ARTICLES

THE ATOMIC MIDWIFE: THE EISENHOWER ADMINISTRATION'S CONTINUITY-OF-GOVERNMENT PLANS AND THE LEGACY OF 'CONSTITUTIONAL DICTATORSHIP'

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The story of the Eisenhower Administration's continuity plans for post-atomic governmental survival provides a unique perspective on the authority of the nation's chief executive in a crisis. Within the pertinent historical context, this Article reconstructs the plans from the memoranda, sample proclamations, and recovery and defense approaches drafted by Eisenhower's cabinet, and details contemporary legal responses to the broad executive powers they assume. It then contemplates the prospects of congressional or judicial resistance using modern constitutional theory, should a similar change in executive authority be effectuated in response to a latter-day national disaster. The conclusion is grim: presidential employment of the military under a defensive war theory coupled with ingenerate limitations on the legislature and the courts foreclose effective resistance to a "constitutional dictatorship."

Part I of this Article sketches the historical background of this tumultuous period in U.S. history, including the American commitment to contain the spread of communism at all costs, even at the risk of an exchange of atomic weapons. Part II elucidates the Eisenhower Administration's contingency plans for such an exchange using recently declassified materials from the Eisenhower Presidential Library in Abilene, Kansas – the responses of the

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President and his Cabinet to the "Operation Alert" series of war planning drills for federal officials, and the actual proclamations and executive orders that would form the basis for the continuation of the federal government. Contemporary legal responses are then examined, including those advocating an expansion of the president's power beyond planning documents, as well as those advancing definitive limits. Part III employs modern constitutional theory to consider legislative and judicial resistance against an overbroad executive response to a cataclysmic national disaster. Attention is given to potential congressional disputes with the ad hoc investiture of regulatory and peacekeeping authority in executive agencies; the dearth of independent information-gathering channels and criteria to measure the severity and duration of the crisis; the scope of the president's use of the military under cover of defensive operations; and the judiciary's role in moderating these disputes or refusing to hear them altogether. Part IV advances a series of test questions suitable for examining a constitutionally infirm executive response to a major national crisis, be it an atomic strike or a modern-day terrorist attack.

While a strategic nuclear war never came to pass between the United States and its Soviet adversaries, this Article should not be approached as a discourse on historical hypotheticals. Nor is it merely a digressive tale in an examination of the forces and events that prompted the passage of the Twenty-Sixth Amendment. Instead, it should serve as a simulacrum for the ability of the executive branch to proactively claim for itself broad powers in the face of extraordinary circumstances – chaos, on home soil, whatever the form it may take – and the informational and institutional limitations Congress and the courts must grapple with in curbing such a state of emergency.1

1. Historical considerations of the limits of presidential power in instances of domestic strife that lack definite termination points or victory conditions continue to inform scholars' perceptions of the Bush Administration's policies towards the War on Terror. See, e.g., Jonathan Alter, What FDR Teaches Us, NEWSWEEK, May 1, 2006, at 28 ("Like Bush, FDR took an expansive view of presidential power. But he didn't circumvent Congress, as Bush did on warrantless wire-tapping. On March 5, 1933, his first full day in office, Roosevelt toyed with giving a speech to the American Legion in which he essentially created a Mussolini-style private army to guard banks against violence. One draft had Roosevelt telling middle-age veterans, long since returned to private life, that "I reserve to myself the right to command you in any phase of the situation that now confronts us." When I saw this document in the Roosevelt Library, my eyes nearly popped out. This was dictator talk – a power grab. But FDR didn't give that speech. Although establishment figures like the columnist Walter Lippmann urged Roosevelt to become a dictator (Mussolini was highly popular in the U.S. and the word, amazingly enough, had a positive connotation at the time), the new president decided to run everything past Congress -- even the arrogant and ill-fated effort to 'pack' the Supreme Court in 1937.").
I. "THINKING ABOUT THE UNTHINKABLE"

The August 1945 atomic bombings of Hiroshima and Nagasaki served as a landmark event in many respects: a fiery conclusion to the carnage of the Second World War and a triumphant finale to scientists' long quest to harness the power of the radioactive atom. But they also served as a beginning – in the words of military historian A.J.C. Edwards, the inauguration of a "balance of terror" between East and West, "a capacity to inflict horrendous damage on the other – damage on the scale which the other would find quite unacceptable."²

Early Cold War crises – the Berlin lockdown of 1948-49 and the Korean War of 1950-53 – threatened to inexorably upset this balance as United States leaders considered the use of tactical nuclear arms.³ As Soviet industrial strength multiplied, and the doctrines of communism gained ground in China and Vietnam, it seemed that when, not if, was the proper query in regards to America's use of its nuclear bombs. Harry Truman brazenly proclaimed this state of affairs in his promulgation of the so-called Truman Doctrine – nuclear weapons, not conventional arms, would be the American response to Soviet incursion upon allied nations.⁴ So did John Foster Dulles, Secretary of State under Dwight D. Eisenhower, who insisted upon America's "right to retaliate immediately and massively, by means and at places of our own choosing" should the Soviets venture forth from behind the Iron Curtain.⁵

The boldness of these words, and the U.S. resolve to battle the spread of communism by all means at its disposal, was undercut by scientists' exploration of the consequences of nuclear war. While Hiroshima and Nagasaki vividly portrayed the physical effects of an atomic blast, these could be at least compared to Allied firestorm bombings that relied on conventional bombs, which left German cities such as Dresden in much the same condition. Following a series of nuclear test detonations in rural Nevada and Utah in the early to mid-1950s, it became clear that atomic weapons wrought destruction more insidious than tumbling skyscrapers and gutted dwellings. Ranchers and farmers close to the explosions described cases of baldness, violent sickness, and leukemia to the Atomic Energy Commission. By 1957, physicians stated that windborne radioactive particles from the tests, now popularly known as

³. See id. at 6.
⁴. Id. at 20.
⁵. Id. at 6 (quoting John Foster Dulles, The Evolution of Foreign Policy, DEPT. OF ST TATE BULLETIN 30, no. 761, Jan. 25, 1954, at 108).
“fallout,” were the cause; countless numbers would be at risk in an actual nuclear conflict, which would spread such fallout through the air and push it deep into the soil far from the epicenter of an explosion. The Eniwetok Island tests in 1958 confirmed another theory, involving the deleterious effects of electromagnetic radiation. The test explosion disrupted radio communication and triggered burglar alarms as far away as Hawaii and Australia; in a general nuclear war, telephones, televisions, and any device dependent on transistors could be rendered permanently useless.

But these chilling effects were not a complete deterrent. While Eisenhower gradually abandoned his commitment to the Dulles plan for “massive retaliation,” arms control or disarmament were unacceptable in the shadow of a looming Soviet adversary, which tested its first nuclear weapon in August 1949. Indeed, a joint American, Soviet, and British effort to create a United Nations Atomic Energy Commission in January 1946 failed utterly, due to impasses in determining the mechanisms by which information might be exchanged and weapons eliminated. Eisenhower, mindful of the growing American-Soviet symmetry in military capabilities and tactics, and informed by the theories of air power strategist Basil Liddell Hart, author Robert Osgood, and Henry Kissinger, turned to the concept of “limited retaliation,” predicated upon the notion of a “survivable” and ultimately “winnable” nuclear conflict. This was the only means of frustrating, on terms of strategy and objectives favorable to the United States, “the basic Soviet . . . consolidation and expansion of their own sphere of power and the eventual domination of the non-communist world.”

By 1957, hydrogen bombs had replaced the far less destructive atomic bombs in the American arsenal. Soviet tests in August 1953 and November 1955 had resulted in the creation of an intercontinental ballistic missile (ICBM), capable of reaching U.S. soil independent of a bomber air wing. America countered by building massive silos full of its own ICBMs and simultaneously adapting the missile to submarine platforms, ensuring sufficient

7. Id. at 306-07.
8. See id. at 70-71 (discussing the first Soviet nuclear test in 1949).
9. See EDWARDS, supra note 2, at 23.
12. See EDWARDS, supra note 2, at 25.
13. See id.
launching sites so as to guarantee successful nuclear retaliation. As preventing or intercepting nuclear weapons was no longer a feasible strategy, and with the "limited war" doctrine firmly in place, the U.S. braced itself for nuclear conflict – and the long and arduous rebuilding process that would follow.

The general public came to understand the effects of atomic war in graphic detail. Business Survival in the Face of Atomic Attack and National Industrial Conference Board Executive Planning if an A-Bomb Falls, two publications written for general consumption, detailed the profound changes that would be wrought by a nuclear explosion. The former predicted widespread electrical and water shortage, direct (flash burns, oxygen depletion, and pernicious anemia) and indirect (debris from the explosion of buildings) injuries to large portions of the populace, and a widespread panic from evacuations and shortages of medical and mortuary aid. A concomitant "paralysis" of industry would set in, stemming more from manpower shortages and "disruption of community life" than physical damage to production plants themselves. The latter forecasted earthquake-like conditions and radiological contamination of the water table should a bomb detonate below ground, and a pressure blast followed by radioactive rain if it should detonate above. Short and long-term survival depended chiefly on citizens' willingness to obey authorities and act as an auxiliary to military relief efforts.

A 1954 Stanford Research Institute study prepared for the National Security Council echoed these findings, stating that in the case of a general nuclear war, only 14 percent of the population would be free from fallout. Further, ground transportation would

14. See id.
15. An isolated document in the Eisenhower archive entitled "U.S. Policy Toward Armed Hostilities," dated October 30, 1958, and originally classified as Top Secret, called for "all necessary means without restraint" to be used against the Soviet Union in case of a "general nuclear war . . . launched against the United States directly or indirectly by the USSR," with the sole moderating factor "the increased or decreased amount of damage to the United States to be expected as a result of different kinds of U.S. retaliatory attacks on the USSR." (on file with author). As it has no author, its authenticity is difficult to assess in light of the Administration's professed stance toward the Soviets; it is interesting to note, however, that preparations made for limited nuclear war might have had to cover a much more devastating attack than originally envisioned by continuity planners.
17. Id. at 30.
19. See id. at 17-19.
20. STANFORD RESEARCH INST., SURVIVAL OF POPULATION FOLLOWING A MASSIVE
be completely interdicted; food supplies would be reduced in twelve states to less than a year's worth; subterranean water and fuel stocks would be isolated by insufficient pumping operations; and the economy would be reduced to subsistence farming and hunting with little regional specialization. It suggested that the federal government “assign priorities, allocate resources, and provide the necessary guidance” to guarantee a national banking and scrip system, ration fuel supplies according to necessary industrial concerns (assuming refineries still existed) vis-à-vis transportation of vital raw materials, and mobilize the “24 percent [of pre-war] manufacturing capacity . . . located in substantially undamaged areas” to jump-start heavy industry. The study was unable to construct a strict timetable for recovery, but noted that pre-attack planning and legislation would greatly reduce national hardships, such as the complete breakdown of the credit system.

The Eisenhower Administration proceeded along the lines suggested by the Stanford report, mindful of the specter of destructive energy in the public consciousness and its capability to sow chaos among the American populace in the event of an attack. The logic of theorist Bernard Brodie's words proved inescapable: “The danger of total war is real and finite. So long as there is a finite chance of war, we have to be interested in outcomes; and although all outcomes will be bad, some would be very much worse than others.” So did RAND staffer Herman Kahn's conclusions — Americans who believed that they and their neighbors had a reasonable chance of survival would endure post-atomic hardships, resilient in the conviction that their suffering was aiding the defeat of global communism.

And so the Cabinet began to “think about the unthinkable,” as Kahn had urged Americans to do. A series of atomic attack simulations, entitled “Operation Alert,” were implemented from 1955 to 1960, to assess the reactions of federal and state officials. These

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NUCLEAR EXCHANGE 3 (1954) (on file with author).
21. Id. at 3, 5, 7.
22. Id. at 9, 11.
23. Id. at 13.
24. See, e.g., BALLINGER, supra note 18, at 18 (warning against panic and hysteria and counseling an informed approach to radioactivity and nuclear power, given a general consensus among laymen that the subject is “too complicated, or secret, or mysterious”).
25. FREEDMAN, supra note 10, at 132 (quoting BERNARD BRODIE, STRATEGY IN A MISSILE AGE (1959)).
26. Id. at 133.
27. See id. at 126.
were designed to test the capability of all levels of government to operate following an attack and to make proper provision for allocation of remaining resources.\textsuperscript{29} Concurrent with these exercises, the Cabinet commissioned executive agencies to develop continuity measures – the means by which a fragmented federal government could begin to exercise authority over a devastated nation.\textsuperscript{30} The plans that explicated them were an enormous undertaking, the fruits of which would ideally never be appreciated by their authors’ constituents.

II. “AND THEREBY REMOVE ANY DOUBT AS TO THEIR LEGAL BASIS”

The existence of survivors delineates the difference between a nuclear holocaust and a limited atomic exchange, though the specter of huddled masses scattered throughout a vast and fallout-scarred wasteland hardly makes the distinction a meaningful one. Instead, “limited” presupposes the continuation of civilization – the post-attack resurgence of the economic and cultural bonds of society, as mediated by a strong but law-abiding government. Thanks to the recent declassification of pertinent documents held by the Dwight D. Eisenhower Library in Abilene, Kansas,\textsuperscript{31} the scope of the Eisenhower Administration’s means of perpetuating the United States as an integrated and functional republic can be understood.

A. The Continuity Plans

Continuity planning was by no means novel. As early as 1792, Congress drafted a bill providing for the succession of some officer – the Secretary of State being the most popular, but the President pro tempore of the Senate and the Speaker of the House the ultimate winners – to the Presidency should the offices of the President and

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\textsuperscript{29} See generally id. at 34-36 (explaining the purpose of Operation Alert 1955 and Eisenhower’s decision to declare martial law as part of the simulation); Maxwell M. Rabb, Sec’y to the Cabinet, Emergency Action Papers (Mar. 2, 1956) (discussing the aftermath and lessons of Operation Alert 1955) (on file with author); Cabinet Paper, Summary of Report on Interim Assembly and ODM Actions in Operation Alert (1955) (discussing the Office of Defense Mobilization’s actions during Operation Alert 1955) (on file with author).

\textsuperscript{30} Eisenhower’s reactions upon seeing the popular motion picture On the Beach, which depicted a world nearly devoid of human life after a general nuclear war, are telling in this regard. See, e.g., U.S. INFO. AGENCY, USIA CIRCULAR INFOGUIDE: ON THE BEACH (1960) (“It is inconceivable that even in the event of a nuclear war, mankind would not have the strength and ingenuity to take all possible steps toward self-preservation . . . as the [1959 Congressional] Joint Committee [on Atomic Energy] pointed out [in hearings on the ‘Biological and Environmental Effects of Nuclear War’ . . . ‘unprecedented destruction’ is not the same as ‘unlimited destruction.’”).

\textsuperscript{31} Interview with David Haight, Research Historian and Archivist, Dwight D. Eisenhower Presidential Library, in Abilene, Ks. (Mar. 28, 2006) (indicating some documents on continuity of government were declassified as recently as 2002).
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the Vice President be vacant. In 1885, following the death of James Garfield and the succession of Chester A. Arthur, the offices of both the President pro tempore and the Speaker of the House were unfilled, highlighting the need for a more comprehensive line of succession. This problem was not completely solved until 1947, when a law passed under Harry Truman provided for the 1792 succession plan to be followed by Cabinet members, in order of the age of their agencies. Beset by illness and a heart attack, Eisenhower would, in the tradition of James Garfield and Woodrow Wilson, suggest another problem to be tackled — that of presidential inability to serve. Continuity plans thus remained very much fluid and ad hoc, according to the nature of the emergency that demanded their activation, until the passage of the Twenty-Fifth Amendment in 1965.

The Office of Defense Mobilization (ODM), a branch of the Federal Civil Defense Administration (FCDA), “acting in behalf of the President and under assignments from the President in his exercise of his constitutional powers,” would oversee major reconstruction efforts following a nuclear war. The ODM was responsible for “mobiliz[ing] resources and direct[ing] the production” pursuant to requests from FCDA and the Departments of Defense and State. The ODM was authorized to “direct Federal programs for allocation of resources, including the adjudication of conflicting claims for manpower, production, energy, fuel, transportation, telecommunications, housing, food, and health services” pursuant to these ends. Broader “responsibilities and authority for insuring survival action” would be entrusted to only “three organizational chains — Department of Defense, Federal Civil Defense Administration, and the Office of Defense Mobilization — each reporting to the President.”

33. See id. at 40-41.
34. See id. at 46.
35. See id. at 51-53.
36. See generally U.S. Const. amend XXV.
37. The FCDA later became the Office of Civil and Defense Management (OCDM) in 1957, which did not significantly change its mission or authority, except for some overlap with those of ODM. For additional powers granted to the Director of OCDM, see, e.g., infra notes 78-79 and accompanying text (strategic materials release).
39. Id.
40. Id.
by federal fiat alone, but through a network of regional ODM and FCDA offices, empowered by a delegation of that “authority conferred upon the Administrator by Title III of the Federal Civil Defense Act of 1950.”42 Such authority lent an ad hoc quality to regional operations, the bounds and limits of which pursuant to nationally integrated civil defense efforts were largely unrestricted.43

ODM also tasked executive agencies with the preparation of Presidential Emergency Action Papers (also termed “Emergency Action Documents” and “Emergency Action Orders”) “in a Plan D-Minus type of emergency.”44 These emergencies were “defined as matters of supreme national importance requiring immediate action or execution by the President” which did not encompass “actions . . . which do not meet this definition . . . regardless of legal requirement therefore.”45 “Inclusion of a proposed emergency action paper among the Presidential Emergency Action Papers,” which would take the form of a proclamation or executive order, could only occur following “the specific direction of the President.”46 Such Actions were “reduced to the smallest and most critical denominator, so that selection of the course of action desired is the only action necessary . . . [followed by] pre-arranged [implementation] by the responsible agencies.”47 These actions would be implemented by use of code words — i.e., “The President has this date signed the following Emergency Action Documents: COMEX, BANANA, FINANCIAL, GOLDEN. FINANCIAL is changed as follows: Quote first line second

42. J.J. Wadsworth, Acting Adm'r, Federal Civil Defense Administration General Order No. 120 (Oct. 30, 1952) [hereinafter Federal Civil Defense Administration General Order No. 120] (on file with author).

43. See, e.g., Val Peterson, Adm'r, Federal Civil Defense Administration General Order No. 235 (May 14, 1956) (on file with author) (detailing the organization of a series of Regional Civil Defense Operations Boards staffed by regional disaster operations officers, the existence of which “put on a more formal basis the interagency activity already in existence . . . [pursuant to] Executive Order No. 10611, dated May 11, 1955, [by which] the President established the Civil Defense Coordinating Board to facilitate the integration of civil defense into the Federal establishment and to assure a maximum coordination of the Federal civil defense effort”).


46. Id.

47. Id.
paragraph" – such that the appropriate executive agencies would “without further direction immediately take all necessary implementing action.”48 There is no indication that these papers were examined or approved by either branch of Congress or the federal courts, though agencies were cautioned to “consult with the President’s Special Counsel . . . [i]n the case of those Action Papers which are of an extremely sensitive nature.”49

Regrettably, most Emergency Action Orders remain under classified seal.50 Nonetheless, educated guesses can be made as to their content from references in other documents, especially in an undated summary of Federal Emergency Plan D-Minus,51 These were divided into: “H-Hour actions, i.e., those actions to be taken immediately by the President, wherever he may be, upon enemy attack” or intelligence of the same; “D-Day actions” implemented on the day of attack; and “Reserve Actions, i.e., those actions to be taken as soon as prevailing conditions demonstrate the need therefor [sic].”52 Emergency Orders pertinent to this Article include: A1-99 (regulation of individuals entering or exiting the country);53 A1-30 (internal security of the nation);54 A4-2; A1-56, 90, 91 Reserve, 92 Reserve, 95 Reserve, 96, 97, 102 Reserve (establishment of various emergency agencies);55 A-54 (augmentation of the Armed Forces by conscription of civilians and activation of reserves, and subsequent

48. Id.

49. Id. (“The responsibility for initiating, expediting, and coordinating the preparation of Emergency Action Papers will rest with the Director of Defense Mobilization . . . [and] should represent completed staff work.”); see also, e.g., PLAN D-MINUS, supra note 44, at Part III Presidential Actions 32, 42 (enabling authority for Emergency Action Orders limited to Executive Order No. 10705, granting certain powers from the Communications Act of 1934 to the OCDM Director, and Executive Order No. 10638, authorizing “the Director, OCDM, to order the release of strategic and critical materials from stockpiles in the event of an enemy attack upon the Continental United States”).


51. See generally PLAN D-MINUS, supra note 44, at Part III Presidential Actions (detailing actions to be taken by the President in chronological order from the moment of attack, in the form of Emergency Action Orders and Executive Orders).


53. PLAN D-MINUS, supra note 44, at Part III Presidential Actions at 35.

54. See generally Memorandum on Certain Aspects of the Role of the Interdepartmental Committee on Internal Security (Jun. 13, 1958) (on file with author) (addressing the need for clarification as to the role of the Committee in internal security matters vis-à-vis extant ODM emergency documents).

55. See PLAN D-MINUS, supra note 44, at Part III Presidential Actions at 35, 36, 38.
suspension of laws preventing its domestic employment);\textsuperscript{56} A1-57 (broadening classification authorizations for federal agencies);\textsuperscript{57} and A1-68 Reserve (curtailing non-essential operations of the executive branch and transferring their personnel, funds, and material to essential functions).\textsuperscript{58} At least one order addressed the FCDA’s use of “personnel, materials, facilities, and services of federal agencies,” as noted in a mock executive order employed during Operation Alert 1955; the administrator of that agency, working towards the goal of ensuring continuity of all vital agencies, could loan or donate as much federal material and equipment as deemed necessary.\textsuperscript{59}

A series of congressional reports and bills were also composed – A1-61 Reserve (report on interim executive actions);\textsuperscript{60} A1-26 Reserve (the “War Resources Act, a Bill providing for (1) priorities and allocations, (2) authority to requisition, (3) expansion of productive capacity and supply, (4) acquisition and disposition of real property, (5) emergency contracting authority, (6) plant seizures, (7) emergency foreign assistance, (8) price and wage stabilization, (9) control of consumer and real estate credit, (10) employment control, (11) settlement of labor disputes, (12) censorship of communications, (13) general provisions”);\textsuperscript{61} A1-84 Reserve, 81 Reserve, 111 Reserve (increasing tax revenues, the public debt, and the currency buyback powers of the Federal Reserve);\textsuperscript{62} and A1-83 Reserve (affording “the President broad emergency powers to cope with civilian personnel problems in the Executive Branch”).\textsuperscript{63}

Those Emergency Action Orders that detailed the formation of a new series of executive agencies did not specify their exact function or lifespan. Instead, they focused on ensuring the activation of these agencies on the day of attack. Chaired by a mixture of civilian business leaders and Cabinet secretaries, the agencies were:

- The National Housing Agency (coordinates “rent, housing price, and real estate credit stabilization prices”), chaired by Aksel Nielsen of the Title Guarantee Company;

- The National Transport Agency (“exercises control over the operation of domestic, overseas, and international” civil shipping, personnel transport, and non-military air and rail

\textsuperscript{56} Id. at 36.
\textsuperscript{57} Id. at 37.
\textsuperscript{58} Id. at 38.
\textsuperscript{59} Executive Order Providing for the Utilization of the Personnel, Materials, Facilities, and Services of Federal Agencies During the Civil-Defense Emergency (undated) (on file with author); see also PLAN D-Minus, supra note 44, at 11.
\textsuperscript{60} PLAN D-Minus, supra note 44, at Part III Presidential Actions at 38.
\textsuperscript{61} Id. at 39.
\textsuperscript{62} Id. at 40.
\textsuperscript{63} Id.
facilities), chaired by Dr. George Baker of the Harvard Business School;

- The Office of Censorship (regulates extra-continental transmissions and "coordinates the voluntary censorship of the domestic press, radio, television, and motion picture"), chaired by Theodore Koop of the CBS Television Network Broadcast House;

- The National Manpower Agency ("develops and administers policies and programs required to recruit, train, retrain, control the distribution of, and manage the manpower resources of the nation"), chaired by Secretary of Labor James P. Mitchell;

- The National Production Agency ("administers national policies and programs required to program, schedule, and control ... the production, manufacture, and use of raw materials"), chaired by President Harold Boeschenstein of Owens-Corning Fiberglass Corporation;

- The National Stabilization Agency ("administers direct economic stabilization programs");

- The National Communications Agency ("assist in maintaining the flow of essential national telecommunications"), chaired by President Frank Stanton of the CBS Television Network;

- National Food Agency (directs the production, processing, and distribution of food for survivors), chaired by Secretary of Agriculture Ezra Taft Benson;

- National Energies and Minerals Agency ("administers national policies and programs required to program, schedule, and control ... the production, distribution, and use of solid fuels, petroleum, and gas"), chaired by J. Edward Warren of Cities Service. 64

Each agency was to be "formed principally" from pre-war agencies with similar functions, where applicable. Thus, the National Food Agency would draw on the staff and resources of the Department of Agriculture, but the National Housing Agency, which had no clear analogue in 1950s America, would use ODM officials in administering its programs.

According to the Attorney General, the agencies as a whole would draw their authority from the passage of the aforementioned War Resources Act:

Inasmuch as no authority is conferred upon the designee until a National Food Agency is created, I perceive no legal obligation. . . .

In this connection, it is noted that issuance of an Executive order

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64. See PLAN C FOR THE CONTINUITY OF GOVERNMENT 104-07 (June 1, 1957) [hereinafter PLAN C] (on file with author).
establishing the Office of War Resources and various subordinate emergency agencies was simulated during Operation Alert, 1957. The legal authority cited in that Executive order [sic] was the so-called War Resources Act which [sic] was assumed to have been enacted during the mobilization period . . . which preceded the simulated attack upon the United States. In view of the assumed enactment of that act, the simulated issuance of the Executive order [sic] for the purposes of the exercise was clearly authorized by law. Since no similar legislative authority actually exists today . . . I feel it would be inadvisable for me to express an opinion concerning the legality of establishing the Office of War Resources, the National Food Agency, or any other similar emergency agency until those documents are submitted for my consideration.65

These agencies were imbued with substantial power over the reconstruction of the United States. Each would have the ability to “requisition or condemn private property or its use,” pursuant to both the passage of an Emergency Resources Act (presumably the War Resources Act) by Congress and/or an Executive Order.66 Requisitioning authority was limited, however, by military necessity, catastrophic failure of civilian resource markets, or severe time constraints.67 Four of these agencies – Housing, Food, Production, and Manpower – might also have the responsibility of carrying out the economic directives of the President through an Office of War Resources (with a “nucleus [in] all areas and personnel of the Office of Defense Mobilization not assigned to other permanent or emergency agencies”68) with only secondary input from the Federal Reserve Board and the Department of the Treasury.69 In any case, the director of the Office of War Resources had the power from the moment of attack to “activate subordinate and temporary agencies, when and as necessary”;70 the authority to redelegate responsibilities

65. Memorandum from William P. Rogers, Attorney Gen., to Gerald D. Morgan, Special Counsel to the President (Dec. 13, 1957) (on file with author).
67. See id. ("Limitation on Use of Requisitioning Authority").
68. PLAN C, supra note 64, at 104.
69. See Privileged Cabinet Paper from Maxwell M. Rabb, Sec'y to the Cabinet, to the Cabinet (Mar. 22, 1955) [hereinafter Privileged Cabinet Paper from Maxwell M. Rabb, Mar. 22, 1955] (on file with author). Note that this was termed “Economic Stabilization Plan B,” an alternative to the (ODM-backed) “Economic Plan A,” which envisioned a role for Congress in directing the President and advising the Federal Reserve on economic policy, as carried out by an ad-hoc “War Stabilization Administration.” Id.
70. PLAN C, supra note 64, at 22.
between all executive agencies;71 and "full control" over all finished items and common utility systems not directly owned or operated by the Department of Defense or civilian relief agencies.72

Some of these Emergency Action Orders, at least those dealing with lines of succession and authority permitting particular agencies to cross pre-attack bounds of authority, would have been published in the Federal Register.73 Once such plans appeared, either in a pre-war edition (assuming such plans did not compromise security classification guidelines) or a post-war edition, they would automatically go into effect74 per the Federal Register Act.75

In November 1959, FCDA, now called the Office of Civil and Defense Mobilization (OCDM), issued the National Plan for Civil Defense and Defense Mobilization.76 This lengthy document served "as the basis for making emergency planning and preparedness assignments to departments and agencies of the Federal Government."77 The plan broadly provided for continuity of executive agencies by resource analysis and stockpiling, pre-attack aid commitments from state and local authorities, and pre-attack assistance to relevant business and industrial concerns.78

The Plan, with more than thirty annexes, promulgated short and long-term goals for national recovery. Annex 25, "Maintenance of Essential Resources," invested "responsibility for the development and maintenance of . . . national resources essential for mobilization purposes . . . within the purview of the federal government," which

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71. Id.
72. Id. at 100.
74. Id.
78. See id. at 3.
was tasked with “expanding, maintaining, or restoring production.”

State and local governments isolated from federal direction were “required to assume responsibility for such resources ... including their protection, use, and distribution, in accordance with national policies and guidelines provided by the Federal Government.”

Annex 16, “Maintenance of Law and Order,” recognized the primacy of state and local police forces, but tasked them with “aiding in the enforcement of Federal operations and emergency measures. Judicial proceedings,” the annex stated, “would be carried out according to the requirements of law and, to the extent feasible, in accordance with established and accepted practices and procedures.”

B. Operation Alert 1955

Operation Alert 1955 (OPAL) affords a unique vantage point on the difference between the contingency plans as drafted and the executive response to the casualties and priorities proceeding from an actual nuclear attack. While many specific Emergency Action Documents were drafted after the conclusion of the exercise, pre-OPAL planning was likely along similar lines, so as to justify generalizing this contrast and applying it to Eisenhower continuity planning as a whole.

One document from the Office of Defense Mobilization, informing government officials on what to expect during the wargame, summarized the projected “Actions Expected of the President:”

Initially 1. Sign Executive Orders, proclamations, and directives necessary for war prosecution but not requiring policy discussions; i.e. freezing assets of the enemy ... controlling enemy aliens

80. Id. at 3.
82. Id.
83. See, e.g., Memorandum from A.J. Goodpaster, White House Staff Sec'y, to Arthur S. Flemming, Dir., Office of Def. Mobilization (July 6, 1955) (on file with author) (indicating Eisenhower's approval that prototype "mobilization proclamations" be further developed by Flemming); Privileged Cabinet Paper from Maxwell M. Rabb, Mar. 2, 1956, supra note 45 (“Operation Alert 1955 demonstrated the requirement for having immediately available certain documents which have been prepared prior to the emergency ... the Office of Defense Mobilization has been collecting and screening proposed Emergency Action Papers.”).
and subversives . . . etc.

2. Review (a) executive actions to be taken until Congress can convene, and messages to Congress requesting Declaration of War, emergency powers legislation and similar basic legislation; (b) proclamation on the civil defense emergency; (c) use of the National Guard; (d) coordinated Federal steps to protect internal security; (e) policies on resumption of production and direction of men and women to perform work essential to national survival; (f) policy regarding return-to-homes of persons in unbombed [sic] cities against possibility of another attack; (g) preliminary Armed Forces strength goals and the rate of build-up, including size, distribution, and timing of Selective Service calls; (h) basic stabilization policies, including restoration of normal banking operations; (i) etc.

While Eisenhower considered a draft declaration of war from White House aide Andrew J. Goodpaster – a document he ultimately chose not to employ during OPAL\(^8\) – he deviated from the ODM plans of action (or implemented steps (b) through (h) in one fell military stroke, depending on one’s perspective) by declaring a state of martial law “immediately,” claiming it to be “vital to the maintenance of public safety and order,” in the words of a White House press release.\(^8\) The statement further noted that “[s]uch martial law would be modified through appropriate action as rapidly as changes in the extreme emergency warranted.”\(^8\) Apparently, such modification was difficult to carry out during the exercise, as Eisenhower subsequently stated that the Reserve Forces, which comprised the martial law peacekeeping forces, were insufficient in number to complete tasks assigned them.\(^8\)

Eisenhower also expressed interest in a program of large-scale war indemnification pursuant to similar German, British, and Japanese efforts during the Second World War.\(^8\) Despite the President’s misgivings concerning the initiative – he termed it “opening a Pandora’s Box” – several Cabinet members offered advice

\(^8\) Memorandum from Fred A. Seaton, Bureau of the Budget Representative, to the White House, to Col. Andrew J. Goodpaster (Jun. 16, 1955) [hereinafter Memorandum from Fred A. Seaton] (on file with author) (handwritten note “informing . . . Seaton . . . [and] ODM Director Arthur S. Flemming [of] . . . President’s decision – not to include this in exercise actions”).

\(^8\) Memorandum from Arthur S. Flemming, Dir. of the Office of Def. Mobilization, to A.J. Goodpaster, White House Staff Sec’y (June 16, 1955) (on file with author).

\(^8\) Id.

\(^8\) See Memorandum from Colonel C.A. Randall to Robert B. Anderson, Deputy Sec’y of Dept of Def. (June 16, 1955) (on file with author).

\(^8\) See Privileged Cabinet Paper from Maxwell M. Rabb, Sec’y to the Cabinet, to the Cabinet 2 (1955) [hereinafter Privileged Cabinet Paper from Maxwell M. Rabb, 1955] (on file with author) (noting the need for ODM to further study and discuss “the problem of indemnification”).
at a June 17, 1955 evaluation of OPAL. Herbert Brownell, Jr., Attorney General, noted “that in the Civil War we had not indemified property owners in the North who suffered from Southern invasions;”90 Secretary of Defense Charles E. Wilson insisted “that in the damaged area utilities should be restored first of all.”91 Rejecting notions of moratoriums on debt and reliance on state worker’s compensation programs as potential solutions – terming them means of “depend[ence] on things that sustain usual life in a State,”92 Eisenhower concluded:

[T]hat he was coming more and more to the conclusion that, under the circumstances of chaos assumed in Operation Alert, we would have to run this country as one big camp - severely regimented. No longer would only the armed services bear the brunt of war . . . all the ordinary processes by which we run this country simply will not work under the circumstances we have assumed here. Our great fundamental problem will be how to mobilize what is left of 165 million people and win a war. We must be very much bolder in our whole approach.93

The roles of the Cabinet and the executive agencies were also questioned in light of their traditional peacetime functions. In a June 9, 1955 meeting with the National Security Council (NSC), for example, Eisenhower expressed his intention that it, “under wartime conditions . . . meet frequently and function effectively as the key advisory body to the President.”94 Val S. Peterson, FCDA director, suggested that martial law ought be used “to do things which he [Eisenhower] could not do otherwise; the role of the military would be to support the civilian administrators in carrying out their duties.” Eisenhower agreed, dismissing the notion that the military “would take over completely” – he noted that “if only half of [the 53 cities hypothetically destroyed during OPAL] had been torched or if only New York-New England cities were affected . . . [their] Governors [sic] would probably request martial law.”95 Under this view, the civilian and military authorities would coexist and cooperate in furthering the national goal of reconstruction; Eisenhower likened it to the “necessary” decision (in the words of Attorney General

90. Minutes of the Second Plenary Meeting of the Interim Assembly, Ravenrock Conference Room 1 (June 17, 1955) [hereinafter Minutes of the Second Plenary Meeting] (on file with author).
91. Id.
92. Id. at 2.
93. Id. at 1, 2.
95. Minutes of the Second Plenary Meeting, supra note 90, at 5.
Brownell) to suspend the Writ of Habeas Corpus by which "a person detained could not be released by the Courts, but ... the Courts would [not] cease their functioning altogether."96

Peterson further advanced the notion "that the [state] Governors [sic] could even be considered as the President's Lieutenants [sic]."97 Eisenhower expanded upon the concept; on the "question of dependence on Governors [sic] and Mayors [sic] ... planning [should] be carried on so that in an emergency, they would know that we would call upon them for certain things at a moment's notice ... each Governor, in an emergency, [could even be asked] to become a Provost-Marshal-General."98 This contrasted sharply with the White House's official press release on the matter, which depicted state governors as independent checks on a potentially overzealous military.99

A final 1956 report on the exercise promulgated two broad conclusions:

1. It is probable that legitimate government would remain in power, after such a bombing; that it would be supplemented by martial law on a wide scale. . . .
2. In the economic field, large-scale government intervention and economic controls will be required ... the post-bombing structure of property would probably be accepted for the duration, with the understanding that a scheme of 'equitable' post-war compensation and adjustment would be carried out. . . .100

C. Reactions to the Plans

The uniformity and thoroughness of the Eisenhower continuity plans belie the difficulty of implanting them. Cabinet members argued about the scope of the President's power and the agencies' power, both existing and emergency; state officials questioned their role in a post-attack world; politicians and legal scholars debated the extent to which Eisenhower could reshape the government in the face of an atomic emergency.

To this end, the agency and Cabinet authors of Emergency Action Orders predicated the President's eventual actions upon his

96. Id.
97. Id. at 6.
98. Id.
99. Anthony Leviero, Mock Martial Law Invoked in Aftermath of Bombing Test, N.Y TIMES, Jun. 17, 1955, at 1, reprinted in Wagner, supra note 28, at 35 (detailing close communication between state governors and the President and the ability of the former to work "individually and collectively with the commanding general, Army area, on each state's and area problems").
100. Memorandum from Andrew J. Goodpaster, White House Staff Sec'y, to Dwight David Eisenhower, President (Jan. 30, 1956) (on file with author).
powers as commander-in-chief. As a 1959 Annex to a Plan D-Minus summary described it, these Actions:

*assum[ed] a civil defense emergency* . . . [such that where statutory] authorities are not available, and the probable delay which would be occasioned by obtaining such authorities would jeopardize the national security, the extraordinary powers of the President under the Constitution [would] be used as legal authority for the required actions.101

Because “[a]ppropriate actions [would] be requested as soon as possible,” Congress would merely be responsible for ratifying or censuring the President’s exercise of such powers concomitant with the severity and duration of the post-attack state of emergency.102 As the aforementioned draft OPAL presidential request for a congressional declaration of war stated:

I have taken, or have directed, the several officers, departments, and agencies of the United States to execute, [sic] numerous actions made necessary by our present circumstances.

Many of these actions have been designed to defend this country. . . . [o]ther actions have been taken to provide aid and relief . . . to restore and maintain order . . . [for] mobilization of the materiel and manpower resources of the nation.103

In directing the execution of these actions, I have utilized the Executive powers [sic] vested in me by the Constitution, including my powers as Commander-in Chief [sic] of the Armed Forces, and the authority contained in existing statutes. I have also taken action *for which the legal basis may be uncertain*, but which were required in my judgment, by the urgency of the situation. I am convinced that the Congress, had it been able to function, *would immediately have made the authority for those actions specific*.

Accordingly, *I ask the Congress to ratify my actions and thereby remove any doubt as to their legal basis*. 

Because of the perceived link between the chief executive and the need for immediate decisions in regard to the fate of the Union, illustrated in this draft speech, the President’s authority was not seen as limited to execution of Emergency Action Documents. The Cabinet repeatedly insisted that preemptive planning – be it embodied within proclamations, executive actions, or Emergency Action Orders – ought not serve as a check on the president’s independent decision-making authority. This was due in part to the nature of these orders – should “maximum use [be] made of ‘triggered’ orders which have been pre-cleared, only the vital policy

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102. *Id.* at 4.
103. Memorandum from Fred A. Seaton, *supra* note 85 (emphasis added).
issues [would] be left for group evaluation at the time of attack. . . . [b]ut information necessary to their decision will not be received at first” 104 – but conflicted with their essential mission, that of making “the decision as to what to do or which of the stated alternatives to choose should ideally be the only action requested of [the President].” 105 Thus, concluded one Cabinet Paper, in reflecting upon the role of Emergency Action Orders in the wake of lessons learned from Operation Alert 1955, “[t]he President’s power of decision shall not be abridged.” 106 Indeed, according to the aforementioned Plan D-Minus summary paper:

It should be clearly understood that the assumption that the President will take these actions is made for planning purposes. In an actual situation, the President retains the authority and responsibility for decisions according to his evaluation of conditions. Decisions would include whether or not to take the various actions, the scope of actions if taken, when and in what sequence and other considerations. 107

Henry Roemer McPhee, Associate Special Counsel to the President, and Malcolm R. Wilkey, Assistant Attorney General, echoed these conclusions. They both agreed that while the President’s proclamation of the National Civil Defense and Defense Mobilization Plan was merely a collection of ideal goals for planning – an opinion shared by the Attorney General 108 – the Emergency Action Papers represented actual executive authority. 109 “[T]hey, and they alone,” according to Wilkey, “confer legal authority to perform [functions such as] . . . direct[ing] the institution of such extraordinary measures [as, for example, ensuring] . . . that commercial stocks in the hands of retailers will automatically be

107. PLAN D-MINUS, supra note 44.
108. See Memorandum from E.P. Aurand to A.J. Goodpaster, White House Staff Sec’y (Aug. 18, 1960) (on file with author) (“According to the opinion rendered by the Attorney General, the National Plan has no legal directive authority . . . only that of a broad planning guide.”).
109. See generally Memorandum from Henry Roemer McPhee, Assoc. Special Counsel to the President, to Malcolm R. Wilkey, Assistant Attorney Gen. (Feb. 25, 1959) (on file with author) (considering whether the “Promulgation and Plan are merely a broad statement of objectives or whether they constitute in some respects a grant of authority and in other respects a directive” pursuant to frequent use of the words “will” and “shall” therein); Memorandum from Malcolm R. Wilkey, Assistant Attorney Gen., to Henry Roemer McPhee, Assoc. Special Counsel to the President (Mar. 13, 1959) [hereinafter Memorandum from Malcolm R. Wilkey] (on file with author).
available to local governments to supplement local stockpiles.”\textsuperscript{110} But should “a question of interpretation of an emergency action document or any other legal document . . . arise, the Plan should be used as an interpretive guide.”\textsuperscript{111} If a conflict between the Plan and the Emergency Action Documents appears intractable, Wilkey concluded, “the disagreement will be resolved through the channels established for the coordination of emergency planning matters,” or, as a last resort, “the disagreement will be presented for Cabinet consideration.”\textsuperscript{112}

William P. Rogers, Eisenhower’s second-term Attorney General, disagreed sharply with the opinions of his predecessors. In contemplating a particular Emergency Action Order providing for the mobilization of civilian personnel via delegation of authority to the Emergency Manpower Agency, Rogers contended that “nothing in the Constitution or statutes of the United States or in the judicial opinions of the courts of this nation . . . can be construed as vesting the President with the legal authority to confer powers of the magnitude described in the proposed order upon any official of the Government.”\textsuperscript{113} Rogers concluded “that the proposed Executive order [sic] is not authorized by law and is contrary to the basic principles and traditional concepts of our Government.”\textsuperscript{114}

How was – or how would it be, in case of an attack – this attitude received by authorities outside the White House’s immediate sphere of influence? While no direct reaction to the continuity plans is recorded in the Eisenhower Presidential Archives – we may conclude that few not associated with the Cabinet were privy to their mechanics – several general contemporary statements were recorded.

Take, for instance, the remarks made by the Commission on Intergovernmental Relations (tasked to “take apart this intricate machine of government . . . and then see whether we can devise an improvement of the mechanism . . . to view the developments of federalism in retrospect . . . and to come up, if possible, with a plan for the future”) at the Washington Conference of Mayors and Other Local Government Executives on National Security, held in the nation’s capital on December 2-3, 1954.\textsuperscript{115} Samuel H. Jones, former

\textsuperscript{110} Memorandum from Malcolm R. Wilkey, \textit{supra} note 109, at 2
\textsuperscript{111} \textit{Id.} at 3.
\textsuperscript{112} \textit{Id.} at 4.
\textsuperscript{113} Memorandum from William P. Rogers to the Director of the Bureau of the Budget (Nov. 19, 1959), \textit{reprinted in} Memorandum from Henry Roemer McPhee, Assoc. Special Counsel to the President, to William P. Rogers, Attorney Gen. (Aug. 26, 1960) (on file with author).
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} Hon. Sam H. Jones, Former Governor of Louisiana, \textit{in} A REPORT ON THE WASHINGTON CONFERENCE OF MAYORS AND OTHER LOCAL EXECUTIVES ON NATIONAL
governor of Louisiana and a member of the Commission, drew from suggestions made by the National Association of Mayors and the National Association of County Officials and advocated a cooperative approach between federal and local governments. Jones reasoned that the former had finally realized that the latter's "problems are of national interest," and citizens throughout the nation "generally seem to be expecting more and more in the way of services from all levels of Government." Ultimately, "cooperative federalism" would be the wisest course for all levels of government, because in Jones' understanding, "[t]he limitations on national government have been removed":

Because of recent Supreme Court decisions, and in the opinion of eminent authorities, there are no longer any constraints on the power of the National Government to control the lives of the American people . . . the Congress is now the sole judge [from a legal and judicial point of view] of how far the National Government shall go in performing governmental functions which are the primary responsibilities of the States and their subdivisions.

Meyer Kestnbaum, chairman of the Commission, echoed Jones' sentiments, observing that "the Supreme Court has pretty well whittled away any restrictions on spending for the general welfare." He noted that such a development had paralleled the trend among "a great many people who seem to feel that the best answer to their local problem is to turn responsibilities over to some agency in Washington."

Harvard Law School Professor Charles Fairman's remarks to the House Military Operations Subcommittee on Government Operations in February 1956 are also enlightening. In evaluating the decision to implement martial law during OPAL, Fairman "stated that he thought it was a 'great mistake to make the Department of Defense and the six Continental Armies the channel of communication between the Federal Government at the top and the State Governments, their subdivisions, and the American people below.'" Contending that states' rights advocates would yield in contemplation of obstacles presented by a post-attack world, Fairman advocated the creation of federal "substations" in which trained

116. Id. at 67.
117. Id. at 73.
118. Hon. Meyer Kestnbaum, Chairman, Commission on Intergovernmental Relations, in A REPORT ON THE WASHINGTON CONFERENCE, supra note 115, at 68.
119. Id. at 76.
120. Id. at 77.
121. WAGNER, supra note 28, at 29.
administrators would handle the concerns of several states. This would ensure that even where the national government was unable to respond, a vestige of "firm national direction and leadership to get this tremendous mass of [state] administrative leadership to respond correctly" would exist. Inspiration and direction from civilian leadership, not compulsion from military officials, would guarantee a return to national prosperity.

But the outlook for the workability and legality of continuity plans was not uniformly positive. OCDM envisioned its National Plan for Civil Defense as "the basis for every policy, plan and program for civil defense and defense mobilization in the United States . . . the criterion for every activity of this agency . . . [such that] [a]ll documents concerning civil defense and defense mobilization which are issued will be subordinate to and compatible with the Plan." Thus, concluded one federal study, disagreements would be plentiful - the Plan delegated authority and control to state and local authorities while Emergency Action Orders envisioned complete federal control over survival measures and reconstruction. It explicated problem areas: those where Emergency Action Orders laid broad claim to (and "automatic" seizure of) state and local resources without providing "a legal means . . . to effectuate it," and those sections of the Plan that "implied . . . State and local operational powers" predicated upon exclusion of the needs of the federal government. Most troubling perhaps was the plan's failure to promulgate "'principles'; [sic] specific, identifiable, 'responsibilities'; [sic] 'requirements'; [sic] or meaningful 'broad courses of action,'" especially in regards to the aforementioned annexes on essential resources management and the maintenance of law and order:

122. See id. at 30-31.
123. Id. at 30.
124. See id. at 32.
125. Memorandum from Leo A. Hoegh, Director, OCDM, to All OCDM Personnel (Oct. 28, 1958) [hereinafter Memorandum from Leo A. Hoegh] (on file with author).
126. See generally Memorandum for the File, Presidential Emergency Action - Federal Emergency Plans C and D-Minus (Nov. 24, 1958) (on file with author) ("Before State and local authorities can be properly reflected in these Presidential [Emergency Action Document] sections, the sources of these authorities will need examination, particularly in relation to possible Federal preemption, which does not appear to be recognized in the plan.").
127. Id. But see, e.g., Federal Civil Defense Administration General Order No. 120, supra note 42; Privileged Cabinet Paper from Maxwell M. Rabb, Sec'y to the Cabinet, to the Cabinet (Apr. 28, 1958) (on file with author) (envisioning the "field organization" of the FCDA under the Plan as "composed of Regional offices, each headed by a Regional Administrator" responsible for "coordination of the civil defense activities of the several States during a civil defense emergency," reminiscent of ODM organization under the Emergency Action Documents).
the exercise of authorities (which are illgal [sic]) without direction from anyone, even the President and reliance on his constitutional powers, e.g. commercial stock in the hands of retailers will automatically be available to local government. It states that government at all levels will stockpile goods, when this manifestly is not true and even if they did, it prescribes no system for control and use of such stockpiles post-attack or for stabilization of the economy now, under the impact of such stockpiling.128

Several executive agencies expressed misgivings as well, concerned about the establishment of emergency interim agencies. The Selective Service System objected to “interim assignments” afforded existing agencies following a nuclear attack, reasoning that “vitaly important functions” would thereby “be withdrawn from existing agencies at a time when we are in critical need of effective continuity, and turned over to some emergency creation not now in being.”129 These emergency agencies had little practical or statutory authority because, as compared with the First and Second World Wars, the existing bureaucracy had the time and funding to train for an eventual nuclear conflict.130 The FCDA joined the Selective Service System in insisting that “civilian survival needs to have the highest priority,” and thus uncoordinated requisitioning authority – the broad powers afforded the emergency federal agencies in OER Resource Directive No. 2 —“would add greatly to the difficulties of this chaotic situation and impede this [Federal Civil Defense] administration in carrying out its statutory responsibilities.”131

Nor was the constitutional logic underpinning these plans132 altogether convincing to non-executive public officials. In a December 1954 meeting of the Commission on Intergovernmental Relations, Senator Wayne Morse proclaimed his “thesis of the constitutional power of the President of the United States to meet an emergency” to be a “limited inherited authority on the part of the President in exercising his Executive power under the Constitution.”133 A President who usurped “the legislative power

128. Memorandum from Leo A. Hoegh, supra note 125, at 3.
129. Memorandum from Lewis B. Hershey, Dir., Selective Service System, to Phillip S. Hughes, Assistant Dir. for Legislative Reference, Bureau of the Budget (Sep. 16, 1958) (on file with author).
130. See generally id. (“Hurriedly formed agencies came into being . . . because nothing at all had been done beforehand in the way of preparation for a civilian war effort.”).
132. See infra Part III.
133. U.S. GOVT PRINTING OFFICE, PRESIDENT IS CLEARLY SUBJECT TO CONSTITUTIONAL CHECK 7 (1952).
which, I say, under the Constitution, is clearly within the jurisdiction of the Congress” could do so only “in an hour of great crisis” where “the security of the Nation was concerned” and “[the] power of the Chief Executive [was] related to the need for its exercise in light of the facts created by the Congress.” 134 Should Congress believe there to exist “a better procedure for handling the crisis” or “that the President of the United States is mistaken in his judgment of the fact,” then it could “immediately ... restrict, modify, or set aside the exercise of such power by the President in the emergency.” 135 Alluding to the Youngstown steel crisis (discussed in Part III of this Article), Morse expressed his fear that each emergency action “establishes a new precedent for a future Executive to look to in order to make a similar course of action a little easier and possibly more acceptable to the general public.” 136

Indeed, in considering Morse’s arguments, one striking omission from the musings of the defense mobilization offices and the Cabinet is the way in which the executive branch would interact, post-attack, with Congress and the courts. This is best exemplified in a 1954 memorandum on survival of the executive branch. Manpower is explained in words and graphs by “actual and estimated [numbers] or war-time operations;” duties are detailed under topics like “Public Order and Internal Security;” but underneath the headings of “Judicial Functions” and “Legislative Functions” are nothing but large blank spaces. 137

III. “THE SUBJECT OF CLOSE EXAMINATION UNDER OUR CONSTITUTIONAL SYSTEM”

The foregoing survey of the Eisenhower Administration’s continuity planning elucidates the means by which a nation, bereft of sophisticated computing systems and satellite surveillance, attempted to cope with an unprecedented massive attack on homeland. Our world today, linked together by vast information networks and sustained by advanced industrial centers, is unlike theirs; nonetheless, the legal issues arising from the chief executive’s assumption of authority in the face of domestic chaos challenge us even to the present day. Consider the extent to which we still grapple with that bedrock principle from Black’s treatise on constitutional law: “[I]t is within the necessary power of the federal government to protect its own existence and the unhindered play of

134. Id. at 9.
135. Id.
136. Id. at 11.
its legitimate activities... to this end, it may provide for... the putting down of all individual or concerted attempts to obstruct or interfere with the discharge of the proper business of government."\textsuperscript{138}

Thus, several concrete questions present themselves for thoughtful legal analysis: what was the authority behind the Emergency Action Orders, and their moderation, not by another branch of government but by another executive plan, the National Plan for Civil Defense? From where springs the authority for the creation and operation of emergency agencies? And what of the continued use of military personnel as an aid to civilian authority? These questions, which will be examined from a modern constitutional perspective, are instrumental in nature; they are the smooth mechanics of expeditiously reorganizing a battered country against the friction of a national charter written in times of comparative tranquility.\textsuperscript{139}

What of solutions contemporaneous to the crisis? Habeas corpus, state resistance to federal directives, and, most importantly, the objections of the Congress and of the judiciary have the potential to affect substantial change in this executive-dominated, post-attack America. But the pressure on national conformity to the directives of a strong leader in a crisis is great – and the temptation for the legislature to bless and the judiciary to demur from controversial executive actions substantial.

A. Executive Orders and Executive Agencies

Despite their grandiose title, Emergency Actions Orders are, as witnessed in the preceding sections, essentially just executive orders and presidential proclamations. Such declarations in wartime were not novel – wide-ranging presidential directives had been issued during the Civil War,\textsuperscript{140} the First\textsuperscript{141} and Second World Wars,\textsuperscript{142} and

\textsuperscript{138} HENRY BLACK, HANDBOOK ON AMERICAN CONSTITUTIONAL LAW 392 (3d ed. 1910).

\textsuperscript{139} But see, e.g., John F. Romano, State Militias and the United States: Changed Responsibilities for a New Era, 56 A.F. L. REV. 233 (2005) (discussing conflicts amongst the Founders in determining the need for a permanent standing army, and the uncertainty in congressional funding and usage of federalized state militias vis-à-vis definite limits placed upon national military forces); Bruce Ackerman & Neal Katyal, Our Unconventional Founding, 62 U. CHI. L. REV. 475 (1995) (deeming that the "institutional bandwagon" of the 1780s, wrought by Federalists who drastically revised state constitutions "and yet... proceeded in a manner utterly indifferent to the formal mechanisms for amendment already stipulated by state constitutional law," mirrored "other moments of grave crisis" such as Reconstruction and the New Deal).

\textsuperscript{140} See, e.g., Ex parte Merryman, 17 F. Cas. 144, 147-48 (C.C.D. Md. 1861) (discussing the claim of executive authority to suspend the writ of habeas corpus in the case of Confederate prisoners of war); The Prize Cases, 67 U.S. 635, 665 (1863) (discussing the claim of executive authority to seize U.S. registered naval vessels
the current War on Terror. As Professor Peter Margulies has suggested, “exigency” enables the President to take unusual and unchecked measures in times of national crisis, threatening to disrupt the balance of power between the three branches of the federal government. "[E]xtraordinary procedures" implemented by the chief executive ultimately “suggest a closed system, where executive will is facilitated by its ability to avoid judicial review and defy other sources of accountability, such as internal government watchdogs, legislators, and nongovernmental organizations.” But however much the idea of such a “closed system” is troubling, is it necessarily inconsistent with the Constitution? In examining executive orders against the backdrop of our theoretical atomic crisis, alongside the emergency agencies they relied upon and the potential congressional reaction, the answer appears to be negative.

Under an enabling piece of legislation – be it the theoretical War Resources Act or the Authorization for Use of Military Force,
passed in the week following the September 11 terrorist attacks – the President has the ability to act in accordance with a crisis too demanding for concerted, inter-branch action. The larger the crisis, the greater the need for an immediate response; the broader the impact of the crisis on American socio-economic concerns, the more likely the President will be entrusted with overseeing their repair. So long as actions taken by the President can be shown to be consistent with the crisis underpinning the congressional authorization, particular executive orders are merely particular courses of action chosen by the President in his capacity as chief executive of laws. And the more rapid and concrete those Presidential actions are, the better the congressional philosophy behind the enabling legislation – repair the country as soon as possible, ready it for possible secondary strikes and counterattacks – is promulgated.

The executive orders in this case – the nearly one hundred Emergency Action Orders ready for executive approval – reflect this philosophy. Though the President would ideally implement Emergency Actions “already familiar to him,” the documents were in fact designed to “be equally available to whomever might, in emergency, succeed to the functions of the Presidency.” Thus, the orders could be implemented by simple code words, with myriad approaches to reconstruction and various theories on the breadth of government involvement in the process distilled to two or three options, ready for immediate approval.

Executive Orders directed to the actions of agencies – as many of the Emergency Action Orders in the case of Eisenhower's continuity

against the United States by such nations, organizations or persons”.

147. See, e.g., Ex Parte Mitsuye Endo, 323 U.S. 283, 302-03 (1944) (explaining that so long as the likelihood among citizens for espionage and sabotage remains substantial, a congressional act and an executive order providing for their internment is within the Constitutional war-making powers of both the President and the Congress; at the moment such assumption concerning a citizen's capacity for espionage or sabotage is proven incorrect, continued detention transforms the Presidential and congressional measure into “something else”); U.S. CONST. art. II, § 3 (the President “shall take Care that the Laws be faithfully executed”); Korematsu v. United States, 323 U.S. 214, 217-18 (1944) (executive orders authorizing military action with a “definite and close relationship” to a congressionally-identified national harm are permissible).

148. Memorandum from Gerald D. Morgan to Governor Adams, supra note 105.

149. See, e.g., Privileged Cabinet Paper from Maxwell M. Rabb, Mar. 2, 1956, supra note 45; Summary of Report on Interim Assembly and ODM Actions in Operation Alert 1955 2 (1955) (on file with author) (“Key officials cannot be expected to probe the complexities of major policy issues, on which there may be several divergent views and possible alternatives, unless the Emergency Action Directives before them have been submitted to them in advance . . . [such that] [t]o the maximum extent possible Emergency Action Directives must be pre-cleared, put on a ‘trigger basis’ . . . ”)
planning appear to be—have special protections according to implied congressional authorizations of authority. One such authority stemmed from the general principle that Congress might concurrently or retroactively validate actions taken by the executive branch, so long as it could have accomplished such actions by itself. Thus, should congressional authorization of funds be made for agencies pursuant to something like the War Resources Act, agency actions taken subsequent to such appropriation would be presumed to be congressionally authorized, with the secretary of that agency afforded the power of a congressional representative. Executive orders could also be validated in this fashion, such that a congressional authorization of funds to an agency acting on behalf of a Presidential would be regarded as a de jure blessing upon the order itself.

Another protection proceeded from the language of the Federal Register Act. Assuming the legality of emergency agencies for the time being, Emergency Actions Orders enacted by them and concurrently published in the Federal Register would be presumed binding upon the American people:

> [the] filing of a document, required or authorized to be published by section 1505 of this title, except in cases where notice by publication is insufficient in law, is sufficient to give notice of the contents of the document to a person subject to or affected by it. The publication in the Federal Register of a document creates a

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150. Letters from Eisenhower to each of the prospective agency directors assume the existence of enabling legislation, as such agencies were to begin operation at the moment of attack without waiting for confirmation of authority. See, e.g., Memorandum from Dwight D. Eisenhower, President, to Dr. George Baker, Graduate School of Business Administration, Harvard University (1954) [hereinafter Memorandum from Dwight D. Eisenhower] ("In the event of an emergency, as soon as you have assured yourself, by means at your disposal, that an Emergency Transport Agency has been activated, you shall immediately assume active direction of that agency and its function. This letter will constitute your authority.").

151. See Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 301-02 (1937) ("It is well settled that Congress may, by enactment not otherwise inappropriate, 'ratify... acts which it might have authorized,' and give the force of law to official action unauthorized when taken.") (internal citations omitted).

152. See, e.g., Brooks v. Dewar, 313 U.S. 354 (1941) (explaining that congressional collection of licensing fees for cattle grazing on public lands to the Interior Department validated the Secretary's interpretation of the Act giving rise to the licensing issues, and amounts to a ratification of the Secretary's action in issuing such licenses as a congressional agent).

153. See, e.g., Isbrandtsen-Moller Co. v. United States, 300 U.S. 139, 147 (1937) (finding an Executive Order abolishing a Shipping Board and delegating its duties to the Department of Commerce validated as within the scope of the Shipping Act of 1916 when Congress released funds to the Department of Commerce to enact other portions of the Act).

rebuttable presumption –
that it was duly issued, prescribed, or promulgated . . . . 155

Should Congress, in reviewing these initial published actions, agree with the form and function of the emergency agencies, presidential discretion would go into effect.156 Thus, the President would be given wide latitude to direct the agencies,157 free from congressional or judicial interference. Most importantly, the President would be absolved from the compulsion to further publicize the agencies’ internal workings, so long as Congress had approved their general mission and function, either directly or indirectly.158 And while the Register would have to contain those “orders having ‘general applicability and legal effect,’” a case could be made that many Executive Action Orders – and delegations passed from the President through ODM or OCDM – were mere “shifting[s] of responsibilities wholly internal” to the emergency agencies, affecting such matters as the production of raw materials, or the transport of foodstuffs, or the further delegation to responsibilities to multi-state administrative districts, that had no immediate and direct impact upon the public at large.159

The only limitations on Emergency Action Orders and subsequent executive orders, it seems, are those that the Cabinet itself cares to institute – in the instant case, those bounds designated by the ODM directives and the National Plan for Civil Defense.160

155. Id. § 1507.

156. See Daniel P. Franklin, Extraordinary Measures: The Exercise of Prerogative Powers in the United States 68 (1991) (stating that “[t]hus, the Federal Register becomes, in effect, a reflection of the legislative prerogative as exercised by the executive branch”).

157. See, e.g., Am. Fed’n of Gov’t Employees v. Carmen, 669 F.2d 815, 823 (1981) (“Finally, even in the absence of a clear statutory provision establishing a governing role for the President, we would not conclude that Congress, simply by assigning a function to an executive agency, thereby intended to exclude initiating action by the President. As this court has had recent occasion to observe, ‘Within the range of choice allowed by statute, the President may direct his subordinates’ choices.’”). The court also cited to United States v. Saunders. 951 F.2d 1065, 1067 (9th Cir. 1991) (“(1) Presidential proclamations and Executive orders, except those not having general applicability and legal effect or effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof; (2) documents or classes of documents that the President may determine from time to time have general applicability and legal effect; and (3) documents or classes of documents that may be required so to be published by Act of Congress.”).

158. See Carmen, 669 F.2d at 820 (explaining how the Federal Register Act, 44 U.S.C. § 1505(a)(1), expressly excludes from its publication requirement those Presidential directives, as in the instant case, which are “effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof”).

159. Saunders, 951 F.2d at 1067.

160. See supra notes 129-31 and accompanying text; see also Privileged Cabinet
These were executive plans limiting executive actions – hardly in keeping with the tripartite spirit of the Constitution, yet difficult to criticize on purely functional grounds. As Justice Jackson aptly noted in the *Youngstown* case, “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum.”

Two Supreme Court decisions have deemed particular executive actions, *qua* exclusively executive aims, as unconstitutional. *United States v. Nixon* considered President Richard Nixon’s assertion of executive privilege in regard to subpoenaed communications, and his larger claim that the chief executive’s actions necessarily transcended law:

> If the president, for example, approves something because of the national security, or in this case because of a threat to internal peace and order of significant magnitude, then the president’s decision in that instance is one that enables those who carry it out, to carry it out without violating a law.

The Supreme Court held that “neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.” Shadow operations of the President even in the cause of vital national interests, whether by surreptitious executive order or the unbridled effects of emergency actions, according to plans and standards instituted by the executive branch itself, could likely be checked by such a limitation on executive authority.

*Youngstown* concerned President Truman’s executive order authorizing the Secretary of Commerce to seize and operate steel mills shut down by a labor strike, in support of the ongoing Korean War effort. Holding that the authority to order such an action “must stem either from an act of Congress or from the Constitution itself,” the Supreme Court concluded that even in light of an armed conflict, “we cannot with faithfulness to our constitutional system

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Paper from Maxwell M. Rabb, Mar. 2, 1956, *supra* note 41; Summary of Report on Interim Assembly and ODM Actions in Operation Alert 1955, *supra* note 149, at 4-5 (limiting, per a cabinet interim committee post-OPAL recommendation, the requisitioning power of military authorities operating pursuant to martial law to “finished goods” and assigning “production of metals and minerals” to the Department of the Interior).

161. 343 U.S. 579, 635 (1952) (Jackson, J., concurring).


165. 343 U.S. at 682-83.
hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production." Justice Frankfurter noted that though the Labor Management Relations Act of 1947 contained provisions "for dealing with a 'national emergency' arising out of a breakdown in peaceful industrial relations... Congress [explicitly] chose not to lodge this power [the seizure of private property] in the President." Justice Jackson concurred, musing on the "comprehensive and undefined presidential powers [that] hold both practical advantages and grave dangers for the country," and finding the latter in instances "[w]hen the President takes measures incompatible with the expressed or implied will of Congress."

There are, however, limitations in applying such reasoning to a crisis that threatens the integrity of the nation itself. As Youngstown itself noted, "there is a zone of twilight in which he [the President] and Congress may have concurrent authority, or in which its distribution is uncertain." This is an especially salient point per an attack on the homeland, where precedents are few, time is limited, and the issue at hand is relatively devoid of political divisiveness, something inherent in the subject matter of the foregoing cases. If Congress and the President share the same general aims — the continued provisioning of military forces, the dispatch of aid to damaged areas, the expeditious reconstruction of the American economy — does therefore the expression of such aims and the means to achieving them, in a document like the National Plan for Civil Defense, fall within that zone of twilight? May the executive respect the spirit of a congressional commission to heal these ills by bypassing the more time-consuming and burdensome letter of pre-war statutes?

166. Id. at 585, 587.
167. Id. at 601 (Frankfurter, J., concurring).
168. Id. at 634, 637 (Jackson, J., concurring).
169. Id. at 637.
170. See, e.g., Franklin, supra note 156, at 68 ("Congress... would certainly approve, and has approved, of executive actions intended to carry out congressional intent... The presidency and its agents also have the responsibility and the privilege of adopting the law to fit the day-to-day operations of government. Congressional intent cannot always be translated into law.").
171. Contra Youngstown, 343 U.S. at 652 (Jackson, J., concurring) (holding that where Congress did not share the President's desire to engage in a Korean police action, steps taken to achieving that aim were presumed to be contrary to congressional intent).
172. See, e.g., Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 116 (1947) (affording wartime and post-war construction of two World War II legislative acts "by the Chief Executive, being both contemporaneous and consistent, [to be] entitled to
To put it another way, consider Professor Edward Keynes' formulation of the classic "defensive/offensive war theory," which, he contends, "assumes that the President has the exclusive constitutional authority to defend U.S. citizens, territory, troops, and property . . . [where so long] as the President's actions remain 'defensive,' he does not require congressional authorization." While this theory applies directly to the war powers of the President, it also seems applicable in the instant case. So long as the President is engaged in "defensive" operations – reconstruction of vital communication, transportation, and resource links, distribution of aid to local governments and citizens – congressional authorization is superfluous; indeed, an executive who would fail to use all the resources at his command to improve the lot of attack survivors would likely be adjudged in dereliction of his duty. Offensive operations – say, mandating the merger of several surviving railroad corporations for economic oversight and administrative purposes – begin to raise questions. But where is the line between defensive and offensive? Are offensive operations contemplated by the National Plan (i.e., the automatic stockpiling of retail goods by commercial vendors that deeply troubled Leo A. Hoegh) in pursuit of a defensive end (the resuscitation of the credit-based economy) acceptable? When does necessary reconstruction become proactive interference with the operation of lower governmental bodies, lower courts, and local and national business concerns? So long as the President and the Congress look toward the same ends, the means to achieving them are not so easily categorized as falling on one side of the line or the other.

The problem – and the answer, if any – lies in the emergency agencies themselves. Their very existence is an affront to the normal great weight," where President Roosevelt created the National Housing Agency, War Food Administration, Office of War Mobilization, Office of Economic Warfare, Foreign Economic Administration, and Surplus War Property Administration under the War Powers Act, and invested the Office of Price Administration with judicial authority under the Emergency Price Control Act of 1947, despite the fact that neither act explicitly provided for such action, though both were "repeatedly construed by the President to confer such authority").


174. See Memorandum from Andrew J. Goodpaster for the Record (Jan. 23, 1958) (on file with author) ("Gordon Gray today reported to me on his meeting with the President yesterday as follows . . . He next recalled that the President had asked him to look into the question of merger and consolidation as a measure to alleviate the plight of certain railroads. He reported that he had consulted several of the most knowledgeable people in this matter, and they felt that it is not the law which is the most important obstacle, but the management echelons themselves, which do not wish to provide for their own liquidation.").

175. See Memorandum from Leo A. Hoegh, supra note 125.
function of the federal government. The action they contemplate, including the conscription and reassignment of large groups of citizens for manpower purposes, the seizure of radio, telephone, and television transmitters, and the close regulation of metals and fuel supplies, are at odds with a republican, capitalist nation. Again, we return to the defensive-offensive war theory. Keynes notes of military conflict that an executive's cautious adherence to defensive actions, perhaps in strict deference to his proscribed constitutional authority, will ultimately not stand: "[A]t some point the escalation of military force transforms the character of the President's actions from defensive to offensive conduct."176 Extended "military hostilities increases the probability that the President will cross the Rubicon and enter the twilight zone between the commander in chief's defensive power and the congressional war power."177 Too great a reliance on defensive action – uplifting messages to the American people on the virtues of self-reliance and excessive trust in the competence of local authority – will at some point precipitate a need for substantial, offensive federal intervention in the process of reconstruction. The longer proactive Emergency Action Orders are delayed, the greater the probability later actions will infringe on the powers of both the executive and legislative branches, with no clear sense of where leadership ought be exercised. Immediate, highly invasive actions by emergency agencies in local and state operations seem the least painful – and for the long-term constitutional health of the country, most prudent – course of action.

Surely the emergency agencies themselves are amenable to criticism. Men of the business and academic worlds, appointed without Senate scrutiny,178 chair them, taking up the mantles of their office at the moment of attack without clear understanding of the agencies they replace or the duration of their assignment. One could make a case that these interim administrators and advisors, subservient as they were to the directives of ODM and OCDM (the creation and staffing of which had been overseen by Congress in peacetime) and the reconstruction plans thereof, are "inferior officers" who may be appointed and confirmed by the President alone.179 Alternatively, we could ascribe the appointment of these functionaries to presidential prerogative in wartime – inasmuch as Eisenhower called upon the National Security Council to be his chief

176. KEYNES, supra note 173, at 90.
177. Id.
178. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose appointments are not herein otherwise provided for . . . ").
179. See id.
advisory body following an atomic attack, so too ought he be able to reorganize the delegation of powers among executive agencies, as the Bush administration did with the Department of Homeland Security. 180

And regardless of presidential wartime prerogative, these agencies are an affront to the highly stratified and equitable bureaucratic organization that has been crafted over time. They abrogate the spirit of the 1883 Pendleton Act, the short bit of legislation that ended nearly one hundred years of unchecked cronyism and "spoils" in agency appointment. 181 Regulatory bodies such as the Emergency Transport, Communications, Production, and Manpower Agencies would have the opportunity to direct state and local governments to enforce radical redistribution of property and resources; absent open files, public notices, and formal agency proceedings with opportunity for public challenge, of the sort envisioned by the Administrative Procedures Act, 182 such directives would be more akin to decrees. Their post-attack missions and branch accountability would clash with their pre-attack antecedent commissions; the functional transformation of the Federal Trade Commission into the Emergency Transport and Emergency

180. See Exec. Order No. 13228, 66 Fed. Reg. 51812 (Oct. 8, 2001) (establishing a "Homeland Security Council" with its members the "President, the Vice President, the Secretary of the Treasury, the Secretary of Defense, the Attorney General, the Secretary of Health and Human Services, the Secretary of Transportation, the Director of the Federal Emergency Management Agency, the Director of the Federal Bureau of Investigation, the Director of Central Intelligence, the Assistant to the President for Homeland Security, and such other officers of the executive branch as the President may from time to time designate."); see also, e.g., Exec. Order No. 15355, 69 Fed. Reg. 55593 (Aug. 27, 2004) (increasing the role of the Director, Central Intelligence Agency, over sister intelligence agencies and the flow of information vital to terror activities thereof); Ronald O'Rourke, Homeland Security: Coast Guard Operations – Background and Issues for Congress, CRS Report for Congress (Mar. 14, 2003), http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RS21125_03142003.pdf (detailing transfer of Coast Guard in its entirety from the Department of Transportation to the Department of Homeland Security); S. Rep. 108-120, at 1 (2004) (describing budget appropriations for the Coast Guard and the Secret Service subsequent to transfer to Department of Homeland Security).

181. Civil Service Act, ch. 27, 22 STAT. 403, 403-04 (1883) ("And, among other things, said [civil service] rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows: First, for open, competitive examinations for testing the fitness of applicants for the public service now classified or to be classified hereunder. Such examinations shall be practical in their character, and so far as may be shall relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed. Second, that all the offices, places, and employments so arranged or to be arranged in classes shall be filled by selections according to grade from among those graded highest as the results of such competitive examinations.").

Production Agencies would violate the special status of the former as announced in Humphrey's Executor, where any "executive function [it performs], as distinguished from executive power in the constitutional sense, [is] . . . in the discharge and effectuation of its quasilegislative or quasijudicial powers, or as an agency of the legislative or judicial departments of the government."183

But these are emergency agencies; no matter how odious they might be to our traditional conceptions of an equitable bureaucracy, they will disappear at the moment the crisis subsides and normalcy returns. Traditionally, in the words of Professor Daniel P. Franklin, it has been the "consistent judgment of the courts that states of emergency are limited in their duration and initiation . . . [as] a function of circumstance rather than edict."184 The problem inherent in such a conclusion lies in the way such a determination of normalcy is made. What occurs when the president is empowered "to exercise emergency powers and to determine, in isolation, when and how long a state of emergency is to last?"185 How can Congress limit the use of emergency powers when such powers that created and sustain agencies are both a bulwark against exacerbation of the emergency and Congress' only functional means of assessing the relative severity of the emergency? And as the President transformed into practical directives broad Congressional intent to "deal with the emergency" from its inception, is it not likely that he will continue to "spell out an interpretation of [any] new [limiting] legislation that is binding on the bureaucracy?"186

Ultimately, the very factor that affords the President wide-ranging authority to deploy such agencies, and compels the Congress to authorize a broad delegation of power to the executive branch – the existence of a heretofore-unknown state of emergency – is judged in severity and duration by the President himself.187 Not only is this conclusion situationally sound, as applied to a Congress bereft of nationwide communication and dependent on a forceful executive for command of federal resources, but it is also legally sound according to extensive Supreme Court jurisprudence: Martin v. Mott188 ("We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. . . . this construction necessarily results from the nature of the power itself"); Home Building & Loan

184. FRANKLIN, supra note 156, at 67.
185. Id. at 68.
186. Id. at 67.
187. Id. at 41-69.
188. 25 U.S. 19, 30 (1827).
Ass'n v. Blaisdell189 ("[T]he war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency"); and Woods v. Cloyd W. Miller Co.190 ("[T]he war power includes the power 'to remedy the evils which have arisen from its rise and progress' and continues for the duration of that emergency," even after the event giving rise to it has terminated, as by an armistice) are all in agreement.

Normatively, it is difficult to fault the President for acting too quickly — taking him to task for aiding the nation in an expeditious fashion simply because his emergency agencies lacked career civil servants or bimonthly public discussion fora.191 Functionally, however, one might imagine these agencies becoming self-perpetuating organizations. We may assume that since ODM and FCDA were in agreement concerning the interstate coordination and control role assigned the regional offices,192 and because these regional offices were specially designed to "operate independently over extended periods and, in addition . . . assume the role of national direction and coordination of civil and defense mobilization activities,"193 little was needed from Congress.194 Path dependency

189. 290 U.S. 398, 426 (1934).
190. 333 U.S. 138, 141-43 (1948) (internal citations omitted).
191. This is especially in keeping with Eisenhower's approach to the problem of atomic war, which stressed a military-like approach to the organization of post-attack government, with limited civilian input. See, e.g., Interview by Ed Edwin with Leo A. Hoegh, Dir., Office of Civil and Def. Mobilization 53 (Oct. 11, 1967) (on file with author) ("Now we had a computer of our natural resources. We knew where our supplies were, where our industrial capacity was. . . . Next, you had to have some regional headquarters. . . . So you have to have government in existence and in control — federal, state, local. Your plan helps that coordinating of the whole effort, you see. Now, people will not riot or panic too much, as long as they've got some control and direction. . . . Of course he was concerned, President Eisenhower, but again he knew that he could minimize the disaster by keeping chain of command in being. It's not just command, but it's services, direction — that's what your local governments are there for, to be able to serve people in distress.").
192. See generally Federal Civil Defense Administration General Order No. 120, supra note 42 (dealing with agreement on regional centers).
193. Privileged Cabinet Paper from Robert Gray, Sec'y to the Cabinet, to the Cabinet (Jun. 1, 1959) (on file with author) (detailing fallout and blast protections afforded these well-staffed, "buttoned-up" centers such that they could contribute "materially to the continuity of the Federal government").
194. See, e.g., Plan for Continuity of the Essential Wartime Functions of the Executive Branch (Feb. 24, 1954) (on file with author) ("A strong Federal coordinating mechanism will be established in areas with large concentrations of government employees to assure effective planning for continuity of essential functions. These will be under the leadership of a Presidentially appointed executive, familiar with governmental operations, who would be assisted by regional officials responsible for essential wartime activities. . . . There must be provision for exercise of authority by other [non-relocated Washington] organization officials, designated in advance of the emergency, [and given] [m]aximum management authority . . . [such that] officials (1)
would likely assert itself as to agency leadership and OCDM direction should a low-ranking cabinet member assume the office of President following an attack.\textsuperscript{195} Criticism of the Eisenhower emergency agencies is appropriate – but as with the "closed system" generated by Emergency Action Orders, it must have its roots in something other than the Constitution.

\textbf{B. Employment of the Military}

With a chain of command impervious to the irradiated winds of change, and possessing a discipline wholly independent of requisition forms and annual stipends, the armed forces exemplified the ideal response to a discordant atomic attack. Eisenhower, enamored of Cincinnatus though he was, well understood the key tactical lesson of the Second World War – the continual triumph of focused, cohesive, motivated bodies of trained individuals overzealous but fragmented and discordant opponents.\textsuperscript{196} And this lesson was no less applicable to a U.S.-Russian nuclear war, where American resolve and determination against a desperate Soviet state and a ruined continental landscape would determine the victor. As FCDA director Val Peterson noted in a 1956 general meeting of the Cabinet:

The President stressed the job of trained government people is to preserve some common sense in a situation where everybody is going crazy . . . . Who is going to bury the dead? . . . . We must not assume that we are going to handle these problems with calmness . . . . The watchword must be: 'Keep it Simple [sic] – Keep it down to the rock bottom'. [sic] If we do that we will be doing wonders at a time like that. Government which goes on with some kind of continuity will be like a one-eyed man in the land of the blind.\textsuperscript{197}

The military was thus designated to "preserve some common

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\textbf{Notes on Expanded Cabinet Meeting on 25 July 1956 (Jul. 25, 1956) (on file with author).}
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\textit{\textsuperscript{195} See Memorandum from Dwight D. Eisenhower, supra note 150 ("As Administrator, you will, in the performance of your duties, be subject to the direction, control, and coordination of the Director of the Office of Civil and Defense Mobilization . . . [y]our tenure as Administrator-designate or as Administrator shall be at the pleasure of the President.").}
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\textit{\textsuperscript{197} Notes on Expanded Cabinet Meeting on 25 July 1956 (Jul. 25, 1956) (on file with author).}
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sense” among a frightened populace in two ways: to operate as an adjunct to civilian authorities, whether affiliated with state government or national emergency agencies, and to implement martial law. As may be gleaned from the foregoing discussion on continuity planning and OPAL, there was little thought given to a timetable for initial mobilization and eventual deactivation of the armed forces in their role, or to what sort of environment would justify the second. Indeed, Eisenhower’s first major policy decision during OPAL – rejecting the submission to Congress of a resolution for the activation of adjunct executive war powers in favor of implementing martial law on a nationwide scale – suggests that use of the military was on an entirely ad hoc basis.

Such a response is understandable from the chief executive’s point of view – the chain of command from the commander-in-chief to local garrisons provides some basis for rational and prompt countermeasures to a chaos-inducing attack on American soil. It is also deeply disturbing from a constitutional standpoint, the familiar specter of an armed force called forth in crisis running roughshod over the republic.

A comprehensive discussion of martial law, including the interplay between civilians and the Uniform Code of Military Justice and the history of its imposition in common law jurisdictions, is beyond the scope of this Article. Nevertheless, some general observations can be made concerning the statutory authorities by which it may be promulgated.

Lectures on Martial Law, an April 1960 Department of the Army publication, defines martial law in a roundabout fashion. It is not “written” law, as a “clearly defined body of law denouncing specific crimes, fixing definite procedures, and providing for specific procedures,” but provides for ad hoc jurisprudence that proceeds from the disturbance at hand; penalties for looting, public demonstrations, and curfew violations may be comparatively harsh in areas of

198. See id.
200. See, e.g., THE FEDERALIST No. 29 (Alexander Hamilton) (“If a well-regulated militia be the most natural defense of a free country, it ought certainly to be under the regulation and at the disposal of that body which is constituted the guardian of the national security. If standing armies are dangerous to liberty, an efficacious power over the militia, in the body to whose care the protection of the State is committed, ought, as far as possible, to take away the inducement and the pretext to such unfriendly institutions. If the federal government can command the aid of the militia in those emergencies which call for the military arm in support of the civil magistrate, it can the better dispense with the employment of a different kind of force.”).
substantial disturbance. Nor is martial law a de facto suspension of habeas corpus or due process, as court-martials and tribunals may be convened without impairing swift and efficient classification of offenses. Instead, martial law is that body of "domestic controls . . . [imposed by] [t]he National Government [pursuant to its] right and duty to protect itself and to preserve its existence." It may take the form of restrictions "over many things, for example, prices, railroads, rents, and rationing" though it can extend to "genuine security matters, such as the establishment of curfews and blackouts, movements of people, occupation by military forces of places deemed of strategic importance, and temporary detention of suspected individuals;" as the study sees "no useful purpose for us to speculate as to the outer limits of this national war power," there exist "numerous other matters equally as important where clear-cut and unqualified answers have not yet been given."

Authority to impose martial law stems from several sources, the most important of which is the "national war power," inherent in the President as Commander-in-Chief in both Congress and the President, in which the latter acts to enforce national law. To these ends, the Posse Comitatus Act of 1878 prohibits Army and Air Force execution of the law "except . . . where expressly authorized by the Constitution or an Act of Congress." 10 U.S.C. § 331 implements Article IV, Section 4 of the Constitution, enabling the President to employ federal troops to suppress a state insurrection following a request from its authorities, while section 332 codifies Article II, Sections 2 and 3, permitting the President to defeat with federal troops "unlawful obstructions, combinations, or assemblages or rebellions" interfering with the normal administration of law. Within the armed forces, regulations existed pertaining to its invocation, such as Army Regulation 500-50, where martial law "is the exercise of power which resides in the Executive Branch of the

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202. *Id.* at 4-5.
203. See *id.* at 5.
204. *Id.* at 12-13.
205. *Id.* at 13.
206. U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.").
208. U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed.").
210. *Id.*
212. *Id.* § 332.
Government to preserve order, and insure the public safety in emergency."213 It "depends for its justification upon public necessity ... [which] gives rise to [its] creation ... justifies its exercise, and ... limits its duration."214

As concerns military aid to civil authorities, references to "execution of the laws" in martial law statutes cover such employment of the armed forces.215 Historical use of federal troops demonstrates the soundness of this legal reasoning; "mixed" disorders, including "labor troubles, election and political troubles, race troubles ... Indian troubles ... [the] protect[ion] of property and preserv[ation of] order in times of flood, fires, etc" necessitated martial law and aided civilians in administering jurisprudential, electoral, or relief programs.216 Army Regulation 500-50 also contained language to these ends, permitting the activation of military assistance "when civil governmental agencies are unable to function or their functioning would itself threaten the public safety."217 The Army proclaimed its readiness to assist civilian authorities in any way necessary in case of "sudden and unexpected invasion, insurrection or riot, endangering the public property of the United States, or of the attempted or threatened robbery, or interruption of the United States mails, or of earthquake, fire, or flood, or other public calamity disrupting the normal processes of government."218

Martial law poses a more serious problem than even the emergency agencies examined in the preceding section. No definite limits need be attached to its use; no blueprint need be drawn up for its deployment across the nation. There is no requirement that the president promulgate a series of long-term goals for the employment of martial law, the achievement of which will automatically demobilize the armed forces in their domestic peacekeeping role. As we have seen, Eisenhower’s continuity plans do not provide for their ends either. Instead, we have a series of potentially conflicting national priorities – the reconstruction of the nation, the reorganization of the populace as a body capable of mounting a counterattack against the enemy, the suppression of disorder from material scarcity, the provision of medical, agricultural, and industrial aid, and the maintenance of internal security against

214. Id.
215. See, e.g., Moyer v. Peabody, 212 U.S. 78, 82 (1909) (explaining that the governor’s usage of state militia to quell a union insurrection is justified, inter alia, by the need to “call them out to execute laws”).
216. WAGNER, supra note 28, at 19.
218. WAGNER, supra note 28, at 23 (citation omitted).
invasion, domestic spies, and resistance by civilian or government officials to federal proclamations. Does the pursuit of one goal necessarily invoke the whole martial law package? Should, for example, habeas corpus be suspended at each point – as a means of maximizing police protection against criminals, rationing limited resources of the courts, sending a harsh lesson to those who would seek to profit from government aid programs, and ensuring that dissidents and enemy aliens are incapacitated swiftly and completely?

Military aid to civil authorities exacerbates these martial law concerns. If efficiency be the value most highly prized in the weeks and months following an atomic attack – and it would certainly be in scarce supply, with communications lines and transportation links disrupted – then its maximization demands the constant employment of the military. Again, we arrive at Professor Keynes' "offensive/defensive" war powers theory.219 If the Emergency Transportation Agency relies on the Army's Transportation Corps as a field staff, coordinating the repair of railroads and the establishment of shipment schedules, why should not the same body, familiar with day-to-day conditions, bear responsibility for addressing abuses of the system? Does efficiency permit the convocation of a district court to prosecute the seller of forged rail passes, culminating in a week-long trial where soldiers are called away from the field to educate judges as expert witnesses? Or does it demand confining such an individual to a brig, a decision on his fate postponed until equitable laws can be fashioned, when the nation emerges from the looming shadow of subsequent atomic exchange with the enemy? Defensive powers of military authorities – aid to civilian bodies, under the control of state governors or agency administrators – gradually become intertwined with offensive powers – the administration of justice, the promulgation and enforcement of limitations on operations of the market, the allocation of civilian manpower to military projects, the curtailing of expressive liberties – in the name of permitting the armed forces to efficiently accomplish their "mission" of national reorganization and reconstruction. While the efficiency inherent in a disciplined, regimented body of troops as contrasted with civilian organizations cannot serve as an ironclad justification for martial operations – as Justice Murphy noted in Duncan v. Kahanamoku220 – it does take on a special value when

219. See supra note 173 and accompanying text.
220. 327 U.S. 304, 330, 332 (1946) (Murphy, J., concurring) (in evaluating the operation of a provost court pursuant to martial law in the Territory of Hawaii during the Second World War, Justice Murphy argued that martial law is not an all or nothing concept, where the military may institute it on its longstanding "proposition that in this nation the military is subordinate to the civil authority"); see also JOSEPH
millions are rendered homeless, hungry, and sick, their chances for life turning on prompt attention from authorities.

A newly appointed executive, successor to a president rendered a casualty in an attack on the homeland, might rely even more heavily on a military offering an easy solution to domestic disturbances. Such a situation would raise difficult constitutional questions; as among a junior bureaucrat now entrusted with the national well-being, and a rump Congress consisting of legislators having substantial experience in committee with the armed forces, or a group of state governors well accustomed to deploying the National Guard to address states of emergency, who ought to be responsible for dictating the role of the armed forces? The underlying assumption of relative equivalency in the Constitution among the executive, the legislature, and the inferior governments justifies a particular distribution of federal power; can one group, seeing this balance upset, raise a cognizable objection to arguably excessive military intervention in civilian affairs?

As with the executive agencies, however, it is difficult to criticize the employment of military assistance in the case of a devastating homeland attack from a purely constitutional standpoint. We can only hope that functional considerations, such as the traditional ingenuity and resourcefulness ascribed state and local government officials independent of external federal control, would prompt an eventual limitation on widespread mobilization of the armed forces. This principle might even prove a powerful impetus for the reassertion of civilian control – in the realm of habeas corpus, for example, powerful arguments for its limitation in the name of comity and governmental efficiency might be checked by a principled

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221. See, e.g., Notes on Expanded Cabinet Meeting on 25 July 1956, supra note 197 (reporting Eisenhower to state: "(d) We should always keep in mind that out major civil defense operations depend primarily on the ingenuity and initiative of Governors and Mayors in local areas, rather than on problem play in Washington. (e) Implementing the Presidential proclamation on military assistance to civil defense, extremely close pre-attack planning between Defense and FCDA will constantly be needed. (f) The federalization of the national guard resulted in the disruption of essential vital activities in many states. We should remember that unnecessary or automatic federalization removes from the direct control of the Governor a substantial source of trained and equipped manpower").

222. See, e.g., Stone v. Powell, 428 U.S. 465, 491 n.31 (1976) ("Resort to habeas
defense of the Great Writ,223 or a sober assessment that its complete suspension might be overreaching in light of similar, more gradual measures.224

C. Resistance to Executive Authority

The first and most obvious resistance to executive authority proceeds from the constitutional division of national policy-making power between the legislature and the chief executive. Congress, in whatever extant form following a national attack, would be the only representative governmental body (as compared to state authorities besieged by federal directives from above and aid requests from its citizenry below) able to mount a substantive attack on the growing authority of the president.

A largely functional Congress might use the tools of peacetime to curb a president seeking additional grants of authority: the legislative veto, the omnibus bill package, and the congressional budget.225 There are also, of course, purely constitutional grounds from which Congress might protest. The Interstate Commerce Clause226 provides a counterpoint to the presidentially mandated shipment of goods across state lines, conveyed by military authorities and tasked according to the plans of the emergency executive agencies. The general power of the purse vested in Congress ought to grant it some measure of control over the expansiveness of these agencies, enabling it to shunt money to concerns absent from the constitutional balance upon which the doctrine of federalism is founded."

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corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government. They include "(i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded." (internal citations omitted).

223. See, e.g., Fay v. Noia, 372 U.S. 391, 400-01 (1963) ("Behind [a principled defense of the writ of habeas corpus] may be discerned the unceasing contest between personal liberty and government oppression. It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and of liberty clash most acutely . . . ."); Bowen v. Johnston, 306 U.S. 19, 26 (1939) ("[T]he writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired.").

224. See WAGNER, supra note 28, at 33 (explaining Charles Fairman’s proposal that a limitation on habeas corpus was wholly unnecessary in light of the Emergency Detention Act of 1950, 50 U.S.C. §§ 811-826 (1951), so long as any individual "as to whom there is reasonable ground to believe that such person probably will engage in . . . . acts of espionage or of sabotage" could be incarcerated).

225. See FRANKLIN, supra note 156, at 86-87 (detailing the formation of a "congressional budget" detailing congressional priorities contrary to those of the executive branch).

226. U.S. CONST. art. 1, § 8, cl. 3 ("To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.").
documents like the National Plan for Civil Defense. Yet in a situation demanding immediate action – a characterization surely applicable to the aftermath of a nuclear war – annual budgets and post hoc objections by the Federal Trade Commission would likely be too weak to stand up to the pre-planned actions of the executive branch. A more substantial legal foothold must be sought.

The *Home Building & Loan Ass'n v. Blaisdell* case considered crisis economic measures taken by the government of Minnesota in response to the Great Depression and found them consistent with inherent state police powers. Of interest to the question at hand is Justice Hughes' expansive consideration of the nature of emergencies and the responses they engender amongst legislators. “While emergency does not create power,” he wrote, “emergency may furnish the occasion for the exercise of power. [And though it] may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.”

So far, this line of thinking is consistent with the Eisenhower continuity plans, the broad interpretation and expansive use of executive power to meet heretofore-unknown disasters. But though Hughes admits the need for the exceptional interference of government in grave situations – in the case before him, the state modification of private housing and mortgage contracts, so repugnant to America's capitalist sensibilities – he cabins such powers squarely within the Constitution:

> Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.

And so we find a bedrock philosophy, strong enough to support a clamorous Congress against public outcry that expediency in administering federal aid outweighs all other concerns.

Other Supreme Court cases detail specific objections the legislature might adopt. If the President defines his actions, as Eisenhower was wont to do, in terms of military preparedness for further attacks, then *Northern Pacific Railway Co.* provides a sound counterpoint: “The complete and undivided character of the war

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228. *Id.* at 426 (quoting *Wilson v. New*, 243 U.S. 332, 348 (1917)).
229. *Id.* at 425-26.
power of the United States is not disputable." As both the chief executive and the legislature are tasked with staffing, supplying, and commanding the military and determining the ends for which it goes into battle, a unilateral seizure of resources and manpower by the chief executive at some phase of an atomic conflict cannot be tolerated. Nor can Congress brook missing members, justifications that disrupted elections, or logistical barriers to legislative sessions guaranteeing the same. The Shreveport Case establishes the supremacy of Congress in protecting and advancing trade and shipment between the states. "Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State," – and for our purposes, not the chief executive or his subsidiary agencies – "that is entitled to prescribe the final and dominant rule." Bunte Bros., extending the logic of the latter, establishes that "[a]uthority actually granted by Congress" – in this case, authority afforded its own regulatory and oversight agencies "of course cannot evaporate through lack of administrative exercise." And McGrain v. Daugherty provides a means for appealing to the judiciary, should Congress wish to adopt the executive's argument that expanded powers are necessary for achievement of its core, constitutional role.

Principle and law notwithstanding, however, Congress would be functionally limited in a crusade against executive authority. In the case before us, we know that Eisenhower intended to rely on his National Security Council, a body largely independent of congressional reporting requirements and reliance upon legislative budget allocations. The maximization of resources might dictate a

232. Id. at 351-52.
234. 273 U.S. 135, 173 (1927) (holding that "the two houses of Congress, in their separate relations, possess, not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and proper to make the express powers effective").
235. See supra note 94 and accompanying text.
236. See, e.g., Federation of American Scientists, History of the National Security Council, 1947-1997, http://www.fas.org/irp/offdocs/nschistory.htm#history (last visited Mar. 23, 2010) ("The view that the NSC had been created to coordinate political and military questions quickly gave way to the understanding that the NSC existed to serve the President alone. The view that the Council's role was to foster collegiality among departments also gave way to the need by successive Presidents to use the Council as a means of controlling and managing competing departments . . . . The structure and functioning of the NSC depended in no small degree upon the interpersonal chemistry between the President and his principal advisers and department heads.").
limitation on inter-branch and inter-governmental communications, reducing congressional access to an informed picture of executive activities.237 This would be compounded by the independent operation of emergency agencies; a mandate to the President to detail his interaction with this infrastructure would result in the disclosure of the reports of only three agencies: the Department of Defense, the Federal Civil Defense Administration, and the Office of Defense Mobilization.238 And if the President determined when and how the Congress convened, as Eisenhower was reportedly determined to do,239 even modest attempts at investigation and inquiry would be stymied. As Professor Franklin notes, it is only "[a]s long as Congress is able to gain access to independent sources of information . . . [that] it will be able to bring to bear the impressive legislative powers granted to it by the Constitution."240

But we would also expect states, whose governors might be conscripted as "Provost-Marshal-Generals,"241 whose resources would be allocated according to regional priorities242 by OCDM,243 and whose historic limitations on the influence of martial control are

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237. See, e.g., Notes on Expanded Cabinet Meeting on 25 July 1956, supra note 197 ("The President made several comments: (a) If we are faced with the problem of handling 61,000 communications in the first three days, what each agency relocation head must do is assign the toughest "Inspector General" he can find to control the use of the communications system – and weed out messages which are unnecessary, over-lengthy and over-classified. As an example: if most of the Treasury Department's problems are going to take place later on, then communications with Treasury should be practically cut off at first . . . .")

238. See supra notes 38-39 and accompanying text.

239. See Memorandum on Mobilization Plan C from Victor Cooley, Acting Dir. of Office of Def. Management (Oct. 15, 1957) (on file with author) ("When you [Andrew J. Goodpaster] return and at your convenience I would like to set up a meeting with you and the White House lawyers and members of my staff to discuss emergency action documents. At that time we should also discuss arrangements for a meeting with Members of Congress as directed by the President at the time of his visit to [classified]. You will recall, he wishes to discuss with them the possibilities of a continuing resolution, which, in the event of an attack, would call for adjournment or recess and a meeting at the call of the President . . . .")

240. FRANKLIN, supra note 156, at 74; see, e.g., Richard B. Schmitt, Congress, Bush Poised for First Friction, L.A. TIMES, Jan. 3, 2007, at A7 (refusal of Justice Department to comply with request from Senator Patrick J. Leahy for production of documents pertaining to "CIA's detention and interrogation policies for suspected terrorists")

241. See supra notes 97-98 and accompanying text.

242. See WAGNER, supra note 28, at 37 ("Under existing laws the President does not have the authority to order State assistance, in the form of manpower or supplies, to be sent from one State to another. Martial law does give him this authority, which would be essential in nuclear-attack situations.")

243. See supra note 80 and accompanying text.
overruled by federal troops, to offer substantial resistance to long-term national reconstruction plans. This would be no easy task in post-atomic America, as state governments would be preoccupied with the plight of their citizens, and national interstate consultation mechanisms would in all likelihood have disappeared.

In fact, effective resistance against federal mandates is difficult enough today, in peacetime America; it is only with cases like United States v. Lopez and Printz v. United States that the Supreme Court has rediscovered that "power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments." In the latter case, Justice Scalia notes the fundamental
duty owed to the National Government, on the part of all state officials, to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law, and the attendant reality that all state actions constituting such obstruction, even legislative acts, are ipso facto invalid.

Yet he concurrently resists the idea that early American statutes imposing a duty upon states equate to a federal power of "state impressions," and rejects the imposition of a "balancing test" according to shared governmental priorities where "the whole object of [a federal] law [is] to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty." "Conscription" of state governments and their officers to effect federal decrees is, in short, "fundamentally incompatible with our constitutional system of dual sovereignty." In the former case, the Court cites NLRB v. Jones & Laughlin Steel Corp. and engages in a reexamination of
the scope of the interstate commerce power [which] "must be considered in the light of our dual system of government and may

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244. U.S. DEP'T OF THE ARMY, MILITARY ASSISTANCE TO CIVIL AUTHORITIES 10 (1966) ("A state may adopt its own concept of military control and define how the militia or National Guard, not in federal service, may be employed . . . . The distinction is of no practical importance to military personnel in active federal service, because their authority to act in martial rule situations can neither be enlarged nor limited by provisions of state law dealing with martial rule.")
248. 521 U.S. at 913.
249. Id. at 932.
250. Id. at 935.
251. 301 U.S. 1, 37 (1937).
not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.”

Would the states have adopted such an approach in an Eisenhower-era America, and would it have worked in a post-atomic nation struggling to regain some measure of normalcy? Historical conjecture is unavailing. But we can with some confidence opine that the Printz/Lopez philosophy represents one of the few fruitful paths of state resistance in the instant case. To quote Professor Althouse’s study of the “anti-commandeering” doctrine in the Age of Terror:

Without the ability to frame their resistance in the language of rights, state and local government officials might not be able to win public support for their resistance, which would otherwise resemble the federalism-based resistance to the civil rights movement that still merges federalism and hostility to rights in the public mind . . . . [T]he ability of state and local government to resist being commandeered creates pressure on the federal government not to go too far, not to put too low a value on individual liberty, so that they can inspire voluntary participation even in the places that have a strong tradition of valuing individual rights.

**D. The Judiciary: Midwife to a Constitutional Dictatorship?**

If the chief end of mankind, as Justice Holmes famously claimed, is to ignore specific facts in favor of the general and lasting propositions, can we dismiss the functional objections identified thus far and empower the courts to craft a grand limitation on emergency executive power? Existing precedent suggests a resoundingly negative answer, to the extent that the judiciary, in the words of Professor Rossiter, becomes an unwitting midwife to a constitutional dictatorship. “[I]n time of crisis,” due to judicial inaction or complicity, “a democratic, constitutional government must be temporarily altered to whatever degree is necessary to overcome the peril and restore national conditions . . . . [such that] government will have more power and the people fewer rights.” The “law of necessity” thus asserts itself, “a rationalization of extraconstitutional, illegal emergency action” that displaces civil liberties and republican guarantees.

Reflections on the classical conception of the nation-state,

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252.  514 U.S. at 557.
253.  Althouse, supra note 247, at 1257, 1261.
255.  Id. at 11 (emphasis omitted).
penned by philosophers known and appreciated by the Founders, suggest a deferential stance toward emergency actions. Hobbes vested permanent authority in the sovereign upon initial consent of the governed, subject only to the inability of that individual to protect his subjects from harm. John Locke argued that government arose from both the consent of and agreement among citizens, placing a check upon the excesses of an absolute monarch in the form of a legislature. Constrained, however, by his notion of the state of nature, in which anarchy drives individuals to form such a compact, Locke concluded that absolutism was permissible in a time of emergency – the legislature compelled to step aside and support their sovereign as he fought for national survival, even if his actions transgressed written or natural law. Rousseau subordinated the national leader to the legislature to an even greater extent than Locke, arguing that the “general will” would ensure the leader’s complicity, on pain of removal from office, in the protection of rights. But that same will, in the form of legislative approval, might countenance illegal actions in emergency – a development Rousseau classified under the generally beneficial concept of “contractual flexibility.” This spectrum of governance – which we might roughly categorize as a progression from European enlightened despotism to modern constitutionalism to the Articles of Confederation – uniformly provided for the transgression of law and liberties should state survival be in doubt.

This general line of thinking has certainly permeated the Supreme Court, where a hands-off approach to questions of excesses in extraordinary times has become an accepted precedent.

Here, it is useful to examine Professor Michael Gerhardt’s scholarship on path dependency in the high court, in which a principle of non-justiciability manifests itself in three concrete ways.

First, there are “foundational institutional practices” which “may be undone only through extremely radical, unprecedented acts of political and judicial will.” The practice most readily applicable to our discussion is the notion of the justiciable question, a more attenuated conceptualization of Marbury’s claim for the Court of “all cases arising under the constitution.” Baker v. Carr establishes several factors that may constitute a nonjusticiable political question

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256. FRANKLIN, supra note 156, at 26.
257. Id. at 27.
258. Id. at 26-29.
259. Id. at 33.
260. Id.
outside of the Court's domain, in which the case at bar reduces to "essentially a function of the separation of powers." These include:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Several of these factors might be brought to bear in the instant question of emergency executive powers. First, a textually demonstrable commitment might be broadly found in an enabling statute passed for the benefit of the President by the Congress; it might also be located in the continuity plans and reconstruction timetables created by executive agencies, acting pursuant to such a law. Of course, one might dispute what form a "textual commitment" ought properly take under the Constitution -- here, Justice Douglas' dissent in Richardson is enlightening, where he construes a nonjusticiable agency text to include a "generality of the accounts under every head of government" and regards as addressable by the court a textual commitment of the sort that "relegates to secrecy vast operations of government and keeps the public from knowing what secret plans concerning this Nation or other nations are afoot."

Second, an initial and necessary nonjudicial policy determination concerns decisions made about "controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch . . . [where the courts are required to] 'develop standards for matters not legal in nature.'" On what cases or legal tracts might the Court draw upon, upon what notions of fairness and equitability, to properly assess executive conduct in an emergency of unparalleled destructive dimensions in this nation's long history? And how equipped is the Court to comprehend and utilize, in a time of a grave

264. Id.
265. United States v. Richardson, 418 U.S. 166, 198, 201-02 (1974) (Douglas, J., dissenting) (agreeing with majority on standing issue but concluding that taxpayer-petitioner's request for information concerning operations conducted by the Central Intelligence Agency on grounds of public accessibility cannot be termed a "generalized complaint about the operation of government").
national disaster, particular confidential state machinations that may be vital to the survival of millions? Chief Justice Berger urged the judiciary to avoid encumbering itself in this difficult situation altogether in Nixon where, quoting from Reynolds, he mandated that the judiciary "should not jeopardize the security which the [executive] privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." 267

Finally, a lack of respect for the coordinate branches of government might be expressed in a ruling upon the limits of the President's role in exercising martial aid and law as Commander-in-Chief, or in taking steps to execute the laws, per his constitutional duty, by instituting broad reconstruction efforts. It might also trample agency discretion – in the case of the emergency agencies or of ODM and OCDM, as "[w]here the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation." 268 Ultimately, Matthews v. Diaz, ruling on the exclusion of certain aliens from federal medical welfare programs on grounds of continuous residency, holds that "[a]ny rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution." 269

As a corollary to the justiciable question requirements, "narrowness" stands as a resolution of "disputes between parties to a lawsuit rather than [an] invalidat[ion] [of] the acts of Congress or of the states." 270 The "ripeness doctrine," best exemplified by Abbott Laboratories, bars "the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." 271 Complaints rendered too quickly against emergency agencies, perhaps by states predicting the disastrous outcome of regional administration and resource allocation, would be blocked by this doctrine. Such a conclusion could also be buttressed by the "clear and present" doctrine of Bridges v. California, in which the

270. FRANKLIN, supra note 156, at 111.
court may refuse to hear any controversy that does not present a "clear and present danger" to the administration of justice.272

Gerhardt’s second category posits the existence of a particular “foundational doctrine” of jurisprudence, which consists of “decisions that govern, clarify, and undergird the Court’s standard of review, or approach to, certain general categories, kinds, and classes of constitutional disputes.”273 Here stands Blaisdell, which reminds us that for every check instituted by the Founders on extraordinary interference in private affairs, broad clauses borne of turbulent times of economic and social distress permit courts to afford the executor of war and emergency powers substantial latitude.274 Justice Jackson’s dissent in Korematsu also belongs in this category; though he denounced the majority’s “distort[ion] [of] the Constitution to approve all that the military may deem expedient,”275 he nonetheless deemed it to “be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality.”276 By want of justiciable “evidence” and “made on information that often would not be admissible and on assumptions that could not be proved,” Justice Jackson concluded that the domestic exercise of martial authority is “not susceptible of intelligent judicial appraisal.”277 These “foundational doctrines,” less abstract than the preceding institutional practices, caution the courts to adopt a deferential and circumspect attitude towards matters of national security and national survival, fraught with economic and military data far outside the scope of the rules of evidence. They also prompt a finding of a nonjusticiable political question under Baker’s “lack of judicially discoverable and manageable standards for resolving it” standard noted above.278

Finally, we come to Gerhardt’s last category, “deeply entrenched constitutional law in our society [which] consists of particular constitutional decisions that are well settled and practically immune to reversal.”279 These are compounded by “non-judicial precedents,” which include, inter alia, the reservation of the “final constitutional judgment” to re-organize the structure of the federal government to authorities external to the Court.280 Ex parte Milligan281 exemplifies

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272. 314 U.S. 252, 263 (1941).
273. Gerhardt, supra note 261, at 951.
275. Ex parte Mitsuye Endo, 323 U.S. 283, 244 (1944) (Jackson, J., dissenting).
276. Id.
277. Id. at 245.
279. Gerhardt, supra note 261, at 950-951.
280. Id. at 986-987.
the former sort of popular precedent, where absent explicit statutory authority the commander-in-chief may exercise substantial control over the exercise of civil liberties with the Court's blessing.\textsuperscript{282} The Prize Cases,\textsuperscript{283} though decided according to an interpretation of executive war powers, better fits into this category; in retroactively approving all of Lincoln's actions associated with the disputed naval blockade, Congress instituted a precedent of post hoc executive absolution. As Professor Keynes notes, these "decisions vitiate the constitutional equilibrium between Congress and the President, since the legislature is unlikely to override the commander in chief's conduct once military hostilities are in progress."\textsuperscript{284} And in legitimating them, "the Supreme Court also undermined the separation of powers . . . [and] legitimated the transfer of the auxiliary war powers to the President . . . [and] simply accepted the President's exercise of power that is vested exclusively in Congress."\textsuperscript{285} Both precedents enable the Court to effectively wash its hands of troublesome questions of excesses of executive power; if the President frames emergency actions in terms of the military or national security or vital execution of the laws, or if Congress later gives a blanket blessing to them (regardless of its relative stature and access to information vis-à-vis the executive branch, as discussed in the previous section), then the actions pass constitutional muster. They pass, though, not through any substantial weighing of necessity versus exercise, or even a sustained inquiry into extant conditions and their demands, but by simple deference to tradition.

Is it possible for the Court to overcome entrenched practices and non-judicial precedents and proclaim a long-standing or popular allocation of power unconstitutional?\textsuperscript{286} INS v. Chadha demonstrates

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281. 71 U.S. 2, 2 (1866).
283. 67 U.S. 635 (1863) (holding that President Lincoln was empowered to meet a rebellion with extraordinary military actions of his own accord, including a naval blockade of Confederate ports and seizure of vessels bound for them).
284. Keynes, supra note 173, at 108.
285. Id. at 108-09.
286. Duncan v. Kahanamoku, 327 U.S. 304, demonstrates another instance where the judiciary rejects unfettered executive-military authority. I feel this case does not overcome the precedential criteria explicated in this section, as its temporal qualities – Duncan raised his claim when the bombing of Pearl Harbor was years old and further continental attacks were unlikely – are of a more definite nature than the emergencies contemplated in this case. A discrete war, with certain victory conditions, is eminently more amenable to judicial evaluation of emergency actions.
\end{footnotes}
that it is. Not only did Justice Berger rule against the House’s instant use of a legislative veto on immigration rulings, but he overruled the one-house instrument in toto, declaring it incompatible with the Constitution’s prerequisite of presentment to the President.287 This severely scaled back the reach of the general legislative veto, a device with its roots in the New Deal presidency.288 But Chadha is one case, and as Professor Franklin notes, its impact has been dulled by a congressional end run around it, via “informal arrangements with the executive branch that [are] in every sense functional legislative vetoes.289

In analyzing the historical functions of precedent, Gerhardt suggests that the Court’s traditional role as “moral educator” of the public, fundamentally incompatible with modern democracy, should be regarded as an outmoded academic conceit.290 I think adopting an approach like this one, as opposed to balancing the historical weight and practical effect of particular non-judicial precedents, or discarding institutional precedents on an ad hoc basis (say, to meet the clamor of a dissatisfied state government or populace demanding an immediate redress of grievances), is the prudent course for the Court in a time of emergency. Gerhardt traces the decline of the Court’s responsibilities in this area to a general sentiment that “the notion of the Court as educator was hard to square with our democratic system of government.”291 Should it not therefore embrace this role when democracy is at a premium, when constitutional protections need to be restated and reinforced against a chaotic surge of executive authority?

As Professor Rossiter notes, “the plea [for] necessity for any dictatorial action will almost always be honored by the courts, the legislature, and the people,” when “an official entrusted with some unusual duty under martial rule [will] be made to answer . . . [and] held responsible for them after its termination.”292 Anything less than the “categorical principle of [acceptable] constitutional [dictatorship] that every public act must be a responsible one and have a public explanation”293 cannot be tolerated. Although “[e]very period of democratic autocracy leaves democracy just a little more autocratic than before, . . . the termination of the crisis must be followed by as complete a return as possible to the political and governmental conditions existing prior to the initiation of the

288. See Franklin, supra note 156, at 85.
289. Id. at 86.
290. See Gerhardt, supra note 261, at 978.
291. Id.
292. Rossiter, supra note 254, at 305.
293. Id.
constitutional dictatorship.”294 It is incumbent upon the Court, whether in the role of moral educator or otherwise, to fulfill these duties. Only the Court, with its detached perspective on the operations of government, the inherent prestige of its members, and the understanding of the traditions and developmental patterns of constitutional government can accomplish these tasks. It alone can guard, as zealously and completely as possible, civil liberties and republicanism, during the desperate hours after a crisis in the homeland. It alone can rule with foresight, free of the myopic concerns of resource allocation of the executive and jealous prerogative preservation of the legislature. Entrenchment in precedent and foundational institutionalism conspire against such an undertaking, but just as the executive contemplating national reconstruction turns to untried means and methods, so too must the Court embrace a path independent approach in the name of constitutional rejuvenation.

IV. “WHETHER THE POTENTIAL LOSS OF FREEDOM CAN BE AVOIDED”

In our final consideration of whether anything may be done to slow the inexorable slide toward executive dominance, we are brought back full circle to the thinking of the 1950s. The contemporary fears of unbridled federalism afford some recourse to meet the still-extant challenge of Blaisdell, where checks on expansive executive authority are so easily overridden by its product, “the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation.”295

Yale Professor Harold D. Lasswell, reflecting upon the “economic despotism” and bipolar nature of the Western world in 1950, prognosticated as to the dangers of an emerging “garrison-police state” in National Security and Individual Freedom.296 This short text linked increased defense spending and private investment interests therein to a “centralization of functions” under federal leadership and absorption of “state and local governments . . . under the fiscal and regulatory arrangements of Washington.”297 Concomitant with these developments, Lasswell contended, would emerge a “dim-out on the sources and channels of public information,” the gradual “undermining of the press and public opinion . . . [akin to] death by slow strangulation more than heart failure,” the recasting of “[n]ational policy . . . [as] a matter of deals made between national pressure-group officials and the bureaucracy

294. Id. at 306.
296. HAROLD D. LASSWELL, NATIONAL SECURITY AND INDIVIDUAL FREEDOM (1950).
297. Id. at 29-30.
of executive departments and agencies," a "decline" of the Senate and the House of Representatives "as effective agencies for controlling the executive" due to "the drying up for informed public opinion," and a lassitude among "the courts to provide some defense [of civil liberties] in future crises, even though the defense gradually crumbles."  

But Lasswell also promulgated a four-part test for "every program put forward on behalf of national security," a test centered on those principles of republican government "peculiarly likely to be violated during a prolonged period of crisis";  

1. Is there a threat to the principle of civilian supremacy in our system of government? 
2. Does the policy involve a threat to freedom of information? 
3. Is there danger to the civil liberties of the individual? 
4. Does the policy violate the principle of a free as against a controlled economy?  

"If the answer to any question is in the affirmative," he concluded, "the problem is to determine whether the potential loss of freedom can be avoided or reduced without endangering national security beyond the margin of reasonable risk."  

At their core, I think, Lasswell's arguments concerned responsibility – responsibility of the courts to administer the test in a definitive fashion, responsibility of Congress to promulgate within its ranks a proactive defense of the test's values, and the responsibility of the courts again to view themselves as guardians of the American "lexocracy," protectors of liberties rather than permissive gatekeepers through which situational exceptions to the rules squeeze through. Responsibility is a value celebrated in hindsight – take, for example, the champions of Lasswell's time, men of conscience who resisted the sweeping anti-communist movement – but difficult to practice when needed most. Amidst legislators exists the temptation to play to public sentiment, to whitewash the excesses of an executive in the name of the vox populi. Amongst the courts stand the many judicially-created barriers against direct involvement in "political" questions, the traditional deference of arbiters to refrain from comment on all but tangible questions of statutory interpretation. But these attitudes cannot stand lest our surprise and suspicion, rightly aroused by the sort of reworking of the federal government promoted by executive machinations like the Eisenhower  

298.  Id. at 30, 33, 37, 38, 46. 
299.  Id. at 57. 
300.  Id. 
301.  Id. 
302.  Id. at 119, 133.
continuity plans, lapse into a weary sense of resignation.

As Professor Rossiter notes, "[a] declaration of martial law or the passage of an enabling act is a step which must always be feared and sometimes bitterly resisted, for it is at once an admission of the incapacity of democratic institutions within which they function."303 Lest we, upon self-reflection, conclude that we protest too much, it is incumbent upon us to remember that in all of history, "[n]o constitutional government ever passed through a period in which emergency powers were used without undergoing some degree of permanent alteration, always in the direction of an aggrandizement of the power of the state."304 Pleins pouvoirs are instruments of extraordinary malleability, both without — to mold the remnants of a populace after a brutal attack into a coherent nation state — and within — where such authority is molded into an extension of executive will or whim, an appendage that reaches through checks and balances to seize whatever the chief desires.

My goal in this Article has not been to suggest that an expansion of executive authority in times of emergency is an unequivocal disaster for federalism and its civil guarantees. A nuclear conflict, or a modern-day attack on the homeland that engenders similar results, compels those in authority, nolens volens, to take prompt action for the welfare of the people. But I think that overly ambitious responses — think of the Eisenhower Administration with its self-perpetuating emergency agencies, its immediate recourse to martial law, its regional control of state resources and manpower, its check on communications among and provisions for those branches of government deemed less than "essential" — have within them the potential to supplant the constitutional operation of government in the name of preserving that way of life. This conclusion is not novel, nor even especially unusual in this Age of Terror. But our examination of the Eisenhower continuity plan does bring something new to the dialogue on executive authority. Just as ODM and OCDM had designed Emergency Action Orders to go into effect from the moment of attack, and appointed untried and unconfirmed administrators to issue broad directives in the days that followed, so the Congress and the judiciary must draft similar forward-thinking plans. For the former, it means a preservation of prerogative, a guarantee that legislative inquiry, interstate commerce regulation, and budgetary control must not devolve into mere dalliances; for the latter, it means a new constitutional philosophy in which uplifting an embattled populace need not crush their rights underfoot. Think of it as an "exit strategy" for the Constitution — the breaking point for the

303. ROSSITER, supra note 254, at 294.
304. Id. at 295.
trade of civil liberties for aid and comfort – the instant where one threat, of roentgens and rubble, can no longer justify a far greater one to our republican way of life.