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George G. Slater

*Indiana University School of Law – Indianapolis*

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# The National Emergencies Act of 1976— End of Emergency Government?

GEORGE SLATER

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## INTRODUCTION

National emergencies, like small wars in distant countries, are easier to get into than they are to escape. Unlike wars, however, the “temporary” powers which national emergencies invoke gradually insinuate themselves into the day-to-day operation of the government where they are largely safe from public and Congressional scrutiny. These emergency powers give the executive extraordinary authority, which if made permanent, would clearly be repugnant to the Constitution. Today we live under four presidentially proclaimed states of national emergency.<sup>1</sup> In response to the numerous bank failures during the Great Depression (1933), President Roosevelt declared a state of national emergency. In the face of “communist aggression” in Korea (1950), President Truman declared a national emergency. President Nixon reacted to a strike by U.S. postal workers (1970) and to a large balance of payments deficit in overseas trade (1971) by declaring states of national emergency. None of these proclamations have ever been terminated.<sup>2</sup>

In each case the President proclaimed a state of national emergency in order to trigger special statutory authority meant for use by the executive branch in a time of national crisis. For example, government agencies must normally advertise their intention to procure property or services. Competitive bids are then received and the lowest bid is accepted. Special legislation provides, however, that the agency will have authority to negotiate purchases **without advertising during a national emergency.**<sup>3</sup> Another law provides that price ceilings which normally limit the amount a government agency may spend to lease property are lifted during a national emergency.<sup>4</sup> Another statute suspends normal limitations on the number of military officers in the Armed Services during a national emergency.<sup>5</sup> In total, there exist today some 470 provisions of federal law which give the executive branch extraordinary authority in time of a national emergency.<sup>6</sup>

The problem is that although the various crisis situations which have given rise to declarations of national emergency have passed, a legal state of national

emergency remains. This means that the executive branch has available, on a daily basis, the authority of some 470 separate statutes meant only to be available in time of actual emergency conditions. It has been said that, "This vast range of powers, taken together, confer enough authority to rule the country without reference to normal constitutional processes."<sup>7</sup> This refers to the fact that by using all of the emergency statutes on a daily basis, the executive branch could rule the country without consulting Congress, thus upsetting the checks and balances that are an integral part of our constitutional system. Thomas Jefferson recognized that "the way to have a good and safe government, is not to trust it all to one, but to divide it among the many." In answer to his own question, "What has destroyed liberty and rights of man in every government which has ever existed under the sun?", he replied, "the generalizing and concentrating of all cares and powers into one body."<sup>8</sup> The Special Senate Committee on National Emergencies and Delegated Emergency Powers, whose history will be discussed, concluded that they could not "accept any doctrine which holds that a nation in *extremis* must submit to the will of a single individual."<sup>9</sup>

The executive branch's use of national emergency power on a continuous basis is not just a theoretical concern, but is an everyday fact of life. Many departments of the executive branch continue to use national emergency authority in their everyday operations relying on the fact that past declarations of national emergency have never been formally terminated. As will be demonstrated, our court system has readily affirmed the agencies' use of such authority by refusing to "look behind" a declaration of national emergency to see if, in reality, one exists. In other words, the courts have not been willing to second guess the executive branch's evaluation that a national emergency declared years ago still exists. Thus, the state of national emergency existing today is a fiction allowed to continue by the executive branch in order to utilize the various national emergency powers available to it by statute, and the fiction has been upheld by the courts.

In the late 1960's and early 1970's several members of Congress became increasingly concerned that the President was thwarting the legislative intent of Congress by allowing the executive branch to continue to use emergency authority long after the conditions which prompted the declarations of emergency had disappeared.<sup>10</sup>

The legislators were trying to face the fact that,

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 great crisis and dire emergency — but do so in ways assuring both that such necessary powers will be terminated immediately when the emergency has ended and that normal processes will be resumed — has not yet been resolved in this country.<sup>11</sup>

The National Emergencies Act of 1976 is a congressional attempt to insure that the executive branch's exercise of national emergency authority is "responsible, appropriate, and timely."<sup>12</sup> The National Emergencies Act is divided into five titles. Title One terminates on September 14, 1978 most Executive authority which is based on **past** proclamations of national emergency.<sup>13</sup> The Act does not terminate the old proclamations themselves, but instead revokes the statutory authority invoked by the past proclamations.

Since the only Executive authority that is revoked is that which is based upon past proclamations of national emergency, the statutory authority remains available to the President whenever he proclaims a new national emergency.

To illustrate, one statute permits the President, during a war or national emergency, and upon the application of any country, to detail members of the armed forces to assist that country in military matters.<sup>14</sup> The President presently has this authority available to him since the United States is still in a legal state of national emergency as a result of the unterminated proclamations. After September 14, 1978, the effective date of the National Emergencies Act, this authority will only be available to the President upon a new proclamation of war or national emergency.

Titles Two,<sup>15</sup> Three,<sup>16</sup> and Four<sup>17</sup> of the Act institute specific procedures to be followed after the declaration of any future national emergency. Title Five<sup>18</sup> excepts certain national emergency power statutes from the effect of the National Emergencies Act.

The purpose of this article is to examine whether the National Emergencies Act will accomplish its purpose of insuring that the exercise of national emergency authority by the Executive is responsible, appropriate, and timely. While the National Emergencies Act has drawn a certain amount of attention to the problem, it has, by no means, solved it. The Act exempts from its provisions eight statutes which the executive branch considers "vital" national emergency authority.<sup>19</sup> The obvious paradox of these exceptions, which is one of the most important continuing problems in the area, is more easily understood after an examination of how the National Emergencies Act came to be law.

## LEGISLATIVE HISTORY

Congress finally came to grips with the problems of ending our current national emergencies after a long period of neglect. It is true that the primary responsibility for ending presidentially declared emergencies lies with the President; but Congress' refusal to face the consequences of failure by the Executive to administer this responsibility has contributed significantly to the current chaos. The story of the development and passage of the National Emergencies Act of 1976 illustrates the continuing problems of dealing with this long neglected area.

The American experience in Vietnam seemed to focus Congressional attention on the national emergency power problem, as Senator Charles Mathias testified:

My own interest in the question of emergency powers developed out of our experience in the Vietnam War and the incursion into Cambodia. It became clear that the President had powers to commit us to warfare without adequate respect for the constitutional requirement that Congress alone can declare a state of war.<sup>20</sup>

In 1972 the Senate formed a new committee, The Special Committee on the Termination of the National Emergency, to consider what problems might arise as a result of terminating the only national emergency known at that time to the Senate to be in existence (the 1950 Korean proclamation). The committee was empowered "to conduct a study and investigation with respect to the termination of the 1950 emergency, to consider problems which might arise as the result of

the termination and to consider what administrative or legislative actions might be necessary.”<sup>21</sup> The name of the Special Committee on the Termination of the National Emergency was subsequently changed to the Special Committee on National Emergencies and Delegated Emergency Powers (hereinafter called the Special Committee) when it was learned that not one but four national emergencies remained unterminated. The Special Committee was unusual in that it was to be completely bipartisan in nature and, in fact, consisted of four Democrats and four Republicans. Senator Mathias explained,

The Committee’s bipartisan nature reflects the intention of the Senate to examine emergency powers legislation solely from a constitutional perspective. We want to determine how these powers affect the proper relationship between the Executive and Legislative branches.<sup>22</sup>

The Special Committee was limited in that it could not report a bill directly to the floor of the Senate but could only recommend action.

The Special Committee began its inquiry by compiling a list of all statutes that gave the Executive special authority in time of national emergency.<sup>23</sup> No complete list existed prior to that time which meant that the Special Committee’s staff had to devise computer programs to search the United States Code for key words such as national emergency, war, national defense, invasion, insurrection, etc. The computer lists then had to be hand checked for accuracy. Until the task was complete, not only did the Congress not have a complete listing of the emergency power delegated to the Executive, but the Executive did not have a complete listing of the emergency power available to it! Senator Church called the compilation one of the Special Committee’s proudest accomplishments.<sup>24</sup>

During the hearings which the Special Committee conducted, a number of constitutional scholars were asked to testify. Much of the testimony confirmed the importance of the inquiry at hand. Dr. Robert S. Rankin, Professor Emeritus of Duke University, warned of the growth in the use of emergency power. He commented on the growth in the last twenty years of “an almost impassioned devotion in the United States to constitutional rights,” but then noted the proliferation of international and domestic crises and added, “This strong devotion to constitutional rights has not prevented the use of emergency power to a degree that would shock many of our constitutional fathers.”<sup>25</sup> The point is that emergency power placed with the President in order that he may be prepared to preserve and protect society in time of crisis is at odds with the constitutional rights of the people and the civilian control of government, which antagonistic functions are both essential characteristics of a durable democratic society. Dr. Rankin’s conclusion was that emergency powers are necessary but must be carefully controlled. He testified, “I think of emergency power as in the same category as morphine. Used properly and within bounds set up by the Constitution it becomes restorative in nature and has a proper place within a democracy. Used improperly it is the very essence of tyranny.”<sup>26</sup>

Dr. Gerhard Casper, Professor of Law and Political Science at the University of Chicago, added historical insight to the Senate hearings by noting the experience of the post-World War I German government whose executive branch used emergency powers with such frequency as to destroy democracy as we know it. He pointed out that “Under Article 48 of the Weimar Constitution, the President had the authority to take emergency measures when public safety and order were endangered. What constitutional lawyers of the Weimar era called

with admirable frankness, 'the directorial powers' of the President, were invoked approximately 136 times between 1919 and 1925."<sup>27</sup>

No one knows exactly how often our Presidents have acted pursuant to emergency power statutes.<sup>28</sup> The Special Committee did compile a list of **Executive Orders in Times of War and National Emergency** but admits that "there is, regrettably no way of being certain that this compilation contains all Executive Orders still in effect issued pursuant to emergency power statutes."<sup>29</sup>

Late in 1973 the Special Committee sent out a form letter<sup>30</sup> requesting that each Executive department that had been delegated emergency statutory authority evaluate the impact of terminating such authority until a future emergency arose. The Special Committee was surprised to find that several agencies' day-to-day operations rested in part on a legal foundation of emergency authority.<sup>31</sup> Nevertheless, the Special Committee's plan to phase out national emergency authority still seemed reasonable. The effective date of the National Emergencies Act was to be one year (later changed to two) from the date of its enactment; a grace period was being given the agencies — time in which to seek permanent legislation replacing the emergency authority. The agencies, however, are well acquainted with the extra discretion and flexibility emergency power gives them and appear to be very hesitant to give it up or to submit these powers to Congressional review. Throughout the balance of the life of the Special Committee, various agencies argued for exceptions from the proposed legislation, and eight exceptions were finally agreed upon. Senator Church said,

[W]e wrote these exceptions into the law with very considerable misgivings.

But in order to reach an accommodation that would permit unanimous action in the Senate and give the promise of a Presidential signature, we did make these exceptions. They thought these particular laws were so vital, they didn't want them placed in a questionable status.<sup>32</sup>

On August 22, 1974 after considering the information gathered in the hearings and the replies from the various executive departments, the Special Committee issued an interim report of findings and recommendation saying, in part, "In our view, Congress should provide statutory guidelines to assure the full operation of constitutional processes in time of war or emergency. This is the best prescription to avoid any future exercise of arbitrary authoritarian power."<sup>33</sup> It recommended legislation "to terminate certain authorities with respect to national emergencies still in effect, and to provide for orderly implementation and termination of future national emergencies."<sup>34</sup> The bill was introduced in the Senate and referred to the Committee on Government Operations. It was finally adopted with amendments on October 7, 1974. The most significant amendment was the exemption of six statutes from the provisions of the bill. Although a version of the Special Committee's recommended legislation was introduced in the House and referred to the Committee on the Judiciary, it was not considered because of other pressing business, mainly the impeachment of Richard Nixon and the nomination of Nelson Rockefeller as Vice President. Thus, the proposed legislation failed to pass both Houses before the adjournment of the 93rd Congress.<sup>35</sup>

With the convening of the 94th Congress, the same proposal was reintroduced into both Houses of Congress, but, again, more pressing business slowed down

consideration of the measure. Although the impeachment inquiry had ended with President Nixon's resignation in August 1974, a new "flap" was developing over revelations of improper activities in the FBI and CIA. In January, 1975, the Senate established a new committee to ". . . conduct an investigation and study of governmental operations with respect to intelligence activities."<sup>36</sup> Senator Frank Church, the Special Committee's co-chairman, was named chairman of this committee and he promptly asked the Staff Director of the Special Committee to become the Staff Director of the new Senate committee. As a result it was over a year before the Special Committee was able to issue its final report. In March, 1975, an entirely new staff of the Special Committee was faced with the task of completing work on the legislation. During the same month the House Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary held hearings and the measure was again amended.<sup>37</sup> The one year grace period, which was designed to give executive agencies a chance to seek permanent law to replace expiring emergency authority, was extended to two years, and additions were made to the list of exemptions from the provisions of the proposed law. The bill was finally adopted by the House on September 4, 1975, and sent to the Senate where it was referred to the Committee on Government Operations. Meanwhile, the final report of the Special Committee was issued urging passage of the National Emergencies Act and concluding that,

[L]egislation is long overdue. A majority of Americans alive today have lived their entire lives under emergency rule. Since 1933, protections and procedures guaranteed by the Constitution have, in varying degrees, been abridged by Executive directives whose legality rests on the continued existence of Presidentially proclaimed states of emergency.<sup>38</sup>

The Committee on Government Operations reported the National Emergencies Act with "one substantial and several technical amendments," deciding that a definition of national emergency should not be included in the bill.

The Committee decided that the definition of when a President is authorized to declare a national emergency should be left to the various statutes which give him extraordinary powers. The National Emergencies Act is not intended to enlarge or add to Executive power. Rather the statute is an effort by the Congress to establish clear procedures and safeguards upon him by other statutes.<sup>39</sup>

President Ford signed the bill into law on September 14, 1976, stating that although he "supported the purposes of the enrolled bill" that one of its provisions, which provided that Congress could terminate a presidentially declared national emergency, was "clearly unconstitutional" and said that he considers that provision separable from the rest of the bill in the event the courts strike down this type of "legislative encroachment" measure.<sup>40</sup>

#### THE EFFORT TO MAKE THE EXECUTIVE'S USE OF NATIONAL EMERGENCY POWER RESPONSIBLE, APPROPRIATE, AND TIMELY

A major goal of the National Emergencies Act was to make the executive branch of government more responsible to Congress when using emergency statutory authority. The legislation was designed to stop "open ended" grants of power to the Executive by terminating the powers available as a result of past declarations of national emergency and to provide statutory guidelines to govern

future declarations. It was felt that if Congress provided statutory guidelines to govern future declarations of national emergency, the President would feel obliged to follow them. At least he would be less likely to act on his own without consulting Congress.

The Special Committee used, as a basic guideline for its work, Justice Jackson's opinion in the famous 1952 case of **Youngstown Sheet & Tube Co. v Sawyer**,<sup>41</sup> in which the Supreme Court held unconstitutional President Truman's attempt to seize control of the striking steel industry. Justice Jackson rejected the notion that a President has "inherent" powers apart from those given him in the Constitution or delegated to him by Congress — even to meet a crisis situation. He said, "such power either has no beginning or it has no end. If it exists, it need submit to no legal restraint. I am not alarmed that it would plunge us straightway into dictatorship, but it is at least a step in that wrong direction."<sup>42</sup> Regarding statutory guidelines he stated:

In the practical working of our Government we already have evolved a technique within the framework of the Constitution by which normal executive powers may be considerably expanded to meet an emergency. Congress may and has granted extraordinary authorities which lie dormant in normal times but may be called into play by the Executive in war or upon proclamation of a national emergency. . . . Under this procedure we retain Government by law — special, temporary law, but law nonetheless.<sup>43</sup>

Former Chief Justice Warren, when counseling the Special Committee, agreed with Justice Jackson's view that where there are statutory guidelines, a President is obliged to follow the precepts contained in the laws passed by Congress and cautioned that inherent powers problems arise when Congress fails to act definitely.<sup>44</sup>

It is important to bear in mind that the Special Committee was concerned with Congress's overdelegation of open ended emergency authority to the Executive, but was not concerned with any express or implied powers given the President by the Constitution. Senator Church stated that "we were principally concerned in establishing statutory procedures to govern future emergencies that would insure Congress the proper legislative role."<sup>45</sup>

Section 101 of the National Emergencies Act seeks to stop open ended grants of authority to the Executive by declaring that "all powers and authorities possessed by the President, any other officer or employee of the Federal Government, or any executive agency . . . as a result of the existence of any declaration of national emergency in effect on the date of enactment of this Act are terminated two years from the date of such enactment."<sup>46</sup> (The date of enactment was September 14, 1976, so the powers and authorities will terminate on September 14, 1978.) The states of national emergency themselves are not terminated but only the authority possessed by the Executive as a result of past declarations of national emergency. Further, most of the statutes remain "on the books" and available to the Executive when a future national emergency is declared.

The Special Committee could have recommended legislation directly terminating the four existing states of national emergency. In fact, this was the inclination of some members.<sup>47</sup> However, they believed that such legislation



would raise a serious constitutional question of whether the separation of powers doctrine would permit a legislative termination of the Executive declarations.<sup>48</sup>

The Special Committee could also have recommended legislation repealing all emergency statutes. The outright repeal of all emergency statutes was discarded because the Committee did not intend to deprive the President of the power necessary to cope with an emergency but only to insure that such declarations be subject to Congressional review.<sup>49</sup>

The Special Committee chose the third alternative — to relegate most of the emergency power statutes to a state of dormancy. Senator Church said, “The statutes conferring emergency powers remain on the shelf, to be pulled off and used as may be required to deal with some future crisis. But procedures governing the use of emergency powers in the future will always be subject to Congressional review.<sup>50</sup> Senator Mathias explained that “While the statutes would go into a state of dormancy . . . , these emergency powers are available to be used upon proclamation of need by the President to meet any future emergency.”<sup>51</sup>

The National Emergencies Act sets forth specific guidelines for the President when he declares a future national emergency. The declaration must be transmitted to Congress and published in the **Federal Register**. Section 201 states, “With respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency. Such proclamation shall immediately be transmitted to the Congress and published in the Federal Register.”<sup>52</sup> In addition to the reporting requirement just mentioned, the President is now required to keep records. Section 401 states that “the President shall be responsible for maintaining a file and index of all significant orders.”<sup>53</sup> He must also keep a record of related expenditures. Section 401(c) states that

When the President declares a national emergency or Congress declares war, the President shall transmit to Congress, within ninety days after the end of each six-month period after such declaration, a report on the total expenditures incurred by the United States Government during such six-month period which are directly attributable to the exercise of powers and authorities conferred by such declaration.<sup>54</sup>

Two major obstacles remain in the effort to make the Executive branch more accountable in their use of national emergency power. The National Emergencies Act did not attempt to solve either. First, the classification of sensitive or important Executive decisions as “confidential,” “secret,” “top secret,” etc. prevents Congressional oversight in most cases. A Special Committee report stated that “While no one would wish to prevent sensitive documents from being classified for reasonable cause, the absolute discretion given to the Executive has led to abuse. It has permitted and encouraged inclusion in this category of many documents in no way connected with essential national security.”<sup>55</sup>

The situation is complicated by the fact that besides Executive Orders, Presidents have used proclamations, letters, memorandums, directives, notices, reorganization plans, administrative designation, and military orders to give effect to their wishes. If the document is not officially designated as an Executive Order or proclamation, the decision of whether or not it will be

published is left to the President.<sup>56</sup> Senator Church summed up the problem well when he said,

Again, Congress' complacency can be cited as the reason for this disorderly state of affairs. Congress has not specified substantive standards under which all — and I emphasize all — presidential directives should be recorded. In addition, Congress has not yet enacted laws to prevent the Executive branch from abusing its power to classify documents where its purpose is to withhold from Congress and the public. The problem of public accountability is unfortunately wrapped in legal controversy and is, in a sense, technical in nature. It involves, however, in a profound sense, the survival of constitutional government.<sup>57</sup>

The second major obstacle to achieving Executive responsibility in the use of national emergency power is the difficulty with finding an effective definition of "national emergency." Webster's dictionary defines "emergency" as a "sudden, generally unexpected occurrence or set of circumstances demanding immediate action."<sup>58</sup> Professor Edward Corwin explains emergency conditions as those which have not attained enough of stability or recurrency to admit of their being dealt with according to rule.<sup>59</sup> In reacting to crises, "distressed" emergencies, "intensified" emergencies, "acute" emergencies, "unprecedented" emergencies, and "unlimited" emergencies have been declared.<sup>60</sup> The point is that in order to avoid the accountability requirements of the National Emergencies Act, the President may just avoid the trigger word "national emergency" when confronted with a crisis situation. In its final report, the Special Committee warned that Congress must be prepared for possible efforts to thwart the intent of the bill by dropping the wording "national emergency" and introducing different terminology.<sup>61</sup>

The National Emergencies Act attempts to make the Executive's use of delegated emergency power not only responsible but also appropriate. The legislation is intended to insure that the Executive will only use the appropriate national emergency authority to confront the crisis at hand. An example will demonstrate that this has not always been the case.

During the Civil War, Congress passed the Feed and Forage Act of 1861 to enable the cavalry in the American West to buy feed for their horses when Congress was out of session. Later, Presidents invoked the authority of this Act . . . to finance American marines in Lebanon in 1958, to support the Berlin mobilization in 1962, and to maintain troops in Southeast Asia.<sup>62</sup>

The President chose not to declare a national emergency during the Vietnam War. There was no need to. He simply relied on the 1950 Korean declaration to trigger any emergency authority he decided to utilize, as the following example shows:

In 1950, Congress passed the Defense Production Act giving the President wide ranging powers to control the production of materials needed for national defense efforts connected with the Korean War. Sixteen years later, the Act was used to fill a Department of Defense order for 3 million tropical uniforms for use in Vietnam. In the fourth quarter of 1966, the President also relied on the law to require steel,

copper, and aluminum producers to set aside part of their output for defense purposes.<sup>63</sup>

In order to encourage the Executive to use only the appropriate national emergency authority, section 301 of the National Emergencies Act specifies that “no powers or authorities made available by statute for use in the event of an emergency shall be exercised unless and until the President specifies the provisions of law under which he, . . . or other officers will act.”<sup>64</sup> The specification must be made in the declaration itself or in a subsequent Executive Order published in the Federal Register and transmitted to Congress.

The National Emergencies Act is also designed to make the Executive’s use of national emergency authority timely. The concept of timeliness blends in somewhat with the companion goals of responsibility and appropriateness, but emphasizes the timing of the declaration and termination of the national emergency.

The legislation was not intended to inhibit in any substantive way the President’s ability to declare a national emergency.<sup>65</sup> During debates on the measure in the House, an amendment was offered which would have limited the conditions under which the President could declare a national emergency, but that proposal was quickly rejected.<sup>66</sup> It was felt that the President needed the “flexibility” to declare a national emergency whenever he deemed it appropriate.

Section 202 of the National Emergencies Act, however, provides that Congress can terminate the emergency by concurrent resolution.<sup>67</sup> The ability to terminate a presidentially declared national emergency acts as a check on the Executive’s untimely use of national emergency power. During House debate on the bill, Representative Moorehead commented on this provision:

[I]t is important that we give our President some flexibility from time to time. This bill gives the Congress the right to wipe out those emergencies on a moment’s notice if we decide it is in the best interest to do so. But let us at least leave the President the constitutional authority he has to protect this country in times of need.<sup>68</sup>

And, as pointed out earlier, this termination by concurrent resolution option of the Congress was the provision President Ford called “unconstitutional” when he signed the bill into law.<sup>69</sup>

## THE EIGHT EXCEPTIONS

The National Emergencies Act exempts from its provisions eight emergency power statutes considered by the Executive to be vital to the operation of government.<sup>70</sup> By allowing the eight exceptions, Congress expressly approved of the Executive’s continued use of the emergency authority contained in those eight statutes. One might ask why the Congress, while trying to pass legislation to end emergency government would allow eight exceptions to the legislation which have the effect of **continuing** emergency government in the United States.

Senator Mathias explained:

The ones that are excepted, or the ones that were particularly requested by the President to be excepted because he felt they were so vital to the operation of Government at this time that he didn’t want to take a chance

that they might not be extended or revised during the 1-year [later change to two] grace period.<sup>71</sup>

It is not difficult to understand why the President and the various executive agencies would argue that the exceptions were vital to the operation of government. The Executive branch is well acquainted with the extra discretion and flexibility that accompanies national emergency authority. In fact, that is the whole idea behind Congress delegating emergency authority to the Executive. Realizing that the Congress, with its many members, tends to react more slowly to a given situation than the President, temporary extraordinary power is delegated to the Executive who is in a better position to use it more swiftly and decisively in meeting a crisis situation. This is hardly new theory. John Locke, the English political philosopher, supported this practice in his *Second Treatise on Civil Government* when he argued that the threat of a crisis, unforeseen, sudden, and potentially catastrophic, required the creation of broad emergency powers that

should be left to the discretion of him that has the executive power . . . since in some governments the lawmaking power is not always in being and is usually too numerous, and too slow for the dispatch requisite to executions " 72

What is not so easy to understand is why the Congress swallowed the Executive's argument. Was not the goal of the National Emergencies Act to end the Executive's day-to-day use of national emergency power? It seems that every exception granted had the effect of directly thwarting this overall legislative purpose. Remember that the National Emergencies Act does not terminate the national emergencies themselves. It only terminates the Executive authority gained by past declarations of national emergency. Thus, the past declarations are still in effect to trigger the authority contained in the eight exceptions.

Are these eight statutes really so vital to the operation of government that they could not have been placed "on the shelf" with the others? The two-year grace period would have permitted the executive agencies time to seek permanent law replacing the emergency authority. By not allowing any exceptions to the National Emergencies Act, Congress would have forced a review of all the Executive's actions which are currently based upon a legal fiction of national emergency.

Evidently, the sponsors of the legislation felt that they had to compromise their position or risk failure to get the legislation signed into law.

We wrote these exceptions into the law with very considerable misgivings . . . But in order to reach an accommodation that would permit unanimous action in the Senate and give the promise of a Presidential signature, we did make these exceptions. They thought these particular laws were so vital, they didn't want them placed in a questionable status.<sup>73</sup>

An examination of the exempted statutes,<sup>74</sup> i.e., those which give the Executive continuing national emergency power, is enlightening. The reader may draw his or her own conclusions on how vital the authority is to the everyday operation of our government.

One of the most significant exceptions from the provisions of the National Emergencies Act is the Trading With the Enemy Act of 1917, as amended,<sup>75</sup>

which is a lengthy statute that during its greater than sixty years of existence has provided the President with, in the words of a House subcommittee,

progressively broader authority to regulate the nation's international (and domestic) finance during periods of declared national emergency. This section has been construed over the years as providing statutory authority for "emergency" actions as diverse as the "bank holiday" of 1933, an alien property freeze and consumer credit controls imposed during World War II, foreign direct investment controls imposed in 1968, and routine export controls in 1972, 1974, and 1976.<sup>76</sup>

The Trading With the Enemy Act is currently the legal authority for a number of government activities. It provides the basis for current trade embargoes against North Korea, Vietnam, Cambodia, and Cuba.<sup>77</sup> It is the legal authority for our government to continue to block (hold) the assets of a number of Eastern European citizens, property which was seized during World War II and vested in the name of the United States Office of Alien Property.<sup>78</sup> Today, the Department of the Treasury manages millions of dollars of such blocked assets. They currently have control of more than \$80 million of assets of the People's Republic of China alone.<sup>79</sup> The Department of the Treasury was an avid supporter of exempting the Trading With the Enemy Act from the provisions of the National Emergencies Act. The Treasury Department's argument was that, although the Fifth Amendment to the Constitution prohibits the taking of property without due process of law, including just compensation, the Trading With the Enemy Act permits such action with respect to foreign property during a national emergency. As a Treasury Department official testified before the Special Committee,

[C]onstitutional problems might arise with respect to the validity for continued blocking of assets of foreign countries if all national emergencies or authorities thereunder were terminated.

....

The problem is the protection of the fifth amendment against the taking of property without due process of law, including proper compensation.

....

However, the situation is different with regard to the blocking of property in time of emergency . . . And the point, in short, is if blocking were attempted under any other authority or any other theory of law than the existence of an emergency, **blocking might prove to be ineffectual constitutionally.** (Emphasis added.)<sup>80</sup>

Thus, the Treasury Department reasoning is that we need the legal fiction of a national emergency to get around the mandates of the Constitution.

In all fairness, the Treasury Department does face a real dilemma in deciding what to do with the blocked assets. One alternative is for the Department to return the assets to the foreign owners without considering whether the foreign governments will return United States citizens' assets which they have blocked. This alternative solves the constitutional problem of taking property without due process, and was urged at the conclusion of an extensive investigation into the administration of the Trading With the Enemy Act in 1957. "Confiscation must not be the practice of a nation which encourages morality in others. Confiscation is the practice of people who deny that morality exists."<sup>81</sup> This approach, however, fails to recognize the "bargaining position" argument, i.e., the benefit gained

from blocking a foreign country's assets until that country agrees to release blocked American assets.<sup>82</sup>

The second alternative is to permanently vest the property — not just block it — and use it to pay American citizens for losses suffered abroad. This action, however, would clearly recognize the act of confiscation and might destroy any chance of future property settlement with these foreign governments.<sup>83</sup>

The last alternative, and the one the Treasury Department has chosen, is to continue blocking the assets hoping it will strengthen their hand in any future property settlements. The major drawback to the continued holding of the assets seems to be their dissipation over time. A 1953 investigation into the administration of the Trading With the Enemy Act revealed that the Office of Alien Property was authorized to defray its expenses out of the proceeds of vested property.<sup>84</sup> The study also recommended an investigation into "persons, manipulations, malfeasance, and misfeasance, of political preference in appointments to lucrative job holdings"<sup>85</sup> within the Office of Alien Property. One also has to ask what the real difference is between the blocking of assets for an indefinite period and outright confiscation. In 1976, Congressman Bingham of New York held hearings<sup>86</sup> to review the current status of the Trading With the Enemy Act. The House considered three bills,<sup>87</sup> resulting in legislation passed by Congress and signed by the President into law at the end of 1977.<sup>88</sup>

Unfortunately, the other exceptions from the provisions of the National Emergencies Act have not received such detailed attention. Section 502(b) of the National Emergencies Act requires that each committee of the House and Senate having jurisdiction with respect to any of the statutes excepted from the provisions of the Act "shall make a complete study and investigation concerning that provision of law and make a report, including any recommendations and proposed revisions such committee may have to its respective House of Congress within two hundred and seventy days."<sup>89</sup> Correspondence between the author and Senator Mathias's office indicates that the required follow-up reports with the exception of the Trading With the Enemy Act report by Congressman Bingham's House subcommittee,<sup>90</sup> have not been prepared. Perhaps the understandable confusion over which committee is responsible for what report is the reason for their unavailability. The only hint of the proper committee jurisdiction is found in the back of the Special Committee compilation of Emergency Power Statutes.<sup>91</sup>

The authorities given government agencies in the statutes exempted from the provisions of the National Emergencies Act are broad authorities — meant only for use in time of real emergency conditions. An agency's ability to lease property without a cost ceiling,<sup>92</sup> to procure property and services without advertising,<sup>93</sup> and to enter into defense related contracts without restriction<sup>94</sup> are large grants of discretionary power to the Executive. In these areas, day-to-day administrative actions will continue to rest on a legal foundation of national emergency.

An examination of some of the agencies' argument for this discretionary power based upon a fictional national emergency is interesting. During House hearings the General Services Administration argued for their continued release from price restrictions when acquiring a leasehold interest in property in this manner:

We had a fire which started to burn up a substantial quantity of personnel records of the Federal Government, and but for the emergency

leasing authority which permitted us to move the records quickly into a facility that was not subject to being demolished, we might have lost more of the records. There really was an emergency in that case and it did not relate to Korea. However, it was a very present thing.<sup>95</sup>

No doubt the General Services Administration's ability to quickly find a new fireproof facility in this case was highly desirable. But the question is whether this ability should have been based upon a national emergency statute triggered by President Truman's proclamation of national emergency in 1950 as it was.

During the same hearings the General Services Administration argued for their continued ability to negotiate contracts without advertising, saying that it allowed them to award contracts to small businesses, to labor surplus areas, and to others who will help the U.S. balance of payments.<sup>96</sup> Surely the potential for abuse is evident and the inability of the Congress to provide statutory guidelines to allow the pursuit of desired social policies without giving the G.S.A. emergency discretion is not at all clear.

No doubt the wish to aid small business, to help the unemployed by awarding contracts in labor surplus areas, and the correction of our balance of payments deficit are all legitimate goals. The question is whether the pursuit of these goals should rest on a legal fiction of national emergency. A General Services Administration official admitted that:

We have felt for many years that some kind of permanent legislation for these purposes would be a better arrangement.<sup>97</sup>

The Department of Defense uses this same reasoning. As one official stated, "The procurement process within the armed services is utilized to accomplish certain major social and economic policies by the placement of contracts in labor surplus areas and in disaster areas, by letting contracts to favor small business, and to achieve a balance of payments favorable to the United States."<sup>98</sup>

One exception from the provisions of the National Emergencies Act has especially broad wording:

The President may authorize any department or agency of the Government which exercises functions in connection with the national defense, . . . to enter into contracts or into amendments or modifications of contracts heretofore or hereafter made and to make advance payments thereon, without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever he deems that such action would facilitate the national defense.

. . . .

This chapter shall be effective only during a national emergency.<sup>99</sup>

The Department of Defense explains,

This statute provides authority to correct mistakes in contracts, to formalize informal commitments, to indemnify contractors against losses or claims resulting from unusually hazardous risks to which they might be exposed during the performance of a contract and for which insurance, even if available, would be prohibitively expensive, and to grant other extraordinary contractual relief.<sup>100</sup>

Again, there is no doubt that the Department of Defense needs the

flexibility to modify contracts in certain instances and to indemnify contractors where commercial insurance is not feasible. The question is whether such flexibility should be based upon hastily drafted emergency powers designed as temporary measures or upon legislation drafted with normal process, intended for normal times and designed for permanent use.

The last statute exempted from the provisions of National Emergencies Act suspends certain limitations on the number of officers in the Armed Forces.<sup>101</sup> This statute has been used, among other things, to authorize the suspension of otherwise mandatory separation of 913 members of the Armed Forces who are listed as missing in action in Southeast Asia until they return or are accounted for.<sup>102</sup> Few would advocate that these brave men should be separated from the Armed Forces, but why can't Congress deal with the problem through ordinary legislative channels? Surely all of the real parties in interest would benefit from legislative resolution of this tragically persistent problem.

To summarize, the emergency statutory authorities delegated to the executive branch contained in the eight exemptions from the provisions of the National Emergencies Act have some common characteristics. First, the original legislative intent reveals that the authority was only to be valid in time of a declared national emergency. Second, a legal (as opposed to a real) national emergency presently exists and is the trigger to make the authority available to the Executive on a continuous basis. Finally, the extraordinary authority is defended in terms of the need for internal flexibility or the need to accomplish social policies unrelated to any condition of real emergency. Why Congress shouldn't deal with these exceptions through permanent, non-emergency legislation is simply an unanswered question. In any event Congress might have, at least, required the Executive agencies to report actions taken under the exempted statutes; but even this is not required.

## THE CASE LAW

During the first round of hearings conducted by the Special Committee in 1973, Dr. Gerhard Casper, of the University of Chicago, testified that "[t]he courts are of little use in the emergency area because the courts are often unwilling, and perhaps rightly unwilling to second guess the Executive . . . on political evaluations."<sup>103</sup> What Dr. Casper was referring to is that even when a presidentially declared national emergency remains unterminated years after the conditions which gave rise to the declaration have passed, the courts have consistently refused to second guess the Executive's argument that a national emergency still exists. The courts, almost without exception, have affirmed the Executive's reliance on past declarations of national emergency to trigger their current use of emergency authority. In the words of a Treasury Department official, "[y]ou do not have to have a state of hostility or imminent hostilities in effect. What you need is a legal emergency on the books. The courts are not going to look behind that . . ." <sup>104</sup> Although courts have often refused to touch these types of "political questions," i.e., those questions the courts feel can be better determined by another branch of government, one might have expected some standard of reasonableness to be injected by the judiciary which would limit the time the Executive could rely on a past declaration of national emergency.<sup>105</sup> Why, for example, has the judiciary so consistently accepted the Executive's argument that President Truman's 1950 declaration of national emergency can continue to trigger the use of national emergency authority almost thirty years later? Shouldn't the courts limit the Executive's reliance on the 1950 declaration



to a reasonable time after the conditions which gave rise to the declaration have passed? Ideally, the Executive would terminate its own declarations of national emergency when the emergency conditions no longer exist. But failing that, shouldn't the courts refuse to enforce Executive actions based on outdated declarations of national emergency? No doubt the courts should be wary of interfering in the Executive's province but it appears that a judicial check on the Executive's unreasonable use of a fiction to gain extraordinary authority is warranted.<sup>106</sup>

Only one case has been found where there was an outright rejection of the 1950 Korean Proclamation reasoning. The defendant was charged with violating gold regulations based upon the emergency provision of the Trading With the Enemy Act. A California District Court, in 1962, dismissed the indictment saying that 'if the President can create crimes by fiat and without congressional approval, our system is not much different from that of the Communists, which allegedly threatens our existence.'<sup>107</sup> The case, however, was overruled three years later.<sup>108</sup>

In 1972, Justice Douglas gave a hint that he might favor judicial intervention. Title 18, Section 2153(a) of the United States Code makes it a crime to destroy or attempt to destroy any war material, war premises, or war utilities in times of war or national emergency. Justice Douglas dissented from the denial of certiorari on a lower court conviction<sup>109</sup> under this statute, saying,

I doubt that many lawyers, let alone laymen, of ordinary intelligence are aware of the continuing effect of the 1950 national emergency declaration. Under these circumstances, it is questionable whether proper notice of possible criminal liability has been afforded to any individual prosecuted under 18 U.S.C. 2153(a). The viability of criminal responsibility predicated upon evaluations of current political temperament or outdated presidential proclamations is an important issue worthy of our consideration on the merits.<sup>110</sup>

On the other hand, examples of judicial affirmation of the Executive's use of the national emergency fiction abound. The validity of the Treasury Department's Foreign Assets Control Regulations<sup>111</sup> is continuously upheld based upon a national emergency provision of the Trading With the Enemy Act triggered by the 1950 Korean declaration.<sup>112</sup>

Similar reasoning has been used to sustain the deportation of an alien without a hearing<sup>113</sup> and to sustain the deportation of an alien for remaining outside the United States to avoid training in the Armed Forces in time of a national emergency.<sup>114</sup> One court in 1955<sup>115</sup> used the Korean declaration to uphold a conviction for engaging in financial transactions with Communist China, as did two recent cases which upheld decisions by the Commissioner of Customs to detain incoming packages originating in North Vietnam.<sup>116</sup>

In 1947, the Navy leased an airfield in Illinois to a private operator with the following provision:

It is understood and agreed that this lease will at all times be revocable at will by the Government upon presentation of notice of cancellation to the Lessee, in writing, sixty (60) days prior to such termination, . . . in event of a national emergency and a decision by the Secretary of the Navy that such revocation is essential.<sup>117</sup>

When the Army wanted the field for a Nike (missile) site in 1954, the Navy

revoked the lease stating “that a national emergency declared by the President in 1950 was still in effect.” The United States Supreme Court upheld the Navy’s reasoning.<sup>118</sup>

In a 1973 case, the United States Court of Appeals, in dicta, approved of the use of the 1950 Korean resolution to support the Secretary of Commerce’s ability to requisition private ships under 46 U.S.C. 1242.<sup>119</sup>

Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission (Secretary of Commerce) to requisition or purchase any vessel or other watercraft owned by citizens of the United States.

The 1950 Korean Proclamation also seems to affect our reserve fleet legislation.<sup>120</sup>

In justifying their practice of not questioning a Presidential proclamation of emergency, some judges take cognizance of the current world situation. This practice, however, tends to confuse the distinction between a real and merely a legal (fictional) emergency. In affirming the decision of the Secretary of State not to validate plaintiff’s passport for travel to Cuba, a United States District Court said,

Plaintiffs seek to undermine the authority for the Secretary’s regulation by urging that the national emergency was limited in scope and has not endured in time, because it dealt with the Korean War. Although the Korean fighting precipitated the 1950 Proclamation, it was clear even then that Korea could not be treated as an isolated trouble spot. To limit the emergency proclamation to Korea would be to ignore its finding of a threat of ‘world conquest by communist imperialism’ based on ‘recent events in Korea and elsewhere,’ and to require a new presidential proclamation for each new crisis in the continuing chain of world-wide eruptions.<sup>121</sup>

Judge Friendly, in affirming the Treasury Department’s decision to block a Cuban citizen’s right to the proceeds of his son’s life insurance policy, stated that “while the courts 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>122</sup>

## SOME WORK REMAINS

When the Special Committee disbanded in 1976, they left a list of “issues that will also deserve attention in the future.”<sup>123</sup> The list revealed the perceived need for Congressional review of the statutes exempted from the provisions of the National Emergencies Act. As previously discussed, the Trading With the Enemy Act has received thorough attention which has resulted in legislation.<sup>124</sup> Hopefully, the other exceptions will be given careful consideration as well.

The Special Committee also called for careful review of Executive department requests for permanent law replacing expiring emergency authority in order to preserve the distinction between permanent and emergency laws. Perhaps the Special Committee was referring to the need to be attentive to the type of argument advanced by the Department of Defense in 1975.

World and national conditions have changed since President Truman officially proclaimed the state of national emergency in 1950 incident to the commencement of hostilities in Korea. Many authorities which were used then for the first time were regarded as extraordinary. Since then, experience has demonstrated a need for these authorities in the regular conduct of the day-to-day operations of the Department of Defense.<sup>125</sup>

In 1970, the acting Assistant Secretary of State was quoted as saying, "We believe the said authority made available by virtue of the 1950 proclamation has been needed during the past two decades and is still needed. This continuing need results from the very acts and threats of aggression which the U.S. and its allies have faced since 1950."<sup>126</sup>

Dr. Adrian Fisher says that the above remark is "a perfect illustration of the kind of danger which exists in a Government like ours when you have loaded guns lying around. They may have been originally loaded in order to fire a salute, but end up being charged with shot and used for other business."<sup>127</sup>

## CONCLUSION

The National Emergencies Act will do much to end emergency government. On September 14, 1978, we will be closer to normal constitutional government than we have been at any time since 1933. The power of the President to declare new emergencies and employ extraordinary powers has been made subject to Congressional approval and public scrutiny. Nevertheless, there remain important questions about the future of this legislation. First, will there be a constitutional problem with section 202(a) (1), the provision for termination of Presidentally declared emergencies by concurrent resolution of the Congress? Second, will Congress or the President ever terminate the four current emergencies? Finally, will the Congress follow through? The excepted statutes are an obvious anomaly, but the hard feelings of the Vietnam and Watergate eras have eased and all the political reasons for these exceptions and the simple inertia which has previously characterized this area will be significant obstacles to action toward repealing these exceptions and replacing them, where necessary, with permanent legislation. Certainly the action already taken on the Trading With the Enemy Act is a hopeful sign. The Congress, the courts and the President will all need to adjust to the changes wrought by this Act and, although the immediate impact is small for most citizens, it will substantially affect us all during the next several years as we move out of emergency government and toward constitutional government.

## FOOTNOTES

- <sup>1</sup> S. Rep. No. 94-922, 94th Cong., 2d Sess. 3 (1976).
- <sup>2</sup> *Id.*
- <sup>3</sup> 41 U.S.C. §252 (1970).
- <sup>4</sup> 40 U.S.C. §278b (1970).
- <sup>5</sup> 10 U.S.C. §3313 (1970).
- <sup>6</sup> S. Rep. No. 94-922, 94th Cong., 2d Sess. 5 (1976).
- <sup>7</sup> S. Rep. No. 93-549, 93d Cong., 1st Sess. III (1973).
- <sup>8</sup> S. Rep. No. 94-922, 94th Cong., 2d Sess. 19 (1976).
- <sup>9</sup> *Id.*
- <sup>10</sup> *Id.* at 2.
- <sup>11</sup> S. Rep. No. 93-549, 93d Cong., 1st Sess. 6 (1973).
- <sup>12</sup> Staff of Senate Comm. on Gov't Operations, 94th Cong., 2d Sess., **National Emergencies Act Source Book 1** (Comm. Print 1976) [ hereinafter cited as **Sourcebook** ].
- <sup>13</sup> National Emergencies Act, Pub. L. No. 94-412 §101, 90 Stat. 1255 (1976); (to be codified in 50 U.S.C. §1601).
- <sup>14</sup> 10 U.S.C. §712 (1970). But note that Congress has placed some limits on the exercise of this power; see the War Powers Resolution of 1923, Pub. L. No. 93-148, 87 Stat. 1255 National Emergencies The War Powers Resolution and the National Emergencies Act of 1976 together promise to do much to alleviate prospective abuses of executive powers.
- <sup>15</sup> National Emergencies Act, Pub. L. No. 94-412 §201, 90 Stat. 1255 (1976); (to be codified in 50 U.S.C. §1621).
- <sup>16</sup> *Id.* §301. (to be codified in 50 U.S.C. §1631).
- <sup>17</sup> *Id.* §401 (to be codified in 50 U.S.C. §1641).
- <sup>18</sup> *Id.* §502 (to be codified in 50 U.S.C. §1651).
- <sup>19</sup> **National Emergencies Act: Hearings on H.R. 3884 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 28 (1975)** (statement of Sen. Church) [ hereinafter cited as **Hearings on H.R. 3884** ].
- <sup>20</sup> **Hearings on H.R. 3884, supra note 19, at 20** (statement of Sen. Mathias). Note that the war powers Resolution of 1973 Pub. L. No. 93-148, 87 Stat. 555 has since directly addressed this problem.
- <sup>21</sup> **Hearings on H.R. 3884, supra note 19, at 20** (statement of Sen. Mathias).
- <sup>22</sup> **National Emergency: Hearings Before the Special Senate Comm. on the Termination of the National Emergency, 93d Cong., 1st Sess. 4 (1973)** (statement of Sen. Mathias) [ hereinafter cited as **1973 Hearings** ].
- <sup>23</sup> *Id.* (Statement of Sen. Mathias).
- <sup>24</sup> **Hearings on H.R. 3884, supra note 19, at 31** (statement of Sen. Church).
- <sup>25</sup> **1973 Hearings, supra note 23, at 9** (statement of Robert S. Rankin).
- <sup>26</sup> *Id.* at 8. (statement of Robert S. Rankin).
- <sup>27</sup> *Id.* at 86 (statement of Gerhard Casper).
- <sup>28</sup> For an excellent history of emergency powers in the United States written by Dr. Harold Relyea of the Library of Congress see generally, **Staff of Special Senate Comm. on National Emergencies and Delegated Emergency Powers, 93d Cong., 2d Sess., A Brief History of Emergency Powers in the United States** (Comm. Print 1974).
- <sup>29</sup> **Staff of Special Senate Comm. on National Emergencies and Delegated Emergency Powers, 93d Cong., 2d Sess., Executive Orders in Time of War and National Emergency 48** (Comm. Print. 1974).

- <sup>30</sup> **Staff of Special Senate Comm. on National Emergencies and Delegated Emergency Powers, 93d Cong., 2d Sess., Executive Replies: Evaluation of Emergency Power Statutes 2** (Comm. Print 1974).
- <sup>31</sup> **S. Rep. No. 94-1168, 94th Cong., 2d Sess. 7**, reprinted in [1976] **United States Code Congressional and Administrative News** 2288.
- <sup>32</sup> **Hearings on H.R. 3884**, *supra* note 19, at 28 (statement of Sen. Church). These exceptions, contained in Title V of the Act, are discussed below.
- <sup>33</sup> **Sourcebook**, *supra* note 12, at 6.
- <sup>34</sup> **Id.**
- <sup>35</sup> **Id.** at 7.
- <sup>36</sup> **S. Rep. No. 94-755, 94th Cong., 2d Sess. Vol. 1, P. 2** (1976).
- <sup>37</sup> **Sourcebook**, *supra* note 12, at 8.
- <sup>38</sup> **S. Rep. No. 94-922 (94th Cong., 2d Sess. 1 (1976))**.
- <sup>39</sup> **Sourcebook**, *supra* note 12, at 9.
- <sup>40</sup> **Id.** at 343. Since the Act purports to deal only with powers conferred by statute rather than with inherent powers of the President, there should be no constitutional difficulty with the termination of emergencies declared after the Act. Further, even those emergencies declared before the Act can effectively be terminated by elimination of the exceptions listed in Title V of the Act. Surely if there is any constitutional difficulty with Congressional termination of Presidentially declared emergencies, it is purely formal and without substance in view of Congress' power to repeal the statutory authority from which the President's non-inherent emergency powers are derived.
- <sup>41</sup> **Youngstown Sheet & Tube Co. v. Sawyer**, 343 U.S. 579, 634-44 (1952); Note also the parallel to the War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555, and see **S. Rep. No. 94-1168, 94th Cong. 2d Sess. 4**, reprinted in 1976 U.S. Code Cong. & Ad. News, 2288.
- <sup>42</sup> **Id.** at 653.
- <sup>43</sup> **Id.** at 652-53. The National Emergencies Act and the War Powers Resolution complement Justice Jackson's opinion in this case. Jackson favored the use of delegated powers, because, unlike inherent powers, the Congress could restrict the President's use of delegated powers. Congress has now begun that second step toward preserving constitutional government by restricting the use of emergency powers delegated to the President.
- <sup>44</sup> **S. Rep. No. 94-922, 94th Cong., 1st Sess. 8** (1976).
- <sup>45</sup> **Hearings on H.R. 3884**, *supra* note 19, at 27 (statement of Sen. Church).
- <sup>46</sup> **National Emergencies Act**, Pub. L. No. 94-412 §101, 90 Stat. 1255, (1976) (to be codified in 50 U.S.C. §1601).
- <sup>47</sup> **Hearings on H.R. 3884**, *supra* note 19, at 35 (statement of Sen. Church).
- <sup>48</sup> The compromise arrived at, however, merely glosses over a problem which can't be ignored indefinitely. Although there is no provision in the Act for terminating the old emergencies, Congress may terminate new, post-Act emergencies by concurrent resolution, section 202(1) of the Act. The problem, however, may not be severe; see note 41, *supra*, for a brief discussion of the constitutional problem here.
- <sup>49</sup> **122 Cong. Rec.** S14843 (daily ed. Aug. 27, 1976) (remarks of Sen. Church).
- <sup>50</sup> **Id.**
- <sup>51</sup> **Sourcebook**, *supra* note 12, at 80.
- <sup>52</sup> **National Emergencies Act**, Pub. L. No. 94-412 §201 (1976), 90 Stat. 1255, (to be codified in 50 U.S.C. §1621).
- <sup>53</sup> **Id.** §401 (to be codified in 50 U.S.C. §1641).
- <sup>54</sup> **Id.**
- <sup>55</sup> **S. Rep. No. 94-922 94th Cong., 2d Sess. 16** (1976).

- <sup>56</sup> *Id.* at 18.
- <sup>57</sup> Church, *Ending Emergency Government*, 8 *Akron L. Rev.* 193, 203 (Winter 1975).
- <sup>58</sup> *Webster's New World Dictionary* 474 (college ed. 1968).
- <sup>59</sup> E. Corwin, *The President: Office and Powers* 1 (2d ed. 1941).
- <sup>60</sup> 1973 *Hearings*, *supra* note 23, at 24 (statement of Cornelius Cotter).
- <sup>61</sup> S. Rep. No. 94-922, 94th Cong. 2d Sess. 11 (1976). One solution is to insert in each statute providing emergency powers a further provision specifying that these powers would be available only upon Presidential declaration of a "national emergency" as defined in the Act. If this were done there would be little chance that anything but inherent powers of the President or minor delegated powers could be invoked without compliance with the Act.
- <sup>62</sup> S. Rep. No. 94-922 (94th Cong. 2d Sess. 12-13 (1976).
- <sup>63</sup> *Id.* at 13.
- <sup>64</sup> National Emergencies Act, Pub. L. No. 94-412 §301, 90 Stat. 1257, (1976) (to be codified in 50 U.S.C. §1631).
- <sup>65</sup> *Sourcebook*, *supra* note 12, at 342.
- <sup>66</sup> *Id.* at 280.
- <sup>67</sup> National Emergencies Act, Pub. L. No. 94-412 §202, 90 Stat. 1255, (to be codified in 50 U.S.C. §1622).
- <sup>68</sup> *Sourcebook*, *supra* note 12, at 280.
- <sup>69</sup> *Id.* at 343. See, however, note 41.
- <sup>70</sup> National Emergencies Act, Pub. L. No. 94-412, §502 (a), 90 Stat. 1258, (1976) (to be codified in 50 U.S.C. §1651).
- <sup>71</sup> *Hearings on H.R. 3884*, *supra* note 19, at 28.
- <sup>72</sup> It is worth noting that modern English practice is to limit strictly the duration of national emergencies. Senator Church emphasizes that during both world wars no state of national emergency in Great Britain was allowed to extend for more than 30 days, 8 *Akron L. Rev.* 193, 204 (Winter 1975).
- <sup>73</sup> *Hearings on H.R. 3884*, *supra* note 19, at 28. (statement of Sen. Church).
- <sup>74</sup> National Emergencies Act, Pub. L. No. 94-412 §502, 90 Stat. 1258, (1976) (to be codified in 50 U.S.C. §1651).
- <sup>75</sup> Trading with the Enemy Act of 1917 §5(b) (1); 12 U.S.C. §95a; U.S.C. App. §5(b) (1970). Note also the most recent amendments, Pub. L. No. 95-223, 91 Stat. 1625, (1977).
- <sup>76</sup> Staff of the Subcomm. on International Trade and Commerce of the House Comm. on International Relations, 94th Cong., 2d Sess., *Trading With the Enemy III* (Comm. Print 1976).
- <sup>77</sup> *Id.*
- <sup>78</sup> *Sourcebook*, *supra* note 12, at 320.
- <sup>79</sup> *Id.*
- <sup>80</sup> *Hearings on H.R. 3884*, *supra* note 19, at 38-40 (statement of Elting Arnold).
- <sup>81</sup> 1973 *Hearings*, *supra* note 23, at 213.
- <sup>82</sup> *Hearings on H.R. 3884*, *supra* note 19, at 41.
- <sup>83</sup> *Id.* at 42.
- <sup>84</sup> 1973 *Hearings*, *supra* note 23, at 167.
- <sup>85</sup> *Id.* at 186.
- <sup>86</sup> Staff of the Subcomm. on International Trade and Commerce of the House Comm. on International Relations, 94th Cong., 2d Sess., *Trading With the Enemy* (Comm. Print 1976).

<sup>87</sup> H.R. 1560, H.R. 2382, H.R. 7738, 95th Cong., 1st Sess. (1977).

<sup>88</sup> This bill has been passed by the Senate and signed by the President, War or National Emergency — Presidential Powers, Pub. L. No. 95-223, 91 Stat. 1625 (1977). In its final form Title I of the bill limits future invocation of section 5(b) of the Trading With the Enemy Act to wartime (section 101(a)) and continues present uses of emergency powers thereunder until the effective date of the National Emergencies Act, September 14, 1978 (section 101(b)). These continued emergency powers may be further extended for unlimited successive one-year periods should the President determine that such extension is in the national interest (101(c)). The exception to the National Emergencies Act for the Trading With the Enemy Act is eliminated (section 101(d)); but the amended Trading With the Enemy Act is exempted from section 101(a) and from Title II of the National Emergencies Act (section 101(c) ).

Title II, entitled International Emergency Economic Powers, establishes non-wartime emergency powers which will be available to the President upon declaration of a new national emergency. Such declaration, however, must be to deal with an “unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy or economy of the United States,” (section 202) to invoke these powers. Section 203 further defines the powers available upon certain further determinations by the President. Section 204 requires reporting beyond the provisions of the National Emergencies Act. Sections 205, 206, 207 and 208 are administrative provisions.

Title III amends the Export Administration Act to provide the President with nonemergency authority to control non-U.S.-origin exports by foreign subsidiaries of U.S. concerns. This authority had previously been exercised under the Trading with the Enemy Act.

<sup>89</sup> National Emergencies Act, Pub. L. No. 94-412 §502(b), 90 Stat. 1259, (1976) (to be codified in 50 U.S.C. §1651).

<sup>90</sup> H.R. Rep. No. 95-459, 95th Cong., 1st Sess. (1977).

<sup>91</sup> S. Rep. No. 93-549, 93rd Cong. 1st Sess. 585-89 (1973).

**Statutes Exempted from the Provisions  
of the National Emergencies Act by  
Congressional Committee Jurisdiction**

Statute Excepted from the National Emergencies Act	Committee Jurisdiction
1 Section 5(b) of the Act of October 6, 1917, as amended (12 U.S.C. 95a; 50 U.S.C. App. 5(b) ). As already noted the Trading With the Enemy Act is receiving considerable attention.	Banking, Housing and Urban Affairs
2 Act of April 28, 1942 (40 U.S.C. 278b) (a release from price ceilings on the government’s ability to lease property during a national emergency).	Government Operations
3 Act of June 30, 1949 (41 U.S.C. 252) (lifts the prerequisite of advertising when the government procures property or services during a national emergency).	Government Operations
4 Section 3477 of the Revised Statutes as amended (31 U.S.C. 203) and	The Judiciary
5 Section 3737 of the Revised Statutes, as amended (41 U.S.C. 15) (restricts the government’s right of set-off against the assignee of moneys due from the government under a contract).	The Judiciary
6 Public Law 85-804 (Act of August 28, 1958, 72 Stat. 972; 50 U.S.C. 1431) (giving authorized defense connected agencies extraordinary contractual authority).	The Judiciary

- 6 Public Law 85-804 (Act of August 28, 1958, 72 Stat. 972; Foreign Relations  
50 U.S.C. 1435) (limiting the extraordinary contractual  
authority to time of national emergency).

Note: It would appear that the assignment of this statute to two different committees was not intended.

- 7 Section 2304(a) (1) of Title 10, United States Code (lifts the Armed Services  
prerequisite of advertising when the Armed Services contract  
for property or services in time of national emergency).
- 8 Sections 3313, 6386(c) and 8313 of Title 10, United States Armed Services  
Code (suspending certain limitations on the numbers of  
military officers during a war or national emergency).

<sup>92</sup> 40 U.S.C. §278b (1970).

<sup>93</sup> 41 U.S.C. §252 (1970), 10 U.S.C. §2304(a) (1) (1970).

<sup>94</sup> 50 U.S.C. §1431-35 (1970).

<sup>95</sup> **Hearings on H.R. 3884**, *supra* note 19, at 75 (statement of Phillip Read).

<sup>96</sup> *Id.* at 72 (statement of Read).

<sup>97</sup> *Id.* at 76. (statement of Read).

<sup>98</sup> *Id.* at 51 (statement of Leonard Niederlehner).

<sup>99</sup> 50 U.S.C. §1431-35 (1970).

<sup>100</sup> **Hearings on H.R. 3884**, *supra* note 19, at 50 (statement of Leonard Niederlehner).

<sup>101</sup> Comparable provisions for the Army, Navy, and Air Force may be found in 10 U.S.C. §3313 (1970),  
10 U.S.C. §6386 (1970), and 10 U.S.C. §8313 (1970), respectively.

<sup>102</sup> **Hearings on H.R. 3884**, *supra* note 19, at 52 (statement of Leonard Niederlehner).

<sup>103</sup> **1973 Hearings**, *supra* note 23, at 91-92. Recently the courts have shown some inclination to restrict the President's use of emergency powers to actions which bear some "reasonable relation to the power delegated and to the emergency giving rise to the action. *Real v. Simon*, 510 F.2d 557, 564 (5th Cir. 1975); *United States v. Yoshida International, Inc.*, 526 F.2d 560, 579 (Ct.C.P.A. 1975). In *Real v. Simon* certain Treasury Department regulations were held not reasonably related to the delegation under section 5(b) of the Trading With the Enemy Act upon which authority they had based. The regulations blocked assets held in the U.S. by a deceased Cuban National.

<sup>104</sup> **Hearings on H.R. 3884**, *supra* note 19, at 44 (statement of Stanley Sommerfield).

<sup>105</sup> The attitude of the courts has been that when dealing with powers delegated by the Congress to the President judicial review should be limited to restraining the President from exceeding the limits of the delegated powers and from violating the Constitution. The courts have refused to look at the substantiality of Presidentially declared emergencies, see cases cited *infra* at p. 52, and have given broad interpretation to the language delegating those powers, *Yoshida*, *supra*, p. 573.

<sup>106</sup> Obviously, things have changed since 1966. It is possible that the courts will take note of the National Emergencies Act and the Congressional intent demonstrated therein and restrict the emergency powers of the President. Hereafter the courts may interpret the delegation language in the excepted statutes more narrowly. The treatment of the Trading With the Enemy Act may also incline the courts to apply greater scrutiny to the remaining emergency powers delegations. Given the express exception of these statutes, however, the courts do have grounds for continuing to refuse to interpret narrowly the delegations in them.

<sup>107</sup> *U.S. v. Briddle*, 212 F. Supp. 584 (S.D. Cal. 1962).

<sup>108</sup> *Pike v. U.S.*, 340 F.2d 487 (9th Cir. 1965).

<sup>109</sup> *Achtenberg v. U.S.*, 459 F.2d 91 (8th Cir. 1972).

<sup>110</sup> 409 U.S. 932, 933 (1972).



- <sup>111</sup> 31 C.F.R. §500 to §520 (1976).
- <sup>112</sup> *Real v. Simon*, 510 F.2d 557 (5th Cir. 1975); *Sardino v. Fed. Reserve Bank of N.Y.*, 361 F.2d 106 (2d Cir. 1966); *Nielsen v. Secretary of the Treasury*, 424 F.2d 833 (D.C. Cir. 1970).
- <sup>113</sup> *Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *U.S. v. Watkins*, 173 F.2d 599 (2d Cir. 1949).
- <sup>114</sup> *Jolley v. Immigration and Naturalization Service*, 441 F.2d 1245 (5th Cir. 1971).
- <sup>115</sup> *U.S. v. China Daily News, Inc.*, 224 F.2d 670 (2d Cir. 1955).
- <sup>116</sup> *Veterans and Reservists for Peace in Vietnam v. Regional Commissioner of Customs*, 459 F.2d 676 (3d Cir. 1972); *Teague v. Commissioner of Customs Region II*, 404 F.2d 441 (2d Cir. 1968).
- <sup>117</sup> *U.S. v. 93,970 Acres of Land*, 360 U.S. 328, 329 (1959).
- <sup>118</sup> *Id.* at 330, 331.
- <sup>119</sup> *American Maritime Ass'n v. Stans*, 329 F. Supp. 1179 (D.D.C. 1971), *aff'd*, 485 F.2d 765 (D.C. Cir. 1973).
- <sup>120</sup> *See Curran v. Laird*, 420 F.2d 122, 128 (D.C. Cir. 1969).
- <sup>121</sup> *MacEwan v. Rusk*, 228 F. Supp. 306, 312 (D. Pa. 1964), *aff'd*, 344 F.2d 963 (3d Cir. 1965).
- <sup>122</sup> *Sardino v. Fed. Reserve Bank of N.Y.*, 361 F.2d 106, 109 (2d Cir. 1966).
- <sup>123</sup> *S. Rep. No. 94-922*, 94th Cong., 2d Sess. 10-18 (1976).
- <sup>124</sup> *Pub. L. 95-223*, 91 Stat. 1625 (1977).
- <sup>125</sup> *Hearings on H.R. 3884*, *supra* note 19, at 69 (statement of Leonard Niederlehner).
- <sup>126</sup> *1973 Hearings*, *supra* note 23, at 65 (statement of Adrian Fisher).
- <sup>127</sup> *Id.*