

**Rt ghgt t gf 'qt 'Rt kqt kkt gf <Rt qdłpi 'vj g'
 Nko kvu'qh'Rt gułf gpvknY ct 'Rqy gt u'
 Wpf gt 'Ugevkqp'928*c+'qh'vj g'
 Eqo o wplecvkqp'cev'qh'3; 56**

O cwj gy 'N0E qpcvł'

TABLE OF CONTENTS

I. INTRODUCTION 128

II. THE ORIGIN AND CONSTRUCTION OF SECTION 706 133

III. CRITICAL QUESTIONS OF WAR AND EXECUTIVE AUTHORITY 137

 A. *Vj g'O gcpłpi 'qhđY ctđ* 137

 B. *The Prospects for Judicial Review* 142

IV. EMERGING TECHNO-LEGAL CONSIDERATIONS 146

V. A PATH FORWARD 150

VI. CONCLUSION 154

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I. INTRODUCTION

Imagine, if you will, a near future when a conservative President, in concert with a solid Republican majority in Congress, commits to using the scourge of fentanyl and other opioids, policymakers aver, is devastating our communities, necessitating that the fight directly be taken to the cartels, as Mexico is unable or unwilling to do so itself.² In a manner reminiscent of the 2001 Authorization for the Use of Military Force³ or perhaps mere observation during a State of the Union address that the nation is now at war with nefarious drug lords⁴ the military turns its sights towards select group of non-state actors, with special operations forces shortly engaged in cross-border strikes.

The conflict abroad proceeds apace, but the homefront threatens to drag it down. Unfavorable reports from embedded correspondents are page one stories on news sites; citizens organize major municipal protests on encrypted mobile apps; and social media platforms augment the unrest through trending topics and newsfeeds.⁵ Enraged, the President vows action in the interest of the national security and defense. Under cover of a century-old statute, he squelches the throughput of the cloud computing centers that power these news sites, slows cellular service in large cities to a crawl,⁶ and ensures that only one social media platform⁷ a platform in which he is majority shareholder and on which his posts dominate conversation operates at anything approaching normal speeds.⁸ In each case, the imperatives of wartime necessity, as conceived and conceptualized by the chief executive, take charge; communications undermining these ends ought be minimized, in

1. Cf. William P. Barr, *Vj g'WUOO wv'F g'gcv'O g'zkeqat'Ftwi 'Ectvgn*, WALL ST. J. (Mar. 2, 2023), <https://www.wsj.com/articles/the-us-must-defeat-mexicos-drug-cartels-narco-terrorism-amlo-el-chapo-crenshaw-military-law-enforcement-b8fac731>.

2. Cf. Ashley S. Deeks, *Unwilling or Unable: Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 486 (2012).

3. 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

4. Cf. Ronald Reagan, President of the United States, Radio Address to the Nation on Federal Drug Policy (Oct. 8, 1982).

5. See generally Sadaf R. Ali & Shahira Fahmy, *Gatekeeping and Citizen Journalism: The Use of Social Media During the Recent Uprisings in Iran, Egypt, and Libya*, 6 MEDIA, WAR & CONFLICT 55 (2013).

6. Cf. T-Mobile USA, Inc., *Order*, 31 FCC Rcd 11410 (2016) (imposing a \$7.5 million penalty on T-Mobile for its plan to represent unlimited data plan representations).

7. *Eqpukf gt'j gtg'yj g'Dkf gp'CF o l'kntcvkpa'c'wgo r w'v'q'htgerug'i qxgtpo gpv* reliance on TikTok by means of the Federal Acquisitions Regulation, 48 CFR §§ 1 *et seq.* See, e.g., Allyson Park, *JUST IN: TikTok Ban Issued for Federal Government Contractors*, NAT'L DEF. (June 26, 2023), <https://www.nationaldefensemagazine.org/articles/2023/6/26/just-in-tiktok-ban-issued-for-federal-government-contractors> [https://perma.cc/P48V-VHLX].

8. Cf. Cheryl Teh, *A pitch deck for Trump's new company claims he's going to build rivals to CNN, Disney Plus, and Netflix*, BUS. INSIDER (Oct. 21, 2021), <https://www.insider.com/trump-pitch-deck-claims-build-rivals-cnn-netflix-truth-social-2021-10> [https://perma.cc/J2AE-UN6A].

the interest of the received public good. Vj g"Rtgukf gpwau"cwj qtkv "is at a maximum by way of his exercise of war powers, by and through an explicit congressional delegation of power, the courts are loath to second-guess him, steering well clear of the ostensibly partisan and pecuniary motives for these actions.

Or imagine another near-term future, in which a liberal politician ascends to the office of commander-in-chief. Her platform was grounded, in significant part, on grappling with climate change in an aggressively holistic o cppgt0P q"rpi gt."uj g"xqy u"lp"j gt"lpcwi wtcvkp"ur ggej ."y kn'j g"eqwpt {au" response be dictated by the effects of the phenomenon, awkwardly remediating its effectsô from rolling blackouts⁹ to ballooning toxic algae blooms¹⁰ to ever-increasing spates of heat-related deaths¹¹ô in an after-the-fact, piecemeal fashion. Instead, the United States will confront the root causes of the environmental crisis, with climate change elevated from a matter of academic and regulatory concern to a national emergency.

Dcengf " d{ " vj g" ðwpgs vlxqecrö" eqpenwukqp" qh" vj g" Wpklgf " P cvkqpu" Kpvti qxgtpo gpvcn' Rcpgn' qp" Erko cvg" Ej cpi g" ðj cv' j wo cp" kphwpeg" j cu" y cto gf " vj g" cvo qur j gtg." qegep" cpf " rpf.ö¹² the President, recalling the paramilitary ambitions and confiscatory methods of her predecessors Richard Nixon¹³ and Ronald Reagan¹⁴ in their crackdown on controlled substances, declares a war on polluters. The country is, after all, a signatory to the Paris Agreement to the United Nations Framework Convention on Climate Change,¹⁵ committing it to reduce greenhouse gas emissions beneath internationally brokered thresholds.¹⁶ Accordingly, the President sets her

9. Cf. Lucio Vasquez & Tom Perumean, *ERCOT says Texas could face rolling blackouts in August, as Houston officials announce cooling centers*, HOUSTON PUB. MEDIA (June 7, 2024), <https://www.houstonpublicmedia.org/articles/infrastructure/ercot/2024/06/07/489942/texas-could-face-a-grid-emergency-rolling-blackouts-in-august-ercot-report-says/> [https://perma.cc/8D6C-38KK].

10. Cf. Frank Cerabino, *Algae blooms, record heat: Florida climate change puts us all in movie with bad ending*, PALM BEACH POST (July 16, 2023), <https://www.palmbeachpost.com/story/news/columns/2023/07/16/algae-blooms-high-temps-hot-ocean-climate-change-challenges-florida/70405223007/> [https://perma.cc/7MUF-GPHF].

11. See, e.g., *Extreme Heat*, U.S. DEPØT OF HEALTH AND HUM. SERVS. (2024), <https://www.hhs.gov/climate-change-health-equity-environmental-justice/climate-change-health-equity/climate-health-outlook/extreme-heat/index.html> [https://perma.cc/6RGN-9ZMX].

12. *Climate Change*, UNITED NATIONS (2024), <https://www.un.org/en/global-issues/climate-change> [https://perma.cc/8PLN-YP2Y].

13. See, e.g., Antoine Perret, *Militarization and Privatization of Security: From the War On Drugs to the Fight Against Organized Crime in Latin America*, 105 INTL REV. RED CROSS 828, 829 (2023).

14. See, e.g., Emily Crick, *Tgci cpau'Okkctkcvkqp"ql'lj g"Y ct"qp"ftwi uø*, GLOB. DRUG POLØY OBSERVATORY (Jun. 13, 2016), <https://gdpo.swan.ac.uk/?p=440> [https://perma.cc/NDN2-8DXH].

15. See generally *Environment Agreement Under the United Nations Framework Convention on Climate Change*, Dec. 12, 2015, T.I.A.S. No. 16,1104.

16. See *The Paris Agreement*, UNITED NATIONS (2024), <https://www.un.org/en/climatechange/paris-agreement> [https://perma.cc/GJ4M-P99C].

sights on vj g"pcvkqpau'uj ctg"qh"vj g"96"o kkkqp"o gvle"vqpu"qh"i tggpj qwug"i cu" emissions produced by Bitcoin miners each year,¹⁷ calling upon the aforementioned statute to drastically cap the traffic throughput of the data centers that power large-scale digital excavation.¹⁸

The scenarios are highly implausible, of course, given the robust protections for speech and assembly of the First Amendment, the due process requirements of the Fifth and the Fourteenth, and the beneficent oversight of a congressionally chartered regulatory body, the Federal Communications Ego o kulkqp "oHEEö-0Cpf "{ gvKy qwf "cti wg"vq"vj g'eqpvtct { <these are states of affairs not only plausible, but frighteningly likely. As the geopolitical grounds of strife shift from the terrestrial to the digitalö and the historical roots of war beget conflicts of ambiguous scope and duration in a multiflorous modernityö presidential ambitions to control and constrain communications, I believe, could flourish in few fields so welcoming as Section 706(a)¹⁹ of the Ego o wplecvkqp"CeV"qh"3; 56."cu"co gpf gf "vj g"öCeö+ö²⁰

Vkrgf "öY ct"r qy gtu"qh"Rtgukf gpvö"Ugevkqp"928" is divided into four operative components, each of which ögrants specific, communications-related powers to the President in time of war or national emergency^{ö21} Taken cu" c"y j qrg."Ugevkqp"928"eqpukwvgu" c"etkkekcn"eqo r qpgpv"qh"vj g"eqwpt { ö" communication infrastructure²² evinced, for example, in international

17. See Cambridge Bitcoin Electricity Consumption Index, CAMBRIDGE CTR. FOR ALT. FIN. (2024), <https://ccaf.io/cbnsi/cbeci/ghg> [<https://perma.cc/T39V-DZKX>]; UN Study Reveals the Hidden Environmental Impacts of Bitcoin: Carbon is Not the Only Harmful By-product, UNITED NATIONS UNIV. (Oct. 24, 2023), <https://unu.edu/press-release/un-study-reveals-hidden-environmental-impacts-bitcoin-carbon-not-only-harmful-product> [<https://perma.cc/LZ3G-JFU9>]; cf. Dett { "Qöf cmqtcq."Data centres not to blame for electricity squeeze, expert claims, IRISH TIMES (Aug. 20, 2024), <https://www.irishtimes.com/business/2024/08/20/data-centres-not-to-blame-for-electricity-squeeze-expert-claims/> [<https://perma.cc/E5S3-6EAL>].

18. See, e.g., Countries Say No to Energy Guzzling Bitcoin Mines, GREENPEACE (May 14, 2024), <https://www.greenpeace.org/usa/countries-say-no-to-bitcoin-mines/> [<https://perma.cc/G5AA-97DY>].

19. 47 U.S.C. § 606(a).

20. 47 U.S.C. § 151.

21. Amendment of Part 73, Subpart G, of the Como öns Rules Regarding the Emergency Broad. Sys., Report and Order and Further Notice of Proposed Rule Making, 10 FCC Rcd 1786, ¶ 5 (1994); see also, e.g., CBS Broad., Notice of Apparent Liability for Forfeiture, 34 FCC Rcd 8417, ¶ 11 (2019) (deeming the Emergency Alert System critical to ghwgwcvkpi "vj g'tgi kurvkg"lpvqvwpf gti kf lpi "Ugevkqp"928."cu"öcp"guugpvkci"pcvkqpcnff ghgpug." go gti gpe { ".cpf"r wrle"uchgv" "u"vgo ö"f guki pgf "vq"cmqy "vj g"Rtgukf gpv"vq" gpi ci g'ter idly and efficiently in crisis communication with the general public).

22. Section 706 parallels the legislative mandate for the creation of the FCC, which ej cti gu'kv"v'tgi wcvg"öeqo o gteg"lp"eqo o wplecvkqp"d { "y ktg"cpf "tcf kf"000hq"vj g't wtr qug"qh" vj g'pcvkqpcnff ghgpugö"cpf "ör tqo qvkpi "uchgv" "qh"ktg"cpf"r tqr gtv { ö"69"WUE0E"373; see also, e.g., Reorganization and Deregulation of Part 97 of the Rules Governing the Amateur Radio Servs., Report and Order, 6"HEE"TeF"693; .6947"ö3; ; ; + "ö"gvulevkpi .ö"j k p"vj g'gxgpv"qh"cp emergency which necessitates the invoking of the Presidentö War Emergency Powers under vj g'r tqxkukqp"qh"Ugevkqp"928.ö"vcpuo kulkqp"qh"vj g'tcf lq"co cvgw"ekkn"go gti gpe { "vgtxleg"vq ugrgevh"gs wpekgu."r gt"vj g"HEEöu"r ngpct { "cwj qtkv" "wvf gt"Ugevkqp"373+0Cf. Yankee Network, Inc. v. FCC, 107 F.2d 212, 218 (D.C. Cir. 1939) (ekkpi "Ugevkqp"928öu"r tqxkukqp"hq" eqo r gpucvkqp"vq"ekxkicp"tcf lq"qr gtevtu"lp"gzr nlevkpi "vj g"ötki j w'cpf"gs wkkguö"cxckrdng"vq current and prospective licensees).

transfers of FCC broadcast licenses, where foreign corporations pledge to

Two of these four components subsections (c) (permitting the President to indefinitely

23. Robert M. Franklin, Transferor and Inmarsat, PLC, Transferee, Declaratory Ruling, 24 FCC Rcd 449, 496, 515 (2009); Petition of TelCove, Inc. for a Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act of 1934, as amended, Order and Declaratory Ruling, 21 FCC Rcd 3982, 3995 (2006).

24. 47 U.S.C. § 606(c).

25. 47 U.S.C. § 606(d).

26. See generally David W. Operbeck, Does the Communications Act of 1934 Contain a Hidden Internet Kill Switch?, 65 FED. COMM. L.J. 1 (2013); Kharson K. Thomspn, Not Like an Egyptian: Cybersecurity and the Internet Kill Switch Debate, 90 TEX. L. REV. 465 (2011); William D. Toronto, Fake News and Kill-Switches: The U.S. Government's Fight to Respond to and Prevent Fake News, 79 A.F. L. REV. 167 (2018); see also Laura B. West, Building Cyber Walls: Executive Emergency Powers in Cyberspace, 11 J. NAT'L SECURITY L. & POL'Y 591, 593-94, 598-604 (2021). Cf. Jim Dempsey, Cybersecurity and the Good Cause Exception to the APA, LAWFARE (Apr. 29, 2022), https://www.lawfaremedia.org/article/cybersecurity-and-good-cause-exception-apa [https://perma.cc/N4ZY-MEB7]; CATHERINE A. THEOHARY & JOHN ROLLINS, CONG. RSCH. SERV., R41674, TERRORIST USE OF THE INTERNET: INFORMATION OPERATIONS IN CYBERSPACE (2011), https://apps.dtic.mil/sti/tr/pdf/ADA544308.pdf [https://perma.cc/PW4X-Q8GS].

27. See, e.g., Protecting Cyberspace as a National Asset Act of 2010, S. 3480, 111th Cong. (2010); Cybersecurity Act of 2010, S. 773, 111th Cong. (2009).

28. See, e.g., Jay P. Kesan & Carol M. Hayes, Mitigative Counterstriking: Self-Defense and Deterrence in Cyberspace, 25 HARV. J. LAW & TECH. 429, 503-06 (2012); David W. Operbeck, Cybersecurity and Executive Power, 89 WASH. U. L. REV. 795, 798-99, 811-12, 839-44 (2013); Roger D. Scott, Legal Aspects of Information Warfare: Military Disruption of Telecommunications, 45 NAVAL L. REV. 79, 7: '88*3; ; : +*6O qtgqxtg.'y g'j { r qj g'ecn capability to disrupt particular telecommunications could be highly controllable and discriminate, focused on individual frequencies or messages . . . Under § 606(a), the President may direct that national defense communications be given precedence or priority

[W]henever he shall deem it necessary for the national security and defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war 0000³⁹

Hqmqy kpi "Rt gukf gpv" Y kuxpau" brief exercise of this power,⁴⁰ it lay dormant for eight years, until being codified in the Radio Act of 1927 (the 0Tcf kq" Cevö+, which provided for enhanced oversight of radio broadcasts and stations by a new regulatory body, the Federal Radio Commission *0HTEö+⁴¹ k"3; 4; . "yj g" Ugcvg" eqpukf gtgf "cf qr vkqp" qh"öc" dkn"vq" r tqxkf g" hqt" yj g" regulation of the transmission of intelligence by wire or wireless,ö" which would centralize extant authority held by the Interstate Commerce Commission over wireline communication and that of the FRC over radio in c'pgy "öeqo o wplecvkpu" eqo o kulkpö⁴² Notably, Section 40(c) of the bill was equivalent to the present Section 706(a) of the Act,⁴³ with its language transposed from a 1917 law that empowered President Wilson to grant ör tghgtpeg" qt" r tktkf ö"vq" övtchle" qt" uwej "uj kr o gpw" qh" eqo o qf kkgu" cu. "kp" j ku" lwf i o gpv. "o c { "dg" guugpvkn"vq" yj g" pcvkpcn" f ghgpug" cpf "ugewkf ö"y kj " t gur gev" vq" övtcpur qt cvkqp" d { "cp { "eqo o qp" ecttkgt" d { "tcktkqcf. "y cvgt. "qt" otherwkuö⁴⁴ Five years later, this provision would be enacted unchanged under the Act,⁴⁵ through which Congress at last öeqo dkpgf "cpf" qti cpk gf" hgf gtcn'tgi wcvkqp" qh" vgrgr j ppg. "vgrgi tcr j. "cpf" tcf kq" eqo o wplecvkpuö" wpf gt" the supervision of the FCC.⁴⁶

In 1941, pursuant to a congressional declaration of war between the United States and the Empire of Japan, Executive Order 8,964 tasked the year-

39. 49 H.R.J. Res. 309, 65th Cong., 40 Stat. 904 (1918).

40. Proclamation of July 22, 1918, 40 Stat. 1807 (1918). Government control was terminated on August 1, 1919, exactly one year after it began. See Michael A. Janson & Christopher S. Yoo, *The Wires Go to War: The U.S. Experiment with Government Ownership of the Telephone System During World War I*, 91 TEX. L. REV. 983, 986 n.15 (2013) (citing LEONARD S. HYMAN ET AL., *THE NEW TELECOMMUNICATIONS INDUSTRY: EVOLUTION AND ORGANIZATION* 81 (1987)).

41. An Act For the regulation of radio communications, and for other purposes, 69 Pub. L. 632, 44 Stat. 1162 (1927).

42. *A Bill to Provide for the Regulation of the Transmission of Intelligence by Wire or Wireless: Hearing on S. 6 Before the S. Comm. on Interstate Com.*, 71st Cong., 21-24 (1929), <https://acrobat.adobe.com/id/urn:aaid:sc:VA6C2:5a4eda40-6afb-4951-90a5-7a702e2d6c1a> [<https://perma.cc/R6GZ-WUJ8>].

43. *Id.* at 18.

44. An Act To amend the Act to regulate commerce, as amended, and for other purposes, Pub. L. No. 39, 40 Stat. 270 (1917). Cf. 56 Cong. Rec. 2014, 2016, 2029 (1918).

45. Compare 47 U.S.C. § 606(a) (2023), with 47 U.S.C. § 606(a) (1934).

46. Bureau of Justice Assistance, *The Communications Act of 1934*, 47 U.S.C. § 151 et seq., U.S. DEPARTMENT OF JUSTICE, <https://bja.ojp.gov/program/it/privacy-civil-liberties/authorities/statutes/1288> [<https://perma.cc/F8HQ-J6FH>] (last visited January 1, 2025). Cf. *Roosevelt Urges Board of Control on Wires, Radio*, N.Y. TIMES, Feb. 26, 1934, at 1, <https://graphics8.nytimes.com/packages/pdf/business/roosevelтурges.pdf> [<https://perma.cc/G9KG-YUMC>].

old Defense Communications Board⁴⁷ with frequency allocation, government
 ugk wtg"qt"emqwtg"qh'tcf kq"ucvklpu."cpf."õk"ceeqtf cpeg"y kj "Ugevkqp"828*c-
 of the Communications Act of 1934, to make such arrangements as may be
 necessary to insure that communications essential to the national defense or
 ugevtkvf 'lj cmj cxg'r tghgtgpeg'qt'r tktkvf '0006⁴⁸ Subsequently given additional
 powers by Executive Order per contemporary congressional enhancements to
 Section 706⁴⁹ and renamed the Board of War Communications,⁵⁰ it was
 abolished by President Truman on February 24, 1947.⁵¹

Subsection (a), then, as employed in World War II, bore a functionalist
 propinquity to the Defense Production Act, which tapped õj g"f qo guve"
 kpf wutkr'dcug"vq"uwr r n("o cvgtkcn"cpf"ugt xlegu"ht"vj g"pcvkpcn'f ghgpgö"v"
 ucvuhf " vj g" wti gpv" pggf u" qh" õo kktct{" r tqf wevkpö" cpf " vj g" õwpls wg"
 vgej pqmî kcnl'tgs vktgo gpvü"vpf gt"õgo gti gpe{"eqpf kklpuö⁵² As Opderbeck

47. See Exec. Order Creating the Defense Communications Board and Defining Its
 Functions and Duties, 5 Fed. Reg. 3817, 3817 (Sept. 26, 1940) (defining the Defense
 Communications Board as an gpvkvf 'ht"ðeqqtf kpcvgt 'r rppkpi 'ht"vj g'o qu'ghhlegpv'eqvtqn'
 and use of radio, wire, and cable communication facilities under jurisdiction of the United
 Ucvgu'k'vko g'qh'pcvkpcn'go gti gpe{.õ'r gt"vj g'pggf u'qh'vj g'cto gf 'htegucpf "õj g'pggf u'qh'
 other goxgtpo gpvcrl'ci gpegu'qh'kpf wut{."cpf "qh'qvj gt'ekkkcp'cevkkkguö-0

48. Exec. Order Prescribing Regs. Governing the Use, Control and Closing of Radio
 Ucvkpu'cpf "vj g'Rtghgpeg'qt'Rtktkvf "qh'Ego o eøp, 6 Fed. Reg. 6367, 6367-68 (Dec. 12,
 1941).

49. See Exec. Order Prescribing Regs. Governing the Use, Control and Closing of
 Tcf kq'Ucvkpu'cpf 'Hekkkgu'ht"Y k'g'Ego o eøpu, 7 Fed. Reg. 1777, 1777-78 (Mar. 10,
 1942). Cf. *Am. Med. Ass'n v. United States*, 130 F.2d 233, 247 n.66 (1942) (citing 47
 U.S.C.A. § 606(c), (d), as amended by Pub. L. No. 413) (õIt is perhaps significant that in the
 latest professional development - radio broadcasting - increased emphasis has been placed on
 . . . governmental control.õ).

50. See Exec. Order No. 9,183, 7 Fed. Reg. 4509, 4509 (June 17, 1942).

51. See Exec. Order No. 9,831, 12 Fed. Reg. 1363, 1363 (Feb. 26, 1947).

52. 50 U.S.C. § 4501(a)(1), (3)(C)(i)-(ii), (7).

nothing of whether the war at issue began by dint of congressional declaration, arose out of a first strike by a hostile actor, or commenced by way of quasi- or extra-legal action on the part of the commander-in-chief.⁶²

Ngj kur vkg"j kxqt { "ku"qh'rkvg"cuukucpeg'lp" f ghkpi "öy ctö"lp"j gctkpi u" on the Radio Act held in March 1924, Major J. O. Mauborgne, amplifying a missive from Secretary of War John W. Weeks, describes yj g"ngi kur vkpau" apparent failure to prioritize the frequency requirements of the Army in times of peace and for the overall national defense. In contrast:

The situation, of course, in time of war, so far as interfering with other people is concerned, is very nicely taken care of by the bill, because the bill says the President may take over any stations he wants for the War Department, and he can naturally also assume control of broadcasting at that stage of the situation , and he can stop broadcasting, if it becomes necessary to do so in the national defense.⁶³

But for a suggestion that the President, in directing traffic, is acting on behalf or in the interest of yj g"o kksct { "fkgevtcvg."yj g"övk g"qh'y ctö"cpf" öpcvkpcnlf ghpgugö"eqputwew'b kttqt "yj qug'lp"r tguqpv-day Section 706(a).

The legislative history for the Act is largely similar.⁶⁴ In a lengthy exchange between Louis G. Caldwell, chairman of the American Bar Cuuqekvkpau'tcfkq"eqo o kwgg."cpf "Ugpcvt 'Erctgpeg'F kn⁶⁵ c'pgdwqwu"övk g" qh'y ctö"ku'cf lwf i gf "yj g"r tgf kcvg"vq"yj g"Rtgulf gpvau"öt ki j v"vq"emug"fy p"cp{ " station or to take over any station.ö⁶⁶ Caldwell, however, does suggest, in an interchange with Senator Key Pittman, that the right vests (*vis-à-vis* the same

62. Cf. Robert F. Daly & Donald L. Nielson, *A Review of National Security-Emergency Preparedness Telecommunications Policy*, SRI INT. 1, 32 (1981) <https://apps.dtic.mil/sti/pdfs/ADA100190.pdf> [<https://perma.cc/95WR-UH9X>] *öjGcej "qh" the specific powers for control is explicitly limited to national emergency and *war conditions*. The powers to establish communications procedures and priorities and to use the armed forces to prevent obstruction of communications services are confined to *conditions of actual war* öööö+(emphasis added).

63. *To Regulate Radio Communication: Hearings on H.R. 7357 Before the H. Comm. on Merch. Marine and Fisheries*, 68th Cong. 137 (1924).

64. A comparison between the originating bills for the Act, H.R. 8301 and S. 3285, demonstrates no difference between them in the wording of Section 706(a). See COMMUNICATIONS BILL: COMPARATIVE PRINT SHOWING DIFFERENCES BETWEEN H.R. 8301 AND S. 3285 AS PASSED BY THE SENATE ON MAY 15, HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE 106-07 (1934).

65. Dill was intimately involved in communications policy; as a co-author of the Radio Cev"j g"y cu'c'r tko g'ctej kge'v'qh"yj g"ör wdrie'lpvgtuv"eqpxgpkpeg."cpf "pgeguks{ö"lucpf ctf" that undergirds the HEEau licensing and regulatory powers. See Erwin G. Krasnow & Jack N. Goodman, *The öPublic Interestö Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605, 609-10 (1998).

66. *Committee on Communications: Hearing Before the Comm. on Interstate Com.*, 93wEqpi 074"3; 52+ <https://heinonline.org/HOL/P?h=hein.cbhear/cochus0001> [<https://perma.cc/L7ZL-F9P6>].

lpucpeg. 'ku'dkkwtecvgf "dgwy ggp'vj g'ödghqtg'cpf "chgtö'qh'vj g'o qo gpvÿ j gp'vj g" President invokes his emergency war powers, even as it recognizes that the temporal formulation itself o c{ 'dg'öuwr gtugf gf 'd{ 'vj g'Rtgulf gpwø emergency y ct'r qy gtuö⁷³

Caselaw is, in the main, unavailing.⁷⁴ One of the few decisions to bear on Section 706(a) is *Bendix Aviation Corp. v. Federal Communications Commission*, in which a group of aviation operators and equipment manufacturers protested the FCC's "regulation of the use of radio frequencies for defense purposes absent statutorily mandated notice-and-comment."⁷⁵ The court dismissed their claim pursuant to the expansive national security concerns attendant upon the issuance of Presidential Proclamation 2914, y j lej "ekgf "dqj "vj g"ötgegpv' gxpwu" kp" Mqtgc" cpf "gnÿy j gtgö" cpf "övj g" kpetgculpi "o gpceg"qh'vj g'hqtegu"qh'eqo o wpluv'ci i tguakpö"cu'vj g'dcuku"htq "övj g"gzkwpeg"qh'c"pvcqpcn'go gti gpe{ .ö⁷⁶ Supporting the putative need to egpvt "ö]p_cvkpcn' vtuw' cpf " tgr qpukdkv{ö" kp" vj g" Rtgulf gpv. "vj g" eqwtv' tgcuppgf .y cu"Ugevkp"928."öy j lej "kp"ektewo ucpegu'ur gekkfg .gzr cpf u'vj g" President's authority to reach and control even already licensed stations and hcekkkuö⁷⁷

A few cases may bear on the question if World War I antecedents to subsection (a) are considered. In *Commercial Cable Co. v. Burleson*, plaintiff telegraph companies sought to enjoin President Wilson's "regulation of the use of radio frequencies for defense purposes absent statutorily mandated notice-and-comment."⁷⁸ The court argued that the White House had failed to utilize them for expeditionary military needs and that the seizure occurred on November 16, 1918, five days after an armistice with the Central Powers was signed.⁷⁸ The court emphasized that the means of telegraphic communications anywhere in the world were not cut off at the time of the seizure. ⁷⁹ Vj g" eqwtv' cnq" fluo kuugf " r rckpvtuö emphasis on chronological logics, adjudging an armistice not an end to war, but a metag'öuwr gpukqp"qh'j quwkkuö⁸⁰ To this end, the court opined on the Rtgulf gpv'etkkcni"cpf "Eqpukwvkpcn"tqng"kp"vtgcv{ -making: öVj g'pvcqpcn' security and defense is to be judged . . . by the stability of the ensuing state of

73. *Id.* at ¶ 1 (2020).
74. This is also true if the scope of the inquiry is expanded to analogous language in the now-defunct 49 U.S.C. § 1(15)(d), under which vj g'kpvgtucvg'Eqo o gteg'Eqo o kuukp."ö]kp" time of war or vj tgevgpgf 'y ct.ö'y cu'bhqtgf gf "hegpug'q'i kxg'ör tghgtgpeg'qt'r tlktkv{ "kp" vcpur qtcvkpö'wr qp'egt vkccvkp'd{ "vj g'Rtgulf gpv'vj cv'uej 'y cu'öguugpvkcn'q'vj g'pvcqpcn' f ghepug'cpf 'ugewkv{ö"See, e.g., *Interstate Com. Commop v. Or. Pac. Indus., Inc.*, 420 U.S. 184, 186-87 n.2 (1975); *U.S. v. Interstate Com. Commop*, 352 U.S. 158, 174 (1956); *U.S. v. Thompson*, 58 F. Supp. 213 n.2 (E.D. Mo. 1944).
75. *Bendix Aviation Corp. v. FCC*, 272 F.2d 533 (D.C. Cir. 1959).
76. PUB. PAPERS OF THE PRESIDENTS OF THE U.S.: HARRY S. TRUMAN 746-47 (Off. of vj g'HgfOTgi 0'P cvniCtej kxgu'cpf "TgeuUgtx0'(' 'I gp0Ugtx0Cf o kp0"1950).
77. *Bendix Aviation Corp.*, 272 F.2d at 540 n.24.
78. *Commercial Cable Co. v. Burleson*, 255 F. 99, 101, 104-06 (S.D.N.Y. 1919).
79. *Id.* at 104
80. *Id.* at 104-05.

peace. The terms of the final conventions . . . are the measure of that [national] ugewtk\ "cpf "f ghpug0⁸¹

Likewise, in *Central Telephone Co. v. South Dakota*, the Supreme Court, in assessing the legality of federally mandated wartime intrastate telephone rates, f ggo gf "f kur qukkxg'o kuukgu'ht qo "öy g'j ki j guv'cwj qtkkqu'qh" y j g" hgf gtcn' I qxgtpo gpv' |y cv" cempqy rfi gf " y cv' y j g" y ct" j cf " gpf gf öö namely, messages from President Wilson to Congress dated November 11 and December 2, 1918.⁸² Some thirty years later, the Western District of New [qtntly qwf "u{ pyj guk' g' y gug' f gekukpu'kp" i tcpv'kp i "y g' i qxgtpo gpv' u" o qv'kp" for an injunction against striking railway workers.⁸³ While the Korean War was but a few months old, the conflict provided a critical basis for government action,⁸⁴ cu" ö|v j g" statutes effective only -in time of warö attach independently of military engagement, öeqpv'kw|kpi _ in force until a formal statement of peace is f gerctgf 0⁸⁵

öY ct. ö'y gp. 'hqt' t' wr qugu'qh' Uge v'kp' 928* c+ 'ku' hebulous, with potential sources of interpretive guidance given to circular logic and an overweening retreat to the tautologies of executive authority. Simply put, the condition of

81. *Id.* at 105-06; *accord* Sw. Tel. & Tel. Co. v. Houston, 256 F. 690, 697 (D. Tex. 3; 3; +*öVj g'uki plpi "qh'y g'cto kuleg'f kf "pqv'vto lpcv'g' y g' y ctöY g'ctg' u'km'c'ly ct. 'cnj qwi j " active hostilities have been suspended, and may not be renewed. This Telephone Act, however, must be interpreted in the light of conditions as they existed at the time of its passage by Congress 0000ö+

82. *Central Tel. Co. v. South Dakota*, 250 U.S. 163, 179 (1919); *accord* Woodrow Wilson, President of the U.S., Sixth Annual Message. at UVA Miller Center (Dec. 2, 1918) <https://millercenter.org/the-presidency/presidential-speeches/december-2-1918-sixth-annual-message> [<https://perma.cc/K9MU-35EY>] *öCpf 'pqy 'y g'ctg' u'wtg'qh'y g' i tgev'tkwo r j "hqt" which every sacrifice was made. It has come, come in its completeness, and with the pride and inspiration of these days of achievement quick within us, we turn to the tasks of peace again . . . ö+:

83. *U.S. v. Switchmen's Union of N. Am.*, 97 F. Supp. 97, 102 (W.D.N.Y. August 11, 1950) *öNext I find that a continuance or resumption of the strike will deprive the Nation of an essential transportation service and will substantially obstruct the flow of interstate commerce and the transmission of the mails of the United States over the affected railway u{vgo 0+:

84. *See id.* cv'322*öK'lu'den'g'xgf 'y cv'y ku'eqwt'ecp' 'cng' l'w' l'ek'ri'p'v'leg'qh'y g' W'p'kgf Nations' conflict over Korea. This greatly emphasizes the necessity for the continued qr gtcv'kp'qh'y ku'tcktkcf 0 (internal citation omitted); *see also, e.g.,* *Parker v. Lester*, 98 F. Supp. 300, 303 (N.D. Cal. 1951) (denying, apropos of executive and administrative r tqxkukpu'r tgf l'ecv'gf "qp' t' q' r j { r'ev'le'ce'v'kp'u'f ggo gf "öguugp'v'kn'v'q'w' 'pc'v'kp'cn'f' ghpug. "v" the implementation of the North Atlantic Pact, Economic Cooperation Administration, and to the prosecution of hostinku'kp' M'qtgc. ö'b q'v'kp'v'q' g'plq'p' t'gs v'kt go gpv'y cv'transnational commercial mariners obtain a security clearance as a prerequisite to gainful employment, per c' h'p'f' l'pi 'y cv'ö|j _y gxgt' i t'lxq'w'v'y g' r' gtu'q'pc'nf' gr tk'c'v'kp' r' g'v'k'p'q'p'tu'j cxg' l'w'ht'gf. 'y g" additional sacrifice they are called upon to make by this denial of their motion bulks small beside the incalculable loss which might result if this court summarily suspended, even in part, the security programö+; *cf.* Harry S. Truman, President of the U.S., Radio and Television Address to the American People on the Need for Government Operation of the Steel Mills (Apr. 8, 1952) (öVj gug'ctg'p'qv'p'qto c'ri'v'ko gu'öVj gug'ctg'v'ko gu'qh'et'kukuö+)

85. *Switchmen's Union of N. Am*0'; 9'HÖU'w' r 0'cv'322*öHowever, neither the war with Germany nor Japan has ever been dissolved and no treaty of peace has followed these y ctuö+:

war stands appositionally to a condition of non-war in the commander-in-chief's equally murky national emergency that impinges upon the national security, for as long as the President exercises them, even, *qua* pre-Act precedent, to the bounds of formally declared peace.⁸⁶ This formulation accords notably with the distinction under international law between a *declaration of the existence of a state of war* (effecting, at bottom, a relational change between the states subject to it and mobilizing the domestic appurtenances incumbent upon it, such as Section 706(a) and a *declaration of war* (undergirding the use of armed force).⁸⁷ In other words, in invoking subsection (a), the commander-in-chief can elide the knotty questions of the how, when, and why of its prosecution, attesting to its apparent existence as justification for any and all communications preference and prioritization deemed necessary to its resolution.

B. The Prospects for Judicial Review

Further complicating the potential scope of Section 706(a) are the obstacles to effective judicial review. Assuming, however unlikely,⁸⁸ a concerted protest by the statutorily affected, the prospects for redress at bar against putative presidential abuse appear exceedingly remote.

The critical analytical framework for adjudging the constitutionality of emergency executive actions was set forth by *Youngstown Tube & Sheet Co. v. Sawyer*.⁸⁹ The Court's analysis, which has been widely cited, sets forth a three-part test for determining the constitutionality of executive actions. The first part asks whether the President is acting in a purely executive capacity, the second part asks whether the President is acting in a quasi-judicial capacity, and the third part asks whether the President is acting in a legislative capacity.

86. See, e.g., DUSTIN A. LEWIS ET AL., INDEFINITE WAR: UNSETTLED INTERNATIONAL LAW ON THE END OF ARMED CONFLICT (Harvard L. Rev. 2017), https://dash.harvard.edu/bitstream/handle/1/30455582/Indefinite%20War%20-%20February%202017_3.pdf?sequence=4&isAllowed=y [https://perma.cc/HMY4-LPM4]. Cf. Kevin Snow, *Congress Continues the Long Path Toward Repealing the 2002 AUMF*, FRIENDS COMM. ON NAT. LEGIS. (July 21, 2023), <https://www.fcni.org/updates/2023-07/congress-continues-long-path-toward-repealing-2002-aumf> [https://perma.cc/6CNF-RU2Y].

87. See JENNIFER K. ELSEA & RICHARD F. GRIMMETT, CONG. RSCH. SERV., RL31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 22-29 (2006).

88. Subsection (a) specifically immunizes carriers from civil or criminal penalties in 47 U.S.C. § 606(a). Moreover, as detailed by *Bd. of Regents v. Nippon Tel. & Tel. Corp.*, No. A-01-CA-478 SS, 2004 U.S. Dist. LEXIS 28819, at *27 (W.D. Tex. June 1, 2004), there exists a discursive distinction between a corporation amenable, by way of voluntarily licensing, to wartime necessity, and the same private concern rendered effectively immune from liability by the President's exercise of his emergency powers. See, e.g., Susan W. Brenner & Leo L. Clarke, *Civilians in Cyberwarfare: Conscripts*, 43 VAND. J. TRANSNAT'L L. 1011, 1016-17 (2010) (explicating, per international law, the legality of compelled civilian participation in armed conflict); cf. David Gray, *Is Google a State Agent?*, 27 STAN. TECH. L. REV. P206, P209-14 (2024).

action on the Korean peninsula.⁸⁹ In a concurring opinion, Justice Jackson promulgated a tripartite taxonomy for assessing the legality of presidential authority under extraordinary conditions.⁹⁰ Germane to the present inquiry is the first circumstance, which establishes that the President's power to negotiate treaties, could seize cables even in time of war without legislative authority.⁹¹ There can be little doubt, per the broad enabling language of and well-entrenched history behind subsection (a), that a future chief executive will be able to exercise his powers exercised thereunder.⁹²

A potential recourse to this state of affairs might be derived from the non-delegation doctrine.⁹³ While the Constitution exclusively vests law-making authority in Congress,⁹⁴ the 1928 *Hampton* decision provided that the legislature may delegate it to the executive or regulatory realms, provided it is directed to conform to an intelligible principle to which the person or body authorized . . . is directed to conform.⁹⁵ Seven years later, however, the Supreme Court cabined this pronouncement, observing in *Panama Refining Co. v. Ryan* that the delegation of power to the executive branch is unconstitutional if it is not accompanied by an intelligible principle.⁹⁶

Putting aside the efficacy of this non-delegation doctrine as a practical check on the ambitions of the executive branch,⁹⁷ its utility in forestalling abuse of Section 706(a) is questionable. In *National Broadcasting Co. v. United States*,⁹⁸ the Supreme Court considered the scope of the FCC's duties as licensor responsible for allocating portions of a limited electromagnetic spectrum to prospective broadcasters. The Court opined that the FCC's duties are not so broad as to require the Commission to act in a particular manner. The Court held that the FCC's duties are not so broad as to require the Commission to act in a particular manner. The Court held that the FCC's duties are not so broad as to require the Commission to act in a particular manner.

89. *Youngstown Tube & Sheet Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952) (Jackson, J., concurring).

90. *Id.* at 635-38.

91. *Id.* at 635.

92. *Id.* at 637. *Cf.* *U.S. v. Western Union Tel. Co.*, 272 F. 311, 315 (S.D.N.Y. 1921) (the President's power to negotiate treaties, could seize cables even in time of war without legislative authority).

93. I am indebted to Professor Joseph Blocher for suggesting this line of inquiry.

94. U.S. CONST. art. I, § 1.

95. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

96. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935).

97. *See, e.g.,* Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 381-83 (2017); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1721-22 (2002).

98. *National Broadcasting Co. v. United States*, 319 U.S. 997, 999 (1943).

99. *Id.* at 1110.

100. *Id.*

reside in the nation's right of self-preservation, and the means of enforcing such right are left to the discretion of the nation, and cannot be interfered with at the pleasure of the States or their courts.¹¹⁴

A final impediment to effective judicial review arises from the seemingly anodyne subject matter of subsection (a). Well apart from the instrumentalities at the commander-in-chief's disposal for the deployment of brigades and batteries or even the reconstitution of civilian-facing communication systems in the face of existential threats¹¹⁵ subsection (a) is possessed of a far less-threatening recourse to traffic management. The President, in other words, might not have the authority to eliminate the ability of citizens to access a platform like Substack or Bluesky, but could merely throttle the data throughput of the servers that support it, blurring the nexus between the articles critical of his administration that it contains (or, more charitably, articles inimical to his estimation of the public interest)¹¹⁶ and a charge of censorship.¹¹⁷ This, I think, suggests something of the constitutionally vexing muddle between otherwise judicially actionable abuses of presidential war authority are cloaked as actions taken incidental to it.¹¹⁸

IV. EMERGING TECHNO-LEGAL CONSIDERATIONS

Thus far, my discussion of Section 706(a) has been centered on the past. Beyond this, however, there exist contemporary and emerging factors that enhance the potential for statutory abuse as set forth in the introduction to this paper from the possible to the likely, given a President impelled primarily by the prospect of partisan or personal gain.¹¹⁹

114. *Read v. Central Union Tel. Co.*, 213 Ill. App. 246, 255 (Ill. App. Ct. 1919).

115. Again, I note the contrast between subsection (a) and the provision by subsections (c) and (d) for the wholesale seizure of wire or wireless systems by the federal government, which, as Brenner and Clarke, *supra* note 88, at 1060, observe of the cyber battlefield, would effectively render facility owners and operators civilian conscripts under the international law of armed conflict.

116. 47 U.S.C. § 606(a).

117. *Cf. Holder v. Humanitarian Law Project*, 561 U.S. 1, 7, 34-35 (2010) (delineating, activity, the grounds for judicial deference to prophylactic measures taken in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess The Government, when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions).

118. See EDWARD KEYNES, UNDECLARED WAR: TWILIGHT ZONE OF CONSTITUTIONAL POWER 88-89 (1982).

119. *Cf. Dell Cameron, Secrecy Concerns Mount Over Spy Powers Targeting US Data Centers*, WIRE (May 14, 2024), <https://www.wired.com/story/section-702-ecsp-civil-liberties-letter/> [<https://perma.cc/67RV-HSFX>] (detailing resistance to recent expansion of data center surveillance powers by the executive branch under Section 702 of FISA).

Vj g'htuv'cpf 'o quvko r qtvcpv'ku'bo qf gtp'y cthctgaulpetgculpi 'wug'qh'yj g' information domain as a battlefield, a development that portends, at best, a fractious understanding of the potential scope and impact of Section 706(a). As Aldrich observed nearly twenty-hkxg"{ gctu'ci q. 'e{ dgtur ceg"ku"ogvj gtgcnö" y j gtg'öy ger qpu'000dqiwi j vlp'cp{ 'eqo r wgt'uatg'000kppqueously manipulate dku'qh'f cvö"vq'y t gcn'c'wgpwcvf "j cxqe"qp "övrgeqo o wplec'v'kpu'eqo r cplgu." r qy gt 'eqo r cplgu. h'kpcpekn'egpvtu. 'cpf 'vj g'htgö¹²⁰ This fluidity, he opined, j cu'ugt'kqu'qp'v'q'ni kcnko r dec'v'kpu'y kj 't'gur gev'vq'öwulpi "guvcdriuj gf 'rcy 'qh' armed conflict constructs to assess military necessity, proportionality, eqm'v'gcn'f co ci g. 'cpf 'vj g'htgö¹²¹ Little has changed in the quarter-century j gpeg'0'Cu'vj g"4239"xgtukqp"qh'vj g"P qt vj "Co gtlecp"Vtgc'v' "Qti cpl' cvk'pau" E { dgt 'F ghpug' 'Egpvt'qh'Gzegm'pegau'Vcnkpp'O cpwcn'f tk' { "qdugt xgu. 'ö]vj g" application of the law of armed conflict to cyber operations can prove r tqdrgo cvk.ö" y kj "uwej " dcule" eqpegr wu' cu" ö]vj g' gz'kugpeg" qh' c" e{ dgt" qr gtc'v'k'p. 'ku'qt'ki kpcvt. 'ku'k'p'v'p'f gf "qdlgev'qh'c'wcem"qt 'ku'r t'gelug'gh'gewö" still the subjects of contestation amongst scholars.¹²²

With the epistemology of war itself cast asunder¹²³ a concerted nadir in the particular case of subsection (a), as per Part II.A of this paper^ö on what foundation can normative claims be staked? How might, for example, we classify the geopolitical aims in and legal justifications for slowing Facebook servers to prevent the spread of anti-Kashmiri misinformation by the Indian Army?¹²⁴ Does throttling communications critical to domestic protests (that oppose, say, acts of imperialism by the United States or one of its proxy states) amount to censorship or a valid response to suspected fifth columnists?¹²⁵ Is prioritizing the voices of Iranian dissidents across social media a valid adjunct vq'vj g'eqwpt { au'egcugruu'y ct "qp"v'gttqt"qt"cp"wpf vg"xlk'rc'v'k'p"qh'p'cv'k'p'cn' sovereignty?¹²⁶

All these questions, of course, presuppose an understanding of the increasingly byzantine technical means and methods through which digital preference and prioritization will be effectuated. Data centers, like Amazon

120. Richard W. Aldrich, *How Do You Know You Are at War in the Information Age?*, 22 HOUS. J. INT'L L. 224-25 (2000).

121. *Id.* at 226.

122. TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 377 (Michael N. Schmitt ed., 2017) (ebook).

123. Cf. David G. Delaney, *Cybersecurity and the Administrative National Security State: Framing the Issues for Federal Legislation*, 40 J. LEGIS. 251, 263-64 (2013-14) (arguing, per *Youngstown*. 'vj cvö]vj g'Rt'guk'f'gpv'u'o kksct { 'r qy gtu'ctg'uko r n' 'c'uvct'v'pi 'point to consider steps that the cyber administrative national security state must take to understand cpf "cf f t'guu'ugewtks { 'kuwgu'qh'yj g'f'ki kcn'ci gö+0

124. See Joseph Menn & Gerry Shih, *Wpf gt 'Tpf'k'au'Pressure, Facebook Let Propaganda and Hate Speech Thrive*, WASH. POST (Sept. 26, 2023), <https://www.washingtonpost.com/world/2023/09/26/india-facebook-propaganda-hate-speech/> [<https://perma.cc/BJY2-K6QE>].

125. Cf. Jonathan Guyer, *The 2010s was a decade of protests. Why did so many revolutions fail?*, VOX (Oct. 1, 2023), <https://www.vox.com/world-politics/23896050/protest-decade-2010-revolutionary-handbook-vincent-bevins-arab-spring-brazil-occupy-hong-kong> [<https://perma.cc/WQS6-ZKEJ>].

126. See, e.g., Ali & Fahmy, *supra* note 5, at 59.

Web Services, constitute the backbone of the modern Internet; central to worldwide connectivity and traffic exchange, they are vital national resources in (and vulnerable targets of) concerted transnational conflict.¹²⁷ Yet even in peacetime, the operations of these institutions, controlled by a handful of insular global corporations and operating well outside the regulatory gaze and popular ken, are difficult to understand.¹²⁸

The second is Section 706(a)(1) "common carrier." Defined by foreign communication by wire or radio or interstate or foreign radio companies.¹³⁰ In 2016, however, the FCC expanded its reach to encompass broadband Internet access service providers in the interests of network transparency and openness.¹³¹ While this regulatory initiative, known as the "Open Internet Order,"¹³² agency leadership has embarked in 2023¹³³ on a successful campaign to resurrect it.¹³⁴ This, of course, places cable television, satellite, and digital subscriber line Internet access providers in the very practices of blocking, throttling, and non-neutral data

127. Cf. *Connecting America: Oversight of the FCC: Hearing Before the Subcomm. on Energy & Com.*, 118th Cong. 2 (2023) (statement of Commissioner Geoffrey Starks) <https://www.congress.gov/117/meeting/house/114545/witnesses/HHRG-117-IF16-Wstate-StarksG-20220331.pdf> [<https://perma.cc/SYC5-4HLU>] like foreign-qy pfg "f cv"egvgtuö" go cpf "c'y j qng-of-i qxgtpo gpvutcvgi {"öq"r tqgevWLU" eqo o wplecvkpu"uqtgf "y kj kp"qt"y cv"qj gty kug"tcpuks"y gug"fcv"egvgtuö; *Privacy and Data Protection Task Force*, FCC (2023), <https://www.fcc.gov/privacy-and-data-protection-task-force> [<https://perma.cc/A9DU-DR57>] "gucdrkj kpi "c"eqo r tgj gpukg"ör wdrie-private cr r tqcej ö"vq"vcemkpi "ör tqdngo u"j cv"gtqf g"y g'r wdrie"t wv"kp"fcv"r tqgevkpö"cpf "lo r gtkl" öj g"pcv"kpö"eqo o wplecvkpu"uwr r n" "ej kpoö"

128. See, e.g., Molly Wood, *We Need to Talk About Cloud Neutrality*, WIRED (Feb. 10, 2020), <https://www.wired.com/story/we-need-to-talk-about-cloud-neutrality/> [<https://perma.cc/9Z5Y-78SF>].

129. 47 U.S.C. § 153(11).

130. See, e.g., Mark A. Hall, *Common Carriers Under the Communications Act*, 48 U. CHI. L. REV. 409, 416-18, 420 (1981).

131. See *Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601, ¶¶ 13-29 (2015) [hereinafter *Open Internet Order*].

132. See *Restoring Internet Freedom*, 33 FCC Rcd 312, ¶ 1 (2017); cf. Toronto, *supra* note 26, at 180-181.

133. See *Safeguarding and Securing the Open Internet*, 89 Fed. Reg. 45404, 45404 (May 22, 2024); cf. Eva Dou, *HEE's Net Neutrality Battle is Back After Years of Deadlock*, WASH. POST (Sept. 28, 2023), <https://www.washingtonpost.com/technology/2023/09/28/fcc-net-neutrality/>; Press Release, FCC, Chairwoman Rosenworcel Proposes to Restore Net Neutrality Rules (Sept. 26, 2023), <https://docs.fcc.gov/public/attachments/DOC-397235A1.pdf> [<https://perma.cc/BHD2-CE2Z>].

134. See *Safeguarding and Securing the Open Internet; Restoring Internet Freedom*, 89 Fed. Reg. 45404, 45404 (final proposed rule May 22, 2024) (to be codified at 47 C.F.R. pts. 8 and 20) "cf qr kpi "öc"Declaratory Ruling, Report and Order, Order, and Order on Reconsideration that reestablishes the FCC's authority over broadband internet access ugtxlegö"cu"qh"lw" "44."4246-0

prioritization¹³⁵ that net neutrality was designed to prevent.¹³⁵ Further complicating matters are claims that the FCC may *already* enjoy common carrier authority over platforms like social media sites and search engines by f l p v q h ' 69 " W U E 0 E " 452. " j g " e q p t x g t u k n ' o i q q f " U c o c t k c p o ' r t q v e i o n f o r c o n t e n t m o d e r a t i o n . ¹³⁶

Finally, there stands the historical consolidation of dispersed federal authorities in a singular individual¹³⁷ the so-called *imperial presidency*, by o y j l e j " g p q t o q w u ' f k u e t g v k p c t { ' r q y g t " v q ' t g u r q p f " v q ' p c v k p c r i ' s e c u r i t y c r i s e s c p f ' r t g e g k x g f ' f c p i g t u ' k u ' e q p e g p t c v g f ' k p ' j g ' q h h e g ' q h ' j g ' r ' t g u k f g p v o ¹³⁷ In the wake of the attacks of September 11, 2001, government officials seized upon a national security crisis to propound new theories of executive authority in the realm of enhanced interrogation tactics,¹³⁸ warrantless electronic surveillance,¹³⁹ and targeted killings of United States nationals abroad.¹⁴⁰ As v j g " D t g p p c p " E g p v g t a u " t g e g p v ' t g r g c u g " q h " u q o g " 722 " r c i g u " q h " o r t g u k f g p v k c r i g o g t i g p e { " c e v k p p " f q e w o g p w o " * o R G C F u o - " I t q o " 4226 to 2008 demonstrates, U g e v k p p ' 928 ' y c u ' p q v l o o w p g ' I t q o " j g ' D w u j ' C f o l p k u t c v k p a u ' g h h q t w ' q ' c o c u u "

135. See *Open Internet Order*, *supra* note 130, at ¶ 4; *Preserving the Open Internet, Broadband Industry Practice, Notice of Proposed Rulemaking*, 25 FCC Rcd 17968, 17974-75 (2010); cf. *Opderbeck*, *supra* note 26, at 37 *oC'v'o quv." U g e v k p p ' 928 * c - _ ' o k i j v ' c w j q t k g ' j g " P r e s i d e n t t o c h a n g e s o m e o f t h e r e q u i r e m e n t s f o r I n t e r n e t t r a f f i c . . . p e r h a p s , f o r e x a m p l e , b y r e q u i r i n g I S P s t o t h r o t t l e P 2 P a p p l i c a t i o n s s u s p e c t e d o f u s e b y a t e r r o r i s t o r g a n i z a t i o n . o - 0 A h k p r i k t p l e ' y k u ' k u ' h q w f ' l p ' H E E ' E j c k o c p " T q u g p y q t e g r a u ' t w o o c t { ' q h ' j g ' c f x c p v c i g u ' v j c v ' w i l l a c c r u e t o t h e c o u n t r y f r o m r e c l a s s i f i c a t i o n , t h e v a s t m a j o r i t y o f w h i c h c o n c e r n e n h a n c e m e n t s t o n a t i o n a l s e c u r i t y a n d p u b l i c s a f e t y . S e e F C C O f f i c e o f t h e C h a i r w o m a n , F A C T S H E E T : N a t i o n a l S e c u r i t y a n d P u b l i c S a f e t y I m p a c t s o f R e s t o r i n g B r o a d b a n d O v e r s i g h t (O c t . 5 , 2 0 2 3) , <https://docs.fcc.gov/public/attachments/DOC-397494A1.pdf> [<https://perma.cc/28NV-MSME>]; cf. *Robbie Troiano, Assessing the Current State of Net Neutrality and Exploring Solutions in Creating and Maintaining Open, Available, and Innovative Internet and Broadband Services*, 14 J. BUS. & TECH. L. 553 (2019) (explicating v j g ' e a p p g u n g f ' o e q o o q p " e c t l t g o ' e r c u k h e c v k p " c u ' e g p t c r i ' v ' H E E " g h h q t w ' q ' r t q j k d k r ' w r q t v g f " t r a f f i c m a n a g e m e n t a b u s e s o n t h e p a r t o f I n t e r n e t s e r v i c e p r o v i d e r s) .

136. See, e.g., *Joel Thayer, The FCC's Legal Authority to Regulate Platforms as Common Carriers*, FED. SOC. BLOG (Mar. 29, 2021) <https://fedsoc.org/commentary/fedsoc-blog/the-legal-authority-for-the-fcc-to-regulate-platforms-as-a-common-carrier> [<https://perma.cc/Q958-ND3L>] *oDgecwag' U g e v k p p ' 452 ' u k u ' l p ' V k r g ' K K ' c m l u g t x l e g u ' e q x g t g f " w p f g t ' j g ' l n c w w g ' c t g ' u w d l g e v ' q ' j g ' V k r g a u ' t w r g o c n k p i " c w j q t k f ' w p f g t ' U g e v k p p ' 423 * d + . . . T r a d i t i o n a l l y , S e c t i o n 2 0 1 (b) a p p l i e s t o r u l e s r e l a t e d t o c o m m o n c a r r i e r s . o - 0

137. Paul Starobin, *Imperial Presidency Has Long History*, GOVERNMENT EXECUTIVE (Feb. 22, 2006), <https://www.govexec.com/federal-news/2006/02/imperial-presidency-has-long-history/21214/> [<https://perma.cc/M9R8-XRF8>].

138. See, e.g., "O go q t c p f w o ' I t q o ' L c { ' U O D { d g g . ' C u u k u c p v ' C w o f ' I g p 0 ' v q ' C n d g t v q " T O G o n z a l e s , C o u n s e l t o t h e P r e s i d e n t (A u g . 1 , 2 0 0 2) , (a v a i l a b l e a t <https://www.justice.gov/media/852816/dl?inline>).

139. See, e.g., Letter I t q o ' L q j p ' E O l q q . ' F g r w f ' C u u k u c p v ' C w o f ' I g p 0 ' Q h h e g ' q h ' N g i c n C o u n s e l , t o U . S . D i s t r i c t J u d g e C o l l e e n K o l l a r - K o t e l l y (M a y 1 7 , 2 0 0 2) (a v a i l a b l e a t <https://www.justice.gov/media/879011/dl?inline>).

140. See, e.g., O g o q t c p f w o ' I t q o ' F c x k f ' L O D c t t q p . ' C e v k p i ' C u u k u c p v ' C w o f ' I g p 0 ' Q h h e g o f L e g a l C o u n s e l , v q ' j g ' C w o f ' I g p 0 R e : A p p l i c a b i l i t y o f F e d e r a l C r i m i n a l L a w s a n d t h e C o n s t i t u t i o n t o C o n t e m p l a t e d L e t h a l O p e r a t i o n s A g a i n s t S h a y k h A n w a r a l - A u l a q i (J u l y 1 6 , 2 0 1 0) (a v a i l a b l e a t https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-07-16_-_olc_aaga_barron_-_al-aulaqi.pdf [<https://perma.cc/7W4Q-9PKTJ>]).

ör qy gtu" vj cv' cr r gct" vq" xem' qxgtuki j v' htqo "Eqpi tguu." vj g" eqwtu." qt" vj g" r vdrleö¹⁴¹ While the text of the relevant PEADs is largely accurate,¹⁴² handwritten comments from NSC staffers suggest that subsection (a) might öcr r]n{ "_vqy ctf" "kpvgtucvq"ecttkgtu"dg{ qpf "röpi]wci g_"qh'ucvwwg."kpe]mf kpi _" d{ " HEEö" cpf" övq" pqpeqo o qp" ecttkgtuö this is beyond statutory röpi]wci g_ö¹⁴³ Further reflections on the scope of Section 706(a) question whether a ö]r_tqerco cvkqp"]ku_"uvm'pgeguuct {"vöpf gt"P cvkqpcn"Go gti gpekgu" Cevö¹⁴⁴ a Watergate-gtc" rgi kurvkg" ej gem' qp" vj g" Rtgukf gpvau" wug" qh' extraordinary powers in a crisis.¹⁴⁵ There seems little doubt that these troubling initiatives will increase, particularly as lawmakers debate the merits qh'c'öf ghöpf "hqt y ctf ö'utcvgi {"hqt"lphqto cvkqp"y cthctg."d{"y j lej "vj g" Wpksf" Ucvgu"o kxct{"y qwf "go dtceg"öcp"qr gtcvqpcn"vgo r q"qh'eqpvöpwquö or persistentö engagemepv'y kj 'cf xgtuctkgu'lp"vj g'e{ dgt'f qo clpö¹⁴⁶

V. A PATH FORWARD

Taking the preceding sections together, the inherent ambiguity and potential applications of Section 706(a) demand reparative action. Such a fix should be both immediate and comprehensive, particularly as social media

141. Benjamin Waldman, *Pgy 'F qewo gpw'kmo kpcv'vj g'Rt gukf gpvau'Uget gv'Wpej gengf Emergency Powers*, BRENNAN CTR. FOR JUST. (May 26, 2002), <https://www.brennancenter.org/our-work/analysis-opinion/new-documents-illuminate-presidents-secret-unchecked-emergency-powers> [https://perma.cc/2FV5-E9U2].

142. See generally Himamauli Das (2004), OSTP NS/EP Wartime Authorities Under 47 U.S.C. Section 706 and E.O. 12472(a)(2) NSC Provides Policy Direction; Himamauli Das (2004), Questions for Section 706 PEAD Review. National Security Advisor ö Legal Advisor *pqvpi . 'hqt'gzco r rög'vj cv'vj g'tgrxcpv'öucvq"qh'go gti gpe{ ö'cpf "övk i gtuö'hqt'wug'qh'Ugevkqp" 706(a) are the öeqpvöwöpeg'qh'c'y ctö'cpf a öpgegu]k{ "_hqt'vj g'pvcvqpcn'f ghöpgu'cpf " security,ö respectively); Himamauli Das (2004), Communications Act Section 706 47 USC § 606. Declassified and released by the George W. Bush Presidential Library under the Freedom of Information Act (FOIA) to the Brennan Cent. for Just, FOIA Request No. 2015-0067-F 1, 3-4 (2015), https://www.brennancenter.org/sites/default/files/2022-05/t030-014-006-peads-20150067f_0.pdf#page= [https://perma.cc/UTT6-Q3PZ] [hereinafter 2015 FOIA Request].

143. 2015 FOIA Request at 1.

144. *Id.* at 3.

145. See 50 U.S.C. §§ 1601; cf. Note, *The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power*, 96 HARV. L. REV. 1102, 1102-3325*3; : 5+*öVj g'r tqdrgo 'r qugf 'd{ 'vj g'pggf 'vq'r gto k'dw'ukm'v'öko k' emergency power . . . has been a troublesome issue for the theory and practice of liberal government. On the one hand, United States constitutional law has long recognized that crises provide occasions for the exercise of extraordinary national powers and that, especially in the context of foreign affairs, the Executive is peculiarly well suited to invoke uwej 'r qy gtöö

146. Robert Chesney, *The Domestic Legal Framework for US Military Cyber Operations*, HOOVER INST. (2020), https://www.hoover.org/sites/default/files/chesney_webreadypdf.pdf [https://perma.cc/8N2Y-TWLT].

A revised subsection (g), incorporating the considerations set forth above, would thus read:

Nothing in subsection (a), (c) or (d) shall be construed to authorize the President to make any amendment to the rules and regulations of the FCC which the FCC would not be authorized by law to make; and nothing in subsection (d) shall be construed to authorize the President to take any action the force and effect of which shall continue beyond the date after which taking of such action would not have been authorized. If in the absence of a declaration of war, as such term is understood under section 1541 of title 50, United States Code, the President, whether directly, or through such person or persons as he designates for the purpose, or through the FCC, gives directions that such communications as in his judgment may be essential to the national defense and security shall have preference or priority with any carrier subject to this chapter:

(1) nothing in subsection (a) shall be construed to authorize the President, whether directly, or through such person or persons as he designates for the purpose, or through the FCC, to censor the communications of any carrier subject to this chapter or otherwise interfere with the right of free speech by means of telecommunications; and

(2) such directions shall be treated as an order of the FCC for purposes of appeal under section 402(b) of this title by any person who is aggrieved or whose interests are adversely affected by their issuance.

VI. CONCLUSION

Thirteen years ago, the Senate Committee on Homeland Security and Governmental Affairs concluded that while the President has the authority to take over wire communications in the United States and, if the President so chooses, shut a network down . . . it is not clear that the President's authority to do so is unlimited.¹⁶⁷ This paper has presented a case to the contrary, per factors intrinsic to the construction of subsection (a) and emerging techno-legal concerns. It has also provided a means of remediation, in the form of a specific statutory fix that should be implemented as rapidly as possible. As an augment to existing scholarship on the potentially pernicious applications of Section 706(c) and (d) and a reflection upon the seeming inadequacy of existing legal frameworks to constrain excesses of executive authority over wired and wireless modalities this paper thus

167. S. REP. No. 111-368, at 10 (2010).

stands as a further bulwark against presidential assumption of emergency powers over national communications in exigent times.¹⁶⁸

168. Patrick A. Thronson, *Toward Comprehensive Reform of America's Emergency Law Regime*, 46 U. MICH. J.L. REFORM 737, 754 n.124 (2013) (postulating that the Obama Administration reached such a conclusion in deeming emergency powers over national communications in exigent times. ¹⁶⁸