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**PRESIDENTIAL EMERGENCY POWERS
RELATED TO INTERNATIONAL
ECONOMIC TRANSACTIONS:
CONGRESSIONAL RECOGNITION
OF CUSTOMARY AUTHORITY**

I. INTRODUCTION

On December 28, 1977, President Carter signed into law Public Law 95-223, an act "[w]ith respect to the powers of the President in time of war or national emergency."¹ The primary purpose of the Act is to revise the Trading With the Enemy Act of 1917 (TWEA),² and thus to restrict presidential authority to respond to emergencies related to international economic transactions. The Act is the latest product of a continuing congressional effort to readjust the balance of power between the two branches of government. The War Powers Resolution³ and the National Emergencies Act⁴ were earlier pieces of legislation intended to have the same effect: to retrieve congressional power which had been relinquished to the President. The question remains, however, whether Congress can reverse a trend toward greater presidential initiative, a trend which until recently it supported.⁵

The Trading With the Enemy Act is a prime example of how presidential initiative has been nurtured and expanded by presidential action and congressional acquiescence. The Act was originally intended to provide the President with the authority to respond to international economic emergencies during time of war; it evolved into the source of authority for presidential responses in such diverse areas as consumer credit,⁶ postal strikes,⁷ and balance

1. Act of Dec. 28, 1977, Pub. L. No. 95-223, 91 Stat. 1625.

2. Trading With the Enemy Act, Ch. 106, 40 Stat. 411 (current version at 50 U.S.C. app. §§ 1-44 (1970)).

3. 50 U.S.C. § 1541-48 (Supp. V 1975).

4. Pub. L. No. 94-412, 90 Stat. 1255 (1976).

5. As one commentator stated:

'[W]henever the American political system has moved systematically with respect to public policy, the direction and the initiative have come from the White House.' The notion that Congress should become more involved in making and implementing foreign policy is unassailable in theory. But Congress has consciously chosen other roads for itself To enable Congress to increase its foreign policy role significantly would require fundamental revisions in the legislature's decision-making apparatus

Sofaer, *The Presidency, War, and Foreign Affairs: Practice Under the Framers*, 40 LAW & CONTEMP. PROB. 12, 38 (Spring 1976).

6. Exec. Order No. 8843, 3 C.F.R. 976 (1941). This Order was retroactively

of payments deficits.⁸ The purpose of this paper is to analyze the concept, development, and scope of the powers delegated to the President under section 5(b) of the TWEA, and to determine what impact Public Law 95-223 will have on the use of these powers in future emergencies. This paper proposes that Congress has, indeed, "chosen other roles for itself,"⁹ and as a result that the constitutional authority of the President has expanded implicitly to include the authority to respond unilaterally to an emergency relating to international economic transactions. The significance of Public Law 95-223 is reflected in the seemingly disparate reactions of the executive and legislative branches towards the Act: President Carter stated that Public Law 95-223 is "largely procedural;"¹⁰ Congress stated that it intended the legislation "to redefine the power of the President to regulate economic transactions in future times of war or national emergency."¹¹ The evidence indicates, however, that while Congress may have "redefined" the power, it did not substantively change the power by that redefinition.

II. HISTORY OF PRESIDENTIAL USES OF EMERGENCY POWERS

Until World War I, the exercise of authority in times of national emergency was largely at the discretion of the President.¹¹ This authority was invoked repeatedly during the Civil War. In 1861 President Abraham Lincoln blockaded Confederate ports, expanded the number of ships in the navy, and enlarged the military, prior to convening an emergency session of Congress.¹³ Lincoln

approved by Congress in the first War Powers Act, ch. 593, 55 Stat. 839 (1941) (codified at 12 U.S.C. § 95a (1976) and 50 U.S.C. app. § 5 (1970)).

7. Pres. Proc. No. 3972, 3 C.F.R. 35 (1970).

8. Exec. Order No. 11,387, 3 C.F.R. 90 (1968).

9. Sofaer, *supra* note 5, at 38.

10. Statement by Pres. Carter at the signing of Public Law 95-223, 13 WEEKLY COMP. OF PRES. DOC. 1940 (Jan. 2, 1978).

11. HOUSE COMM. ON INTERNATIONAL RELATIONS, TRADING WITH THE ENEMY ACT REFORM LEGISLATION, H.R. REP. NO. 459, 95th Cong., 1st Sess. 1 (1977).

12. SENATE COMM. ON GOVERNMENT OPERATIONS AND THE SPECIAL COMM. ON NATIONAL EMERGENCIES AND DELEGATED EMERGENCY POWERS, THE NATIONAL EMERGENCIES ACT SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS, 94th Cong., 2d Sess. 1 (Comm. Print 1976) [hereinafter cited as SOURCE BOOK]; see also C. ROSSITER, THE CONSTITUTION, THE PRESIDENT, AND CRISIS GOVERNMENT 221 (1948).

13. STAFF OF SENATE SPECIAL COMM. ON NATIONAL EMERGENCIES AND DELEGATED EMERGENCY POWERS, A BRIEF HISTORY OF EMERGENCY POWERS IN THE UNITED STATES, 93d Cong., 2d Sess. 12 (Comm. Print 1974).

found constitutional validity for his actions in "protection of the public peace."¹⁴ Once Congress convened, it approved his actions "as if they had been issued and done under the previous express authority and direction of the Congress of the United States."¹⁵ That same year, Lincoln suspended the writ of habeas corpus, and two years later the Congress confirmed that "during the present rebellion the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of *habeas corpus* in any case"¹⁶

In 1894 President Grover Cleveland acted without prior approval to prevent interference by striking railroad employees with the mail and with interstate commerce. The Supreme Court later affirmed his authority to act in such an emergency.¹⁷ Under the "stewardship" theory, President Theodore Roosevelt reflected Lincoln's attitude: it is not necessary for the President to have a particular grant of power in order to act in an emergency, because the President's primary duty is to act affirmatively for the common well being.¹⁸

This broad conception of presidential powers was narrowed considerably by President Woodrow Wilson. When confronted with the crisis of American involvement in World War I, President Wilson sought congressional approval for almost all his actions.¹⁹ As one scholar noted, "[t]he basis of Lincoln's power was the Constitution, and he operated in spite of Congress. The basis of Wilson's power was a group of statutes, and he cooperated with Congress."²⁰ One source of Wilson's emergency powers was the Trading With the Enemy Act, passed by Congress in 1917 to "define, regulate, and punish trading with the enemy"²¹ The intent of Congress was to grant to the President the powers necessary, in time of war,²² to regulate the export or hoarding of gold, foreign ex-

14. Pres. Proc. of April 19, 1861, reprinted in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 14 (J. Richardson ed. 1904).

15. Act of Aug. 6, 1861, ch. 63, § 3, 12 Stat. 326.

16. Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755-58.

17. *In re Debs*, 158 U.S. 564, 582 (1895).

18. C. ROSSITER, *supra* note 12, at 218.

19. *Id.* at 229.

20. *Id.* See also STAFF OF THE SENATE SPECIAL COMM. ON THE TERMINATION OF THE NATIONAL EMERGENCY, SUMMARY OF EMERGENCY POWER STATUTES, 93d Cong., 1st Sess. 3 (Comm. Print 1973) [hereinafter cited as SUMMARY OF EMERGENCY POWER STATUTES].

21. Ch. 106, § 1, 40 Stat. 411 (1807).

22. 55 CONG. REC. 7013 (1917) (letter from Sec'y of Treas. William G. McAdoo). See also 55 CONG. REC. 7011 (1917).

change transactions, and any form of transfers of credit to a foreign country.²³

While most of the war-related statutes were terminated at the end of World War I, the TWEA was retained, primarily because property was still held by the Alien Property Custodian under authority of the Act. Although commentators have remarked that the TWEA was always considered legislation available in the event of another war,²⁴ the Act was next relied upon by President Franklin D. Roosevelt to declare the 1933 Bank Holiday,²⁵ a domestic, peacetime emergency. Even though section 5(b) of the 1917 TWEA only granted emergency powers to the President "compatible with . . . the successful prosecution of the war,"²⁶ and the language of section 5(b) was limited to economic transactions with foreign countries, within eight hours after the Emergency Banking Act was introduced in Congress, it was approved and signed into law. Not only did Congress approve this domestic, peacetime application of section 5(b), it also amended section 5(b) to read, "During the time of war or during any other period of national emergency declared by the President . . ." ²⁷ (Emphasis added.) Congress recognized that this language expanded presidential power, but even those reluctant to approve such a transfer of congressional authority supported the amendment because of the severe economic conditions at the time.²⁸ President Roosevelt continued to cite section 5(b) as authority for acting in domestic emergencies such as regulation of consumer credit.²⁹ In 1941 Congress again expanded his authority, allowing the President to define "any and all" of the items used in the statute.³⁰

Emergency powers under section 5(b) were again invoked by the Executive on December 16, 1950, when President Harry S. Truman declared a national emergency in connection with the Korean cri-

23. Exec. Order of Oct. 12, 1917, reprinted in ALIEN PROPERTY CUSTODIAN REPORT 499 (1919).

24. M. DOMKE, TRADING WITH THE ENEMY IN WORLD WAR I, at 2 (1943).

25. Pres. Proc. No. 2039, reprinted in 48 Stat. 1691 (1933).

26. Ch. 106, § 5(b), 40 Stat. 411 (1917).

27. Emergency Banking Relief Act of 1933, ch. 1, § 2, 48 Stat. 1 (codified at 12 U.S.C. § 95b (1970) and 50 U.S.C. app. § 5 (1970)). The House passed the bill after only 38 minutes of debate, and without printed copies of the bill available for study. That evening the Senate approved the legislation. See SUMMARY OF EMERGENCY POWER STATUTES, *supra* note 20, at 7.

28. 77 CONG. REC. 65 (1933).

29. Exec. Order No. 8843, 3 C.F.R. 976 (1941).

30. Ch. 593, § 301(3), 55 Stat. 839 (1941) (codified at 12 U.S.C. § 95a(3) (1976)).

sis.³¹ Under this new declaration, section 5(b) was used once more as authority to control areas at best peripherally related to a foreign enemy. This pattern of domestic or peacetime use of section 5(b) continued when President Lyndon B. Johnson cited Truman's 1950 declaration of national emergency as precedent for a program designed to correct the United States balance of payments deficit.³² This application of the TWEA was yet another step removed from the original purpose of the Act, because here the emergency requirement was lacking. The balance of payments deficit had existed for some time prior to January 1, 1968. As one commentator noted, "the measures were taken without debate or authority from Congress, and they had no rational connection with the purpose of the Trading With the Enemy Act."³³ Congress did not object, however, and the program continued until 1974.

In 1971, President Richard M. Nixon declared a new national emergency in order to implement a ten percent import duty surcharge.³⁴ Since he was scheduled to meet with Emperor Hirohito of Japan within two weeks, President Nixon did not want to cite the Trading With the Enemy Act as authority for his declaration of a national emergency.³⁵ Instead, he declared an emergency based on statutes which included *but were not limited to* the 1930 Tariff Act and the Trade Expansion Act. When the surcharge was challenged in court, however, the Administration specifically cited section 5(b) of the Trading With the Enemy Act,³⁶ and on appeal the court found that "[t]he broad and flexible construction given to § 5(b) by the courts which have considered it is consistent with the intent of Congress and with the broad purposes of the Act."³⁷ Section 5(b) was also the basis for President Nixon's mobilization

31. Pres. Proc. No. 2914, 3 C.F.R. 99 (1950).

32. Exec. Order No. 11,387, 3 C.F.R. 90 (1968).

33. *Emergency Controls on International Economic Transactions: Hearings on Trading With the Enemy Reform Legislation Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations, 95th Cong., 1st Sess. 7 (1977)* (statement of Andreas F. Lowenfeld) [hereinafter cited as *Hearings on Trading With the Enemy Reform Legislation*].

34. Pres. Proc. No. 4074, 3 C.F.R. 80 (1971).

35. *Hearings on Trading With the Enemy Reform Legislation*, note 33 *supra*.

36. *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560 (C.C.P.A. 1976). On appeal, the court was presented with the question of whether the President could rely on the Trading With the Enemy Act to impose a temporary surcharge on imports. Although the lower court found that section 5(b) did not extend to any presidential imposition of customs duties, the Court of Customs and Patent Appeals held that imposition of the surcharge was within the powers granted by section 5(b).

37. *Id.* at 583.

of National Guard units during the 1970 strike by Post Office employees.³⁸ In addition, the TWEA has been used four times in recent years to extend the Export Administration Act,³⁹ and has been used to authorize the Foreign Assets Control Regulations,⁴⁰ the Cuban Assets Control Regulations,⁴¹ the Transaction Control Regulations,⁴² and the Foreign Funds Control Regulations.⁴³

It is significant that, prior to the signing of Public Law 95-223, the United States had been in a declared state of national emergency since 1933; in fact, there were four presidentially-proclaimed emergencies in effect at the time Public Law 95-223 was signed in 1977. It is also significant to remember that the original source of authority for dealing with these "emergencies" was an act passed in 1917 for the specific purpose of allowing the President to regulate economic transactions with foreign nations in time of war. As the Department of Justice stated in 1976, "As a result of continuing interplay between the Executive and Congress, Section 5(b) has been the statutory foundation for control of domestic as well as international financial transactions and is not restricted to 'trading with the enemy.'"⁴⁴

III. CONGRESSIONAL REACTION TO THE DEVELOPMENT OF EMERGENCY POWERS IN THE PRESIDENT

Until the emergency of the conflict between the Executive and Congress toward the end of the Vietnam War, there was little if any evidence of congressional concern or disapproval of the President's broad application of section 5(b) powers. There was, instead, a

38. Pres. Proc. No. 3972, 3 C.F.R. 35 (1970).

39. Exec. Order No. 11,940, 3 C.F.R. 150 (1976); Exec. Order No. 11,810, 3A C.F.R. 180 (1974); Exec. Order No. 11,796, 3A C.F.R. 163 (1974); Exec. Order No. 11,677, 3A C.F.R. 197 (1972).

40. 31 C.F.R. § 500 (1959), *as amended*, 27 Fed. Reg. 1116 (1962). The Regulations prohibited all transactions with North Korea, China, Cambodia, and Vietnam unless authorized by the Secretary of the Treasury. In 1971, the Department of the Treasury lifted the trade embargo on China.

41. 31 C.F.R. § 515 (1965). The Regulations prohibited all transactions between the United States and Cuba, with specified exceptions.

42. 31 C.F.R. § 505 (1959). The Regulations prohibit any person in the United States from buying or selling strategic commodities in any foreign country if those commodities are ultimately destined for a Communist country.

43. 31 C.F.R. § 520 (1967). The Regulations continue the World War II retention of assets in the United States belonging to Czechoslovakia, Estonia, Latvia, Lithuania, and East Germany.

44. Letter from Antonin Scalia, Ass't Att'y Gen., Office of Legal Counsel, to J.T. Smith, Gen. Counsel, Dep't of Commerce (Sept. 29, 1976), *reprinted in* INTERNATIONAL TRADE REP., U.S. EXPORT WEEKLY (BNA) No. 128 (Oct. 19, 1976).

constant pattern of approval, either implicit or explicit, of nearly all actions taken under the authority of section 5(b).⁴⁵ Congressional reaction to the Emergency Banking Act has been noted previously, along with other instances of expanded application of the TWEA. This history of section 5(b) and the Export Administration Act lends further credence to the theory of congressional acquiescence in the area. During the 1974 attempt to renew the Export Administration Act, Senator Packwood acknowledged that the only control over exports that would be available if the Act expired would be based on the TWEA.⁴⁶ During a later debate on the Export Administration Act, Representatives Ashley and Frenzel recognized that if the President saw a need to impose limitations on exports at that time he could do so only under the authority of the TWEA because the Act had expired.⁴⁷ In 1970, when President Nixon called up the National Guard during the postal strike, his reliance on section 5(b) was not questioned by Congress. The congressional objections were aimed, rather, at the President's threatened veto of a pay increase for Post Office employees.⁴⁸

In all reports prepared by the congressional committees charged with studying the emergency powers of the President, it was recognized that "[n]o charge can be sustained that the Executive branch has usurped powers belonging to the Legislative branch; on the contrary, the transfer of power has been in accord with due process of normal legislative procedures."⁴⁹ It was not until Congress became concerned over the unilateral actions of the executive branch that there was any demonstrable interest in what it recognized as a shift of power from Congress to the President, primarily in foreign policy and the budget.⁵⁰ Congress' demonstrable interest became apparent with the War Powers Resolution.⁵¹ Additionally, Watergate had greatly increased congressional concern for greater accountability from the Executive.⁵² The National Emergencies Act and the Trading With the Enemy Act are further attempts by Congress to reassert its authority to "regulate Commerce with foreign nations" ⁵³

45. 122 CONG. REC. S14,840 (1976) (remarks of Sen. Mathias).

46. 120 CONG. REC. S20,978 (1974). See also SOURCE BOOK, *supra* note 12, at 251.

47. 120 CONG. REC. 35171 (1974).

48. 116 CONG. REC. H8606-11 (1970).

49. SUMMARY OF EMERGENCY POWER STATUTES, *supra* note 20, at 6.

50. See generally SOURCE BOOK, *supra* note 12, Introduction.

51. 50 U.S.C. § 1541 (Supp. V 1975).

52. See generally SOURCE BOOK, *supra* note 12, Introduction.

53. U.S. CONST. art. I, § 8, cl. 3. See also SOURCE BOOK, *supra* note 12, at 262.

The question remains, however, whether passage of reform legislation such as Public Law 95-223 will significantly limit the authority of the President in time of national emergency. First, it is uncertain whether the language of Public Law 95-223 is strong enough and restrictive enough to significantly limit presidential powers. President Carter implied that the substance of prior emergency authority has not been changed, at least in his own mind, when he classified Public Law 95-223 as "largely procedural."⁵⁴ Second, since FDR's 1933 declaration of a national emergency, there has been a consistent pattern of transfer of power in this area from the Congress to the President. Over 470 statutes delegating such powers to the Executive have been passed or recodified by Congress since 1933; the President has assumed approximately 200 special powers.⁵⁵ One expert has theorized that "the combination of legislative permissiveness and executive assertiveness over the past forty years has created a significant shift in the functional constitutional allocations of power to regulate foreign commerce from the legislative to the executive branches [*sic*]."⁵⁶

Furthermore, the Supreme Court has recognized that authority initially delegated by Congress to the President does not always remain delegated by and subject to congressional withdrawal. The uniform practice of the Executive over a significant period of time,⁵⁷ acquiesced in by Congress, can create permanent authority in the President. Such practice is said to be "beyond any power of alteration."⁵⁸ Both the history of the President's unchallenged use of this emergency economic power for almost 45 years, and the lack of strongly restrictive language inserted by Congress in the "revised" Act, indicate that this power is no longer delegated, but is permanently vested in the President.

IV. ANALYSIS OF PUBLIC LAW 95-223

A. *Impetus for Reform*

Under the National Emergencies Act, Congress established pro-

54. See text accompanying notes 10-11 *supra*.

55. SUMMARY OF EMERGENCY POWER STATUTES, *supra* note 20, at 6.

56. *Hearings on Trading With the Enemy Reform Legislation*, *supra* note 33, at 26-32 (prepared statement of Harold G. Maier). See also 118 CONG. REC. S18,367 (1972) (remarks of Sen. Mathias); Roche, *Executive Power and Domestic Emergency: A Quest for Prerogative*, 5 WESTERN POL. Q. 592, 595 (1952).

57. In *Parsons v. United States*, 167 U.S. 324, 330-31 (1897), the Court cited one practice which had existed for a period of 45 years. The TWEA has been the basis for peacetime emergency actions for over 45 years, since 1933.

58. *Id.* at 330.

cedural guidelines for control of future national emergencies, but exempted existing national emergencies declared under section 5(b) of the TWEA.⁵⁹ Although this provision exempted almost all existing emergencies, Congress recognized that a number of necessary government functions relied on section 5(b) authority and that to rescind that section abruptly would disrupt administrative functions of government.⁶⁰ At the same time, however, Congress was anxious to end the expansion or even the continuation of existing emergency powers of the President. To resolve this dilemma, Congress first exempted existing section 5(b) emergencies, and then directed the International Relations Committee to conduct an in-depth study of section 5(b) of the TWEA and to propose workable alternatives to the continuation of the existing emergencies. Public Law 95-223 was the result.

B. *Wartime Emergency Powers*

Under the TWEA, the President had economic emergency powers "[d]uring the time of war or during any other period of national emergency declared by the President"⁶¹ The powers made available to the President during such a period included regulation of any transactions in foreign exchange, banking transfers, coin, bullion, currency, and securities; regulation of property in which a foreign country, or national of that country, had any interest; the power to vest such property; and the power to use, hold, administer, liquidate, or sell such property for the benefit of the United States. The President retains these powers under the 1977 amendments to the Trading With the Enemy Act during time of war, as declared by Congress.⁶² In addition Public Law 95-223 "grandfathers" the applications of the TWEA existing on July 1, 1977,⁶³ a date chosen to avoid the use of the TWEA as authority for future extensions of the Export Administration Regulations.⁶⁴ The existing programs based on the TWEA, such as control of

59. Pub. L. No. 94-412, § 502(a)(1), 90 Stat. 1258 (1976) (to be codified in 50 U.S.C. § 1651).

60. See *Hearings on Trading With the Enemy Reform Legislation*, *supra* note 33, at 103-04 (statement of C. Fred Bergsten).

61. 50 U.S.C. app. § 5(b)(1) (1970) (amended 1977).

62. Act of Dec. 28, 1977, Pub. L. No. 95-223, § 102, 91 Stat. 1625 (to be codified in 50 U.S.C. app. § 5).

63. *Id.* § 101(b).

64. HOUSE COMM. ON INTERNATIONAL RELATIONS, REPORT ON TRADING WITH THE ENEMY ACT REFORM LEGISLATION, H.R. REP. NO. 459, 95th Cong., 1st Sess. 13 (1977) [hereinafter cited as HOUSE REPORT].

Cuban assets in the United States, may be extended by the President for one-year periods upon his determination that an extension would be in the national interest.⁶⁵

C. *Limitations on Domestic Emergency Powers*

Title II of Public Law 95-223 is the International Emergency Economic Powers Act (the "Act").⁶⁶ The Act, which purportedly creates limited emergency authority in the President in the case of any future national emergency, defines such emergency as "any unusual or 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"⁶⁷ A national emergency declared under section 5(b) of the TWEA was a basis for future presidential actions as well as for the immediate emergency. Such declarations were not self-limiting in either application or time. A declaration of emergency under the Act only creates authority to deal with the instant problem (although no time limit is imposed on an emergency); authority to respond to a new emergency can be created only by a new declaration.⁶⁸ In addition, Public Law 95-223 removes the President's peacetime authority to vest, to regulate purely domestic transactions, to regulate gold or bullion, or to seize records—powers which remain available in time of war.⁶⁹

The Act further requires the President to "consult" with Congress, *if possible*, prior to the declaration of a national emergency, and, in any event, to send a report to Congress explaining the circumstances which indicated the need for such powers, and designating the foreign country against which such action is taken.⁷⁰ Finally, the President is to report to Congress every six months on his exercise of powers under the Act.⁷¹

A closer analysis of these provisions indicates that President Carter's conception of the Act as "procedural" is arguably accurate; it further reveals that in almost all situations where the Act would be relied upon, the new procedures will not result in sub-

65. Act of Dec. 28, 1977, Pub. L. No. 95-223, 91 Stat. 1625 (to be codified in 50 U.S.C. app. § 5).

66. *Id.* § 201 (to be codified in 50 U.S.C. § 1701).

67. *Id.* § 202(a) (to be codified in 50 U.S.C. § 1701).

68. *Id.* § 202(b) (to be codified in 50 U.S.C. § 1701).

69. HOUSE REPORT, *supra* note 64, at 15.

70. Act of Dec. 28, 1977, Pub. L. No. 95-223, § 204(a)-(b), 91 Stat. 1627 (to be codified in 50 U.S.C. § 1703).

71. *Id.* § 204(c) (to be codified in 50 U.S.C. § 1703).

stantive changes in the President's power to regulate foreign economic transactions during a national emergency. The wartime powers of the President remain virtually unchanged under Title I. Although Title II limits a domestic, peacetime emergency to an "unusual or extraordinary threat" whose source is at least in "substantial part" outside the United States and which threatens "the national security, foreign policy, or economy,"⁷² it fails to define "unusual threat" or "substantial part." Since 1941 the President has been authorized to define the terms in the TWEA; there is no indication that this authority has been withdrawn in the revised Act. In reviewing recent applications of emergency powers by the President, a strong argument can be made that emergencies such as the balance of payments deficit and the import duty surcharge were caused to a "substantial" degree by forces outside the United States, that they were "unusual" situations, and that they were threats to the economy. It should also be noted that in the past the President has been relatively discriminating in the use of TWEA powers. In almost every instance, the authority was used in a situation which, if allowed to continue, would have injured the national economy, and which had some connection with foreign individuals or states. In many instances, presidential action was taken only after Congress had failed to resolve the situation—for example, its failure to develop a program to deal with the balance of payments deficit.

Nor is it a substantive change in the President's emergency powers to require him to "consult" with Congress, *if possible*, prior to declaring a national emergency, or to send a report to Congress after exercising such powers. A key to the emergency powers in question, one which is not challenged by Public Law 95-223, is the ability to declare an emergency without prior consultation with Congress. History confirms that once action has been taken, the President has either gone to Congress and received retroactive approval⁷³ (Emergency Banking Act, Lincoln's blockade, Consumer Credit Act), or he has received the tacit approval of Congress as reflected by the statements of individual congressmen⁷⁴ (Nixon's action on the postal strike, Export Administration Act). Presidents have, by and large, been restrained in their use of section 5(b) powers, invoking them in almost all instances to counter popularly recognized threats to the economy.⁷⁵ Correspondingly, Congress

72. *Id.* § 202(a) (to be codified in 50 U.S.C. § 1701).

73. *See* text accompanying notes 13-15, 26, & 29 *supra*.

74. SUMMARY OF EMERGENCY POWER STATUTES, *supra* note 20, at 4.

75. *See* text accompanying notes 38-39 *supra*. *See generally* *Hearings on Trad-*

has objected but infrequently to these actions. As one commentator pointed out, "Congress delegates its power to effect remedial measures during a national emergency because the existence of the emergency makes it difficult, if not impossible, for Congress to effectively respond to the crisis."⁷⁶ Congress' ultimate recognition of the need to vest emergency powers in the President during time of war *and* peace is reflected by the fact that in revising the TWEA it did not revert to the original concept of the Act, that is, that the President was granted specified emergency economic powers during time of war only.

The most controversial aspect of Public Law 95-223 is section 207(b), which permits the termination of a declared national emergency by Congress through the use of a concurrent resolution.⁷⁷ The Carter Administration has taken the position that the concurrent resolution provision violates the constitutional doctrine of separation of powers.⁷⁸ This position was emphasized by President Carter in his statement accompanying the signing of the Act:

In approving the bill, I must note my serious concern over the provision . . . which would allow Congress to terminate a national emergency declared by the President by concurrent resolution.

Provisions such as these raise profound constitutional questions, since Article I, Section 7, of the Constitution requires that Congressional action having the force of law be presented to the President for his signature or veto. In addition, such provisions have the potential of involving Congress in the execution of the laws—a responsibility reserved exclusively to the President under the Constitution. This feature of the bill may be unconstitutional. I will therefore treat the provision as requiring only that I "notify and wait" with respect to national emergencies covered by Section 207(b) of the Act.⁷⁹

It was the consensus of the subcommittee which formulated the bill that "this is an area where [the Congress and the Executive]

ing With the Enemy Reform Legislation, *supra* note 33, at 26-32 (prepared statement of Harold G. Maier).

76. Garson & Miller, *The Foreign Direct Investment Regulations: Constitutional Questions and Operational Aspects Examined*, 11 B. C. INDUS. & COM. L. REV. 143, 151 (1970).

77. For a balanced discussion of the constitutionality of such actions, see L. Fisher, *A Political Context for Legislative Vetoes* (Feb. 10-11, 1978) (paper presented to the White Burkett Miller Center of Public Affairs, University of Virginia).

78. *Hearings on Trading With the Enemy Reform Legislation*, *supra* note 33, at 109, 114 (statement of C. Fred Bergsten).

79. Statement of Pres. Carter, note 10 *supra*.

have to agree to disagree."⁸⁰ It should also be pointed out that, in his statement accompanying the signing of the National Emergencies Act, President Gerald Ford indicated that he, too, felt the concurrent resolution provision was unconstitutional.⁸¹ Constitutional scholars disagree over the legal effect of a legislative veto.⁸² If, in a court test, a congressional veto of the President's emergency declaration should be upheld, this provision would be Congress' strongest tool in Public Law 95-223. Whether Congress can use the veto to regain authority, however, depends first on its willingness to use the veto and then on the outcome of a judicial test. As noted earlier, the President has used these powers only for politically popular actions. If that pattern continues, it is unlikely Congress will have occasion to use the concurrent resolution. Thus, what is potentially the strongest section of the Act will not be much help to Congress in its attempt to reassert its equality with the Executive in this area.

D. *Judicial Implications*

Because presidential action under Public Law 95-223 may be subject not only to congressional scrutiny but also to possible court challenges, the Executive will have to justify his action in light of the legal analysis the Court will be likely to use. When judging the constitutionality of presidential actions, Justice Jackson suggested that all actions could be placed in one of three categories:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, . . .
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, but there is a zone of twilight in which he and Congress may have concurrent authority Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables

80. See *Hearings on Trading With the Enemy Act Reform Legislation*, *supra* note 33, at 110-20 (statement of Rep. Bingham, Chairman).

81. HOUSE REPORT, note 64 *supra*.

82. See, e.g., *Hearings on Trading With the Enemy Reform Legislation*, *supra* note 33, at 20, 32 (statements of Harold G. Maier and Stanley D. Metzger); L. Fisher, note 77 *supra*.

83. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring).

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.⁸³

It was Congress' intent, in "reforming" the TWEA, to restrict presidential initiative in applying emergency powers in time of peace. Such restriction would imply that any failure by the President to receive congressional approval of a national emergency declaration would place his authority "at its lowest ebb." As discussed earlier, however, a strong argument can be made that Public Law 95-223 is only procedural housekeeping, and does not remove or even restrict the substantive emergency powers as they have been interpreted since 1933. The President is not required to receive approval from, or even consult with, Congress before declaring an emergency. Once an emergency has been declared, no legislation by Congress is required to continue the emergency. The specific limitations on peacetime emergency powers—restrictions against the regulation of purely domestic transactions, regulation of gold or bullion, vesting, or the seizure of records—are not areas which the Executive has recently controlled through section 5(b) powers. With the exception of the procedural requirements of reporting to Congress and separate declarations for each emergency, the powers defined in Public Law 95-223 may be exercised as they have been in the past and still allow the President the "maximum authority" found in Justice Jackson's first category.

IV. THE DEVELOPMENT OF "CUSTOMARY" EMERGENCY AUTHORITY

Over the past 50 years, a shift in the constitutional authority to declare a peacetime emergency, and to control the powers stemming from such a declaration, has occurred. Congress has knowingly and willingly relinquished these powers to the President. Both branches recognize, and the courts have concurred, that the Executive now has what might be termed "inherent powers" to declare an emergency, and to operate accordingly, in areas involving transactions in "foreign exchange, transfers of credit or payments between, by, through, or to any banking institution."⁸⁴ As noted earlier, the original purpose of the TWEA—to provide emergency economic powers to the President *in time of war*—was not reiterated by Congress in Public Law 95-223; nor did Congress require implementing legislation or even retroactive approval of a declaration of national emergency. Congress implicitly acknowl-

84. Letter from Antonin Scalia, note 44 *supra*.

edged that the customary authority of the President in this area had become so accepted and necessary that Congress was not in a position to deny its existence. The strongest reform measure in Public Law 95-223, the concurrent resolution, lacks the strength to reestablish Congress' authority because, as one scholar noted, the Executive has strong constitutional grounds for ignoring a concurrent resolution terminating a declared emergency.⁸⁵

The gradual and consistent development of these powers follows a pattern similar to that required in international law to establish the existence of customary law. One international law scholar has explained that the concept of customary law is rooted in the desire for order and security. A premium is placed upon imitation of previous acts by other states.⁸⁶ The problems in establishing these powers as constitutionally vested in the President are similar to the problems which arise in trying to establish the existence of customary international law. Little judicial review is available on the constitutional question of separation of powers, just as little or no judicial review is available to prove the formation of a new concept of customary international law. Both must instead rely on prior governmental practice to establish the content of the law which has developed. In the case of federal domestic law, one scholar persuasively argues that "while in many instances neither the President nor the Congress may have the constitutional authority to act individually in the manner selected, the *combined* acts may amount to a constitutionally legitimate process which is accepted as authoritative by all branches and by the public."⁸⁷

In the case of emergency powers being vested in the President the three branches of government have, for at least fifty years, recognized a need for the President to have unilateral authority to react to emergency situations, particularly ones involving foreign economic transactions. Congress has supported and, at times relied upon, the existence of this authority in the President. In addition, the Court has consistently upheld the constitutionality of these emergency powers.⁸⁸ This pattern further coincides with the

85. *Hearings on Trading With the Enemy Reform Legislation*, *supra* note 33, at 25 (statement of Harold G. Maier).

86. A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 270 (1971).

87. H.G. Maier, *A Process of Constitutional Change: The Relevance of Prior Governmental Practice to the Constitutional Law of Separation of Powers* (1978) (unpublished manuscript).

88. As the Court noted in *United States v. Yoshida Int'l, Inc.*, "[the TWEA] has . . . survived every attack on its constitutionality . . ." 526 F.2d 560, 573 n.16 (C.C.P.A. 1975).

conclusion of Francois Geny that there are two necessary elements of custom: usage, or repeated practice, and the exercise of subjective right of those who apply the concept.⁸⁹ These two elements can be documented in the use of emergency powers in foreign commercial transactions. The use of these powers over the years is documented, as is the consistent recognition by all three branches of government that the authority is both available and constitutional. Since 1933, the Presidents who have employed emergency authority have been secure enough to exercise the accompanying powers without prior consultation with Congress. As the Department of Justice stated in 1976, "Congress was clearly aware that Section 5(b) could be used in this manner We know of no indication of Congressional disagreement with the legality of this practice or criticism of it."⁹⁰

That customary practice of the executive and legislative branches of the government can create a basis for constitutional law has long been recognized by the Supreme Court. In an early case involving the question whether the President had the power to remove a United States District Attorney, the Court found that, even though Congress may have originally had such authority, it relinquished it in legislation passed in 1789. That decision, "and the universal practice of the Government under it, *had settled the question beyond any power of alteration.*"⁹¹ (Emphasis added.) As further precedent, the Court cited a statement by Daniel Webster during the debate on the dismissal of the Secretary of the Treasury by President Jackson. Webster acknowledged that, although he would have argued differently on the original legislation in 1789, he had come to "regard it as a settled point . . . settled by the practice of the Government, settled by legislation" ⁹² In *Myers v. United States*, the Court reaffirmed its position that the customary practice of the government—acquiescence in and reliance on a legislative delegation of power over a period of years—is constitutionally binding.⁹³ The *Myers* Court held that "mere subsequent legislation" cannot reverse such construction.⁹⁴ Although the factual basis of *Myers* has been limited,⁹⁵ the Court's analysis of the development of a constitutional power based on the custom-

89. A. D'AMATO, *supra* note 86, at 49.

90. Letter from Antonin Scalia, note 44 *supra*.

91. *Parsons v. United States*, 167 U.S. 324, 330 (1897) (emphasis added).

92. *Id.* at 331.

93. *Myers v. United States*, 272 U.S. 52, 148 (1926).

94. *Id.* at 152.

95. See *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

ary practice of the government has continued to be cited with approval.⁹⁶

The continuing vitality of customary constitutional law is evident in Congress' "revision" of the Trading With the Enemy Act. While attempting to withdraw or control all emergency powers of the President through the National Emergencies Act, Congress recognized that the powers stemming from the TWEA could not be withdrawn. Too many necessary governmental functions were dependent on the continuation of the TWEA. Even after detailed study and analysis, the 1977 "revision" left the President's emergency economic powers virtually intact. As noted earlier, no attempt was made to limit the President's powers to the original scope of the Act—only in time of war.⁹⁷ The custom of congressional and Executive reliance on the President's power to react to an internationally-related economic emergency has become too strong, too necessary to the efficient functioning of the government to disregard.

To establish the existence of a concept of customary international law, six requirements have been proposed: the concept must be: (1) internally consistent, (2) general without being vague, (3) within all the inductive evidence, (4) parsimonious, (5) objectively determinable, and (6) claim-oriented.⁹⁸ The theory proposed in this paper—that the authority of the President to declare a peacetime emergency in the area of international economic transactions and to assume the accompanying powers—meets the requirements for the formulation of customary law. It is, first of all, internally consistent. Congress and the President have acknowledged that such authority has, through delegation, practice, and acquiescence, shifted to the President.⁹⁹ Each time the President has cited the TWEA, he has broadened its scope, and each time he has done so, Congress has accepted his actions.¹⁰⁰ Although in the first few

96. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976).

97. See text accompanying notes 54-58 *supra*.

98. A. D'AMATO, *supra* note 86, at 13-19.

99. See, e.g., *Interim Report—A Recommended National Emergencies Act*, 120 CONG. REC. S15,784-94 (1974). During that debate Senator Pearson stated: "My concern was increased when I realized Congress bears a large share of responsibility for the steady accretion of emergency power. While Presidents can and have unilaterally declared that states of emergency exist, Congress has given them means to exercise extraordinary powers during these times." Senator Hansen concurred: "There has not been an usurpation of Congressional power but rather there has been an authorized delegation."

100. *Id.* at S15,785 (statement of Sen. Church on the Introduction of S. 3957—*A National Emergencies Act*).

applications of section 5(b) powers in time of peace Congress attempted to establish itself as the source of those powers by retroactively authorizing the President to take such action, the practice soon ceased. Congress seems to have implicitly recognized that a grant of authority after the fact was unnecessary when the validity of the President's action was recognized prior to congressional action. No later attempts by Congress to exercise control have been discovered. The pattern of presidential action followed by congressional acceptance has been consistent.

A proposed customary law must also be general without being vague. The concept of emergency authority to react to economic emergencies relating to foreign transactions is general enough to permit broad application (*e.g.*, actions to control a balance of trade deficit, consumer credit, postal strike); yet specific enough to have been limited in application to emergencies that threaten the economy of the United States through interaction with foreign nations or individuals.

The third requirement is that the theory must fit all the inductive evidence. This inductive evidence is to be gathered from "observation of the behavior of national decision-makers,"¹⁰¹ in addition to treaties and other evidence of state practice.¹⁰² In this case, the inductive evidence supports the theory that both the executive and legislative branches of the government recognize that emergency controls over international economic transactions are available to the President. To reiterate evidence presented earlier: although the TWEA was intended as a limited grant of wartime economic powers, since 1933 the Executive has cited it for an increasingly diverse series of actions, all related to some degree to international economic transactions. As one witness stated before the House Subcommittee on International Economic Policy and Trade, "section 5(b) has been used as an economic measure without connotation of enemy involvement."¹⁰³ Even in its attempt to impose limits on presidential powers, Congress did not insert language requiring "enemy involvement" in order to activate these powers;¹⁰⁴ a national economic emergency with a substantial source outside the United States is the major requirement.¹⁰⁵ This is per-

101. A. D'AMATO, *supra* note 86, at 14.

102. *Id.* at 15.

103. *Hearings on Trading With the Enemy Reform Legislation*, *supra* note 33, at 6 (statement of Andreas F. Lowenfeld).

104. *Id.* at 29 (prepared statement of Harold G. Maier).

105. Act of Dec. 28, 1977, Pub. L. No. 95-223, § 202(a), 91 Stat. 1625 (to be codified in 50 U.S.C. § 1701).

suasive evidence that Congress recognizes the reliance of the government on this broader authority.¹⁰⁶

The proposed theory must also be parsimonious, or simple. Simplicity is necessary because "[i]nternational law is very practical—it exists and survives because it works."¹⁰⁷ Simplicity is necessary in domestic law for the same reason. In this case, for almost sixty years all three branches of government have recognized the necessity that the President be empowered to act promptly in the face of an emergency.¹⁰⁸ It exists because, in the past, it has allowed the President to react when Congress failed to act with the necessary urgency, when there was no time to wait for congressional action, or when it was not politically expedient for Congress to act.

The proposed concept of customary law is objectively determinable since its presence can be established in the acts of the President since 1933, in the acquiescence of Congress, and in the decisions of the courts. Finally, is it a claim-oriented theory? This requirement is one which takes into account the "persuasiveness" of the theory.¹⁰⁹ Is evidence of the existence of the first five requirements persuasive that Congress has relinquished its authority to regulate emergencies arising from international economic transactions? Is it persuasive that Public Law 95-223 makes no substantive changes in the President's authority to control United States response to such emergencies? This paper concludes that the answer to these questions is "yes."

VI. CONCLUSION

The question of whether constitutional law can be created through the customary practice of the executive and legislative branches has no unanimous answer among constitutional scholars. Whether power delegated by Congress to the President can, at some point, become vested in the President, has also been debated. The answer to both questions, however, seems affirmative when placed in the specific context of presidential power to respond to emergencies related to foreign economic transactions. Congress addressed the issue of controlling the President's powers in this area after almost two years of study. It considered the alternatives

106. 120 CONG. REC. S15,785 (1974) (statement of Sen. Church); 118 CONG. REC. S18,367 (1972) (remarks of Sen. Mathias).

107. A. D'AMATO, *supra* note 86, at 16.

108. *See, e.g.,* United States v. Yoshida Int'l, Inc., 526 F.2d at 578; SUMMARY OF EMERGENCY POWER STATUTES, *supra* note 20, at 11.

109. A. D'AMATO, *supra* note 86, at 18.

during a period of strong backlash against excessive uses of presidential authority, a time when Congress' attempt to reassert its equality with the Executive was strongly supported by the voters. Acting from the position of relative strength and assertiveness, Congress was still unable to place any substantive restrictions on the President's emergency powers over foreign economic transactions. The evidence seems strongly to support the theory that this power to act has become so recognized and depended upon by both the President and Congress that Congress realized it could not be withdrawn or even substantially limited. Congress acknowledged that it had, over the past 45 years, relinquished any authority it once might have had to limit the President's power to wartime emergencies only, and that the emergency power is now vested in the President.

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