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# NATIONAL EMERGENCIES ACT

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## HEARING

BEFORE THE

## COMMITTEE ON GOVERNMENT OPERATIONS UNITED STATES SENATE

NINETY-FOURTH CONGRESS

SECOND SESSION

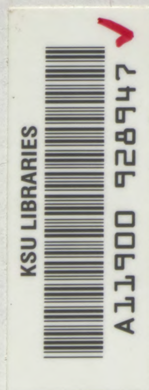
ON

## H.R. 3884

TO TERMINATE CERTAIN AUTHORITIES WITH RESPECT TO NATIONAL EMERGENCIES STILL IN EFFECT, AND TO PROVIDE FOR ORDERLY IMPLEMENTATION AND TERMINATION OF FUTURE NATIONAL EMERGENCIES

FEBRUARY 25, 1976

Printed for the use of the Committee on Government Operations



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# NATIONAL EMERGENCIES ACT

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WEDNESDAY, FEBRUARY 25, 1976

U.S. SENATE,
COMMITTEE ON GOVERNMENT OPERATIONS,
*Washington, D.C.*

The committee met, pursuant to notice, at 2 p.m. in room 3302, the Dirksen Senate Office Building, Hon. Abraham Ribicoff (chairman) presiding.

Present: Senators Ribicoff, Church, and Mathias.

Staff members present: Richard A. Wegman, chief counsel and staff director; Eli E. Nobleman, counsel; and Elizabeth Preast, assistant chief clerk.

## OPENING STATEMENT BY SENATOR ABRAHAM RIBICOFF

Chairman RIBICOFF. The committee will be in order.

Today, we will hear testimony relative to H.R. 3884, a bill to terminate certain authorities with respect to national emergencies still in effect, and to provide for orderly implementation and termination of future national emergencies.

The purpose of H.R. 3884 is to terminate, as of 2 years from the date of enactment, powers and authorities possessed by the President, any other officer or employee of the Federal Government, or any executive agency, as a result of existing states of national emergency, and to establish authority for the declaration of future emergencies in a manner which will clearly define the powers of the President and provide for regular Congressional review.

H.R. 3884 passed the House of Representatives on September 4, 1975 and was referred to this Committee. It is substantially similar to S. 3957, which was ordered reported by this Committee in the 93d Congress and passed the Senate by a voice vote on October 7, 1974. Thereafter, it was referred to the House Committee on the Judiciary which took no action on it due to the press of other business.

The National Emergencies Act would:

1. Terminate, as of 2 years from the date of enactment, powers and authorities available to the Executive as a result of the states of national emergency now in force;

2. Provide for congressional review of future Presidential declarations of national emergency no less frequently than every 6 months and congressional termination of states of emergency at any time by concurrent resolution;

3. Provide for congressional oversight of, and accountability for, actions taken by the Executive in the exercise of delegated emergency powers; and

4. Repeal specific obsolete emergency powers statutes and retain in force certain statutes deemed necessary for ongoing operations of the Government.

In summary, enactment of this legislation would end the states of emergency under which the United States has been operating for more than 40 years. It would also insure that the extraordinary powers which now reside in the hands of the Chief Executive—powers to seize property and commodities, organize and control the means of production, assign military forces abroad and restrict travel—could be utilized only when emergencies exist, and then, only under safeguards provided by congressional review.

The bill before us, as well as a companion measure, S. 977, represent the culmination of approximately 2 years of work by the Special Committee on the Termination of the National Emergency. This special committee, cochaired by Senators Frank Church and Charles McC. Mathias, made an extensive study of emergency government in the United States and the constitutional problems created thereby. It held a number of public hearings and enlisted the aid of legal scholars, the Library of Congress, and executive agencies.

We are privileged to have with us this afternoon, the two distinguished Senators who cochaired the Special Committee on the Termination of the National Emergency, Senators Church and Mathias. I might add that Senator Mathias was formerly a member of this committee.

The Senate and the Nation are, indeed, indebted to these gentlemen who, together with their colleagues on the special committee, have devoted so much time and effort to this very important task.

Senator Church, you may proceed as you will, sir.

## TESTIMONY OF HON. FRANK CHURCH, A U.S. SENATOR FROM THE STATE OF IDAHO

Senator CHURCH. Thank you very much, Mr. Chairman.

I would like to follow the example of the Chair and submit my statement which I have prepared.

Chairman RIBICOFF. Without objection, the statement will be inserted in the record as though read at the conclusion of your testimony.

Senator CHURCH. I will be happy, Mr. Chairman, to respond to any questions that you may have concerning this bill.

Chairman RIBICOFF. I have a few questions.

As I understand it, Senator Church, this act will terminate various powers and authority now possessed by the Executive as a result of existing State and national emergencies. How will it affect rules and regulations which were issued pursuant to such emergency?

Senator CHURCH. Legislation certainly does have an impact on rules and regulations issued pursuant to emergency authorities. The act terminates the effect of these rules and regulations.

Chairman RIBICOFF. Section 502 of the act exempts certain provisions of existing law in the coverage of application of the Act pending further review by a congressional committee.

Would you please elaborate on the history and the intention of this section?

Senator CHURCH. Mr. Chairman, when we first introduced the National Emergencies Act in 1974, the legislation did not exempt any provisions of law from the force of the Act. We would have preferred to keep it that way, but the Executive branch emphasized that certain statutes were crucial to the continued operation of the Government. As a result, on October 7, 1974, Senator Mathias offered an amendment providing for the exemptions of six statutes considered essential by the Executive branch. In the course of its deliberations, the House Judiciary Committee added a few exemptions and eliminated one. The most significant of the statutes which are exempted from the force of the Act is the Trading With The Enemy Act, which provides for the administration and regulation of both transactions in foreign exchange of gold and silver, and property transfer in which any foreign country or national has an interest. Other exempted statutes deal with purchases and contracts for property, assignment of claims, the transfer of contracts, and the authority to maintain MIA's on active duty until their status is finally determined.

It is essential to note that all these statutes were exempted from the force of the Act on the condition that the appropriate committees in the House and Senate would review and study the statutes and report their recommendations within 270 days of the enactment of this Act.

It is our belief that it is appropriate to limit the exceptions to this act to the smallest number possible. Where permanent law is required, it should be enacted, but regular reliance on authorities intended for emergency circumstances must be ended.

Chairman RIBICOFF. I note that Title I of the act provides for a 2-year grace period during which the powers and authorities possessed by the President as a result of past declaration of national emergency continue in force.

How does this affect the other titles of the act? Do the new procedures for the declaration, administration, and determination of national emergencies come into effect immediately, or does the delay apply there as well?

Senator CHURCH. Mr. Chairman, with respect to future national emergencies, there is no delay. Following the enactment of this bill, any future national emergency will have to be declared, administered, and terminated in accordance with this act.

Chairman RIBICOFF. I have been advised that the Office of Management and Budget opposes the use of a concurrent resolution to terminate future Presidentially-declared national emergencies. Their objection is based upon the ground that this procedure bypasses the constitutional method of enacting legislation, with particular reference to the role of the President. I assume that you and Senator Mathias have looked into this question and I would appreciate having your views.

Senator CHURCH. Yes, we have looked into this, Mr. Chairman. And the opposition of OMB to the use of the concurrent resolution is long standing and well understood. We knew of it in October of 1974 and we worked out various compromises with the Administration.

That having been accomplished, we were given to understand by the President that he would accept this legislation; he recognized the need for legislation in this field.

And the House, of course, had already passed the bill. The Senate previously passed the bill in the last session of the Congress. And now with the reenactment of the bill in the Senate, we'll be in a position at long last following 4 years of study and hard work by the special committee to enact this bill into law.

Chairman RIBICOFF. The committee has just received a letter and a memorandum from the Governor of Puerto Rico with respect to the island of Culebra. In his letter, he refers to the use of the island as a naval weapons training area and he describes the hardships suffered by the inhabitants of the island as a result of such use.

Although he acknowledges the fact that the President issued an Executive order on October 17, 1975, abolishing the Culebra Island Naval Defensive Sea Area, he expresses the fear that under existing law, the President could, by Executive order, reestablish the Defensive Sea Area.

Accordingly, he has submitted an amendment to H.R. 3884 which would amend existing laws so as to prohibit the President from establishing a Defensive Sea Area which incorporates the island of Culebra by Executive order.

In support of his position, the Governor indicates that any such action should be a decision of the Congress which could be accomplished by enactment of legislation.

At an appropriate point in the record, without objection, the letter and the accompanying memorandum will be inserted. I might add that the Navy has advised that it has no objection to the Governor's proposal. Without objection, the Navy's comments will be inserted in the record.

I assume that you are familiar with the Culebra matter and we would appreciate your views on the Governor's proposal.

Senator CHURCH. Mr. Chairman, on the merits of the proposal, I have no objection. I worry some about the wisdom of amending this bill at this late date. It's been a long and delicate process of negotiation that has led us to the point where we can bring to an end 40 years of emergency government. This can't be accomplished, as the committee well knows, without the concurrence of both Houses of Congress and the signature of the President.

If we amend this bill and pass it in a different form, and it has been finally approved of in the House, then we must go back to the House again.

I have no objection to the amendment as such, but whether it's worth footing a bill as hazard is troublesome to me.

If your committee were to determine that the House would automatically approve the amendment, I would have no objeection to it. But I would hate to see this bill which I regard as the most important piece of legislation with which I have ever been associated in my 20 years in the Senate. If this bill were put in hazard simply because of a desire to add a last minute thought or a last minute amendment, then I think that that would be a very serious mistake.

So my answer does not go to the merits of the amendment itself, but to whether or not it would be wise to amend this bill in any way that would require it to go back once again to the House of Representatives unless we know for sure that the House will approve the revised bill without further deliberations.

It's been a long trip, Mr. Chairman, and I wouldn't want to stumble on the last step of the trail and thus fail to reach the destination.

Chairman RIBICOFF. The committee staff will check with the House staff to determine the outlook. I'm inclined to agree with Senator Church. There is no sense in having another delay for 2 years.

Well, thank you very much, Senator Church.

Senator CHURCH. Thank you, Mr. Chairman.

[The prepared statement of Senator Church follows:]

PREPARED STATEMENT BY HON. FRANK CHURCH, A U.S. SENATOR FROM THE STATE OF IDAHO

Mr. Chairman, it is with pleasure that I appear before you to request speedy and favorable consideration of the National Emergencies Act by your committee. The legislation is, at the moment, little noticed and free of controversy, thanks to careful work by the Congress over three years time, cooperation with the administration of two presidents and a bipartisanship which all too seldom marks the deliberations of the Congress.

But the obscurity and unanimity which surrounds the Act should not disguise the significance of the opportunity this legislation presents. For more than four decades this nation has been governed, in part, by emergency law, law little known and seldom used in the full breadth of its power but powerful and dangerous law nonetheless. During much of this time the President has had available virtually dictatorial power, ready for use at a moment's notice. Even now, the President has power under the authority delegated by statute to: 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 number of ways control the lives of all American citizens. The President can exercise all these powers without benefit of additional Congressional review or sanction.

The National Emergencies Act will put an end to this threat. The legislation will terminate all powers and authorities under any national emergency existing on the date of enactment as of two years from that date. Presently, there are four national emergencies known to be in existence:

The national emergency declared by Franklin Roosevelt on March 9, 1933, to cope with the banking crisis;

The national emergency declared by Harry Truman on December 16, 1950, to respond to the Korean conflict;

The national emergency declared by Richard Nixon on March 23, 1970, to deal with the Post Office strike; and

The national emergency declared by Richard Nixon on August 15, 1971, to implement currency restrictions and to enforce controls on foreign trade.

The bill provides procedures and requirements concerning the future declaration and termination of national emergencies and establishes controls on the exercise of emergency powers. It requires that records be maintained of significant orders of the President and of agency rules and regulations issued during a war or national emergency, and that such orders and rules and regulations be transmitted to the Congress. A report of all expenditures directly attributable to the exercise of powers and authorities under a declaration of national emergency would have to be transmitted to the Congress within ninety days after each six month period under the declaration.

The bill provides for the repeal of certain obsolete statutes and for the continuance in effect of emergency powers and authority under listed statutes which are important to present functions of the Government.

This is a bill which provides for a statutory resolution and definition concerning the exercise of the powers and authorities in connection with national emergencies which may occur in the future. By providing for a termination of powers and authorities relating to existing emergencies, the bill will make it possible for our Government to function in accordance with regular and normal provisions of law rather than through special exceptions and procedures which were intended to be in effect for limited periods during specific emergency conditions.

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Emergency rule has always raised troublesome problems both in political theory and in Constitutional practice. Since the failure of the Roman Republic, historians and philosophers have analyzed the problem posed to a legislature when it confers extraordinary power upon the Executive. Machiavelli, in his Discourses on Livy, acknowledged that great power may, on occasion, have to be given to the Executive if the state is to survive, but warned of the grave dangers in doing so. He cautioned:

"Yet it is not good that in a republic anything should ever happen that has to be dealt with extralegally. The extralegal action may turn out well at the moment yet the example has a bad effect, because it establishes a custom of breaking laws for good purposes; later, with this example, they are broken for bad purposes."

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

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

Turning to the American context, I would like to stress that the word "emergency" is not found in the Constitution. As scholar Clinton Rossiter has observed:

"It never seems to have been seriously considered in the Convention of 1787, the Federalist, or the debates in the state ratifying conventions that the men who were to govern in future years would ever have to go outside the words of the Constitution to find the means to meet any crisis."

As a result, the authority to respond to a crisis must be derived from the powers that are expressly provided for in the Constitution.

The Supreme Court has indicated that there are clear restraints upon Executive action in times of emergency. In Ex parte Milligan Justice Davis, speaking for the majority of the Supreme Court, wrote:

"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism; but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence. . . .

". . . It could well be said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation."

Similarly, in 1934, Chief Justice Hughes held for a majority of the Supreme Court:

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

Nonetheless, the powers available to the President have gradually expanded. The wars, emergencies, and crises of various kinds of the past forty years, in addition to the growth of the Executive branch bureaucracy under the leadership of strong Presidents, and the diminished role of the Congress in the making of policy—these factors have all contributed to the erosion of constitutional government.

Little review by the Judicial Branch was exercised until 24 years ago when the Supreme Court turned back an attempt by President Truman to take over the striking steel industry by means of an assertion of emergency power. Speaking for the majority, Justice Black issued the Youngstown Steel opinion which still stands as the definitive statement in this area. Justice Black held that "the President's power, if any, to issue the order must stem from an Act of Congress or from the Constitution itself."

He characterized President Truman's action as an unconstitutional abrogation of "law-making power" by the Executive.

Justice Jackson's widely quoted and praised concurring opinion stressed that our system of government is a "balanced power structure" and pointed out that Executive power to act is a variable depending upon the collective will of Congress for its authority. Justice Jackson listed three situations which determine the extent of the President's Power:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .

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

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.

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

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

Justice Jackson's analysis is as important today as it was when written twenty-four years ago. As an example of its continuing importance, let me cite the counsel given to the Special Committee by the late Chief Justice of the Supreme Court Earl Warren just prior to his death:

"Chief Justice Warren said that while the Constitution provides that only Congress can make the law, the legislature had the obligation through enacting statutes to provide firm policy guidelines for the Executive branch. The former Chief Justice agreed with Justice Jackson's view that where there are statutory guidelines, a President is obliged to follow the precepts contained in the laws passed by the Congress. Inherent powers problems arise and the other branches act, he said, largely when Congress fails to act definitely, when it fails to make needed laws and when there is a necessity for legislative action and Congress fails to meet the challenge."

In writing the National Emergencies Act, we have accepted Justice Jackson's opinion as a basic guideline. It is our belief that the National Emergencies Act will provide long overdue statutory guidelines for the handling of national emergencies. It is our belief, supported I would suggest by Justice Jackson's opinion and the weight of constitutional scholarship, that our legislation will constitute the exclusive authority for the exercise of Presidential powers in an emergency. The Congress having acted, the President's power will be in Justice Jackson's words "at its lowest ebb." No claim can, in the future, be advanced that a particular type or class of emergency can arise in which the President's powers are not subject to Congressional review.

There remains, however, the question of just how far the writ of this legislation run. What is covered by it and what is not? The legislation before you does not answer that question precisely. Those who drafted it concluded that we could not account for every conceivable type of emergency and write appropriate statutory provisions. We did, however, accept some guidelines. First, on the outer extremes of possibility, emergencies of a grave nature should in all cases fall under this Act. The Congress cannot in the future honor any claim that an emergency is so severe that the President could act without the Congressional review required under this legislation.

Second, on the lower extreme of the range of potential threats, it should be clear that the President should not be allowed to invoke emergency authorities or in any way utilize the provision of this Act for frivolous or partisan matters, nor for that matter in cases where important but not "essential" problems are at stake. The Act authorizes the President to declare a state of national emergency only when it is "essential to the preservation, protection, and defense of the Constitution or to the common defense, safety, or well-being of the territory or people of the United States." The Committee intentionally chose language which would make clear that the authority of the Act was to be reserved for matters that are "essential" to the protection of the Constitution and the people.

But, it may be argued, is there not a need for a single strong authority with extraordinary powers in the event of nuclear attack or extraordinary natural disaster? No doubt we can envision circumstances where greater authority must be lodged in the Executive, but I can envision no circumstances in which the Executive can simply arrogate those powers to himself without recourse to the Legislative branch. To those who argue for greater latitude, I would cite the experience of the British who fought all through the Second World War on delega-

tion of power extended to the Prime Minister for no longer than 30 days at a time.

We simply cannot admit to a doctrine which holds that a nation in extremis must submit to the will of a single individual. Such is the doctrine which has carried India to its present state, and on pretexts far less ominous than those we are discussing, other nations have overturned their fundamental form of government. It must not be allowed to happen here. Now, in a time of relative calm, it is propitious to reaffirm and make clear that proposition.

We will all grant that most of the exercise of authority by the President and his requests for additional authority are right and necessary. I do not wish to see a crippled Executive or a President disarmed of the ability to act quickly in time of crisis or to enforce the law. My point is simply this: the Congress should be forwarned that it is inherent in the nature of modern government that the Executive will seek to enlarge its power in small ways and large.

We already have a Presidency the powers of which are unrivaled in our history. The historic redemption of jurisdiction by the Congress which has gone on in this decade—in the form of the War Powers Act, the Congressional intervention to circumscribe and finally end the War in Vietnam, the new budget authority and the regaining of some control over foreign policy—is long overdue and urgently needed. The Congress must not again trade away its responsibilities in the name of national emergency. Let that be one of the lessons learned from the investigation now completed and the favorable recommendation I ask of you for the National Emergencies Act today.

Chairman RIBICOFF. We have received a letter from Hon. Rafael Hernandez Colon, Governor, Commonwealth of Puerto Rico, expressing the interest of Puerto Rico in H.R. 3884. The letter with enclosure will be entered in the hearing record at this point.

[The letter referred to follows:]

COMMONWEALTH OF PUERTO RICO,
OFFICE OF THE GOVERNOR,
*La Fortaleza, San Juan, February 6, 1976.*

Hon. ABRAHAM A. RIBICOFF,
*Chairman, Government Operations Committee,*
*U.S. Senate, Washington, D.C.*

DEAR CHAIRMAN RIBICOFF: I understand that the Government Operations Committee will be considering the National Emergencies Act (H.R. 3884) in hearings scheduled for February 24, 1976. Puerto Rico has a special interest in this legislation.

As you may know, Puerto Rico has for many years sought the permanent termination of Navy weapons training at the tiny, inhabited island of Culebra. Due in large measure to the support of Congress, we finally achieved complete termination of all Navy weapons training at Culebra and its Cays. Weapons training at Culebra proper ceased on July 1, 1975, in accordance with a directive of former President Nixon, and the Navy weapons training at Culebra's cays terminated on September 30, 1975, as a consequence of President Ford's decision.

On October 17, 1975, acting in response to the recommendation of the Secretary of Defense, President Ford signed Executive Order 11886 abolishing the Culebra Island Naval Defensive Sea Area that had been established by Executive Order 8684 in 1941. President Ford's October 17, 1975, Executive Order also recited the fact that "The Culebra Island Naval Airspace Reservation has, at the request of the United States Navy, been revoked by the Federal Aviation Administration (14 CFR Part 73.71; 40 FR 45804)."

The 1941 Executive Order that originally established the Culebra Island Naval Defensive Sea Area as a wartime measure had the effect of transforming Culebra into a virtual federal prison. Just as a similar statutory provision that dealt with Army military zones—Section 1383 of Title 18, United States Code, that is to be specifically repealed in H.R. 3884—was used to confirm the shameful relocation and retention of United States citizens of Japanese ancestry during World War II, its naval counterpart—Section 2152 of Title 18, United States Code—has been used in the equally shameful abridgement of the rights of United States citizens residing on the three by seven mile island of Culebra, Puerto Rico, to depart from and return to their homes and even to pursue their livelihood as fishermen. The inhabitants of Culebra were subjected to criminal prosecution for exercising these basic rights of life, liberty and the pursuit of happiness unless they first obtained the permission of the Secretary of the Navy.

Since the mid-50's, the Navy has on several occasions attempted to implement a plan to acquire all of Culebra and force the inhibitants to leave their homes forever and even take their ancestors with them from their cemetery graves. Each time this monstrous plan surfaced it was abandoned only to be resurrected time and time again. Although we have been told by the Navy and the Defense Department that this time the termination of training at Culebra is permanent, I have been advised that the Culebra Island Naval Defensive Sea Area that has now been abolished by Executive Order could be reestablished by a future executive order without any consideration by Congress so long as the wartime legislation conferring this authority in the President continues in effect. As Governor of Puerto Rico I wish to make it as certain as possible that the hardship and suffering borne by the Culebrans never again can be reimposed on these American citizens.

In letters to several Senators and Congressman Rodino, I pointed out the parallels between Section 2152 of Title 18 of the United States Code and its Army counterpart—Section 1383 of Title 18, United States Code—that is to be specifically repealed in H.R. 3884. On behalf of Puerto Rico I had suggested that the repeal of both of these wartime anachronisms would assure the people of Puerto Rico and, indeed, all citizens of the United States that the suffering of the Culebrans will not be reimposed upon them or anyone else in the future without the considered judgment of Congress being brought to bear to determine the absolute necessity for such action (See enclosed memorandum dated June 23, 1975).

I understand that the House of Representatives did not have an opportunity to consider adding a reference to 18 U.S.C. § 2152 in the repealer section of H.R. 3884. I also understand that because of its concern that the repeal of 18 U.S.C. § 2152 might impinge upon its ability to control or modify existing defensive sea areas, the Navy is reluctant to endorse the repeal of the entire section. I understand further, however, that the Navy has no objection to a narrow amendment of Section 2152 that would make it clear that a defensive sea area cannot be reestablished at Culebra unless Congress enacts legislation to the contrary in the future.

The people of Puerto Rico, therefore, would be most grateful if your Committee would add at the end of Title 5 of H.R. 3884 a new section as follows:

"Section 503: The third paragraph of Section 2152 of Title 18, United States Code, is amended by inserting '(except that the President not establish a defensive sea area incorporating the Island of Culebra, Puerto Rico, or the waters adjacent to such island)' immediately after 'executive order.' "

If testimony on behalf of Puerto Rico would be necessary and helpful on this point, we would be delighted to provide a witness.

Sincerely yours,

RAFAEL HERNANDEZ COLON.

Enclosure.

AMENDING THE PROPOSED NATIONAL EMERGENCIES ACT [H.R. 3884 AND S. 977] TO MAKE THE REPEALER CONTAINED IN SECTION 501(e) OF THE HOUSE BILL AND THE IDENTICAL REPEALER IN SECTION 601(e) OF THE SENATE BILL APPPLICABLE TO NAVY ZONES AS WELL AS ARMY ZONES

H.R. 3384 and S. 977, companion bills comprising the "National Emergencies Act" state in section 501(e) and section 601(e), respectively, that: "Section 1383 of title 18, United States Code, is repealed." This section provides criminal penalties for "Whoever, contrary to the restrictions applicable thereto, enters, remains in, leaves, or commits any act in any military area or military zone prescribed under the authority of an Executive Order of the President, by the Secretary of the Army, or by any military commander designated by the Secretary of the Army . . ." when it appears that the individual knew of the restrictions or order and that his act was in violation thereof. As stated in House Report Number 94–238: "This section was originally enacted as a wartime measure . . ." and "was not intended to apply in normal peacetime situations." Noting that repeal of section 1383 of title 18 is consistent with previous congressional repeal of the Emergency Detention Act, the House Report cited language from a House Report issued in connection with that earlier action to the effect that: "The Emergency Detention Act serves no useful purpose, but, on the contrary, only engenders fears and resentment on the part of many of our fellow citizens. . . ."

A very similar provision, Section 2152 of title 18 of the United States Code, also originally enacted as a wartime measure, is the Navy counterpart of Section 1383. This section provides criminal penalties for "Whoever knowingly, willfully, or

wantonly violates any duly authorized and promulgated order or regulation of the President governing persons or vessels within the limits of defensive sea areas, which the President, for purposes of national defense may from time to time establish by executive order. . . ."

Just as with section 1383, the broad discretion conferred upon the President by section 2152 to create a defensive sea area anywhere in the United States without consultation with Congress, which may have been necessary in wartime, is pernicious and inappropriate in current peacetime. Just as the Army version—section 1383—was used to confirm the shameful relocation and detention of United States citizens of Japanese ancestry during World War II, as discussed in House Report Number 94–238, its naval counterpart—section 2152—has been used in the equally shameful abridgement of the rights of United States citizens residing on the tiny island of Culebra, Puerto Rico, to depart from and return to their homes and even to pursue their livelihood as fishermen. In both instances the courts have upheld this authority in the face of challenges on constitutional grounds.[1]

Likewise, just as the repeal of section 1383 is consistent with Congress' prior expression of its disapproval of this kind of authority—its repeal of the Emergency Detention Act—repeal of section 2152 would complement this prior repeal action. It also would be consistent with Congress' expressed determination to end naval weapons training at the tiny, inhabited island of Culebra that was made possible by the wartime exercise of the section 2152 authority. On June 5, 1974, the Senate voted unanimously to terminate all naval weapons training at Culebra by a date certain;[2] later that same month the President ordered cessation of all navy weapons training at Culebra by July 1, 1975, and all navy weapons training at the Culebra Cays as soon thereafter as possible but in no event later than December 31, 1975.

The Secretary of Defense has agreed to initiate action to terminate the Culebra Island Naval Defensive Sea Area created pursuant to the authority conferred upon the President in section 2152 of title 18, United States Code, but so long as Culebra or, for that matter, any other geographic area of the United States can be transformed into a prison by the mere issuance of a Presidential Executive Order, this unbridled discretion will continue to engender "fears and resentment on the part of many of our fellow citizens."

Repeal of section 2152 would leave undisturbed existing naval defensive sea areas and would permit the creation of appropriate naval defensive sea areas in those instances where Congress is persuaded that there is a genuine need for such action.

The repeal of section 2152 could be readily accomplished by amending section 501(e) of H.R. 3884 and section 601(e) of S. 977, each of which reads: "Section 1383 of title 18, United States Code, is repealed." to read as follows: Sections 1383 *and 2152* of title 18, United States Code, *are* repealed."

Both sections 1383 and 2152 and their predecessors evolved along remarkably similar historical lines, dating as far back as the Spanish-American War of 1898. This history is recounted in some detail in the body of the attached memorandum.

### Memorandum

Re A comparative analysis of the legislative history of sections 1383 and 2152 of title 18, United States Code.

The original precursor of Sections 1383 and 2152 of current Title 18, United States Code is found in an Act of July 7, 1898, promulgated during the Spanish-American War.[1] Both the Senate and the House Reports accompanying that

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[1] *Hirabayashi* v. *United States*, 320 U.S. 81 (1943); *Feliciano* v. *United States*, 297 F. Supp. 1356, aff'd. 422 F. 2d 943 (1970), cert. denied, 400 U.S. 823 (1970).

[2] See 120 Cong. Rec. 9811–19 (daily ed. June 5, 1974).

[1] 55th Congress, Sess. II, Chap. 576, 30 Stat. 717, in relevant part: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who shall willfully, wantonly, or maliciously trespass upon, injure, or destroy any of the works or property or material of any submarine mine or torpedo, or fortification or harbor-defense system owned or constructed or in process of construction by the United States, or shall willfully or maliciously interfere with the operation or use of any such submarine mine, torpedo, fortification, or harbor-defense system, or shall knowingly, willfully or wantonly violate any regulation of the War Department that has been made for the protection of such mine, torpedo, fortification or harbor-defense system shall be punished, on conviction thereof in a district court of the United States for the district in which the offense is committed, by a fine of not less than one hundred nor more than five thousand dollars, or with imprisonment for a term not exceeding five years, or with both, in the discretion of the court."

legislation indicate clearly that this Act was inspired by the need to defend United States interests in the then "existing war." [2] Letters from the Secretary of War and the Deputy Judge Advocate General, with which the Senate Report fully concurred, cited "the existing war" in recommending enactment of this legislation.[3]

A letter of the Deputy Judge Advocate General of April 27, 1898, submitting a draft of bill for consideration evidenced primary concern with the protection of the "seacoast defenses," but it also referred generally to the absence of statutory authority over acts committed by civilians elsewhere than "at the theater of war," or "within a district under martial law." [4]

The Act of July 7, 1898 conferred no regulatory power on the Executive Branch.

In 1909, Congress enacted legislation codifying, revising and amending the penal laws of the United States.[5] The language already quoted from the original 1898 Act evolved into Sections 44 and 45 of the Criminal Code of 1909 which ultimately became Sections 1383 and 2152 of current Title 18. Section 44 of the 1909 Act dealt with naval concerns,[6] while Section 45 became its army counterpart.[7] Both sections dealt essentially with the same types of violations—trespass in military areas and destruction of property in these areas.

Neither section yet conferred any regulatory power on the Executive.

In 1917 at the height of world War I Section 44 of the Act of 1909 was amended. The House Bill, known as the Naval Appropriations Bill (H.R. 20632 of January 30, 1917) introduced for the first time the delegation of authority to the President to make rules and regulations governing conduct within defensive areas.[8] In response to a written request from the Secretary of the Navy,[9] the Senate further amended Section 44 to delegate to the President for the first time authority to establish by order such defensive sea areas "as may be necessary in his discretion for purposes of national defense, . . . ." [10]

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[2] Senate Report No. 1259 of June 20, 1898; House Report No. 1635 of June 29, 1898.

[3] Id.

[4] Letter to Judge Advocate's Office, Headquarters, Department of the East, Governors Island, New York City, April 27, 1898: "In view of the existing war, the important interests of the United States in the seacoast defenses, the absence of military jurisdiction over acts committed by civilians elsewhere than at the theater of war, or within a district under martial law, the absence of any statutes of the United States for the protection from injury of its defenses, and the impunity with which such defenses may be interfered with by designing persons, and the great harm which may result therefrom, I have the honor to submit the accompanying draft of biill for consideration and such action as may be deemed proper." House Report No. 1635.

[5] 60th Congress, Sess. II, March 4, 1909, 35 Stat. 1088.

[6] "Sec. 44. Whoever shall willfully trespass upon, injure, or destroy any of the works or property or material of any submarine mine or torpedo, or fortification or harbor-defense system owned or constructed or in process of constuction by the United States, or shall willfully interfere with the operation or use of any such submarine mine, torpedo, fortification, or harbor defense system, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both." 35 State. 1097.

[7] "Sec. 45. Whoever, shall go upon any military reservation, army post, fort, or arsenal, for any purpose prohibited by law or military regulation made in pursuance of law, or whoever shall reenter or be found within any such reservation, post, fort, or arsenal, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof, shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both." 35 Stat. 1097.

[8] H. Rep. No. 1633, 64th Cong., 2d Sess. 1 (1917).

[9] The Secretary proposed "that certain authority be requested from Congress to legalize the establishment and the control and protection of harbour defenses and defensive sea areas which may become necessary *in time of actual or threatened war.*

"Should hostilities be threatened of a maritime nature, it will be necessary for the purposes of national defense to establish 'defensive sea areas'. . . ." (Emphasis added.) S. Rep. No. 940, 64th Cong., 2d Sess. 1 (1917).

[10] 54 Cong. Record, 4725: "That section 44 of the act entitled 'An act to codify, revise and amend the penal laws of the United States,' approved March 4, 1909, be and the same is hereby, amended to read as follows:

Whoever shall willfully trespass upon, injure, or destroy any of the works or property or material of any submarine mine or torpedo or fortification or harbor-defense system owned or constructed or in process of construction by the United States, or shall willfully interfere with the operation or use of any such submarine, mine, torpedo, fortification, or harbor-defense system, or shall knowingly, willfully, or wantonly violate any duly authorized and promulgated order or regulation of the President governing persons or vessels within the limits of defensive sea areas, which defensive sea areas are hereby authorized to be established by order of the President from time to time as may be necessary in his discretion for purposes of national defense, shall be punished on conviction thereof in a district or circuit court of appeals of the United States for the district or circuit in which the offense is committed, or into which the offender is first brought, by a fine of not more than $5,000, or by imprisonment for a term not exceeding five years, or by both, in the discretion of the court."

The date of this Act—1917, during World War I—the nature of the Bill to which it was attached—appropriations for the Navy—the letter of the Secretary of the Navy, and the Senate floor debate that followed presentation of the Senate amendment,[11] all indicate that the power conferred upon the Executive to establish defensive sea areas was related to the state of "actual or threatened war" and the inherent preoccupations with national security it generated.

In 1926 both Sections 44, as amended, and 45 of the Criminal Code became Sections 96 and 97 of Title 18, United States Code, under the general heading: "Chapter 4—Offenses Against Operations of Government."[12] The authority granted to the Executive in the 1917 Bill remains unchanged in Section 96.[13]

This legislatively delegated executive authority may have served as the model for the subsequent assertion by President Franklin Delano Roosevelt during World War II of his inherent power as President and Commander-in-Chief of the Armed Forces to establish military areas referred to in the companion Section 97 of Title 18 of the United States Code.

On February 19, 1942, President Franklin Delano Roosevelt issued Executive Order No. 9066 authorizing "the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, . . . ."[14]

Subsequently legislation was enacted on March 21, 1942 which confirmed this assertion of executive power by adding explicit reference to such power in an act providing penalties for unlawful entry into military areas or zones prescribed by the delegees of the President to the effect that "whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, . . . ."[15]

This legislation was a product of the prevailing war climate: "The necessity for this legislation arose from the fact that the safe conduct of the war requires the fullest possible protection against either espionage or sabotage to national defense material, national defense premises, and national defense utilities. . . ."[16]

In fact the Secretary of War invoked the interest of field Commanders in urging the passage of this legislation: "Dear Mr. May: By telephone on Thursday, March 12, 1942, Lt. Gen John L. DeWitt, commanding the Western Defense Command, requested that action be taken to expedite passage of S. 2352 and H.R. 6758, bills to provide penalties for violation of restrictions or orders with respect to persons entering, remaining in, or leaving military areas or zones . . . ."[17]

In 1948, an Act to revise, codify and enact into positive law Title 18 of the United States Code[18] merged Section 997 of Title 18 of the United States Code and the Act of 1942 into Section 1383, which read as follows:

"§ 1382. Restrictions in military areas or zones.

Whoever, contrary to the restrictions applicable thereof, enters, remains in, leaves, or commits any act in any military area or military zone, *prescribed under the authority of an Executive order of the President, by the Secretary of the Army, or by any military commander designated by the Secretary of the*

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[11] 54 Cong. Record 4725. (64th Congress, 2d Sess., 1917):

"Mr. PENROSE. Mr. President, I should like to ask the acting chairman of the committee whether this is not largely covered by the espionage bill which the Senate passed recently?

Mr. SWANSON. It is quite possible that it will be covered. I have not looked it up carefully. If it is covered, when the bill gets into conference we can eliminate it or modify it; but it is necessary, especially for mines. People are apt to be very careless about mines if you should get into war.

Mr. PENROSE. Well, that is satisfactory.

Mr. SWANSON. It is very necessary.

Mr. PENROSE. Let it go to conference."

[12] 44 Stat. 463.

[13] U.S.C. § 96. "which defensive sea areas are hereby authorized to be established by order of the President from time to time as may be necessary in his discretion for purposes of national defense. . . ."

[14] Exec. Or. 9066 of Feb. 19, 1942. H. Rep. No. 1906, 77th Cong., 2d Sess. (1942).

[15] Id. 56 Stat. 173.

[16] H. Rep. No. 1906, 77th Cong., 2d Sess. (1942).

[17] Id. Letter of the Secretary of War to the Chairman of the Committee on Military Affairs, House of Representatives on March 14, 1942.

[18] Act of June 25, 1948. 62 Stat. 683.

*Army*, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be fined not more than $5,000 or imprisoned not more than one year, or both." [19] (Emphasis supplied.)

In the same process of codification Section 96 of Title 18 of the United States Code became Section 2152, which reads as follows:

"§ 2152. Fortification, harbor defenses, or defensive sea areas.

Whoever willfully trespasses upon, injures, or destroys any of the works or property or material of any submarine mine or torpedo or fortification or harbor-defense system owned or constructed or in process of construction by the United States; or

Whoever willfully interferes with the operations or use of any such submarine mine, torpedo, fortification, or harbor-defense system; or

Whoever knowingly, willfully, or wantonly violates any duly authorized and promulgated order or regulation of the President governing persons or vessels within the limits of defensive sea areas, *which the President, for purposes of national defense, may from time to time establish by executive order*—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both." [20] (Emphasis supplied.)

In the 1948 codification, the two sections became separated within Title 18 of the United States code for the first time: Section 1383 (previously Section 97, Title 18, U.S.C. and Section 45, Criminal Code) is placed under Chapter 67, entitled "Military and Navy" and Section 2152 (previously Section 96, Title 18, U.S.C. and Section 44, Criminal Code) is placed under Chapter 105, entitled "Sabotage." Nevertheless, their respective purposes remain faithful to their common origin, i.e., the need to assure security within military premises and to provide for effective punishment of violators.

The 1948 version of those provisions is maintained in current Title 18 of the United States Code and it is Section 1383 that has been proposed for repeal by H.R. 3884.[21]

There is no reason why Section 2152 should not also be repealed. Section 2152 is essentially the navy counterpart of Section 1383.

Chairman RIBICOFF. At this point in the record we will enter, without objection the statement of Senator Mathias as though read.

[The prepared statement of Senator Charles Mathias follows:]

PREPARED STATEMENT BY HON. CHARLES McC. MATHIAS, A U.S. SENATOR FROM THE STATE OF MARYLAND

During the past three years Senator Church and I have been the only co-chairmen in Congress. Throughout our proceedings we have alternated the lead-off position. Today, I am second in the line-up.

I have enjoyed working with Senator Church, and I feel that our proceedings have been conducted in a bipartisan manner and have been marked by a rare degree of cooperation between the Executive and Legislative branches of government. In 1974, Senator Church and I met with President Ford to discuss the National Emergencies Act, and at that time he agreed in principle with what we were proposing. We have been able to use Air Force computer tapes of the United States Code and have received the cooperation of the Justice Department at every step. We have solicited and greatly benefitted from views of all Executive agencies and departments. In all, our deliberations have been characterized by a unanimity customary for the declaration of National Peanut Week or the fight against hemophilia but highly unusual for significant questions of national policy. It is because of this spirit that Senator Church and I can recommend the National Emergencies Act with such enthusiasm today.

I believe that the legislation before you—the National Emergencies Act—is extremely important and long overdue. Most Americans are unaware that the majority of the people in the United States have lived their entire lives under emergency government. Ever since 1933, more than four decades ago, protections

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[19] 62 Stat. 765.

[20] 62 Stat. 799. There were some changes in the language of this Section, as contrasted to its 1940 version, but the power conferred on the President remains unimpaired.

[21] Title V, Section 501(e) reads: "Section 1383 of Title 18, United States Code, is repealed."

and procedures guaranteed by the Constitution have, in varying degrees, been abridged by executive directives whose legality stems from existing states of national emergency.

Revelations of how power has been abused by high government officials gives rise to new concerns about the potential exercise, unchecked by Congress or the American people, of extraordinary emergency powers. The plethora of emergency powers now available to the President could be readily used for unintended purposes.

The National Emergencies Act represents a significant step toward correcting this dangerous situation. The legislation terminates powers and authorities possessed by the Executive as a result of existing states of national emergency and establishes authority for the handling of future emergencies in a manner which will clearly define the powers of the President and provide for regular Congressional review. The bill should end the disarray that has characterized emergency laws and procedures in the United States.

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

During the years 1969 to 1972, particularly, I introduced or co-sponsored numerous bills to repeal Congressional resolutions in support of the President's actions, for example, the Formosa and the Gulf of Tonkin Resolutions. In 1971, I submitted Senate Concurrent Resolution 27 to establish a special joint committee to study the effect of terminating the first state of emergency we found in existence, that declared by President Truman in 1950 during the Korean War. Then on May 23, 1972, I introduced, with Senator Church's co-sponsorship, Senate Resolution 304, which called for the creation of the Senate Special Committee on the Termination of the National Emergency. The Committee was to be empowered "to conduct a study and investigation with respect to the termination of the 1950 emergency," to consider problems which might arise as the result of the termination and to consider what administrative or legislative actions might be necessary.

S. Res. 304 was the subject of hearings before the Senate Foreign Relations Committee to which it was referred. On June 13, 1972, this resolution was reported favorably after hearings and executive reports. The bill was subsequently passed, and on September 18 Senators Church, Hart, Pell, Stevenson, Mathias, Hansen, Pearson and Case were appointed—an equal number of Majority and Minority members—and Senator Church and I became co-chairmen. On January 6, 1973, the Committee began its work under the authority of S. Res. 9 in the 93d Congress.

When the Committee was established, we immediately began a survey to determine the scope of existing law. We met with Attorney General Kleindienst and enlisted the cooperation of the Department of Justice. A special task force was established in the White House to look into the question of emergency powers We began working with the Senate committees having standing authority over the pertinent legislation and began a process of keeping your committee abreast of all that we were doing.

Discovering the scope of existing law proved to be a problem. Nowhere in the executive branch or in the Library of Congress was there a compendium of national emergency legislation. In the past, the only way to compile a catalog useful to Congress would have required going through every page of the 86 volumes of the Statutes-at-Large. Fortunately, the U.S. Code was put into computer tapes by the U.S. Air Force in the so-called LITE system, which is located at a military facility in the State of Colorado. The Special Committee devised several programs for computer searches based on a wide spectrum of key words and phrases contained in typical provisions of law which delegate extraordinary powers. Examples of some trigger words are "national emergency," "war," "national defense," "invasion," "insurrection," etc.

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

To determine legislative intent, the U.S. Code citations were then hand checked against the Statutes-at-Large, the Reports of Standing Committees of the U.S. Senate and House of Representatives and, where applicable, Reports of Senate and House Conferences.

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

I should point out exactly how the 470 statutes were identified. All the statutes covered by the National Emergencies Act are characterized by their requiring that the President proclaim a state of national emergency or a state of war to be operative. This excludes some legislation which was passed during a time of emergency and was originally intended only for that purpose but nonetheless continues in force to this day. An example of this is the Feed and Forage Act of 1861 which was passed to enable the calvary in the American West to buy feed for their horses when Congress was out of session. Since then the President has invoked the authority of this Act to expend millions of dollars without benefit of Congressional action. During the Vietnam War and during the Berlin Airlift, the Department of Defense used the law repeatedly to fund military activities not authorized by Congress.

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

A review of these emergency statutes reveals a consistent pattern of law-making by which Congress, through its own actions, has transferred this awesome power to the Executive, ostensibly to meet the problems of governing effectively in times of great crisis. No charge can be sustained that the Executive branch usurped these powers from the Legislative branch. The contrary is true; the transfer has been routinely mandated by Congress itself in response to the exigencies of war and other grave emergencies.

A few examples from the 470 emergency statutes now in force should make it clear what kinds of extraordinary discretionary power have been delegated to the President:

Statute 10 USC 712 permits the President "during a war or a declared national emergency" to "detail members of the Army, Navy, Air Force, and Marine Corps to assist in military matters" in any foreign country.

Under 10 USC 333, the president can use the militia or armed forces to suppress "conspiracy," if it is likely that "any part" of the people in a state will be deprived of some constitutional right, and the state itself refuses to act. Under this statute, the president conceivably could circumvent Article IV, Section 4, of the Constitution even before waiting for state legislatures or state executives to request Federal troops.

Under 18 USC 1383, the president has authority to declare any part or all of the United States military zones. People in such zones can be jailed for a year for violating any "executive order of the president." Would these arrests be reviewable in court? It is not clear. Judicial review of agency actions is guaranteed in 5 USC 702, but 5 USC 701 excludes actions taken under declarations of martial law.

A president could make use of Public Law 733, which expresses the determination of the United States to prevent "by whatever means may be necessary including the use of arms," any "subversive" activities by the government of Cuba.

Under 47 USC 308, the Federal Communications Commission could, during a national emergency, modify existing broadcast licenses under terms it might prescribe.

Under 47 USC 606, the president can amend "as he sees fit" the rules and regulations of the Federal Communications Commission and, in particular, can "cause the closing of any facility or station for wire communications."

If the President finds the nation "threatened by attack," he could under 44 USC 1505, cease to publish his regulations in the Federal Register if he determines that it is "impracticable." This could open the way to promulgation of secret laws.

What these examples suggest, and what the magnitude of emergency powers affirm, is that most of these laws do not provide for Congressional oversight or termination. There are two reasons which can be adduced as to why this is so. First, few, if any, foresaw that the temporary states of emergency declared in 1933, 1939, 1941, 1950, 1970, 1971, would become what are now regarded collectively as virtually permanent states of emergency—the 1939 and 1941 emergencies were terminated in 1952. Forty-three years can, in no way, be defined as a temporary emergency. Second, the various administrations which drafted these laws were uninterested in providing for Congressional review, oversight, or termination of these delegated powers which gave to the President such wide-ranging authority.

The Special Committee has held extensive hearings seeking the views and advice of the country's most distinguished authorities on constitutional government in time of crisis. In addition to scholarly authorities in the fields of political science and the law, the Special Committee sought the counsel of all the former Attorneys General and two former Supreme Court Justices, as well as many distinguished lawyers.

The Committee also obtained the views and opinions of each of the three branches about how to best meet the problem of emergency rule. We thought it was particularly necessary to obtain not simply the present day perspective, but also the perspective of those who have served in previous administrations, Congresses, and courts over the past 41 years of emergency rule. It was particularly helpful to have views of those who served as both Attorney General and Supreme Court Justice. We had the opinion, of course, of Justice Jackson in the most important Youngstown Steel case. We are fortunate to have a number of Attorneys General who have served in many capacities and not only in the Executive branch. A number of this country's most distinguished law schools have on their faculties men who have served their Government in the Executive branch or in the Judiciary or as staff consultants to congressional committees. In addition, we sought the advice of each Senate Committee with authority over the pertinent statutes. This broad perspective over the four decades of emergency rule was absolutely vital in order to consider the problem in a context that, of course, would include the immediate concerns of the respective branches but also the test of history and considered reflection on the part of those who have been through the experience and could objectively judge.

Many of these views and opinions are contained in the published hearings of the Committee. Considerable valuable advice was given in study sessions at law schools or at private meetings held by members of the Committee over the past three years.

Upon the basis of all these hearings and consultations, the Special Committee drew up the National Emergencies Act. Let me briefly review the legislative history of the Act.

In the 93rd Congress the Senate passed legislation very similar to the legislation we are considering today. The Special Committee submitted S. 3957 to the Senate on August 22, 1974. The bill provided for:

1. Termination of powers and authorities available to the Executive as a result of the states of national emergency in force.
2. Congressional review of future national emergencies.
3. Congressional oversight of and Executive accountability for actions taken in the exercise of emergency powers.
4. Repeal of obsolete emergency powers statutes.

The Committee on Government Operations, to which the bill was referred, reported it without amendment on September 30, 1974 (S. Rept. 93–1193). On October 7 on the floor of the Senate, I offered amendments incorporating compromises agreed to by the Administration. The amendments provided for:

1. Extension of the termination date for existing emergency powers from nine to twelve months from enactment;
2. A semi-annual review and decision by Congress on whether to end an emergency, rather than automatic termination of states of emergency;
3. Reduction of the number of statutes to be repealed;
4. Exemption of six statutes considered essential by the Executive Branch and provision for their review by appropriate Congressional committees;
5. Requirements for an accounting of expenditures incurred in the exercise of national emergency statutes.

The amended legislation passed the Senate without dissent on October 7, 1974.

Senate bill, S. 3957, then went to the House of Representatives, but the House Judiciary Committee, to which the legislation was referred, was unable to act on the bill in 1974. Representative Peter Rodino, the Committee Chairman, had intended to hold early hearings on the legislation; however, the impeachment inquiry and confirmation of Vice President Rockefeller prevented consideration during the 93rd Congress, and the bill consequently died.

Early in the 94th Congress, on February 27, 1975, Chairman Rodino introduced H.R. 3884 and on March 6, 1975, I introduced S. 977. The bills were identical and, with the exception of two minor technical amendments, they were the same as the measure already passed by the Senate.

The House Judiciary Subcommittee on Administrative Law and Governmental Relations, chaired by Representative Walter Flowers, held hearings on H.R. 3884 on March 6, 13, 19 and April 9, 1975. Witnesses included Senator Church, Representative Rodino, representatives of Executive departments and agencies, and myself.

On May 21, 1975, the Judiciary Committee reported H.R. 3884 with amendments (H. Rept. 94–238). Most of the changes clarified and corrected sections of the bill. One amendment advanced from one year to two years the effective date for the termination of the existing emergency powers. The two year delay provided time for all Executive agencies and departments dependent on emergency statutes to seek permanent legislation. Another revision gave the Executive additional time to account for expenditures incurred during the exercise of emergency powers. This was done to insure that the Executive had sufficient time to report expenditures. The Committee also increased the number of statutes which would be exempt from the force of the legislation.

H.R. 3884, as amended by the House Judiciary Committee, passed the House on September 4, 1975. On the floor, the House accepted an amendment by Representative Matsunaga to provide for automatic termination of an emergency if the Executive fails to publicly renew the emergency. The legislation passed the House easily; only five members voted against the bill, while 388 voted in favor of it.

H.R. 3884, as passed by the House, is the bill before us today. To insure that its provisions are clearly understood, I would now like to review the bill and explain some of the thinking behind it.

Title I of the legislation provides for the termination of all powers and authorities possessed by the Executive as a result of existing states of national emergency. These powers are to be terminated two years from the date of enactment of this legislation. The grace period is designed to give all Executive agencies, offices, and departments which have become dependent on emergency statutes for their day-to-day operations time to seek permanent legislation, if appropriate.

Title II concerns the declaration and termination of future national emergencies. The provisions of Title II, along with those of Titles III and IV, are designed to insure Congressional oversight of Presidential actions in time of emergency. No such oversight has existed to date.

Section 201 provides that the President may declare a national emergency when it is "essential to the preservation, protection, and defense of the Constitution or to the common defense, safety, or well-being of the territory and people of the United States." The section is not intended to grant additional authority to the President, and the provisions of the bill are not meant to supersede existing provisions of the law which authorize declarations of emergency by the Congress.

Emergency authorities will only come into effect if the President complies with the provisions of this Act. Section 201(a) requires that any Presidential declaration of an emergency be immediately transmitted to the Congress and published in the Federal Register. Section 201(b) states that the statutes granting powers to the President in time of emergency shall have effect only during times the President has declared a national emergency and then only if he has acted in accordance with the provisions of the Act. Subsequent legislation can supersede this Act only in specific terms.

Section 202 contains the crucial sections which detail the role of Congress in future emergencies. We concluded that it would be irresponsible to propose the termination of existing emergencies and the laying dormant of existing powers without providing a means for declaring and terminating future emergencies.

The version of the National Emergencies Act first reported by the Senate Government Operations Committee contained a provision in which emergencies were

to continue for six months. At the end of six months, emergencies were to be automatically terminated unless extended by the Congress. In that event, the President would have to proclaim a state of emergency again and, this time obtain Congressional approval only for another six months at a time.

This provision caused concern in the Executive branch. Although we would have preferred the bill as written, a compromise was worked out which the Senate found acceptable. The present formula provides that the President can proclaim a national emergency which could continue indefinitely. However, the Congress may at any time reject by Concurrent Resolution the President's use of these powers. Subsections (b) and (c) of Section 202 establish procedures to insure Congressional consideration of a concurrent resolution which would terminate a national emergency. The provisions are similar to those set out in Section 7 of the War Powers Act, and they give every possible assurance that the Congress will vote aye or nay on the continuation of the emergency at the end of six months and at six month intervals thereafter. While a statute cannot require that the two Houses vote, it can provide special rules to help assure a vote.

A final clause included in Section 202 is the amendment of Representative Matsunaga which was accepted by the House during debate. In provides that any national emergency declared by the President not otherwise previously terminated "shall terminate on the anniversary of the declaration of that emergency if, within the ninety day period prior to each anniversary date, the President does not publish in the Federal Register and transmit to the Congress a notice stating that the emergency is still in effect."

Title III requires the President to specify the provisions of law under which he intends to act either in the declaration of national emergency or in contemporaneous or subsequent Executive orders. These must be published in the Federal Register and transmitted to the Congress.

Title IV requires an extensive system of record keeping by the President and Executive agencies so that the Congress and the people may be informed what reactions are being taken. All significant orders, rules, and regulations issued pursuant to a declaration of emergency must be transmitted to the Congress, along with regular reports on expenditures incurred.

Title V deals with the repeal and continuation of certain emergency powers and statutes. Section 501 provides for the repeal or amendment of seven existing laws which have been found to be superseded or obsolete. Section 502 exempts certain provisions of law from the force of the legislation, subject to further investigation by the Standing Committees of the House and Senate. Many Government departments have come to depend on these laws for their day-to-day operations, and abrupt termination of these provisions would be disruptive. The Committee has exempted these authorities to avoid potential disruption and to allow careful review and evaluation of the statutes and enactment of permanent law where appropriate. The law requires that House and Senate Committees report within 270 days on any of these statutes that fall within their jurisdiction.

Let me conclude by saying that we believe that we have provided the Executive branch and the nation with an effective, workable method for dealing with future emergencies in accord with Constitutional processes. The legislation insures that the extraordinary powers now in the hands of the Executive will be utilized only in time of genuine emergency and then only under safeguards insuring Congressional review.

Chairman RIBICOFF. Without objection, there will be inserted an explanation of the position of Senator Mathias on the Culebra amendment.

[The information referred to follows:]

### EXPLANATION OF POSITION OF SENATOR MATHIAS ON CULEBRA AMENDMENT TO TITLE V OF H.R. 3884

H.R. 3884, as amended by the House, is the bill before us today. Senator Church and I recommend that Government Operations report the bill favorably, with the addition of a single amendment. We make this recommendation on the understanding that this amendment will not hinder the enactment of this Act.

We propose that Title V have a new section—Section 503—which would read as follows:

"Section 503: The third paragraph of section 2152 of Title 18, United States Code, is amended by inserting '(except that the President not establish a defensive sea area incorporating the Island of Culebra, Puerto Rico, or the waters adjacent to such island)' immediately after 'executive order.'"

We believe that this amendment is needed to insure protection for the inhabitants of Culebra, a small island off the coast of Puerto Rico.

For twenty-four years Culebra and its Cays have been the site of Navy weapons training and target practice. The Culebra Island Naval Defensive Sea Area was created in February, 1941, when President Franklin D. Roosevelt signed Executive Order 8684 authorizing its establishment.

The Navy activities had a major impact on the lives of the inhabitants of this island. In letters to Senator Church and myself, the Governor of Puerto Rico stated, "the 1941 Executive Order that originally established the Culebra Island Naval Defensive Sea Area . . . had the effect of transforming Culebra into a virtual federal prison." The Governor concluded, "The inhabitants of Culebra were subjected to criminal prosecution for exercising these basic rights of life, liberty and pursuit of happiness unless they first obtained the permission of the Secretary of the Navy."*

Recognizing the problem created, the Senate voted on June 5, 1974, to terminate all naval weapons training at Culebra at a date certain. Later that month, President Nixon ordered cessation of all such training by July 1, 1975, and all Navy weapons training at the Culebra Cays as soon thereafter as possible but in no event later than December 31, 1975. Weapons training at Culebra proper ceased on July 1, 1975, and activities at Culebra's Cays terminated on September 30, 1975. On October 17, 1975, President Ford signed Executive Order 11886 abolishing the Culebra Naval Defensive Sea Area.

The situation remains, however, in which any President in the future may reestablish a defensive sea area in Culebra with the same calamitous effects on the inhabitants. Our amendment insures that restrictions will not be reimposed upon the Culebrans without the considered judgment of the Congress being brought to bear to determine the necessity of this action.

We would have preferred to repeal Section 2152 of Title 18 of the United States Code, the authority which authorizes the President to establish any defensive sea areas. But the Navy believed that this would endanger its ability to protect and modify existing sea areas and to ward off future terrorist attacks. In view of this, we offer this more limited amendment, which will protect Culebra, the one place where the President's ability to create defensive sea areas has been controversial. Through this amendment, we make certain that Presidential action will not again jeopardize the rights of the inhabitants of Culebra.

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*The identical letter addressed to Senator Ribicoff, appears on p. 8.

94th CONGRESS
1st Session

# H. R. 3884

IN THE SENATE OF THE UNITED STATES

September 5, 1975
Read twice and referred to the Committee on Government Operations

# AN ACT

To terminate certain authorities with respect to national emergencies still in effect, and to provide for orderly implementation and termination of future national emergencies.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "National Emergencies
4 Act".

5 TITLE I—TERMINATING EXISTING DECLARED
6 EMERGENCIES

7 Sec. 101. (a) All powers and authorities possessed by
8 the President, any other officer or employee of the Federal
9 Government, or any executive agency, as defined in section
10 105 of title 5, United States Code, as a result of the exist-

1 ence of any declaration of national emergency in effect on
2 the date of enactment of this Act are terminated two years
3 from the date of such enactment. Such termination shall not
4 affect—
5 (1) any action taken or proceeding pending not
6 finally concluded or determined on such date;
7 (2) any action or proceeding based on any act
8 committed prior to such date; or
9 (3) any rights or duties that matured or penalties
10 that were incurred prior to such date.
11 (b) For the purpose of this section, the words "any
12 national emergency in effect" means a general declaration
13 of emergency made by the President.
14 TITLE II—DECLARATIONS OF FUTURE
15 NATIONAL EMERGENCIES
16 Sec. 201. (a) In the event the President finds that a
17 proclamation of a national emergency is essential to the
18 preservation, protection and defense of the Constitution or
19 to the common defense, safety, or well-being of the territory
20 or people of the United States, the President is authorized
21 to proclaim the existence of a national emergency. Such
22 proclamation shall immediately be transmitted to the Con-
23 gress and published in the Federal Register.
24 (b) Any provisions of law conferring powers and
25 authorities to be exercised during a national emergency shall

1 be effective and remain in effect (1) only when the Presi-
2 dent (in accordance with subsection (a) of this section),
3 specifically declares a national emergency, and (2) only in
4 accordance with this Act. No law enacted after the date of
5 enactment of this Act shall supersede this title unless it does
6 so in specific terms, referring to this title, and declaring that
7 the new law supersedes the provisions of this title.

8 SEC. 202. (a) Any national emergency declared by the
9 President in accordance with this title shall terminate if—

10 (1) Congress terminates the emergency by concur-
11 rent resolution; or

12 (2) the President issues a proclamation terminating
13 the emergency.

14 Any national emergency declared by the President shall be
15 terminated on the date specified in any concurrent resolution
16 referred to in clause (1) or on the date specified in a proc-
17 lamation by the President terminating the emergency as
18 provided in clause (2) of this subsection, and any powers
19 or authorities exercised by reason of said emergency shall
20 cease to be exercised after such specified date, except that
21 such termination shall not affect—

22 (A) any action taken or proceeding pending not
23 finally concluded or determined on such date;

24 (B) any action or proceeding based on any act
25 committed prior to such date; or

1 (C) any rights or duties that matured or penalties
2 that were incurred prior to such date.
3 (b) Not later than six months after a national emer-
4 gency is declared, and not later than the end of each six-
5 month period thereafter that such emergency continues, each
6 House of Congress shall meet to consider a vote on a con-
7 current resolution to determine whether that emergency shall
8 be terminated.
9 (c) (1) A concurrent resolution to terminate a national
10 emergency declared by the President shall be referred to
11 the appropriate committee of the House of Representatives
12 or the Senate, as the case may be. One such concurrent reso-
13 lution shall be reported out by such committee together with
14 its recommendations within fifteen calendar days, unless
15 such House shall otherwise determine by the yeas and nays.
16 (2) Any concurrent resolution so reported shall become
17 the pending business of the House in question (in the case
18 of the Senate the time for debate shall be equally divided
19 between the proponents and the opponents) and shall be
20 voted on within three calendar days thereafter, unless such
21 House shall otherwise determine by yeas and nays.
22 (3) Such a concurrent resolution passed by one House
23 shall be referred to the appropriate committee of the other
24 House and shall be reported out by such committee together
25 with its recommendations within fifteen calendar days and

1 shall thereupon become the pending business of such House
2 and shall be voted upon within three calendar days, unless
3 such House shall otherwise determine by yeas and nays.
4 (4) In the case of any disagreement between the two
5 Houses of Congress with respect to a concurrent resolution
6 passed by both Houses, conferees shall be prompty ap-
7 pointed and the committee of conference shall make and file
8 a report with respect to such concurrent resolution within
9 six calendar days after the legislation is referred to the com-
10 mittee of conference. Notwithstanding any rule in either
11 House concerning the printing of conference reports in the
12 Record or concerning any delay in the consideration of such
13 reports, such report shall be acted on by both Houses not
14 later than six calendar days after the conference report is
15 filed. In the event the conferees are unable to agree within
16 forty-eight hours, they shall report back to their respective
17 Houses in disagreement.
18 (5) Paragraphs (1)-(4) of this subsection, subsection
19 (b) of this section, and section 602(b) of this Act are en-
20 acted by Congress—
21 (A) as an exercise of the rulemaking power of the
22 Senate and the House of Representatives, respectively,
23 and as such they are deemed a part of the rules of each
24 House, respectively, but applicable only with respect to
25 the procedure to be followed in the House in the case of

1 resolutions described by this subsection; and they super-
2 sede other rules only to the extent that they are incon-
3 sistent therewith; and

4 (B) with full recognition of the constitutional right
5 of either House to change the rules (so far as relating to
6 the procedure of that House) at any time, in the same
7 manner, and to the same extent as in the case of any
8 other rule of that House.

9 (d) Any national emergency declared by the President
10 in accordance with this title, and not otherwise previously
11 terminated, shall terminate on the anniversary of the declara-
12 tion of that emergency if, within the ninety-day period prior
13 to each anniversary date, the President does not publish in
14 the Federal Register and transmit to the Congress a notice
15 stating that the emergency is still in effect.

16 TITLE III—EXERCISE OF EMERGENCY POWERS
17 AND AUTHORITIES

18 SEC. 301. When the President declares a national emer-
19 gency no powers or authorities made available by statute
20 for use in the event of an emergency shall be exercised unless
21 and until the President specifies the provisions of law under
22 which he proposes that he, or other officers will act. Such
23 specification may be made either in the declaration of a
24 national emergency, or by one or more contemporaneous or

1 subsequent Executive orders published in the Federal Reg-
2 ister and transmitted to the Congress.

3 TITLE IV—ACCOUNTABILITY AND REPORTING
4 REQUIREMENTS OF THE PRESIDENT

5 SEC. 401. (a) When the President declares a national
6 emergency, or Congress declares war, the President shall be
7 responsible for maintaining a file and index of all significant
8 orders of the President, including Executive orders and proc-
9 lamations, and each Executive agency shall maintain a file
10 and index of all rules and regulations, issued during such
11 emergency or war issued pursuant to such declarations.

12 (b) All such significant orders of the President, includ-
13 ing Executive orders, and such rules and regulations shall
14 be transmitted to the Congress promptly under means to
15 assure confidentiality where appropriate.

16 (c) When the President declares a national emergency
17 or Congress declares war, the President shall transmit to
18 Congress, within ninety days after the end of each six-month
19 period after such declaration, a report on the total expendi-
20 tures incurred by the United States Government during such
21 six-month period which are directly attributable to the
22 exercise of powers and authorities conferred by such declara-
23 tion. Not later than ninety days after the termination of each

1 such emergency or war, the President shall transmit a final
2 report on all such expenditures.

3 TITLE V—REPEAL AND CONTINUATION OF
4 CERTAIN EMERGENCY POWER AND OTHER
5 STATUTES

6 SEC. 501. (a) Section 349 (a) of the Immigration and
7 Nationality Act (8 U.S.C. 1481 (a)) is amended—
8 (1) at the end of paragraph (9), by striking out
9 "; or" and inserting in lieu thereof a period; and
10 (2) by striking out paragraph (10).
11 (b) Section 2667 (b) of title 10 of the United States
12 Code is amended—
13 (1) by inserting "and" at the end of paragraph
14 (3);
15 (2) by striking out paragraph (4); and
16 (3) by redesignating paragraph (5) as (4).
17 (c) The joint resolution entitled "Joint resolution to
18 authorize the temporary continuation of regulation of con-
19 sumer credit", approved August 8, 1947 (12 U.S.C. 249),
20 is repealed.
21 (d) Section 5 (m) of the Tennessee Valley Authority
22 Act of 1933 as amended (16 U.S.C. 831d (m)) is repealed.
23 (e) Section 1383 of title 18, United States Code, is
24 repealed.
25 (f) Section 6 of the Act entitled "An Act to amend

1 the Public Health Service Act in regard to certain matters
2 of personnel and administration, and for other purposes",
3 approved February 28, 1948, is amended by striking out
4 subsections (b), (c), (d), (e), and (f) (42 U.S.C. 211b).
5 (g) Section 9 of the Merchant Ship Sales Act of 1946
6 (50 U.S.C. App. 1742) is repealed.
7 (h) This section shall not affect—
8 (1) any action taken or proceeding pending not
9 finally concluded or determined at the time of repeal;
10 (2) any action or proceeding based on any act
11 committed prior to repeal; or
12 (3) any rights or duties that matured or penalties
13 that were incurred prior to repeal.
14 SEC. 502. (a) The provisions of this Act shall not apply
15 to the following provisions of law, the powers and authori-
16 ties conferred thereby, and actions taken thereunder:
17 (1) Section 5 (b) of the Act of October 6, 1917,
18 as amended (12 U.S.C. 95a; 50 U.S.C. App. 5 (b));
19 (2) Act of April 28, 1942 (40 U.S.C. 278b);
20 (3) Act of June 30, 1949 (41 U.S.C. 252);
21 (4) Section 3477 of the Revised Statutes, as
22 amended (31 U.S.C. 203);
23 (5) Section 3737 of the Revised Statutes, as
24 amended (41 U.S.C. 15);

1 (6) Public Law 85-804 (Act of Aug. 28, 1958,
2 72 Stat. 972; 50 U.S.C. 1431-1435);
3 (7) Section 2304(a)(1) of title 10, United States
4 Code;
5 (8) Sections 3313, 6386(c), and 8313 of title 10,
6 United States Code.
7 (b) Each committee of the House of Representatives
8 and the Senate having jurisdiction with respect to any
9 provision of law referred to in subsection (a) of this section
10 shall make a complete study and investigation concerning
11 that provision of law and make a report, including any rec-
12 ommendations and proposed revisions it may have, to its
13 respective House of Congress within two hundred and
14 seventy days after the date of enactment of this Act.

Passed the House of Representatives September 4, 1975.

Attest: W. PAT JENNINGS,

*Clerk.*

TRANSPORTATION INSTITUTE

923 15th STREET, N.W.
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(202) 347-2590

Herbert Brand
President

April 5, 1976

The Honorable
Abraham A. Ribicoff
Chairman
Committee on Government Operations
3308 Dirksen Senate Office Building
United States Senate
Washington, D.C. 20510

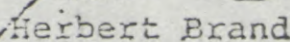
Dear Mr. Chairman:

On Wednesday, February 25, your Committee on Government Operations conducted a hearing on the bill H.R. 3884 -- the proposed "National Emergencies Act".

On behalf of the Transportation Institute, I respectfully request that the enclosed statement and the accompanying proposed amendment to H.R. 3884 be made a part of the hearing record.

Your favorable consideration of this request will be appreciated.

Sincerely,



Herbert Brand

HB/kc
Enclosures

Statement of the Transportation Institute on
H.R. 3884—the "National Emergencies Act"

The Transportation Institute wishes to express its appreciation to the Senate Committee on Government Operations for the opportunity to submit its comments on the bill H.R. 3884—the "National Emergencies Act."

H.R. 3884 would terminate certain authorities with respect to national emergencies still in effect, and would provide for orderly implementation and termination of future national emergencies. It represents the work product of the Senate Special Committee on the Termination of the National Emergency which undertook a two-year study of the problems, application and scope of emergency statutes. The Special Committee is to be complimented for its work in this regard.

The Transportation Institute concurs in the statement set forth in the letter of December 24, 1974 from the General Counsel of the Department of Defense to the Chairman of the Committee on the Judiciary of the House of Representatives, which notes in part the following:

> "World and national conditions have changed since President Truman officially proclaimed the state of national emergency in 1950 incident to the commencement of hostilities in Korea. *** The desirability of terminating existing states of emergency is recognized and no objection to their termination is entertained by the Department of Defense. . . ."

Unfortunately, Title V of H.R. 3884, and specifically Section 501, which provides for the repeal of certain statutes, fails to address the Act of December 27, 1950 to authorize the waiver of the navigation and vessel-inspection laws (P.L. 81-891; 64 Stat. 1120; 46 U.S.C. note). This 1950 Act, although admittedly necessary at the time of its enactment, is no longer needed and represents a source of continuing concern to the maritime industry with respect to its administration. This Act *directs* the department or agency responsible for the administration of navigation and vessel-inspection laws to waive compliance with such laws "upon the request of the Secretary of Defense to the extent being necessary in the interest of national defense by

the Secretary of Defense." Moreover, although the statute addresses only the "navigation and vessel-inspection laws," it has been administered, allegedly based upon legislative history, so as to enable the Secretary of Defense to direct the waiver of the "coastwise laws" of the United States. However, based upon the clear language of the statute, failing to specifically include the "coastwise laws," we submit that such waiver authority does *not* extend to the coastwise laws [Cf., e.g., 48 U.S.C. 1405c(d) which specifically cites "navigation, vessel inspection, *and coastwise laws* of the United States" (emphasis supplied)].

"...While not a term defined in the statutes, the coastwise laws refer to the laws regulating the coastwise or coasting trade. The terms coastwise trade and coasting trade describe vessels engaged in domestic trade or plying between port and port in the United States, as distinguished from vessels engaged in foreign trade or plying between a United States port and a port of a foreign country." (See 42 Op. Atty. Gen. August 7, 1963 at page 4.) Thus, for example, coastwise laws of the United States, such as Section 27 of the Merchant Marine Act, 1920 (46 U.S.C. 883) prohibiting the transportation of merchandise between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, in any other vessels than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, can be and have been circumvented and frustrated. The result has been a reduction in the employment of U.S.-flag vessels and the loss of jobs to American seamen.

It is of interest to note that the Committee report of each the House of Representatives and the Senate, accompanying H.R. 9681 of the 81st Congress, Second Session (House Report 3120 of September 20, 1950 and Senate Report No. 2630 of December 13, 1950, respectively), which became Public Law 81-891, contained the following identical language:

> "The movement of troops and supplies to Korea make urgent need for this legislation. The authority to waive the navigation and vessel-inspection laws existed during World War II, and such waivers, within certain limits, can now be made under law which *terminates* on January 15, 1951.
>
> * * *
>
> "...The desirability of permitting waivers of these laws for the purpose of expeditious movement of troops and supplies needs no emphasis *in these times....*" (Emphasis supplied)

The Transportation Institute respectfully submits that *first,* this Act has been administered in such a manner as to extend beyond the "navigation and vessel-inspection laws" intended by the Congress so as to include also the "coastwise law"; and *second,* in the words of the General Counsel of the Department of Defense, "World and national conditions have changed since President Truman officially proclaimed the state of national emergency in 1950 incident to the commencement of hostilities in Korea," which, based upon the report of the respective committee in each the House of Representatives and the Senate, represented the motivation for this 1950 Act.

Accordingly, the Transportation Institute respectfully urges the Senate Committee on Government Operations to adopt an amendment (a copy of which is attached to this statement) repealing the Act of December 27, 1950 to authorize the waiver of the navigation and vessel-inspection laws. Should a national emergency arise at a future date dictating the need for such extraordinary powers, then at that time the Congress can undertake consideration of appropriate enabling legislation. Meanwhile, under present conditions, there is neither reason nor justification for leaving this extraordinary power in the hands of the Secretary of Defense, and for eliminating affirmative action by the Congress to waive the coastwise laws as is now the case.

Proposed Amendment to H.R. 3334

On page 9 immediately after line 10, insert the following new subsection:

" '(h)' The Act of December 27, 1950 to authorize the waiver of the navigation and vessel-inspection laws is repealed."

On page 9, line 11, strike "(h)" and insert in lieu thereof "(i)."

Purpose

The purpose of this amendment is to repeal the authority of the 1950 Act whereby the department responsible for the administration of the navigation and vessel-inspection law is "*directed* to waive compliance with such laws upon request of the Secretary of Defense." (Emphasis supplied)

This 1950 Act was designed to meet the national emergency created by the Korean Conflict. Both the report of the House Committee on Merchant Marine and Fisheries (H. Rept. No. 3120, 81st Cong., 2nd Sess., September 20, 1950, accompanying H.R. 9681) and the report of the Senate Committee on Commerce (S. Rept. No. 2630, 81st Cong., 2nd Sess. of December 13, 1950, accompanying H.R. 9681) contained the following identical justification:

> "The movement of troops and supplies to Korea make urgent need for this legislation. The authority to waive the navigation and vessel-inspection laws existed during World War II, and such waivers, within certain limits, can now be made under law which *terminates* on January 15, 1951.
>
> ***
>
> "...The desirability of permitting waivers of these laws for the purpose of expeditious movement of troops and supplies needs no emphasis *in these times....*" (Emphasis supplied)

Waiver of such laws presently requires an affirmative act by the Congress. This proposed amendment would result in a like requirement. Otherwise, a simple directive from the Secretary of Defense can serve to enable foreign-built and foreign-registered vessels to engage in the coastwise trade of the United States. Thus, no opportunity is afforded for Congressional review or oversight; and there exists the possibility that such authority can be abused.

Chairman RIBICOFF. This committee will stand adjourned, and the record will show that Senator Mathias participated in the hearing.

[Whereupon, at 2:18 p.m., the hearing was adjourned.]