

Washington University Law Review

Volume 1961 | Issue 3

January 1961

Review of “Powers of the President During Crises,” By J. Malcolm Smith & Cornelius P. Cotter

William L. Bradshaw
University of Missouri

Follow this and additional works at: https://openscholarship.wustl.edu/law_lawreview



Part of the [President/Executive Department Commons](#)

Recommended Citation

William L. Bradshaw, *Review of “Powers of the President During Crises,” By J. Malcolm Smith & Cornelius P. Cotter*, 1961 WASH. U. L. Q. 307 (1961).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol1961/iss3/8

This Book Review is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

must lament that death stilled his voice in 1953, since his advice would be continually helpful in the present Cold War. But through the immortality of his good works, Felix Cohen's memory and beliefs remain with us.

NEIL N. BERNSTEIN †

POWERS OF THE PRESIDENT DURING CRISES, J. Malcolm Smith and Cornelius P. Cotter, Public Affairs Press, Washington, D. C., 1960. Pp. 146. \$5.00.

The major emphasis of the work is on emergency powers during wartime, with lesser attention being accorded to emergencies generally involving a small area. In the latter category are emergencies brought about by reason of droughts, earthquakes, fires, floods and tornadoes. The normal procedure followed in such cases is that Congress will authorize the president to take appropriate action after declaring that an emergency exists.

The conclusion that the Constitution authorizes the use of emergency powers is reached by the literature on the breadth of the inherent, residual, executive and war powers of the president. Hundreds of cases involving the use of emergency powers during crises in the three Administrations since 1933 are discussed by the authors, with a few references to earlier precedents. However, the point of view adopted is that precedent is unnecessary for the exercise of "emergency" powers. Supporting this position are references to numerous occasions where recent presidents have considered it necessary to exercise an emergency power for the public good without authority of law.

A separate chapter is devoted to the various legislative restraints on the use of the emergency powers. Among these restraints are requirements that the executive must report to Congress or to a Congressional Committee. In some cases Congress may by concurrent resolution check, modify or terminate an emergency program, while in other instances, legislation may require inter-agency cooperation in declaring and in meeting an emergency.

In the chapter devoted to judicial review, the authors agree that self-preservation in time of war may require the violation of constitutional rights of the individual. They quote with approval the dictum of Chief Justice Hughes that "the war power of the federal government . . . is a power to wage war successfully." Brief reference is made to the *Milligan* case following the Civil War, and to the *Schenck* case with Justice Holmes' "clear and present danger

† A.B., University of Michigan, 1954; LL.B., Yale University, 1957. Member of the District of Columbia and Wyoming bars.

doctrine." It is pointed out that today, in effect, the Court has adopted Justice Hand's modification of that doctrine, substituting "probability" for "imminence."

The discussions of the constitutional issues in the 1952 Steel Seizure Cases and in the 1957 Steel Strike are a clear indication that Supreme Court justices hold widely divergent opinions regarding emergency powers. These opinions, and those in other cases cited, add to a "confusing array" of data on a controversial subject, and involve the Court in decision-making—a function for which it is ill-adapted.

By way of recommendation, the authors propose a generic statute authorizing the President to proclaim a national or regional emergency. The proposed statute would further empower him to issue appropriate rules and regulations. These, he would be required to report to Congress, which in turn could revoke any provision. By this procedure, the authors contend, the government could cope with a crisis and at the same time retain legal limits upon arbitrary exercises of power.

The work, although not easy reading, is a valuable addition to the literature in a complex and controversial field. This reviewer believes that much of the data in the 19 pages of references should have been incorporated into the 146 pages of textual material.

WILLIAM L. BRADSHAW †

† Dean, School of Business and Public Administration, University of Missouri.