

## EMERGENCY WARS

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So spake the Fiend, and with necessitie,  
The Tyrants plea, excus'd his devilish deeds.  
-John Milton, *Paradise Lost*

On February 15, 2019, President Donald Trump proclaimed a national emergency because “[t]he current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency.” Intending to circumvent negotiations with Congress over funding his border wall, Trump used the National Emergencies Act to activate sections 2808 and 12302 of title 10, United States Code to fund the border wall through unspent Department of Defense funds.<sup>1</sup> Trump’s policies on immigration across the U.S.-Mexico border play into a long history of anti-immigrant politics in the United States and racially-driven politics within the conservative movement. However, unexplored by contemporary historians, the mechanism Trump is using to address the “crisis” at the southern border deserves more attention.

In the shadow of Watergate and the Vietnam War, Congress passed the National Emergencies Act in 1976 to terminate national emergencies, restrict the president’s powers during those emergencies, and create a procedure to give Congress more authority and information in future exercises of emergency power. The act was one of many pieces of legislation in the 1970s aiming to promote government transparency, limit presidential power, and protect individual rights. The 1973 War Powers Resolution, the 1978 Foreign Intelligence Surveillance Act, the 1978 Independent Counsel Act, the 1976 Government in the Sunshine Act, the 1974 Privacy Act, the 1974 Impoundment Control Act, 1978 the Presidential Records Act, and 1978 Ethics in Government Act all curtailed executive authority to the benefit of Congress’s,

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<sup>1</sup> Donald J. Trump, Proclamation, “Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States, Proclamation 9844 of February 15, 2019,” *Federal Register* 84 (February 20, 2019): 4949, <https://www.federalregister.gov/documents/2019/02/20/2019-03011/declaring-a-national-emergency-concerning-the-southern-border-of-the-united-states>

while establishing or reforming procedures for exercising executive power. At the same time, Congress delegated less power to administrative agencies in the 1970s and early 1980s, asserting greater legislative control over agency decision-making.<sup>2</sup> The National Emergencies Act fits into a broader political trend, but unlike these other laws, it reflects on a much longer history of national emergencies in American politics.

By declaring a national emergency to build his signature border wall, Trump is adding to a century-long history of presidents declaring national emergencies to activate dormant statutory powers. The basic legal mechanics for exercising emergency powers have existed since World War I. Congress will pass laws called “delegatory statutes” giving the president the power to take a certain action “in a national emergency” or “under a threat of war.” The president then declares a national emergency, giving them the authority to summon the necessary delegatory statutes. What constitutes a national emergency is almost entirely up to the president’s discretion. As Alexander Hamilton wrote in Federalist no. 23 about powers of national defense, “These powers ought to exist, without limitation; because it, is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them.” As a result, he argued, “The circumstances that endanger the safety of nations are infinite; and for this reason, no constitutional shackles can wisely be imposed on the power to which the care of it is committed.”<sup>3</sup> The Supreme Court acceded this view in the 1812 case *Martin v. Mott*, which held that the president has the exclusive power to determine when the nation faces an existential exigency.<sup>4</sup>

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<sup>2</sup> Shapiro, Sidney A., and Robert L. Glicksman. “Congress, the Supreme Court, and the Quiet Revolution in Administrative Law.” *Duke Law Journal* 1988, no. 5 (November 1988): 819. <https://doi.org/10.2307/1372642>. j

<sup>3</sup> Alexander Hamilton, “No. 23: The Necessity of a Government as Energetic as the One Proposed to the Preservation of the Union,” in Clinton Rossiter, ed., *The Federalist Papers* (New York: Mentor, 1999), 148–53.

<sup>4</sup> *Martin v. Mott*, 25 U.S. 19 (1827).

Why do emergencies matter? As Obama Chief of Staff and later-Chicago Mayor Rahm Emanuel told the *Wall Street Journal* during the 2008 campaign, “You never want to a serious crisis to go to waste. And what I mean by that, is that it’s an opportunity to do things you think you could not do before.”<sup>5</sup> While it drew the ire of conservative commentators, Emanuel’s aphorism reflects a broader truth in American history. Stephen Skowronek writes, “Crisis situations tend to become the watersheds in a state's institutional development.”<sup>6</sup> Because they very quickly present an urgent problem, which pushes politicians towards a single solution, emergencies and ensuing emergency powers are powerful forces for shaping American politics. Thus, Congress’s attempt to restrict the president’s emergency powers through the National Emergencies Act has a broader significance beyond interbranch conflict; instead, it is a rebuke of an emboldened executive, the political vehicle that helped create an activist federal government in the 20<sup>th</sup> century.

The National Emergencies Act also signifies a political shift, as modern American liberalism, which had championed an emboldened executive since the Progressive Era and later New Deal, shifted to reject an imperial presidency, fearing the deleterious effects of unchecked power. Where once liberals saw emergency powers as an effective means of expanding the federal government, those liberals who drafted the National Emergencies Act saw emergency powers as a highway to autocracy, particularly because the end of the Vietnam War, Watergate, and détente showed the perils of presidential power, as well as the diminished need. With the end of the New Deal order came the end of the New Deal emphasis on the presidency. As liberals in the 1970s moved away from president-centric governance, the burgeoning conservative

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<sup>5</sup> Jack Rosenthal, “A Terrible Thing to Waste,” *The New York Times*, July 31, 2009, <https://www.nytimes.com/2009/08/02/magazine/02FOB-onlanguage-t.html>.

<sup>6</sup> Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920*, (Cambridge: Cambridge University Press, 1982), pg. 10.

movement slowly came to embrace presidential power as both a tool for curtailing the federal government domestically and commanding a unified anti-communist policy abroad. The Republican Party's rejection of détente, exemplified by Ronald Reagan's 1976 primary bid, conservative criticism of the Panama Canal Treaties, and the Team B report on the CIA's assessment of Soviet military capabilities was part of resurgent anti-communist politics in the late 1970s. This anti-communism pushed Republicans to embrace a strong unitary executive, who would wield powers to decisively defend America's national interests.

This thesis interacts with the growing historical literature on 20<sup>th</sup>-century American politics and makes important contributions by examining the politics of presidential power, a significant lacuna in the current historiography. Current historical scholarship has also adapted to criticism of Consensus History by emphasizing social, political, and economic conflict to deconstruct pre-existing myths. Recent scholarship has emphasized politics outdoors, that is political organizations and institutions beyond public officeholders, who featured prominently in Consensus and New Left historiography. Even within established political institutions, historians have emphasized procedures and process, like Julian Zelizer's *On Capitol Hill*, which like this thesis, explores how procedures impact the political landscape. American Political Development, a branch of political science, has also contributed significantly to the ongoing revival of American political history and is highly relevant for this thesis's understanding of the growth of the American state. However, the most comprehensive history of national emergencies still remains research published by the National Emergencies Act's drafters; not only have historians not examined the National Emergencies Act, but presidential history has fallen out of style, as social, cultural, and environmental histories have become en vogue. Studies of the presidency and of presidents have become an endangered species within academia, relegated to the protected

area of the Barnes & Noble history section. While histories of the presidencies are lacking, historical scholarship on politics during and since the 1970s is abundant, with works by Bruce Schulman, Beth Bailey, and David Farber chronicling the decade's complex nexus of culture, identity, and politics.<sup>7</sup> This thesis readdresses the lack of historical scholarship on the presidency by examining presidential power within the broader social and cultural context of the 70s and by highlighting the importance of procedure in deciding the limits of presidential powers. This thesis also addresses the traditional left-right debate over presidential power, but at the same time examines inter-branch conflict as an additional and useful analytical framework for understanding debates over presidential power in the 1970s.

Some recent scholarship has shed light on emergencies and war in American history. Mary Dudziak's *War Time* meditates on how the semi-permanent state of war attributed to the War on Terror has a much deeper history than many expect and how even conventional wars often lack clean beginnings and ends.<sup>8</sup> Jefferson Cowie's *The Great Exception* studies period between 1933 and the 1970s as an exception in American history, marked by high union participation, low immigration, low income inequality, a decline in religious observance, race and culture's role in politics, and the birth of the American welfare state.<sup>9</sup> Interestingly, the United States was in a continuous national emergency from 1933 to 1976, when the National Emergencies Act terminated it, making the period a legal exception as well. Legal scholars have also focused on emergency powers as a factor eroding legal liberalism and the rule of law. This scholarship, particularly prominent after 9/11, drew on political theory to analyze national

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<sup>7</sup> Bruce Schulman, *The Seventies : The Great Shift in American Culture, Society, and Politics* (New York: Free Press, 2001).; Beth Bailey and David R. Farber, *America in the Seventies* (Lawrence: University Press of Kansas, 2004).

<sup>8</sup> Mary Dudziak, *War Time: An Idea, Its History, Its Consequences* (New York: Oxford University Press, 2012).

<sup>9</sup> Jefferson Cowie, *The Great Exception: The New Deal & the Limits of American Politics* (Princeton: Princeton University Press, 2016).



emergency legal regimes, their history, and their effect on legal systems. Kim Scheppele, Sanford Levinson, Jules Lobel, Oren Gross, Adrian Vermeule, and Eric Posner have all written on emergencies and American constitutionalism with varying degrees of consensus.<sup>10</sup> The legal scholarship on emergencies, while rich, often aims for a prescription for the present rather than a description of the past, but still provides a more thorough historical analysis of emergencies than most historical scholarship. By combining legal and historical literature with a study of archival documents, this thesis hopes to analyze the politics of power surrounding debates over emergency powers in the 1970s. This thesis should not pique the interest of only historians, legal scholars, or political scientists; because of President Trump's

This thesis will first explore how the senators who worked to pass the National Emergencies Act and similar laws saw the rise of presidential power in the 20<sup>th</sup> century, constructing a historical critique of the presidency, which New Deal liberals came to champion as a means of growing and managing the federal government during the Great Depression, World War II, and Cold War. The second chapter will tell the narrative history of how liberal senators opposed to the Vietnam War came to address what they perceived as dangerously unchecked emergency powers. Frank Church and Charles Mathias's attempt to address emergency powers fits neatly into the distrust of public institutions pervasive in the 1970s and liberals' rising opposition to a strong presidency after Watergate and Vietnam. The third chapter examines the political and legislative history of the National Emergencies Act after Richard

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<sup>10</sup> Kim Lane Scheppele, "North American Emergencies: The Use of Emergency Powers in Canada and the United States," *International Journal of Constitutional Law* 4, no. 2 (April 1, 2006): 213–43, <https://doi.org/10.1093/icon/mol003>; Sanford Levinson, "CONSTITUTIONAL NORMS IN A STATE OF PERMANENT EMERGENCY," *Georgia Law Review* 40, no. 3 (Spring, 2006): 699-751.; Jules Lobel, "Emergency Power and the Decline of Liberalism," *The Yale Law Journal* 98, no. 7 (May 1989): 1385, <https://doi.org/10.2307/796748>; Oren Gross, "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?," *The Yale Law Journal* 112 (2003): 124.; Eric Posner and Adrian Vermeule, *The Executive Unbound : After the Madisonian Republic* (New York: Oxford University Press, 2010).

Nixon's resignation in August 1974. Negotiations between senators and the Ford administration led the bill's drafters to amend the legislation, introducing minor procedural changes which would have profound ramifications post-passage. Here, this thesis also explores how conservatives came to celebrate a strong presidency after decades of anti-executive skepticism. The thesis concludes with an assessment of the National Emergencies Act from 1976 to the present day, analyzing how a bill intended to prevent the abuse of emergency powers, came to commit the very sin it was intended to prevent.

## CHAPTER 1: A New Emergency

### Introduction

On the warm morning of July 19, 1968, Senator William J. Fulbright (D-AR) sent his testimony to the Senate Judiciary Subcommittee on the Separation of Powers. In front of Chairman Sam Ervin (D-NC), Dr. Seth Tillman, a close aide to Fulbright, read the senator's statement on what he saw as the rotting of American governance. "The authority of Congress in foreign policy has been eroding steadily since 1940, the year of America's emergence as a major and permanent participant in world affairs, and the erosion has created a significant constitutional imbalance. Many, if not most of the major decisions of American foreign policy in this era have been executive decisions."<sup>11</sup> While Fulbright lamented Congress's dwindling role in foreign affairs, he said, "there are signs in the Congress, particularly in the Senate, of a growing awareness of the loss of congressional power, of growing uneasiness over the extent of Executive power, and of a growing willingness to raise questions that a year or so ago might have gone unasked, to challenge decisions that would have gone unchallenged, and to try to distinguish between real emergencies and situations which, for reasons of Executive convenience, are only said to be emergencies."<sup>12</sup>

But how and why did this imbalance of powers come to be? "The cause of the constitutional imbalance is crisis," wrote Senator Fulbright. "In the main," Fulbright continued, "it has been circumstance rather than design which has given the Executive its great predominance in foreign policy. The circumstance has been crisis, an entire era of crisis in which urgent decisions have been required again and again, decisions of a kind that the Congress is ill-

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<sup>11</sup> *A Study of the Separation of Powers between the Executive, Judicial, and Legislative Branches of Government provided by the Constitution, before Subcommittee on the Separation of Powers, 90<sup>th</sup> Cong. 41 (July 19, 1968) (Statement of William J. Fulbright, United States Senator) (hereafter cited as Fulbright Testimony).*

<sup>12</sup> Fulbright Testimony, *Subcommittee on Separation of Powers*, pg. 43.

equipped to make with what has been thought to be the requisite speed.”<sup>13</sup> Fulbright, expressing an opinion shared by several colleagues, saw the mid-20<sup>th</sup> century as an era of crises which threatened the constitutional order and which Congress needed to address. Far beyond the power over foreign affairs, senators worried how the fundamental liberties of American citizens could survive abuses by an executive wielding undemocratic emergency power. A Senate committee reported at this time that, “Most of the statutes pertaining to emergency powers were passed in times of extreme crisis,” and that these laws were of such significance to civil liberties, to the operation of domestic and foreign commerce, and the general functioning of the U.S. Government, that, in microcosm, “they reflect dominant trends in the political, economic, and judicial life in the United States.”<sup>14</sup>

In order to address how Congress restricted unbridled presidential emergency power during the 1970s, it helps to understand their perspective on how and why these emergency powers accumulated, and how the National Emergencies Act fit into long-running criticism of emergency powers. In the views of these senators and some historians, crisis drove the growth of the presidency in the 20<sup>th</sup> century, demanding expedited responses outside of cumbersome constitutional procedures.<sup>15</sup> Resolving national crises demanded increased presidential authority and an emboldened federal government, causing presidential emergency powers to accumulate over decades. Despite persistent criticism from the Old Right, liberals largely embraced an emboldened presidency during the Great Depression and Cold War, until the Vietnam War.

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<sup>13</sup> Fulbright Testimony, *Subcommittee on Separation of Powers*, pg. 42

<sup>14</sup> Frank Church, and Charles Mathias, *Emergency Power Statutes: Provisions of Federal Law now in Effect Delegating to the Executive Extraordinary Authority in Time of National Emergency*, report prepared for the Special Committee on the Termination of the National Emergency, 93<sup>rd</sup> Cong. 1<sup>st</sup> sess., 1973, Committee Print 93-000, pg. 7.

<sup>15</sup> Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government*, (New York: Oxford University Press, 1987).

However, by the late-1960s, Congress began to assert itself into the prerogatives of an executive branch it increasingly distrusted.

## **New Deal and World War II**

The Great Depression thrust the United States into the deepest economic crisis in its history and the resulting New Deal fundamentally changed the relationship between the American citizen and the state. When Franklin Roosevelt took office in March 1933, the nation was in crisis. Gross National Product had fallen by half, 5,000 banks had failed,<sup>16</sup> millions were unemployed, and slums sprouted in the shadow of America's decrepit cities. When World War I veterans began squatting in government buildings along Pennsylvania Avenue, President Hoover had Gen. Douglas MacArthur drive them out with bayonets and tear gas.<sup>17</sup>

When a landslide victory swept Roosevelt into office in 1932, he promised to tackle the economic crisis in war-like terms. In his first inaugural address, he said: "I shall ask the Congress for the one remaining instrument to meet the crisis—broad Executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe."<sup>18</sup> That line earned the loudest applause of the speech, revealing wide public support for strengthening executive authority.<sup>19</sup> The speech and what it portended was a pivotal moment in the history of modern liberalism. Roosevelt's New Deal coalition, a shaky kaleidoscope of factions and interests born from his first two terms in office, would dominate American politics for decades, transform the American state, and remain monumental even

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<sup>16</sup> Jefferson Cowie, *The Great Exception: The New Deal & the Limits of American Politics*, (Princeton: Princeton University Press, 2016), pg. 98.

<sup>17</sup> William E. Leuchtenburg, *The American President: From Teddy Roosevelt to Bill Clinton*, (New York, NY: Oxford University Press, 2015), pg. 139.

<sup>18</sup> Franklin D. Roosevelt, Inaugural Address Online by Gerhard Peters and John T. Woolley, The American Presidency Project, <https://www.presidency.ucsb.edu/node/208712>.

<sup>19</sup> Cowie, *The Great Exception*, pg. 96.

today. The departure from normalcy would be permanent. As Roosevelt, himself said, “We could never go back to the old order.”<sup>20</sup>

The root of this sea change, the New Deal, particularly the First New Deal, was an emergency measure that invested unprecedented power in the president. Based on the World War I template, Franklin Roosevelt declared a national emergency on March 6, 1933, two days after assuming office. He did this to declare a bank holiday under section 5(b) of the Trading with the Enemy Act until March 9, when he called a special session of Congress to resolve the banking crisis.<sup>21</sup> Because the law had technically lapsed, this statutory authority was questionable at best, and although it was retroactively blessed by Congress, it led former President Hoover to compare it to Hitler’s burning of the Reichstag, producing a false emergency.<sup>22</sup> On March 9, the House passed the Emergency Banking Act after 38 minutes of debate. The Senate passed it that evening and eight hours after its introduction, Roosevelt signed the bill into law.<sup>23</sup> The law revived the Trading with the Enemy Act and amended it to operate in national emergencies, kicking off Roosevelt’s Hundred Days.<sup>24</sup>

The rhetoric of an impending national emergency festooned New Deal politics. Campaigning in 1936, Roosevelt said, “Three and a half years ago we declared war on depression. You and I know today that that war is being won.” When accepting the Democratic re-nomination, he said, “I accept the commission you have tendered me. I join with you. I am enlisted for the duration of the war.”<sup>25</sup> Aside from Roosevelt himself, Robert Wagner argued that

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<sup>20</sup> Franklin Roosevelt, *On Our Way*, (New York: The John Day company, 1934), pg. 36.

<sup>21</sup> <http://www.presidency.ucsb.edu/ws/?pid=14661>, <http://www.presidency.ucsb.edu/ws/?pid=14485>.

<sup>22</sup> Leuchtenberg, *The American President: From Teddy Roosevelt to Bill Clinton*, pg. 146.

<sup>23</sup> Leuchtenberg, *The American President: From Teddy Roosevelt to Bill Clinton*, pg. 148.

<sup>24</sup> Michael R. Belknap, "New Deal and the Emergency Powers Doctrine." *Tex. L. Rev.* 62 (1983): pg. 73.

<sup>25</sup> William E Leuchtenberg, “The New Deal and the Analogue of War,” in *Change and Continuity in Twentieth Century America*, ed. John Braeman, Robert H. Bremner, and Everett Walters, (Columbia, OH: Ohio State University Press, 1964), pg. 136-137.

because of the economic emergency, Congress's power under the Commerce Clause increased. The Supreme Court would later dismiss the emergency power doctrine, which holds that the government's power increases during a national emergency under a "flexible constitution."<sup>26</sup> Despite this, the emergency dominated the political sphere and demanded a unified national effort, akin to war. Brain Trust economist Rexford Tugwell wrote in his 1935 book *The Battle for Democracy*, that wartime democracies "achieve unity to an extent which seems extraordinary to one viewing the wartime economy from the tangled confusion of peacetime values."<sup>27</sup> Speaker Rainey, passing the Emergency Banking Act, compared it to World War I: "Today we are engaged in another war, more serious even in its character and presenting greater dangers to the Republic."<sup>28</sup> There were also legal ramifications for this emergency rhetoric; according to attorney Roger Roots, Roosevelt's Banking Holiday arguably violated the Fourth, Fifth, and Sixth Amendments, the Contracts Clause, and the Non-Delegation Doctrine, but faced no challenge in the Supreme Court.<sup>29</sup>

The thesis of crisis-based state building, centered around executive power, is found in both political science and history and explains why emergency powers grew nearly unchecked for decades after the New Deal.<sup>30</sup> A thorough analysis of the New Deal is beyond the scope of this paper, but the role of crisis in it is key to understanding Congress's later reading of history and historians' explanations for the growth of executive power. Much of the New Deal, especially the First New Deal, centered around the economic emergency facing the country and

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<sup>26</sup> Belknap, *New Deal and the Emergency Powers*, 86-87.

<sup>27</sup> Rexford, *The Battle for Democracy* (New York, 1935), pg. 296, cited in Leuchtenberg, "The New Deal and the Analogue of War," pg. 106.

<sup>28</sup> Leuchtenberg, "The New Deal and the Analogue of War," pg. 107.

<sup>29</sup> Roger I. Roots, "Government by Permanent Emergency: The Forgotten History of the New Deal Constitution." *Suffolk UL Rev.* 33 (1999): 262.

<sup>30</sup> Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government*, (New York: Oxford University Press, 1987).

the political rhetoric reflected that. The reason for this was the urgent need to build support for a stronger American state. As historian William Leuchtenberg has argued, “the New Dealers resorted to the analogue of war, because in America the sense of community is weak, the distrust of the state is strong.”<sup>31</sup> Julian Zelizer, analyzing resistance to high taxes since the New Deal, notes one consistent and critical strategy politicians have used to convince an anti-tax electorate of the need for more state revenue is a national crisis; During World War II for instance, “when policy makers sold the mass income tax through a national public relations campaign that promoted taxpaying as the patriotic duty of citizens who were not fighting abroad.” As Zelizer notes, broad-based anti-statism has continually shaped American political culture, making national crises critical inflection points for the growth of state power, and by extension, executive power.<sup>32</sup>

The broad executive power that the Roosevelt, and later Truman, espoused had its origins decades earlier in the Progressive Era. Woodrow Wilson, in his work *Congressional Government*, argued that the separation of powers was antiquated and threatened America’s national development as it entered a new, modern age. He wrote,

*“The evident explanation of this change of attitude towards the Constitution is that we have been made conscious by the rude shock of the war and by subsequent developments of policy, that there has been a vast alteration in the conditions of government; that the checks and balances which once obtained are no longer effective; and that we are really living under a constitution essentially different from that which we have been so long worshiping as our own peculiar and incomparable possession. In short, this model government is no longer conformable with its own original pattern.”*<sup>33</sup>

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<sup>31</sup> Leuchtenberg, “The New Deal and the Analogue of War,” in Braeman, Brenner and Walters eds. *Change and Continuity in Twentieth Century America*, pg. 142.

<sup>32</sup> Julian E. Zelizer, *Governing America: The Revival of Political History*, (Princeton: Princeton University Press, 2012), pg. 99.

<sup>33</sup> Woodrow Wilson, *Congressional Government*, (Boston: Houghton Mifflin Company, 1885), <https://www.gutenberg.org/files/35861/35861-h/35861-h.htm>.



Stephen Skowronek finds in this “Progressive Paradigm” two premises: “that the Constitution thwarted necessary action” and “that the Constitution did not stand in the way of its own reconstruction.”<sup>34</sup> As a result, progressives, seeking a more flexible and assertive federal government, pushed for a more powerful presidency grounded in popular sovereignty. The presidency was a means for the people to manifest their will, or as Wilson wrote, “The nation as a whole has chosen him and is conscious that it has no other political spokesman. His is the only national voice in affairs. Let him once win the admiration and confidence of the country, and no other single force can withstand him, no combination of forces will easily overpower him.”<sup>35</sup> Theodore Roosevelt took this idea further, arguing in the 1912 election for recall elections of presidents who had lost popular support.<sup>36</sup> At the same time, the federal government would become more institutionalized and laden with experts, which would surround and guide the presidency, sharing power within the executive branch.<sup>37</sup>

Scholars played a critical role in the growth of the presidency in the 20<sup>th</sup> century. From FDR to Johnson, the presidential synthesis dominated American history. Scholars like Arthur Schlesinger, Richard Hofstadter, William Leuchtenberg, helped place the presidency at the center of American history and political time. At the same time, political scientists like Clinton Rossiter, Edward Corwin, and Richard Neustadt, whose 1960 work *Presidential Power* became a leading handbook on the presidency, focused on presidential preeminence in American politics.<sup>38</sup> Often times these scholars would work within liberal presidential administrations or the liberal

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<sup>34</sup> Stephen Skowronek, “The Unsettled State of Presidential History,” in *Recapturing the Oval Office: New Historical Approaches to the American Presidency*, eds. Bruce Schulman and Brian Balogh, (Ithaca, NY: Cornell University Press, 2015), pg. 18.

<sup>35</sup> Woodrow Wilson, “The President of the United States,” in *Constitutional Government of the United States* (New York: Columbia University Press, 1908) <https://online.hilldale.edu/file/presidency/lecture-4/The-President-Of-the-United-States-Woodrow-Wilson-Pgs.-649-660.pdf>.

<sup>36</sup> Skowronek, “The Unsettled State of Presidential History,” pg. 19.

<sup>37</sup> Skowronek, “The Unsettled State of Presidential History,” pg. 20.

<sup>38</sup> Zelizer, *Governing America*, pg. 18-20.

advocacy group Americans for Democratic Action; the same scholars behind the liberal consensus to the political predominance of the presidency. The growth of presidential power was integral to American liberalism in the mid-20<sup>th</sup> century; Julian Zelizer writes, “The synthesis presented three views about the presidency: the president was an engine of liberal policy; the presidency had grown in power over the course of the twentieth century, and the president was the prime mover in national politics since the New Deal.... The growth of presidential power and the triumph of liberalism went hand in hand.”<sup>39</sup>

While Roosevelt did not assert unilateral presidential power to pursue the New Deal, he did rely heavily on congressional statutes delegating powers to him which a national emergency activated, relying largely on the model Wilson used during World War I.<sup>40</sup> William Leuchtenberg writes, “There was scarcely a New Deal act or agency that did not owe something to the experience of World War I.”<sup>41</sup> Leuchtenberg argues that because “[World War I] wartime control of industry went much further efforts in recognizing the place of the twentieth-century state,” the war analogue was an effective rallying cry for the New Deal.<sup>42</sup>

Just as effective as the war analogue was an actual war. Legal historian Michael Belknap points out that the same Supreme Court, which widely rejected the emergency powers doctrine proposed to justify the New Deal’s radical expansion of government power, accepted the same justification for sweeping federal authority during World War II. Cases like *Schechter Poultry, US v. Butler*, and *Carter v. Carter Coal Co.* handed the Roosevelt administration resounding defeats, while in wartime cases like *Korematsu v. US*, *Yakus v. US*, and *Hirabayashi v. US*, the Court accepted that military exigencies could justify circumventing the Fourteenth and Fourth

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<sup>39</sup> Zelizer, *Governing America*, pg. 20.

<sup>40</sup> Arthur M. Schlesinger, *The Imperial Presidency*, (Boston: Houghton Mifflin, 1973), pg. 115.

<sup>41</sup> Leuchtenberg, *The New Deal and the Analogue of War*, pg. 109.

<sup>42</sup> Leuchtenberg, *The New Deal and the Analogue of War*, pg. 143.

Amendment.<sup>43</sup> The Supreme Court was far more deferential to emergency powers in wartime than during economic crises, enshrining an emergency powers doctrine which has endured intact to the present day.

In addition to favorable Supreme Court precedent, World War II expanded emergency powers by practice, the significance of which scholars and senators later fumed over. By 1940, the threat of war from Europe and the Pacific loomed, leading Roosevelt to take preemptive steps to involve the United States in the conflict. This sometimes put him at odds with constitutional norms; for instance, Roosevelt ignited a political and legal firestorm when he signed a Destroyers-for-Bases deal with the U.K. without congressional consent.<sup>44</sup> Roosevelt backed up his decision with an opinion by Attorney General Robert Jackson, a pragmatic supporter of executive prerogative. Wendell Wilkie called it “the most dictatorial and arbitrary act of any president in the history of the United States.”<sup>45</sup> This deal set a significant precedent; in 1953, Harold Stein wrote, “The acquisition of a dozen bases and gifts of fifty destroyers that President Roosevelt moved on so cautiously less than fifteen years ago would be a routine, indeed a minor transaction today.”<sup>46</sup>

The onset of World War II brought another national emergency, which in the eyes of Fulbright and his colleagues, marked the further development of presidential power and congressional indolence. On Sept. 8, 1939, as German troops swept through Poland, Roosevelt issued a “limited” national emergency in case American interests were threatened. Dubbing it

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<sup>43</sup> Belknap, *Emergency Powers and the New Deal*; <https://www.oyez.org/cases/1940-1955/321us414>.

<sup>44</sup> Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies*, (New Brunswick, N.J.: Transaction Publishers, 2008), pg. 268; interestingly, Sen. Fulbright later criticized Roosevelt’s shoot-on-sight order to convoy escorts as usurping Congress’ war powers. See Schlesinger, *The Imperial Presidency*, pg. 110.

<sup>45</sup> John Yoo, “Franklin Roosevelt and Presidential Power.” *Chap. L. Rev.* 21 (2018): 205. <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=3988&context=facpubs>.

<sup>46</sup> Harold Stein, “Foreign Policy and the Dispersion of Power,” *Public Administration Review*, summer 1953; cited in Schlesinger, *The Imperial Presidency*, pg. 141.

“limited” did not actually change the emergency powers Roosevelt could assume, but it helped assuage political attacks against Roosevelt for intervening in European affairs.<sup>47</sup> In May 1941 Roosevelt declared an unlimited national emergency; together, these two declarations served as the basis for the enormous delegation of wartime power to come. The 1941 Lend-Lease Act, the Emergency Price Control Act, and the First and Second War Powers Acts gave the president immense power to regulate the American economy. Each of these laws contained clauses allowing Congress to repeal a president’s executive orders empowered by these laws, but Roosevelt, despite finding these provisions unconstitutional, signed them regardless.<sup>48</sup> Using emergency powers, Roosevelt seized plants which failed to produce military equipment, set prices and wages, negotiated international agreements to station U.S. troops abroad without Congressional consent, froze foreign assets, and detained 110,000 Japanese-Americans.<sup>49</sup> Japanese internment was the most egregious exercise of war powers. In his dissent, which foreshadowed the language of the National Emergencies Act’s backers, then-Associate Justice Robert Jackson wrote the decision was a “loaded weapon, ready for the hand of any new authority that can bring forward a plausible claim of urgent need.”<sup>50</sup>

Despite largely working hand-in-hand with Congress, Roosevelt also made provocative assertions of inherent presidential authority, foreshadowing later acts by Truman and Nixon. In cajoling Congress to repeal part of the Price Control Act, Roosevelt stated, “In the event that Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act.... The President has the power, under the Constitution and under Congressional acts, to take

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<sup>47</sup> Harold Relyea, *A Brief History of Emergency Powers in the United States: A Working Paper Prepared for the Special Committee on National Emergencies and Delegated Emergency Powers, United States Senate*, (Washington: U.S. Govt. Print. Off., 1974.), pg. 70.

<sup>48</sup> Schlesinger, *The Imperial Presidency*, pg. 110.

<sup>49</sup> Relyea, *A Brief History of Emergency Powers in the United States*, pg. 70-78.

<sup>50</sup> *Korematsu v. United States* 323 U.S. 214.

measures necessary to avert a disaster which would interfere with winning the war.” At the end of the emergency, Roosevelt would lay down these authorities and restore the presidency to normality.<sup>51</sup> This, Roosevelt’s most stark assertion of presidential authority shows just how much power Roosevelt had infused into the presidency.

## **Cold War**

According to Roosevelt, victory in World War II should have brought a swift termination to presidential power. However, through a patchwork of declarations and extensions, wartime powers from World War II extended well into the 1950s, furthering the constitutional imbalance which liberal anti-war senators later described.<sup>52</sup> President Truman officially declared an end to hostilities on Dec. 31, 1946, but noted a state of war still existed.<sup>53</sup> Congress did not officially end the war with Germany until 1951 and Japan until 1952; in mid-1947, at Truman’s request, Congress repealed most, but not all, wartime delegatory statutes.<sup>54</sup> The Supreme Court even weighed in; in a case surrounding rent controls operating after the war, Justice Douglas wrote, “the war power does not necessarily end with the cessation of hostilities.”<sup>55</sup> Frayed at its boundaries, World War II’s unsure end fed directly into the Cold War, and its first major conflict in Korea. On June 25, 1950, Soviet-backed North Korea invaded the American-backed South; within five days, President Truman dispatched American ground forces into the conflict. However, by October, China entered the war and by December, the war became a protracted and

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<sup>51</sup> Rossiter, *Constitutional Dictatorship*, pg. 268.

<sup>52</sup> U.S. Congress, Senate, Special Committee on the Termination of the National Emergency, *PART 1-Constitutional Questions Concerning Emergency Powers*, 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., 1973, 66.; Relyea, *A Brief History of Emergency Powers in the United States*, pg. 88

<sup>53</sup> Mary L. Dudziak, *War Time: An Idea, Its History, Its Consequences*, (New York: Oxford University Press, 2012), pg. 37.

<sup>54</sup> Relyea, *A Brief History of Emergency Powers in the United States*, pg. 88.

<sup>55</sup> *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948).

bloody stalemate along the 38<sup>th</sup> parallel.<sup>56</sup> By the 1953 armistice, two million Americans had served, 36,574 had died, and the American government had been transformed.<sup>57</sup>

After conferring with Congressional leaders, on December 16, 1950, President Truman declared a national emergency, because “world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world.”<sup>58</sup> The proclamation justified itself by citing then Korean conflict, but also cited the threat posed by communist world conquest to American liberties as the reason for the national emergency.<sup>59</sup> This national emergency served much the same purpose as Roosevelt’s 1939 national emergency: to activate statutory emergency powers allowing the president to fix prices, implement wage controls and expedite wartime production.<sup>60</sup> However, it was open-ended, intended to last until communism no longer threatened the United States, perpetuating a state of permanent emergencies which later troubled Congress.

Drafting the proclamation fell to Adrian Fisher, a middle-aged State Department lawyer and Harvard Law graduate who had advised the government’s case in *Korematsu*, the case which upheld Japanese internment.<sup>61</sup> Because war with Germany and Japan technically had not ended and the Truman administration could thus draw on those war powers, Fisher did not intend the

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<sup>56</sup> Relyea, *A Brief History of Emergency Powers in the United States*, pg. 88.

<sup>57</sup> Stephen M. Griffin, *Long Wars and the Constitution*, (Cambridge, Massachusetts: Harvard University Press, 2013), pg. 76.

<sup>58</sup> U.S. Congress, Senate, Special Committee on the Termination of the National Emergency, *Executive Orders in Times of War and National Emergencies*, 93rd Cong., 2d sess., 1974, S. Rep. 931280–291, pg. 146.

<sup>59</sup> Proclamation 2914—Proclaiming the Existence of a National Emergency, December 16, 1950  
<http://www.presidency.ucsb.edu/ws/?pid=13684>

<sup>60</sup> Harry S. Truman, *The Truman Memoirs. Vol. II. the Years of Trial and Hope, 1947-53* (New York: Doubleday & Company, Inc, 2019), pg. 420-426; Memo, Theodore Tannenwald, Jr., to George Elsey, with attachment, December 4, 1950. Elsey Papers, Harry S. Truman Administration File. Korea-National Emergency Proclamation, December 15, 1950,  
[https://www.trumanlibrary.org/whistlestop/study\\_collections/koreanwar/documents/index.php?documentdate=1950-12-04&documentid=ci-17-3&pagenumber=1](https://www.trumanlibrary.org/whistlestop/study_collections/koreanwar/documents/index.php?documentdate=1950-12-04&documentid=ci-17-3&pagenumber=1).

<sup>61</sup> US Congress, Senate, Special Committee on the Termination of the National Emergency, *PART 1-Constitutional Questions Concerning Emergency Powers*, 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., 1973, 60.

1950 national emergency to have any legal effect. Instead, it was, “an expression of the national will of the United States.”<sup>62</sup> Nevertheless, this emergency was an integral part of the national security apparatus, as it was the basis for domestic and international economic controls.

The growth of the national security apparatus as a result of the Korean war was immediate and obvious. In 1949, Truman proposed a ceiling on defense spending of \$14.5 billion that would last for the foreseeable future.<sup>63</sup> In September 1950, after intervening in Korea, Truman publicly demanded doubling the defense budget from \$15 billion to \$30 billion.<sup>64</sup> Later that month, Truman approved NSC-68, a policy paper envisioning a permanent struggle with communism and requiring a vast global American military commitment. As Stephen Griffin argues, this strategy, the result of internal executive branch deliberations, had significant constitutional implications, since it required the president to wield both the material and legal means to defeat communism. Thus, it assumed the unilateral power of the president over *ad bellum* war powers. Griffin writes, “If that strategy [containment] involved the capacity to respond quickly to multiple foreign threats with overwhelming force, that meant the president *had* to possess the power to initiate military action, even war, as he saw fit.”<sup>65</sup>

Crises and the administrative demands which followed also grew the presidency in physical terms. During World War II, President Roosevelt had no more than 11 White House staff assistants, which expanded to 13 with Truman, 37 with Eisenhower, and up to 48 under Nixon, greatly increasing the administrative capacity of the Executive Office of the President.

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<sup>62</sup> US Congress, Senate, Special Committee on the Termination of the National Emergency, *PART 1-Constitutional Questions Concerning Emergency Powers*, 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., 1973, 60.

<sup>63</sup> Michael J. Hogan, *A Cross of Iron: Harry S. Truman and the Origins of the National Security State, 1945-1954*, (Cambridge, U.K.; New York: Cambridge University Press, 1998), pg. 267.

<sup>64</sup> Julian E. Zelizer, *Arsenal of Democracy: The Politics of National Security--from World War II to the War on Terrorism*, (New York: Basic Books, 2010), pg. 102.

<sup>65</sup> Griffin, *Long Wars and the Constitution*, pg. 60-63.

The total Executive Office staff under Nixon amounted to 5395 people in 1971, nearly five times the number under Eisenhower in 1954. The creation of a centralized staff around the president was a product of the Great Depression when the 1939 Government Reorganization Act created the Executive Office of the President to help Roosevelt manage the myriad of economic and social programs under his purview. The office grew further during the Cold War until the presidency bore little resemblance to its pre-New Deal predecessors.<sup>66</sup>

Yet the powers of the president, even during the Cold War, were not limitless. In the spring of 1952, the United Steel Workers struck, threatening the U.S.'s wartime steel production, which was vital for everything from bullets to jeep bumpers to plane engines. Truman, believing any lapse of steel production would threaten the war effort, ordered the nationalization of the steel mills on the basis of his constitutional authority as commander-in-chief. The factory owners sued to retake their factories and the case shortly reached the Supreme Court. In *Youngstown Sheet & Tube Co. v. Sawyer*, a case which scholars have compared to *Marbury v. Madison* and *Brown v. Board of Education*, the court ruled 6-3 against President Truman, finding his radical interpretation of the commander-in-chief clause erroneous.<sup>67</sup>

In an opinion that State Department legal adviser under President Obama Harold Koh later called a foundation of the “national security constitution,” Justice Robert Jackson developed a highly influential tripartite framework that would come to define the relationship between Congress, the presidency, and the Constitution, which said outside of the Constitution, Congress is the key determiner of presidential power and can either check or embolden the presidency.<sup>68</sup> In ruling against Truman, Jackson had become far more suspicious of executive power, which he

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<sup>66</sup> Schlesinger, *The Imperial Presidency*, pg. 220-222

<sup>67</sup> Adler, David Gray. "The steel seizure case and inherent presidential power." *Const. Comment.* 19 (2002): 156.

<sup>68</sup> Griffin, *Long Wars and the Constitution*, pg. 90-95



had once championed as Roosevelt's Attorney General who wrote the legal justification for the Destroyers-for-Bases deal. This concurrence is especially important, as the Special Committee on the Termination of the National Emergency later adopted Justice Jackson's concurrence as its framework for writing the 1976 National Emergencies Act.<sup>69</sup>

Identifying three types of presidential action, Jackson wrote,

*"When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty..."*

*"When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.*

*"When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."<sup>70</sup>*

However, despite Jackson's ruling in the Steel Seizure Case, Truman's 1950 national emergency, relying on the permanent threat of communism, would further perpetuate presidential emergency powers, much to Congress's later chagrin. As NSC-68 stated, the nature of nuclear weapons, the unacceptable consequences of Soviet hegemony over Eurasia and the aggressive nature of international communism meant the United States had to contend endlessly with communism through all measures short of war.<sup>71</sup> Thus, the permanent communist menace would engender a permanent state of emergency, enlarging the presidency and collapsing the distinction between war and peace. This was a view shared by contemporaries. "In the mind of

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<sup>69</sup> U.S. Congress, Senate, Special Committee on the Termination of the National Emergency, *Final Report*, 94th Cong., 2d sess., 1976, S. Rep. 94-922, pg. 8.

<sup>70</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)

<sup>71</sup> "A Report to the National Security Council - NSC 68", April 12, 1950. President's Secretary's File, Harry S. Truman Presidential Library, [https://www.trumanlibrary.org/whistlestop/study\\_collections/coldwar/documents/pdf/10-1.pdf](https://www.trumanlibrary.org/whistlestop/study_collections/coldwar/documents/pdf/10-1.pdf)

the Truman administration,” Michael Hogan writes, “the distinction between war and peace had dissolved in a view of the Cold War as a permanent state of national emergency.”<sup>72</sup>

Just as the persistent crisis posed by international communism justified the expansion of presidential power, it also justified one of the largest expansions of the federal government in the 20<sup>th</sup> century. Andrew Grossman, reflecting on American Political Development’s research on the early Cold War, remarks, “Law-making in an atmosphere of emergency planning (1947–1953) institutionalized the centralization of power in the executive branch of government...”<sup>73</sup>

Although he emphasizes continuity with older American anti-statist traditions, Michael Hogan concedes, “there is no doubt that new responsibilities and perceived threats led to an unprecedented peacetime allocation of resources to the military arm of the state, and to the creation of powerful government agencies that had not existed before. Both developments amounted to major departures from American tradition, both added enormously to the size and power of the state, and both took the state in new directions.”<sup>74</sup> As Eisenhower said in his farewell address, the conflict with communism “commands our whole attention, absorbs our very beings. We face a hostile ideology- global in scope, atheistic in character, ruthless in purpose, and insidious in method.” As a result, he argued, “we can no longer risk emergency improvisation of national defense; we have been compelled to create a permanent armaments industry of vast proportions.”<sup>75</sup> Campbell Craig and Fredrik Logevall argue, “Just as the New Deal created an array of institutions and interests that say their prosperity and even their

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<sup>72</sup> Hogan, *A Cross of Iron*, pg. 319

<sup>73</sup> Andrew D. Grossman, “The early Cold War and American political development: Reflections on recent research,” *International Journal of Politics, Culture, and Society* 15, no. 3 (2002): 471-483.

<sup>74</sup> Hogan, *A Cross of Iron*, pg. 464

<sup>75</sup> Dwight D. Eisenhower, “Farewell Radio and Television Address to the American People,” (speech, Washington D.C., January 17, 1961), Eisenhower Presidential Library, [https://www.eisenhower.archives.gov/all\\_about\\_ike/speeches/farewell\\_address.pdf](https://www.eisenhower.archives.gov/all_about_ike/speeches/farewell_address.pdf)

existence tied to the ever-greater expansion of the American state, the Cold War did the same thing after 1950 in the area of foreign policy, though on a greater scale.”<sup>76</sup>

As the Cold War dragged on, national emergencies began to pile up. By the early 1970s, Roosevelt’s 1933 national emergency and Truman’s 1950 national emergency were still in effect. President Eisenhower in 1960 and 1961 and President Kennedy in 1962 both extended a 1933 executive order, made under the 1933 national emergency, banning the holding or export of gold.<sup>77</sup> In 1968, President Johnson used section 5b of the Trading with the Enemy Act to regulate the United States’ balance of payments without reference to Congress.<sup>78</sup> This was a particularly egregious move which would appear frequently in later congressional hearings. Johnson, without consulting Congress, drew up and promulgated an entire regulatory program for U.S. companies engaging in foreign direct investment, supported by an entire bureaucratic apparatus. Emergency powers became part of routine economic management; between 1945 and 1952, the U.S. government seized and operated 35 private businesses, relying on the War Labor Disputes Act and, after it expired, the 1916 Transportation Act.<sup>79</sup>

This raised the specter of an undemocratic slide. Robert S. Rankin and Winfried Dallmyr’s 1962 *Freedom and Emergency Powers in the Cold War* analyzed three contemporary exercises of emergency powers: labor disputes, non-military defense, and racial equality. Domestic efforts to maintain a stable economy, protect America’s image on the world stage, and ensure adequate civil defense all required the expansion of government power and in these cases,

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<sup>76</sup> Campbell Craig, and Fredrik Logevall, *America’s Cold War: The Politics of Insecurity*, (Cambridge, Mass.: Belknap Press of Harvard University Press, 2009), pg. 107.

<sup>77</sup> US Congress, Senate, Special Committee on the Termination of the National Emergency, *PART 2-Views of Former Attorney Generals*, 93rd Cong., 1st sess., 1973, pg. 674.

<sup>78</sup> US Congress, Senate, Special Committee on the Termination of the National Emergency, *PART 2-Views of Former Attorney Generals*, 93rd Cong., 1st sess., 1973, pg. 667.

<sup>79</sup> Relyea, *A Brief History of Emergency Powers in the United States*, pg. 108.

emergency powers. They wrote, “In a constitutional system dedicated to the preservation of individual liberties, expanding emergency functions of the government raise problems of grave importance and magnitude. The basic and inescapable question is, How can a democracy face the challenge of the cold war and still remain a democracy?” The use of federal marshals to promote civil rights, industrial seizures and a growing federal civil defense apparatus all shifted the balance toward the presidency and toward states of emergency.<sup>80</sup>

These national emergencies had criminal consequences for certain Americans, particularly those who violated emergency presidential decrees. In the 1957 case *Bauer v. United States*, the Ninth Circuit also upheld Bauer’s conviction under Roosevelt’s 1933 emergency.<sup>81</sup> In 1965, the Ninth Circuit Court of Appeals again upheld the conviction of two individuals for hoarding gold in violation of Roosevelt’s executive order.<sup>82</sup> That same year, in *Sardino v. Federal Reserve Bank of New York*, the Second Circuit upheld the appellant’s conviction for violating the U.S. embargo of Cuba, which rested on the validity of the Trading with the Enemy Act and Truman’s 1950 emergency declaration. Judge Friendly wrote, “While the court will not review a determination so peculiarly within the province of the chief executive, there can hardly be doubt as to the existence of an emergency today when thousands of United States troops are in action and many more are in readiness around the globe.”<sup>83</sup>

### **The Politics of Presidential Powers in the New Deal Era**

At the same time that liberals developed an appetite for executive power, conservatives, playing into a long anti-statist tradition in American politics, expressed their opposition to

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<sup>80</sup> Robert S. Rankin and Fred R. Dallmayr, *Freedom and Emergency Powers in the Cold War*, (New York: Appleton-Century-Crofts, 1964), pg. 2.

<sup>81</sup> *Bauer v. United States*, 244 F.2d 794 (9th Cir. 1957)

<sup>82</sup> *Robert Sheldon Pike and Ryk Henry Brouwer, Appellants, v. United States of America, Appellee*, 340 F.2d 487 (9th Cir. 1965)

<sup>83</sup> 361 F. 2d 106 - *Sardino v. Federal Reserve Bank of New York*

centralized state authority from the Roosevelt to the Johnson administration. The Old Right, epitomized by ‘Mr. Republican’ Sen. Robert Taft, starkly opposed to the New Deal and the changes it had wrought but equally detested how Roosevelt had transformed the executive branch. “By 1945 Franklin Roosevelt represented the Right’s major institutional enemy—the strong chief executive. The presidency and the entire executive branch had mushroomed in size during the 1930s and 1940s, becoming synonymous with New Deal reforms and later the bureaucratic wartime intrusions,” wrote David Reinhard.<sup>84</sup> Roosevelt adviser-turned critic James Warburg said in a 1934 speech to the Chicago Council on Foreign Relations that the American voters should stand against the New Deal, instead of “opening the door to the ideas and ideals as foreign to most of us as the German goose step or the Fascist salute.”<sup>85</sup> Ogden Mills, Hoover’s Treasury Secretary, agreed; Mills, speaking to the New York State Young Republicans Clubs, cited a New Hersey tailor imprisoned for charging more than the NRA code price and said, “This man went to prison without even a trial by jury, not for violating a specific criminal statutes, Federal or State, but for violating an executive edict or decree... That, my friends, is tyranny.”<sup>86</sup> Opposed to the economic tyranny of the New Deal, conservative business interests, motivated by both their ideology and pocketbooks, founded the American Liberty League and later the Foundation for Economic Education to push a laissez-faire economic agenda to counter the interventionist economic policies dominant under Roosevelt.<sup>87</sup> At the same time, conservative

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<sup>84</sup> David W. Reinhard, *The Republican Right since 1945*, (Lexington, KY: University Press of Kentucky, 1983), pg. 2.

<sup>85</sup> Howard Wood, "NEW DEAL LEADS TO A DICTATOR, SAYS WARBURG." *Chicago Daily Tribune*, October 5, 1934, <http://libproxy.lib.unc.edu/login?url=https://search.proquest.com/docview/181626076?accountid=14244>.

<sup>86</sup> Special to THE NEW YORK TIMES. "NEW DEAL TREND TOWARD 'TYRANNY' SCORED BY MILLS," *New York Times*, May 20, 1934.

<http://libproxy.lib.unc.edu/login?url=https://search.proquest.com/docview/101243071?accountid=14244>.

<sup>87</sup> Kim Phillips-Fein, *Invisible Hands: The Making of the Conservative Movement from the New Deal to Reagan*, (New York: W.W. Norton & Company, 2009).

Republicans and southern Democrats worked together in a ramshackle coalition to oppose New Deal legislation in Congress, overcoming their partisan differences.<sup>88</sup>

After World War II, the Old Right also opposed the rise of presidential power in foreign affairs, spurred on by new post-war international commitments and the threat of communism. Taft wrote in 1951, “There can be no question that the executive departments have claimed more and more power over the field of foreign policy at the same time that the importance of foreign policy in its effect upon every feature of American life has steadily increased.” Taft expressed concern that “the President will become a complete dictator in the entire field of foreign policy” and this power would bleed into the domestic sphere, leaving Congress a rump branch of government.<sup>89</sup> Aaron Friedberg puts this opposition to American state-building during the early Cold War in the context of traditional American anti-statism dating back to Thomas Jefferson; describing Republican opposition to Truman’s defense policies, Friedberg writes, “The essence of the Republican critique was clear enough: rising taxes, expanding expenditures, a ballooning federal bureaucracy, and increasing government regulations and controls were tilting the balance of national power toward Washington, and within Washington toward the executive branch.”<sup>90</sup> Republicans took explicit steps to limit presidential power; capitalizing on their brief control of Congress after World War II, Republicans passed the 22<sup>nd</sup> Amendment to limit presidents to two terms, passing the most explicit and binding restriction on presidential power in decades.<sup>91</sup>

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<sup>88</sup> James T. Patterson, "A Conservative Coalition forms in Congress, 1933-1939," *The Journal of American History* 52, no. 4 (1966): 757-772.

<sup>89</sup> Geoffrey Matthews, "Robert A. Taft, The Constitution and American Foreign Policy, 1939-53," *Journal of Contemporary History* 17, no. 3 (1982): 507-522.

<sup>90</sup> Aaron L. Friedberg, *In the Shadow of the Garrison State: America's Anti-Statism and Its Cold War Grand Strategy*, (Princeton, N.J.: Princeton University Press, 2000), pg. 41.

<sup>91</sup> Thomas H. Neale, "Presidential Terms and Tenure: Perspectives and Proposals for Change," Congressional Research Service (2009).

At this time, J. William Fulbright, Rhodes Scholar, and Arkansas Senator was a rising star in politics and foreign affairs. He, like many liberal internationalists, firmly opposed the neo-isolationists of the Old Right, like Sen. Robert Taft and Sen. John Bricker. In doing so, Fulbright became a classic Cold Warrior and would see the presidency expanded to manage the communist threat.<sup>92</sup> When Sen. Bricker proposed a constitutional amendment to limit the president's power to make foreign agreements without consulting Congress, Fulbright opposed it. To him, global circumstances had brought about "a period of inevitable and unpredictable change," and he argued that the proposal, which sought to reassert Congress' prerogative over foreign affairs, would throttle the presidency and undermine the Constitution.<sup>93</sup> However, liberalism's faith in the honest and effective use of executive power, exemplified by Fulbright, would tremble and collapse as the United States moved deeper and deeper into Indochina.

This pattern of Republican opposition to the expansion of the federal government and executive authority continued into the 1960s. Unlike anti-statist politics early in the Cold War, opposition to the Great Society was far more regionally and racially-based. In his book *The Emerging Republican Majority*, Kevin Phillips noted, "Within the House of Representatives, most votes on Great Society have straddled old Civil War divisions..." and that "Democratic 'Great Society' programs aligned that party with many Negro demands..."<sup>94</sup> Yet, opposition to the Great Society hit on the same anti-statist and anti-executive notes as previous criticism. *Ronald Reagan Speaks Out Against Socialized Medicine*, a 1961 LP put out with the support of the American Medical Association, was a strong critique of big government; noting that 1/5 of the United States' industrial capacity was owned by the government, Reagan warned of coming

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<sup>92</sup> Randall Bennett Woods, *Fulbright: A Biography*, (New York: Cambridge University Press, 1995), pg. 152.

<sup>93</sup> Fulbright, Feb. 2, 1954 speech; cited in Woods, *Fulbright: A Biography*, pg. 192.

<sup>94</sup> Kevin Phillips, *The Emerging Republican Majority*, (New Rochelle, NY: Arlington House, 1969), pg. 15, 331.

“federal programs that would invade every area of freedom as we have known it in this country.” Reagan continued that if the listener didn’t call their Congressman, “one of these days, you and I are going to spend our sunset years telling our children and our children’s children what it once was like in America when men were free.”<sup>95</sup> Goldwater took a more personal tact during the 1964 campaign when describing Johnson’s cajoling of Congress; he said, “This is nothing less than totalitarian philosophy- the principle that the end justifies the means.”<sup>96</sup>

### **Congress Awakens**

It would not take long for anti-executive criticism of the Vietnam War to drown out anti-executive criticism of the Great Society, resurrect Congress’s power over foreign affairs, and sow doubts about the primacy of the executive branch. The seeds of congressional discontent were sown when passing the Tonkin Gulf Resolution; only two senators, Wayne Morse (D-OR) and Ernest Gruening (D-AK) voted against the resolution, hitting notes which would become familiar over the next decade. Sen. Morse said, “A constitutional principle is involved. It is dangerous to give to any President an unchecked power, after the passage of a joint resolution, to make war.... In effect, you are trying to get around article I, section 8, by amending the Constitution by way of a joint resolution.”<sup>97</sup> Yet the resolution, presented as an emergency measure necessitated by an attack on U.S. forces, passed overwhelmingly, showing how perceived emergencies can drive government policy. In 1965, as Johnson escalated the war with Operation Rolling Thunder beyond what Senator Fulbright believed authorized by the Tonkin Gulf Resolution, the liberal anti-war Senate Foreign Relations fought back, holding televised

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<sup>95</sup> Ronald Reagan, “Ronald Reagan Speaks Out Against Socialized Medicine,” *Ronald Reagan Foundation*, accessed March 1, 2019, released 1961, <https://www.youtube.com/watch?v=AYrIDlrLDSQ>.

<sup>96</sup> Carroll Kilpatrick, “Barry Sees LBJ Afraid to Debate,” *The Washington Post*, September 22, 1964, <http://libproxy.lib.unc.edu/login?url=https://search.proquest.com/docview/142137747?accountid=14244>.

<sup>97</sup> 110 Cong. Rec, 18445 (Remarks of Sen. Morse)



hearings on the war in open defiance of their president and party. In 1966, polls showed Americans narrowly in favor of Johnson's Vietnam policies, which ranked as the most important issue facing the nation, although war support would decline dramatically in the next few years, destroying Johnson's presidency.<sup>98</sup>

Criticism of executive power was a key component of anti-war liberals' criticism of Vietnam. For instance, in 1967, Sen. Fulbright, then a leading anti-war senator far removed from his deference to the executive during debates on the Bricker amendment, introduced a resolution to prevent the executive branch from making foreign agreements without consulting Congress, lest foreign entanglements ensnare the United States in another war.<sup>99</sup> However, because debates over executive power are often thinly disguised debates over executive policies, Nixon's invasion of Cambodia brought presidential power to the forefront. In April 1971 McGovern-Hartfield amendment threatened to cut off funding for forces in Vietnam to mandate a withdrawal within two months. Although the amendment failed, the Cooper-Church amendment, which eliminated funding for troops in Cambodia after two months and prohibited expanding the war into Thailand and Laos, passed; Nixon withdrew U.S. forces by the two-month deadline and claimed the mission was accomplished, marking a dramatic expansion in Congress's authority over foreign policy.<sup>100</sup> Meanwhile, the executive branch defended the president's war powers; Nicholas Katzenbach testified to the Senate in 1967 that, "under our constitutional system the source of an effective foreign policy is Presidential power." He said, "His is a responsibility born of the need for speed and decisiveness in an emergency. ... To him flow all of the vast intelligence and information connected with national security. The President, of necessity, has a

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<sup>98</sup> Melvin Small, *At the Water's Edge : American Politics and the Vietnam War*, (Chicago: Ivan R. Dee, 2005), pg. 67.

<sup>99</sup> U.S. Congress, Senate, Committee on Foreign Relations, *Hearing on S. Res. 151 Relating to United States Commitments to Foreign Powers*, 90<sup>th</sup> Cong., 1<sup>st</sup> sess., August 16, 1967, pg. 8.

<sup>100</sup> Small, *At the Water's Edge*, pg. 153-155

preeminent responsibility in this field.”<sup>101</sup> Katzenbach noted to Chairman Sam Ervin that the president has ultimate authority over national security in an emergency, the definition of which, Ervin retorted, had greatly expanded in the case of the Tonkin Gulf Resolution.<sup>102</sup>

Fears of unchecked government power wielded by the president also affected the domestic sphere, where privacy concerns during the mid-1960s also pushed Congress to protect individual liberty from the rapidly widening government ambit. In 1965, LBJ announced a National Data Bank to streamline federal databases, improving government efficiency as part of the Great Society. This met with unexpected backlash; the *New York Times* ran the headline “The U.S. Central Data Bank: Would it threaten your privacy?”<sup>103</sup> Congress quickly held hearings on the proposal, spearheaded by the Judiciary Subcommittee on Administrative Practice and Procedure, chaired by Sen. Edward V. Long (D-MO), and the Judiciary Subcommittee on Constitutional Rights, chaired by Sen. Sam J. Ervin, Jr. (DNC). During hearings underway in 1971, Sen. Ervin noted, “The replies we are receiving are astounding, not only for the information they are disclosing but for the attitudes displayed toward the right of Congress and the American people to know what Government is doing.”<sup>104</sup> The House Government Operations Committee’s Special Subcommittee on Invasion of Privacy, led by Rep. Cornelius Gallagher (D-NJ) also blasted the proposal; Gallagher stated the National Data Bank “would be paid for at the

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<sup>101</sup> U.S. Congress, Senate, Committee on Foreign Relations, *Hearing on S. Res. 151 Relating to United States Commitments to Foreign Powers*, 90<sup>th</sup> Cong., 1<sup>st</sup> sess., August 16, 1967, pg. 76.

<sup>102</sup> U.S. Congress, Senate, Committee on Foreign Relations, *Hearing on S. Res. 151 Relating to United States Commitments to Foreign Powers*, 90<sup>th</sup> Cong., 1<sup>st</sup> sess., August 16, 1967, pg. 86.

<sup>103</sup> Nan Robertson, “Data Bank: Peril or Aid?” *New York Times*, January 7, 1968, <https://timesmachine.nytimes.com/timesmachine/1968/01/07/110088042.html?action=click&contentCollection=Archives&module=ArticleEndCTA&region=ArchiveBody&pgtype=article&pageNumber=52>.

<sup>104</sup> US Congress, Subcommittee on Constitutional Rights of the Committee on the Judiciary, *Federal data banks and constitutional rights: a study of data systems on individuals maintained by agencies of the United States Government*, 93<sup>rd</sup> Cong., 2<sup>nd</sup> sess., 1974, Committee Print, <https://babel.hathitrust.org/cgi/pt?id=uc1.a0000638098;view=1up;seq=12>.

far greater expense of weakening the right to privacy of all American citizens. Surely this is too exorbitant a price to pay for an economized filing system.” The news media concurred, running headlines alluding to ‘Big Brother’ and a ‘Peeping Tom’.<sup>105</sup> In his 1964 book *The Naked Society*, journalist Vance Packard observed how technological advancements in data storage, polygraph tests, hidden microphones, and computing power threatened American’s privacy. He wrote, “There are banks of giant memory machines that conceivably could recall in a few seconds every pertinent action — including failures, embarrassments or possibly incriminating acts — from the lifetime of each citizen.”<sup>106</sup> In stark contrast to the liberalism of Franklin Roosevelt, an allergy to concentrated power was key to liberalism in the late 1960s and early 70s, whether it be in Vietnam or at home.

Meanwhile, the Senate aimed to reassert its treaty power by attacking executive agreements, which often had the gravity of foreign treaties but did not require the Senate’s two-thirds approval. Often, Congress would remain ignorant of these agreements, which germinated in the bowels of the executive branch. In 1969, Sen. Stuart Symington (D-MO) set up a subcommittee of the Senate Foreign Relations Committee to study executive agreements and see how concentrated foreign relations had become in the executive branch. He was alarmed at the scope of U.S. security assistance and deployments abroad, almost all of which Congress had not endorsed but merely funded with vague assurances from presidents. For instance, in 1971, 32,000 U.S. troops were stationed in Thailand, along with seven air bases, all of which Congress had not approved. U.S. security assistance across the developing world, nuclear weapons

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<sup>105</sup> Rebecca S. Kraus, *Statistical déjà vu: The National Data Center Proposal of 1965 and its descendants*, (Miami Beach, FL: US Census Bureau, 2011), <https://www.census.gov/history/pdf/kraus-natdatacenter.pdf>.

<sup>106</sup> Margaret O’Mara, “Opinion | The End of Privacy Began in the 1960s,” *The New York Times*, December 7, 2018, sec. Opinion, <https://www.nytimes.com/2018/12/05/opinion/google-facebook-privacy.html>.

deployments, and security commitments which might enmesh the United States in another Vietnam were rampant during the Cold War, all without Congress's knowledge.<sup>107</sup>

These inquiries marked an important trend in the late 1960s and early 1970s: liberal Senate committees using their investigative powers to expose the extent of presidential power and reassert Congress's authority in a wide array of policy-making. As Congress reasserted itself against a seemingly out-of-control presidency, it ran headlong into a government which for four decades had managed the routine business on extraordinary legal grounds. Now, Congress would have to reckon with the massive stores of accumulated emergency powers and find a way to eliminate them.

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<sup>107</sup> Schlesinger, *The Imperial Presidency*, pg. 201-206

## CHAPTER 2: The Senate Strikes Back

On Monday, June 5, 1972, ten days after Nixon visited Moscow for the first time and twelve days before the Watergate break-in, a tiny Senate subcommittee held a revelatory hearing. At 10 AM, Melvin Laird, the Secretary of Defense, and Adm. Thomas Moorer, the Chairman of the Joint Chiefs of Staff, testified in what is now the Dirksen Senate Building to a mostly empty Appropriations Subcommittee meeting; only Senator William Proxmire (D-WI), the chairman, and the elderly anti-war Senator Allen Ellender (D-LA) were present. Such an insignificant meeting did not normally demand more attention than that.

Laird, a close friend of Proxmire since their service in the Wisconsin state legislature in the 1950s, was supposed to testify on the President's foreign military assistance program, which totaled a sizeable \$6 billion.<sup>108</sup> The hearing, Laird's last before the Appropriations Subcommittee, opened cordially, with acknowledgment of each other's friendship and years of public service. For a handful of minutes, Laird testified to the need to expand security assistance funding to allies and partners around the world to defend the free world and keep the peace, which was a key part of the Nixon Doctrine. It was, as most Congressional testimony seems, exceedingly dull, with a discussion of foreign currency reserve requirements and budget cuts.<sup>109</sup>

Yet there was a pressing issue which Proxmire addressed immediately after Laird finished his opening statement. In the heat of the 1972 election, several senators, members of, as Proxmire emphasized, "this co-equal branch of government," had pledged to cease funding the unpopular Vietnam War in order to force President Nixon to withdraw. It was a widely popular position among liberals, so much so that both Senators Humphrey and McGovern, the two

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<sup>108</sup> U.S. Congress, Senate, Subcommittee of the Committee on Appropriations, *FOREIGN ASSISTANCE AND RELATED PROGRAMS APPROPRIATIONS FOR FISCAL YEAR 1973*, 92<sup>nd</sup> Cong., 2<sup>nd</sup> sess., 1972, pg. 828.

<sup>109</sup> U.S. Congress, Senate, Subcommittee of the Committee on Appropriations, *FOREIGN ASSISTANCE AND RELATED PROGRAMS APPROPRIATIONS FOR FISCAL YEAR 1973*, 92<sup>nd</sup> Cong., 2<sup>nd</sup> sess., 1972, pg. 828-832.

leading candidates in the Democratic primary had adopted it. McGovern would clinch the nomination a month later.

So, Proxmire asked, what would you do if we failed to pass a defense budget by June 30?

Laird responded,

*“If there is not any action 'by the Senate at all on even a continuing resolution, then the only legislation which would permit us to operate would be the deficiency authorization legislation which was passed at the time of the Civil War which gives to the Department of Defense and to the Commander-in-Chief, the President of the United States, the authority to obligate on a deficiency basis for the subsistence of our military personnel and for other requirements needed to support those military people.”*<sup>110</sup>

Proxmire was deeply “troubled.” In the nearly empty committee room, the Secretary of Defense was telling him the power of the purse, the almighty sacrosanct constitutional power of Congress could be usurped by the President to continue a war against Congress’ wishes using an obscure Civil War-era law.

The law in question was the 1861 Feed and Forage Act, which originally allowed Union cavalry to buy supplies while in the field when Congress was out of session.<sup>111</sup> Yet this was not some archaic legislation dusted off by Nixon’s lawyers to continue the Vietnam War; Congress had twice recognized the law by referencing it in previous Defense Appropriation Acts and the President had invoked it five times in the previous ten years, often as a stopgap measure between defense budgets. In fact, since 1968, the Secretary of Defense had notified Congress every time he had invoked this law. Yet, like so many presidential powers during the Vietnam Era, it was now being turned against Congress.<sup>112</sup>

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<sup>110</sup> U.S. Congress, Senate, Subcommittee of the Committee on Appropriations, *FOREIGN ASSISTANCE AND RELATED PROGRAMS APPROPRIATIONS FOR FISCAL YEAR 1973*, 92<sup>nd</sup> Cong., 2<sup>nd</sup> sess., 1972, pg. 837.

<sup>111</sup> Aaron S Klieman, “Preparing for the Hour of Need: The National Emergencies Act,” *Presidential Studies Quarterly* 9, no. 1 (1979): 54.

<sup>112</sup> U.S. Congress, Senate, Subcommittee of the Committee on Appropriations, *FOREIGN ASSISTANCE AND RELATED PROGRAMS APPROPRIATIONS FOR FISCAL YEAR 1973*, 92<sup>nd</sup> Cong., 2<sup>nd</sup> sess., 1972, pg. 840-841.

“What power does Congress really have here?” Proxmire inquired. “It is said that Congress has the power of the purse. You are telling me that if we cut off, the President can now act under a deficiency appropriation bill?” Laird told him yes, that the law lasted indefinitely and there was no limit to the amount of money the Department of Defense could allocate without Congress. In fact, the military had used the law in 1968, 1969 and 1972 to fund operations in Vietnam and Cambodia. If Congress wished to cease funding for the Vietnam War, they would have to actively reassert their constitutional prerogative by repealing the Feed and Forage Act, which Laird said he opposed.<sup>113</sup> The Pentagon would likely force Congress to do just that, The next year, when Congress threatened to slash funds for Nixon’s bombing of Cambodia, Laird’s successor, Elliot Richardson, testified that “[w]e can find the money... [w]e can invoke the [feed and forage] authority.”<sup>114</sup>

The testimony shocked Proxmire so much that he wrote to the Comptroller General of the United States, who confirmed that the President, upon determining that such an action is necessary, could invoke the Feed and Forage Act to supply military forces without any input from Congress. But even more surprising to Proxmire was that Congress had routinely delegated this power to the President, year after year, in defense appropriations acts.<sup>115</sup> This broad discretionary power, in government and nation split by the rice paddies and napalm a world away, now seemed reckless and unconstitutional. Although this committee meeting seemed

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<sup>113</sup> U.S. Congress, Senate, Subcommittee of the Committee on Appropriations, *FOREIGN ASSISTANCE AND RELATED PROGRAMS APPROPRIATIONS FOR FISCAL YEAR 1973*, 92<sup>nd</sup> Cong., 2<sup>nd</sup> sess., 1972, pg. 838-843.

<sup>114</sup> Robert Lekachman, “Presidential Spending Power,” *The New York Times*, November 16, 1975, sec. Archives, <https://www.nytimes.com/1975/11/16/archives/is-section-3732-the-catch22-of-the-federal-budget-presidential.html>.

<sup>115</sup> U.S. Congress, Senate, Subcommittee of the Committee on Appropriations, *FOREIGN ASSISTANCE AND RELATED PROGRAMS APPROPRIATIONS FOR FISCAL YEAR 1973*, 92<sup>nd</sup> Cong., 2<sup>nd</sup> sess., 1972, pg. 841.

insignificant, it would set in motion one of the largest revocations of presidential power in American history.

This exchange provided the impetus for the bipartisan Special Committee on the Termination of the National Emergency, an eight-person committee that sought to investigate the President's statutory authority and propose prudent reforms. In its four-year tenure, the committee, chaired by ardent champions of Congress's prerogative, sought to aggressively limit presidential emergency power, and in doing so, reclaim authority for Congress and curb the federal government's emergency authority. The committee signaled a bipartisan distrust of centralized executive power, a defining theme of 1970s politics.

### **Establishing the Committee**

Two days later, on June 7, the Committee on Foreign Relations held a closed hearing on S.R. 304, which would establish a bipartisan special committee to research and remedy the lingering 1950 national emergency, which Truman had declared during the Korean War.<sup>116</sup> The committee reported favorably on the bill six days later and it quickly passed the Senate; by September, the Special Committee on the Termination of the National Emergency was born.

Sen. Frank Church became the Democratic co-chair of the committee and Charles Mathias became the Republican co-chair. Church, a lone Democrat from a sea of Idaho Republicans, had served in the Senate since 1956 when he joined the body as the youngest senator. Tall and trim with a boyish face, Church quickly earned a spot on the Foreign Relations Committee and became known for his rhetorical skills.<sup>117</sup> One of the earliest and loudest critics of the Vietnam War, Church proposed ending aid to Vietnam in 1963 and immediately wanted

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<sup>116</sup> U.S. Congress, Senate, Committee on Foreign Relations, *Study relating to the termination of the National Emergency* (To accompany S. Res. 304), 92<sup>nd</sup> Cong., 2<sup>nd</sup> sess., 1972, S. Rep. 92-858, pg. 2.

<sup>117</sup> "Young Voice of the Party." *New York Times* (1923-Current File), May 25, 1960.

<http://libproxy.lib.unc.edu/login?url=https://search.proquest.com/docview/114985558?accountid=14244>.



an investigation into the Gulf of Tonkin Incident in August 1964.<sup>118</sup> No fan of a strong executive, in 1970, Church gave a speech titled “Of Presidents and Caesars,” denouncing the concentration of presidential war powers as a prelude to a dictatorship. He adamantly opposed presidential impoundment, sponsored the Cooper-Church amendment to end the Vietnam War, and sponsored the Formosa Resolution’s repeal.<sup>119</sup> Within a liberal Senate, Church was one of the biggest opponents of the Cold War and the national security state.

Mathias, a Maryland Republican, was perhaps Nixon’s greatest Republican opponent. In 1969, White House aide H.R. Haldeman, looking to pressure moderate Republicans into supporting Nixon’s policy on Vietnam, ordered a letter-writing and phone call campaign to blast Mathias for lack of fidelity to the President.<sup>120</sup> Noted for his opposition to the Vietnam War, Mathias was by far and away the most anti-Nixon Republican in the Senate in terms of votes cast.<sup>121</sup> After Nixon’s 1970 purge of liberal Republican Senator Charles Goodell from the party, it was rumored he might do the same to Mathias, who had opposed two Nixon Supreme Court nominees and backed a Democratic plan for government financing of campaigns. A Washington

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<sup>118</sup> David S Broder, "A Dove Bucking the Nixon Tide," *The Washington Post, Times Herald* (1959-1973), Oct 13, 1968. <http://libproxy.lib.unc.edu/login?url=https://search.proquest.com/docview/143416525?accountid=14244.>; U.S. Congress, Senate, Committee on Foreign Relations, *EXECUTIVE SESSIONS OF THE SENATE FOREIGN RELATIONS COMMITTEE*, 90<sup>th</sup> Cong, 2<sup>nd</sup> sess., 1968, S. PRT. 111–23, [https://www.foreign.senate.gov/imo/media/doc/executive\\_sessions\\_foreign\\_relations\\_committee\\_vietnam\\_1968\\_made\\_available\\_july\\_2010.pdf](https://www.foreign.senate.gov/imo/media/doc/executive_sessions_foreign_relations_committee_vietnam_1968_made_available_july_2010.pdf), pg. 101

<sup>119</sup> S. J. Res. 48, 1971; The House and Senate passed the 1955 Formosa Resolution to allow the president to support Chinese nationalists on Taiwan from armed attack. Its repeal was part of the broader Congressional reassertion of power in foreign affairs and revocation the president’s authority to deploy the military abroad. See Sen. Report 92-363; in the summer of 1970, Sen. Cooper (R-KY) and Church attached their eponymous amendment, which would have banned military operations in Cambodia, to the Foreign Military Sales of Act of 1971. The amendment, which was a reaction to Nixon’s unilateral and controversial support for a South Vietnamese invasion of Cambodia, passed the Senate but failed in the House.; John H. Averill, "Cooper Urges Congress to Regain Power," *Los Angeles Times*, Dec 25, 1972. <http://libproxy.lib.unc.edu/login?url=https://search-proquest-com.libproxy.lib.unc.edu/docview/157067176?accountid=14244>.

<sup>120</sup> E.W. Kenworthy, "Haldeman Memos Attack Senators," *New York Times*, November 08, 1973. <http://libproxy.lib.unc.edu/login?url=https://search.proquest.com/docview/119730212?accountid=14244>.

<sup>121</sup> Memo, Bill Timmons to Richard Nixon, September 1, 1973, Timmons Chronological Files, Sept-Oct 1973, Folder 5, Box 328, Richard Nixon Presidential Library.

Post article read, “The senator’s liberalism and tendency to bolt party lines have bred animosity in the inner sanctum.”<sup>122</sup> So tense was their relationship that Mathias later recounted that Nixon reputedly placed him on the enemies list.<sup>123</sup>

Spurred on by presidential war powers running rampant in Vietnam and Cambodia, Charles Mathias had repeatedly attempted to end the 1950 national emergency before Melvin Laird’s testimony. In May 1971 he proposed a joint congressional committee, which would have combined House and Senate members, to tackle the issue. Mathias had introduced bills to After the Foreign Relations Committee provided feedback on the bill in February 1972, Mathias introduced a revised version in May, which ultimately passed after the shocking exchange between Proxmire and Laird gave extra attention to the President’s statutory powers.<sup>124</sup> The new bill created a bipartisan special committee of eight members to tackle the issue of the 1950 national emergency, a lingering legal device spanning the entirety of the Cold War.

Because he was in the majority, Church could have simply managed the committee as the sole chair but chose the unorthodox arrangement of two co-chairs to emphasize the committee’s bipartisanship on such an important issue. Mathias later likened the two co-chairs to the old vaudeville act “Alphonse and Gaston,” where two friends collide as they walk through a door at the same time.<sup>125</sup> At the nearly unanimous recommendation of Republican senators, he named

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<sup>122</sup> Rowland Evans and, Robert Novak, "Mathias: The New Goodwill," *The Washington Post*, December 5, 1971. <http://libproxy.lib.unc.edu/login?url=https://search.proquest.com/docview/148100241?accountid=14244>.

<sup>123</sup> Robert A. Martin, *Interview with Charles Mathias*, transcript of oral history conducted by Robert A. Martin, The Miller Center Foundation and the Edward M. Kennedy Institute for the United States Senate, 2016, <https://www.emkinstitute.org/resources/charles-mathias>.

<sup>124</sup> U.S. Congress, Senate, Committee on Foreign Relations, *Study relating to the termination of the National Emergency* (To accompany S. Res. 304), 92<sup>nd</sup> Cong., 2<sup>nd</sup> sess., 1972, S. Rep. 92-858, pg. 1; This is not to suggest the exchange between Laird and Proxmire was necessary for starting the committee. However, years later, Sen. Church recalled this as episode as being the catalyst for investigating national emergencies. See Frank Church, "Ending Emergency Government," *American Bar Association Journal* 63, no. 2 (1977): 197-199.

<sup>125</sup> U.S. Congress, House, Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, Hearings on H.R. 3884 to terminate certain authorities with respect to national emergencies still in

Mathias, with whom he repealed the Formosa Resolution, as his co-chair.<sup>126</sup> The two co-chairs then chose the remaining six committee members: Philip Hart (D-MI), Claiborne Pell (D-RI), Adlai E. Stevenson (D-IL), Clifford Case (R-NJ), Clifford Hansen (R-WY), and James Pearson (R-KS). While the Nixon administration counted Hansen as voting with them 93.5% of the time, every other committee member was either a liberal Democrat or a moderate Republican.<sup>127</sup> The special committee was very much an outgrowth of Fulbright's Foreign Relations Committee, which supplied half of the special committee's membership.<sup>128</sup>

The Senate Foreign Relations Committee under Chairman Fulbright had perhaps the most antagonistic relationship with the White House of any legislative committee. The War Powers Resolution, a child of the Foreign Relations Committee, is a prime example of this. Passed in 1973 under the shadow of Vietnam, the Resolution emerged from liberal Democratic Senators as a check on the President's ability to bring the nation into a war. However, Nixon saw the bill as an unconstitutional assault on the presidency and vetoed it. He wrote the bill was "unconstitutional and dangerous" and would "would seriously undermine this nation's ability to act decisively and convincingly in times of international crisis."<sup>129</sup> Nevertheless, Congress overrode his veto and passed the bill anyway.<sup>130</sup>

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effect, and to provide for full orderly implementation and termination of future national emergencies, 94<sup>th</sup> Cong., 1<sup>st</sup> sess., March, 1975, pg. 20.

<sup>126</sup> Letter from Carl Marcy to Frank Church, September 29, 1972, Frank Church Papers, Boise State University Library, Special Collections and Archives, Series 29, Box 1, Folder 1; S J Res 48, 1971.

<sup>127</sup> Timmons Memo to Nixon, September 1, 1973, Nixon Presidential Library, Timmons Chronological, Sept-Oct 1973, Folder 5.

<sup>128</sup> U.S. Congress, Senate, Committee on Foreign Relations, *Study relating to the termination of the National Emergency* (To accompany S. Res. 304), 92<sup>nd</sup> Cong., 2<sup>nd</sup> sess., 1972, S. Rep. 92-858, pg. 1.

<sup>129</sup> Richard L. Madden, "Nixon Vetoes a Bill To Cut War Power Of the Presidency," *The New York Times*, October 25, 1973, <https://www.nytimes.com/1973/10/25/archives/nixon-vetoes-a-bill-to-cut-war-power-of-the-presidency-warpowers.html>.

<sup>130</sup> William B. Spong Jr, "The War Powers Resolution Revisited: Historic Accomplishment or Surrender." *Wm. and Mary L. Rev.* 16 (1974): 823.

Their mandate was “to conduct a study and investigation with respect to the matter of terminating the national emergency proclaimed by the President of the United States on December 16, 1950.” To accomplish this goal, the committee was to consult with the executive branch, consider any unintended consequences of terminating the national emergency, and to investigate terminating certain delegated emergency powers.<sup>131</sup> Put simply, the committee was intended “to restore the constitutional balance between the Presidency and the Congress.”<sup>132</sup>

Although the Committee officially assembled in the fall of 1972, it took several more months for it to accrue a staff and meeting place. William Miller, a former-diplomat and now-staffer for Senator Cooper, became the committee’s Chief Counsel and Tom Dine, a staffer for Church, became the committee’s second professional staff member. Both had cut their teeth working for Democrats on the Foreign Relations Committee and had strong anti-Vietnam bona fides. Additionally, Martha Mecham and Audrey Hatry served as the committee’s clerks. Originally, the committee was to report its findings by January 1973, this was when their research began.

The committee had a fraught relationship with the Nixon Administration. On January 17, 1973, the two co-chairs met with Attorney General Kleindienst, who agreed to cooperate and assigned Jack Goldklang of the DOJ’s Office of Legal Counsel to work directly with the committee. Lawyers from the State Department and Defense Department consulted the committee as well.<sup>133</sup> Tom Korologos, a White House Congressional Liaison in the White House, represented the Nixon administration on this issue. However, on January 17, 1973,

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<sup>131</sup> U.S. Congress, Senate, Special Committee on the Termination of the National Emergency, *Final Report*, 94th Cong., 2d sess., 1976, S. Rep. 94-922, pg. 2.

<sup>132</sup> 118 Cong. Rec., pg. 18367.

<sup>133</sup> U.S. Congress, Senate, Special Committee on the Termination of the National Emergency, *Review and Manner of Investigating Mandate Pursuant to S. RES. 9*, 93<sup>rd</sup> Congress, 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., 1973, Committee Print 96-780, pg. 17.

Korologos reported to Kissinger that the special committee could be “one of our major Foreign Policy battles in the Senate this year.”<sup>134</sup> The committee could hold hearings, had subpoena powers, and a budget of \$175,000 for their first year, which although smaller than most committee budgets alarmed Korologos and his colleagues, as it enabled the committee to take substantial and public actions. The liberal committee staff of Bill Miller and Tom Dine, combined with the importance of the Trading with the Enemy Act to containing communism, made the committee an object of automatic suspicion in the centralized Nixon White House.<sup>135</sup> Bill Miller was particularly despised in certain Republican circles; when Church later appointed him to the select committee investigating intelligence activities, later known as the Church Committee, Republicans were apoplectic. To them, Miller was part of “a ‘cabal’ who take a revisionist view of the cold war and push for reduced defense expenditures and a softer foreign policy.” During a 1969 fight over the anti-ballistic missile treaty, State Department officials became so frustrated with Miller that they insisted he no longer attend meetings on the issue.<sup>136</sup>

The special committee operated on a set of basic assumptions that distinguished them from their political opponents. First, they believed that the presidency had grown too powerful over the past few decades, and blamed a mixture of crises and congressional inaction. As Mathias said on the Senate floor, “I believe that we do face today a national emergency - even a paradoxically continuous one. It emerged during the Depression and has been with us for several decades. It is a crisis that throws our whole system of Constitutional government into jeopardy. This emergency-if I may use the term so loosely is the atrophy of Congress.”<sup>137</sup> This was a key

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<sup>134</sup> Memo, Tom Korologos to Henry Kissinger, January 17, 1973, White House Central Files, Folder: EX FG 36 Senate Committees, 2 of 3, 1973-74, Box 16, Richard Nixon Presidential Library

<sup>135</sup> Memo, Tom Korologos to Henry Kissinger, January 17, 1973, White House Central Files, Folder: EX FG 36 Senate Committees, 2 of 3, 1973-74, Box 16, Richard Nixon Presidential Library

<sup>136</sup> Rowland Evans and Robert Novak, “Alarm Bells Over the CIA Investigator,” *Washington Post*, February 9, 1975

<sup>137</sup> 118 Cong. Rec., pg. 18368-18369.

connection between Vietnam and the National Emergencies Act; many who opposed Nixon's bombing of Cambodia because it was an illegal usurpation of the congressional war power, which was itself the product of decades of crisis and congressional negligence.<sup>138</sup> For Mathias, the same argument applied to national emergencies. Mathias lambasted Roosevelt's 1933 emergency declaration as beginning an era of permanent emergencies devoid of congressional input, which President Nixon had continued and even expanded. For example, he cited Nixon's unilateral decision to remove the U.S. from the gold standard and freeze certain public employees' wages to fight inflation in 1971. Mathias stated that because the emergency had been continuous since 1933, emergency powers had accumulated and become institutionalized in the executive.<sup>139</sup> To the committee, congressional lethargy had produced an emboldened executive which it was their mission to humble.

Their second assumption was that the president's powers were a threat to American civil liberties and constitutional order. Mathias complained that Johnson's 1968 use of the Trading with the Enemy Act was a tactic to avoid working with Congress by usurping their legislative authority. Without the 1950 national emergency, "these measures clearly represent an unconstitutional encroachment on legislative authority."<sup>140</sup> At the beginning of the committee, the senators knew of 200 emergency laws giving the president extraordinary powers. They believed these laws granted powers which "infringe on so many crucial constitutional rights and principles that collectively they may be seen as placing our system of democratic government in jeopardy." But more importantly, "these measures threaten the constitutional balance of powers" between the presidency and Congress. The senators believed the Constitution did not allow for a

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<sup>138</sup> Schlesinger, *The Imperial Presidency*.

<sup>139</sup> 118 Cong. Rec., 18368-18369.

<sup>140</sup> 117 Cong. Rec., pg. 15275.

state of emergency to become the norm and shuddered to think of the doors this emergency opened.<sup>141</sup>

Third, Congress could and must check the presidency by reasserting itself in areas seemingly absorbed by the presidency, such as emergency powers. Since 1937, when the Supreme Court adopted a deferential stance towards the New Deal, the committee found that “the Court has been extremely reluctant to invalidate any congressional delegation of economic powers to the President.”<sup>142</sup> What Congress had given, Congress could take away, and since the Court was unlikely to weigh in, the burden fell solely on Congress. The committee frequently cited Justice Jackson’s concurrence in the 1953 Steel Seizure case, where he wrote, “We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.”<sup>143</sup>

### **The Committee Begins Its Work**

When the committee began its work on January 6, 1973, its first task was research.<sup>144</sup> The committee aimed to catalog all laws operating during national emergencies and determine which national emergencies, besides the 1950 national emergency declared by Truman, were still in effect. Committee staff members Tom Dine and Bill Miller set out to catalog all existing laws related to emergency powers, but found that nowhere in government was there a comprehensive list of statutes active in national emergencies or a list of relevant executive orders. Based on previous catalogs produced by the Defense Department and Office of Emergency Planning, the

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<sup>141</sup> 117 Cong. Rec., pg. 15275.

<sup>142</sup> U.S. Congress, Senate, Special Committee on the Termination of the National Emergency, *Emergency Powers States: Provisions of Federal Law Now In Effect Delegating To The Executive Extraordinary Authority In Time Of National Emergency*, 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., 1973, Committee Print 98-405, pg. 6.

<sup>143</sup> U.S. Congress, Senate, Special Committee on the Termination of the National Emergency, *Emergency Powers States: Provisions of Federal Law Now In Effect Delegating To The Executive Extraordinary Authority In Time Of National Emergency*, 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., 1973, Committee Print 98-405, pg. 14.

<sup>144</sup> S. Res. 9, January 6, 1973.

committee knew of at least 200 special powers accrued by the President, including Johnson's use of emergency economic authority to control American investments abroad in 1968 and Nixon's suspension of the Davis-Bacon Act in 1971.<sup>145</sup> However, the committee had no clear understanding of these 200 powers' scope or longevity.<sup>146</sup>

The committee received a much-needed boost when in early 1973, the staff discovered the entire U.S. Code digitized on an Air Force base in Colorado. When Church heard the news, he was so ecstatic, he remembered that he jumped up and down with glee.<sup>147</sup> Now, the committee could search the terms, "emergency," "national emergency," "crisis," "invasion," and several other keywords to compile a comprehensive list of emergency laws. Naturally, the task of sifting through this catalog fell to an intern. Because some wartime powers lacked any discernable trigger words, the committee also searched all 87 volumes of U.S. statutes by hand, working in two separate teams with staff from the Library of Congress.<sup>148</sup> The staff then checked the filtered search results against previous catalogs of emergency powers to ensure their accuracy.<sup>149</sup> The disorganized jumble of emergency declarations and powers provided another justification for the committee: the chaotic legal mess could impede swift action in a true crisis. In some cases, the President could declare an emergency, in others Congress could, and in others, they could act jointly. Sometimes cabinet officials could declare national emergencies

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<sup>145</sup> U.S. Congress, Senate, Special Committee on the Termination of the National Emergency, *Final Report*, 94th Cong., 2d sess., 1976, S. Rep. 94-922.

<sup>146</sup> U.S. Congress, Senate, Special Committee on the Termination of the National Emergency, *Review and Manner of Investigating Mandate Pursuant to S. RES. 9*, 93<sup>rd</sup> Congress, 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., 1973, Committee Print 96-780, pg. 2.

<sup>147</sup> Ashby, *Fighting then Odds*, pg. 413

<sup>148</sup> U.S. Congress, Senate, Special Committee on the Termination of the National Emergency, *Review and Manner of Investigating Mandate Pursuant to S. RES. 9*, 93<sup>rd</sup> Congress, 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., 1973, Committee Print 96-780, pg. 2.

<sup>149</sup> U.S. Congress, Senate, Special Committee on the Termination of the National Emergency, *Emergency Powers States: Provisions of Federal Law Now In Effect Delegating To The Executive Extraordinary Authority In Time Of National Emergency*, 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., 1973, Committee Print 98-405, pg. 16.



without consulting the President or Congress. This irregularity drove the committee to create uniform mechanisms for emergency powers; Much like the War Powers Resolution, the National Emergencies Act would establish procedures as a way of hemming presidential power.<sup>150</sup> It is ironic that computers, which Senators feared would expand government power at the expense of citizens' liberties, helped check that same government power.

The committee held three hearings to consult experts and executive branch officials on how to reform emergency powers. The hearings were not large public affairs, especially since the Watergate hearings dwarfed them in the headlines. The first hearing, which occurred on April 11 and 12, 1973, two weeks after the last U.S. soldier left Vietnam and just over two weeks before Nixon fired White House Counsel John Dean, invited academics to discuss the constitutional issues of emergency powers. Major names in the scholarly literature like Professors Robert Rankin, Cornelius Cotter, Malcolm Smith, and Gerhard Casper testified. Dr. Adrian Fisher, who wrote the original 1950 national emergency, also testified, providing first-hand experience to the proliferation of presidential emergency powers.

At this first hearing, the committee first announced its astonishing revelations. They had found 580 statutes delegating the President extraordinary authority over American citizens' lives during national emergencies.<sup>151</sup> These laws gave the president "a vast range of powers, which taken all together, confer the power to rule this country without reference to normal constitutional processes."<sup>152</sup> Even more surprising was that the United States had been in a state of emergency since March 6, 1933, when President Roosevelt declared an emergency to enforce

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<sup>150</sup> U.S. Congress, Senate, Special Committee on the Termination of the National Emergency, *Review and Manner of Investigating Mandate Pursuant to S. RES. 9*, 93<sup>rd</sup> Congress, 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., 1973, Committee Print 96-780, pg. 19.

<sup>151</sup> The committee would later revise the number down to 470 in June, 1973.

<sup>152</sup> US Congress, Senate, Special Committee on the Termination of the National Emergency, *PART 1-Constitutional Questions Concerning Emergency Powers*, 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., 1973, 1.

a bank holiday during the Great Depression.<sup>153</sup> To the committee, crises drove this aggrandizement of powers into the President's hands. With the Great Depression, World War II and the Korean War, the body of laws grew bit by bit. The committee found distinct categories of laws: first, those which had become part of everyday government life, and thus should become permanent; second, those which were clearly obsolete and should be repealed; third, those which "because of their far-reaching impact, should be recast to provide the public with protection against possible abuses of power."<sup>154</sup>

Some laws struck the committee staff and members as particularly egregious. 10 USC 712 allowed the president, if they consider it in the national interest, to dispatch soldiers to any country to assist in "military matters" which seemed an enormous surrender of Congress' war powers.<sup>155</sup> Another, 18 USC 1383 allowed the President, the Secretary of the Army, or any military officer designated by the President, to declare any area in the United States a military zone and imprison anyone for a year for entering or leaving that zone. While Congress had repealed the Emergency Detention Act two years before the committee began, 18 USC 1383 still allowed the President to detain citizens for possibly arbitrary reasons.<sup>156</sup> Some laws seemed pointless. 46 USC 249a authorized the Secretary of Commerce to issue a distinctive service ribbon to any "master, officer or member of the crew of any United States ship" who had served after June 1950 during a war or national emergency.<sup>157</sup> Some laws seemed sensible in emergency

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<sup>153</sup> News Release, Special Senate Committee on the Termination of the National Emergency, April 11, 1973, Frank Church Papers, Boise State University Library, Special Collections and Archives, Series 29, Box 1, Folder 3

<sup>154</sup> News Release, Special Senate Committee on the Termination of the National Emergency, April 11, 1973, Frank Church Papers, Boise State University Library, Special Collections and Archives, Series 29, Box 1, Folder 3.

<sup>155</sup> News Release, Special Senate Committee on the Termination of the National Emergency, April 11, 1973, Frank Church Papers, Boise State University Library, Special Collections and Archives, Series 29, Box 1, Folder 3.

<sup>156</sup> News Release, Special Senate Committee on the Termination of the National Emergency, April 11, 1973, Frank Church Papers, Boise State University Library, Special Collections and Archives, Series 29, Box 1, Folder 3.

<sup>157</sup> U.S. Congress, Senate, Special Committee on the Termination of the National Emergency, *Emergency Powers States: Provisions of Federal Law Now In Effect Delegating To The Executive Extraordinary Authority In Time Of National Emergency*, 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., 1973, Committee Print 98-405, pg. 355.

situations, but absurd when the emergency had passed. For instance, in 1973, the Secretary of Commerce could requisition any vessel any U.S. citizen's watercraft, so long as they provided the owner with just compensation.<sup>158</sup> Emergencies also had a significant effect beyond statutes. Consulting Professor John T. Elliff, the committee staff found the FBI's domestic surveillance, which the Church Committee would later investigate, depended on Executive orders pursuant to the 1939 declaration of national emergency.

At the second hearing, which fell on the morning of Tuesday, July 24, the committee consulted former Attorneys General. Nicholas Katzenbach, Attorney General under President Johnson, testified, and his successor, Ramsey Clark. Retired Supreme Court Justice Tom C. Clark, who ruled on the important Steel Seizure Case, testified as well since he served as Attorney General under from 1945 to 1949. The third hearing focused on former members of the Nixon Administration, who testified on how to best hold the President accountable for emergency actions. On November 28, the two witnesses testified. The first was Erwin Griswold, who served as Solicitor General under Nixon, and while a law professor, was instrumental in drafting the 1935 Federal Register Act, which required publishing presidential dicta to improve government transparency. The other witness was Elliot Richardson, the Attorney General whom Nixon had fired only a month prior during the Saturday Night Massacre. In all, the hearings provided important expert testimony which elucidated the executive's viewpoints and provided expert advice to the senators.

Senator Church wrote, "The 2,000-year-old problem of how a legislative body in a democratic republic may extend extraordinary powers for use by the executive during times of

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<sup>158</sup> U.S. Congress, Senate, Special Committee on the Termination of the National Emergency, *Emergency Powers States: Provisions of Federal Law Now In Effect Delegating To The Executive Extraordinary Authority In Time Of National Emergency*, 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., 1973, Committee Print 98-405, pg. 367.

great crisis and dire emergency... has not yet been resolved in this country.”<sup>159</sup> So, during the course of its research and hearings, the committee set out to resolve this problem and looked to other nations for inspiration. Great Britain during the Second World War offered a promising model; Parliament would only extend the state of emergency for 30 days at a time, but had a massive “stand-by reservoir of emergency powers to enable the executive to act swiftly and effectively ... in both war and peace.”<sup>160</sup> This model was particularly appealing because it offered Congress created control over and knowledge of national security issues. The committee also looked to the Weimar Republic as an example to avoid and a reason for strict Congressional diligence. Under Article 48 of the Weimar Constitution, the President could assume dictatorial powers when public safety required it. Between 1919 and 1925, the German President used these powers 136 times. Although the German President was required to report all dictatorial measures to the Reichstag, this happened only three times between 1919 and 1932, as the Reichstag, divided and squabbling, could not challenge Presidents with substantial popular mandates. This legislative laxity made Hitler’s use of Article 48 an easy legal tool with which to claim absolute power. For this reason, the 1948 Bonn Constitution abolished not only emergency powers but eliminated an elected presidency, in order to prevent future abuses.<sup>161</sup> This provided a terrifying example to the special committee of the need for legislative oversight and the dangers of constitutional laxity.

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<sup>159</sup> U.S. Congress, Senate, Special Committee on the Termination of the National Emergency, *Emergency Powers States: Provisions of Federal Law Now In Effect Delegating To The Executive Extraordinary Authority In Time Of National Emergency*, 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., 1973, Committee Print 98-405, pg. 6.

<sup>160</sup> US Congress, Senate, Special Committee on the Termination of the National Emergency, *PART 2-Views of Former Attorney Generals*, 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., 1973, pg. 503.

<sup>161</sup> US Congress, Senate, Special Committee on the Termination of the National Emergency, *PART 1-Constitutional Questions Concerning Emergency Powers*, 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., 1973, pg. 86-87.

The committee found three possible approaches to reforming national emergencies: (a) outright repeal of all emergency statutes, (b) relegating all emergency provisions to a state of dormancy to be used in future emergencies, or (c) maintaining emergency provisions in the United States Code but for use only in states of emergency declared in accordance” with specified oversight procedures.<sup>162</sup> After some debate, the committee opted for the third approach to avoid any major clashes with the executive branch, even if it meant compromising on the bill’s substance.<sup>163</sup> This produced legislation similar to the War Powers Resolution, which established procedures for previously unconstrained presidential behavior. Ultimately, designing an emergency powers regime was a balancing act. As William Miller, the committee staff director wrote, “If emergency powers are used too late, a democratic state might be destroyed, when the timely use of emergency powers possibly could have saved it. If used arbitrarily and capriciously, its use could degenerate into the worst form of dictatorship.”<sup>164</sup> The committee saw themselves as being dangerously out of balance and aimed to right the ship of state.

The committee decided to investigate which emergency laws were necessary and which could be safely repealed. So, the committee staff sent letters to every government agency and every legislative committee to ask which of the 470 law they felt were obsolete, which they felt could be improved, and which should be cast as permanent statutes. The Office of Management and Budget under Roy Ash managed the process of coordinating every executive agency to work with the special committee. However, executive branch agencies appeared fairly unwilling to let their emergency authorities slip away. Of every executive branch department, only the

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<sup>162</sup> U.S. Congress, Senate, Special Committee on the Termination of the National Emergency, *Final Report*, 94th Cong., 2d sess., 1976, S. Rep. 94–922, pg. 4.

<sup>163</sup> U.S. Congress, Special Committee on the Termination of the National Emergency, *Pending Legislation and Review of Committee Business*, 93<sup>rd</sup> Cong., 2<sup>nd</sup> sess., 1974, Committee Print 37-125.

<sup>164</sup> US Congress, Senate, Special Committee on the Termination of the National Emergency, *PART 1-Constitutional Questions Concerning Emergency Powers*, 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., 1973, pg. 268.

Department of Agriculture said more emergency laws under its purview were obsolete than not. In fact, the Department of Defense, which exercised by far the most emergency powers, said the committee should only repeal one of their emergency powers.<sup>165</sup> The conflicts over power between the White House and Congress was replicated here between the bureaucracy and Congress. Now that the committee had identified the obsolete laws, in the summer of 1974, they began to draft a bill to end the unending emergencies.

### **The 1970s and the Presidency**

The committee's perceived mission fits into the broader narratives about executive power and distrust of government pervasive during the late 1960s and 1970s. In 1964, the Pew Research Center found 77% of Americans had trust in their government. By 1970, it had slipped to 54%. By 1974, it had plummeted to 36%.<sup>166</sup> Daniel Moynihan, a Nixon aide and future senator, wrote in 1970, "The primary problem of American society continues to be that of the eroding authority of the principal institutions of government and society." To him, the presidency was the most beleaguered institution, despite some patching up by Nixon, due to the Vietnam War. Importantly, Moynihan saw education level as a critical indicator of voters' distrust toward a strong presidency, indicative of the coming intellectual charge against presidential power.<sup>167</sup> The esteemed opinion writer, James Reston, concurred; in 1973 he wrote, "There has been a sharp decline in respect for authority in the United States as a result of the [Vietnam] war—a decline in respect not only for the civil authority of government but also for

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<sup>165</sup> List of Recommended Actions on Emergency Statutes, RG 46, Records of the U.S. Senate, Senate Special Committee on National Emergencies, National Archives-Center for Legislative Archives, 93-94 Congresses, Box 25, Folder: Recommended Action on Emerg. Statutes.

<sup>166</sup> Pew Research Center, "Public Trust in Government: 1958-2017," [people-press.org, http://www.people-press.org/2017/12/14/public-trust-in-government-1958-2017/](http://www.people-press.org/2017/12/14/public-trust-in-government-1958-2017/) (accessed March 6, 2019).

<sup>167</sup> Memo, Daniel Patrick Moynihan to Richard Nixon, November 13, 1970, Richard Nixon Presidential Library, [https://www.nixonlibrary.gov/sites/default/files/virtuallibrary/documents/jun09/111370\\_Moynihan.pdf](https://www.nixonlibrary.gov/sites/default/files/virtuallibrary/documents/jun09/111370_Moynihan.pdf)

the moral authority of the schools, the universities, the press, the church, and even the family.”<sup>168</sup> The Vietnam War, which includes the My Lai massacre, the Pentagon Papers, and Nixon’s secret bombing of Cambodia, was a key driver of declining trust in government. As H.R. Haldeman told Nixon in the Oval Office, what the average American would take away from the Pentagon Papers was that, “you can’t trust the government; you can’t believe what they say; and you can’t rely on their judgment; and the – the implicit infallibility of presidents, which has been an accepted thing in America, is badly hurt by this, because it shows that people do things the President wants to do even though it’s wrong, and the President can be wrong.”<sup>169</sup>

Declining trust in public institutions translated directly into suspicion of institutions’ powers. Scholars like Bruce Schulman and Julian Zelizer have shown this distrust came from several places, such as the failure of campaign finance reform and the growth of the Sunbelt to produce the ephemeral and pervasive “crisis of confidence” which covered the decade.<sup>170</sup> Like Vietnam, campaign finance reform, or demographic shifts, Watergate inspired suspicion of government and a desire to limit governmental power. During the Watergate impeachment hearings in the House Judiciary Committee, Rep. Walter Flowers [D-AL] said, “The power of the presidency is a public trust, and the people must be able to believe and rely on their president.” To Flowers, “... if the people cannot know that their President is candid and truthful with them, then the very basis of government is undermined.”<sup>171</sup> As historian Theodore

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<sup>168</sup> James Reston, “War Leaves Deep Mark on U.S.,” *The New York Times*, January 24, 1973, sec. Archives, <https://www.nytimes.com/1973/01/24/archives/war-leaves-deep-mark-on-us-long-vietnamese-war-has-left-a-deep-mark.html>.

<sup>169</sup> Conversation; Bob Haldeman to Richard Nixon; June 14, 1971; National Security Archive, George Washington University; <https://nsarchive2.gwu.edu//NSAE/NSAE48/nixon.html>

<sup>170</sup> Julian E. Zelizer, “Seeds of cynicism: The Struggle over Campaign Finance, 1956–1974,” *Journal of Policy History* 14, no. 1 (2002): 73-111. See also Bruce J. Schulman, *The Seventies: The Great Shift in American Culture, Society, and Politics*, (Simon and Schuster, 2001).

<sup>171</sup> “Excerpts From Judiciary Panel Statements,” *The Washington Post (1974-Current File)*; Washington, D.C., July 26, 1974.

Borstelmann argues, “The ultimate message embedded in Watergate and also in the deceptive Vietnam policies of the Johnson administration was simply not to trust government – ultimately a conservative attitude that rejected four decades of New Deal activist management from Washington.”<sup>172</sup> It’s no accident that since Watergate, eight of 11 Democratic and Republican presidential nominees have run as outsiders, not to mention the uniquely popular independent Ross Perot.<sup>173</sup>

Some critics even proposed amending the presidency outright. In 1974, an American Enterprise Institute panel discussion chaired by esteemed constitutional law professor Alexander Bickel debated whether or not the president should have a single six-year term or perhaps the unitary executive be divided into a committee of executives.<sup>174</sup> In 1973, historian Barbara Tuchman wrote a *New York Times* op-ed entitled “Should we abolish the presidency?” She wrote, “Owing to the steady accretion of power in the executive over the last forty years, the institution of the Presidency is not now functioning as the Constitution intended, and this malfunction has become perilous to the state.” Tuchman agreed with the committee that Congress had failed to check the “natural tendency of an executive to become dictatorial” and that a cabinet government can function just as well as a unitary executive during crises.<sup>175</sup>

To these critics, the presidency, a formerly noble institution inhabited by FDR, Lincoln, and Kennedy, had become a cesspool under Nixon. It is impossible to say definitively whether or

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<sup>172</sup> Borstelmann, *The 1970s*, pg. 45-46

<sup>173</sup> Lara M. Brown, “Outsiders can’t fix Washington. They’re the ones who spent the past 40 years wrecking it,” *Washington Post*, March 21, 2018, [https://www.washingtonpost.com/news/made-by-history/wp/2018/03/21/outside-cant-fix-washington-theyre-the-ones-who-spent-the-past-40-years-wrecking-it/?utm\\_term=.6ae7d35ca8c0](https://www.washingtonpost.com/news/made-by-history/wp/2018/03/21/outside-cant-fix-washington-theyre-the-ones-who-spent-the-past-40-years-wrecking-it/?utm_term=.6ae7d35ca8c0)

<sup>174</sup> Alexander M. Bickel, and Charles S Hyneman, *Watergate, Politics, and the Legal Process: An AEI Round Table Held on 13 and 14 March 1974 at the American Enterprise Institute for Public Policy Research*, (Washington, D.C. Washington: American Enterprise Institute for Public Policy Research, 1974), pg. 31.

<sup>175</sup> Barbara Tuchman, “Should We Abolish the Presidency?” *New York Times*, February 13, 1973, <https://www.nytimes.com/1973/02/13/archives/should-we-abolish-the-presidency.html>.



not the suspicions of and revolts against presidential power were driven by partisan animosity, simple ideology, or a pragmatic response to disturbing new problem. However, the sources of this reaction to presidential power are easily identified. This distrust and attacks on the presidency and President Nixon came from mainstream liberals but stemmed from the New Left's animosity towards established institutions and concentrated power. Bruce Schulman writes, "Liberals believed the political system gave voice to individuals; they just needed to vote, participate, stand up and make themselves heard. New Leftists bristled at the naivete of that faith."<sup>176</sup> Aside from Congress, the distrust of centralized power came from the New Left and later trickled into academia and the press.

Liberal critics had long cast Nixon as the opportunistic "Tricky Dick," an oleaginous demagogue wielding populism and willing to fight dirty to win. But once Nixon took the White House, liberal criticisms morphed into the New Left's conspiracism and hatred. As David Greenberg discusses in *Nixon's Shadow*, Nixon's paranoiac tendencies and the New Left's skepticism towards established institutions formed a vicious cycle, where reprisals and retribution spiraled into occasionally physical combat, like when anti-war protestors threw rocks and eggs at Nixon's limo.<sup>177</sup> Nixon responded by giving a speech two days later, where he condemned "the wave of violence and terrorism by the radical anti-democratic elements in our society." He said the answer to this violence was firmness and the robust application of the law.<sup>178</sup> and, once told H.R. Haldeman, "We're up against an enemy, a conspiracy. They're using any means. We're going to use any means."<sup>179</sup>

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<sup>176</sup> Schulman, *The Seventies: The Great Shift in American Culture, Society, and Politics*.

<sup>177</sup> Robert B. Semple Jr, "Eggs and Rocks Thrown at Nixon After Coast Talk," *The New York Times*, October 30, 1970, sec. Archives, <https://www.nytimes.com/1970/10/30/archives/eggs-and-rocks-thrown-at-nixon-after-coast-talk-eggs-and-rocks.html>.

<sup>178</sup> David Greenberg, *Nixon's Shadow: The History of an Image*, (New York: WW Norton & Company, 2004), pg. 95.

<sup>179</sup> Greenberg, pg. 78; see *New York Times*, May 20, 1977 and February 12, 1998.

The New Left's distrust of "The Man" fomented during Vietnam, but Watergate moved that distrust towards the political center. Liberal politicians, newsmen, and professors who had supported Johnson could not rightly criticize Nixon's management of the Vietnam War, but they could easily lambast Nixon for abuses of power without the New Left's conspiratorial stylings. While liberalism's revolt against presidential power clearly began over Vietnam in the 1960s, it exploded during the Nixon presidency. As the vicious cycle of paranoia and repression between New Left activists and Nixon's White House continued, mainstream liberals came to recognize and despise Nixon's tyrannical behavior. Justice Douglass wrote in a 1972 opinion, "Those who register dissent or who petition their governments for redress are subjected to scrutiny by grand juries, by the FBI, or even by the military. Their associates are interrogated. Their homes are bugged and their telephones are wiretapped. They are befriended by secret government informers. Their patriotism and loyalty are questioned."<sup>180</sup> During Watergate, just as Hunter S. Thompson likened Nixon to Hitler, so too did George McGovern and Robert Byrd after the Saturday Night Massacre.<sup>181</sup>

The George McGovern's 1972 nomination was the peak of New Left convergence with the mainstream Democratic Party. Fresh off the destruction of the New Deal coalition in Chicago in 1968, the party moved towards an uncertain future as Democrats defected to Richard Nixon and the New Left occupied a more prominent place, if only briefly. The 1972 Convention featured the first debate on gay rights at a major party convention.<sup>182</sup> The party platform was pro-free speech, sought "to ensure the equitable distribution of wealth and power," and proposed

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<sup>180</sup> United States v. United States Dist. Ct., 407 U.S. 297 (1972)

<sup>181</sup> Hunter S. Thompson, "Fear and Loathing in Washington," *Rolling Stone*, July, 4, 1974, <https://www.rollingstone.com/politics/politics-news/fear-and-loathing-in-washington-204130/>; Greenberg, pg. 105

<sup>182</sup> Michelle Martin, "In 1972, Davis Blazed Party Trail On Gay Rights," *NPR*, September 5, 2012, <https://www.npr.org/2012/09/05/160607418/in-1972-davis-blazed-party-trail-on-gay-rights>

giving government charters to multinational corporations, strengthening state control over the economy. The platform even included a “right to be different,” which celebrated individuality and multiculturalism.<sup>183</sup> McGovern favored radical cuts to military spending, which helped move neo-conservative Democrats towards Nixon.<sup>184</sup> While he was far from an SDS member, McGovern was the closest thing to it.<sup>185</sup>

Both the New Left and the special committee were highly concerned with the threats posed by emergency powers run amok. The suspicion towards concentrated power fed both New Left conspiracies and Congress’s attempt to reclaim emergency authorities. For instance, the leftist newspaper *Sanity Now* ran stories on how the phony “national emergency” has been in effect since Truman and underlies the conspiracy which is the true root of Watergate.<sup>186</sup> The anarchist Detroit-based newspaper *The Fifth Estate* also wrote about “Nixon has total power” through emergency statutes, making the United States resemble a dictatorship.<sup>187</sup> The underground paper *Berkeley Barb* also reported on the committee’s work, describing how “These laws not only give a President a nearly dictatorial degree of power – but they also have the effect of getting Americans used to the concept of having repressive laws enacted.”<sup>188</sup>

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<sup>183</sup> Democratic Party Platforms, 1972 Democratic Party Platform Online by Gerhard Peters and John T. Woolley, The American Presidency Project <https://www.presidency.ucsb.edu/node/273248>

<sup>184</sup> Christopher Lydon, “McGovern Offers a Plan To Cut Defense Outlays,” *The New York Times*, Jan. 20, 1972, <https://www.nytimes.com/1972/01/20/archives/mcgovern-offers-a-plan-to-cut-defense-outlays.html>

<sup>185</sup> Roberta N. Haar, “Insurgency and American Foreign Policy: the case of George McGovern.” *World Affairs* 180, no. 2 (2017): 32-61.

<sup>186</sup> Gus Hall, “The Conspiracy that led to Watergate,” *Sanity Now*, issue 75, August 1, 1973, <http://voices.revealdigital.com.libproxy.lib.unc.edu/cgi-bin/independentvoices?a=d&d=BGFBCHE19730801.1.13&srpos=6&e=-1971---1977--en-20--1--txt-txIN-%22national+emergency%22-----1#>

<sup>187</sup> “Nixon has ‘total’ power,” *The Fifth Estate*, February 2-15, 1974, vol. 8, issue 21, <http://voices.revealdigital.com.libproxy.lib.unc.edu/cgi-bin/independentvoices?a=d&d=BFGJBGD19740202.1.5&srpos=11&e=-1971---1977--en-20--1--txt-txIN-%22national+emergency%22-----1#>

<sup>188</sup> “Nixon’s Laws Can Can You,” *Berkeley Barb*, Jan. 4-10, 1974, vol. 18, issue. 25, <http://voices.revealdigital.com.libproxy.lib.unc.edu/cgi->

The repeal of the 1950 Emergency Detention Act, also known as the Concentration Camp Law, is indicative of how distrust of government and concern for civil liberties in the late 1960s manifested in legislative action. Passed during the height of Cold War hysteria, the law allowed the Justice Department to build and maintain detention facilities for anyone suspected of espionage or sabotage, should a war break out. The law intentionally paralleled the internment of Japanese-Americans during World War II. Although government sold off the six detention sites later in the 1950s, when the fear of communist invasion subsided, the law remained on the books. However, in 1966, a booklet titled *Concentration Camps U.S.A.* circulated within New Left and African-American communities, stoking concerns about government repression.<sup>189</sup> The House Committee on Un-American Activities had even mentioned using the Emergency Detention Act to quell overt violence by “Communists and black nationalists” which they considered “guerillas.”<sup>190</sup> This led Japanese-Americans, many of whom had lived through internment, to organize a grassroots movement for the Emergency Detention Act’s repeal. With the law’s repeal in 1971, advocates of marginalized groups successfully eliminated a monument to historical oppression and asserted themselves as new examples of “loyal Americans.”<sup>191</sup> The law was repealed, but a similar World War II -era emergency law would become a serious concern for the special committee.

While academia, namely historians, political scientists, and lawyers, played a central role in the development of the presidency in the 20<sup>th</sup> century, academia played an equally central role

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bin/independentvoices?a=d&d=BFBJFGD19740104.1.5&srpos=29&e=-1971---1977--en-20--21--txt-txIN-%22national+emergency%22-----1#

<sup>189</sup> Masumi Izumi, “PROHIBITING ‘AMERICAN CONCENTRATION CAMPS,’” *Pacific Historical Review* 74, no. 2 (May 2005): 165–94, <https://doi.org/10.1525/phr.2005.74.2.165>.

<sup>190</sup> U.S. Congress, House, Committee on Un-American Activities, *Guerilla Warfare Advocates in the United States*, 90<sup>th</sup> Cong., 2<sup>nd</sup> sess., Committee Print 37-359, pg. 60.

<sup>191</sup> Izumi, *Prohibiting “American Concentration Camps”*

in liberalism's shift away from presidential power in the 1970s, of which the National Emergency Act is a prime example. Where once intellectuals embraced the strong executive as the benevolent North Star in American politics, by the 1970s, those same intellectuals had moved into a post-presidential synthesis. Not only was the presidency no longer the central object of analysis but now a strong executive was anathema to American life. Arthur Schlesinger is a prime example of this. In 1967, he wrote in his diary, "The irony is that all of us for years have been defending the presidential prerogative and regarding the Congress as a drag on policy. It is evident that this delight in a strong presidency was based on the fact that, up to now, strong presidents in American history have pursued policies of which we approved. We are now confronted by the anomaly of a strong presidency using these arguments to pursue a course which, so far as I can see, can only lead to disaster."<sup>192</sup> In 1973, he wrote *The Imperial Presidency* chronicling the presidency's gradual absorption of the power to declare war as well as Nixon's various abuses and peccadillos, coining the phrase which still today describes a rogue executive branch.<sup>193</sup>

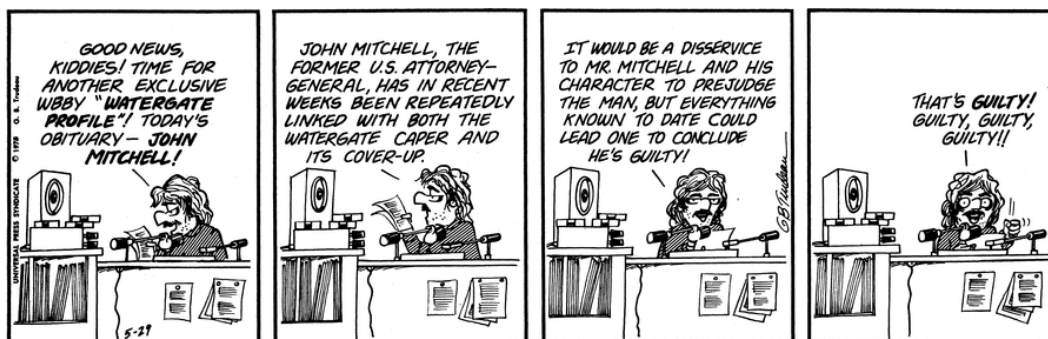
Another example of academia opposing an empowered executive was the 1974 Conference on Advocacy in the United States of America, which brought out lawyers, political scientists, and historians from institutions like Harvard, Columbia, the Council on Foreign Relations, the University of Chicago, Yale, Brown and the City University of New York. The conference produced a consensus-based report, which included overwhelmingly popular recommendations that Congress "participate more fully" in shaping "American use-of-force policy than is now the case," that "No member of the executive branch," not even the president,

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<sup>192</sup> Stephen Skowronek, "The Unsettled State of Presidential History," in *Recapturing the Oval Office: New Historical Approaches to the American Presidency*, eds. Bruce Schulman and Brian Balogh, (Ithaca, NY: Cornell University Press, 2015), pg. 18.

<sup>193</sup> Schlesinger, *The Imperial Presidency*.

“should have the right to refuse to appear before Congress when summoned to testify,” and that a special Executive-Legislative group should be formed “immediately to examine the goals of U.S. foreign policy and guidelines for the conduct of foreign affairs.”<sup>194</sup> When Congress attacked the presidency, members brought professors like constitutional law scholars Alexander Bickel, Cornelius Cotter, and Arthur S. Miller to testify in hearings. Nixon aide Tom Huston, circulating a memo about Congress’ assault on presidential powers, wrote how “the arguments of intellectuals” rather than “the rantings of Fulbright” were hemming in the presidency.<sup>195</sup> In 1969, Vice President Agnew said, “A spirit of national masochism prevails, encouraged by an effete corps of impudent snobs who characterize themselves as intellectuals.”<sup>196</sup>



The humorous 1973 Doonesbury comic strip captures the mix of passionate conviction and feigned dispassionate objectivity amongst Watergate observers.<sup>197</sup>

The press, which channeled and amplified the discourse of academia and Congress, became highly adversarial towards the presidency during the late 1960s and early 1970s. For

<sup>194</sup> Chief Justice Earl Warren Conference on Advocacy in the United States (1975: Cambridge, Mass. The Powers of the Presidency: Final Report. Cambridge, Mass.: The Foundation, 1975.)

<sup>195</sup> Memo; from Tom Charles Huston; The Assault on the Constitutional Powers of the Presidency; May 23, 1970;

[https://www.nixonlibrary.gov/sites/default/files/virtuallibrary/releases/dec10/dec10/dec10\\_76.pdf](https://www.nixonlibrary.gov/sites/default/files/virtuallibrary/releases/dec10/dec10/dec10_76.pdf)

<sup>196</sup> “As Spiro Agnew Sees It,” *The New York Times*, May 10, 1970,

<https://www.nytimes.com/1970/05/10/archives/as-spiro-agnew-sees-it.html>

<sup>197</sup> Michael Cavanaugh, “41 years later, The Post publishes spiked ‘Doonesbury’ Watergate comic for the first time. Here’s why...,” *Washington Post*, April 26, 2014, [https://www.washingtonpost.com/news/comic-riffs/wp/2014/04/26/41-years-later-the-post-publishes-spiked-doonesbury-watergate-comic-for-the-first-time-heres-why/?utm\\_term=.722ae52cb391](https://www.washingtonpost.com/news/comic-riffs/wp/2014/04/26/41-years-later-the-post-publishes-spiked-doonesbury-watergate-comic-for-the-first-time-heres-why/?utm_term=.722ae52cb391)

instance, Tom Wicker dubbed Nixon an “American Emperor” in *The New York Times*.<sup>198</sup> Marquis Childs of the *Baltimore Sun* invoked de Tocqueville’s warnings about “tyranny of the majority” to dub Nixon King Richard the First.<sup>199</sup> In November 1973, reporter Jack Rodgers described how Nixon could use emergency powers specified in classified 1969 memo Interdepartmental Action Plan for Civil Disturbances which prescribed plans for squashing dissent, casting an anodyne document as a totalitarian power grab.<sup>200</sup> The distrust was mutual; Nixon’s hostility towards the press is well-known. He told Kissinger in the Oval Office, “Never forget: the press is the enemy. The establishment is the enemy. The professors are the enemy. ... Write that on a blackboard 100 times and never forget it.”<sup>201</sup> Vice President Agnew bluntly criticized the press as being an unelected corps of power brokers manipulating American society behind the curtain, an interesting claim mirroring the charges of tyranny leveled against the Nixon White House.<sup>202</sup> The press was far from shy about striking back. Woodward and Bernstein’s *All the President’s Men* depicted vast abuses of power and rose to the top of the bestseller lists. In 1973, John Herbers ran a four-part series in the *New York Times* on Nixon’s expansion and abuses of presidential power.<sup>203</sup>

The National Emergencies Act was a part of this broader distrust of and attack on the presidency. Grown out of Watergate and Vietnam, the skepticism of a strong executive not only encouraged restraints on the presidency but also opened a window for Congress to reassert itself

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<sup>198</sup> Tom Wicker, *An American Emperor*, *New York Times*, May 9, 1972

<sup>199</sup> Marquis Childs, “Nixon Courting Tyranny of the Silent Majority,” *The Sun (1837-1993)*, Mar 12, 1973. <http://libproxy.lib.unc.edu/login?url=https://search-proquest-com.libproxy.lib.unc.edu/docview/541283431?accountid=14244>.

<sup>200</sup> Jack Rodgers, “President possesses emergency powers,” *Farmington Daily Times*, November 15, 1973, <https://newspaperarchive.com/farmington-daily-times-nov-15-1973-p-4/>

<sup>201</sup> “Nixon’s the one still preoccupied with enemies,” *The New York Times*, December 3, 2008, <https://www.nytimes.com/2008/12/03/world/americas/03iht-nixon.1.18356903.html>

<sup>202</sup> Spiro Agnew, “TV News Coverage,” (speech, Des Moines, November 13, 1969), *American Rhetoric*, <https://www.americanrhetoric.com/speeches/spiroagnewtvnewscoverage.htm>

<sup>203</sup> John Herbers, *Nixon’s Presidency: A Nation is Changed*, *New York Times*, March 6, 1974.

as a co-equal branch of government. However, the special committee acted strategically to ensure they would not face opposition from the Nixon White House.

After 18 months of reports, hearings, and investigations, the special committee was finally ready to restrict the president's emergency powers. The proposed bill was ready by July 1974 but Church and Mathias bided their time as the Nixon administration crumbled. As Majority Leader Mansfield told Bill Miller, "it is too good and important a bill to let those Nixon people get at it."<sup>204</sup> By then, Watergate had already eaten the Nixon administration. As the shadow of a hotel at 2650 Virginia Ave loomed over 1600 Pennsylvania Ave., it became increasingly clear that the president would face impeachment and possibly be removed from office. Soon after the bill was ready, the Supreme Court in *US v. Nixon* unanimously ordered the president to hand over the White House tapes; at this point, 44% of Americans supported removing Nixon from office, which would increase to 57% by early August.<sup>205</sup> As his support among Republican Senators eroded, Nixon resigned on August 9, 1974, elevating Gerald Ford to the presidency and opening a new chapter for the National Emergencies Act.

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<sup>204</sup> Ashby, *Fighting the Odds*, pg. 414.

<sup>205</sup> Andrew Kohut, "How the Watergate Crisis eroded public support for Richard Nixon," *Pew Research Center*, August 8, 2014, <http://www.pewresearch.org/fact-tank/2014/08/08/how-the-watergate-crisis-eroded-public-support-for-richard-nixon/>.



## CHAPTER 3: The Return of the Emergency

### Introduction

Richard Nixon's resignation marked a change for the National Emergencies Act from research and reporting to legislating. The special committee, led by Sen. Church (D-ID) and Sen. Mathias (R-MD), had spent the Nixon administration producing a catalog of emergency powers, conferring with executive branch agencies on which powers were obsolete and were necessary, and hearing testimony from constitutional scholars and political scientists. Now, the committee would actually work to curtail executive power under the Ford administration. Senators Church and Mathias would have to bring forth legislation that would avoid a presidential veto yet still assert Congress's role as a coequal branch of government. During that process, the distrust of government that defined American politics after Watergate and Vietnam ran headlong into the practical realities of governing a 20<sup>th</sup>-century global superpower. Furthermore, as the New Right gained steam in the 1970s, a strong presidency became an attractive method for achieving its hawkish foreign policy and desire for leaner government, placing an emerging conservative movement at odds with the anti-war liberals in Congress.

At the same time, the Ford administration found itself caught between capitulation to Congress or preserving the province of the executive, either of which could upset the recently shaken constitutional order. Ford began his administration leaning towards the former, but gradually shifted towards the latter at the same time the Republican party moved in a more conservative, pro-executive direction. This posed a dilemma for Mathias and Church, who needed to compromise to reform emergency powers but wanted to ensure presidential compliance with the bill after passage. As the executive and legislative branches deliberated, the importance of process became clearer. Ultimately, the National Emergencies Act did little to directly expand or restrict presidential power but instead, it established a framework which

would limit the president's ability to act without Congress's knowledge within the secrecy of the Oval Office. It was the procedures for declaring and terminating a national emergency which would prove important, because procedures define the rules of a political landscape, determining which actors have which powers and which responsibilities. Procedures can also become symbolic of greater issues, as the congressional veto provision of the National Emergencies Act would take on larger meaning in a presidency which perceived itself to be under siege.

Together, the National Emergencies Act and its sister legislation, (IEEPA) would reform the chaotic mess of near tyrannical emergency powers discovered by the special committee by instituting clear procedures and requiring congressional input. However, permanent emergencies first began in the Great Depression and continued during World War II and the Cold War because they were expedient solutions to daunting problems. Birthed from the forehead of liberalism, the expansion of the federal government, helmed by an infallible presidency, grew through the political windows which iterative crises presented. The president could declare an emergency, rally the country, and exercise special powers to resolve a crisis, after which the emergency could continue because of the continuing specter of crisis and trust that the emergency powers would not be abused. Permanent emergencies became the norm simply because it was too much trouble to end the emergencies. Détente and the distrust stemming from Watergate pushed Congress to pass the National Emergencies Act.

Ultimately, the National Emergencies Act would become law but fail to constrain presidential emergency powers due to a combination of congressional lassitude, compromises which preserved executive power, and begrudging acceptance of presidential primacy in national security matters. Trust in government returned and détente, condemned by hawkish conservatives, died, ending the brief window when Congress shackled the presidency with

dozens of framework statutes. Two key framework statutes, the National Emergencies Act and IEEPA, would pave the way for a proliferation of future national emergencies without any substantial checks on presidential emergency power. The situation decades after the National Emergency Act's passage would look similar to the situation decades prior; ironically, because the National Emergencies Act established a congressionally blessed procedure for declaring national emergencies beyond the president's constitutional authority, the law actually enhanced presidential powers by codifying and formalizing powers which had developed unplanned and unorganized for decades.

### **Compromise**

The committee's relationship with the executive branch was always of paramount importance to its basic function. The senators needed to know which emergency statutes were useful and which were not, lest the National Emergencies Act accidentally repeal a seemingly innocuous law and cause mass bureaucratic chaos. As Frank Church described it, "we are in a situation which this Special Committee is trying to correct, whereby Congress, acting pursuant to its recommendations, cannot correct without the active cooperation of the President, barring the unlikelihood that we could get a two-thirds vote to override his veto."<sup>206</sup>

The need for cooperation with the executive branch presented a dilemma as Congress could hardly stand the Nixon administration. When discussing the President's sole authority to declare national emergencies, former Attorney General Richardson told the Senator Case during a hearing, "You can't construct a government, Senator Case, on the premise that nobody can be trusted."

*Sen. Case: "We are now in a point which tests this very deeply."  
Fmr. Att. Gen. Richardson: "If we have reached that point."*

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<sup>206</sup> US Congress, Senate, Special Committee on the Termination of the National Emergency, *PART 3-Constitutional Questions Concerning Emergency Powers*, 93rd Cong., 1st sess., 1973, pg. 742.

*Sen. Case: "We are already at that point."*<sup>207</sup>

This lack of trust came to the forefront in 1974, when Staff Director Bill Miller made a startling discovery: the president could, during a national emergency, destroy records of an executive order or emergency proclamation under the Federal Register Act of 1935. Miller discovered this when researching executive orders during national emergencies and was alarmed by the implications. The committee found that the president could either declare an executive order a secret for national security reasons and hide it from the public, or give the executive order another name without changing its legal effect; in the committee's eyes, this could keep matters of tremendous consequence hidden from Congress and the public.<sup>208</sup> Nixon suspended publication in the Federal Register to keep his bombing in Cambodia covert.<sup>209</sup> Senator Mathias encapsulated this dread when he said: "Emergencies, historically, from Rome and ancient times on, emergencies have been a classic means of usurpation of power by rules from legislative bodies."<sup>210</sup>

On August 22, just thirteen days after Nixon resigned, the committee submitted the first draft of the National Emergencies Act to the Senate.<sup>211</sup> The initial bill would have done several major things. First, it deactivated all emergency powers 271 days after the bill's passage. Second, it automatically terminated any future national emergency 180 days after the president or Congress declared it, although Congress could extend the emergency. The committee drew this

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<sup>207</sup> US Congress, Senate, Special Committee on the Termination of the National Emergency, *PART 3-Constitutional Questions Concerning Emergency Powers*, 93rd Cong., 1st sess., 1973, pg. 754.

<sup>208</sup> U.S. Congress, Special Committee on the Termination of the National Emergency, *Pending Legislation and Review of Committee Business*, 93rd Cong., 2nd sess., 1974, Committee Print 37-125, pg. 5.

<sup>209</sup> Andrew Rudalevige, *The New Imperial Presidency: Renewing Presidential Power after Watergate* (Ann Arbor: University of Michigan Press, 2005), pg. 114.

<sup>210</sup> U.S. Congress, Special Committee on the Termination of the National Emergency, *Pending Legislation and Review of Committee Business*, 93rd Cong., 2nd sess., 1974, Committee Print 37-125, pg. 7.

<sup>211</sup> U.S. Congress, Senate, Special Committee on the Termination of the National Emergency, *Final Report*, 94th Cong., 2d sess., 1976, S. Rep. 94-922, pg. 8.; President's Daily Diary; August 22, 1974; President's Daily Diary Collection; Box 72; Gerald R. Ford Presidential Library; <https://www.fordlibrarymuseum.gov/library/document/diary/pdd740822.pdf>

from the United Kingdom's emergency power regime during the Second World War, when Parliament had to re-approve the executive's emergency authorities every 30 days. Third, it allowed Congress to terminate an ongoing national emergency by concurrent resolution, a controversial mechanism called a legislative veto. Fourth, the president had to specify which emergency powers he was drawing on, so as to prevent presidents from using powers totally unrelated to another emergency. Fifth, it required the publication of all emergency proclamations in the Federal Register so Congress would remain informed of ongoing emergency actions. Lastly, the bill repealed nearly 50 emergency laws, including the all-important Trading with the Enemy Act, 8 U.S.C. 1481, which could strip U.S. citizenship from draft dodgers, and 18 U.S.C. 1383, which allowed the President to declare any land a military zone and imprison anyone living there.<sup>212</sup> The bill then went to the Government Operations Committee, chaired by Senator Sam Ervin, no stranger to wrestling the executive branch, which unanimously sent the bill forward for full Senate approval.

However, Senators Church and Mathias only introduced the bill after meeting with the newly-inaugurated President Ford in the Oval Office and obtaining his endorsement, just to be sure passing the bill would not trigger further constitutional tumult. The brief Oval Office meeting between Church, Mathias and Ford took place at 10:30 AM on August 22. Ford's adviser Bill Timmons, who had served as Assistant for Legislative Affairs since the very beginning of the Nixon administration, cautioned Ford against supporting the bill, which he felt would tilt the interbranch power balance too greatly in favor of Congress.<sup>213</sup> Other staffers like

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<sup>212</sup> U.S. Congress, Senate, Government Operations Committee, *Report of the Government Operations United States Senate to Accompany S. 3957 to terminate certain authorities with respect to national emergencies still in effect and to and to provide for orderly implementation and termination of future national emergencies*, 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., 1973, S. Rep. 93-1193.

<sup>213</sup> Memorandum for the President, August 22, 1974, Folder: Memoranda- Timmons to the President August 1974 (2), Bill Timmons Files Box 3, Gerald R. Ford Presidential Library.

Assistant to the President for Domestic Affairs Kenneth Cole, Deputy Assistant to the President for Congressional Relations Tom Korologos, and OMB General Counsel Stanley Ebner opposed Congress limiting presidential powers, but did not advise Ford directly on the National Emergencies Act.<sup>214</sup> While the senators and the White House both agreed to repeal obsolete emergency power statutes, which the special committee and executive branch agencies had cooperatively reviewed, the Ford administration had some qualms with the bill. The Department of Justice did not support the bill, which it feared could have dire implications for the Department of Defense, the agency which relied the most on emergency statutes for routine business. They also objected because of the seemingly too-short grace period for re-enacting emergency statutes which needed amending and because the law prevented the president from extending a state of emergency.<sup>215</sup>

Despite the strong objections from the White House staff and Department of Justice, President Ford declared he felt “fully sympathetic” for the legislation.<sup>216</sup> He and the senators agreed on terminating the existing national emergencies, establishing regular and consistent procedures for declaring future national emergencies, and even dispatched executive branch staffers to help the special committee work out the disagreements between the branches.<sup>217</sup> This highlights the split-brain approach of the Ford administration on executive powers, which was caught between combating or compromising with Congress.

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<sup>214</sup> Remarks of Kenneth Cole, Illinois Municipal League, October 28, 1974, Raoul Duval Papers, Box 9, Folder: Speech Material-Presidential Powers, Ford Presidential Library; <https://www.fordlibrarymuseum.gov/library/document/0047/phw19740923-06.pdf>

<sup>215</sup> Memo; from Vince Rakestraw to Attorney General; August 14, 1974; Folder: Emergency Powers Legislation; Bill Timmons Papers; Box 3; Gerald R. Ford Presidential Library.

<sup>216</sup> “Presidential Emergency Powers Curbs Proposed,” *Los Angeles Times*, August 23, 1974.

<sup>217</sup> Letter to the President, September 5, 1974, Frank Church Papers, Boise State University Library, Special Collections and Archives, Series 2.9, Box 1, Folder 6

Despite the absence of trust, the threat of a veto compelled the committee to compromise with the nascent Ford administration just as the bill, S.3957, came to the Senate floor. At the last minute, on October 7, Senator Mathias went onto the Senate floor to offer amendments suggested by the Office of Management and Budget. At the White House's request, Church and Mathias had delayed voting on the National Emergencies Act to hear these suggestions and agree to them.<sup>218</sup> These amendments were part of a last-minute compromise between the White House and the committee to alter the bill and prevent Congress from scoring such a major victory over the President.

These amendments were substantial. First, they eliminated the automatic six-month termination of national emergencies, instead of requiring Congress to actively end an emergency in a mandatory meeting every six months. The amendments whittled down the list of repealed statutes by sending obsolete ones to the House Codification Committee; however, the amendments exempted the Trading with the Enemy Act and the Read Reserve provision (this enabled the President to call up the reserves unilaterally), the two most useful emergency laws. Importantly, the new bill mandated that a national emergency terminates after a year, but the president could extend it indefinitely simply by notifying Congress and publishing that notification in the Federal Register. This minor procedural adjustment had profound ramifications since it required the congressional initiative to change the status quo. Senator Roth then added an amendment requiring the President to keep all significant orders on file during a national emergency, so as to improve transparency and prevent future inter-branch conflict over government records.<sup>219</sup> Lastly, the bill established a one-year grace period, later extended to two

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<sup>218</sup> Letter to Peter Rodino from Frank Church and Charles Mathias, October 7, 1974, Church Papers, Series 2.9, Box 1, Folder 6, Boise State University Archives.

<sup>219</sup> 120 Cong. Rec., pg. 349012.

years, for the executive to amend or substitute emergency powers which had become necessary for routine government operations. For example, in August 1971 the Treasury Department used the Trading with the Enemies Act to limit the export of soybeans.<sup>220</sup> The act also totally exempted a few emergency powers so critical that the Ford administration did not want to risk Congress not amending or revising them during the grace period; this exemption covered the Trading with the Enemy Act but required Congress address the exempted laws within 270 days. The National Emergencies Act passed the Senate without dissent on October 7, 1974, which Senator Mathias called “a major step toward ending the erosion of constitutional government.”<sup>221</sup>

But the bill would not make it to the House. Overwhelmed with confirming Nelson Rockefeller to the Vice Presidency and concluding their investigation into Watergate, the House Judiciary Committee was too busy to make progress on the legislation. This did not surprise Mathias and Church, who worked with Rep. Peter Rodino (D-NJ), chair of the House Judiciary Committee, to reintroduce the bill early in the next session.<sup>222</sup> This marks a new chapter in the history of the National Emergencies Act, one marked by complex interbranch dynamics and the politics of power after Watergate.

### **Horseshoe politics and Presidential Power in the 1970s**

In the mid-1970s, both liberals and conservatives began to change their views on presidential power. While Watergate and Vietnam fueled liberal disillusionment with an activist presidency, as expressed by the National Emergencies Act, conservatives, on the rise in the Republican party, had a much more favorable view.

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<sup>220</sup> Stephen Green, “Senate Votes Presidential Power Curb,” *Washington Post*, October 8, 1974

<sup>221</sup> Press Release, Office of Charles McC. Mathias, Folder: Press Coverage, 1974, Senate Special Committee on National Emergencies 93d and 94<sup>th</sup> Congress, Press Coverage, Box 15, National Archives Center for Legislative Archives.

<sup>222</sup> Letter to Peter Rodino from Frank Church and Charles Mathias, October 7, 1974, Church Papers, Series 2.9, Box 1, Folder 6, Boise State University Archives.



Ditching the anti-executive viewpoints of Robert Taft and John Bricker, conservatives embraced a strong executive both as a means of defending against communism and as a tool for curtailing the size of government. For instance, while presidents since Jefferson had impounded appropriated funds to gut programs they disliked, Nixon escalated it, impounding more than \$12 billion by 1973.<sup>223</sup> Congress was shocked by Nixon re-writing their budgets without their control, so Congress, led by Senator Ervin, bill manager for the National Emergencies Act, passed the Impoundment Control Act of 1974 to stop the practice. With impoundment ruled out, Ford used his veto to curtail government spending and save “the taxpayers billions of dollars.”<sup>224</sup> However, to conservatives, Congress was preventing the president from decisively cutting wasteful and unnecessary government spending which was exacerbating inflation.

Support for a strong executive was not confined to the executive branch. Barry Goldwater published an article in the *Virginia Journal of International Law* in the summer of 1973, which made his viewpoint crystal clear. He wrote, “The Office of the Presidency has come under the most vigorous attack of any period in history. ... To them [Congress], he acts more as an elected Monarch than he does the elected leader of a democratic Republic.” He lambasted the War Powers Resolution as unconstitutional, castigated the critics of executive agreements, whereby the president entered into foreign arrangements without referring to the Senate for ratification and chastised Congress for infringing on executive privilege, which was so vital for military security. Goldwater also argued the post-World War II shift in foreign affairs power from

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<sup>223</sup> Julian E. Zelizer, *Governing America: The Revival of Political History*, (Princeton: Princeton University Press, 2012), pg. 257. James M. Naughton, “The Senate Is Determined to Recover Some of Its Powers,” *The New York Times*, May 13, 1973, sec. Archives, <https://www.nytimes.com/1973/05/13/archives/constitutional-ervin-ah-think-the-senate-is-determined-to-recover.html>.

<sup>224</sup> Memo; from Ron Nessen through Dick Cheney to the President; Draft Response to Questions on Presidential Power; Folder: Federal Government Presidential Powers (1); Box 8; Presidential Handwriting File; Gerald R Ford Presidential Library.

Congress to the presidency, which motivated liberals like Fulbright and Church to support bills like the War Powers Resolution of National Emergencies Act, was a myth, because the presidents from Washington to Nixon had sent the military into combat at least 200 times without congressional approval. The archetypal Cold War hawk viewed the president as rightly dominant over national security matters, despite being a member of Congress, because a strong presidency was critical for American military primacy. Goldwater attacked the senators and representatives who wanted to weaken the presidency as embodying the “death wish of dreamers, who think we have no problems and no need for a commitment to our national security.”<sup>225</sup> However, Goldwater’s zeal for an activist presidency was likely an extension of his anti-communism and not a belief in the inherent value of executive power, since he later sued President Carter for ending a defense treaty with Taiwan without consulting Congress.<sup>226</sup>

However, some conservatives were wary of the uptick in presidential power. Robert Welch, the founder of the anti-communist John Birch Society, spoke for two hours at a Los Angeles political banquet in March 1974 about how “Mr. Nixon has already been assuming and exercising dictatorial power.” Chief among his complaints were making war without congressional authorization, making executive agreements to avoid getting treaties ratified by the Senate and defying the court system for his own gain.<sup>227</sup> Similarly, the Liberty Lobby, a conservative anti-communist advocacy organization, endorsed the work of Senators Church and Mathias and National Emergencies Act. To the Liberty Lobby, “[t]his important matter is long

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<sup>225</sup> Barry M. Goldwater, “The President’s Constitutional Primacy in Foreign Relations and National Defense.” *Va. J. Int’l L.* 13 (1972): 463.

<sup>226</sup> *Goldwater v. Carter*, 444 U.S. 996 (1979).

<sup>227</sup> Kenneth Reich, “Calls Him a Would-Be Dictator: Welch Assails Nixon at Birch Society Dinner,” *Los Angeles Times*, March 11, 1974.

overdue, and should provide the means of restoring, in large measure, the proper balance of governmental powers.”<sup>228</sup>

While the John Birch Society represented an anti-executive anti-communist aspect of the Republican party, a more pro-executive anti-communist wing emerged during the late 1970s. Ford’s Chief of Staff Dick Cheney was one member of the administration focused on preserving presidential power. He, along with Press Secretary Ron Nessen, put together draft responses for how to answer press questions about presidential power. They argued, “The powers of the President are established by the Constitution and by law and there have been no fundamental changes in these grants of authority.” They saw Congress’s actions as “a natural reaction to the steady growth of Executive Branch power over the past 40 years” and were “sure it’s also a reaction to Watergate and Vietnam.” However, to them, only the president could manage day-to-day diplomacy, and cited the disruptive effects of Congress on issues like “Angola, aid to Turkey, Soviet emigration and trade, and damaging disruptions of our legitimate foreign intelligence activities.”<sup>229</sup> The support for a strong executive played into the growing hawkishness within the Republican Party. Support for détente weakened Ford during his brutal 1976 primary battle with Ronald Reagan and gradually fell apart during the Carter administration, as conservative forces within Congress scuttled SALT II and the Panama treaties proved an albatross for their supporters on Capitol Hill.<sup>230</sup> Carter’s limp responses to the Soviet invasion of Afghanistan and the Iranian Hostage Crisis helped conservatives paint him as

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<sup>228</sup> Letter to Senator Church from Curtis B. Dall, Frank Church Papers, Series 2.9, Box 1, Folder 4, Boise State University Archives.

<sup>229</sup> Memo; from Ron Nessen through Dick Cheney to the President; Draft Response to Questions on Presidential Power; Folder: Federal Government Presidential Powers (1); Box 8; Presidential Handwriting File; Gerald R Ford Presidential Library.

<sup>230</sup> Zelizer, *Arsenal of Democracy*, pg. 280-284.

feckless and feeble, undermining the political center on foreign policy issues.<sup>231</sup> The resurgent anti-communism within the Republican Party and among Democratic neo-conservatives fostered a fondness for a decisive chief executive which would last for years.

Despite these important political shifts, the National Emergencies Act did not dominate headlines, as important historical topics often do. Watergate devoured all the oxygen and what was left went to inflation, the energy crisis, or the 1973 Yom Kippur War. Even after Nixon's resignation, the issue of emergency powers, too legalistic and obscure for front pages, faded into the background as the Church Committee exposed rampant wrongdoing by U.S. intelligence agencies both at home and abroad and took away staff from the special committee. However, the lack of public attention does not mean the National Emergencies Act is insignificant, as historically significant events often slip through newsrooms unnoticed.

The press reported a fair amount on the National Emergencies Act, placing it in the context of Vietnam and Watergate and emphasizing the shocking extent of the president's powers. For instance, *The Los Angeles Times* wrote that the Vietnam War spurred Congress to address dormant emergency powers which could threaten individual liberties, listing the president's powers in a shocking lede.<sup>232</sup> *The Washington Post* reported on the "permanent state of emergency" which had consumed the country for decades and corroded American democracy.<sup>233</sup> The only TV airtime dedicated to the National Emergencies Act was from Howard K. Smith, who used his nightly "Comment" section on the ABC Evening News to agree with Senators Church and Mathias's committee report and endorsed an end to the climate of crisis.<sup>234</sup>

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<sup>231</sup> Zelizer, *Governing America*, pg. 298-310.

<sup>232</sup> John Averill, "Congress Moves to Cut President's Crisis Powers," *Los Angeles Times*, March 18, 1974.

<sup>233</sup> Ronald Goldfarb, "The Permanent State of Emergency," *The Washington Post*, January 6, 1974.

<sup>234</sup> *ABC World News Tonight with Howard K Smith*, "Friday, Sep 28, 1973" ABC, September 28, 1973, <https://tvnews.vanderbilt.edu/broadcasts/27973>.

However, one exception was when James Kilpatrick, a state's rights segregationist, nationally syndicated columnist and panelist on *Crossfire*, made a potent observation when reporting on the passage of the National Emergencies Act noting, "Ideologies march around a circle, and now and then they meet." To him, passing the National Emergencies Act was one such meeting.<sup>235</sup> The issue of presidential power, particularly in the realm of national security, defies clear ideological or partisan delineation. This takes on special significance when applied to beliefs about big government versus small government or the role of the Constitution in modern politics, revealing complexities and contradictions which underlie past and contemporary political discourses.

### **Reintroducing the Bill**

Since the National Emergencies Act had passed the Senate in 1974 but failed to move into the House, causing it to die at the end of the 1974 session, a representative would have to reintroduce the bill to kickstart the legislative process. A close confidant of Church and Mathias, Rep. Peter Rodino (D-NJ) reintroduced the National Emergencies Act in the House as H.R. 3884 on February 27, 1975. H.R. 3884 was a carbon copy of the amended bill introduced by Senator Mathias the previous October, and the House immediately referred it to the Judiciary Committee. Senator Mathias also reintroduced the bill as S. 977, but all the legislative movement took place in the House. House Judiciary Subcommittee on Administrative Law and Governmental Relations, chaired by Representative Walter Flowers, then held hearings on H.R. 3884 in March and April 1975.

The committee hearings brought in government lawyers from the State, Treasury, Defense, and Justice Departments to speak on the bill's efficacy and also sought the guidance of Senators Church and Mathias, who testified together about how H.R. 3884 would return the

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<sup>235</sup> James Kilpatrick, "The Circle, Right to Left," *Washington Star-News*, Monday, October 14, 1974.

United States to normal constitutional government and “restore to the Congress its full role in the legislative branch.”<sup>236</sup> The hearings showcased a high level of compromise and comity between the executive and the legislature; every witness supported passing the National Emergencies Act and several committee members and witnesses remarked on the strong cooperation between the two branches.<sup>237</sup> The special committee also remarked in a report how the bill “has received broad bipartisan support and elicited a rare degree of cooperation between the Executive and Legislative branches of government.”<sup>238</sup>

However, one area of disagreement arose during the hearings. Assistant Attorney General Antonin Scalia, who as head of the Office of the Legal Counsel provided legal interpretations and advice to the executive branch, gave his support for the bill but objected to the section allowing Congress to terminate national emergencies by concurrent resolutions. The resolutions would pass both houses by a simple majority but would have the force of law without a presidential signature or veto. While this mechanism was appealing for checking presidential power, it raised serious constitutional issues since it effectively sidestepped the president’s veto power.

The Ford administration was particularly keen to keep the presidency from losing its primacy to Congress in the aftermath of Watergate. In draft responses to reporters’ questions on presidential power, the Ford administration denied that the presidency had lost its basic powers. Press Secretary Ron Nessen wrote that “This is probably a natural reaction to the steady growth of Executive Branch power over the past 40 years. I’m sure it is also a reaction to Watergate and

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<sup>236</sup> U.S. Congress, House, Committee on the Judiciary, Hearings on H.R. 3884, 94th Cong., 1st sess., 1975, 33.

<sup>237</sup> U.S. Congress, House, Committee on the Judiciary, Hearings on H.R. 3884, 94th Cong., 1st sess., 1975.

<sup>238</sup> U.S. Congress, Senate, Special Committee on the Termination of the National Emergency, *Final Report*, 94th Cong., 2d sess., 1976, S. Rep. 94–922, pg. 8.

Vietnam.” He cited Ford’s vetoes as proof of his willingness to stand up to the Democratic Congress and pointed out that although Congress has an important role to play in foreign policy, “in an era of intercontinental missiles and instant communications, only the President can manage day-to-day relations with more than 100 foreign nations.”<sup>239</sup> Ford’s veto of the International Security Assistance and Arms Export Control Act in May 1976, when he was fighting Ronald Reagan to win the Republican primary, shows Ford’s desire to protect the president’s prerogatives. In his veto message, Ford cited the bill’s “unwise restrictions that would seriously inhibit” his constitutional powers and a coherent foreign policy.<sup>240</sup> After he left office, Ford gave a speech at an American Enterprise Institute where he warned of an imperiled presidency, rather than an imperial presidency, which an activist judiciary and resurgent Congress had thoroughly hobbled. He said Congress may be “the world’s greatest deliberative body, and I think it is, but it is just not prepared for crisis management of our foreign policy.” He said, “Congress in recent years has gone too far in many areas in trying to assume powers that belong to the President and the executive branch,” and that “We should never send a President of this great country to the bargaining table with one hand tied behind him.” Ford was particularly critical of how intelligence reforms had deprived the president of quality intelligence, which was all the more critical as the Iranian Revolution gathered steam.<sup>241</sup>

Ford had not always been such a staunch defender of the executive. A multi-term congressman from Michigan, Ford gave a speech in December 1963 on the “Growth of

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<sup>239</sup> Memo; from Ron Nessen through Dick Cheney to the President; Draft Response to Questions on Presidential Power; Folder: Federal Government Presidential Powers (1); Box 8; Presidential Handwriting File; Gerald R Ford Presidential Library.

<sup>240</sup> Alex Hindman, *Gerald Ford and the Separation of Powers: Preserving the Constitutional Presidency in the Post-Watergate Period* (Lanham, Maryland: Lexington Books, 2017), pg. 83.

<sup>241</sup> Marjorie Hunter, “Ford Says That Congress Hobbles President by Foreign Policy Action,” *The New York Times*, December 14, 1978, sec. Archives, <https://www.nytimes.com/1978/12/14/archives/ford-says-that-congress-hobbles-president-by-foreign-policy-action.html>.

Executive Power.” In a spirited defense of the separation of powers, he said, “If the executive branch succeeds through the exercise of its tremendous power in obtaining control of the legislative branch, as has been increasingly the case, then tyranny is the result.” Like Church and Mathias after him, Ford juxtaposed the bloated presidency with references to Hitler, Mussolini, and Stalin, alongside quotations from *The Federalist Papers*. While later liberal senators placed the blame for the accretion of presidential power on a constant crisis which pervaded the nation since the Great Depression, Ford blamed the politics of promises, which in a modern-day spoils system, used leverage over interest groups to ensure a subservient Congress.<sup>242</sup> However, where one stands often depends on where one sits, and the Oval Office is a most intoxicating seat of power.

Despite his past views, the Ford administration was eager to defend the presidency and saw legislative veto by concurrent resolution as an important issue. The legislative veto was not a new issue; Franklin Roosevelt made similar objections to provisions within the Lend-Lease Act of 1941, and the First and Second War Powers Acts during World War II. President Hoover created the concept in 1929 when he wanted to streamline his government reorganization bill by having Congress vote up-or-down on his proposed reorganization.<sup>243</sup> However, Congress in the 1970s began included legislative veto clauses in a wide variety of legislation, ranging from war powers to impoundment, and agency regulations, and even allowed a single house or committee in some cases to pass a concurrent resolution without presidential assent.<sup>244</sup> In September 1974, Stanley Ebner, General Counsel to the Office of Management and Budget, formed a task force to

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<sup>242</sup> Speech; Gerald R. Ford; December 1963; Growth of Executive Power; Box D16; Ford Congressional Papers: Press Secretary and Speech File; Gerald R. Ford Library.

<https://www.fordlibrarymuseum.gov/library/document/0054/4525802.pdf>.

<sup>243</sup> Louis Fisher, "The legislative veto: Invalidated, it survives." *Law & Contemp. Probs.* 56 (1993): 273.

<sup>244</sup> Louis Fisher, "The legislative veto: Invalidated, it survives." *Law & Contemp. Probs.* 56 (1993): 273.



tackle legislative encroachments, which primarily focused on legislative vetoes, although restrictions on appointments and executive agreements could also be included. In a tone similar to Church and Mathias, the task force warned the legislative veto “could conceivably be used to entirely usurp the Executive’s independent authority.”<sup>245</sup> Justice Department lawyers even drew up a list of statutes which included legislative veto provisions for presidential counsel Rodrick Hills in June 1975. The list included 119 laws which allowed Congress to sidestep the president’s veto power, although the list was likely incomplete due to a rushed schedule and limited staff.<sup>246</sup> Ford used his veto power to block the more egregious legislative encroachments, while Justice Department lawyers Robert Bork, Antonin Scalia, and White House Counsel Philip Buchen produced legal analysis and congressional testimony registering their opposition.

### **Passing the Bill**

While the executive and legislature sparred over niche constitutional questions, the National Emergencies Act wound its way through Congress. On May 21, 1975, the bill left the House Judiciary Committee and later passed the full House on September 4, with only five representatives voting against it. Those five, led by Rep. John Conyers (D-MI) and Rep. Robert Drinan (D-MA), wanted to automatically terminate national emergencies after only 90 days, effectively undoing the delicate compromise with the executive, but their amendment failed and the law passed.<sup>247</sup> The bill then went to the Senate Government Operations Committee once again, where it passed with some technical amendments on August 26, 1976. The Senate then sent the bill to the president’s desk and he signed it on September 14, 1976, almost two years

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<sup>245</sup> Alex Hindman, *Gerald Ford and the Separation of Powers: Preserving the Constitutional Presidency in the Post-Watergate Period* (Lanham, Maryland: Lexington Books, 2017), pg. 203.

<sup>246</sup> Memo; Bobbie Kilberg to Roderick M. Hills; June 20, 1975; Folder: Tab R- Legislative Encroachments 1; box 19; Bobbie Greene Kilberg Papers; Ford Presidential Library.

<sup>247</sup> 121 Cong. Rec., pg. 27632-27646.

after its first introduction and four years after the special committee began. Assessing the committee's work, Sen. Mathias said, "The work done by the Special Committee on Emergency Powers has been a pioneering effort. It has laid the groundwork, I believe, for bringing the whole area of national security and secret activities under constitutional processes."<sup>248</sup>

The Ford administration turned the bill signing into a non-event. The president only invited Sen. Mathias to the Oval Office for the ceremony, but upon arriving, he realized no one had even bothered to tell Sen. Church. Mathias had to call his co-chair and bring him to the White House for a brief photograph and signing. Mathias brought his two sons along to witness the ceremony, but the only officials there were Ford, Mathias, and Church. The bill signing was not even on the president's official schedule; the press only learned about it when Ron Nessen casually mentioned it at a press briefing. The press peppered Nessen wanting to know why the National Emergencies Act, which Church referred to as the most important bill he had passed in Congress, had received no attention and was signed in private. Nessen had to obfuscate by saying someone else made the decision to sign the bill privately, but he could not give a clear answer as to who. Helen Thomas, the longtime White House correspondent for United Press International, asked why the administration buried the bill signing: "It [NEA] takes a hell of a lot of power away from the President. Not to spotlight legislation like that is incredible, especially after the kind of exposure we have had on bill signings of much lesser impact on the Nation." The press pool also pointed out the hypocrisy of the president supporting legislation promoting transparency in government while signing major bills covertly, without any press involvement.

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<sup>248</sup> 122 Cong. Rec., pg. 28225.

Nessen stonewalled and insisted that bill signings were an internal White House matter and would stay as such.<sup>249</sup> It is unclear who decided to keep the bill signing private or why.

In his signing statement, Ford made his disapproval of the National Emergencies Act's legislative veto provision clear. He stated, "Such provisions are contrary to the general constitutional principle of separation of powers whereby Congress enacts laws but the President and the agencies of government execute them." He continued, saying, "they violate Article I, section 7 of the United States Constitution which requires that resolutions having the force of law be sent to the President for his signature or veto."<sup>250</sup> Ford even pointed out that he had directed the Attorney General to join the lawsuit *Buckley v Valeo*, which would challenge the constitutionality of the legislative veto provision in the Federal Election Campaign Act, although the Supreme Court ultimately declined to definitively rule on the issue. Despite the issue of legislative encroachment, the Ford administration supported the National Emergencies Act and worked with the special committee to produce an acceptable bipartisan bill.

The National Emergencies Act was the first time Congress set limits on the president's emergency powers. Like the War Powers Act, it established procedures for the president to follow when exercising emergency powers, while also mandating consultation with Congress and transparency within the executive branch. The National Emergencies Act had several goals: to reassert congressional oversight over emergency powers, to establish procedures to prevent legal ambiguities in a crisis, to end government by permanent emergency, and to ensure Congress would never be blindsided by undiscovered accumulated powers again.

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<sup>249</sup> Press Secretary Briefing; Ron Nessen; September 14, 1976; Press Secretary Briefings, 9/14/76; Box 22; Ron Nessen Files; Gerald R. Ford Library; <https://www.fordlibrarymuseum.gov/library/document/0151/1671720.pdf>.

<sup>250</sup> Press Release; Statement by the President upon signing the National Emergencies Act; September 14, 1976; White House Press Releases; Box 30; Gerald R. Ford Library; <https://www.fordlibrarymuseum.gov/library/document/0248/whpr19760914-009.pdf>.

Shortly after the National Emergencies Act passed, Congress tackled the Trading with the Enemy Act, the statutory authorization for so much of the United States' Cold War sanctions architecture. By the 1970s, the Trading with the Enemy Act was the basis for economic sanctions on the People's Republic of China, North Vietnam, Cuba, North Korea, and several other communist foes.<sup>251</sup> The federal government has also emergency powers to support some intrusive economic intervention in the vein of FDR's bank holiday. Between 1945 and 1952, the U.S. government seized and operated 35 private businesses, relying on the War Labor Disputes Act and, after it expired, the 1916 Transportation Act.<sup>252</sup> By the 1970s, the political calculus favored deregulation and removing federal economic controls. This intersected with the drive to reform emergency powers to produce the International Emergency Powers Act of 1977 (IEEPA).

Congress passed IEEPA on December 15, 1977, and President Carter signed it on December 28.<sup>253</sup> The act limited the Trading with the Enemy Act to declared wars and amended related laws to ensure congruity across statutes. The law granted the president the authority to "investigate, regulate or prohibit – (i) any transactions in foreign exchange, (ii) transfers of credit or payments between, by or through or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof, (iii) the import or export of currency or securities" and also gave the president sweeping powers over property "in which any foreign country or a national thereof has any interest." However, unlike the Trading with the Enemy Act, this authority applied only "any unusual and extraordinary threat, which has

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<sup>251</sup> U.S. Congress, House, Subcommittee on International Economic Policy and Trade of Committee on International Relations, *Emergency Controls on Economic Transactions*, 95th Cong., 1st session, 1977, pg. 102.

<sup>252</sup> Harold Relyea, *A Brief History of Emergency Powers in the United States*, report prepared for the use of the Special Committee on the Termination of the National Emergency, 93rd Cong., 2nd sess., 1974, Committee Print., pg. 108.

<sup>253</sup> Harold Relyea, *A Brief History of Emergency Powers in the United States*, report prepared for the use of the Special Committee on the Termination of the National Emergency, 93rd Cong., 2nd sess., 1974, Committee Print., pg. 108.

its source in whole or substantial part outside of the United States” for which the president had declared a national emergency, meaning the president could not use IEEPA for domestic economic controls as Franklin Roosevelt used the Trading with the Enemy Act. It is also worth noting that Carter, much like Ford, objected to IEEPA’s legislative veto provision, indicating an institutional rather than partisan conflict over congressional powers.<sup>254</sup> The National Emergencies Act and IEEPA created a new legal regime for emergency powers, organizing a patchwork quilt of legal authorities into a coherent framework, the product of executive and legislative compromise.

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<sup>254</sup> James E. Carter, “Presidential Powers During Wartime and National Emergencies, Presidential Signing Statement by James E. Carter,” December 28, 1977, [https://congressional.proquest.com/legisinsight?id=PL95-223PS&type=PRES\\_SIGN\\_STMT](https://congressional.proquest.com/legisinsight?id=PL95-223PS&type=PRES_SIGN_STMT).

### **Conclusion: The Phantom Emergency**

The National Emergencies Act did not restore the constitutional balance of powers as its drafters envisioned, nor did it end the permanent state of emergency, nor foreclose any potential abuse of emergency powers. For the most part, the law was an absolute failure. There are now more than 30 active national emergencies, which stretch back to 1979, when Jimmy Carter declared a national emergency using IEEPA to block “all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States...”<sup>255</sup> Presidents have routinely extended this national emergency through the National Emergencies Act, producing a 40-year emergency. Presidents have declared 58 national emergencies since 1976 and 31 of them are still ongoing.<sup>256</sup> While the president may not exercise the nearly dictatorial powers left on the books in 1975, presidents may still exert tremendous influence over the lives of American citizens through economic controls, seizure of internet infrastructure, or deploying U.S. armed forces domestically. A recent Brennan Center for Justice report found 123 statutes delegating to the president additional authority in a national emergency, which while a decrease from 470 statutes, is not insubstantial.<sup>257</sup>

Why did the National Emergencies Act fail? Part of it was congressional acquiescence. Although Congress is required to vote every six months to terminate a national emergency, they have yet to hold a single such vote in over 40 years under the National Emergencies Act. No one

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<sup>255</sup> Jimmy Carter, Proclamation, “Blocking Iranian Government Property, Executive Order 12170 of Nov. 14, 1979,” *Federal Register* 44 (November 14, 1979): 65729, <https://www.archives.gov/federal-register/codification/executive-order/12170.html>

<sup>256</sup> “Emergency Powers | Brennan Center for Justice,” accessed March 17, 2019, <https://www.brennancenter.org/analysis/emergency-powers>.

<sup>257</sup> Elizabeth Goitein, “The Alarming Scope of the President’s Emergency Powers,” *The Atlantic*, February 2019, <https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/>.

knows why this has never happened, but when representatives and senators focus increasingly on fundraising, there is little time for legislating on issues which until recently few people have noticed.<sup>258</sup> This has allowed the presidency to run roughshod over the coequal branch, declaring and extending national emergencies without so much as a whimper from the legislature. Another danger of the National Emergencies Act is that it gives the president nearly absolute discretion in declaring an emergency, which is why the Sudanese Civil War, Somali pirates, and, now, a “crisis” at the southern border rise to the level of national emergencies.<sup>259</sup> Because National Emergencies Act preserved the executive’s ability to define a national emergency extremely broadly, the president can declare anything a national emergency and based on current case law, the judiciary would have a difficult time second-guessing the president’s judgment.<sup>260</sup> This was one prediction of Clinton Rossiter’s influential *Constitutional Dictatorship*, which argued allowing the executive to define the terms of its own powers could lead to abuses when a democratic state concentrates power in the executive during a crisis.<sup>261</sup> Yet congressional acquiescence when drafting the bill also proved lethal; much like the War Powers Resolution, the NEA gave the presidency enough statutory authorization to accomplish its policy goals while blessing the president’s actions with congressional authorization.<sup>262</sup>

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<sup>258</sup> David Jolly, “Peeling Back the Curtain, *Politico*, January 19, 2016, <https://www.politico.com/f/?id=00000152-5783-daaf-a75b-7fa766540000>.

<sup>259</sup> Barack Obama, Proclamation, “Blocking Property of Certain Persons With Respect to South Sudan, E.O. 13664 of Apr 3, 2014,” *Federal Register* 79 (April 7, 2014): 19281-19285, <https://www.federalregister.gov/documents/2014/04/07/2014-07895/blocking-property-of-certain-persons-with-respect-to-south-sudan>; Barack Obama, Proclamation, “Blocking Property of Certain Persons Contributing to the Conflict in Somalia, E.O. 13536 of Apr 12, 2010,” *Federal Register* 75 (April 15, 2010): 19869-19872, <https://www.federalregister.gov/documents/2010/04/15/2010-8878/blocking-property-of-certain-persons-contributing-to-the-conflict-in-somalia>.

<sup>260</sup> *Martin v. Mott*, 25 U.S. 12 (1827)

<sup>261</sup> Clinton Rossiter, *Constitutional Dictatorship : Crisis Government in the Modern Democracies* (New Brunswick, N.J.: Transaction Publishers, 2002).

<sup>262</sup> Louis Fisher and David Gray Adler, “The War Powers Resolution: Time to Say Goodbye,” *Political Science Quarterly* 113, no. 1 (March 1998): 1–20, <https://doi.org/10.2307/2657648>.

The Supreme Court is also partially responsible for neutering the National Emergencies Act. In *INS v. Chadha* (1983), the Supreme Court ruled that a congressional resolution could not override an emergency declaration without the president's signature.<sup>263</sup> The need to overcome an inevitable veto forces Congress to muster a two-thirds vote in both houses should it ever try to claw its power back under the terms of the National Emergencies Act. This only increased the obstacles for Congress to reassert its statutory authority under the NEA.

The National Emergency Act was also a product of Vietnam and Watergate, and without recent political shocks driving popular support for reform, the statutes ultimately failed to accomplish their goals. Leading advocates for addressing overgrown emergency powers failed to anticipate future demands for an assertive presidency during the War on Terror, failed to build popular awareness or support for the issue, and made critical decisions in the legislative process which undermined the reform effort.<sup>264</sup> Over time, enthusiasm for the reform dwindled as executive power faded from the forefront of political concerns and the liberal anti-war cohort of senators gradually left office.

But ultimately, the realities of American hegemony demand a strong president capable of responding to crises and exercising a coherent foreign policy. Senator Fulbright, speaking during the Vietnam War said that if "America is to become an empire, there is very little chance that it can avoid becoming a virtual dictatorship as well."<sup>265</sup> Professors Adrian Vermuele and Eric Posner argue in *Executive Unbound: After the Madisonian Republic* that emergency powers might undermine liberal constitutionalism, allowing for a stronger executive more adaptable to

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<sup>263</sup> *INS v Chadha*, 462 U.S. 919 (1983).

<sup>264</sup> Julian E. Zelizer, "Seeds of cynicism: The struggle over campaign finance, 1956–1974" *Journal of Policy History* 14, no. 1 (2002): 73-111.

<sup>265</sup> 115 CONG. REC. 16618 (June 19, 1969) (Statement of Senator Fulbright).



the rigors of modern governing.<sup>266</sup> Routine emergency government, which tracked the growth of the American state during the New Deal and Cold War, had become too indispensable to the realities of governing to eliminate. Emergencies allowed the executive to take decisive steps outside of traditional avenues of the political process. The demands of the modern American state, especially in foreign affairs, has drawn presidents towards emergency powers as Congress and the judiciary stand mutely by. The National Emergencies Act failed to address the roots causes of the growth of emergency power in the 20<sup>th</sup> century and as a result, lies utterly broken by ongoing constitutional behaviors.

However, the dynamics encouraging dependence on permanent emergencies have changed since the National Emergencies Act became law. Originally, routine use of emergency powers was a way of managing a large federal bureaucracy, especially during severe crises. Now, partisanship in Congress has turned the American legislature into a dysfunctional parliamentary circus, a shadow of its former self. The vast majority of ongoing national emergencies use IEEPA to sanction state and non-state actors around the world, simply because going to an intensely partisan Congress would consume precious political capital and man-hours. The rising tide of partisanship is better tackled by scholars like Julian Zelizer and Kevin Kruse, or Norm Ornstein and Thomas Mann.<sup>267</sup> However, the undeniable rise of partisanship in American politics, desiccating and incessant though it may be, could bring about new restrictions on presidential powers. When he declared a national emergency, President Trump said, “So I’m going to be signing a national emergency. And it’s been signed many times before. It’s been signed by other Presidents from 1977 or so. It gave the Presidents the power. There’s rarely been

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<sup>266</sup> Posner and Vermeule, *The Executive Unbound*.

<sup>267</sup> Thomas E. Mann, and Norman J. Ornstein, *It’s even worse than it looks: How the American constitutional system collided with the new politics of extremism*, (Basic Books, 2016).; Kevin Kruse and Julian E. Zelizer, *Fault Lines: A History of the United States since 1974*, (New York: WW Norton, 2019).

a problem. They sign it; nobody cares. I guess they weren't very exciting. But nobody cares."<sup>268</sup>

But suddenly, it seems people care once again. For the first time under the National Emergencies Act, Congress, on February 22, 2019, voted to end a national emergency.<sup>269</sup> On March 14, 59 senators, both Republicans, and Democrats like the National Emergencies Act's drafters, voted to terminate Trump's national emergency, prompting the president to tweet only minutes later "VETO!"<sup>270</sup> The next day, the president followed through on his tweet, issuing his first veto and the first-ever veto of a bill to terminate a national emergency.<sup>271</sup> The entire episode reiterates the mixed politics of presidential power, as the libertarian right slides leftward. Sen. Jerry Moran (R-KS) said, "I believe the use of emergency powers in this circumstance violates the Constitution. This continues our country down the path of all-powerful executive — something those who wrote the Constitution were fearful of. ... The law passed by Congress years ago allowing the president emergency powers is flawed and needs to be repealed or amended."<sup>272</sup> Sen. Mitt Romney (R-UT) voted for repealing the emergency, saying "This is a

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<sup>268</sup> Donald J Trump, "Remarks by President Trump on the National Security and Humanitarian Crisis on our Southern Border," (speech, Washington D.C., February 15, 2019), White House, <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-national-security-humanitarian-crisis-southern-border/>

<sup>269</sup> Emily Cochrane, "House Votes to Block Trump's National Emergency Declaration About the Border," *The New York Times*, February 27, 2019, sec. U.S., <https://www.nytimes.com/2019/02/26/us/politics/national-emergency-vote.html>.

<sup>270</sup> Emily Cochrane and Glenn Thrush, "Senate Rejects Trump's Border Emergency Declaration, Setting Up First Veto," *The New York Times*, March 15, 2019, sec. U.S., <https://www.nytimes.com/2019/03/14/us/politics/senate-vote-trump-national-emergency.html>.; Donald J. Trump, "VETO!," Tweet, @realDonaldTrump (blog), March 14, 2019, <https://twitter.com/realDonaldTrump/status/1106272915488686080>.

<sup>271</sup> Michael Tackett, "Trump Issues First Veto After Congress Rejects Border Emergency," *The New York Times*, March 15, 2019, sec. U.S., <https://www.nytimes.com/2019/03/15/us/politics/trump-veto.html>.

<sup>272</sup> Senator Jerry Moran, "I Share President Trump's Goal of Securing Our Borders, but Expanding the Powers of the Presidency beyond Its Constitutional Limits Is Something I Cannot Support. Here Are My Thoughts on How I Came to This Decision:Pic.Twitter.Com/DEHoBuNdhu," Tweet, @JerryMoran (blog), March 14, 2019, [https://twitter.com/JerryMoran/status/1106241585082175491?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1106241585082175491&ref\\_url=https%3A%2F%2Fwww.nytimes.com%2F2019%2F03%2F14%2FuS%2Fpolitics%2Fsenate-vote-trump-national-emergency.html](https://twitter.com/JerryMoran/status/1106241585082175491?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1106241585082175491&ref_url=https%3A%2F%2Fwww.nytimes.com%2F2019%2F03%2F14%2FuS%2Fpolitics%2Fsenate-vote-trump-national-emergency.html).

vote for the Constitution and for the balance of powers that is at its core. For the Executive Branch to override a law passed by Congress would make it the ultimate power rather than a balancing power.”<sup>273</sup>

Sen. Mike Lee (R-UT) even introduced a bill to reform the National Emergencies Act. Called the “Assuring that Robust, Thorough, and Informed Congressional Leadership is Exercised Over National Emergencies Act” or ARTICLE ONE Act, the bill, sponsored by 14 Republican senators, limits national emergencies to 30 days, requires a congressional vote to extend a national emergency further, introduces new reporting requirements, and allows Congress to limit the president’s specific emergency powers while approving the national emergency declaration.<sup>274</sup> Even President Trump supports reforming the NEA, tweeting, “If, at a later date, Congress wants to update the law, I will support those efforts but today’s issue is BORDER SECURITY and Crime!!! Don’t vote with Pelosi!”<sup>275</sup> Whether or not meaningful reform of the National Emergencies Act materializes, this episode highlights how in a deeply partisan era, constitutional prerogatives and fears of unchecked presidential power can still overcome party lines. Studying previous reforms of national emergencies and their role in American history can reveal the merits and faults of the National Emergencies Act and help inform the future of presidential power. For future reforms to succeed, they will have to avoid

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<sup>273</sup> “Romney Announces Vote to Disapprove of National Emergency Declaration | Senator Mitt Romney,” accessed March 17, 2019, <https://www.romney.senate.gov/romney-announces-vote-disapprove-national-emergency-declaration>.

<sup>274</sup> United States Senator Mike Lee, “Sen. Lee Introduces ARTICLE ONE Act to Reclaim Congressional Power,” accessed March 17, 2019, <https://www.lee.senate.gov/public/index.cfm/2019/3/sen-lee-introduces-article-one-act-to-reclaim-congressional-power>.

<sup>275</sup> Donald J. Trump, “...If, at a Later Date, Congress Wants to Update the Law, I Will Support Those Efforts, but Today’s Issue Is BORDER SECURITY and Crime!!! Don’t Vote with Pelosi!,” Tweet, *@realDonaldTrump* (blog), March 14, 2019, [https://twitter.com/realDonaldTrump/status/1106196591453577217?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1106196591453577217&ref\\_url=https%3A%2F%2Fwww.nytimes.com%2F2019%2F03%2F14%2Fus%2Fpolitics%2Fsenate-vote-trump-national-emergency.html](https://twitter.com/realDonaldTrump/status/1106196591453577217?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1106196591453577217&ref_url=https%3A%2F%2Fwww.nytimes.com%2F2019%2F03%2F14%2Fus%2Fpolitics%2Fsenate-vote-trump-national-emergency.html).

the pitfalls of institutional indolence, procedural shortsightedness, and deference which doomed the National Emergencies Act; perhaps further studying the legislation's history will reveal important insights into how to address presidential powers today.

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