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93d Congress
2d Session } COMMITTEE PRINT

A BRIEF HISTORY OF EMERGENCY POWERS IN THE UNITED STATES

A WORKING PAPER

PREPARED FOR THE

SPECIAL COMMITTEE ON NATIONAL EMERGENCIES AND DELEGATED EMERGENCY POWERS UNITED STATES SENATE

JULY 1974

Printed for the use of the Special Committee on National Emergencies
and Delegated Emergency Powers

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SPECIAL COMMITTEE ON NATIONAL EMERGENCIES AND DELEGATED EMERGENCY POWERS

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FOREWORD

When the Special Committee began its work in January 1973, there was no basic study outlining the use of emergency powers in the United States from the time of the Philadelphia Constitutional Convention to the present. To fill this scholarly gap, we asked Dr. Harold Relyea of the Library of Congress to write a chronological history of the American government in times of emergency.

This is a valuable study. The great crises of American history are highlighted; so are the mechanisms of administration by which the Federal Government—all three branches—met particular emergency situations. Especially significant are the experiences and legacies of Shay's Rebellion, the Civil War, labor strikes of the late 19th century, and both World Wars.

The contemporary situation is more complicated. The United States has been in a state of national emergency since March 9, 1933. In fact, there are now in effect four Presidentially proclaimed states of national emergency. In addition to the banking emergency declared by President Roosevelt, there is also the national emergency proclaimed by President Truman on December 16, 1950, during the Korean conflict, plus the states of national emergency declared by President Nixon on March 23, 1970, and August 15, 1971. Concomitantly, especially since the days of the 1933 economic emergency, it has been Congress' habit to delegate extensive emergency authority—which continues even when the emergency has passed—and not to set a terminating date. The United States thus has on the books at least 470 significant emergency powers statutes without time limitations delegating to the Executive extensive discretionary powers, ordinarily exercised by the Legislature, which affect the lives of American citizens in a host of all-encompassing ways. This vast range of powers, taken together, confer enough authority to rule this country without reference to normal constitutional processes. These laws make no provision for congressional oversight nor do they reserve to Congress a means for terminating the "temporary" emergencies which trigger them into use. No wonder the distinguished political scientist, the late Clinton Rossiter, entitled his post-World War II study on modern democratic states, "Constitutional Dictatorship." Emergency government has become the norm.

The Special Committee has undertaken a study of the states of national emergency in which we now find ourselves, and the plethora of emergency powers, including Executive Orders and other presidential directives, classified and unclassified, that Congress and the Executive have brought into being over the years. The Special Committee has also been examining the consequences of terminating the declared states of national emergency that now prevail; to recommend what steps Congress should take to insure that the termination can be accomplished without adverse effect upon the necessary tasks of governing; and, also, to recommend ways in which the United States can meet future emergency situations with speed and effectiveness but without relinquishment of congressional oversight and control.

Dr. Relyea's study provides the Special Committee and the public an informative and useful background to the present quandry in which we now find ourselves.

FRANK CHURCH,
CHARLES MCC. MATHIAS, JR.,
Co-Chairmen.

A BRIEF HISTORY OF EMERGENCY POWERS IN THE UNITED STATES *

Part I
1775–1929

An Overview

A belief in the supremacy of law is an inherent element in the American concept of self-rule. However, John Locke, the 17th century English political theorist and a pre-eminent exponent of "a government of laws and not of men," argued that occasions may arise when the Executive must exert a broad discretion in meeting special exigencies or "emergencies" for which the legislative power has provided no relief and/or existing law will not grant necessary remedy.[1] Locke did not regard this prerogative as limited to wartime, or even to situations of great urgency. It was sufficient if the "public good" might be advanced by its exercise.[2]

In the American governmental experience, the utilization of emergency powers has been contingent upon the Chief Executive's view of his office. One authority noted:

> Emergency powers are not solely derived from legal sources. The extent of their invocation and use is also contingent upon the personal conception which the incumbent

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* Prepared for the Special Committee by Harold C. Relyea, Ph. D., Analyst in American National Government, Government and General Research Division, Library of Congress under the direction of the staff of the Special Committee.

[1] "Emergency is defined as 'an unforeseen combination of circumstances or the resulting state that calls for immediate action.' *Webster's Third New International Dictionary of the English Language Unabridged.* (Springfield, 1961.) It is characterized by urgency and relative infrequency of occurrence and is equivalent to a public calamity resulting from fire, flood or like disaster not reasonably subject to anticipation. *Home Building and Loan Association* v. *Blaisdell,* 290 U.S. 398, 440 (1934). Professor Edward S. Corwin explains emergency conditions as those 'which have not attained enough stability or recurrency to admit of their being dealt with according to rule.' *The President: Office and Powers* (New York, 1940), p. 1. From Albert L. Strum, Emergencies and the President. *Journal of Politics,* v. 11, Feb., 1949, p. 121; in a prepared statement entitled *Congress as Source and Overseer of Emergency Powers,* Cornelius P. Cotter, testifying before the Senate Special Committee on the Termination of the National Emergency on April 11, 1973, characterized an 'emergency' condition, saying: "It denotes the existence of conditions of varying nature, intensity and duration, which are perceived to threaten life or well-being beyond tolerable limits" (p. 1). He also said it "connotes the existence of conditions suddenly intensifying the degree of existing danger to life or well-being beyond that which is accepted as normal" (p. 3).

[2] Edward S. Corwin. *The President: Office and Powers, 1787–1957.* Fourth Revised Edition. New York: New York University Press, 1957, pp. 147–148.

> of the presidential office has of the Presidency and the premises upon which he interprets his legal powers. In the last analysis, the authority of a President is largely determined by the President himself. Presidential interpretations throughout the decades have fixed the standards and limits of executive competence.[3]

A President adopting Theodore Roosevelt's "Stewardship Theory" of office would, undoubtedly, have little reservation in utilizing implied Executive powers. In his autobiography, Roosevelt exemplified his view of the Presidency, explaining:

> The most important factor in getting the right spirit in my Administration, next to the insistence upon courage, honesty and a genuine democracy of desire to serve the plain people, was my insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its constitutional powers. My view was that every executive officer, and above all every executive officer in high position, was a steward of the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin. I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws. Under this interpretation of executive power I did and caused to be done many things not previously done by the President and the heads of the Departments. I did not usurp power, but I did greatly broaden the use of executive power. In other words, I acted for the public welfare, I acted for the common well-being of all our people, whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition. I did not care a rap for the mere form and show of power; I cared immensely for the use that could be made of the substance.[4]

Just a few months before leaving office in June 1908, Roosevelt told Sir George Otto Trevelyan,

> While President I have *been* President, emphatically; I have used every ounce of power there was in the office and I have not cared a rap for the criticisms of those who spoke of my "usurpation of power;" for I know that the talk has been all nonsense and that there had been no usurpation. I believe that the efficiency of this Government depends upon it possessing a strong central executive, and whenever I could establish a precedent for strength in the executive,
>
> [Emphasis supplied.]

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[3] Strum, *op. cit.*, pp. 125–126.

[4] Theodore Roosevelt. *An Autobiography*. New York: Scribner, 1926, pp. 388–389.

as I did for instance as regards external affairs in the case of sending the fleet around the world, taking Panama, settling affairs of Santo Domingo, and Cuba; or as I did in internal affairs in settling the anthracite coal strike, in keeping order in Nevada . . . or as I have done in bringing the big corporations to book . . . in all these cases I have felt not merely that my action was right in itself, but that in showing the strength of, or in giving strength to, the executive, I was establishing a precedent of value. I believe that responsibility should go with power, and that it is not well that the strong executive should be a perpetual executive.[5]

Opposed to this view of the presidency was Roosevelt's former Secretary of War (1905–1908), personal choice for and actual successor as Chief Executive, William Howard Taft. According to America's twenty-seventh President,

> The true view of the Executive functions is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest, and there is nothing in the Neagle case [*In re Neagle*, 135 U.S. 1 (1890)] and its definition of a law of the United States, or in other precedents, warranting such an inference. The grants of Executive power are necessary in general terms in order not to embarrass the Executive within the field of action plainly marked for him, but his jurisdiction must be justified and vindicated by affirmative constitutional or statutory provision, or it does not exist. There have not been wanting, however, eminent men in high public office holding a different view and who have insisted upon the necessity for an undefined residuum of Executive power in the public interest. They have not been confined to the present generation.[6]

Between these two views of the Presidency lie various gradations of opinion, as many conceptions of the office as there have been holders. (See Bibliography following the "History" for a list of studies.) Generally, however, it may be shown that those holding Roosevelt's stewardship theory have been more comfortable with exercising Executive power in times of emergency. Demanding exigencies have, on occasion, persuaded men unsympathetic to the stewardship view to alter their thinking. For example, Thomas Jefferson was unsure of

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[5] Corwin, *op. cit.*, p. 407n; originally from Joseph Bucklin Bishop. *Theodore Roosevelt and His Time* (Vol. II). New York: Scribners, 1920, p. 94.

[6] William Howard Taft. *Our Chief Magistrate and his Powers*. New York: Columbia University Press, 191, pp. 139–140; for a direct response to Theodore Roosevelt's expression of Presidential power, see —. The Presidency. New York; Scribners, 191, pp. 125–130.

his authority for entering into the Louisiana Purchase, yet the situation required action and the threat posed to American security by a neighboring imperial and aggressive power could be eliminated. Jefferson's behavior in this instance might be viewed as an exercise of emergency powers, though he had not been in sympathy with the strong Executive idea before assuming the Presidency. Similarly, though he had argued against the stewardship theory in his Blumenthal Lectures at Columbia University in 1915–16, former President Taft, writing the majority opinion of the Supreme Court as Chief Justice in the *Myers* case [7] appealed to the opening clause of Article II of the Constitution as a grant of power. He held that the Chief Executive had the right to remove executive and administrative officers of the U.S. nominated or appointed by him, without the least restraint or limitation by Congress. The Constitution, Taft contended, intended such officers to serve only at the President's pleasure.

In addition to emergency actions which a Chief Executive might take on the basis of implied presidential powers, there are also statutory grants of executive emergency authority. Congress has often authorized what might be termed presidential legislation which either legitimates a questionable Executive action that has already occurred or grants special powers to the President to act upon a pending situation. Also, emergency developments have prompted what might be described as presidential justice: the granting of pardons and reprieves to individuals who had run afoul of laws peculiar to the crisis condition.

It is necessary, in understanding these types of emergency power, to consider the origins and development of their use within the context of a constitutional, democratic republic. Such a review seems warranted if for no other reason than to ponder the relevance of the observation made by Niccolo Machiavelli (1469–1527) who, in his exploration of the use and abuse of dictatorship, concluded "that republics, which when in imminent danger, have recourse neither to a dictatorship, nor to some form of authority analogous to it, will always be ruined when grave misfortune befalls them." [8] Having met great perils and dangers and survived them, does the United States endure today as a democracy?

The Formative Period

Emergency powers were first expressed with regard to the nation as a whole prior to the actual founding of the republic. Between 1775 and 1781, the Continental Congress passed a series of acts and resolves which count as the first expressions of emergency authority.[9] These instruments dealt almost exclusively with the prosecution of the war.

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[7] See *Myers* v. *United States*, 272 U.S. 52, 106–177 (1926).

[8] Niccolo Machiavelli. *The Discourses*. [Edited with an introduction by Bernard Crick] Harmondsworth, Middlesex, England: Penguin Books, 1970, p. 196.

[9] See J. Reuben Clark, Jr., comp. Emergency Legislation Passed Prior to December, 1917 Dealing with the Control and Taking of Private Property for the Public Use, Benefit, or Welfare; Presidential Proclamations and Executive Orders of Analagous Legislation Since 1775. Washington: U.S. Government Printing Office, 1918, pp. 201–228.

Emergency powers, as such, were not an issue during the debates over the formation of the Constitution. Hamilton raised the issue in No. 23 of The Federalist Papers.* He wrote: . . .

> 'The authorities essential to the care of the common defence are these: To raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation; because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite; and for this reason, no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils, which are appointed to preside over the common defence.
>
> This is one of those truths, which, to a correct and unprejudiced mind, carries its own evidence along with it; and may be obscured, but cannot be made plainer by argument or reasoning. It rests upon axioms, as simple as they are universal—the means ought to be proportioned to the end; the persons from whose agency the attainment of any end is expected, ought to possess the means by which it is to be attained.
>
> Whether there ought to be a Federal Government entrusted with the care of the common defence, is a question, in the first instance, open to discussion; but the moment it is decided in the affirmative, it will follow, that, that government ought to be clothed with all the powers requisite to the complete execution of its trust. And unless it can be shown, that the circumstances which may affect the public safety, are reducible within certain determinate limits; unless the contrary of this position can be fairly and rationally disputed, it must be admitted as a necessary consequence, that there can be no limitation of that authority, which is to provide for the defence and protection of the community, in any matter essential to its efficacy; that is, in any matter essential to the formation, direction, or support of the national forces.

The only constitutional provisions which can be considered to grant emergency discretion are Article I, section 5, the House of Representatives, power of impeachment; Article I, section 6, the Senate's power to try all impeachments; Article I, section 8, the Congress' power to declare war; Article I, section 9, Congress shall suspend the privilege of habeas corpus only in cases of rebellion or invasion when the public safety may require it; and the allowance in Article II, section 3 for the President to call special sessions of Congress. The lack of debate can be credited to the manner in which the

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*The Federalist Papers by Alexander Hamilton, James Madison, and John Jay.

bases for emergency powers evolved after the ratification of the Constitution: By Presidents relying upon implied powers or taking the stewardship view of their duties of office, by judicial sanction of Executive actions of questionable authority, or by congressional grant of statutory power.

One of the first exercises of emergency power came in the summer of 1792 when the residents of western Pennsylvania, Virginia, and the Carolinas began forcefully opposing a Federal excise tax on whiskey. Anticipating rebellious activity, Congress enacted legislation providing for the calling forth of the militia to suppress insurrections and repel invasions.[10] Section 3 of this statute required that a presidential proclamation be issued to warn insurgents to cease their activity; if hostilities persisted, the militia would be activated. On August 7, 1794, President Washington issued such a proclamation. He then followed up by taking command of forces organized to put down the rebellion.[11] He subsequently pardoned two of the leaders of the insurgents who had been tried, convicted, and sentenced to be hanged.[12]

More sweeping emergency authority was granted to the President in 1789 with a statute regarding aliens. Corwin noted,

> By the Alien Act of 1798 Congress delegated to the President virtually unlimited power to "direct the conduct" of nationals of hostile countries whenever the United States should be engaged in a declared war *or its territory threatened with invasion*, and this enactment, somewhat amended, still remains on the statute books. Indeed, for nearly one hundred and twenty years it was almost the only provision of its kind.[13]

[Emphasis supplied.]

The Alien Act obligated the President to make a proclamation to the public declaring a state of war or threatened invasion and this action by the Executive entitled him to extraordinary powers articulated within the statute with regard to aliens.[14]

Jefferson and Madison enlarged the scope of Presidential discretion. As already noted, President Jefferson took final action in May 1803, to secure the Louisiana Territory from the French subject to congressional approval. The Constitution and statutes provided no specific authority or congressional guidance on the purchase, but his action could have been justified as an emergency exercise. As early as January 1803, Jefferson wrote Treasury Secretary Albert Gallatin that "There is no constitutional difficulty as to the acquisition of territory, and whether, when acquired, it may be taken into the Union by the Constitution as it now stands, will become a question of expediency." In his Third Annual Message to Congress on October 17, 1803, the President submitted the following reasoning for the purchase:

> Congress witnessed, at their last session, the extraordinary agitation produced in the public mind by the suspension of

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[10] 1 Stat. 264–265.
[11] James D. Richardson, comp. *A Compilation of the Messages and Papers of the Presidents* (Vol. I). New York: Bureau of National Literature, 1897, pp. 149–154.
[12] See *Ibid.*, p. 181.
[13] Corwin, *op. cit.*, p. 158.
[14] 1 Stat. 577–578.

our right of deposit at the port of New Orleans, no assignment of another place having been made according to treaty. They were sensible that the continuance of that privation would be more injurious to our nation than any consequences which could flow from any mode of redress, but reposing just confidence in the good faith of the government whose officer had committed the wrong, friendly and reasonable representations were resorted to, and the right of deposit was restored.

Previous, however, to this period, we had not been unaware of the danger to which our peace would be perpetually exposed while so important a key to the commerce of the western country remained under foreign power. Difficulties, too, were presenting themselves as to the navigation of other streams, which, arising within our territories, pass through those adjacent. Propositions had, therefore, been authorized for obtaining, on fair conditions, the sovereignty of New Orleans, and of other possessions in that quarter interesting to our quiet, to such extent as was deemed practicable; and the provisional appropriation of two millions of dollars, to be applied and accounted for by the president of the United States, intended as part of the price, was considered as conveying the sanction of Congress to the acquisition proposed. The enlightened government of France saw, with just discernment, the importance to both nations of such liberal arrangements as might best and permanently promote the peace, friendship, and interests of both; and the property and sovereignty of all Louisiana, which had been restored to them, have on certain conditions been transferred to the United States by instruments bearing date the 30th of April last. When these shall have received the constitutional sanction of the senate, they will without delay be communicated to the representatives also, for the exercise of their functions, as to those conditions which are within the powers vested by the constitution in Congress. While the property and sovereignty of the Mississippi and its waters secure an independent outlet for the produce of the western States. and an uncontrolled navigation through their whole course. free from collision with other powers and the dangers to our peace from that source, the fertility of the country, its climate and extent, promise in due season important aids to our treasury, an ample provision for our posterity, and a wide-spread field for the blessings of freedom and equal laws.

With the wisdom of Congress it will rest to take those ulterior measures which may be necessary for the immediate occupation and temporary government of the country; for its incorporation into our Union; for rendering the change of government a blessing to our newly-adopted brethren; for securing to them the rights of conscience and of property; for confirming to the Indian inhabitants their occupancy and self-government, establishing friendly and commercial relations with them, and for ascertaining the geography of the country acquired. Such materials for your information,

> relative to its affairs in general, as the short space of time has permitted me to collect, will be laid before you when the subject shall be in a state for your consideration.

Similarly, President Madison's efforts toward and subsequent proclamation regarding the United States possession of West Florida could, for reasons of maintaining national security and sovereignty, be regarded as an emergency action. Madison's proclamation read in part: "Whereas a crisis has at length arrived subversive of the order of things under the Spanish authorities, whereby a failure of the United States to take the said territory into its possession may lead to events ultimately contravening the views of both parties, whilst in the meantime the tranquility and security of our adjoining territories are endangered and new facilities given to violations of our revenue and commercial laws of those prohibiting the introduction of slaves." [15]

Special emergency statutes were enacted during the Wars of 1812 and 1847.[16] These laws pertained largely to shipping, trading with the enemy, the regulation of imported goods, control of foreign vessels in American waters, and compensation for property lost and destroyed during military service.

At the time of the War of 1812, the stewardship view of presidential authority began to be argued before the Supreme Court. This initiated rationalization for emergency actions by the Chief Executive. Corwin observed:

> As early as 1818 it had been recognized by the Court that the United States had, in the absence of statutory provision to the contrary, a common-law right to sue on a bill of exchange endorsed to the Treasurer of the United States [*Dugan's Executors* v. *United States*, 3 Wheat. 172 (1818)]; and a few years later the broad general doctrine had been laid down "that the United States, being a body politic, as an incident to their general sovereignty, have a capacity to enter into contracts" "within the general sphere of their constitutional powers" through the instrumentality of the appropriate executive department "whenever such contracts . . . are not forbidden by law" [*United States* v. *Tingy*, 5 Pet. 115 (1831)]. In the latter case, moreover, the Court had listened to argument by the Attorney General that in the performance of the trust enjoined on him by the "take care" clause, the President "not only may, but . . . is bound to avail himself of every appropriate means not forbidden by law;" and, while the Court does not avert to this contention, the immediate and inevitable result of its holding was the location in the executive department of the power that it ascribed to the United States Government in its corporate capacity.[17]

Additional legal argumentation on this matter followed the War of 1847 when Attorney General Caleb Cushing, in 1853 and 1854,

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[15] See Richardson, *op. cit.*, pp. 465–466.
[16] See Clark, *op. cit.*, pp. 990–1026.
[17] Corwin, *op. cit.*, p. 149.

prepared a series of opinions regarding the Chief Executive's authority.

> One of these claimed for the President the power, as growing out of his duty to "take care that the laws be faithfully executed." to institute investigations and incur expenditures therefor which it became the moral obligation of Congress to meet [6 *Opins. A. G.* 28]. Another held that although no statute made it the duty of the United States to assume the legal defense by counsel of marshals and other ministerial officers of the law when they were used for their official acts, yet it was within the discretion of the President to do so if he was persuaded that such officers were being harassed by suits on this account [6 *Opins. A. G.* 220]. Pertinent too was Cushing's holding a little later that a marshal of the United States, when opposed in the execution of his duty by unlawful combinations, had authority to summon the entire able-bodied force of his precinct as a *posse comitatus*, comprehending not only bystanders and citizens generally but any and all organized armed forces, whether militia of the states, or officers, soldiers, sailors, and marines of the United States [6 *Opins. A. G.* 466].[18]

In the history of the exercise of emergency powers, President Lincoln would rely upon the *posse comitatus* argument in justification of his call for volunteers in April of 1861. Cushing's opinion would also be articulated in the cases of *In re Neagle* (1890) and *In re Debs* (1895), both of which resulted in broader Presidential discretion in the exercise of implied emergency power.

The Civil War

In 1860, following the election of Abraham Lincoln to the Presidency, the South Carolina legislature, by unanimous vote, called for a State convention. It assembled at Columbia and passed without dissent an ordinance declaring that "the Union now subsisting between South Carolina and the other States, under the name of the 'United States of America,' is hereby dissolved." Seceding on December 20, 1860, South Carolina was followed by Mississippi (January 19, 1861), Louisiana (January 26, 1861), and Texas (February 1, 1861). The seceding States called for a convention. Meeting in Montgomery, Alabama, it framed a constitution resembling the U.S. Constitution, and on February 8, 1861 set up a provisional government. The Confederate Provisional Congress lost no time in enacting emergency powers for their Chief Executive. On May 11, 1861, the first such grant of emergency power came in a statute authorizing the President to take control of the telegraph lines. Additional statutes continued to provide emergency power, the last enactment being in June of 1864.[19]

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[18] *Ibid.*

[19] For a collection of emergency legislation enacted by the Confederate Provisional Congress, see Clark, *op. cit.*, pp. 1026–1052.

President-elect Lincoln was unable to halt the cataclysm of a dissolving Union and open warfare among the States. By the time of his inaugural (March 4, 1861), the Confederate Provisional Government had been established (February 4, 1861), Jefferson Davis had been elected (February 9, 1861) and inaugurated as President of the Confederacy (February 18, 1961), an army had been assembled by the secessionist States, open warfare had begun with the firing on Fort Sumter (December 26, 1860) and Federal forts and arsenals within the South had been seized, beginning with the Charleston weapons installation (December 30, 1860).

Lincoln had a little over 2 months to consider his course of action; his personal role was decisive in shaping the outcome of the situation. His efforts have been simply and profoundly stated by Wilfred E. Binkley:

> Unquestionably the high-water mark of the exercise of executive power in the United States is found in the administration of Abraham Lincoln. No President before or since has pushed the boundaries of executive power so far over into the legislative sphere. No one can ever know just what Lincoln conceived to be limits of his powers.[20]

In his own words, Lincoln wrote:

> . . . my oath to preserve the Constitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government—that nation—of which that Constitution was the organic law. Was it possible to lose the nation, and yet preserve the constitution? By general law life *and* limb must be protected; yet often a limb must be amputated to save a life, but a life is never wisely given to save a limb. I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution through the preservation of the nation. Right or wrong, I assumed this ground, and now avow it. I could not feel that, to the best of my ability, I had ever tried to preserve the constitution, if, to save slavery, or any minor matter, I should permit the wreck of government, country, and Constitution all together.[21]

And in the more contemporary view of Clinton Rossiter:

> . . . Mr. Lincoln subscribed to a theory that in the absence of Congress and in the presence of an emergency the President has the right and duty to adopt measures which would ordinarily be illegal, subject to the necessity of subsequent congressional approval. He did more than this; he seemed to assert that the war powers of the Constitution could upon occasion devolve completely upon the President, if their exercise was based upon public opinion and an

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[20] Wilfred E. Binkley. *President and Congress*. New York: Alfred A. Knopf, 1947, p. 126.

[21] Letter to Albert G. Hodges (April 4, 1864) in Roy P. Basler, ed. *The Collected Works of Abraham Lincoln* (Vol. VIII). New Brunswick: Rutgers University Press, 1953, p. 281.

> inexorable necessity. They were then sufficient to embrace any action within the fields of executive or legislative or even judicial power essential to the preservation of the Union. [He] . . . implied that this government like all others, possessed an absolute power of self-defense, a power to be exerted by the President of the United States. And this power extended to the breaking of the fundamental laws of the nation, if such a step were unavoidable.[22]

Lincoln's role derived from the popular prestige of his office and the crisis confronting the Nation. After 1862, he could not rely upon support from the Republican party as it split into two camps, conservatives and moderates generally loyal to the President and radicals who attacked Lincoln for his authoritarian leadership and his failure to prosecute the war with greater vigor. His Cabinet was a pretense which required constant manipulation in order that it might remain together to convey the image of a loyal coalition.[23] He often found himself working at cross-purposes with the legislature and, with the press of rapidly transpiring events demanding action, he observed: "I conceive I may in an emergency do things on military grounds which cannot constitutionally be done by the Congress." [24]

> As interpreted by President Lincoln, the war power specifically included the right to determine the existence of "rebellion" and call forth the militia to suppress it; the right to increase the regular army by calling for volunteers beyond the authorized total; the right to suspend the *habeas corpus* privilege; the right to proclaim martial law; the right to place persons under arrest without warrant and without judicially showing the cause of detention; the right to seize citizens' property if such seizure should become indispensable to the successful prosecution of the war; the right to spend money from the treasury of the United States without congressional appropriation; the right to suppress newspapers; and the right to do unusual things by proclamation, especially to proclaim freedom to the slaves of those in arms against the Government. These were some of the conspicuous powers which President Lincoln exercised, and in the exercise of which he was as a rule, though not without exception, sustained in the courts.[25]

Increasing Armed Forces

When Lincoln assumed the presidency and thus the responsibility of maintaining the union, Congress was not in session.

> His first step was to issue an executive proclamation (April 15, 1861) in which he declared that, inasmuch as

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[22] Clinton Rossiter. *Constitutional Dictatorship: Crisis Government in the Modern Democracies*. Princeton: Princeton University Press, 1948, p. 229.

[23] See Binkley, *op. cit.*, pp. 121–122.

[24] George Fort Milton. *The Use of Presidential Power*, 1789–1943. Boston: Little, Brown & Co., 1944, p. 111.

[25] James G. Randall. *Constitutional Problems Under Lincoln*, Revised Edition, Urbana: University of Illinois, 1951, pp. 36–37.

> the execution of the laws of the United States was being forcibly obstructed in the seven southernmost states, he was compelled to resort to his constitutional and statutory powers to call forth "the militia of the several States of the Union to the aggregate number of 75,000" in order to suppress the rebellion and guarantee the execution of the laws. In this same proclamation he put out a call to the Houses of Congress to convene in special session on July 4, "to consider and determine such measures as, in their wisdom, the public safety and interest may seem to demand." [26]

The President's reasons for delaying a congressional convocation on the crisis are not historically clear and, as various motivations for his behavior have been suggested by later historians, numerous theories have been advanced with regard to this hesitancy. Professor Rossiter, for one, suggested that Lincoln very likely thought the rebellion would be over by July 4.[27] The date is also of importance if we consider the President was to be facing a hostile and divided Congress at a time of tumult. The date of meeting might symbolically foster unity. Recognizing the need for immediate action, Lincoln may also have thought congressional deliberations over the crisis a costly democratic extravagance and that as Commander in Chief he had not only the authority but the obligation as well to meet the emergency quickly and decisively.

Whatever his reasons, the President not only delayed calling Congress into immediate session, but entered into its constitutionally designated policy sphere. On April 19, Lincoln issued a proclamation establishing a blockade on the ports of the secessionist States,[28] "a measure hitherto regarded as contrary to both the Constitution and the law of nations except when the government was embroiled in a declared, foreign war." [29] Congress had not been given an opportunity to consider a declaration of war.

The next day, the President ordered 19 vessels be added to the Navy "for purposes of public defense." [30] A short time later the blockade was extended to the ports of Virginia and North Carolina.[31]

In a proclamation of May 3, Lincoln ordered that the regular army be enlarged by 22,714 officers and men, that navy personnel be increased by 18,000, and that 42,032 volunteers be accommodated for three year terms of service.[32] Such a directive, of course, antagonized Congress which, according to Article I, section 8, is specifically empowered "to raise and support armies."

In his July 4 message to the Congress, Lincoln suggested that, while his actions with regard to the expansion of the armed forces were legally questionable,

> [t]hese measures, whether strictly legal or not, were ventured upon under what appeared to be a popular and a

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[26] Rossiter, *op. cit.*, p. 225; see Richardson, pp. 3214–3215.
[27] *Ibid.*, p. 226.
[28] See Richardson, *op. cit.*, pp. 3215–3216.
[29] Rossiter, *loc. cit.*
[30] *Ibid.*
[31] Richardson, *op. cit.*, p. 3216.
[32] *Ibid.*, pp. 3216–3217.

> public necessity, trusting then, as now, that Congress would readily ratify them. It is believed that nothing has been done beyond the constitutional competency of Congress.[33]

The Congress subsequently sanctioned the President's actions with regard to increasing armed forces personnel, noting in an act of August 6, 1861:

> That all the acts, proclamations, and orders of the President of the United States after the fourth of March, eighteen hundred and sixty-one, respecting the army and navy of the United States, and calling out or relating to the militia or volunteers from the States, are hereby approved and in all respects legalized and made valid, to the same intent and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress of the United States.[34]

What choice did the legislative branch have concerning the matter? Lincoln's actions were a fait d'accompli. The President had invaded the policy sphere of Congress on this matter. Most legislators apparently considered this a unique occurrence not to be repeated. Few legislators called for a careful examination of any proposition that proposed to approve or legalize anything that was an infringement upon Congress' role according to the Constitution. The result was a necessary defense response—and controversy over powers shared by the President and Congress.

The Rebellion

The hostilities between the Union and the Confederacy opened without a declaration of war and terminated without a treaty of peace. Thus, when the President, as Commander in Chief or as Chief Executive, took his actions to quell the rebellion and maintain the union, there was no determination, other than his own, that a condition of war actually existed.

> The actual fixing of such a time rested with the President and Congress, but the judicial department found the matter of such importance in the determination of controversies that it was necessarily called upon to *define* the period of the war [*Phillips* v. *Hatch*, 1 Dillion 571 (1870); *U.S.* v. *Anderson*, 9 Wallace 56, 71 (1870)]. In its search for some public act to mark the legal opening of the war, the court selected the President's two proclamations of blockade (that of the 19th of April, 1861, applying to South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana and Texas; and that of April 27th applying to Virginia and North Carolina) and declare that these were the dates at which the legal state of war began for the States concerned.

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[33] *Ibid.*, p. 3225.
[34] 12 Stat. 326.

> Two Presidential Proclamations were also held to have determined the legal close of the war: the proclamations of April 2, 1866, declaring the insurrection to be at an end in every State except Texas, and the final Proclamation of August 20, 1866, declaring the insurrection had ceased in every State. It will thus be seen that the legal termination of the war followed about a year after its effective termination through the military surrenders of Lee and Johnson [see *The Protector*, 12 Wallace 700 (1871)].[35]

The more crucial question with regard to a legal condition of war concerned the President's actions prior to the convening of Congress.

> The alleged "unconstitutionality" of this conduct of President Lincoln was urged as a leading argument by those who contended that the whole process by which the "war" began was illegal. This matter was elaborately threshed out before the Supreme Court in the *Prize Cases* [67 Black 635 (1863)]. Certain ships had been captured for violating the President's blockade proclamations of April 19 and 27 and in the contentions as to the lawfulness of these prizes the whole issue of the legality of the war in its early stages was drawn into the controversy. War, it was argued, must begin with a declaration; Congress alone has the power of declaring war; the President's power of suppressing an insurrection is not tantamount to the war power; and his right to promulgate a blockade order becomes valid only after war has become a legal fact through a congressional declaration. War, therefore, did not lawfully exist, it was said, when these early captures were made; hence there could be no valid blockade and no prize jurisdiction in the Federal courts.[36]

By a 5–4 decision, the Supreme Court, in the opinion of Justice Grier, observed:

> Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government. A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a *war*. *They* claim to be in arms to establish their liberty and independence, in order to become a sovereign State, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason. . . .

[Emphasis supplied.]

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[35] Randall, *op. cit.*, pp. 49–50.
[36] *Ibid.*, pp. 52–53.

> As a civil war is never publicly proclaimed, *eo nomine*, against insurgents, its actual existence is a fact in our domestic history which the Court is bound to notice and to know.[37]

With regard to the President and his authority to meet such hostilities, Justice Grier opined:

> Whether the President in fulfilling his duties, as Commander in Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be goverened by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.[38]

Professor Rossiter, after a thoughtful consideration of the President's conduct and the Supreme Court's decision, came to this contemporary conclusion:

> What the Supreme Court held was simply this: that the President of the United States has the constitutional power, under such circumstances as he shall deem imperative, to brand as belligerents the inhabitants of any area in general insurrection. In other words, he has an almost unrestrained power to act toward insurrectionary citizens as if they were enemies of the United States, and thus place them outside the protection of the Constitution. This, it seems hardly necessary to state, is dictatorial power in the extreme. The Constitution can be suspended after all—by any President of the United States who ascertains and proclaims a widespread territorial revolt. "In the interval between April 12 and July 4, 1861 a new principle thus appeared in the constitutional system of the United States, namely, that of a temporary dictatorship." [39]

Habeas Corpus

Rising out of the question of who is to determine the existence of a rebellion or similar such exigency which imperils the public safety is the matter of the legal suspension of the habeas corpus privilege. According to Article I, section 9 of the Constitution: "The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

[Emphasis supplied.]

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[37] *The Prize Cases*, 2 Black (67 U.S.) 635 at 666–7 (1862).
[38] *Ibid.*, p. 670.
[39] Rossiter, *op. cit.*, p. 230; the citation appearing in the quotation is from W. A. Dunning. Essays on the Civil War and Reconstruction. New York: Macmillan, 1898, p. 20.

On April 27, 1861, Lincoln issued a proclamation authorizing the Commanding General of the United States Army to suspend the writ of habeas corpus "at any point or in the vicinity of any military line which is now or which shall be used between the city of Philadelphia and the city of Washington." [40] Another proclamation on July 2 extended this power to the area between New York and the capital.[41] "This was done by the President in the face of almost unanimous opinion that the constitutional clause regulating the suspension of the writ of habeas corpus was directed to Congress alone, and that the President did not share in this power of suspension." [42]

The often cited test of Lincoln's power to suspend the habeas corpus privilege is the case *Ex parte Merryman* wherein Chief Justice Roger B. Taney, after his writ of habeas corpus, issued for John Merryman who was then incarcerated at Fort McHenry, was refused on the basis of Lincoln's order suspending the privilege, delivered an opinion holding the President's action void as the matter of suspension was a power which the Constitution left to Congress.[43] The decision, however, was not particularly significant in resolving the dispute over the legal suspension of the habeas corpus privilege. At the time it was issued, it was ignored and Merryman, because the court lacked enforcement authority, remained under detention. On the larger propriety issue, one commentator has concluded:

> In the light of Civil War experience, it is doubtful whether any clear-cut principle of undisputed legal authority can be said to exist in American jurisprudence with reference to this fundamental point of law. The Supreme Court has never definitely made a conclusive pronouncement upon the central issue as to whether the suspending power rests with the President or with Congress. The Merryman decision was not that of the Supreme Court; but it was an opinion of one member of the Court, Taney, in a case which he heard while on circuit. Furthermore, it was in chambers, not in open court, that the decision was rendered. The decision is not to be found in the reports of cases tried before the Supreme Court, but in those of the circuit courts. At the time it was rendered it was not at all regarded as a settlement of the matter. On this point the evidence is convincing, for, after Taney's opinion had been rendered, there were various discussions as to an appended decision by the Supreme Court on the President's suspending power. A confidential and unpublished communication from Attorney General Bates to Secretary of War Stanton, dated January 31, 1863, has a significant bearing on this point. Having heard that the Secretary contemplated bringing before the Supreme Court for review certain proceedings of the Supreme Court of Wisconsin involving the President's suspending power, Bates advised emphatically against it, urging that a decision of the Court pronouncing the arbitrary arrests illegal would "do more to paralyze the Executive . . . than the worst

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[40] Richardson, *op. cit.*, p. 3219.
[41] *Ibid.*, p. 3220.
[42] Rossiter, *op. cit.*, p. 227.
[43] *Ex parte Merryman*, 17 Fed. Cases 144 (1861), No. 9487.

> defeat our armies have yet sustained," and that such an adverse decision was to be anticipated, in view of the "antecedents and present proclivities" of a majority of the Court, taken in connection with the expressed opinion of certain of its members." [44]

During the controversy over the habeas corpus suspension, Congress did not provide any solution to the question, though the subject of the legal suspension of the privilege was debated in all three sessions of the 37th Congress. At least one scholar has suggested that this inaction served as a tacit sanction of the President's right in the matter.[45] However, by the summer of 1862, efforts were underway in the House to legislate on the issue.[46] It was not until the following year that the Habeas Corpus Act finally gained approval when

> in the early hours of March 3, 1863, after a tiresome all-night session, a bare quorum of an over-worked Senate by a piece of sharp practice on the part of the presiding officer outwitted those who were filibustering against the measure and passed Senator Trumbull's conference bill which had been slowly evolved through weary months of wrangling. The act so passed declared in oracular phrase that "during the present rebellion the President of the United States, whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of *habeas corpus* in any case throughout the United States or any part thereof." [47]

Under the provisions of the act, officers having custody of prisons would be required to obey a judge's order for release and those against whom no violation of Federal law was charged could not be held. Also, lists of those political prisoners arrested in the past, as well as those incarcerated in the future, were required to be kept and furnished to the courts. In general, the mandate of officers for arresting and detaining political prisoners was to come from Congress and not the President. But there is some question with regard to the statute's practical effect. Professor Randall, expert on the administrative history of this law, concluded "that the act was not carried out in sufficient degree to make any noticeable difference in the matter of the arrest, confinement, and release of political prisoners." [48]

The fourth and subsequent section of the act, according to the author of these provisions, "indemnified the President, Cabinet, and all who in pursuance of their authority made arrests during the period of the suspension" of the *habeas corpus* privilege by the President.[49]

> Some who concurred in the Attorney General's opinion that the President had the full power to suspend, and to delegate such authority to subordinates, argued that no

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[44] Randall, *op. cit.*, pp. 131–132.

[45] See George C. Sellery. "Lincoln's Suspension of Habeas Corpus as Viewed by Congress." *Bulletin of the University of Wisconsin*, v. 1, 1907: 213–286.

[46] See Congressional Globe, July 3, 1862, p. 3106ff.

[47] Randall, *op. cit.*, p. 130; see Congressional Globe, March 3, 1863, p. 190ff.; also see 12 Stat. 755–758.

[48] Randall, *op. cit.*, p. 166.

[49] Congressional Globe, December 8, 1862, p. 22; the author of the provision was Rep. Thaddeus Stevens (R–Pa.).

wrongs had been committed, and that no indemnification was necessary. Conversely, the very basis of the bill of indemnity, in the minds of many who voted for it, was an assumption that the President did not constitutionally have this power, or at least a doubt as to the legality of this presidential suspension and a desire to clear up the matter once for all.[50]

Due to difficulties which the indemnity provisions of the statute encountered at the sub-national level, the act was substantially amended in 1866.[51] "Under the original law, as interpreted by the State courts, an order of the President himself had to be produced in court in order to make available the benefits of the act as a defense." [52] The amendment enlarged the definition of communication between the Chief Executive and subordinates to include indirect and verbal orders. The new provisions also called for the removal of indemnity cases from the state to the Federal courts with a clause for damage and cost claims in the event State judicial officials persisted with a case after it had been transferred to the Federal jurisdiction.[53]

In brief, no determination was made whether or not President Lincoln had, during the early years of the rebellion, properly exercised an emergency power of the Executive by suspending the *habeas corpus* privilege. The Habeas Corpus Act of 1863 recognized that the President "is authorized to suspend the privilege of the writ of *habeas corpus*" and granted indemnity to the Chief Executive, his officers of government, and certain other subordinates whose duty it was to carry out orders issued under the color of the Executive's suspension proclamation. Further statutory sanction of the President's power in this policy area would be given in 1871.

Arrests and Martial Law

When Lincoln assumed the Presidency, hostilities had already begun and it was, therefore, imperative that certain individuals, unsympathetic to the Union cause, be restricted in their travels or detained at locations where they created no threat to defense operations.

> The Government's first efforts to control the civilian population were conducted by the Secretary of State, for reasons both personal and official. William H. Seward, the "Premier" of the Cabinet, had an unquenchable zeal for dabbling in everybody else's business. In addition, since the establishment of the Federal Government the office of the Secretary of State had been somewhat of a catchall for duties no other executive agency was designed to handle. With the war, and the new problem of subversion on the home front, Seward soon began to busy himself about arrests of political prisoners, their incarceration, and then the next step of setting up secret agents to ferret them out.[54]

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[50] Randall, *op. cit.*, pp. 192–193.

[51] See *Ibid.*, pp. 193–199 for a general discussion of state court opposition to the statute.

[52] *Ibid.*, p. 198.

[53] 14 Stat. 46–47.

[54] George Fort Milton. *Abraham Lincoln and the Fifth Column.* New York: The Vanguard Press, 1942, p. 48.

There are no informative records as to how or why the initial arrests of political prisoners and the creation of a secret service fell to Secretary Seward. It is entirely likely that he requested these duties. The more important consideration, however, concerns the extent to which he responsibly carried out these obligations. According to one of the Secretary's biographers:

> Arrests were made for any one of many reasons: where men were suspected of having given, or intending to give, aid or comfort to the enemy in any substantial way,—as by helping in the organization of troops, by supplying arms or provisions, or selling the bonds of the states in secession; by public or private communications that opposed United States enlistments or encouraged those of the Confederacy; by expressing sympathy with the South or attacking the administration; by belonging to organizations designed to obstruct the progress of the war—in fact, for almost any act that indicated a desire to see the government fail in its effort to conquer disunion.[55]

But the question was not simply one of fact. A number of due process considerations were raised by the manner and nature of the arrest and detention of political offenders.

> The person suspected of disloyalty was often seized at night, searched, borne off to the nearest fort, deprived of his valuables, and locked up in a casemate, or in a battery generally crowded with men that had had similar experiences. It was not rare for arrests regarded as political to be made by order of the Secretary of War or of some military officer; but, with only a few exceptions, these prisoners came under the control of the Secretary of State just as if he had taken the original action.
>
> For a few days the newcomer usually varied reflection and loud denunciation of the administration. But the discomforts of his confinement soon led him to seek his freedom. When he resolved to send for friends and an attorney, he was informed that the rules forbade visitors, except in rare instances, that attorneys were entirely excluded, and the prisoner who sought their aid would greatly prejudice his case. Only unsealed letters would be forwarded, and if they contained objectionable statements they were returned to the writer or filed in the Department of State with other papers relating to the case. There still remained a possibility, it was generally assumed, of speedy relief by appeal to the Secretary in person. Then a long narrative, describing the experiences of a man whose innocence was equaled only by his misfortunes, was addressed to the nervous, wiry, all-powerful man keeping watch over international relations, political offenders, and affairs generally. The letter was usually read by the Chief Clerk or Assistant Secretary, and then merely filed. A second, third, and fourth petition for liberation and explanations was sent to the department—

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[55] Frederic Bancroft. The Life of William H. Seward (Vol. II). New York: Harper & Brothers, 1900, p. 260.

> but with no result save that the materials for the study of history and human nature were thereby enlarged; the Secretary was calm in the belief that the man was a plotter and could do no harm while he remained in custody.[56]

To rectify this situation, two important steps were taken in February 1862. On St. Valentine's Day, an Executive Order was issued providing for the wholesale release of most political prisoners, excepting only "persons detained as spies in the service of the insurgents, or others whose release at the present moment may be deemed incompatible with the public safety." [57] A special review panel, consisting of Judge Edwards Pierrepont and General John A. Dix, was established to expedite releases under this order.[58]

In addition to the question of justice for political prisoners during the emergency conditions of the Civil War there was also the problem of due process and justice where martial law had been proclaimed. Such a declaration was first made by the President on September 24, 1862. The instrument was designed to outline the conditions of due process which would be applied to "all Rebels and Insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to Rebels against the authority of the United States." [59] Those civilians loyal to the Union living in areas away from the war zone and held by the North remained subject largely to the existing laws of civil authority.

> Martial law, on the other hand, allows a military trial for offenses unknown to the civil law, and permits the execution of sentences for which the civil law offers no basis. It is true that mere detection of the prisoner might itself constitute a considerable grievance, and might be so prolonged as to amount to heavy punishment; but this is certainly a milder infringement of liberty than the rapid completion of all the steps of a summary process, including the execution of the sentence. The compensating element in the situation is that while the privilege is being suspended, the "public safety" is being guarded as the Constitution-makers contemplated; and, if the power of arrest be not abused, unavoidable wrong done to a few individuals may perhaps be tolerated in view of the promotion of general security.[60]

Prior to the period of the Civil War, the use of martial law by Federal officialdom had been rare, applied with great caution and restraint, and only of fleeting duration. On the occasion of the Whiskey Rebellion, Washington did not declare a condition of martial law in

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[56] *Ibid.*, pp. 261–262.
[57] See Richardson, *op. cit.*, pp. 3303–3305.
[58] The correspondence of the panel and lists of those released at its direction may be found in Fred C. Ainsworth and Joseph W. Kirkley, comps. *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies*, Series II (Vol. II). Washington: U.S. Government Printing Office, 1897. (55th Congress, 3rd session. House Document No. 66).
[59] Basler, *op. cit.*, (Vol. V), pp. 436–437.
[60] Randall, *op. cit.*, pp. 153–154.

the areas of insurrection and the army operated in subjection to the civil power. Federal judges were respected by military commanders; the rebels were arrested by civil officers on warrants; "leaders of the insurrection were convicted in the regular courts, sentenced to death for treason, and pardoned by the President." [61]

When an effort by Aaron Burr and others to either seize Mexico for the United States or have the Western States secede from the Union was uncovered in 1805 and 1806, the precedent of the Whiskey Rebellion prevailed. The conspirators were brought before Federal courts, were tried, and punished under civil law. Burr was acquitted of both treason and of high misdemeanor. It is questionable that his lot would have been the same if trial had occurred before a military commission.

> General Jackson's excessive zeal in imposing military rule over civilians in Louisiana during the War of 1812 led to a result opposite to that intended. He had made a military arrest under martial law, and when served with a writ of *habeas corpus* by the district court he not only disregarded the writ but imprisoned the judge who issued it. As Jackson was subjected to an attachment for contempt and compelled to pay a fine of $1,000, the net result of the episode was a vindication of civil authority.[62]

The use of martial law by Lincoln, and its application during the Civil War by the military, appears to have been satisfactory to Congress. As one authority wrote

> Considering the imperative demands of the emergency, a fair amount of restraint was shown in the making of arrests. An examination of the orders issued from Washington and from the various department headquarters reveals a considerable degree of caution. Mere disloyal remarks were to be overlooked, but such violence of word or act as would disturb the peace was to be deemed sufficient cause for arrest. Higher officers sought to check the tendency of subordinates to make vexatious arrests on mere suspicion, and many annoyances of conduct short of actual aid to the enemy were tolerated. In Baltimore in 1862 the order went out that no citizen was to be arrested and confined for disloyalty or treasonable practices except on written charges under oath. Not only the President himself but the chief generals and members of the Cabinet acted as restraining agencies to temper the severity of overzealous officers.[63]

Undoubtedly unwarranted arrests were, on occasion, made by the military authorities. Many individuals, for instance, had their difficulties with Secretary Seward and his secret agents, but martial law did not work any hardship on most political prisoners as Seward did not rely upon it. He was virtually a law unto himself during the first year of the war. Congress remained largely unaware of Seward's role with regard to political prisoners or their conditions. No attempt was

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[61] *Ibid.*, p. 144.
[62] *Ibid.*, p. 145.
[63] *Ibid.*, p. 154.

made by Congress to alter the application or administration of martial law. Following the war, the return of civil authority in those areas which had been under military authority was accomplished on an area basis. The border States were the first to be restored to civil law while parts of the Confederacy remained under martial law during reconstruction.

Conscription

The matter of men being conscripted into the armed forces by the President during the Civil War was a unique occurrence.

> Prior to the Civil War conscription had never been applied by the national law. During the Revolution some of the States filled their Continental quotas by means of the draft, and a conscription law was considered during the War of 1812; but the opposition of New England and the failure of the two houses of Congress to agree caused the abandonment of the measure. For the Mexican War the army was fully recruited by voluntary enlistment.[64]

When the Civil War broke out, three types of military organization were available to the President: (1) a small efficient regular army, recruited by enlistment, and numbering about 13,000 men in 1861; (2) unprofessional volunteers, accepted when their services were offered, and assigned a fixed tour of duty; and (3) the state militia, created by state law, commanded by officers appointed under State authority, and generally considered to be under the command of the governors unless called out for national purposes, as provided under the Constitution, by the President.

> A series of Federal laws had been passed with the intention of making the militia a really effective agency of the Federal Government. The first of these laws was that of May 8, 1792, which provided (indirectly) for the enrollment of "every free able-bodied white male citizen of the respective States" between the ages of eighteen and forty-five, and then proceeded to indicate a plan of organization (which the State legislatures were to carry into effect) and to prescribe the rules of discipline to be observed [1 Stat. 271–274]. Another act of 1792 [1 Stat. 264–265], superseded in 1795 [1 Stat. 424–425], carried important provisions for calling forth the militia for those distinctly Federal purposes which the Constitution contemplated: executing the laws of the Union, suppressing insurrections, and repelling invasions. This act provided that, whenever the laws of the United States should be opposed in any State by "combinations too powerful to be suppressed by the ordinary course of judicial proceedings," the President might use the State militia to put down such combinations. Other laws had been passed which indicate that it was the intention of Congress to make the militia an actual, and not merely a nominal, part of the national forces [1 Stat. 119–121; 403; 522; 576–577; 2 Stat. 207].[65]

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[64] *Ibid.*, pp. 204–241.
[65] *Ibid.*, pp. 242–243.

In all ways, then, the militia was ideally suited for use in a rebellion such as that confronting President Lincoln. However, when the President issued his proclamation on April 15, 1861 for 75,000 militia, he not only obtained slightly more soldiers than requested, but also exhausted the resource.[66] "The actual organization under the uniform law of Congress had been left to the States, and they had neglected in many cases to make the militia a living, effective force." [67]

This prompted a second call for troops on May 3, 1861, a request for three-year volunteers and additions to the regular army and navy.[68] Lincoln knew his second call for troops was made without any statutory authority. But, as indicated in his July 4th address to the special meeting of Congress, the legislature's sanction of this action was anticipated.

On July 17, 1862, Congress passed an amendment to the statute of February 25, 1795.[69]

> The law of that year did not expressly provide conscription. Compulsory service could be read into the act in only two ways: first, the President's authority to issue regulations could be (and, in fact, was) construed to include the power of ordering a draft; and second, the provision that the militia "shall include all male citizens between the ages of eighteen and forty-five" involved universal military liability. This latter provision, however (at least as far as white citizens were concerned), was included in the Act of 1972 and had long been a part of established law. So far as the militia was concerned, the nominal principle of universal liability already existed, and Congress was merely taking advantage of this fact. It was applying conscription by the line of least resistance. As the national legislature was not ready for a drastic and thorough conscription law, it merely employed the inefficient militia system, instead of creating a purely national army; and, instead of providing a nation-wide method of conscription, reliance was placed upon State laws which were to be supplemented by Presidential regulations.[70]

Thus, the President's emergency call for volunteers was approved by Congress and the sanctioning legislation continued the Chief Executive's involvement in this policy area. The conscription system established by this act was not adequate and a more thorough and efficient method of conscription was enacted on March 3, 1861.[71] Also, a supplemental conscription statute was passed in 1864.[72] In general, the conscription laws also withstood judicial challenges and emergency authority in this policy area remained unshaken throughout the war.[73]

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[66] Richardson, *op. cit.*, pp. 3214–3215.
[67] Randall, *op. cit.*, pp. 243–244.
[68] Richardson, *op. cit.*, pp. 3216–3217.
[69] 12 Stat. 597–600.
[70] Randall, *op. cit.*, pp. 245–246.
[71] 12 Stat. 731–737.
[72] 13 Stat. 379–380.
[73] On the legal perplexities of the draft laws see Randall, *op. cit.*, pp. 252–264, 268–275.

Confiscation

The emergency power to confiscate the property of individuals sympathetic to the enemy was recognized by both the Union and the Confederacy in legislative instruments. "By a Confederate statute of May 21, 1861, debts due to Northerners were confiscated; and a further act of August 30, 1861, sequestered the property of 'aliens,' by which was meant those adherent to the Union." [74] The efforts by Congress in this matter were realized on August 6, 1861 when legislation was enacted to regulate any property which might be devoted to hostile use.[75] A more comprehensive statute was passed on July 17, 1862.[76]

> The Federal confiscation law of 1862 differed both in degree and in kind from that of 1861; for it was a punitive measure directed against persons, taking their property by way of penalty, and it embraced in its terms all those who adhered to the "rebellion." The law was under consideration during the whole of the long session of the Thirty-Seventh Congress, and an amazing volume of oratory was poured forth in its discussion. Each member of House and Senate, it seemed, had a confiscation speech in his pocket; and so numerous were the orations on this subject that many members had to be content with "leave to print" their remarks in the appendix of the *Congressional Globe*, with the privilege of distributing printed copies to their constituents.[77]

The major opponents of the confiscation law in 1862 were Democrats and representatives of the border States. They saw their constituent's property being seized by first one army and then another as the battle lines shifted back and forth. Some argued the measure violated the attainder clause of the Constitution. It was also suggested that any type of legalized confiscation would only serve to make peace and reunion a more difficult enterprise. After long months of debate, however, the bill was passed.

The statute was generally a failure, both in its treason provisions and its confiscation clauses. "As there were hundreds of treason indictments but no punishments, so there were many confiscation cases, but only a small amount of property confiscated." [78] Amounts deposited to the Federal treasury as net proceeds realized under the act totaled $129,680.67.[79]

> [I]t is clear that there was not a sufficiently diligent and systematic enforcement of the acts to produce any marked effect other than a feeling of irritation and injury on the part of a few despoiled owners. Confident predictions of the supporters of confiscation as to the material weakening of the enemy's resources were doomed to disappointment.

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[74] *Ibid.*, pp. 275–276.
[75] 12 Stat. 319.
[76] 12 Stat. 589–592.
[77] Randall, *op. cit.*, p. 276.
[78] *Ibid.*, p. 288.
[79] *Ibid.*, p. 289.

Financially, then, confiscation was a failure, while the other purpose of the act, that of punishing "rebels," was unequally and unjustly accomplished. No practical object in the prosecution of the war was achieved by appropriating the private property of a few unoffending noncombatants. The whole experience pertaining to the Civil War confiscations was such as to condemn the policy of promoting war by extreme punitive measures for the coercion of individuals.[80]

Other confiscation instruments included a direct tax levy system for areas in insurrectionary districts.[81] Under this arrangement, "where the tax quotas could not be peaceably collected, special tax commissioners should be appointed by the President; and that as soon as the military authority of the United States could be established, these commissioners should make assessments 'upon all the lands and lots of ground' situated in the insurrectionary territory." [82]

> Seizures under this act differed from ordinary tax sales. A valuable estate would be sold to pay a trifling tax; and the surplus, over and above the amount of the tax, instead of being paid to the owner, as in the usual tax sale, was turned into the Federal treasury. The customary privilege of redemption which belongs to a dispossessed owner whose property has gone to pay a tax was conditioned upon the taking of an oath to support the Constitution of the United States.[83]

Another seizure mechanism can be found in the Captured Property Act of March 3, 1863.[84]

> This act was essentially an exercise of the "belligerent right of confiscation" in a form different from that of the confiscation acts, and applying to property which the latter could not reach. The competence belonged to Congress, according to the Supreme Court, to provide for the forfeiture of the property of *all persons* within the Confederacy, loyal as well as disloyal, on the principle that all inhabitants of enemy territory are enemies [*Mrs. Alexander's Cotton*, 2 Wallace 404 (1865)]. This, however, would have been an extreme measure, and the restoration of the property of loyal citizens was therefore provided for in the act. In so doing, Congress renounced a part of its strict belligerent rights as the Supreme Court understood them.[85]

[Emphasis supplied.]

Under the terms of the statute, agents of the Treasury Department entered the States of the Confederacy and began seizing abandoned or otherwise considered captured property of a "non-warlike character" in localities where the army had already swept through.

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[80] *Ibid.*, pp. 291–292.
[81] 1212 Stat. 422–426; amended 12 Stat. 640–641.
[82] Randall, *op. cit.*, p. 317.
[83] *Ibid.*, pp. 319–320.
[84] 12 Stat. 820–821.
[85] Randall, *op. cit.*, pp. 324–325.

Although their work was hazardous due to hostile inhabitants and the presence of Confederate agents in search of cotton and foodstuffs, it was quite profitable. By May 1868, gross sales of property seized under the act amounted to approximately $30 million while net proceeds totaled about $25 million. Almost 95 percent of the property seized was cotton.[86]

Efforts to forestall seizure through judicial redress were of little consequence. It was only with a proclamation of pardon that the courts began to provide for some recovery of lost property. Lincoln's first pardon proclamation,[87] and the first three such proclamations of President Andrew Johnson, indicated confiscated property was not to be returned.[88] However, a proclamation of unconditional pardon, devoid of any reservations, opened the way to some redress for seized property.[89] Procedural decisions were slow in evolving with regard to avenues of relief. In 1867, the Supreme Court ruled that,

> [i]n the case of confiscations completed by judicial process . . . restoration was possible as a result of pardon only where the property had been condemned under the act of 1861, and then only the Government's share of the proceeds was returned. Considering the comparatively small number of condemnations under the earlier act, it is evident that this class of restorations was insignificant.[90]

Congress enacted legislation providing for redress through suit with the Court of Claims in confiscations made under the Captured Property Act.[91] In this class of cases, the Supreme Court determined that

> Congress had intended to restore property not only to loyal owners, but to those who had been hostile and might later become loyal; that after the proclamation of general amnesty the restoration of property to all *bona fide* owners claiming under the Captured Property Act became the duty of the Government; and that such restoration became the "absolute right of the persons pardoned," the Government having constituted itself the trustee, not only for claimants protected by the original act, but for all who might later be recognized as entitled to their property. "Pardon and restoration of political rights," declared the court, "were in return for the oath and its fulfillment. To refuse it would be a breach of faith not less cruel and astounding than to abandon the freed people whom the executive had promised to maintain in their freedom." [92]

As a result of this decision, all claimants, regardless of their original loyalty, were entitled to restoration. Generally the effort to obtain seized property was slow, frustrating, and usually only partially successful. The emergency power, once exercised, was not easily reversed once the crisis had passed.

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[86] *Ibid.*, p. 326.
[87] Richardson, *op. cit.*, pp. 3414–3416.
[88] *Ibid.*, pp. 3508–3510, 3745–3746, 3853–3854.
[89] *Ibid.*, p. 3906.
[90] Randall, *op. cit.*, p. 335; *Armstrong's Foundry*, 6 Wallace 766 (1867).
[91] 12 Stat. 820 §3; 15 Stat. 243–244 §3.
[92] Randall, *op. cit.*, p. 339; *United States* v. *Klein*, 13 Wallace 128 (1872).

Emancipation

President Lincoln, on September 22, 1862, announced that, by Executive proclamation, as of the beginning of the new year, "all persons held as slaves within any State or designated part of a State the people whereof shall then be in rebellion against the United States shall be then, thenceforward, and forever free; and the executive government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons and will do no act or acts to repress such persons, or any of them, in any efforts they may make for their actual freedom." [93] There was no intention, however, that the freed slaves should immediately revolt or otherwise seek revenge upon their former masters. [94] The interesting aspect of the proclamation was its legal basis and authority.

> It was a generally accepted axiom of American constitutional law in 1861 that slavery was a domestic institution of the States, and that as a State institution it was outside Federal jurisdiction. When the Civil War came, however, it was widely believed that the Government acquired a power in this field which in peace times it did not have. This extraordinary authority to strike at slavery during the great national emergency is what we mean by the "war power over slavery." Some there were who justified this war power by claiming the "belligerent right" of emancipating an enemies slaves—a right which they held to be within the laws of war—while others maintained that the question was domestic, not international, and that control over local affairs normally lying within State jurisdiction could be assumed by the National Government as an enlarged municipal power growing out of insurrection and civil war. [95]

Lincoln's own thinking on the question of slavery had obviously changed during the time of his assumption of office and the occasion of his issuing the Emancipation Proclamation. Before coming to the Presidency he was not an "abolitionist." He had not sought the repeal of the fugitive slave law, did not oppose the admission of slave States to the Union, and did not think Congress had any right to regulate slavery within the States. His inaugural address in 1861 disclaimed any role of interference with slavery at the subnational level. [96] Yet, by September of the following year, he not only sought to abolish slavery within the insurrectionary jurisdictions, but did so without any specific grant of authority for this action from Congress.

Emulating the position of the earlier Lincoln,

> Congress uttered a similar disclaimer when it adopted, almost without dissent, the Crittenden resolution of July 22, 1861, which declared that "this war is not waged . . . in any spirit of oppression, or for any purpose of conquest or

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[93] Richardson, *op. cit.*, pp. 3297–32–9.
[94] See Lincoln's Proclamation of January 1, 1863 in *Ibid.*, pp. 3358–3360.
[95] Randall, *op. cit.*, p. 343.
[96] Richardson, *op. cit.*, pp. 320–3213; See also Richard Hofstadter's *The American Political Tradition and the Men Who Made It* and his chapter on Lincoln.

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> subjugation, or . . . of overthrowing or interfering with the rights or established institutions of (the) States, but to defend and maintain the supremacy of the Constitution, and to preserve the Union with all the . . . rights of the several States unimpaired." [97]

But, like the Chief Executive, Congress also changed its thinking on the question of the Federal role with regard to the slavery question.

> Congress, and to a certain extent the Executive, became increasingly radical under the influence of the "war mind;" that the purpose of the war widened as the months of desperate fighting passed; that the foreign situation seemed to call for a more definite declaration concerning slavery; and that, in order to deal with various practical phases of the slavery problem as they came up, the Government found itself forced either to take some steps toward emancipation or to become both its own enemy and an active promoter of slavery. Lincoln's references to noninterference with slavery in his first inaugural are not to be interpreted as a prediction of governmental policy in the event of civil war, but as a pledge offered in the hope of keeping the slave States in the Union.
>
> It is not the part of statesmanship to adhere stubbornly to a given policy after all chances for its success have been lost; and as far as President Lincoln was concerned the policy of non-interference was at least given a fair trial during the first year and a half of the war. When the Emancipation Proclamation of September 22, 1862, indicated that this former policy was abandoned, there was not only a hundred day warning given, but there was also the pledge of Federal pecuniary aid to any State that should adopt emancipation by its own laws.[98]

Congress gave sanction to the President's action in section 9 of the Confiscation Act of July 17, 1862 and, indirectly, in section 12 of the Militia Act of the same date.[99] The Thirteenth Amendment finalized the matter by abolishing slavery within the United States "or any place subject to their jurisdiction" and by specifying that further regulation of the matter would be left to Congress and "appropriate legislation." On December 18, 1865, the amendment was adopted.

Press Restrictions

During the 1860s, the press was hungry for the sensational and shot through with politics. It was a time of publishing moguls and fierce circulation competition. Thus, for a variety of reasons, the journalism community was highly interested in the war.

Of all the emergency powers exercised during the period of the insurrection, government policies and actions with regard to the press were probably among the least offensive, given the zealousness of

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[97] Randall, *op. cit.*, p. 352; see also Congressional Globe, July 22, 1861, p. 222.
[98] Randall, *op. cit.*, p. 353.
[99] 12 Stat. 591, 599.

journalists and the restrictions involved. Indeed, as one authority comments:

> A striking fact concerning the subject of journalistic activity during the Civil War was the lack of any real censorship. There were, it is true, some efforts to establish a telegraphic censorship. In April 1861, the Government took exclusive control of the telegraph lines radiating from Washington; and the function of censoring the dispatches sent over the wires from the national capital was at different times under the charge of the Treasury, the State, and the War Departments. Operating under the instructions from the Cabinet officer in whose department he was placed, the censor excluded communications giving military information, and also those which were deemed to convey too much news concerning the activities of the Government. Reports of delicate diplomatic questions, criticisms of Cabinet members, comments giving the mere opinion of correspondents, advance information of contemplated measures, and stories injurious to the reputation of officers, were denied the wires.[100]

Reporters might have been severely and summarily dealt with under the 57th Article of War, if arrested in the war zone, which provided that anyone "convicted of holding correspondence with, or giving intelligence to, the enemy, either directly *or indirectly*," might suffer the death penalty or such other punishment as might be provided by a court-martial. However, "against news writers this section of the military code was rarely, if ever, applied." [101] There were instances when newspapers were compelled to suspend publication for some brief interval or a single issue of a publication might be suppressed by the government. "Cases in which this drastic method of press control was applied were fairly numerous, although it is also true that throughout the war the most flagrant disloyalty was suffered to continue in many prominent papers." [102] Other methods of press control included the restriction of a newspaper's circulation to a specific geographic area and/or the denial of the use of the mails.[103] The most serious action taken against the press during the Civil War was the arrest and detention of editors by military authorities, but this manner of treatment was actually no different than that accorded other suspects of disloyalty or Union infidelity.[104]

[Emphasis supplied.]

> In seeking a just interpretation of the question of press control during the Civil War, one must balance the immediate and practical considerations, of which the executive branch must be ever watchful, with the constitutional and legal phases of the subject. When powerful papers were upsetting strategy by the revelation of military secrets, discrediting the Government, defaming the generals, weakening the

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[100] Randall, *op. cit.*, pp. 481–482.
[101] *Ibid.*, p. 490.
[102] *Ibid.*, p. 492; see pp. 492–499 for examples of suspension.
[103] See *Ibid.*, pp. 500–502.
[104] See *Ibid.*, pp. 502–505.

> morale of soldier and citizen, uttering disloyal sentiments, formenting jealous antagonism among officers, and clamoring for a peace which would have meant the consummation of disunion, even the most patient administration charged with the preservation of the Union by war, would have been tempted to the use of vigorous measures of suppression. Yet in face of this strong provocation there stood the citizen's fundamental right of a free press. Though for every wrong there should be some remedy, it seemed that our Constitution and laws lacked a specific legal remedy for journalistic wrongs against the Government. The urgings of the war mind and the demands of military men tended to pull the Government in the direction of arbitrary measures, while that deeper sense of regard for law was at the same time operating as a powerful restraining force.[105]

In brief, Congress was willing to allow the President, as Commander in Chief, to pursue this area of policy as he saw fit in accordance with the prosecution of the war. The Legislature took no direct action in regulating the Executive's authority to control the press during the insurrection. These restrictions, of course, disappeared with the peace of Appomattox.

Power Balance

For the emergency period of the Civil War, what conclusions can be drawn regarding the implications of the situation for our system of government? Generally, the opinion of scholars and experts is "that neither Congress nor the Supreme Court exercised any effective restraint upon the President."[106] The actions of the Chief Executive were either unchallenged or sanctioned by Congress and were either justified or, because of no opportunity to render judgment, went without notice by the Supreme Court. The Executive made a quick response to the emergency at hand, a response which Congress or the Court might have rejected in law, but which had, nevertheless, been made in fact and with some degree of popular approval. Such a stress on the Constitutional system of checks and balances, covering so many areas of action, would not arise again for another hundred years.

Reconstruction

Following the assassination of Lincoln, President Andrew Johnson was left with the task of effectuating a reconstruction plan initially designed by his martyred predecessor. Johnson attempted to implement Lincoln's policy by utilizing the proclamation authority of the Presidency and by relying upon what might be termed the emergency of restoring the insurrectionary territories to the Union with the close of open hostilities. Johnson began carrying out his plan with a proclamation appointing the provisional governor of North Carolina.[107]

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[105] *Ibid.*, pp. 505–506.

[106] *Ibid.*, p. 517; for concurrences with this view see Binkley, *op. cit.*, pp. 124–127; Rossiter, *op. cit.*, pp. 233–234; and Woodrow Wilson. *Constitutional Government in the United States*. New York: Columbia University Press, 1907, p. 58.

[107] Richardson, *op. cit.*, pp. 3510–3512.

> In this document the President's scheme of restoration was outlined. The provisional governor was instructed to call a convention to be chosen by the "loyal" people of the state to make constitutional changes and prepare the state for Federal restoration. The amnesty oath (to support the Constitution of the United States) was to be required of the delegates and those electing them; but when the convention should assemble it was to prescribe permanent voting and officeholding qualifications for the state. The President definitely stated that the determination of these qualifications was "a power (which) the people of the . . . States . . . have rightfully exercised from the origin of the Government to the present time." Temporarily, civil government for the state was to be administered under the authority of the provisional governor, while Federal functions, executive and judicial, were to be resumed by the proper officials.[108]

Similar proclamations were issued for the other secessionist States but, unlike Lincolns' tenure of office, Congress was unwilling to allow the new Chief Executive sole discretion in the matter of reconstruction. Johnson sought to exert emergency powers. In the Congressional view, the crisis justifying past use of such authority had ceased to exist. The result was a bitter struggle between the Legislature and the Executive over the issue, with the President's suggestions being ignored and Congress setting policy on the matter.[109]

In 1871, Congress demonstrated its willingness to allow the President some emergency role with regard to reconstruction government when it passed legislation designed to control the rampages of a new conspiratorial organization known as the Ku Klux Klan.[110] "Because of reconstruction disturbances in South Carolina it was provided that, in case of unlawful combination against the United States amounting to rebellion, 'it shall be lawful for the President . . . when in his judgment the public safety shall require it, to suspend the privilege of the writ of *habeas corpus* to the end that such rebellion may be overthrown'." [111] President Grant issued a proclamation suspending the habeas corpus privilege in nine counties of South Carolina, but his announcement specifically cited the 1871 statute as the authority for his action.[112]

> From this instance one may conclude that Congress in 1871 believed that a suspension of the privilege might be authorized by the national legislature, though it was to be put into effect by the President. The President's concurrence in this view is shown by his signature of the bill and by the form in which his proclamation was drawn. There is nothing, however, in either the law or the proclamation of 1871 which

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[108] James G. Randall. *The Civil War and Reconstruction*. Boston: D. C. Heath and Company, 1937, p. 712.
[109] For an overview of congressional activity on the matter see *Ibid.*, pp. 719–730.
[110] 17 Stat. 13–15.
[111] Randall, Constitutional Problems Under Lincoln, p. 135.
[112] Richardson, *op. cit.*, pp. 4090–4092.

> touches the question of the *exclusive* power of Congress to suspend; and the legislation is significant merely as an instance of the exercise of a power without being conclusive as to the constitutional authority involved.[113]

[Emphasis supplied.]

Strike Emergencies

In the period immediately following the reconstruction era (1865–1877), the nation faced national emergencies in the field of industrial labor relations. The first of these followed the panic of 1873 and centered in the railroad workforce.

> Less than five months after President Hayes took office, the country was embroiled in a fierce internal conflict. Local, and even state, authorities were helpless to stem the impulsive and imprudent outbursts of violence. In a period of eight days during July 1877, no fewer than nine governors called on the President to assist in maintaining the peace. Singularly enough, in view of the domestic uprisings in preceding years, the wrath of the people was not directed against the government of the nation or of any state. For the first time in history the country was in the throes of a great industrial strike.[114]

[Emphasis supplied.]

The solution to the problem of maintaining the domestic tranquility was the dispatching of troops to those areas where the public safety was endangered.[115] After deliberating with his Cabinet, Hayes determined he had the right to declare martial law and, without any other authority, the regular army might be dispatched quickly to those areas exhibiting turmoil. At one point in the Cabinet's deliberations, the question was raised as to

> whether the Government should not put the rioters in the position of levying war against the United States. Apparently this suggestion was favorably received. Hayes advised that a proclamation be prepared announcing the government's new stand. However, the decision as to its issuance was postponed. The proclamation, if prepared, was never published.[116]

Generally, the President did not take the initiative in quelling the various disturbances at this time. Delivery of the mail was interrupted and interstate commerce was halted in certain areas. Still, these matters did not prompt presidential action.

> Troop movements took place for three reasons only: first, upon receipt of a formal call from an embarrassed State; second, to protect Federal property; third, to enforce the

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[113] Randall, *Constitutional Problems Under Lincoln*, pp. 135–13 .

[114] Bennett M. Rich. *The Presidents and Civil Disorder*. Washington: The Brookings Institution, 1941, p. 72; on earlier policing actions see *Ibid.*, pp. 21–72.

[115] For a list of troop dispatches see *Report of the Secretary of War*. Washington: U.S. Government Printing Office, 1878. (45th Congress, 2d session. House Executive document No. 1, part 2), pp. 92–98.

[116] Rich, *op. cit.*, p. 82.

> mandates of the United States courts. The President expected the States to act first. A newspaperman who called at his home on Sunday evening, July 22, reported that Hayes thought vigorous measures should be used, but that the Federal Government would do nothing more than respond to calls made by the States.[117]

The President's only real positive action was to enforce the orders of the courts and in this he was hampered, as in the other instances of troop movement, by a lack of any large number of Federal soldiers. However, his role in the crisis earned him praise and public acclaim and he appears to have suffered no political or congressional enmity for his role.

During a period of economic plight, Jacob S. Coxey organized a march of the unemployed to Washington in 1893. Initially the group consisted of a small band drawn from the Massillon, Ohio area. As the idea of a march spread, however, other contingents were organized in localities reaching into the far West. The various units, meeting in Washington, had to arrange their own travel. Thus, some groups seized trains to make the long journey.

> Federal intervention usually resulted from the fact that many of the western railroads were in the hands of receivers appointed by the United States courts. A district court would issue an order to the Federal marshal to protect the receivers and to prevent the railway property from being molested. Injunctions were often issued, and any interference by the Coxeyites with the railroads would subject them to contempt proceedings. Numerous deputy marshals were necessary to execute the orders of the courts. In a period of two months so many deputies were required to maintain the peace in the 14 states and two territories where disturbances occurred that Attorney General Richard Olney was compelled to ask for a deficiency appropriation of $125,000.[118]

Soon, however, the efforts of the civil law enforcement authorities began to be overtaxed and the President was faced with many requests for military assistance in putting down the seizures. As the state governors made their demands for Federal troops, the Chief Executive did not respond effectively until the leaders of the march were finally seized in Washington for walking on the grass. The Coxeyite effort constituted more of a nuisance than an actual threat to public safety. Its legacy was the procedures that were developed requiring Federal intervention for meeting the next such disturbance. This was to manifest itself in the Pullman strike of 1894.

> The Pullman strike, like the Coxey movement, was a result of the hard times. Wages at the Pullman Palace Car Company had been reduced 25 percent, although salaries of the officers and managers remained untouched, and although dividends had actually been increased. In order to keep the plant operating, the company had taken contracts at a

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[117] *Ibid.*, p. 83.
[118] *Ibid.*, p. 88.

price less than the cost of labor and materials. In the opinion of the President's investigating commission, which was appointed near the end of the strike and which reported some months later, an undue proportion of this loss was thrown on the workers by the reduction in wages. Contending that wages and rents were unrelated, the company refused to concede any reduction in the high charges for living quarters. Expression was finally given to the "chronic discontent" of the employees when, on May 9, a committee representing all the departments went to the management and requested that the old wage level be restored. This request which, according to the President's commission, was unreasonable, was refused. The company, unfortunately, would make no concession whatever. On May 10, three members of the committee were laid off. That evening the men, most of whom were members of the American Railway Union, voted to strike. The 600 nonunion workers were immediately laid off, and the plant was closed.[119]

After a meeting with the General Managers Association, which represented the employers, U.S. District Attorney Thomas E. Milchrist, in conjunction with the railroad attorneys, obtained an injunction against the strike on the grounds that it interferred with the transmittal of the mail. By July 8, Attorney General Richard Olney, having received word of obstruction of the mail in eleven states, began moving the Federal Government toward the use of troops to relieve the halt in railroad service.

> To be effective, Olney's plan of a vigorous assertion of the rights of the United States at the "origin and center of the demonstration" had to be carried out at once. Although he believed that the President had the right to act on his own initiative to prevent interference with interstate commerce and with the mails, the Attorney General proceeded on the supposition that Cleveland "could not be induced to move except in support of the judicial tribunals." "The Department of Justice," Olney wrote some years later, "in order to be prepared for the exigency, *took measures to put itself in the position which had induced the President to authorize the use of troops as against the Coxey movement.*" [120]
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> [Emphasis supplied.]

Ultimately, the President did dispatch troops.[121] Their arrival in Illinois, however, was not pleasing to Governor John P. Altgeld who, on July 5, fired a sharp protest to the Chief Executive. Incorrectly the Governor presumed the President's authority for such action was based upon an 1861 statute which "was in reality a war measure." [122]

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[119] *Ibid.*, pp. 91–92, also see Almont Lindsey. *The Pullman Strike: The Story of a Unique Experiment and of a Great Labor Upheaval.* Chicago: University of Chicago Press, 1942.

[120] Rich, *op. cit.*, p. 96; also see Henry James. *Richard Olney and His Public Service.* Boston and New York: Houghton Mifflin Co., 1923, p. 203.

[121] See Grover Cleveland. *Presidential Problems.* New York: The Century Co., 1904, pp. 79–121.

[122] Robert McElroy. *Grover Cleveland, The Man and the Statesman,* New York; Harper & Brothers, 1925, pp. 151–163.

> Altgeld's contention that no condition existed making impossible the enforcement of the laws by ordinary judicial proceedings may have been true. Cleveland had been informed otherwise and, in the wording of the statute, "the judgment of the President" was the controlling factor.[123]

During the course of the strike conflict, Eugene V. Debs, leader of the railroad workers, was arrested for violating the injunction against tampering with the railways. When his case was reviewed by the Supreme Court (Debs' conviction was sustained), the majority opinion gave strong support to the Chief Executive in such matters, saying:

> The entire strength of the Nation may be used to enforce in any part of the land the full and free exercise of national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the arr y of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws . . . .[124]

Coincidental with the Pullman strike were mining disputes in the Coeur d'Alene region of Idaho. At the request of Governor Norman Willey, President Harrison dispatched Federal troops in 1892 to supplement the state's national guard peace keeping force. Again, in 1894, Governor W. J. McConnell requested Federal troops to help in the maintenance of public safety. President Grover Cleveland accommodated this plea.[125]

> In the years following 1894 there were isolated instances of violence, but it was not until 1899 that an outbreak occurred which the governor deemed too large for state authorities to handle. In April, an effort was made to unionize completely the Bunker Hill and Sullivan Mining Company at Wardner and to compel the payment of regular union wages. On April 29, a Northern Pacific train was seized and the engineer compelled to carry the miners from several towns to Wardner. Nearly 1,000 men, some 200 of whom were armed and masked, gathered at the Bunker Hill mine. By means of 3,500 pounds of stolen dynamite, the $250,000 concentrator, one of the world's largest, was blown to bits. Two men were killed in the hail of bullets which signalled the success of the project of destruction. After this demonstration, the men boarded the train, later to be denominated the "Dynamite Express," and without further incident returned from whence they came. [126]

Because the Idaho National Guard was, at this time, serving in the Philippines, Governor Frank Steunenberg appealed to President McKinley. The request for assistance was answered by Brigadier

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[123] Rich, *op. cit.*, p. 99.
[124] *In re Debs*, 158 U.S. 582 (1895).
[125] See Rich, *op. cit.*, pp. 110–113.
[126] *Ibid.*, p. 113.

General H. C. Merriam, commander of the Department of Colorado, who gathered a force of over 500 men and, with Presidential sanction, declared martial law in Coeur d'Alene. "Here was a limited form of martial law being established by the United States although it was preceded by no announcement either from the President or from the commanding officer." [127] A few days later, however, the Governor declared martial law, thus placing the general on firmer legal ground.

When the whole situation came under congressional scrutiny at the turn of the century, "opponents of the President condemned his consent to the use of troops as one more demonstration of his subserviency to the industrial interests." [128]

> Had the soldiers been on duty for only a few days it would be difficult to place any blame on the President if, through the commander's misconception of his duty, the troops were not acting in a strictly legal manner. After many weeks, however, the soldiers were still acting in the capacity of prison guards, and in other respects serving merely as the agents of the state. Even then, unfortunately, McKinley conducted no investigation as to their need. For month after month Federal troops assisted the state executive in the maintenance of complete domination over the entire mining region. Surely McKinley might have asked that the legislature give its approval of this extraordinary procedure. He might well have insisted that the state raise the small force necessary to police the area. Instead, at no time was there any suggestion from McKinley or any Federal officer that the state legislature be convened. A little more attention on the part of the President would have saved the administration from a great amount of criticism and, of more importance, would have saved the people of the Coeur d'Alene from unnecessary suffering. By a prompt response to the Governor's request for troops McKinley was carrying out the national government's constitutional obligation to preserve the States from domestic violence. By permitting the troops to remain for such a long period, without conducting an adequate inquiry as to their necessity, and in view of the type of control established in the area, the President was neglecting the like obligation to guarantee to every state a republican form of government.[129]

When a strike occurred at Telluride, Colo., in 1903 and the public safety was threatened, Governor James Peabody dispatched the state militia to keep the situation in hand but, when he appealed to President Roosevelt for assistance, he was refused three times. After the third decline and an interview with the two Senators from Colorado, Roosevelt let it be known that he felt he did not have any basis for interfering in the disturbance.[130]

When, in 1907, troops were dispatched to Goldfield, Nev., their use was very restrained. The commander of the Federal force was

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[127] *Ibid.*, p. 114.
[128] *Ibid.*, p. 118.
[129] *Ibid.*, pp. 119–120.
[130] *Ibid.*, pp. 122–125.

to keep in touch with the governor and local civil authorities but was to take his orders directly from the President or the commanding officer of the department. No proclamation was issued in conjunction with the dispatching of troops and the Chief Executive, at one point, penned the following with regard to their use:

> The troops are not sent to take the part of either side in a purely industrial dispute, as long as it is kept within the bounds of law and order. They are to be neither for nor against either the strikers or the employers. They are to prevent riot, violence and disorder, under and in accordance with the Constitution and the laws of the land. No man is to be interfered with so long as he conducts himself in a peaceful and orderly manner.[131]

Not only did the President have personal observers of the situation reporting to him, but he also dispatched a three-man investigating commission. When this panel suggested the State should supply the peacekeeping force and not the Federal Government, Roosevelt forwarded a copy of their report to the Governor. Ultimately the State legislature provided for the utilization of State forces in the dispute area and Federal troops were withdrawn.[132]

More controversial than these incidents was the settlement of the anthracite coal strike of 1902.

> In the fall of 1902 President Roosevelt performed a service to the nation which ranks in history as one of the most patriotic and beneficent of his career, but which, when he entered upon it, was denounced with more bitterness than almost any other of his public acts. A universal strike of the miners in the anthracite coal regions of Pennsylvania, involving about 150,000 men, was instituted in the spring of that year and continued, with steadily increasing animosity between the mine operators and mine workers, through the summer and into the autumn, with no prospects of settlement. Its progress was marked with many acts of violence on the part of the strikers against the nonunion laborers whom the operators were trying to employ. The Governor of Pennsylvania had been appealed to and had sent militia to the mines for the protection of life and property, but though there were in the later stages of the strike about 2,000 of these troops, they had shown themselves unable to put a stop to violence. It was estimated that during the rioting 20 persons had been killed and about 40 injured, and that much property had been destroyed. The Governor was subjected to sharp criticism for the inefficiency of the force and was accused of sympathy with the strikers. Although called upon repeatedly to confess the inadequacy of the State militia to restore and preserve order, and to appeal to the National Government to come to the aid of the State, he refused to do so.[133]

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[131] *Ibid.*, p. 129.
[132] *Ibid.*, pp. 125–135.
[133] Joseph B. Bishop. *Theodore Roosevelt and His Time* (Vol. I). New York: Charles Scribner's Sons, 1920, p. 198.

With the approach of winter, concern began to mount in the States east of the Mississippi River for available fuel should the strike continue. President Roosevelt had received word of this concern from governors and mayors in the region. Yet, the President did not feel there was any clearly defined action he might take with regard to the matter. His first efforts were informal communications with the disputants asking them to reconcile their differences. Next he attempted formal mediation. Another effort was made by forming an investigating commission.

> This commission was only part of the President's plan. The investigation which it was to conduct would take time. In order that mining operations might be resumed as speedily as possible, the President consulted with Senator Quay, who was all powerful in Pennsylvania politics, and was assured by him that whenever the President desired him to do so he would have the Governor of the State notify the President that he could not keep order in the coal regions and needed Federal interference. The President then informed Major-General John M. Schofield that in case of Federal interference he wished to send him to the coal regions with the regular army troops with instructions to act as receiver of the mines, take full charge, put down all violence, and disregard any orders from the operators. The President asked the General if, in case the operators went to court and had a writ served on him, he would do as was done under Lincoln, simply send the writ on to the President. After a little thought the General replied that he would. Roosevelt said: "All right, I will send you." [134]

However, the President's intentions were made known to the strikers and operators who were pressured into a compromise of their differences and mediation through the investigation commission. Examining the matter as it was discussed in Roosevelt's autobiography a few years later, former President William Howard Taft commented:

> Now it is perfectly evident that Mr. Roosevelt thinks that he was charged with the duty not only to suppress disorder in Pennsylvania but to furnish coal to avoid the coal famine in New York and New England, and therefore he proposed to use the army of the United States to mine the coal which should prevent or relieve the famine. It was his intention to take the coal mines out of the hands of their lawful owners, and to mine the coal which belonged to them and sell it in the Eastern market, against their objection, without any court proceeding of any kind and without any legal obligation on their part to work the mines at all. It was an advocacy of a higher law and his obligation to execute it which it is a little startling to find advanced by a former President of a constitutional republic. It is perfectly evident from his statement that it was not the maintenance of law and order in Pennsylvania and the suppression of insurrection, the *only ground* upon which he could intervene at all, that actuated him in what he proposed to do. He used the

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[134] *Ibid.*, pp. 211–212.

expression that he would "get" the governor of Pennsylvania to call for troops from him, and then, having secured a formal authority for the use of the army to suppress disorder, he proposed to use it for the seizure of private property and its appropriation for the benefit of the people of other States. The benevolence of his purpose no one can deny, but no one who looks at it from the standpoint of a government of law could regard it as anything but lawless. I venture to doubt whether, had the exigency arisen, he would have proceeded to such extremity. I think he would have listened to those about him, who were better advised as to the constitutional limitations imposed on him by his oath of office.[135]

[Emphasis supplied.]

Prior to the outbreak of the First World War, labor unrest once again flared in Colorado.

> The strike was not centered at any one town or at any one mine. Rather, it embraced the mines in many communities over a considerable area. Although there were a number of independent operators, the Colorado Fuel and Iron Company, a Rockefeller interest, was the recognized leader. The economic, political, and social life of the district was completely dominated by the operators, and it was in opposition to this domination, perhaps more than for any particular measure of relief, that the battle, in all its bitterness, raged.[136]

The Governor attempted to control the strife with the State militia but to no avail. The newly established Department of Labor also sent a mediator into the conflict but these efforts also failed to contain the violence. Ultimately, after the famous "Ludlow Massacre" where two women and eleven children suffocated in a pit beneath a burning tent floor, an appeal was made for Federal troops.

Preoccupied with a crisis in Mexico, President Wilson first deferred to a congressional investigating committee. Before the panel could visit the State, a second call for troops, more urgent than the first, greeted the Chief Executive. Uncertain of his authority to enter the dispute and anxious to have every avenue of settlement explored before soldiers entered the conflict, Wilson called a meeting at the White House where he sought to personally mediate the situation. When John D. Rockefeller, Jr., refused to attend the meeting, the President ordered troops into the strike zone. In giving his order, the Chief Executive wrote Colorado Governor Elias M. Ammons, saying:

> I shall order *that no person or persons, natural or artificial, shall be permitted to do that which may give rise to disorder*. . . . to the end that good order may be established and maintained, I shall not, by the use of the troops or by any attempt at jurisdiction, inject the power of the Federal Government into the controversy which has produced the

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[135] William Howard Taft. *The Presidency: Its Duties, Its Powers, Its Opportunities and Its Limitations*. New York: Charles Scribner's Sons, 1916, pp. 129–130.
[136] Rich, *op. cit.*, p. 136.

present situation. The settlement of the controversy falls strictly within the field of State power. My duty, as I now see it is to confine myself to maintaining a status of good order until the State can reassert its authority and resume the enforcement thereof. . . .

The manifest disadvantage of having two military forces under separate sources of control, operating within the same localities, leads me to request you to withdraw your militia as soon as the troops of the United States have reached the scene and are ready to take over the necessary control.[137]

[Emphasis supplied.]

Federal troops enjoyed a broad mandate of authority, including an authorization to disregard a writ of habeas corpus from the State courts, even though they were sent to enforce State law. Generally, the Colorado public greeted the troops with a sense of relief and welcome. Martial law, declared by the Governor, remained in effect. A general disarmament of the populace was made by the army in the name of the President. Strikebreakers were ordered from the area. The Federal Government made active efforts to mediate the strike and, once the dispute was settled, Federal troops withdrew from the area shortly after the new year in 1915.

Emergency labor disputes of the period between the Civil War and World War I, when they threatened the public safety or functions for which the Federal Government was responsible, not only drew the attention of the President, but established his role in this area of exigent policy. It was in this area that emergency power could be clearly delineated from war power. The decision of the Supreme Court in the *Debs* case read this authority into the law while the actions of the various Chief Executives made a generally favorable impression on the public conscience.

World War I

When world war broke out in 1914, the United States, in terms of emergency conditions confronting the nation as a whole, was unaffected by the European conflict.

> The nature of the crisis permitted the United States again to pass through a period of national danger with very little alteration in the organization of the government, certainly less than might have been expected by observers of contemporary British and French practice, or than might have been thought advisable for the successful prosecution of the war. The decline of the British Parliament was not paralleled in the American Congress, nor did the state of seige and DORA [the Defense of the Realm Act which suspended certain civil liberties in England] have American counterparts. The most important alteration in the federal government was the expansion of its administrative branch to fight the war of production; the chief readjustment in the relations of people and

[137] *Ibid.*, p. 141.

> government was the control exercised by this administration over American business and industry.[138]

Like Lincoln, President Wilson acquired dictatorial powers during the period of American involvement in international hostilities. But the basis of Wilson's authority varied significantly from that of Lincoln's.

> The most significant feature of the Wilsonian dictatorship is the way in which the President acquired his vast powers. The preponderance of his crisis authority was delegated to him by statutes of Congress. In brief, the most important single emergency device in the World War government was the delegatory statute. Confronted by the necessity of raising and equipping a huge army to fight overseas rather than by a sudden and violent threat to the Republic, Wilson chose to demand express legislative authority for almost every unusual step he felt impelled to take. Lincoln had shown what the office of President was equal to in crises calling for solitary executive actions. Now Wilson was to show its efficacy as a crisis instrument working along with the legislative branch of the government. The basis of Lincoln's power was the Constitution, and he operated in spite of Congress. The basis of Wilson's power was a group of statutes, and he cooperated with Congress.[139]

The President also exercised certain discretion over and above that provided by statute, but he utilized it in a manner which generally did not outrage the legislature. For example, he armed American merchantmen in February 1917; created a propaganda and censorship instrument—the Committee on Public Information—which had no statutory authority for its limitations upon the First Amendment; and he created various emergency agencies under the broad authority of the Council of National Defense.

> Among the important statutory delegations to the President were acts empowering him to take over and operate the railroads and water systems, to regulate and commandeer all ship-building facilities in the United States, to regulate and prohibit exports, to raise an army by conscription, to allocate priorities in transportation, to regulate the conduct of resident enemy aliens, to take over and operate the telegraph and telephone systems, to redistribute functions among the executive agencies of the federal government, to control the foreign language press, and to censor all communications to and from foreign ccuntries.[140]

Council of National Defense

The principal mechansism for carrying out wartime administration was the Council of National Defense. Created in 1916, the language

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[138] Rossiter, *op. cit.*, p. 241.
[139] *Ibid.*, p. 242; for a compilation of certain of these statutes see Clark, *op. cit.*, pp. 1–125.
[140] Rossiter, *op. cit.*, p. 243.

establishing the panel was inserted in the Army Appropriations Act at the direction of Newton D. Baker, Secretary of War.[141] The concept of such a unit, however, had been discussed for some time.

> As far back as 1910 the idea of a Council of National Defense had begun to take root in the minds of men who perceived how helpless the country would be in the event of war, for lack of forethought and planning, and General Leonard Wood and other army men were emphasizing the need even before that of more extensive military system. As long ago as 1902, General Crozier, as chief of the Ordnance Bureau, had urged the wisdom of a great enlargement of the artillery arm. Had the advice of the officers been taken, and had the Government set about to plan for the expansion of the peacetime forces into an army of the size that was contemplated in Europe even before the revelations of the World War, the corollaries of such a course would have led to a large degree of industrial preparedness, though, as we now know, almost grotesquely inadequate. It really required a year's observation of the war in Europe for an understanding of the fact that modern wars are fought, not by armies, but by nations, and that the whole moral, spiritual, and physical energy of the Nation must be summoned to the struggle.[142]

This, then, was the mission envisioned in the creation of such a panel, and the opinion expressed above was that of Grosvenor B. Clarkson, the man who was the Council's most vigorous and challenged director. And, as he has noted, the unit was not only favored by the military, but was championed by defense-minded civilians as well.[143]

In announcing the formation of the Council of National Defense, President Wilson said:

> The Council's chief functions are:
>
> 1. The coordination of all forms of transportation and the development of means of transportation to meet the military, industrial, and commercial needs of the Nation.
>
> 2. The extension of the industrial mobilization work of the Committee on Industrial Preparedness of the Naval Consulting Board. Complete information as to our manufacturing and producing facilities adaptable to many-sided uses of modern warfare will be procured, analyzed, and made use of.
>
> One of the objects of the Council will be to inform American manufacturers as to the part they can and must play in national emergency. It is empowered to es-

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[141] 39 Stat. 649–650.

[142] Grosvenor B. Clarkson. *Industrial America in the World War: The Strategy Behind the Line 1917–1918*. Boston and New York: Houghton Mifflin Co., 1923, pp. 11–12.

[143] For background information on events leading to the creation of the Council see: Grosvenor B. Clarkson, *op. cit.*, pp. 15–18 and John Dos Passos. Mr. Wilson's War. New York: Doubleday & Co., 1962, pp. 220–223.

> tablish at once and maintain through subordinate bodies of specially qualified persons and auxiliary organizations composed of men of the best creative and administrative capacity, capable of mobilizing to the utmost the resources of the country.[144]

Established with an appropriation of $200,000, the Council met on September 18, 1916, in the offices of Secretary of War Newton D. Baker, the body's first chairman.[145] The Council was assisted by a Director who initially was Walter S. Gifford, and a Secretary, who was Grosvenor Clarkson. These officials also assisted an advisory unit to the Council with staff services and direction.

> In the nature of things the Advisory Commission of the Council of National Defense became the real executive branch of the Council. The Council proper was made up of the Secretary of War, who was elected chairman, the Secretary of the Navy, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, and the Secretary of Labor. It is true that the Council early distinctly affirmed that the duties of the Advisory Commission were advisory and that the power of decision lay with the Council, thus conforming to the letter of law; but the initiative lay with the members of the Commission and the Council inevitably came to accept its advice, and it was then charged with the execution of the things decided upon. Council and action united usually have their way under any executive.[146]

With the passage of the Lever Act of August 10, 1917, the President was empowered to establish new agencies or carry out emergency domestic functions through whatever established agency he so desired. This led to the creation of a variety of specialized bipartisan, balanced interest units attached to the Council of National Defense.[147] In addition to a multiplicity of emergency subunits organized under the umbrella-like supervision of the Council, State Councils of Defense were also organized.

> Generally throughout the East, state Defense Councils had no legal powers; their work was chiefly advisory and educational. They stimulated among the people a greater understanding of war aims and cooperation in the government's policies and programs, provided comforts and conveniences for soldiers in camp, looked out for their dependents at home, and sought to promote the welfare of citizens amid the unfamiliar conditions imposed by the war. Throughout much of the West, however, it was a different story. Many western states gave their Councils wide discretionary powers which permitted them to do everything not incon-

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[144] Grosvenor B. Clarkson, *op. cit.*, p. 22.

[145] Daniel R. Beaver. *Newton D. Baker and the American War Effort 1917–1919.* Lincoln: University of Nebraska Press, 1966, p.53.

[146] Grosvenor B. Clarkson, *op. cit.*, pp. 22–23.

[147] For a compilation of Federal level subunits of the Council of National Defense see U.S. Council of National Defense, Division of Statistics. *Directory of Auxiliary War Organizations.* Washington: Council of National Defense, November 1, 1917, 123 p.

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> sistent with state or federal law, a limitation that proved quite flexible under the ruberic of promulgating and carrying out "such measures as may be necessary to meet the exigencies of all situations occasioned by the war." Hence, idle persons could be compelled to work, and such persons could be classified and assigned according to occupations suffering from a shortage of labor. Councils so endowed were able to regulate not only industrial and agricultural relations but educational and religious affairs as well, and to suppress whatever in their estimation appeared unpatriotic or subversive. Such Councils were, in some instances, a wartime version or revival of the vigilantes of pioneer days, and they carried out their functions in about the same rough-and-ready manner.[148]

While various Federal-level subunits conducted much of the research, investigation, and administration necessary for wartime operations, the Council of National Defense held the ultimate authority and responsibility for these actions. It not only met as a unit apart from the Cabinet, but specific directives were issued and enforced in its name.[149] As Chairman of the Council, Secretary Baker "decreed that military supplies should have the right of way over all other goods on the Nation's railroads." [150] Similarly, he took another action with regard to regulating the price of bituminous coal.[151] Another account records that "the Council of National Defense and the Shipping Board came under heavy hostile fire for suspending the law requiring competitive bidding in the letting of war contracts." [152] In brief, the Council operated as an arm of the President during the emergency period of the First World War. It stood as a mechanism for creating a number of emergency management units during the wartime crisis. Yet, it was an entity which could and did act in and of itself to meet the needs of wartime administration and management. There was apparently no unwillingness on the part of members of the Council to go before congressional committees, even though the questioning of them was probably very intense at certain times during the period of the war. It does not appear that members of the Council came before the Congress in any capacity other than their Cabinet officer-departmental Secretary roles.[153] With the conclusion of the war, the Council went into a period of dormancy. It was later revived with the outbreak of the Second World War.

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[148] Seward W. Livermore. *Politics Is Adjourned: Woodrow Wilson and the War Congress, 1916–1918.* Middletown, Conn.: Wesleyan University Press, 1966, pp. 42–43.

[149] For the record of Council meetings see Franklin H. Martin. *Digest of Proceedings of the Council of National Defense During the World War.* Washington: U.S. Government Printing Office, 1934. 700 p. (73d Congress, 2d session. Document No. 193).

[150] Beaver, *op. cit.*, p. 61.

[151] *Ibid.*, p. 65.

[152] Livermore, *op. cit.*, p. 39.

[153] See, for example, U.S. Congress. House. Committee on Appropriations. Council of National Defense. Hearings, 65th Congress, 1st session. Washington: U.S. Government Printing Office, 1917. 157 p.

Committee on Public Information

Prior to America's actual entry into the European conflict in 1917, various suggestions had been made among defense-oriented officials with regard to the control of sensitive information during a period of war. Leaders in the effort were the War, Navy, Treasury, and State Departments. It was not until after an actual declaration of war had been made that legislation, the Espionage Act of June 15, 1917, was enacted which authorized this type of government activity.[154]

> Before that bill became a law, however, the first of three executive orders dealing with censorship, had been issued [E.O. 2594, April 13, 1917]. On April 13, the Secretaries of State, War, and Navy, in a joint letter to the President, had recommended the creation of a Committee on Public Information in which the two functions of censorship and publicity could be joined. This suggestion followed rather closely many ideas that had been expressed previously to Grosvenor Clarkson, of the Council of National Defense, by leading newspapermen and publishers in response to Clarkson's request for their opinions and suggestions as to the kind of censorship this nation should have in event of war. Among those who had submitted ideas on the subject were, Mark Sullivan, then editor of *Collier's*, Arthur W. Page of Doubleday, Page & Company, Frederick Palmer, William Hard, and Roy Howard. Clarkson had placed all these replies in the hands of the Secretary of War, where he hoped they would help crystallize thought and action. When he had asked for those opinions, it was thought that the Council of National Defense might have charge of censorship.[155]

Wilson preferred to locate the censorship and publicity functions in a separate unit, headed by a man sympathetic to the needs of the press community but still aware of the necessity of information control during wartime. In his Executive Order, the President named George Creel to head the panel and included the Secretaries of State, Navy, and War as members. The group then set about its task, aptly described by Harold Lasswell in the following paragraph.

> During the war-period it came to be recognized that the mobilization of men and means was not sufficient; there must be a mobilization of opinion. Power over opinion, as over life and property, passed into official hands, because the danger from license was greater than the danger of abuse. Indeed, there is no question but that government management of opinion is an unescapable corollary of large-scale modern war. The only question is the degree to which the government should try to conduct its propaganda secretly, and the degree to which it should conduct it openly. As far as the home public is concerned, there is nothing to be gained by concealment, and there is a certain loss of prestige for

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[154] 40 Stat. 217–231.

[155] James R. Mock. *Censorship 1917*. Princeton: Princeton University Press, 1941, pp. 44–45.

all that is said, when secrecy is attempted. The carrying power of ideas is greatly increased when the authority of the government is added to them. With certain insignificant exceptions (the smuggling of propaganda material into adjacent enemy countries), nothing is lost, if all propaganda operations in neutral and allied countries are carried on openly. Otherwise, indeed, suspicion and distrust may exist when complete confidence and understanding are indispensable. The United States Committee on Public Information was undoubtedly correct in notifying neutral governments of what they wanted to do inside neutral borders.[156]

The actual operations and restrictions of the Committee were not deemed particularly offensive to the American civil liberties tradition.[157] Professor Rossiter wrote later:

> No censorship of the press was established during the World War, and all demands by the executive or members of Congress for anything smacking of prior censorship was defeated. Such control of the printed word as did exist was effected in several ways: through prosecutions under the Espionage and Sedition Acts, the closing (under Title XII of the Espionage Act) of the mails to printed matter violating the tenets established in those acts, federal censorship of cables and other means of communication to and from foreign countries, a rather complete discretionary censorship of the foreign language press in the United States (under section 19 of the Trading With the Enemy Act), and voluntary self-censorship by all newspapers and periodicals in the United States. This latter procedure was effected largely through the cooperation of the press with the famed Committee on Public Information. This powerful organization headed by George Creel was set up by an executive order of August 14, 1917 and was never recognized by Congress except by a statute of 1918 making an appropriation for its expenses. Its chief task was that of propaganda and publicity, but it also acted in conjunction with the other federal authorities concerned with the suppression of vital information and seditious utterances in such a way that it became a sort of extra-legal, overall directing body for the American press. The policies and standards which it advised were not flouted by the newspapers.[158]

With the end of hostilities in Europe, the Committee on Public Information began reducing its staff and limiting its activities. In 1919 Congress halted its operations and designated the Director of

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[156] Harold D. Lasswell. *Propaganda Technique in the World War*. New York: Peter Smith, 1938, pp. 14–15.

[157] On the operations of the Committee on Public Information see: George Creel. *How We Advertised America*. New York and London: Harper & Brothers, 1920; James R. Mock. *Censorship 1917*. Princeton: Princeton University Press, 1941; ———. and Cedric Larson. *Words That Won the War*. Princeton: Princeton University Press, 1939; Chairman of the Committee on Public Information. *Report of the Chairman of the Committee on Public Information, 1917–1919*. Washington: U.S. Government Printing Office, 1920.

[158] Rossiter, *op. cit.*, p. 253.

the Council on National Defense as the agent for settling the accounts of the panel.[159]

> On the whole, it cannot be said that the suspension of civil liberty was a very important emergency technique in the World War. Although blatant disloyalty and treason were judicially punished, much more severely and unnecessarily than in the Civil War, the average citizen and newspaper continued to speak and act pretty much as usual. The limitations on American liberty in World War I were ridiculously few.[160]

Return to Normalcy

On November 11, 1918, an armistice was signed which brought about a cessation of hostilities at 11 o'clock that morning. Peace negotiations were initiated on January 18, 1919.

> The return of peace was followed by an abandonment of practically all the new procedures and agencies which had been created to meet the demands of war, as well as by a reaction to executive power similar to that which followed the death of Lincoln. Most of those statutes and agencies which did not cease operation under the terms of their limited statutory duration were repealed or abolished by the Act of March 3, 1921 [41 Stat. 1359–1360]. In the summer of 1920 Congress passed a bill—343 to 3 in the House, unanimously in the Senate—repealing sixty wartime measures delegating powers to the President. Wilson killed it by a pocket veto, and thereby provided the Republican Party with a stock of campaign ammunition against "executive dictatorship." And yet the Republican candidate himself had stated during the war that "what the United States needs and what it must have if it is to win the war is a supreme dictator, with sole control of and sole responsibility for every phase of war activity. . . . The sooner it comes the better for all of us. . . . For supreme dictator at the present moment, there is but one possible man, the President of the United States." [161]

Postwar Unrest

In the period following the World War, America was a restless nation and this ferment occasionally spilled over into outbursts which endangered the public safety. Rioting broke out in Washington, D.C., in July 1919. The Secretary of War ordered troops out to quell the disturbance and Congress indicated an interest in declaring martial law but, by the end of the month, the situation had quieted and the troops were withdrawn. The President made no statement

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[159] 41 Stat. 327.

[160] Rossiter, *loc. cit.*, for a slightly different view see Zechariah Chafee, Jr. *Free Speech in the United States.* Cambridge: Harvard University Press, 1941, especially part I.

[161] Rossiter, *op. cit.*, pp. 253–254.

on the matter and apparently had no direct involvement in its settlement.[162] At this time, President Wilson was preoccupied with obtaining public support for the League of Nations idea and would shortly spend himself in this endeavor. Thus, because the Chief Executive was so engaged, it was the Secretary of War who, a few months after the Washington riots, dispatched Federal troops to Omaha, Nebr. to quell disturbances in that city.[163] And, when labor unrest occurred in Gary, Ind., a few weeks later, it was General Leonard Wood who ordered troops into the city.[164] Commenting on these actions, one authority has concluded:

> It is evident that the government's policies during the post-armistice period were a complete departure from customary practice. Even though most of the states had no organized protective force, and even though the President was ill, there would seem to be little excuse for the action of the War Department in completely abdicating its responsibilities. Instead of the governors' sending their requests to the President, appeals went to departmental commanding officers, and upon them, rather than upon the President, rested the decision concerning the necessity for troops. Notwithstanding the statutory requirement of a presidential proclamation, this matter also was left to the discretion of the commanding officers. About none of these matters did the War Department exercise any responsibility. The number and severity of restrictions upon the inhabitants of the disturbed area, the policies to be pursued respecting arrest and detention, the length of time the troops were to remain—all of these problems, apparently, were left to the decision of the individual commanders. Professor Corwin has aptly summarized this extraordinary situation by pointing out that the government's manner of handling disturbances immediately after the World War represents the "most complete, sustained, and altogether deliberate neglect of the formalities required by Article IV and the supplementary acts of Congress that has thus far occurred." [165]

President Harding, shortly after taking office, was confronted with requests for Federal troops to restore order in the coal fields of West Virginia. Initially he refused the appeals, saying he did not wish to have soldiers acting as a police force. Later he issued a proclamation commanding the insurgents in the area to disperse.[166] When violence continued, however, Harding dispatched troops but withheld declaring martial law. No opposition was met by the soldiers. The insurgents were, whenever and wherever possible, disarmed by the military authorities and prosecution of all cases was left to the civil courts. Within 3 months the troops were withdrawn.[167]

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[162] Rich, *op. cit.*, p. 153.
[163] See *Ibid.*, pp. 154–155.
[164] See *Ibid.*, pp. 156–157.
[165] *Ibid.*, p. 158.
[166] Richardson, *op. cit.*, pp. 8988–8989.
[167] *Ibid.*, pp. 167–158.

> In the summer of 1932, President Hoover faced one of the most trying problems imaginable, the presence in the nation's capital of thousands of needy veterans who were determined to force the immediate payment of the soldier's bonus. From every part of the country, by almost every conceivable means of transportation, veterans flocked to Washington to demand that Congress relieve, by a flood of cash, the economic paralysis which had settled over the United States. Reminiscent of the followers of Coxey 40 years before, the veterans seized trains in East St. Louis and Baltimore and took temporary possession of the Pennsylvania Railroad yard at Cleveland. Their presence in Washington was described as a "supreme escape gesture." [168]

Although the House passed a bill allocating the funds sought by the marchers, the President let it be known he would not approve the measure. The legislation failed in the Senate and Congress, shortly thereafter, adjourned. Before leaving Washington, however, the legislative branch, at the President's urging, provided $100,000 to transport the veterans home. Some took advantage of the opportunity to leave, but it was estimated that some 11,000 persons, located at 24 separate camps in Washington, remained behind during the summer of 1932. As a result of disturbances in and around Federal buildings undergoing demolition and a brief riot which followed one eviction scene where one veteran was killed and another fatally wounded, Federal troops, requested by the District Commissioners, were brought into the city. A tank platoon and a cavalry squadron, together with an infantry battalion, were called into action. About 500 troops were located in the District with another 1,000 held in reserve at nearby military installations. On the afternoon of July 28, these forces, under the command of General Douglas MacArthur advanced on the Pennsylvania Avenue encampment of the veterans.

> The cavalry led the way, followed by tanks, machine gunners, and infantry, all headed toward the "fort" of the B.E.F. [Bonus Expeditionary Force], a skeletonized building at Third Street. After a half hour's wait the troops donned gas masks and in a few minutes of tear gas bombing completely cleared the "fort." The troops were deployed in such a fashion as to drive the Marchers away from the business area and toward the encampment at Anacostia. This was accomplished without the troops' firing a shot although, apparently, there was a considerable display of swinging cavalry sabres and prodding bayonets.[169]

After a brief halt at the edge of the Anacostia encampment of the veterans, the troops moved into the shacktown and, throughout the night, completed its destruction. Without any shelter, penniless, and unwanted, the veterans fled the District reportedly "aghast at the failure of their confident prediction that no soldier would move into action against them." [170]

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[168] *Ibid.*, pp. 167–168.
[169] *Ibid.*, p. 172.
[170] New York *Times*, July 29, 1932, p. 1.

Although the President, through a report prepared by Attorney General William D. Mitchell, asserted that as many as a quarter of the Bonus Marchers were not actually veterans and many were known to have police records, the emergency action taken against the marchers earned the President much criticism. No legal action had been taken to remove the veterans from their positions within Federal buildings undergoing demolition. Instead, they were driven out by Federal troops who had been summoned without a Presidential Proclamation. The use of such armed might against veterans in shacks was also criticized, but this was less a legal question than a political one and it undoubtedly was in the minds of many voters 3 months later when they turned Herbert Hoover out of office.

Part II

1929–1945

President Calvin Coolidge sent his last state of the Union message to Congress a fortnight before Christmas, 1928. Perusing the prosperous, but not yet exhausted 1920's, the Chief Executive reported:

> No Congress of the United States ever assembled, on surveying the state of the Union, has met with a more pleasing prospect than that which appears at the present time. In the domestic field there is tranquility and contentment, harmonious relations between management and wage earner, freedom from industrial strife, and the highest record of years of prosperity. In the foreign field there is peace, the good will which comes from mutual understanding, and the knowledge that the problems which a short time ago appeared so ominous are yielding to the touch of manifest friendship. The great wealth created by our enterprise and industry, and saved by our economy, has had the widest distribution among our own people, and has gone out in a steady stream to serve the charity and the business of the world. The requirements of existence have passed beyond the standard of necessity into the region of luxury. Enlarging production is consumed by an increasing demand at home and an expanding commerce abroad. The country can regard the present with satisfaction and anticipate the future with optimism.[1]

One year later, the dreamworld envisioned by the President would vanish to be replaced by a nightmare.[2] Shortly after his inauguration, President Hoover, on April 15, 1929, called a special session of the 71st Congress to deal with farm relief and a limited revision of the tariff. The stock market evidenced nervousness. Prices continued to rise during the summer months. Individual issues did well and speculation in securities continued. But, as prices rose, so too did the volume of speculation. When the increases in the brokers' loans were criticized, there was sharp response against such "prophets of doom." Nevertheless, it was the twilight of an illusion which came to an abrupt end with the dawning of the twenty-fourth day of October 1929.

[1] Fred L. Israel, ed. The State of the Union Messages of the Presidents (Vol. III). New York: Chelsea House-Robert Hector Publishers, 1966, p. 2727.

[2] For a general account of the historical events and economic circumstances surrounding the depression, see John Kenneth Galbraith. *The Great Crash, 1929.* Boston: Houghton Mifflin Co., 1954.

That Thursday morning the selling came in a roaring and presently incredible deluge. How much of it was short selling will never be known, for no statistical record of the total was kept, but apparently the amount was not very great. Some of it, of course, was frightened selling, even alarm, that the slow gains of weeks and months could be swept away in a few precipitous hours. But even in the first hour on Thursday the greater part of the selling was surely forced selling. In a market so honeycombed with credit, the beautifully contrived system whereby the stock gambler whose margin was exhausted by a fall in market prices was automatically sold out, became a beautifully contrived system for wrecking the price structure. In poured the selling orders by hundreds and thousands; it seemed as if nobody wanted to buy; and as prices melted away, presently the brokers in the howling melee of the Stock Exchange were fighting to sell before it was too late. The great Panic was on.[3]

Depression

Economic crisis was not new to America. The country had experienced financial setbacks of nationwide proportion in 1857, 1875, and 1893. But history was an enemy in the setting of strategy to deal with the depression of 1929. The periods of economic difficulty of the past were but a tumble when compared to the plunge of the Great Depression. And this was the first problem experienced by those attempting to rectify the plight of the country: They did not recognize the ramifications of the situation or the extent of damage done and continuing to be done. Perhaps, too, the administrative machinery was not available or sufficiently developed to halt the downward economic spiral. It may have been that the President's philosophy of government was inadequate for meeting the exigency.[4] In the face of all efforts to halt its progress, the cancer of economic disaster continued to devastate American society mercilessly.

With succeeding generations, the signs of the Great Depression are less vivid in the public conscience.

The major phenomena of the Depression were mostly negative and did not assail the eye.

But if you knew where to look, some of them would begin to appear. First, the breadlines in the poorer districts. Second, those bleak settlements ironically known as "Hoovervilles" in the outskirts of the cities and on vacant lots—groups of makeshift shacks constructed out of packing boxes, scrap iron, anything that could be picked up free in a diligent combing of the city dumps: shacks in which men and sometimes whole families of evicted people were sleeping

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[3] Frederick Lewis Allen. *Since Yesterday: The Nineteen-Thirties in America.* New York and London: Harper & Brothers, 1940, pp. 23–24.

[4] For a chronicle of Hoover's efforts at halting the depression, see Gene Smith. *The Shattered Dream: Herbert Hoover and the Great Depression.* New York: William Morrow & Co., 1970.

on automobile seats carried from auto-graveyards, warming themselves before fires of rubbish in grease drums. Third, the homeless people sleeping in doorways or on park benches, and going the rounds of restaurants for left-over half-eaten biscuits, pie crusts, anything to keep the fires of life burning. Fourth, the vastly increased number of thumbers on the highways, and particularly of freight-car transients on the railroads: a huge army of drifters ever on the move, searching half-aimlessly for a place where there might be a job. According to Jonathan Norton Leonard, the Missouri Pacific Railroad in 1929 had "taken official cognizance" of 13,745 migrants; by 1931 the figure had already jumped to 186,028. It was estimated that by the beginning of 1933, the country over, there were a million of these transients on the move. Forty-five thousand had passed through El Paso in the space of six months; 1,500 were passing through Kansas City every day. Among them were large numbers of young boys, and girls disguised as boys. According to the Children's Bureau, there were 200,000 children thus drifting about the United States. So huge was the number of freight-car hoppers in the Southwest that in a number of places the railroad police simply had to give up trying to remove them from the trains: There were far too many of them.[5]

The depression demoralized the Nation: It destroyed individual dignity and self-respect, shattered family structure, and begged actions which civilized society had almost forgotten. In brief, it created a most desperate situation, ripe for exploitation by zealots, fanatics, or demagogues. It also created an emergency, which unlike exigencies of the past, dealt a kind of violence to the public that neither armed forces nor military weaponry could repel. It was a new type of crisis leading to a broad extension of Executive power.

In 1932 a malcontent and despairing electorate voted against Herbert Hoover. Although a dedicated public servant of demonstrated ability, Hoover was replaced by Franklin D. Roosevelt whom Walter Lippmann once characterized as "a pleasant man who, without any important qualifications for the office, would very much like to be President."[6]

Like Abraham Lincoln, Franklin D. Roosevelt assumed the duties of his office at a time of great crisis. He had obtained first-hand administrative experience during the Wilson administration as Assistant Secretary of the Navy.

> The administrative burdens which fell on the shoulders of the young Roosevelt during those years were extremely heavy, particularly during the period of World War I. According to all accounts, Secretary of the Navy, Josephus Daniels depended on Roosevelt very greatly for the supervision of most of the administrative work of the department. In accordance with their mutually agreed upon division of labor, Daniels concentrated almost exclusively upon the

[5] Allen, *op. cit.*, pp. 60–61.
[6] William E. Leuchtenburg. *Franklin D. Roosevelt and the New Deal.* New York: Harper & Row, 1963, p. 10.

political aspects of the department's affairs and upon the conduct of the major operations of the Navy, while delegating to Roosevelt the main responsibility for administration. Thus, Roosevelt's primary job was that of managing the routine, day-to-day conduct of the department's business. In performing this role, however, he managed to make his scope of activities quite extensive. While he gave first priority to those matters which the Secretary assigned to him, Roosevelt's interests in everything concerning the Navy were so far-reaching that it seems he tried to have something to do with almost all aspects of the department's operations. Secretary Daniels was to write many years later that he had often been asked what part of naval activities Roosevelt had been most interested in. The real answer, he said, lay in a remark Roosevelt used to make, "I get my fingers into about everything and there's no law against it." [7]

In 1921, Roosevelt was struck down by a severe attack of infantile paralysis. Although he was restricted from any involvement in public life, he continued to keep informed about politics and government. His concern with management and administration remained sufficiently fixed that by about 1922 or 1923 he was contemplating writing a book to be entitled "The Machinery of Government."

According to his plans, the volume was to be an analysis of the practical workings of the government, with major sections on "The Crying Need of a National Budget," "A Revision of Departmental Functions," and "Make Government Service Attractive." Unfortunately, he never completed more than a preface of a dozen pages. About the same time, he did manage to finish an article setting forth his views on these matters, and sent it to the editor of the *Saturday Evening Post*, George Horace Lorimer, for possible publication. Lorimer, however, declined to publish it.[8]

In the period between these writings and the campaign of 1928, Roosevelt also involved himself in active politics. Guided by his old friend Louis Howe, Roosevelt allied himself with Alfred E. Smith, making a dramatic nomination speech at the 1924 Democratic National Convention where he dubbed Smith "the Happy Warrior." [9] Four years later, Roosevelt again put Smith in nomination for the presidency, and was himself selected to run for the New York governorship which Smith was vacating. Smith lost but Roosevelt went to Albany. Here he made further preparation for his later national duties.

The Governorship of New York is probably the country's largest and most difficult executive job, next to the Presidency. This is due not only to the size and importance of

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[7] A. J. Wann. *The President as Chief Administrator: A Study of Franklin D. Roosevelt.* Washington: Public Affairs Press, 1968, p. 12.

[8] *Ibid*, p. 18.

[9] See Kenneth S. Davis. *FDR: The Beckoning of Destiny, 1882–1928.* New York: G. P. Putnam's Sons, 1971 and Alfred B. Rollins, Jr. *Roosevelt and Howe.* New York: Alfred A. Knopf, 1962.

the State, but also to the fact that the direction of the administrative machinery of the State government is vested in the Governor in New York to an extent not yet realized in most other States. This administrative supremacy of the Governor resulted principally from the governmental reorganization measures effected by Roosevelt's predecessor, Governor Alfred E. Smith, whereby practically all of the State's administrative system was centralized under the Governor's control. After trying for several years, Smith had finally succeeded in getting the legislature to consolidate the 187 agencies of the State government, many of which had been virtually independent, into only 18 administrative departments responsible to the Governor. Following this reorganization, there were only two state elective officials other than the Governor with administrative duties: the Attorney General and the Comptroller. Practically all other administrative personnel came under Roosevelt's supervision as Governor. The only significant exception was the New York educational system which operated under the direction of a twelve-member Board of Regents. Under the reorganization, appointment of the regents had been left in the hands of the State legislature on the somewhat surprising grounds that legislative appointment would keep them and the educational system out of partisan politics.[10]

As Governor, Roosevelt familiarized himself with large-scale administration, became adept at political decision-making, and experienced the effects of the depression upon a segment of the nation. He was thus equipped to meet the exigencies of the situation when inaugurated the thirty-second President of the United States in March 1933. In addition, he brought to the White House a coterie of intellectual experts who would assist the Chief Executive in those tasks which had to be performed in order that the nation might escape further economic agony.[11]

Emergency

In his inaugural address, the President was eloquent, telling the American public "that the only thing we have to fear is fear itself—nameless, unreasoning, unjustified terror which paralyzes needed efforts to convert retreat into advance." But, more important, to the question of leadership during crisis, he said:

> It is to be hoped that the normal balance of Executive and legislative authority may be wholly adequate to meet the unprecedented task before us. But it may be that an unprecedented demand and need for undelayed action may call for temporary departure from that normal balance of public procedure.
>
> I am prepared under my constitutional duty to recommend the measures that a stricken Nation in the midst of a

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[10] Wann, *op. cit.*, pp. 18–19.

[11] See Rexford G. Tugwell. *The Brains Trust*. New York: The Viking Press, 1968.

stricken world may require. These measures, or such other measures as the Congress may build out of its experience and wisdom, I shall seek, within my constitutional authority, to bring to speedy adoption.

But in the event that the Congress shall fail to take one of these two courses, and in the event that the national emergency is still critical, I shall not evade the clear course of duty that will then confront me. I shall ask the Congress for the one remaining instrument to meet the crisis—broad Executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe.[12]

Such was his view of the condition of the nation and the response which the President must appropriately make to the situation. The view was not original with Roosevelt. A year before, Justice Louis D. Brandeis had suggested that the depression constituted "an emergency more serious than war." [13] A year after the inaugural Roosevelt, in discussing the plight of the banks and accompanying economic chaos which confronted him when he assumed his office, would be made to offer this characterization of the emergency:

> . . . the full meaning of that word "emergency" related to far more than banks: it covered the whole economic and therefore the whole social structure of the country. It was an emergency that went to the roots of our agriculture, our commerce, and our industry; it was an emergency that had existed for a whole generation in its underlying causes and for three and one-half years in its visible effects. It could be cured only by a complete reorganization and a measured control of the economic structure. It could not be cured in a week, in a month, or a year. It called for a long series of new laws, new administrative agencies. It required separate measures affecting different subjects; but all of them component parts of a fairly definite broad plan. Most of all it called for readiness and understanding on the part of the people. We could never go back to the old order.[14]

The Hundred Days

The day after his inaugural, Roosevelt issued a proclamation calling a special session of Congress.[15] The meeting was to occur on March 9 for the purpose of enacting some type of brief program to deal with the bank crisis and the plight of the economy. It is not, however, altogether clear as to just what was planned for the extra

[12] *The Public Papers and Addresses of Franklin D. Roosevelt* (Vol. II). New York: Random House, 1938, p. 15.

[13] *New State Ice Co. v. Liebmann*, 285 U.S. 306 (1932).

[14] Franklin D. Roosevelt. *On Our Way*. New York: The John Day Company, 1934, pp. 35–36; although the President is credited with being the author of this volume, it is more likely the work of some of his assistants but the exact authorship is not known. It is utilized here as, at a minimum, at least reflecting the President's thinking on the matters it discusses.

[15] Roosevelt papers (Vol. II), p. 17.

session. A year after the event had transpired, this explanation was offered:

> A month before the Inauguration, I had felt that the beginning of the broad program could well be undertaken by a special session of the Congress to be called for some time in April. This would have given the new Administration opportunity to become familiar with the administrative machinery and to perfect the proposed legislative program. The banking crisis, however, changed all this; and it soon became clear that because Congress was already in session and understood so clearly the necessities of the case, it would be best for the Congress and the President to press forward with the more fundamental proposals of the "New Deal." [16]

In actual fact, it would appear that the President called the Congress into special session to sanction his emergency banking action and then continued the meeting for as long as it suited the mutual purposes of the two branches. When the proclamation for the gathering was issued on March 5, no purpose for the assembly was specifically indicated or even alluded to generally. Roosevelt knew what he wanted to do but had no legislative plans. "Before arriving in Washington, he had rough drafts of two presidential proclamations: one calling a special session of Congress; the other declaring a bank holiday and controlling the export of gold by invoking forgotten provisions of the wartime Trading With the Enemy Act." [17] The bank holiday proclamation was issued on March 6.[18] Between the evening after the inauguration and the opening of Congress, William Woodin, Roosevelt's Treasury Secretary, Ogden Mills, Hoover's Treasury Secretary, Raymond Moley, a Roosevelt assistant, and a few others wrote the emergency banking bill. When Congress convened, the House had no copies of the measure and had to rely upon the Speaker reading from a draft text. After thirty-eight minutes of debate, the House passed the bill. That evening the Senate followed suit.

> The emergency banking measure extended government assistance to private bankers to reopen their banks. The bill validated actions the President had already taken, gave him complete control over gold movements, penalized hoarding, authorized the issue of new Federal Reserve bank notes, and arranged for the reopening of banks with liquid assets and the reorganization of the rest.[19]

The President then issued a second proclamation under the authority of the legislation passed that day continuing the bank holiday and the terms and provisions of the March 6 proclamation.[20]

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[16] Roosevelt, *op. cit.*, pp. 36–37.

[17] Arthur M. Schlesinger, Jr. *The Coming of the New Deal.* Boston: Houghton Mifflin Co., 1959, p. 4; also see generally Frank Freidel. *Franklin D. Roosevelt: Launching the New Deal.*

[18] Roosevelt papers (Vol. II), pp. 24–26.

[19] Leuchtenburg, *op. cit.*, p. 43; at the time of Roosevelt's bank holiday order, several state governors had already taken such action. See *Ibid.*, pp. 38–39. The legislation, as enacted, appears at 48 Stat. 1.

[20] Roosevelt papers (Vol. II), p. 48.

Having transmitted his first message to Congress the day before and received virtually instant action,[21] the President sent a second request to Capitol Hill asking for the authority to cut $400 million from veterans' payments and another $100 million from the Federal civilian personnel payroll.[22] After a brief delay, during which opposition within the House Democratic caucus was beaten back,[23] the legislation was enacted.[24] In its final title, however, the President was required to submit all of his executive orders on the subject matter of the statute to Congress for review. In addition, the orders were not to become effective until 60 days after such transmission unless Congress provided an earlier effective date.[25]

Next, the President fulfilled an old plank in the Democratic Party platform and he asked Congress to modify the Volstead Act (41 Stat. 305).[26]

> Roosevelt's message touched off a raucous, rollicking debate. The drys, who had succeeded in killing a beer bill only a few weeks before, rehearsed the arguments that had been so convincing for more than a decade, but to no avail. Representative Bob Boylan of New York protested that this was "the same old sob story you have been telling us for the last 12 years. Why, I almost know your words verbatim—the distressed mother, the wayward son, the unruly daughter, the roadhouse, and so forth, and so forth. . . ." Impatient congressmen chanted: "Vote—vote—we want beer;" within a week both houses had passed the beer bill, and added wine for good measure, although congressmen protested that 3.2 wine was not "interesting." On March 22, Roosevelt signed the bill.[27]

Giving the Nation beer was hardly an emergency action. However, feeding the citizenry was and, with his message of March 16, Roosevelt set the wheels in motion for the subsidizing of farm staples.[28] In a very brief message and a very controversial bill the President called for a "new means to rescue agriculture." The House passed the bill very quickly but a multitude of farm commodity processing lobbyists stalled the measure in the Senate. Due largely to incidents of violence in the Corn Belt and a threatened national farmer's strike by the Farmer's Holiday Association, the legislation was enacted on May 12.[29] Dubbed the *Agricultural Adjustment Act*, a portion of the statute contained a declaration of emergency:"

[Emphasis supplied.]

> That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of

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[21] *Ibid.*, pp. 45–46.
[22] *Ibid.*, pp. 49–51.
[23] See Leuchtenburg, *op. cit.*, p. 45.
[24] 48 Stat. 8.
[25] 48 Stat. 16.
[26] Roosevelt papers (Vol. II), pp. 66–67.
[27] Leuchtenburg, *op. cit.*, p. 46; 48 Stat. 16.
[28] Roosevelt Papers (Vol. II), pp. 74–79.
[29] 48 Stat. 31.

farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment of title I of this Act.

Arthur Schlesinger, Jr., interprets this farm move:

> The broad design was clear: to help correct the imbalance between industry and agriculture by raising farm prices; and to raise farm prices through the curtailment of production, the regulation of marketing, and a variety of other devices. And there was general agreement on the mechanism: the establishment of a new agency within the Department of Agriculture, to be called the Agricultural Adjustment Administration. But the immense discretion conferred on the Executive under the AAA law left many crucial decisions for the future. Much would therefore depend on the men summoned to conduct what Mordecai Ezekiel pronounced "the greatest single experiment in economic planning under capitalist conditions ever attempted by a democracy in times of peace." [30]

The interesting aspect of the legislation lies in the fact that it created *a permanent agency designed to eradicate an emergency condition in the sphere of agriculture*. The reasoning, apparently, was that the permanent governmental unit would not only eliminate the emergency situation but, in the aftermath, would control those conditions promoting the crisis and forestall any such exigency from occurring again. The legislation also empowered the President, for purposes of meeting the financing provisions of the statute, to engage in broad monetary expansion and, by proclamation, to fix the weights of gold and silver dollars.[31] The United States had abandoned the gold standard on April 19.[32]

[Emphasis supplied.]

On March 21 the President called upon Congress to establish programs for unemployment relief.[33] "The first is the enrollment of workers now by the Federal Government for such public employment as can be quickly started and will not interfere with the demand for or the proper standards of normal employment." This was realized in the passage of an act of March 31.[34] Acting upon this statutory authority, the President issued E.O. 6101 on April 5, establishing the Civilian Conservation Corps.[35]

A second element in the President's unemployment relief message was "grants to States for relief work." This was realized in legislation

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[30] Schlesinger, *op. cit.*, pp. 45–46.
[31] 48 Stat. 52–54.
[32] This was casually announced at a presidential press conference; see Roosevelt papers (Vol. II), pp. 137–141.
[33] *Ibid.*, pp. 80–81.
[34] 48 Stat. 22–23.
[35] Roosevelt papers (Vol. II), pp. 107–108.

declaring "that the present economic depression has created a serious emergency, due to widespread unemployment and increasing inadequacy of State and local relief funds." [36] The statute created the Federal Emergency Relief Administration for dealing with the State grants.

The third consideration in the President's message was for "a broad public works labor-creating program." This was realized in the establishment of the Public Works Administration. Organized under E.O. 6174 of June 16, the PWA was authorized to employ persons in public works and construction projects.[37] These responsibilities were expanded and extended in E.O. 6252 of August 19, 1933,[38] issued pursuant to the authority of the National Industrial Recovery Act (48 Stat. 195).[39]

Next, the President encouraged action upon safeguarding the farms and homes of the public from being seized by creditors. On March 27 Roosevelt issued E.O. 6084 which consolidated existing farm credit administrative units.[40] Next came the Farm Credit Act of June 16 which provided some guarantee of assistance to those needing additional credit in farm financing.[41] "Within eighteen months, the Farm Credit Administration, a merger of government farm loan agencies under the energetic Henry Morgenthau, Jr., and his deputy, William Myers of Cornell, would refinance a fifth of all farm mortgages." [42]

> In June, Congress adopted the Home Owners' Loan Act amidst cries that the law bailed out real-estate interests rather than the homeowner. Without having to scale down the debt he was owed, the mortgagor could turn in defaulted mortgages for guaranteed government bonds. Yet, however much the act was tailored to the interests of financial institutions, it provided a lifesaver for thousands of Americans. When the Home Owners' Loan Corporation opened for business in Akron, a double column stretched for three blocks down Main Street by 7 in the morning; when the doors opened, 500 people pressed into the lobby. In the end, HOLC would help refinance one out of every five mortgaged urban private dwellings in America.[43]

It was also during the Hundred Days period of emergency legislation that the Roosevelt administration secured the establishment of two new independent regulatory agencies. The first sought was in the area of Federal supervision of investment securities in interstate commerce.[44] This request resulted in the Securities Act of 1933 which established the Securities and Exchange Commission.[45] Later Congress was to enact legislation creating the Federal Deposit Insurance Corporation.[46]

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[36] 48 Stat. 55; also see Roosevelt papers (Vol. II), pp. 183–184.
[37] Roosevelt papers (Vol. II), pp. 249–250.
[38] *Ibid.*, pp. 329–331.
[39] *Ibid.*, pp. 329–331.
[40] *Ibid.*, pp. 85–89.
[41] 48 Stat. 257.
[42] Leuchtenburg, *op. cit.*, p. 52.
[43] *Ibid.*, p. 53; 48 Stat. 128.
[44] Roosevelt papers (Vol. II), pp. 93–94.
[45] 48 Stat. 74.
[46] 48 Stat. 162.

Another agency sought by the President [47] and established by Congress at this time was the Tennessee Valley Authority.[48]

In closing days of the special session, Roosevelt called for emergency railroad legislation.[49] The resulting statute established a Federal Coordinator for Transportation and granted increased powers to the Interstate Commerce Commission.[50]

One of the last major actions of Congress during the Hundred Days was the enactment of the National Industrial Recovery Act.[51] The President's request for this legislation sought "the machinery necessary for a great cooperative movement throughout all industry in order to obtain wide reemployment, to shorten the working week, to pay a decent wage for the shorter week and to prevent unfair competition and disastrous overproduction" and also to give "the Executive full power to start a large program of direct employment." [52] This resulted in the establishment of the National Industrial Recovery Administration and the enlargement of the duties and responsibilities of the Public Works Administration.

On June 16, with the whirlwind Hundred Days about to close, the President sent the following message to the Speaker of the House of Representatives:

> Before the adjournment of the Special Session I want to convey to you and to the members of the House of Representatives an expression of my thanks for making possible, on the broad average, a more sincere and whole-hearted cooperation between the legislative and the executive branches of the United States Government than has been witnessed by the American people in many a long year.
>
> This spirit of teamwork has in most cases transcended party lines. It has taken cognizance of a crisis in the affairs of our Nation and of the world. It has grasped the need for a new approach to problems both old and new. It has proven that our form of government can rise to an emergency and can carry through a broad program in record time.[53]

Emergency Legislation

The measures enacted during the special session of the 73rd Congress (1st session) were a response to a condition of national emergency, a situation apparent to the President and to every Member of Congress. However, it was the Executive who formally recognized the exigency in his inaugural and announced his intention to act upon it, using all the authority his office might command. Thus, as with emergency situations of the past, *it was the President who assumed the*

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[47] Roosevelt papers (Vol. II), pp. 122–123.
[48] 48 Stat. 58; amended 49 Stat. 1075.
[49] Roosevelt papers (Vol. II), p. 153.
[50] 48 Stat. 211; "Title I of this Act was a temporary measure effective for one year only, unless extended by the President. It was extended by Presidential Proclamation, May 2, 1934, Proclamation No. 2082. It was further extended by Joint Resolution of Congress (Pub. Res. No. 27, 74th Congress; 49 Stat. 376), until June 17, 1936, when it ceased to be effective." Roosevelt papers (Vol. II), p. 154.
[51] 48 Stat. 195.
[52] Roosevelt papers (Vol. II), p. 202.
[53] *Ibid.*, pp. 256–257.

leadership in meeting the exigency and the legislature either sanctioned his actions in meeting the crisis or, at his request, granted new statutory powers.

[Emphasis supplied.]

The substance of the legislation enacted at this time was a recognition of the need for the exercise of emergency authority, not in a temporal sense but in terms of power. Taking cognizance of Justice Brandeis' words in 1932 that the depression constituted "an emergency more serious than war,"

> New Deal lawyers festooned early legislation with "emergency clauses." When the Court in January 1934, in a 5–4 decision written by Chief Justice Hughes, upheld a Minnesota moratorium on mortgages, it indicated it might be receptive to such a view of the depression. "While emergency does not create power," Hughes states, "emergency may furnish the occasion for the exercise of power [*Home Building & Loan Association* v. *Blaisdell et al.*, 290 U.S. 426 (1934)]." [54]

Thus, in the first legislation enacted during the special session, Congress declared "that a serious emergency exists and that it is imperatively necessary speedily to put into effect remedies of uniform national application." [55] A statute concerning direct loans by Federal reserve banks to state banks made reference to "the existing emergency in banking" but implied that the period of the exigency might be determined by the President, at least for the purposes of the act.[56] The opening title of the Agricultural Adjustment Act declared the presence of an "acute economic emergency" which the statute was designed to meet. However, the legislation left the discontinuance of the act with the Executive, saying: "This title shall cease to be in effect whenever the President finds and proclaims that the national economic emergency in relation to agriculture has been ended." [57] The Emergency Farm Mortgage Act of 1933 left the activation of its provisions entirely within the discretion of the Chief Executive.[58] Title II of the Securities Act, named the Corporation of Foreign Bondholders Act, did not take effect, "until the President finds that its taking effect is in the public interest and by proclamation so declares." [59]

Certain of the statutes enacted during this period provided specific emergency powers to the President or broad general authority to correct matters of crisis. The Emergency Banking Act recognized the Executive's prerogative to declare a condition of national emergency and, "under such rules and regulations as he may prescribe," regulate banking and related financial matters effecting the economy.[60] This statute also continued the Chief Executive's authority to suspend the operations of member banks of the Federal Reserve System.[61] Under

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[54] Leuchtenburg, *op. cit.*, p. 143.
[55] 48 Stat. 1.
[56] 48 Stat. 20 § 404.
[57] 48 Stat. 39 § 13.
[58] 48 Stat. 51 § 43.
[59] 48 Stat. 95 § 211.
[60] 48 Stat. 1 § 2(b).
[61] 48 Stat. 2 § 4.

the authority of the relief act of March 31, the President was granted broad power "to provide for employing citizens of the United States who are unemployed, in the construction, maintenance and carrying on of works of a public nature in connection with the forestation of lands belonging to the United States or to the several States." Authority was also granted to house, care for, and compensate such individuals as might be recruited to carry out programs established pursuant to the act.[62] As already noted, discretionary power was granted the President in the Emergency Farm Mortgage Act with regard to its provisions.[63] Leasing authority was granted to the Chief Executive with regard to certain specified TVA properties.[64] This same legislation also recognized the authority of Congress to declare a national emergency, as well as war, and, at such time, "to take possession of all or any part of the property described or referred to in this Act for the purpose of manufacturing explosives or for other war purposes." [65]

After declaring a condition of national emergency with regard to unemployment and the disorganization of industry" in Title I of the National Industrial Recovery Act,[66] Congress granted the President authority to establish administrative agencies to carry out the provisions of the act and granted permission for the delegation of "any of his functions and powers under this title." [67]

But these grants of power were not long in duration. On this point and the Hundred Days legislative experience, Clinton Rossiter has commented:

> One of the leading characteristics of the Civil War and World War governments was the fact that the limitations on the use of emergency powers remained the normal limitations of the American constitutional and political system. Moreover, these limitations were weakened, for the Supreme Court refused during and after both crises to pass unfavorably upon any of the extraordinary legislative or executive acts—with the single and comparatively harmless exception of the Milligan Case in 1866. This was not true of America's third emergency government. The limitations on executive and legislative power in the year 1933 itself remained the usual political and constitutional responsibility of the two branches; but shortly thereafter the Supreme Court, asked to interpret parts of this legislation which were infinitely more controversial than the popular war acts of the other two crisis governments, was not loathe to inform the government that some of the New Deal crisis statutes had passed beyond the bounds of two great American constitutional principles: federalism and the separation of powers. Specifically, the AAA was voided on the first of these counts, the NRA on both of them [*U.S.* v. *Butler*, 297 U.S. 1 (1936); *Schechter Poultry Co.* v. *U.S.*, 295 U.S. 495 (1935)]. Even though all this happened two years or

[62] 48 Stat. 22–23.
[63] 48 Stat. 51 § 43.
[64] 48 Stat. 60 § 2(n).
[65] 48 Stat. 68 § 20.
[66] 48 Stat. 195 § 1.
[67] 48 Stat. 195 § 2.

more after the passage of these statutes, they were still in operation at the time; thus the decisions did work a sizable if belated check on the government's crisis activity. Just how effective a limitation on crisis action this makes of the Court is hard to say. In light of the recent war, the Court today would seem to be a fairly harmless observer of the *emergency* activities of the President and Congress. It is highly unlikely that the separation of powers and the Tenth Amendment will be called upon again to hamstring the efforts of the government to deal resolutely with a serious national emergency.[68]

[Emphasis supplied.]

Emergency Administration

Having established a number of new programs, either through statutory authorizations or by grants of discretionary power, the President was faced with the task of purposefully administrating and coordinating these mandates. "Organizationally, in dealing with the depression, it was Roosevelt's general policy to assign new, emergency functions to newly created agencies, rather than to already existing departments." [69] The President had a variety of reasons for pursuing this course: he thought the departments were burdened with duties which preoccupied them in meeting the current crisis; he believed a new agency with a single task in attacking an exigency would be dedicated and persistent in its mission; he felt that such new agencies with emergency duties as might be created to deal with the depression could, when the crisis passed, be easily eradicated without disturbing the regular Executive branch departments; he thought talented and expert personnel might be attracted to the specialized new emergency units; and there was also a desire on the part of the President to avoid the established Civil Service channels in staffing for the emergency period and to utilize political appointees.[70]

As a first step toward establishing a coordinating instrument, Roosevelt, acting under the authority of the Federal Emergency Relief Act (48 Stat. 22) and the National Industrial Recovery Act (48 Stat. 195), issued E.O. 6202A on July 11, 1933, establishing a temporary Executive Council.[71] As an explanation for the creation of this panel the following statement was offered in a chronology of the unit's activities:

> The wide diffusion of emergency activities undertaken by the Federal Government immediately following the first inauguration of Franklin D. Roosevelt as President, coupled with the imperative requirement for quick action, necessitated the forming of a compact group of administrative officials of both permanent and temporary units who could advise the Chief Executive with respect to various courses

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[68] Clinton Rossiter. *Constitutional Dictatorship: Crisis Government in the Modern Democracies.* Princeton: Princeton University Press, 1948, p. 264.

[69] Wann, *op. cit.*, p. 26; also see Robert E. Sherwood. *Roosevelt and Hopkins.* New York: Harper and Brothers, 1948, pp. 31–32.

[70] Wann, *op. cit.*, pp. 26–27.

[71] Roosevelt papers (Vol. II, pp. 279–280).

of procedure, and, at the same time, be in a position to follow them through with a minimum of delay or confusion.[72]

Composed of twenty-four members and meeting every Tuesday afternoon with Roosevelt presiding, the Council soon "proved too cumbersome for effective discussion." [73]

Actually, the Executive Council functioned more or less as an enlarged Cabinet, with Roosevelt conducting the Council meetings in much the same way as he did those of the regular Cabinet. Although he may have originally intended that the Executive Council would serve as a broad coordinating agency, it did not function effectively in that way. The Council was not provided with a staff, nor did it have any formal power to coordinate the work of the departments and agencies other than that exercised by Roosevelt himself. The only coordinating function served by the Council was that of enabling the heads of the regular departments to meet once a week with the heads of the new emergency agencies and the President to exchange ideas and information on problems that were interdepartmental in scope.

In itself, this was undoubtedly of considerable value in the early days of the New Deal, but neither the Council nor the Executive Secretary served in an important way to make decisions of a coordinative nature for the President. Such decisions were made by Roosevelt himself, with the Executive Council serving only as a source of information and advice. [Frank C.] Walker's most valuable role continued to be that of an informal "trouble shooter" who served the President behind-the-scenes in trying to iron out difficulties and smooth ruffled feelings, rather than in his formal role as Executive Secretary of the Executive Council. Except insofar as it may have been valuable as a device for exchanging information and for enabling the heads of the departments and agencies to get to know each other better, the Council did not serve as an effective mechanism for coordination.[74]

Recognizing the deficiencies of the Executive Council, the President established another coordinating organization with a more limited membership. Relying upon the same statutory authority utilized for creating the Executive Council, together with the provisions of the Agricultural Adjustment Act (48 Stat. 31), Roosevelt issued E.O. 6433A on November 17, 1933 setting up the National Emergency Council.[75]

In establishing the National Emergency Council Roosevelt had some significant political motives as well. The creation

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[72] The U.S. National Emergency Council. The National Emergency Council: A Chronological Review of Its Activities from November 17, 1933 Through December 31, 1937. Washington: The U.S. National Emergency Council, 1938, p. 1; Cf. Roosevelt, *op. cit.*, p. 141.

[73] Lester G. Seligman and Elmer E. Cornwell, Jr., eds. *New Deal Mosaic: Roosevelt Confers with his National Emergency Council, 1933–1936*. Eugene: Univer sity of Oregon Press, 1965, p. xv.

[74] Wann, *op. cit.*, p. 51.

[75] Roosevelt papers (Vol. II), pp. 487–489.

> of the Council, with its attendant publicity, dramatized to the public that efforts were being made to improve the emergency programs. It was designed to serve as something of a "shot in the arm" to both those in the administration carrying out the emergency programs and to the general public in encouraging increased support of the New Deal's efforts.[76]

In addition to its responsibilities as a presidential advisory panel and program clearing house at the national level, the National Emergency Council had directors "in each of the States to establish closer coordination in the operations of the different Federal agencies working within the State, and also to coordinate Federal activities with those being undertaken by the states themselves in such fields as relief and public works." [77]

> In addition, the Council was assigned the task of serving as a centralized agency to disseminate information and to provide guidance to the people of the country about how to make use of the various recovery and relief agencies. By making a single field organization under the National Emergency Council responsible for reporting and disseminating information, rather than allowing each agency to continue to do these things for itself, Roosevelt stated that he was trying to "wipe out all needless and costly duplication of personnel" and "make for a more effective administration." In performing these functions, the Council did a competent job which contributed to the overall effectiveness of the emergency programs. In the area of providing coordination between the heads of the various agencies in Washington, however, the Council proved rather early not to be a particularly valuable device. The Council itself was undoubtedly too large to act effectively as a coordinative agency, and the Executive Director was not given sufficient authority by Roosevelt to act for him in making final decisions Along with problems of major importance, many petty difficulties were raised at the meetings, and a lot of time was undoubtedly wasted by the busy men who attended.[78]

Recognizing the limitations of the National Emergency Council in the coordination of the activities of the administration in the areas of relief and unemployment, the President, on June 30, 1934, issued E.O. 6770 establishing the Industrial Emergency Committee as a subunit of the Council.[79] This panel functioned until the fall of the year when Roosevelt, through E.O. 6889A of October 31, 1934, consolidated the Executive Council, the National Emergency Council and the Industrial Emergency Committee.[80] By late 1935 and early 1936 the reconstituted National Emergency Council was in steady decline with very infrequent meetings occurring. On September 16, 1937,

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[76] Wann, *op. cit.*, pp. 52–53.
[77] *Ibid.*, p. 56.
[78] *Ibid.*, for a collection of transcripts of business transacted by the Council see Seligman and Cornwell, *op. cit.*, note 73.
[79] Roosevelt papers (Vol. III), pp. 333–334.
[80] *Ibid.*, pp. 441–444.

Roosevelt issued E.O. 7709A abolishing the panel.[81] The administrative staff of the Council continued to serve the President until 1939 when the Executive Office of the President was established and many of these personnel were absorbed into that new presidential administrative entity. On his experience with the Council, Roosevelt said:

> The whole NEC was a wonderful essay in democracy. It was exactly like a New England town meeting. It gave everybody a chance to blow off. I learned many things there—many things that those who were reporting never suspected that I learned and some that they wouldn't have liked me to know anything about. They also learned a lot about each other. At the beginning it was a wonderful device for keeping up the morale of the whole team, as long as instant relief and recovery were the sole goals.
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> But like a New England town meeting, it was too big to do much actual work. It had to be split up into committees and subcommittees until in the end I couldn't take it anymore because I found myself making stump speeches to the council instead of listening to its members. The time came when I could get most out of it by just talking to [NEC Executive Director] Frank Walker alone, especially after the organization of the whole relief setup in the spring of '35.[82]

In brief, the experience of these coordinating administrative councils constitutes an important expression of democratic practice in the course of the Executive's exercise of emergency power. Unlike Lincoln, Roosevelt utilized his emergency authority after various consultations and deliberations with those participating in these forums. To be sure, these panels were composed of a democratic elite and, undoubtedly, their collective influence upon the President's final decision in a variety of matters was probably minor. But they are important bodies in emergency government if for no other reason than they demonstrate a willingness on the part of the Chief Executive to consider opinions and views at a time when his singular authority for action was assured.

In his exercise of administrative power during a period of crisis, President Roosevelt also demonstrated an ability to utilize existing agencies to meet emergency conditions. A case in point was the Reconstruction Finance Corporation which was created in 1932 (47 Stat. 5) and ultimately abolished in 1953 (67 Stat. 230).

> Under Hoover, the RFC had been an instrument of the established businessmen, particularly of the eastern *rentiers*. Roosevelt put the agency under a Texas banker, Jesse Jones, who represented the southwestern boomers' desire for expansion, and who spoke for businessmen less interested in protecting existing holdings than in fresh ventures. Jones converted the RFC into a vastly different organization from what it had been under Hoover. Instead of lending money to banks, and thereby increasing their debt, as had been done in the Hoover regime, Jones sought to enlarge their capital. By buying bank preferred stock, he bolstered

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[81] *Ibid.* (Vol. VI), p. 356.

[82] Louis Brownlow. *A Passion for Anonymity: The Autobiography of Louis Brownlow, Second Half*. Chicago: University of Chicago Press, 1958, p. 321.

> the capital structure of banks, created a base for credit expansion, and made it possible for the deposit insurance system to function. Under Jones, the Corporation became not only the nation's largest bank but its biggest single investor. Eventually, Jones ruled an empire of RFC subsidiaries: federal mortgage agencies; the Commodity Credit Corporation; the Electric Home and Farm Authority, which sparked the purchase of electric appliances; and the Export-Import Bank, which spurred foreign trade.[83]

The President also continued to experiment with new agencies as well as the New Deal ran its course. For example, out of the Federal Emergency Relief Act (48 Stat. 55) of the Hundred Days came the Federal Civil Works Administration, established by E.O. 6420B of November 9, 1933.[84] At its peak of operation, the agency employed 4,230,000 persons.[85]

> In its brief span the CWA built or improved some 500,000 miles of roads, 40,000 schools, over 3,500 playgrounds and athletic fields, and 1,000 airports. Workmen renovated Montana's State Capitol Building and helped erect Pittsburgh's Cathedral of Learning. The CWA employed fifty thousand teachers to keep rural schools open and to teach adult education classes in the cities. It provided enough money to put back to work every teacher on Boston's unemployed rolls. It hired three thousand artists and writers, and used a variety of other special skills. Opera singers toured the Ozarks; prehistoric mounds were excavated for the Smithsonian Institution; ninety-four Indians restocked the Kodiak Islands with snowshoe rabbits. The CWA pumped a billion dollars of purchasing power into the sagging economy.[86]

In time, both the instrument and the tactics for dealing with unemployment relief had to be changed. So the CWA was allowed to expire in 1935 and was replaced by the Works Progress Administration, created by E.O. 7034 on May 6, 1935.[87] The functions of the WPA were subsequently transferred to the Federal Works Agency by Reorganization Plan I which became effective July 1, 1939.[88] Ultimately, the functions of the FWA were given over to the General Services Administration on June 30, 1949 (63 Stat. 380).

The administrative devices adopted during the New Deal exhibit a experimental and restless nature which derives from the regime's desire to utilize virtually any instrumentality to alleviate the crisis at hand. As the conditions of the emergency changed, so too did the administrative response of the Executive to the exigency. Efforts were continuously made to coordinate and concert the administration's activities through the councils discussed earlier or through the Executive Office of the President and its units after 1939. The success of

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[83] Leuchtenburg, *op. cit.*, pp. 71–72.
[84] Roosevelt papers (Vol. II), pp. 456–457.
[85] Leuchtenburg, *op. cit.*, p. 121.
[86] *Ibid.*, pp. 121–122.
[87] Roosevelt papers (Vol. IV), pp. 163–167.
[88] *Ibid.* (Vol. VIII), pp. 245–271; also see *Ibid.* (Vol. XI), pp. 505–506.

this experiment rested upon the willingness of Congress to grant the President discretionary power during the period of the emergency and Roosevelt's exercise of that authority through what were often bold actions and fluctuating administrative practices. To the extent that the conditions of the depression were beaten back in the period prior to world war in 1940, the credit for the government's success must be attributed to these two factors.

International Emergency

During the late 1930's, the world saw the rise of totalitarian regimes in Europe and Asia. Adolf Hitler came to power in Germany in 1933 and in 6 years led that nation into rearmament, a belief in racial supremacy, dictatorial government, and a territorial expansion which included portions of Czechoslovakia, all of Austria, and threatened the Polish corridor and the Saar region. Japan, in the meantime, had colonized Manchuria (renamed Manchukuo) and Korea and continued to pressure the Chinese for more territory while troops spilled southward into the Nanyang peninsula. While these developments occurred, the United States espoused and continued to maintain an official policy of strict neutrality with regard to the diplomatic entanglements and overseas hostilities. However, this position of international neutrality did not mean that the United States would not prepare for its own defense or fail to take steps to maintain its own domestic well-being during the period of crisis. Thus, on September 8, 1939, President Roosevelt issued a proclamation of limited national emergency.[89]

The President was careful to stress in a press conference that the emergency which he had recognized was a limited one, that it was intended to permit the invocation of only a few statutes which would allow the necessary protective arrangements to be made against a spreading of the crisis. Otherwise, the vast collection of statutes at his disposal would not be used. The emergency was therefore "limited" in the sense that in the opinion of the President it warranted the use of only a few of the many available statutory powers. This description of the emergency originated with the President. There is no basis for it in the statutes. They pertain usually to a "national emergency" without specifying its intensity, whether "limited" or "unlimited." A recognition of an emergency by the President called all of these statutes into play. Mr. Roosevelt was, therefore, entirely free to select the statutes which might be comprehended by his notice of a "limited emergency." Whatever restraint might affect his choice would be self-imposed. His refinement of emergencies appears to have been

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[89] Roosevelt papers (Vol. VIII), pp. 488–489; such a proclamation had apparently been contemplated in late 1937 at the time Japanese aircraft bombed the American gunboat *Panay* on the Yangtze River in China. The desire was to seize Japanese assets and investments in the United States and to extract payment for damages. The idea for a national emergency proclamation on the matter was outlined by Herman Oliphant, a Treasury Department legal expert and close personal assistant to Treasury Secretary Henry Morgenthau who was also involved in developing the plan. Although a memorandum on the scheme reached President Roosevelt's desk, he did not implement it and there is no evidence to indicate it was consulted on the occasion of preparing the 1939 proclamation. Oliphant died in January, 1939. See John Morton Blum. *Roosevelt and Morgenthau.* Boston: Houghton Mifflin Company, 1970, pp. 225–230.

prompted by a concern with public relations, rather than with any fine legal distinctions. Mr. Roosevelt felt that ". . . if one were to issue a Proclamation of National Emergency without any limitation, scare headlines might be justified, because, under that, the Executive could do all kinds of things." All actions of the government in the emergency which had been recognized would be done, the President declared in his press conference, on a peace-time basis. Neither the defense of the country nor its internal economy would be placed upon a war footing.[90]

Slowly the steps were taken administratively to prepare the country for the threatening international crisis. In May, 1940, the Council of National Defense was revived, its Advisory Commission being the instrument of primary importance to the President as he could appoint the members without congressional clearance. The Council itself never met outside of the Cabinet. "The individual members of the Commission had been active in preparing plans for what might be required to meet the possible needs of the future, and had taken initial steps in carrying some of their plans into operations." [91]

The next instrumentality created to direct and coordinate administrative activities related to the pending international exigencies was the Office of Emergency Management. In establishing the component units of the Executive Office of the President in 1939, E.O. 8248 of September 8 made reference to such a body saying "in the event of a national emergency, or threat of a national emergency, such office for emergency management as the President shall determine" was authorized to be created.[92] The Office for Emergency Management was established by an administrative order on May 25, 1940 and its functions were specified in E.O. 8629 of January 7, 1941 and an administrative order of the same date.[93]

> Most, but not all, of the agencies concerned with the defense program became a part of OEM. The organization of the government in crisis proceeded upon the theory that the regular departments and agencies should dispose of crisis matters insofar as they were capable. Otherwise, the matters should be handled by new agencies created especially for the crisis. The new agencies might be a part of the Executive Office of the President or they might be independent of it. The allocation of the new agencies was determined by the belief of Mr. Roosevelt that direct operating duties should be brought into the Executive Office under either of two circumstances. First, when the attitude of an existing agency toward defense problems is hostile and a change in personnel of the agency cannot otherwise be justified. Second, when the activity is peculiarly related to the crisis and is of

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[90] Louis W. Koenig. *The Presidency and the Crisis:* Powers of the Office from the Invasion of Poland to Pearl Harbor. New York: King's Crown Press, 1944, p. 13; for a list of statutory powers granted under a proclamation of national emergency at this time see Frank Murphy. *Executive Powers Under National Emergency.* Washington: U.S. Gov't. Print. Off., 1939. (76th Congress, 2d session Senate document No. 133).

[91] Wann, *op. cit.*, p. 140.

[92] Roosevelt papers (Vol. VIII), p. 491.

[93] *Ibid.* (Vol. IX), pp. 689–694.

such importance that it must be brought under the President's control.[94]

The Office for Emergency Management served as the umbrella unit within the Executive Office for a number of subordinate emergency management bodies.[95] Eventually its functions were assumed by the Office of War Mobilization created by E.O. 9347 of May 27, 1943. This unit was transferred by E.O. 9488 of October 3, 1944, to the statutorily established Office of War Mobilization and Reconversion (58 Stat. 785).[96]

More questionable during this period of professed neutrality was the President's action with regard to transferring fifty retired American destroyers to Great Britain in exchange for American defense bases in British territories located in the Caribbean. In his message to Congress informing the legislature of his agreement, the President called the arrangement "the most important action in the reinforcement of our national defense that has been taken since the Louisiana Purchase." [97]

> The parallel to Jefferson and Louisiana was less than perfect. While the response to the disclosure of the transfer was generally enthusiastic—even the Chicago *Tribune* approved it—many were disturbed by the method Roosevelt had chosen. Critics charged that he had flouted the authority of Congress, whose rights in the matter he had previously conceded; that he had acted without taking the people into his confidence; and that he had transgressed international law. At a time when Britain faced annihilation, Roosevelt and his supporters had little patience with animadversions based on Edwardian conventions of international law. To his admirers, the transaction was a magnificent stroke of daring statesmanship. They rejoiced in the abandonment of traditional neutrality and the fusion of British and American interests. Henceforth, as Churchill told the Commons, the United States and Great Britain would be "somewhat mixed up together." [98]

Some 8 months after the announcement of this agreement with the British, the President proclaimed a condition of unlimited national emergency and thereby removed any self-imposed restrictions upon his authority to deal with the mounting international exigency.[99] And what might the Chief Executive do under this proclamation?

> [H]e might increase the strength of the armed forces and order reserves and retired officers to active duty; he might regulate transactions in foreign exchange, transactions by Federal Reserve banks, and waive or modify monthly apportionment of appropriations; he might take over power houses, dams, conduits and reservoirs for the manufacture

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[94] Koenig, *op. cit.*, p. 82.
[95] Roosevelt papers (Vol. IX), pp. 697–702.
[96] See Herman M. Somers. *Presidential Agency: OWMR, The Office of War Mobilization and Reconversion*. Cambridge: Harvard University Press, 1950.
[97] See Roosevelt papers (Vol. IX), pp. 391–405.
[98] Leuchtenburg, *op. cit.*, pp. 305–306.
[99] See Roosevelt papers (Vol. X), pp. 181–195.

of munitions or any purpose involving the safety of the United States; he might suspend the eight-hour day for persons engaged in work covered by government contracts; he might suspend or amend regulations governing radio and wire communications; he might direct preferences and priorities in transportation; he might requisition any American vessel, terminate charters of Maritime Commission vessels, suspend provisions relating to the citizenship of officers or crews, and regulate the movement of all vessels in territorial waters.[100]

Under the color of his emergency proclamations, Roosevelt took a number of actions which the conditions of the international crisis dictated.

> A sudden strike in the plant of North American Aviation, Incorporated, at Los Angeles, on June 5, 1941, precipitated President Franklin D. Roosevelt's first use of the regular troops. During his previous administrations, the President had disapproved every proposal to call out the troops. In this instance, however, because of his belief in the urgent necessity for the continued production of fighting planes, he showed no hesitancy in making use of the armed forces.[101]

Under E.O. 8773 of June 9, 1941, the President ordered the Secretary of War to take control of the factory. Troops dispatched to the scene assisted local police in maintaining order around the area of the plant, the residential area of workers employed at the facility, and in aiding willing employees to enter and depart from the factory.

> The troops experienced little difficulty with the striking workers. At different times men were placed under military arrest and escorted from the strike area, but no one was held for any length of time. Picketing was forbidden within a mile of the plant, the sale of liquor was banned within the same area, and only residents or workers bound for the plant were allowed passage into the strike zone. Patrols were set up inside as well as around the plant and a squad of soldiers remained on duty at either side of the main gate. With order completely restored and production resumed, the troops were withdrawn from the plant. Two thousand soldiers left Inglewood on June 17 and the remainder, about 1,500, who were bivouacked 1,000 yards from the plant, returned to their home stations July 3. On July 2, the President signed an order terminating the government's possession of the plant [E.O. 8814].[102]

On June 21, the President asked Congress for legislation authorizing the requisition of property for national defense purposes.[103] Such a measure would strengthen the Executive's role in dealing with disputes

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[100] Koenig, *op. cit.*, pp. 12–13; for specific statutory grants of emergency authority see *Ibid.*, pp. 123–153 and Murphy, *op. cit.*, note 90.

[101] Bennett M. Rich. *The Presidents and Civil Disorder.* Washington: The Brookings Institution, 1941, p. 177.

[102] *Ibid.*, p. 183.

[103] Roosevelt papers (Vol. X), pp. 230–232.

such as that experienced at North American Aviation. Such a statute (55 Stat. 742) was signed into law on October 16. However, before the year was out, two more seizures of private industries were necessitated, one occurring—

> when the President directed the Secretary of the Navy to occupy and operate the plant of the Federal Shipbuilding and Drydock Company [E.O. 8868, August 23, 1941]. The final instance of a seizure occurring during the crisis was the directive by the President to the Secretary of War to take possession of and operate the Bendix, New Jersey, plants of Air Associates, Incorporated, and to produce the military airplane parts and equipment called for by the company's contracts [E.O. 8928, October 30, 1941]. The seizure followed upon a strike.[104]

The President negotiated a series of defense agreements whereby American troops were either stationed in foreign territory or were utilized to replace the troops of nations at war in nonbelligerent tasks so that these countries might commit their own military personnel to combat. Such was the case with Canada when, on August 18, 1940, it was announced that the United States Navy, in effect, would police the Canadian and American coasts, providing mutual defense to both borders. Canadian seamen would, of course, be released to aid the British Navy.[105]

In April, 1941, an agreement was reached with the Danish minister to the United States whereby Greenland would be protected by American military and naval personnel.

> Mr. Roosevelt was unconfiding to Congress on the Greenland situation. He did not favor Congress with a communication on the subject, however important it was in the strategy of defense for the Western Hemisphere. Congress could become informed only by the diligence of its members in reading the newspapers, or by the skill of its committees in questioning executive officers. Those members who enjoyed the confidence of knowledgeable persons in the administration might through them gain further insights. But there was no formal contact between Mr. Roosevelt and Congress. It was kept completely in the dark, even after the agreement had been completed and whatever inhibitions of secrecy there may once have been were now removed.[106]

In November, 1941, an agreement was reached with the Netherlands government allowing American troops to occupy Dutch Guiana. "The President did not communicate with Congress concerning Dutch Guiana either before or after the occupation. The only illumination given by the President was contained in a White House Statement."[107]

> The occupation of Iceland follows much the same pattern. It was facilitated by an agreement with the Danish minister at Washington which subsequently was disclaimed by the

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[104] Koenig, *op. cit.*, p. 78.
[105] *Ibid.*, p. 26; Roosevelt papers (Vol. IX), p. 331.
[106] Koenig, *op. cit.*, pp. 26–27.
[107] *Ibid.*, pp. 46–47; Roosevelt papers (Vol. X), pp. 495–496.

government in Denmark. The President acted without first consulting Congress. He did, however, make a report to Congress after the occupation had been completed. His action had been of tremendous importance. By sending American troops to the territory of a nation at war with Germany, the President had taken steps which were tantamount to placing the United States itself at war. Our troops were occupying territory which Germany might be expected to claim by force of arms.[108]

During a cruise to the Panama Canal in early 1940, Roosevelt dropped anchor at ports in Columbia, Panama, and Costa Rica, secured agreements from each country regarding American use of their airfields should defense of the Canal become necessary, and by the close of the year concluded arrangements for the leasing of naval air bases in Brazil and Chile.[109]

> But the most spectacular agreement was the Atlantic Charter. It originated from a Conference which was staged with a dramatic suddenness and secrecy that rivaled the traditional showmanship of the dictators. Those qualities give the Atlantic Conference its most lasting impressions, for definite commitment of the United States to any obligation was unapparent. Our government may have pledged itself to the final destruction of the "Nazi tyranny." But it was bound to no immediate and specific action. The Atlantic Charter was a statement of ideals unaccompanied by disclosure of a ready plan for their attainment. However great the fanfare inspired by the Charter, the energies of the Conferees were devoted largely to current matters of policy. The presence at the Conference of high ranking officers of the armed services aroused the suspicion that undisclosed military agreements had been concluded. The agreements were conjectured as more ambitious than the matter of the operation of the Lend-Lease Act which was reported to have been discussed by the military entourage of the President and the Prime Minister. It has been revealed that Britain and the United States agreed upon two courses of action of immediate effect. They would undertake parallel measures to impress upon Japan that her continued aggressions in the Pacific would not be accepted idly. In the interests of strategy it was also decided that the United States would resume conversations with Japan, if she so requested, to explore every possibility for a peaceful adjustment in the Far East. An element of continuity was given to the work of the Conference by the interest of the conferees in a nation which was unrepresented. In the concluding moments of their meeting, Mr. Roosevelt and Mr. Churchill addressed a joint message to Stalin proposing that he receive "high representatives" of the United States and Great Britain to discuss "long-term" plans for the defeat of the Axis.[110]

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[108] Koenig, *op. cit.*, p. 47; Roosevelt papers (Vol. X), pp. 255–262.
[109] Koenig, *op. cit.*, pp. 50–51.
[110] *Ibid.*, p. 27.

The President also took steps to protect the funds of nations falling under or threatened by the aggressing Axis powers. On April 10, 1940, Roosevelt issued E.O. 8389 protecting the monies of Norway and Denmark.[111] A similar order, E.O. 8785 of June 14, 1941, was later issued with regard to Norway, Denmark, The Netherlands, Belgium, Luxembourg, France, Monaco, Lativa, Lithuania, Estonia, Rumania, Bulgaria, Hungary, Yugoslavia, Greece, Albania, Andorra, Austria, Czechoslovakia, Danzig, Finland, Germany, Italy, Liechtenstein, Poland, Portugal, San Marino, Spain, Sweden, Switzerland, and the Union of Soviet Socialist Republics.[112] On July 26, 1941, E.O. 8832 added China and Japan to the list of nations having frozen assets held by the United States.[113]

On July 17, 1941, the President issued a proclamation blacklisting some 1,800 Latin American firms which had been deemed to be aiding Italy and/or Germany.[114]

Perhaps the most notable emergency action of the President during the period immediately prior to American involvement in World War II derived from authority granted to him by the Lend Lease Act (55 Stat. 31). Signed into law on March 11, 1941, the statute authorized the transmittal of war material to nations whose defense the President deems vital to the defense of the United States.[115] In addition to providing the Chief Executive with broad discretionary power in the area of armaments and weapons shipments, the measure also set the defense production machinery of industry in motion.

> The President suddenly announced on April 29, 1941, that he would extend the neutrality patrol to any limits he thought necessary for the defense of the Western Hemisphere. Simultaneously, Admiral Stark disclosed that patrols already were operating as far as 2,000 miles out at sea. The President now made it clear that he would not recognize any German combat zone around the British Isles and that he considered it legal for American warships to enter belligerent areas which he himself had delimited by executive orders at the beginning of the war as forbidden to entry by United States merchantmen. The President had overcome his timidity on convoys. After ingenious denials, he at last revealed that they were in full operation to escort material of war safely to Britain.[116]

In the period between the invasion of Poland, which marked the beginning of World War II in Europe, and the bombing of Pearl Harbor, which marked the entry of the United States into the total international conflict, President Roosevelt pursued a series of emergency actions designed initially to preserve the neutrality of the nation and yet safeguard it. This position gave way to a policy of indirectly assisting nations engaged in open warfare with Germany and Japan by troop supplements and the protection of colonial territories located within the American geographic sphere of influence.

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[111] Roosevelt papers (Vol. IX), pp. 130–133.
[112] *Ibid.*, (Vol. X), pp. 217–224.
[113] *Ibid.*, pp. 281–282.
[114] *Ibid.*, pp. 267–269.
[115] *Ibid.*, pp. 48–51.
[116] Koenig, *op. cit.*, p. 53.

Following this, a policy of arms sales and shipment by the United States was developed and operationalized. Thus, by mid-1941, the President had moved from a position of strict neutrality to a posture of supplying war materials to Britain and her allies, placing American seamen in combat zones, and stationing American troops in foreign territories which might well be expected to be invaded by Germany. Much of this shift in policy had been realized through and manifested by the exercise of emergency powers.

War

On Sunday morning, December 7, 1941, Japanese aircraft attacked American military and naval installations at Pearl Harbor in Hawaii. The engagement lasted approximately two hours; resolution of the Pacific conflict would come four years later with the arrival of the atomic age. Simultaneous with the raid on Oahu, the Japanese launched assaults on the Philippines, Guam, and Midway Island. The following day Congress declared war on Japan. Three days later, the United States extended the declaration to Germany and Italy.

The initial months of the Pacific war were desparate and devastating for American forces. At Pearl Harbor, 19 ships were sunk or disabled; about 150 planes were destroyed; 2,335 soldiers and sailors were killed and 68 civilians perished. The Japanese took Guam (December 13) and Wake Island (December 22). The Philippine invasion (December 10) repelled the American defenders with Manila and Cavite soon falling to the Japanese (January 2). After a siege of more than 3 months, Bataan fell (April 9) and American forces withdrew to Corregidor Island where 11,500 ultimately were forced to surrender on May 6 to the Japanese.

British forces in Asia and the Pacific also collapsed with the onslaught of the invaders. The Japanese pushed into the Netherlands East Indies where, in the waning days of February, they engaged American naval forces in the costliest contest following Pearl Harbor, the Battle of the Java Sea. American military and naval manpower was either being defeated, captured, or destroyed. Ships and planes were rapidly spent with seemingly no immediate hope of their being replaced. The California coastal inhabitants anticipated an invasion of the United States.

With the declarations of war and the impending international crisis, Roosevelt, for the duration of the hostilities, would exercise both war powers, in his capacity as Commander in Chief, and emergency powers, in his role as Chief Administrator. The resulting experience was

> a President who went beyond Wilson and even Lincoln in the bold and successful exertion of his constitutional and statutory powers; a Congress which gave the President all the power he needed to wage a victorious total war, but stubbornly refused to be shunted to the back of the stage by the leading man; a multitude of presidentially created boards and bureaus which regulated the nation's entire economic life and which, for all the false starts and mistakes and prophecies of doom, could point to the most incredible triumphs of produc-

tion, research, and supply in the history of man; a governmental record of noninterference with the political liberties of the American people that would have been well-nigh perfect but for one dictatorial performance, the evacuation of 70,000 American citizens of Japanese descent from the Pacific Coast area; and finally a Supreme Court that once again *durante bello* gave judicial sanction to whatever powers and actions the President and Congress found necessary to the prosecution of the war, and then *post bellum* had a lot of strong but unavailing things to say about the limits of the Constitution-at-War.[117]

Perhaps the President's strongest statement of his authority during this period of exigency may be found in his address of September 7, 1942 demanding that Congress repeal a provision of the Price Control Act (56 Stat. 26) enacted much earlier in the year. In his message, Roosevelt said:

> In the event that the Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act.
>
> The President has the powers, under the Constitution and under Congressional Acts, to take measures necessary to avert a disaster which would interfere with the winning of the war.
>
> I have given the most careful and thoughtful consideration to meeting this issue, without further reference to the Congress. I have determined, however, on this vital matter to consult with the Congress.
>
> There may be those who will say that, if the situation is as grave as I have stated it to be, I should use my powers and act now. I can only say that I have approached this problem from every angle, and that I have decided that the course of conduct which I am following in this case is consistent with my sense of responsibility as President in time of war, and with my deep and unalterable devotion to the processes of democracy.
>
> The responsibilities of the President in wartime to protect the Nation are very grave. This total war, with our fighting fronts all over the world, makes the use of the executive power far more essential than in any previous war.
>
> If we were invaded, the people of this country would expect the President to use any and all means to repel the invader.
>
> The Revolution and the War Between the States were fought on our own soil, but today this war will be won or lost on other continents and in remote seas. I cannot tell what powers may have to be exercised in order to win this war.
>
> The American people can be sure that I will use my powers with a full sense of responsibility to the Constitution and to

[117] Rossiter, *op. cit.*, p. 265; for a catalog of emergency powers granted to the President during the period of the war see Library of Congress. Legislative Reference Service. Acts of Congress Applicable in Time of Emergency. Washington: Legislative Reference Service, 1945. (Public Affairs Bulletin No. 35).

my country. The American people can also be sure that I shall not hesitate to use every power vested in me to accomplish the defeat of our enemies in any part of the world where our own safety demands such defeat.

And when the war is won, the powers under which I act will automatically revert to the people of the United States—to the people to whom those powers belong.[118]

In brief, Roosevelt, relying to the fullest extent possible upon the powers and duties of his offices as a public trust, asserted that there are certain situations which the Executive is not only best equipped to deal quickly and effectively with, but which, in the event Congress fails to act, the President must, as some kind of tribune of the people, take in hand. Unlike the proverbial Cincinnatus, however, this assumption of a constitutional dictatorship would appear to be by self-designation. The separation of powers arrangement within the Constitution, of course, mitigates against any such assumption of power. Indeed, Congress may, as in the experience of Lincoln's exercise of emergency power, sanction the Executive's response to a crisis, even though the action might have been legally questionable at the time of its execution. Or the legislature might curtail any future use of some particular expression of authority. In the case of Roosevelt, he appears to have been goading Congress with a strong statement of intent rather than actually threatening to overstep it. His record of actions would also seem to indicate that he generally escaped incurring congressional enmity in his wartime exercise of power.[119]

One of the most questionable and objectionable executions of emergency power occurred on February 19, 1942, with the issuance of E.O. 9066 which ordered the internment of American citizens of Japanese ancestry who were living in certain designated Pacific coast areas. By August 7, 1942 some 110,000 individuals, fully 70,000 of whom were legal citizens of the United States, had been detained and incarcerated in special camps according to the provisions of the Presidential directive.

The official explanation for this enforced mass evacuation—which as the Nation knows worked grievous personal and financial hardships on the unfortunate people thus uprooted—was that it was "a matter of military necessity." The "military necessity" which the army had specifically in mind was the possibility of a Japanese assault upon the Pacific Coast. In such an event, it was asserted, the presence of thousands of disloyal or unpredictable people of Japanese descent might easily prove an element of confusion which the enemy could exploit to excessive advantage. To the suggestion that the loyal and disloyal should have been separated by individual examination, as Britain had done with the enemy aliens in its midst, the answer was made that there was not enough time. (The main Exclusion Order was issued *five* months after Pearl Harbor.) The criterion for

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[118] Roosevelt papers (Vol. XI), pp. 364–365, 372–373.

[119] See generally Roland Young. *Congressional Politics in the Second World War.* New York: Columbia University Press, 1956.

> exclusion was thus not the rational one of disloyalty but the undemocratic one of race.[120]
>
> [Emphasis supplied.]

While not specifically sanctioning the President's action with regard to Japanese-American citizens, Congress generally gave its support to the internment directive. "An Act of March 21, 1942 in effect ratified and confirmed Executive Order 9066 by making a Federal misdemeanor (punishable by a $5,000 fine and a year in jail) of any action in violation of the restrictions laid down by the President, the Secretary of War, or designated military subordinates." [121]

> The Supreme Court in its turn was given full opportunity to declare the evacuation unconstitutional and proffer the injured Japanese-Americans some belated relief. This the Court steadfastly refused to do, despite the fact that its decisions were rendered in June 1943 and December 1944, when judicial invalidation of the evacuation scheme would have had no more effect on the war effort than *Ex Parte Milligan* [4 Wallace 2 (1866)] had on the course of the Civil War. In *Hirabayashi* v. *U.S.* [320 U.S. 81 (1943)] the Court upheld General DeWitt's curfew order [issued by him as commander of the continental Western Defense Command] under which a University of Washington senior had been convicted, and neatly evaded judicial examination of the validity of the general evacuation order. In *Korematsu* v. *U.S.* [323 U.S. 214 (1944)] the Court went a good deal further in support of the executive and military authorities and accepted as final the General's judgment that the necessities of the moment demanded the complete evacuation of all persons of Japanese ancestry, and that there was no time in early 1942 to examine the suspected members of the Japanese-American community on an individual basis. The punishment of this loyal citizen of the United States was sanctioned by the highest court of the land; his crime: sitting in his own home. Bitter dissents from this decision were entered by Justice Murphy and Roberts, a milder one by Justice Jackson. In *Ex Parte Endo* [323 U.S. 283 (1944)] the Court decided unanimously that a Japanese-American citizen of proven loyalty was entitled to an unconditional release from the inland camp to which she had been sent. The great constitutional issue was again sidestepped.[122]

For the most part, the Japanese-American population assigned to detention camps remained incarcerated at these locations for the duration of the war. Very few of them were relocated outside of the camps during the period of continued overseas hostilities.[123] Late in

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[120] Rossiter, *op. cit.*, p. 281.

[121] *Ibid.*, p. 282; 56 Stat. 173; appears in the 1970 edition of U.S. Code as 18 U.S.C. 1383.

[122] Rossiter, *op. cit.*, p. 282.

[123] See generally Audrie Girdner and Anne Loftis. *The Great Betrayal.* New York: Macmillan Co., 1969; Morton Grodzins. *Americans Betrayed.* Chicago: University of Chicago Press, 1949; A. H. Leighton. *The Governing of Men.* Princeton: Princeton University Press, 1945.

the conflict, a large group of qualified Japanese-American males were recruited into the army and served valiantly in the European theater. At the end of the war the detainees were allowed to return to their former communities. In addition to being humiliated and persecuted, these people often found their homes possessed by someone outside their family and other articles of personal property stolen.

The story of martial law in Hawaii is considerably less disturbing and has a slightly happier ending. On December 7, 1941 Governor J. B. Poindexter, acting upon a clear grant of authority in the Organic Act of the Territory of Hawaii [31 Stat. 141 § 67], suspended the writ of habeas corpus, declared martial law throughout the islands, and turned over for the Commanding General, Hawaiian Department, the exercise of all his normal powers "during the present emergency and until the danger of invasion is removed." A telegram was dispatched to the President asking for confirmation of his action, and this confirmation was immediately forthcoming. Under the confused circumstances of the moment this swift establishment of martial law was a judicious and warranted measure. Despite a rising wave of criticism in the months following the Battle of Midway against the continuation of martial law, it was not terminated fully until October 1944. The strong protests of Governor Stainback had resulted in the return of eighteen functions of civil government to the civil authorities in March 1943, but the military continued to maintain a qualified martial law.[124]

The continuation of martial law in Hawaii after the decisive battles of 1942 does not appear to have captured the attention of Congress. This may have been due to the territorial status of the area and/or some general opinion that regarded the islands as being principally a naval base.

Not until February 25, 1946 did the Supreme Court get a chance to review the constitutionality of the extension of martial law after the initial Japanese threat had passed. The *Ex Parte Milligan* of this war was *Duncan* v. *Kahanamoku* [327 U.S. 304 (1946)]. The simple question for decision was the validity of two prison sentences imposed by military tribunals upon civilians for civilian crimes—one on a 1942 charge of embezzlement, the other on a 1944 charge of assault upon two Marine sentries in the Pearl Harbor Navy Yard. The Court held by a 6–2 decision that the military courts had no jurisdiction in either instance, and that the prisoners should be released from custody. The particular constitutional doctrine announced in the Milligan case—that military courts have no jurisdiction over civilians in areas where no imminent danger threatens and the regular courts are able to discharge their duties—was thus vigorously reasserted. Justice Black's majority opinion judiciously refrained from reciting once

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[124] Rossiter, *op. cit.*, p. 284; also see Robert S. Rankin. "Hawaii Under Martial Law." Journal of Politics, v. 5, August 1943: 270–291; —. "Martial Law and the Writ of Habeas Corpus in Hawaii." Journal of Politics, v. 6, May 1944: 213–230.

again the unqualified statement of the crisis validity of the Constitution delivered by Justice Davis in the Milligan case. Justice Murphy, one of the dissenters in the Korematsu case, was able to sing the old refrain without laying himself open to the charge of rank hypocrisy. Two men got some belated but welcome relief, and the Court upheld the Constitution. But the people of Hawaii lived under martial law until October 1944. The Duncan case will be even less of a controlling precedent than the Milligan decision.[125]

Eight German agents landed off the coasts of Long Island and Florida and were captured by the Federal Bureau of Investigation in June 1942. Because the Germans had discarded their uniforms for civilian clothes and carried sabotage materials, Roosevelt established a military commission for the trial of the men.[126] The Supreme Court upheld the President's action in the matter.[127] Subsequently, two of the men were given commuted sentences by the Chief Executive because of their assistance to the government in capturing the other agents. On August 8, 1942, the other six saboteurs were electrocuted. The incident was unusual because the capture had occurred away from the European and African theaters of war and arrests were made by a civilian police authority. Nevertheless, the United States was involved in a truly "world war" and the whole Western Hemisphere had been designated the American theater of war. Authority existed for the President, as Commander in Chief, to direct that the military authorities deal with the saboteurs.[128] There is also evidence that the President felt particularly bitter toward these foreign intruders.[129]

> The political liberties of the American people—the freedoms of person, speech, press, and assembly—suffered less invasion in this war than in either the Civil War or the World War [I], with one major exception. A number of reasons have been suggested for this heartening feature of the last few years—most important among them being the virtual unanimity of the Nation (after Pearl Harbor) on the necessity of the war, the Federal assumption and state surrender of the major responsibility for dealing with the problem of subversive print and speech, and the conscious effort of the Roosevelt administration not to repeat the uncalled-for excesses of the last war. This was easily the most popular war the American people ever fought; the problems of civil liberty were therefore comparatively easy to solve.[130]

The principal instruments for dealing with speech and press during the period of World War II were the old Espionage Act of 1917 (40 Stat. 217) and the Alien Registration Act of 1940 (54 Stat. 670). "The latter made it unlawful to advise or urge insubordination,

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[125] *Ibid.*, pp. 284–285.
[126] Roosevelt papers (Vol. XI), pp. 296–298.
[127] *Ex Parte Quirin*, 317 U.S. 1 (1942).
[128] Thirty-eighth Article of War, 10 U.S.C. 1509.
[129] See James MacGregor Burns. *Roosevelt: The Soldier of Freedom*. New York: Harcourt, Brace and Jovanovich, 1970, pp. 254–255.
[130] Rossiter, *op. cit.*, p. 276.

disloyalty, or refusal of duty in the armed forces of the United States, or to distribute any printed or written matter advising such disaffection; to advise, advocate, or teach the desirability of overthrowing or destroying any government in the United States by word or print; or to organize or affiliate with any group or society advocating the overthrow of lawful government." [131] Generally, the government took few actions against any newspapers or radio broadcasters during the war for violations of this statute. Such efforts at prosecution as were made came to be directed against extreme ideologies of the political spectrum. Even in these instances the cases were often never actually adjudicated. "One governmental action which evoked a good deal of well-aimed criticism was that taken by the Postmaster-General (under the Espionage Act and at the request of the Department of Justice) in barring from the mails a large group of seditious and near-seditious publications, *inter alia* the Radio Priest's [Father Charles E. Coughlin] *Social Justice*, the *Galilean*, and the *Philadelphia Herald*. Admittedly these suppressions were long overdue; nevertheless the Postmaster-General's summary action should have been subject to a closer survey by the courts." [132] The President did not directly exercise any emergency power against newspaper or radio broadcasters during the war. There were, however, administrative instruments for controlling information during the period of world conflict.

> Censorship in the second World War was the province of Byron Price and his Office of Censorship, set up by an Executive Order of December 19, 1941 [E.O. 8985] to carry out those provisions of the First War Powers Act which granted the government an absolute discretion in the censorship of all communications with foreign countries [55 Stat. 838]. The domestic press and radio were controlled on a strictly voluntary and extra-legal basis under the sensible terms of a Censorship Code issued by Mr. Price in early 1942. On the whole, the problem was well handled throughout the war, although there were instances—such as the President's tour of the nation's industries in September 1942—when the press felt that it was being unnecessarily stifled. Six members of the President's Cabinet were included in an advisory Censorship Policy Board. The other job of the first World War's Committee on Public Information—the publicizing and propagandizing of the war at home and abroad—was carried on by Elmer Davis's Office of War Information, set up in June 1942 [E.O. 9182] to consolidate the hitherto unconnected activities of such groups as the Office of Facts and Figures and the Foreign Information Service.[133]

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131 *Ibid.*

132 *Ibid.*, p. 277; see *Hannegan* v. *Esquire*, 327 U.S. 146 (1946).

133 Rossiter, *op. cit.*, pp. 277–278; also see: Harwood L. Childs. "Public Information and Opinion." American Political Science Review, v. 37, February, 1943: 56–68; —, ed. "The Office of War Information." Public Opinion Quarterly, v. 7, Spring, 1943: entire issue; Elmer Davis and Byron Price. *War Information and Censorship*. Washington: American Council on Public Affairs, 1943; Byron Price. "Governmental Censorship in Wartime." American Political Science Review, v. 36, October, 1942: 837–850.

Organized labor also fared well during the period of the war, suffering no loss of the right to strike, to picket, or to leave one job for another. Various labor disputes did occur during the time of global conflict but the man-hours lost to strikes was rather low in number.[134]

In certain areas of industry, the President found it necessary, when strikes or work stoppages threatened the war effort, to order government seizures of the operations in question. The first such case occurred in May of 1943 and lasted for 7 stormy months. After many weeks of negotiation and arbitration failed to settle the dispute, Roosevelt, on May 1, directed (E.O. 9340) the Secretary of the Interior to take over and operate certain coal mines closed by a strike of the United Mine Workers. On June 23, the union ordered its workers back on the job and on October 12 the mines were returned to the operators.[135] By the end of the month new disputes again halted production whereupon the President again ordered the Secretary of the Interior to seize the mining operations. The Secretary negotiated an agreement between the strikers and management on November 2. Approved by the union on November 5, the workers went to work a few days later. On May 31, 1944 the mines were once again returned to the operators.[136]

It was also in 1943 that the railroad brotherhoods called for a strike shortly after Christmas. Fearing this action would impair military offensives planned for the following year, the President called the union and operator leadership to the White House on December 19, and with the assistance of James F. Byrnes, Director of the Office of War Mobilization, attempted to negotiate an agreement to avoid the strike. The majority of the unions involved cancelled their strike orders but, because three brotherhoods failed to follow this action, the President, on December 27 directed (E.O. 9412) that the Government seize and operate the railroads. Hours before the strike was to occur, the three holdout unions cancelled their calls.[137]

After a 2 year period of recalcitrance toward the Government's wartime labor policies, Montgomery Ward & Company, in April 1944, gave notice of its plan to terminate its contract with its employees union, claiming that the union no longer represented a majority of the workers. After the firm spurned directives that it continue the contract until elections could be called, the union struck on April 12, 1944, to protest the company's failure to abide by the National War Labor Board's order. Due to this refusal to cooperate with the Board, the President, on April 25, directed [E.O. 9438] the Secretary of Commerce to seize and operate the Montgomery Ward plants and facilities. When an election was held shortly thereafter among the employees, the union was retained by a vote of 2,340 to 1,565. On the same day the company was returned to the owners.

On December 9, 1944 another dispute arose between Ward's employees and managers, this time at retail outlets in Detroit. At issue was a NWLB order for wage increases. Again the facilities of the company were seized. The Circuit Court of Appeals for the Seventh circuit upheld the Executive's action in the matter and it was not until August

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[134] Rossiter, *op. cit.*, p. 278.
[135] Roosevelt papers (Vol. XII), pp. 185–199; *Ibid.*, pp. 260–263.
[136] *Ibid.*, pp. 462–466.
[137] *Ibid.* pp. 563–569.

25, 1945 that Ward's plants were directed (E.O. 9603) to be returned to their private owners.[138]

While governmental seizures of private businesses had never been entirely palatable in some quarters of Congress, the case of Montgomery Ward & Company stimulated interest to the point of a full investigation of the case. Those most active in the matter were House Republicans who, to a man, voted for the creation of a special committee to look into the incident. The result of the inquiry was a division of support along partisan lines: the Democrats sanctioning the government's action, the Republicans favoring Ward's defiance. The probe did not, however, stimulate any legislation to curb such exercises of emergency power.[139]

Generally, the President was not given any great multiplicity of additional statutory powers during the period of the war. What he did obtain were broad grants of discretionary power, provided in the First War Powers Act of December 18, 1941 (55 Stat. 838), the Second War Powers Act of March 27, 1942 (56 Stat. 176), and the Emergency Price Control Act of January 30, 1942 (56 Stat. 23). The last of these granted broad authority for the control of a wide variety of goods and services being utilized by the American public.

The two War Powers Acts were rag-bags into which were tossed all manner of provisions dealing with such emergency problems as administrative reorganization for war, censorship of overseas communications, alien property, defense contracts, the power to penalize priorities violations, trading with the enemy, the governmental acquisition of property, and free postage for the armed forces. The statutory basis for the war administration's "government by decree" of the nation's essential business and industry was this clause [56 Stat. 178 § 301(2)] in the Second War Powers Act:

"Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest or to promote the national defense." [140]

Not all of the Executive's administrative authority in the exercise of emergency powers derived from statutes. Indeed, as one commentator notes, much of this authority would seem to be derived from the Constitution.

In keeping with this paramount fact of presidential authority and responsibility, almost every war agency which

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[138] *Ibid.* (Vol. XIII), pp. 446–453.

[139] See: U.S. Congress. House. Select Committee to Investigate Seizure of Montgomery Ward and Company. Investigation of Seizure of Montgomery Ward and Company. Hearings, 78th Congress, 2d session. Washington: U.S. Gov't Print. Off., 1944; —. —. —. Investigation with Respect to Seizure by the Government of Property of Montgomery Ward and Company. Washington: U.S. Gov't Print. Off., 1944. (78th Congress, 2d session. House. Report no. 1904); Young, *op. cit.*, pp. 65–67.

[140] Rossiter, *op. cit.*, p. 270.

the American people came to know so well was created out of the whole cloth of Mr. Roosevelt's war powers under the Constitution, with hardly a reference to statutory provision. The single important exception was the Office of Price Administration, which found its legal basis in the Emergency Price Control Act of 1942, and which remained independent of the President's immediate authority throughout the war—mostly because it acted exactly the way Mr. Roosevelt wanted it to act.

The other major agencies—the War Production Board, the Office of War Mobilization, the War Shipping Administration, the Office of Defense Transportation, the War Manpower Commission, the Office of War Information, the War Labor Board, and all the rest—wielded their individual portions of the totality of presidential power within the framework of the Office for Emergency Management. The OEM is of particular significance as the coordinating agency set up to aid the President in the oversight of this multitude of boards and bureaus which functioned in his name and by his authority. It was established in the Executive Office of the President by an administrative order of May 25, 1940, which in turn was based on the congressionally approved Executive Order of September 8, 1939 providing that there should be "in the event of a national emergency, or threat of a national emergency, such office for emergency management as the President shall determine." The OEM functioned throughout the war as a general advisory, investigating, and coordinating office within the President's immediate entourage.[141]

The President's powers during the crisis of the war were undoubtedly unprecedented in the history of the American government experience. In part, this situation derived from the perilous nature of the times. The circumstances of the international crisis required rapid decision based upon concerted planning. In addition, Roosevelt had been tested during the exigencies of a grueling economic depression. He was a familiar leader and a majority of Congress and the public felt he could be trusted with the reins of power. The legislature had its own role but it was not one of closely checking the Executive's exercise of emergency authority. As one observer has commented:

> Perhaps Congress could have acted a little more nobly and a little less politically, but this is unimportant for the problem at hand. What is important is that Congress acted as usual, and under the circumstances it doesn't seem to have made much difference. Whether it acts badly or not, the national legislature should never give up any power or alter any procedure in an emergency unless such a step appears to be absolutely necessary. It was in pursuance of this basic principle of constitutional dictatorship that the American legislature played its part in the government of World War II.[142]

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[141] *Ibid.*, pp. 273–274.
[142] *Ibid.*, p. 272.

The legislature and the courts of the national government were willing to trust in the President's leadership during the grave hours of international crisis. Soon, however, the drama of wartime emergency played itself to an end. On April 12, 1945, Franklin D. Roosevelt died at Warm Springs, Georgia. A few weeks later, on May 8, the war was concluded in Europe. On August 6, the world witnesses the unleashing of atomic power and on the fourteenth day of that month hostilities in the Pacific were ended. The most massive shooting war in world history came to a halt. And in the aftermath, during the era of the Cold War would come new situations for the exercise of executive emergency powers.

Part III

1945–1974

Upon taking his oath of office on April 12, 1945, President Harry S. Truman issued the following statement: "The world may be sure that we will prosecute the war on both fronts, east and west, with all the vigor we possess to a successful conclusion." [1] Shortly thereafter, the European hostilities ceased. With the dropping of the atomic bomb on Hiroshima and Nagasaki and the arrival of the atomic age, the Japanese surrendered on August 14.

Following the end of World War II, the concept and practice of emergency powers would broaden and extend into new policies and programs. The temporary instruments of the New Deal, designed to meet momentary exigencies, were transformed into permanent multi-faceted arrangements for acting upon national defense matters—nonmilitary and military—labor problems, natural disasters, civil rights violations, and economic difficulties. In the absence of any declarations of war, emergency powers were utilized to discipline the Nation during occasions when the United States was engaged in actions meeting open hostility. Indeed, the case can be made that the term "emergency" attained expression in the statutes from 1945 to 1974 in such a manner as to make it a word of art rather than a legal description of a particular situation warranting special action.

With the close of warfare in Europe and Asia, President Truman found it desirable to continue certain of the powers vested in him by the Second World War Powers Act (56 Stat. 176). To aid in the post-war reconversion process, this statute was extended on December 28, 1945 (59 Stat. 658), again on June 26, 1946 (60 Stat. 345), and selected titles were continued in the First Decontrol Act of 1947 (61 Stat. 34) and the Second Decontrol Act of the same year (61 Stat. 321).[2] These extensions were necessary due to the provision in the original statute for a specific date of expiration which only Congress might extend (56 Stat. 187 § 1501). Each of these cases involved what might be characterized as war powers, *i.e.* grants of special authority for a time of declared open warfare.

A different situation prevailed, however, with regard to emergency powers. The President might, and did, terminate certain special tax provisions applicable during exigencies. These sections of the Internal Revenue Code were withdrawn by a proclamation on Sep-

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[1] Public Papers of the Presidents of the United States: Harry S. Truman (1945). Washington: U.S. Government Printing Office, 1961, p. 1.

[2] For Presidential statements on these measures see *Ibid.*, pp. 588–589 and *Ibid.* (1947), pp. 107–113, 252–254, 333–334.

tember 29, 1943.[3] But when the official cessation of hostilities was announced on December 31, 1946, the emergency powers activated by the President in 1939 and 1941 continued. As President Truman noted during a press conference on these matters, "termination of the emergency and the termination of the war has to be made by the Congress itself—by legislation."[4] In 1951 Congress, by enactment of a joint resolution (65 Stat. 451), terminated the declaration of war against Germany. The following year the Senate, on March 20, ratified the treaty of peace with Japan, thereby ending hostilities with that nation.[5] The emergency powers of the Executive remained in effect until mid-July, 1947, when Congress, at the request of the President, repealed (61 Stat. 449) a variety of emergency and war statute provisions.[6] Certain tax code items, activated during the recent exigency, were eliminated (61 Stat. 919) later that year.[7] These actions did not, however, terminate all of the emergency powers available to the President at that time as a consequence of the 1939 and 1941 proclamations.[8]

Nevertheless, when the Korean crisis threatened an economically and militarily unprepared America in 1950, the President found it necessary to once again proclaim a condition of national emergency in order to activate special statutory powers for meeting the exigency, and to whip up public support for the Korean intervention.

As Dr. Adrian Fisher testified to the Special Committee, ". . . (T)his proclamation was primarily designed to be an expression of national will of the United States—to do all it could to bring the Korean war to an honorable halt."

On June 25, 1950, the North Korean Army invaded South Korea. Two days later President Truman ordered U.S. air and naval forces into the conflict with ground forces committed on June 30. By September, American armed forces had recaptured the capital city of Seoul and were advancing north. On October 20, the North Korean capital, Pyongyang, was overtaken and troop movements continued on toward the Manchurian border. Six days later Chinese Communist forces streamed across the Yalu River and began a massive offensive against the troops of General Douglas MacArthur. On December 5, American military personnel abandoned Pyongyang and began a general retreat toward the 38th parallel marking the division between North and South Korea. President Truman faced the problem of providing additional support materials for this army, the difficulty of mobilizing and equipping new forces yet to be committed to the fighting, and the dilemma of disciplining the economy, all of which had to be done without alarming the Soviets with the impression that the United States was about to declare war.

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[3] 10 F.R. 12475.

[4] Truman papers (1946), p. 513; the full transcript of the press conference and the related proclamation may be found at pp. 512–514.

[5] See Congressional Record, v. 98, March 20, 1952: 2596–2606.

[6] See Truman papers (1947), pp. 134–146.

[7] For a compilation of the statutes under consideration see: Legislative Reference Service. Termination of War Controls. Washington: U.S. Government Printing Office, 1947. (80th Congress, 1st session. Senate Document No. 5); Department of Justice. Termination of War Controls. Washington: U.S. Government Printing Office, 1947. (80th Congress, 1st session. Senate. Document No. 42).

[8] See Truman papers (1947), pp. 357–358.

The President recorded the following thoughts on the occasion in his memoirs:

> General Marshall pointed out that we were just on the verge of launching the NATO armed forces and that our entire international position depended on strengthening western Europe. We could not rush into measures for Korea and the Pacific that would cause such Russian reactions that our European allies would be scared away.
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> I asked Secretary [of the Treasury John W.] Snyder's opinion on the question of declaring a national emergency, and he said that it was necessary in order to convince the Congress. He observed that one side of Congress was pushing very hard, perhaps even too hard, for military measures, while another side was refusing to vote taxes, saying that we had plenty of time.
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> I announced then [National Security Council meeting of December 11, 1950] that I would hold a meeting with congressional leaders on Wednesday to outline a program of action and inform them of my decision regarding the declaration of a national emergency. [General Marshall had informed the Appropriations Committees on December 8 that such a proclamation might be forthcoming.] I would then make a national broadcast to explain the situation and call for support of our program.
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> The meeting with congressional leaders took place at 10 a.m., Wednesday, December 13. It was a completely bipartisan group, with the senior Democratic and Republican members of the Committees on Foreign Relations, Armed Services, and Appropriations. In addition to the members of Congress, there were present: [Secretary of State Dean] Acheson, [Secretary of Defense George] Marshall, [Secretary of the Treasury John] Snyder, [National Security Resources Board Chairman W. Stuart] Symington, John Foster Dulles [then working with the State Department in matters regarding the United Nations and a treaty of peace with Japan], [Special Assistant to the President W. Averill] Harriman.
>
> I told the congressional leaders that we were faced with the necessity for a sharp step-up in our mobilization. In order to help this situation along I was considering issuing a proclamation of national emergency. So that the members of Congress might understand the situation facing us, I read them a summary of an intelligence report on the probable Soviet moves in connection with the present situation.[9]

The President also provided congressional leaders with "a list of legislative provisions compiled by the Department of Justice, all of which would become effective in the event a national emergency was proclaimed by the President." [10]

A number of questions were asked at this meeting and were reported in the President's account of the proceedings. Some of those present

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[9] Harry S. Truman. Years of Trial and Hope. New York: Doubleday and Company, 1956, pp. 419–420.

[10] *Ibid.*, p. 423; for the complete list, see Appendix, p. 135–140.

voiced concern over the necessity of declaring a national emergency, even though they were willing to go along with the Chief Executive on the proclamation. Senator Robert Taft questioned the President on the matter of whether or not the national emergency would require full mobilization.[11] Senator Taft doubted that the legal reasons for issuing a proclamation were pressing and was generally opposed to the idea of declaring an emergency 'without knowing the details of what is involved'—such as the draft and taxes." [12]

Senator Kenneth Wherry expressed other concerns.

> He would go along, he said, with the program to strengthen the Nation, but as to the proclamation he thought he needed more facts. Also, he was doubtful about a number of our commitments abroad, though he did not say which ones, and he wondered why the additional authorities the President wished to obtain under the proclamation of emergency could not be asked for, one by one, from the Congress.

The President then recalled:

> He turned to me and asked me point-blank why, if I wanted more power, I did not ask Congress for it. I replied that many of the powers needed would have to be discretionary if I were to act as promptly as emergency situations might require. Wherry asked why I could not ask for just some of the powers rather than for powers sufficient for a full mobilization. I explained that time was of the essence and that it would not be practicable to request authorization for the expansion of our forces in piece meal fashion. Wherry shot back that of course I should know; I was the only one who had the facts. I replied that the facts were available to Wherry and to everybody else in the room. They had been given as thorough a briefing as any civil official had ever been given and they were to ask more questions if they wanted to.[13]

Another congressional delegation met with the President and his economic advisers the following day. After that the Chief Executive met with the Cabinet and his staff on the national emergency proclamation. On December 14 the National Security Council was called into session. The following evening the President made a radio and television report to the American people on the significance of the national emergency.[14] The next day, December 16, a state of national emergency was proclaimed. The instrument has remained in effect since its promulgation.[15]

With the ratification of the treaty of peace with Japan on March 20, 1952, Congress was requested to continue certain of the emergency powers activated by the 1939 and 1941 proclamations of national emergency. The President asked for such a continuation of these

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[11] Truman, *op. cit.*, p. 422.
[12] *Ibid.*, p. 424.
[13] *Ibid.*
[14] Truman papers (1950), pp. 741–746.
[15] *Ibid.*, pp. 746–747.

powers during the Korean crisis and recognized they would terminate with or shortly after the ratification of the Japanese peace treaty.[16] Such extensions of these Executive powers for dealing with exigencies of the moment began with the Emergency Powers Interim Continuation Act (66 Stat. 54) of April 14, 1952. This statute was continued in force (66 Stat. 96; 66 Stat. 137; 66 Stat. 296) until consideration could be given to a second instrument, the Emergency Powers Continuation Act (66 Stat. 330), for granting specific emergency statutory provisions.[17] The second statute was continued (67 Stat. 18; 67 Stat. 131) to August 1, 1953. The authority contained in these two statutes remained available to the President after he proclaimed the 1939 and 1941 national emergencies terminated (66 Stat. c31) on April 28, 1952. The December 16, 1950 proclamation of a national emergency (64 Stat. A454) was not affected by the termination of the two earlier national emergency conditions and served, by itself, to provide the Executive with certain emergency powers.

The continued existence of the President's 1950 proclamation of a condition of national emergency serves to indicate that those statutes activated by this instrument also are still in effect. In addition, during the intervening years, new statutes may have been enacted which immediately became operational due to the existence of this proclamation. There is also a class of legislation which has been titled "emergency" but which may or may not be activated by the 1950 proclamation. The referent "emergency" in the title of the statute may be a term of art, begging quick enactment of the legislation, rather than a term of law, relating to a particular legal condition.

In addition to those considerations, there are the actual exercises of emergency power made by Presidents during the post-World War II period and a variety of available powers which the Chief Executive has at his disposal but which have not actually been exercised. These matters are examined in terms of various policy spheres.

Nonmilitary Defense

The concept of nonmilitary defense policy is better understood in terms of the more popular ruberic "civil defense." It is an area of policy which the Executive Branch administers in terms of emergency powers. Enlarging upon this point, one authority comments:

> It is at least debatable whether and to what extent the authority of the president over the nonmilitary population under a civil defense program can be derived strictly from his war powers. By necessity, an effective civil defense program must comprise long-range preparations and planning, that is, activities which cannot be limited to the attack or immediate postattack period but must extend into "peacetime"—as far as the cold war permits such a designation. Reliance on war powers to cover these activities clearly involves a considerable modification of the usage of the

[16] See *Ibid.* (1952–1953), pp. 160–161, 240–241.

[17] See U.S. Congress. House. Committee on the Judiciary. Emergency Powers Continuation Act. Hearings, 82nd Congress, 2d session. Washington: U.S. Govt. Print. Off., 1952; the Senate Committee on the Judiciary did not hold hearings on these measures.

concept. Unless the term "cold war powers" is adopted, it may be preferable to qualify the functions of the president in the nonmilitary defense field as a combination of traditional war powers and his prerogatives as chief executive and law-enforcement officer. The situation is somewhat different on the state level; for although state governors are usually empowered to act as commanders-in-chief of the state militia, states are regularly deprived of the capacity to wage war and thus, of war powers. On the other hand, States are traditionally endowed with the so-called "police power," a power which is not as such inherent in the federal government. Nevertheless, an extension of the police power to nonmilitary defense programs injects an element of war emergency into the concept which is not regularly found in police actions. Thus, while transforming the war powers of the president in the direction of a greater emphasis on "civilian" operations, nonmilitary defense modifies the police power of the states by adding the aspect of "defense" measures.[18]

An Office of Civilian Defense had been created by President Roosevelt in 1941 (E.O. 8757) within the Office for Emergency Management but it had been abolished in 1945 (E.O. 9562) with the end of the fighting. In 1950, a Federal Civil Defense Administration was established (E.O. 10186) within the Office for Emergency Management and was later made an independent agency by the provisions of the Federal Civilian Defense Act (64 Stat. 1245). In 1958, the agency, together with the Office of Defense Mobilization, was consolidated by reorganization plan (72 Stat. 1799) to create the Office of Civil Defense Mobilization. In 1961, the civil defense functions of this agency were transferred to the Secretary of Defense (E.O. 10952) and the remaining functions were redesignated the Office of Emergency Planning by an act of September 22, 1961 (75 Stat. 630). (In 1973, the Office of Preparedness within the General Services Administration (GSA) was ordered to carry out the emergency planning and coordination responsibilities formerly assigned to the Office of Emergency Preparedness with the exception of former OEP responsibilities relating to natural disasters and import investigations.) These civil defense functions are administered by the Defense Civil Preparedness Agency, established by the direction of the Secretary of Defense in 1972. The Property Management and Disposal Service of the General Services Administration, in cooperation with the Public Health Service, has responsibilities in distributing emergency civil defense medical resources.

The basic civil defense statute, the Federal Civil Defense Act of 1950 (64 Stat. 1245), set forth special powers which might be activated by a presidential proclamation or congressional resolution declaring a condition of emergency by reason of the fact "that an attack upon the United States has occurred or is anticipated (64 Stat. 1251)." As set forth in Title III of the statute, the emergency powers include immunity of the Federal Government from suits brought against it

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[18] Robert S. Rankin and Winfried R. Dallmayr. Freedom and Emergency Powers in the Cold War. New York: Appleton-Century-Crofts, 1964, pp. 8–9.

in connection with carrying out the provisions of the act (64 Stat. 1253 § 304), waiver of the safeguards of the Administrative Procedure Act (64 Stat. 1253 § 305), and authority to confiscate property pursuant to carrying out the provisions of the act (64 Stat. 1253 § 306). This authority remains in effect at present (50 U.S.C. App. 2291–2297) and is due to expire on June 30, 1974 unless terminated earlier or extended by Congress.

> The act distinguishes between general "power and duties" and "emergency authority," apparently with the understanding that the former could be used in all situations, even in the absence of emergency, while the latter would be exercised in cases of largescale catastrophe. Among the regular "powers and duties," the section dealing with governmental acquisition of private property deserves brief mention. Due to the basic operational responsibilities of the Defense Department under the reorganization order of 1961, this power seems to be vested today mainly in the Secretary of Defense, subject to presidential control. The section grants the authority to procure by condemnation or otherwise, construct, lease, transport, store, maintain, renovate or distribute materials and facilities for civil defense, with the right to take immediate possession thereof. Acquisition "by condemnation" obviously refers to the taking of private property through regular condemnation proceedings in a court of competent jurisdiction. However, the authority granted by the act is much broader as suggested by the phrase "or otherwise" which signifies that, apart from contractual transfer and condemnation, the government may under certain conditions requisition private property for public purposes without judicial proceedings. Nevertheless, it must be added that, at least in this particular section, the authority of the government is carefully circumscribed and qualified. Above all, the procurement power can only be exercised in accordance with the requirements of existing law in the sense that statutory provisions concerning negotiations, transfer of title and determination compensation must be observed. Moreover, the act adds the proviso that the procuring officer may only lease real property, but cannot acquire fee title to this property unless specifically authorized by act of Congress. Also, the acquiring officer is required to report at least quarterly to Congress all property acquisitions made under this section of the act.[19]

It has also been observed that the statute distinguishes among conditions of national emergency, civil defense emergency, and war. As one authority has commented:

> . . . a civil defense emergency does not necessarily arise with a presidential declaration of a national emergency and that a special proclamation or at least notification is required in order to put the provisions of the title in operation.

[19] *Ibid.*, pp. 41–42

> Also, it may be useful to point out that the existence of a civil defense emergency does not necessarily coincide with a declaration of war or actual warfare. Possibly, there may be a declared war without the existence of a civil defense emergency due to the absence of an attack or anticipated attack upon the United States. On the other hand, the proclamation of a civil defense emergency in case of an anticipated attack does not seem to depend necessarily on preceding warfare or a declared state of war. The act specifies that the emergency shall terminate upon the issuance of a presidential proclamation or the passage by Congress of a concurrent resolution to this effect.[20]

Another aspect of nonmilitary defense policy may be evidenced in the responses of the United States to oppressed peoples. In 1956, for example, President Eisenhower launched an emergency program for Hungarian refugees.[21] At the termination of the effort a year later, some 30,000 individuals had been assisted in gaining admittance to the United States and over $50 million had been allocated to aid these immigrants.[22] Clearly the action undertaken was of an emergency and political nature as well as being exclusively under Executive control. Established with the avowed purpose "to render relief and peaceful assistance to the Hungarian people and to aid refugees fleeing from Hungary in the face of the Soviet military offensive aimed at crushing the Hungarians' struggle for freedom and national independence," there was, understandably, no objection to this temporary exercise of emergency power by the President. By construing the action of the United States as that of protecting these freed people by assisting them in a free world, it could be argued that there was a defense aspect to this policy but that it was of a nonmilitary nature.

Labor Policy

Prior to the end of World War II when nationwide strikes or labor disputes affecting some vital aspect of the national interest are regarded as national emergency situations, the options available to the President for ending such an exigency were ad hoc and somewhat authoritarian in implication: personal arbitration, court orders, seizure of facilities, operation of the facilities, declaration of martial law. However, in 1947 the Labor-Management Relations or Taft-Hartley Act (61 Stat. 155) provided new procedures for dealing with these matters.

> Very briefly, these procedures are the following: whenever in the opinion of the President of the United States an actual or threatened strike or lockout affecting an entire industry or a substantial part thereof would, if permitted

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[20] *Ibid.*, pp. 42–43.

[21] Public Papers of the Presidents of the United States: Dwight D. Eisenhower (1956). Washington: U.S. Government Printing Office, 1958, p. 1093.

[22] *Ibid.* (1957), pp. 850–852.

to occur or to continue, imperil the national health or safety, the president "may" appoint a board of inquiry with authority to study the issues in the dispute and to report to him, but without the power to make recommendations. Upon receiving a report from this board, the president may then direct the attorney general to seek an injunction against the strike or lockout in a federal district court. If the court finds that the strike or lockout fulfills the described conditions of an emergency dispute, it issues an order enjoining the strike or its continuation.

During the ensuing "cooling off" period, labor and management are required to continue or resume negotiations and to seek a settlement, possibly with the help of the Federal Mediation and Conciliation Service. In the meantime the board of inquiry is reconvened by the president for the purpose of reporting to him on the position of the parties at the end of sixty days. The president makes the latter report public and, during the following fifteen days, the National Labor Relations Board conducts a secret poll of the employees on the "last offer" of each employer involved in the dispute. Within five days thereafter, the Board certifies the results of the poll to the attorney general who, regardless of the outcome of the ballot, asks the court to discharge the injunction, with the entire injunctive process to be completed in eighty days. Finally, the president—with or without recommendations for legislative action—submits a record of the entire proceedings to Congress.[23]

The use of and success of these procedures is reflected in the following table outlining the invocation of the statute's injunctive relief provision.

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[23] Rankin and Dallmayr, *op. cit.*, pp. 102–103.

Taft-Hartley Act injunctions in national emergency disputes (1947–72) [24]

Case	Injunction issued	Strike in progress when injunction issued	Strike halted
Atomic energy, 1948	Yes	No	
Meatpacking, 1948	No		
Bituminous coal, 1948	Yes	Yes	Yes.
Telephone, 1948	No		
Maritime (all coasts) 1948	Yes	No	
Bituminous coal, 1948	No		
Longshoring, Atlantic, 1948	Yes	No	
Bituminous coal, 1949–50	Yes	Yes	No.
Nonferrous metals, 1951	Yes	Yes	Yes.
Fabricated steel and atomic energy, 1952	Yes	Yes	Yes.
Longshoring, Atlantic, 1953	Yes	Yes	Yes.
Atomic energy, 1954	Yes	Yes	Yes.
Do	No		
Longshoring, Atlantic and Gulf, 1956–57	Yes	Yes	Yes.
Atomic energy, 1957	Yes	Yes	Yes.
Longshoring, Atlantic and Gulf, 1959	Yes	Yes	Yes.
Basic steel, 1959	Yes	Yes	Yes.
Maritime (all coasts), 1961	Yes	Yes	Yes.
Maritime, West coast, 1962	Yes	Yes	Yes.
Aircraft manufacturing, 1962	Yes	Yes	Yes.
Longshoring, Atlantic and Gulf, 1962–63	Yes	Yes	Yes.
Aerospace, 1962	Yes	Yes	Yes.
Aerospace, 1962–63	Yes	No	
Longshoring, Atlantic and Gulf, 1964–65	Yes	Yes	Yes.
Military aircraft engines, 1966	Yes	Yes	Yes.
Do	Yes	Yes	Yes.
West coast shipyards, 1967	Yes	Yes	Yes.
Military aircraft engines, 1967	Yes	Yes	Yes.
Longshoring, Atlantic and Gulf, 1968	Yes	Yes	Yes.
Grain shipping, West coast, 1971	Yes	Yes	Yes.
Grain shipping, Chicago, 1971	No		
Longshoring, Atlantic and Gulf, 1971	Yes	Yes	Yes.
Longshoring, West coast, 1972	Yes	Yes	Yes.
Do	Yes	Yes	Yes.

Also available as a strike settlement instrument is the Railway Labor Act (44 Stat. 577) which "emphasizes mediation and voluntary arbitration, has been interpreted to permit recommendations by neutral boards, and does not call for either injunctions or last-offer ballots." [25]

> More specifically, the Railway Labor Act of 1926, as amended, provides [45 U.S.C. 151 et seq.] for a National Board to assist in resolving labor disputes in both the railroad and airlines industries. If the private parties in these industries cannot settle a dispute themselves, either one may call in the Mediation Board, or it may volunteer its services "in case any labor emergency is found by it to exist at any time."

[24] Adapted from Donald E. Cullen. National Emergency Strikes. Ithaca: New York State School of Industrial and Labor Relations, Cornell University, 1968, pp. 56–57 with supplementary information provided by the Bureau of Labor Statistics, U.S. Department of Labor.

[25] Cullen *op. cit.*, p. 67.

When the Board comes into a dispute, its mandate is first to "use its best efforts" to obtain an agreement by mediation. If mediation fails, the Board is instructed to try "to induce the parties to submit their controversy to arbitration." If the parties refuse to arbitrate, the NMB notifies them in writing that mediation has failed, and for the next thirty days "no change shall be made" unilaterally in wages or working conditions, a polite way of saying no strike shall occur.

At any point in this thirty-day period, if the Mediation Board believes that a dispute threaten[s] substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service," it so notifies the President, who may "create a board to investigate and report respecting such dispute." The emergency board is to report to the President within 30 days from the date of its creation. During these 30 days, and "for 30 days after such board has made its report to the President, no change, except by agreement, shall be made by the parties . . . in the conditions out of which the dispute arose." [26]

Utilization of the emergency board provision of the Railway Labor Act is reflected in the following table.

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[26] *Ibid.*, pp. 66–67.

Railway Labor Act emergency boards and strikes (1926–71) [27]

Year	Emergency boards appointed		Number of strikes	
	Rail	Air*	Rail	Air
1926	0	0	NA	NA
1927	0	0	0	0
1928	1	0	1	0
1929	2	0	3	0
1930	0	0	1	0
1931	1	0	0	0
1932	1	0	0	1
1933	1	0	0	1
1934	5	0	0	0
1935	0	0	1	1
1936	1	0	2	0
1937	3	0	6	0
1938	1	0	1	0
1939	1	0	0	2
1940	0	0	1	0
1941	4	0	5	0
1942	2	0	9	0
1943	11	0	8	1
1944	2	0	12	0
1945	27	3.	13	2
1946	19	1	17	2
1947	21	1	7	2
1948	15	1	12	3
1949	10	2	10	3
1950	11	0	17	3
1951	6	2	17	5
1952	4	2	15	7
1953	1	3	23	7
1954	2	0	10	4
1955	2	1	20	7
1956	5	0	14	3
1957	3	0	15	2
1958	1	5	11	18
1959	0	1	10	6
1960	6	1	16	12
1961	3	2	9	6
1962	6	6	4	1
1963	3	1	8	9
1964	4	2	27	15
1965	4	0	19	7
1966	1	1	4	1
1967	2	2	0	8
1968	2	0	5	2
1969	1	0	6	4
1970	3	0	3	8
1971	1	0	5	5

*Airlines not covered by the act until April 1936.

There is also the possibility that the President may ask Congress to extend the period of time of strike prohibition set by the Railway Labor Act. This was the course of action which President Lyndon Johnson took on two occasions in 1967.[28]

[27] Adapted from *Ibid.*, pp. 70–71 with supplementary information drawn from the annual reports of the U.S. National Mediation Board for the years 1966–71.

[28] See Public Papers of the Presidents of the United States: Lyndon B. Johnson (1967). Washington: U.S. Government Printing Office, 1968, pp. 439–442, 442–443, 444, 468–469, 696–699.

The President may also use national emergency powers to deal with a strike. Faced with a stoppage in the postal service in 1970, President Richard Nixon proclaimed a state of national emergency, thereby permitting him to utilize portions of the military Ready Reserve (10 U.S.C. 673) to assist in moving the mail and to also order (E.O. 11519) National Guard units to assist in this effort.[29] Operations were directed by the Secretary of Defense. Although this use of the Armed Forces lasted for about a week, the proclamation activating the dispatching of troops seemingly remains in effect and could be utilized in the event of another postal strike, regardless of the legality of such a halt in mail service.

Under emergency conditions, the President may stop a strike by utilizing the strike delay provisions of the Taft-Hartley Act or Railway Labor Act, by obtaining court orders against its continuance, or by utilizing troops to perform the functions of the striking workers (or by a combination of these remedies). It would seem that the emergency conditions recognized by the Taft-Hartley Act and the Railway Labor Act are not necessarily those specified by a proclamation of national emergency. Nevertheless, the portion of the statute regarding procedures for dealing with the exigencies of a strike (61 Stat. 155 §206) is entitled "National Emergencies."

Disaster Relief

It was not until the post-World War II period that disaster relief efforts were refined into a developed program.

> Prior to the 1950 enactment of Public Law 875 [64 Stat. 1109] by the 81st Congress, there was no permanent program of Federal disaster assistance to State and local governments in the United States. Private agencies bore the primary responsibility for disaster relief. The most effective private disaster relief organization was the American Red Cross. Governmental sanction for the activities of this quasi-public institution was set out in the Act of January 5, 1905 [33 Stat. 599]. Operating within the framework, of this law, the Red Cross was usually able to provide short-term assistance—food, clothing, emergency housing—and limited financial support for rehabilitation. In addition, it conducted or assisted rescue operations, evacauation, and mass care. These activities were aimed at the direct and immediate relief of the stricken population.
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> Private aid, with the exception of Red Cross assistance, was largely nonexistent in most sections of the country. Where other private relief organizations did exist, they were usually inadequate in the face of large-scale natural disasters. The narrow scope and focus of the Red Cross mission, the limited presence of other private assistance efforts, and the limited budgets of all disaster aid organizations inhibited disaster recovery.[30]

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[29] See Weekly Compilation of Presidential Documents, v. 6, March 30, 1970: 418–420; 84 Stat. 2222.

[30] Office of Emergency Preparedness. Executive Office of the President. Report to Congress: Disaster Preparedness. Washington: Office of Emergency Preparedness, January, 1972, p. 167.

State and local governments, prior to the 1950 statute, were also limited in their disaster relief efforts due to restricted financial reserves. Funds set aside for dealing with natural calamities were often inadequate in meeting the exigency. The best that subnational jurisdictions could offer were police protection against looting and public disorder and repair of disaster-damaged public facilities such as roads, streets, sewers, and bridges.

The only alternative to the limited assistance of private agencies and State and local governments lay in an appeal to Washington for special disaster aid. As early as 1803, the Federal Government recognized its responsibility for disaster assistance in cases where efforts of private agencies and State and local governments were not adequate to cope with disaster damage. Between 1803 and 1950, over 100 separate special assistance acts were passed by Congress. These laws, however, were enacted only after disasters had occurred. The after-the-fact nature of this *ad hoc* legislation resulted in a time lag between catastrophe and Federal assistance, and hardship and suffering were long endured before assistance could be made available.

> During the 1930's, a large amount of Federal disaster aid was channeled through programs of such agencies as the Federal Civil Works Administration, the Federal Emergency Relief Administration, the Works Progress Administration, the Public Works Administration, and the Civilian Conservation Corps. These programs, while not primarily geared to disaster assistance, frequently gave effective disaster aid. Federal disaster assistance was not formally coordinated, however and there was no continuous program of Federal disaster aid.[31]

Some effort was made to dispense catastrophe aid through catastrophe relief work programs of the National Emergency Council. Numerous floods in 1936 and 1937 prompted this activity as did tornadoes in Georgia, and earthquake in Montana, and droughts in various areas of the central United States.[32]

> Prompted by the need for continuing Federal disaster aid in the hurricane-plagued Gulf Coast and flood-prone areas along the Mississippi and Missouri Rivers, Congress in 1947 enacted the first general disaster relief act—Public Law 233, 80th Congress [61 Stat. 422] (approved July 27, 1947). The War Assets Administrator was authorized to transfer surplus Federal property to the Federal Works Administrator, who in turn was to lend or to transfer this property to State and local governments to alleviate disaster impact. The Federal Works Administration could work through any Federal agency or any State or local government, and Federal agencies were directed to give this effort full cooperation. Congress made no special appropriation

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[31] *Ibid.*, pp. 167–168.

[32] See National Emergency Council. The National Emergency Council: A Chronological Review of Its Activities from November 17, 1933 through December 31, 1937. Washington: National Emergency Council, 1938, pp. 53-87.

to carry out this Act; rather, FWA was directed to use funds available under the Surplus Property Act of 1944 [58 Stat. 765] for the transfer of surplus or other excess property.

FWA thus assumed responsibility for administering the Disaster Surplus Property Program. When a disaster of sufficient severity occurred, FWA would recommend that the President invoke P.L. 80–233. Upon favorable Presidential action, The War Assets Administration (WAA) was alerted to anticipate material requests from local governments. FWA and WAA processed these requests and arranged for property delivery.[33]

After the store of surplus Federal property was depleted through this course of disaster assistance, the Chief Executive began allocating funds from his contingency account to maintain the disaster recovery program. Eventually an emergency fund for this function was granted to the President. However, it soon became evident that some more thorough and developed effort had to be provided to meet natural catastrophe.

On September 30, 1950, the 81st Congress passed the first comprehensive Federal Disaster Act (Public Law 81–875 [64 Stat. 1109]). This law gave the President broad and continuing disaster assistance powers in those cases in which he delcared the situation a "major disaster." P.L. 81–875 was directed principally at aiding the recovery and repair of public facilities of local government.

Under the authority of P.L. 81–875, the President on March 2, 1951, issued Executive Order 10221, which delegated disaster relief administrative responsibility to the Housing and Home Finance Agency (HHFA).

The 82nd Congress, by Public Law 107 [65 Stat. 173] August 3, 1951) amended P.L. 81–875 to provide for the easing of credit restrictions under the National Housing Act and to authorize the furnishing of emergency housing for victims of disasters. The amendment was prompted by the Kansas-Missouri flood of 1951.

On January 15, 1953, the President revoked Executive Order 10221 and issued Executive Order 10427, transferring P.L. 81–875 administration from HHFA to the Federal Civil Defense Administrator.[34]

In 1953, Congress further amended (67 Stat. 180) the Federal Disaster Act "to permit loan and donation of Federal surplus property to State and local governments for repair of disaster-damaged public facilities and for individual rehabilitation." [35] The legislation was enacted in the aftermath of tornado disaster in Worcester, Mass. Nine years later the statute was modified again.

With the approval of Public Law 87–502 [76 Stat. 111] on June 27, 1962, Guam, American Samoa, and the Trust

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[33] Office of Emergency Preparedness, *op. cit.*, p. 168.
[34] *Ibid.*, p. 169.
[35] *Ibid.*

Territory of the Pacific Islands were included within the definition of "State" and made eligible for Federal assistance under P.L. 81–875. This action made P.L. 81–875 applicable to all of the United States and its possessions. (Puerto Rico and the Virgin Islands were included in the original law; disaster relief is separately authorized for the Canal Zone by Title 2, Chapter 9, Section 235 of the Canal Zone Code.)

P.L. 87–502 also authorized emergency repair and temporary replacement of disaster-damaged facilities of State governments. P.L. 81–875 originally provided only for emergency repair or temporary replacement of public facilities owned by local governments.

Public Law 89–769 [80 Stat. 1316] (November 6, 1966) amended P.L. 81–875 by including rural communities, unincorporated towns, and villages as eligible entities on whose behalf a State or local government might make application for Federal disaster aid. P.L. 89–769 delegated additional authority and responsibility to OEP [Office of Emergency Preparedness], specifically:

Authority to share (on a 50–50 basis) costs of repair, restoration, or reconstruction of certain State, county, municipal, or other local government agency projects in the process of construction where damages was the result of a major disaster (Section 9);

Authority to plan and coordinate all Federal disaster assistance (Section 12);

Responsibility for disaster preparedness liason with State and local governments (Section 12);

Responsibility for the conduct of a study on ways to prevent or minimize loss of property, personal injury, and death from forest and grass fires (Section 13).[36]

Supplementing the general assistance program contained in the amended Federal Disaster Act, Congress enacted statutes to assist Alaskan earthquake victims (78 Stat. 505) in 1964, Pacific Northwest flood losses (79 Stat. 131) in late 1964 and early 1965, and hurricane disaster problems in Florida, Louisiana, and Mississippi (79 Stat. 1301) in 1965.

Shortly after Hurricane Camille struck the Gulf Coast in August 1969, Congress passed Public Law 91–79 [83 Stat. 125] (October 1, 1969). This Act permitted the Federal Government, through the Director of ODP (the agency's name was changed later that month from the Office of Emergency Planning to the Office of Emergency Preparedness) to provide additional disaster assistance, particularly to individuals affected by major disasters. Specifically, this law:

Permitted loans by SBA [Small Business Administration] and FHA [Federal Housing Administration] with authority to cancel up to $1800 on loans over $500 received for damage caused by a disaster,

Permitted the President to distribute through the Secretary of Agriculture coupon allotments and surplus food commodities to low-income households,

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[36] *Ibid.*

Authorized unemployment payments to individuals unemployed as a result of a major disaster,

Authorized OEP, acting for the President, to make grants to States and political subdivisions for the purpose of removing debris deposited on privately owned lands or waters as a result of a major disaster,

Provided for financial assistance to States to develop comprehensive plans and programs for assisting individuals suffering losses as a result of major disasters.[37]

The following year Congress enacted the Disaster Relief Act of 1970 (84 Stat. 1744) which was designed to modernize and consolidate the disaster relief program. The statute repealed P.L. 81–875, most of 89–769, and 91–79.

Passage of P.L. 91–606 represents the most significant landmark in the history of the Federal Disaster Assistance Program. It not only included almost all of the previous provisions for Federal disaster assistance but incorporated new features based on many years of experience by the Federal Government in responding to the human suffering and material losses caused by natural disasters. The new provisions follow:

For Federal funding to State and local governments for disaster-damaged public facilities, the Act removed the restriction to only *emergency* repairs or *temporary* replacement and authorized up to 100 percent reimbursement of the cost of their *permanent* repair, restoration, or replacement.

Federal grant-in-aid program administrative procedures may be waived or modified during a declared major disaster.

The Director, OEP, is authorized to coordinate, with their consent, the relief effort of private organizations such as the Red Cross, the Salvation Army, and the Mennonite Disaster Service.

Nondiscrimination in disaster assistance is emphasized.

The resources of the Federal Government can be made available, on determination by the President, to avert or lessen the effects of a disaster before it occurs.

The Director, OEP, is given special authority to set up emergency communications and to provide temporary public transportation to carry out his responsibilities in a major disaster situation.

Age of any adult Federal loan applicant will not be considered in determining his eligibility.

[Emphasis supplied.]

SBA and FHA are authorized to make loans to sources of major employment in a disaster area in such amounts that will permit these sources to resume operations and contribute to the restoration of the economic viability of the area.

Legal assistance may be given to low-income individuals to meet their needs as a consequence of a major disaster, consistent with the goals of the programs of the Act.

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[37] *Ibid.*, pp. 169–170.

The President may make a grant to a local government which has experienced a substantial loss of property tax revenue as a result of a major disaster.

Federal loans for repair, restoration, or replacement of residences are contingent upon compliance with applicable building codes and standards of safety, decency and sanitation.[38]

In conjunction with P.L. 91-606, the President directed (E.O. 11575) certain authority granted by the statute would be reserved to himself:

> the declaration of major disasters, determination with respect to restoration of Federal facilities, and the prescribing of time limits for granting priorities for public-facilities and housing assistance in the disaster area. The OEP Director is delegated authority to act in all other matters for which the President is given responsibility in the Act except two: the Secretary of Defense is designated to act for the President concerning the availability and use of civil defense communications for disaster warnings; the Secretary of Agriculture acts for the President concerning the use of surplus commodities and food coupons in a major disaster situation.[39]

In 1972, Congress amended (P.L. 92–209) the Disaster Relief Act "to authorize Federal grants for repair, reconstruction, or replacement of medical care facilities owned by tax-exempt organizations and damaged or destroyed by a major disaster—up to 100 percent of net cost for existing facilities, up to 50 percent for those under construction." [40]

These statutes constitute the disaster relief program under which the President may grant emergency aid to those suffering from natural catastrophe. The emergency powers of the Chief Executive in these matters are those of (1) defining or recognizing a disaster situation and (2) specifying the type(s) of financial assistance which can be or will be allocated. While this area of emergency authority does not derive from any proclamation of a national emergency, the extension of disaster assistance is conditioned upon the President's declaration of a disaster condition in a specified locale.

Civil Rights

In the area of civil rights policy, one of the earliest post-World War II grants of emergency power came in Title II of the Internal Security Act of 1950 (64 Stat. 987), called the Emergency Detention Act (64 Stat. 1019). According to this statute (64 Stat. 1021 §102) the President may, in the event of

1. Invasion of the territory of the United States or its possessions,
2. Declaration of war by Congress, or
3. Insurrection within the United States in aid of a foreign enemy

declare, by public proclamation, an "Internal Security Emergency." This announcement made the special police provisions of the statute

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[38] *Ibid.*, p. 170.
[39] *Ibid.*, p. 170.
[40] *Ibid.*, p. 172.

effective. Termination of the emergency could be made by either a presidential proclamation or a concurrent resolution of Congress.

> In time of internal security emergency, the President, acting through the Attorney General or such other officers as he might designate, might "apprehend and by order detain each person as to whom he, the Attorney General or such other officer so designate, finds that there is a reasonable ground to believe that such person may engage in, or may conspire with others to engage in acts of espionage or sabotage." Persons so detained would remain in custody until termination of the emergency, or until released by order of the Attorney General, a Detention Review Board, to be set up under the bill, or "a final order of release by a United States court after review of the action of the Board of Detention Review." This last would be a most unlikely occurrence indeed.[41]

Although the total statute was enacted over the strong objections and veto of President Truman,[42] detention centers were maintained at former prisoner-of-war camps at Florence, Ariz., and El Reno, Okla., at former Army installations at Avon Park Fla., Tule Lake, Calif., and Wickenburg, Ariz. There was also a detention center at the Allenwood, Pa., ordnance depot.[43]

In 1968, at a time when rioting and mass violence had and were devastating various urban centers of the nation, two references to national detention centers prompted public interest in their existence and demands for not only their elimination but also the repeal of the Emergency Detention Act. The first arousal of public interest in the detention centers occurred when a House Committee on Un-American Activities (now the Committee on Internal Security) report, prepared by committee consultant Phillip Abbot Luce, suggested:

> Acts of overt violence by the guerrillas would mean that they had declared a "state of war" within the country and, therefore, would forfeit their rights as in wartime. The McCarran [Internal Security] Act provides for various detention centers to be operated throughout the country and these might well be utilized for the temporary imprisonment of warring guerrillas.[44]

The use of the term "guerrillas" was regarded by some to be a cryptic reference to black urban rioters. This suspicion was popularized further when a novel by John A. Williams gained wider readership. Actually published in 1967, *The Man Who Cried I Am* discussed, in the context of its own story, a secret governmental scheme called the King Alfred Plan by which the black population would be incarcerated in special camps.[45] This fictional situation coincided in the

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[41] Cornelius P. Cotter and J. Malcolm Smith. An American Paradox: The Emergency Detention Act of 1950. Journal of Politics, v. 19, February, 1957: 22.

[42] See Truman papers (1950), pp. 645–653.

[43] Cotter and Smith, *op. cit.*, p. 20.

[44] U.S. Congress. House. Committee on Un-American Activities. Guerrilla Warfare Advocates in the United States. Washington: U.S. Government Printing Office, 1968. (90th Congress, 2d session. House. Report no. 1351), p. 59.

[45] John A. Williams. The Man Who Cried I Am. Boston: Little, Brown & Co., 1967.

minds of some with the detention suggestion contained in the Un-American Activities Committee report.[46] Undoubtedly this was not the only stimulus prompting a call for the repeal of the Emergency Detention Act, but it did serve to mobilize opinion in favor of such an action. In 1971, Congress enacted legislation (P.L. 92–128) overturning the detention statute.

For purposes of maintaining public safety, the President has, on occasions where the enforcement of Federal civil rights matters were at issue, dispatched troops to maintain order. The first of these instances in the post-World War II era occurred in 1957 at the Little Rock and Central High School, Little Rock, Ark.[47] A similar situation prevailed at the University of Mississippi in 1962 and Federal troops were called to intervene in that instance. A year later, soldiers were utilized to enforce Federal civil rights guarantees at the University of Alabama. In each case, troops served to maintain public order, to disperse unlawful assemblies, and to guarantee the Federal civil rights of citizens. Court orders had been issued in each case and troops served to carry out these directives.

During 1967 and 1968, urban disorders prompted President Johnson to order Federal troops into Detroit (E.O. 11364),[48] Washington, D.C. (E.O. 11403),[49] Chicago (E.O. 11404),[50] and Baltimore (E.O. 11405).[51] In the case of the state jurisdictions, troops were dispatched in response to the requests of the governor. The military were utilized in the District of Columbia by order of the President as Commander in Chief of the D.C. militia.

The use of troops in integration efforts and situations of riot has been for the purpose of guaranteeing the civil rights of all parties involved in these matters. The military functioned to strengthen the police authority; they did not act under a condition of martial law but rather enforced Federal civil law. Troops were mobilized to meet an exigency and were withdrawn when the crisis subsided. They were utilized in emergency situations where the national interest was involved and therefore, it may be argued, a theoretical condition of national emergency prompted their mobilization.

Economic Management

Undoubtedly the oldest emergency authority available to the President today derives from President Roosevelt's 1933 proclamation calling for the closing of the banks (48 Stat. 1689). This action was affirmed by Congress in the Emergency Banking Act (48 Stat. 1) and, on the basis of this statutory authority, the President's power in this policy sphere has continued (48 Stat. 1691). Though the im-

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[46] The only comment on this matter by the committee appeared in U.S. Congress. House. Committee on Internal Security. Annual Report for the Year 1970 (91st Congress, 2d Session). Washington: U.S. Government Printing Office, 1970. (92nd Congress, 2d Session. House. Report no. 14), pp. 80–81.

[47] See Rankin and Dallmayr, *op. cit.*, pp. 205–213; Eisenhower papers (1957), pp. 678–679, 695–696; *Ibid.* (1958), p. 701; also for general reference see Anthony Lewis and The New York Times. Portrait of a Decade. New York: Random House, 1964; Congressional Quarterly. Revolution In Civil Rights, 4th Edition. Washington: Congressional Quarterly Service, June, 1968.

[48] See Johnson papers (1967), pp. 714–717; Proc. 3795, 32 F.R. 10905.

[49] See Proc. 3850, 33 F.R. 5495.

[50] See Johnson papers (1968), p. 497; Proc. 3841, 33 F.R. 5497.

[51] See Johnson papers (1968), p. 498; Proc. 3842, 33 F.R. 5499.

mediate banking crisis prompting these actions ceased to exist long ago, the President's proclamations remain in effect today. The existence of this 1933 authority has been recognized in directives issued by President Eisenhower (E.O. 10896 and E.O. 10905), President Kennedy (E.O. 11037), and President Johnson (E.O. 11387). However, as these matters indicate, the President is, to some extent, limited as to how far he may venture into management of the economy.

> The problem of executive power in the economic field is not of recent origin; it is at least as old as the debates on tariff policy during the early years of the nation. Under the federal constitution, the major power in economic and industrial matters is obviously vested in Congress under the "commerce clause." However, the executive branch of government has always played a large role in this area either through legislative delegation of power or through the exercise of "inherent" or emergency powers in times of national crisis. The two world wars of our century vastly increased executive authority. Both wars were fought as much on the production front as on the military, with the result that the traditional war powers of the president were progressively intermingled with emergency powers in industrial relations and wage-price developments. Some of the latter powers were abandoned or revoked at the end of military hostilities; others were continued in force and were temporarily or periodically extended.[52]

One of the emergency economic actions which came into increased use during the period of World War II was Federal expropriation of manufacturing and transportation facilities during strikes.

> Government seizure of plants during labor disputes has frequently been defended as a strong but balanced form of public intervention which, while avoiding the onerous side effects of compulsory arbitration or injunction, protects the public interest in the maintenance of an essential service. This estimate appears to have merit especially where the measure is not intended to enforce a recommended settlement but to function as a holding device permitting negotiations without loss of the strike weapon on the part of one disputant. Whatever its merits or demerits, seizure by the President, in order to be valid, has to be founded on a constitutional basis, such as the President's authority as Commander in Chief which applies primarily in wartime, or on specific legislative authorization. In peacetime, on the other hand, the power of the President to seize a plant without legislative permission is very doubtful. If at all, such a measure can only be justified by a national emergency of severe proportions. It so happens that emergencies of this nature are not entirely rare in the present [1963] cold war period with its blending of wartime and peacetime standards. Regularly, of course, any governmental taking of property relies on the constitutional principle of eminent domain. However, in view of the necessity of "just compensation," a compensation which can only be granted by Congress, eminent domain is hardly a sufficient

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[52] Rankin and Dallmayr, *op. cit.*, p. 97.

basis of presidential power in the absence of statutory permission, unless there is a justified expectation that Congress will ratify the exercise of seizure by the president by passing a compensation measure.[53]

In the post-World War II period, authority for the seizure of plants and facilities was generally found in the Smith-Connally Act of 1943, formally known as the War Labor Disputes Act (57 Stat. 163). This statute expired on June 30, 1947. Seizures ordered in 1948 and 1950 were based upon the Transportation Act of 1916 (39 Stat. 645). The following table lists manufacturing and transportation facilities seized, for instance, during Truman's tenure as President.

Government seizure and operation of private business, 1945–73

Order	Date	Business
9540	Apr. 17, 1945	Cities Service Refining Co.
9542	Apr. 23, 1945	United Engineering Co.
9544	Apr. 25, 1945	Certain airport in Oregon.
9548	May 3, 1945	Certain coal mines.
9552	May 19, 1945	Cocker Machine & Foundry Co.
9554	May 23, 1945	Chicago motor carriers.
9559	May 28, 1945	Gaffney Manufacturing Co.
9560	June 1, 1945	Mary-Leila Cotton Mills.
9564	June 5, 1945	Humble Oil & Refining Co.
9565	do	Pure Oil Co.
9570	June 14, 1945	Scranton Transit Co.
9572	June 15, 1945	Toledo, Peoria & Western RR.
9574	June 18, 1945	Diamond Alkali Co.
9577A	July 1, 1945	Texas Co.
9585	July 4, 1945	Goodyear Tire & Rubber Co.
9589A	July 19, 1945	Sinclair Rubber Co.
9592A	July 23, 1945	Los Angeles Shipbuilding & Drydock Co.
9593	July 25, 1945	Springfield Plywood Co.
9595	July 30, 1945	U.S. Rubber Co.
9602	Aug. 23, 1945	Illinois Central RR.
9603	Aug. 25, 1945	Termination of various orders regarding seizures of business.
9639	Oct. 4, 1945	Certain petroleum plants and facilities.
9658	Nov. 21, 1945	Capital Transit Co.
9661	Nov. 29, 1945	Great Lakes Towing Co.
9667	Dec. 28, 1945	Certain vessels, harbors, ports, and waterfronts.
9685	Jan. 24, 1946	Certain livestock, meat, meat products, and byproducts.
9693	Feb. 5, 1946	New York Harbor towing and transportation.
9727	May 17, 1946	Certain railroads.
9728	May 21, 1946	Certain coal mines.
9736	June 14, 1946	Monongahela RR.
9758	July 19, 1946	Certain coal mines.
9957	May 10, 1948	Certain railroads.
10141	July 8, 1950	Do.
10155	Aug. 25, 1950	Do.
10340	Apr. 8, 1952	Certain steel mills.

The court decisions regarding the 1952 steel seizure dealt a severe blow to this exercise of executive power. It placed strict situational restrictions on unilateral presidential moves.

[53] *Ibid.*, pp. 146–147.

On November 1, 1951, during the Korean War, the United Steelworkers of America announced their intention to seek improvements in working conditions when their contract expired in early 1952. As recorded in his memoirs, President Truman observed:

> In 1951 the steel industry said that it did not wish to discuss the union's demands for increased wages and changes in working conditions, and the union announced that the workers would strike on December 31. I had no way of knowing why the companies refused to negotiate with the union. Perhaps they thought this was opportune time to get tough. Perhaps they believed that the urgent needs of the defense program would bring the government into the dispute and force continued production at unchanged contract conditions. Whatever the reasons, the officials of the Defense Department and of the defense production agencies viewed the impending strike with the gravest alarm. Secretary of Defense Robert A. Lovett had for months been pointing out to me that the national defense program would be endangered if a strike was allowed to halt production. All the members of the Cabinet agreed with Lovett that it would be harmful to the country and injurious to our campaign in Korea if our steel mills were allowed to close down. We were then not only trying to keep our forces in Korea, as well as elsewhere, fully equipped, but we had allies to whom we had promised arms and munitions and whose determination to resist Communism might depend on our ability to supply them the weapons they so badly needed.
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> It was obvious that the best interests of the nation would be seriously affected if a strike in the steel industry took place.[54]

Rejecting utilization of the procedures of the Taft-Hartley Act because it "had been designed primarily for peacetime labor problems," President Truman entered the steel dispute under the provisions of the Defense Production Act of 1950 (64 Stat. 798), utilizing the Wage Stabilization Board, created in accordance with that statute (E.O. 10161), to arbitrate the crisis.

> On January 3, 1952, the Wage Stabilization Board appointed a tripartite panel, consisting of two representatives each of industry, labor, and the public, to hear the evidence. At the same time, the board requested both parties to maintain production pending a report to the President, with the understanding that if no agreement was reached by April 4, the union could strike upon giving prior notice to the companies. On March 20, the board issued its recommendations which, among other things, provided for staggered wage increases, additional fringe benefits and a union shop clause in the new contracts. The recommendations were accepted by the union but promptly rejected by the companies which claimed that the proposed increases would result in additional costs of over one hundred million dollars in 1952 and one hundred forty-one million dollars

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[54] Truman, *op. cit.*, pp. 466–467.

> in 1953. A period of intense negotiations followed but produced no agreement. On April 4, the union served notice of an industry-wide strike, to become effective at 12:01 a.m., April 9. Thereupon, on the evening of April 8, President Truman announced that he had ordered [E.O. 10340] his Secretary of Commerce, Sawyer, to take possession of the steel plants by midnight.[55]

The industry did not delay in seeking an injunction against the President's action. Initial pleas were denied but, after intervention by the Federal Mediation and Conciliation Service failed, motions on the seizure and alteration of the terms and conditions of employment were heard in Federal District Court.

> On April 29, District Judge Pine of the District of Columbia rendered his decision granting an injunction against the government. The decision was based on two major arguments: first, that the seizure was not supported by a statutory authorization as it should have been in a peacetime situation; and second, that in the absence of statutory support the president's action could only be founded on his power as commander-in-chief which, however, did not cover a seizure effected neither in time of war nor in a theater of war. In addition, the court relied for its ruling on findings that the Secretary of Commerce was not beyond the reach of judicial power and that the damages were shown to be irreparable. Judge Pine concluded his decision by expressing the belief
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> > that the contemplated strike, if it came, with all its awful results, would be less injurious to the public than the injury which would flow from a timorous judicial recognition that there is some basis for this claim of unlimited and unrestrained executive power, which would be implicit in a failure to grant the injunction.[56]

When the case reached the Supreme Court, the result, handed down on June 2, was a 6 to 3 decision to sustain the District Court.[57] However there was no unanimity among the majority as to the principles and issues involved in the dispute: While Justice Black wrote the opinion of the Court, Justices Frankfurter, Jackson, Douglas, and Burton, who were all in agreement with this view, prepared their own separate concurring opinions. Justice Black limited his concurrence to the opinion of the Court.

> A cautious and circumspect approach to the case reveals that if the decision is a landmark, it stands for a much more limited proposition than the broad language of the majority opinion would suggest. It may be exaggerated to say that the decision was in "the same class as a restricted railroad ticket, good for this day and train only;" but it is undeniable

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[55] Rankin and Dallmayr, *op. cit.*, p. 152; Truman papers (1952), pp. 246–251.
[56] Rankin and Dallmayr, *op. cit.*, p. 153; *Youngstown Sheet and Tube Co.* v. *Sawyer*, 103 F. Supp. 569, 574 (D.D.C. 1952).
[57] *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).

that the ruling did not resolve the problem of the extent of executive emergency powers under all circumstances. For a general statement of such executive powers, the majority opinion conceded too little while the dissent claimed too much. The majority opinion fully seconded on this point by the concurring opinion of Justice Douglas, is unduly restrictive in holding that, since Congress may act in this field, seizure by the President must always be based on express legislative authorization. Stated in this broad manner, the opinion disregards executive practice and more permissive judicial precedent, and erects an excessively high wall between legislative and executive functions; moreover, the statement was not required by the circumstances and could have profited from Justice Frankfurter's admonition to hew to the facts of the case. On the other hand, the position taken by the dissent that the President may exercise broad emergency powers unless a particular method of action is expressly denied by Congress claims too much, especially in view of existing legislation stipulating procedures which the President could and should have used. The argument that existing procedures were merely permissive is not convincing in the light of evidence presented in the concurring opinions on the legislative history and congressional policy of the Taft-Hartley Act. As it appears, the proper basis of the decision, and the only general proposition for which the case may stand, is contained in the view expressed by Justices Frankfurter, Jackson, Burton and Clark that, under existing circumstances, the President could not exercise independent powers in the face of statutory procedures prescribed by Congress.[58]

The *Youngstown* case marked the end of business seizures by the Federal government. Though aspects of the Supreme Court's decision have left uncertainty on a variety of minor legal points, the case served notice that a condition of war must exist in order that such seizures would be legally justified.

As an emergency action in regulating the economy, President Truman instituted price controls in 1946 by extending certain of the functions of the Office of Price Administration (E.O. 9745).[59] These controls were later continued under the Price Control Act of 1946 (60 Stat. 664).[60] These restrictions were removed (E.O. 9801) late in the year.[61] It could be argued that these controls were instituted through an extension of war powers or those authorities necessary for the prosecution of World War II. There was no proclamation of national emergency announced, with regard to the economy itself, nor did the Price Control Act of 1946 contain any declaration of an emergency. The statute was a continuation of the provisions of the Emergency Price Control Act of 1942 (56 Stat. 23) which was prompted by our involvement in world hostilities.

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[58] Rankin and Dallmayr, *op., cit.*, pp. 162–163.
[59] Truman papers (1946), pp. 329–334.
[60] *Ibid.*, pp. 359–362.
[61] *Ibid.*, pp. 451–455, 475–477.

These observations lead to the suggestion that, especially in the area of economic management, various statutes and Executive actions may be termed or designated as emergency measures but the use of the referent "emergency" is a matter of art rather than law. In brief, certain emergency laws and actions appear to have no relationship to a proclaimed condition of national emergency. The provisions of these statutes and the actions of the President may be carried out regardless of whether or not a proclamation of national emergency is in effect and require no proclamation of intent for them to be utilized. Programs and actions of the type being referred to include the Veterans' Emergency Housing Act of 1946 (60 Stat. 207),[62] the Emergency Feed Grain Act of 1961 (75 Stat. 6),[63] the Emergency Home Finance Act of 1970 (84 Stat. 450),[64] the Emergency Community Facilities Act of 1970 (84 Stat. 886),[65] the Emergency Employment Act of 1971 (85 Stat. 146),[66] the Emergency Loan Guarantee Act (85 Stat. 178),[67] the Emergency Unemployment Compensation Act (85 Stat. 810),[68] and the Emergency Livestock Credit Act of 1974. What these statutes provide is specific authority for the President to act upon a situation on a continuous basis rather than utilizing special temporary powers activated for the period a proclamation of national emergency is in effect. President Nixon, it should be noted, did choose to utilize a proclamation of national emergency on August 15, 1971 to control the balance of payments flow by terminating temporarily certain trade agreement provisos and imposing certain supplemental duties on imported goods.[69]

In addition to the provisions of Title 50 of the United States Code, excepting those sections applicable only in circumstances of a declaration of war, the President has a variety of powers which he may utilize to regulate the economy, trade, and currency exchange. Examples of this authority include regulation of foreign exchange (12 U.S.C. 95a), customs and duties (19 U.S.C. 1318), examination of agency monthly accounts of expenditures (31 U.S.C. 80), and the control of shipping, vessel use, and personnel involved in same (46 U.S.C. 835, 1132(h), 1202(d), 1160(g), 1241(b), 1242(a), and 1401–1413). All of these provisions are activated by a proclamation of national emergency or a declaration of war.

The significant factor which emerges from an examination of emergency powers for controlling the economy is that a variety of statutes have been enacted since the conclusion of World War II for contending with various aspects of a weak or crisis economy. Some of these laws were or are temporary in duration and others have a permanent existence. However, many of them owe nothing to a condition or proclamation of national emergency for their application to an exigency. To a lesser extent, this same situation is true with regard to so-called emergency law in other policy areas.

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[62] *Ibid.*, pp. 114–115, 488–489.

[63] Public Papers of the Presidents of the United States: John F. Kennedy (1961). Washington: U.S. Government Printing Office, 1962, pp. 2–2–203, 253.

[64] Nixon papers (1970), pp. 619–621.

[65] *Ibid.*, pp. 822–823.

[66] *Ibid.* (1971), pp. 816–817.

[67] *Ibid.*, p. 846.

[68] *Ibid.*, pp. 1216–1217.

[69] See Weekly Compilation of Presidential Documents, v. 7, August 23, 1971: 1174–1175.

Defense Preparedness

In the area of defense preparedness certain authorities should be noted with regard to powers they confer upon the President. What these statutes specify are the bases for contingency preparations for exigencies involving the physical security of the Nation. These are not, in the strict sense, war powers as they are operative both prior to and during a declared war. In general, they do, however, refer to war materials: specifically, to functions of stockpiling, production, scarce resource management, and special economic regulations. Two statutes are particularly important in the first of these policy spheres.

The Defense Production Act of 1950 [64 Stat. 798] empowers the President to make provision either for purchases of, or commitments to purchase metals and other raw materials, including liquid fuels. The government may use the acquired items or offer them for resale. The same Act also empowers the President to encourage the exploration, development, and mining of critical and strategic minerals and metals. The Mutual Security Act of 1951 [65 Stat. 373] also provides sustenance for the stockpiling program. The Director for Mutual Security is authorized to initiate projects designed to increase production and help in obtaining raw materials in which deficiencies exist among the United States' free world allies. The purpose of aiding recipients of American aid to develop their own stockpiling program of critical materials is to reduce the steady drain on United States' resources. The power of condemnation was added to the power of requisitioning granted in the 1950 Defense Production Act when Congress in a 1951 amendment [65 Stat. 131] empowered the President in the interest of national defense, and when deemed necessary by him, to acquire materials needed by the government. Acquisition may be by transfer, donation, purchase, or, if needed, properly instituted judicial proceedings.

Upon amendment of the July 1940 Act [54 Stat. 2712] in June 1942 [56 Stat. 463], the President was authorized to prohibit or curtail the exportation of any articles, technical data, materials, or supplies, except under such rules and regulations as he might prescribe. Unless the President under this section of the Act were to be performed by the Board of Economic Warfare [see E.O. 9380 and E.O. 9630 for redistribution of functions]. The Export Control Act of 1949 [63 Stat. 7] empowered the President to prohibit or curtail the exportation from the United States, its Territories and possessions, of any articles, materials, or supplies, including technical data but excluding agricultural commodities in excess of domestic requirements. The purpose here was to protect the United States from the excessive drain of scarce materials. The Atomic Energy Act [65 Stat. 692] also prohibited the export from or import into the United States or curtail the exportation from the United States, its Territories and as authorized by the Atomic Energy Commission upon a

determination by the President that the common defense and security would not be adversely affected thereby.[72]

Special attention was also given to priorities and allocation during the cold war period.

> The First Decontrol Act of 1947 [61 Stat. 34] providing for the termination of certain provisions of the Second War Powers Act [56 Stat. 176], permitted the continued exercise of power to allocate materials which were certified by the Secretaries of State and Commerce as necessary to meet international commitments. Section 101 of the Defense Production Act of 1950 [64 Stat. 798] empowered the President to allocate materials in such manner, upon such conditions, and to such extent as he deems necessary or appropriate to promote the national defense. A related section provided that no person should accumulate (1) in excess of the reasonable demands of business, personal, or home consumption, or (2) for the purpose of resale at prices in excess of prevailing market prices, materials which had been designated by the President as scarce materials or materials the supply of which would be threatened by such accumulation. The Atomic Energy Act of 1946, as amended in 1951 [65 Stat. 692], expends the allocation power to its logical extreme by allocating all fissionable material to the federal government, making it unlawful for any person to possess or transfer any fissionable material, except as authorized by the Atomic Energy Commission.[73]

In the area of economic regulation, the experience of the Korean war brought forth statutes, administrative practice, and expertise in control of a wartime economy in the absence of a declaration of war.

> The major purpose of the Defense Production Act of 1950 was to place the national economy on a war production footing with minimal possible effect upon civilian production and consumption. An effort was made to expand the total productive facilities of the nation beyond the levels needed to meet the civilian demand, thus reducing the need to curtail civilian consumption. To some extent, however, it was anticipated that normal civilian production and purchases would have to be curtailed and redirected. In this connection the Federal Reserve Board by law was empowered to impose consumer credit controls pursuant to an Executive Order [E.O. 8843] until such time as the President determined that the exercise of such controls were no longer necessary. The controls, of course, were to be directed at carrying out the objectives of the Defense Production Act. In addition, the President was authorized from time to time to prescribe regulations for regulating real estate construction credit as he believed necessary to prevent or reduce excessive fluctuations in such credit. He was empowered to prescribe maximum loan or credit values, minimum down payments, trade-in

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[72] *Ibid.*, p. 57.
[73] *Ibid.*, p. 78.

> or exchange values, maximum maturities and maximum amounts of credit. These, of course, were direct controls, as distinguished from inducements or incentives designed to reduce civilian demand for materials and productive facilities needed by the military establishment.[74]

The Executive also had a strong hand in price control in the period after World War II and on into the cold war era.

> In an effort to adapt the price control program to postwar reconversion and prepare for its eventual termination Congress in July 1946 extended the life of the Price Control Act of 1942 [56 Stat. 23] to June 30, 1947 [60 Stat. 664], admonishing the Office of Price Administration and other agencies to use their price powers to promote the earliest practicable balance between production and demand: Congress wanted the control of prices and the use of subsidy powers to be terminated as rapidly as possible. The President was directed to recommend to the Congress legislation needed to establish monetary, fiscal, and other policies adequate to supplement the control of prices and wages during the balance of the fiscal year 1947. A Joint Resolution of March 1947 continued the price control program with regard to sugar until October 31, 1947 [61 Stat. 35]. Rent control as well as other war production controls continued in effect by the Defense Production Act of 1950 which authorized the President to establish a ceiling or ceilings on the price, rental, commission, rate, fee, charge or allowance paid or received on the sale or delivery, or the purchase or receipt, by or to any person, of any material or service. And the same Act required that the President issue regulations and orders stabilizing wages, salaries, and other compensation. Once the Korean War ended, all controls, price, rent and credit were swept off the statute books.[75]

Certain of the defense preparedness statutes enacted since World War II are operational regardless of any condition of national emergency or war. Others were activated by the continued existence of President Truman's 1950 proclamation of a national emergency. There are also provisions which remain to be utilized only under a declaration of war. Even those statutes eradicated after the termination of the Korean conflict have significance if only to illustrate the type of economic and fiscal management authority which is bestowed upon the Executive in times of crisis.

Communications

During both World War I and World War II, the Federal government established and utilized the services of information control offices.

> The War Powers Act of December 1941 [55 Stat. 838] specifically empowered the President to establish censorship

[74] *Ibid.*, pp. 64–65.
[75] *Ibid.*, pp. 66–67.

of communications between the United States and foreign countries. During the existence of the war, the President, at his discretion, established rules and regulations for the censorship of communications by mail, cable, radio, or other means of transmission passing between the United States and any foreign country. The authority to prescribe the rule by which censorship would be applied, extended to communications carried by any vessel or other means of transportation touching at any port, place, or territory of the United States and bound to or from any foreign country.

A month later the Communications Act of 1934 [48 Stat. 1064] was amended [56 Stat. 18; also 56 Stat. 1096] to enable the President in time of war or threat of war to regulate or close any or all facilities or stations for wire communication within the jurisdiction of the United States. Nearly 10 years later this power was extended to any or all stations or devices capable of emitting electromagnetic radiations within the jurisdiction of the United States [64 Stat. 825]. The power to close stations for radio communication within the jurisdiction of the United States included those suitable as navigational aids beyond 5 miles of the United States.[76]

Current authority by which the President may regulate communications is referred to as "war powers" (47 U.S.C. 606) but provision is made for "a threat of war" and "national emergency." By a proclamation attesting to any one of these conditions, the Chief Executive may engage in regulation of communications to a sufficient degree that censorship might be imposed. In recent testimony before the House Foreign Operations and Government Information Subcommittee, a representative of the Office of Emergency Preparedness indicated that these provisions would not be exercised in "any situation short of wartime."[77] During the course of hearings before this panel the stand-by plan for the organization and operation of an Office of Censorship within the Office of Emergency Preparedness was disclosed.[78] Also introduced into the record was the Standby Volunteer Censorship Code for all media of publication or broadcast and a draft legislative proposal which, if enacted by Congress, would grant the President broad authority in regulating communications.[79] Without its passage, the President would presumably be forced to rely upon existing authority or other war powers.

Reserve Authority

National Emergency proclamations in 1917, 1933, 1970 and 1971 were self-limiting to specific policy areas or functions. They did not generally seek to activate special statutory powers beyond their immediate subject matter. Proclamations of national emergency in 1939,

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[76] *Ibid.*, p. 84.

[77] U.S. Congress. House. Committee on Government Operations. Subcommittee on Foreign Operations and Government Information. U.S. Government Information Policies and Practices—Problems of Congress in Obtaining Information from the Executive Branch. Hearings, 92nd Congress, 2d Session. Washington: U.S. Govt. Print. Off., 1972, p. 2960.

[78] *Ibid.*, pp. 2943–2953.

[79] *Ibid.*, pp. 2953–2959.

1941 and 1950 were general in nature and did activate all emergency statutory provisions enacted by Congress as of the date of the proclamation. Since 1950, the Nation has been in a state of general national emergency. Congress has not yet taken direct action to terminate this proclamation; legislation has been enacted which recognizes the existence of this instrument and reserves its emergency provisions for a proclaimed national emergency subsequent to the 1950 declaration. Examples of these statute provisions include personnel actions regarding reservists (10 U.S.C. 599, 673, 679(a), 681(b)), retirement of warrant officers (10 U.S.C. 565, 599), suspension of grade limitations in the armed services (10 U.S.C. 3202(d), 8202(d), 5451), use of public lands for defense purposes (43 U.S.C. 155), and suspension of Outer Continental Shelf leases (43 U.S.C. 1341(c)).

Congressional Reconsideration

During the final months of the 92d Congress, interest was expressed within the Senate in devoting concerted attention to national emergency powers available to the Executive. With the opening of the 93d Congress there was established, on January 6, 1973, a Special Committee on the Termination of the National Emergency. The immediate mission of the panel, as expressed in its authorizing resolution (S. Res. 242), is "to conduct a study and investigation with respect to the matter of terminating the national emergency proclaimed by the President of the United States on December 16, 1950, and announced in Presidential Proclamation Numbered 2914, dated the same date." Of course, upon exploring the subject matter of national emergency powers available to the Executive, the mission of the Special Committee became more burdensome.

There was not just one proclamation of national emergency in effect, but four such instruments, issued in 1933, 1950, 1970, and 1971. After scrutinizing the U.S. Code and uncodified statutory emergency powers, the Special Committee identified 470 provisions of Federal law in effect which delegate extraordinary authority in time of national emergency to the Executive.[80] No process existed to automatically terminate the proclamations. Thus, it became the task of the panel to prepare and seek comment upon a formula for regulating emergency proclamations in the future and to attempt to identify provisions of emergency law which should be abolished, relegated to permanent status, or continued in a stand-by capacity.[81]

As a consequence of the findings of the Special Committee with regard to emergency law, efforts were made in enacting the Energy Emergency Act (S. 2589) in 1973 to eliminate any interpretation of the legislation's recognition of a condition of energy emergency as a

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[80] See U.S. Congress. Senate. Special Committee on the Termination of the National Emergency. Emergency powers statutes: provisions of Federal law now in effect delegating to the executive extraordinary authority in time of national emergency. Washington: U.S. Govt. Print. Off., 1973. (93rd Congress, 1st session. Senate. Report No. 549). 607 p; also U.S. Congress. Senate. Special Committee on National Emergencies and Delegated Emergency Powers. Executive orders in times of war and National Emergency Washington: U.S. Govt. Print. Off., 1974. 283 p. At head of title: 93rd Congress, 2d. session. Committee Print.

[81] See —. —. —. National Emergency. Hearings, 93d Congress, 1st and 2d sessions. Washington, U.S. Govt. Printing Office, 1973–74.

declaration of a state of national emergency.[82] The President's authority in exercising such emergency power as the measure did convey was confined to a period of 1 year only. Having had an opportunity to acquaint itself with the nature and exercise of emergency authority, Congress carefully guarded its provision and exercise in 1973.

Emergency Powers

The history of emergency powers, extending from the days of the Continental Congress to the atomic age, reflects at least one highly discernable trend: those authorities available to the Executive in time of crisis or national exigency have, since the time of the Lincoln Administration, come to be increasingly specified in statutory language. The discretion available to a Civil War President in his exercise of emergency power has, to a considerable extent, been harnessed in the contemporary era. The range of authority may not be diminished from that time to now but the options for its use are more in accord with constitutional processes.

To the extent that this observation has validity, the following comment of two eminent civil libertarians and scholars deserves thoughtful consideration.

> Congress can, and therefore should, normally prescribe the procedures to be followed by the president in emergencies; only timely congressional action can obviate exaggerated or autocratic claims on the part of the executive. Statutory procedures prescribed by Congress must be respected by the president both in peacetime conditions and in "less-than-catastrophic" emergencies or in the absence of a state of war. Where no statutory procedures are stipulated, there is at least a strong presumption that the president can act to meet an immediate emergency provided that constitutional safeguards, such as compensation for seizure, and general congressional policies are respected. The president's authority to exercise independent powers has more solid support in case of declared war, in the theater of military operations or possibly in modern-type catastrophic emergencies resulting from an intense warming-up of the cold war, although general constitutional provisions and principles would have to be preserved. It must be added, however, that in every instance of an exercise of emergency powers by the president the finding or declaration of emergency remains subject to judicial review by the courts. The latter principle is manifested in all opinions in the *Youngstown* case and expressly conceded by the dissent.[83]

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[82] See U.S. Congress. House. Conference. Energy emergency act. Washington, U.S. Govt. Printing Office, 1974. (93rd Congress, 2d session. House Report No. 763), p. 41.

[83] Rankin and Dallmayr, *op. cit.*, p. 164.

Part IV

DECLARING AND TERMINATING A STATE OF NATIONAL EMERGENCY

The origins of emergency powers in the life of America's national government can be traced to legislation enacted in 1775 by the Continental Congress. Shay's Rebellion was the first emergency test for the new administration. Until the crisis of the First World War, Presidents utilized such authority, whether specified in the statutes or implied by the Constitution, at their own discretion. Special Presidential proclamations often announced the exercise of these crisis powers as demonstrated by Lincoln's practice. Since the period of World War I, the Chief Executive has, using a proclamation, declared a state of national emergency, sometimes confining the matter of exigency to a specific policy sphere and sometimes placing no such limitation on the matter.

Recent Practices

The first emergency proclamation, explicitly issued as such, was made (39 Stat. 1814) by President Woodrow Wilson on February 5, 1917. Issued by virtue of the authority conferred upon the President by legislation establishing the United States Shipping Board (39 Stat. 728), the proclamation was concerned ith matters of water transportation policy. It as terminated, along with a variety of other wartime measures, by statute (41 Stat. 1359) on March 3, 1921.

The second national emergency proclamation was issued (48 Stat. 1689) by President Franklin D. Roosevelt on March 6, 1933, some 48 hours after assuming office. Issued upon the somewhat questionable authority of the Trading With the Enemy Act of 1917 (40 Stat. 411), the proclamation declared a bank holiday and halted all financial transactions by closing the banks. The Chief Executive's action and proclamation were sanctioned by Congress with the passage of the Emergency Banking Act (48 Stat. 1) on March 9. The day this legislation was signed into law the President issued a second proclamation (48 Stat. 1691), based upon the authority of the new law, continuing the bank holiday until the various banking institutions established they were capable of conducting business in accordance with new banking policy. These proclamations regarding a national emergency in banking have not been repealed.

On February 28, 1935, President Roosevelt issued a proclamation (49 Stat. 3438) which, while it did not directly announce a condition of national emergency, recognized the continuation of an existing national emergency in the agricultural industry. Accordingly, the proclamation established the effective dates of the Cotton Control Act (48 Stat. 598) approved April 21, 1934. It was repealed on on February 10, 1936 (49 Stat. 1106).

The first general proclamation of a state of national emergency was made by President Roosevelt on September 8, 1939 (54 Stat. 2643). Calling his pronouncement a proclamation of "limited" national emergency, though the law gave no recognition to the qualifying term, the Chief Executive was, by this action, accorded a variety of statutory powers which were activated by the issuance of the proclamation.

On May 27, 1941 the President issued a proclamation (55 Stat. 1647) of "unlimited" national emergency. This action did not add any new powers to the list of emergency authorities made available to the Chief Executive by the 1939 proclamation. Instead, the action was a political gesture prompted by the circumstances of conflict in Europe and growing tensions in Asia.

These two war-related proclamations of a general national emergency remained in effect until 1947 when certain specific emergency and war statute provisions were terminated by a law (61 Stat. 449) approved July 25, 1947. Earlier, on September 29, 1945, President Truman had, by proclamation (59 Stat. 886) withdrawn certain emergency provisions of the Internal Revenue Code as the end of hostilities in both theaters of war made their use no longer warranted.

On October 19, 1951, Congress terminated (65 Stat. 451) the declaration of war against Germany. On March 20, 1952, the Senate ratified the treaty of peace with Japan. Because these actions legally established the end of World War II, for certain emergency provisions to continue congressional action was required. By joint resolution, Congress enacted the Emergency Powers Interim Continuation Act (66 Stat. 54) to maintain such emergency authority and continued to extend the life of the measure (66 Stat. 96; 66 Stat. 137; 66 Stat. 296) until the Emergency Powers Continuation Act was prepared and ratified (66 Stat. 330). This latter statute was continued (67 Stat. 18; 67 Stat. 131) until August, 1953 when its emergency authorities were finally allowed to elapse. On April 28, 1952, President Truman generally terminated (66 Stat. c31) by proclamation the 1939 and 1941 emergency conditions, leaving operative only those statutorily continued by the above laws. This action did not effect a general proclamation of national emergency issued (64 Stat. A454) by President Truman on December 16, 1950 as it was specifically exempted in the 1952 termination announcement.

The 1950 national emergency proclamation, issued to provide the Chief Executive with additional powers to prosecute matters of crisis provoked by hostilities in Korea, remains in effect today. In addition, President Richard Nixon issued a proclamation (84 Stat. 2222) on March 23, 1970, regarding a national emergency with regard to a halt in postal service. On August 23, 1971, he issued a proclamation (85 Stat. 926) announcing a national emergency with regard to balance of payments in overseas trade. Both of these proclamations remain in effect as well.

Emergency Law

Because emergency powers used in the past have tended to be authoritarian in nature, they pose a serious threat to the American democratic governmental system. The late historian Clinton Rossiter

has described various Western democracies under emergency government as "constitutional dictatorships." At the conclusion of his study of these various emergency forms of rule, he set forth for consideration certain essential criteria of crisis politics in the belief that: "A free people should certainly be educated and encouraged to demand that the use of emergency powers in their defense conform to these standards." [1] These criteria are:

1. No general regime or particular institution of the constitutional dictatorship should be initiated unless it is necessary or even indispensable to the preservation of the State and its constitutional order.
2. The decision to institute a constitutional dictatorship should never be in the hands of the man or men who will constitute the dictator.
3. No government should initiate a constitutional dictatorship without making specific provision for its termination.
4. All uses of emergency powers and all readjustments in the organization of the government should be e fected in pursuit of constitutional or legal requirements.
5. No dictatorial institution should be adopted, no right invaded, no regular procedure altered any more than is absolutely necessary for the conquest of the particular crisis.
6. The measures adopted in the prosecution of a constitutional dictatorship should never be permanent in character or effect.
7. The dictatorship should be carried on by persons representative of every part of the citizenry interested in the defense of the existing constitutional order.
8. Ultimate responsibility should be maintained for every action taken under a constitutional dictatorship.
9. The decision to terminate a constitutional dictatorship, like the decision to institute one, should never be in the hands of the man or men who constitute the dictator.
10. No constitutional dictatorship should extend beyond the termination of the crisis for which it was instituted.
11. Finally, the termination of the crisis must be followed by as complete a return as possible to the political and governmental conditions existing prior to the initiation of the constitutional dictatorship.

Making these criteria operational in terms of statutory restrictions and guidance for the exercise of emergency power in the United States could be accomplished in a variety of ways ranging from specialized prescriptions to an omnibus emergency powers procedure law. The following innovations might be utilized to control the exercise of emergency authority.

1. *Any proclamation of a state of national emergency serves to activate the establishment, required by law, of a congressional committee or com-*

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[1] Clinton L. Rossiter. Constitutional Dictatorship: Crisis Government in the Modern Democracies. Princeton: Princeton University Press, 1948, p. 298; the criteria offered by the author are presented and discussed at pp. 298–306.

mittees charged with the responsibility of oversight of Executive Branch activities and operations conducted under emergency authority.

Precedent for such a panel may be found in the Lincoln era Committee on the Conduct of the War [2] and the World War II era Senate Special Committee to Investigate the National Defense Program, commonly referred to as the Truman Committee (in deference to its chairman, Sen. Harry S. Truman).[3] Membership on such a panel might be specified in terms of a certain number of Members from the Committees on Government Operations, Judiciary, Armed Services, and Foreign Relations or Foreign Affairs. Such a committee might be joint or separately established in each House of Congress. The primary function of the panel would be investigation, giving it a status such as the Appropriations and Government Operations committees with regard to powers of inquiry. At the termination of the national emergency proclamation, this committee would be dissolved until another proclamation activated it; its documents and materials would be kept with the Committee on Government Operations.

2. *Agency regulations issued under statutory emergency provisions, Executive orders issued in accordance with statutory emergency power provisions, or agency administrative orders issued in accordance with statutory emergency power provisions should be subject to approval by Congress.*

Such approval might take the form followed in the sanction of reorganization plans, i.e., such regulation would go into effect 60 days from date of promulgation unless one House of Congress, by simple resolution, disapproves them, or a direct vote of approval might be required. Such a vote might be taken on a joint resolution, which would require presidential signature, or on a concurrent or simple resolution. Examination of the regulations, made in accordance with hearings on and/or the reporting of an approval or disapproval measure, might be undertaken by a standing committee or by a special committee, such as the emergency powers panel mentioned above.

3. *Title 1 of the United States Code should be amended to add section 202d providing for a special list of or index of statutory emergency power provisions to be appended to every edition of the Code.*

Such a requirement would provide a ready and current specification of powers available to the Executive in a condition of proclaimed national emergency. A list might appropriately be added to the Title 50 appendices and an index entry under the term "emergencies" might specify all relevant citations.

4. *Statutory grants of emergency power might be written so that certain of the provisions are declared effective or terminated by a concurrent resolution.*

Activation of emergency powers or withdrawal of same by a concurrent resolution of Congress would keep such authority governed by this proviso within the exclusive control of Congress. Unlike the joint

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[2] See: W. W. Pierson. The Committee on the Conduct of the Civil War. American Historical Review, v. 23, April, 1918: 550–576; T. H. Williams. The Committee on the Conduct of the War. Journal of the American Military Institute, v. 3, Fall, 1939: 139–156.

[3] See Donald H. Riddle. The Truman Committee: A Study in Congressional Responsibility. New Brunswick: Rutgers University Press, 1964.

resolution, the concurrent resolution becomes effective upon passage by both congressional chambers and requires no presidential signature of approval. Such a provision was included in the Second War Powers Act (56 Stat. 187 § 1501) whereby Congress could terminate the effectiveness of portions of the statute. Under the terms of the Neutrality Act of 1939 (54 Stat. 4 § 1) the provisions of the law became effective "whenever the President, or Congress by concurrent resolution, shall find that there exists a state of war between foreign states, and that it is necessary to promote the security or preserve the peace of the United States or to protect the lives of citizens of the United States, the President shall issue a proclamation naming the states involved; and he shall from time to time, by proclamation, name other states as and when they may become involved in the war." Congress also retained control of the effective date of the Federal-Aid Highway Act of 1944 (58 Stat. 839 § 2) through the use of the concurrent resolution. As these examples illustrate, the concurrent resolution has been used in the years of World War II and might be successfully utilized again at the present time.

5. *Statutory delegations of emergency power to the Executive might be terminated or the conditions under which the President may use this authority may be declared terminated by concurrent resolution.*

Again, emergency powers so governed by the exercise of a concurrent resolution would remain within the exclusive protection of Congress. The language expressing this type of authority generally reads: "The provisions of this Act . . . shall terminate on June 30, 19—, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution." This type of provision has been included in a variety of statutes which contain emergency authority.

These include:

First War Powers Act, 1941 (55 Stat. 31 § 3).
Second War Powers Act, 1942 (56 Stat. 176 § 1501).
Small Business Production Act, 1942 (56 Stat. 351 § 12).
Export Control Act, 1942 (56 Stat. 463 § 6(d)).
National Defense Requisition Act, 1942 (56 Stat. 467 § 2).
Canadian Shipping Act, 1942 (56 Stat. 735).
Act Suspending Statute of Limitations, 1942 (56 Stat. 747).
Communications Act Amendment, 1943 (57 Stat. 161).
War Labor Disputes Act, 1943 (57 Stat. 163 § 10).
Extension of Selective Training and Service Act, 1945 (59 Stat. 166 § 1).
First Decontrol Act, 1947 (61 Stat. 34 § 1501).
Export Control Act, 1949 (63 Stat. 7 § 12).
Mutual Defense Assistance Act, 1942 (63 Stat. 714 § 405(d)).
Foreign Economic Assistance Act, 1950 (64 Stat. 198 § 409(b)).
Defense Production Act, 1950 (64 Stat. 798 § 17, 716).
Civil Aeronautics Act Amendment, 1950 (64 Stat. 825 § 1205).
Federal Civil Defense Act, 1950 (64 Stat. 1245 § 307).
First War Powers Act Amendment, 1951 (64 Stat. 1257 § 12).
Mutual Security Act, 1951 (65 Stat. 373 § 530).
Criminal Procedure Amendment, 1953 (67 Stat. 135 § 2157).
Military Construction Authorization, 1953 (67 Stat. 177 § 1).
Military Traffic Continuance Act, 1953 (67 Stat. 244).

6. *Congress may specify by statute the procedures to be followed by the Executive in declaring a condition of national emergency.*

With regard to an omnibus emergency powers statute, two experts in the area of emergency policy have suggested:

> We propose a generic statute to empower the President to proclaim a national or regional emergency. Under such a proclamation the President may issue rules and regulations which have the force of law. A proclamation of emergency would be placed before the Congress within twenty-four hours of its issuance. If Congress were not in session, it would be called into session within five days from the time of the declaration of emergency. The proclamation of emergency would stand unless revoked by concurrent resolution of both Houses of Congress within five days of Congress' coming into special session.
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> The rules and regulations issued under the proclamation would be similarly subject to revocation by concurrent resolution and Congress should possess the item veto in this respect; i.e., it may revoke one rule, while permitting others to stand. An emergency proclamation and regulations issued under it, would automatically expire after thirty days, but would be subject to reissuance by the President, provided the Congress concurred. Congress, upon the issuance of an emergency proclamation would establish a scrutiny committee on emergency powers, patterned after the Joint Committee on Atomic Energy. Congress would maintain continuous scrutiny of the administration of powers exercised under the proclamation. The Committee's primary responsibility would be to keep Congress sufficiently advised as to whether powers had been responsibly administered.[4]

In response to this proposal, two other experts in the field of emergency policy have said: "Such a 'generic statute' would either have to be detailed in which case it could not anticipate all contingencies or it would be a blanket authorization which is unnecessary and of doubtful value in view of our written constitution." [5] This criticism can be countered by noting (1) that the utilization of emergency power is an accomplished fact, (2) that the statutes recognize the existence of this special authority for dealing with crises, and (3) that what the "generic statute" basically suggests is a procedure for the exercise of emergency power. Taking guidance from the recent War Powers Act, what basic provisions might an Emergency Powers Procedure Act contain?

1. Requirement that a proclamation be issued by the President in order that statutory emergency power provisions be activated.
   a. Prior consultation with Congress be required.
   b. Provision that such a proclamation automatically convenes Congress may be required.

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[4] J. Malcolm Smith and Cornelius P. Cotter. *Powers of the President During Crisis.* Washington: Public Affairs Press, 1960, pp. 144–145; See their testimony before the Special Committee on the Termination of the National Emergency, April 11, 1973. Hearings, Part I, "Constitutional Questions Concerning Emergency Powers."

[5] Robert S. Rankin and Winfried Dallmayr. *Freedom and Emergency Powers in the Cold War.* New York: Appleton-Century-Crofts, 1964, p. 268n.

2. The emergency powers proclamation specifies its scope and nature.

a. May specify a general condition of national emergency.

b. May specify a condition of national emergency within a particular policy area—banking, farming, and so forth.

c. In making a specialized proclamation, the Executive would specify those statutory provisions which were envisioned as being within the scope of the instrument.

3. Congressional approval.

a. Immediate approval of emergency proclamation by congressional concurrent resolution may be required.

b. Reports on emergency power actions may be required of the President within thirty days after issuing such a proclamation unless;

(1) The President determines and certifies to Congress in writing to the satisfaction of Congress that an unavoidable necessity of safe-guarding some specified aspect of the general welfare requires continuance of the emergency condition, or

(2) Congress is physically unable to meet as a result of an armed attack upon the United States, or

(3) The continued use of emergency powers has been authorized in specific legislation enacted for that purpose by the Congress.

c. Failure to report to Congress within 30 days after the issuance of an emergency proclamation shall require the introduction of a concurrent resolution terminating the proclamation and condition of national emergency.

d. Any concurrent resolution introduced pursuant to these provisions for purposes of terminating a national emergency shall, if sponsored or cosponsored by one-third of the Members of the House of Congress in which it is introduced, be considered reported to the floor of such House no later than one day following its introduction unless the Members of such House otherwise determine by yeas and nays; any such concurrent resolution, after having been passed by the House of Congress in which it originated, shall be considered reported to the floor of the other House of Congress within one day after it has been passed by the House in which it originated and sent to the other House, unless the Members of the other House shall otherwise determine by yeas and nays.

e. Any concurrent resolution reported to the floor pursuant to the above provision [d.] or when placed directly on the calendar shall immediately become the pending business of the House in which such resolution is reported or placed directly on the calendar, and shall be voted upon within three days after it has been reported or placed directly on the calendar, as the case may be, unless such House shall otherwise determine by yeas and nays.

f. Passage of such a concurrent resolution shall terminate any and all funding for activities carried out under statutory emergency power provisions and shall make Federal officers liable for any action carried out under these same provisions

unless Congress shall otherwise specifically indemnify them or otherwise make them immune to this provision.

4. Addition of a separability clause to the effect that should any provision of the statute or the application thereof to any person or circumstance be held invalid, the remainder of the statute and the application of such provision to any other person or circumstance shall not be affected thereby.

The authority of Congress to set forth such procedures lies within the general legislative authority conferred in Article I, Section 8 of the Constitution. The importance of such a statute derives from both functional want and legal necessity. At a minimum, the statute provides a procedure and due process for the exercise of emergency authority. It outlines a basic course which the Executive must follow in order to utilize a wide variety of broad and discretionary power during a condition of national emergency.

And it also serves to check that power, both protecting the separation of powers principle and maintaining democratic practices. The President exercises emergency power but not without the concurrence of Congress. The elected representatives of the people serve to protect the constitutionally guaranteed rights of the public while simultaneously pursuing their duties as a co-equal branch of the Federal government. Conflicts between the Executive and the Legislature over the utilization of emergency powers will fall to the third partner of the triumvirate, the courts.

Emergency powers must be carefully managed if for no other reason than their authoritarian nature and breadth of scope. Much consideration has been given over the past few years to the President's exercise of war powers. Yet, the necessity of the Executive meeting a crisis or national exigency in the absence of a declaration of war could prompt the utilization of emergency powers and this authority extends into almost every aspect of public business. Regardless of the substance of these emergency powers, procedures for their exercise and equitable controls upon their use are fundamental to the continuance of a democratic order.

Ultimately, there are constitutional restraints upon Executive response to perceived emergency. This is exemplified by Justice Davis' decision for the majority of the Supreme Court in *Ex parte Milligan*, 4 Wall. 2, 1920–21, 126 (1866):

> 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.

Part V

BIBLIOGRAPHY ON EMERGENCY POWERS

The bibliography that follows is intended as a reference for those that may wish to study the subject of emergency rule more completely. The following books are a useful beginning to the subject: Louis Koenig, *The Presidency and the Crisis* (1944); James G. Randall, *Constitutional Problems Under Lincoln* (1926, 1951); Robert S. Rankin and Winfried R. Dallmayr, *Freedom and Emergency Powers in the Cold War* (1964); Bennett Milton Rich, *The Presidents and Civil Disorder* (1941); Clinton L. Rossiter, *Constitutional Dictatorship* (1948); J. Malcom Smith and Cornelius P. Cotter, *Powers of the President During Crisis* (1960). Of course, there are the three volumes of Hearings by the Senate Special Committee on National Emergencies and Delegated Emergency Powers plus two studies:

Emergency Powers Statutes: Provisions of Federal Law Now in Effect Delegating to the Executive Extraordinary Authority in Time of National Emergency (Senate Report No. 93–549)—Special Committee on Termination of the National Emergency; and *Executive Orders in Times of War and National Emergency*—Special Committee on National Emergencies and Delegated Emergency Powers.

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APPENDIX

PROVISIONS OF LAW WHICH WOULD BECOME OPERATIVE UPON PROCLAMATION OF A NATIONAL EMERGENCY BY THE PRESIDENT*

Mr. McCormack. Mr. Speaker, under the leave to extend my remarks in the Record, I include the following provisions of law which a preliminary study by the Department of Justice was indicated would become operative upon proclamation of a national emergency by the President:

I. Provisions as to Which the Joint Resolution of July 25, 1947 (61 Stat. 449,. 451–454) Terminated the State of War and the National Emergencies Then Existing

Act of February 26, 1925 (43 Stat. 984): Provides that the Secretary of War, upon his sale thereof, shall attach such conditions as shall ensure use by the United States of the railroad of the Hoboken Manufacturers' Railroad Co. (owned by the Port of New York Authority) in the event of war or other national emergency.

Act of April 12, 1926 (44 Stat. pt. 2, p. 241): Government authorized to assume absolute control, for military purposes, of the municipal aviation field on land leased to Tucson, Ariz., in case of emergency, or in event it should be deemed advisable.

Act of May 29, 1926 (44 Stat. pt. 2, p. 677): Exchange of land is authorized on condition that other party agrees that Department of War may assume control of airfield near Yuma, Ariz., in case of emergency, or in the event that it should be deemed advisable by the Secretary of War.

Subsection 2, page 1292, of act of May 15, 1936 (49 Stat. 1292): Secretary of War may transfer specified land to city of Little Rock, Ark., upon condition that the Secretary of War may require the city to turn over complete control of the Little Rock Municipal Airport to the United States in time of national emergency.

Act of May 27, 1936 (49 Stat. 1387), as amended by Public Law 97, Eighty-first Congress: Deed by United States to Charleston, S.C., of certain land shall provide for authority of President to take it for use of War Department in the event of a national emergency.

Section 3 of act of June 21, 1938 (52 Stat. 834): Deed shall provide the right of the President to take over Hoboken Pier Terminal property in event of a national emergency for use by the Department of the Army.

Act of November 21, 1941 (55 Stat. 781): Time for examination of accounts of Army disbursing officers is extended to 90 days in time of war or during any emergency declared by Congress or determined by the President and for a period of 18 months after such war or emergency (31 U.S.C. 80a).

Section 18 of act of February 2, 1901 (31 Stat. 752): Authority for the Surgeon General to appoint as many contract surgeons as necessary in emergencies (10 U.S.C. 107).

Act of December 26, 1941 (55 Stat. 862) as amended: Time for administrative examination of monthly accounts of disbursing officers of Navy, Marine Corps, and Coast Guard is extended in time of war or national emergency (31 U.S.C. 80b).

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*Speech of Hon. John W. McCormack, of Massachusetts, to the House of Representatives, Monday, December 18, 1950.

Act of August 29, 1916 (39 Stat. 580): Navy enlisted men on furlough without pay for the unexpired portion of their enlistment are subject to recall to complete the enlistment period in time of war or national emergency (34 U.S.C. 191).

Act of August 18, 1941 (55 Stat. 629): Authorizes enlistments in the Navy or Marine Corps to be extended in time of war, or national emergency declared by the President (34 U.S.C. 181).

Act of March 22, 1943 (57 Stat. 41): Jurisdiction of naval courts extended to certain persons outside of the United States in time of war or national emergency (34 U.S.C. 1201).

NOTE.—Repealed by section 14(s) of Public Law 506, Eighty-first Congress, effective May 31, 1951.

Act of August 29, 1916 (39 Stat. 591):

Authority of Secretary of the Navy to call retired enlisted men into active service in time of war or when a national emergency exists (34 U.S.C. 433).

In time of war or national emergency commissioned and warrant officers of the Coast Guard on the retired list may be called to active duty (14 U.S.C. 240, 310 (as enacted by Public Law 207, 81st Cong.)).

Act of April 8, 1946 (60 Stat. 86): Concerning the rate of pay in certain circumstances of retired officers of the permanent grade or rank of rear admiral recalled to active duty in time of war or other national emergency (34 U.S.C. 428).

Article 65 of the AGN (40 Stat. 393), as amended by 40 Statutes 708, 43 Statutes 1088 and 52 Statutes 1175: Service on naval courts martial by reserves, etc., when actively serving under the Navy Department in time of war or during the existence of an emergency (34 U.S.C. 1200, art. 65).

NOTE: Repealed by section 14 (n) of Public Law 506, Eighty-first Congress, effective May 31, 1951.

Section 10 of the act of June 14, 1940 (54 Stat. 395): Provisions of act of April 25, 1939 (53 Stat. 591), authorizing contracts upon a cost-plus basis in certain cases, are to be applicable to naval public works and utilities projects in the Fourteenth Naval District during the period of any national emergency declared by the President to exist.

Section 18 of act of August 2, 1946 (60 Stat. 853): Authorizes transportation and subsistence on naval vessels at Government expense of such persons as the Secretary of Navy may authorize during the existence of war or national emergency as declared by the President (34 U.S.C. 474).

Section 10 of the act of May 14, 1930 (46 Stat. 332): Authority to the Secretary of the Navy to revoke the lease of the floating drydock and water-front accessories at the New Orleans naval station in case of national emergency declared by the President.

Act of May 29, 1930 (46 Stat. 479): Authority of the Secretary of the Navy to revoke the lease of the United States naval destroyer and submarine base at Squantum, Mass., in case of a national emergency declared by the President.

Joint resolution of April 11, 1898 (30 Stat. 737): Permits the erection of temporary forts or fortifications in case of emergency when, in the opinion of the President, the immediate erection of any temporary fort or fortification is deemed important and urgent without complying with formalities and procedures ordinarily followed (50 U.S.C. 178).

Act of March 3, 1925 (43 Stat. 1109): Authority to close Fort McHenry Military Reservation in Maryland in case of a national emergency and use it for military purposes (16 U.S.C. 440).

Section 1 of the act of July 2, 1940 (54 Stat. 724): Suspension in event of declared national emergency of provision that natural features of Barro Colorado Island in Gatun Lake, C.Z., be left in their natural state for scientific observation and investigation (48 U.S.C. 1381).

Section 4(b) of act of July 2, 1940 (54 Stat. 714), as amended: Regular working hours of laborers and mechanics employed by the War Department to be 8 hours per day or 40 hours per week during a national emergency declared by the President with authority in Secretary of War to prescribe regulations governing hours in excess of 40 to be compensated at not less than time and one-half (5 U.S.C. 189a).

Section 606 of the Communications Act of 1934 (48 Stat. 1104): Subsection (c) authorizes the President to suspend or amend rules and regulations of the FCC applicable to any or all stations in the United States, to cause the closing of and station and the removal of its equipment, or to authorize its use and control by the Government upon just compensation to the owners upon proclamation by the President that there exists war or a threat of war or a state of public peril or disaster or other national emergency or in order to preserve the neutrality of the United States (47 U.S.C. 606).

Section 4 of act of July 15, 1918 (40 Stat. 901), as amended: Makes unlawful without prior United States Maritime Commission approval various actions with respect to domestic shipping facilities including its transfer to foreign ownership or registry, when the United States is at war or during any national emergency, the existence of which is declared by proclamation of the President (46 U.S.C. 835).

Merchant Marine Act of 1936: During a national emergency as proclaimed by the President, he may suspend the provisions of this section (requirements as to United States citizenship of officers and crew and requirement that alien crew members be declarants) (46 U.S.C. 1132 (h) (a) sec. 302, 49 Stat. 1992).

Authorizes the Maritime Commission to terminate charters of public vessels whenever the President shall proclaim that the security of the national defense makes it advisable, or during any national emergency declared by proclamation of the President (46 U.S.C. 1202 (d) (b) sec. 712 (49 Stat. 2010)).

Authorizes Maritime Commission to requisition or purchase vessels whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President (46 U.S.C. 1242 (a) (c) sec. 902 (49 Stat. 2015)).

Section 1 of title II of act of June 15, 1917 (40 Stat. 220); Whenever the President by proclamation or Executive order declares a national emergency to exist by reason of actual or threatened war, or disturbance or threatened disturbance of the international relations of the United States the Secretary of the Treasury may make rules and regulations, governing the anchorage and movement of vessels, foreign and domestic, in United States waters, and may inspect and in certain contingencies take possession and control of such vessels. Within the Canal Zone, the Governor of the Panama Canal is delegated similar powers (50 U.S.C. 191).

Act of August 4, 1949 (63 Stat. 551); (a) The Coast Guard Reserve may be called or continued on active duty in time of war or national emergency declared by the President (14 U.S.C. 753).

Act of March 4, 1917 (39 Stat. 1192); In case of national emergency the President may suspend provisions of the 8-hour law as to contracts with the United States subject to provision for the payment of overtime (40 U.S.C. 326).

Section 6 of act of August 30, 1935 (49 Stat. 1011): Authorizes the President to suspend the provisions of the act which relate to the rate of wages for laborers and mechanics employed by contractor and subcontractor on public buildings in event of a national emergency (40 U.S.C. 276a-5).

II. Provisions Enacted Later Than Those Dealt With in Part I, Above

Act of June 28, 1947 (61 Stat. 191): The Secretary of the Army may refuse to accept resignations of enlisted men in time of war or national emergency declared by the President or Congress (10 U.S.C. 628).

Section 13 (g) (2) (E) of the Surplus Property Act of 1944, as amended by section 2 of the act of July 30, 1947 (61 Stat. 679): Disposition of all surplus airports, airport facilities and equipment, disposed of under the Surplus Property Act, must in general be made subject to the condition that the United States shall have the right to use, control and possess them during any national emergency declared by the President or by the Congress (50 U.S.C. App. 1622 (g) (2) (E), 50 U.S.C. App. 1622 (g) (3)).

Section 1 of the act of August 5, 1947 (61 Stat. 774): The Secretary of the Air Force, the Secretary of the Army, and the Secretary of the Navy may each lease nonsurplus property under their control respectively, but, irrespective of the terms of the lease, it shall be revokable by the Secretary of the department concerned during a national emergency declared by the President (5 U.S.C. 626s–3, 10 U.S.C. 1270, 34 U.S.C. 522a).

Sections 103(a) and (b), 114 (b) and (c), 203 (a), of the Officer Personnel Act of 1947 (61 Stat. 799, 811, 816): Limitations on the number of admirals of the line of the Navy, generals in the Marine Corps, and admirals of the Staff Corps of the Navy do not apply in time of war or national emergency declared after the effective date of this act (34 U.S.C. 4 (a) and (b), 34 U.S.C. 626 (b) and (c), 34 U.S.C. 5).

Section 304(n) of the Officer Personnel Act of 1947 (61 Stat. 840): The termination by this provision of the authority to make temporary naval appointments under the act of July 24, 1941 (55 Stat. 603) shall not be held to impair the authority to make temporary appointments under that act during any future war or national emergency (34 U.S.C. 211a (n)).

Sections 413 (a) and (b), 415 (a) and (b) of the same act (61 Stat. 876): Statutory limitations on the number of naval and marine officers, respectively, are removed in time of war or national emergency declared after the effective date of this act, and such designations in time of war or national emergency may be made down to the rank of captain or colonel, respectively (34 U.S.C. 211d (a) and (b), 34 U.S.C. 623b (a) and (b)).

Section 424 of the same act (61 Stat. 879): The statutory limitation on the number of temporary commissions which the President may issue in the Navy Medical Corps do not apply in time of war or (sic) declared national emergency (34 U.S.C. 21).

Section 430 of the same act (61 Stat. 881): The statutory limitation on the number of retired admirals who may be serving on active duty does not apply in time of war or national emergency declared after the date of approval of this act (34 U.S.C. 211e).

Sections 503(a), 504(b), and 515(b) of the same act (61 Stat. 885, 887, 907): The statutory limitation on the number of Army officers above the grade of major general applies until a national emergency is declared [after July 1, 1948] (10 U.S.C. 506a(a), 10 U.S.C. 506b(b), 10 U.S.C. 506d(b)).

Section 514(f) of the same act (61 Stat. 906): The operation of any statutory provisions prescribing mandatory retirement or separation of Regular Army officers may be suspended by the President in time of emergency declared by the President or by the Congress and in time of war (10 U.S.C. 941a(f)).

Section 515(e) of the same act (61 Stat. 907): The President is authorized to issue temporary commissions in the Army of the United States, to continue during the emergency or war in which the appointment was made and for 6 months thereafter, in time of emergency declared by the President, or by the Congress, and in time of war (10 U.S.C. 506d(e)).

Joint resolution of August 8, 1947 (61 Stat. 921): The Board of Governors of the Federal Reserve System shall not exercise consumer credit controls pursuant to Executive Order 8843 except during the time of war beginning after the date of enactment of this joint resolution (12 U.S.C. 248 note).

Section 2(c)(1) and (e) of the Armed Services Procurement Act of 1947 (62 Stat. 21), Section 3(a) of the Central Intelligency Agency Act of 1949, Public Law 110, Eighty-first Congress: Purchases and contracts for supplies and services made by the Department of the Army, the Department of the Navy, the Department of the Air Force, the United States Coast Guard, the National Advisory Committee for Aeronautics, and the Central Intelligency Agency, need not be made by advertising if determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress (41 U.S.C. 151(c) (1) and (e)) (50 U.S.C. 403c).

Section 6 of the act of February 28, 1948, amending section 210 (k) of the Public Health Service Act, as amended (62 Stat. 44): Any commissioned officer of a professional category of the regular corps of the Public Health Service may be recommended to the President for promotion to any higher grade in that category, whether or not a vacancy exists in that grade, in time of war or of national emergency proclaimed by the President (42 U.S.C. 211(k)).

Section 10(b) of the Coast and Geodetic Survey Commission Officers' Act of 1948 (62 Stat. 299): The President may suspend the operation of any statutory provisions relating to promotion of officers in the Coast and Geodetic Survey in time of emergency declared by the President or by the Congress, and in time of war (33 U.S.C. 853i(b)).

The act of June 19, 1948, amending paragraph 5 of section 3A of the Civil Service Retirement Act of May 29, 1930 (62 Stat. 504): Any Member of Congress who, during any war or time of national emergency as proclaimed by the President or declared by the Congress, leaves his office to enter the Armed Forces, shall for the purpose of this provision, be deemed to continue as a Member of Congress during such military service (5 U.S.C. 693–1(5)).

Section 6 of the act of June 28, 1948 (62 Stat. 1065): The right, title, and interest of any lands, together with improvements thereon, which are conveyed under section 5 of this act (authorizing the Defense Homes Corporation to convey certain real estate in the District of Columbia to Howard University), shall revert to the United States upon a written finding made by the President prior to July 1, 1963, that the property is needed by the United States in connection with a national defense emergency (42 U.S.C. 1575, note).

Section 1e of the act of July 2, 1948 (62 Stat. 1230): The Secretary of the Army is authorized to convey a certain part of Santa Rosa Island, Fla., to Okaloosa

County, Fla., for recreational purposes, subject to a condition that in the event of a national emergency the Secretary shall have the right to take over that property in his discretion for such use and for such length of time as the emergency shall require (not codified).

Section 507(b) of the Officer Personnel Act of 1947 (61 Stat. 893): The President may suspend the operation of any provision of law pertaining to promotion in time of emergency declared by the President or by the Congress and in time of war (10 U.S.C. 559a(b)).

Section 1 of the act of May 28, 1948 (62 Stat. 276): Personnel whose transportation the Secretary of one of the military departments may assure in accordance with the authority of this act include during any period of war or national emergency declared by the Congress or the President, personnel working with private plants engaged in the manufacture of material for those departments (5 U.S.C. 189c, 5 U.S.C. 415d, 5 U.S.C. 626n).

Section 302 (c) (1) and (e) of the Federal Property and Administrative Services Act of 1949, Public Law No. 152, Eighty-first Congress:

Purchases and contracts for supplies and services may be negotiated by the heads of executive departments and agencies without the advertising required by section 303 of this act if determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress (41 U.S.C. 252(c)).

The Secretary of the Department in which the Coast Guard is operating may order any retired Coast Guard commissioned officer or warrant officer to active duty in time of war or national emergency. Enlisted men may be so ordered by the Commandant of the Coast Guard (14 U.S.C. 240, 310, 359 (Public Law No. 207, 81st Cong.)).

Under regulations prescribed by the Secretary, an enlisted man may be detained in the Coast Guard beyond the term of his enlistment during a period of war or national emergency as proclaimed by the President, and, in the interest of national defense, for a period not to exceed 6 months after the end of the war or the termination of the emergency (14 U.S.C. 367 (a)(4) (Public Law No. 207, 81st Cong.)).

Any law removing for the duration of a war or national emergency proclaimed by the President any restriction contained in any then-existing law as applied to the Navy, shall, in the same manner and to the same extent, remove such restrictions as applied to the Coast Guard (14 U.S.C. 652 (Public Law No. 207, 81st Cong.)).

Any member of the Coast Guard Reserve may be ordered to active duty, in time of war or national emergency declared by the President to exist, for the duration of the war or until the termination of the emergency as declared by the President, and may be continued on such active duty for such duration and 6 months thereafter, notwithstanding that the term of appointment or enlistment may have expired (14 U.S.C. 752, 753(a) (Public Law No. 207, 81st Congress.)).

The sum of $150 for the purchase of uniforms, in addition to the normal uniform allowance, may be paid to Coast Guard Reserve officers upon first reporting for active duty, in times of war or national emergency. Enlisted personnel of the Coast Guard Reserve may be issued articles additional to the normal Reserve issue, upon first reporting for active duty in time of war or national emergency (14 U.S.C. 759 (Public Law 207, 81st Cong.)).

Section 8 of the same act (Public Law 207, 81st Cong.), amending section 7 of the act of July 1, 1918 (40 Stat. 717): Any commissioned or warrant officer on the retired list of the Navy or Marine Corps may be ordered to active duty during the existence of war or of a national emergency declared by the President to exist, and he shall be entitled to promotion on the retired list as if such services had been rendered continuously on the active list.

Section 402(a) of the Career Compensation Act of 1949, Public Law 351, Eighty-first Congress: For the purposes of disability retirement in the uniformed services, any disability incurred in line of duty during the serviceman's active services in time of war or national emergency shall be considered to be the proximate result of the performance of active duty (37 U.S.C. 272(a)).

Section 3(b) of the joint resolution of March 7, 1947 (61 Stat. 10) as amended by the joint resolution of July 1, 1948 (62 Stat. 1212):

The Maritime Commission (now succeeded by the Maritime Board and the Maritime Administration. Reorganization Plan No. 21 of 1950) may terminate any arrangement into which it has entered, pursuant to this resolution, regarding ocean transportation service to Alaska, whenever the President shall proclaim that the security of the national defense makes it advisable, or during any national emergency declared by proclamation of the President (46 U.S.C. 866, note).

Article 71(b) of the Uniform Code of Military Justice, act of May 5, 1950 (not in effect until May 31, 1951 (sec. 5 of the act)): The Secretary of the military department concerned may commute a court-martial sentence of dismissal of an officer, to reduction to any enlisted grade in time of war or national emergency (50 U.S.C. 658).

Section 3 of the act of June 30, 1950, Public Law 593, Eighty-first Congress: The conveyance of a specified part of Camp Joseph T. Robinson, Ark., to the State of Arkansas, shall contain the provision that the United States shall have the right of reentry upon and use of that property, whenever the Congress of the United States shall declare a state of war or other national emergency, or the President declares a state of emergency to exist.

Section 1206 of the Merchant Marine Act, 1936, as amended by the act of September 7, 1960, Public Law 763, Eighty-first Congress: The Secretary of Commerce is authorized to provide war-risk insurance to appropriate persons during any time the United States is at war or during any period of emergency declared to exist by the President (46 U.S.C. 1286).

Section 4(c) and (e) of the National Defense Facilities Act of 1950, Public Law 783, Eighty-first Congress: The Secretary of Defense shall not permit property, acquired under this act and permitted by him in accordance with the act to be used by persons or organizations, to be used in any way which will interfere with their use for the administration and training of Reserve components of the Armed Forces, or in time of war or national emergency by other units of the Armed Forces of the United States or any other use by the Federal Government. The same requirement shall apply to facilities asquired or improved by any State with funds contributed by the Secretary of Defense in accordance with section 3 (b) or (c) of the act (50 U.S.C. 783).

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