# Rt ghgt t gf 'qt 'Rt kqt køk gf <Rt qd kpi 'tj g'' Nko køu'qh'Rt gulf gpvkcnY ct 'Rqy gt u'' Wpf gt 'Ugevkqp'928\*c+'qh'tj g'' E qo o wpkecvkqpu'Cev'qh'3; 56

O cvvj gy 'N0Eqpcv{,

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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 o ktkct { 'hqteg"ci ckpuviõpcteq-wttqtkuwö"qp"yj g"pckqpøu"uqwj gtp"dqtf gt0 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.<sup>2</sup> In a manner reminiscent of the 2001 Authorization for the Use of Military Force<sup>3</sup>ô or perhaps yj g"Rtgukf gpvau" mere observation during a State of the Union address that the nation is now at war with nefarious drug lords<sup>4</sup>ô 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.<sup>5</sup> 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,<sup>6</sup> and ensures that only one õugewtgö"social media platform<sup>7</sup>ô a platform in which he is majority shareholder and on which his posts dominate conversationô operates at anything approaching normal speeds.<sup>8</sup> 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

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).

<sup>1.</sup> *Cf.* William P. Barr, *Vj g'WUDO ww/F glgcv/O gzkeqa/F twi 'Ect vgnu*, 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.

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

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

<sup>6.</sup> *Cf.* T-Mobile USA, Inc., *Order*, 31 FCC Rcd 11410 (2016) (imposing a \$7.5 million penalty on T-O qdkrg'hqt'ko r rgo gpvkpi 'c'ôf g-r tkqtkk cvkqpö'r qrke{ "qp'egmvrct" consumers in contravention of unlimited data plan representations).

<sup>7.</sup> Eqpulf gt'j gtg''y g'Dlf gp''Cf o lpluttculqpøt'cwgo r wt''q'hqtgenqug'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*, NATøL 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].

<sup>8.</sup> *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"Rtgulf gpva"cwj qtk{ "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"nqpi gt."uj g"xqy u"lp"j gt "lpcwi wtc.kqp"ur ggej ."y knl'y g"eqwput {øu" response be dictated by the effects of the phenomenon, awkwardly remediating its effectsô from rolling blackouts<sup>9</sup> to ballooning toxic algae blooms<sup>10</sup> to ever-increasing spates of heat-related deaths<sup>11</sup>ô 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{ " y g" õwpgs vkxqecrö" eqpenvukqp" qh" y g" Wpkgf " P cvkqpu" Kogti qxgtpo gpvcn' Rcpgn' qp" Erko cvg" Ej cpi g" õvj cv' j vo cp" kohnvgpeg" j cu" y cto gf " y g" cvo qur j gtg." qegcp" cpf " rcpf .ö<sup>12</sup> the President, recalling the paramilitary ambitions and confiscatory methods of her predecessors Richard Nixon<sup>13</sup> and Ronald Reagan<sup>14</sup> 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,<sup>15</sup> committing it to reduce greenhouse gas emissions beneath internationally brokered thresholds.<sup>16</sup> Accordingly, the President sets her

<sup>9.</sup> *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/texascould-face-a-grid-emergency-rolling-blackouts-in-august-ercot-report-says/ [https://perma.cc/8D6C-38KK].

<sup>10.</sup> *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-tempshot-ocean-climate-change-challenges-florida/70405223007/ [https://perma.cc/7MUF-GPHF].

<sup>11.</sup> 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].

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

<sup>13.</sup> 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 INT&L REV. RED CROSS 828, 829 (2023).

<sup>14.</sup> See, e.g., Emily Crick, Tgci cpøu'O ktkct kucvkqp"q/l'ij g":¥ ct "qp"F twi uø, GLOB. DRUG POLøV OBSERVATORY (Jun. 13, 2016), https://gdpo.swan.ac.uk/?p=440 [https://perma.cc/NDN2-8DXH].

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

<sup>16.</sup> See The Paris Agreement, UNITED NATIONS (2024),

https://www.un.org/en/climatechange/paris-agreement [https://perma.cc/GJ4M-P99C].

sights on y g"pcvkqpøu"uj ctg"qh"y g"96"o kmkqp"o gvtke"vqpu"qh"i tggpj qwug"i cu" emissions produced by Bitcoin miners each year,<sup>17</sup> calling upon the aforementioned statute to drastically cap the traffic throughput of the data centers that power large-scale digital excavation.<sup>18</sup>

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 Eqo o kukqp<sup>\*\*</sup>6HEEö+0Cpf "{gv<sup>\*</sup>Ky qwf "cti wg<sup>\*</sup>vq"y 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 digitalô and the historical roots of war beget conflicts of ambiguous scope and duration in a multiflorous modernityô presidential ambitions to control and constrain communications, I believe, could flourish in few fields so welcoming as Section 706(a)<sup>19</sup> of the Eqo o wykecvkqpu'Cev'qh'3; 56."cu'co gpf gf "\*j g'ôCevö+0<sup>0</sup>

Vkrgf "õY ct"r qy gtu"qh"Rtgulf gpvö"Ugevkqp"928"is divided into four operative components, each of which õgrants specific, communications-related powers to the President in time of war or national emergency<sup>621</sup> Taken cu"c"y j qrg."Ugevkqp"928"eqpuvkwwgu"c"etkkecn'eqo r qpgpv'qh"y j g"eqwpvt {øu" communication infrastructure<sup>22</sup> evinced, for example, in international

squeeze-expert-claims/ [https://perma.cc/E5S3-6EAL].

- 19. 47 U.S.C. § 606(a).
- 20. 47 U.S.C. § 151.

<sup>17.</sup> 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 Byproduct, UNITED NATIONS UNIV. (Oct. 24, 2023), https://unu.edu/press-release/un-studyreveals-hidden-environmental-impacts-bitcoin-carbon-not-only-harmful-product [https://perma.cc/LZ3G-JFU9]; cf. Dctt {'QØ cmqtcp."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-

<sup>18.</sup> 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].

<sup>21.</sup> Amendment of Part 73, Subpart G, of the Como ønøs 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 ghgewc.lpi 'lj g'lgi kurc.lxg'lpvgp'lvpf gti ktf lpi ''Uge.lqp'928.''cu'õcp''guugp.lcrl'pc.lqpcnl'f ghgpug.'' go gti gpe{.''cpf 'r wdnle''uchgv{ ''u{ ugo ö''f guki pgf ''q''cmy ''j g''Rtgukf gpv''q''gpi ci g''tcr idly and efficiently in crisis communication with the general public).

<sup>22.</sup> Section 706 parallels the legislative mandate for the creation of the FCC, which ej cti gu'kk'q'tgi wrcyg'öeqo o gteg'hp''eqo o wpkecklqp''d{ "y ktg''cpf 'tcf kq'000hqt''y g'r wtr qug''qh'' y g''pcklqpcilf ghgpugö''cpf 'or tqo qkpi ''uchgv{ "qh''lkhg''cpf ''r tqr gtv{ 06''69''WUE0È''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''\*3; :; +'\*tgutkekpi .''ō]k\_p''y g''gzgpv'qh''cp emergency which necessitates the invoking of the Presidentøs War Emergency Powers under y g''r tqxkıkqpu''qh''Ugevkqp''928.ö''tcpuo kuukqpu''qh''y g''ccf kq''co cyst ''ekski'go gti gpe{ ''ugtxkeg''q ugrgev'Itgs wgpekgu ''r gt''y g''HEEøu''r ngpct{ ''cwj qtk{ ''wpf gt''Ugevkqp''373+0'Cf. Yankee Network, Inc. v. FCC, 107 F.2d 212, 218 (D.C. Cir. 1939) (ekkpi ''Ugevkqp''928øu''r tqxkıkqpu''qh''q ekxkicp''tcf kq''qr gtcvqtu'kp''gzr necvkpi ''y g''ŏtk j wi'cpf ''gs wkkguö''cxckrcdrg''q current and prospective licensees).

transfers of FCC broadcast licenses, where foreign corporations pledge to cdkf g'd{ "õy g'qtf gtu'qh'y g'Rtgukf gpv'kp''y g'gzgtekug''qh'' kulj gt''cwj qtk{ "wpf gt" È 928ö''cu''c''o cpkbguvvkqp''qh''their eqo r ncpeg''kp''õghbgevkxg."ghhkekgpv."cpf wpko r gf gf 'hcuj kqpö'y kj 'f qo guvke''rcy  $\mathcal{G}^3$ 

Two of these four componentsô subsections (c) (permitting the President to indefinitely uwur gpf "qt" co gpf "õyj g" twgu" cpf " tgi wrckqpu" applicable to any or all stations or devices capable of emitting electromagnetic tcf kckqpuö+<sup>24</sup> and (d) (permitting the President to, *inter alia*, close or nationalize facilities for communication by wire or radio)<sup>25</sup>ô have been the subject of extensive study. Roughly a decade ago, multiple monographs<sup>26</sup> opined on the putative interrelationship of these provisions to nascent rgi kurckqp" eqpvgo r rckpi " cp" Kpytpgy" õnkn" uy kej .ö<sup>27</sup> while others eqpegr wcrk gf "y go "cu"xkcn"tguqwtegu"kp" y g"pckqpøu"cdktk{ "vq"gpi ci g"kp" cyberwar.<sup>28</sup> More recently, the FCC has deployed them in designating Chinese-funded telecommunications corporations as longitudinal national

- 24. 47 U.S.C. § 606(c).
- 25. 47 U.S.C. § 606(d).

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. Opderbeck, *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; ; : +\*60 qtgqxgt.''y g'j {r qy gdecn 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 qxgt''qy gt''eqo o wheckqpu'y j kg''y g'WUUku''gpi ci gf 'lp'y ct@+0

<sup>23.</sup> 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).

<sup>26.</sup> See generally David W. Opderbeck, Does the Communications Act of 1934 Contain a Hidden Internet Kill Switch?, 65 FED. COMM. L.J. 1 (2013); Kharson K. Thomspon, 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& 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& 591, 593-94, 598-604 (2021). Cf. Jim Dempsey, Cybersecurity and the -Good Causeø Exception to the APA, LAWFARE (Apr. 29, 2022),

security threats,<sup>29</sup> pursuant to y g" gzgewkxg" dtcpej øu" j kwqtkecm{ "dtqcf " operationalization<sup>30</sup> of these same emergency powers.<sup>31</sup>

Yet I maintain that the little-known subsection (a) ô which focuses on *slowing* rather than *seizing* the operation of commercial communications instrumentalitiesô constitutes the far more pernicious (and potentially insidious) tool for forestalling free and open discourse in times of putative crisis.<sup>32</sup> Under this subsection, õ]f\_wtkpi "y g"eqpkpwcpeg"qh"c"y ct"kp"y j kj " the United States ku'gpi ci gf .ö'the chief executive (whether directly or through j ku'cwj qtk gf 'uwdqtf kpcyu'qt 'y tqwi j 'y g"HEE+.'ökh'j g'hkpf u'ks'pgeguuct { 'hqt" the national defense and security,ö'o c { "õdirect that such communications as in his judgment may be essential to the national defense and security shall have preference or priority with any carrier uwdlgev' 'q"]y g"Cev\_0<sup>33</sup> Such directives o c { "dg"kuwgf "õat and for such times as he may determine,ö and carriers are civilly and criminally immunized from complying with them.<sup>34</sup>

31. See, e.g., Amendment of Sections 87.161, 87.163, and 87.165 of the Commønøs Rules and Regs. to Provide for the Sec. Control of Air Traffic and Air Navigation Aids, Order, 14 F.C.C. 4f '857'\*3; 8: +\*\*ekkpi 'Gzgewksg''Qtf gt '32.534''cu'i tqwpf u'hqt 'oc'f gvckgf " operational plan for the security control of specified non-Federal air navigation aidsö); Amendment of Part 10 of the Commøpøs Rules and Regs. to Effectuate the Commønøs CONELRAD Plan for the Public Safety Radio Servs., *Notice*, 42 F.C.C. 642 (1955) (explicating the functional and declaratory basis for the establishment of CONELRAD).

32. *Cf.* DeLorean L. Forbes, *F glkplpi "öGo gt i gpelguö<"Y j cv'ij g"Wpkgf "Ucvgu"Ecp Learn from the United Kingdom about National Emergencies and the Rule of Law*, 37 ARIZ. J. INTøL & COMPAR. L. 411, 422 (2020) (citing Section 706(c) as one of scores of laws notable lp"öyj gkt "r qvgpvkcnhqt "cdwgö"d{ "yj g"Rtgulf gpv+. Notably, the Unplug the Internet Kill Switch Act of 2020, S. 4646, H.R. 8336, 338vj "Eqpi 0\*4242+."y j lej "y cu'lpvgpf gf "vq"ör tqvgev Co gtlecpuø'Htuv'cpf "Hqwtyi 'Co gpf o gpv'tk j u"d{ "r tgxgpvlpi "c"r tgulf gpv'htqo "wulpi emergency powers to unilaterally take control over or deny access to the internet and other telecommunications capabilities.ö left subsection (a) untouched in proposing comprehensive revisions to Section 706. Press Release, U.S. Sen. Dr. Rand Paul, Dr. Rand Paul Questions Dr. Fauci on Effectiveness of Government Lockdowns, Shutting Down Economy (Sept. 23, 2020) (on file with author) https://www.paul.senate.gov/news-dr-rand-paul-condemns-effortprevent-president-trump-stopping-endless-war/ [https://perma.cc/E43E-75N5].

33. See 69"WUE0È'375\*33+:<sup>16</sup>73+<sup>16</sup>f ghplpi 'öeqo o qp"ecttkgt.ö'öecttkgt.ö'cpf övgrgeqo o wplecvkqpu'ecttkgtö for purposes of the Act). *Cf.* Review of Rules and Requirements For Priority Services, *Report and Order*, 35 FCC Rcd 7685, ¶ 1 (2020) (explaining that subsection (a) forms part and parcel of the means by which the President will örgxgtci g"ceeguu'vq"eqo o gtekcn'eqo o wplecvkqpu'lphcutwewtg'vq"uwr r qtv'pcvkqpcn'eqo o cpf." control, and communications by providing prioritized connectivity during national go gti gpekguö'r gt"ör tkqtkkk gf "r tqxkukqpkpi "cpf 'tguvqtcvkqp"qh'y ktgf "eqo o wplecvkqpu'lektevkwu" qt"r tkqtkkk gf leqo o wplecvkqpu'lqt 'y ktgrkgg"qt 'y ktgrguu'ecmiö+[hereinafter Rules and Requirements].

34. 47 U.S.C. § 606(a).

<sup>29.</sup> See, e.g., Huawei Technologies. USA, Inc. v. FCC, 2 F.4th 421, 443-44 (5th Cir. 2021).

<sup>30.</sup> See Exec. Order No. 10,312, 16 Fed. Reg. 12452, 12452 (Dec. 10, 1951) (explaining that establishment of the CONtrol of ELectromagnetic RADiation \*©EQP GNTCF ö+"crgt kpi "kugo "y cullwurkthgf."per executive proclamation of a national emergency, qp"kj g"dcuku'kj cvlõi qxgtpo gpv"cpf "pqp-government radio stations may be silenced or required to be operated in a manner consistent with the needs of national security and defense in the event of hostile action endangering the nation, or imminent threat thetgqhö+0

Such broad languageô and a marked paucity of extant scholarship on its implicationsô occasions this paper. In <u>Part One</u>, I provide a brief summary qh''y g''uwdugekqpøu''gxqnwkqp''cpf ''cr r deckqpu''htqo ''y g''htuv'f gecf gu''qh''y g'' twentieth century. In <u>Part Two</u>, I j ki j di j v'' y q'' qh''Ugekqp''928\*c+øu''ng{'' weaknessesô c''r qqtn{''f ghkpgf ''wg''qh''y g'' vgto ''õy ctö''cu''c'' tki i gt ''hqt''ku'' invocation and manifold barriers to judicial review in the event the President opts to invoke it. In <u>Part Three</u>, I note three key emerging techno-political factorsô the increasing use of the information domain as a battlefield; the i tqy kpi ''co dk/'qh'y g''ucwwgøu'tghgtgpeg''q'õecttkgtö''d{ ''y c{''qh''pgv''pgwtctk{='' and the capacious legal assertions of the so-ecngf 'õko r gtkch'r tgukf gpe{öô as grounds for additional concern, should this subsection be weaponized in an emergency of nebulous reach and duration.<sup>35</sup> Finally, I propose a comprehensive statutory fix to redress this state of affairs.

### II. THE ORIGIN AND CONSTRUCTION OF SECTION 706

Qp"Cwi wuv'35."3; 34."Eqpi tguu"r cuugf "Rwdrke"Ncy "486."õCp"Cev"vq" tgi wucvg"tcf kq"eqo o wpkecvkqp.ö"cu"an attempt to address the growing problem of congestion on the airwaves.<sup>36</sup> Under it, y g"qr gtcvkqp"qh"õcp{"cr r ctcwu"hqt" tcf kq"eqo o wpkecvkqp"cu"c"o gcpu"qh"eqo o gtekcn"kpyteqwtugö"qt "international communication was predicated on r quuguukqp"qh"õc"nkegpug."tgxqecdrg"hqt" cause . . . granted by the Secretary of Commerce and Labor@"Gcej "uwej " license, Congress specified, would not only include operational specifications and limitations but a proviso:

[T]hat the President of the United States in time of war or public peril or disaster may cause the closing of any station for radio communication and the removal therefrom of all radio apparatus, or may authorize the use or control of any such station or apparatus by any department of the Government, upon just compensation to the owners.<sup>37</sup>

As Toronto details at length,<sup>38</sup> this provision was employed roughly one {gct"chrgt"y g"Wpkgf "Ucvguø"gpvt {"kpvq"Y qtrf "Y ct"K On July 16, 1918, Congress jointly empowered the President:

<sup>35.</sup> *Cf.* Richard Jackson & Matt McDonald, *Constructivism, US Foreign Policy, and y g'õWar on Terror,ö'in* NEW DIRECTIONS IN US FOREIGN POLICY 18 (Inderjeet Parmar et al. eds., 2009); Jeffrey Record, *Bounding the Global War on Terror* 13-22 (2003).

<sup>36.</sup> *See, e.g.*, David Moss et al., *Regulating Radio in the Age of Broadcasting*, HARV. BUS. SCH. CASE 716-043 (2016), https://www.hbs.edu/faculty/Pages/item.aspx?num=50386 [https://perma.cc/GXH9-8Y5B].

<sup>37.</sup> Radio Act of 1912, Pub. L. No. 264, §§ 1, 2 (1912); *see* Opderbeck, *supra* note 26, at 17, 20.

<sup>38.</sup> *See* Toronto, *supra* note 26, at 177-78; *accord* Opderbeck, *supra* note 28, at 831-832.

[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  $00006^{39}$ 

Hqmqy kpi "Rtgukf gpv' Y kmqpøu" brief exercise of this power,<sup>40</sup> it lay dormant for eight years, until being codified in the Radio Act of 1927 (the  $\tilde{o}Tcf kq'Cevo+$ , which provided for enhanced oversight of radio broadcasts and stations by a new regulatory body, the Federal Radio Commission  $\tilde{o}HTE\ddot{o}+^{41}$ 

Kp"3; 4; ."y g"Ugpcyg"eqpukf gt gf "cf qr vkqp"qh"õc"dkn"vq"r tqxkf g"hqt "y 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 'õeqo o wpkecvkqpu'eqo o kuukqp06<sup>42</sup> Notably, Section 40(c) of the bill was equivalent to the present Section 706(a) of the Act,<sup>43</sup> with its language transposed from a 1917 law that empowered President Wilson to grant õr tghgtgpeg"qt"r tkqtk{ö"vq"õvtchke"qt"uvej "uj kr o gpvu"qh"eqo o qf kkgu"cu "kp" j ku"lwf i o gpv."o c{"dg"guugpvkch'vq"y g"pcvkqpcn'f ghgpug"cpf "ugevtk{ö"y kj " tgur gev" vq"õvtcpur qtvcvkqp" d{"cp{"eqo o qp"ecttkgt"d{"tckrtqcf."y cvgt."qt" otherwkug06<sup>44</sup> Five years later, this provision would be enacted unchanged under the Act,<sup>45</sup> through which Congress at last õeqo dkpgf "cpf "qti cpk gf" hgf gtchtgi wrcvkqp"qh'vgrgr j qpg."vgrgi tcr j."cpf 'tcf kq"eqo o wpkecvkqpuö'wpf gt" the supervision of the FCC.<sup>46</sup>

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-

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

<sup>40.</sup> 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)).

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

<sup>42.</sup> 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].

<sup>43.</sup> *Id.* at 18.

<sup>44.</sup> 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).

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

<sup>46.</sup> Bureau of Justice Assistance, *The Communications Act of 1934*, 47 U.S.C. § 151 et seq., U.S. DEPør 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/roosevelturges.pdf [https://perma.cc/G9KG-YUMC].

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old Defense Communications Board<sup>47</sup> with frequency allocation, government ugk wtg"qt"enuwtg"qh'tcf kq"uxxkqpu."cpf."õkp"ceeqtf cpeg"y kj "Ugexkqp"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 ugewtk{ 'uj cmj cxg'r tghgtgpeg"qt'r tkqtk{ '000ö<sup>48</sup> Subsequently given additional powers by Executive Order per contemporary congressional enhancements to Section 706<sup>49</sup> and renamed the Board of War Communications,<sup>50</sup> it was abolished by President Truman on February 24, 1947.<sup>51</sup>

Subsection (a), then, as employed in World War II, bore a functionalist propinquity to the Defense Production Act, which tapped õy g"f qo guvke" kpf wuxtkcn'dcug''vq''uwr r n{ "o cvgtkcn"cpf "ugtxkegu"hqt "y g"pcvkqpcn'f ghgpugö''vq" ucvkuh{ "y g" wti gpv" pggf u" qh' õo ktkct { "rtqf wevkqpö" cpf "y g" õwpks wg" vgej pqnqi kecn'tgs wktgo gpvuö''wpf gt'õgo gti gpe{ "eqpf kkqpu05<sup>52</sup> As Opderbeck

<sup>47.</sup> 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 gptk{ 'hqt'öeqqtf kpcygf 'r rcppkpi 'hqt'y g'o quv'ghhekgpv'eqptqn' and use of radio, wire, and cable communication facilities under jurisdiction of the United Ucvgu'kp'ko g'qh'pcvkqpcn'go gti gpe{.ö'r gt'y g'pggf u'qh'y g'cto gf 'hqtegu'cpf 'öy g'pggf u'qh' other goxgtpo gpvcn'ci gpekgu 'qh'kpf wux{.'cpf 'qh'qy gt'ekkkkcp'cevkxkkguö+0

<sup>48.</sup> Exec. Order Prescribing Regs. Governing the Use, Control and Closing of Radio Ucvkqpu'cpf 'vj g'Rtghtgpeg''qt'Rtkqtk{ ''qh'Eqo o eøp, 6 Fed. Reg. 6367, 6367-68 (Dec. 12, 1941).

<sup>49.</sup> *See* Exec. Order Prescribing Regs. Governing the Use, Control and Closing of Tcf kq'Ucxkqpu'cpf 'Hcekkkkgu'hqt 'Y ktg'Eqo o eqpu, 7 Fed. Reg. 1777, 1777-78 (Mar. 10, 1942). *Cf.* Am. Med. Asson 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) (öIt is perhaps significant that in the latest professional development - radio broadcasting - increased emphasis has been placed on ... governmental control.ö).

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

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

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

illustrates, shifting postwar imperatives functionally<sup>53</sup> and substantively<sup>54</sup> relegated it to the realm of civil defense, per a series of Executive Orders that prompted õvarious agencies, including the Federal Communications Commission, [to] cf qr v'eqpvkpi gpe{'r rcpu'hqt''y ct''cpf 'pcvkqpcn'go gti gpekguö'' under the authority of Section 706.<sup>55</sup> Vj g''P cvkqpcn'Ugewtkv{ 'Eqwpekn'\*õP UEö+'' served to coordinate these efforts, ensuring a unified blueprint for preserving the preference of õcommunications for the federal government under go gti gpe{ ''eqpf kkqpu.''kpenvf kpi ''pvengct''cvcen00<sup>56</sup>

Recent administrations have employed Section 706(a) as a critical tool hqt "gpuwlpi "y g"wplpygttwr yf "hrqy "qh"õ]u\_wtxkxcdrg. "tguktlgpv."gpf wtkpi ."cpf " ghtgevkxg" eqo o wplecvkqpuö<sup>57</sup> between and among the various arms of the hgf gtcrli qxgtpo gpv0Vj g'Qdco c"Y j kg"J qwugøu'Gzgewkxg'Qtf gt'35.83: .'hqt" instance, tasked both the Assistant to the President for Homeland Security and Counterterrorism and the Director of Office of Science and Technology Policy \*õQUVRö+"with advising on and monitoring the use of the authorities ugv'hqty "d{ "Ugevlqp'928."y kj 'y g'rcwgt "kpuxtweyf "vq"õcf xkug'y g'Rtguld gpv'qp" the prioritization of radio spectrum and wired communications that support NS/EP ]pcvlqpcn'ugewtka{ lgo gti gpe{ "rtgr ctgf pguu\_"hwpevlqpu05<sup>58</sup> The Trump Cf o lpkrxtcvlqp"tgxkugf "y gug"r rcpu."go r qy gtkpi "y g"F ktgevqt"qh"QUVR"õto exercise the authorities vested in the President by section 706(a) . . . if the

<sup>53.</sup> Compare 47 U.S.C. § 151 (creating a Federal Communications Commission for the purpose of, *inter alia*. 'öy g'r wtr qug''qh'y g''pcvlqpcrl'f glgpugö''cpf 'öy g''r wtr qug''qh'r tqo qvlpi " safety of life and property through the use of wire and tcf lq 'eqo o wplecvlqpuö+, *with* STEPHEN K. COLLIER & ANDREW LAKOFF, THE GOVERNMENT OF EMERGENCY: VITAL SYSTEMS, EXPERTISE, AND THE POLITICS OF SECURITY 260-61 (Princeton Univ. Press, 2021) (detailing the õO ctej 1954 Defense Mobilization Order to the [Federal Civil Defense Administration]. . . . which assigned [it] responsibility for measures relating to the protection of life and property against attack and for dealing with the civil defense emergency conditions arising qw''qh'cwenö+'\*kpygtpcrl's wqcvkqp''o ctm''qo kwgf +0

<sup>54.</sup> See, e.g., Independent Offices Appropriations for 1967: Hearings Before the Subcomm. on Indep. Offs. of the H. Comm. on Appropriations, 89th Cong. 1568 (1966) https://www.govinfo.gov/app/details/CHRG-89hhrg61473p2/CHRG-89hhrg61473p2 [https://perma.cc/9TUU-K4LK] \*two o ctk kpi '\j g'\or repu'cpf 'r tqi tco u\or fguki pgf 'd{ '\j g'' FCC under Executive Order 11,092. '4: 'Hgf 0T gi 0'425'\*Lcp0'; .'3; 85+.'\or g'f gxgrqr 'c'u\cvg'qh'' readiness . . . with respect to all conditions of emergency, including attack upon the United U\cvgu\or g'\j kej '\or cong'kpvq''ceeqwpv'\j g'r quukdkkk{ 'qhl'I qxgtpo gpv'r tghgtgpeg''qt 'r tkqtk{ 'y kj '' common carriers or of exclusive Government use or control of communications services or facilities whep''cwj qtk gf ''d{ ''rcy \ot e; Exec. Order No. 11,556, 35 Fed. Reg. 14193, 14193 §§ 2(a), 4(a) (Sept. 9, 1970) (delegating to the Director of the Office of Telecommunications Rqrke{.'\ot y g''Rtgukf gpv\s principal adviser on telecommunications Act of 1934, as amended . . . . under the overall policy direction of the Director of the Office of Emergency Rtgr ctgf pgu\otin.

<sup>55.</sup> Opderback, *supra* note 28, at 831.

<sup>56.</sup> Armstrong v. Exec. Office of the President, 90 F.3d 553, 562 (D.C. Cir. 1996).

<sup>57.</sup> Exec. Order No. 13,618, 77 Fed. Reg. 40779 § 1 (July 6, 2012).

<sup>58.</sup> *Id.* at § 2.2.

President takes the actions, including issuing any necessary proclamations cpf 'hhpf kpi u.'tgs whtgf "d{ ''yj cv'ugevkqp''vq 'kpxqng''yj qug''cwj qtkkgu06<sup>59</sup>

# III. CRITICAL QUESTIONS OF WAR AND EXECUTIVE AUTHORITY

Given the seemingly innocuous applications of Section 706(a) to dateô a pointed exigency arising from the extraordinary demands of existential conflict and a backstop for federal crisis communications in the nuclear ageô the scenarios that introduced this paper seem even more implausible. And yet, I maintain that this subsection remains amenable to abuse, exceeding the scope of its historical development and the congressional intent that undergirds it. Key to this argument is its pregnant use of the word *war* and its pointed resistance, when operationalized by the President, to judicial review.

## A. Vjg'Ogcpkpi ''qh'õY ctö

While subsection (a) turns on the phrase õeqpvkpvcpeg"qh'y ct 'kp'y j kej " y g'Wpkgf 'Ucvgu'ku'gpi ci gf .ö'it hcku'\q'f ghkpg''y cv'y ctøu'character<sup>60</sup>ô is it an international armed conflict, an internal armed conflict, or one of the many cases on the margins."uvej "cu"y qug"kp"y g"tgcm "qh"õe{dgt"qr gtcvkqpu?ö<sup>61</sup> Complicating the question is the use of the passive voice: õgpi ci go gpvö'uc{u"

<sup>59.</sup> Exec. Order No. 13,961, 85 Fed. Reg. 79379, 79380 § 6(a) (Dec. 7, 2020); *cf.* U.S. DEPØT OF HOMELAND SEC., FEDERAL EMERGENCY MANAGEMENT AGENCY, FEDERAL CONTINUITY DIRECTIVE 1: FEDERAL EXECUTIVE BRANCH NATIONAL CONTINUITY PROGRAM AND REQUIREMENTS (2017), https://www.gpo.gov/docs/default-source/accessibility-privacy-coop-files/January2017FCD1-2.pdf [https://perma.cc/VR6H-BN58] (summarizing Rtgukf gpvkcn/Rqnke { 'F ktgevkxg'62.'y j kej 'ôf ktgevu'y g'Ugetgvct { 'qh'J qo grcpf 'Ugewka{ 'y tqwi j '' the Administrator of the Federal Emergency Management Agency . . . to coordinate the implementation, execution, and assessment of continuity activities among executive f gr ctvo gpvu'cpf ''ci gpekguö+.

<sup>60.</sup> In a 1939 address to the Indianapolis Bar Association, for example, Senator Robert C0Vch/j ki j tki j vgf "j g"öf cpi gtu"vq"f go qetcvke"r tqeguugu"cwgpf cpv'wr qp"o qf gtp"y cthctg.ö"d{ y c{"qh'y g"ögz vgpukxgö"go gti gpe{"cwj qtkkgu"chqtf gf "j g"ej kgh"gzgewkxg. 85 CONG. REC. 714. Tgxkgy kpi "Ugevkqp"928\*c+"j g"eqo o gpvgf <öK'cr r gctu "y gtghqtg."y cv"j y g"Rtgukf gpva\_ powers with respect to telephone and telegraph systems are much more limited, and even then may only be exercised in time of war. But we saw that President Wilson imposed a strict egpuqutuj kr "kp"y g"Y qtrf "Y ct"y kj qw"uxcwwqt {"cwj qtk{0"Id. at 715.

<sup>61.</sup> See Prosecutor v. Vcf k. No. IT-94-1-l, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 65, 70, (KpvatEtko 0Vtkd0hqt''y g'Hqto gt"[ wi qurcxkc" Oct. 2, 1995), http://www.icty.org/x/cases/tadic/acdec/en/51002.htm [https://perma.cc/3JQH-G6KP];  $E \{ dgt' y cthctg''cpf' kpvgtpcvkqpcn'j wo cpkctkcp'rcy <V jg'KETE øu'r qukkqp, INTøL$ COMM. RED CROSS (June 28, 2013),

https://www.icrc.org/sites/default/files/external/doc/en/assets/files/2013/130621-cyberwarfare-q-and-a-eng.pdf [https://perma.cc/2LYR-GYSZ]; *cf.* John C.F. Tillson & Robert Fabrie, *OSD Duties in the Respond Strategy*, INST. DEF. ANALYSIS (Jan. 1999), https://apps.dtic.mil/sti/tr/pdf/ADA375146.pdf [https://perma.cc/49N3-CHIG\_"%F wlpi "*any war*, the President may order any carrier to give preference or priority for national defense eqo o wplecvkqpu@+!\*go r j cuku'cf f gf +.

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.<sup>62</sup>

Ngi km kxg'j knqt { "ku'qh'nkwg'cuukncpeg'kp'f ghkpkpi "õy ct@'Kp'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 y g"rgi kuc kqpøu" 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.<sup>63</sup>

But for a suggestion that the President, in directing traffic, is acting on behalf or in the interest of y g"o ktkct{"fktgevqtcvg."y g"õvko g"qh"y ctö"cpf" õpcvkqpcn'f ghgpugö"eqpuvtvevu"o kttqt 'y qug"kp"r tgugpv-day Section 706(a).

The legislative history for the Act is largely similar.<sup>64</sup> In a lengthy exchange between Louis G. Caldwell, chairman of the American Bar Cuuqekckqpøu'tcf kq'eqo o kwgg."cpf 'Ugpcvqt 'Entgpeg'F km<sup>65</sup> c'pgdwqwu'õvko g'' qh'y ctö''ku''cf lwf i gf ''y g''r tgf kecvg''vq''y g''Rtgukf gpvøu'ötki j v'vq''enqug''f qy p''cp{'' station or to take over any station.ö<sup>66</sup> Caldwell, however, does suggest, in an interchange with Senator Key Pittman, that the right vests (vis-à-vis the same

<sup>62.</sup> 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] \*õ]G\_cej "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* 00006+(emphasis added).

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

<sup>64.</sup> 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).

<sup>65.</sup> Dill was intimately involved in communications policy; as a co-author of the Radio Cev'j g'y cu'c'r tlo g'ctej kgev'qh'y g'õr wdnke kpvgtguv.'eqpxgpkgpeg.'cpf 'pgeguukk ö'uvcpf ctf " that undergirds the HEEøu licensing and regulatory powers. *See* Erwin G. Krasnow & Jack N. Goodman, *The õPublic Interestö Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605, 609-10 (1998).

<sup>66.</sup> Committee on Communications: Hearing Before the Comm. on Interstate Com., 93uv/Eqpi 074<sup>16</sup>3; 52+, 'https://heinonline.org/HOL/P?h=hein.cbhear/cochus0001 [https://perma.cc/L7ZL-F9P6].

kpuvcpeg. 'ku'dkhwtecvgf 'dgw ggp'y g'ödghqtg''cpf 'chrgtö''qh'y g'o qo gpv'y j gp'y g'' President invokes his emergency war powers, even as it recognizes that the temporal formulation itself o c{''dg'õuwr gtugf gf ''d{''y g'Rtgukf gpvøs emergency y ct'r qy gtu $00^{73}$ 

Caselaw is, in the main, unavailing.<sup>74</sup> 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 FCCøu"tgencukhecvkqp"qh"tcfkq"dcpfu"hqt"ekkkl" defense purposes absent statutorily mandated notice-and-comment.<sup>75</sup> The court dismissed their claim pursuant to the expansive national security concerns attendant upon the issuance of Presidential Proclamation 2914, y j kej "ekgf" dqyj " y g"õtgegpv" gxgpu" kp" Mqtgc" cpf " gnugy j gtgö" cpf " õy g" kpetgcukpi "o gpceg"qh"y g"hqtegu"qh"eqo o wpkw"ci i tguukqpö"cu"y g"dcuku"hqt" õy g"gzkugpeg"qh"c"pcvkqpcn'go gti gpe{.ö<sup>76</sup> Supporting the putative need to egpvgt" õ]p\_cvkqpcn' vtwu" cpf " tgur qpukkkk{ö" kp" y g" Rtgukf gpv." y g" eqwtv" tgcuqpgf. "y cu"Ugevkqp"928."õy j kej "kp"ektewo ucpegu"ur gekhgf. "gzr cpf u" y g" Presidentøs authority to reach and control even already licensed stations and hcekkkgu@<sup>77</sup>

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 Wilsonøu"ugk wtg"qh" y gkt" communications lines under the aforementioned 1918 joint resolution, arguing 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.<sup>78</sup> The court ej ctcevetk gf "vj g"hktuv"cti wo gpv"cu"õc "nco g"ego r tgj gpukap"ah"vj g"uegr g"cpf" xctkgv{" qh" o qf gtp" y ct.ö" pqvkpi " y cv" ecugu" qh" f qo guvke" gur kqpci g" cpf " kpygtf gr gpf gpv'ytcpupcykqpcn'eco r cki pu'o krkcygf 'ci ckpuv'y g'eqpenyukqp'õy cv' means of telegraphic communications anywhere in the world were not crrtqrtkcyg" yq" ku" rtqugewkqp@<sup>79</sup> Vj g" eqwty" cnuq" f kuo kuugf " rnckpykhhuø" emphasis on chronological logics, adjudging an armistice not an end to war, but a metg"õuwur gpukqp"qh"j quvkrkkguð<sup>80</sup> To this end, the court opined on the Rtgukf gpv/u"etkkecn"\*cpf "Eqpuvkwvkqpcn+"tqpg"kp"vtgcv{ -making: õVj g"pcvkqpcn" security and defense is to be judged ... by the stability of the ensuing state of

<sup>73.</sup> Id. at ¶ 1 (2020).

<sup>74.</sup> 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 yj g"Kygtucvg"Eqo o gteg"Eqo o kukqp."ö]kp" time of war or yj tgcvgpgf "y ct.ö"y cu"chqtf gf "hegpug"vq" i kvg"ör tghgtgpeg"qt 'r tkqtk{ "kp" vtcpur qtvcvkqpö"wr qp"egt vkhecvkqp"d{ "yj g"Rtgukf gpv'yj cv'uwej "y cu"õguugpvkch'vq"yj g"pcvkqpcn" f ghgpug"cpf "ugewtk{@"See, e.g., Interstate Com. Commøp v. Or. Pac. Indus., Inc., 420 U.S. 184, 186-87 n.2 (1975); U.S. v. Interstate Com. Commøp, 352 U.S. 158, 174 (1956); U.S. v. Thompson, 58 F. Supp. 213 n.2 (E.D. Mo. 1944).

<sup>75.</sup> Bendix Aviation Corp. v. FCC, 272 F.2d 533 (D.C. Cir. 1959).

<sup>76.</sup> PUB. PAPERS OF THE PRESIDENTS OF THE U.S.: HARRY S. TRUMAN 746-47 (Off. of y g'Hgf 0Tgi 0'P cvaiCtej ksgu"cpf 'Tgeu0Ugtx0'( 'I gp0Ugtx0Cf o kp0''1950).

<sup>77.</sup> Bendix Aviation Corp., 272 F.2d at 540 n.24.

<sup>78.</sup> Commercial Cable Co. v. Burleson, 255 F. 99, 101, 104-06 (S.D.N.Y. 1919).

<sup>79.</sup> Id. at 104

<sup>80.</sup> Id. at 104-05.

peace. The terms of the final conventions . . . are the measure of that [national] ugewtk{ "cpf 'f ghgpug $\mathfrak{G}^{81}$ 

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 kuukxgu htqo "õvj g"j ki j guv cwj qt kkgu "qh" y g"hgf gtch' I qxgtpo gpv' ]y cv\_' cempqy ngf i gf "y cv' y g" y ct" j cf "gpf gf öô namely, messages from President Wilson to Congress dated November 11 and December 2, 1918.<sup>82</sup> Some thirty years later, the Western District of New [ qtmly qwff "u{ pvj gul{ g"yj gug"f gekukqpu"kp"i tcpvkpi "vj g"i qxgtpo gpvøu"o qvkqp" for an injunction against striking railway workers.<sup>83</sup> While the Korean War was but a few months old, the conflict provided a critical basis for government action,<sup>84</sup> cu" õ]vj g" statutes effective only ∹in time of war¢ö attach independently of military engagement, õeqp\pw]kpi \_ in force until a formal statement of peace is f genct gf  $0\dot{b}^{85}$ õY ct.ö'j gp. hqt 'r wtr qugu'qh'Ugevlqp'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

85. Switchmen's Union of N. Am0'', 9'HOUwr rOcv'322''' $\delta$ However, neither the war with Germany nor Japan has ever been dissolved and no treaty of peace has followed these y ctu $\dot{O}$ +.

<sup>81.</sup> *Id.* at 105-06; *accord* Sw. Tel. & Tel. Co. v. Houston, 256 F. 690, 697 (D. Tex. 3; 3; +\*6Vj g'uki pkpi ''qh'yj g''cto knkeg'f kf ''pqv'ygto kpcyg''yj g''y ct0Y g''ctg''nkm'cv'y 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 00006+0

<sup>82.</sup> 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] \*oCpf "pqy "y g"ctg"uwtg"qh"yi g"i tgcv"vtkwo 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+.

<sup>83.</sup> U.S. v. Switchmen's Union of N. Am., 97 F. Supp. 97, 102 (W.D.N.Y. August 11, 1950) \*6Next 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{urgo @+.

<sup>84.</sup> See id. cv/322<sup>1%</sup>õK/ku<sup>\*</sup>dgrkgxgf <sup>\*</sup>yj cv<sup>\*</sup>yj ku<sup>\*</sup>eqwt v<sup>\*</sup>ecp<sup>\*</sup>cng<sup>\*</sup>lwf kekcripqvkeg<sup>\*</sup>qh<sup>\*</sup>yj g<sup>\*</sup>Wpkgf Nations' conflict over Korea. This greatly emphasizes the necessity for the continued qr gtcvkqp<sup>\*</sup>qh<sup>\*</sup>yj ku<sup>\*</sup>tcktqcf (b) (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 tqxkukqpu<sup>\*</sup>r tgf kecvgf <sup>\*</sup>qp<sup>\*</sup>r tqr j { recvke<sup>\*</sup>cevkqpu<sup>\*</sup>f ggo gf <sup>\*</sup>oguugpvkcri<sup>\*</sup>q<sup>\*</sup>qwt<sup>\*</sup>pcvkqpcrif ghgpug.<sup>\*</sup>vq<sup>\*</sup> the implementation of the North Atlantic Pact, Economic Cooperation Administration, and to the prosecution of hostirkkgu<sup>\*</sup>kp<sup>\*</sup>Mqtgc.ö<sup>\*</sup>o qvkqp<sup>\*</sup>vq<sup>\*</sup>gplqkp<sup>\*</sup>tgs wktgo gpv<sup>\*</sup>yj cv<sup>\*</sup>transnational commercial mariners obtain a security clearance as a prerequisite to gainful employment, per c'hkpf kpi <sup>\*</sup>yj cv<sup>\*</sup>oj <u>a</u>g xgt<sup>\*</sup>i tkgxqwu<sup>\*</sup>yj g<sup>\*</sup>r gtuqpcrif gr tkxcvkqp<sup>\*</sup>r gvkkqpgtu<sup>\*</sup>j cxg<sup>\*</sup>uwhgtgf.<sup>\*</sup>yj g<sup>\*</sup> 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) (õVj gug<sup>\*</sup>ctg<sup>\*</sup>pqv<sup>\*</sup>pqto crivko gu<sup>0</sup>Vj gug<sup>\*</sup>ctg<sup>\*</sup>ko gu<sup>\*</sup>qh<sup>\*</sup>etkuku0i+0

war stands appositionally to a condition of non-war in the commander-inej kgh/u'kpxqecvkqp''qh'j ku'y ct'r qy gtu=kv'gpf wtgu. "cu'uqo gyj kpi "qh'cp'cpcrqi wg" to the 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.<sup>86</sup> 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 y g'orcy "qh'y ct,ö such as Section 706(a)) and a declaration of war \*uvduvkvvkpi 'y g'oncy 'qh'y ctö'hqt 'y g'oncy 'qh'r gcegö and undergirding the use of armed force).<sup>87</sup> In other words, in invoking subsection (a), the commander-in-chief can elide the knotty questions of the how, when, cpf "y j { "qh"c "eqphdevau"i gpguku"kp "hqevukpi "qp "y j g"hcev"\*qt "õeqpvkpvcpegö+"qh" 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,<sup>88</sup> 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.* 'kp'y j kej 'y g''Uwr tgo g'Eqwtv'tgdwhgf ''Rtgukf gpv'Vtwo cpøu''cwgo r v yq''pcvkqpcrk g'o quv'qh'y g''qwpvt {øu''uvggrlo kmu'r wtuwcpv'\q''y g''qpi qkpi 'r qrkeg

<sup>86.</sup> See, e.g., DUSTIN A. LEWIS ET AL., INDEFINITE WAR: UNSETTLED INTERNATIONAL LAW ON THE END OF ARMED CONFLICT (Harvard L. Uej ORtqi tco "qp"Kp vai"N. & Armed Conflict, 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.fcnl.org/updates/2023-07/congress-continues-long-path-toward-repealing-2002-aumf [https://perma.cc/6CNF-RU2Y].

<sup>87.</sup> 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).

<sup>88.</sup> Subsection (a) specifically immunizes carriers from civil or criminal penalties in õeqo r n{ kpi 'y kj 'cp{ '000'qtf gt 'qt 'f kgekqp'hqt'r tglgtgpeg''qt''r tkqtk{ 'j gtgkp''cwj qtk gf 06 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 õcp''qti cp qh'y g'wcw00''See, e.g., Susan W. Brenner & Leo L. Clarke, *Civilians in Cyberwarfare: Conscripts*, 43 VAND. J. TRANSNATØL 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.<sup>89</sup> In a concurring opinion, Justice Jackson promulgated a tripartite taxonomy for assessing the legality of presidential authority under extraordinary conditions.<sup>90</sup> Germane to the present inquiry is the first circumstance, which establishes that ptgukf gpvkcdöcwj qtkk{ "ku"cv"ksu" o czko wo ö" y j gp" r tgf kecvgf " qp" õcp" gzr tguu" qt " ko r nkgf " cwj qtk cvkqp" qh" Congress.ö<sup>91</sup> There can be little doubt, per the broad enabling language of and well-entrenched history behind subsection (a), that a future chief executive y qwf "gplq{"õy g"utqpi guv'qh'' tguvo r vkqpu"cpf "y g"y kf guv'n vkwf g"qh'lwf kekcn" kpvgtr tgvcvkqpö" p"c"ej cmgpi g"vq his powers exercised thereunder.<sup>92</sup>

A potential recourse to this state of affairs might be derived from the non-delegation doctrine.<sup>93</sup> While the Constitution exclusively vests law-making authority in Congress,<sup>94</sup> the 1928 *Hampton* decision provided that the legislature may delegate it to the executive or regulatory realms, provided it ku"ceeqo r cpkgf "d{"õan intelligible principle to which the person or body authorized . . . is directed to conform@<sup>95</sup> Seven years later, however, the Supreme Court cabined this pronouncement, observing in *Panama Refining Co. v. Ryan* õy cv<sup>1</sup>y gtg'ctg'ho ku'qh'f grgi cvkqp'y j kej 'y gtg'ku'þq'eqpuvkwkqpcn' cwj qtk{ 'vq'tcpuegpf ö<sup>96</sup>

Putting aside the efficacy of this non-delegation doctrine as a practical check on the ambitions of the executive branch,<sup>97</sup> its utility in forestalling abuse of Section 706(a) is questionable. In *National Broadcasting Co. v. United States*,<sup>98</sup> the Supreme Court considered the scope of the HEEøu duties as licensor responsible for allocating portions of a limited electromagnetic spectrum to prospective broadcasters. Qdugtxlpi 'ý cv'õ]vj g'hcekkkgu'qh'tcf kq" ctg"pqv'ncti g"gpqwi j "vq"ceeqo o qf cvg"cm'y j q"y kuj "vq"wug"y go .ö"y g"Eqwtv" opined that the FCC y cu'tgur qpukdrg"hqt"dqy "õf gygto kpkpi "ý g"eqo r qukkqp" qh" Jeqo o wpkeckqpu\_" vtchkeö" cpf "õr qhekpi " y g" y cxg" rgpi y u" vq" r tgxgpv" uvckqpu''htqo "kpvgthgtkpi "y ky "gcej "qy gtö<sup>99</sup>ô communications management tasks remarkably similar to those described in Section 706(a). In discharging these tasks, y g"Eqwtv'gor j cuk gf "y cv'y g"HEE"õy cu"pqv'hgh/'cv'rcti gö'r gt"cp" intelligible cqpi tguukqpcrl" õxqwej uvqpö<sup>100</sup>ô the statutory õr wdrke" kpvgtguv."

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) \*õ]Kv/k/f qgu/pqv/cr r gct '000/j cv/j g/Rtgulf gpv.'gkj gt 'kp'/j g/gzgtekug/qh/j g/f grgi cvgf " legislative powers given him by Congress or in the exercise of his constitutional power to negotiate treaties, could seize cables even in time of war without legislative authority.ö+0

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.

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

eqpxgpkgpeg."cpf "pgeguuk {ö standard,<sup>101</sup> possessed of sufficient granularity as to defeat invocation of the non-delegation doctrine.<sup>102</sup>

Inasmuch as *National Broadcasting Co.* supports a delegation in peacetime of the highly complex work of communications traffic managementô per the well-hqwpf gf "õr ractical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directivesö<sup>103</sup>ô there exists no overriding jurisprudential standard by why such a delegation would be invalid in war, especially in light of the foregoing discussion of the fluid nature of these socio-political conditions.<sup>104</sup> This is particularly true when adjudging the intelligible principles putatively at issue in each delegation: y g"õr wdrke" kpwgtguv.'eqpxgpkgpeg.'cpf 'bgegukk(ö'ucpf ctf .'y j kej .'y hile tenable, has been the subject of protracted criticism for its vague construction and historically mutable application.<sup>105</sup> Such phrasing is notable in comparison to Section 928\*c #u"tgbgtgpeg" vq"vtchke" o cpci go gpv'cevkqpu"f ggo gf "õpgeguuct {ö'cpf "õgugpvkcrö" vq"õy g" national defense and security.ö<sup>106</sup> which is entitled to

104. Review of the Emergency Alert Sys., 80 Fed. Reg. 37167 (proposed July 30, 2015) (to be codified at 47 C.F.R. pt. 11); see, e.g., Touby v. U.S., 722"WU0382."387"\*3; ; 3+"\*ôY g" have long recognized that the nondelegation doctrine does not prevent Congress from seeking assistance, within proper limits, from its coordinate Branches. Thus, Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree gh'f kuetgvkgp '0000; = Qr r 'Egwqp'O km. 'Kpe0x0Cf o øt 'of Wage & Hour Div., 312 U.S. 126, 145 (3; 63+1% Vj g'Eqpukwwkqp."xkgy gf "cu"c"eqpvkpwqwun{ "qr gtcvkxg"ej ctvgt"qh'i qxgtpo gpv."ku" not to be interpreted as demanding the impossible or the impracticable. The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule qh'eqpf wex06+0Vj ku'grkukqp'ku'cnuq'gxkpegf "d{ 'vj g'go gti gpe{ 'qr gtcxkqpu'qh'HEE-licensed broadcasters, which, both legallyô see, e.g., Review of the Emergency Alert Sys., First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 18625, ¶ 21-22, 25, 37, 54 (2005), reconsideration granted in part, denied in part sub nom, Amendment qh'Rctv'33"qh'yj g'Eqo o øpu'Twrgu." Order on Reconsideration, 33 FCC Rcd 7490 (2019) and practicallyô see, e.g., Patric R. Spence et al., Serving the Public Interest in a Crisis: Does Local Radio Meet the Public Interest?, 19 J. CONTINGENCIES & CRISIS MGMT. 227, 227, 232 (2011)ô ctg'uxtwewtgf "cnpi 'vj g'uco g'õr wdrke kpygtgurö"eqpuxtwev'cwgpf cpv'wpf gt "qtf kpct {" conditions.

105. See, e.g., Krasnow & Goodman, supra note 65; David B. Froomkin, The Nondelegation Doctrine and the Structure of the Executive, 41 YALE J. ON REG. 60, 78-79, 88, 92-93 (2024); Randolph J. May, A Modest Plea for FCC Modesty Regarding the Public Interest Standard, 60 ADMIN. L. REV. 895, 899-901 (2008); Willard D. Rowland Jr., The Meaning of õthe Public Interestö in Communications Policy, Part I: Its Origins in State and Federal Regulation, 2 COMM. L. & POL'Y 309, 309-15 (1997); Willard D. Rowland Jr., The Meaning of õthe Public Interestö in Communications Policy 6 Part II: Its Implementation in Early Broadcast Law and Regulation, 2 COMM. L. & POL'Y 363, 364-66 (1997).

106. 69'WULEOÈ'828\*c+'\*6F wtkpi 'ý g'eqpvkpwcpeg''qh'c'y ct 'kp''y j kej 'ý g'Wpkgf States is engaged, the President is authorized, if he finds it necessary for the national defense and security, to direct that such communications as in his judgment may be essential to the pcvkqpcn'f ghgpug''cpf 'ugewtkk' '00006+0

<sup>101. 47</sup> U.S.C. §§ 307(a), 308, 309(a), 310(d).

<sup>102.</sup> See Richard A. Epstein, *How Bad Constitutional Law Leads to Bad Economic Regulations*, ATLANTIC ONLINE (Oct. 20, 2019),

https://www.theatlantic.com/ideas/archive/2019/10/how-bad-constitutional-law-leads-bad-regulations/600280/ [https://perma.cc/P29W-NDQD].

<sup>103.</sup> Mistretta v. United States, 488 U.S. 361, 372 (1989).

reside in the nationøs 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<sup>(1)14</sup>

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-ej kghøu" f kur querl' wpf gti kt f kpi " y g" deployment of brigades and batteriesô or even the reconstitution of civilianfacing communication systems in the face of existential threats<sup>115</sup>ô 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 õpcvkqpcnf ghgpug''cpf 'ugewtky ö<sup>116</sup> and a charge of censorship .<sup>117</sup> This, I think, suggests something of the constitutionally vexing muddle between õf ghgpukxgö"cpf "õqhgpukxgö"gzgewkxg"r qy gt "gzr necvgf "d{ "Mg{pgu."y j gtg" otherwise judicially actionable abuses of presidential war authority are cloaked as actions taken incidental to it.<sup>118</sup>

## 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 abuseô as set forth in the introduction to this paperô from the possible to the likely, given a President impelled primarily by the prospect of partisan or personal gain.<sup>119</sup>

<sup>114.</sup> Read v. Central Union Tel. Co., 213 Ill. App. 246, 255 (Ill. App. Ct. 1919).

<sup>115.</sup> 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.

<sup>116. 47</sup> U.S.C. § 606(a).

<sup>117.</sup> *Cf.* Holder v. Humanitarian Law Project, 561 U.S. 1, 7, 34-35 (2010) (delineating, r gt'c'Htuv'Co gpf o gpv'ej cmgpi g''q'uxcwvqt { "o gcuwtgu'r tquetkdkpi "õy g''r tqxkukqp''qh" õo cvgtkcn'uwr r qtv'qt 'tguqwtegu''q'egtvckp''hqtgki p''qti cpk cvqpu''y cv'gpi ci g''kp''ygttqtkrv'' 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 conclusionsö+.

<sup>118.</sup> See Edward Keynes, Undeclared War: Twilight Zone of Constitutional Power 88-89 (1982).

<sup>119.</sup> *Cf.* Dell Cameron, *Secrecy Concerns Mount Over Spy Powers Targeting US Data Centers*, WIRED (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).

Vi g'hktuv.'cpf 'o quvko r qtvcpv.'ku'o qf gtp'y cthctgøu'kpetgcukpi 'wug'qh'y 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"õgy gtgcnö" v j gtg'õv gcr qpu'000dqwi j vkp'cp{ 'eqo r wgt 'lvqtg'000kppgeuously manipulate dku"qh'f cvcö"vq"y tgcnl'cvgpvcvgf "j cxqe"qp"õvgrgeqo o wpkecvkqpu"eqo r cpkgu." r qy gt "eqo r cpkgu. "heppeken" egygtu. "cpf "y g"heng@i<sup>120</sup> This fluidity, he opined, j cu'ugtkąwu''ąpvąnaj kecn'ko r niecykąpu''y kyj "tgur gev'ya "õwukpi "guvcdrikuj gf "noy "ah" armed conflict constructs to assess military necessity, proportionality, eqmcvgtcn'f co ci g."cpf "vj g"rkng@<sup>121</sup> Little has changed in the quarter-century j gpeg0'Cu"y g"4239"xgtukqp"qh"y g"Pqty "Co gtkecp"Vtgcv{ "Qti cpk cvkqpøu" E { dgt "F ghgpug "Egpvgt "qh'Gzegngpegøu" Vcmkpp "O cpwcn'f tkn{"qdugtxgu."õ]vjg" application of the law of armed conflict to cyber operations can prove r tqdrgo cvke.ö" y kj " uvej " dcuke" eqpegr vu" cu" õ]vj g" gzkuvgpeg" qh" c" e{dgt" qr gtcvkqp. "ku"qtki kpcvqt. "ku"kpvgpf gf "qdlgev"qh"cvcem"qt "ku"r tgekug"ghhgevuö" still the subjects of contestation amongst scholars.<sup>122</sup>

With the epistemology of war itself cast asunder<sup>123</sup>ô a concerted nadir in the particular case of subsection (a), as per Part II.A of this paperô 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?<sup>124</sup> 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?<sup>125</sup> Is prioritizing the voices of Iranian dissidents across social media a valid adjunct vq"y g"eqwpt{au"egcugguu"y ct"qp"vgttqt"qt"cp"wpf wg"xkqrcvkqp"qh"pcvkqpcn" sovereignty?<sup>126</sup>

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

121. Id. at 226.

124. See Joseph Menn & Gerry Shih, *Wpf gt 'Kpf kcøu'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].

<sup>120.</sup> Richard W. Aldrich, *How Do You Know You Are at War in the Information Age?*, 22 Hous. J. INTøL L. 224-25 (2000).

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

<sup>123.</sup> 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."\y c\'o]\y j "Rtgukf gp\ullo kkct{"r qy gtu"ctg"ulo r n{"c"uct\kpi "point to consider steps that the cyber administrative national security state must take to understand cpf "cf f tguu"ugewtk{ "kuwgu"qh"\y g"f ki kcn"ci gö+0

<sup>125.</sup> *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].

<sup>126.</sup> 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.<sup>127</sup> 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.<sup>128</sup>

The second is Section 706øt"tghgtgpeg"vq"*common carrier*. Defined by y g"Cev"cu"õcp{ "r gtuqp"gpi ci gf "cu"c"eqo o qp"ecttkgt "hqt" j ktg."kp"kpvgtuvcg"qt" foreign communication by wire or radio or interstate or foreign radio vtcpuo kuukqp"qh"gpgti {.ö<sup>129</sup> the term has traditionally applied to telephone companies.<sup>130</sup> In 2016, however, the FCC expanded its reach to encompass broadband Internet access service \*õDKCUö+" providers in the interests of network transparency and openness.<sup>131</sup> While this regulatory initiative, known cu'pgv/pgwtctk{.'y cu'cdcpf qpgf 'vg q"{gctu'rcvgt 'kp'hcxqt"qh'c'tgwtp'\q"c'õrki j vvqwej "tgi wrcvqt {"htco gy qtmö<sup>132</sup> agency leadership has embarked in 2023<sup>133</sup> on a successful campaign to resurrect it.<sup>134</sup> This, of course, places cable television, satellite, and digital subscriber line Internet access providers us wctgn{'vg kj kp''Ugevkqp'928\*c+øu'etquuj cktu.'gpcdrkpi ''y g''Rtgukf gpv'vq''gpi ci g'' in the very practicesô blocking, throttling, and non-neutral data

<sup>127.</sup> 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] \*pq4pi 'yj cv'õpgy qtmlugewtk{ ''yj tgcu'' like foreign-qy pgf 'f cvc''egpvgtuö'f go cpf ''c'y j qrg-of-i qxgtpo gpvlutcvgi { 'oq''r tqvgev'WUU' eqo o wplecvlqpu'uvqtgf ''y kj kp''qt 'yj cv''qyj gty kug''tcpuk/'yj gug'f cvc''egpvgtuö+; Privacy and Data Protection Task Force, FCC (2023), https://www.fcc.gov/privacy-and-data-protection-taskforce [https://perma.cc/A9DU-DR57] \*guvcdrkuj kpi ''c''eqo r tgj gpuk/g''or wdrke-private cr r tqcej ö''q''vcemkpi ''õr tqdrgo u''yj cv''gtqf g''yj g''r wdrkeøu''twu/kp''f cvc''r tqvgevlqpö''cpf 'ko r gtkri' õyj g''pcvlqpøti'eqo o wplecvlqpu''uvr r n{ ''ej ckpö+0

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

<sup>129. 47</sup> U.S.C. § 153(11).

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

<sup>131.</sup> 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].

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

<sup>133.</sup> See Safeguarding and Securing the Open Internet, 89 Fed. Reg. 45404, 45404 (May 22, 2024); cf. Eva Dou, *HEEøt'Net Neutrality Battle is Back After Years of Deadlock*, WASH. POST (Sept. 28, 2023), https://www.washingtonpost.com/technology/2023/09/28/fccnet-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].

<sup>134.</sup> 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 vkpi "oc"*Declaratory Ruling, Report and Order, Order, and Order on Reconsideration* that reestablishes the FCCør"authority over broadband internet access ugtxkegö"cu"qh"Lwn[ "44."4246+0

prioritizationô that net neutrality was designed to prevent.<sup>135</sup> 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 kpvl'qh'69"WUE0È'452. "y g"eqpvtqxgtukcn'õi qqf "Uco ctkcpö"r tqvgevion for content moderation.<sup>136</sup>

Finally, there stands the historical consolidation of dispersed federal authorities in a singular individualô the so-called *imperial presidency*, by õy j kej "gpqto qwu"f kuetgvkqpct { "r qy gt "vq"tgur qpf "vq"pcvkqpcn'security crises cpf "r gtegkxgf "f cpi gtu'ku"eqpegpvtcvgf "kp"yj g"qhhkeg"qh'yj g"r tgukf gpv&ö<sup>137</sup> 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,<sup>138</sup> warrantless electronic surveillance,<sup>139</sup> and targeted killings of United States nationals abroad.<sup>140</sup> As y g" Dtgppcp" Egpvgtøu" tgegpv" tgrgcug" qh" uqo g" 722" r ci gu" qh" õr tgukf gpvkcri go gti gpe{"cevkqp"f qewo gpuö" öRGCF uö+"htqo "4226 to 2008 demonstrates, Ugevkqp"928'y cu'þqv'ko o wpg"htqo "y g"Dwj "Cf o kpkutcvkqpøu"ghhqtvu'q"co cuu"

136. See, e.g., Joel Thayer, The FCCøs Legal Authority to Regulate Platforms as Common Carriers, FED. Soc. BLOG (Mar. 29, 2021) https://fedsoc.org/commentary/fedsocblog/the-legal-authority-for-the-fcc-to-regulate-platforms-as-a-common-carrier [https://perma.cc/Q958-ND3L] \*oDgecwug'Ugevkqp'452'uku'kp''Vkrg''KK'cri'ugtxkegu'eqxgtgf " wpf gt 'yj g''ucwwg''ctg'uwdlgev'\q''j g''Vkrgat'twgo cribpi 'cwj qtk{ 'wpf gt 'Ugevkqp''423\*d+... Traditionally, Section 201(b) applies to rules related to common carriers.ö+0

<sup>135.</sup> 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 \*6Cv'o quv']Ugekqp'928\*c+\_'o ki j v'cwj qtk g''j g'' President to change some of the requirements for Internet traffic . . . perhaps, for example, by requiring ISPs to throttle P2P applications suspected of use by a terrorist organization.ö+0A hpcnktqpke''y kwku'hqwpf 'kp''HEE'Ej ckto cp''Tqugpy qtegnau'uwo o ct {''qh'y g''cf xcpvci gu'y cv'' will accrue to the country from reclassification, the vast majority of which concern enhancements to national security and public safety. See FCC Office of the Chairwoman, FACT SHEET: National Security and Public Safety Impacts of Restoring Broadband Oversight (Oct. 5, 2023), 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 y g'eqpvgngf 'öeqo o qp''ecttkgtö''encukkkevkqp''cu''egpvtcrl'q''HEE'ghtqtu''q''r tqj kdkv'r wtr qtvgf '' traffic management abuses on the part of Internet service providers).

<sup>137.</sup> 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].

<sup>138.</sup> See, e.g..'O go qtcpf wo 'htqo 'Lc{ 'UDD{dgg.'Cuukucpv'Cwø{ 'I gp0''\q'Cndgt\q'T0 Gonzales, Counsel to the President (Aug. 1, 2002), (available at https://www.justice.gov/media/852816/dl?inline).

<sup>139.</sup> See, e.g., Letter htqo 'Iqj p'E0[ qq.'F gr w{ 'Cuukucpv'Cws{ 'I gp0'Qhheg'qh'Ngi cn Counsel, to U.S. District Judge Colleen Kollar-Kotelly (May 17, 2002) (available at https://www.justice.gov/media/879011/dl?inline).

<sup>140.</sup> See, e.g., O go qtcpf wo 'htqo 'F cxkf 'I0Dcttqp.'Cevkpi 'Cuukarcpv'Cwg( 'I gp0'Qhheg of Legal Counsel, vq''y g'Cwg( 'I gp0Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi (July 16, 2010) (available at

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-9PKT]).

õr qy gtu" yi cv" cr r gct" vq" reeni qxgtuki j v"htqo "Eqpi tguu." yi g" eqwtvu." qt" yi g" r wdrke@i<sup>141</sup> While the text of the relevant PEADs is largely accurate,<sup>142</sup> handwritten comments from NSC staffers suggest that subsection (a) might õcr r ]n{\_"vqy ctf "kpvgtuvcy"ecttlgtu"dg{qpf "rcpi ]wci g\_"qh"uxcwsg." kpe]nvf kpi \_" d{" HEEö" cpf" õvq" pqpeqo o qp" ecttlgtuô this is beyond statutory rcpi ]wci g\_@i<sup>143</sup> Further reflections on the scope of Section 706(a) question whether a õ]r\_tqerco cvkqp"]ku\_"uvkn"pgeguuct{"wpf gt"P cvkqpcrl'Go gti gpekgu" Cevö<sup>144</sup> a Watergate-gtc" rgi kurcvkxg" ej geml qp" yi g" Rtgukf gpv/u" wug" qh" extraordinary powers in a crisis.<sup>145</sup> There seems little doubt that these troubling initiatives will increase, particularly as lawmakers debate the merits qh"c"öf ghgpf "hqty ctf ö"utcvgi { 'hqt "kphqto cvkqp" y cthctg."d{ "y j kej "y g"Wpkgf" Uccyu" o kksct { " y qwf" go dtceg" õcp" qr gtcvkqpcrl vgo r q" qh" eqpvkpvqwû or persistentô engagemepv'y kj "cf xgtuctkgu"kp'yi g"e{dgt"f qo ckp@i<sup>146</sup>

# 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

<sup>141.</sup> Benjamin Waldman, *Pgy 'F qewo gput'Knwo lpcvg'ij g'Rt gulf gpv/u'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].

<sup>142.</sup> 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 ó Legal Advisor "pq\pi ."hqt"gzco r ng"j cv\j g"tgngxcpv'õucvg"qh"go gti gpe{ö"cpf "õtki i gtuö"hqt"wg"qh"Uge\qp" 706(a) are the õeqp\pvcpeg"qh"c"y ctö"cpf a õpgeguu]k{\_'hqt"yj g"pc\qpcrif ghgpug"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].

<sup>143. 2015</sup> FOIA Request at 1.

<sup>144.</sup> Id. at 3.

<sup>145.</sup> 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<sup>1%</sup>3; : 5+<sup>1%</sup>öVj g'r tqdrgo 'r qugf ''d{ ''y g''pggf ''q''r gto k/'dw'ukn'\q''ho 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 gt@+0

<sup>146.</sup> 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].

provide telecommunications services, which would ordinarily be subject to the non-discrimination requirements of Section 202(a), on a prioritized dcuku05<sup>151</sup> Hct"htqo "eqpukkwkpi "cp"cevkqp"õy j kej "y g"[FCC] would not be cwj qtk gf "d{"ncy "vq"o cng.ö<sup>152</sup> Presidential prioritization fits comfortably y kj kp"y gug"r tqxkukqpu."hcekcm{"gxcf kpi "y g"Cevku"r tqj kdkkqp"qp"chqtf kpi " õcp{"wpf wg"qt "wptgcuqpcdrg"r tghgtgpeg"qt"cf xcpvci g"vq"cp{"r ctvkewrct person, class of persons, qt"nqcrkx{ö<sup>153</sup> under cloak of national security.

To this end, I look to other portions of the United States Code for solutions to the structural problems outlined above. In culling a workable f ghkpkkqp"qh"õy ct.ö"y g"Y ct "Rqy gtu"Resolution<sup>154</sup> is an ideal source, given y cv"k/dqy "r tqo wi cvgu"õc"eqpi tguukqpcn definition qh'y g"y qtf "-y ctø ko ct verg"K6<sup>155</sup> and or taxkf gu"c"ngi keen "eqpuvkwvkapen"cmqeevkap "qh"y et "r qy gtuo" kp"f kukpi wkuj kpi "dgw ggp"õc"f genetevkqp"qh"y etö"epf "e"õur gekhke"uvewvqt {" cwj qtk cyqpö<sup>156</sup> for employment of the armed forces.<sup>157</sup> More specifically, y g"ux wyg"ko r qugu"ur gekhle "tgr qt kpi "tgs wltgo gpvu"wr qp"y g"Rtgulf gpv"õ]k p" y g"cdugpeg"qh"c"f genetevkqp"qh"y ct.ö"y j kej "ceeqtf u"y kj "y g"pqvkqp"y cv" our gelthe "uvcwwat { "cwi at k cvkap "hat "o knksct { "cevkap." y j kng "dcugf "ap" Congressøs power to authorize military action, must be viewed as being subsidiary to a formal declaration of war and cannot constitute a wartime state gh"chicku@<sup>158</sup> Applied to the question at hand, this discursive construction both elides the heretofore tangled (and tautological) attempts to define uwdugevkqp"\*c+øu"tghgtgpeg"\q"õeqpvkpvcpeg"qh"y ctö"cpf "gnvekf cvgu"yj g"o cppgt" by which limitations upon presidential traffic prioritization should be imposedô i.e., in all cases short of a declaration of war under color of Article I. Section 8.159

Cu'\q'\j g'Httu\Co gpf o gpv."Vkng'69'kugh'kputweu'\j g'HEE'\q'õr tqeggf" cautiously and with crrtqrtkcvg"tgutckpvö in proposing forfeitures for or predicating license renewals upon broadcasts of indecent or profane

<sup>151.</sup> Rules and Requirements, *supra* note 33, at ¶ 26.

<sup>152.</sup> The Communications Act of 1934, 47 U.S.C. § 606(g).

<sup>153.</sup> *Id.* § 202(a); *cf. Open Internet Order, supra* note 130, at ¶¶ 441-52 (predicating bans on the throttling and paid prioritization of BIAS traffic upon, *inter alia*, Section 202 of the Act).

<sup>154. 50</sup> U.S.C. §§ 1541-1548.

<sup>155.</sup> Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 101-02 (1984).

<sup>156. 50</sup> U.S.C. § 1541(c).

<sup>157.</sup> Christopher J. Schmidt, *Could a CIA or FBI Agent Be Quartered in Your House during a War on Terrorism, Iraq or North Korea*?, 48 ST. LOUIS L.J. 587, 618 (2004).

<sup>158.</sup> Id. at 618-19.

<sup>159.</sup> This is also commensurate with the vast weight of caselaw discussed in Part III, *supra*, which recognized executive primacy in dictating the scope and duration of traffic prioritization within the context of a declared war (i.e., World Wars I and II).

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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  $\delta$ Ugevkqp'928'i kxgu'yj g'Rtgukf gpv' 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 Rtgukf gpv'eqwf "qtf gt"c"rgugt "cevkqp $0\delta^{167}$  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)ô and a reflection upon the seeming inadequacy of existing legal frameworks to constrain excesses of executive authority over wired and wireless modalitiesô this paper thus

<sup>167.</sup> S. REP. No. 111-368, at 10 (2010).

stands as a further bulwark against presidential assumption of  $\tilde{o}rgpct{" cwj qtk}{" o"qxgt national communications in exigent times.<sup>168</sup>$ 

<sup>168.</sup> Patrick A. Thronson, *Toward Comprehensive Reform of Americaøs 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 Ugevkqp'928'uwhhelgpvlõvq'wpkrvgtcm{" ugk g'eqpvtqrlqh'tcflq'cpf '\grgxkukqp'uvcvkqpu.'rj qpg'u{uso u.'cpf '\j g'Kpytpgvö+0