Preferred or Prioritized: Probing the Limits of Presidential War Powers Under Section 706(a) of the Communications Act of 1934

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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 military force against "narco-terrorists" on the nation's southern border.[1] 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 Force[3]—or perhaps the President's mere observation during a State of the Union address that the nation is now at war with nefarious drug lords[4]—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 "secure" social media platform[7]—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

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1. *Cf.* William P. Barr, *The U.S. Must Defeat Mexico's Drug Cartels*, 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 implementing a "de-prioritization" policy on cellular consumers in contravention of unlimited data plan representations).

7. Consider here the Biden Administration's attempts to foreclose government 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. The President's authority 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 manner. No longer, she vows in her inauguration speech, will the country's response be dictated by the effects of the phenomenon, awkwardly remediating its effects—from rolling blackouts[9] to ballooning toxic algae blooms[10] to ever-increasing spates of heat-related deaths[11]—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.

Backed by the "unequivocal" conclusion of the United Nations Intergovernmental Panel on Climate Change "that human influence has warmed the atmosphere, ocean and land,"[12] the President, recalling the paramilitary ambitions and confiscatory methods of her predecessors Richard Nixon[13] and Ronald Reagan[14] 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. DEP'T 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 INT'L REV. RED CROSS 828, 829 (2023).

14. *See, e.g.*, Emily Crick, *Reagan's Militarisation of the 'War on Drugs'*, GLOB. DRUG POL'Y 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 the nation's share of the 74 million metric tons of greenhouse gas 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 Commission ("FCC"). And yet I would argue to the contrary: these are states of affairs not only plausible, but frighteningly likely. As the geopolitical grounds of strife shift from the terrestrial to the digital—and the historical roots of war beget conflicts of ambiguous scope and duration in a multiflorous modernity—presidential ambitions to control and constrain communications, I believe, could flourish in few fields so welcoming as Section 706(a)[19] of the Communications Act of 1934, as amended (the "Act").[20]

Titled "War powers of President," Section 706 is divided into four operative components, each of which "grants specific, communications-related powers to the President in time of war or national emergency."[21] Taken as a whole, Section 706 constitutes a critical component of the country's communication infrastructure[22] evinced, for example, in international

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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.* Barry O'Halloran, *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 Comm'n's 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 effectuating the legislative intent undergirding Section 706, as "an essential national defense, emergency, and public safety system" designed to allow the President to engage rapidly and efficiently in crisis communication with the general public).

22. Section 706 parallels the legislative mandate for the creation of the FCC, which charges it to regulate "commerce in communication by wire and radio . . . for the purpose of the national defense" and "promoting safety of life and property." 47 U.S.C. § 151; *see also, e.g.,* Reorganization and Deregulation of Part 97 of the Rules Governing the Amateur Radio Servs., *Report and Order*, 4 FCC Rcd 4719, 4725 (1989) (restricting, "[i]n the event of an emergency which necessitates the invoking of the President's War Emergency Powers under the provisions of Section 706," transmissions of the radio amateur civil emergency service to select frequencies, per the FCC's plenary authority under Section 151). *Cf.* Yankee Network, Inc. v. FCC*,* 107 F.2d 212, 218 (D.C. Cir. 1939) (citing Section 706's provision for compensation to civilian radio operators in explicating the "rights and equities" available to current and prospective licensees).

transfers of FCC broadcast licenses, where foreign corporations pledge to abide by "the orders of the President in the exercise of his/her authority under § 706" as a manifestation of their compliance in "effective, efficient, and unimpeded fashion" with domestic law.[23]

Two of these four components—subsections (c) (permitting the President to indefinitely suspend or amend "the rules and regulations applicable to any or all stations or devices capable of emitting electromagnetic radiations")[24] and (d) (permitting the President to, *inter alia*, close or nationalize facilities for communication by wire or radio)[25]—have been the subject of extensive study. Roughly a decade ago, multiple monographs[26] opined on the putative interrelationship of these provisions to nascent legislation contemplating an Internet "kill switch,"[27] while others conceptualized them as vital resources in the nation's ability to engage in cyberwar.[28] More recently, the FCC has deployed them in designating Chinese-funded telecommunications corporations as longitudinal national

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. 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'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. 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. 57, 58, 66 (1998) ("Moreover, the hypothetical 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 over other communications while the U.S. is engaged in war.").

security threats,[29] pursuant to the executive branch's historically broad operationalization[30] of these same emergency powers.[31]

Yet I maintain that the little-known subsection (a) —which focuses on *slowing* rather than *seizing* the operation of commercial communications instrumentalities—constitutes the far more pernicious (and potentially insidious) tool for forestalling free and open discourse in times of putative crisis.[32] Under this subsection, "[d]uring the continuance of a war in which the United States is engaged," the chief executive (whether directly or through his authorized subordinates or through the FCC), "if he finds it necessary for the national defense and security," may "direct 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 [the Act]."[33] Such directives may be issued "at and for such times as he may determine," and carriers are civilly and criminally immunized from complying with them.[34]

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

30. *See* Exec. Order No. 10,312, 16 Fed. Reg. 12452, 12452 (Dec. 10, 1951) (explaining that establishment of the CONtrol of ELectromagnetic RADiation ("CONELRAD") alerting system was justified, per executive proclamation of a national emergency, on the basis that "government and non-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 thereof").

31. *See, e.g.*, Amendment of Sections 87.161, 87.163, and 87.165 of the Comm'n's Rules and Regs. to Provide for the Sec. Control of Air Traffic and Air Navigation Aids, *Order*, 14 F.C.C. 2d 635 (1968) (citing Executive Order 10,312 as grounds for "a detailed operational plan for the security control of specified non-Federal air navigation aids"); Amendment of Part 10 of the Comm'n's Rules and Regs. to Effectuate the Comm'n's 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, *Defining "Emergencies": What the United States Can Learn from the United Kingdom about National Emergencies and the Rule of Law*, 37 ARIZ. J. INT'L & COMPAR. L. 411, 422 (2020) (citing Section 706(c) as one of scores of laws notable in "their potential for abuse" by the President). Notably, the Unplug the Internet Kill Switch Act of 2020, S. 4646, H.R. 8336, 116th Cong. (2020), which was intended to "protect Americans' First and Fourth Amendment rights by preventing a president from using emergency powers to unilaterally take control over or deny access to the internet and other telecommunications capabilities," 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-effort-prevent-president-trump-stopping-endless-war/ [https://perma.cc/E43E-75N5].

33. *See* 47 U.S.C. § 153(11), (51) (defining "common carrier," "carrier," and "telecommunications carrier" 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 "leverage access to commercial communications infrastructure to support national command, control, and communications by providing prioritized connectivity during national emergencies," per "prioritized provisioning and restoration of wired communications circuits or prioritized communications for wireline or wireless calls") [hereinafter Rules and Requirements].

34. 47 U.S.C. § 606(a).

Such broad language—and a marked paucity of extant scholarship on its implications—occasions this paper. In Part One, I provide a brief summary of the subsection's evolution and applications from the first decades of the twentieth century. In Part Two, I highlight two of Section 706(a)'s key weaknesses—a poorly defined use of the term "war" as a trigger for its invocation and manifold barriers to judicial review in the event the President opts to invoke it. In Part Three, I note three key emerging techno-political factors—the increasing use of the information domain as a battlefield; the growing ambit of the statute's reference to "carrier" by way of net neutrality; and the capacious legal assertions of the so-called "imperial presidency"—as grounds for additional concern, should this subsection be weaponized in an emergency of nebulous reach and duration.[35] Finally, I propose a comprehensive statutory fix to redress this state of affairs.

II. THE ORIGIN AND CONSTRUCTION OF SECTION 706

On August 13, 1912, Congress passed Public Law 264, "An Act to regulate radio communication," as an attempt to address the growing problem of congestion on the airwaves.[36] Under it, the operation of "any apparatus for radio communication as a means of commercial intercourse" or international communication was predicated on possession of "a license, revocable for cause . . . granted by the Secretary of Commerce and Labor." Each such 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.[37]

As Toronto details at length,[38] this provision was employed roughly one year after the United States' entry into World War I. On July 16, 1918, Congress jointly empowered the President:

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35. *Cf.* Richard Jackson & Matt McDonald, *Constructivism, US Foreign Policy, and the "War on Terror," 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).

36. *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].

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

38. *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 . . . ."[39]

Following President Wilson's brief exercise of this power,[40] it lay dormant for eight years, until being codified in the Radio Act of 1927 (the "Radio Act"), which provided for enhanced oversight of radio broadcasts and stations by a new regulatory body, the Federal Radio Commission ("FRC").[41]

In 1929, the Senate considered adoption of "a bill to provide for the regulation of the transmission of intelligence by wire or wireless," which would centralize extant authority held by the Interstate Commerce Commission over wireline communication and that of the FRC over radio in a new "communications commission."[42] 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 "preference or priority" to "traffic or such shipments of commodities as, in his judgment, may be essential to the national defense and security" with respect to "transportation by any common carrier by railroad, water, or otherwise."[44] Five years later, this provision would be enacted unchanged under the Act,[45] through which Congress at last "combined and organized federal regulation of telephone, telegraph, and radio communications" under 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-

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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. DEP'T 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/rooseveltturges.pdf [https://perma.cc/G9KG-YUMC].

old Defense Communications Board[47] with frequency allocation, government seizure or closure of radio stations, and, "in accordance with Section 606(a) of the Communications Act of 1934, to make such arrangements as may be necessary to insure that communications essential to the national defense or security shall have preference or priority . . . "[48] Subsequently given additional powers by Executive Order per contemporary congressional enhancements to Section 706[49] 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 "the domestic industrial base to supply materials and services for the national defense" to satisfy the urgent needs of "military production" and the "unique technological requirements" under "emergency conditions."[52] 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 entity for "coordinated planning for the most efficient control and use of radio, wire, and cable communication facilities under jurisdiction of the United States in time of national emergency," per the needs of the armed forces and "the needs of other governmental agencies, of industry, and of other civilian activities").

48. Exec. Order Prescribing Regs. Governing the Use, Control and Closing of Radio Stations and the Prefrence or Priority of Commc'n, 6 Fed. Reg. 6367, 6367-68 (Dec. 12, 1941).

49. *See* Exec. Order Prescribing Regs. Governing the Use, Control and Closing of Radio Stations and Facilities for Wire Commc'ns, 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) ("It is perhaps significant that in the latest professional development - radio broadcasting - increased emphasis has been placed on . . . governmental control.").

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).

illustrates, shifting postwar imperatives functionally[53] and substantively[54] relegated it to the realm of civil defense, per a series of Executive Orders that prompted "various agencies, including the Federal Communications Commission, [to] adopt contingency plans for war and national emergencies" under the authority of Section 706.[55] The National Security Council ("NSC") served to coordinate these efforts, ensuring a unified blueprint for preserving the preference of "communications for the federal government under emergency conditions, including nuclear attack."[56]

Recent administrations have employed Section 706(a) as a critical tool for ensuing the uninterrupted flow of "[s]urvivable, resilient, enduring, and effective communications"[57] between and among the various arms of the federal government. The Obama White House's Executive Order 13,618, for instance, tasked both the Assistant to the President for Homeland Security and Counterterrorism and the Director of Office of Science and Technology Policy ("OSTP") with advising on and monitoring the use of the authorities set forth by Section 706, with the latter instructed to "advise the President on the prioritization of radio spectrum and wired communications that support NS/EP [national security/emergency preparedness] functions."[58] The Trump Administration revised these plans, empowering the Director of OSTP "to exercise the authorities vested in the President by section 706(a) . . . if the

53. *Compare* 47 U.S.C. § 151 (creating a Federal Communications Commission for the purpose of, *inter alia*, "the purpose of the national defense" and "the purpose of promoting safety of life and property through the use of wire and radio communications"), *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 "March 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 out of attack") (internal quotation marks omitted).

54. *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] (summarizing the "plans and programs" designed by the FCC under Executive Order 11,092, 28 Fed. Reg. 203 (Jan. 9, 1963), "to develop a state of readiness . . . with respect to all conditions of emergency, including attack upon the United States," which "take into account the possibility of Government preference or priority with common carriers or of exclusive Government use or control of communications services or facilities when authorized by law"); 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 Policy, "the President's principal adviser on telecommunications . . . . the authority vested in the President by subsections 606 (a), (c), and (d) of the Communications Act of 1934, as amended . . . . under the overall policy direction of the Director of the Office of Emergency Preparedness").

55. Opderback, *supra* note 28, at 831.

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

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

58. *Id.* at § 2.2.

President takes the actions, including issuing any necessary proclamations and findings, required by that section to invoke those authorities."[59]

III. CRITICAL QUESTIONS OF WAR AND EXECUTIVE AUTHORITY

Given the seemingly innocuous applications of Section 706(a) to date—a pointed exigency arising from the extraordinary demands of existential conflict and a backstop for federal crisis communications in the nuclear age—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. The Meaning of "War"

While subsection (a) turns on the phrase "continuance of war in which the United States is engaged," it fails to define that war's character[60]—is it an international armed conflict, an internal armed conflict, or one of the many cases on the margins, such as those in the realm of "cyber operations?"[61] Complicating the question is the use of the passive voice: "engagement" says

59. Exec. Order No. 13,961, 85 Fed. Reg. 79379, 79380 § 6(a) (Dec. 7, 2020); *cf.* U.S. DEP'T 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 Presidential Policy Directive 40, which "directs the Secretary of Homeland Security through the Administrator of the Federal Emergency Management Agency . . . to coordinate the implementation, execution, and assessment of continuity activities among executive departments and agencies").

60. In a 1939 address to the Indianapolis Bar Association, for example, Senator Robert A. Taft highlighted the "dangers to democratic processes attendant upon modern warfare," by way of the "extensive" emergency authorities afforded the chief executive. 85 CONG. REC. 714. Reviewing Section 706(a), he commented: "It appears, therefore, that [the President's] 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 censorship in the World War without statutory authority." *Id.* at 715.

61. *See* Prosecutor v. Tadić, No. IT-94-1-l, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 65, 70, (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), http://www.icty.org/x/cases/tadic/acdec/en/51002.htm [https://perma.cc/3JQH-G6KP]; *Cyber warfare and international humanitarian law: The ICRC's position*, INT'L COMM. RED CROSS (June 28, 2013), https://www.icrc.org/sites/default/files/external/doc/en/assets/files/2013/130621-cyber-warfare-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-AFJE] ("During *any war*, the President may order any carrier to give preference or priority for national defense communications.") (emphasis added).

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]

Legislative history is of little assistance in defining "war." In hearings on the Radio Act held in March 1924, Major J. O. Mauborgne, amplifying a missive from Secretary of War John W. Weeks, describes the legislation's 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 the military directorate, the "time of war" and "national defense" constructs mirror those in present-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 Association's radio committee, and Senator Clarence Dill,[65] a nebulous "time of war" is adjudged the predicate to the President's "right to close down any station or to take over any station."[66] Caldwell, however, does suggest, in an interchange with Senator Key Pittman, that the right vests (vis-à-vis the same

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62. *Cf.* Robert F. Daly & Donald L. Nielson*, A Review of National Security-Emergency Preparedness Telecommunications Policy*, SRI INT'L 1, 32 (1981) https://apps.dtic.mil/sti/pdfs/ADA100190.pdf [https://perma.cc/95WR-UH9X] ("[E]ach of 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* . . . .") (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 Act, he was a prime architect of the "public interest, convenience, and necessity" standard that undergirds the FCC's licensing and regulatory powers. *See* Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" 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.,* 71st Cong. 52 (1930), https://heinonline.org/HOL/P?h=hein.cbhear/cochus0001 [https://perma.cc/L7ZL-F9P6].

"time of war" phrasing) "as soon as war is declared."[67] A similar discursive construct is employed in testimony by Army Signal Corps Major General George Owen Squier, which asserts that "the Army and Navy in time of war" (as counterposed against "time of peace" and "peacetime") "should have the use of all [available radio frequencies] if necessary" and that the President "will take over everything in time of war anyway."[68]

The implementing regulations for Section 706, 47 CFR § 201.0 *et seq*., are also unavailing. These rules distinguish between "crises and emergencies, wartime and non-wartime," but define the former concept recursively, whereby a "wartime emergency means a crisis or event which permits the exercise of the war power functions of the President under section 706 . . . "[69] While note is taken, however obliquely, of the disparity between the President's "limited non-wartime NS/EP telecommunications functions . . . and wartime NS/EP functions" under the Act, this observation is made in the context of "survival and recovery during a crisis or emergency" occasioning an "unavoidable interdependence between and among Federal, State, and local authorities" and the federal government's use of lesser authorities "for management or control of intrastate carrier services and continuity of interconnectivity with interstate carriers . . . "[70] In other words, "wartime" and its counterpart, for purposes of these rules, are little more than conceits, demarcations of convenience intended to maximize the unity of presidential command across jurisdictional lines whenever Section 706(a) is invoked.[71]

FCC decisions fail to provide any additional granularity. In 2020's *Rules and Requirements for Priority Services*, the agency updated its decades-old rules for granting NS/EP personnel access to "priority service programs" that facilitate emergency communications.[72] Again, the critical inflection point between war and non-war is more semiotic than substantive; revisions to a Department of Homeland Security wireless access framework, for

67. *Id.* at 147 ("There are other provisions of the act that amply protect us in time of war and provide for sufficient control of the situation. The President, for example, can shut down any station, or take it over, as soon as war is declared.").

68. *Id.* at 205.

69. 47 C.F.R §§ 201.2(m), 201.3(a), (b) (2024); *see also* 47 C.F.R § 201.3(e) (2024) (restating the powers available under subsection (a) to the President "during war").

70. 47 C.F.R. § 201.3(b)(1), (2) (2024).

71. *Cf.* 47 C.F.R § 201.3(f) (2024) ("During an attack on the United States by an aggressor nation, and in an immediate postattack period, all decisions regarding the use of telecommunications resources will be directed to the objective of national survival and recovery."). *Cf.* Opderbeck, *supra* note 26, at 41 ("Even if subsection 606(d) is read against a background of unlimited ancillary jurisdiction over the Internet, it applies *only* in wartime. The same is true of subsections (a) and (b), which are war powers only, and not broader emergency powers . . . . This difference makes sense in light of the differing purposes of subsections (a), (b), and (d) in contrast to subsection (c) . . . . [as] a Cold War measure designed to frustrate the capacity of a hostile country such as the Soviet Union to launch a nuclear first strike.").

72. Modernizing Priority Servs. Rules to Support Emergency Personnel, *Notice of Proposed Rulemaking*, 35 FCC Rcd 7685, ¶¶ 1-3 (2020) (predicating rulemaking on the development of Internet Protocol-based technologies in the years following the 1988 establishment of a Telecommunications Service Priority program for NS/EP users).

instance, is bifurcated between the "before and after" of the moment when the President invokes his emergency war powers, even as it recognizes that the temporal formulation itself may be "superseded by the President's emergency war powers."[73]

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 reclassification of radio bands for civil 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, which cited both the "recent events in Korea and elsewhere" and "the increasing menace of the forces of communist aggression" as the basis for "the existence of a national emergency."[76] Supporting the putative need to center "[n]ational trust and responsibility" in the President, the court reasoned, was Section 706, "which in circumstances specified, expands the President's authority to reach and control even already licensed stations and facilities."[77]

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 seizure of their 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.[78] The court characterized the first argument as "a lame comprehension of the scope and variety of modern war," noting that cases of domestic espionage and interdependent transnational campaigns militated against the conclusion "that means of telegraphic communications anywhere in the world were not appropriate to its prosecution."[79] The court also dismissed plaintiffs' emphasis on chronological logics, adjudging an armistice not an end to war, but a mere "suspension of hostilities."[80] To this end, the court opined on the President's critical (and Constitutional) role in treaty-making: "The national 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 the Interstate Commerce Commission, "[i]n time of war or threatened war," was afforded license to give "preference or priority in transportation" upon certification by the President that such was "essential to the national defense and security." *See, e.g.*, Interstate Com. Comm'n v. Or. Pac. Indus., Inc., 420 U.S. 184, 186-87 n.2 (1975); U.S. v. Interstate Com. Comm'n, 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 the Fed. Reg., Nat'l Archives and Recs. Serv., & Gen. Serv. Admin., 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] security and defense."[81]

Likewise, in *Central Telephone Co. v. South Dakota*, the Supreme Court, in assessing the legality of federally mandated wartime intrastate telephone rates, deemed dispositive missives from "the highest authorities of the federal Government [that] acknowledged that the war had ended"—namely, messages from President Wilson to Congress dated November 11 and December 2, 1918.[82] Some thirty years later, the Western District of New York would synthesize these decisions in granting the government's motion 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] as "[t]he statutes effective only 'in time of war'" attach independently of military engagement, "continu[ing] in force until a formal statement of peace is declared."[85]

"War," then, for purposes of Section 706(a), is nebulous, 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

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81. *Id.* at 105-06; *accord* Sw. Tel. & Tel. Co. v. Houston, 256 F. 690, 697 (D. Tex. 1919) ("The signing of the armistice did not terminate the war. We are still at war, although 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 . . . .").

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] ("And now we are sure of the great triumph for 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 . . . ").

83. U.S. v. Switchmen's Union of N. Am., 97 F. Supp. 97, 102 (W.D.N.Y. August 11, 1950) ("Next 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 system.").

84. *See id.* at 100 ("It is believed that this court can take judicial notice of the United Nations' conflict over Korea. This greatly emphasizes the necessity for the continued operation of this railroad.") (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 provisions predicated on prophylactic actions deemed "essential to our national defense, to the implementation of the North Atlantic Pact, Economic Cooperation Administration, and to the prosecution of hostilities in Korea," motion to enjoin requirement that transnational commercial mariners obtain a security clearance as a prerequisite to gainful employment, per a finding that "[h]owever grievous the personal deprivation petitioners have suffered, the 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 program"); *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) ("These are not normal times. These are times of crisis.").

85. *Switchmen's Union of N. Am.*, 97 F. Supp. at 100 ("However, neither the war with Germany nor Japan has ever been dissolved and no treaty of peace has followed these wars.").

war stands appositionally to a condition of non-war in the commander-in-chief's invocation of his war powers; it endures, as something of an analogue 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.[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 the "law of war," such as Section 706(a)) and a *declaration of war* (substituting the "law of war" for the "law of peace" and 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 a conflict's genesis in focusing on the fact (or "continuance") 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*, in which the Supreme Court rebuffed President Truman's attempt to nationalize most of the country's steel mills pursuant to the ongoing police

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86. *See, e.g.*, DUSTIN A. LEWIS ET AL., INDEFINITE WAR: UNSETTLED INTERNATIONAL LAW ON THE END OF ARMED CONFLICT (Harvard L. Sch. Program on Int'l L. & 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].

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 "complying with any . . . order or direction for preference or priority herein authorized." 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 "an organ of the state." *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 presidential "authority is at its maximum" when predicated on "an express or implied authorization of Congress."[91] There can be little doubt, per the broad enabling language of and well-entrenched history behind subsection (a), that a future chief executive would enjoy "the strongest of presumptions and the widest latitude of judicial interpretation" in a challenge to 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 accompanied by "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 there are limits of delegation which there is no constitutional authority to transcend"[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. Observing that "[t]he facilities of radio are not large enough to accommodate all who wish to use them," the Court opined that the FCC was responsible for both "determining the composition of [communications] traffic" and "policing the wave lengths to prevent stations from interfering with each other"[99]—communications management tasks remarkably similar to those described in Section 706(a). In discharging these tasks, the Court emphasized that the FCC "was not left at large" per an intelligible congressional "touchstone"[100]—the statutory "public interest,

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) ("[I]t it does not appear . . . that the President, either in the exercise of the delegated 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.").

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.*

convenience, and necessity" standard,[101] possessed of sufficient granularity as to defeat invocation of the non-delegation doctrine.[102]

Inasmuch as *National Broadcasting Co.* supports a delegation in peacetime of the highly complex work of communications traffic management—per the well-founded "practical 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 directives"[103]—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.[104] This is particularly true when adjudging the intelligible principles putatively at issue in each delegation: the "public interest, convenience, and necessity" standard, which, while tenable, has been the subject of protracted criticism for its vague construction and historically mutable application.[105] Such phrasing is notable in comparison to Section 706(a)'s reference to traffic management actions deemed "necessary" and "essential" to "the national defense and security,"[106] which is entitled to

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

102. *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].

103. Mistretta v. United States, 488 U.S. 361, 372 (1989).

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.*,* 500 U.S. 160, 165 (1991) ("We 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 of discretion . . . ."); Opp Cotton Mills, Inc. v. Adm'r of Wage & Hour Div., 312 U.S. 126, 145 (1941) ("The Constitution, viewed as a continuously operative charter of government, is 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 of conduct."). This elision is also evinced by the emergency operations of FCC-licensed broadcasters, which, both legally—*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 of Part 11 of the Comm'ns Rules, *Order on Reconsideration*, 33 FCC Rcd 7490 (2019) and practically—*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)—are structured along the same "public interest" construct attendant under ordinary 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 "the Public Interest" 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 "the Public Interest" in Communications Policy – Part II: Its Implementation in Early Broadcast Law and Regulation*, 2 COMM. L. & POL'Y 363, 364-66 (1997).

106. 47 U.S.C. § 606(a) ("During the continuance of a war in which the United 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 national defense and security . . . .").

especial deference as an extension of the President's constitutional authority as commander-in-chief.[107]

The aforementioned pre-Act cases buttress these conclusions, subordinating the whys-and-wherefores of specific communicative preferences or prioritizations to the judgment of the Commander-in-Chief. In *Commercial Cable*, the court reasoned that the purpose of the joint resolution authorizing executive seizure and control of the nation's telecommunications infrastructure "was to put the property at the general disposal of the President in the discharge of some of his constitutional functions, without inquiry as to the specific purposes which he might have in mind."[108] Judicial second-guessing would, in any case, threaten the urgent business of the "effective prosecution" of the war; the President, in the cause of the national defense, "had to act quickly, certainly, and without the trammels of courts or private interests."[109] More pointedly, in *Dakota Central*, the Supreme Court dismissed attacks upon "the motives" impelling President Wilson to take charge of telephone lines; "as the contention at best concerns not a want of power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power."[110]

Further pre-Act cases provide additional support. In *Southwestern Telegraph and Telephone Co. v. City of Houston*,[111] the Texas Southern District, quoting the seminal *Legal Tender Cases*,[112] enjoined a municipality's attempt to forestall the imposition of government-prescribed calling rates. "The act authorizing the taking over of the telegraph and telephone lines, being a war measure, should be liberally construed," the *Southwestern Telegraph and Telephone* court reasoned, and clear deference paid to Congress's use of "its vast power in time of war and public peril . . . for the husbanding and marshaling of the resources of the nation."[113] A state court, confronting directly the fact of corporate seizure, put it more bluntly, apropos of a series of federal authorities: "The war power and all powers incident to it

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107. *See, e.g*., In re NSA Telecomms. Records Litig., 671 F.3d 881, 897-98 (9th Cir. 2011) (because a challenged provision of the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. §§ 1801 *et seq*., "arises within the realm of national security—a concern traditionally designated to the Executive as part of his Commander-in-Chief power . . . the intelligible principle standard need not be overly rigid … The Supreme Court has repeatedly underscored that the intelligible principle standard is relaxed for delegations in fields in which the Executive has traditionally wielded its own power.") (citation omitted).

108. 255 F. at 102.

109. *Id.* at 103-04.

110. 250 U.S. at 184. *But see id.* at 176 (deeming it "the duty of the court in a proper proceeding" to examine "recitals" by the executive branch regarding the wartime necessity for increasing telephone rates per an apparent congressional disapproval of such an assertion).

111. Sw. Tel. and Tel. Co. v. Houston, 256 F. 690, 696 (S.D. Tex. 1919).

112. 79 U.S. 457, 563 (1871) ("In certain emergencies government must have at its command, not only the personal services—the bodies and lives—of its citizens, but the lesser, though not less essential, power of absolute control over the resources of the country.").

113. Sw. Tel. & Tel. Co., 256 F. at 696.

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 undergirding the deployment of brigades and batteries—or even the reconstitution of civilian-facing communication systems in the face of existential threats[115]—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 "national defense and security"[116] and a charge of censorship .[117] This, I think, suggests something of the constitutionally vexing muddle between "defensive" and "offensive" executive power explicated by Keynes, where 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]

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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, per a First Amendment challenge to statutory measures proscribing "the provision of "material support or resources to certain foreign organizations that engage in terrorist 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*, 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).

The first, and most important, is modern warfare's increasing use of the *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-five years ago, cyberspace is "ethereal," where "weapons . . . bought in any computer store . . . innocuously manipulate bits of data" to wreak attenuated havoc on "telecommunications companies, power companies, financial centers, and the like."[120] This fluidity, he opined, has serious ontological implications with respect to "using established law of armed conflict constructs to assess military necessity, proportionality, collateral damage, and the like."[121] Little has changed in the quarter-century hence. As the 2017 version of the North American Treaty Organization's Cyber Defense Center of Excellence's Tallinn Manual drily observes, "[t]he application of the law of armed conflict to cyber operations can prove problematic," with such basic concepts as "[t]he existence of a cyber operation, its originator, its intended object of attack, or its precise effects" still the subjects of contestation amongst scholars.[122]

With the epistemology of war itself cast asunder[123]—a concerted nadir in the particular case of subsection (a), as per Part II.A of this paper—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 to the country's ceaseless war on terror or an undue violation of national 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*, that "[t]he President's military powers are simply a starting point to consider steps that the cyber administrative national security state must take to understand and address security issues of the digital age").

124. *See* Joseph Menn & Gerry Shih, *Under India's 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's reference to *common carrier*. Defined by the Act as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy,"[129] the term has traditionally applied to telephone companies.[130] In 2016, however, the FCC expanded its reach to encompass broadband Internet access service ("BIAS") providers in the interests of network transparency and openness.[131] While this regulatory initiative, known as net neutrality, was abandoned two years later in favor of a return to a "light-touch regulatory framework,"[132] agency leadership has embarked in 2023[133] on a successful campaign to resurrect it.[134] This, of course, places cable television, satellite, and digital subscriber line Internet access providers squarely within Section 706(a)'s crosshairs, enabling the President to engage in the very practices—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] (noting that "network security threats like foreign-owned data centers" demand a whole-of-government strategy "to protect U.S. communications stored within or that otherwise transit these data centers"); *Privacy and Data Protection Task Force*, FCC (2023), https://www.fcc.gov/privacy-and-data-protection-task-force [https://perma.cc/A9DU-DR57] (establishing a comprehensive "public-private approach" to tackling "problems that erode the public's trust in data protection" and imperil "the nation's communications supply chain").

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, *FCC'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) (adopting "a *Declaratory Ruling, Report and Order, Order, and Order on Reconsideration* that reestablishes the FCC's authority over broadband internet access service" as of July 22, 2024).

prioritization—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 dint of 47 U.S.C. § 230, the controversial "good Samaritan" protection for content moderation.[136]

Finally, there stands the historical consolidation of dispersed federal authorities in a singular individual—the so-called *imperial presidency*, by "which enormous discretionary power to respond to national security crises and perceived dangers is concentrated in the office of the president."[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 the Brennan Center's recent release of some 500 pages of "presidential emergency action documents" ("PEADs") from 2004 to 2008 demonstrates, Section 706 was not immune from the Bush Administration's efforts to amass

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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 ("At most, [Section 706(a)] might authorize the 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."). A final ironic twist is found in FCC Chairman Rosenworcel's summary of the advantages that 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 the contested "common carrier" classification as central to FCC efforts to prohibit purported traffic management abuses on the part of Internet service providers).

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] ("Because Section 230 sits in Title II, all services covered under the statute are subject to the Title's rulemaking authority under Section 201(b) . . . Traditionally, Section 201(b) applies to rules related to common carriers.").

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.*, Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), (available at https://www.justice.gov/media/852816/dl?inline).

139. *See, e.g.*, Letter from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, to U.S. District Judge Colleen Kollar-Kotelly (May 17, 2002) (available at https://www.justice.gov/media/879011/dl?inline).

140. *See, e.g.*, Memorandum from David J. Barron, Acting Assistant Att'y Gen., Office of Legal Counsel, to the Att'y Gen. Re: 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]).

"powers that appear to lack oversight from Congress, the courts, or the public."[141] While the text of the relevant PEADs is largely accurate,[142] handwritten comments from NSC staffers suggest that subsection (a) might "app[ly] toward interstate carriers beyond lang[uage] of statute, inc[luding] by FCC" and "to noncommon carriers—this is beyond statutory lang[uage]."[143] Further reflections on the scope of Section 706(a) question whether a "[p]roclamation [is] still necessary under National Emergencies Act,"[144] a Watergate-era legislative check on the President's use of extraordinary powers in a crisis.[145] There seems little doubt that these troubling initiatives will increase, particularly as lawmakers debate the merits of a "defend forward" strategy for information warfare, by which the United States military would embrace "an operational tempo of continuous—or persistent—engagement with adversaries in the cyber domain."[146]

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, *New Documents Illuminate the President's Secret, Unchecked 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 – Legal Advisor (noting, for example that the relevant "state of emergency" and "triggers" for use of Section 706(a) are the "continuance of a war" and a "necess[ity] for the national defense and security," 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, 1102-1103 (1983) ("The problem posed by the need to permit but still to limit 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 such power.").

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].

platforms themselves may fall within the ambit of the statute in the near future.[147]

A statutory prophylactic ought to be constructed, I believe, that addresses the statute's manifold weaknesses. Such a fix should be narrowly drawn; as Weitzman notes of rehabilitating the National Emergencies Act: "[c]ertain congressional attempts to limit or constrain inherent presidential crisis authorities through legislation might even be regarded as unconstitutional interferences with the President's authority to exercise a power committed to her and her alone."[148] Yet it should also be comprehensive enough to redress the statute's systemic shortcomings—namely, the vagueness of its reference to "war," the unclear mechanism for judicial review of executive action taken pursuant to it, and, most crucially, its apparent failure to recognize First Amendment liberties as a counterbalance to Article II authorities.

As a preliminary matter, it must be noted that Section 706 does contain an organic check on the exercise of powers delineated thereunder. Subsection (g), "Limitations upon Presidential Power," reads:

> Nothing in subsection (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.[149]

Clearly, the first clause of the foregoing could be amended to incorporate a specific reference to subsection (a), thereby circumscribing presidential authority within the bounds set forth by Congress under the Act.

Yet while this constitutes an important step, I believe it does not end the inquiry. Since 1967, the FCC has maintained a NS/EP restoration priority program for telecommunications carriers, by which civilian traffic may be degraded in the interest of wartime exigency.[150] "As originally drafted, the rules were intended as a regulatory carveout to allow common carriers to

147. *See* Moody v. NetChoice, LLC*,* 144 S. Ct. 2383 (2024) (remanding First Amendment challenges by interactive service providers to Texas and Florida content moderation laws for, *inter alia*, assessment of whether providers are properly classed as common carriers); *see also, e.g.*, Removing Section 230 Immunity for Official Accounts of Censoring Foreign Adversaries Act, S. 941, 118th Cong. (2024); Legislative Proposal to Sunset Section 230 of the Communications Decency Act, 170th Cong. 543 (2024).

148. Samuel Weitzman, *Back to Good: Restoring the National Emergencies Act*, 54 COLUM. J.L. & SOC. PROBS. 365, 371 (2021).

149. 47 U.S.C. § 606(g).

150. *See* Rules and Requirements, *supra* note 33, at ¶¶ 4-9 (explaining the purpose and operation of the Telecommunications Service Priority, Wireless Priority, and Government Emergency Telecommunications Services); Nat'l Sec. Emergency Preparedness Telecomm. Serv. Priority Sys., *Report and Order*, 3 FCC Rcd 6650, para. 2 (1988) (summarizing historical development of these provisions).

provide telecommunications services, which would ordinarily be subject to the non-discrimination requirements of Section 202(a), on a prioritized basis."[151] Far from constituting an action "which the [FCC] would not be authorized by law to make,"[152] Presidential prioritization fits comfortably within these provisions, facially evading the Act's prohibition on affording "any undue or unreasonable preference or advantage to any particular person, class of persons, or locality"[153] 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 definition of "war," the War Powers Resolution[154] is an ideal source, given that it both promulgates "a congressional definition of the word 'war' in article I"[155] and "provides a logical, constitutional allocation of war powers" in distinguishing between "a declaration of war" and a "specific statutory authorization" [156] for employment of the armed forces.[157] More specifically, the statute imposes specific reporting requirements upon the President "[i]n the absence of a declaration of war," which accords with the notion that "specific statutory authorization for military action, while based on Congress's power to authorize military action, must be viewed as being subsidiary to a formal declaration of war and cannot constitute a wartime state of affairs."[158] Applied to the question at hand, this discursive construction both elides the heretofore tangled (and tautological) attempts to define subsection (a)'s reference to "continuance of war" and elucidates the manner by which limitations upon presidential traffic prioritization should be imposed—i.e., in all cases short of a declaration of war under color of Article I, Section 8.[159]

As to the First Amendment, Title 47 itself instructs the FCC to "proceed cautiously and with appropriate restraint" in proposing forfeitures for or predicating license renewals upon broadcasts of indecent or profane

151. Rules and Requirements, *supra* note 33, at ¶ 26.

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

153. *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).

154. 50 U.S.C. §§ 1541-1548.

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

156. 50 U.S.C. § 1541(c).

157. 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).

158. *Id.* at 618-19.

159. 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).

material,[160] notwithstanding the criminalization of such acts.[161] Section 326 of the Act specifically disclaims the FCC's "power of censorship over the radio communications or signals transmitted by any radio station" and prohibits it from imposing any "regulation or condition" that will "interfere with the right of free speech by means of radio communication."[162] While not directly applicable to the instant inquiry by dint of its reference to "radio communications",[163] this language appears eminently adaptable to ensuring the primacy of constitutional considerations when prioritizing telecommunications traffic.[164]

Finally, as Mortenson notes of the nebulous reach of presidential ambition in times of exigency, "executive branch interpretation often proceeds either out of sight or without a clear path to judicial review."[165] Here, I consider a statutory revision that would afford a predictable, accessible, and robust mechanism[166] for carriers putatively affected by action taken pursuant to Section 706(a) to obtain court intervention at the earliest possible date, taking into account the extraordinary circumstances surrounding the executive's invocation of emergency. Here, an explicit right to appeal to the United States Court of Appeals for the District of Columbia seems appropriate; reflecting review mechanisms presently in place under Section 402(b) of the Act for aggrieved carriers, this accords with extant Section 706(g)'s use of FCC orders as a conceptual framing for executive action.

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160. WDBJ TV, Inc., *Notice of Apparent Liability for Forfeiture*, 30 FCC Rcd 3024, ¶ 11 (2015); Good Karma Broad., LLC, *Forfeiture Order*, 27 FCC Rcd 10938, ¶ 15 n.61 (2012); Application of Texas Educ. Broad. Coop., Inc. for Renewal of License for Station KOOP(FM), Hornsby, Tex., *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture*, 22 FCC Rcd 13038, ¶ 17 (2007).

161. *See* 18 U.S.C. § 1464 ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.").

162. 47 U.S.C. § 326.

163. *See, e.g.*, Review of Foreign Ownership Policies for Broad., Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Commc'ns Act of 1934, as Amended, *Notice of Proposed Rulemaking*, 30 FCC Rcd 11830, ¶ 14 (2015) (recognizing "the distinct nature of the services provided by common carriers and broadcast stations" in the context of foreign ownership attribution).

164. As the FCC itself observed in 1974, the existence of Section 326 of the Act means the expansive traffic management powers afforded the FCC (which, as discussed above, circumvent the non-delegation doctrine by dint of the "public interest, convenience, and necessity" standard) "must be reconciled with free speech considerations." Petition of Action For Children's TV (ACT) for Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children's Programing and the Establishment of a Weekly 14-Hour Quota of Children's TV Programs, *Children's Television Report and Policy Statement*, 50 F.C.C. 2d. 1, 3 (1974).

165. Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1173 (2019).

166. Or, more fulsomely, judicial review that will "(1) maximize participation by the three branches of government; (2) provide clear and predictable rules; (3) identify substantive norms to guide governmental action or judicial review or both; and (4) allocate the burden of legislative inaction on the party best positioned to overcome it." Mario L. Barnes & F. Greg Bowman, *Entering Unprecedented Terrain: Charting a Method To Reduce Madness in Post-9/11 Power and Rights Conflicts*, 62 U. MIAMI L. REV. 365, 412 (2008).

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 "Section 706 gives the President 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 could order a lesser action."[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 "plenary authority" 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 Section 706 sufficient "to unilaterally seize control of radio and television stations, phone systems, and the Internet").