4316, 2026 WL 877779, at *16 (D.D.C. Mar. 31, 2026) ("Bald assertions of 'national security' cannot excuse the Government's failure to follow the law").

[5] *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 391–92 (2024).

[6] *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

[7] *Overton Park*, 401 U.S. at 420.

[8] *Dep't of Com. v. New York*, 588 U.S. 752, 785–86 (2019) (rejecting the agency's stated rationale because it "seems to have been contrived").

[9] *Oregon v. Trump*, 802 F. Supp. 3d 1277, 1292 (D. Or. 2025).

[10] U.S. Const. art. VI, cl. 2.

[11] *Suncor Energy Inc. v. Cty. Comm'rs of Boulder Cty.,* No. 25-170 (U.S. 2026).

[12] *Michigan v. Dep't of Energy*, 2026 U.S. App. LEXIS 27898 (D.C. Cir. 2026).