

# RECENT DEVELOPMENT

## GASOLINE PRICES AND HURRICANES: CONGRESSIONAL REACTION TO THE DECOUPLING OF GASOLINE PRICES FROM THE PRICE OF CRUDE OIL

### I. INTRODUCTION

A major catalyst for legislation concerning gasoline prices in the 109th Congress was the hurricanes of 2005. Hurricanes Katrina and Rita not only ravaged the coastlines of the states lining the Gulf of Mexico, but also caused gasoline refineries in the region to shut down before, during, and after the hurricanes.<sup>1</sup> This disruption led to a sharp spike in prices and short supply of gasoline, especially in areas hit by the hurricanes.<sup>2</sup> These sharp spikes in prices are reflections of an “asymmetry between various pairs of upstream and downstream prices in the vertically integrated [gasoline production] chain” known as decoupling.<sup>3</sup>

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1. ROBERT BAMBERGER & LAWRENCE KUMINS, CONG. RESEARCH SERV., OIL AND GAS: SUPPLY ISSUES AFTER KATRINA AND RITA 1 (2005), <http://ncseonline.org/NLE/CRSreports/05Oct/RS22233.pdf>.

2. FED. TRADE COMM’N, INVESTIGATION OF GASOLINE PRICE MANIPULATION AND POST-KATRINA GASOLINE PRICE INCREASES 59–94 (2006); James R. Healey, *Storm Worsens Oil, Gas Problems*, USA TODAY, Aug. 31, 2005, [http://www.usatoday.com/money/industries/energy/2005-08-29-katrina-cover-1b-usat\\_x.htm](http://www.usatoday.com/money/industries/energy/2005-08-29-katrina-cover-1b-usat_x.htm).

3. See DIANA MOSS, AMERICAN ANTITRUST INSTITUTE WORKING PAPER NO. 07-03, COMPETITION IN U.S. PETROLEUM REFINING AND MARKETING: PART II—REVIEW OF THE ECONOMIC LITERATURE 7 (2007). Decoupling is one of four categories of analysis that observes these asymmetries. *Id.* “Asymmetry occurs when downstream (e.g., retail gasoline) prices increase faster than upstream (e.g., crude oil) prices when upstream prices are on the rise, but fall more slowly when upstream prices are on the decline.” *Id.* at 7–8. “Lack of a symmetric response is characterized by a downstream price response that not only lags the initial upstream shock but is of a different intensity. Shocks may reflect variations in crude oil supply, refining bottlenecks, or variations in demand.” *Id.* at 9. This Article addresses “shocks” that are caused by refining bottlenecks. See also Keith Rawlins, Recent Development, *Gasoline Prices and the Energy Policy Act of 2005: The Decoupling of Gasoline Prices from the Price of Crude Oil*,

Part II of this Article discusses gasoline price decoupling as related to hurricanes, what factors of decoupling are most affected by hurricanes, and what logical solutions would most address these factors. Part III discusses legislation introduced by the 109th Congress aimed at mitigating or preventing gasoline price spikes (“decoupling”) in the event of a sudden halt in gasoline production<sup>4</sup> and examines how this legislation affects decoupling. Part IV notes a possible solution Congress has yet to address.

## II. GASOLINE PRICE DECOUPLING: FACTORS AFFECTED BY HURRICANES

Hurricanes Katrina and Rita of 2005 should be remembered as a wake-up call for Congress regarding price decoupling between gasoline and crude oil. Price decoupling occurs when the price of gasoline is more volatile than the price of crude oil.<sup>5</sup> When this occurs, the price of gasoline can increase or decrease over time substantially faster than the price of crude oil. It is thought that price decoupling occurs for a variety of reasons, including: (1) an increase in U.S. demand for gasoline as economic growth has resumed in the past few years; (2) domestic refining capability declined in both the number of refineries and refining capacity; (3) changes in the structure of the refining industry; (4) cost-cutting in the refining industry by operating with lower inventories, making them less able to meet unanticipated demand or supply shortage; (5) fragmentation of gasoline markets because of regional air regulations; (6) increasing reliance by U.S. oil companies on imported gasoline to meet increasing demand, as opposed to expanding existing refinery capacity or building new refineries; and (7) compliance with environmental regulation.<sup>6</sup>

Some of these decoupling factors affected the price of gasoline more than others when hurricanes hit the heavy-

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1 ENVTL. & ENERGY L. & POL'Y J. 409, 410 (2007).

4. See *infra* notes 19–35 and accompanying text.

5. See ROBERT PIROG, CONG. RESEARCH SERV., OIL INDUSTRY PROFITS: ANALYSIS OF RECENT PERFORMANCE 3 (2005), <http://fpc.state.gov/documents/organization/51075.pdf>.

6. CARL BEHRENS & CAROL GLOVER, CONG. RESEARCH SERV., GASOLINE PRICES: NEW LEGISLATION AND PROPOSALS 3 (2005), [http://digital.library.unt.edu/govdocs/crs/data/2005/upl-meta-crs-7610/IB10134\\_2005Oct05.pdf](http://digital.library.unt.edu/govdocs/crs/data/2005/upl-meta-crs-7610/IB10134_2005Oct05.pdf). Issue briefs are regularly updated, and this brief (IB10134) culminated in a Congressional Research Service Report. CARL E. BEHRENS & CAROL GLOVER, CONG. RESEARCH SERV., GASOLINE PRICES: NEW LEGISLATION AND PROPOSALS (2006), <http://fpc.state.gov/documents/organization/69485.pdf>.

refining region of the Gulf of Mexico.<sup>7</sup> In particular, the hurricanes magnified the effects of a reduced U.S. refining capacity and low gasoline inventories.<sup>8</sup>

#### A. *Reduced Refining Capacities*

Hurricanes can cause gasoline price spikes because they reduce refining capacities. Domestic refining capacity (crude oil refined to gasoline) has decreased from 18.62 mbd in 1981 to 16.78 mbd in 2002 (roughly a ten percent decrease).<sup>9</sup> In addition to the industry-wide reduction in refining capacity over the years, hurricanes Katrina and Rita further reduced refining capacity in the Gulf Coast region.<sup>10</sup> A Congressional report on oil and gas supply issues after hurricanes Katrina and Rita determined that a refining capacity of 3.1 mbd was then unavailable from Gulf Coast refiners.<sup>11</sup> The diminished capacity was directly attributable to the damage caused by and lack of utilities resulting from the 2005 hurricanes.<sup>12</sup> Thus, not only has U.S. refining capacity decreased by ten percent since 1981, but the 2005 hurricane season also temporarily caused further reductions in domestic refining capacity by roughly eighteen percent.<sup>13</sup> A sudden reduction in supply by eighteen percent while demand remains constant will result in a dramatic spike in prices of *any* commodity, including gasoline.

#### B. *Low Gasoline Inventories*

Disruptions in production resulting from hurricanes also cause spikes in gasoline prices because of low gasoline inventories. “The refining industry has been operating with lower inventories of both crude oil *and gasoline*, as a means of cutting costs.”<sup>14</sup> The reduced inventory held by refiners is an issue of

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7. See BAMBURGER & KUMINS, *supra* note 1, at 2 (noting that gasoline prices decrease with increasing gasoline inventories, but ultimate recovery from the hurricanes depends on refineries’ ability to resume their refining capacities).

8. *Id.*

9. CARL E. BEHRENS & CAROL GLOVER, CONG. RESEARCH SERV., GASOLINE PRICES: NEW LEGISLATION AND PROPOSALS 3 (2006), <http://fpc.state.gov/documents/organization/59366.pdf> [hereinafter BEHRENS & GLOVER II].

10. BAMBURGER & KUMINS, *supra* note 1, at 4.

11. *Id.* at 2 (noting that “[a]t the end of September, roughly 900,000 barrels of refining capacity at four plants in the Gulf remained completely shut down after Hurricane Katrina; another 2.2 mbd remained down because of Hurricane Rita”).

12. *Id.* at 3.

13. *Id.*; see also BEHRENS & GLOVER II, *supra* note 9, at 4.

14. BEHRENS & GLOVER II, *supra* note 9, at 4 (emphasis added).

importance because when hurricanes bring gasoline production to a halt, all that is left to compensate for the lack of production is inventoried gasoline. Thus, the amount of inventoried gasoline will dramatically affect the price of gasoline after hurricanes.

In the instance of a hurricane, refineries shut down and gasoline production stops. When production stops, the refiners' only supply of gasoline is that which they hold in inventory. When inventory levels are not large enough to meet demand for a specified period of time, prices surge. If refineries or the U.S. government maintained larger inventories, then gasoline price surges could be mitigated during a stoppage in production of gasoline like those experienced during a hurricane.

### C. Possible Solutions

Possible solutions include those temporary and permanent. As a temporary solution to high gasoline prices caused by decoupling during hurricanes, Congress could create and regulate a gasoline reserve similar to the Strategic Petroleum Reserve.<sup>15</sup> In so doing, Congress need not be concerned by Constitutional authority issues inherent to the regulation of private oil companies. Strategic gasoline reserves could be placed in various areas of the United States so that a sudden halt in the production of gasoline regionally would not create a sudden spike in prices nationally.<sup>16</sup> For example, a reserve of gasoline could be strategically located in an area in the Gulf Coast region generally unaffected by hurricanes, such as Dallas, Texas. If the refineries in Houston, Texas, were to shut down for an impending hurricane, the gasoline reserve in Dallas could be used to supply gasoline to areas that are usually supplied by Houston gasoline refineries.<sup>17</sup> Having this extra supply of gasoline could mitigate or

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15. Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975) (codified as amended at 42 U.S.C. §§ 6231-6247) (authorizing creation of the Strategic Petroleum Reserve).

16. A regionally strategic location of gasoline reserves is important because U.S. gasoline consumption varies by region. Energy Info. Admin., Graphs and Charts, Demand, U.S. Oil Consumption by Region, [http://www.eia.doe.gov/pub/oil\\_gas/petroleum/analysis\\_publications/oil\\_market\\_basics/demand\\_text.htm#U.S.%20Consumption%20by%20Region](http://www.eia.doe.gov/pub/oil_gas/petroleum/analysis_publications/oil_market_basics/demand_text.htm#U.S.%20Consumption%20by%20Region) (last visited Feb. 28, 2007) (noting that "[t]he East Coast consumes the largest volume of oil of the five major regions of the country, as shown in the graph"). There are five regions known as Petroleum Administration for Defense Districts: East Coast, Gulf Coast, West Coast, Midwest, and the Rockies. Energy Info. Admin., Graphs and Charts, Demand, U.S. Oil Consumption by Region, Appendix A, [http://www.eia.doe.gov/pub/oil\\_gas/petroleum/analysis\\_publications/oil\\_market\\_basics/paddmap.htm](http://www.eia.doe.gov/pub/oil_gas/petroleum/analysis_publications/oil_market_basics/paddmap.htm) (last visited Feb. 28, 2007) (showing a map of the Petroleum Administration for Defense Districts).

17. Noting the magnitude of gasoline needed in these inventories may be helpful in

prevent regional spikes caused by sudden halts of gasoline production. For maximum effectiveness, gasoline reserves would need to be strategically located across the country so that, for example, a reserve on the East Coast would not be expected to supply customers of an off-line West Coast gasoline refinery.<sup>18</sup>

As a more permanent solution to combating high gasoline prices due to decoupling, Congress could regulate refining capacity. Regulating refining capacity would be a more permanent solution because the ability of U.S. gasoline refineries to meet consumer demand would be continuous, as opposed to the one-time-only use of a gasoline reserve. The primary purpose of the regulation would likely be to increase U.S. refining capacity, whether it is from building federally-operated gasoline refineries or mandating that private oil companies increase their refining capacity. Therefore, this solution actually divides into two parts—regulation of federal refineries and private regulation.

### III. HOW HAS CONGRESS ADDRESSED GASOLINE INVENTORIES AND REFINING CAPACITY?

Congress seems to have followed the logic that surging prices are caused by a lack of refining capacity and supply shortages and that legislation should focus on creating more refining capacity and higher inventories of gasoline.

#### A. *Recent Senate Action*

The U.S. Senate responded to the high gasoline prices created by the 2005 hurricanes by proposing the creation of a Strategic Gasoline and Fuel Reserve.<sup>19</sup> On September 29, 2005, Senators Richard Durbin, Joseph Lieberman, Barack Obama, Harry Reid, and Charles Schumer introduced Senate bill 1794,

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understanding this solution. See Energy Info. Admin., U.S. Oil Demand by District, [http://www.eia.doe.gov/pub/oil\\_gas/petroleum/analysis\\_publications/oil\\_market\\_basics/dem\\_image\\_us\\_regl\\_cons.htm](http://www.eia.doe.gov/pub/oil_gas/petroleum/analysis_publications/oil_market_basics/dem_image_us_regl_cons.htm) (last visited Feb. 28, 2007) (showing regional consumption for finished petroleum products, including gasoline).

18. U.S. demand for gasoline has averaged around 9 million barrels per day since 2004. For 2004 gasoline demand numbers, see Energy Info. Admin., Graphs and Charts, Demand, U.S. Oil Demand by Petroleum Product, [http://www.eia.doe.gov/pub/oil\\_gas/petroleum/analysis\\_publications/oil\\_market\\_basics/dem\\_image\\_us\\_cons\\_prod.htm](http://www.eia.doe.gov/pub/oil_gas/petroleum/analysis_publications/oil_market_basics/dem_image_us_cons_prod.htm) (last visited Feb. 28, 2007). For 2005–2006 gasoline demand numbers, see Energy Info. Admin., Petroleum, This Week in Petroleum, Gasoline Demand, [http://tonto.eia.doe.gov/oog/info/twip/twip\\_gasoline.html#demand](http://tonto.eia.doe.gov/oog/info/twip/twip_gasoline.html#demand) (last visited Feb. 28, 2007).

19. Strategic Gasoline and Fuel Reserve Act, S. 1794, 109th Cong. (2005).

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entitled the Strategic Gasoline and Fuel Reserve Act of 2005.<sup>20</sup>  
The Act seeks to:

- (1) Establish a 47.5 million barrel strategic fuel reserve comprised of no more than 40 million barrels of unleaded gasoline and 7.5 million barrels of jet fuel. The reserve would be located at no less than three, and no more than five, strategically significant regional locations throughout the U.S. to be determined by the Secretary of Energy;
- (2) Require the Secretary of Energy to work with the Secretary of Homeland Security, to determine the most appropriate physical design and security measures for the Reserve;
- (3) Provide the President with the authority to release gasoline or jet fuel from the Reserve upon finding that a shortage in supply will cause adverse economic consequences;
- (4) Provide Governors the ability to request release of gasoline or fuel from the Reserve should there be a supply issue in the Governor's state. The Secretary of Energy is authorized to make a determination of the findings presented by the Governor;
- (5) Provide authority to the President to temporarily suspend filling the Reserve; however, the bill requires that the President seek Congressional approval to extend the fill completion date beyond the March 2008 deadline determined by the Act;
- (6) Requires the Secretary to report to Congress and the President a plan for filling, managing and disposing of gasoline reserves. The report would also include an estimated cost of Reserve. The Secretary must also include in the report efforts that the Department of Energy will take to minimize the potential need for release from the Reserve;
- (7) Requires that the Reserve would be operational no later than two years after enactment of the Act.<sup>21</sup>

At the conclusion of the 109th Congressional session, the bill was before the Senate Committee on Energy and Natural

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20. *Id.*

21. *U.S. Senator Dick Durbin: The Strategic Gasoline and Fuel Reserve Act of 2005* (Sept. 29, 2005), <http://democrats.senate.gov/~dpc/press/05/2005A20337.html> (last visited Aug. 29, 2006).

Resources.<sup>22</sup>

*B. Recent House Action*

1. H.R. 3893

On September 26, 2005, Representative Joe Barton introduced the Gasoline for America's Security Act of 2005 to the House.<sup>23</sup> The Act provides for presidential designation of potential refinery sites on federal lands and military bases that are closing, and sets up a process for coordinating authorization and related environmental review for construction of new refineries.<sup>24</sup> In short, the Act would give refiners financial and bureaucratic incentive to build new facilities. The House passed the bill,<sup>25</sup> referred it to the Senate, and the Senate read and submitted it to the Committee on Energy and Natural Resources.<sup>26</sup>

2. H.R. 3792

On September 15, 2005, Representatives Sherrod Brown, Timothy Bishop, Lois Capps, Susan Davis, Harold Ford, Nita Lowey, and Major Owens introduced the Gasoline Availability Stabilization Reserve Act to the House.<sup>27</sup> The Act establishes an unleaded gasoline reserve with a total capacity of 20 million barrels and gives the Secretary of Energy the authority to make decisions including plans for transportation of the gasoline in emergencies.<sup>28</sup> At the conclusion of the 109th Congressional session, the bill was in the House Subcommittee on Energy and

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22. The Library of Congress, THOMAS Home, Bills Resolutions, Search Results, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:s.01794>: (last visited Nov. 17, 2006).

23. The Library of Congress, THOMAS Home, Bill Resolutions, Search Results, <http://www.thomas.gov/cgi-bin/bdquery/z?d109:HR03893>: (last visited Nov. 25, 2006).

24. Gasoline for America's Security Act of 2005, H.R. 3893, 109th Cong. (2005) (as reported to the House).

25. CARL E. BEHRENS & CAROL GLOVER, CONG. RESEARCH SERV., GASOLINE PRICES: NEW LEGISLATION AND PROPOSALS 9 (2005), <http://fpc.state.gov/documents/organization/56862.pdf> [hereinafter BEHRENS & GLOVER III].

26. Gasoline for America's Security Act of 2005, H.R. 3893, 109th Cong. (2005) (as referred to the Senate Committee on Energy and Natural Resources after being received from the House). The Senate Committee on Environment and Public Works rejected a senate bill similar to H.R. 3893. *See* Gas Petroleum Refinery Improvement and Community Empowerment Act, S. 1772, 109th Cong. (2005) (as introduced to the Senate); BEHRENS & GLOVER III, *supra* note 25, at 10.

27. The Library of Congress, THOMAS Home, Bills Resolutions, Search Results, <http://www.thomas.gov/cgi-bin/bdquery/z?d109:HR03792:@@P> (last visited Nov. 25, 2006) [hereinafter *The Library of Congress*].

28. H.R. 3792, 109th Cong. (2005) (as introduced in the House).

Air Quality.<sup>29</sup>

### 3. H.R. 5365

On May 11, 2006, Representative Frederick Boucher and twenty co-sponsors introduced a bill “to provide for the establishment of a Strategic Refinery Reserve.”<sup>30</sup> The bill amends the Energy Policy and Conservation Act by adding provisions creating a refinery reserve.<sup>31</sup> In particular, the bill gives the Secretary of Energy authority “to design and construct new refineries, or acquire closed refineries and reopen them, to carry out this section.”<sup>32</sup> Second, the bill provides operation, location, and emergency guidelines for these refineries.<sup>33</sup> Third, the bill establishes reporting requirements for refiners that plan to permanently close an existing refinery.<sup>34</sup> At the conclusion of the 109th Congressional session, the bill was in the House Subcommittee on Energy and Air Quality.<sup>35</sup>

#### C. Analysis of Congressional Legislation

A reserve of gasoline would directly address the price spikes caused by hurricanes like Katrina and Rita. A reserve would be an extra supply of gasoline that replaces gasoline that would have been produced by refineries had they not shut down during a hurricane. Therefore, a reserve would serve to mitigate price increases. However, there are other situations, natural and man made, in which having such reserves would be an important tool in preventing the economic disruption of supply failure.

Strategically placed gasoline reserves could mitigate or prevent gasoline price surges in other national emergencies. For example, earthquakes on the West Coast could quickly take a refinery off-line or damage the gasoline distribution infrastructure. West Coast gasoline reserves could assist in preventing price spikes when production in West Coast refineries is halted because of earthquakes. Similarly, hurricanes on the East Coast can affect refineries just as much as hurricanes on the Gulf Coast or earthquakes on the West Coast.

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29. *The Library of Congress, supra* note 27.

30. H.R. 5365, 109th Cong. (2006) (as introduced in the House).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. GovTrack.us, Bill Status, <http://www.govtrack.us/congress/bill.xpd?bill=h109-5365> (last visited Feb. 14, 2007).

More ominously, the world's new realities bring new concerns. Gasoline reserves could prevent the potential effects of terrorist attacks on refineries. A terrorist attack on a refinery would likely halt production of gasoline for a longer period than a hurricane and cause a prolonged increase in gas prices. Such effects could be very alluring to terrorists who seek to disrupt the American economy. Strategic gasoline reserves would dilute the harmful economic effects that terrorist attacks on refineries would have on gasoline prices because the supply lost from a halt in gasoline production at refineries could be offset by the reserves.<sup>36</sup>

Additionally, the creation of a strategic gasoline reserve is important given:

[t]he Bush Administration has ordered the release of crude oil from the Strategic Petroleum Reserve (which was created in the 1970s following an oil embargo), but without refinery capacity [or a significant inventory of gasoline], putting crude oil on the market does little to provide gasoline to consumers and alleviate high prices at [the] pump.<sup>37</sup>

Having an inventory of gasoline available for consumers in a time where refinery capacity is debilitated will reduce or prevent price spikes.

One may argue that importing gasoline from European nations alleviated some of the supply shortages created by the 2005 hurricanes.<sup>38</sup> However, U.S. reliance on foreign sources thousands of miles away for a gasoline supply that can be disrupted in a matter of hours is ludicrous. In addition, "relying on the resources held by foreign nations in the future compromises our national and energy security."<sup>39</sup> America needs a way to mitigate and even prevent gasoline price surges that may follow a hurricane. Creating gasoline reserves accomplishes this goal.

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36. The Author does recognize that creating Strategic Gasoline Reserves would create more targets for a terrorist attack, but this disadvantage is countered by arguing that decentralizing the source and location of supplies of gasoline would discourage terrorist activities against American gasoline supplies.

37. *Durbin Proposes Strategic Gas and Fuel Reserve* (Oct. 4, 2005), <http://durbin.senate.gov/record.cfm?id=246867> (last visited Aug. 29, 2006).

38. On November 1, 2005, Senator Durbin wrote a letter to the Secretary of Energy Samuel Bodman stating, "Over the past two months, the United States has imported record levels of refined fuel products." *Durbin Welcomes Bush Administration Possible Action to Stockpile Gasoline Reserves* (Nov. 2, 2005), <http://durbin.senate.gov/record.cfm?id=248146> (last visited Aug. 29, 2006).

39. *Id.*

The bills addressing refining capacity, H.R. 3983 and H.R. 5365, are a step in the right direction for increasing refining capacity as a means to lower gasoline prices. Particularly, H.R. 5365 gets right at the heart of the gasoline price spike problem—a sudden shortage of gasoline refining capacity—because it establishes actual refineries to make up for capacity lost during emergencies.

One may notice that five members of the Senate sponsored S. 1794 (which creates a gasoline reserve),<sup>40</sup> seven members of the House sponsored H.R. 3792 (which creates a gasoline reserve),<sup>41</sup> twenty-one members of the House sponsored H.R. 5365 (which creates refinery reserves),<sup>42</sup> and just one Congressman sponsored H.R. 3893 (which addressed refining capacity).<sup>43</sup> Of the four bills addressing inventory and refining capacity, two support each solution. The balance of sponsorship and number of bills addressing inventory and refining capacity is good news because it shows that Congress is paying attention to what affects gasoline price spikes, both temporarily and permanently, and what reasonable solutions should and do exist. Moreover, it shows that Congress favors both increasing gasoline inventories and refining capacity as equally important to mitigating gasoline price spikes.

Disappointingly, none of these bills became law in the 109th Congress. Three of the bills—S. 1794, H.R. 5365, and H.R. 3792—were introduced and referred to subcommittee.<sup>44</sup> Progress, however, stopped there.<sup>45</sup> H.R. 3893 made it the furthest through Congress in that it passed the House and was referred to the Senate; however, it too became stuck in a subcommittee.<sup>46</sup>

#### IV. CONGRESS SHOULD REGULATE THE PRICE OF GASOLINE BY REGULATING REFINING CAPACITY

Ironically, one aspect of increasing refining capacity that the 109th Congress did not address is private regulation of refining capacity specifically through price controls. Congress has the power to regulate the price of gasoline through regulation of the refining capacity of refining companies, and it has regulated the

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40. See *supra* notes 19–22 and accompanying text.

41. See *supra* notes 27–29 and accompanying text.

42. See *supra* notes 30–35 and accompanying text.

43. See *supra* notes 23–26 and accompanying text.

44. See *supra* notes 19–22, 27–35, and accompanying text.

45. See *id.*

46. See *supra* notes 23–26 and accompanying text.

price of crude oil in the past. Moreover, Congress should use this power to abate gasoline price spikes in concert with its other solutions of regulating federal refineries and federal gasoline inventories.

A. *Congress Has the Power*

Congress has the Constitutional power under the Commerce Clause to force oil companies to expand refining capacity. Under the doctrine of *United States v. Lopez*, Congress generally has the power under the Commerce Clause to regulate interstate commerce when at least one of three conditions are met: (1) when Congress seeks to regulate channels of interstate commerce (roads, rivers, railways, airspace, etc.); (2) when Congress seeks to regulate instrumentalities of interstate commerce (trucks, trains, etc.); or (3) when Congress seeks to regulate activities that are substantially related to interstate commerce.<sup>47</sup> Under the third prong of the *Lopez* test, Congress would have to fashion a law that would convince the United States Supreme Court that forcing refiners to increase refining capacity is substantially related to interstate commerce. In addition, Congress should ensure any such legislation contains a proper jurisdictional nexus for the regulation.<sup>48</sup>

B. *Congress Has Previously Given the President Authority to Control the Price of Oil*

Congress has previously passed legislation to help control the price of crude oil and refined petroleum products.<sup>49</sup> First, Congress passed the Economic Stabilization Act of 1970, which authorized the President “to control the price of commodities, including crude oil and refined petroleum.”<sup>50</sup> Second, the Emergency Petroleum Allocation Act of 1973 (“EPAA”) “establish[ed] temporary measures ‘to deal with shortages of crude oil, residual oil, and refined petroleum products or dislocation in their national distribution system’ and to ‘minimize the adverse impacts of such shortages or dislocations on the

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47. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

48. *See United States v. Morrison*, 529 U.S. 598, 613 (2000).

49. ANGIE A. WELBORN & AARON M. FLYNN, CONG. RESEARCH SERV., PRICE INCREASE IN THE AFTERMATH OF KATRINA: AUTHORITY TO LIMIT PRICE GOUGING 4 (2005), <http://www.fas.org/sgp/crs/misc/RS22236.pdf>; Economic Stabilization Act of 1970 §§ 201–206, Pub. L. No. 91-379, 84 Stat. 796, 799–800 (1970).

50. WELBORN & FLYNN, *supra* note 49, at 4; Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627, 693–702 (codified at 15 U.S.C. §§ 751–760).

American people and the domestic economy.”<sup>51</sup> To meet this goal, the EPAA “granted the President *broad authority* to allocate oil and *specify its price*.”<sup>52</sup> Third, the Energy Policy and Conservation Act of 1975 created the Strategic Petroleum Reserve along with procedures for regulation of the reserve.<sup>53</sup>

C. *Congress Should Give the President Authority to Regulate the Price of Gasoline with an Emphasis on Expanding Refining Capacity as a Means to Meet the Regulation*

Just as Congress created legislation to alleviate economic strain of crude oil prices in the past, Congress should act to stabilize gas prices. One way Congress can do so is by regulating refining capacity. The 2005 hurricane season was not the first time gasoline prices have surged. Nonetheless, the 2005 hurricane season is distinguishable from past instances of high gas prices. When trying to stabilize prices in the past, Congressional action sought to control the price of crude oil because gas prices were coupled to crude oil prices.<sup>54</sup> As a result, Congressional action did not directly control the activities of private oil companies who were not in total control of the U.S. oil supply. However, hurricanes Katrina and Rita have shown that indirectly regulating private oil companies is no longer feasible because gasoline prices have decoupled from crude oil prices and because oil companies are now very much in control of the U.S. gasoline supply. Congress, therefore, has much more justification for controlling gasoline prices through refiners’ activities than it did for controlling crude oil prices via similar mechanisms.

## V. CONCLUSION

Hurricanes Katrina and Rita emphasized the phenomenon of price decoupling between crude oil and gasoline prices. The price of gasoline decouples, or surges, from the price of crude oil during hurricanes because of decreased refining capacity (refinery shut-down) and low gasoline inventories. Congress has introduced legislation addressing refining capacity and creating gasoline reserves to increase inventories as both a permanent and temporary means for stabilizing gasoline prices in times of

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51. WELBORN & FLYNN, *supra* note 49, at 4 (quoting 15 U.S.C. § 751(b)).

52. *Id.* at 4 (emphasis added).

53. *Id.* at 5; Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975) (codified as amended at 42 U.S.C. §§ 6231–6247).

54. *See supra* notes 49–53 and accompanying text.

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emergency; however, while it is commendable that both the Senate and the House have taken action, much remains to be done. Congress needs to keep sight of the interests of the American people—to regulate the price of gasoline so that severe increases in the price of gasoline do not affect economic activity. Moreover, Congress needs to realize that gasoline reserves are only a temporary solution to the larger problem of decoupling. Addressing the permanent solution of increasing refining capacity is critical in making any sort of lasting difference. One permanent solution Congress has yet to address is the regulation of private refining capacity. Congress has the power to increase U.S. gasoline refining capacity through regulation, and should use this power to the benefit of the American people.

*Keith Rawlins*