

## PUBLIC HEALTH EMERGENCIES AS THREATS TO NATIONAL SECURITY

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### INTRODUCTION

Protecting the nation from a diverse array of public health threats remains a consummate objective of federal, state, and local governments. Achieving it is no simple task. Threats to the public's health are multifarious, unpredictable, and downright scary in many cases. Media coverage of gruesome deaths from naturally-occurring diseases like Ebola tap into Americans' fears of dangerous, deadly conditions.<sup>1</sup> Confirmed links between Zika virus and infant microcephaly (e.g., small skulls and impaired brains), Guillain-Barre Syndrome, and other disabling conditions shape peoples' perceptions of their own risks of infection.<sup>2</sup> Legitimate and irrational fears are stoked by significant levels of distrust of government or industry.<sup>3</sup> Virtually every major infectious disease or bioterrorism threat is coupled with loosely-based, albeit well-publicized, conspiracy theories. They include everything from devious schemes to thin minority populations or stealth efforts to unleash contaminants on an unknowing populace through dangerous vaccines, genetically-altered mosquitos, or other vectors.<sup>4</sup>

Americans' trepidations of public health threats invariably beget responses among federal, state, and local governments even if the actual risks to domestic populations are infinitesimally low. The 2001 anthrax attacks directly impacted only a couple dozen people, and took only five American victims.<sup>5</sup> The spread of Ebola viral disease (EVD) killed upwards of 11,000 people in West Africa, but only one person, Eric Thomas Duncan, in the U.S. (after he

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<sup>1</sup> Corey H. Basch et al., *Coverage of the Ebola Virus Disease Epidemic in Three Widely Circulated U.S. Newspapers: Implications for Preparedness and Prevention*, 4 HEALTH PROMOTION PERSP. 247 (2014).

<sup>2</sup> Laura Beil, *Women Who Brought Zika Fears Home With Them*, N.Y. TIMES (Mar. 15, 2016), <http://www.nytimes.com/2016/03/15/health/zika-virus-pregnant-women-microcephaly-ultrasounds.html>.

<sup>3</sup> Katie Worth, *As Brazil Confronts Zika, Vaccine Rumors Shape Perceptions*, PBS (Feb. 16, 2016), <http://www.pbs.org/wgbh/frontline/article/as-brazil-confronts-zika-vaccine-rumors-shape-perceptions>.

<sup>4</sup> Andrew Jacobs, *Conspiracy Theories About Zika Spread Through Brazil With the Virus*, N.Y. TIMES (Feb. 17, 2016), <http://www.nytimes.com/2016/02/17/world/americas/conspiracy-theories-about-zika-spread-along-with-the-virus.html> (discussing conspiracy theories attributing the cause of Zika virus to (1) an elitist plot to depopulate the earth and (2) genetically modified mosquitoes released to combat dengue. Additional discussion focuses on the cause of increased microcephaly cases linking it to vaccinations for chickenpox and rubella).

<sup>5</sup> Robert Johnston, *Review of Fall 2001 Anthrax Bioattacks*, ROBERT JOHNSTON'S ARCHIVE (Sept. 28, 2007), <http://www.johnstonsarchive.net/terrorism/anthrax.html>.

arrived in Dallas after contracting the illness in Liberia).<sup>6</sup> Still, for decades, national, state, and local government leaders often classify these and other conditions as emergencies through different legal authorities.<sup>7</sup> To the extent characterizing emerging diseases or acts of bioterrorism as emergencies (despite sometimes specious risks) results in response efforts that greatly limit negative public health impacts, such classifications may be warranted.

More recently, federal leaders and agencies have re-conceptualized the nature of public health emergencies in terms of national security, reflecting a shift in national authority and accountability. Multiple Presidents and other federal officials speak in terms of how public health events pose national security threats (NSTs) or national security priorities (NSPs). On April 1, 2016, President Obama proclaimed that public health is the key to national security and well-being at home and abroad.<sup>8</sup> As discussed in this Commentary,<sup>9</sup> classifying public health concerns as national security threats presents uncertainties with practical and legal implications. Practical implications include the augmentation of federal influence, resources, and powers to coordinate responses internationally and at home. Labeling public health emergencies as national security events can alter how federal, state, and local governments respond legally to public health crises now and in the future.

## I. PUBLIC HEALTH THREATS TO NATIONAL SECURITY

When it comes to emergencies that may impact population health, it seems everyone wants in on the action. For decades government at all levels in the United States have responded to various public health threats either through routine public health authorities or via declarations of emergency, disaster, or public health emergency.<sup>10</sup> The President can declare states of emergency or disaster pursuant to the federal Stafford Act<sup>11</sup> and National Emergencies Act,<sup>12</sup> among other routes. The Secretary of the Department of Health and Human Services (HHS) is authorized to declare states of public health emergency pursuant to the Pandemic and All Hazards Preparedness Act (PAHPA).<sup>13</sup> State governors use their sovereign powers to issue similar declarations of emergency or disaster via a myriad of legislative designations.<sup>14</sup> Local

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<sup>6</sup> *2014 Ebola Outbreak in West Africa – Case Counts*, CTR. FOR DISEASE CONTROL AND PREVENTION (Apr. 13, 2016), <http://www.cdc.gov/vhf/ebola/outbreaks/2014-west-africa/case-counts.html>.

<sup>7</sup> JAMES G. HODGE JR., *PUBLIC HEALTH LAW IN A NUTSHELL* 261-69 (2d ed. 2015).

<sup>8</sup> Press Release, Office of the White House Press Sec'y, Presidential Proclamation: National Public Health Week, 2016 (Apr. 1, 2016), <https://www.whitehouse.gov/the-press-office/2016/04/01/presidential-proclamation-national-public-health-week-2016>.

<sup>9</sup> This Commentary is based in part on the symposium presentation by James G. Hodge, Jr. on March 1, 2016 at Georgetown University Law Center sponsored by the Journal of National Security Law and Policy and Timothy and Linda O'Neill Institute for Global and National Health Law.

<sup>10</sup> HODGE JR., *supra* note 7, at 261-64.

<sup>11</sup> Stafford Act, 42 U.S.C. §§ 5121-5207 (2013).

<sup>12</sup> National Emergencies Act, 50 U.S.C. §§ 1601-1651 (2009).

<sup>13</sup> Pandemic and All-Hazards Preparedness Act (PAHPA), Pub. L. No. 109-417, 120 Stat. 2831 (2006).

<sup>14</sup> HODGE JR., *supra* note 7, at 261-64; Emergency Declaration Authorities Across All States and D.C.: Table, THE NETWORK FOR PUB. HEALTH L. (June 16, 2015), [https://www.networkforphl.org/\\_asset/gxrdwm/Emergency-Declaration-Authorities.pdf](https://www.networkforphl.org/_asset/gxrdwm/Emergency-Declaration-Authorities.pdf).

governments with sufficient home rule can declare emergencies via county commissioners, mayors, or other local leaders.<sup>15</sup>

Use of these powers allocates governmental responsibilities in amorphous and overlapping ways. For example, state governments like California and Texas that declared an “emergency” or “disaster” in response to the H1N1 pandemic in 2009-2010 largely empowered state emergency management agencies to coordinate responses in tandem with health agencies.<sup>16</sup> In response to the same threat, Maryland Governor Martin O’Malley declared a “public health emergency,” pursuant to state law framed consistent with the Model State Emergency Health Powers Act (MSEHPA),<sup>17</sup> bestowing health departments (rather than emergency management agencies) with leading roles in coordination and response.<sup>18</sup>

Striking dissimilarities stem from who is “calling the shots” under varied emergency powers. State emergency management agencies employ principles of incident management to efficiently operate across an array of crisis events like floods, fires, and hurricanes. Public health emergencies, especially involving disease threats, are a different type of crisis, necessitating specialized powers, investigations, and responses. Health agencies are arguably better positioned and equipped to lead response coordination of a disease threat via specific public health powers that are often outside the expertise of emergency management agencies.

Against this backdrop, federal agents have increasingly carved out a wedge of authority extending beyond mere emergency declarations. Unlike state and local governments, the federal government is Constitutionally-vested with the sole ability to cross borders to respond nationally and internationally. As a result, it has repeatedly classified public health crises not just as emergencies, but also as threats to national security.

#### A. *Scope of National Security Classifications*

The federal government’s broad and exclusive authorities to address national security are grounded in multiple Constitutional provisions and clarified in statutory enactments.<sup>19</sup> The National Security Act (NSA) of 1947<sup>20</sup> established the National Security Council (NSC) and Central Intelligence Agency (CIA), and restructured military forces to gather data and contribute to executive responses.<sup>21</sup> NSC is tasked with advising the President on foreign and domestic

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<sup>15</sup> HODGE JR., *supra* note 7, at 263-64.

<sup>16</sup> Press Release, Cal. Dep’t Food and Agric., CDFA Working with State and Federal Agencies on Swine Flu (Apr. 28, 2009), [https://www.cdfa.ca.gov/egov/Press\\_Releases/Press\\_Release.asp?PRnum=09-028](https://www.cdfa.ca.gov/egov/Press_Releases/Press_Release.asp?PRnum=09-028); *Gov. Perry Issues Swine Flu Disaster Proclamation*, NEWSPAPER TREE (Apr. 29, 2009), <http://archive.newspapertree.com/news/3744-gov-perry-issues-swine-flu-disaster-proclamation>.

<sup>17</sup> *Model State Emergency Health Powers Act*, CTR. FOR L. AND THE PUBLIC’S HEALTH (Dec. 21, 2001), <http://www.publichealthlaw.net/MSEHPA/MSEHPA.pdf>.

<sup>18</sup> John Colmers & Daniel Fox, *The Politics of Emergency Health Powers and the Isolation of Public Health*, 93 AM. J. PUB. HEALTH 397 (Mar. 2003).

<sup>19</sup> U.S. CONST. art. 1 § 8, art. 2 § 2, art. 4 § 4. Article 1, Section 8 establishes national defense as an exclusive federal role and authorizes Congress to declare war and provide for the common defense. Article 2, Section 2 establishes the President as Commander in Chief. Article 4, Section 4 guarantees a republican form of government and State protection from invasion.

<sup>20</sup> National Security Act of 1947, 50 U.S.C. § 401 (2012).

<sup>21</sup> *Id.*

matters of national security to appropriately coordinate effective plans and responses.<sup>22</sup> The Defense Production Act of 1950 empowers the President to protect national security interests by allocating materials, services, and facilities to promote national defense, and controlling market forces in crises.<sup>23</sup> The Goldwater-Nichols Defense Department Reorganization Act of 1986 requires the President to submit an annual national security strategy report (accompanied with a budget proposal) to Congress.<sup>24</sup> This report, produced in classified and unclassified forms, sets the stage for security threat responses, interests, and goals each year.<sup>25</sup>

National security powers also extend beyond the President. The Foreign Assistance Act (FAA) of 1961 authorizes coordinated efforts of NSC and Department of Defense (DoD) to provide humanitarian aid abroad.<sup>26</sup> After the 2001 anthrax attacks, Congress passed the Project BioShield Act in 2004 to improve public health infrastructure and medical countermeasures related to chemical, biological, radiological, or nuclear (CBRN) threats and increase biosurveillance of harmful pathogens.<sup>27</sup> Project Bioshield authorizes the Secretary of the Department of Homeland Security (DHS) to issue material threat determinations (MTDs) regarding a CBRN event to fund essential countermeasures.<sup>28</sup> In 2004, DHS received \$5.6 billion to use over ten years to purchase next-generation countermeasures against anthrax, smallpox, and other biothreats classified as MTDs.<sup>29</sup>

Pursuant to these powers, matters of national security traditionally entail use of military powers or criminal investigations to protect American interests from external threats of nuclear strikes, terrorism, or other acts of aggression. Historically, threats like infectious disease, bioterrorism, and environmental degradation were not commonly perceived as national security interests.<sup>30</sup> Yet, beginning in the late 1980s the scope of national security expanded to include these different types of threats.<sup>31</sup> In January 2000, CIA issued a report detailing specific impacts on national security of infectious diseases resulting in a high number of deaths, delaying economic or political developments, causing travel restrictions, or increasing the probability of an attack against the U.S.<sup>32</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> Defense Production Act of 1950, 50 U.S.C. §§ 4501-4568 (2015).

<sup>24</sup> Goldwater-Nichols Defense Department Reorganization Act of 1986, 50 U.S.C. § 404(A) (2012).

<sup>25</sup> *See, e.g.*, THE NAT'L SECURITY STRATEGY ARCHIVE, <http://nssarchive.us>. While a yearly report is required by the Act, often Presidents issue the reports late or not at all.

<sup>26</sup> Foreign Assistance Act, 22 U.S.C.A. § 2151 (1974); Exec. Order No. 13,155, 65 Fed. Reg. 30,521 (May 12, 2000).

<sup>27</sup> Project BioShield Act of 2004, 42 U.S.C. § 247d-6b (2004); HARLEY FELDBAUM, U.S. GLOBAL HEALTH AND NATIONAL SECURITY POLICY: A REPORT OF THE CSIS GLOBAL HEALTH POLICY CENTER 9 (2009), [http://csis.org/files/media/isis/pubs/090420\\_feldbaum\\_usglobalhealth.pdf](http://csis.org/files/media/isis/pubs/090420_feldbaum_usglobalhealth.pdf).

<sup>28</sup> 42 U.S.C. § 247d-6b(c)(2) (2012).

<sup>29</sup> *Progress in the War on Terror*, THE WHITE HOUSE: PRESIDENT GEORGE W. BUSH (2004), <http://georgewbush-whitehouse.archives.gov/infocus/bioshield>.

<sup>30</sup> David P. Fidler, *Public Health and National Security in the Global Age: Infectious Diseases, Bioterrorism, and Realpolitik*, 35 GEO. WASH. INT'L. L. REV. 787, 791-92 (2003).

<sup>31</sup> *Id.* at 5; *Current and Projected National Security Threats to the United States: Hearing Before the S. Select Comm. on Intelligence*, 107th Cong. 88 (2002) (statement of Dale L. Watson, Exec. Assistant Dir., Counterterrorism/Counterintelligence Div., Fed. Bureau of Investigation).

<sup>32</sup> The Global Infectious Disease Threat and Its Implications for the United States, Nat'l Intelligence Council, NIE 99-17D, 10 (2000) [hereinafter "The Global Infectious Disease Threat."]

Since the issuance of CIA's report, multiple public health threats (discussed in more detail in Part II.B) have garnered increasing interest in Presidential and NSC reports, statements, and press releases.<sup>33</sup> **Table 1**, below, clarifies distinctions for three commonly-used classifications based on available, unclassified executive and agency materials, underlying legal authorities, and secondary sources. While these national security designations are unquestionably influential politically,<sup>34</sup> the gamut of legal directives and decisions related to their use is not publicly-known given the classified nature of many specific federal actions or responses.<sup>35</sup>

**Table 1. National Security Classifications**

National Security Threat	National Security Priority	Material Threat Determination
Systemic threat to domestic, regional, or global health or safety, or political, civil, or economic security, requiring significant additional resources, planning, and action by the U.S. (and other nations). <sup>36</sup>	Determination that potential humanitarian, economic, or political losses support a heightened level of national attention by the President, HHS, DHS, NSC, DoD, or other federal entity. <sup>37</sup>	DHS determination that CBRN agent poses a plausible threat to a significant number of American lives, permitting HHS to utilize BioShield reserve funds for necessary countermeasures. <sup>38</sup>

*B. National Security and Public Health Threats*

Consistent with the schemata in **Table 1**, multiple public health threats have been classified as national security events. One of the first was HIV/AIDS. NSC initially (and accurately) theorized that HIV/AIDS would lead to staggering mortality and infection rates, humanitarian emergencies, and military conflicts requiring federal intervention.<sup>39</sup> In 2002, the National Intelligence Council (NIC) projected that HIV/AIDS would seriously implicate national security interests as the disease spread to more populous countries.<sup>40</sup> President Bill Clinton initiated federal efforts to significantly increase the HIV/AIDS global prevention budget, accelerate vaccination research, mobilize new resources, and encourage international

<sup>33</sup> JENNIFER BROWER AND PETER CHALK, RAND CORPORATION, *THE GLOBAL THREAT OF NEW AND REEMERGING INFECTIOUS DISEASES: RECONCILING U.S. NATIONAL SECURITY AND PUBLIC HEALTH POLICY* (2003).

<sup>34</sup> Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1753 (2011).

<sup>35</sup> *Id.* at 1716-17.

<sup>36</sup> Exec. Order No. 13,691, 80 Fed. Reg. 9,349 (Feb. 20, 2015); Press Release, The White House Office of the Press Sec'y, Remarks by the President After Meeting on Ebola (Oct. 6, 2014), <https://www.whitehouse.gov/the-press-office/2014/10/06/remarks-president-after-meeting-ebola>.

<sup>37</sup> Tom Friedman, *Executive Order Issued on One of the Most Urgent Health Concerns Facing Us Today*, DEP'T. HEALTH AND HUM. SERV. (Sept. 19, 2014), <http://www.hhs.gov/blog/2014/09/executive-order-issued-combating-antibiotic-resistant-bacteria.html>; Sylvia Mathews Burwell, *Our Response to the Ebola Crisis*, DEP'T. HEALTH AND HUM. SERV. (Sept. 17, 2014), <http://www.hhs.gov/blog/2014/09/our-response-ebola-crisis.html>.

<sup>38</sup> *Taking Measure of Countermeasures (Part 1): Hearing Before the Subcomm. on Emergency Preparedness, Response, and Comm'n of the H. Comm. on Homeland Sec.*, 112th Cong. (2011) (statement of Dr. Segaran Pillai, Chief Med. and Sci. Advisor, Directorate Chem. and Biological Def. Div., Dep't of Homeland Sec.), [https://homeland.house.gov/files/Testimony%20Pillai\\_0.pdf](https://homeland.house.gov/files/Testimony%20Pillai_0.pdf).

<sup>39</sup> 5 U.S.C. § 901 (2012); *Global Aids Crisis Deemed Threat to U.S., Human Security*, GUTTMACHER POL'Y REV., (June 1, 2000), <https://www.guttmacher.org/about/gpr/2000/06/global-aids-crisis-deemed-threat-us-human-security>.

<sup>40</sup> NATIONAL INTELLIGENCE COUNCIL, *THE NEXT WAVE OF HIV/AIDS: NIGERIA, ETHIOPIA, RUSSIA, INDIA, AND CHINA* (Sept. 2002).

humanitarian efforts.<sup>41</sup> In 2003, President George W. Bush created the President's Emergency Plan for AIDS Relief (PEPFAR), funding treatment and prevention measures for millions of persons largely in African countries.<sup>42</sup> Classifying HIV/AIDS as a NST paved the way for subsequent classifications of other infectious diseases or public health threats as matters of national security, as selectively illustrated in **Table 2** and explained further below.

**Table 2. Select Examples of Public Health Issues and National Security**

Date[s]	Threat	Issued By	Source	Authority Cited	Brief Description
2002 2006	HIV/AIDS	Pres. George W. Bush	Natl. Security Strategy	Unspecified	In 2 Natl. Security Strategies, Pres. Bush referred to HIV/AIDS as a potential NST due to high risks to public health, social order, and economic costs.
4/1/05	H5N1	Pres. George W. Bush	Natl. Strategy Pandemic Influenza	50 U.S.C. § 3021; Exec. Order 13375	Fearing the virus would evolve to human-to-human transmission, H5N1 was declared a NST to enhance government responses.
4/26/09	H1N1	HHS	PHE Declaration	42 U.S.C § 247d	H1N1 was declared a PHE by HHS and recognized as potentially affecting national security.
8/10/12	Violence Against Women	Pres. Obama	Exec. Order 13623	Unspecified	Gender-based violence undermines health, national security, and political and economic stability.
5/29/13	MERS	HHS	EUA	21 U.S.C. § 360bbb-3	MERS has a significant potential to affect national security or the health security of U.S. citizens living abroad, justifying use of IVDs.
9/18/14	Antibiotic Resistant Bacteria	Pres. Obama	Exec. Order 13676	Unspecified	Antibiotic resistant bacteria deemed a NSP, justifying NSC oversight of agencies implementing federal policies to combat the threat.
9/22/06 9/26/14	Ebola	DHS; Pres. Obama	MTD GHSA Summit; Press Release	42 U.S.C. § 3192-F; 10 U.S.C. § 153	MTD and NSP issued related to the explosive spread of Ebola viral disease internationally and potential for domestic infections.
11/6/13	Climate Change	Pres. Obama	Exec. Order 13653	Exec, Order 13514; 15 U.S.C. 2933	Climate change preparedness includes the capacity to protect against related damages to life, health, property, livelihoods, and national security.
2/13/15	Cybersecurity	Pres. Obama	Exec. Order 13691	Exec. Order 13636; PPD-21	Order enhanced federal government's ability to detect, investigate, prevent, and respond to cyber threats to the public health and safety of the U.S.

<sup>41</sup> *A National Security Strategy for a Global Age*, THE WHITE HOUSE (Dec. 2000).

<sup>42</sup> THE HENRY J. KAISER FAMILY FOUNDATION, THE U.S. PRESIDENT'S EMERGENCY PLAN FOR AIDS RELIEF (PEPFAR) (June 2014), <https://kaiserfamilyfoundation.files.wordpress.com/2014/06/8002-05-the-u-s-presidents-emergency-plan-for-aids-relief-pepfar1.pdf>. Congressional budget appropriations under PEPFAR peaked at \$6.9 billion under President Obama in 2010.

Diseases like Severe Acute Respiratory Syndrome (SARS), Middle East Respiratory Syndrome (MERS), multi-drug-resistant tuberculosis (MDR-TB), and pandemic influenzas have all been noted as NSPs, though not necessarily NSTs.<sup>43</sup> Following Hurricane Katrina in 2005, Congress recognized how large-scale PHEs could weaken economic productivity and endanger societal security and stability.<sup>44</sup> It passed PAHPA<sup>45</sup> in 2006 (later reauthorized in 2013<sup>46</sup>) to improve coordination of HHS' and DHS' activities with state and local authorities to respond to deliberate, accidental, and natural PHEs. In 2014, President Obama identified antibiotic-resistant bacteria as a national security and public health priority via an executive order that outlined cross-sector efforts and investments to prevent and control outbreaks.<sup>47</sup>

On September 22, 2006, DHS' Secretary issued a MTD for EVD noting that that the viral agent has sufficient capacity to directly affect national security.<sup>48</sup> In the midst of the 2014 EVD outbreak in West Africa, DHS' declaration allowed HHS to issue an emergency use authorization (EUA) for in vitro diagnostics for the detection of EVD.<sup>49</sup> President Obama referred to EVD as a NSP<sup>50</sup> initially in a press release on September 14, 2014, and then twelve days later at the White House Global Health Security Agenda Summit,<sup>51</sup> (leading to additional funding to combat the virus globally).<sup>52</sup> On October 6, President Obama noted EVD as a NST in remarks following a meeting with the Administration's response team.<sup>53</sup> Expansions of the

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<sup>43</sup> FELDBAUM, *supra* note 27, at 5-7.

<sup>44</sup> U.S. DEP'T HEALTH & HUM. SERVS., NAT'L HEALTH STRATEGY OF THE UNITED STATES OF AMERICA (2009), <http://www.phe.gov/Preparedness/planning/authority/nhss/strategy/Documents/nhss-final.pdf>.

<sup>45</sup> Pandemic and All-Hazards Preparedness Act (PAHPA), Pub. L. No. 109-417, 120 Stat. 2831 (2006).

<sup>46</sup> Pandemic and All-Hazards Preparedness Reauthorization Act, Pub. L. No. 113-5, 127 Stat. 161 (2013).

<sup>47</sup> Exec. Order No. 13,676, 79 Fed. Reg. 56,931 (Sept. 18, 2000).

<sup>48</sup> 79 Fed. Reg. 47,141 (Aug. 12, 2014).

<sup>49</sup> *Id.*

<sup>50</sup> Lawrence O. Gostin, et al., *The President's National Security Agenda: Curtailing Ebola, Safeguarding the Future*, 313 J. AM. MED. ASS'N 27 (2015).

<sup>51</sup> Press Release, The White House Office of the Press Sec'y, Remarks by President Obama at Global Health Security Agenda Summit (Sept. 26, 2014), <https://www.whitehouse.gov/the-press-office/2014/09/26/remarks-president-global-health-security-agenda-summit>; Press Release, The White House Office of the Press Sec'y, FACT SHEET: U.S. Response to the Ebola Epidemic in West Africa (Sept. 16, 2014), <https://www.whitehouse.gov/the-press-office/2014/09/16/fact-sheet-us-response-ebola-epidemic-west-africa>.

<sup>52</sup> Emma Margolin, *Congress Clears \$750 Million to Fight Ebola in West Africa*, MSNBC (Oct. 10, 2014),

<http://www.msnbc.com/msnbc/congress-clears-750-million-fight-ebola-west-africa>;

Press Release, USAID, USAID Administration Announces \$142 Million in Humanitarian Assistance Grants and Projects for Ebola Africa (Oct. 15, 2014), <http://www.usaid.gov/news-information/press-releases/oct-15-2014-usaid-administrator-announces-142-million-humanitarian-assistance-ebola>. In November 2014, President Obama failed to get Congressional approval of authority under the FAA through the Ebola Emergency Response Act, H.R. 5710.

113th Cong. (2014) (proposed). However, on December 16, 2014, President Obama signed the Consolidated and Further Continuing Appropriations Act of 2015 that allotted \$5.4 billion in emergency funding to combat EVD. Consolidated and Further Continuing Appropriations Act 2015, Pub. L. No. 113-235, 128 Stat. 2130 (2014). During the outbreak, CDC and several states issued separate, divergent EVD screening and monitoring policies for individuals returning from affected countries, demonstrating power struggles between federal and state authorities in public health responses framed as national security concerns. *Interim Table of State Ebola Screening and Monitoring Policies for Asymptomatic Individuals*, CTR. FOR DISEASE CONTROL AND PREVENTION (Aug. 31, 2015), <http://www.cdc.gov/phlp/docs/interim-ebolascreeing.pdf>.

<sup>53</sup> Press Release, The White House Office of the Press Sec'y, Remarks by the President After Meeting on Ebola (Oct. 6, 2014), <https://www.whitehouse.gov/the-press-office/2014/10/06/remarks-president-after-meeting-ebola>.

concept of national security afford federal aid through military health-related operations and funding for public health research, supplies, and biosurveillance.<sup>54</sup>

On February 26, 2016, pursuant to FDA's issuance of an EUA for a new Zika virus test, HHS' Secretary Sylvia Burwell stated that Zika virus has ". . . significant potential to affect *national security* or the health and security of United States citizens living abroad . . . ."<sup>55</sup> Though falling shy of declaring Zika virus an NST, her announcement couches HHS' authority to act pursuant to the Food, Drug, and Cosmetic Act within the realm of national security implications.<sup>56</sup> Describing military contributions to the global response to Zika virus, Navy Admiral Kurt W. Tidd noted "[w]orking with our partners to improve access to health systems are inherent parts of the U.S. government's effort to promote a peaceful, prosperous, *secure* and resilient Western Hemisphere (emphasis added)."<sup>57</sup> On July 5, 2016 Vice Presidential candidate and Virginia Senator Tim Kaine classified Zika a "national security issue."<sup>58</sup>

## II. NATIONAL SECURITY CLASSIFICATIONS OF PUBLIC HEALTH CONCERN

With political support for continued designations of public health threats as national security priorities in the modern era, federal authorities seem poised to solidify what was once a trend into standing foreign and domestic policy. Continued expansions of the types of public health threats that qualify as national security events are anticipated. Federal national security plans are already being formulated for diverse public health issues such as obesity,<sup>59</sup> cybersecurity,<sup>60</sup> and climate change.<sup>61</sup>

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<sup>54</sup> Jane Evans, *Pandemics and National Security*, 1 GLOBAL SEC. STUD. 100 (2010), <http://globalsecuritystudies.com/Evans%20PANDEMICS.pdf>.

<sup>55</sup> 81 Fed. Reg. 10,878, 10,879 (Mar. 2, 2016).

<sup>56</sup> Five months later, on August 12, 2016, HHS' Secretary Burwell declared a PHE related to the spread of Zika virus in Puerto Rico. *Determination that a Public Health Emergency Exists in Puerto Rico as a Consequence of the Zika Virus Outbreak*, DEPT. OF HEALTH & HUMAN SERVICES (Aug. 12, 2016), <http://www.phe.gov/emergency/news/healthactions/phe/Pages/zika-pr.aspx>.

<sup>57</sup> Jim Garamone, *Tidd: 'Whole-of-Hemisphere' Fighting Zika Virus*, U.S. DEP'T DEFENSE (Mar. 22 2016), <http://www.defense.gov/News-Article-View/Article/699836/tidd-whole-of-hemisphere-fighting-zika-virus>.

<sup>58</sup> Lawrence O. Gostin & James G. Hodge, Jr., *Zika prevention is a matter of national security*, TIME (Aug. 12, 2016), <http://time.com/4449287/zika-prevention-national-security>.

<sup>59</sup> Obesity has been informally cited as a potential NST given the need for healthy Americans to form a competent military force. See, e.g., Lori M. Hunter, *Obesity Epidemic a Threat to U.S. Military Personnel and National Security*, POPULATION REFERENCE BUREAU (Sept. 2013), <http://www.prb.org/Publications/Articles/2013/us-obesity-military.aspx>. CDC estimated in 2012 that 5.7 million men and 16.5 million women were ineligible for military service because they exceeded the Army's enlistment weight and body fat requirements. *Adult Obesity Causes and Consequences*, CTR. FOR DISEASE CONTROL AND PREVENTION (June 16, 2015), <http://www.cdc.gov/obesity/adult/causes.html>. In 2015, 10% of Army recruits were disqualified because of weight or insufficient physical fitness. The Army speculates that if the obesity epidemic continues to grow, by 2020 only 20% of young persons in the general population will qualify for military service. *Id.* In response, the Army's Soldier Fueling Initiative is designed to provide healthier options in dining halls, remove fast food options from bases, and provide nutrition education. See Dennis Steele, *Better Nutrition Efforts Fill the Army's Plate*, ARMY MAGAZINE (Apr. 16, 2014), <http://www.armymagazine.org/2014/04/16/better-nutrition-efforts-fill-the-armys-plate>.

<sup>60</sup> Protecting cyberspace is consistently cited as a national security issue. Cyberspace infrastructure may be vulnerable to the pilfering of data and money, and may threaten the delivery of essential services. DHS cites three difficulties in securing cyberspace: (1) the ability of malicious actors to operate anywhere in the world, (2) the linkage between cyberspace and physical systems, and (3) the difficulty in reducing vulnerabilities in complex cyber



Yet what types of public health threats should qualify as national security events? It is a given that these threats hold the potential to cause widespread and devastating harm to human security, health, or life, but not every public health menace implicates national security. Benchmarks or standards to guide these determinations and their timing may be warranted, but are largely absent from publicly-available federal policy or related scholarship.

To fill this void, we cull from existing examples, literature, and prevailing federal law and policy a series of criteria for labeling what we call “*national security classifications of public health concern*.” These ten criteria summarized below (in no order of priority) are intended to identify key considerations to help clarify future national security designations and concomitant roles and responsibilities of federal and subnational governments in the United States.

1. *Existence of a potential or current threat to political and social stability.* Widespread infectious disease outbreaks can aggravate or spur political or social destabilization in developing nations. HIV/AIDS wreaked havoc on already fragile political systems in multiple, severely underdeveloped African countries. Social networks disintegrated as scores of individuals became ill and died. These factors were reflected again in 2014 when President Obama labeled the 2014 Ebola outbreak as an affront to political stability due to its great humanitarian toll in Liberia, Guinea, and Sierra Leone, and other affected areas of West Africa.<sup>62</sup> Military leaders within DoD are closely tracking the 2016 spread of Zika virus in South America, Latin America, and the Caribbean in part due to fears of potential regional destabilization.
2. *Presence of a potential or current threat to political, civic, and social participation.* Sometimes a public health concern may not threaten the stability of political and social systems overall, but rather the participation of specific citizens or others residing within national borders. Pervasive gender-based violence, for example, greatly hinders women’s ability to participate and contribute socially, politically, civically, and economically to

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systems. DEP’T OF HOMELAND SEC., CYBERSECURITY OVERVIEW (Sept. 22, 2015), <https://www.dhs.gov/cybersecurity-overview>. The Cybersecurity Act of 2015, Pub. L. No. 114-113 (2015), facilitates private companies seeking to share information on their cybersecurity measures. In February 2016, President Obama directed federal agencies to implement the Cybersecurity National Action Plan to enhance awareness, protect privacy, maintain public safety and economic security, and empower Americans to control their digital security. Press Release, The White House Office of the Press Sec’y, FACT SHEET: Cybersecurity National Action Plan (Feb. 9, 2016), <https://www.whitehouse.gov/the-press-office/2016/02/09/fact-sheet-cybersecurity-national-action-plan>; see also Exec. Order No. 13,691, 80 Fed. Reg. 9,347 (Feb. 20, 2015).

<sup>61</sup> Maya Rhodan, *Obama Calls Climate Change a National Security Threat*, TIME (May 20, 2015), <http://time.com/3890579/barack-obama-coast-guard-commencement>. President Obama’s administration cites climate change as a NST given the potential of floods, droughts, storms, and natural disasters to destabilize nations and increase conflicts over resources. *Id.* Changing natural landscapes (such as erosion, rising sea levels, increased wildfire damage) could slow military training and activity. Extreme weather can impede the production of buildings, airports, bridges, and other infrastructure, leading to long-term economic hardships. The White House is strategizing globally and domestically to coordinate efforts to slow climate change. In January 2016, DoD was allocated specific resources to manage climate change risks. DOD DIRECTIVE 4715.21: CLIMATE CHANGE ADAPTION AND RESILIENCE (Jan. 14, 2016), <http://www.dtic.mil/whs/directives/corres/pdf/471521p.pdf> [hereinafter DOD DIRECTIVE].

<sup>62</sup> Press Release, The White House Office of the Press Sec’y, Remarks by the President After Meeting on Ebola (Oct. 6, 2014), <https://www.whitehouse.gov/the-press-office/2014/10/06/remarks-president-after-meeting-ebola>.

their communities.<sup>63</sup> National security implications clearly arise whenever the health of vulnerable groups is targeted with negative impacts on these interests.

3. *Imperils economic stability internationally or domestically.* Public health and environmental factors that have the capacity to derail economic interests in a region or domestically over the short- or long-term may lead to national security classifications. President Obama and DoD have used this basis to denote the strains on a global economy of climate change and its potential to cause severe natural disasters, extreme weather, and increased competition for natural resources.<sup>64</sup>
4. *Potential to weaken or diminish military power.* Any major public health threat that directly impacts the U.S. military is apt to be tagged as a NSP. In 2000, NIC predicted infectious diseases would continue to account for more U.S. military hospital admissions than battlefield injuries in the future (much as they have in prior world wars). Conditions like HIV threaten international peacekeeping efforts as army recruitment pools are diminished due to high infection rates in some areas.<sup>65</sup> EVD and Zika virus directly threatened U.S. troops assigned to mitigate its spread. Obesity among American young adults poses real risks of military diminutions absent corrective measures.
5. *Ability of a threat or its impacts to cross transnational borders.* Localized emerging disease outbreaks within specific countries do not garner national security attention absent other factors. However, emerging disease outbreaks like SARS, MDR-TB, EVD, and Zika virus that easily cross borders absent intervention are top priorities. After decades of largely dormant or minimal spread among smaller populated counties, the spread of Zika to heavily-populated South and Latin American countries beginning in 2014 elevated its risks. In February 2016, the Director of National Intelligence projected Zika virus would affect nearly every country in the Western Hemisphere by the end of the year.<sup>66</sup> As of August 15, 2016, WHO reported over 65 countries with active transmission of the virus.<sup>67</sup>
6. *Threats emanating from non-state actors.* Unlike traditional threats to national security, public health concerns may percolate and escalate independent of global or national actors. For example, antibiotic-resistant bacteria results from widespread overuse among health care providers, patients, and others irrespective of public health recommendations, resulting in a new threat to global human security.<sup>68</sup>

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<sup>63</sup> Exec. Order No. 13,623, 77 Fed. Reg. 49,345 (2012).

<sup>64</sup> DOD DIRECTIVE, *supra* note 61; Rhodan, *supra* note 61.

<sup>65</sup> The Global Infectious Disease Threat, *supra* note 32, at 10.

<sup>66</sup> *World Wide Threats: Hearing Before the H. Permanent Select Comm. on Intelligence*, 114th Cong. 14 (2016), <http://intelligence.house.gov/sites/intelligence.house.gov/files/documents/clappersfrwwt.pdf> (statement by James R. Clapper, Dir. of Nat'l Intelligence) [hereinafter *World Wide Threats Assessment*].

<sup>67</sup> WORLD HEALTH ORG., PREVENTION OF SEXUAL TRANSMISSION OF ZIKA VIRUS: INTERIM GUIDANCE UPDATE (June 7, 2016), [http://apps.who.int/iris/bitstream/10665/204421/1/WHO\\_ZIKV\\_MOC\\_16.1\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/204421/1/WHO_ZIKV_MOC_16.1_eng.pdf).

<sup>68</sup> Exec. Order 13,676, 184 Fed. Reg. 56,931 (Sept. 18, 2014).

7. *Exceeds unilateral, national control.* A new era of increasing globalization facilitates the rapid spread of highly-infectious diseases. The premise that these conditions can be neatly contained within national borders on any continent is farcical. EVD decimated health systems in multiple West African countries and slipped easily across borders. Even in developed countries like the U.S., national health and public health systems may be strained to control such threats alone.<sup>69</sup> Collaboration through national security prioritization is key to combatting these types of public health scourges. To combat the 2014 Ebola outbreak, for example, U.S. military and public health forces partnered with the United Nations, WHO, West African nations, African Union, European Union, United Kingdom, France, Germany, and others.<sup>70</sup>
8. *Occurrence or potential for systemic human rights abuses.* Documented accounts of horrific human rights abuses against Americans or others that threaten U.S. humanitarian and health interests may justify national security designations and responses. President Obama referred to the radical Islamic terrorist group ISIL's brutality and barbarism against women, children, and the opposition as a threat to the security of the Middle East and the world.<sup>71</sup> Left unchecked, these deplorable actions by ISIL and other extremist groups threaten American military personnel, facilities, and citizens abroad and at home.
9. *Insufficiencies of global public health entities to adequately respond.* Sometimes national security implications stem from inadequacies of global partners or initiatives to stymie negative public health impacts of emerging conditions. Absent effective interventions, U.S. national security may be at heightened risk. In the heart of the 2014 Ebola outbreak response, President Obama described the world as looking to the U.S. to take charge, stating that it is "prepared to take leadership on [Ebola] to provide the kinds of capabilities that only America has, and to mobilize the world in ways that only America can do."<sup>72</sup> These comments were made against a backdrop of largely critical assessments of WHO in its failure to limit the public health impacts,<sup>73</sup> as well as pleas from entities like *Médecins Sans Frontières* ("Doctors Without Borders") for U.S. military interventions.<sup>74</sup> Similar claims have arisen related to U.S. Congressional failures to fund global and domestic Zika preparedness and response in 2016.<sup>75</sup>
10. *Perceived need for classification based on public perception.* It may seem trite to suggest that perceived needs for national security classifications may predict their use. And to the

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<sup>69</sup> *World Wide Threats Assessment*, *supra* note 66, at 14.

<sup>70</sup> Press Release, The White House Office of the Press Sec'y, FACT SHEET: U.S. Response to the Ebola Epidemic in West Africa (Sept. 16, 2014), <https://www.whitehouse.gov/the-press-office/2014/09/16/fact-sheet-us-response-ebola-epidemic-west-africa>.

<sup>71</sup> Press Release, The White House Office of the Press Sec'y, Statement by the President on ISIL (Sept. 10, 2014), <https://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1>.

<sup>72</sup> Press Release, The White House Office of the Press Sec'y, Remarks by the President on the Ebola Outbreak (Sept. 16, 2014), <https://www.whitehouse.gov/the-press-office/2014/09/16/remarks-president-ebola-outbreak>.

<sup>73</sup> B.D. Colen, *An Indictment of Ebola Response*, HARVARD GAZETTE (Nov. 22, 2015), <http://news.harvard.edu/gazette/story/2015/11/an-indictment-of-ebola-response>.

<sup>74</sup> Joan Liu, *United Nations Special Briefing on Ebola*, MÉDECINS SANS FRONTIÈRES (Sept. 2, 2014), <http://www.doctorswithoutborders.org/news-stories/speechopen-letter/united-nations-special-briefing-ebola>.

<sup>75</sup> James G. Hodge, Jr. *Generation Zika*, \_\_ JURIMETRICS \_\_ 2016 (forthcoming).

extent that public perceptions among Americans (or their elected leaders at the federal and state levels) solely support such classification, they may be ill-placed. However, perceived needs may still lend to national security designations. “Hot” topics, especially in national election years, can be politicized by those holding and seeking offices to placate and allay public fears and concerns. In response to the shooting deaths of 14 persons in San Bernardino, California in December 2015, numerous federal officials and at least two Presidential candidates sought to prioritize exclusionary policies affecting Muslims as a NST.<sup>76</sup> Advancing unconstitutional policies through the guise of the need to protect national security is abhorrent, but may still be a factor in classifying specific risks.

## CONCLUSION

After pivoting on the core foundations of national security classifications over the last two decades, federal authorities have demonstrated continued and sustained use of these distinctions as applied to varied public health threats. The breadth and nature of specific federal powers authorized pursuant to these gradations are not fully-known due largely to the “classified” nature of federal responses to security threats. To the extent, however, that these classifications proliferate, clarity regarding how and when they are applied is essential.

Our proposed criteria for “*national security classifications of public health concern*” are intended to illuminate key identified bases for these distinctions based on publicly-disclosed data. Other factors well outside our security clearance may also be used to designate public health concerns in the realm of national security. Greater transparency within the federal government may not only further clarify the bases for these classifications, but potentially justify them as well.

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<sup>76</sup> Rebecca Shabad, *Donald Trump Calls for “Total and Complete Shutdown” of Muslims Entering U.S.*, CBS NEWS (Dec. 7, 2015), <http://www.cbsnews.com/news/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-u-s>; David Weigel, *Ted Cruz Says San Bernardino Shooting May Be ‘Radical Islamic Terrorism,’* WASH. POST (Dec. 3, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/12/03/ted-cruz-calls-san-bernardino-shooting-radical-islamic-terrorism>; Press Release, Congressman Bob Goodlatte, Goodlatte Announces Judiciary Committee to Intro Bill to Strengthen Visa Security (Dec. 15, 2015), [http://goodlatte.house.gov/press\\_releases/828](http://goodlatte.house.gov/press_releases/828).