

Bush-era continuity of government planning

Recently, the Internet has been abuzz with speculation about new national security directives that establish a White House point-person for so-called "continuity of government," or COG, operations. Dual directives signed by the president on May 9th replace older COG protocols from the Clinton administration, and also create a new executive branch position of "National Continuity Coordinator." Due to the volume of discussion about these orders, it is important to understand what they are, what they are not, and what aspects of these orders warrant additional scrutiny.

History

"Continuity of Government" programs have existed in various forms since the Cold War. These programs have generally set forth contingency plans under which the federal government could continue to operate in the event of a major catastrophe, such as a nuclear war. During the 1950s and 60s, COG planning involved the creation of succession procedures for federal officials, as well as the construction of secure locations to house congressional and executive branch personnel in the event of nuclear attack.

During the Carter administration, COG planning was brought under the umbrella of the newly created Federal Emergency Management Agency (FEMA). The Reagan administration embraced and enhanced COG operations as part of its strategic military posture, which involved planning to fight and win a limited nuclear exchange with the Soviet Union. COG protocols have been updated by every successive presidential administration, and existing COG plans were even implemented shortly after 9/11. A 2002 Washington Post article detailed the mobilization of a "shadow government" in a secure bunker outside of Washington DC, tasked with assuming executive branch functions in the event that the nation's leadership was killed or otherwise impaired.

Controversy

"Continuity of Government" plans have been controversial since their inception, for a variety of reasons. COG operations are expensive, and their true cost is hidden within the government's "black budget," which is known for extravagant spending, as well as for episodes of financial impropriety and fraud. Doomsday-style contingency plans have also long contained provisions that grant broad authority to the President. For example,

President Kennedy's executive order 10995 allows the President to re-allocate space on the radio and television spectrum in the event of a national emergency - essentially allowing the executive branch to seize control of electronic communications in a time of national disaster. Likewise, executive order 11004 allows the federal government to coordinate the relocation of population centers, or to designate areas of the country to be abandoned.

Many executive orders relating to COG operations have a classified annex, or are classified in their entirety. For instance, President Bush's newly signed NSPD-51 and HSPD-20 have such annexes. This secrecy has prompted speculation and concern about the scope of the powers hidden within these classified documents. COG critics point to Reagan-era contingency plans that were revealed during the Iran-Contra affair as prime examples of the dangers of such secrecy. During congressional hearings on the Iran-Contra matter, Texas representative Jack Brooks asked Colonel Oliver North about contingency plans that he had helped to draft which provided for a suspension of the U.S. Constitution. Hearing chairman Daniel Inouye prevented public discussion of this matter, but it was later revealed that such FEMA contingency plans did exist, although they were eventually scuttled by Reagan's Attorney General William French Smith.

Over time, criticism of COG planning has come from both sides of the political divide. Reagan-era contingency plans caused much concern on the left during the 1980s - particularly in the aftermath of the Iran-Contra revelations. Likewise, Bill Clinton's updating of COG plans in the late 1990's was viewed with suspicion by elements of the right, who intimated that Clinton might try to take advantage of the Y2K event to assume dictatorial powers. Central to both of these critiques are several legitimate questions. For instance, what kind of event would trigger the President's broad powers under COG protocols? Are these powers Constitutional? Who gets to define what constitutes a "national emergency?" And what happens to those who don't share that assessment?

To the extent that COG plans are merely procedural contingencies that allow the federal government to continue to function in the event of a major disaster, they pose no substantive problems. To the degree that COG-related executive orders enhance the ability of the President to pre-empt state and local decision making, they challenge closely held notions of American federalism. And if classified COG plans were found to still

contain stand-by provisions to suspend the Constitution, they would be patently illegal. Bearing all of this in mind, what are we to make of the new changes to COG protocols made by President Bush's recent directives?

The Bush plan

Overall, COG plans as amended by NSPD-51 and HSPD-20 seem to provide for:

- The revocation of Clinton-era COG plans;
- The establishment of a new executive branch "National Continuity Coordinator" who is tasked with integrating existing contingency plans among the many federal agencies, as well as executing additional functions set out in the Presidential directives;
- Establishing benchmarks for continuity of government preparedness among federal agencies, as well as the District of Columbia;
- Distributing funds to state and local governments to underwrite continuity of government exercises;
- Naming the President as the head of the national continuity of government effort;
- Enumerating COG duties of the executive branch, such as ensuring the continued functioning of the national economy, and providing publicly visible leadership in a time of national crisis;
- Providing guidance to state, local, and tribal governments about how to mesh their emergency plans with federal COG plans.

Analysis

While the President's recent directives deserve close scrutiny, they do not entail all that has been claimed by some critics.

In reading NSPD-51, some have made claims that the President has effectively positioned himself to seize control of the entire government during a national emergency. Based on the public text of NSPD-51, this claim lacks support. While all COG plans since the 1950s have envisioned vesting the President with some degree of broad power, NSPD-51 does not

appear to strip other branches of the government of their inherent authorities (although there are several separation of powers issues raised by this document, which are detailed below.)

At the same time, the language of NSPD-51 is muddled with regard to the role of the executive branch in COG planning. On one hand, it purports to place the President in charge of COG preparedness for the entire federal government (which would likely raise separation of powers issues), but on the other hand, it also notes that Congress and the judiciary shall be responsible for their own COG preparations. Nowhere, however, does it vest the President with the complete authority to usurp the power of the other branches of government. This is not to say that there may not be more problematic powers contained within the classified annex. As the Reagan administration demonstrated, the classification of COG plans provides opportunities for such powers to be both claimed and codified. However, in the absence of hard proof, there is no way to confirm some of the broader claims made by critics of the Bush administration's COG updates. Rather, additional scrutiny should be brought to bear on the classified portions of NSPD-51 and HSPD-20, to ensure that the plans contained within are not extra-constitutional.

As noted above, NSPD-51 does raise some legitimate questions about the separation of powers. Various elements of the COG plan that it sets forth do not involve executive branch agencies, and thus these elements would have to be approved by Congress, rather than mandated by the White House. These provisions include regulations pertaining to the national economy, and the implementation a national communications system.

Finally, despite claims to the contrary, NSPD 51 does not provide for a take-over of state, local or tribal governments. Instead, it suggests that the contingency plans of these governments should be coordinated with federal efforts. However, it should be noted that the Bush administration was successful in recently securing legislation that *does* provide a potential threat to federalism and local control. The 2006 Defense Authorization Act amended the pre-existing Insurrection Act, and effectively empowered the President to mobilize federal troops to intervene in local affairs without the consent of state governors. This could potentially occur whenever the President determines that there is an emergency that is beyond the ability of local authorities to manage. Previously, the President could only deploy federal troops in situations where "insurrection" or "domestic violence"

made the enforcement of federal laws "impractical." The newly amended Insurrection Act adds "natural disasters, terrorist attacks" or "serious public health emergencies" as triggering criteria for federal troop deployment. This new authority should be curtailed, and additional investigation is warranted to discover whether classified sections of NSPD-51 and HSPD-20 enhance the military deployment powers that were recently granted to the President.

In summary, COG plans have long been a source of concern for those committed to constitutional government, due to the secret nature of their operations. However, the Bush administration's updating of continuity of government plans is not - as some have claimed - a *de facto* sign of impending dictatorship. Operations in the COG realm should be watched with a discerning eye, though, given past revelations, and given the scope of the President's new powers to deploy federal troops. Added scrutiny - plus appropriate changes to federal law - are required to ensure that the President is not vested with too much emergency authority, with too few checks.

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