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Ending Emergency Government

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ENDING EMERGENCY GOVERNMENT

SENATOR FRANK CHURCH*

INTRODUCTION

MY CONCERN IS TO END emergency government which the United States has practiced since March 9, 1933,¹ and to establish an orderly procedure for handling inevitable emergency situations. This is an issue of importance to our common future and the future well-being of our constitutional system of government.

There are now in effect four presidentially proclaimed states of national emergency: The national emergency declared by President Roosevelt in 1933, to deal with the Great Depression;² the national emergency proclaimed by President Truman in December 1950, during the Korean conflict,³ and the two states of national emergency declared

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¹ Act of March 9, 1933, Pub. L. No. 73-1, 48 Stat. 1 (1933).

² A few days after taking office in 1933, President Roosevelt declared a bank holiday and proclaimed that "heavy and unwarranted withdrawals of gold and currency from... banking institutions for the purpose of hoarding; and continuous and increasingly extensive speculative activity abroad in foreign exchange" resulting in "severe drains on the Nation's stocks of gold... have created a national emergency. ..." Proclamation No. 2039, 48 Stat. 1689 (March 6, 1933).

³ Proclamation No. 2914, 3 C.F.R. 99 (Supp. 1950).

PROCLAIMING THE EXISTENCE OF A NATIONAL EMERGENCY *By the President of the United States of America*

A PROCLAMATION

WHEREAS, recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and

WHEREAS, world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

WHEREAS, if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to choose those who conduct their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and

WHEREAS, the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible:

NOW, THEREFORE, I HARRY S. TRUMAN, President of the United States of America, do proclaim the existence of a national emergency, which requires that the military, naval, air, and civilian defenses of this country be strengthened as speedily as possible to the end that we may be able to repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made through the United Nations and otherwise to bring about lasting peace.

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by President Nixon in March 1970⁴ and on August 15, 1971.⁵ None of them has ever been terminated.

This means that a majority of the American people have lived all their lives under emergency rule. For 41 years, protections and procedures guaranteed by the Constitution have, in varying degrees, been abridged by executive directives that derive from presidentially proclaimed states of national emergency.

I summon all citizens to make a united effort for the security and well-being of our beloved country and to place its needs foremost in thought and action that the full moral and material strength of the Nation may be readied for the dangers which threaten us.

I summon our farmers, our workers in industry, and our businessmen to make a mighty production effort to meet the defense requirements of the Nation and to this end to eliminate all waste and inefficiency and to subordinate all lesser interests to the common good.

I summon every person and every community to make, with a spirit of neighborliness, whatever sacrifices are necessary for the welfare of the Nation.

I summon all State and local leaders and officials to cooperate fully with the military and civilian defense agencies of the United States in the national defense program.

I summon all citizens to be loyal to the principles upon which our Nation is founded, to keep faith with our friends and allies, and to be firm in our devotion to the peaceful purposes for which the United Nations was founded.

I am confident that we will meet the dangers that confront us with courage and determination, strong in the faith that we can thereby "secure the Blessings of Liberty to ourselves and our Posterity."

In witness whereof, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

Done at the City of Washington this 16th day of December (10:20 a.m.) in the year of our Lord nineteen hundred and fifty, and of the Independence of the United States of America the one hundred and seventy-fifth.

HARRY S. TRUMAN.

⁴ Proclamation No. 3972, 3 C.F.R. 473 (Supp. 1970).

DECLARING A NATIONAL EMERGENCY
By the President of the United States of America

A PROCLAMATION

WHEREAS, certain employees of the Postal Service are engaged in an unlawful work stoppage which has prevented the delivery of the mails and the discharge of other postal functions in various parts of the United States; and

WHEREAS, as a result of such unlawful work stoppage the performance of critical governmental and private functions, such as the processing of men into the Armed Forces of the United States, the transmission of tax refunds and the receipt of tax collections, the transmission of Social Security and welfare payments, and the conduct of numerous and important commercial transactions, has wholly ceased or is seriously impeded; and

WHEREAS, the continuance of such work stoppage with its attendant consequences will impair the ability of this Nation to carry out its obligations abroad, and will cripple or halt the official and commercial intercourse which is essential to the conduct of its domestic business:

NOW, THEREFORE, I, RICHARD NIXON, President of the United States of America, pursuant to the powers vested in me by the Constitution and laws of the United States and more particularly by the provisions of Section 673 of Title 10 of the United States Code, do hereby declare a state of national emergency, and direct the Secretary of Defense to take such action as he deems necessary to carry out the provisions of said Section 673 in order that the laws of the United States pertaining to the Post Office Department may be executed in accordance with their terms.

IN WITNESS WHEREOF, I have hereunto set my hand this 23d day of March in the year of our Lord nineteen hundred and seventy, and of the Independence of the United States of America the one hundred and ninety-fourth.

RICHARD NIXON.

Revelations of how power has been abused by a President, certain presidential advisers, and high executive officials should give rise to new concerns about the potential exercise, unchecked by Congress or the American people, of these extraordinary emergency powers. Like a loaded gun lying around the house, the plethora of delegated authority could readily be used for purposes far removed from those originally intended.

The philosophical issue of how a constitutional democracy should deal with great crises reaches back to the Greek city-states and the Roman Republic. In the United States, at least since the time of the Civil War, actions taken by the Executive in times of crises have, in important ways, shaped the present phenomenon of a permanent emergency.⁶

⁵ Proclamation No. 4074, 36 Fed. Reg. 15724 (1971).

IMPOSITION OF SUPPLEMENTAL DUTY FOR BALANCE OF PAYMENTS PAYMENTS
By the President of the United States of America

A PROCLAMATION

WHEREAS, there has been a prolonged decline in the international monetary reserves of the United States, and our trade and international competitive position is seriously threatened and, as a result, our continued ability to assure our security could be impaired;

WHEREAS, the balance of payments position of the United States requires the imposition of a surcharge on dutiable imports;

WHEREAS, pursuant to the authority vested in him by the Constitution and the statutes, including, but not limited to, the Tariff Act of 1930, as amended (hereinafter referred to as "the Tariff Act"), and the Trade Expansion Act of 1962 (hereinafter referred to as "the TEA"), the President entered into, and proclaimed tariff rates under, trade agreements with foreign countries;

WHEREAS, under the Tariff Act, the TEA, and other provisions of law, the President may, at any time, modify or terminate, in whole or in part, any proclamation made under his authority;

NOW, THEREFORE, I, RICHARD NIXON, President of the United States of America, acting under the authority vested in me by the Constitution and the statutes, including, but not limited to, the Tariff Act, and the TEA, respectively, do proclaim as follows:

A. I hereby declare a national emergency during which I call upon the public and private sector to make the efforts necessary to strengthen the international economic position of the United States.

B. (1) I hereby terminate in part for such period as may be necessary and modify prior Presidential Proclamations which carry out trade agreements insofar as such proclamations are inconsistent with, or proclaim duties different from, those made effective pursuant to the terms of this Proclamation.

(2) Such Proclamations are suspended only insofar as is required to assess a surcharge in the form of a supplemental duty amounting to 10 percent ad valorem. Such supplemental duty shall be imposed on all dutiable articles imported into the customs territory of the United States from outside thereof, which are entered, or withdrawn from warehouse, for consumption after 12:01 a.m., August 16, 1971, provided, however, that if the imposition of an additional duty of 10 percent ad valorem would cause the total duty or charge payable to exceed the total duty or charge payable at the rate prescribed in column 2 of the Tariff Schedules of the United States, then the column 2 rate shall apply.

* * * * *

⁶ See J. LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT 203 (Hafner Pub. Co. 1947), wherein Locke suggested:

[Emergency power] 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 so too slow for the dispatch requisite to executions, and because, also it is impossible to foresee and so by laws to provide for all accidents and necessities that may concern the public, or make such laws as will do no harm, if they are executed with an inflexible rigour on all occasions and upon all persons that may come in their way, therefore there

It is important to note that the word "emergency" is not found in the Constitution. The authority to deal with a crisis situation must be derived from the express provisions of the Constitution.⁷ Moreover, when faced with a situation in which extraordinary economic conditions were attempted to be used as a justification for the creation or enlargement of constitutional authority, Chief Justice Hughes held for a majority of the United States Supreme Court that:

Emergency does not create power. Emergency does not increase granted power or remove or diminish restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency.⁸

Albert Sturm has reviewed the history of the exercise of presidential emergency power and has come to the conclusion that although the legal sources of presidential emergency power are the Constitution and congressional delegations, "The extent of their invocation and use is also contingent upon the personal conception which the incumbent of the presidential office has of the Presidency and the premises upon which he interprets his legal powers."⁹

Needless to say, the history of our nation reflects that the role conception of the various presidents has varied. Relatedly, it is no coincidence that the exercise of presidential emergency powers can be correlated to these overall conceptions.¹⁰

is a latitude left to the executive power to do many things of choice which the laws do not prescribe.

It is also important to look at the definition of "emergency." See Sturm, *Emergencies and The Presidency*, 11 J. POLITICS 121 (Feb., 1949) [hereinafter cited as Sturm] at n.1 where it is stated:

Emergency is defined as "an unforeseen combination of circumstances or the resulting state that calls for immediate action." Webster's NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (unabridged 2d ed., Springfield, 1939). It is characterized by urgency and relative infrequency of occurrence and is equivalent to a public calamity resulting from fire, flood or like disaster not reasonably subject to anticipation. Home Building and Loan Association v. Blaisdell, 290 U.S. 398, 440 (1934). Professor Edward S. Corwin explains emergency conditions as those "which have not attained enough stability or recurrency to admit their being dealt with according to rule." THE PRESIDENT: OFFICE AND POWERS 1 (New York, 1940).

⁷ U.S. CONST. art. I, § 8.

⁸ Home Bldg. and Loan Ass'n v. Blaisdell, 290 U.S. 398, 425 (1934). See also Schechter v. United States, 295 U.S. 495 (1935); Wilson v. New, 243 U.S. 332, 348 (1917); *ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120, 121 (1866).

⁹ Sturm, *supra* note 6, at 126.

¹⁰ See Sturm, *supra* note 6, at 121, n.23, wherein it is stated that:

Theodore Roosevelt classified the Presidents in two groups: the Jackson-Lincoln group and the Buchanan-Taft group. The conceptions of the first group are largely embodied in the "stewardship theory" of Theodore Roosevelt which he expressed in the following terms:

"My view was that every executive officer in high position was a steward of the people bound actively and affirmatively to do all he could for the people, and not to content himself with the negative merit of keeping the talents undamaged in a napkin. I declined to adopt the view that what was imperatively

JUDICIAL REVIEW OF EMERGENCY GOVERNMENT

If we begin with the premise that an emergency does not create or enlarge constitutional powers¹¹ it is noteworthy to mention that great discretion has been granted the Executive branch to determine the nature and duration of the remedy for the crisis situation.¹²

On April 8, 1952, the issuing by President Truman of Executive Order 10340, directing the seizure of the steel industry, resulted in a re-examination by the United States Supreme Court of the roles of the three branches of government in an emergency situation.¹³ The steel companies conceded the existence of broad emergency powers but argued that it was the role of Congress to "... legislate appropriately and specifically to protect the nation from threatened disaster."¹⁴

Justice Black, writing the majority opinion for the Court, held that "The President's power, if any, to issue the order must stem from an act of Congress or from the Constitution itself."¹⁵ Justice Black characterized President Truman's action as an unconstitutional arrogation of "law-making power" to the executive.¹⁶

Justice Jackson's concurring opinion in the Steel Seizure Case has been praised as "By far the most lucid, best reasoned, and most adequate ..." of the six separate concurring majority opinions.¹⁷ In his opinion, Justice Jackson stressed that our system of government is a "balanced power structure."¹⁸ He also pointed out that executive power to act is a variable depending upon the collective will of Congress for its authority.

necessary for the Nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but *his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws.*" [Emphasis added.] *Theodore Roosevelt; An Autobiography* (New York, 1925), p. 357.

The typical view of the second group was expressed by ex-President Taft in 1916: The true view of the Executive functions is as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the federal Constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest. *Our Chief Magistrate and His Powers* (New York, 1916), p. 88.

¹¹ *Schechter v. United States*, 295 U.S. 495 (1935); *Home Bldg. and Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934); *Wilson v. New*, 243 U.S. 332 (1917).

¹² *See, e.g., The Prize Cases*, 67 U.S. (2 Black) 635 (1863). This case is an example of how, in the past, the Supreme Court has accepted a Congressional validation of the exercise by the Executive branch of emergency powers.

¹³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) [hereinafter cited as *Youngstown*].

¹⁴ Brief for Petitioner, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
¹⁵ 343 U.S. at 585.

¹⁶ 343 U.S. at 587.

¹⁷ J. SMITH & C. COTTER, *POWERS OF THE PRESIDENT DURING CRISIS* 138 (1960) [hereinafter cited as SMITH & COTTER].

¹⁸ 343 U.S. at 634.

Justice Jackson listed three situations which determine the extent of the President's Power:

1. 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. . . .

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers. . . .

3. 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.¹⁹

In setting forth these tests, authorities feel that Justice Jackson set up a workable analysis which provided a sound conclusion:

The seizure of the steel mills by President Truman in face of a contrary congressional policy fell into the third of these categories and left presidential power "most vulnerable to attack and in the least favorable of possible constitutional postures." The Court could sustain the President's action "only by holding that seizure of such strike-bound industries is within his domain and beyond control by Congress."²⁰

Justice Jackson's analysis is as important today as it was twenty-three years ago when it was written. Still today, the 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 to 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 been resolved.

CONGRESSIONAL REACTION

In January, 1973, Senator Charles Mathias of Maryland and I became co-chairmen of a Special Committee created by the Senate²¹ to examine the consequences of terminating the declared states of national emergency that now prevail; to recommend what steps the Congress should take to ensure that the termination can be accomplished without adverse effect upon the necessary tasks of governing; and also, to recommend ways in which the United States can meet future emergency situations with speed and effectiveness but without relinquishment of congressional oversight and control.

In accordance with this mandate, the Special Committee on National

¹⁹ 343 U.S. at 635-37.

²⁰ SMITH & COTTER at 139, citing *Youngstown* at 640.

²¹ S. Res. 242, 93d Cong., 2d Sess., 120 Cong. Rec. 510058 (1974); S. Res. 9, 93d Cong., 1st Sess., 119 Cong. Rec. 5270 (1973); S. Res. 304, 92d Cong., 2d Sess., 120 Cong. Rec. 5276 (1972).

Emergencies and Delegated Emergency Powers (in conjunction with the Executive branch, expert constitutional authorities, as well as former high officials of this government) has been engaged in a detailed study to determine the most reasonable ways to restore normalcy to the operations of our government.

THE COMPILATION OF NATIONAL EMERGENCY STATUTES

A first and necessary step was to bring together the body of statutes, which have been passed by Congress, conferring extraordinary powers upon the Executive branch in times of national emergency. This was a most difficult task, which was finally completed in the autumn of 1973.²² Nowhere in the government, in either the Executive or Legislative branches, did there exist a complete catalog of all emergency statutes. Many were aware that there had been a delegation of an enormous amount of power but, of how much power, no one knew. In order to correct this situation, the Special Committee staff worked with Executive officials, experts in the Library of Congress and the General Accounting Office, and knowledgeable legal authorities to compile an authoritative list of delegated emergency powers.

In the past, the only way to compile a catalog useful to Congress would have required going through every page of every volume of the Statutes-at-Large. Fortunately, the United States Code (1970 edition and one supplement) was put into computer tapes by the U.S. Air Force in the so-called LITE system, which is located at a military facility in the State of Colorado. The Special Committee devised several programs for computer searches based on a wide spectrum of key words and phrases contained in typical provisions of law which delegate extraordinary powers. Examples of some trigger words are "national emergency," "war," "national defense," "invasion," "insurrection."

These programs, designed to produce a computer printout of all provisions of the United States Code that pertain to a state of war or national emergency, resulted in several thousand citations. At this point, the Special Committee and Library of Congress staffs went through the printouts, separating out all those provisions of the United States Code most relevant to war or national emergency, and weeding out those provisions of a trivial or extremely remote nature. Two separate teams worked on the computer printouts and the results were put together in a third basic list of United States Code citations.

To determine legislative intent, the United States Code citations were then hand checked against the Statutes-at-Large, the Reports of Standing

²² SPECIAL SENATE COMM. ON THE TERMINATION OF THE NATIONAL EMERGENCY, EMERGENCY POWERS STATUTES: PROVISIONS OF FEDERAL LAW NOW IN EFFECT DELEGATING TO THE EXECUTIVE EXTRAORDINARY AUTHORITY IN TIME OF NATIONAL EMERGENCY, S. REP. NO. 93-549, 93d Cong., 1st Sess. (1973) [hereinafter cited as EMERGENCY POWERS STATUTES].

Committees of the United States Senate and House of Representatives and, where applicable, Reports of Senate and House Conferences.

In addition, the laws passed since the publishing of the 1970 Code were checked and relevant citations were added to the master list. The compilation was then checked against existing official catalogs of the Department of Defense, the Office of Emergency Planning, and a 1962 House Judiciary Committee synopsis of emergency powers. The result was a compilation and commentary on 470 special statutes invokable by the President during a time of declared national emergency.²³

THE SCOPE OF THE CONFERRED POWERS

These hundreds of statutes clothe the President with virtually unlimited powers with which he can affect the lives of American citizens in a host of all-encompassing ways. This vast range of powers, taken together, confers enough authority on the President to rule the country without reference to normal constitutional processes.²⁴

Under the authority delegated by these statutes the President may: seize property; organize and control the means of production; seize commodities; assign military forces abroad; institute martial law; seize and control all transportation and communication; regulate the operation of private enterprise; restrict travel; and, in a plethora of particular ways, control the lives of all American citizens.²⁵

A review of these emergency statutes reveals a consistent pattern of lawmaking by which Congress, through its own action, and subsequent inaction, has transferred this awesome power to the executive, ostensibly to meet the problems of governing effectively in times of great crisis. The charge that the Executive branch usurped these powers from the Legislative branch cannot be sustained. The contrary is true—the transfer has been routinely mandated by Congress itself in response to the exigencies of war and other grave emergencies.²⁶

Legislative history shows that during the limited debates that did take place, a few, but very few, objections were raised by Senators and Congressmen expressing concern about the lack of provision for congressional guidance, as well as the absence of any terminal date for the authorities granted. Their speeches raised legitimate doubts about the wisdom of giving such open-ended authority to the President, with no procedural means provided to withdraw that authority once the emergency had passed.

²³ See EMERGENCY POWERS STATUTES, *supra* note 22, at 591.

²⁴ See L. KOENIG, *THE PRESIDENCY AND THE CRISIS* (1944); R. RENKIN & W. DALLMAYR, *FREEDOM AND EMERGENCY POWERS IN THE COLD WAR* (1964); C. ROSSITER, *CONSTITUTIONAL DICTATORSHIP* (rev. ed. 1963); J. SMITH & C. COTTER, *POWERS OF THE PRESIDENCY DURING CRISIS* (1960).

²⁵ EMERGENCY POWER STATUTES, *supra* note 22, at 6-7.

²⁶ EMERGENCY POWER STATUTES, *supra* note 22, at 6-14.

For example, one of the very first of these laws, enacted in 1933, was the Emergency Banking Act²⁷ based upon Section 5(b) of the Trading With the Enemy Act of 1917.²⁸ This act, passed on March 9, 1933, gave to President Roosevelt, with the full approval of Congress, the power to control major aspects of the economy, an authority which had formerly been reserved to the Congress. A portion of that act, still in force, illustrates the kind of open-ended authority Congress has typically given to the President during the past 40 years.²⁹

The present-day status of world affairs provides the opportunity to re-evaluate the form and substance of the emergency powers. The time is ripe for Congress to assess the nature, quality, and effect of what has now become known as emergency powers legislation. These laws are of great significance to civil liberties, to the operation of domestic and foreign commerce, and to the general functioning of the United States Government.

EMERGENCY WAR POWERS

In the context of the war powers issue and the long debate of the past decade over national commitments, 10 United States Code

²⁷ 12 U.S.C. § 95(a) (1933).

²⁸ 50 U.S.C. App. § 5(b) (1917).

²⁹ 12 U.S.C. § 95(a) (1933) states in part:

(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest.

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; and the President shall, in the manner hereinabove provided, require any person to keep a full record of, and to furnish under oath, in the form of reports or otherwise, complete information relative to any act or transaction referred to in this subdivision either before, during, or after the completion thereof, or relative to any interest in foreign property, or relative to any property in which any foreign country or any national thereof has or has had any interest, or as may be otherwise necessary to enforce the provisions of this subdivision, and in any case in which a report could be required, the President may, in the manner hereinabove provided, require the production, or if necessary to the national security or defense, the seizure, of any books of account, records, contracts, letters, memoranda, or other papers, in the custody or control of such person; and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

(2) Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any rule, regulation,

Section 712 (1951), entitled "Foreign governments: detail to assist," is important.³⁰ It reads:

(a) Upon the application of a country concerned, the President, whenever he considers it in the public interest, may detail members of the Army, Navy, Air Force, and Marine Corps to assist in military matters—

(1) any republic in North America, Central America, or South America;

(2) the Republic of Cuba, Haiti, or Santo Domingo and

(3) during a war or a declared national emergency, any other country that he considers it advisable to assist in the interest of national defense.

(b) Subject to the prior approval of the Secretary of the military department concerned, a member detailed under this section may accept any office from the country to which he is detailed. He is entitled to credit for all service while so detailed, as if serving with the armed forces of the United States. Arrangements may be made by the President, with countries to which such members are detailed to perform functions under this section, for reimbursement to the United States or other sharing the cost of performing such functions.

The Defense Department, in answer to inquiries by the Special Committee concerning this provision, has stated that it has only been used with regard to Latin America, Liberia and Iran, and interprets its applicability as being limited to noncombatant advisers.³¹ However, the language of Section 712 is wide open to other interpretations. Since Congress has delegated this power in such an open-ended way the argument could be made that no further congressional concurrence was necessary.

The repeal, three years ago, of almost all of the 1950 Emergency Detention Act was a constructive step, but 18 United States Code Section 1383 (1948) remains.³² Entitled "Restrictions in military areas and zones," it reads:

Whoever, contrary to the restrictions applicable thereto, enters, remains in, leaves, or commits any act in any military area or military zone prescribed under the authority of an Executive order of the President, by the Secretary of the Army, or by any military commander designated by the Secretary of the Army, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act

instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder.

³⁰ EMERGENCY POWERS STATUTES, *supra* note 22, at 110-112.

³¹ EMERGENCY POWERS STATUTES, *supra* note 22, at 9.

³² 18 U.S.C. § 1383 (1948) was based on 18 U.S.C. § 97(a) (1942).

was in violation thereof, be fined not more than \$5,000 or imprisoned not more than one year, or both.

This statute appears, on its face, to be a permanent, not an emergency power. It was used as the basis for internment of Japanese-Americans in World War II.³³ Although it seems to be cast in a permanent form, the legislative history of the section shows that the statute was intended as a World War II emergency power only, and was not to apply in "normal" peacetime circumstances. Yet the law remains on the books.

A second study by the Special Committee analyzes the arbitrary use of Executive Orders in times of declared national emergency.³⁴ It is our conclusion that a great many of the most significant presidential decisions are not available for congressional or public scrutiny either in the *Federal Register* or through transmittal of classified information to the Senate and the House.³⁵

A CONGRESSIONAL ATTEMPT TO UNRAVEL THE PROBLEM

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 information 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.

What the Executive branch does with public funds and who is entitled to know about Executive directives are among the most important issues now being faced by our system. Until a majority of the men on Capitol Hill grapple with these problems directly, Congress will be confronted with a continuing veil of secrecy and will be left shackled in its capacity to oversee the Executive branch. The bombing of Cambodia, indeed the whole presidential conduct of the Indochina War, and now Watergate, tragically demonstrate the results of such legislative abdication.

³³ On February 19, 1942, President Roosevelt, acting as President and Commander-in-Chief, issued Executive Order No. 9066 authorizing military commanders designated by the President to establish "military areas" from which any or all persons might be excluded for national security reasons. Congress, by the passage of 18 U.S.C. § 97(a) (March 21, 1942) made the violation of enforcement orders issued under the Executive Order a criminal offense.

On March 24, 1942, General DeWitt, the military commander of the Western Defense Command, designated the Pacific Coast states as Military Area No. 1, and in a series of resulting orders required persons of Japanese ancestry to remove from designated districts to "relocation centers" established further inland. *See Ex parte Endo* 323 U.S. 283 (1944); *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

³⁴ EMERGENCY POWERS STATUTES, *supra* note 22.

³⁵ *Id.*

Accordingly, Senator Mathias and I, along with the remaining members of the Special Committee, and Senator Ervin, offered an omnibus legislative package on August 22, 1974, to remedy this situation.³⁶ The measure would terminate all existing emergencies and provide orderly procedures for both declaring and ending new national emergencies in the future. It would provide that, in the event of a national emergency in which "the preservation, protection and defense of the Constitution, or . . . the common defense, safety, or well-being of the territory or people of the United States" is at stake, "the President is authorized to proclaim the existence of a national emergency." Such a presidential proclamation would be published in the *Federal Register*, in which the President would have to designate those provisions of emergency law to be exercised during the declared emergency, in order for the statutes to become operative.

Any national emergency so declared by the President could be terminated by a concurrent resolution by the Congress. Moreover, rather than allow emergency powers to continue unexamined, the Congress would be required to vote at six-month intervals thereafter as to whether the emergency shall or shall not be continued. By comparison I might note here that through both World Wars, the British Parliament declared the United Kingdom to be in a state of national emergency for only 30 days at a time.³⁷

CONCLUSION

Since the failure of the Roman Republic, historians and philosophers have analyzed the problem posed to a legislature when it confers extraordinary power upon the executive. Their writings teach us that liberty is fragile, and vulnerable to those who exercise power purely for its own sake. Machiavelli, in his *Discourses on Livy*, acknowledged that great power may, on occasion, have to be given to the executive if the state is to survive, but warned of the grave dangers in doing so. He cautioned:

Yet it is not good that in a republic anything should ever happen that has to be dealt with extralegally. The extralegal action may turn out well at the moment yet the example has a bad effect, because it establishes a custom of breaking laws for good purposes; later, with this example, they are broken for bad purposes. Therefore a republic will never be perfect if with her laws she has not provided for everything, and furnished a means for dealing with every unexpected

³⁶ S. 3957, 93d Cong., 2d Sess. (1974).

[Ed. Note: S. 3957 was passed by the Senate on October 7, 1974. It was sent to the House where it was referred to the Judiciary Committee. As the 93d Congress ended (December, 1974), S. 3957 was before the House Subcommittee on Claims and Government Operation. Thus, the bill will have to be re-introduced to the Senate in the First Session of the 94th Congress by its original sponsors, Senators Church and Mathias.]

³⁷ Cotter, *Constitutionalizing Emergency Powers: The British Experience*, 5 *STAN. L. REV.* 382 (1953).

event, and laid down a method for using it. In conclusion, therefore, I say that those republics that cannot against impending danger take refuge under a dictator or some such authority will in serious emergencies always be ruined.³⁸

Rousseau also discussed the question of delegated emergency powers in his *Social Contract*. He wrote:

Moreover, in whatever way this important commission may be conferred, it is important to fix its duration at a very short term which can never be prolonged. In the crises which cause it to be established, the State is soon destroyed or saved; and the urgent need having passed away, the dictatorship becomes tyrannical or useless.³⁹

Despite this ancient advice, frail men continue to succumb to the temptations of great power. These are times when we can ill afford to let that power go unchecked.

³⁸ N. MACHIAVELLI, DISCOURSES ON THE FIRST DECADE OF TITUS LIVIUS 268-69 (Tudor Publ. Co., 1965).

³⁹ J. Rousseau, *Social Contract*, in FAMOUS UTOPIAS 113 (1901).