TOWARD COMPREHENSIVE REFORM OF AMERICA'S EMERGENCY LAW REGIME

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Unbenownst to most Americans, the United States is presently under thirty presidentially declared states of emergency. They confer vast powers on the Executive Branch, including the ability to financially incapacitate any person or organization in the United States, seize control of the nation's communications infrastructure, mobilize military forces, expand the permissible size of the military without congressional authorization, and extend tours of duty without consent from service personnel. Declared states of emergency may also activate Presidential Emergency Action Documents and other continuity-of-government procedures, which confer powers on the President—such as the unilateral suspension of habeas corpus—that appear fundamentally opposed to the American constitutional order. Although the National Emergencies Act, by its plain language, requires Congress to vote every six months on whether a declared national emergency should continue, Congress has done so only once in the nearly forty-year history of the Act.

This Note and an accompanying online compendium attempt, for the first time since the 1970s, to reach a reasonably complete assessment of the scope and legal effects of the thirty national emergencies now in effect in the United States. The Note also proposes specific statutory reforms to rein in the unchecked growth of these emergencies and political reforms to subject the vast executive powers granted by the U.S. emergency law regime to the democratic process.

"[The Founders] knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies."

–Justice Robert Jackson
Youngstown Sheet & Tube Co. v. Sawyer[1]

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1. 343 U.S. 579, 650 (1952).

INTRODUCTION

"A national emergency exists by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States," President George W. Bush proclaimed on September 14, 2001.[2] "I hereby declare that the national emergency has existed since September 11, 2001."[3] Over a decade later, with Osama bin Laden dead and the infrastructure of al Qaeda "taken apart,"[4] this same emergency, and the vast powers it bestows, is still with us—along with twenty-nine other national emergencies that grant the President greatly enhanced powers to regulate the nation's economic, military, and foreign affairs.[5] Although Congress has been required by statute, for nearly forty years, to vote every six months on whether a national emergency should continue, it has done so only once.[6]

The current proliferation of national emergencies is exactly what the National Emergencies Act (NEA) was enacted to prevent.[7] The NEA has failed entirely in this regard. The story of its failure is a story of how the United States Congress achieved a moment of clarity about the vast emergency powers it had been delegating to the President for decades and the quantity and scope of unchecked emergency powers then in effect.[8] It is a story of how Congress, with substantial support and cooperation from the Executive Branch,[9] constructed a framework intended to comprehensively regulate and limit future declarations of national emergency.[10] And it is a story of

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2. *See* Proclamation No. 7463, 3 C.F.R. 263 (2002), *available at* http://www.gpo.gov/fdsys/pkg/CFR-2002-title3-vol1/pdf/CFR-2002-title3-vol1-proc7463.pdf.

3. *Id.*

4. Fawn Johnson & Alexandra Jaffe, *Brennan: "We're on the Path to al-Qaida's Destruction,"* NAT'L J. (Apr. 29, 2012, 2:21 PM), http://www.nationaljournal.com/nationalsecurity/brennan-we-re-on-the-path-to-al-qaida-s-destruction—20120429.

5. *See infra* Parts III–IV.

6. *See infra* Part II.

7. National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255–58 (1976) (codified at 50 U.S.C. §§ 1601–1651 (2006)); *see also infra* Part II.

8. *See, e.g.*, 121 CONG. REC. S2302 (daily ed. Mar. 6, 1975) (statement of Sen. Charles Mathias), *reprinted in* S. COMM. ON GOV'T OPERATIONS & THE SPECIAL COMM. ON NAT'L EMERGENCIES AND DELEGATED EMERGENCY POWERS, 94TH CONG., 2D SESS., THE NATIONAL EMERGENCIES ACT SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS, at 285 (1976) [hereinafter S. COMM. ON GOV'T OPERATIONS] ("The Committee concluded that not one, but four national emergencies exist and continue to this day. Moreover, we discovered that emergency powers exist in more than 470 separate statutes and, when combined, give the President potential dictatorial powers.").

9. *See* S. REP. NO. 93-1170, at 4 (1974), reprinted in S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 22.

10. *See* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 291.

how Congress, enabled by the judiciary, subsequently rendered its own work superfluous by consigning the NEA's safeguards against the abuse of emergency powers to a state of disuse and irrelevance.[11]

In the 1970s, senators and representatives across the political spectrum responded vigorously to a Senate committee finding that the United States had been operating for over forty years under four presidentially declared states of emergency that gave rise to vast emergency powers.[12] The existence of these emergencies made it "distressingly clear" to that committee "that our Constitutional

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11. *See* Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1080 (2004). The NEA specifies that "[n]ot later than six months after a national emergency is declared, and not later than the end of each six-month period thereafter that such emergency continues, each House of Congress shall meet to consider a vote on a joint resolution to determine whether that emergency shall be terminated." 50 U.S.C. § 1622(b) (2006). Congress has never complied with the plain language of this section, however, as no such vote has ever occurred. Ackerman, *supra*, at 1080 (quoting Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1417 (1989)). Furthermore, "despite the mandatory force of the word 'shall,' courts have found 'no legal remedy for a congressional failure to comply with the statute.' " *Id.*

Courts and commentators have claimed that a present-day Congress may not bind a future one. *See, e.g.*, U.S. v. Winstar Corp., 518 U.S. 839, 872 (1996) ("'Acts of parliament derogatory from the power of subsequent parliaments bind not. . . . [T]he legislature, being in truth the sovereign power . . . acknowledges no superior upon earth, which the prior legislature must have been, if it's [sic] ordinances could bind the present parliament.' ") (quoting Blackstone) (alteration in original). Although this principle, of course, supports the proposition that a Congress may undo a law passed by a prior Congress, it does not mean that Congress is exempt from the operation of duly enacted, effective laws, such as 50 U.S.C. § 1622(b). Numerous Congresses have passed laws imposing obligations on Congress that would make little sense if they were not treated as legal obligations by future Congresses. *See, e.g.*, Congressional Accountability Act of 1995, P.L. 104-1, 109 Stat. 3 (codified as amended at 2 U.S.C. §§ 1301–1438 (2006)) (imposing existing statutes pertaining to employment discrimination, workplace safety, and other matters on Congress); *see also* Thomas Jefferson, A MANUAL OF PARLIAMENTARY PRACTICE: FOR THE USE OF THE SENATE OF THE UNITED STATES (2d ed. 1812), *in* JEFFERSON'S PARLIAMENTARY WRITINGS 359 (Wilbur S. Howell ed., 1988), *quoted in* Harold H. Bruff, *That the Laws Shall Bind Equally on All: Congressional and Executive Roles in Applying Laws to Congress*, 48 ARK. L. REV. 105, 105 (1995) ("It was probably from [their] view of the encroaching character of privilege, that the framers of our constitution, in their care to provide that the laws shall bind equally on all, and especially that those who make them shall not exempt themselves from their operation, have only privileged 'Senators and Representatives' themselves from . . . 'being questioned in any other place for any speech or debate in either House.' ") (alteration in original). Congress's legal obligations include requirements to regularly perform certain legislative acts. *See, e.g.*, 14 U.S.C. § 661 (2006) ("For each fiscal year, Congress shall authorize the strength for active duty personnel of the Coast Guard as of the end of that fiscal year."); 40 U.S.C. § 18104 (2006) ("Each House of Congress shall establish a policy under which Members of the House of Representatives and the Senate may obtain TTY's for use in communicating with hearing-impaired and speech-impaired individuals . . . .").

12. *See, e.g.*, S. REP. NO. 93-1170, *supra* note 9, at 1.

government has been weakened by 41 consecutive years of emergency rule."[13] Today, elected representatives and the national political discourse appear oblivious to the ongoing operation of thirty presidentially declared states of national emergency.[14] In short, the very mechanism the Congress enacted—with "exemplary" cooperation from the Executive Branch[15]—to prevent numerous or indefinite declarations of national emergency has become part and parcel of their unmitigated propagation.[16]

This Note and an accompanying online compendium[17] attempt, for the first time since the 1970s, to provide a reasonably complete assessment of the scope and legal effects of the thirty national emergencies now in effect in the United States. This Note also proposes specific statutory reforms to halt the unchecked growth of these emergencies, and political reforms that would subject the vast executive powers granted by the U.S. emergency law regime to the democratic process.

Part I outlines the methodology that this Note employs in assessing the scope and domestic effects of national emergencies. Part II analyzes the legislative history and text of the NEA. Part III details some of the most notable domestic emergency powers triggered by a declaration of national emergency, including those that allow the Executive Branch to completely freeze the assets of those merely suspected of terrorism, suspend minimum wage requirements in public contracts, and seize control of U.S. communications infrastructure. It also reviews publicly available, yet hardly publicized, information on highly classified continuity-of-government procedures and Presidential Emergency Action Documents (PEADs), some of which appear contrary to fundamental constitutional principles.

Part IV focuses on the implications of national emergencies for foreign affairs, particularly the central role of the national emergency declared after the terrorist attacks of September 11, 2001 (9/11) as an independent basis of authority for mobilizing military forces, expanding the permissible size of the military, and extending tours of duty without consent from service personnel.

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13. *Id.*

14. *See infra* Part III, Table 1.

15. *See* S. REP. NO. 93-1170, *supra* note 9.

16. For a discussion of one theory of the political dynamic underlying this process, by which mechanisms of review instituted by one Congress fall into lassitude because of a lack of political will on the part of later Congresses, see ERIC POSNER & ADRIAN VERMEULE, EXECUTIVE UNBOUND 55, 85–89 (2010).

17. *See* PATRICK THRONSON, COMPILATION OF NATIONAL EMERGENCY POWERS, U. MICH. J.L. REFORM (2013), *available at* http://www.mjlr.org/wp-content/uploads/2013/03/National_Emergency_Powers.pdf.

Part V proposes reforms to restore congressional oversight and democratic accountability, including a model statute.

I. METHODOLOGY

This Note catalogues statutory provisions and presidential orders containing powers that are explicitly activated by a presidential declaration of national emergency, analyzes the most far-reaching of these powers, and proposes reforms. The accompanying online compendium of emergency powers provides a full description of my methodology.[18]

This Note draws on a variety of primary sources, primarily statutes, presidential orders, and other government documents. Federal law provides for presidential declarations of emergency that are analogous to a "national emergency" but are classified differently and trigger authorities beyond those activated by a declaration of national emergency. These additional types of emergencies include "national security emergency," "catastrophic emergency," "defense emergency," "air defense emergency," and "civil emergency."[19] The powers triggered by declaring any of these emergencies are considered in the analysis presented below, the online companion, or both.

Emergency powers that are activated by a declaration of national emergency derive from both statutes and presidential orders. These orders can take a wide range of forms, including Executive Orders, Proclamations, and Presidential Directives.[20] Although presidents have called presidential directives by different names since Harry Truman issued the first such directive[21] in 1947,[22] they take three

18. *See id.*

19. A "national emergency" is the only type of emergency that the NEA mentions. *See* National Emergencies Act, 50 U.S.C. §§ 1601–1651 (2006). However, the legislative history of the NEA indicates that it was intended to regulate any declaration of national emergency, however denoted. *See* S. REP. NO. 93-1170, *supra* note 9, at 11.

20. *See* HAROLD C. RELYEA, CONG. RESEARCH SERV., 98-611 GOV, PRESIDENTIAL DIRECTIVES: BACKGROUND AND OVERVIEW 3–8 (2008), *available at* http://www.fas.org/sgp/crs/misc/98-611.pdf. These other forms include presidential announcements, licenses, certificates, interpretations, findings, regulations, memoranda, directives, authorizations, letters, administrative orders, designations, reorganization plans, and military orders. *Id.* The Executive Branch has maintained that there is no difference in legal effectiveness between these various forms of communicating a presidential order. *See* Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order, 24 Op. O.L.C. 29 (2000), *available at* http://www.justice.gov/olc/predirective.htm [hereinafter Legal Effectiveness of a Presidential Directive].

21. *See* RELYEA, *supra* note 20, at 3–8.

22. *See National Security Council [NSC] Truman Administration [1947–1953]*, FED'N OF AM. SCIENTISTS, http://www.fas.org/irp/offdocs/direct.htm (last visited Jan. 28, 2012).

main forms: study directives, which instruct the National Security Council or other government agencies to provide information to the President on a given subject;[23] decision directives, which contain orders and policy determinations;[24] and homeland security presidential directives, which "record and communicate presidential decisions about the homeland security policies of the United States."[25] The full text and even the titles of many directives are secret.[26] Despite this secrecy, the Executive Branch has maintained that such directives retain the full force and effect of law.[27]

My findings are incomplete for two unavoidable reasons: many directives are still classified,[28] and those that are publicly available likely represent only a small portion of the presidential orders deemed sensitive by the federal government. The number of such directives is dramatically lower in more recent administrations, particularly those of George W. Bush and Barack Obama, than under previous presidents.[29] As the National Security Archive has observed, this suggests that important presidential orders have been communicated through documents or channels that are obscured from the public.[30]

My analysis concludes that a declaration of national emergency makes available to the President powers contained in at least 160

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23. *See, e.g.*, *Presidential Study Directive on Mass Atrocities*, THE WHITE HOUSE (Aug. 4, 2011), http://www.fas.org/irp/offdocs/psd/psd-10.html.

24. *See, e.g.*, *Presidential Policy Directive 8*, DEP'T OF HOMELAND SECURITY (March 30, 2011), http://www.dhs.gov/xabout/laws/gc_1215444247124.shtm.

25. *See* Homeland Security Presidential Directive/HSPD-1: Organization and Operation of the Homeland Security Council, 37 WEEKLY COMP. PRES. DOC. 1568 (Oct. 29, 2001), *available at* http://www.fas.org/irp/offdocs/nspd/hspd-1.htm.

26. *See, e.g.*, *Presidential Policy Directives*, FED'N OF AM. SCIENTISTS, http://www.fas.org/irp/offdocs/ppd/index.html (last visited Nov. 1, 2012).

27. *See* Legal Effectiveness of a Presidential Directive, *supra* note 20.

28. *See, e.g.*, *National Security Presidential Directives [NSPD] George W. Bush Administration*, FED'N OF AM. SCIENTISTS, http://www.fas.org/irp/offdocs/nspd/index.html (last visited Oct. 21, 2012); *Presidential Policy Directives [PPDs] Barack Obama Administration*, FED'N OF AM. SCIENTISTS, http://www.fas.org/irp/offdocs/ppd/index.html (last visited, Oct. 21, 2012).

29. *Compare e.g.*, *NSDD—National Security Decision Directives—Reagan Administration*, FED'N OF AM. SCIENTISTS, http://www.fas.org/irp/offdocs/nsdd/index.html (last visited Dec. 26, 2012) (325 decision directives), *with National Security Presidential Directives [NSPD] George W. Bush Administration*, FED'N OF AM. SCIENTISTS, http://www.fas.org/irp/offdocs/nspd/index.html (last visited Dec. 26, 2012) (91 decision directives), *and Presidential Policy Directives [PPDs] Barack Obama Administration*, FED'N OF AM. SCIENTISTS, http://www.fas.org/irp/offdocs/ppd/index.html (last visited Dec. 26, 2012) (20 decision directives).

30. *Cf. Presidential Directives on National Security, Part II: From Harry Truman to George W. Bush (Presidential Directives, Part II)*, DIGITAL NAT'L SECURITY ARCHIVE, http://nsarchive.chadwyck.com.proxy.lib.umich.edu/collections/content/PR/intro.jsp (last visited Nov. 1, 2012) ("[M]any of the issues dealt with . . . through decision directives were handled in subsequent administrations through memoranda that did not fall within the series reproduced in this collection.").

provisions of statutory law and dozens of Executive Orders, presidential directives, and other regulations.[31] The sections that follow analyze some of the provisions with the most far-reaching effects on the individual liberties and livelihoods of United States residents and on the country's international relations.

II. LEGISLATIVE HISTORY

This Part examines the legislative history of the NEA and the text of the Act. It seeks in part to ascertain the legislative intent of Congress—as expressed in revisions to the legislation, committee reports, and floor debates—with respect to the Act, and examine whether that intent was betrayed. Understanding this essential history is indispensable to meaningful reform.

A. Origins of the Act

"To understand the full significance of the National Emergencies Act," Senators Frank Mathias (R-MD) and Frank Church (D-ID) wrote in the introduction to a 1976 legislative history sourcebook of the NEA, "one must place it within the context of Congressional efforts to reclaim prerogatives abandoned to the Executive."[32] Senators Church and Mathias had in mind Vietnam- and Watergate-era congressional reforms that represented an "historic redemption of jurisdiction by the Congress"[33] and included passage of the War Powers Resolution, inquiries into the conduct of intelligence agencies, and the rejection of weapons-development initiatives.[34]

Senator Mathias, a Republican, provided the initial impetus for the NEA.[35] "My own interest in the question of emergency powers," Mathias testified before a House committee, "developed out of our experience in the Vietnam War and the incursion into Cambodia. It became clear that the President had powers to commit us to warfare without adequate respect for the constitutional requirement

31. *See* THRONSON, *supra* note 17.

32. S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at viii.

33. 122 CONG. REC. S14,846 (daily ed. Aug. 27, 1976) (statement of Sen. Frank Church), *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 338.

34. *See* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at viii.

35. *See id.* at 3 (quoting *National Emergencies Act: Hearings Before the Subcomm. on Admin. Law and Gov't Relations of the H. Comm. on the Judiciary*, 94th Cong. 1st Sess. 20 (1998) (statement of Sen. Charles Mathias, Co-Chair, S. Special Comm. on Nat'l Emergencies and Delegated Emergency Powers).

that Congress alone can declare war."[36] Mathias submitted a resolution in 1971 to assess the consequences of terminating the ongoing state of emergency initially declared by President Truman on the eve of the Korean War in 1950.[37] With Frank Church, a Democrat, as a co-sponsor, Mathias introduced a resolution that called for the creation of a Senate Special Committee on the Termination of the National Emergency, which passed in 1972.[38]

The Special Committee, co-chaired by Senators Church and Mathias,[39] was the only congressional committee of its time to have a membership comprised of an equal number of Republicans and Democrats.[40] Senate leadership from both parties supported its efforts.[41] A subsequent Senate resolution changed the name of the Special Committee to the Special Committee on National Emergencies and Delegated Emergency Powers[42] after the Committee "quickly discovered that disorder enveloped the whole field of emergency statutes and procedures," as evidenced by the fact that "[n]ot one but four emergency proclamations remained in force."[43] These Proclamations—also included in Part III, Table 1—were:

- President Franklin Roosevelt's declaration of national emergency on March 9, 1933 to address the contemporary banking crisis by imposing a "bank holiday";[44]
- President Harry Truman's declaration of national emergency on December 16, 1950 in response to the outbreak of the Korean War;[45]
- President Richard Nixon's declaration of national emergency on March 23, 1970 to address a postal strike;[46] and
- President Nixon's declaration of national emergency on August 15, 1971 to impose currency controls and restrict foreign trade in response to a balance-of-payments crisis.[47]

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36. *Id.*

37. *See id.*

38. *See id.* at 3–4.

39. *See id.* at 4.

40. *See* 120 CONG. REC. S15,739 (daily ed. Aug. 22, 1974) (statement of Sen. Frank Church), *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 76.

41. *See id.*

42. *See* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 3–4.

43. *See* S. REP. NO. 94-922, at 3 (1974), *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 35.

44. *See id.*; S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 1.

45. *See* S. REP. NO. 94-922, *supra* note 43, at 3, *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 35.

46. *See id.* at 2–3.

47. *See id.*

Throughout the early 1970s, the Special Committee also heard testimony and received advice from legal and political science scholars, prominent lawyers, two former U.S. Supreme Court justices, and all former U.S. Attorneys General living at the time.[48] Special Committee staff and the Library of Congress searched for statutory provisions activated by declarations of national emergency. They found that a declaration of national emergency made 470 statutory provisions available for the President's use.[49]

With a ringing call for reform, the Special Committee proposed legislation to regulate national emergencies in its 1974 interim and 1976 final reports.[50] It noted that "protections and procedures guaranteed by the Constitution have, in varying degrees, been abridged . . . . The President has had extraordinary powers—powers to seize property and commodities, seize control of transportation and communications, organize and control the means of production, assign military forces abroad, and restrict travel."[51] The Special Committee laid much of the blame for the long duration and vast expansion of U.S. emergency law at the feet of Congress: "This dangerous state of affairs is a direct result of Congress's failure to establish effective means for the handling of emergencies . . . . Congress, through its own actions has transferred awesome magnitudes of power to the Executive without ever examining the cumulative effect of that delegation of responsibility."[52]

The Special Committee unanimously approved a draft National Emergencies Act.[53] The Committee intended the draft Act to serve several key objectives,[54] including deactivation of the emergency powers that the four existing states of national emergency had activated.[55] No statute had ever authorized a President to declare a national emergency or had prescribed conditions for its continuation or termination.[56] Relying on Justice Jackson's concurring opinion

48. *See id.* at 3–4.

49. *See id.* at 5. The compilation is contained in S. SPECIAL COMM. ON THE TERMINATION OF THE NAT'L EMERGENCY, EMERGENCY POWERS STATUTES: PROVISIONS OF FEDERAL LAW NOW IN EFFECT DELEGATING TO THE EXECUTIVE EXTRAORDINARY AUTHORITY IN TIME OF NATIONAL EMERGENCY (Comm. Print 1950).

50. *See id.* at 1 ("The Special Committee . . . ends its work with an emphatic plea that the National Emergencies Act, H.R., 3884, be passed as soon as possible . . . . The legislation is long overdue. A majority of Americans alive today have lived their entire lives under emergency rule.").

51. *Id.* at 3.

52. *Id.* at 1.

53. *See* S. REP. NO. 93-1170, *supra* note 9, at 6–7, *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 22.

54. *See id.*

55. *See id.* at 4.

56. *See id.* at 6; *see also* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 351–54.

in *Youngstown*, the Special Committee believed that enacting a statutory scheme to regulate the declaration and termination of future emergencies would be "the best prescription to avoid any future exercise of arbitrary authoritarian power" and would obligate the President to follow clear legal guidelines when declaring and responding to future emergencies.[57]

The Special Committee intended the statutory framework to regulate any and all presidential declarations of emergency, not simply those specifically denominated "national emergency."[58] It sought "to provide the Executive Branch with an effective, workable method for dealing with future emergencies in accord with Constitutional processes."[59] The Special Committee intended that the legislation ensure transparency and public accountability regarding the Executive Branch's exercise of emergency powers.[60]

In 1975, the House passed an amended version of the legislation by an overwhelming vote of 388–5.[61] The bill was sent to the Senate,[62] where it was reported out unanimously in August 1976, with amendments, by the Senate Committee on Government Operations.[63] The Senate passed an amended version of the bill in August 1976, and the House assented to the Senate amendments shortly thereafter.[64] President Ford signed the National Emergencies Act into law on September 14, 1976.[65]

B. Key Aspects of the Text and Its Evolution

By enacting the NEA, Congress intended to establish robust mechanisms to ensure regular congressional review of declarations

57. *See* S. REP. NO. 93-1170, *supra* note 9, at 6, *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 22. "For as the Youngstown Case decided," the Special Committee expounded, "where there is a statute, the Executive is obliged to use the statutory remedy; where there are no lawful statutory guidelines is to invite so-called inherent powers to come into play." *Id.*

58. *See* S. REP. NO. 94-922, *supra* note 43, at 11, *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 35 ("Congress must be prepared for possible efforts to thwart the intent of the bill by dropping the wording 'national emergency' and introducing different terminology. Committees must insure that all emergency legislation, however denominated, has the same accountability and reporting requirements and termination procedures.").

59. *See id.* at 6.

60. *See id.* at 4.

61. *See id.* at 8.

62. *See id.*

63. *See* S. REP. NO. 94-1168, at 19 (1976), *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 308.

64. *See* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 9.

65. *Id.*

of national emergency.[66] Congress also compromised with the Executive Branch with regard to the future availability certain national emergency powers.[67]

1. Termination of Then-Active Emergency Powers

Although the NEA sought "[t]o terminate certain authorities with respect to national emergencies still in effect, and to provide for orderly implementation and termination of future national emergencies,"[68] Congress did not completely terminate the four national emergencies then in force.[69] Harold Relyea, a Congressional Research Service scholar who played a central role in the work of the Special Committee,[70] opined that Congress did not possess the power to terminate a national emergency itself, reasoning that declaring a national emergency is a valid exercise of the President's Article II authority.[71] Congress, he wrote, can "terminate" a national emergency only insofar as it possesses the authority to "render [declared national emergencies] ineffective by returning to dormancy the statutory authorities they had activated, thereby necessitating a new declaration to activate standby statutory emergency authorities."[72] In short, Congress could make an emergency toothless, but could not make it disappear.

The initial draft of the NEA would have terminated all executive emergency powers then in effect.[73] The final version of the bill, however, created eight exceptions.[74] Congress made these exceptions because it concluded that the continued exercise of the emergency powers authorized by those statutes had become "essential to the functioning of the government" after "the prolongation of

66. *See infra* Part II.B.4.

67. *See infra* Part II.B.1–2.

68. National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255, 1255 (1976); S. REP. NO. 93-1170, *supra* note 9, at 7.

69. *See* 50 U.S.C. § 1651 (2006).

70. *See* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at v.

71. *See* HAROLD C. RELYEA, CONG. RESEARCH SERV., 98-505 GOV, NATIONAL EMERGENCY POWERS 12 (2007), *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 22.

72. *See id.*

73. *See* S. REP. NO. 93-1170, *supra* note 9, at 7–10, *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 22.

74. *See* National Emergencies Act § 1651, 50 U.S.C. § 1651 (2006). These exemptions included the Trading with the Enemy Act (TWEA) (12 U.S.C. § 95a (2006) which the Treasury Department deemed crucial for regulating trade and settling claims brought by U.S. nationals whose property foreign nationals had wrongfully expropriated, and a provision allowing the Department of Defense to make emergency exceptions to the requirement that it conduct open procurement. *See id.*

emergency rule in the United States."[75] The NEA was not, however, intended to continue these emergency exceptions indefinitely, but rather to "provide a reasonable period of time to make a transition from emergency law to permanent law."[76]

2. Emergency Powers Repealed by the NEA

The initial draft of the NEA provided for the repeal of forty-nine sections or subsections of emergency powers statutes[77] out of a total of 470 such provisions identified by the Special Committee.[78] The final version repealed only seven statutory provisions,[79] including:

- The President's power to criminalize, by Executive Order, activities within military zones;[80]
- The Executive Branch's authority to strip of U.S. citizenship and legal status any person deemed to have remained outside the United States to avoid military service during a national emergency;[81] and
- The Federal Reserve's authority to regulate consumer credit during a national emergency.[82]

A report by the Senate Special Committee cited the decrease in the number of statutes to be repealed as one of several compromises reached between the Executive Branch and the Senate Committee on Government Operations.[83] Senator Mathias offered a different explanation for the change, stating in a floor debate on

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75. S. REP. NO. 94-922, *supra* note 43, at 10, *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 35.

76. *See* 121 CONG REC. S18,360 (daily ed. Oct. 7, 1974) (statement of Sen. Charles Mathias) *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 149; *see also* S. REP. NO. 94-922, *supra* note 43, at 10, *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 35.

77. *See* S. REP. NO. 93-1170, *supra* note 9, at 10, *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 35.

78. *See* S. REP. NO. 94-922, *supra* note 43, at 5, *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 35.

79. *See* National Emergencies Act § 501, 50 U.S.C. § 1651 (2006).

80. *See id.* § 501(e); Act of June 25, 1948, ch. 645, 62 Stat. 765 (repealed 1976). A prior version of that Act was used as the mechanism for interning Japanese-Americans during World War II. *See* David A. Harris, *On the Contemporary Meaning of Korematsu: "Liberty Lies in the Hearts of Men and Women,"* 76 MO. L. REV. 1, 3 (2011).

81. *See* National Emergencies Act § 501(a); Act of June 27, 1952, ch. 477, § 349(a)(10), 66 Stat. 268 (repealed 1976).

82. *See* National Emergencies Act § 501(c); Act of Aug. 8, 1947, ch. 517, 61 Stat. 921 (repealed 1976).

83. *See* S. REP. NO. 94-922, *supra* note 43, at 8–9, *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 35.

the bill that "most of the provisions that have been deleted from our original list are to be taken care of in various deadwood projects by the Codification Committee of the House of Representatives."[84] This statutory housecleaning does not seem to have occurred, however, as most of the provisions the draft legislation designated for repeal remain in force.[85]

3. Future Declarations of National Emergencies and Use of Emergency Powers

The initial draft of the NEA provided that the President would only be authorized to declare a national emergency "[i]n the event the President finds that the proclamation of a national emergency is essential to the preservation, protection, and defense of the Constitution, and is essential to the common defense, safety, or well-being of the territory and people of the United States."[86] This language does not appear in the final bill, which places no conditions on the President's ability to declare a national emergency.[87] The House Government Operations Committee removed this provision out of concern that the "overly broad" language "might have been construed to confer upon the President statutory authority to declare national emergencies, other than that which he now has through various statutory delegations."[88] Congress, in other words, did not intend the NEA to provide the President with independent statutory grounds for declaring a national emergency. Rather, it intended that the NEA regulate emergency powers exercised pursuant to other statutes.

Although Congress did not intend the NEA to be an independent legal basis that justified declaring an emergency, it did intend the NEA to be the sole path to the exercise of emergency powers.[89] Any emergency powers activated by "provisions of law" authorizing certain actions in a national emergency may only be used if the President declared a national emergency in accordance with the

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84. *See* 120 CONG. REC. S18,359 (daily ed. Oct. 7, 1974) (statement of Sen. Charles Mathias), *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 148.

85. *Compare* S. REP. NO. 93-1170, *supra* note 9, at 10, *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 35, *with* THRONSON, *supra* note 17.

86. *See* S. REP. NO. 93-1170, *supra* note 9, at 7, *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 35.

87. *See* National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255.

88. *See* S. REP. NO. 94-1168, *supra* note 63, at 3, *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 308.

89. *See* National Emergencies Act § 201(b), 50 U.S.C. § 1621(b) (2006); S. REP. NO. 93-1170, *supra* note 9, at 8, *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 22.

provisions of the NEA and otherwise complied with the Act.[90] Both the initial and final versions also specify that the President may only exercise those emergency powers that he specified when declaring a national emergency.[91]

4. Congressional Checks on Executive Emergency Powers

The draft NEA provided for congressional oversight of national emergencies by imposing accountability and reporting requirements on the President.[92] National emergencies are to end after six months unless Congress voted by concurrent resolution to extend the emergency; it could also vote at any time to terminate the emergency.[93] The draft bill also required that the President transmit to Congress all orders, rules, and regulations promulgated pursuant to a declared emergency.[94] The final bill preserved this obligation.[95] It also required that, every six months following a declaration of national emergency, the President must submit to Congress an accounting of expenditures "directly attributable to the exercise of powers and authorities conferred by such declaration."[96]

At the Ford Administration's request,[97] Congress removed the provision specifying that absent further congressional action, a declaration of national emergency would terminate after six months. But as enacted, the NEA still imposes a requirement that "[n]ot later than six months after a national emergency is declared, and not later than the end of each six-month period thereafter . . . each

90. *See* National Emergencies Act § 201(b), 50 U.S.C. § 1621(b) (2006); S. REP. NO. 93-1170, *supra* note 9, at 8, *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 22. Furthermore, no other law may supersede the title containing this particular provision unless it did so in explicit terms. *See* National Emergencies Act § 201(b), 50 U.S.C. § 1621(b) (2006).

91. *See* National Emergencies Act § 301, 50 U.S.C. § 1631 (2006); S. REP. NO. 93-1170, *supra* note 9, at 8, *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 22. The primary purpose animating this requirement was to ensure that the Executive Branch would provide notice to the public and Congress. *See* S. REP. NO. 93-1170, *supra* note 9, at 8, *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 22; *see also* H. REP. NO. 94-238, at 8 (1975), *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 190.

92. *See* S. REP. NO. 93-1170, *supra* note 9, at 8–9, *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 22.

93. *See id.* at 8. The Supreme Court subsequently held that using concurrent resolutions to override executive action was unconstitutional. *See* Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983).

94. *See* S. REP. NO. 93-1170, *supra* note 9, at 8–9, *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 22.

95. *See* National Emergencies Act § 401(b), 50 U.S.C. § 1641(b) (2006).

96. *See id.* § 401(c), 50 U.S.C. § 1641(c) (2006).

97. *See* 121 CONG. REC. H8,343 (daily ed. Sept. 4, 1975) (statement of Rep. Robert Drinan), *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 257.

House of Congress *shall meet* to consider a vote on a concurrent resolution to determine whether that emergency shall be terminated."[98] The enacted version also specifies that declared emergencies will terminate automatically after one year unless renewed by the President,[99] and that the President may terminate a national emergency at any time.[100]

Congress has enacted two significant amendments to the NEA since its passage. First, although it retains the requirement that Congress meet every six months to consider terminating national emergency powers, the statute now provides that a joint resolution, rather than a concurrent resolution, is the appropriate mechanism for terminating national emergencies.[101] Like a typical bill, a joint resolution requires the President's signature to become law, and Congress can override a President's veto of a joint resolution with a two-thirds majority in both houses. Second, the emergency authority granted under the Trading with the Enemy Act (TWEA) is not exempt from the modern statute,[102] since the TWEA no longer provides a basis for declaring a national emergency in peacetime.[103] Notwithstanding these differences, the plain text of the contemporary statute clearly reflects Congress's intent to curb the unchecked propagation of national emergencies and the unrestrained exercise of emergency powers.

C. Subsequent History

Though Senators Church and Mathias had "hope[d] that the nation enjoys such domestic tranquility that [the NEA's] authorities are never invoked,"[104] the 1979 Iranian revolution soon led to the first post-NEA declaration of national emergency. In a tersely worded Executive Order, President Carter declared "that the situation in Iran constitutes an unusual and extraordinary threat to the national security, foreign policy and economy of the United States," leading him to "hereby declare a national emergency to deal with

98. *See* National Emergencies Act § 202(b), 50 U.S.C. § 1622(d) (2006) (emphasis added).

99. *See id.* § 202(d), 50 U.S.C. § 1622(d) (2006).

100. *See id.* § 202(a), 50 U.S.C. § 1622(a) (2006).

101. *See id.* § 202(a)(1), 50 U.S.C. § 1622(a)(1) (2006). For a discussion of the power of a past Congress to bind a future Congress, see *supra* note 11.

102. *See id.* § 1651.

103. *See* 12 U.S.C. § 95a (2006).

104. *See* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at vii.

that threat."[105] The declaration froze all property subject to the jurisdiction of the United States in which the government and central bank of Iran had an interest.[106] Remarkably, that emergency is still in effect today, since, according to President Obama, "our relations with Iran have not yet returned to normal, and the process of implementing the January 19, 1981 agreements with Iran is still underway."[107]

The emergency has continued for over thirty-three years, in direct contravention of Congress's intent to prohibit perpetual states of emergency. This situation was made possible largely by the fact that Congress has not followed its own statutory requirement to consider every six months a joint resolution on terminating the emergency. A Congressional Research Service report stated that in May 1980, the Chair of the House Foreign Affairs Committee sent a letter to the Speaker of the House that was intended to fulfill this requirement.[108] This letter is the only expression of Congress's judgment that any state of national emergency should continue.[109] The Congressional Record is devoid of evidence that a similar letter, let alone a concurrent or joint resolution, was ever again considered regarding this or any other national emergency.[110]

The judiciary, meanwhile, has declined to give any meaningful force to the requirement that Congress meet to consider such a resolution. *Beacon Products Corp. v. Reagan* concerned a corporation that was seeking to trade with Nicaragua but was barred from doing so by trade restrictions issued pursuant to a national emergency pertaining to Nicaragua.[111] Both parties stipulated that Congress had not met to consider a resolution regarding whether the national emergency should be terminated,[112] even though the NEA provides that emergency powers "shall be effective and remain in effect . . . only in accordance with this Act."[113] Nonetheless, the U.S. Court of Appeals for the First Circuit, in an opinion written by then-

105. Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (Nov. 14, 1979).

106. *See id.*

107. Notice on Continuing the National Emergency with Respect to Iran, 75 Fed. Reg. 69,569 (Nov. 10, 2010).

108. MARK W. LOWENTHAL & ELLEN C. COLLIER, CONG. RESEARCH SERV., IB80001, IRAN: EXECUTIVE AND CONGRESSIONAL REACTIONS AND ROLES 31–32 (1981).

109. *See id.*

110. This finding is consistent with that of legal scholars. *See, e.g.,* Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1080 (2004); Jules Lobel, *Emergency Powers and the Decline of Liberalism*, 98 YALE L.J. 1385, 1416 (1989).

111. *See* Beacon Prods. Corp. v Reagan, 814 F.2d 1 (1st Cir. 1987).

112. *See id.* at 4.

113. 50 U.S.C. § 1621(b) (2006).

Judge Breyer, held that the national emergency was valid notwithstanding Congress's failure to vote. The court reasoned:

> It seems far more likely that Congress meant the "shall meet to consider a vote" language to give those who want to end the emergency the chance to force a vote on the issue, rather than to *require* those who do *not* want to end the emergency to force congressional action to prevent automatic termination.[114]

Because of this softening of the mandatory force of "shall" under the NEA—along with congressional inaction and expansionary Executive Branches—thirty national emergencies currently remain in effect in the United States.

III. KEY DOMESTIC IMPACTS OF DECLARING A NATIONAL EMERGENCY

To examine the powers that accrue to the Executive after a declaration of national emergency is to enter a world that contrasts sharply with the traditional conception of the United States as being a government of limited and enumerated powers. The thirty national emergencies now in effect in the United States are more than abstract or limited exercises of presidential authority. Each emergency activates powers in over 160 provisions of statutory law, dozens of presidential orders, and numerous other federal regulations.[115] As discussed in depth below,[116] these declarations of emergency grant the President many of the same sweeping powers that Congress sought to limit when it passed the NEA in 1976,[117] as well as additional powers that did not exist when the Act was passed.[118]

Emergency powers that are presently in effect, or need only a presidential order to become operative, raise troubling questions as to whether the executive power, in its full extent, is consistent with our conceptions of the presidency or limited government. Declared national emergencies have, in recent years, provided legal justifications for the exercise of myriad, diverse domestic powers. These

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114. *See Beacon Prods. Corp.*, 814 F.2d at 5 (emphasis in original). *But see* LOWENTHAL & COLLIER, *supra* note 108.

115. *See id.*

116. *See infra* Part III.A, C–D.

117. *Compare* S. SPECIAL COMM. ON THE TERMINATION OF THE NAT'L EMERGENCY, *supra* note 49, *with* THRONSON, *supra* note 17 (enumerating executive powers activated by a declaration of national emergency).

118. *See, e.g.*, 50 U.S.C. §§ 1701–1707 (2006) (granting the President the power to freeze the assets of, and prohibit donations to, designated U.S. or alien natural persons or organizations).

powers have included the extrajudicial authority to deprive designated persons[119]—including U.S. citizens[120] and organizations operating in the United States[121]—of access to personal assets and even to donations of humanitarian items such as food, clothing, and medicine.[122] The Executive Branch has also unilaterally suspended wage-rate requirements for public contracts.[123] During a national emergency, the President—and, in some cases, Cabinet officials—also possess the authority to unilaterally seize control of radio and television stations, phone systems, and the Internet;[124] to impose extensive food-supply controls;[125] and to seize commercial vessels.[126]

The following table presents the thirty national emergencies currently in effect in the United States.

TABLE 1: DECLARATIONS OF NATIONAL EMERGENCY CURRENTLY IN EFFECT[127]

EXECUTIVE ORDER OR PROCLAMATION	SUBJECT	DATE FIRST DECLARED
Proc. 2040	Bank Holiday	Mar. 6, 1933
Proc. 2941	Korean War	Dec. 16, 1950
Proc. 2942	Postal Strike	Mar. 23, 1970

119. *See id.*

120. *See, e.g.*, U.S. DEP'T OF THE TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, SPECIALLY DESIGNATED NATIONALS AND BLOCKED PERSONS 427 (Oct. 18, 2012), *available at* http://www.treasury.gov/ofac/downloads/t11sdn.pdf (designating Abdul Rahman S. Taha); Eric Sandberg-Zakian, *Counterterrorism, the Constitution, and the Civil-Criminal Divide: Evaluating the Designation of U.S. Persons Under the International Emergency Economic Powers Act*, 48 HARV. J. ON LEGIS. 95, 96–97 (2011).

121. *See, e.g.*, U.S. DEP'T OF THE TREASURY, *supra* note 120, at 432 (designating Tamils Rehabilitation Organization).

122. *See* 50 U.S.C. §§ 1701–1707 (2006).

123. *See* 40 U.S.C. § 3147 (2006); *see also infra* notes 155–164 and accompanying text.

124. *See* 47 U.S.C. § 606 (2006). The Obama Administration has interpreted the statute as giving the government this same plenary authority over contemporary forms of communication. *See infra* note 171 and accompanying text.

125. *See, e.g.*, 7 U.S.C. §§ 1332, 1371, 1427a(a), 1444 (2006).

126. *See* 50 U.S.C. § 191 (2006).

127. Current as of Feb. 12, 2013. Information compiled from search of U.S. Government Printing Office documents at *Federal Digital System*, U.S. GOV'T PRINTING OFFICE, http://www.gpo.gov/fdsys/ (last visited Feb. 12, 2013). The first four documents in the table are indicated by their subject, the rest by their title.

Proc. 4074	Balance of Payments Crisis	Aug. 15, 1971
E.O. 12170	Blocking Iranian Government Property	Nov. 14, 1979
E.O. 12938	Proliferation of Weapons of Mass Destruction	Nov. 14, 1994
E.O. 12947	Prohibiting Transactions with Terrorists Who Threaten to Disrupt the Middle East Peace Process	Jan. 23, 1994
E.O. 12957	Prohibiting Certain Transactions with Respect to the Development of Iranian Petroleum Resources	Mar. 15, 1995
E.O. 12978	Blocking Assets and Prohibiting Transactions with Significant Narcotics Traffickers	Oct. 21, 1995
Proc. 6867	Regulating the Anchorage and Movement of Vessels with Respect to Cuba	Mar. 1, 1996
E.O. 13047	Prohibiting New Investment in Burma	May 22, 1997
E.O. 13067	Blocking Sudanese Government Property and Prohibiting Transactions with Sudan	Nov. 3, 1997
E.O. 13159	Blocking Property of the Government of the Russian Federation Relating to the Disposition of Highly Enriched Uranium Extracted from Nuclear Weapons	June 21, 2000
E.O. 13219	Blocking Property of Persons Who Threaten International Stabilization Efforts in the Western Balkans	June 26, 2001
E.O. 13222	Continuing Export Control Regulations	Aug. 17, 2001
Proc. 7463	Declaration of National Emergency by Reason of Certain Terrorist Attacks	Sep. 14, 2001
E.O. 13224	Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism	Sep. 23, 2001
E.O. 13288	Blocking Property of Persons Undermining Democratic Processes or Institutions in Zimbabwe	Mar. 6, 2003
E.O. 13303	Protecting the Development Fund for Iraq and Certain Other Property in Which Iraq Has an Interest	May 22, 2003
E.O. 13338	Blocking Property of Certain Persons and Prohibiting the Export of Certain Goods to Syria	May 11, 2004
E.O. 13348	Blocking Property of Certain Persons and Prohibiting the Importation of Certain Goods from Liberia	July 22, 2004
E.O. 13396	Blocking Property of Certain Persons Contributing to the Conflict in Côte d'Ivoire	Feb. 7, 2006

E.O. 13405	Blocking Property of Certain Persons Undermining Democratic Processes or Institutions in Belarus	June 16, 2006
E.O. 13413	Blocking Property of Certain Persons Contributing to the Conflict in the Democratic Republic of the Congo	Oct. 27, 2006
E.O. 13441	Blocking Property of Persons Undermining the Sovereignty of Lebanon or Its Democratic Processes and Institutions	Aug. 1, 2007
E.O. 13466	Continuing Certain Restrictions with Respect to North Korea and North Korean Nationals	June 26, 2008
E.O. 13536	Blocking Property of Certain Persons Contributing to the Conflict in Somalia	Apr. 12, 2010
E.O. 13566	Blocking Property and Prohibiting Certain Transactions Related to Libya	Feb. 25, 2011
E.O. 13581	Blocking Property of Transnational Criminal Organizations	July 25, 2011
E.O. 13611	Blocking Property of Persons Threatening the Peace, Security, or Stability of Yemen	May 16, 2012

The remainder of this Part analyzes select emergency statutes that significantly affect the domestic sphere of American life. It focuses on powers that arguably have the most far-reaching effect on the constitutional rights and economic livelihoods of U.S. residents.[128]

Section A details the power of the Executive Branch to deprive individuals and organizations of access to assets and basic humanitarian aid during a national emergency. Section B outlines the power of the Executive to suspend wage laws for public contracts. Section C provides other major emergency powers statutes that have not been used in recent years, but which can be activated at the President's direction pursuant to any of the thirty national emergencies in effect. Section D examines Presidential Emergency Action Documents (PEADs) and plans for so-called continuity of government (i.e., the effort to preserve and maintain essential government functions in the midst of presidentially designated emergencies). Available information indicates that some PEADs confer on the Executive the power to suspend the writ of habeas corpus and detain without charge persons considered to be subversive.

128. This Note can, for reasons of space, analyze only some of these powers. A reasonably complete catalog of the powers that are activated for the use of the Executive Branch following a presidential declaration of national emergency is available online. *See* THRONSON, *supra* note 17.

A. Targeted Financial Incapacitation: The International Emergency Economic Powers Act

Like the 1976 National Emergencies Act, Congress passed the International Emergency Economic Powers Act (IEEPA) in 1977 to "revise and delimit" the President's emergency authority.[129] The IEEPA was meant to replace the TWEA, which was used as a means of imposing broad-ranging economic controls that sometimes bore little relation to the declared national emergency authorizing them.[130] The IEEPA primarily concerns international financial transactions[131] and transactions that otherwise "involv[e] an interest" of a foreign national.[132] But the federal government has frequently applied the emergency powers granted by the statute to "U.S. persons"—people and organizations with legal status in the United States, including U.S. citizens.[133] Courts have also construed "interest" to include assets that are wholly owned by a U.S. person but in which a foreign national has a potential beneficial interest.[134]

Declaring a national emergency under the NEA also activates presidential powers under the IEEPA.[135] The IEEPA specifies that the President may only use powers it authorizes to deal with an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat."[136] The statute further provides, somewhat ambiguously, that the President may only use IEEPA powers activated by a declaration of national emergency to "deal with" that specific emergency.[137] Unlike the NEA, the IEEPA does not include an automatic termination provision nor requires that Congress vote to perpetuate the powers that it grants.

One article concisely summarized the operation of the IEEPA:

> In practice, this authority is exercised in what can roughly be described as a three-step process. First, the President issues an Executive Order declaring a national emergency, describing the type of individuals who will be sanctioned, and delegating

129. *See* S. REP. NO. 95-466, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4540, 4541.
130. *See id.* at 1–3.
131. *See* 50 U.S.C. § 1702 (a)(1)(A) (2006).
132. *See* 50 U.S.C. § 1702(a)(1)(B)–(C) (2006).
133. *See, e.g.*, *supra* note 120.
134. *See, e.g.*, Global Relief Found. v. O'Neill, 315 F.3d 748, 753 (7th Cir. 2002).
135. *See* 50 U.S.C. § 1701(a) (2006).
136. *See id.*
137. *See id.* § 1701(b).

> the task of implementing sanctions to the Secretary of State or the Secretary of the Treasury. Second, the cabinet member charged with implementation designates particular individuals (people or entities) as fitting the description in the Executive Order. Third, the [U.S. Department of the] Treasury's Office of Foreign Assets Control ("OFAC")—the executive entity charged with carrying out the sanctions—proceeds to block all property of and transactions involving the designated individuals.[138]

The IEEPA thus grants the Executive Branch the power to freeze the assets of, and prohibit financial transactions involving, individuals designated by Executive Order. This includes the power to prohibit bank payments and transfers of credit insofar as they "involve" an interest of a designated person, entity, or country,[139] and to prohibit the holding, use, or transfer of property implicating a relevant foreign interest.[140] The President may exercise these powers over property belonging to any person within the jurisdiction of the United States.[141] Indeed, the Treasury Department's nearly six-hundred-page list of blocked persons and organizations contains the names of numerous U.S. persons.[142]

This summary power to block persons from accessing their assets extends even to basic life necessities. Although one section of the IEEPA exempts from the President's authority "donations, by persons subject to the jurisdiction of the United States, of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering,"[143] another section permits the President to regulate or prohibit the donation of these items if "the President determines that such donations . . . would seriously impair his ability to deal with" a declared national emergency. [144] Anyone who violates the IEEPA is subject to a civil penalty up to $250,000;[145] a willful violation may incur a criminal penalty up to $1,000,000 and up to twenty years in prison.[146] Every President who has declared a national emergency and exercised IEEPA powers pursuant to that emergency has prohibited such donations.[147]

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138. *See* Sandberg-Zakian, *supra* note 120, at 100.
139. *See* 50 U.S.C. § 1702(a)(1)(A) (2006).
140. *See id.* § 1702(a)(1)(B).
141. *See id.* § 1702(a)(1)(A)–(B).
142. *See, e.g.*, U.S. DEP'T OF THE TREASURY, *supra* note 120.
143. *See* 50 U.S.C. § 1702(b)(2) (2006).
144. *See id.*
145. *See* 50 U.S.C.A. § 1705(a)–(b) (West 2012).
146. *See id.* § 1705(a)–(c).
147. *See infra* Executive Orders listed in Part III, Table 1.

Courts have interpreted the scope of "involving an interest" expansively to encompass any property that might benefit a designated foreign national.[148] In *Global Relief Foundation v. O'Neill*,[149] the federal government froze the assets of the second-largest Islamic charity in the United States, which ceased to exist less than one year later.[150] The court held that the IEEPA authorized the Executive Branch to freeze assets that it determines might benefit a designated foreign person or country "even if a U.S. citizen is the legal owner," notwithstanding the Fifth Amendment's prohibition on deprivation of property without due process of law.[151]

The President thus has the authority to issue an Executive Order to block all the assets of a U.S. citizen or permanent resident—not to mention a person with a more tenuous immigration status—and prohibit donations of food or medicine to that person. No money may be paid from an account at a financial institution over which the United States has jurisdiction if the Executive Branch has "designated" the account holder under the IEEPA.[152] Moreover, a person whom the Treasury Department deems a "Special Designated Global Terrorist"[153] may only receive free emergency medical care if granted a license by the Department.[154] The IEEPA thus grants the Executive Branch power not merely over certain property or activities of designated people, but over the very survival of a human being within the jurisdiction of the United States.

B. Suspension of Minimum Wage Requirements in Public Contracts

Federal law imposes minimum wage requirements for contracts to which the United States or the District of Columbia is a party.[155] Among other requirements, such contracts must prescribe minimum wages for the various types of laborers who will be employed under the contract, with the wage of each laborer based on the local going rate for workers in the same occupation.[156] Workers are entitled to overtime pay[157] and a weekly paycheck.[158] The federal

148. *See, e.g.*, Global Relief Found. v. O'Neill, 315 F.3d 748, 753 (7th Cir. 2002).
149. *Id.* at 750.
150. *See* Sandberg-Zakian, *supra* note 120, at 95.
151. *See Global Relief Found.*, 315 F.3d at 753; U.S. CONST. amend. V.
152. *See* 31 C.F.R. § 594.504 (2009).
153. *See* 31 C.F.R. § 594.310 (2012); *see also* 31 C.F.R. 594.201 (2012).
154. *See* 31 C.F.R. § 594.507 (2009).
155. *See* 40 U.S.C. §§ 3141–3148 (2006).
156. *See id.* § 3142(a)–(b).
157. *See id.* § 3142(e).
158. *See id.* § 3142(c).

government may terminate a contract to which it is a party if the contractor fails to pay wages as the contract provides.[159]

During a national emergency, however, 40 U.S.C. § 3147 authorizes the Executive to suspend all of these provisions.[160] President Bush did so in the aftermath of Hurricane Katrina.[161] Rather than invoking the NEA to declare a national emergency as the Act requires, President Bush stated, in his order suspending minimum wage and other requirements, "I find that the conditions caused by Hurricane Katrina constitute a 'national emergency' within the meaning of [40 U.S.C. § 3147]."[162] The legality of such a means of declaring a national emergency was never subjected to challenge, however, as the President revoked the Proclamation less than two months later.[163] The suspension was not retroactively applied.[164]

C. Emergency Powers Not in Active Use

The Executive Branch has dozens of additional statutory provisions at its disposal that grant it extraordinary powers during a national emergency.[165] The notice requirement of the NEA provides that the President may exercise these powers either by declaring a national emergency or by issuing an Executive Order stating that the President will exercise such powers pursuant to an existing declared emergency.[166] For example, the President, acting through the Secretary of Agriculture, has broad authority during a national emergency to impose supply constraints to influence prices of various crops.[167] The President may also unilaterally order the inspection and seizure of commercial vessels during a national emergency.[168]

Provisions that empower the President to seize control of the nation's communications infrastructure pose even greater implications for individual liberty. If the President "deems it necessary in

159. *See id.* § 3143.
160. *See id.* § 3147.
161. *See* Proclamation No. 7924, 3 C.F.R. 104–06 (2006).
162. *Id.* at 104.
163. *See* Proclamation No. 7959, 3 C.F.R. 138 (2006).
164. Some commentators have emphasized the significance of this suspension, drawing a link between President Bush's suspension of prevailing wage requirements and a slew of allegations of severe labor abuses in the wake of Hurricane Katrina. *See, e.g.*, Haley E. Olam & Erin S. Stamper, Note, *The Suspension of the Davis-Bacon Act and the Exploitation of Migrant Workers in the Wake of Hurricane Katrina*, 24 HOFSTRA LAB. & EMP. L.J. 145 (2006).
165. *See* THRONSON, *supra* note 17.
166. *See* 50 U.S.C. § 1631 (2006); *supra* Part II.A.
167. *See, e.g.*, 7 U.S.C. §§ 1332, 1371, 1427a(a), 1444 (2006).
168. *See* 50 U.S.C. § 191 (2006).

the interest of national security or defense" during a war or national emergency, he is authorized to suspend or alter rules for broadcast stations or devices, close "any station for radio communication, or any device capable of emitting electromagnetic radiations . . . which is suitable for use as a navigational aid beyond five miles," or "authorize the use or control of any such station or device . . . by any department of the Government."[169] The President also may exercise broad control over "any facility or station for wire communication," with the power to amend regulations for such facilities and stations, seize them, or employ them for government use.[170]

These provisions may reasonably be interpreted as authorizing the government to seize and control all radio stations, broadcast television stations, cable television stations, and telecommunications networks in the United States during a declared national emergency. This, at any rate, is the position of the Obama Administration. During the debate over the now-moribund "internet kill switch" bill, the Obama Administration expressed its position to Congress that the President already has authority under the NEA and the above provisions to control Internet traffic in an emergency.[171] Thus, the only apparent legal obstacle standing between present conditions and this degree of government control over mass media and telecommunications is a presidential order.

D. Presidential Emergency Action Documents: Fundamental Violations of the Constitutional Order?

Presidential declarations of national emergency enable the president to use draft classified orders to exercise perhaps even more expansive powers, known variously as Presidential Emergency Action Documents or Presidential Emergency Action Directives (PEADs).[172] The Federal Emergency Management Agency (FEMA)

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169. 47 U.S.C. § 606(c) (2006). Just compensation is required in each instance. *See id.* § 606(e).

170. *Id.* § 606(d). Just compensation is likewise required. *See id.* § 606(e).

171. *See Protecting Cyberspace as a National Asset: Hearing Before the S. Comm. On Homeland Security and Governmental Affairs*, 111th Cong. 79 (2010), *available at* http://www.hsgac.senate.gov/download/2010-06-15-reitinger-testimony (prepared statement of Philip R. Reitinger, Deputy Under Secretary, National Protection and Programs Directorate, Department of Homeland Security).

172. *See* FED. EMERGENCY MGMT. AGENCY [FEMA], FEMA MANUAL 5400.2 111 (effective Feb. 29, 2000), *available at* http://web.archive.org/web/20030313025356/http://www.fema.gov/pdf/library/5400_2.pdf; Marc Ambinder, *The Day After*, NAT'L J. (Apr. 11, 2011, 4:47 PM), *available at* http://www.nationaljournal.com/magazine/government-still-unprepared-

defines these documents as "[f]inal drafts of Presidential messages, proposed legislation proclamations, and other formal documents, including DOJ [Department of Justice]-issued cover sheets addressed to the President, to be issued in event of a Presidentially-declared national emergency."[173] They originated as part of Eisenhower-era planning for continuity of government (COG) procedures, which were intended to maintain major government operations during and following a nuclear exchange with the Soviet Union.[174] The situations in which the Executive Branch plans to employ such procedures, however, now encompass a broad array of declared national emergencies.[175]

The Executive's concern to plan for COG seems eminently reasonable, given the terrible consequences natural and human-caused disasters can have on governmental institutions and U.S. residents, particularly vulnerable populations. This wise desire to plan appropriately for disasters appears to be a significant motive in the creation and maintenance of PEADs.[176] But court records and numerous government documents indicate that the methods that some PEADs are intended to employ to ensure COG may be inimical to the contemporary constitutional order. The powers these plans purport to grant are titanic in scale, vastly outstripping even

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for-disaster-20110411. Ambinder departs from publicly available information in terming PEADs "presidential emergency-action directives." *See id.*

173. FEMA MANUAL, *supra* note 172, at 111.

174. *See generally* Matthew L. Conaty, *The Atomic Midwife: The Eisenhower Administration's Continuity-of-Government Plans and the Legacy of "Constitutional Dictatorship,"* 62 RUTGERS L. REV. 627 (2010) (providing a detailed historical account and legal analysis of Eisenhower-era continuity of government planning). The Truman Administration also appears to have contemplated asserting this kind of emergency executive authority. *See* Hobson v. Brennan, 646 F. Supp. 884, 897 (D.D.C. 1986) (reproducing an FBI memorandum that states, "A plan of action has been prepared . . . to implement the apprehension and detention of individuals listed in the Security Index and for the seizure of specified contraband. This plan is formally known as the 'Program for Apprehension and Detention of Persons Considered Potentially Dangerous to the National Defense and Public Safety of the United States.' "). For interesting accounts of the involvement—dating back to the 1970s—in COG planning of former Secretary of Defense Donald Rumsfeld and former Vice President Dick Cheney, see, for example, JAMES MANN, RISE OF THE VULCANS 138–45, 295–96 (2004); PETER DALE SCOTT, THE ROAD TO 9/11 183–87 (2007).

175. *See* FEMA MANUAL, *supra* note 172, at 111.

176. *See, e.g.*, Ambinder, *supra* note 172 ("The PEADs provide Cabinet secretaries, White House aides, and other senior officials with what amount to checklists: Have you called here? Have you waited for 'x' amount of time? Are you sure that FEMA hasn't done 'y'? After they answer the questions, the checklists then empower the officials to temporarily assume certain presidential authority to make sure that the government can function. The directives even spell out what happens if someone lower in the line of succession takes advantage of uncertainty to assume presidential authority. The documents are written, essentially, to deal with possible coups d'état.").

the significant expansions of presidential power during the past decade.

The history of COG planning and PEADs exhibits two major trends: first, consistency over time in the severe limitations of liberty that the documents purport to authorize; and second, an increase over time in the number and nature of circumstances in which federal officials deem it appropriate to significantly curtail civil rights. The Eisenhower administration "commissioned executive agencies to develop continuity measures [COG]—the means by which a fragmented federal government could begin to exercise authority over a devastated nation" after a nuclear attack.[177] Such plans included establishing alternate locations to carry out federal functions[178] and even creating new federal agencies, such as the Office of Censorship, National Housing Agency, and National Manpower Agency.[179]

Although modern-era PEADs are generally unavailable to the public,[180] numerous recently released Federal Bureau of Investigation (FBI) memoranda that describe these documents indicate that these plans have included unilateral suspension of habeas corpus by the Executive Branch,[181] martial law,[182] apprehension and detention of "subversive" individuals listed in a government "Security Index,"[183] and restrictions on travel, including the power to invalidate

177. *See* Conaty, *supra* note 174, at 633.

178. *See* A.H. BELMONT, MEMORANDUM TO L.V. BOARDMAN ON DEFENSE PLANS 1 (1958), *available at* http://www.governmentattic.org/4docs/FBI-Presid-Emerg-Action-Docs_1958-1979.pdf (stating that "initial [PEADs] approved by the President were available for inclusion in our personal 'Emergency Kit.' Also, that additional copies for pre-positioning at our site would be provided upon verification of secure storage facilities at [the FBI's relocation site] . . . ."); *see also* David S. Rotenstein, *The Undisclosed Location Disclosed: Continuity of Government Sites as Recent Past Resources*, http://blog.historian4hire.net/2010/07/15/coldwarsites/#_edn9 (last updated Aug. 22, 2011).

179. *See* Conaty, *supra* note 174, at 637–38.

180. I was unable to locate the exact text of any PEADs. *Cf. id.* at 636 (noting the author was likewise unable to locate the text of PEADs). An inquiry to the Reagan Library revealed that they are still classified.

181. *See, e.g.*, MEMORANDUM TO W.C. SULLIVAN ON PRESIDENTIAL EMERGENCY ACTION DOCUMENTS (1967), *available at* http://www.governmentattic.org/4docs/FBI-Presid-Emerg-Action-Docs_1958-1979.pdf. The Constitution explicitly reserves the power to suspend the writ of habeas corpus solely to Congress. *See* U.S. CONST. art I, § 9 (providing, among Congress's enumerated powers, that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it"); *id.* art. II (containing no provision for presidential suspension of habeas corpus). For an extensive discussion of President Lincoln's efforts to suspend habeas corpus during the American Civil War, see, for example, CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP 223–39 (1948).

182. *See, e.g.*, MEMORANDUM FROM W.O. CREGG TO L'ALLIER ON DEFENSE PLANS 2 (1961), *available at* http://www.governmentattic.org/4docs/FBI-Presid-Emerg-Action-Docs_1958-1979.pdf.

183. *See* Hobson v. Brennan, 646 F. Supp. 884, 896 (D.D.C. 1986).

the passports of U.S. citizens attempting to leave the country.[184] A recent analysis of declassified Eisenhower Administration documents concluded that "[t]here is no indication that these papers were examined or approved by either branch of Congress or the federal courts."[185] The only mechanism for legal review of these documents appears to have been a directive to agencies to "consult with the President's Special Counsel . . . [i]n the case of those Action Papers which are of an extremely sensitive nature."[186]

PEADs drafted during the Eisenhower years that pose troubling implications for constitutional rights apparently still exist.[187] A 1978 FBI memorandum provides a remarkable summary of several PEADs:

> PEAD 17 authorizes the Secretary of State to seize property. PEAD 20 is an Executive Order directing the Secretary of Defense to restore and maintain law and order when it has broken down. PEAD 21 is an Executive Order providing for a temporary suspension of the privilege of the Writ of Habeas Corpus.
>
> . . .
>
> PEAD 18 is a proclamation delegating to the Attorney General the authority to prescribe more stringent documentary requirements for citizens and aliens entering or leaving the United States. It . . . in effect places authority in both the Attorney General and the Secretary of State to regulate the flow of persons into and out of the country.[188]

The circumstances under which these plans would be executed expanded over time to include events other than nuclear warfare. For example, an April 1968 Johnson Administration FBI memorandum recommended implementing a "Priority Apprehension Program based on dangerousness of individuals on SI"—the government's Security Index—and noted that the government had "recently amended [its] definition of a dangerous person in new

184. *See, e.g.*, F.J. CASSIDY, MEMORANDUM T. W. LEAVITT ON FEDERAL EMERGENCY PLAN D (1976), *available at* http://www.governmentattic.org/4docs/FBI-Presid-Emerg-Action-Docs_1958-1979.pdf.

185. Conaty, *supra* note 174, at 636.

186. *Id.* (internal quotation marks omitted).

187. *See, e.g.*, text accompanying notes 187–212; MEMORANDUM TO W.O CREGAR ON PRESIDENTIAL EMERGENCY ACTION DOCUMENTS (BUPLANS) (1978), *available at* http://www.governmentattic.org/4docs/FBI-Presid-Emerg-Action-Docs_1958-1979.pdf.

188. *See* MEMORANDUM TO W.O. CREGAR, *supra* note 187.

Presidential Emergency Action Document 6, broadening it to include terrorists or persons who would interfere with Government operation and defense effort [sic]."[189] The memorandum implied that the Index and detention program were widely applicable to a variety of emergencies: "The Security Index contains names of individuals who should be considered for immediate apprehension and detention *in the event of a national emergency* in order to safeguard the internal security of the United States by preventing sabotage, espionage, and insurrection. The list now consists of over 10,000 names."[190] The Nixon Administration continued this effort, in great part through the efforts of James McCord, an Army officer and Watergate burglar.[191]

There appear to be no publicly available memoranda describing PEADs that are more recent than 1979. News sources and Congressional testimony, however, indicate that planning in a similar vein occurred throughout the Reagan years. A remarkable exchange between Representatives Jack Brooks (D-TX), Daniel Inouye (D-HI), and Iran-Contra conspirator Col. Oliver North during the 1987 Iran-Contra hearings illustrates this ongoing planning:

> REP. BROOKS: Colonel North, in your work at the NSC [National Security Council], were you not assigned, at one time, to work on plans for the continuity of government in the event of a major disaster? . . .
>
> SEN. [DANIEL] INOUYE: I believe that question touches upon a highly sensitive and classified area so may I request that you not touch upon that, sir?
>
> REP. BROOKS: I was particularly concerned, Mr. Chairman, because I read in Miami papers, and several others, that there

189. Hobson v. Brennan, 646 F. Supp. 884, 896 (D.D.C. 1986) (reproducing an FBI memorandum to W.C. Sullivan from C.D. Brennan entitled "Program for Apprehension and Detention of Persons Considered Potentially Dangerous to the National Defense and Public Safety of the United States (DETPRO)").

190. *Id.* at 897 (emphasis added).

191. *See* CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT'S MEN 23 (1974) (cited in Peter Dale Scott, *The Doomsday Project and Deep Events*, ASIA-PACIFIC J., vol. 9, no. 2, Nov. 21, 2011) (noting that Watergate burglar and Air Force Reserve Lieutenant Colonel James McCord was assigned to the Office of Emergency Preparedness, the mission of which "was to draw up lists of radicals and to help develop contingency plans for censorship of the news media and U.S. mail in time of war"); *see also, e.g.*, DAVID F. KRUGLER, THIS IS ONLY A TEST: HOW WASHINGTON, D.C. PREPARED FOR NUCLEAR WAR 184 (2006) ("Soon, the [D.C. Office of Civil Defense (against nuclear attack)] was being recast as the Office of Emergency Preparedness. Its major duties were now readiness for natural disasters and crowd control for parades and demonstrations.").

> had been a plan developed by that same agency, a contingency plan in the event of emergency, that would suspend the American constitution. And I was deeply concerned about it and wondered if that was the area in which he had worked. I believe that it was and I wanted to get his confirmation.[192]

Representative Brooks was referring to a *Miami Herald* report that Col. North and FEMA developed a secret contingency plan that called for

> suspension of the Constitution, turning control of the United States over to FEMA, appointing military commanders to run state and local governments, and declaring martial law during a national crisis. The plan did not define national crisis, but it was understood to be nuclear war, violent and widespread internal dissent or national opposition against a military invasion abroad.[193]

A 1991 CNN investigative report gave further details of the Reagan administration's COG planning.[194] The documentary revealed that plans drafted under the direction of then-Vice President George H.W. Bush included a separate line of succession to the presidency that was not only unknown to Congress, but conflicted with the line of succession provided in the Constitution and statutory law.[195] This "Presidential Successor Support System" purportedly included, at one point or another, Howard Baker, a White House Chief of Staff under Reagan; Richard Helms, the former director of the Central Intelligence Agency (CIA); and Jean Kirkpatrick, the UN Ambassador—none of whom were in the constitutional or statutorily prescribed line of succession.[196]

Publicly available information shows that the Clinton, George W. Bush, and Obama Administrations have maintained preexisting

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192. Jasonmacs, *Jack Brooks Questions Oliver North*, DAILYMOTION (Jan. 16, 2007), http://www.dailymotion.com/video/xzwj6_jack-brooks-questions-oliver-north_news (author transcript of user-posted recording of hearing); *see also* Janet Cawley & Christopher Drew, *Probers Ask North About Crisis Plan*, CHI. TRIB. (July 14, 1987), http://articles.chicagotribune.com/1987-07-14/news/8702210462_1_opponents-of-contra-aid-covert-policy-john-poindexter (reporting on the exchange between Brooks and North). Following the above-quoted exchange, Inouye suggested that the matter be discussed in an executive session, *see* Jasonmacs, *infra*, but I have been unable to locate evidence indicating that this session took place.

193. Alfonso Chardy, *Reagan Aides and the 'Secret' Government*, MIAMI HERALD (July 5, 1987), at 15A.

194. *See CNN Special Assignment: Doomsday Government* (CNN television broadcast Nov. 17, 1991) (transcript of recording available through LexisNexis Academic).

195. *See id.*

196. *See id.*

COG plans and PEADs or developed new ones.[197] Minutes of a 2004 meeting of the Homeland Security Council Deputies Committee indicate that the Deputies committed to

> advise their own Department and Agency general counsels to work with [the Homeland Security Council's] HSC's Office of General Counsel and the White House Counsel's Office to:
>
> a. Update those Presidential Emergency Action Documents (PEADs) assigned to the Federal Emergency Management Agency (FEMA) and DOJ's Office of Legal Counsel (OLC) to their respective Department or Agency; and
>
> b. Compile or update individual Department and Agency compilations of Secretarial emergency authorities.[198]

Evidence for the persistence of PEADs is also seen in the FEMA Manual.[199] U.S. military documents indicate that FEMA's National Preparedness Directorate develops PEADs,[200] which are currently retained by FEMA "permanent[ly,]" until "superseded or obsolete."[201]

At least some of these plans appear to contemplate executive usurpation of broad powers and curtailment of individual rights to the same extent as in the Eisenhower-era plans. *National Journal* reported in 2011 that current "[c]lassified Executive Orders spell out a range of powers the president can assume in the event of an incident of national significance. (Since 1958, one of these documents has provided for the suspension of habeas corpus for citizens on 'security' lists at the time of a crisis.)"[202] Lengthy investigative articles have indicated that the federal government, as of the end of the George W. Bush administration, still maintained a database of

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197. *See* PRESIDENT'S COMM. ON CRITICAL INFRASTRUCTURE PROTECTION, CRITICAL FOUNDATIONS: PROTECTING AMERICA'S INFRASTRUCTURES B-17 (1997), *available at* www.fas.org/sgp/library/pccip.pdf (pertaining to the Clinton Administration); MINUTES, HSC DEPUTIES COMMITTEEE MEETING SUMMARY OF CONCLUSIONS (May 6, 2004), *available at* http://library.rumsfeld.com/doclib/sp/3135/2004-05-12%20to%20Jim%20Haynes%20re%20Fingerprints%20Memo%20Attachment.pdf#search="pead" (pertaining to the George W. Bush Administration); Ambinder, *supra* note 172 (pertaining to the Obama Administration).

198. MINUTES, s*upra* note 197. These are attached to a memorandum from former Secretary of Defense Donald Rumsfeld to Jim Haynes, then General Counsel of the Department of Defense, and former Deputy Secretary of Defense Paul Wolfowitz. *See id.*

199. FEMA, *supra* note 172, at 111.

200. *See* U.S. AIR FORCE AIR MOBILITY COMMAND, DIRECTOR OF MOBILITY FORCES (DM4) HANDBOOK 42 (2011) (on file with author).

201. FEMA, *supra* note 172, at 111.

202. Ambinder, *supra* note 172.

putatively dangerous persons to be detained without charge during an emergency.[203] The database is apparently known as "Main Core," and is reported to contain eight million names.[204]

At least one person who was implicated in the development of PEADs has attested to their continued existence. Colonel Oliver North, who was reported to have been involved in COG planning in the 1980s,[205] publicly claimed in 2010 that a PEAD exists "to embargo . . . any company that cooperates with an enemy."[206] He also claimed in 2005 that "neither [President Bush] nor any other [president] needs more 'legal' or legislated authority to send U.S. troops into the teeth of a disaster. Every President's aides carry PEADs . . . giving the Chief Executive broad authorities in the midst of a declared national emergency."[207] Bolstering North's claim, the Department of Homeland Security lists among its "target capabilities" for emergency response the power to "[i]mplement plans for Emergency proclamations, martial law, curfew declarations, and other legal issues."[208]

Post-9/11 circumstances, moreover, increase the likelihood that PEADs will be utilized. COG plans were activated for the first time in U.S. history after the 9/11 attacks.[209] These plans were converted from a temporary measure to an "indefinite precaution"—a "permanent feature of 'the new reality, based on what the threat looks like,'" with "high-ranking officials representing their departments . . . rotating in and out of the assignment at one of two fortified

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203. *See* Christopher Ketcham, *The Last Roundup*, 2 RADAR 4, issue 10, 80–88 (May/June 2008), *available at* http://www.christopherketcham.com%2Fwp-content%2Fuploads%2F2010%2F02%2FThe%2520Last%2520Roundup%2C%2520Radar%2520Magazine.pdf; Tim Shorrock, *Exposing Bush's Historic Abuse of Power*, SALON (July 23, 2008, 8:00 AM), http://www.salon.com/2008/07/23/new_churchcomm/.

204. *See* Ketcham, *supra* note 203; Shorrock, *supra* note 203.

205. See *supra* notes 192–193 and accompanying text.

206. *FOX Hannity*, (Fox News Network television broadcast Apr. 29, 2010).

207. Oliver North, *Send in the Marines*, MILITARY.COM (Sept. 29, 2005), http://www.military.com/opinion/0,,77908,00.html. North added, "In May of 1992, President George H. W. Bush issued such an order at the request of [the] California governor during the 'Rodney King riots' in Los Angeles. His Executive Order 12804 suspended the proscriptions of Posse Comitatus to allow Army and Marine units to 'restore law and order.'" *Id.*

208. *See Target Capabilities List: A Companion to the National Preparedness Guidelines*, U.S. DEP'T OF HOMELAND SECURITY (Sept. 2007), https://www.fema.gov/txt/government/training/tcl.txt (also available at http://web.archive.org/web/20100603040544/https://www.fema.gov/txt/government/training/tcl.txt).

209. *See* NAT'L COMMISSION ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 38, 326, 555 n.9 (2004); Barton Gellman & Susan Schmidt, *Shadow Government Is at Work in Secret*, WASH. POST, Mar. 1, 2002, http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060900891.html.

locations along the East Coast," reportedly to ensure the continued functioning of government in the event of a catastrophe.[210]

The contemporary COG framework, as far as can be determined from publicly available information, lacks the sharp demarcation between normal government functioning and emergency COG functioning via PEADs. Today, activating COG plans does not trigger an abrupt transition to a sharply different federal structure. Instead, government functions transition gradually into COG functioning depending on official perceptions of the probability and severity of an emergency.[211] Federal agencies transfer personnel and authority to alternate locations as the Continuity of Government Readiness Conditions (COGCON) "readiness level" changes in response "to escalating threat levels or actual emergencies."[212]

Because actively functioning parallel governmental structures meant to trigger PEADs are institutionalized within the normal structure of government, the threshold for deploying PEADs necessarily becomes lower. Furthermore, as COG functions become imbricated within non-emergency government procedures, COG will likely become regarded as a garden-variety feature of the administrative state, setting the stage for executive assertion of even more expansive emergency powers in the future. The normalization of COG, in other words, might well function as a one-way ratchet toward even more expansive executive powers. The result is an increased likelihood that PEADs will be deployed, and that those deployed will cause profound, lasting transformations to American democracy—transformations of questionable legality.

IV. NATIONAL EMERGENCIES, THE MILITARY, AND THE "GLOBAL WAR ON TERROR"

Presidential declarations of national emergency furnish the President with broad military and foreign affairs powers. This Part focuses on a small group of those powers, which authorize the Executive to call reserve troops to service and expand the armed forces beyond statutorily prescribed limits. These authorities, though little discussed, are among the primary bases for the

210. Gellman & Schmidt, *supra* note 209.

211. *See* U.S. DEP'T OF HOMELAND SECURITY, FEDERAL CONTINUITY DIRECTIVE 1 n.3 (2008), *available at* http://www.fema.gov/pdf/about/offices/fcd1.pdf.

212. *Id.* at 4. COGCON levels range from one to four, with Level One being the most urgent. This scheme resembles the Defense Readiness Condition (DEFCON) system maintained by the U.S. Department of Defense. *See* U.S. ARMY CORPS OF ENG'RS, EMERGENCY ACTIONS PLAN 4-5 (2001), *available at* http://www.sas.usace.army.mil/em/CESAS500112.pdf.

"Global War on Terror" (GWOT). In short, the GWOT is being conducted in large part on the basis of emergency decrees. (The analysis below brackets the interesting question of whether the contemporary GWOT actually constitutes an armed conflict under domestic and international law.)

The GWOT transcends the temporal and geographic limits we traditionally associate with armed conflicts. The Pentagon's February 2013 casualty report for Operation Enduring Freedom (OEF)—the military campaign most commonly associated with the "global war on terror"—includes U.S. military and civilian casualties in sixteen countries on four continents.[213] In 2012, members of the U.S. Special Forces were deployed in seventy-nine countries to combat suspected terrorists,[214] up from sixty in 2009.[215] The lack of temporal and geographic boundaries on how the GWOT is fought is succinctly expressed in an Executive Order signed by President Bush to establish "Global War on Terrorism Expeditionary and Service Medals."[216] The Executive Order specifies that the medals "shall be awarded to members of the Armed Forces of the United States who serve or have served in military expeditions to combat terrorism, as defined by such regulations, on or after September 11, 2001, and before a terminal date to be prescribed by the Secretary of Defense."[217] The "war," according to this Order, consists of all terrorism-related military operations. Its endpoint is not defined by a concrete military achievement; rather, it will end when the Executive Branch says it has ended.

Most legal commentators assume that the struggle against al Qaeda has largely been waged on the basis of the 2001 congressional Authorization for Use of Military Force (AUMF).[218] But another central element of this unbounded so-called war is a similarly

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213. *See* U.S. DEP'T OF DEFENSE, CASUALTY STATUS REPORT (Feb. 14, 2013), http://www.defense.gov/news/casualty.pdf. The countries are Afghanistan, Cuba (Guantanamo Bay), Djibouti, Eritrea, Ethiopia, Jordan, Kenya, Kyrgyzstan, Pakistan, Philippines, Seychelles, Sudan, Tajikistan, Turkey, Uzbekistan, and Yemen. *Id.*

214. *See* Pam Benson, *Special Operations Forces Risk Being Overused* (July 27, 2012), http://security.blogs.cnn.com/2012/07/27/special-operations-forces-risk-being-overused-misused-former-chief-says/.

215. *See* Karen DeYoung & Greg Jaffe, *U.S. 'Secret War' Expands Globally as Special Operations Forces Take Larger Role*, WASH. POST (June 4, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/06/03/AR2010060304965.html.

216. *See* Exec. Order No. 13,289, 3 C.F.R. 191–92 (2004).

217. *See id.* §§ 1–2.

218. *See, e.g.*, Thomas P. Crocker, *Presidential Power and Constitutional Responsibility*, 52 B.C. L. REV. 1551–52 (2011) ("In the days following the attacks on September 11, Congress granted the President authority [in the AUMF]. With this grant of power, President George W. Bush subsequently undertook a number of actions."); Authorization for Use of Military Force § 2(a), 50 U.S.C. § 1541 note (2006).

unbounded national emergency declared by the President.[219] This declaration has never been reviewed by Congress and has been renewed annually by Presidents Bush and Obama since 2001.[220] As this Part will discuss, Proclamation 7463, declared in the immediate aftermath of 9/11, has served as the primary authorization for the Executive to call hundreds of thousands of reservists into indefinite active service, extend the tours of duty of thousands of military personnel past contractually agreed upon termination dates, and waive statutory limitations on the size of the armed forces.[221]

A. Proclamation 7463 and the Organization of "Overseas Contingency Operations"

This section is intended to show that various Executive agencies have understood that the national emergency declared after 9/11 has a crucial role to play in the struggle against al Qaeda. The next section (Section B) details how the declaration and continuation of this emergency has enabled the Executive to order Americans to active duty in the armed forces without a congressional authorization for the use of force, and to use a "back-door draft" to expand the armed forces by unilaterally extending the terms of service of active-duty personnel beyond their agreed-upon date of termination.

The terminology the Executive Branch has used over the past twelve years to describe global combat operations against suspected terrorists is diverse and evolving. The paradigmatic terms were

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219. *See* Proclamation No. 7463, 3 C.F.R. 263 (2002), *available at* http://www.gpo.gov/fdsys/pkg/CFR-2002-title3-vol1/pdf/CFR-2002-title3-vol1-proc7463.pdf.

220. *See* H.R. DOC. NO. 107-261 (2002); Notice of September 10, 2003, 68 Fed. Reg. 53,665; Notice of September 10, 2004, 69 Fed. Reg. 55,313; Notice of September 8, 2005, 70 Fed. Reg. 54,229; Notice of September 5, 2006, 71 Fed. Reg. 52,733; Notice of September 12, 2007, 72 Fed. Reg. 52,465; Notice of August 28, 2008, 73 Fed. Reg. 51,211; Notice of September 10, 2009, 74 Fed. Reg. 46,883; Notice of September 10, 2010, 75 Fed. Reg. 55,661; Notice of September 9, 2011, 76 Fed. Reg. 56,633, Notice of September 11, 2012, 77 Fed. Reg. 56,517 (all entitled "Continuation of the National Emergency with Respect to Certain Terrorist Attacks"). It is clear that Congress does not review the emergency status because each renewal by the President is a "continuation." If Congress had reviewed the emergency every six months, as the plain language of the statute directs, Congress would be the body continuing or discontinuing the emergency, not the President.

221. *See infra* Part IV.B.

"War on Terror"[222] and its variants, including "Global War on Terrorism"[223] (GWOT) and the "Long War."[224] Although these designations still see some use in official circles,[225] and have widespread popular valence, the Obama Administration has now officially designated antiterrorism operations abroad as "Overseas Contingency Operations."[226] The shift in terminology belies a crucial continuity between the two administrations: the state of national emergency proclaimed by President Bush following the 9/11 attacks[227] has been renewed every year to date by both Presidents.[228]

President George W. Bush issued Proclamation 7463, "Declaration of National Emergency by Reason of Certain Terrorist Attacks," on September 14, 2001.[229] This Proclamation, which ushered in a wide-ranging national emergency,[230] was made pursuant to the NEA and listed ten statutory provisions containing standby emergency authorities that the President intended to utilize.[231] These provisions have played, and continue to play, a pivotal role in facilitating the conduct of U.S. military operations in Afghanistan and Iraq.[232] This national emergency remains in effect, leaving the Executive authorities granted by these provisions in effect as well.[233]

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222. *E.g.*, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2005 1 (2005) ("America will prevail in the War on Terror by defeating terrorists and their supporters.").

223. *E.g.*, DAVID S. CHU, DEP'T OF DEFENSE CIVILIAN PERSONNEL MANAGEMENT SERV., MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS ON SECRETARY OF DEFENSE MEDAL FOR THE GLOBAL WAR ON TERRORISM, (2007), *available at* http://www.cpms.osd.mil/ASSETS/0A1E43DB055F4565B3B1AC5C9EA9563A/Aug%20Announcement%20Memo.pdf.

224. *E.g.*, Bill Sullivan, *Fighting the Long War—Military Strategy for the War on Terrorism*, AIR UNIV. (Jan. 12, 2006), http://www.au.af.mil/au/awc/awcgate/jcs/jcslongwar_12jan06_j5.pdf.

225. *See, e.g., War on Terror Exhibit*, FEDERAL BUREAU OF INVESTIGATION (Oct. 14, 2011), http://www.fbi.gov/news/podcasts/thisweek/war-on-terror-exhibit/view.

226. *See, e.g.*, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2012 137–40 (2012); Scott Wilson & Al Kamen, '*Global War on Terror' Is Given New Name*, WASH. POST (Mar. 25, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818.html. The Obama Administration has also termed the general effort to combat terrorism domestically and internationally as "Countering Violent Extremism." *See* Mark Hosenball, *Obama's 'Intelligence Czar' Plugs a New Counterterrorism Catchphrase*, THE DAILY BEAST (Apr. 6, 2010), http://www.thedailybeast.com/newsweek/blogs/declassified/2010/04/06/obama-s-intelligence-czar-plugs-a-new-counterterrorism-catchphrase.html.

227. *See infra* Part IV.B–C.

228. *See supra* notes 220–221 and accompanying text.

229. *See* Proclamation No. 3 C.F.R. 263 (2002).

230. *See infra* Part IV.B–C.

231. *See id.*

232. *See infra* notes 234–254 and accompanying text.

233. *See* Notice, Continuation of the National Emergency with Respect to Certain Terrorist Attacks, 76 Fed. Reg. 56,633 (Sept. 9, 2011).

One provision that the Proclamation invoked was 10 U.S.C. § 101(a)(13), which defines a "contingency operation."[234] A "contingency operation," unlike "War on Terror," has statutory significance:

> The term "contingency operation" means a military operation that—
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> (A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or
>
> (B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of this title, chapter 15 of this title, or any other provision of law . . . during a war or *during a national emergency declared by the President or Congress.*[235]

The Proclamation, together with an Executive Order made pursuant to the Proclamation and issued the same day,[236] called members of the Ready Reserve to serve under § 12302[237] in OEF. The Proclamation thus satisfied the criteria under subpart (B) for the existence of a contingency operation. That national emergency served, and still serves, as the source of authority for calling reserve components of the military to active duty in OEF,[238] which comprises ongoing U.S. military activities in combating suspected terrorists in Afghanistan and numerous other nations throughout the world.[239] This Proclamation and Executive Order also serve as the only bases for ordering troops to active duty in the other prominent U.S. military operations of the past decade: Operation Iraqi Freedom (OIF) (the invasion and occupation of Iraq beginning in March 2003), Operation New Dawn (OND) (the continuing U.S.

234. *See* Proclamation No. 7463, 3 C.F.R. 263 (2002); 10 U.S.C.A. § 101(a)(13)(A)–(B) (West 2012).

235. *See id.* (emphasis added).

236. *See* Exec. Order 13,223, 3 C.F.R. 785–86 (2002).

237. 10 U.S.C. § 12302 (2006).

238. *See* Exec. Order 13,223, 3 C.F.R. 785–86 (2002).

239. U.S. DEP'T OF DEFENSE *supra* note 213.

military mission in Iraq), and Operation Noble Eagle (ONE) (domestic GWOT-related military exercises).[240] The Army has stated:

> Operations Noble Eagle (ONE), OEF and OIF fall under one involuntary callup action, Executive Order 13223, September 14, 2001, better known as the Global War on Terrorism (GWOT) contingency/conflict. . . . ONE, OEF, OIF, and Operation New Dawn (OND) fall under one contingency, the GWOT.[241]

A 2003 memorandum from Secretary of Defense Donald Rumsfeld to President Bush provides even more telling evidence of the central role Proclamation 7463 plays in the War on Terror.[242] The memorandum requests that the President renew the NEA and provides draft language for the President to effectuate the renewal.[243] Rumsfeld stressed the importance to the continuation of the GWOT of renewing the national emergency:

> On September 14, 2001, you declared a national emergency in Proclamation 7463. Pursuant to that declaration, you have issued Executive Orders . . . . These Executive Orders have been essential in our war on terrorism . . . . Continued access to members of our Reserve components, use of the military personnel authorities, and exercise of the emergency construction authority delegated in the Executive Orders cited above, will be vital after September 14, 2003, the second anniversary date of Proclamation 7463.[244]

High-ranking Executive Branch officials thus have clearly viewed the state of national emergency declared in 2001 to be central to the propagation of the War on Terror.

In light of these Proclamations, the vigorous debate over whether the Iraq War was part of the GWOT seems moot. According to the

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240. *See Armed Forces Reserve Medal*, U.S. ARMY HUMAN RESOURCES COMMAND WEBSITE (last updated Feb. 28, 2012), https://www.hrc.army.mil/TAGD/Armed%20Forces%20Reserve%20Medal; *see also* Richard J. Lavigne, *Title X v. Title IV: A Mobilization Culture*, 54 USCG RESERVIST 7-01.

241. *See Armed Forces Reserve Medal*, *supra* note 240 (explaining why a soldier was only entitled to one "M-Device Reservist Medal" for serving in both OIF and OEF) (emphasis added).

242. *See* DONALD RUMSFELD, MEMORANDUM TO GEORGE W. BUSH ON EXTENSION OF THE DECLARATION OF NATIONAL EMERGENCY IN PROCLAMATION 7463 (2003), *available at* http://library.rumsfeld.com/doclib/sp/2991/2003-08-08%20to%20President%20George%20W%20Bush%20re%20Extension%20of%20Declaration%20of%20National%20Emergency%20in%20Proclamation%207463.pdf.

243. *See id.*

244. *Id.*

military, the national emergency declared by President Bush authorized the mobilization of the armed forces for all of the major conflicts of the last decade. Tellingly, these conflicts all fall under the single heading, "Overseas Contingency Operation," in the 2013 proposed military budget.[245] The federal government's conception of the GWOT seems unbounded not only in geographic and temporal scope, but also in its capacity to form the legal foundation of all major U.S. military operations, both domestically and throughout the world.

B. Involuntary Service in—and Expansion of—the Armed Forces

The traditional narrative offered to explain the legal basis for the military powers invoked by Presidents George W. Bush and Barack Obama following the 9/11 terrorist attacks focuses on the AUMF, passed one week after the horrific events of that day.[246] The AUMF provides "[t]hat the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons."[247]

Congress intended the AUMF to satisfy in advance the requirements of the War Powers Resolution (WPR),[248] which requires congressional authorization for the President's mobilization of troops into hostilities within sixty days after Congress receives notice of such an event.[249] Scholars, congressional representatives, and government officials hold that the AUMF is the source of executive authority to call up and deploy troops.[250] But significant actions,

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245. *See* OFFICE OF MGMT. AND BUDGET, EXEC. OFFICE OF THE PRESIDENT, OVERSEAS CONTINGENCY OPERATIONS, THE BUDGET FOR FISCAL YEAR 2013, at 92 (2013), *available at* http://www.whitehouse.gov/sites/default/files/omb/budget/fy2013/assets/overseas.pdf.

246. *See, e.g.*, Thomas P. Crocker, *Presidential Power and Constitutional Responsibility*, 52 B.C. L. REV. 1551–52 (2011) ("In the days following the attacks on September 11, Congress granted the President authority [in the AUMF]. With this grant of power, President George W. Bush subsequently undertook a number of actions."); Authorization for Use of Military Force § 2(a), 50 U.S.C. § 1541 note (2006); U.S. DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL QAI'DA OR AN ASSOCIATED FORCE 2 (undated), *available at* http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf (citing the AUMF as one basis of authority for senior administration officials to order the killing of American citizens suspected of engaging in terrorism).

247. Authorization for Use of Military Force § 2(a), 50 U.S.C. § 1541 note (2006).

248. *See id.* § 2(b).

249. *See* 50 U.S.C. § 1544(b) (2006).

250. *See supra* note 218 and accompanying text.

carried on by the Executive Branch without a congressional grant of authority, preceded the AUMF.

Simply by declaring a national emergency, the Executive Branch was able to order up to one million Americans to active duty in the U.S. armed forces. In Proclamation 7463, President Bush declared that he would use the authorities granted to him under 10 U.S.C. § 12302,[251] which gives the President authority to call up the Ready Reserve in a declared national emergency.[252] The Ready Reserve consists of approximately 1.08 million people,[253] and "is the primary manpower pool of the reserve components" of the entire military.[254] Activating executive authorities under § 12302 allowed the Secretary of Defense or his designee, "without the consent of the persons concerned," to order any unit or unassigned member to active duty for up to twenty-four consecutive months.[255] Although the statute limits the number of persons in involuntary active-duty service to one million,[256] the number of reservists that may be involuntarily called to active duty as a result of the Proclamation amount to nearly the entire strength of the Ready Reserve.[257]

The Proclamation not only permits the involuntary deployment of reservists, but also involuntary extension of their tours of duty—a process known as "stop loss"[258] or the "back-door draft."[259] During a national emergency, the President may "suspend any provision of law relating to promotion, retirement, or separation applicable to any active-duty member of the armed forces whom the President determines is essential to the national security of the United States."[260] Those members of the armed forces must serve in the military for the full twenty-four months specified in § 12302 or for another period determined by the President, whichever is earlier.[261]

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251. *See* Proclamation No. 7463, 3 C.F.R. 263 (2002).

252. *See* 10 U.S.C.A. § 12302(a)–(c) (West 2012).

253. *See* LAWRENCE KAPP, CONG. RESEARCH SERV., RL30802, RESERVE COMPONENT PERSONNEL ISSUES 4 (2012).

254. *Id.* at 1. The seven components of the military are the Army National Guard, the Army Reserve, the Navy Reserve, the Marine Corps Reserve, the Air National Guard, the Air Force Reserve, and the Coast Guard Reserve. *See id.* at 5.

255. *See* 10 U.S.C.A. § 12302(a) (West 2012).

256. *See id.* § 12302(c).

257. *See* KAPP, *supra* note 253, at 4.

258. *See* CHARLES A. HEMING, CONG. RESEARCH SERV., R40121, U.S. MILITARY STOP LOSS PROGRAM: KEY QUESTIONS AND ANSWERS 4 (2009).

259. *See, e.g.*, Cheryce M. Cryer, *Stop Loss and the Back-Door Draft: An Illumination of Government Contract Violations and Potential Allegations of Modern-Day Slavery*, 49 HOW. L.J. 853, 853 (2006).

260. See 10 U.S.C. § 12305 (2006) (a provision triggered by the national emergency declared after 9/11).

261. *See* 10 U.S.C.A. § 12305(b) (West 2012).

The stop-loss policy raises important due process concerns for service members compelled to serve for months beyond their anticipated termination of active duty.[262] Stop loss also puts additional strain on military families and has forced wounded soldiers back into active duty.[263] Strikingly, even though the Iraq War is officially over, "Reserve Component service members may still be ordered to active duty, with or without their consent, to support Operation New Dawn for up to 400 days . . . to provide flexibility for the Combatant Commander."[264]

V. RESTORING OVERSIGHT OVER DECLARED STATES OF EMERGENCY

A nation under thirty states of national emergency can hardly claim that emergency laws are the exception to—rather than the rule of—normal governance. Draft and operational directives that contemplate drastically curtailing individual freedoms, and appear not to have benefited from the participation or oversight of the legislative and judicial branches, undermine the conception of the United States as a nation governed primarily by laws and regulations passed according to predetermined, open, and constitutionally based procedures. Furthermore, since the NEA only provides for a single type of national emergency, each national emergency declared, whether about an issue of great or comparatively small importance to the survival of the nation, puts every available national emergency power at the disposal of the Executive, regardless of whether the powers are necessary to combat the declared emergency. In other words, the national emergency declared in response to the 9/11 attacks has the same legal effect as the national emergency declared relative to "persons undermining democratic processes or institutions in Zimbabwe": each allows the Executive to empoy any powers that the U.S. Code or Executive Orders authorize for use in a national emergency.

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262. *See, e.g.*, Evan Wooton, *Banging on the Back-Door Draft: The Constitutional Validity of Stop-Loss in the Military*, 47 WM. & MARY L. REV. 1061 *passim* (2005).

263. *See* George Maynard, *Troops' Suffering Compounded By Stop-Loss*, THE DAILY CAMPUS (last updated Jan. 18, 2010), http://www.dailycampus.com/2.7438/troops-suffering-compounded-by-stop-loss-1.1055580#.UBKhHqCbrKQ.

264. CLIFFORD M. STANLEY, UNDER SECRETARY OF DEFENSE, MEMORANDUM TO SECRETARIES OF THE MILITARY DEPARTMENTS (2011), *available at* http://www.armyg1.army.mil%2FMilitaryPersonnel%2FPPG%2FHyperlinks%2FAdobe%2520Files%2FMemorandum%2520for%2520Secretaries%2520of%2520the%2520Military%2520Departments.pdf.

Remedying this situation will require sustained efforts on several fronts, including the involvement of informed and passionately engaged U.S. residents. Three reforms are essential: revising the National Emergencies Act to provide for meaningful congressional oversight; ensuring congressional review of Presidential Emergency Action Documents; and establishing a bipartisan select committee to assess the scope of emergency powers available to the Executive today and to promote public dialogue. This Part addresses each of these proposals in turn.

A. Revisions to 50 U.S.C. § 1621

The following proposed revisions to the National Emergencies Act will accomplish three key objectives: force congressional review of declarations of national emergency through a funding mechanism; prevent the President from declaring an emergency substantially similar to one deactivated by Congress; and provide that no funds should be expended pursuant to presidential directives (including PEADs) that are not disclosed to Congress. These revisions will also help fulfill the intent of the Special Committee that drafted the legislation and the Congress that overwhelmingly approved it.

1. Revised Statute

Proposed revisions to the NEA are contained in the text below. I have tried to preserve the original statutory language where possible. Additions to the statute are underlined, and deleted portions are indicated by strike-though text.

(a) ~~With respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency. Such proclamation shall immediately be transmitted to the Congress and published in the Federal Register.~~ Any declaration of national emergency by the president, whether pursuant to an Act of Congress or a presidential directive, shall be immediately transmitted to the Congress and published in the Federal Register.
(b) Any provisions of law conferring powers and authorities to be exercised during a national emergency shall be effective and remain in effect—

(1) only when the President or his designee (in accordance with subsection (a) of this section), specifically declares a national emergency, and

(2) only in accordance with this chapter. No law enacted after September 14, 1976, shall supersede this subchapter unless it does so in specific terms, referring to this subchapter, and declaring that the new law supersedes the provisions of this subchapter.

(c) For purposes of this subchapter and any powers exercised pursuant to this subchapter—

(1) "national emergency" includes any emergency declared by the President, however denominated, except an emergency declared under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended.

(2) "presidential directives" include presidential determinations, memoranda, letters, notices, military orders, homeland security directives, emergency action documents, national continuity directives, executive orders, proclamations, and any similar documents that assert powers pursuant to a state of emergency.

2. Discussion

The proposed revised statute expands the definition of "national emergency" to comprise all relevant states of emergency contained in the U.S. Code. This change reflects the intent of the Senate Special Committee on the Termination of the National Emergency.[265] The revision also extends the regulatory authority of the National Emergencies Act to emergency powers contained in presidential directives.[266] Federal disaster relief to states and local communities under the Stafford Act[267] is exempt from the revised statute.[268]

Some might argue that exempting the Stafford Act offers a loophole for indefinite emergency powers. The Stafford Act, however, has a restrictive definition of "emergency" that does not invoke the

265. *See supra* text accompanying notes 58–60; § 1 of revised statute.

266. *See* § 2 of revised statute.

267. *See* Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974, Pub. L. 93-288, 88 Stat. 143 (codified as amended at 42 U.S.C. §§ 5121–5207). As an example, this Act was recently employed to provide disaster relief in numerous states following Hurricane Sandy. *See, e.g.*, *Hurricane Sandy: Stafford Act Emergency Declarations for 11 States*, U.S. DEP'T OF LABOR EMPLOYEE & TRAINING ADMIN., http://www.doleta.gov/usworkforce/whatsnew/eta_default.cfm?id=5860 (last updated Oct. 31, 2012).

268. *See* § 1 of revised statute.

more expansive powers previously described.[269] Federal action authorized under that Act is intended merely to supplement the efforts of state and local governments.[270] Obtaining congressional approval for federal assistance for every localized disaster might prove cumbersome, and emergencies declared under the Stafford Act have not led to indefinite assertions of broad presidential power.[271] Asserting such power on a national level on the basis of a localized natural disaster, moreover, might lack political legitimacy.

Others might argue that a congressional vote to terminate a national emergency will endanger U.S. treaty obligations. The United Nations Charter obligates U.N. member states to give effect—through such means as "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations"—to economic sanctions imposed by the U.N. Security Council.[272] Presidents appear to have sometimes declared national emergencies in part to implement sanctions imposed by the Security Council.[273]

The United Nations Participation Act (UNPA), however, appears to provide sufficient authority to implement economic sanctions imposed by the U.N. Security Council under Article 41 of the U.N. Charter[274]—a fact that has been recognized by the U.S. Treasury

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269. The NEA requires that the exercise of emergency powers is authorized during a national emergency "only when the President . . . specifically declares a national emergency, and (2) only in accordance with this chapter." 50 U.S.C. § 1621(b) (2006). The NEA further provides, "No law enacted after September 14, 1976, shall supersede this subchapter unless it does so in specific terms, referring to this subchapter, and declaring that the new law supersedes the provisions of this subchapter." *Id.* Nothing in the Stafford Act matches the description of this latter provision.

270. An emergency under the Stafford Act "means any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States." 42 U.S.C.A. § 5122 (2006).

271. No national emergency has ever been declared under the Stafford Act. *See supra* Part III, Table 1.

272. *See* U.N. Charter arts. 25, 41.

273. *See* Exec. Order No. 13,396, 3 C.F.R. 209–10 (2007) (implementing a 2004 Security Council resolution that imposed sanctions on Côte d'Ivoire); Exec. Order No. 12,725, 55 Fed. Reg. 33,091 (Aug. 9, 1990) (implementing Security Council sanctions on Iraq following Iraq's invasion of Kuwait).

274. *See* 22 U.S.C.A. § 287c(a) (West 2012) ("Notwithstanding the provisions of any other law, whenever the United States is called upon by the Security Council to apply measures which said Council has decided, pursuant to article 41 of said Charter, are to be employed to give effect to its decisions under said Charter, the President may, to the extent necessary to apply such measures, through any agency which he may designate, and under such orders, rules, and regulations as may be prescribed by him, investigate, regulate, or prohibit, in whole or in part, economic relations or rail, sea, air, postal, telegraphic, radio, and other means of communication between any foreign country or any national thereof or any person

Department.[275] This includes the ability of the President to block access to property pursuant to a resolution of the Security Council.[276] Provisions of the UNPA do not require a declaration of national emergency in order to become effective.[277] Executive departments also sometimes implement Security Council resolutions without prior presidential action.[278] In short, the Executive has sufficient means at its disposal to impose Security Council sanctions without activating sweeping emergency powers by declaring a national emergency.[279]

B. Revisions to 50 U.S.C. § 1622

1. Revised Statute

(a) TERMINATION METHODS

Any national emergency declared by the President in accordance with this subchapter, and any national emergency the President or officials in the Executive Branch assert is otherwise in force, shall terminate if—

(1) there is enacted into law a joint resolution terminating the emergency; or

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therein and the United States or any person subject to the jurisdiction thereof, or involving any property subject to the jurisdiction of the United States.").

275. *See* Willam B. Hoffman, Chief Counsel, Office of Foreign Assets Control, U.S. Dep't of the Treasury, *How to Approach a New Office of Foreign Assets Control Sanctions Program*, 27 STETSON L. REV. 1413 (1998) ("UNPA provides domestic implementation authority for mandatory provisions of U.N. Security Council resolutions under chapter 41 of the United Nations Charter.").

276. *See id.*

277. *See* 22 U.S.C.A. §§ 287–287c(a) (West 2012).

278. *See Embargoed Persons and Countries*, U.S. BUREAU OF INDUS. AND SECURITY, http://www.bis.doc.gov/policiesandregulations/05forpolcontrols/chap5_embargo.htm (last visited Feb. 12, 2013) (noting that the day after a 2004 Security Council embargo on arms exports to Côte d'Ivoire, the U.S. Department of State issued guidance to arms manufacturers stating that it would not approve licenses for exports of defense articles to Côte d'Ivoire). The national emergency regarding Côte d'Ivoire was not declared until 2006. *See* Exec. Order No. 13,396, 3 C.F.R. 209–10 (2007).

279. Even if the IEEPA were necessary to implement a Security Council resolution, the NEA's requirement that Congress vote every six months on whether to terminate a national emergency is lawful and should take precedence over any contrary provision in the U.N. Charter. Under traditional U.S. principles of statutory construction, a duly enacted federal statute trumps contrary provisions of an earlier treaty. *See, e.g.*, Natural Resources Defense Council v. Envtl. Protection Agency, 464 F.3d 1, 12 (2006). The U.N. Charter was signed in 1945. *See Introductory Note*, UNITED NATIONS, http://www.un.org/en/documents/charter/intro.shtml (last visited Feb. 12, 2013). This means that congressional votes to terminate a national emergency according to the 1976 NEA or any future reformed version of the statute would be lawful.

(2) the President issues a proclamation terminating the emergency; or

(3) Congress does not enact a joint resolution to continue the emergency within 60 days following a declaration of national emergency, or Congress does not enact a joint resolution to continue the emergency within 60 days of the most recent joint resolution continuing the emergency, whichever is later.

Any national emergency declared by the President shall be terminated on the date specified in any joint resolution referred to in clause (1); ~~or~~ on the date specified in a proclamation by the President terminating the emergency as provided in clause (2) of this subsection; or on the date specified in clause (3) of this subsection, whichever date is earlier. Any powers or authorities exercised by reason of said emergency shall cease to be exercised after such specified date, except that such termination shall not affect—

(A) any action taken or proceeding pending not finally concluded or determined on such date;

(B) any action or proceeding based on any act committed prior to such date; or

(C) any rights or duties that matured or penalties that were incurred prior to such date.

~~(b) TERMINATION REVIEW OF NATIONAL EMERGENCIES BY CONGRESS~~

~~Not later than six months after a national emergency is declared, and not later than the end of each six-month period thereafter that such emergency continues, each House of Congress shall meet to consider a vote on a joint resolution to determine whether that emergency shall be terminated.~~

(b) EXPENDITURES

No funds may be appropriated or expended pursuant to a national emergency that has been terminated, except as provided in clause (3) of subsection (a) of this section.

(c) EFFECTIVENESS OF TERMINATION

The President may not declare, and no funds may be expended pursuant to, an emergency that is based on a substantially similar core of operative fact as a terminated emergency within six months of the emergency's termination.

2. Discussion

These revisions require Congress to pass a joint resolution every sixty days to continue a national emergency.[280] This prevents the

280. *See* 50 U.S.C. § 1622(a)(3) of revised statute.

continuation of indefinite emergencies. Some might view this period of review as too short, particularly in light of the six-month period of review the statute previously specified. Minor modifications to this time period would probably not impair the statute's effectiveness in accomplishing the objectives of these proposed revisions. Regardless, however, the sweeping nature of the emergency powers currently authorized by statute call for more frequent congressional review to protect against abuse and executive overreach.

The revisions specify that a national emergency terminates if Congress fails to pass a joint resolution continuing it, in which case all emergency authorities that were exercised pursuant to the national emergency cease.[281] The revised statute bans expenditures pursuant to terminated national emergencies.[282] The President is also barred from redeclaring an emergency that Congress terminated, and funds may not be appropriated or expended pursuant to such an emergency.[283]

Using funding as a mechanism of congressional oversight corresponds to Congress's traditional constitutional role of possessing the power of the purse. The requirement that no funds be expended pursuant to a national emergency that has lapsed or been terminated also widens the circle of people responsible for ensuring compliance with the law to include numerous administrative agency personnel, not simply those in Congress and the Executive Office of the President. This will likely have the effect of placing additional roadblocks in the way of an overly acquiescent Congress and a President who seeks to use emergency powers in legally questionable ways.

C. Promoting Additional Congressional Oversight and Public Dialogue

To ensure proper oversight and begin a public dialogue about the authorities the Executive Branch should be able to exercise in a national emergency, Congress should convene a special bipartisan committee similar to the Senate Special Committee on the Termination of the National Emergency. This committee could promote awareness and discussion of emergency powers within Congress and the general public. The extent of Congress's awareness of the vast array of executive emergency powers is uncertain, as is the extent of Congress's understanding of Executive Branch COG planning. At

281. *See id.*
282. *See* 50 U.S.C. § 1622(b) of revised statute.
283. *See* 50 U.S.C. § 1622(c) of revised statute.

least one source suggests that the Executive Branch has sought to plan collaboratively with Congress and the judiciary.[284] In 2007, however, the Executive Branch denied the House Homeland Security Committee access to COG plans.[285] The White House claimed, in effect, that the members of the Committee lacked the proper security clearances to examine the plans and that the White House would only share information concerning COG only with the highest-ranking members of Congress.[286] But its willingness to engage in even that limited degree of information sharing is uncertain. The Administration did not inform the Senate Majority Leader or the Senate President Pro Tempore—who is third in the line of presidential succession—that it had implemented COG procedures on 9/11 and kept them in place.[287]

A special House or Senate bipartisan committee should review and assess the legality of the PEADs currently on file with the Executive Branch. PEADs should also be made available to the public insofar as they do not reveal alternate operational locations, technical details, or similar information that, if disclosed, would materially undermine COG operations. This would facilitate meaningful public discourse about which restrictions of liberty, if any, should be imposed during a national emergency and about what circumstances constitute a genuine emergency. Discourse of this kind is at the core of a democratic government, and decisions concerning fundamental freedoms that are made in the context of full and open discussion, rather than in secrecy or in the midst of catastrophe and panic, are likely to be far more wise and beneficial to the long-term survival of American democracy.

There is precedent for the type of review proposed here. The Bush administration briefed some members of the 9/11 Commission on the "general nature and implementation of . . . continuity plans," although the Committee "did not investigate this topic, except as necessary to understand the activities and communications

284. *See* Ambinder, *supra* note 172 ("The Bush-era COG plans were based on the commonsense premise that no post-disaster government would be legitimate unless people perceived it to be a valid expression of their will and the constitutional balancing of powers among the branches. The Bush White House encouraged the federal branches to plan together.").

285. *See* Jeff Kosseff, *White House Again Denies DeFazio's Information Request*, OREGONLIVE.COM (Aug. 2, 2007, 5:31 PM), http://blog.oregonlive.com/politics/2007/08/white_house_again_denies_defaz.html.

286. *See id.*

287. *See, e.g.*, Francie Grace, *'Shadow Government' News to Congress*, CBS NEWS (Mar. 1, 2002), http://www.cbsnews.com/stories/2002/03/01/attack/main502530.shtml. The website erroneously lists the date of the story as Feb. 11, 2009.

of key officials on 9/11."[288] In the 1970s, the Senate Special Committee began an inquiry into COG programs.[289] The inquiry, however, was obstructed by "the veil of secrecy surrounding these programs."[290] At least some members of the most democratic branch of government should be able to review the plans that the Executive Branch intends to carry out during a declared emergency, particularly since there is reason to suspect that some of the plans would propose unlawful acts.

CONCLUSION

The challenge of containing and regulating national emergencies shows itself most clearly in the context of terrorism and foreign affairs. Every emergency declared since the passage of the NEA was a response to possible terrorist threats or events that appeared to implicate U.S. foreign policy.[291] But this challenge expands far beyond the context of terrorism and international relations.

Emergencies occur everywhere in America and in the world. Emergency managers operate municipal governments,[292] the nation faces emergency drug shortages,[293] there are looming scarcities in fossil fuels and potable water,[294] and climate change is projected to have numerous severe consequences that threaten U.S. national security with droughts, pandemics, floods, starvation, mass migrations, and civil unrest.[295] The power that the U.S. government claims it possesses to kill American citizens whom an Executive Branch official suspects of being members of al Qaeda or associated forces also reflects an approach to governance that is profoundly

288. *See* NAT'L COMMISSION ON TERRORIST ATTACKS UPON THE U.S., *supra* note 209, at 555 n.9.

289. *See* S. SPECIAL COMM. ON NAT'L EMERGENCIES AND DELEGATED EMERGENCY POWERS, STAFF REPORT ON EMERGENCY PREPAREDNESS IN THE UNITED STATES, at 38 (1976), *reprinted in* S. COMM. ON GOV'T OPERATIONS, *supra* note 8, at 55, 67.

290. *Id.*

291. *See supra* Part III, Table 1.

292. *See, e.g.*, *Welcome to the Emergency Manager's Page*, THE CITY OF PONTIAC, MICHIGAN (last visited Nov. 1, 2012), http://www.pontiac.mi.us/info/efm.html.

293. Alex Wayne, *Doctors' Lobby Declares Drug Shortages a National Emergency*, BLOOMBERG (Nov. 15, 2011), http://www.bloomberg.com/news/2011-11-15/doctors-lobby-declares-drug-shortages-national-health-emergency.html.

294. *See generally* JAMES HOWARD KUNSTLER, THE LONG EMERGENCY (2005) (projecting adverse political and social consequences of fossil-fuel depletion).

295. *See* John M. Broder, *Climate Change Seen as Threat to U.S. Security*, N.Y. TIMES (Aug. 9, 2009), http://www.nytimes.com/2009/08/09/science/earth/09climate.html?pagewanted=all.

emergency based.[296] In short, present and anticipated national and global developments provide ample grist for the mill of expansive emergency powers. This makes the task of reforming America's emergency law regime to create effective, rational constraints on the exercise of emergency powers even more pressing. Without such constraints, the federal government and the public may become inured to prolonged states of emergency and the expansive powers they authorize, creating a one-way ratchet toward even more expansive executive power and establishing a floor for future assertions of emergency authority that may grow more deferential to the Executive with time.

Furthermore, declaring a national emergency to deal with national and international threats may prove an all-too-tempting alternative to traditional lawmaking, satisfying the Executive's need for speed and flexibility and limiting the political exposure of members of Congress. Such an outcome would bode poorly for a sound, deliberative legislative process. Emergency decrees made in relative haste seem inherently less likely than traditional lawmaking to address a challenge comprehensively and to accommodate the interests of the people whom a law will likely affect.

The continuing existence of expansive, longstanding national emergencies without congressional review might also prevent emergency powers from being used with political legitimacy in situations where they might truly be needed. If political repression and public corruption by the government of Belarus presently constitute an "unusual and extraordinary threat to the national security and foreign policy of the United States,"[297] the word "emergency" ceases to be meaningful. This could have the effect of making the public cynical toward claims by the government that emergency powers are needed to deal with a crisis, hampering effective action.

Legislative reform, effective congressional oversight, transparency, and public involvement can curb the numerous, seemingly unlimited current states of national emergency. Only wise, democratic restraints can prevent the United States' present emergency

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296. *See* U.S. DEP'T OF JUSTICE, *supra* note 246, at 1, 7. Note that the federal government's current National Strategy for Counterterrorism focuses on "the collection of groups and individuals who comprise *al-Qa'ida and its affiliates and adherents*"; "adherents" need not have had any contact with al Qa'ida, but only need be "inspired to take action in furtherance of the goals of al-Qa'ida —the organization and the ideology." *See* EXEC. OFFICE OF THE PRESIDENT, NATIONAL STRATEGY FOR COUNTERTERRORISM 3–4 (2011), *available at* http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf (emphasis in original) ("Adherence to al-Qa'ida's ideology may not require allegiance to al-Qa'ida, the organization. Individuals who sympathize with or actively support al-Qa'ida may be inspired to violence and can pose an ongoing threat, even if they have little or no formal contact with al-Qa'ida.").

297. Exec. Order No. 13,405, 3 C.F.R. 231–33 (2007).

law regime from utterly engulfing individual freedoms and civil society through ever more aggressive expansions of executive emergency powers.