



IEEPS & PEADS ON My : THE PRESIDENCY ~ TOO BIG TO FAIL?

presidential power exceeds their commitment to individual liberties.

All but two of the emergency declarations in effect today were issued under the **International Emergency Economic Powers Act**, or **IEEPA**. Passed in 1977, the law allows the president to declare a national emergency “to deal with any unusual and extraordinary threat that “has its source in whole or substantial part outside the United States.” The president can then order a range of economic actions to address the threat, including freezing assets and blocking financial transactions in which any foreign nation or foreign national has an interest.

After 9/11 George Bush’s *Executive Order 13224* prohibited transactions not just with any suspected foreign terrorists, but with any foreigner **or any U.S. citizen** suspected of providing them with support. *Once a person is “designated” under the order, no American can legally give him a job, rent him an apartment, provide him with medical services, or even sell him a loaf of bread unless the government grants a license to allow the transaction. The patriot Act gave the order more muscle, allowing the government to trigger these consequences merely by opening an investigation into whether a person or group should be designated.*

Designations under Executive Order 13224 are opaque and extremely difficult to challenge. The government needs only a “reasonable basis” for believing that someone is involved with or supports terrorism in order to designate him. The target is generally given **no advance notice and no hearing**. He may request reconsideration and submit evidence on his behalf, but the government **faces no deadline to respond and does not have to prove its charges in court**. Moreover, the evidence against the target is typically classified, which means he is not allowed to see it. He can try to challenge the action in court, but his chances of success are minimal, as most judges defer to the government’s assessment of its own evidence.

For instance, two months after 9/11, the Treasury Department designated Garad Jama, a Somali-born American, based on an erroneous determination that his money-wiring business was part of a terror-financing network his **office was shut down** and his **bank account frozen**. Only after he filed a lawsuit did the government allow him to work as a grocery-store cashier and pay his living expenses. It was several more months before the government *reversed* his designation and *unfroze* his assets. By then he had lost his business

IEEPA’s limits have yet to be fully tested. After two courts ruled that the government’s actions against American charities were unconstitutional, Barack Obama’s administration chose not to appeal the decisions and largely refrained from further controversial designations of American organizations and citizens. Trump has had no hesitation characterizing the caravan of Central American asylum seekers headed toward the U.S. border seek asylum as a “National Emergency.” He has that authority under **IEEPA**. He could determine that any American inside the U.S. who offers material support to the asylum seekers—or, for that matter, to undocumented immigrants inside the United States—poses “an unusual and extraordinary threat” to national security, and authorize the Treasury Department to take action against them.

Individuals targeted by the order could lose their jobs, and find their bank accounts frozen and their health insurance canceled. The battle in the courts would then pick up exactly where it left off during the Obama administration—but with a newly reconstituted Supreme Court making the final call.

The idea of how readily those big Abrams tanks could start rolling through the streets of U.S. cities like ours is not so surprising to many Americans. “**Posse Comitatus**” is not a constitutional rule. The Constitution, however, does not prohibit military participation in police activity. Nor does the Posse Comitatus Act of 1878 outlaw such participation; it merely states that any authority to use the military for law-enforcement purposes must derive from the Constitution or from a statute.

The Insurrection Act of 1807 provides the necessary authority. As amended over the years, it allows the president to deploy troops upon the request of a state’s governor or legislature to help put down an insurrection within that state. It also allows the president to deploy troops unilaterally, either because he determines that rebellious activity has made it “impracticable” to enforce federal law through regular means, or because he deems it necessary to suppress “insurrection, domestic violence, unlawful combination, or conspiracy” (terms not defined in the statute) that

hinders the rights of a class of people or “impedes the course of justice.”

Presidents have wielded the Insurrection Act under a range of circumstances. Dwight Eisenhower used it in 1957 when he sent troops into Little Rock, Arkansas, to enforce school desegregation. George H. W. Bush employed it in 1992 to help stop the riots that erupted in Los Angeles after the verdict in the Rodney King case. George W. Bush considered invoking it to help restore public order after Hurricane Katrina, but opted against it when the governor of Louisiana resisted federal control over the state’s National Guard.

Trump could characterize sanctuary cities—cities that refuse to provide assistance to immigration-enforcement officials—as “conspiracies” against federal authorities, and order the military to enforce immigration laws in those places. Conjuring the specter of “liberal mobs,” he could send troops to suppress alleged rioting at the fringes of anti-Trump protests.

If you are thrilled by **IEEPA**, try **PEADS**, a series of directives known as **Presidential Emergency Action Documents**. These are draft executive orders, proclamations, and messages to Congress that are prepared in advance of anticipated emergencies. **PEADS** are closely guarded within the government; none has ever been publicly released or leaked. But their contents have occasionally been described in public sources, including FBI memorandums that were obtained through the Freedom of Information Act as well as agency manuals and court records. According to these sources, **PEADS** drafted from the 1950s through the 1970s would **authorize not only martial law but the suspension of habeas corpus by the executive branch, the revocation of Americans’ passports, and the roundup and detention of “subversives” identified in an FBI “Security Index” that contained more than 10,000 names.**

In 1987, The Miami Herald reported that Lieutenant Colonel Oliver North had worked with the **Federal Emergency Management Agency** to create a secret contingency plan authorizing “*suspension of the Constitution, turning control of the United States over to FEMA, appointment of military commanders to run state and local governments and declaration of martial law during a national crisis.*” After WWII, J. Edgar Hoover asked for similar powers from Truman. Attorney General John Mitchell under Nixon had a plan. Certainly VP Cheney had one too.

A 2007 Department of Homeland Security report lists “**martial law**” and “**curfew declarations**” as “**critical tasks**” that local, state, and federal government should be able to perform in emergencies. Since 2012, the Department of Justice has been requesting and receiving funds from Congress to update several dozen **PEADS** first developed in 1989. The funding requests contain no indication of what these **PEADS** encompass, or what standards the department intends to apply in reviewing them. But whatever the Obama administration’s intent, it is Trump’s Attorney General to decide actually use them.

In the case in which the Supreme Court blocked President Truman’s attempt to seize the nation’s steel mills, Justice Jackson observed that broad emergency powers were “*something the forefathers omitted*” from the Constitution. “*They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation,*” he wrote. “**We may also suspect that they suspected that emergency powers would tend to kindle emergencies.**”

What has prevented the wholesale abuse of these authorities until now is a baseline commitment to liberal democracy on the part of past presidents. Under a president who doesn’t share that commitment, what might we see? Using the Presidential Alert system first tested in October 2018, the president sends a text message to every American’s cellphone, warning that there is “*a risk of violence at polling stations*” and that “*troops will be deployed as necessary*” to keep order. Some members of opposition groups are frightened into staying home on Election Day; other people simply can’t find accurate information online about voting. With turnout at a historical low, a president who was facing impeachment just months earlier handily wins reelection—and marks his victory by renewing the state of emergency. Authoritarians Trump has openly claimed to admire—including the Philippines’ Rodrigo Duterte and Turkey’s Recep Tayyip Erdoğan—have gone this route.

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Now that the President has declared a “national emergency”—a decision that is entirely within his discretion—**more than 100 special provisions** are available to him. For instance, the president can, with the flick of his pen, activate laws allowing him to shut down many kinds of electronic communications inside the United States or freeze Americans’ bank accounts. Other powers are available even without a declaration of emergency, including **laws that allow the president to deploy troops inside the country** to subdue domestic unrest.

Aiming to rein in this proliferation, Congress passed the **National Emergencies Act in 1976**. Under this law, the president *still has complete discretion* to issue an emergency declaration—but he **must specify** in the declaration which powers he intends to use, **issue public updates** if he decides to invoke additional powers, and report to Congress on the government’s emergency-related expenditures **every six months!!!** The state of emergency expires after a year unless the president renews it, and **the Senate and the House must meet every six months** while the emergency is in effect “*to consider a vote*” on termination.

By any objective measure, the law has failed. **Thirty states of emergency are in effect today**—several times more than when the act was passed. Most have been renewed for years on end. And during the 40 years the law has been in place, **Congress has not met even once, let alone every six months**, to vote on whether to end them.

As a result, the president has access to emergency powers contained in 123 statutory provisions, as recently calculated by the Brennan Center for Justice at NYU School of Law, where I work. The *National Emergencies Act* doesn’t require that the powers invoked relate to the nature of the emergency. Take a moment to consider that during a declared war or national emergency, the president can unilaterally suspend the law that bars government testing of biological and chemical agents on unwitting human subjects.

Just by using the amended **Section 706 of the Communications Act of 1934** which allows the president to shut down or take control of “*any facility or station for wire communication*” upon his proclamation. Under this interpretation, Section 706 could effectively function as a “**kill switch**” in the U.S.—one that would be available to the president the moment he proclaimed a mere threat of war. It could also give the president power to assume control over U.S. internet traffic.

The potential impact of such a move can hardly be overstated. In August, in an early-morning tweet, Trump lamented that search engines were “**RIGGED**” to serve up negative articles about him. If the government were to take control of U.S. internet infrastructure, **Trump could ensure that internet searches always return pro-Trump content as the top results**. The government also would have the ability to impede domestic access to particular websites, including social-media platforms. It could monitor emails or prevent them from reaching their destination. It could exert control over computer systems (such as states’ voter databases) and physical devices (such as Amazon’s Echo speakers) that are connected to the internet.

Complete control of internet content would not be necessary for Trump’s purposes; even with less comprehensive interventions, he could do a great deal to disrupt political discourse and hinder effective, organized political opposition. Indeed, all it would take is five Supreme Court justices whose commitment to