

The Permanent State of Emergency

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A FEW YEARS AGO, when the Pentagon was faced with a congressional cutoff of Vietnam war funds, it found a unique way to provide money for U.S. troops in Southeast Asia. It found an emergency statute dating back to the Civil War—a law originally intended to allow cavalry troops on the Western frontier to provide feed and forage for their horses—and used it to justify the continued flow of funds for our Vietnam forces.

This is only one way in which the government has exploited outdated emergency powers that have never been repealed. In fact, though it may be news to most Americans, we have been living for at least 40 years under a state of emergency rule, a condition which has vastly expanded the powers of the executive branch.

Under one emergency statute still on the books, for example, the Securities and Exchange Commission, with the permission of the President, may summarily seize all stock exchanges. Another old emergency law gives the President power to use the militia or armed forces to "take such measures as he considers necessary" to suppress domestic violence or conspiracies if

state or federal laws are hindered, thus creating the possibility of martial law. Still another dated statute gives the Federal Communications Commission power to grant permits and licenses as it sees fit, unrestrained by ordinary requirements of the law, and it allows the President to suspend or amend FCC rules and regulations, close stations and remove equipment.

As the Senate's Special Committee on the Termination of the National Emergency recently put it, four presidential proclamations and 470 separate laws have created a situation under which the President today may "seize property; organize and control the means of production; seize commodities; assign military forces abroad; institute martial law; seize and control all transportation and communication; regulate the operation of private enterprise; restrict travel; and, in a plethora of particular ways, control the lives of all American citizens. . . . For 40 years, freedoms and governmental procedures guaranteed by the Constitution have, in various degrees, been abridged by laws brought into force by states of national emergency."

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The existence of even the theoretical possibility for using such emergency powers today is frightening. But, even without Watergate's lessons about the lengths to which the White House may go to get its way, the concern is not merely theoretical; the fear of such powers being abused is not paranoid. For the powers have been misused on numerous occasions, for purposes that are likely to disturb people of all ideologies.

In 1957, for example, President Eisenhower used emergency provisions dating from World War II to justify sending troops into Little Rock, Ark., to quell the conflict over desegregating Central High School there. Emergency powers to use military reserves were revived by President Kennedy in the Berlin crisis and by President Nixon in the recent Middle East flare-up.

A favorite old statute that has been put to mischievous uses through the years is the Trading with the Enemy Act. Passed in 1917, this World War I law was designed to allow the government to gain control over U.S. property owned by foreign (enemy) nationals or countries. But later amendments included regulations controlling the foreign investments of American citizens, and in 1968 President Johnson issued an executive order applying the act to U.S. companies investing in Switzerland.

Under this authority, the government recently prosecuted a Kentucky businessman for failing to report his investment in real property abroad, as required by Commerce Department regulations issued pursuant to the LBJ order. No foreign government owned any of the property in question, and lawyers for the defendant argued that the effect of the prosecution was "to stand the purpose of the statute on its head." U.S. District Court Judge George Hart dismissed the indictment, stating at a hearing that Congress "couldn't conceive of America sinking to this level" in passing the legislation in question.

Taft vs. Roosevelt

A ERNEST FITZGERALD, the Defense Department gadfly, reports about another emergency power perversion in his book "The High Priests of Waste." Fitzgerald's case involves P. L. 85-804, which allows the President and 11 other executive heads to declare a corporation essential to the national defense and thus give it public money not otherwise available.

Fitzgerald asked General Accounting

Office officials how they rationalized using this emergency power to provide the Lockheed Corporation in 1971 with what he terms a billion-dollar "bail out" from its contract to produce the C-5A. He was told, correctly, that the state of emergency declared by President Truman on Dec. 16, 1950, when the Chinese entered the Korean War was the justification. One GAO lawyer told Fitzgerald that under P.L. 85-804, an agency head may declare a company essential to the national defense and give it contracts, modify existing contracts and provide funds without getting anything in return, without justification, and without challenge.

There is no denying, of course, that the problem raised by the legitimate needs of the executive for special powers in times of national emergency are fundamental and historic.

In modern American history, two views have been espoused. The first, now a minority view, was articulated by William Howard Taft in his lectures on the presidency 60 years ago. In modern parlance it might be labeled the "strict constructionist" viewpoint.

"A President can exercise no power which cannot fairly and reasonably be traced to some specific grant of power . . . in the federal Constitution, or in any act of Congress passed in pursuance thereof," Taft admonished. "There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest."

President Theodore Roosevelt articulated the other view, described in the special Senate committee's 600-page report as the "stewardship" theory of the presidency. In his autobiography, Roosevelt wrote:

"My view was that every executive officer . . . was a steward of the people bound actively and affirmatively to do all he could for the people and not to content himself with the negative merit of keeping his talents undamaged in a napkin . . . My belief was that it was not only [the President's] 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 departments. I did not usurp power but I did greatly broaden the use of the executive power. In other words, I acted for the common well-being of all our people whenever and whatever measure was necessary, unless prevent-

ed by direct constitutional or legislative prohibition."

The Roosevelt approach has prevailed, spurred by the natural panics surrounding economic and military emergencies during the last half century.

The problem is that while the emergency situations themselves have ended, the officially proclaimed states of emergency have not. Not only the 1950 Korean War emergency, but the 1933 emergency declared by President Franklin Delano Roosevelt, the 1970 postal strike emergency declared by President Nixon and the 1971 economic emergency proclaimed by President Nixon to impose import surcharges are all technically still in effect. It is these unending states of emergency that allow 470 other laws to be used for exotic purposes today.

As a result of this governmental phenomenon, in the Senate committee's words, "The extensive use of delegated powers exercised under an aura of crisis has become a dominant aspect of the presidency."

These presidential powers have gone relatively unchecked by the courts and by Congress. In fact, Congress has perfunctorily approved almost all presidential requests for emergency powers despite its constitutional charter to "make all laws."

The special Senate committee, while recognizing the need for special executive powers in emergencies, called for new procedures to enact future emergency powers, to assure effective legislative oversight over such powers, and to provide for termination of such grants of powers after the emergency subsides. Hopefully, its efforts will lead to the repeal of many obsolete delegations of emergency powers.

There are also other hopeful signs. When President Nixon recently sent to Congress his National Emergency Petroleum Act (the energy bill), the measure contained no termination date. Quietly, Sen. Frank Church (D-Idaho), co-chairman of the special Senate committee and also a member of the Senate Interior Committee, persuaded Interior Committee chairman Henry Jackson (D-Wash.) to add a provision ending the bill's powers a year after its enactment. Reporting requirements and oversight procedures also were adopted.

This incident did not attract wide attention, but it reflected the beginning of a legislative initiative in an area where historic congressional negligence and expanding presidential claims for special powers have produced an astounding phenomenon of un-

limited executive power.

New legislation has also been drafted by Sens. Church and Charles McC. Mathias (R-Md.), the other co-chairman of the special committee. Likely provisions in the measure include:

- A requirement that all presidentially declared national emergencies end 90 days after they are declared unless Congress terminates them earlier or agrees to their extension.

- A stipulation that no such emergency powers shall continue after 180 days without another presidential or congressional declaration of emergency.

- A requirement that all proclamations of national emergencies by the President be disclosed to Congress.

- A stipulation that the President maintain and provide Congress with records of all executive orders and other exercises of emergency powers.

It appears that Congress may be about to end our 40-year state of emergency. In doing so, it will take the country back to its traditional constitutional form of government from the precarious national security state of the past decades.