

CRS Report for Congress

National Emergency Powers

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NATIONAL EMERGENCY POWERS

SUMMARY

The President of the United States has available certain powers that may be exercised in the event that the Nation is threatened by crisis, exigency, or emergency circumstances (other than natural disasters, war, or near-war situations). Such powers may be stated explicitly or implied by the Constitution, assumed by the Chief Executive to be constitutionally permissible, or inferred from or specified by statute. Through legislation, Congress has made a great many delegations of authority in this regard over the past 200 years.

There are, however, limits and restraints upon the President in his exercise of emergency powers. With the exception of the habeas corpus clause, the Constitution makes no allowance for the suspension of any of its provisions during a national emergency. Disputes over the constitutionality or legality of the exercise of emergency powers are judicially reviewable. Indeed, both the Judiciary and Congress, as co-equal branches, can restrain the Executive regarding emergency powers. So can public opinion. Furthermore, since 1976, the President has been subject to certain procedural formalities in utilizing some statutorily delegated emergency authority. The National Emergencies Act (50 U.S.C. 1601-1651) eliminated or modified some statutory grants of emergency authority, required the President to declare formally the existence of a national emergency and to specify what statutory authority, activated by the declaration, would be used, and provided Congress a means to countermand the President's declaration and the activated authority being sought.

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NATIONAL EMERGENCY POWERS

Federal law provides a variety of powers for the President to use in response to crisis, exigency, or emergency circumstances threatening the Nation. Moreover, they are not limited to military or war situations. Some of these authorities, deriving from the Constitution or statutory law, are continuously available to the President with little or no qualification. Others—statutory delegations from Congress—exist on a stand-by basis and remain dormant until the President formally declares a national emergency. These delegations or grants of power authorize the President to meet the problems of governing effectively in times of crisis. Under the powers delegated by such 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 variety of ways, control the lives of United States citizens. Furthermore, Congress may modify, rescind, or render dormant such delegated emergency authority.

Until the crisis of World War I, Presidents utilized emergency powers at their own discretion. Proclamations announced their exercise of exigency authority. However, during World War I and thereafter, Chief Executives have had available to them a growing body of stand-by emergency authority which became operative upon the issuance of a proclamation declaring a condition of national emergency. Sometimes such proclamations confined the matter of crisis to a specific policy sphere, and sometimes they placed no limitation on the pronouncement whatsoever. These activations of stand-by emergency authority remained acceptable practice until the era of the Vietnam war. In 1976, Congress curtailed this practice with the passage of the National Emergencies Act.

BACKGROUND AND HISTORY

The exercise of emergency powers had long been a concern of the classical political theorists, including the eighteenth century English philosopher John Locke, who had a strong influence upon the Founding Fathers in the United States. A preeminent exponent of a government of laws and not of men, Locke argued that occasions may arise when the Executive must exert a broad discretion in meeting special exigencies or "emergencies" for which the legislative power has provided no relief or existing law grants no necessary remedy. He did not regard this prerogative as limited to wartime, or even to situations of great urgency. It was sufficient if the "public good" might be advanced by its exercise.¹

¹ Thomas I. Cook, ed. *Two Treatises of Government* by John Locke. New York, Hafner Publishing Company, 1947, pp. 203-207; Edward S. Corwin. *The President: Office and Powers, 1787-1957*. Fourth Revised Edition. New York,

Emergency powers were first expressed prior to the actual founding of the Republic. Between 1775 and 1781, the Continental Congress passed a series of acts and resolves which count as the first expressions of emergency authority.² These instruments dealt almost exclusively with the prosecution of the Revolutionary War.

At the Constitutional Convention of 1787, emergency powers, as such, failed to attract much attention during the course of debate over the charter for the new government. It may be argued, however, that the granting of emergency powers by Congress is implicit in its Article I, section 8 authority to "provide for the common Defense and general Welfare," the commerce clause, its war, armed forces, and militia powers, and the "necessary and proper" clause empowering it to make such laws as are required to fulfill the executions of "the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

There is a tradition of constitutional interpretation that has resulted in so-called implied powers, which may be invoked in order to respond to an emergency situation. Locke seems to have anticipated this practice. Furthermore, Presidents have occasionally taken an emergency action which they *assumed* to be constitutionally permissible. Thus, in the American governmental experience, the exercise of emergency powers has been somewhat dependent upon the Chief Executive's view of the Presidential office.

Perhaps the President who most clearly articulated a view of his office in conformity with the Lockean position was Theodore Roosevelt. Describing what came to be called the "stewardship" theory of the Presidency, Roosevelt wrote of his "insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its constitutional powers." It was his view "that every executive officer, and above all every executive officer in high position, was a steward of the people," and he "declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it." Indeed, it was Roosevelt's belief that, for the President, "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."³

New York University Press, 1957, pp. 147-148.

² See J. Reuben Clark, Jr., comp. *Emergency Legislation Passed Prior to December 1917 Dealing with the Control and Taking of Private Property for the Public Use, Benefit, or Welfare, Presidential Proclamations and Executive Orders Thereunder, to and Including January 31, 1918, to Which Is Added a Reprint of Analogous Legislation Since 1775*. Washington, U. S. Govt. Print. Off., 1918, pp. 201-228.

³ Theodore Roosevelt. *An Autobiography*. New York, The Macmillan Company, 1913, pp. 388-389.

Opposed to this view of the Presidency was Roosevelt's former Secretary of War, personal choice for, and actual successor as Chief Executive, William Howard Taft. America's twenty-seventh President viewed his office in more limited terms, writing "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." In his view, such a "specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof. There is," Taft concluded, "no undefined residuum of power which he can exercise because it seems to him to be in the public interest"⁴

Between these two views of the Presidency lie various gradations of opinion, resulting in perhaps as many conceptions of the office as there have been holders. One authority has summed up the situation in the following words:

Emergency powers are not solely derived from legal sources. 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. In the last analysis, the authority of a President is largely determined by the President himself.⁵

Finally, apart from the Constitution, but resulting from its prescribed procedures, there are statutory grants of power for emergency conditions. The President is authorized by Congress to take some special or extraordinary action, ostensibly to meet the problems of governing effectively in times of exigency. Sometimes these laws are only of temporary duration. The Economic Stabilization Act of 1970, for example, allowed the President to impose certain wage and price controls for about three years before it eventually expired automatically in 1974.⁶ The statute gave the President emergency authority to address a crisis in the Nation's economy.

Of course, many of these laws are continuously maintained or permanently available for the President's ready use in responding to an emergency. The Defense Production Act, originally adopted in 1950 to prioritize and regulate the manufacture of military material, is exemplary of this type of statute.⁷

⁴ William Howard Taft. *Our Chief Magistrate and his Powers*. New York, Columbia University Press, 1916, pp. 139-140; for a direct response to Theodore Roosevelt's expression of Presidential power, see William Howard Taft. *The Presidency*. New York, Charles Scribner's Sons, 1916, pp. 125-130.

⁵ Albert L. Sturm. Emergencies and the Presidency. *Journal of Politics*, v. 11, February, 1949, pp. 125-126.

⁶ See 84 Stat. 799-800, 1468; 85 Stat. 13, 38, 743-755; and 87 Stat. 27-29.

⁷ See 64 Stat. 798; 50 U.S.C. App. 2061 et. seq.

Lastly, there are various stand-by laws which convey special emergency powers once the President formally declares a national emergency activating them. In 1973, a Senate special committee studying emergency powers published a compilation identifying some 470 provisions of Federal law delegating to the Executive extraordinary authority in time of national emergency.⁸ The vast majority of them are of the stand-by kind—dormant until activated by the President. However, formal procedures for invoking these authorities, accounting for their use, and regulating their activation and application were only recently established by the National Emergencies Act of 1976.⁹

THE EMERGENCY CONCEPT

Relying upon constitutional authority or congressional delegations made at various times over the past 200 years, the President of the United States may exercise certain powers in the event that the continued existence of the Nation is threatened by crisis, exigency, or *emergency* circumstances. What is a national emergency?

In the simplest understanding of the term, the dictionary defines an emergency as "an unforeseen combination of circumstances or the resulting state that calls for immediate action."¹⁰ In the midst of the crisis of the Great Depression, a 1934 Supreme Court majority opinion characterized an emergency in terms of urgency and relative infrequency of occurrence as well as equivalence to a public calamity resulting from fire, flood, or like disaster not reasonably subject to anticipation.¹¹ An eminent constitutional scholar, the late Edward S. Corwin, explained emergency conditions as being those "which have not attained enough of stability or recurrency to admit of their being dealt with according to rule."¹² During congressional committee hearings on emergency powers in 1973, a political scientist described an emergency in the following terms: "It denotes the existence of conditions of varying nature, intensity and duration, which are perceived to threaten life or well-being beyond tolerable

⁸ U. S. Congress. Senate. Special Committee on the Termination of the National Emergency. *Emergency Powers Statutes*. S. Rept. 93-549, 93rd Congress, 1st session. Washington, U. S. Govt. Print. Off., 1973.

⁹ 90 Stat. 1255; 50 U.S.C. 1601-1651.

¹⁰ *Webster's New Collegiate Dictionary*. Springfield, G & C Merriam Company, 1974, p. 372.

¹¹ *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398, 440 (1934).

¹² Edward S. Corwin. *The President: Office and Powers, 1787-1957*, p. 3.

limits."¹³ Corwin also indicated it "connotes the existence of conditions suddenly intensifying the degree of existing danger to life or well-being beyond that which is accepted as normal."¹⁴

There are perhaps at least four aspects of an emergency condition. The first is its temporal character: an emergency is sudden, unforeseen, and of unknown duration. The second is its potential gravity: an emergency is dangerous and threatening to life and well-being. The third, in terms of governmental role and authority, is the matter of perception: who discerns this phenomenon? The Constitution may be guiding on this question, but not always conclusive. Fourth, there is the element of response: by definition, an emergency requires immediate action, but is, as well, unanticipated and, therefore, as Corwin notes, cannot always be "dealt with according to rule."¹⁵ From these simple factors arise the dynamics of national emergency powers.¹⁶ These dynamics can be seen in the history of the exercise of emergency powers.

LAW AND PRACTICE

During the summer of 1792, residents of western Pennsylvania, Virginia, and the Carolinas began forcefully opposing the collection of a Federal excise tax on whiskey. Anticipating rebellious activity, Congress enacted legislation providing for the calling forth of the militia to suppress insurrections and repel invasions.¹⁶ Section 3 of this statute required that a Presidential proclamation be issued to warn insurgents to cease their activity.¹⁷ If hostilities persisted, the militia could be dispatched. On August 17, 1794, President Washington

¹³ U. S. Congress. Senate. Special Committee on the Termination of the National Emergency. *National Emergency*. Hearings, 93rd Congress, 1st session. April 11-12, 1973. Washington, U. S. Govt. Print. Off., 1973, p. 277.

¹⁴ *Ibid.*, p. 279.

¹⁵ While the concept of emergency powers can arguably be extended to embrace authority exercised in response to circumstances of natural disaster, this dimension is not within the scope of this report. Various Federal response arrangements and programs for dealing with natural disasters have been established and administered with no potential or actual disruption of constitutional arrangements. With regard to Corwin's characterization of emergency conditions, these long-standing arrangements and programs suggest that natural disasters do "admit of their being dealt with according to rule."

¹⁶ 1 Stat. 264-265.

¹⁷ This authority may presently be found at 10 U.S.C. 334 (1988).

issued such a proclamation. The insurgency continued. The President then took command of the forces organized to put down the rebellion.¹⁸

Here was the beginning of a pattern of policy expression and implementation regarding emergency powers. Congress legislated extraordinary or special authority for discretionary use by the President in a time of emergency. In issuing a proclamation, the Chief Executive notified Congress that he was making use of this power and also apprised other affected parties of his emergency action.

Over the next 100 years, Congress enacted various permanent and stand-by laws for responding largely to military, economic, and labor emergencies. During this span of years, however, the exercise of emergency powers by President Lincoln brought the first great dispute over the authority and discretion of the Chief Executive to engage in emergency actions.

By the time of Lincoln's inauguration (March 4, 1861), seven States of the lower South had announced their secession from the Union; the Confederate provisional government had been established (February 4, 1861); Jefferson Davis had been elected (February 9, 1861) and installed as president of the Confederacy (February 18, 1861); and an army was being mobilized by the secessionists. Lincoln had a little over two months to consider his course of action.

When the new President assumed office, Congress was not in session. For reasons of his own, Lincoln delayed calling a special meeting of the legislature, but soon ventured into its constitutionally designated policy sphere. On April 19, he issued a proclamation establishing a blockade on the ports of the secessionist States,¹⁹ "a measure hitherto regarded as contrary to both the Constitution and the law of nations except when the government was embroiled in a declared, foreign war."²⁰ Congress, of course, had not been given an opportunity to consider a declaration of war.

The next day, the President ordered the addition of 19 vessels to the Navy "for purposes of public defense."²¹ A short time later, the blockade was extended to the ports of Virginia and North Carolina.²²

¹⁸ See. James D. Richardson, ed. *A Compilation of the Messages and Papers of the Presidents*. Vol. 1. New York, Bureau of National Literature, 1897, pp. 149-154.

¹⁹ See *Ibid.*, Vol. 7, pp. 3215-3216.

²⁰ Clinton L. Rossiter. *Constitutional Dictatorship*. New York, Harcourt, Brace, and World, 1963, p. 225.

²¹ *Ibid.*

²² See James D. Richardson, comp. *A Compilation of the Messages and Papers of the Presidents*. Vol. 7, p. 3216.

By a proclamation of May 3, Lincoln ordered that the regular army be enlarged by 22,714 men, that Navy personnel be increased by 18,000, and that 42,032 volunteers be accommodated for three-year terms of service.²³ Such a directive, of course, antagonized many Representatives and Senators, because Congress is specifically authorized by Article I, Section 8, of the Constitution "to raise and support armies."

In his July message to the newly assembled Congress, Lincoln suggested that, while his actions with regard to the expansion of the armed forces might be legally suspect, "[t]hese measures, whether strictly legal or not, were ventured upon under what appeared to be a popular and a public necessity, trusting then, as now, that Congress would readily ratify them. It is believed," he wrote, "that nothing has been done beyond the constitutional competency of Congress."²⁴

Indeed, Congress subsequently did legislatively authorize, and thereby approve, the President's actions regarding his increasing armed forces personnel, and would do the same later concerning some other questionable emergency actions. In the case of Lincoln, the opinion of scholars and experts is "that neither Congress nor the Supreme Court exercised any effective restraint upon the President."²⁵ The emergency actions of the Chief Executive were either unchallenged or approved by Congress, and were either accepted or, because of almost no opportunity to render judgment, went largely without notice by the Supreme Court. The President made a quick response to the emergency at hand, a response which Congress or the Court might have rejected in law, but which, nonetheless, had been made in fact and with some degree of popular approval. Similar controversy would arise concerning the emergency actions of Presidents Woodrow Wilson and Franklin D. Roosevelt. Both men exercised extensive emergency powers with regard to world hostilities, and Roosevelt also used emergency authority to deal with the Great Depression. Their emergency actions, however, were largely supported by statutory delegations and a high degree of approval on the part of both Congress and the public.

Furthermore, during the Wilson and Roosevelt presidencies, a major procedural development occurred in the exercise of emergency powers—use of a proclamation to declare a national emergency and, thereby, to activate all stand-by statutory provisions delegating authority to the President during a national emergency. The first such national emergency proclamation was issued

²³ See *Ibid.*, pp. 3216-3217.

²⁴ *Ibid.*, p. 3225.

²⁵ James G. Randall. *Constitutional Problems Under Lincoln*. Urbana, University of Illinois Press, 1951; also see Wilfred E. Binkley. *President and Congress*. New York, Alfred A. Knopf, 1947, pp. 124-127; Clinton L. Rossiter. *Constitutional Dictatorship*, pp. 233-234; and Woodrow Wilson. *Constitutional Government in the United States*. New York, Columbia University Press, 1907, p. 58.

by President Wilson on February 5, 1917.²⁶ Promulgated on the authority of a statute establishing the United States Shipping Board, the proclamation concerned water transportation policy.²⁷ It was statutorily terminated along with a variety of other wartime measures on March 3, 1921.²⁸

President Franklin D. Roosevelt issued the next national emergency proclamation some 48 hours after assuming office.²⁹ Proclaimed March 6, 1933, on the somewhat questionable authority of the Trading With the Enemy Act of 1917,³⁰ the proclamation declared a so-called "bank holiday" and halted a major class of financial transactions by closing the banks. Congress subsequently gave specific statutory support for the Chief Executive's action with the passage of the Emergency Banking Act on March 9.³¹ Upon signing this legislation into law, the President issued a second banking proclamation, based upon the authority of the new law, continuing the bank holiday until it was determined that banking institutions were capable of conducting business in accordance with new banking policy.³²

Next, on September 8, 1939, President Roosevelt promulgated a proclamation of "limited" national emergency, though the qualifying term had no meaningful legal significance.³³ Almost two years later, on May 27, 1941, he issued a proclamation of "unlimited" national emergency.³⁴ This action, however, actually did not make any important new powers available to the Chief Executive in addition to those activated by the 1939 proclamation. The President's purpose in making the second proclamation was largely to apprise the American people of the worsening conflict in Europe and growing tensions in Asia.

These two war-related proclamations of a general condition of national emergency remained operative until 1947 when certain of the provisions of law they had activated were statutorily rescinded.³⁵ Then, in 1951, Congress

²⁶ 39 Stat. 1814.

²⁷ 39 Stat. 728.

²⁸ 41 Stat. 1359.

²⁹ 48 Stat. 1689.

³⁰ 40 Stat. 411.

³¹ 48 Stat. 1.

³² 48 Stat. 1691.

³³ 54 Stat. 2643.

³⁴ 55 Stat. 1647.

³⁵ 61 Stat. 449.

terminated the declaration of war against Germany.³⁶ In the spring of the following year, the Senate ratified the treaty of peace with Japan. Because these actions marked the end of World War II for the United States, legislation was required to keep certain emergency provisions in effect. Initially, the Emergency Powers Interim Continuation Act temporarily maintained this emergency authority.³⁷ It was subsequently supplanted by the Emergency Powers Continuation Act, which kept selected emergency delegations in force until August of 1953.³⁸ By proclamation in April of 1952, President Harry S. Truman terminated the 1939 and 1941 national emergency declarations, leaving operative only those emergency authorities continued by statutory specification.³⁹

Truman's 1952 termination, however, specifically exempted a December, 1950, proclamation of national emergency he had issued in response to hostilities in Korea.⁴⁰ Furthermore, this condition of national emergency would remain in force and unimpaired well into the era of the Vietnam war.

Two other proclamations of national emergency also would be promulgated before Congress once again turned its attention to these matters. Faced with a postal strike, President Richard M. Nixon declared a national emergency in March of 1970,⁴¹ thereby permitting him to use units of the military Ready Reserve to assist in moving the mail.⁴² A second national emergency was proclaimed by Nixon in August, 1971, to control the balance of payments flow by terminating temporarily certain trade agreement provisos and imposing supplemental duties on some imported goods.⁴³

CONGRESSIONAL CONCERNS

In the years following the conclusion of U.S. armed forces involvement in active military conflict in Korea, occasional expressions of concern were heard in Congress regarding the continued existence of Truman's 1950 national emergency proclamation long after the conditions prompting its issuance had disappeared. There was some annoyance that the President was retaining

³⁶ 65 Stat. 451.

³⁷ 66 Stat. 54; extended at 66 Stat. 96, 137, and 296.

³⁸ 66 Stat. 330; extended at 67 Stat. 18 and 131.

³⁹ 66 Stat. c31.

⁴⁰ 64 Stat. A454.

⁴¹ 84 Stat. 2222.

⁴² See 10 U.S.C. 673 (1970).

⁴³ 85 Stat. 926.

extraordinary powers intended only for time of genuine emergency, and a feeling that the Chief Executive was thwarting the legislative intent of Congress by continuously failing to terminate the declared national emergency.⁴⁴

Growing public and congressional displeasure with the President's exercise of his war powers and deepening U.S. involvement in hostilities in Vietnam prompted interest in a variety of related matters. For Senator Charles McC. Mathias, a leader in this policy area, interest in the question of emergency powers developed out of U.S. involvement in Vietnam and the incursion into Cambodia. "It became clear," he said, "that the President had powers to commit us to warfare without adequate respect for the constitutional requirement that Congress alone can declare a state of war." In response, among other actions, Mathias, together with Senator Frank Church, sought to establish a Senate special committee to study and investigate the termination of a 1950 proclamation of national emergency that was being used to prosecute the Vietnam war, "to consider problems which might arise as the result of the termination and to consider what administrative or legislative actions might be necessary." Such a panel was initially chartered by S. Res. 304 as the Special Committee on the Termination of the National Emergency in June of 1972, but did not begin operations before the end of the year.⁴⁵

With the convening of the 93rd Congress in 1973, the Special Committee was approved again with S. Res. 9. Upon exploring the subject matter of national emergency powers, however, the mission of the Special Committee became more burdensome. There was not just one proclamation of national emergency in effect, but four such instruments, issued in 1933, 1950, 1970, and 1971. The United States was in a condition of national emergency four times over, and with each proclamation, the whole collection of statutorily delegated emergency powers was activated. Consequently, in 1974, with S. Res. 242, the study panel was rechartered as the Special Committee on National Emergencies and Delegated Emergency Powers to reflect its focus upon matters larger than the 1950 emergency proclamation. Its final mandate was provided by S. Res. 10 in the 94th Congress, although its termination date was necessarily extended briefly in 1976 by S. Res. 370. Senator Church and Senator Mathias co-chaired the panel.⁴⁶

⁴⁴ The historical record suggests that, prior to 1973 when congressional research revealed their existence, other outstanding proclaimed national emergencies were not apparent to or much discussed by Members of Congress.

⁴⁵ U. S. Congress. House. Committee on the Judiciary. *National Emergencies Act*. Hearings, 94th Congress, 1st session. March 6, 13, 19, and April 9, 1975. Washington, U. S. Govt. Print. Off., 1975, p. 20.

⁴⁶ Other members of the Special Committee included Senators Clifford P. Case, Clifford P. Hansen, Philip A. Hart, James B. Pearson, Claiborne Pell, and Adlai E. Stevenson III.

The Special Committee conducted and produced various studies during its existence.⁴⁷ After scrutinizing the *United States Code* and uncodified statutory emergency powers, the panel identified 470 provisions of Federal law which delegated extraordinary authority to the Executive in time of national emergency.⁴⁸ Not all of them required a declaration of national emergency to be operative, but they were, nevertheless, extraordinary grants. The Special Committee also found that no process existed for automatically terminating the four outstanding national emergency proclamations. Thus, the panel began developing legislation containing a formula for regulating emergency declarations in the future and otherwise adjusting the body of statutorily delegated emergency powers by abolishing some provisions, relegating others to permanent status, and continuing others in a stand-by capacity. In addition, the panel also began preparing a report offering its findings and recommendations regarding the state of national emergency powers in the Nation.

THE NATIONAL EMERGENCIES ACT

The Special Committee, in July of 1974, unanimously recommended legislation establishing a procedure for the Presidential declaration and congressional regulation of a national emergency. The proposal also modified

⁴⁷ See U. S. Congress. Senate. Special Committee on National Emergencies and Delegated Emergency Powers. *A Brief History of Emergency Powers in the United States*. Committee print, 93rd Congress, 2d session. Washington, U. S. Govt. Print. Off., 1974; U. S. Congress. Senate. Special Committee on National Emergencies and Delegated Emergency Powers. *A Recommended National Emergencies Act*. S. Rept. 93-1170, 93rd Congress, 2d session. Washington, U. S. Govt. Print. Off., 1974; U. S. Congress. Senate. Special Committee on National Emergencies and Delegated Emergency Powers. *Executive Orders in Times of War and National Emergency*. Committee print, 93rd Congress, 2d session. Washington, U. S. Govt. Print. Off., 1974; U. S. Congress. Senate. Special Committee on National Emergencies and Delegated Emergency Powers. *Executive Replies*. [3 parts.] Committee print, 93rd Congress, 2d session. Washington, U. S. Govt. Print. Off., 1974; U. S. Congress. Senate. Special Committee on National Emergencies and Delegated Emergency Powers. *National Emergencies and Delegated Emergency Powers*. S. Rept. 94-922, 94th Congress, 2d session. Washington, U. S. Govt. Print. Off., 1976; U. S. Congress. Senate. Special Committee on the Termination of the National Emergency. *Emergency Powers Statutes*. S. Rept. 93-549, 93rd Congress, 1st session. Washington, U. S. Govt. Print. Off., 1973; U. S. Congress. Senate. Special Committee on the Termination of the National Emergency. *National Emergency*. [3 parts.] Hearings, 93rd Congress, 1st session. April 11, 12, July 24, November 28, 1973. Washington, U. S. Govt. Print. Off., 1973.

⁴⁸ See U. S. Congress. Senate. Special Committee on the Termination of the National Emergency. *Emergency Powers Statutes*.

various statutorily delegated emergency powers.⁴⁹ In arriving at this reform measure, the panel consulted with various executive branch agencies regarding the significance of existing emergency statutes, recommendations for legislative action, and views as to the repeal of some provisions of emergency law.⁵⁰

This recommended legislation was introduced by Senator Frank Church for himself and others on August 22, 1974, and became S. 3957. It was reported from the Senate Committee on Government Operations on September 30 without public hearings or amendment.⁵¹ The bill was subsequently discussed on the Senate floor on October 7, when it was amended and passed.⁵²

Although a version of the reform legislation had been introduced in the House on September 16, becoming H.R. 16668, the Committee on the Judiciary, to which the measure was referred, did not have an opportunity to consider either that bill or the Senate adopted version due to the press of other business—chiefly the impeachment of President Nixon and the nomination of Nelson A. Rockefeller to be Vice President of the United States. Thus, the National Emergencies Act failed to be considered on the House floor before the final adjournment of the 93rd Congress.

With the convening of the next Congress, the proposal was introduced in the House on February 27, 1975, becoming H.R. 3884, and in the Senate on March 6, becoming S. 977. House hearings occurred in March and April before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary.⁵³ The bill was subsequently marked-up and, on April 15, was reported in amended form to the full committee on a 4-0 vote. On May 21, the Committee on the Judiciary, on a voice vote, reported the bill with technical amendments.⁵⁴ During the course of House debate on September 4, there was agreement to both the committee amendments and a floor amendment providing that national emergencies end automatically one year after their

⁴⁹ See U. S. Congress. Senate. Special Committee on National Emergencies and Delegated Emergency Powers. *A Recommended National Emergencies Act*.

⁵⁰ See U. S. Congress. Senate. Special Committee on National Emergencies and Delegated Emergency Powers. *Executive Replies*.

⁵¹ See U. S. Congress. Senate. Committee on Government Operations. *National Emergencies Act*. S. Rept. 93-1193, 93rd Congress, 2d session. Washington, U. S. Govt. Print. Off., 1974.

⁵² See *Congressional Record*, v. 120, October 7, 1974, pp. 34011-34022.

⁵³ See U. S. Congress. House. Committee on the Judiciary. *National Emergencies Act*. Hearings, 94th Congress, 1st session. March 6, 13, 19, and April 9, 1975. Washington, U. S. Govt. Print. Off., 1975.

⁵⁴ U. S. Congress. House. Committee on the Judiciary. *National Emergencies*. H. Rept. 94-238, 94th Congress, 1st session. Washington, U. S. Govt. Print. Off., 1975.

declaration unless the President informs Congress and the public of a continuation. The bill was then passed on a 388-5 yeas and nays vote and sent to the Senate, where it was referred to the Committee on Government Operations.⁵⁵

The Senate Committee on Government Operations held a hearing on H.R. 3884 on February 25, 1976.⁵⁶ The bill was subsequently reported on August 26 with one substantive and several technical amendments.⁵⁷ The following day, the amended bill was passed and returned to the House.⁵⁸ On August 31, the House agreed to the Senate amendments,⁵⁹ clearing the proposal for President Gerald Ford's signature on September 14.⁶⁰

As enacted, the National Emergencies Act consists of five titles. The first of these generally returned all stand-by statutory delegations of emergency power activated by an outstanding declaration of national emergency to a dormant state two years after the statute's approval. However, the Act did not cancel the 1933, 1950, 1970, and 1971 national emergency proclamations because these were issued by the President pursuant to his Article II constitutional authority. Nevertheless, it did render them ineffective by returning to dormancy the statutory authorities they had activated, thereby necessitating a new declaration to activate stand-by statutory emergency authorities.

Title II provides a procedure for future declarations of national emergency by the President and prescribes arrangements for their congressional regulation. The statute establishes an exclusive means for declaring a national emergency. Furthermore, emergency declarations shall automatically terminate after one year unless formally continued for another year by the President, but may be terminated earlier by either the President or Congress. Originally, the

⁵⁵ *Congressional Record*, v. 121, September 4, 1975, pp. 27631-27647; *Ibid.*, September 5, 1975, p. 27745.

⁵⁶ See U. S. Congress. Senate. Committee on Government Operations. *National Emergencies Act*. Hearing, 94th Congress, 2d session. February 25, 1976. Washington, U. S. Govt. Print. Off., 1976.

⁵⁷ See U. S. Congress. Senate. Committee on Government Operations. *National Emergencies Act*. S. Rept. 94-1168, 94th Congress, 2d session. Washington, U. S. Govt. Print. Off., 1976.

⁵⁸ See *Congressional Record*, v. 122, August 27, 1976, pp. 28224-28228.

⁵⁹ *Ibid.*, August 31, 1976, p. 28466.

⁶⁰ 90 Stat. 1255; 50 U.S.C. 1601-1651 (1988); see U. S. Congress. Senate. Committee on Government Operations and Special Committee on National Emergencies and Delegated Emergency Powers. *The National Emergencies Act (Public Law 94-412)*. *Source Book: Legislative History, Texts, and Other Documents*. Committee print, 94th Congress, 2d session. Washington, U. S. Govt. Print. Off., 1976.

prescribed method for congressional termination of a declared national emergency originally was a concurrent resolution adopted by both Houses of Congress. This type of so-called "legislative veto" was effectively invalidated by the Supreme Court in 1983.⁶¹ The National Emergencies Act was amended in 1985 to substitute a joint resolution as the vehicle for rescinding a national emergency declaration.⁶²

When declaring a national emergency, the President must indicate, according to Title III, the powers and authorities being activated to respond to the exigency at hand.

Certain Presidential accountability and reporting requirements regarding national emergency declarations are specified in Title IV, and the repeal and continuation of various statutory provisions delegating emergency powers is accomplished in Title V.

Since the 1976 enactment of the National Emergencies Act, the following national emergencies have been declared pursuant to its provisions. With the exception of the 1983 and 1984 actions continuing export control regulations, all of these emergency declarations are operative.

⁶¹ See *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

⁶² See 99 Stat. 405, 448.

TABLE 1: DECLARED NATIONAL EMERGENCIES, 1976-1990⁶³

| Declaration | Date | Title |
|-------------|----------|---|
| E.O. 12170 | 11/14/79 | Blocking Iranian Government Property |
| E.O. 12211 | 04/17/80 | Further Prohibitions on Transactions with Iran |
| E.O. 12444 | 10/14/83 | Continuation Export Control Regulations |
| E.O. 12470 | 03/30/84 | Continuation of Export Control Regulations |
| E.O. 12513 | 05/01/85 | Prohibiting Trade and Certain Other Transactions Involving Nicaragua |
| E.O. 12532 | 09/09/85 | Prohibiting Trade and Certain Other Transactions Involving South Africa |
| E.O. 12543 | 01/07/86 | Prohibiting Trade and Certain Transactions Involving Libya |
| E.O. 12635 | 04/08/88 | Prohibiting Certain Transactions With Respect to Panama |
| E.O. 12722 | 08/02/90 | Blocking Iraqi Government Property and Prohibiting Transactions with Iraq |
| E.O. 12730 | 09/30/90 | Continuation of Export Control Regulations |
| E.O. 12735 | 11/16/90 | Chemical and Biological Weapons Proliferation |

⁶³ The full texts of the cited executive orders declaring a national emergency may be found in the Title 3 compilations of the *Code of Federal Regulations* for the year indicated, or otherwise as follows: E.O. 12170, 3 C.F.R., 1979 Comp., pp. 457-458; E.O. 12211, 3 C.F.R., 1980 Comp., pp. 253-255; E.O. 12444, 3 C.F.R., 1983 Comp., pp. 214-215; E.O. 12470, 3 C.F.R., 1984 Comp., pp. 168-169; E.O. 12513, 3 C.F.R., 1985 Comp., p. 342; E.O. 12532, 3 C.F.R., 1985 Comp., pp. 387-391; E.O. 12543, 3 C.F.R., 1986 Comp., pp. 181-182; E.O. 12635, 3 C.F.R., 1988 Comp., pp. 563-564; E.O. 12722, *Federal Register*, v. 55, August 3, 1990, pp. 31803-31804; E.O. 12730, *Federal Register*, v. 55, October 2, 1990, pp. 40373-40374.

In its final report, issued in late May of 1976, the Special Committee concluded "by reemphasizing that emergency laws and procedures in the United States have been neglected for too long, and that Congress must pass the National Emergencies Act to end a potentially dangerous situation."⁶⁴ The panel's recommended legislation, of course, was enacted into law before the end of the year.

Other issues identified by the Special Committee as deserving attention in the future, however, did not fare so well. The panel, for example, was hopeful that standing committees of both Houses of Congress would review statutory emergency power provisions within their respective jurisdictions with a view to the continued need for and possible adjustment of such authority.⁶⁵ Actions in this regard probably were not as ambitious as the Special Committee expected. A title of the Federal Civil Defense Act of 1950, granting the President or Congress power to declare a civil defense emergency in the event an attack on the United States occurred or was anticipated, expired in June of 1974 after the House Committee on Rules failed to report a measure continuing the statute.⁶⁶

A provision of emergency law was refined in May of 1976. Legislation was enacted granting the President the authority to order certain selected members of an armed services reserve component to active duty without a declaration of war or national emergency.⁶⁷ Previously, such an activation of military reserve personnel had been limited to a "time of national emergency declared by the President" or "when otherwise authorized by law."⁶⁸

Another refinement of emergency law occurred in 1977 when action was completed on the International Emergency Economic Powers Act.⁶⁹ Reform legislation containing this statute⁷⁰ modified a provision of the Trading With the Enemy Act of 1917 authorizing the President to regulate the Nation's

⁶⁴ U. S. Congress. Senate. Special Committee on National Emergencies and Delegated Emergency Powers. *National Emergencies and Delegated Emergency Powers*, p. 19.

⁶⁵ *Ibid.*, p. 10.

⁶⁶ See 50 U.S.C. App. 2297 (1970); U. S. Congress. House. Committee on Armed Services. *Extending Civil Defense Emergency Authorities*. H. Rept. 93-1243, 93rd Congress, 2d session. Washington, U. S. Govt. Print. Off., 1974; Associated Press. Rules Panel Halts Bill on War Powers. *Washington Post*, September 19, 1974, p. A5.

⁶⁷ 90 Stat. 517; 10 U.S.C. 673b.

⁶⁸ See 10 U.S.C. 673 (1970).

⁶⁹ See 50 U.S.C. 1701-1706 (1988).

⁷⁰ See 91 Stat. 1625.

international and domestic finance during periods of declared war or national emergency.⁷¹ The enacted bill limited the President's Trading With the Enemy Act power to regulate the country's finances to times of declared war. In the International Emergency Economic Powers Act, it conferred authority on the Chief Executive to exercise controls over international economic transactions in the future during a declared national emergency and established procedures governing the use of this power, including close consultation with Congress when declaring a national emergency to activate the IEEPA. Such a declaration would be subject to congressional regulation under the procedures of the National Emergencies Act.⁷²

Other matters identified in the final report of the Special Committee for congressional scrutiny included—

- investigation of emergency preparedness efforts conducted by the executive branch;
- attention to congressional preparations for an emergency and continual review of emergency law;
- ending open-ended grants of authority to the Executive;
- investigation and institution of stricter controls over delegated powers; and
- improving the accountability of Executive decisionmaking.⁷³

⁷¹ See 12 U.S.C. 95a and 50 U.S.C. App. 5(b) (1976).

⁷² Of related interest to these statutory developments, President Ford, by proclamation of February 19, 1976, gave notice that E.O. 966, providing for the internment of Japanese-Americans in certain military areas during World War II, was cancelled as of the issuance of the proclamation formally establishing the cessation of World War II on December 31, 1946. See 3 C.F.R., 1976 Comp., pp. 8-9. Certain statutory authority relevant to this executive order, concerning the creation of military areas and zones, was cancelled by the National Emergencies Act. See 18 U.S.C. 1383 (1976). However, not all such authority was eliminated by the statute; a parallel provision concerning defensive sea areas was retained without modification or qualification. See 18 U.S.C. 2152 (1988).

⁷³ See U. S. Congress. Senate. Special Committee on National Emergencies and Delegated Emergency Powers. *National Emergencies and Delegated Emergency Powers*, pp. 11-18.

There is some public record indication that certain of these points, particularly the first and the last, have been addressed in the past decade and a half by congressional overseers.⁷⁴

CONCLUSION

The development, exercise, and regulation of emergency powers, from the days of the Continental Congress to the present, reflect at least one highly discernable trend: those authorities available to the Executive in time of national crisis or exigency have, since the time of the Lincoln Administration, come to be increasingly rooted in statutory law. The discretion available to a Civil War President in his exercise of emergency power has, to a considerable extent, been harnessed in the contemporary period. Furthermore, due to greater reliance upon statutory expression, the range of this authority has come to be more circumscribed, and the options for its use have come to be regulated procedurally through the National Emergencies Act. Since its enactment, however, the National Emergencies Act has not been revisited by congressional overseers. Nonetheless, as the final report of the Senate Special Committee on National Emergencies suggests, the prospect remains that further improvements and reforms in this policy area might be pursued and perfected.

⁷⁴ See, for example, U. S. Congress. House. Committee on Government Operations. *Presidential Directives and Records Accountability Act*. Hearing, 100th Congress, 2d session. August 3, 1988. Washington, U. S. Govt. Print. Off., 1989; U. S. Congress. House. Committee on Interior and Insular Affairs. *Emergency Preparedness and the Licensing Process for Commercial Nuclear Power Reactors*. [2 parts.] Hearings, 98th Congress, 1st session. April 18 and July 8, 1983. Washington, U. S. Govt. Print. Off., 1985.

APPENDIX:**NATIONAL EMERGENCY POWERS AND THE KUWAIT CRISIS:
RECENT EXECUTIVE ORDERS**

Since the beginning of August 1990, President Bush has issued certain executive orders concerning national emergencies. Several of these directives pertain to the crisis resulting from the invasion and occupation of Kuwait by Iraqi armed forces. However, they are not all responses to war or near-war situations. These executive orders are described in capsule profiles set out below. The date of issuance, a publication reference, and a summary of content are provided for each citation.

E.O. 12722 of August 2, 1990 (*Federal Register*, v. 55, August 3, 1990: 31803-31804). The order declares a national emergency with regard to the threat to the national security and foreign policy of the United States resulting from the Iraqi invasion of Kuwait. The International Emergency Economic Powers Act (50 U.S.C. 1701 et. seq.) is invoked, and this statute, together with the Export Administration Act (50 U.S.C. App. 2404) and the Federal Aviation Act (49 U.S.C. 1514) are applied to block Iraqi government property and to prohibit certain transactions by a United States person, as defined in the order, with Iraq.⁷⁵

E.O. 12723 of August 2, 1990 (*Federal Register*, v. 55, August 3, 1990: 31805). In pursuit of the national emergency declared with E.O. 12722, this order applies the International Emergency Economic Powers Act to block Kuwaiti government property.

E.O. 12724 of August 9, 1990 (*Federal Register*, v. 55, August 13, 1990: 33089-33090). In pursuit of the national emergency declared with E.O. 12722, this order applies the International Emergency Economic Powers Act, the United Nations Participation Act (22 U.S.C. 287c), and the Federal Aviation Act (49 U.S.C. 1301 et. seq.) to block Iraqi government property and prohibit certain additional transactions by a United States person, as defined in the order, with

⁷⁵ Affected Iraqi government property, according to the executive order, includes "[a]ll property and interests in property of the Government of Iraq, its agencies, instrumentalities and controlled entities and the Central Bank of Iraq that are in the United States, that hereafter come within the United States or that are or hereafter come within the possession or control of United States persons, including their overseas branches." The term "United States person" is defined to embrace both individuals and corporate bodies and means "any United States citizen, permanent resident alien, juridical person organized under the laws of the United States, or any person in the United States."

Iraq.⁷⁶ The order also expands certain forms of administrative action prescribed by E.O. 12722.

E.O. 12725 of August 9, 1990 (*Federal Register*, v. 55, August 13, 1990: 33091-33092). In pursuit of the national emergency declared with E.O. 12722, this order applies the International Emergency Economic Powers Act, the United Nations Participation Act, and the Federal Aviation Act to block Kuwaiti government property and prohibit certain additional transactions by a United States person, as defined in the order, with Kuwait. The order also expands certain forms of administrative action prescribed by E.O. 12723.

E.O. 12727 of August 22, 1990 (*Federal Register*, v. 55, August 27, 1990: 35027). Pursuant to Federal law, including 10 U.S.C. 121 and 673b, the President ordered the Selected Reserve of the armed forces to active duty in response to the Iraqi invasion of Kuwait.

E.O. 12728 of August 22, 1990 (*Federal Register*, v. 55, August 27, 1990: 35029). Pursuant to Federal law, including 3 U.S.C. 3401 and 10 U.S.C. 673c, the President, by order, delegated authority to suspend any provision of law relating to the promotion, retirement, or separation of members of the armed forces in support of the U.S. response to the Iraqi invasion of Kuwait.

E.O. 12730 of September 30, 1990 (*Federal Register*, v. 55, October 2, 1990: 40373-40374). The order declares a national emergency with regard to the threat to the national security, foreign policy, and economy of the United States resulting from the unrestricted access of foreign parties to U.S. goods, technology, and technical data, and the existence of certain boycott practices of foreign nations. The International Emergency Economic Powers Act is invoked, and this statute is applied to continue export control regulations implementing the Export Administration Act (50 U.S.C. App. 2401 et. seq.) which, not having been reauthorized, automatically expired on September 30, 1990.

E.O. 12733 of November 13, 1990 (*Federal Register*, v. 55, November 15, 1990: 47837). Pursuant to Federal law, including 3 U.S.C. 301, 10 U.S.C. 673b(a) and (i), and E.O. 12727, the President, by order, authorized the extension of the period of active duty of personnel of the Selected Reserve of the armed forces in support of the U.S. response to the Iraqi invasion of Kuwait.

E.O. 12734 of November 14, 1990 (*Federal Register*, v. 55, November 19, 1990: 48099). In pursuit of the national emergency declared with E.O. 12722, this order invokes emergency construction authority (10 U.S.C. 2808) in support of the U.S. response to the Iraqi invasion of Kuwait.

E.O. 12735 of November 16, 1990 (*Federal Register*, v. 55, November 20, 1990: 48587-48589). The order declares a national emergency with regard to the threat to the national security and foreign policy of the United States

⁷⁶ Iraqi government property continues to be defined as indicated in note 75, but the definition of "United States person" is expanded to include "vessels of U.S. registration."

resulting from the proliferation of chemical and biological weapons. Export authority, including the Arms Export Control Act (22 U.S.C. 2751 et. seq.) and the export control regulations continued by E.O. 12730, as well as the Foreign Assistance Act of 1961 (75 Stat. 424), the International Financial Institutions Act (22 U.S.C. 262d), and the Federal Aviation Act (49 U.S.C. App. 1301(10)) were applied in response to the emergency.

E.O. 12742 of January 8, 1991 (*Federal Register*, v. 56, January 10, 1991: 1079-1080). The order delegates to selected executive branch officers certain authority of the President (10 U.S.C. 4501 and 9501, 50 U.S.C. 82, and 50 U.S.C. App. 468) to achieve priority performance and prompt delivery of government orders for articles, products, and materials to meet national security requirements. All orders, regulations, and other forms of administrative action issued, taken, or continued in effect pursuant to the Defense Production Act (50 U.S.C. App. 2061 et. seq.) remain in full force and effect, to the extent supported by any law or any authority delegated to the respective officers pursuant to this executive order. The Defense Production Act was not reauthorized in the closing days of the 101st Congress and expired on October 20, 1990.

E.O. 12743 of January 23, 1991 (*Federal Register*, v. 56, January 18, 1991: 2661-2662). In pursuit of the national emergency declared with E.O. 12722, this order brings the Ready Reserve of the armed forces to active duty status for a period of not more than 24 months.

E.O. 12744 of January 21, 1991 (*Federal Register*, v. 56, January 23, 1991: 2663). For purposes of 26 U.S.C. 112 of the Internal Revenue Code, the President designated, as of January 17, 1991, certain locations, including the airspace above such locations, in the larger Persian Gulf region as an area in which armed forces of the United States are and have been engaged in combat.

E.O. 12750 of February 14, 1991 (*Federal Register*, v. 56, February 19, 1991: 6785). For purposes of 26 U.S.C. 7508 of the Internal Revenue Code, the President designated certain locations, including the air space above such locations, of the larger Persian Gulf region as the theater zone for Operation Desert Shield service personnel.

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