

# CRS Report for Congress

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## National Emergency Powers

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# National Emergency Powers

## Summary

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

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

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# National Emergency Powers

Federal law provides a variety of powers for the President to use in response to crisis, exigency, or emergency circumstances threatening the nation. Moreover, they are not limited to military or war situations. Some of these authorities, deriving from the Constitution or statutory law, are continuously available to the President with little or no qualification. Others — statutory delegations from Congress — exist on a stand-by basis and remain dormant until the President formally declares a national emergency. These delegations or grants of power authorize the President to meet the problems of governing effectively in times of crisis. Under the powers delegated by such statutes, the President may seize property, organize and control the means of production, seize commodities, assign military forces abroad, institute martial law, seize and control all transportation and communication, regulate the operation of private enterprise, restrict travel, and, in a variety of ways, control the lives of United States citizens. Furthermore, Congress may modify, rescind, or render dormant such delegated emergency authority.

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

## Background and History

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

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<sup>1</sup> Thomas I. Cook, ed., *Two Treatises of Government*, by John Locke (New York: Hafner, 1947), pp. 203-207; Edward S. Corwin, *The President: Office and Powers, 1787-1957*, fourth revised edition (New York: New York University Press, 1957), pp. 147-148.

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

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

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

Perhaps the President who most clearly articulated a view of his office in conformity with the Lockean position was Theodore Roosevelt. Describing what came to be called the “stewardship” theory of the presidency, Roosevelt wrote of his “insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its constitutional powers.” It was his view “that every executive officer, and above all every executive officer in high position, was a steward of the people,” and he “declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it.” Indeed, it was Roosevelt’s belief that, for the President, “it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws.”<sup>3</sup>

Opposed to this view of the presidency was Roosevelt’s former Secretary of War, personal choice for, and actual successor as Chief Executive, William Howard Taft. He viewed the presidential office in more limited terms, writing “that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise.” In his view, such a “specific grant must be

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

<sup>3</sup> Theodore Roosevelt, *An Autobiography* (New York: Macmillan, 1913), pp. 388-389.

either in the Federal Constitution or in an act of Congress passed in pursuance thereof. There is,” Taft concluded, “no undefined residuum of power which he can exercise because it seems to him to be in the public interest....”<sup>4</sup>

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

Emergency powers are not solely derived from legal sources. The extent of their invocation and use is also contingent upon the personal conception which the incumbent of the Presidential office has of the Presidency and the premises upon which he interprets his legal powers. In the last analysis, the authority of a President is largely determined by the President himself.<sup>5</sup>

Finally, apart from the Constitution, but resulting from its prescribed procedures, there are statutory grants of power for emergency conditions. The President is authorized by Congress to take some special or extraordinary action, ostensibly to meet the problems of governing effectively in times of exigency. Sometimes these laws are only of temporary duration. The Economic Stabilization Act of 1970, for example, allowed the President to impose certain wage and price controls for about three years before it expired automatically in 1974.<sup>6</sup> The statute gave the President emergency authority to address a crisis in the nation’s economy.

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

Finally, there are various stand-by laws that convey special emergency powers once the President formally declares a national emergency activating them. In 1973, a Senate special committee studying emergency powers published a compilation identifying some 470 provisions of federal law delegating to the executive extraordinary authority in time of national emergency.<sup>8</sup> The vast majority of them are of the stand-by kind — dormant until activated by the President. However, formal procedures for invoking these authorities, accounting for their use, and

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<sup>4</sup> William Howard Taft, *Our Chief Magistrate and His Powers* (New York: Columbia University Press, 1916), pp. 139-140; for a direct response to Theodore Roosevelt’s expression of presidential power, see William Howard Taft, *The Presidency* (New York, Charles Scribner’s Sons, 1916), pp. 125-130.

<sup>5</sup> Albert L. Sturm, “Emergencies and the Presidency,” *Journal of Politics*, vol. 11, Feb. 1949, pp. 125-126.

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

<sup>7</sup> See 64 Stat. 798; 50 U.S.C. App. 2061 *et seq.* (1994).

<sup>8</sup> U.S. Congress, Senate Special Committee on the Termination of the National Emergency, *Emergency Powers Statutes*, 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., S.Rept. 93-549 (Washington: GPO, 1973).

regulating their activation and application were established a while ago by the National Emergencies Act of 1976.<sup>9</sup>

## The Emergency Concept

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

In the simplest understanding of the term, the dictionary defines an emergency as “an unforeseen combination of circumstances or the resulting state that calls for immediate action.”<sup>10</sup> In the midst of the crisis of the Great Depression, a 1934 Supreme Court majority opinion characterized an emergency in terms of urgency and relative infrequency of occurrence as well as equivalence to a public calamity resulting from fire, flood, or like disaster not reasonably subject to anticipation.<sup>11</sup> An eminent constitutional scholar, the late Edward S. Corwin, explained emergency conditions as being those “which have not attained enough of stability or recurrency to admit of their being dealt with according to rule.”<sup>12</sup> During congressional committee hearings on emergency powers in 1973, a political scientist described an emergency in the following terms: “It denotes the existence of conditions of varying nature, intensity and duration, which are perceived to threaten life or well-being beyond tolerable limits.”<sup>13</sup> Corwin also indicated it “connotes the existence of conditions suddenly intensifying the degree of existing danger to life or well-being beyond that which is accepted as normal.”<sup>14</sup>

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

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<sup>9</sup> 90 Stat. 1255; 50 U.S.C. 1601-1651.

<sup>10</sup> *Webster's New Collegiate Dictionary* (Springfield, MA: G & C Merriam, 1974), p. 372.

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

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

<sup>13</sup> U.S. Congress, Senate Special Committee on the Termination of the National Emergency, *National Emergency*, hearings, 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., Apr. 11-12, 1973 (Washington: GPO, 1973), p. 277.

<sup>14</sup> *Ibid.*, p. 279.

national emergency powers.<sup>15</sup> These dynamics can be seen in the history of the exercise of emergency powers.

## Law and Practice

During the summer of 1792, residents of western Pennsylvania, Virginia, and the Carolinas began forcefully opposing the collection of a federal excise tax on whiskey. Anticipating rebellious activity, Congress enacted legislation providing for the calling forth of the militia to suppress insurrections and repel invasions.<sup>16</sup> Section 3 of this statute required that a presidential proclamation be issued to warn insurgents to cease their activity.<sup>17</sup> If hostilities persisted, the militia could be dispatched. On August 17, 1794, President Washington issued such a proclamation. The insurgency continued. The President then took command of the forces organized to put down the rebellion.<sup>18</sup>

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

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

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

When the new President assumed office, Congress was not in session. For reasons of his own, Lincoln delayed calling a special meeting of the legislature, but

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

<sup>16</sup> 1 Stat. 264-265.

<sup>17</sup> This authority may presently be found at 10 U.S.C. 334.

<sup>18</sup> See James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents*, vol. 1 (New York: Bureau of National Literature, 1897), pp. 149-154.



soon ventured into its constitutionally designated policy sphere. On April 19, he issued a proclamation establishing a blockade on the ports of the secessionist states,<sup>19</sup> “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.”<sup>20</sup> Congress, of course, had not been given an opportunity to consider a declaration of war.

The next day, the President ordered the addition of 19 vessels to the navy “for purposes of public defense.”<sup>21</sup> A short time later, the blockade was extended to the ports of Virginia and North Carolina.<sup>22</sup>

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

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

Indeed, Congress subsequently did legislatively authorize, and thereby approve, the President’s actions regarding his increasing armed forces personnel, and would do the same later concerning some other questionable emergency actions. In the case of Lincoln, the opinion of scholars and experts is “that neither Congress nor the Supreme Court exercised any effective restraint upon the President.”<sup>25</sup> The emergency actions of the Chief Executive were either unchallenged or approved by Congress, and were either accepted or, because of almost no opportunity to render judgment, went largely without notice by the Supreme Court. The President made

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<sup>19</sup> *Ibid.*, vol. 7, pp. 3215-3216.

<sup>20</sup> Clinton L. Rossiter, *Constitutional Dictatorship* (New York: Harcourt, Brace, and World, 1963), p. 225.

<sup>21</sup> *Ibid.*

<sup>22</sup> See James D. Richardson, comp., *A Compilation of the Messages and Papers of the Presidents*, vol. 7, p. 3216.

<sup>23</sup> *Ibid.*, pp. 3216-3217.

<sup>24</sup> *Ibid.*, p. 3225.

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

a quick response to the emergency at hand, a response which Congress or the courts might have rejected in law, but which, nonetheless, had been made in fact and with some degree of popular approval. Similar controversy would arise concerning the emergency actions of Presidents Woodrow Wilson and Franklin D. Roosevelt. Both men exercised extensive emergency powers with regard to world hostilities, and Roosevelt also used emergency authority to deal with the Great Depression. Their emergency actions, however, were largely supported by statutory delegations and a high degree of approval on the part of both Congress and the public.

Furthermore, during the Wilson and Roosevelt presidencies, a major procedural development occurred in the exercise of emergency powers — use of a proclamation to declare a national emergency and thereby activate all stand-by statutory provisions delegating authority to the President during a national emergency. The first such national emergency proclamation was issued by President Wilson on February 5, 1917.<sup>26</sup> Promulgated on the authority of a statute establishing the United States Shipping Board, the proclamation concerned water transportation policy.<sup>27</sup> It was statutorily terminated, along with a variety of other wartime measures, on March 3, 1921.<sup>28</sup>

President Franklin D. Roosevelt issued the next national emergency proclamation some 48 hours after assuming office.<sup>29</sup> Proclaimed March 6, 1933, on the somewhat questionable authority of the Trading with the Enemy Act of 1917,<sup>30</sup> the proclamation declared a so-called “bank holiday” and halted a major class of financial transactions by closing the banks. Congress subsequently gave specific statutory support for the Chief Executive’s action with the passage of the Emergency Banking Act on March 9.<sup>31</sup> Upon signing this legislation into law, the President issued a second banking proclamation, based upon the authority of the new law, continuing the bank holiday until it was determined that banking institutions were capable of conducting business in accordance with new banking policy.<sup>32</sup>

Next, on September 8, 1939, President Roosevelt promulgated a proclamation of “limited” national emergency, though the qualifying term had no meaningful legal significance.<sup>33</sup> Almost two years later, on May 27, 1941, he issued a proclamation of “unlimited” national emergency.<sup>34</sup> This action, however, actually did not make any important new powers available to the Chief Executive in addition to those activated by the 1939 proclamation. The President’s purpose in making the second

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<sup>26</sup> 39 Stat. 1814.

<sup>27</sup> 39 Stat. 728.

<sup>28</sup> 41 Stat. 1359.

<sup>29</sup> 48 Stat. 1689.

<sup>30</sup> 40 Stat. 411.

<sup>31</sup> 48 Stat. 1.

<sup>32</sup> 48 Stat. 1691.

<sup>33</sup> 54 Stat. 2643.

<sup>34</sup> 55 Stat. 1647.

proclamation was largely to apprise the American people of the worsening conflict in Europe and growing tensions in Asia.

These two war-related proclamations of a general condition of national emergency remained operative until 1947, when certain of the provisions of law they had activated were statutorily rescinded.<sup>35</sup> Then, in 1951, Congress terminated the declaration of war against Germany.<sup>36</sup> In the spring of the following year, the Senate ratified the treaty of peace with Japan. Because these actions marked the end of World War II for the United States, legislation was required to keep certain emergency provisions in effect. Initially, the Emergency Powers Interim Continuation Act temporarily maintained this emergency authority.<sup>37</sup> It was subsequently supplanted by the Emergency Powers Continuation Act, which kept selected emergency delegations in force until August 1953.<sup>38</sup> By proclamation in April 1952, President Harry S. Truman terminated the 1939 and 1941 national emergency declarations, leaving operative only those emergency authorities continued by statutory specification.<sup>39</sup>

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

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

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<sup>35</sup> 61 Stat. 449.

<sup>36</sup> 65 Stat. 451.

<sup>37</sup> 66 Stat. 54; extended at 66 Stat. 96, 137, and 296.

<sup>38</sup> 66 Stat. 330; extended at 67 Stat. 18 and 131.

<sup>39</sup> 66 Stat. c31.

<sup>40</sup> 64 Stat. A454.

<sup>41</sup> 84 Stat. 2222.

<sup>42</sup> See 10 U.S.C. 673 (1970).

<sup>43</sup> 85 Stat. 926.

## Congressional Concerns

In the years following the conclusion of U.S. armed forces involvement in active military conflict in Korea, occasional expressions of concern were heard in Congress regarding the continued existence of President Truman's 1950 national emergency proclamation long after the conditions prompting its issuance had disappeared. There was some annoyance that the President was retaining extraordinary powers intended only for a time of genuine emergency, and a feeling that the Chief Executive was thwarting the legislative intent of Congress by continuously failing to terminate the declared national emergency.<sup>44</sup>

Growing public and congressional displeasure with the President's exercise of his war powers and deepening U.S. involvement in hostilities in Vietnam prompted interest in a variety of related matters. For Senator Charles Mathias, interest in the question of emergency powers developed out of U.S. involvement in Vietnam and the incursion into Cambodia. Together with Senator Frank Church, he sought to establish a Senate special committee to study the implications of terminating the 1950 proclamation of national emergency that was being used to prosecute the Vietnam war, "to consider problems which might arise as the result of the termination and to consider what administrative or legislative actions might be necessary." Such a panel was initially chartered by S.Res. 304 as the Special Committee on the Termination of the National Emergency in June of 1972, but did not begin operations before the end of the year.<sup>45</sup>

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

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

<sup>45</sup> U.S. Congress, House Committee on the Judiciary, *National Emergencies Act*, hearings, 94<sup>th</sup> Cong., 1<sup>st</sup> sess., Mar. 6, 13, 19, and Apr. 9, 1975 (Washington: GPO, 1975), p. 20.

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

The Special Committee on National Emergencies and Delegated Emergency Powers produced various studies during its existence.<sup>47</sup> After scrutinizing the United States Code and uncodified statutory emergency powers, the panel identified 470 provisions of federal law which delegated extraordinary authority to the executive in time of national emergency. Not all of them required a declaration of national emergency to be operative, but they were, nevertheless, extraordinary grants. The special committee also found that no process existed for automatically terminating the four outstanding national emergency proclamations. Thus, the panel began developing legislation containing a formula for regulating emergency declarations in the future and otherwise adjusting the body of statutorily delegated emergency powers by abolishing some provisions, relegating others to permanent status, and continuing others in a standby capacity. In addition, the panel also began preparing a report offering its findings and recommendations regarding the state of national emergency powers in the nation.

## The National Emergencies Act

The special committee, in July 1974, unanimously recommended legislation establishing a procedure for the presidential declaration and congressional regulation of a national emergency. The proposal also modified various statutorily delegated emergency powers. In arriving at this reform measure, the panel consulted with various executive branch agencies regarding the significance of existing emergency statutes, recommendations for legislative action, and views as to the repeal of some provisions of emergency law.

This recommended legislation was introduced by Senator Church for himself and others on August 22, 1974, and became S. 3957. It was reported from the Senate Committee on Government Operations on September 30 without public hearings or

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<sup>47</sup> See U.S. Congress, Senate Special Committee on National Emergencies and Delegated Emergency Powers, *A Brief History of Emergency Powers in the United States*, committee print, 93<sup>rd</sup> Cong., 2<sup>nd</sup> sess. (Washington: GPO, 1974); U.S. Congress, Senate Special Committee on National Emergencies and Delegated Emergency Powers, *A Recommended National Emergencies Act*, 93<sup>rd</sup> Cong., 2<sup>nd</sup> sess., S.Rept. 93-1170 (Washington: GPO, 1974); U.S. Congress, Senate Special Committee on National Emergencies and Delegated Emergency Powers, *Executive Orders in Times of War and National Emergency*, committee print, 93<sup>rd</sup> Cong., 2<sup>nd</sup> sess. (Washington: GPO, 1974); U.S. Congress, Senate Special Committee on National Emergencies and Delegated Emergency Powers, *Executive Replies*, 3 parts, committee print, 93<sup>rd</sup> Cong., 2<sup>nd</sup> sess. (Washington: GPO, 1974); U.S. Congress, Senate Special Committee on National Emergencies and Delegated Emergency Powers, *National Emergencies and Delegated Emergency Powers*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., S.Rept. 94-922 (Washington: GPO, 1976); U.S. Congress, Senate Special Committee on the Termination of the National Emergency, *Emergency Powers Statutes*, 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., S.Rept. 93-549 (Washington: GPO, 1973); U.S. Congress, Senate Special Committee on the Termination of the National Emergency, *National Emergency*, 3 parts, hearings, 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., Apr. 11-12, July 24, and Nov. 28, 1973 (Washington: GPO, 1973).

amendment.<sup>48</sup> The bill was subsequently discussed on the Senate floor on October 7, when it was amended and passed.<sup>49</sup>

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

With the convening of the next Congress, the proposal was introduced in the House on February 27, 1975, becoming H.R. 3884, and in the Senate on March 6, becoming S. 977. House hearings occurred in March and April before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary.<sup>50</sup> The bill was subsequently marked-up and, on April 15, was reported in amended form to the full committee on a 4-0 vote. On May 21, the Committee on the Judiciary, on a voice vote, reported the bill with technical amendments.<sup>51</sup> During the course of House debate on September 4, there was agreement to both the committee amendments and a floor amendment providing that national emergencies end automatically one year after their declaration unless the President informs Congress and the public of a continuation. The bill was then passed on a 388-5 yea and nay vote and sent to the Senate, where it was referred to the Committee on Government Operations.<sup>52</sup>

The Senate Committee on Government Operations held a hearing on H.R. 3884 on February 25, 1976,<sup>53</sup> The bill was subsequently reported on August 26 with one substantive and several technical amendments.<sup>54</sup> The following day, the amended bill was passed and returned to the House.<sup>55</sup> On August 31, the House agreed to the

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<sup>48</sup> See U.S. Congress, Senate Committee on Government Operations, *National Emergencies Act*, 93<sup>rd</sup> Cong., 2<sup>nd</sup> sess., S.Rept. 93-1193 (Washington: GPO, 1974).

<sup>49</sup> See *Congressional Record*, vol. 120, Oct. 7, 1974, pp. 34011-34022.

<sup>50</sup> See U.S. Congress, House Committee on the Judiciary, *National Emergencies Act*, hearings, 94<sup>th</sup> Cong., 1<sup>st</sup> sess., Mar. 6, 13, 19, and Apr. 9, 1975 (Washington: GPO, 1975).

<sup>51</sup> U.S. Congress, House Committee on the Judiciary, *National Emergencies*, 94<sup>th</sup> Cong., 1<sup>st</sup> sess., H.Rept. 94-238 (Washington: GPO, 1975).

<sup>52</sup> *Congressional Record*, vol. 121, Sept. 4, 1975, pp. 27631-27647; *Ibid.*, Sept. 5, 1975, p. 27745.

<sup>53</sup> See U.S. Congress, Senate Committee on Government Operations, *National Emergencies Act*, hearing, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., Feb. 25, 1976 (Washington: GPO, 1976).

<sup>54</sup> See U.S. Congress, Senate Committee on Government Operations, *National Emergencies Act*, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., S.Rept. 94-1168 (Washington: GPO, 1976).

<sup>55</sup> See *Congressional Record*, vol. 122, Aug. 27, 1976, pp. 28224-28228.

Senate amendments,<sup>56</sup> clearing the proposal for President Gerald Ford's signature on September 14.<sup>57</sup>

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

Title II provided a procedure for future declarations of national emergency by the President and prescribed arrangements for their congressional regulation. The statute established an exclusive means for declaring a national emergency. Furthermore, emergency declarations were to terminate automatically after one year unless formally continued for another year by the President, but could be terminated earlier by either the President or Congress. Originally, the prescribed method for congressional termination of a declared national emergency was a concurrent resolution adopted by both houses of Congress. This type of so-called "legislative veto" was effectively invalidated by the Supreme Court in 1983.<sup>58</sup> The National Emergencies Act was amended in 1985 to substitute a joint resolution as the vehicle for rescinding a national emergency declaration.<sup>59</sup>

When declaring a national emergency, the President must indicate, according to Title III, the powers and authorities being activated to respond to the exigency at hand. Certain presidential accountability and reporting requirements regarding national emergency declarations were specified in Title IV, and the repeal and continuation of various statutory provisions delegating emergency powers was accomplished in Title V.

Since the 1976 enactment of the National Emergencies Act, various national emergencies, identified in **Table 1**, have been declared pursuant to its provisions. Some were subsequently revoked, while others remain operative. All original declarations made pursuant to the National Emergencies Act are identified in **Table 1**. Unless otherwise indicated (in italic), their status is operational. A *Code of Federal Regulations* or *Federal Register* citation is provided to enable examination of their full text.

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<sup>56</sup> Ibid., Aug. 31, 1976, p. 28466.

<sup>57</sup> 90 Stat. 1255; 50 U.S.C. 1601-1651 (1988); see U.S. Congress, Senate Committee on Government Operations and Special Committee on National Emergencies and Delegated Emergency Powers, *The National Emergencies Act (Public Law 94-412)*. *Source Book: Legislative History, Texts, and Other Documents*, committee print, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess. (Washington: GPO, 1976).

<sup>58</sup> See *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

<sup>59</sup> See 99 Stat. 405, 448.

**Table 1. Declared National Emergencies, 1976-2006**

<b>Declaration</b>	<b>Date</b>	<b>Title</b>	<b>Citation/Status</b>
E.O. 12170	11/14/79	Blocking Iranian Government Property	3 C.F.R., 1979 Comp., pp. 457-458.
E.O. 12211	04/17/80	Further Prohibitions on Transactions with Iran	3 C.F.R., 1980 Comp., pp. 253-255.
<i>E.O. 12444</i>	10/14/83	Continuation of Export Control Regulations	3 C.F.R., 1983 Comp., pp. 214-215; <i>revoked by E.O. 12451 of 12/20/83.</i>
<i>E.O. 12470</i>	03/30/84	Continuation of Export Control Regulations	3 C.F.R., 1984 Comp., pp. 168-169; <i>revoked by E.O. 12525 of 07/12/85.</i>
<i>E.O. 12513</i>	05/01/85	Prohibiting Trade and Certain Other Transactions Involving Nicaragua	3 C.F.R., 1985 Comp., p. 342; <i>revoked by E.O. 12707 of 03/13/90.</i>
<i>E.O. 12532</i>	09/09/85	Prohibiting Trade and Certain Other Transactions Involving South Africa	3 C.F.R., 1985 Comp., pp. 387-391; <i>revoked by E.O. 12769 of 07/10/91.</i>
<i>E.O. 12543</i>	01/07/86	Prohibiting Trade and Certain Transactions Involving Libya	3 C.F.R., 1986 Comp., pp. 181-182; <i>revoked by E.O. 13357 of 09/20/04.</i>
<i>E.O. 12635</i>	04/08/88	Prohibiting Certain Transactions with Respect to Panama	3 C.F.R., 1988 Comp., pp. 563-564; <i>revoked by E.O. 12710 of 04/05/90.</i>
<i>E.O. 12722</i>	08/02/90	Blocking Iraqi Government Property and Prohibiting Transactions with Iraq	3 C.F.R., 1990 Comp., pp. 294-295; <i>revoked by E.O. 13350 of 07/29/04.</i>
<i>E.O. 12730</i>	09/30/90	Continuation of Export Control Regulations	3 C.F.R., 1990 Comp., pp. 305-306; <i>revoked by E.O. 12867 of 09/30/93.</i>
<i>E.O. 12735</i>	11/16/90	Chemical and Biological Weapons Proliferation	3 C.F.R., 1990 Comp., pp. 313-316; <i>revoked by E.O. 12938 of 11/11/94.</i>



<b>Declaration</b>	<b>Date</b>	<b>Title</b>	<b>Citation/Status</b>
<i>E.O. 12775</i>	10/04/91	Prohibiting Certain Transactions with Respect to Haiti	3 C.F.R., 1991 Comp., pp. 349-350; <i>revoked by E.O. 12932 of 10/14/94.</i>
<i>E.O. 12808</i>	05/30/92	Blocking "Yugoslav Government" Property and Property of the Governments of Serbia and Montenegro	3 C.F.R., 1992 Comp., pp. 305-306; <i>revoked by E.O. 13304 of 05/28/03.</i>
<i>E.O. 12865</i>	09/26/93	Prohibiting Certain Transactions Involving UNITA	3 C.F.R., 1993 Comp., pp. 636-638; <i>revoked by E.O. 13298 of 05/06/03.</i>
<i>E.O. 12868</i>	09/30/93	Restricting the Participation by United States Persons in Weapons Proliferation Activities	3 C.F.R., 1993 Comp., pp. 650-651; <i>revoked by E.O. 12930 of 09/29/94.</i>
<i>E.O. 12923</i>	06/30/94	Continuation of Export Control Regulations	3 C.F.R., 1994 Comp., pp. 916-917; <i>revoked by E.O. 12924 of 08/19/94.</i>
<i>E.O. 12924</i>	08/19/94	Continuation of Export Control Regulations	3 C.F.R., 1994 Comp., pp. 917-919; <i>revoked by E.O. 13206 of 04/04/01.</i>
<i>E.O. 12930</i>	09/29/94	Measures to Restrict the Participation by United States Persons in Weapons Proliferation Activities	3 C.F.R., 1994 Comp., pp. 924-925; <i>revoked by E.O. 12938 of 11/14/94.</i>
<i>E.O. 12934</i>	10/25/94	Blocking Property and Additional Measures With Respect to the Bosnian Serb-Controlled Areas of the Republic of Bosnia and Herzegovina	3 C.F.R., 1994 Comp., pp. 930-932; <i>revoked by E.O. 13304 of 05/28/03.</i>
<i>E.O. 12938</i>	11/14/94	Proliferation of Weapons of Mass Destruction	3 C.F.R., 1994 Comp., pp. 950-954.
<i>E.O. 12947</i>	01/23/95	Prohibiting Transactions with Terrorists Who Threaten to Disrupt the Middle East Peace Process	3 C.F.R., 1995 Comp., pp. 319-320.
<i>E.O. 12957</i>	03/15/95	Prohibiting Certain Transactions with Respect to the Development of Iranian Petroleum Resources	3 C.F.R., 1995 Comp., pp. 332-333; <i>revoked in part by E.O. 12959 of 05/06/95.</i>

<b>Declaration</b>	<b>Date</b>	<b>Title</b>	<b>Citation/Status</b>
E.O. 12978	10/21/95	Blocking Assets and Prohibiting Transactions with Significant Narcotics Traffickers	3 C.F.R., 1995 Comp., pp. 415-417.
Proc. 6867	03/01/96	Regulation of the Anchorage and Movement of Vessels with Respect to Cuba	3 C.F.R., 1996 Comp., pp. 8-9.
<i>E.O. 13047</i>	05/22/97	Prohibiting New Investment in Burma	3 C.F.R., 1997 Comp., pp. 202-204; <i>revoked in part by E.O. 13310 of 07/28/03.</i>
E.O. 13067	11/03/97	Blocking Sudanese Government Property and Prohibiting Transactions with Sudan	3 C.F.R., 1997 Comp., pp. 230-231; expanded by E.O. 13400 of 05/01/06.
<i>E.O. 13088</i>	06/09/98	Blocking Property of the Governments of the Federal Republic of Yugoslavia (Serbia and Montenegro), the Republic of Serbia, and the Republic of Montenegro, and Prohibiting New Investment in the Republic of Serbia in Response to the Situation in Kosovo	3 C.F.R., 1998 Comp., pp. 191-193; <i>revoked by E.O. 13304 of 05/28/03.</i>
<i>E.O. 13129</i>	07/04/99	Blocking Property and Prohibiting Transactions with the Taliban	3 C.F.R. 1999 Comp., pp. 200-203; <i>revoked by E.O. 13268 of 07/02/02.</i>
E.O. 13159	06/21/00	Blocking Property of the Government of the Russian Federation Relating to the Disposition of Highly Enriched Uranium Extracted from Nuclear Weapons	3 C.F.R. 2000 Comp., pp. 277-278.
<i>E.O. 13194</i>	01/18/01	Prohibiting the Importation of Rough Diamonds from Sierra Leone	3 C.F.R. 2001 Comp., pp. 741-743; <i>revoked by E.O. 13224 of 01/15/04.</i>
E.O. 13219	06/26/01	Blocking Property of Persons Who Threaten International Stabilization Efforts in the Western Balkans	3 C.F.R. 2001 Comp., pp. 778-782; revised by E.O. 13304 of 05/28/03.
E.O. 13222	08/17/01	Continuation of Export Control Regulations	3 C.F.R. 2001 Comp., pp. 783-784.

Declaration	Date	Title	Citation/Status
Proc. 7463	09/14/01	Declaration of National Emergency by Reason of Certain Terrorist Attacks	3 C.F.R. 2001 Comp., p. 263.
E.O. 13224	09/23/01	Blocking Property and Prohibiting Transactions with Persons who Commit, Threaten to Commit, or Support Terrorism	3 C.F.R. 2001 Comp., pp. 786-789
E.O. 13288	03/06/03	Blocking Property of Persons Undermining Democratic Processes or Institutions in Zimbabwe	3 C.F.R. 2003 Comp., pp. 186-191.
E.O. 13303	5/22/03	Protecting the Development Fund for Iraq and Certain Other Property in Which Iraq has an Interest	3 C.F.R. 2003 Comp., pp. 227-229; scope expanded by E.O. 13315 of 08/28/03.
E.O. 13338	05/11/04	Blocking Property of Certain Persons and Prohibiting the Export of Certain Goods to Syria	3 C.F.R. 2004 Comp., pp. 168-172.
E.O. 13348	07/22/04	Blocking Property of Certain Persons and Prohibiting the Importation of Certain Goods from Liberia	3 C.F.R. 2004 Comp., pp. 189-195.
E.O. 13396	02/07/06	Blocking Property of Certain Persons Contributing to the Conflict in Côte d'Ivoire	71 Fed. Reg. 7389-7391

In its final report, issued in late May 1976, the special committee concluded “by reemphasizing that emergency laws and procedures in the United States have been neglected for too long, and that Congress must pass the National Emergencies Act to end a potentially dangerous situation.”<sup>60</sup> The panel’s recommended legislation, of course, was enacted into law before the end of the year.

Other issues identified by the special committee as deserving attention in the future, however, did not fare so well. The panel, for example, was hopeful that standing committees of both houses of Congress would review statutory emergency power provisions within their respective jurisdictions with a view to the continued need for, and possible adjustment of, such authority.<sup>61</sup> Actions in this regard probably were not as ambitious as the special committee expected. A title of the Federal Civil Defense Act of 1950, granting the President or Congress power to

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<sup>60</sup> U.S. Congress, Senate Special Committee on National Emergencies and Delegated Emergency Powers, *National Emergencies and Delegated Emergency Powers*, p. 19.

<sup>61</sup> *Ibid.*, p. 10.

declare a civil defense emergency in the event an attack on the United States occurred or was anticipated, expired in June 1974 after the House Committee on Rules failed to report a measure continuing the statute.<sup>62</sup>

A provision of emergency law was refined in May 1976. Legislation was enacted granting the President the authority to order certain selected members of an armed services reserve component to active duty without a declaration of war or national emergency.<sup>63</sup> Previously, such an activation of military reserve personnel had been limited to a “time of national emergency declared by the President” or “when otherwise authorized by law.”<sup>64</sup>

Another refinement of emergency law occurred in 1977 when action was completed on the International Emergency Economic Powers Act (IEEPA).<sup>65</sup> Reform legislation containing this statute<sup>66</sup> modified a provision of the Trading with the Enemy Act of 1917, authorizing the President to regulate the nation’s international and domestic finance during periods of declared war or national emergency.<sup>67</sup> The enacted bill limited the President’s Trading with the Enemy Act power to regulate the country’s finances to times of declared war. In IEEPA, a provision conferred authority on the Chief Executive to exercise controls over international economic transactions in the future during a declared national emergency and established procedures governing the use of this power, including close consultation with Congress when declaring a national emergency to activate IEEPA. Such a declaration would be subject to congressional regulation under the procedures of the National Emergencies Act.<sup>68</sup>

Other matters identified in the final report of the special committee for congressional scrutiny included:

- investigation of emergency preparedness efforts conducted by the executive branch;

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<sup>62</sup> See 50 U.S.C. App. 2297 (1970); U.S. Congress, House Committee on Armed Services, *Extending Civil Defense Emergency Authorities*, 93<sup>rd</sup> Cong., 2<sup>nd</sup> sess., H.Rept. 93-1243 (Washington: GPO, 1974); Associated Press, “Rules Panel Halts Bill on War Powers,” *Washington Post*, Sept. 19, 1974, p. A5.

<sup>63</sup> 90 Stat. 517; 10 U.S.C. 12302

<sup>64</sup> 10 U.S.C. 673 (1970).

<sup>65</sup> 50 U.S.C. 1701-1706.

<sup>66</sup> 91 Stat. 1625.

<sup>67</sup> 12 U.S.C. 95a and 50 U.S.C. App. 5(b) (1976).

<sup>68</sup> Of related interest to these statutory developments, President Ford, by a proclamation of February 19, 1976, gave notice that E.O. 9066, providing for the internment of Japanese-Americans in certain military areas during World War II, was canceled as of the issuance of the proclamation formally establishing the cessation of World War II on December 31, 1946. See 3 C.F.R., 1976 Comp., pp. 8-9. Certain statutory authority relevant to this executive order, concerning the creation of military areas and zones, was canceled by the National Emergencies Act. See 18 U.S.C. 1383 (1976).

- attention to congressional preparations for an emergency and continual review of emergency law;
- ending open-ended grants of authority to the executive;
- investigation and institution of stricter controls over delegated powers; and
- improving the accountability of executive decisionmaking.<sup>69</sup>

There is some public record indication that certain of these points, particularly the first and the last, have been addressed in the past two decades by congressional overseers.<sup>70</sup>

## Overview

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

An anomaly in the activation of emergency powers appears to have occurred on September 8, 2005, when President George W. Bush issued a proclamation suspending certain wage requirements of the Davis-Bacon Act in the course of the federal response to the Gulf coast disaster resulting from Hurricane Katrina.<sup>71</sup> Instead of following the historical pattern of declaring a national emergency to activate the suspension authority,<sup>72</sup> the President set out the following rationale in the proclamation: “I find that the conditions caused by Hurricane Katrina constitute a

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<sup>69</sup> See U.S. Congress, Senate Special Committee on National Emergencies and Delegated Emergency Powers, *National Emergencies and Delegated Emergency Powers*, pp. 11-18.

<sup>70</sup> See, for example, U.S. Congress, House Committee on Government Operations, *Presidential Directives and Records Accountability Act*, hearing, 100<sup>th</sup> Cong., 2<sup>nd</sup> sess., Aug. 3, 1988 (Washington: GPO, 1989); U.S. Congress, House Committee on Interior and Insular Affairs, *Emergency Preparedness and the Licensing Process for Commercial Nuclear Power Reactors*, 2 parts, hearings, 98<sup>th</sup> Cong., 1<sup>st</sup> sess., Apr. 18 and July 8, 1983 (Washington: GPO, 1985).

<sup>71</sup> See *Federal Register*, vol. 70, Sept. 13, 2005, pp. 54227-54228.

<sup>72</sup> Currently found at 40 U.S.C. § 3147; formerly codified at 40 U.S.C. § 276a-5.

‘national emergency’ within the meaning of section 3147 of title 40, United States Code.’<sup>73</sup> A more likely course of action seemingly would have been for the President to declare a national emergency pursuant to the National Emergencies Act and to specify that he was, accordingly, activating the suspension authority. Although the propriety of the President’s action in this case might have been ultimately determined in the courts, the proclamation was revoked on November 3, 2005, by a proclamation in which the President cited the National Emergencies Act as authority, in part, for his action.<sup>74</sup>

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<sup>73</sup> *Federal Register*, vol. 70, Sept. 13, 2005, p. 54227.

<sup>74</sup> *Ibid.*, Nov. 8, 2005, p. 67899.

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