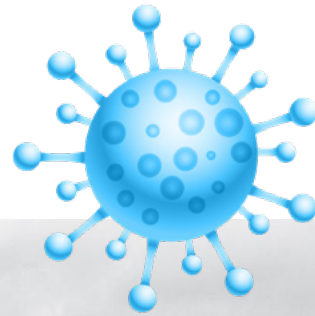
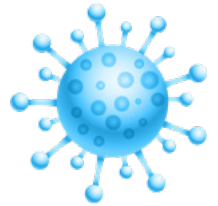
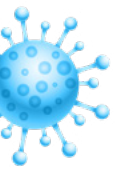




Disease Outbreak and National Security: Drawing Lessons from the COVID-19 Crisis to Improve Emergency Response

Balaji L. Narain



In response to the COVID-19 crisis, Presidents Donald Trump and Joe Biden have invoked statutory authorities to obtain medical equipment and stem the spread of the virus. Their actions provide an opportunity to reflect on how the current disaster response statutory framework treats healthcare crises and disaster response more generally. Indeed, under the existing federal statutory framework, disaster preparation is ingrained as a core priority for national security, whereas disaster response is not. Presidents Barack Obama, Trump, and Biden all invoked statutory authorities to address healthcare challenges and disease outbreaks that occurred under their watch. The different combination of authorities invoked by each reveals the extent to which the architects of the disaster response framework considered healthcare crises a threat to national security. I propose a new statute that would cement an understanding of disease outbreak as a national security threat and recognize that disaster response is as critical to national security as preparedness.

On March 13, 2020, President Donald Trump proclaimed a national emergency in response to the novel coronavirus (COVID-19).¹ After pronouncing these “[t]wo very big words,”² Trump also proclaimed his intention “to unleash the full power of the federal government.”³ Subsequently, he declared “major disasters” caused by COVID-19, expanding the declarations to encompass all 50 states, the District of Columbia, and four territories.⁴ This marked the first time that a president has invoked the National Emergency Act and the Stafford Act in response to a single crisis and the first time that a major disaster has been declared in all 50 states in response to a single event or crisis.⁵

A robust response was well warranted, as the outbreak of COVID-19 created risks for U.S. national security. It has threatened the well-being of the nation and has diverted the attention and resources of the government away from other national security threats.⁶ Nevertheless, the current federal response is insufficient because it relies on an outdated statutory framework that does not always recognize that healthcare challenges can be national security threats or that disaster response is also a national security concern.

The outbreak of COVID-19 has provided an opportunity to reconsider the current emergency and disaster response statutory framework. Federal law acknowledges that certain healthcare challenges,

1 “Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak,” Trump White House Archives, Mar. 13, 2020, <https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

2 “Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Conference,” The White House, Mar. 13, 2020, <https://www.govinfo.gov/content/pkg/DCPD-202000153/pdf/DCPD-202000153.pdf>.

3 The White House, “Remarks by President Trump.”

4 “COVID-19 Disaster Declarations,” Federal Emergency Management Agency, accessed Jan. 23, 2022, <https://www.fema.gov/coronavirus/disaster-declarations>.

5 Research by the Congressional Research Service also found that Trump’s declarations of “major disasters” constituted “the first time a major disaster declaration has been authorized under current law in response to a public health incident.” “Emergency Authorities Under the National Emergencies Act, Stafford Act, and Public Health Service Act (R46379),” Congressional Research Service, 2020, 21, note 57, <https://crsreports.congress.gov/product/details?prodcode=R46379>.

6 Although Department of Defense officials did not publicly state that COVID-19 has undermined troop readiness, efforts undertaken to prevent the spread of disease can impact steady-state operations, such as by reducing exercises that promote interoperability with partner nations. Mark Cancian, “How Coronavirus Could Hurt U.S. Military Readiness,” *Forbes*, Mar. 11, 2020, <https://www.forbes.com/sites/markcancian/2020/03/11/will-covid-19-devastate-military-readiness/#75c9b1661e10>; and “Strait and Harrow: With the World Distracted, China Intimidates Taiwan,” *The Economist*, Apr. 8, 2020, <https://www.economist.com/asia/2020/04/08/with-the-world-distracted-china-intimidates-taiwan>.



such as disease outbreaks, could present threats to national security, and that responses to such events are national security challenges.⁷ This orientation is statutorily cemented in preparation and prevention, but is less concerned with what comes after the disease has started spreading domestically. This paper explores the organization of emergency response and its implications for national security. The legislative reforms offered here could help to solidify the national security orientation of responses to public health crises and could spur the federal government to play a more proactive role in such responses.

It is unlikely that COVID-19 will be the last event of its kind. Future outbreaks of disease may again impact the United States on a national level with particularly virulent effects that could overwhelm the capabilities of certain state and local authorities. The global spread of COVID-19 and the unsteady federal response have demonstrated that disaster response and national security should not be viewed by policymakers as two separate paradigms. Acknowledging how public health crisis response is related to national security, and not merely to health and welfare concerns, is an important conceptual step toward crafting a response that uses the entire federal government to contain public health disasters more quickly.

In addition to highlighting the need to think about treating disaster response, in particular to disease outbreaks, as a national security challenge, COVID-19 has thrown a spotlight on the gaps in the statutory framework that authorizes emergency and disaster response. Trump has come under criticism for taking an approach that, while invoking the powers afforded by Congress, preferred to let the federal government play a supporting role to states, creating a leadership vacuum in the response to the crisis.⁸ This approach does not merely reflect political will or philosophy but also the underlying statutory framework that limits the federal government's involvement in disaster response, even when responding to a problem of national concern. The legislative amendments

suggested later in this paper would provide a stronger, more coherent framework for federal agencies to assert a more central role in disaster response, while retaining congressional oversight. In contrast to his predecessor, President Joe Biden has sought a more robust role for the federal government in combating COVID-19. For instance, as documented below, he has not only declared national emergencies, but he has also asserted authorities under national security statutes to acquire and distribute vaccines and other vital medical equipment.

The outbreak has highlighted an opportunity to update and harmonize disparate legislation to cement an understanding that disaster response can implicate national security as much as disaster preparedness.

Presidents have long claimed and exercised the authority to recognize and respond to states of emergency. This general authority has been supplemented with specific grants of power by Congress, allowing the executive branch to deploy funding and resources to combat such crises. However, these resources and powers vary, depending on the type and nature of the crisis at hand. The primary statutes concerning responding to national emergencies are the National Emergencies Act and the Stafford Act, each serving different purposes.⁹ The recent and ongoing spread of COVID-19 has thrown the strengths and weaknesses of this landscape into sharp relief and has thus highlighted opportunities for improvement. The current statutory framework has two key gaps. The first is the inconsistent criteria in the U.S. code for when the president might respond to emergencies or disasters. The second is the lack of explicit inclusion of health-related emergencies like pandemic events in the provisions of federal law concerning emergency

7 James G. Hodge, Jr. and Kim Weidenaar, "Strengthening National Security by Protecting Public Health: Public Health Emergencies as Threats to National Security," *Journal of National Security Law and Policy* 9, no. 1 (2017): 81, 86–88, 90–93, <https://jnslp.com/2016/09/27/public-health-emergencies-threats-national-security/>. However, other authors criticize efforts to equate pandemic response with national security. Robert Malley and Stephen Pomper, "The Perils of Hying Pandemic Response as a National Security Issue," *Just Security*, May 4, 2020, <https://www.justsecurity.org/70001/the-perils-of-hying-pandemic-response-as-a-national-security-issue/>.

8 Emily Berman, "The Roles of the State and Federal Governments in a Pandemic," *Journal of National Security Law and Policy* 11, no. 1 (2020): 79, <https://jnslp.com/2020/10/19/the-roles-of-the-state-and-federal-governments-in-a-pandemic/>.

9 Pub. L. No. 94-412, 90 Stat. 1255 (1976), 50 U.S.C. §§ 1601–1651; and Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 100-707, 102 Stat. 4689 (1988), 42 U.S.C. §§ 5121–5191.

response. I propose legislation to address both.

There is already considerable literature on emergency powers,¹⁰ the authority of the president to respond to emergencies, and the interplay with Congress' constitutional powers and responsibilities.¹¹ Putting aside the normative question of whether or to what extent a president ought to have unilateral authority to respond to crises, I assess the current state of the law, which provides the president with broad latitude to act, but within parameters set by Congress. The ongoing COVID-19 pandemic and the efforts to combat its health and economic effects demonstrate how legislative reform could help to streamline the exercise of federal power to respond to public health crises. The outbreak has highlighted an opportunity to update and harmonize disparate legislation to cement an understanding that disaster response can implicate national security as much as disaster preparedness.

COVID-19 has exposed several gaps in current thinking about what constitutes an emergency and when the president may act in urgent circumstances. Not willing to let a crisis go to waste, this paper proposes a new Emergencies and Disasters Response Act, which would set uniform criteria to declare and respond to emergencies or other crises. The focus of the proposed legislative reform is to ensure that response to infectious disease outbreak is overtly recognized as impacting national security as much as preparation and is prioritized accordingly. Done correctly, this new legislation would not only provide new authority to the president but would also enable Congress to exercise meaningful oversight by establishing coherent criteria for the president to invoke such authority.

The legislative proposal would create a new framework that would be applicable to all emergencies. However, the content of the reform is informed by the recent COVID-19 crisis and by lessons learned from the federal response. Although the goal is not to create a parallel legislative framework to address future pandemic crises, the proposed legislation would expressly include public health threats as events warranting federal involvement and relief. The difference between the proposed approach and the current paradigm is not simply conceptual. The proposed legislation

would encourage a whole-of-government response to disasters and encourage the use of the national security apparatus to contain the damage. As COVID-19 has shown, when the federal government is slow to acknowledge the significance of a disaster or its national security implications, state and local authorities may be unable to contain the damage.

The purposes behind the proposed legislative revisions are manifold. They would help to create a common language for what constitutes an emergency or threat to the United States that could be used in different contexts, thus providing the outer boundaries of when the president can act. The legislative revisions would also impel the federal government to be more proactive in responding to domestic crises, particularly those involving infectious diseases, and would place the federal government on firmer ground in terms of its authority to respond to such crises.

The paper proceeds as follows. The second section briefly addresses the national security implications of COVID-19 and how the disease has posed a threat both domestically and abroad. Section three discusses the national emergency paradigm and different authorities — inherent and legislative — that empower a president to recognize a state of emergency and respond thereto. The fourth section looks back at pandemic response and the use of national emergency authority under the Obama administration. Section five examines particular uses of these authorities during the Trump administration, both before and during the COVID-19 outbreak. Section six looks at how the Biden administration has handled the outbreak thus far. Section seven draws on these lessons to suggest new legislation to simplify and harmonize different authorities to recognize and respond to emergencies, particularly those pertaining to public health challenges.

10 Bruce Ackerman, "The Emergency Constitution," *Yale Law Journal* 113, no. 5 (March 2004), <https://www.yalelawjournal.org/essay/the-emergency-constitution>.

11 David J. Barron and Martin S. Lederman, "The Commander in Chief at the Lowest Ebb — Framing the Problem, Doctrine, and Original Understanding," *Harvard Law Review*, no. 121 (2008), <https://harvardlawreview.org/2008/01/the-commander-in-chief-at-the-lowest-ebb-ae-framing-the-problem-doctrine-and-original-understanding/>; Patrick A. Thronson, "Toward Comprehensive Reform of America's Emergency Law Regime," *University of Michigan Journal of Law and Reform*, no. 46 (2013), <https://repository.law.umich.edu/mjlr/vol46/iss2/19/>; and Joshua L. Friedman, "Emergency Powers of the Executive: The President's Authority When All Hell Breaks Loose," *Journal of Law and Health* 25, no. 2 (2012): 275, <https://engagedscholarship.csuohio.edu/jlh/vol25/iss2/4/>. ("However, in the case of an emergency action, such as a disaster occurring within a state whereas the President has to send in the National Guard to maintain order, the President's powers must be absolute and not subject to congressional or judicial scrutiny.")



COVID-19's Effects on U.S. National Security

Invoking “national security” has become a kind of talisman used to elevate the importance of any given topic. Views about what is included in national security have become increasingly expansive, provoking criticism that an imprecise, over-inclusive conception of national security risks blurring the line between domestic and foreign concerns,¹² which would make the breadth of national security potentially limitless. However, not every issue of national importance implicates national security.

Defining the outer limits of U.S. national security interests is beyond the scope of this paper. But even a less-expansive definition of national security would include disease outbreak events.¹³ As COVID-19 demonstrated, a public health crisis can forcefully disrupt the normal operations of all branches of the federal government.¹⁴ Former Assistant to the President for Homeland Security and Counterterrorism, and current Deputy Attorney General, Lisa Monaco has taken this position, saying, “There is ample reason to treat pandemic disease as a national security priority.”¹⁵ Policymakers

should treat pandemic disease as a national security priority, not because invoking national security brings robust federal national security apparatuses into operation, but because of the direct and indirect effects of such disease on Americans’ physical safety and the normal functioning of civic bodies. The 2017 *National Security Strategy* noted that the spread of infectious disease has significant implications for U.S. national security, whether in the form of a deliberate attack or zoonotic spread.¹⁶

The threat of disease to troop health and wellness has proven commonplace in conflict after conflict. COVID-19 has demonstrated that this remains true even in an era of modern medicine, with the virus affecting troop wellness, readiness, and deployment rotations. The COVID-19 outbreak has caused the service branches to adjust their accessions processes, and the Department of Defense has considered guidelines that would disqualify prospective enlistees if they had previously contracted COVID-19.¹⁷ Moreover, to curtail the spread of the disease, the Department of Defense issued a series of “stop travel” orders.¹⁸ This affected the tempo of personnel movement to and from deployed locations.¹⁹ COVID-19 has resulted in a

12 Laura K. Donohue, “The Limits of National Security,” *American Criminal Law Review*, no. 48 (2011): 1577, 1579, <https://scholarship.law.georgetown.edu/facpub/1010>. (“National security dominates the domestic discourse . . . making it the United States’ most powerful institutional engine.”)

13 Donohue, “The Limits of National Security,” 1584. (“I do not adopt a definition [of national security] based on a specific subject matter, such as foreign relations. Instead, to understand what we mean by ‘national security’ I look to the object that is to be secured and the reason for its preservation—the purpose for which such object exists. The former, the object that is to be secured, is the political structure of government.”)

14 Claudia Grisales and Audrey Carlsen, “Congress And COVID-19: Members’ Cases And Quarantines,” *National Public Radio*, Feb. 8, 2021, updated Dec. 31, 2021, <https://www.npr.org/2020/04/15/833692377/how-the-coronavirus-has-affected-individual-members-of-congress>. Authorizing remote voting by proxy in the House of Representatives and providing for official remote committee proceedings during a public health emergency due to a novel coronavirus, and for other purposes, H.R. 965, 116th Cong. § 1 (2020); Adopting the Rules of the House of Representatives of the One Hundred Seventeenth Congress, and for other purposes, H.R. 8, 117th Cong. § 3(s) (2021); and “Court Orders and Updates During COVID-19 Pandemic,” United States Courts, accessed Jan. 23, 2022, <https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic>.

15 Lisa Monaco, “Pandemic Disease Is a Threat to National Security,” *Foreign Affairs*, Mar. 3, 2020, <https://www.foreignaffairs.com/articles/2020-03-03/pandemic-disease-threat-national-security>; and *Worldwide Threat Assessment of the U.S. Intelligence Community, Office of the Director of National Intelligence*, 2019, 21, <https://www.odni.gov/index.php/newsroom/congressional-testimonies/item/1947-statement-for-the-record-worldwide-threat-assessment-of-the-us-intelligence-community>. (“We assess that the United States and the world will remain vulnerable to the next flu pandemic or largescale outbreak of a contagious disease that could lead to massive rates of death and disability, severely affect the world economy, strain international resources, and increase calls on the United States for support.”)

16 *National Security Strategy of the United States of America*, The White House, December 2017, 9, <https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>. (“Naturally emerging outbreaks of viruses such as Ebola and SARS, as well as the deliberate 2001 anthrax attacks in the United States, demonstrated the impact of biological threats on national security by taking lives, generating economic losses, and contributing to a loss of confidence in government institutions.”)

17 “U.S. Army Places Temporary Hold on New Recruits to Basic Training,” U.S. Army Public Affairs, April 6, 2020, <https://www.army.mil/article/234280/?from=cv>; Meghann Myers, “Coronavirus Survivors Banned from Joining the Military,” *Military Times*, May 6, 2020, <https://www.militarytimes.com/news/your-military/2020/05/06/coronavirus-survivors-banned-from-joining-the-military/>; and Meghann Myers, “Republican Lawmaker Pushes Back on DoD Policy Barring Some Coronavirus Survivors from Enlisting,” *Military Times*, May 12, 2020, <https://www.militarytimes.com/news/your-military/2020/05/12/republican-lawmaker-pushes-back-on-dod-policy-barring-some-coronavirus-survivors-from-enlisting/>.

18 “Modification and Reissuance of DoD Response to Coronavirus Disease 2019 — Travel Restrictions,” Department of Defense, April 20, 2020, <https://media.defense.gov/2020/Apr/20/2002284632/-1/-1/1/MODIFICATION-AND-REISSUANCE-OF-DOD-RESPONSE-TO-CORONAVIRUS-DISEASE-2019-TRAVEL-RESTRICTIONS.PDF> (halting travel until June 30, 2020, with limited, enumerated exemptions); “Travel Restrictions for DoD Components in Response to Coronavirus Disease 2019,” Department of Defense, March 11, 2020, <https://media.defense.gov/2020/Mar/11/2002263242/-1/-1/1/TRAVEL-RESTRICTIONS-FOR-DOD-COMPONENTS-IN-RESPONSE-TO-CORONAVIRUS-DISEASE-2019.PDF> (superseded); and “Stop Movement for All Domestic Travel for DoD Components in Response to Corona virus Disease 2019,” Department of Defense, Mar. 13, 2020, <https://media.defense.gov/2020/Mar/13/2002264686/-1/-1/1/STOP-MOVEMENT-FOR-ALL-DOMESTIC-TRAVEL-FOR-DOD-COMPONENTS-IN-RESPONSE-TO-CORONAVIRUS-2019.PDF>.

19 Paul D. Shinkman, “U.S. Quarantines Troops in Afghanistan Coronavirus Fallout,” *U.S. News & World Report*, March 19, 2020, <https://www.usnews.com/news/national-news/articles/2020-03-19/us-quarantines-troops-in-afghanistan-amid-coronavirus-fallout>. (“To preserve our currently-healthy force, Resolute Support is making the necessary adjustments to temporarily pause personnel movement into theater.”)

reduction in the number of U.S. troops embedding with foreign troops for training, particularly with Iraqi security forces.²⁰ It has meant fewer missions in which U.S. personnel directly interact with foreign troops or foreign populations.

COVID-19 also shuttered production plants responsible for defense materiel. The effect has been global. Manufacturing plants in Mexico, for instance, were subject to local quarantine and lockdown rules, which placed pressure on the downstream contractors in the United States that relied on these plants to supply the armed forces.²¹

But the risks extended well beyond the immediate impact to America's armed forces. There have been other, subtler, national security risks arising from COVID-19. First, financial crises and recessions have occurred in emerging markets,²² exacerbating political instability.²³ Second, outbreaks and health crises have emerged in conflict zones, including infectious disease outbreaks in refugee camps. By mid-May 2020, for example, COVID-19 was making its way through Yemen,²⁴ a major conflict zone, as well as through Rohingya refugee camps in Bangladesh.²⁵ Subsequent waves of COVID-19 engulfed Yemen, whose healthcare system was already decimated by ongoing armed conflict, so that, by September 2021, Yemen had the highest

COVID-19 fatality rates in the world.²⁶ Third, COVID-19 strained the integrity of the food supply chain, resulting from both demand spikes and supply disruptions from labor shortages.²⁷ Indeed, according to the World Bank, COVID-19 is estimated to have increased the number of people facing food insecurity in 2020 and 2021.²⁸

COVID-19 also has demonstrably contributed to antidemocratic and authoritarian tendencies. Authoritarian governments in Africa have used COVID-19 as an excuse to prevent opposition rallies or to entrench their control.²⁹ China's national government has been using harsh measures to try to stamp out the virus, effectively quarantining huge swathes of its cities in response to individual cases.³⁰ Such actions have further fortified the Chinese central government's control. Even more problematic, leaders in ostensibly democratic nations have used COVID-19 as an opportunity to consolidate power.³¹ This is evident in Hungary, where Prime Minister Viktor Orban, who has exhibited authoritarian tendencies in the past, has used COVID-19 as a pretense to secure additional power.³² China has also used the COVID-19 outbreak as an opening to escalate activity in the South China Sea and assert its sovereignty over waters that the United States holds are open and international.³³ The

20 Carla Babb, "Iraq Suspends Training Because of COVID-19," *Voice of America*, March 20, 2020, <https://www.voanews.com/science-health/coronavirus-outbreak/iraq-suspends-training-because-covid-19>.

21 Marcus Weisgerber, "Pentagon Urges Mexico to Reopen COVID-Closed Factories that Supply US Weapon Makers," *Defense One*, April 20, 2020, <https://www.defenseone.com/business/2020/04/pentagon-urges-mexico-reopen-covid-closed-factories-supply-us-weapon-makers/164756/>

22 Scott Davis, "Emerging-Market Economies Face COVID-19 and a 'Sudden Stop' in Capital Flows," *Federal Reserve Bank of Dallas*, April 14, 2020 <https://www.dallasfed.org/research/economics/2020/0414>.

23 Liz Sly, "Stirrings of Unrest Around the World Could Portend Turmoil as Economies Collapse," *Washington Post*, April 19, 2020, https://www.washingtonpost.com/world/coronavirus-protests-lebanon-india-iraq/2020/04/19/1581dde4-7e5f-11ea-84c2-0792d8591911_story.html.

24 Declan Walsh, "As Fighting Surges, Yemen Is Hit with 1st Cluster of Covid-19 Infections," *New York Times*, April 29, 2020, <https://www.nytimes.com/2020/04/29/world/middleeast/yemen-saudi-coronavirus-cholera.html>.

25 Michael Sullivan, "COVID-19 Has Arrived in Rohingya Refugee Camps and Aid Workers Fear the Worst," *National Public Radio*, May 15, 2020, <https://www.npr.org/sections/coronavirus-live-updates/2020/05/15/856584129/covid-19-has-arrived-in-rohingya-refugee-camps-and-aid-workers-fear-the-worst>.

26 "Third COVID Wave Engulfs Yemen with 99 percent of People Unvaccinated," Oxfam International, Sept. 22, 2021, <https://www.oxfam.org/en/press-releases/third-covid-wave-engulfs-yemen-99-percent-people-unvaccinated>.

27 Jeff Luckstead, Rodolfo M. Nayga Jr. and Heather A. Snell, "Labor Issues in the Food Supply Chain Amid the COVID-19 Pandemic," *Applied Economic Perspectives and Policy* 43, no. 1 (2021): 382–400, <https://doi.org/10.1002/aepp.13090>.

28 "Brief: Food Security and COVID-19," World Bank, Dec. 13, 2021, <https://www.worldbank.org/en/topic/agriculture/brief/food-security-and-covid-19>.

29 Solomon Amadasun, "COVID-19 Palaver: Ending Rights Violations of Vulnerable Groups in Africa," *World Development*, no. 134 (October 2020), <https://doi.org/10.1016/j.worlddev.2020.105054>.

30 Amy Qin and Amy Chang Chien, "China Holds the Line on 'Zero Covid,' but Some Wonder for How Long," *New York Times*, Jan. 21, 2022, <https://www.nytimes.com/2022/01/21/world/asia/china-zero-covid-policy.html>.

31 "Protection Racket: Would-be Autocrats Are Using Covid-19 as an Excuse to Grab More Power," *The Economist*, April 25, 2020, 49, <https://www.economist.com/international/2020/04/23/would-be-autocrats-are-using-covid-19-as-an-excuse-to-grab-more-power>.

32 Discussing Hungarian legislation allowing Orban to govern by decree indefinitely, see Yasmeen Serhan, "The EU Watches as Hungary Kills Democracy," *The Atlantic*, April 2, 2020, <https://www.theatlantic.com/international/archive/2020/04/europe-hungary-viktor-orban-coronavirus-covid19-democracy/609313/>. See also Shaun Walker and Jennifer Rankin, "Hungary Passes Law that Will Let Orbán Rule by Decree," *The Guardian*, March 30, 2020, <https://www.theguardian.com/world/2020/mar/30/hungary-jail-for-coronavirus-misinformation-viktor-orban>.

33 Robert A. Manning and Patrick M. Cronin, "Under Cover of Pandemic, China Steps Up Brinkmanship in South China Sea," *Foreign Policy*, May 14, 2020, <https://foreignpolicy.com/2020/05/14/south-china-sea-dispute-accelerated-by-coronavirus/>. ("Betting that the United States is focused elsewhere and exhausted from years of Chinese encroachments, Beijing's efforts are approaching an irretrievable tipping point. China aims to coerce its maritime neighbors to abandon their claims and territorial rights under international law and irrevocably alter the status quo.")

concern has become acute as southeast Asian nations that lay claim to the same waters have slashed their defense budgets in the wake of COVID-19 and are less prepared to respond to aggressive Chinese actions.³⁴ China has also been taking advantage of other nations' distraction to enact harsh national security legislation for Hong Kong.³⁵

These examples demonstrate how a widespread public health crisis like a disease outbreak can very quickly transform from a healthcare challenge to a national security threat. Equally important, these national security challenges will almost certainly recur in the future, as COVID-19 is unlikely to be the last disease outbreak of its kind. Containing future pandemic events may require a statutory framework that more affirmatively recognizes this national security risk and allows for the necessary action to be taken on the federal level.

Prospect of Future Pandemics

The United States has faced, and will continue to face, the daunting prospect of future disease outbreak events, requiring executive branch officials to plan in advance and to pass on institutional knowledge to future administrations. During the transition between the Obama and Trump administrations, Assistant to the President for Homeland Security and Counterterrorism Lisa Monaco invited members of the incoming administration to a tabletop exercise regarding pandemic spread and federal response. In preparation for future infectious disease outbreaks, the Obama administration's outgoing national security ad-

viser, Susan Rice, warned incoming administration officials about the inevitability of a pandemic event. Before departing, she provided them with a "playbook" to help national security officials to prepare for roadblocks they would face when responding to such events.³⁶

Officials in the Trump administration acknowledged the gravity of this threat and the need to develop strategies to counter it. In 2018, the Trump administration published its *National Biodefense Strategy*,³⁷ followed in 2019 by the *Global Health Security Strategy*.³⁸ The biodefense strategy noted that "[t]he use of biological weapons or their proliferation by state or non-state actors presents a significant challenge to our national security,"³⁹ and similarly noted that an infectious disease outbreak could "directly impact[] the U.S. population and its health, security, and prosperity."⁴⁰ The accompanying national security presidential memorandum expressly stated that "[i]t is the policy of the United States to preserve our national and economic security by protecting the Nation from biological threats."⁴¹ The *Global Health Security Strategy* reiterates this position, espousing that "[p]romoting global health security to detect and mitigate outbreaks early remains a core tenet of our National Security Strategy."⁴² Officials in the Trump administration acknowledged the risk of infectious disease outbreak and emphasized preparedness.⁴³ Indeed, Trump's homeland security adviser, Thomas Bossert, who served in that role in 2017 and 2018, observed that "we need to look clear eyed at the fact that we may have a devastating pandemic influenza or an intentional anthrax

34 "Downward Trend: Southeast Asian Countries Cut Defense Spending," *Defense News*, May 26, 2020, <https://www.defensenews.com/global/asia-pacific/2020/05/26/downward-trend-southeast-asian-countries-cut-defense-spending/>.

35 Phila Siu, "Beijing Has Approved a National Security Law for Hong Kong, But What Will It Mean and What Are the Concerns?" *South China Morning Post*, May 29, 2020, <https://www.scmp.com/news/hong-kong/politics/article/3086585/explainer-beijing-has-approved-national-security-law-hong>; and David J. Lynch, "Pompeo Says U.S. Should End Special Treatment for Hong Kong, Ramping Up Economic, Diplomatic Tensions with China," *Washington Post*, May 27, 2020, <https://www.washingtonpost.com/business/2020/05/27/trump-china-hong-kong-trade/>.

36 "Playbook for Early Response to High-Consequence Emerging Infectious Disease Threats and Biological Incidents," The White House, 2016, <https://assets.documentcloud.org/documents/6819703/WH-Pandemic-Playbook.pdf>; Dan Diamond and Nahal Toosi, "Trump Team Failed to Follow NSC's Pandemic Playbook," *Politico*, March 25, 2020, <https://www.politico.com/news/2020/03/25/trump-coronavirus-national-security-council-149285>; and Sarah Silverstein, "Obama's Former National Security Advisor Susan Rice Reveals Exactly What the US Has Done Wrong in Handling the Coronavirus Pandemic and Where We Go from Here," *Business Insider*, April 16, 2020, <https://www.businessinsider.com/former-national-security-advisor-susan-rice-on-coronavirus-pandemic-2020-4>.

37 *National Biodefense Strategy*, The White House, 2018, <https://trumpwhitehouse.archives.gov/wp-content/uploads/2018/09/National-Biodefense-Strategy.pdf>.

38 *United States Government Global Health Security Strategy*, The White House, 2019, <https://trumpwhitehouse.archives.gov/wp-content/uploads/2019/05/GHSS.pdf>.

39 The White House, *National Biodefense Strategy*, 2.

40 The White House, *National Biodefense Strategy*, 2.

41 "Presidential Memorandum on the Support for National Biodefense," The White House, Sept. 18, 2018, <https://trumpwhitehouse.archives.gov/presidential-actions/presidential-memorandum-support-national-biodefense/>.

42 The White House, *Global Health Security Strategy*, 6–7.

43 Jonathan Landay, "White House Developing Comprehensive Biosecurity Strategy: Official," *Reuters*, July 20, 2017, <https://www.reuters.com/article/us-usa-security-biodefense/white-house-developing-comprehensive-biosecurity-strategy-official-idUSKBN1A52HZ>.

attack,”⁴⁴ a remark that would prove prescient.

However, the administration did not act in unison to counter this threat and personnel moves at the White House undermined the administration’s ability to respond to the threat. Under Trump, National Security Advisers John Bolton and Robert O’Brien led a reorganization of the National Security Council in order to reduce its size.⁴⁵ This effort has been criticized for dismantling the council’s Directorate for Global Health Security and Biodefense.⁴⁶ Former Trump administration officials have pushed back against criticisms of the reorganization, but have acknowledged that “[o]ne such move at the NSC [National Security Council] was to create the counterproliferation and biodefense directorate, which was the result of consolidating three directorates into one, given the obvious overlap between arms control and nonproliferation, weapons of mass destruction terrorism, and global health and biodefense.”⁴⁷ Although the primary purpose of the reorganization was to reduce excessive personnel at the National Security Council, the reorganization reflects the administration’s focus and where it would direct the bulk of its effort. Critics argued that the consolidation of several portfolios into one at the National Security Council may have reduced staff numbers, but it also reduced the focus on a vital concern for national security.⁴⁸ One of Biden’s first measures in office was to reinstate the council’s Directorate for Global Health Security and Biodefense.⁴⁹ However, because this position has been recreated by executive action rather than by statute, it could be terminated once more under a subsequent president.

Both the Obama and Trump administrations

accurately predicted the prospect of future pandemics. The Obama administration drew on its experience tackling three outbreak events to devise a plan for its successor. As the risk of future pandemics persists, it will be similarly crucial for the Biden administration to pass on institutional knowledge in order to prepare future administrations. Equally important, it will be necessary to have a statutory framework in place that provides the president with the authority and flexibility to combat pandemic events while giving Congress the capacity to conduct meaningful oversight.

The Emergency Declaration and Response Paradigm

Moments of crisis or emergency place great strain on the constitutional framework. The tension between the desire for rapid executive action and robust congressional involvement during an emergency has produced a rich literature.⁵⁰ There is already considerable work on the constitutional underpinnings of responding to emergencies, where the power to act should reside, and the role of the legislative or judicial branch in such moments. The tension remains acute in circumstances where both Congress and the president possess authority, namely when it comes to responding to a domestic crisis.

From the earliest days of the republic, the framers were concerned about the emergencies that the new nation might face. They considered that the executive could act to meet such emergencies without needing prior approval from the legislature, but with the expectation that that power would be

44 Landay, "White House Developing Comprehensive Biosecurity Strategy."

45 David A. Wemer, "Trump's National Security Advisor Touts New 'Streamlined' National Security Council," Atlantic Council, Feb. 11, 2021, <https://www.atlanticcouncil.org/blogs/new-atlanticist/trumps-national-security-advisor-touts-new-streamlined-national-security-council/>; and Ed Yong, "Ebola Returns Just as the White House Loses Its Top Biodefense Expert," *The Atlantic*, May 11, 2018, <https://www.theatlantic.com/health/archive/2018/05/white-house-loses-global-health-security-lead-as-a-new-ebola-outbreak-hits/560195/>.

46 Beth Cameron, "I Ran the White House Pandemic Office. Trump Closed It," *Washington Post*, March 13, 2020, https://www.washingtonpost.com/outlook/nsc-pandemic-office-trump-closed/2020/03/13/a70de09c-6491-11ea-acc8-80c22bbe96f_story.html.

47 Tim Morrison, "No, the White House Didn't 'Dissolve' Its Pandemic Response Office. I Was There," *Washington Post*, March 16, 2020, <https://www.washingtonpost.com/opinions/2020/03/16/no-white-house-didnt-dissolve-its-pandemic-response-office/>.

48 Kimberly Dozier and Vera Bergengruen, "Under Fire for Coronavirus Response, Trump Officials Defend Disbanding Pandemic Team," *Time*, March 19, 2020, [time.com/5806558/administration-officials-fight-criticism/](https://www.time.com/5806558/administration-officials-fight-criticism/).

49 "Executive Order on Organizing and Mobilizing the United States Government to Provide a Unified and Effective Response To Combat COVID-19 and to Provide United States Leadership on Global Health and Security," The White House, Jan. 20, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-organizing-and-mobilizing-united-states-government-to-provide-unified-and-effective-response-to-combat-covid-19-and-to-provide-united-states-leadership-on-glo>. ("NSC Directorate on Global Health Security and Biodefense, which shall be headed by a Senior Director for Global Health Security and Biodefense. The Senior Director shall be responsible for monitoring current and emerging biological threats.")

50 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 649–50 (1952) (Jackson, J., concurring) ("The appeal, however, that we declare the existence of inherent powers ex necessitate to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies."); Barron and Lederman, "Framing the Problem," 737–48 (examining arguments regarding conflicts between congressional and presidential war powers); and Steven G. Calabresi, "Some Normative Arguments for the Unitary Executive," *Arkansas Law Review*, no. 48 (1993): 87–90 (exploring tensions regarding Congress' and the president's respective powers in the realm of foreign policy and warmaking).

temporally limited and that Congress would soon have to convene to ratify or reject such actions.⁵¹

Presidents have, on occasion, declared states of national emergency, explicitly or implicitly relying on an asserted constitutional authority, such as that under the Commander-in-Chief Clause.⁵² Scholars have considered whether any remnants of executive power exist within Article II's various provisions (such as the Vesting Clause or Take Care Clause).⁵³ By and large, constitutional scholars have concluded that, for better or worse, the president possesses and may exercise the bulk of emergency powers.⁵⁴ Although the judiciary has scrutinized the particular actions a president has taken under a declaration of emergency,⁵⁵ courts have deferred to determinations by presidents that an emergency existed in these cases and have been loath to second-guess such determinations.⁵⁶

The question of what powers the president may assert in the absence of, or in contravention of, congressional action remains salient. Over time, Congress has provided the president with authorities

to respond to crises both external and internal in origin. Historically, Congress has conceived of national emergencies and domestic disaster response as two different areas of policy warranting different legislation and different responses. The primary federal statute providing for aid in the face of domestic disasters treats "emergencies" separately from declarations of "major disasters."⁵⁷ The main difference is that emergencies have traditionally been perceived as implicating national security, whereas disasters have not. This semantic construct persists to this day.

Federal policy has historically provided that the primary responsibility for preparing for and responding to crises or emergencies falls at the lowest level, upon state and local governments.⁵⁸ This approach to disaster response reflects a federated system of government. But it is not without its critics, particularly because of its potential for dysfunction in times of crisis when clear guidance and clear lines of authority are needed.⁵⁹ The decentralized approach to disaster response has

51 Barron and Lederman, "Framing the Problem," 746 ("Historically, the understanding seems to have been not that there is a constitutional power (or duty) to disregard the law, but that extreme threats to the nation might sometimes dictate that the President act extraconstitutionally and thereafter publicly confess such civil disobedience and throw himself on the mercy of the legislature and the public."); Lucius Wilmerding, Jr., "The President and the Law," *Political Science Quarterly* 67, no. 3 (September 1952): 322, <https://www.jstor.org/stable/2145161> (observing that the Framers "thought it incumbent on those who accept great charges to risk themselves on great occasions, when the safety of the nation or some of its very high interests were at stake."); and Rachel Goodman, "Imagining a Federal Emergency Board: A Framework for Legalizing Executive Emergency Power," *New York University Law Review* 85, no. 4 (October 2010): 1273, note 46, <https://www.nyulawreview.org/issues/volume-85-number-4/imagining-a-federal-emergency-board-a-framework-for-legalizing-executive-emergency-power/>.

52 "Exec. Order 10,340 — Directing the Secretary of Commerce to Take Possession of and Operate the Plants and Facilities of Certain Steel Companies," 17 Fed. Reg. 3139, April 8, 1952, The American Presidency Project, accessed Jan. 24, 2022, <https://www.presidency.ucsb.edu/documents/executive-order-10340-directing-the-secretary-commerce-take-possession-and-operate-the>.

53 Henry P. Monaghan, "The Protective Power of the Presidency," *Columbia Law Review* 93, no. 1 (January 1993): 20–23, https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1160&context=faculty_scholarship (discussing the "residuum" theory).

54 Stephen I. Vladeck, "Emergency Power and the Militia Acts," *Yale Law Journal* 114, no. 1 (October 2004): 151, <https://www.yalelawjournal.org/note/emergency-power-and-the-militia-acts> (noting that "there is little question that the bulk of emergency power belongs exclusively to the Executive, and that the Constitution, to whatever degree it speaks to the issue, does not suggest otherwise"); and Friedman, *Emergency Powers of the Executive*, 305 ("it is clear that the President is inherently granted with the powers to unilaterally act to protect and control the national security and interests of the United States.").

55 For instance, Executive Order 10340 lay at the heart of the *Youngstown* litigation.

56 *Bauer v. United States*, 244 F.2d 794, 797 (9th Cir. 1957) ("However, this Court should not declare the end of any emergency as matter of law. Nor, except under most exceptional circumstances, should judicial notice be taken by us of conditions from which we might be inclined to conclude an emergency has ended."); *MacEwan v. Rusk*, 228 F. Supp. 306, 312 (E.D. Pa. 1964) ("A court may not lightly hold that an executive proclamation of a national emergency has expired by lapse of time. It is true that a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends on the truth of what is declared. But the mistake would indeed have to be 'obvious' before a court would be justified in overturning a legislative or executive determination of the existence of a national emergency"); and *United States v. Yoshida International, Inc.*, 526 F.2d 560, 581, n.32 ("We agree with the Customs Court that courts will not review the bona fides of a declaration of an emergency by the President. Judicial suspicion should not form a basis for decision.").

57 Compare 42 U.S.C. § 5122(a), with 42 U.S.C. § 5122(b).

58 As the Congressional Research Service has observed, the United States "has generally taken a 'bottom up' approach to both managing and providing assistance, during and following a disaster. The responsibility for responding to disasters begins at the local level with survivors, emergency services personnel, and elected officials." *Congressional Primer on Responding to and Recovering From Major Disasters and Emergencies*, Congressional Research Service, Updated June 3, 2020, 1, <https://sgp.fas.org/crs/homesecc/R41981.pdf>. See also *National Response Plan*, U.S. Department of Homeland Security, 2004, 15 ("A basic premise of the NRP is that incidents are generally handled at the lowest jurisdictional level possible."). The 2004 *National Response Plan* states that during an "Incident of National Significance," the secretary of Homeland Security could proactively initiate a response in coordination with other federal departments and agencies.

59 Davia Cox Downey and William M. Myers, "Federalism, Intergovernmental Relationships, and Emergency Response: A Comparison of Australia and the United States," *American Review of Public Administration* 50, no. 6–7 (2020): 527, <https://doi.org/10.1177/2F0275074020941696>; and Hannah J. Wiseman, "Delegation and Dysfunction," *Yale Journal of Regulation* 35, no. 1 (2018), <https://www.yalejreg.com/print/delegation-and-dysfunction/>.

nevertheless had strong adherents across the political spectrum.⁶⁰ But over time, and particularly after the attacks of Sept. 11, 2001, the federal legislative and regulatory approach has shifted slightly. As seen in legislative reforms after the Sept. 11 attacks, there has been increasing awareness that improving disaster preparedness can strengthen

Embargo Act,⁶² the Trading with the Enemy Act,⁶³ the International Emergency Economic Powers Act,⁶⁴ and many others.⁶⁵ Historically, however, the federal government was disinclined to provide relief for victims of disasters, as there was no standing authority to provide federal relief for disasters. This distinction between disasters and emergencies reflected a conceptual paradigm in which disaster events did not raise national security considerations.⁶⁶

In 1950, Congress passed the first modern disaster relief legislation, the Federal Disaster Relief Act,⁶⁷ which challenged the orthodox view that domestic crises did not rise to the level of creating national security crises and were

not a primary concern for the federal government. However, this authority was not exercised until 1953 by President Dwight Eisenhower.⁶⁸ Over the next quarter century, Congress passed additional disaster response legislation, including in 1976, but made a distinction between natural disasters and emergencies, further cementing that disaster response was separate from national security, a view that persists today.

By and large, constitutional scholars have concluded that, for better or worse, the president possesses and may exercise the bulk of emergency powers.

national security. Nevertheless, the statutory configuration remains awkwardly segmented, both in terms of who can determine whether an incident warrants federal response and the conditions under which the federal government may respond.

Below, I examine the salient statutes addressing emergency powers and disasters to ascertain how Congress has infused some, but not all, of these statutes with a national security orientation.

Early Evolution of Emergency Power and Disaster-Response Statutes

Over nearly two-and-a-half centuries, Congress has endowed the president with powers to meet domestic and foreign threats in times of emergency. Examples include the Militia Acts,⁶¹ the

The National Emergencies Act

The National Emergencies Act, passed in 1976 and signed into law by President Gerald Ford, was part of a wave of reforms passed by Congress in the post-Watergate era that were intended to curb the powers that the executive branch had acquired

60 Michael Greenberger, "The Alfonse and Gaston of Governmental Response to National Public Health Emergencies: Lessons Learned from Hurricane Katrina for the Federal Government and the States," *Administrative Law Review* 58, no. 3 (June 2006): 613 (citing statements from Democratic and Republican governors supporting a decentralized approach to disaster response).

61 Vladeck, "Emergency Power and the Militia Acts."

62 Pub. L. No. 10-5, 2 Stat. 251 (1807). The Embargo Act was later repealed by the Non-Intercourse Act of 1809, Pub. L. No. 10-24, 2 Stat. 528 (1809).

63 Pub. L. No. 65-91, 40 Stat. 411 (1917).

64 Pub. L. No. 95-223, 91 Stat. 1626 (1977), 50 U.S.C. § 1701 et seq. The International Emergency Economic Powers Act did not repeal the Trading with the Enemy Act but did amend it so that the Trading with the Enemy Act would only apply during a period of declared war and not merely during a period of declared national emergency. See Pub. L. No. 95-223 § 101.

65 S. Rep. 93-549, United State Senate, 1973, 17-43 (summarizing statutes delegating powers in times of war or national emergency).

66 This is a conceptual distinction found not just in statute but in case law. In 1934, in assessing the constitutionality of the Minnesota Mortgage Moratorium Law, the U.S. Supreme Court considered what events might be considered emergencies to warrant state intervention. See *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934). The court held:

"It cannot be maintained that constitutional prohibition should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by a great public calamity such as fire, flood, or earthquake The reservation of state power appropriate to such extraordinary conditions may be deemed to be as much a part of all contracts, as is the reservation of state power to protect the public interest in the other situations to which we have referred. And if state power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood or earthquake, that power cannot be said to be non-existent when the urgent public need demanding such relief is produced by other and economic causes."

Id. at 439-40. These types of natural disasters would make their way into subsequent federal legislation.

67 Federal Disaster Relief Act of 1950, Pub. L. No. 81-875, 64 Stat. 1109 (1950).

68 "DR-1-GA," Federal Emergency Management Agency, May 2, 1953, <https://www.fema.gov/disaster/declarations>.



over time.⁶⁹ Before the enactment of the act, members of Congress expressed concern over the ability of presidents to declare emergencies and exercise emergency powers,⁷⁰ not just by exercise of inherent authority but also by cession of power from Congress.

The first section of the National Emergencies Act rescinded previous presidential declarations of national emergencies.⁷¹ It then imposed procedural requirements on the president when declaring a national emergency,⁷² provisions for reviewing and terminating a declared state of emergency,⁷³ and accountability and reporting requirements after the declaration of an emergency.⁷⁴ Unsurprisingly in a statute intended to curb presidential powers, it does not grant the president any new authorities in the event of an emergency, nor does it provide the president with dedicated funding.⁷⁵ Instead, the statute indicates that such powers may be found in other statutes.⁷⁶

With limited exceptions prescribed by Congress,⁷⁷ the requirements of the National Emergencies Act apply to existing federal statutes that supply the president with additional powers and authorities during times of emergency.⁷⁸ Nevertheless,

even this legislation, designed to restrain the president's authority to declare emergencies, still provides the president with tremendous latitude to declare whether an emergency exists because it fails to provide a definition of what would constitute an emergency.⁷⁹

The Stafford Act

The Stafford Act, first passed in 1988, is the primary federal statute creating standing authorities to provide relief during domestic disasters or emergencies. The Stafford Act is a revision to previous disaster response statutes, and has itself been subject to numerous revisions, in particular in 2000, 2013, and 2018.⁸⁰ Over time, despite these amendments, the Stafford Act has remained generally consistent: a federalized structure in which the state authorities request support from the national government that the national government may then grant.

The president may declare that a major disaster exists after the governor of an affected state or the chief executive of an Indian tribal government requests assistance.⁸¹ When submitting a request, a

69 Michael A. Fitts, "The Legalization of the Presidency: A Twenty-Five Year Watergate Retrospective," *St. Louis Law Journal*, no. 43 (1999): 730–31, <https://heinonline.org/HOL/LandingPage?handle=hein.journals/stlulj43&div=28&id=&page=>.

70 S. Rep. 93-549, 1, 6–7.

71 50 U.S.C. § 1601.

72 50 U.S.C. § 1621(a) (requiring the president to transmit any proclamation or declaration of emergency to Congress "immediately" and further requiring such declaration to be published in the Federal Register).

73 50 U.S.C. § 1622(a) (providing that a national emergency can be terminated by the president by proclamation or by a joint resolution of Congress); 50 U.S.C. § 1622(b) (providing that "not later than six months" after the declaration of an emergency, each house of Congress "shall meet" to consider a vote on a joint resolution to determine whether to terminate that emergency); and 50 U.S.C. § 1622(d) (providing that a declaration of emergency shall automatically terminate on the anniversary of the declaration of emergency if the president does not publish a notice in the Federal Register and transmit a notice to Congress that the emergency is to continue past the anniversary).

74 50 U.S.C. § 1641(a) (requiring the president and each executive agency to maintain a file and index of all significant orders, regulations, proclamations, rules, or regulations promulgated during a period of declared emergency); 50 U.S.C. § 1641(b) (providing that all significant orders of the president "shall be transmitted" to Congress promptly); and 50 U.S.C. § 1641(c) (requiring the president to inform Congress every six months on total expenditures of the U.S. government "which are directly attributable to the exercise of powers and authorities conferred by" a declaration of emergency).

75 "Presidential Declarations of Emergency for COVID-19: NEA and Stafford Act IN11264," Congressional Research Service, March 19, 2020, <https://crsreports.congress.gov/product/pdf/IN/IN11264>.

76 50 U.S.C. § 1631 ("When the President declares a national emergency, no powers or authorities made available by statute for use in the event of an emergency shall be exercised unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act.")

77 50 U.S.C. § 1651(a).

78 The Department of Justice Office of Legal Counsel has opined that the National Emergencies Act applies to extant federal statutes regardless of whether the separate statutes explicitly require the president to declare a national emergency first. "Applicability of the National Emergencies Act to Statutes that Do Not Expressly Require the President to Declare a National Emergency," *Opinions of the Office of Legal Counsel* 40, Aug. 24, 2016, <https://www.justice.gov/opinion/file/914396/download>. This is relevant, for instance, because the National Emergencies Act includes a one-year time limit on an emergency unless the president renews it, whereas other statutes, such as the International Emergency Economic Powers Act, do not explicitly do so. Previously, the Office of Legal Counsel had opined that the requirements of the National Emergencies Act did not apply to statutes that granted emergency powers but did not explicitly require the president to declare an emergency first. "Legal Authorities Available to the President to Respond to a Severe Energy Supply Interruption or Other Substantial Reduction in Available Petroleum Products," *Opinions of the Office of Legal Counsel* 6, Nov. 15, 1982, 674, note 78, <https://www.justice.gov/file/23221/download>. However, the Office of Legal Counsel has since eschewed that position.

79 Kim Lane Scheppelle, "Emergency Powers and the Constitution: Small Emergencies," *Georgia Law Review* 40 (2006): 843–44 (arguing that federal legislation has granted the president "absolute" power to determine and declare states of emergency).

80 Disaster Relief Act of 1974, Pub. L. No. 93-288, 88 Stat. 143 (1974); Disaster Mitigation Act of 2000, Pub. L. No. 106-390, 114 Stat. 1552 (2000); Sandy Recovery Improvement Act of 2013, Pub. L. No. 113-2, Div B, 127 Stat. 39 (2013); and Disaster Recovery Reform Act of 2018, Pub. L. No. 115-254, Div D, 132 Stat. 3438 (2018).

81 42 U.S.C. § 5170(a), 5170(b).

governor or a chief executive must demonstrate that “the disaster is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary.”⁸² Moreover, the requester must “furnish information on the nature and amount of State and local resources which have been or will be committed to alleviating the results of the disaster, and shall certify that, for the current disaster, State and local government obligations and expenditures . . . will comply with all applicable cost-sharing requirements” of the Stafford Act.⁸³

Similarly, the president may declare an emergency after receiving a request from a governor or chief executive.⁸⁴ However, the president may also declare an emergency without such a request, “when he determines that an emergency exists for which the primary responsibility for response rests with the United States because the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority.”⁸⁵ In addition to declarations of major disasters or emergencies, a third category of federal assistance, Fire Management Assistance Grants, allows the federal government to provide resources “for the mitigation, management, and control of any fire on public or private forest land or grassland that threatens such destruction as would constitute a major disaster.”⁸⁶ However, as these resources can only be used to address fire control or mitigation, I do not discuss them further here.

The federal resources available to respond to a crisis differ depending on whether the event is labeled as an emergency or a major disaster.⁸⁷ For instance, by statute, the total amount of federal government assistance that can be provided for any single emergency cannot exceed \$5,000,000.⁸⁸

The federal share of eligible costs for various repair projects under an emergency is a minimum of 75 percent.⁸⁹ By contrast, a declaration of a major disaster triggers more public assistance and individual assistance programs, as well as a federal share of eligible costs for various repair projects that can increase to 85 percent under certain circumstances.⁹⁰

At the beginning of the Stafford Act, Congress makes several findings and declarations regarding the potential impacts of disasters, but makes no mention of the impact of such disasters on national security.⁹¹ Congress also did not express an intent to mitigate the impact of disasters on national security.⁹²

Unlike the National Emergencies Act, the Stafford Act provides a definition for an emergency: “any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe.”⁹³ However, the definition is, according to the terms of the Stafford Act, applicable only to the chapter of the U.S. code concerning disaster relief.⁹⁴

The Stafford Act also defines a major disaster, but in doing so makes it considerably more difficult for the federal government to provide resources speedily in the event of a threat to national security:

“Major disaster” means any natural catastrophe (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster

82 42 U.S.C. § 5170(a).

83 42 U.S.C. § 5170(a).

84 42 U.S.C. §§ 5191(a), (c).

85 42 U.S.C. § 5191(b).

86 42 U.S.C. § 5187.

87 Compare 42 U.S.C. § 5192 (federal emergency assistance), with 42 U.S.C. §§ 5170a–5189h. See also “Stafford Act Assistance for Public Health Incidents (IN11229),” Congressional Research Service, 2020, <https://crsreports.congress.gov/product/details?prodcode=IN11229>.

88 42 U.S.C. § 5193(b)(1).

89 42 U.S.C. § 5193(b)(1).

90 42 U.S.C. § 5172(b)(3)(A); and 42 U.S.C. § 5172(b)(3)(D) (allowing the president to increase the federal cost share above 85 percent).

91 42 U.S.C. § 5121(a).

92 42 U.S.C. § 5121(b).

93 42 U.S.C. § 5122(1).

94 42 U.S.C. § 5122.



assistance under this Act to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.⁹⁵

Despite numerous occurrences in U.S. history of the spread of infectious diseases, the Stafford Act does not include such outbreaks in its explicit list of the types of natural catastrophes and occurrences that might constitute a major disaster. Arguably, the word “including” means that infectious diseases are not *precluded* from warranting federal aid. As discussed below, the Trump administration used this ambiguity to shoehorn the COVID-19 crisis into the scope of the Stafford Act.

The consequence of this statutory definition of a major disaster is that it is primarily conceived of as something that threatens the health and welfare of American citizens. This is consistent with Congress’ findings and declarations, but it also means that any attempt to use the Stafford Act to provide federal resources in the face of a threat to national security requires the president to construe the facts and circumstances as fitting within the act’s definition. The ambiguity could also invite litigation, in the same way that Trump’s reprogramming of funds for the construction of a border wall did, pursuant to his declaration of an emergency under the National Emergencies Act.⁹⁶

The Defense Production Act

Although not often considered a primary tool in responding to emergencies, the Defense Production Act empowers the federal government to obtain critical resources during times of crisis.⁹⁷ First enacted in 1950 in response to the start of the

Korean War, the Defense Production Act has since been reenacted and amended. It currently states that “the security of the United States is dependent on the ability of the domestic industrial base to supply materials and services for the national defense and to prepare for and respond to military conflicts, natural or man-caused disasters, or acts of terrorism within the United States.”⁹⁸

The act contains numerous authorities, the most pertinent of which (based on historical usage) are Priorities and Allocations (Title I),⁹⁹ Expansion of Productive Capacity and Supply (Title III),¹⁰⁰ and General Provisions (Title VII).¹⁰¹ Under the act, the president may declare certain materials to be scarce or that the supply of these materials would be threatened by hoarding, and in doing so make the hoarding or price gouging of such materials illegal.¹⁰² Title III of the Defense Production Act also establishes a Defense Production Act Fund,¹⁰³ which may be used to provide financial incentives and assistance to meet the goals of the act. At the end of each fiscal year, the fund may not retain a balance over \$750 million, and any excess over that amount is to be diverted to general Treasury funds.¹⁰⁴ The majority of the authorities under the Defense Production Act are scheduled to expire on Sept. 30, 2025.¹⁰⁵

The act has been relied upon both during and outside of wartime. The Department of Defense regularly uses the Title I authorities delegated to it,¹⁰⁶ and FEMA relied on Title I authorities to support relief efforts during the 2017 hurricane season.¹⁰⁷ Although Sections 301 and 302 of the act have been used relatively infrequently, the Department of Defense has used its authorities under Section 303 (under Title III)¹⁰⁸ to create, maintain, protect, expand, or restore domestic industrial base capabilities essential to the national defense.¹⁰⁹

95 42 U.S.C. § 5122(2).

96 “Can the Department of Defense Build the Border Wall? (LSB10242),” Congressional Research Service, Feb. 18, 2019, <https://crsreports.congress.gov/product/details?prodcode=LSB10242>.

97 Pub. L. No. 81-774, 64 Stat. 798 (1950), 50 U.S.C. § 4501 *et seq.*

98 50 U.S.C. § 4502.

99 50 U.S.C. §§ 4511–18.

100 50 U.S.C. §§ 4531–34.

101 50 U.S.C. §§ 4551–68.

102 50 U.S.C. § 4512.

103 50 U.S.C. § 4534.

104 50 U.S.C. § 4534.

105 50 U.S.C. § 4564(a).

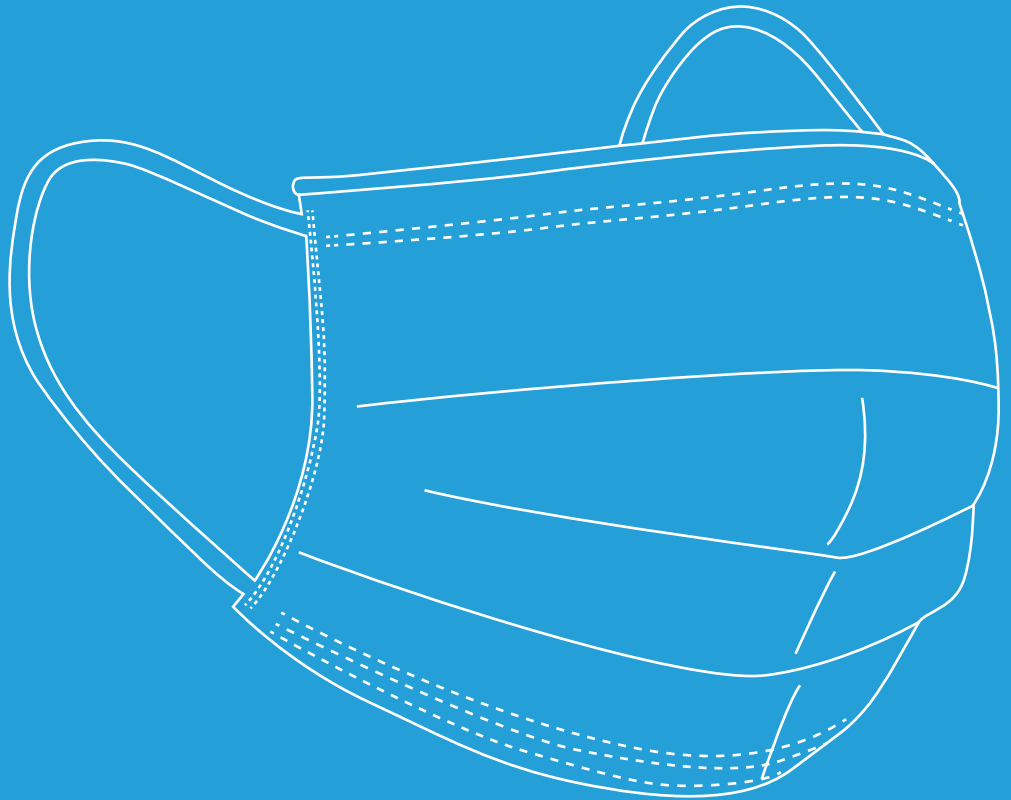
106 “The Defense Production Act of 1950: History, Authorities, and Considerations for Congress (R43767),” Congressional Research Service, March 2, 2020, 8–9, <https://crsreports.congress.gov/product/details?prodcode=R43767>.

107 Congressional Research Service, “The Defense Production Act of 1950,” 9.

108 50 U.S.C. § 4533.

109 Congressional Research Service, “The Defense Production Act of 1950,” 14.

[F]ederal law treats infectious disease prevention and preparedness as a matter of national security and a critical issue for federal agencies, but does not so clearly treat infectious disease response as a matter of national security, potentially resulting in a dangerously incoherent approach to mitigating an outbreak.





Post-9/11 Legislation

After the attacks of Sept. 11, 2001, Congress increasingly recognized that health crises, particularly infectious disease outbreaks or chemical weapon attacks, could threaten national security. Attacks using anthrax spores underscored for lawmakers how serious a risk infectious diseases pose.¹¹⁰

In 2002, Congress enacted the Public Health Security and Bioterrorism Preparedness and Response Act,¹¹¹ which, among other things, directed the Health and Human Services secretary to develop strategies to “respond effectively to bioterrorism and other public health emergencies.”¹¹² In 2006, Congress passed the Pandemic and All-Hazards Preparedness Act,¹¹³ which authorized the creation of the Biomedical Advanced Research and Development Authority.¹¹⁴ The latter, under the supervision of the Health and Human Services secretary, is charged with, in addition to other duties, “facilitating collaboration between the Department of Health and Human Services and other Federal agencies, relevant industries, academia, and other persons, with respect to such advanced research and development,”¹¹⁵ “promoting countermeasure and product advanced research and development,”¹¹⁶ and “promoting innovation to reduce the time and cost of countermeasure and product advanced research and development.”¹¹⁷ The Pandemic and All-Hazards Preparedness Act was subsequently amended by the Pandemic and All-Hazards Preparedness Reauthorization Act of 2013 and the Pandemic and All-Hazards Preparedness and Advancing Innovation Act of 2019.¹¹⁸ The 2019 act mandated that the national health security strategy, published quadrennially by the Health and Human Services secretary, include information on disease transmission and global health security threats.¹¹⁹

Another statute of particular importance to pandemic preparedness is the Public Health Service Act,¹²⁰ first passed in 1944. This law has been amended by a number of subsequent statutes, including the Pandemic and All-Hazards Preparedness and Advancing Innovation Act. Provisions of the statute empower the secretary of the Department of Health and Human Services to declare a public health emergency,¹²¹ including in the event of significant outbreaks of infectious diseases or bioterrorist attacks.¹²² Indeed, as discussed below, several secretaries have invoked these authorities in the past decade during outbreaks of infectious disease. However, this statute does not unleash the resources that would be available after the declaration of either an emergency or a major disaster under the Stafford Act. Unlike the National Emergencies Act or Stafford Act, this statute specifically includes a disease outbreak as an event that could trigger the Health and Human Services secretary’s powers. This inconsistency further highlights how the statutory framework is fragmented.

The post-9/11 posture emphasizes innovation, prevention, and preparedness. The various pieces of legislation passed in the previous two decades reflect a welcome orientation toward understanding that infectious disease is a core concern of national security. However, the legislative landscape still reflects a bifurcated understanding, where the relevant health-related statutes emphasize preparedness but do not bring to bear the authority and resources that would come from a declaration under the Stafford Act. That is, federal law treats infectious disease *prevention* and *preparedness* as a matter of national security and a critical issue for federal agencies, but does not so clearly treat infectious disease *response* as a matter of national security, potentially resulting in a dangerously incoherent approach to mitigating an outbreak.

110 “Amerithrax or Anthrax Investigation,” Federal Bureau of Investigation, accessed Jan. 23, 2022 <https://www.fbi.gov/history/famous-cases/amerithrax-or-anthrax-investigation>.

111 Pub. L. No. 107-188, 116 Stat. 594 (2002).

112 Pub. L. No. 107-188 § 101.

113 Pub. L. No. 109-417, 120 Stat. 2832 (2006).

114 Pub. L. No. 109-417 § 401; 42 USC 247d-7e.

115 42 U.S.C. § 247d-7e(c)(2)(A).

116 42 U.S.C. § 247d-7e(c)(2)(B).

117 42 U.S.C. § 247d-7e(c)(2)(D).

118 Pub. L. No. 113-5, 127 Stat. 161 (2013); and Pub. L. No. 116-22, 133 Stat. 905 (2019).

119 42 U.S.C. §300hh-1(b)(9)–(10).

120 Pub. L. No. 78-410, 58 Stat. 682 (1944), 42 U.S.C. § 201 et seq.

121 42 U.S.C. § 247d (Public Health Emergencies).

122 42 U.S.C. § 247d(a)(2). Congress granted the Health and Human Services secretary the power to declare public health emergencies in 1983 (see Public Health Service Act Amendment, Pub. L. No. 98-49, 97 Stat. 245 (1983)), and amended this provision in 2000 to include significant outbreaks of infectious diseases or bioterrorist attacks. Public Health Improvement Act, Pub. L. No. 106-505, § 102, 114 Stat. 2314, 2316 (2000).

Disease Outbreak and Response During the Obama Administration

In order to illustrate the shortcomings of the current legislative framework for dealing with public health crises, and identify where it needs repair, it is helpful to look at how the executive branch has dealt with such crises in recent history. Before moving on to discuss the Trump and Biden administrations' handling of the COVID-19 outbreak, I look at the Obama administration's response to disease-related emergencies. Specifically, the Obama administration responded to three prominent transnational outbreaks of disease, each with a different transmission vector: the outbreak of the H1N1 virus in 2009 and 2010, the outbreak of the Ebola virus in 2014, and the outbreak of the Zika virus in 2015 and 2016. These three examples from Obama's presidency demonstrate varying degrees of acknowledgment of infectious disease outbreaks as threats to national security. The three instances also highlight what authorities a president can use or has used depending on how proximate the threat to the United States is.

H1N1 Virus: 2009–2010

In 2009, the H1N1 virus (known commonly as “swine flu”) spread quickly, eventually reaching the United States.¹²³ On April 26, 2009, the acting secretary of Health and Human Services declared a public health emergency.¹²⁴ This declaration was renewed four times in July, October, and December of 2009, as well as in March of

2010.¹²⁵ On June 11, 2009, the World Health Organization declared the H1N1 virus to be a pandemic,¹²⁶ and eight days later the United States reported that all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands had cases of H1N1 infection.¹²⁷

On Oct. 23, 2009, Obama declared a national emergency pursuant to the National Emergencies Act,¹²⁸ which he did not renew one year later.¹²⁹ Obama did not declare an emergency or a major disaster under the Stafford Act.¹³⁰ At the time, analysis conducted by the Congressional Research Service did not provide a definitive answer on whether responding to pandemic outbreaks, such as an influenza outbreak, fell within the purview of the Stafford Act,¹³¹ although the Trump administration later took advantage of the uncertainty in the act's definition of a major disaster to answer the question in the affirmative during the COVID-19 crisis. Consequently, because a declaration under the National Emergencies Act does not activate a dedicated funding pot, the primary federal response to the H1N1 virus came from the Department of Health and Human Services and the actions of its secretary.

Over time, the threat posed by the H1N1 virus receded in the United States and internationally. On Aug. 11, 2010, the World Health Organization declared the end of the H1N1 influenza pandemic.¹³² In 2012, the Department of Health and Human Services examined the cumulative responses to the outbreak to identify areas of success as well as opportunities for improvement.¹³³ The report acknowledged, as an area of success, that

123 "2009 H1N1 Pandemic Timeline," Centers for Disease Control and Prevention, May 5, 2020, <https://www.cdc.gov/flu/pandemic-resources/2009-pandemic-timeline.html>.

124 "Determination that a Public Health Emergency Exists," U.S. Department of Health and Human Services, April 26, 2009, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/h1n1.aspx>.

125 "Renewal of Determination that a Public Health Emergency Exists," U.S. Department of Health and Human Services, July 24, 2009, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/h1n1.aspx>; "Renewal of Determination that a Public Health Emergency Exists," U.S. Department of Health and Human Services, Oct. 1, 2009, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/h1n1.aspx>; "Renewal of Determination that a Public Health Emergency Exists," U.S. Department of Health and Human Services, Dec. 28, 2009, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/h1n1.aspx>; "Renewal of Determination that a Public Health Emergency Exists," U.S. Department of Health and Human Services, March 22, 2010, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/h1n1.aspx>.

126 Centers for Disease Control and Prevention, "2009 H1N1 Pandemic Timeline."

127 Centers for Disease Control and Prevention, "2009 H1N1 Pandemic Timeline."

128 Pres. Proc. No. 8443, 74 Fed. Reg. 55,439, Oct. 23, 2009 (specifically empowering the Health and Human Services secretary to exercise authority under Section 1135 of the Social Security Act, 42 U.S.C. § 1320b-5).

129 By statute, after the termination of the declaration of emergency by passage of time, any waiver or modification of requirements made by the Health and Human Services secretary under the Social Security Act (specifically referenced in Obama's emergency declaration) also expire. 42 U.S.C. § 1320b-5(e).

130 "The 2009 Influenza Pandemic: An Overview (R40554)," Congressional Research Service, 2009, 7, <https://crsreports.congress.gov/product/details?prodcode=R40554> (noting that "The applicability of major disaster assistance to infectious disease threats—whether natural (e.g., a flu pandemic) or intentional (bioterrorism)—has been a matter of debate").

131 Congressional Research Service, "The 2009 Influenza Pandemic: An Overview (R40554)," 9.

132 Centers for Disease Control and Prevention, "2009 H1N1 Pandemic Timeline."

133 "An HHS Retrospective on the 2009 H1N1 Influenza Pandemic to Advance All Hazards Preparedness," U.S. Department of Health and Human Services, Revised June 15, 2012, ii, <https://www.phe.gov/Preparedness/mcm/h1n1-retrospective/Documents/h1n1-retrospective.pdf>.



the federal government had invested time, energy, funding, and resources to prepare for a severe influenza pandemic, and that, consequently, “the federal government had an explicit strategy and implementation plan in place when the 2009 H1N1 pandemic emerged.”¹³⁴

Ebola Virus: 2014–2016

On Dec. 26, 2013, a boy in the western African nation of Guinea developed a severe illness and died two days later. This boy was later identified to be the index case for the subsequent outbreak of Ebola.¹³⁵ The boy’s extended family fell sick, as did members of the hospital staff who treated them. As the disease continued to spread throughout Guinea, World Health Organization laboratories confirmed it to be Ebola, publicly announcing the outbreak on March 23, 2014.¹³⁶ During the three months it took to identify the virus, it had already reached neighboring Liberia and Sierra Leone. However, “despite growing evidence of the outbreak’s uncontrolled spread,” the World Health Organization did not declare a Public Health Emergency of International Concern until Aug. 8, 2014, several months after the initial detection.¹³⁷

Although the U.S. response was initially slow and delayed, by August 2014, the United States began moving aggressively to contain the virus in West Africa before it could spread to the United States.¹³⁸ To accomplish this, Obama drew on a different set of authorities than he did when responding to the H1N1 crisis. He neither declared

an emergency under the National Emergencies Act nor an emergency or major disaster under the Stafford Act.

Nevertheless, the Obama administration’s overt posture was to treat the viral outbreak as not simply a humanitarian disaster but also a threat to national security. Armed forces deployed to West Africa to assist in pandemic reduction efforts.¹³⁹ Under the name Operation United Assistance, U.S. Africa Command provided “coordination of logistics, training, and engineering support to the U.S. Agency for International Development (USAID) in West Africa to assist in the overall U.S. Government Foreign Humanitarian Assistance/Disaster Relief efforts to contain the spread of the Ebola Virus.”¹⁴⁰

Domestically, Obama appointed Ronald Klain as “Ebola czar.”¹⁴¹ Klain, who reported to the national security adviser and the homeland security adviser,¹⁴² was responsible for coordinating the response to Ebola among the relevant federal agencies.¹⁴³ Although the appointment of an “Ebola czar” was a temporary measure to coordinate the government response, Obama subsequently ordered the creation of a permanent position within the National Security Council: the directorate of global health security and biodefense.¹⁴⁴ According to Beth Cameron, who held that position from September 2016 to March 2017, and again since January 2021, “The job of a White House pandemics office would have been to get ahead: to accelerate the response, empower experts, anticipate failures, and act quickly and transparently to solve problems.”¹⁴⁵

134 Department of Health and Human Services, “An HHS Retrospective.”

135 “One Year Into the Ebola Epidemic: A Deadly, Tenacious, and Unforgiving Virus,” World Health Organization, 2015, <https://www.who.int/news-room/spotlight/one-year-into-the-ebola-epidemic>.

136 World Health Organization, “One Year Into the Ebola Epidemic.”

137 Steven J. Hoffman and Sarah L. Silverberg, “Delays in Global Disease Outbreak Responses: Lessons from H1N1, Ebola, and Zika,” *American Journal of Public Health* 108, no. 3 (March 2018): 330, <https://doi.org/10.2105/AJPH.2017.304245>; and “Statement on the 1st meeting of the IHR Emergency Committee on the 2014 Ebola Outbreak in West Africa,” World Health Organization, Aug. 8, 2014, <https://www.who.int/news/item/08-08-2014-statement-on-the-1st-meeting-of-the-ih-er-emergency-committee-on-the-2014-ebola-outbreak-in-west-africa>.

138 “The U.S. Response to Ebola: Status of the FY2015 Emergency Ebola Appropriation,” Kaiser Family Foundation, Dec. 11, 2015, <https://www.kff.org/global-health-policy/issue-brief/the-u-s-response-to-ebola-status-of-the-fy2015-emergency-ebola-appropriation/>.

139 See Exec. Order. No. 13,680, *Ordering the Selected Reserve and Certain Individual Ready Reserve Members of the Armed Forces to Active Duty*, 79 Fed. Reg. 63287, Oct. 16, 2014, <https://www.federalregister.gov/documents/2014/10/23/2014-25292/ordering-the-selected-reserve-and-certain-individual-ready-reserve-members-of-the-armed-forces-to> (finding, under the president’s constitutional authority, a need to augment active-duty troops with members of the reserve forces); and Nick Simeone, “Obama Activates Reserves for Operation United Assistance,” *DOD News*, U.S. Department of Defense, Oct. 17, 2014, <https://www.defense.gov/Explore/News/Article/Article/603475/>.

140 “Operation United Assistance,” U.S. Africa Command, accessed Jan. 25, 2022, <https://web.archive.org/web/20141014115649/http://www.africom.mil/operation-united-assistance/>.

141 Julie Hirschfeld Davis, “Before Ebola, New Czar Handled Political Crises,” *New York Times*, Oct. 17, 2014, <https://www.nytimes.com/2014/10/18/us/ron-klain-chief-of-staff-to-2-vice-presidents-is-named-ebola-czar.html>.

142 Davis, “Before Ebola, New Czar Handled Political Crises.”

143 Major Garrett, “What to Know About Ron Klain’s Job as Ebola Czar,” *CBS News*, Oct. 22, 2014, <https://www.cbsnews.com/news/what-to-know-about-ron-klains-job-as-ebola-czar/>.

144 Cameron, “I Ran the White House Pandemic Office.”

145 Cameron, “I Ran the White House Pandemic Office.”

By the time the outbreak was quelled in 2016, it had become the largest outbreak of Ebola in history, with 28,616 confirmed cases in Guinea, Liberia, and Sierra Leone and 11,310 dead.¹⁴⁶ There were a total of 11 reported cases of Ebola in the United States. Because the virus did not spread within the United States, Obama did not declare an emergency or invoke emergency powers. Nevertheless, the administration's overt posture was to treat the outbreak as a national security risk and to rely on Obama's authority as commander-in-chief to arrest the spread of infectious disease.

Zika Virus: 2015–2016

In March 2015, health officials in Brazil reported an outbreak of skin rashes, later identified to be the Zika virus.¹⁴⁷ Outbreaks and evidence of transmission appeared in the Americas, Africa, and other parts of the world. The Zika virus transmitted through an entirely different vector (mosquitos) than either H1N1 influenza or the Ebola virus, which spread through respiratory transmission or person-to-person transmission of bodily fluids.¹⁴⁸

In 2015, there were 62 symptomatic Zika virus cases in the United States (all reported in travelers to the U.S. from other affected areas) and 10 symptomatic cases in U.S. territories (one traveler from another affected area, and the remainder who were infected locally). In 2016, the number of reported infections spiked dramatically — there were 5,168 symptomatic Zika cases reported in the United States, of which 4,944 were travelers coming to the United States from affected areas, and 224 were the result of local

mosquito-borne transmission. Cases dropped off after 2017, with a total of four cases reported in the United States in 2020.¹⁴⁹

The Obama administration's response to the Zika virus did not rely on the same tools as during the Ebola virus, but instead relied primarily on public health tools to prevent or contain the spread. As with the Ebola virus, Obama did not declare an emergency under the National Emergencies Act, nor did he declare an emergency or major disaster under the Stafford Act. The Health and Human Services secretary declared a public health emergency in Puerto Rico,¹⁵⁰ but not in other parts of the United States. Nevertheless, the federal government's posture was one of aggressive federal action to prepare for the arrival of the disease in the United States and mitigate its spread.

In February of 2016, the Obama administration sought \$1.9 billion "in emergency funding to support the full range of activities needed to prevent, detect, and respond to the Zika virus and its serious associated health effects."¹⁵¹ After congressional delays to voting on requested funding to combat the outbreak, the Obama administration drew upon \$600 million initially appropriated to combat the Ebola crisis.¹⁵²

COVID-19 and the Trump Administration's Response

The outbreak of COVID-19 was a fast-developing and fast-spreading event. The exact origins of the disease are still uncertain. Even after Biden ordered U.S. intelligence agencies to provide their best assessment of how the disease emerged,¹⁵³ the intelligence community remains divided on

146 "Ebola Virus Disease Situation Report," World Health Organization, June 10, 2016, https://apps.who.int/iris/bitstream/handle/10665/208883/ebolasitrep_10Jun2016_eng.pdf.

147 Camila Zanluca et al., "First Report of Autochthonous Transmission of Zika Virus in Brazil," *Memórias do Instituto Oswaldo Cruz* 110 (2015), <https://doi.org/10.1590/0074-02760150192>; and Chris Fellner, "Zika in America: The Year in Review," *Pharmacy and Therapeutics* 41, no. 12 (December 2016): 778–91, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5132420/>.

148 "Zika Transmission," Centers for Disease Control and Prevention, accessed Jan. 25, 2022, <https://www.cdc.gov/zika/prevention/transmission-methods.html>.

149 "Zika Cases in the United States," Centers for Disease Control and Prevention, accessed Jan. 25, 2022, <https://www.cdc.gov/zika/reporting/2020-case-counts.html>.

150 "Determination that a Public Health Emergency Exists in Puerto Rico as a Consequence of the Zika Virus Outbreak," U.S. Department of Health and Human Services, Aug. 12, 2016, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/zika-pr.aspx>; "Renewal of Determination that a Public Health Emergency Exists," U.S. Department of Health and Human Services, Nov. 4, 2016, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/zika-renewal.aspx>; "Renewal of Determination that a Public Health Emergency Exists," U.S. Department of Health and Human Services, Jan. 31, 2017, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/zika-31Jan2017.aspx>; and "Renewal of Determination that a Public Health Emergency Exists," U.S. Department of Health and Human Services, April 28, 2017, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/zika-renewal-28April2017.aspx>.

151 "Our Response to the Zika Virus," The White House, accessed Jan. 25, 2022, <https://obamawhitehouse.archives.gov/zika>.

152 Donald G. McNeil Jr., "Obama Administration to Transfer Ebola Funds to Zika Fight," *New York Times*, April 6, 2016, <https://www.nytimes.com/2016/04/07/health/zika-virus-budget-ebola.html>.

153 "Statement by President Joe Biden on the Investigation into the Origins of COVID-19," The White House, May 26, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/05/26/statement-by-president-joe-biden-on-the-investigation-into-the-origins-of-covid-19/>.



the most likely origin.¹⁵⁴ However, there is strong evidence that the severity and transmissibility of the disease were initially downplayed by the Chinese government.

On Jan. 31, 2020, the secretary of the Department of Health and Human Services declared that a public health emergency had existed due to COVID-19 since Jan. 27, 2020, pursuant to the Public Health Services Act.¹⁵⁵ This declaration was subsequently renewed on April 21,

2020,¹⁵⁶ and again on July 23 and Oct. 2, 2020.¹⁵⁷ On March 11, 2020, Trump issued a 30-day ban on travel to and from continental Europe.¹⁵⁸ He declared a national emergency pursuant to the National Emergencies Act on March 13, 2020. On the same day, Trump also declared a nationwide emergency pursuant to the Stafford Act.¹⁵⁹ The White House issued social distancing guidelines, initially to last for two weeks, but which were extended to 30 more days, ending on April 29,

154 "Declassified Assessment on COVID-19 Origins," Office of the Director of National Intelligence, Oct. 29, 2021, <https://www.dni.gov/index.php/newsroom/reports-publications/reports-publications-2021/item/2263-declassified-assessment-on-covid-19-origins>.

155 "Determination that a Public Health Emergency Exists," U.S. Department of Health and Human Services, Jan. 31, 2020, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx>; and Proclamation No. 9994, 85 Fed. Reg. 15,337, March 13, 2020.

156 "Renewal of Determination that A Public Health Emergency Exists," U.S. Department of Health and Human Services, April 21, 2020, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/covid19-21apr2020.aspx>.

157 "Public Health Emergency Declarations," U.S. Department of Health and Human Services, accessed Jan. 28, 2022, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/default.aspx>.

158 Niraj Chokshi, "Airlines Cancel Flights and Lay Off Workers as Stocks Plummet," *New York Times*, March 12, 2020, <https://www.nytimes.com/2020/03/12/business/economy/coronavirus-airlines-trump-europe.html>.

159 "Letter to Federal Agencies on an Emergency Determination for the Coronavirus Disease 2019 (COVID-19) Pandemic Under the Robert T. Stafford Disaster Relief and Emergency Assistance Act," The White House, March 13, 2020, The American Presidency Project, <https://www.presidency.ucsb.edu/documents/letter-federal-agencies-emergency-determination-for-the-coronavirus-disease-2019-covid-19> (noting also that due to the severity of the crisis, requests for major declarations may be appropriate).

2020.¹⁶⁰ These guidelines, however, were not compulsory or binding on states. Stay-at-home orders or mandatory isolation orders were imposed by state governors and mayors.

Trump first invoked the Defense Production Act in March 2020 to secure the production of ventilators and other equipment. He delegated authority to the Health and Human Services secretary to use the act's Title I prioritization and allocation decisions;¹⁶¹ he delegated authority to the secretary, along with FEMA, to prevent hoarding of materials critical to the effort to respond to COVID-19;¹⁶² he directed the secretary to compel General Motors to "accept, perform, and prioritize" contracts or orders for ventilators;¹⁶³ and he directed the secretary to use Defense Production Act authorities to obtain ventilators and other personal protective equipment from multiple companies and allocate scarce or threatened health or medical resources for domestic use.¹⁶⁴ On March 25, 2020, the secretary issued a notice designating 15 categories of materials as scarce or threatened.¹⁶⁵ Subsequently, the Department of Justice announced that it had helped to confiscate and redistribute medical sup-

plies from price gougers.¹⁶⁶ However, the Trump administration only infrequently used the Defense Production Act to address the COVID-19 crisis. Money allocated by Congress for purchases of protective equipment under the act was redirected to other purposes.¹⁶⁷

Although the Trump administration did eventually make declarations under the Stafford Act for all 50 states, the federal government did not consolidate efforts to source and provide personal protective equipment to states, local governments, or hospitals. However, except for the efforts to use the Defense Production Act to compel production of certain equipment, the federal government encouraged state governors to play a more prominent, front-line role in responding to the crisis. Although this allowed for a diversity of response among the states, it also resulted in states competing and bidding against each other, as well as against the federal government, for vital resources.¹⁶⁸ A key criticism of this hands-off approach, which extended through the distribution of vaccines, was that it engendered a lack of accountability because of ambiguity over what entities were actually responsible

160 "Remarks at a White House Coronavirus Task Force Press Briefing," The White House, March 16, 2020, The American Presidency Project, <https://www.presidency.ucsb.edu/documents/remarks-white-house-coronavirus-task-force-press-briefing-2>; "Remarks at a White House Coronavirus Task Force Press Briefing," The White House, March 29, 2020, The American Presidency Project, <https://www.presidency.ucsb.edu/documents/remarks-white-house-coronavirus-task-force-press-briefing-14>; Tamara Keith, et al., "How 15 Days Became 45: Trump Extends Guidelines To Slow Coronavirus," *National Public Radio*, March 30, 2020, <https://www.npr.org/2020/03/30/822448199/how-15-days-became-45-trump-extends-guidelines-to-slow-coronavirus>; and Franco Ordoñez, "White House's Social Distancing Guidelines Will Be 'Fading Out,' Trump Says," *National Public Radio*, April 29, 2020, <https://www.npr.org/sections/coronavirus-live-updates/2020/04/29/848025672/white-houses-social-distancing-guidelines-will-be-fading-out-trump-says>.

161 "Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19," The White House, March 18, 2020, <https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-prioritizing-allocating-health-medical-resources-respond-spread-covid-19/>.

162 "Executive Order on Preventing Hoarding of Health and Medical Resources to Respond to the Spread of COVID-19," The White House, March 23, 2020, <https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-preventing-hoarding-health-medical-resources-respond-spread-covid-19/>.

163 "Memorandum on Order Under the Defense Production Act Regarding General Motors Company," The White House, March 27, 2020, <https://trumpwhitehouse.archives.gov/presidential-actions/memorandum-order-defense-production-act-regarding-general-motors-company/>.

164 "Memorandum on an Order Under the Defense Production Act of 1950 Regarding the Purchase of Ventilators," The White House, April 2, 2020, The American Presidency Project, <https://www.presidency.ucsb.edu/documents/memorandum-order-under-the-defense-production-act-1950-regarding-the-purchase-ventilators>; "Memorandum on an Order Under the Defense Production Act of 1950 Regarding 3M Company," The White House, April 2, 2020, The American Presidency Project, <https://www.presidency.ucsb.edu/documents/memorandum-order-under-the-defense-production-act-1950-regarding-3m-company>; "Memorandum on Allocating Certain Scarce or Threatened Health and Medical Resources to Domestic Use," The White House, April 3, 2020, <https://trumpwhitehouse.archives.gov/presidential-actions/memorandum-allocating-certain-scarce-threatened-health-medical-resources-domestic-use/>.

165 "Notice of Designation of Scarce Materials or Threatened Materials Subject to COVID-19 Hoarding Prevention Measures Under Executive Order 13910 and Section 102 of the Defense Production Act of 1950," U.S. Department of Health and Human Services, March 25, 2020, <https://www.hhs.gov/sites/default/files/hhs-dfa-notice-of-scarce-materials-for-hoarding-prevention.pdf>.

166 "Department of Justice and Department of Health and Human Services Partner to Distribute More Than Half a Million Medical Supplies Confiscated from Price Gougers," U.S. Department of Justice, April 2, 2020, <https://www.justice.gov/opa/pr/department-justice-and-department-health-and-human-services-partner-distribute-more-half>.

167 Andrew Jacobs, "Despite Claims, Trump Rarely Uses Wartime Law in Battle Against Covid," *New York Times*, Sept. 22, 2020, <https://www.nytimes.com/2020/09/22/health/Covid-Trump-Defense-Production-Act.html>; and "Defense Production Act (DPA): Recent Developments in Response to COVID-19 (IN11470)," Congressional Research Service, July 28, 2020, 3, <https://crsreports.congress.gov/product/details?prodcode=IN11470> ("The Administration's DPA implementation pattern appears sporadic and relatively narrow.")

168 Cynthia J. Bowling, Jonathan M. Fisk, and John C. Morris, "Seeking Patterns in Chaos: Transactional Federalism in the Trump Administration's Response to the COVID-19 Pandemic," *American Review of Public Administration* 50, no. 6–7 (2020): 514, <https://doi.org/10.1177/2F0275074020941686>; Andrew Soergel, "States Competing in 'Global Jungle' for PPE," *U.S. News & World Report*, April 7, 2020, <https://www.usnews.com/news/best-states/articles/2020-04-07/states-compete-in-global-jungle-for-personal-protective-equipment-amid-coronavirus>; and Lauren Feiner, "States Are Bidding Against Each Other and the Federal Government for Important Medical Supplies — and It's Driving Up Prices," *CNBC*, April 11, 2020, <https://www.cnbc.com/2020/04/09/why-states-and-the-federal-government-are-bidding-on-ppe.html>.

for managing the crisis.¹⁶⁹

The Trump administration formally invoked a host of the authorities identified above, but it also declined to play an overarching coordinating role of obtaining and distributing necessary equipment to state and local jurisdictions, preferring instead to let the lower levels of government bid for the necessary equipment themselves. Much has been written about how political considerations, rather than the fragmented legislative architecture, guided the Trump administration's decision-making and its posture toward limiting the federal government's role in the response to the novel virus.¹⁷⁰ However, this position that the federal government should play a supporting role to the states is encouraged by the fragmented legislative architecture itself, in which federal disaster response is secondary to each state's response, even if the underlying crisis may transcend state boundaries.¹⁷¹ The president could declare an emergency on the basis that "an emergency exists for which the primary responsibility for response" lies with the federal government.¹⁷² As documented above, the legislation provides for different resources if an incident is categorized as an emergency versus a major disaster. Even if the Trump administration did not find itself legally hampered by the inconsistent statutes, the risk for the Biden administration, as well as future administrations, is that similarly shoehorning actions into imprecise definitions may make federal actions open to claims of going beyond its statutory authority.

COVID-19 and the Biden Administration's Response

Although the Biden administration has only been in office for a year, enough time has passed to evaluate the administration's approach to COVID-19 and the measures that it took early on to mitigate the pandemic. Shortly after taking office, Biden issued the *National Strategy for the COVID-19 Response and Pandemic Preparedness*.¹⁷³

Biden's immediate priorities differed from those of Trump's, as he advocated for more robust federal intervention. For instance, the strategy emphasized mounting a safe, effective and comprehensive vaccination campaign. Indeed, Biden initially promoted vaccination using moral suasion. The Biden administration subsequently imposed requirements for military servicemembers¹⁷⁴ and civilian federal employees to be vaccinated,¹⁷⁵ and also issued regulations for large private companies to mandate their employees be vaccinated.¹⁷⁶

Biden also emphasized monetary relief for Americans. He advocated for Congress to pass the American Rescue Plan Act of 2021, which it did, and he signed it into law on March 11, 2021.¹⁷⁷

In other ways, however, Biden's actions constituted a continuation of Trump's. On Feb. 24, 2021, Biden issued a proclamation, extending the national emergency invoked by Trump and stating that the COVID-19 pandemic continued to cause significant risk to the public health and safety of the United States.¹⁷⁸ Pursuant to the National Emer-

169 Rebeca Robbins, Frances Robles, and Tim Arango, "Here's Why Distribution of the Vaccine Is Taking Longer than Expected," *New York Times*, Dec. 31, 2020, <https://www.nytimes.com/2020/12/31/health/vaccine-distribution-delays.html>.

170 Ken Dilanian and Dan De Luce, "Trump Administration's Lack of a Unified Coronavirus Strategy Will Cost Lives, Say a Dozen Experts," *NBC News*, April 3, 2020, <https://www.nbcnews.com/politics/donald-trump/trump-administration-s-lack-unified-coronavirus-strategy-will-cost-lives-n1175126>; Brett Samuels, "Decentralized Leadership Raises Questions About Trump Coronavirus Response," *The Hill*, April 4, 2020, <https://thehill.com/homenews/administration/491093-decentralized-leadership-raises-questions-about-trump-coronavirus?rl=1>; Yasmeen Abutaleb et al., "The Inside Story of How Trump's Denial, Mismanagement and Magical Thinking Led to the Pandemic's Dark Winter," *Washington Post*, Dec. 19, 2020, <https://www.washingtonpost.com/graphics/2020/politics/trump-covid-pandemic-dark-winter/>; and "Comparing Trump and Biden on COVID-19," Kaiser Family Foundation, Sept. 11, 2020, <https://www.kff.org/coronavirus-covid-19/issue-brief/comparing-trump-and-biden-on-covid-19/>.

171 42 U.S.C. § 5170 (predicating any declaration of major disaster on a determination that "effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary").

172 42 U.S.C. § 5191.

173 *National Strategy for the COVID-19 Response and Pandemic Preparedness*, The White House, January 2021, <https://www.whitehouse.gov/wp-content/uploads/2021/01/National-Strategy-for-the-COVID-19-Response-and-Pandemic-Preparedness.pdf>.

174 "Statement by President Joe Biden on COVID-19 Vaccines for Service Members," The White House, Aug. 9, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/09/statement-by-president-joe-biden-on-covid-19-vaccines-for-service-members/>.

175 "Executive Order on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees," The White House, Sept. 9, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-requiring-coronavirus-disease-2019-vaccination-for-federal-employees/>.

176 "Fact Sheet: Biden Administration Announces Details of Two Major Vaccination Policies," The White House, Nov. 4, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/04/fact-sheet-biden-administration-announces-details-of-two-major-vaccination-policies/>. On Jan. 13, 2022, the Supreme Court later blocked the Biden administration's vaccine mandate for businesses. See *NFIB v. Department of Labor*, Slip. Op., https://www.supremecourt.gov/opinions/21pdf/21a244_hgci.pdf.

177 Pub. L. No. 117-2 (2021).

178 "A Letter on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic," The White House, Feb. 24, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/24/a-letter-on-the-continuation-of-the-national-emergency-concerning-the-coronavirus-disease-2019-covid-19-pandemic/>.

gencies Act, Biden's extension would stay in effect until March 1, 2022.

And, like his predecessor, Biden has leveraged the Defense Production Act to expand access to vaccines and other medical equipment. On his second day in office, Biden issued an executive order directing key federal agencies involved in pandemic recovery to identify shortfalls in the provision of pandemic response supplies and remedy these gaps.¹⁷⁹ This order explicitly authorized agencies to use the Defense Production Act as legal authority to acquire additional stockpiles of medical supplies, improve distribution networks, build market capacity, and expand the industrial base. The Biden administration again invoked the Defense Production Act to speed up the production of vaccines for COVID-19¹⁸⁰ and promised in December 2021 to continue leveraging the act if needed to fulfill its promise to purchase and distribute 500 million at-home COVID-19 tests to Americans.¹⁸¹

The Biden administration's actions indicate that it envisions a more robust, proactive role for the federal government in responding to and containing COVID-19 than the Trump administration did. And while the Biden administration pushed for legislative financial relief for American families, Biden's orders within his first week in office indicated that he was willing to use the authorities at his command, including the Defense Production Act, more frequently than his predecessor to ensure that states and local governments had the medical supplies and vaccines necessary to mitigate the spread of the virus and provide medical care for infected individuals.

Drawing Lessons from Previous Disease Outbreaks and Proposing Legislative Reforms

What lessons has COVID-19 imparted? Certainly, that preparation for disasters can be critical to protect national security. But, so can the response. Once the preparation meets the reality of the severity of the crisis, the federal government has to make a rapid assessment of how it can help, and then act swiftly to procure and distribute the necessary resources. Hewing stridently to edicts of federalism and waiting until after state and local governments are overwhelmed before intervening risks prolonging the crisis. During times of crisis,

such as an infectious disease outbreak that can spread rapidly from state to state, the federal government may be the only locus of authority that can visualize the entire scope of the crisis, marshal the resources to combat it, and prevent states from competing with one another for scarce resources.

The federal government could play a tremendously beneficial role in quelling the crisis to prevent the spread within the country as well as internationally, so long as it does so early on and uses its position to obtain and provide resources for state and local governments. But there is a disconnect between the pre-outbreak legislative posture toward infectious disease outbreak (which emphasizes preparation and acknowledges such outbreaks as threats to security) and the paradigm for dealing with the outbreak once it reaches U.S. soil, where it falls within the framework for addressing disasters (which treats an outbreak primarily as a state and local health and welfare challenge). Because of the ease with which contagious diseases can spread across local, state, or national boundaries, pandemic events could arguably be considered to be crises that fall primarily within the responsibility of the federal government. To prepare for future pandemic events, as well as for future unimagined disasters, I recommend a broader reconsideration of disaster response legislation.

Proposed Revisions of Law

The recent and ongoing effort to stop the spread of COVID-19 has revealed several opportunities for amending the legal landscape. In this section, I offer a proposal to consolidate and harmonize the primary statutes upon which presidents traditionally rely when responding to domestic disasters. Although this is not limited to healthcare or pandemic-related events, the COVID-19 crisis has highlighted the need for such amendment.

I propose legislation based on four major goals — two for the executive branch and two for the legislative branch — in order to improve the *status quo* of a response to a domestic crisis: (1) clarify the powers the executive branch may exercise; (2) empower the executive to respond quickly; (3) increase transparency in federal response; and (4) allow Congress to conduct effective oversight over efforts to respond. Although legislation is not a

179 "A Sustainable Public Health Supply Chain," The White House, Jan. 21, 2001, <https://www.federalregister.gov/documents/2021/01/26/2021-01865/a-sustainable-public-health-supply-chain>.

180 "Remarks by President Biden on the Administration's COVID-19 Vaccination Efforts," The White House, March 2, 2021, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/03/02/remarks-by-president-biden-on-the-administrations-covid-19-vaccination-efforts/>.

181 "FACT SHEET: President Biden Announces New Actions to Protect Americans and Help Communities and Hospitals Battle Omicron," The White House, Dec. 21, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/21/fact-sheet-president-biden-announces-new-actions-to-protect-americans-and-help-communities-and-hospitals-battle-omicron/>.

panacea for concerns of executive overreach during moments of crisis or threats to national security, careful construction can address many of the same concerns by delimiting what authorities a president might possess and for how long, and by providing for meaningful oversight. Some of the proposals offered below to improve oversight reflect the paucity of examples of Congress exercising oversight under the National Emergencies Act. That statute requires Congress to meet six months after the declaration of a national emergency to vote on whether the emergency should be terminated,¹⁸² but failure to do so has no binding effect on the continuation of a declared emergency.¹⁸³

The normative goal of the proposals below is to cement an understanding that disaster response, as much as disaster preparation, is an area in which the federal government can play a tremendously beneficial, proactive role. After a disaster such as an infectious disease outbreak strikes, the current posture reflects uncertainties as to how each level of government should respond. First, the legislative proposals would overtly recognize that infectious disease response implicates nation-

Rather than relying on different authorities with different criteria, I propose reforming the current federal emergency and disaster response statutory framework into one statute with harmonized criteria.

al security. Second, they would not merely allow but would encourage the president to respond proactively to a threat such as COVID-19 and deploy a whole-of-government approach that coordinates the response and obtains and provides the necessary resources for that response. Third, defining beforehand the powers to be exercised and restricting the temporal or geographic scope of those powers would assist Congress in meaningfully overseeing the response. The oversight measures proposed here would put the onus on the executive branch to disclose information to Congress. If it does not, automatic brakes would engage to pause the president's ability to deploy federal re-

sources. Doing so helps to reach a balance between rapid response and meaningful oversight to make sure resources are applied most effectively.

Executive Goals:

Improved Clarity to Facilitate Response

The experiences of the Obama, Trump, and Biden administrations have shown that phenomena such as infectious disease outbreaks can have significant national impacts with particularly disastrous localized effects. To that end, I propose a new Emergencies and Disaster Response Act.

Rather than relying on different authorities with different criteria, I propose reforming the current federal emergency and disaster response statutory framework into one statute with harmonized criteria. Having multiple criteria for an emergency declaration by the president, such as under the National Emergencies Act or the Stafford Act, or by the Health and Human Services secretary under the Public Health Service Act, leaves an impression that a public health emergency does not pose the same national security challenges as an archetypal emergency, such as a military threat. But, as seen above in the discussion of COVID-19's impact on national security, nothing could be further from the truth.

Recognizing that public health emergencies threaten national security, the new statute would consolidate certain affected legislation (primarily definitions and declaration criteria) from Title 42 (pertaining to public health and welfare) into Title 50 (pertaining to war and national defense). That is, I propose that Congress prescribe a definition of "emergencies" (with an illustrative and non-exhaustive list of examples) that could then be referenced in other legislation. Creating a common set of definitions can help to form a common understanding as to what warrants federal intervention. Such legislation should clearly include infectious disease outbreaks within the scope of federal concern, mitigating (if not eliminating) any subsequent interpretive confusion as to whether the federal government should undertake a leading role in the response to such a crisis.

As part of consolidating definitions of what constitutes emergencies and disasters, the legislation would allow the president to declare a state of emergency but would restrict the authorities that he or she can exercise depending on the nature or origin of the cri-

182 50 U.S.C. § 1622(b).

183 *United States v. Ali Amirnazmi*, 645 F.3d 564 (3d Cir. 2011). Others who have searched the Congressional Record have found only one instance where Congress has met pursuant to the statutory obligation in 50 U.S.C. § 1622(b). Thronson, "Toward Comprehensive Reform of America's Emergency Law Regime," 752.

sis at hand — such as foreign versus domestic, armed attack versus healthcare crisis — and would take into account whether and what resources are allocated by state and local governments. By creating this unified definition, the Emergencies and Disaster Response Act would eliminate the distinction between emergencies and major disasters within what is now the Stafford Act. However, the statute need not require federal response in every emergency scenario, but could base the response on the nature, severity, and origin of the crisis. Congress should prescribe certain categories of events that are automatically recognized as being a federal concern, such as infectious disease outbreaks. The benefit of doing so would be that the federal government could move rapidly without requiring a formal request for assistance from state or tribal governments.

Beyond the primary structural revision proposed above, I propose additional legislative revisions to the authorities of executive branch actors. As the novel coronavirus crisis amply demonstrated, there is a need for one individual who is focused on responding to pandemic events. The new Emergencies and Disaster Response Act would therefore provide, by statute, for an individual within the National Security Council whose focus is on pandemic threats. There is precedent for this: The National Security Act of 1947 created the National Security Council and provided for membership on the council.¹⁸⁴ Similarly, Congress could provide for coordinating positions on pandemic response or, more broadly, healthcare challenges that rise to the level of national security threats. Although the Biden administration has already undone the Trump administration's effort to consolidate positions within the National Security Council,¹⁸⁵ a future administration could easily take the same approach as Trump. Legislation would create a permanent position with the responsibility and resources to monitor current and emerging biological threats. Although creating the position does not ensure that a future president would necessarily fill it promptly or with someone qualified, creating the position and empowering whoever holds it to coordinate across the federal government would provide a future officeholder with the tools to

successfully monitor such threats.

The Emergencies and Disaster Response Act would also specify changes to the existing Stafford Act. As it would eliminate the distinction between emergencies and major disasters, it would also amend the federal cost-share provisions such that there would be a common sliding scale that would reflect the severity of the crisis and the measures that state or local governments have already taken to mitigate hazards. Furthermore, the Stafford Act currently categorizes types of “essential assistance” that the federal government may provide in the event of a major disaster.¹⁸⁶ Under the proposed consolidated criteria for emergency declaration, such essential assistance would be made available for all declarations, with the amount of assistance provided based on need. Currently, the Stafford Act also provides for the provision of certain “services essential to saving lives and protecting and preserving property or public health and safety;”¹⁸⁷ including “emergency medical care, emergency mass care, emergency shelter, and provision of food, water, medicine[,] durable medical equipment, and other essential needs.”¹⁸⁸ I propose amending this statutory provision to include personal protective equipment and *non*-durable medical equipment of the kind that was needed but in short supply nationwide throughout much of the early days of the COVID-19 outbreak.¹⁸⁹

Finally, the new legislation would create a standing public health emergency funding appropriation to allow the federal government to marshal and deploy resources rapidly in the event of a future disease outbreak.¹⁹⁰

Legislative Goals:

Improved Transparency and Oversight

In order to ensure that Congress maintains sufficient oversight over the response to an emergency, statutory limitations should be placed on the authority of the executive to declare a crisis and direct resources in response. Congress has significant oversight powers, but it may be beneficial to construct safeguards and brakes into any legislation. As the

184 Pub. L. No. 80-253 § 101, 61 Stat. 495 (1947), now codified at 50 U.S.C. § 3021.

185 The White House, “Executive Order on Organizing and Mobilizing the United States Government to Provide a Unified and Effective Response to Combat COVID-19 and to Provide United States Leadership on Global Health and Security.”

186 42 U.S.C. § 5170b.

187 42 U.S.C. § 5170b(a)(3).

188 42 U.S.C. § 5170b(a)(3)(B).

189 Andrew Jacobs, Matt Richtel, and Mike Baker, “At War with No Ammo: Doctors Say Shortage of Protective Gear Is Dire,” *New York Times*, March 19, 2020, <https://www.nytimes.com/2020/03/19/health/coronavirus-masks-shortage.html>.

190 As Klain, the former Obama Administration “Ebola czar” commented, the congressional delays in approving funding to respond to the Zika virus demonstrate the need for a dedicated appropriation. Kelly McEvers, “Former White House Ebola Czar Urges Congress To Act Faster On Zika,” *National Public Radio*, May 24, 2016, <https://www.npr.org/2016/05/24/479349612/former-white-house-ebola-czar-urges-congress-to-act-faster-on-zika>.



Senate Committee on the Termination of the National Emergency found, American history is replete with examples of Congress providing authority to the president after the beginning of a crisis, with such legislation remaining on the books and available for use long after the initial crisis had passed.¹⁹¹ The legislation proposed here would build in safeguards and oversight mechanisms to mitigate such risks.

Importantly, unlike the National Emergency Act,¹⁹² the Emergencies and Disaster Response Act would attempt to create a cogent definition of the term “emergency.” The Stafford Act does provide a definition of emergency,¹⁹³ but the definition only applies to that statute and only makes sense within a framework that treats crisis response or disaster response primarily as a health and welfare matter that does not implicate national security. By creating a definition ahead of time, Congress has the opportunity to set the outer boundaries of when the president might be able to declare an emergency or, at the very least, set limits on the president’s ability to spend federal resources.

To further ensure that Congress is able to engage in effective oversight, statutory restrictions should be placed on the use of federal resources in responding to an emergency. For instance, any funding could terminate after 30 days unless certain contingencies are met, such as periodic reporting on how any federal resources are disseminated.

In addition to the legislative proposals above, Congress should create a joint, bipartisan congressional oversight panel to oversee federal funding during national emergencies, in the same way that the Coronavirus Aid, Relief, and Economic Security Act created a congressional oversight commission to ensure lawful use of federal funds,¹⁹⁴ or the Emergency Economic Stabilization Act of 2008 created the Congressional Oversight Panel to oversee the Troubled Asset Relief Program.¹⁹⁵

Even a few measures such as these would help to ensure that Congress remains involved in and informed about how federal resources are disbursed during an emergency.

A Brief Comment on Federalism

Before enacting these legislative reforms, Congress would likely have to contend with concerns that any adjustment to the federal government’s role in disaster response could run into federalism and constitutional constraints. The current federated approach to disaster response is deeply rooted in commonly held perceptions of where responsibility for disaster response should generally lie.¹⁹⁶

Concerns over whether the legislative proposals above, or any other legislative reforms, are disrupting the division of powers between the national and state government should not be dismissed lightly. The legislative proposal envisioned here is not intended to change wholesale the division of responsibilities for disaster relief. Nor is it intended to elevate everyday police powers to the federal government. But, as seen during COVID-19, certain types of disaster events have a national impact and transcend state boundaries, even if there are varying effects in particular places. As also seen during COVID-19, without proactive federal involvement, state and local governments can quickly become overwhelmed in similar ways and can end up competing with one another for resources.¹⁹⁷

The Emergencies and Disaster Response Act would streamline definitions of disasters, emergencies, and other circumstances that trigger federal action, so that state and local governments have greater clarity about when federal agencies might act and therefore know what events remain the states’ responsibility. The proposed legislation may not satisfy those who prefer more state-level control over emergency response or those who prefer stronger federal control over emergency response. However, it is ultimately faithful to precepts of federalism in that it recognizes that some categories of disaster events (unlike, say, local weather phenomena, small-scale fires, or other events with low likelihood of interstate effects) are far-reaching in scope and impact, bringing them within the national government’s purview, especially where events can quickly overwhelm state and local responders and quickly cross state lines. Even with the recommended statutory proposal in place, careful monitoring and constant state-federal

191 S. Rep. 93-549, 3–7.

192 50 U.S.C. § 1621 (discussing declaration of a “national emergency” without defining what would constitute an emergency).

193 42 U.S.C. § 5122(1).

194 Pub. L. No. 116-136, 134 Stat. 281 (2020); and § 4020, 134 Stat. 486.

195 Pub. L. No. 110-343, 122 Stat. 3765 (2008), 12 U.S.C. § 5201 *et seq.*; 12 U.S.C. § 5233 (establishing the Congressional Oversight Panel); 12 U.S.C. § 5214 (requiring the Financial Stability Oversight Board to provide reports to the Congressional Oversight Panel); and 12 U.S.C. §§ 5226–5227 (requiring the Comptroller General to provide reports to the Congressional Oversight Panel).

196 Greenberger, “The Alfonse and Gaston of Governmental Response to National Public Health Emergencies,” 613.

197 Jacobs, Richtel, and Baker, “At War with No Ammo.”

communication would be necessary to understand whether the federal government needs to bring its resources to bear.


Conclusion

During times of emergency, perhaps no responsibility is more important for the executive than keeping Americans safe and responding coherently and decisively. A whole-of-government approach is necessary to synchronize the activities of all agencies in the federal government as well as all relevant levels of government. This has been amply demonstrated during the current COVID-19 crisis, which has required strenuous efforts at federal, state, and local levels of government. As noted above, the Department of Health and Human Services has published the *National Health Security Strategy*, professing to adopt such an approach. However, the COVID-19 crisis and other disease outbreaks that preceded it have shown that even more could be done to facilitate the federal government's ability to operate in a space that has significant ramifications for national security and arguably falls squarely within the ambit of federal responsibilities.

Over the course of several decades, the federal government has increasingly approached infectious disease outbreaks or bioterrorism as threats to national security. In multiple statutes, the federal government has been empowered to play a significant role, whether coordinating responses, providing grants for research, or helping subordinate levels of government prepare for contingencies. But after an infectious disease has struck, the legislative arena is more uncertain, vacillating between treating the event as a public health incident or as a threat to national security. The choice is not binary, but acknowledging that response — as much as preparedness — concerns national security may impel the federal government to play a larger role in responding to public health crises. Although pandemics are certainly not the only crisis or disaster threatening American national security, the inconsistent response to outbreaks over the Obama, Trump, and Biden administrations shows the need to improve statutory design to deal with emergencies, more broadly, and pandemics, specifically.

Any response to a disaster should not only be robust and effective, but also grounded in law. Considerable literature has addressed the American constitutional design and how emergency response fits within that framework. Even under the existing institutional structure, it is nevertheless possible to find opportunities to ensure a robust disaster response. To that end, this paper has proposed a new

statute, the Emergencies and Disaster Response Act, that would consolidate the National Emergencies Act, the Stafford Act, and parts of the Public Health Services Act. It would help to close gaps in federal authorities in circumstances where national security and public health intersect. It would more coherently define what would constitute an emergency and, in doing so, acknowledge that public health crises threaten national security and ought to be treated like other national emergencies. It would also provide standing, dedicated funding to allow the federal government to respond quickly and robustly.

But robust powers should be balanced with effective oversight to guard against abuse. The proposed legislation is an effort to manage carefully the tension between effective action and effective oversight. By pushing for legislative change, Congress could empower the president to act when crisis strikes, encourage the federal government to be especially proactive in fast-spreading disease outbreaks, and preserve the ability to protect taxpayer dollars. These goals are not mutually exclusive. Taking these measures now may help the United States to be better prepared for when the next pandemic strikes. 

Balaji L. Narain previously served on active duty as a major and judge advocate in the U.S. Air Force. He received his J.D. from Harvard Law School in 2010. He is a member of the bar of New York State, the Court of Appeals for the Armed Forces, and the U.S. Supreme Court.

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