1973

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OCCASIONAL PAPERS

FROM THE LAW SCHOOL

THE UNIVERSITY OF CHICAGO

NO. 6

1973

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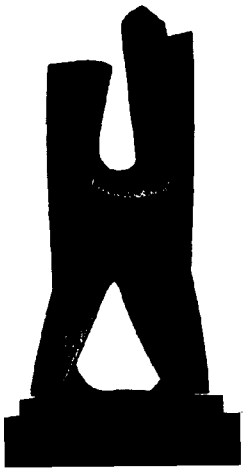

On Emergency Powers of the President: Every Inch a King?

By GERHARD CASPER

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I am grateful to the Committee for providing me with this opportunity to testify on the important subject which is the concern of the Committee. I shall discuss the emergency powers of the executive, first by analyzing the constitutional framework, and then by raising some even larger historical and political questions.

I.

While the constitutions of other democracies, for instance France and Germany, include more or less elaborate rules for institutional adjustments to be made during emergencies (like transfer of legislative powers to the executive or a parliamentary committee), the United States Constitution does not provide for suspending the basic and ordinary distribution and separation of powers in times of emergency. This is not to say that the Constitution is void of any rules for extraordinary situations, but rather that these rules are narrow in scope.

In view of the attitudes prevailing at the Constitutional Convention, it should come as no surprise that no drastic structural changes for coping with national emergencies were contemplated. To confer upon the President extraordinary constitutional authority to deal independently with emergencies, would have only further heightened the widespread fear that the Presidency might be turned into a temporary monarchy or might fall into the hands of a Cataline or Cromwell,

*This paper is based upon the statement by Gerhard Casper, Professor of Law and Political Science, The University of Chicago, before the United States Senate's Special Committee on The Termination of the National Emergency, April 12, 1973.

and would have jeopardized its adoption. As Franklin said when speaking against an absolute negative for the executive: "The first man put at the helm will be a good one. Nobody knows what sort may come afterwards. The executive will always be increasing here, till it ends in a Monarchy." [Madison, Notes of Debates in the Federal Convention of 1787, 66 (Norton Library 1969)]. Corwin's assertion that "the Presidency was designed in great measure to reproduce the monarchy of George III with the corruption left out," can claim to be no more than a clever response to Sir Henry Maine's dictum, that "the American constitution is the British constitution with the monarchy left out." [Corwin, The President: Office and Powers 14, 4th ed. (1957)].

As concerns the most dangerous of all emergencies: war, the Constitutional Convention gave the executive the power to repel sudden attacks but left declarations of war to Congress. [Madison, *supra* at 476]. The problem with the war powers of the Confederation, after all, had not been the fact that they were vested in the Continental Congress, but that they were insufficient vis-a-vis the states. In addition to the quota system of financial contributions, the Confederation depended on quota requisitions of manpower. These were the deficiencies the new constitution was primarily designed to resolve. Otherwise, we do well to remember that the War of Independence was carried to its successful end by the Congress itself. [On the prevailing views about the weaknesses of the Confederation, cf. Wood, The Creation of the American Republic 1776-1787, 471ff (1969)].

On the same day on which the Convention discussed the war power, August 16, 1787, it also dealt with the internal emergency of rebellions within a state. Governeur Morris, otherwise a friend of a strong executive, argued against hampering the general government by not permitting it to intervene without application by a state legislature: "We are acting a very strange part. We first form a strong man to protect us, and at the same time wish to tie his hands be-

hind him. The legislature may surely be trusted with such a power to preserve the public tranquility." [Madison, *supra* at 475]. In context, "strong man" meant the general government and "legislature" the national legislature.

Given the fact that the United States Constitution has been interpreted by almost all analysts, American and foreign, as an extremely carefully engineered document, characterized by a sustained sombreness of mood, anticipating "little good, but mainly evil: war, universal corruption, public insolence and insubordination," [Jacobson, Political Science and Political Education, 57 The American Political Science Review 561, 562 (1963)] the refusal to arrange for institutional changes during emergencies expresses the confidence of the Founding Fathers that the ordinary institutions were so designed as to be capable of coping with extraordinary events. After all, their system of government, as The Federalist amply demonstrates, was based on the "scientific" insight that "power controled or abridged is almost always the rival and enemy of that power by which it is controled or abridged." [Hamilton, Federalist No. 15]. Checks were heaped upon checks so that the love for power could be harnessed. In the decade following the War of Independence, distrust of power seems to have been the most widespread sentiment among Americans.

What are those constitutional provisions which may be considered to have a bearing on the question of emergency powers? Article I Section 8 gives the Congress the power

> To declare War. . .;
>
> To raise and support Armies, but no Appropriation of Money to that use shall be for a longer term than two years;
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces;
>
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining the Militia. . .

Section 9 of the same Article prohibits suspension of the privilege of the writ of habeas corpus, "unless when in Case of Rebellion or Invasion the public Safety may require it."

Unless the grant of the executive power per se is seen as giving the President emergency powers, a queer interpretation in light of the Convention's detailed delegation of powers and especially in light of the "necessary and proper clause," Article II which deals with the Presidency has only two relevant provisions.* Section 2 makes the President "Commander in Chief of the Army and Navy of the United States and of the Militia of the several States, when called into the actual Service of the United States." Section 3 empowers the President to convene both Houses or either of them "on extraordinary occasions."

Finally, Section 4 of Article IV, the article which regulates certain aspects of federalism, provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

*Almost all the considerable substantive powers of the modern presidency have been conferred upon that office by Congressional legislation. The Constitution itself carefully enumerates (and thus limits) Presidential powers. An analysis of the Constitution yields something like the following list.

I. Legislative process
   (1) "power" (duty) to inform the Congress about the state of the union and to make recommendations;
   (2) power to convene both Houses of Congress, or either of them, on extraordinary occasions;
   (3) power to adjourn Congress in case of disagreement between the Houses;
   (4) Veto power;
   (5) "power" (duty) to execute the laws (this includes delegated rule-making powers).

II. "Foreign Affairs" powers
   (1) power to make treaties by and with the consent and advice of two-thirds of the Senate;
   (2) power to receive envoys;
   (3) power to appoint envoys, subject to Senate confirmation.

III. Power as Commander-in-Chief, including the power to repel sudden attacks on the United States or its armed forces.

IV. Sundry powers
   (1) power to receive advice from department heads;
   (2) power of pardon;
   (3) power of appointments, subject to constraints listed in Article II, Section 2.

Beyond these specific provisions, Congress may, of course, in the exercise of its power to make all necessary and proper laws for executing powers vested in the Government of the United States, authorize the President to take certain measures in specified emergencies. Since the Constitution nowhere gives the President either the power to declare a national emergency or to legislate independently of Congress, such declarations must generally be based on Congressional delegation, subject to the restrictions which limit delegation of powers.

The only exception to this rule involves the President's power to repel sudden attacks on the United States (and its armed forces stationed abroad) which surely includes the power to take emergency action. But since the ultimate war power is in the hands of the Congress, the scope of the President's power in this area is uncertain: it falls into what Justice Jackson has called "a zone of twilight." [Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (Jackson concurring) (1952)]. Not as a matter of constitutional law, but as a factual matter, public confusion about the borders of this zone has been considerably increased due to the inertia of Congress with respect to the Korean and Vietnam enterprises.

What is reasonably clear, however, is that the President's portion of the so-called "foreign affairs power" does not give him any special emergency power outside the framework of Congressional delegation. It is important to remember that foreign affairs is not an exclusive domain of the President. More importantly, power over foreign affairs does not give the President added power over internal, including economic affairs. [343 U.S. 579, 644]. *United States v. Curtiss-Wright* is not a case to the contrary, since the Court limited it to its facts which involved "a situation entirely external to the United States." [United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315 (1936)]. Justice Sutherland's extravagant dicta in that case about "the very delicate, plenary and exclusive power of the Pres-

ident as the sole organ of the federal government in the field of international relations" [299 U.S. 304, 320] are irrelevant, precisely because they are dicta. The President in that case had acted in accordance with a very specific and narrow Joint Resolution of Congress which would meet anybody's standards for delegation of powers.

There must be grave doubts, for example, about the constitutionality of the surcharge imposed by President Nixon on August 15, 1971 and apparently justified by his declaration of a national emergency, since in that situation statutory authority was insufficient. [Pres. Proclamation No. 4074, 36 Fed. Reg. 15,724 (1971)]. The President has no constitutional authority to engage in regulation of the economy by mere incantation of the word "emergency." [Comment, The United States Response to Common Market Trade Preferences and the Legality of the Import Surcharge, 39 The University of Chicago Law Review 177, 234 (1971)]. Here, as elsewhere, the Congress, of course, bears responsibility. Since it generally applauded the measures of August 15, 1971, it apparently considered itself relieved of institutional constraints. In the end, the Congress neither ratified nor removed the surcharge. The President did so when he thought it had accomplished its goal.

Whatever emergency powers are to be given the President by the Congress ought to be circumscribed as to the specific circumstances in which they may be invoked, must include standards for their exercise and must, in any event, never amount to transfer of legislative powers to the executive or to abdication on the part of the Congress. [Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935)]. This principle does not exclude delegation of somewhat broader rule-making powers for and during emergencies than would be permitted under delegation of powers standards for ordinary times. As Justice Jackson wrote in the *Steel Seizure Cases:*

> In the practical working of Government, we already have evolved a technique within the framework of the Constitution by which nor-

> mal executive powers may be considerably expanded to meet an emergency. Congress may and has granted extraordinary authorities which lie dormant in normal times but may be called into play by the Executive in war or upon proclamation of a national emergency. [343 U.S. 579, 652].

The most important conclusion to follow from the prohibition of transfer of legislative powers and abdication is that it is generally the obligation of Congress to determine when an emergency begins and when it ends. While fixing the beginning may be very difficult since abstract language has to be used to define future events never exactly foreseeable, determination of the end of an emergency is considerably less difficult since the Congress will have or should have all the necessary information.

The point of the matter is that it would be unrealistic not to view rule-making powers of the President during emergencies as essentially legislative in nature. Delegation under these circumstances will give the President not just discretion as to details, but often will be open-ended as to content and scope of the authorization. To make this state of affairs constitutionally proper, it has to be put under severe constraints in terms of Congressional oversight and termination. If this argument has any power, those laws presently on the books must be considered unconstitutional which give the executive extraordinary powers without providing for termination of a Presidentially invoked emergency. They constitute an unchecked transfer of legislative powers.

It does not take any particular legal sensitivity to find it shocking that as late as 1970, a United States Court of Appeals upheld the Cuban Assets Control Regulations on the authority of the Korean Emergency. [Nielsen v. Secretary of the Treasury, 424 F.2d 833 (1970). See also Sardino v. Federal Reserve Bank of New York, 361 F.2d 106 (1966)]. How can the Congress expect a citizen to abide by principles of law and order, if he is called upon to obey regulations which by no stretch of the imagination can be related to the state of affairs which allegedly justifies them.

This surrealistic nightmare (has the Great Depression emergency ended?) is also extremely bad politics, since the only way a citizen can be expected to cope with appeals for extraordinary sacrifices which are normally associated with emergency proclamations is not to take them too seriously. Public rhetoric suffers anyway from inflation.

Constitutional and orderly lawmaking calls for no less than restricting to an absolute minimum those laws which confer emergency powers on the President. But more importantly, it is mandatory for the Congress to provide regular review for all emergencies which have been invoked. To force the Congress to do so, no emergency authority should be permitted to continue beyond a fixed time span (for instance, six months), unless re-enacted by the Congress. A principle which would continue an emergency unless ended by the Congress after mandatory review will probably not do constitutionally, because our experience with the inertia of Congress has shown Congressional veto to be futile as well as unconstitutional. Inaction on the part of the Congress can be as unconstitutional as action. In short, it is not only the legislative prerogative of the Congress, but it is its duty tightly to control emergencies. Otherwise, this could truly become a "garrison state."

Challenged to define "emergency" one feels inclined to answer: "An emergency is an emergency, is an emergency..." To define emergencies in dictionary terms ("an unforeseen combination of circumstances or the resulting state that calls for immediate action") is not exactly helpful either. Attempts to give meaning to the concept of emergency by providing examples (war, insurrection) simply tend to shift the definitional burden. These conceptual difficulties point to the nature of the problem: whether a state of affairs may be designated an emergency and thus bring extraordinary powers of government into play, is a question of context evaluation and judgment. Under the American system of government, judgments of this nature, i.e., judgments with far-

reaching consequences for rights and obligations, are committed to the Congress. I am therefore of the opinion that the President alone cannot—as a rule and with the previously noted exception of his right to repel sudden attacks—declare a state of emergency. There may be extremely rare situations where the President may consider it his responsibility to invoke emergency powers and only subsequently ask the Congress for ratification. One should perhaps conceptualize such emergencies as "extraordinary" even by comparison with other emergencies. For instance, I do not believe that the so-called "balance of payments" emergency was of such a nature.

Congressional emergency legislation, as I envisage it, falls into three different categories. (1) Substantive legislation: this is legislation of the type which says, that in case of a Congressionally declared emergency the President may do such and such. Present legislation and future proposals of this nature should be carefully reviewed for their constitutionality in terms of delegation of powers and restrictions of individual rights. (2) The second category I shall call, for lack of a better term, "invocation" legislation: Congress, through legislation or joint resolution, in a specific instance invokes emergency powers. Invocation legislation would list in detail those statutes which the emergency brings into operation. (3) The last category I shall call "framework" legislation: this is legislation of the type contemplated by the Special Committee. It spells out that "invocation" is principally a function of Congress. It would require that in the rare situations where the President has the authority to declare an emergency, he has to seek Congressional ratification (within 30 or 60 days). It would further provide that a state of emergency must not last longer than six months unless renewed by the Congress.

II

Given the highly technical nature of law and its language, comparison to laws of foreign na-

tions is perhaps the most inexact of all social sciences. The opportunities for error due to failure to appreciate fully foreign legal intricacies and political traditions are virtually endless. Nevertheless, some comparison with emergency powers under the Weimar Constitution may be in order. I do not offer this comparison in order to argue that Weimar ended in a dictatorship because of excessive Presidential emergency powers. It would be foolish to make that argument, for such argument must disregard too many other explanatory variables, though I hasten to say that some causal relationship did exist. Instead, I indulge such comparison only with reference to the relatively narrow point about legislative passivity that I just made. Under Art. 48 of the Weimar Constitution, the President had the authority to take emergency measures when public safety and order were endangered. What Constitutional lawyers of the Weimar era called with admirable frankness, "the dictatorial powers" of the President, were invoked approximately 136 times between 1919 and 1925. Due to the improvement of economic and political conditions in the mid-1920s, the authority was not utilized for about five years. Beginning in July 1930 and through March 1932, another 61 Presidential orders were promulgated under Art. 48. [The figures are taken from Anschütz, Die Verfassung des Deutschen Reiches 279-80 (1933)]. As a safeguard, that Article required the President to report all such measures without delay to the Reichstag and to repeal them if the Reichstag so demanded. Between 1919 and 1932, this happened exactly three times. [Anschütz, *supra* at 294]. Parliament was much too confused, split, and passive to counter vigorous Presidents who claimed to act according to the mandate they held on account of popular election. Furthermore, as Holborn has argued, the use of Art. 48 encouraged the political parties "to believe that they could shun unpleasant legislative responsibilities, because there existed another power capable of sustaining the government." (Holborn, A History of Modern Germany

1840-1945, 546 (1969)). One should add that in the end, the "other power" also proved itself to be capable of delivering the republic into the hands of its enemy.

If anything is to be learned from American history, and from foreign experience, it is, of course, that no amount of constitutional law will help unless the Congress pulls itself together and jealously and responsibly guards its legislative prerogative. Again, this point has been made most persuasively by Mr. Justice Jackson in his *Steel Seizure* concurrence:

> But I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was wordly wisdom in the maxim attributed to Napoleon that "The tools belong to the man who can use them." We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers. [343 U.S. 579, 654].

Unfortunately, Jackson's pessimism has proved to be amply justified in the few years which have passed since the only major Supreme Court decision on the subject matter.

I turn to somewhat more speculative matters. It is, of course, often argued that Congress cannot wield emergency tools because it is institutionally incapable of doing so. This argument comes in two varieties: an absolute one, and a relative one. The absolute version is clearly not warranted in light of the constitutional history of the country. In addition to the above mentioned example of the War of Independence, we would do well to remember that following Lincoln's assassination, almost the entire burden of dealing with emergency conditions prevailing after the Civil War fell on the Congress. Congress, in particular through the emergency Reconstruction Acts of March 1867, by and large acquitted itself rather admirably. Professor Fairman, one of our leading constitutional historians on the period, has recently summarized the immensely difficult

situation with which the Congress was faced in the following words:

> Congress must reckon with a President who had met every critical measure with a veto, and who, while adhering to his duty to enforce the statutes, would yet give them the narrowest construction. The Court had not placed its authority behind the statutes: indeed it was widely believed to stand ready to condemn the entire effort. State officers were not merely evading federal laws by subterfuge: at critical junctures they proclaimed them to be unconstitutional and refused obedience. What Congress did in the prosecution of its effort to restore the Union on the basis of the Fourteenth Amendment is entitled to a far more discriminating consideration than it has generally received. [Fairman, History of the Supreme Court of the United States: Reconstruction and Reunion, 1864-88, Part One 342-43 (1971)].

It goes without saying that there are many legitimate criticisms of what the Congress did and did not do during Reconstruction. Yet, anybody familiar with the details of Reconstruction politics must at least admit that the Congress did better than President Johnson. And what greater emergency than the Civil War and Reconstruction with their tremendous dissension, dislocations and racial problems, has the United States seen? Though perhaps larger in operational scope, World Wars I and II seem to pale by comparison because in those instances the country was more or less united. The last example of "a house divided," the Vietnam War, is no glowing testimony to the inherent capacity of the Presidency effectively to resolve emergencies.

The relative variety of the incapacity argument does not deny that the Congress may have been capable of dealing with emergencies in an earlier age when everything, including emergencies, supposedly happened at a slower pace and matters could be resolved with less of a bureaucratic infrastructure. It holds that the world has become ever so much more complex and ever so much more swiftly moving and that these externalities allegedly have diminished Congressional capacity.

First of all, it should be noted that some of

these developments, like the so-called communications revolution, have benefitted the Congress. The President will find it much easier nowadays to convene the Congress on "extraordinary occasions," if that becomes necessary, than in 1787. The fact is that the Congress is nowadays practically in permanent session. Also, many of the recent emergencies, for instance the Vietnam War, did not exactly happen from one minute to another. The balance of payments emergency was in the making for many years. As concerns any need to respond swiftly to developments on foreign exchanges: does one really want to argue that multinational corporations and oil sheiks can amend the United States Constitution?

It is quite true that the Congress does not presently have the bureaucratic capacities that might be needed for careful evaluation of administration policies. That deficiency, however, most certainly is remediable. In any event, the alleged lack of information and understanding on the part of the Congress is largely of the Presidents' making. The executive concludes secret executive agreements, invokes executive privilege for the vastly expanded White House bureaucracy, impounds funds from one day to another, and then argues that the Congress would not know what to do in an emergency. However, Presidents are only partially responsible for this state of affairs. If unfortunate and unwise, it is still natural that they show no excessive concern for keeping the Congress viable. Most of the responsibility for the sad state of affairs lies with the Congress. While kings, even presidents, may abdicate, Congress has no constitutional right to do so. "Emergency powers" are among the most serious dangers to democracy. The duty of Congress to abate the danger is clear. All that is doubtful is whether the members of Congress have the will to abide their constitutional oath of office.

Editor: Frank L. Ellsworth

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