

Emergency Rhetoric in the US Congress: Debating the National Emergencies Act of 1976

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ABSTRACT

From the Constitutional Convention onwards the question of emergency powers has been central to political discussions in the United States. The debates on the National Emergencies Act of 1976 (“NEA”) can be seen, however, as specifically relevant to the conception of the state of emergency in US constitutional politics. The law placed the process of declaring, executing, and terminating a state of emergency on a statutory footing and established new procedures for dealing with further emergencies. The paper examines, through the debates, the question of to what extent president’s war/emergency powers are contingent on Congress exploiting its own constitutional powers. The problematic of dealing with emergency powers through the framework of a statutory delegation of power is also addressed.

KEYWORDS

National Emergencies Act of 1976, US Congress, rhetoric, debates.

Extensive debates concerning the presidential use of emergency and war powers arose in the United States after the Vietnam War. According to Senator Church (D-ID), an incident during the course of the hearing on the involvement of US forces to Cambodia organized by the Senate Foreign Relations Committee in 1972² “brought the scope of emergency powers and their potential undermining constitutional government to the attention of the Congress.” (Discussion on the National Emergencies Act, Congressional Record (CR) 1976, S33416). In this paper I examine the question of how the president’s war/emergency powers are contingent on Congress exploiting its own consti-

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2 Foreign Assistance Act of 1973: Hearings before a Subcomm. of the Senate Comm. on appropriations, 92nd Congress, 2nd session (See Fuller 1979, 1454).

tutional powers in the NEA debates, as well as the problems concerning the statutory delegations of power.

A Senate Special Committee was formed in early 1970s to study existing emergencies and the use of emergency powers in the United States. The Committee's concluding result was the National Emergencies Act. The bill (S.3957) was introduced by the Senate Special Committee on August 2, 1974. The Senate Committee on Government Operations reported the bill on September 30, 1974 and it passed in Senate in October 1974. The bill was further referred to the House Committee on Judiciary, which, however, failed to take any further action. Since the House Committee and its chairman Pete Rodino (D-NJ) were engaged with the Watergate hearings, consideration of the measure was not completed before the expiration of the 93rd Congress. Senator Mathias (R-MD) together with Senator Church (D-ID) introduced a similar bill S.977 in March 1975. At the same time Representative Rodino introduced H.R.3884, a bill identical to S. 977, for the House. The H.R.3884 bill was referred to House Judiciary Committee and passed the House with some amendments on September 4, 1975 by a vote of 388-5. The National Emergencies Act was finally enacted in August 1976 with President Gerald Ford's signature (Klieman 1979, 64; NEA Source Book 1976).

The purpose of the national emergency legislation was to terminate already existing emergencies. Further, the bill's intention in establishing the authority for emergency declarations was to clearly define the powers of the president and secure regular congressional oversight and accountability for actions taken by the executive. The Senate Committee print explained the need for the new kind of legislation: "The aim of the National Emergencies Act is to insure that the exercise of national emergency authority is responsible, appropriate and timely" (NEA Source Book 1976, 1).

The NEA legislation was enacted without that much public or scholarly notice. Klieman (1979, 47) writes that the bill came "at the height of a presidential election year and amidst the special bicentennial celebration". Even later on the bill has not attracted much attention compared to the War Powers Resolution, which was enacted three years earlier (Klieman 1979, 48). Senator Church argues, however, that Congress considered the Act highly important:

Emergency powers make up a relatively small but important body of statutes out of the total of thousands that have been passed or recodified since 1933. But emergency powers laws are of such importance to civil liberties, to the operation of domestic and foreign commerce, and the normal functioning of the US government, that Congress should delay no longer in regularizing their use (Introduction of S.3957 CR 1974, S15784).

In retrospect, it seems that the law has not succeeded in providing any affirmative framework for the exercise of emergency powers. After September 11, 2001, the conceptions of national emergencies and emergency powers have been at the very centre of political discussions. The Congress has been reluctant to insist on co-operation between the legislative and executive branches of government similar to that of the 1970s. This seems to suggest that the NEA bill has not succeeded in defining the exercise of emergency powers in a way that would secure regular congressional oversight and accountability. One of the reasons is the vague wording of the bill and the lack of tools to create a specific framework for the use of emergency powers.

FORTY YEARS OF EMERGENCY GOVERNMENT IN THE UNITED STATES

The need to specify the use of presidential emergency powers emerged in the 1970s, by which time the United States had been formally under a national emergency government since 1930s. The Senate Special Committee found that the emergencies proclaimed by President Franklin D. Roosevelt to deal with the banking crisis in 1933, by Harry S. Truman to respond to the Korean conflict in 1950, by Richard M. Nixon to cope with the Post Office strike in 1970, and by Nixon again to enforce currency constraints and to execute regulations on foreign trade in 1971 had never been terminated. Further, the Senate Special Committee found that there were over 470 emergency power statutes granting extra ordinary powers to the president (NEA Source Book, 1976). Congress had delegated the powers without fully taking into account their cumulative effect over time. For instance, Senator Church noted during the Senate discussions of the bill that apparently no consideration had been given to their combined effect on the separation of powers between the executive and legislative branches or on civil liberties (A National Emergencies Act CR 1974, S29976).

The real problem also was that these kinds of emergency legislations have been enacted without securing enough time for debate and thoughtful consideration. According to Senator Church “inadequate and hurried way of legislating” had been done repeatedly, e.g. during the Second World War and Korean War, and in the Tonkin Gulf Resolution of 1964. Senator Church commented in the course of the National Emergencies Act discussions,

On occasions, legislative history shows that during the limited debates that did take place, a few but very few, objections were raised by Senators and Congressmen expressing concern about the lack of provision for congressional oversight, as well as the absence of any terminal date for authorities granted (A National Emergencies Act CR 1974, S29976).

The Senate Special Committee Report (S.Rept. 94-922) from March 1973 concluded that Congress had allowed the executive branch to draft laws. Most of the emergency statutes were written by the executive branch and sent to Congress in a crisis atmosphere without providing any requirements for congressional oversight or specific dates for termination. Senator Church argued on the floor of the Senate that this had happened “despite the constitutional responsibility conferred on Congress by Article I, Section 8 of the Constitution, which states that Congress ‘makes the laws’” (A National Emergencies Act CR 1974, S29976).

Several members of Congress gave examples of Congress’ failure to fulfil its constitutional duties during the discussions concerning the bill: “It is important to understand how the present state of emergency rule has come about. The failure to place emergency rule under firm constitutional guidelines must be considered as a failure by all three branches to carry out their respective constitutional responsibilities,” said Senator Mathias (Debate and adoption of S.3957, 1974, quoted in the NEA Source Book 1976, 151). Representative Hutchinson (R-MI) also pointed out that the legislation was crucially needed because there were no rules or regulations concerning the use of emergency powers:

The “National Emergencies Act” is an appropriate and prudent response to an important policy question currently facing Congress, that is how extensive should be the powers granted to the President in a time of national emergency and, further, how should the exercise of these special powers be overseen and controlled? [...] This measure seeks to remedy the fact that no statutory framework now exists to guide the conduct of our government during a period of national emergency (House debate and adoption of H.R.3884, 1975, quoted in the NEA Source Book 1976, 252).

The arguments expressed during the discussions of the NEA legislation illustrate that the Congress namely wanted to restore the constitutional checks and balances requirement to the field of war and emergency powers. Several members emphasised that national emergency powers presuppose the cooperation between the legislative and executive branches of government: “This bill represents another effort by Congress to insure that Congress and the President share equally the responsibility for major national policy decisions.” (Senator Roth (R-DE), Debate and adoption of S.3957, 1974, quoted in the NEA Source Book 1976, 170) Members emphasised, however, that Congress did not intend to infringe upon the constitutional powers of the president, as Representative Hutchinson argued:

As a firm believer in a strong presidency and Executive flexibility, I could not support this bill if it would impair any of the rightful constitutional powers of the President. It will have no impact on his flexibility to declare a national emergency and to quickly respond if the necessity arises. The bill has no impact on the powers of the President in time of war. Rather, what it seeks to assure is that the rule of law prevails in a national emergency situation and that it cannot be bypassed, merely because we find ourselves in a state of national emergency (House debate and adoption of H.R.3884, 1975, quoted in the NEA Source Book 1976, 252-3).

Despite the understandable concentration of power (mainly executive) in times of crisis, the principle of separation of powers should prevent emergency powers from being used to attempt to acquire absolute or unilateral power. Senator Church, expressed this idea in the Congress with the following words:

The Congress should be forewarned that it is inherent in the nature of government that the executive will seek to enlarge its power. We already have a Presidency the powers of which are unrivaled in our history. The historic redemption of jurisdiction by the Congress which has gone in this decade - in the form of the War Powers Act, the congressional intervention to circumscribe and finally to end the war in Vietnam, the new budget authority and the regaining of some control over foreign policy – is long overdue and urgently needed. The Congress must not again trade away its responsibilities in the name of national emergency (Senate debate and adoption of H.R.3884, 1976, quoted in the NEA Source Book 1976, 338).

The main arguments behind the legislation specified the future availability of emergency powers. Another question of concern to the members was: How it is possible to define the powers of the president within a statutory framework and to secure the participation of Congress in times of crisis?

DEFINING THE SCOPE OF NATIONAL EMERGENCIES THROUGH THE STATUTORY FRAMEWORK

Despite certain historical-legal paradigms for national emergency situations, the conception of emergency has remained vague and problematic. Foreign policy staff member of the Senate Thomas A. Dine argued during the committee hearings of the NEA in 1973: “In my discussions and research, I

have yet to come across definition. There is no objective or standard definition [of national emergency] [...] If the President says so, it is a national emergency” (Committee Print 96-780, quoted in the Senate hearings before the Special Committee on the Termination of the National Emergency, Part 1, 1973, 258). Senator Pell (D-RI) further acknowledged during the executive session:

I wonder if there are really three gradations of emergency - national economic emergency, national military emergency, and national survival emergency. The President has the constitutional duty in a survival situation to do everything he can to save the United States (*ibid.*, 259).

The concept of “emergency” is not defined in the Constitution. Scholars are divided as to whether the Founding Fathers left emergency powers out of the Constitution intentionally, or whether they intended the system of checks and balances to apply also to war and emergency powers. For instance, the Congress can declare war but the President is Commander-in-Chief.

The National Emergencies Act of 1976 also failed to specify the concept of a state of emergency. The earlier versions of the bill included a section (201 a) that provided a more specific framework to national emergency proclamations: “In the event the President finds that the proclamation of a national emergency is essential to the preservation, protection, and defense of the Constitution, and is essential to the common defense, safety, or well-being of the territory and people of the United States, the President is authorized to proclaim the existence of a national emergency” (NEA Source Book 1976, 25). The final version failed to describe what kind of emergencies the bill was intended to cover. Without such a specification the courts and Congress face the difficult of how to hold up any standard to justify the use of emergency powers. The final version of the bill states, “with respect to Acts of Congress authorizing the exercise, during a period of a national emergency, of any special or extraordinary power, the President is authorized to declare such a national emergency. Any such proclamation must be transmitted to the Congress and published in the Federal Register.” The bill continues, “When the President declares a national emergency, no powers or authorities made available by statute for use in the event of an emergency shall be exercised unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act” (Public Law 94-412).

Interestingly, the bill itself does not make any references to the Constitutional *habeas corpus* clause, which generally is considered the only reference to any kind of emergency powers in the US Constitution. The Constitution of

the United States establishes: “The privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in cases of *rebellion* or *invasion* the public safety may require it (US Constitution 1787, Article 1, section 9).” The debate and the final version of the legislation, however, illustrate that Congress recognised the constitutional power of the president to declare national emergencies.

The idea to create constitutional emergency powers did not seriously occur in the congressional discussions surrounding the National Emergencies Act of 1976. Rather, the Congress generally approved of possible expansion of the chief executive’s power during times of crisis. The augmentation of presidential power should not, however, happen at the expense of congressional authority. Representative Rodino argued in Congress,

The [national emergencies act] bill does not take any emergency powers away from the President. Rather, it insures that such powers are exercised only during an actual emergency and that both Congress and the public are kept informed of the exercise of such emergency powers (Bill to End Unterminated National Emergencies 1974, quoted in the NEA Source Book 1976, 175).

The discussions clearly illustrate that there was a felt need to provide statutory delegation of power in order to make sure the constitutional separation of powers applies in times of crisis as well. Senator Church emphasized that there had been a steady erosion of the constitutional government:

Nonetheless, the emergency powers made available to the President have steadily expanded. Foreign war and domestic crisis during the past 40 years, in addition to the inexorable growth of the executive bureaucracy under the leadership of aggressive presidents, and the diminished role of the Congress in the making of policy – these factors have all contributed to the erosion of normal constitutional government (Senate debate and adoption of H.R.3884, 1976, quoted in the NEA Source Book 1976, 337).

Therefore, Congress tried several times in the 1970s to restore the constitutional balance between the executive and the legislative branches of the government by enacting new legislation, such as the War Powers Resolution in 1973 and the National Emergencies Act in 1976.

THE PRACTICAL PROBLEMATIC OF THE NEA BILL

Most members of Congress responded positively to the legislation. However, critical comments were presented concerning mainly the lack of legislation to specifically address restrictions on the use of emergency powers. Representative Holtzman (D-NY) stated on the floor: “When we delegate vast powers to the President, we ought to also take into account how to protect the people from an abuse of those powers. Unfortunately, this bill fails to do this effectively.” (House debate and adoption of H.R. 3884, 1975, quoted in the NEA Source Book 1976, 276) The final version of the bill did not include any specification of what would be considered an “abuse” of presidential emergency powers. The president may declare a national emergency whenever deeming it necessary. Such use of national emergency powers by the president was not disputed, but rather the “possible and arbitrary use of emergency powers”. All members of Congress did not, however, take the president’s “unilateral emergency powers” without reservation:

It seems to be, Mr. Chairman, very clear that the Congress was given the lawmaking powers under the Constitution, and that whatever right the President has to declare an emergency should be spelled out by the Congress of the United States. Through the last 40 years, the Congress has been very careless and derelict in not doing this. [...] Why should we in the Congress allow the President unilaterally to proclaim an emergency and unilaterally to implement provisions of said emergency? That is an abdication of the power clearly placed in the Congress by the Constitution (Representative Drinan (D-MA), House debate and adoption of H.R.3884, 1975, quoted in the NEA Source Book 1976, 279).

Much discussion surrounding the National Emergencies Act of 1976 concerned the fact that it gave Congress the burden to terminate unilateral presidential action instead of giving the president the burden of affirmatively demonstrating that an emergency really exists (House of Representatives debate and adoption of H.R.3884, 1975, H8325-H8341). Representative Drinan emphasised that emergencies should be short-term affairs, and Congress should not allow the president any “loose power” by which he or she could proclaim an emergency, since that could continue protractedly until both houses of the Congress agree to end it. Representative Drinan further proposed an amendment to the bill in which he urged,

[...] the Congress to adopt an amendment to this very necessary bill that would provide that the emergency proclaimed by the President automatically be terminated within 30 days unless Congress acts affirmatively to approve an extension (National Emergencies CR 1975, H27637).

Drinan refers to the burden of the Congress to terminate the presidential use of emergency powers. The final version of the bill established that no later than six months after a national emergency is declared and every six months after that, each house should consider a vote on a concurrent resolution concerning termination of the state of national emergency.³ This automatic revocation requirement failed and become rather “a dead letter” in practice (Fisher 2007, 265). The original idea of the Senate Special Committee was that specific emergency powers could exist only for a set period of 30, 45, or 60 days. According to Representative Drinan (National Emergencies CR 1975, H27642) the administration influenced the Senate Special Committee to change its view.

Due to the Supreme Court decision *Ins. v. Chadha* (1983), only joint resolutions that are exposed to veto can nowadays be used to terminate declarations of national emergency made by the president. The concurrent resolution, in the original language of the bill, is not subject to a presidential veto, but neither does it have the force of law. Therefore, concurrent resolutions are political rather than legal measures. Already in the 1970s there were doubts that the use of concurrent resolutions in the bills may be unconstitutional.⁴ The concurrent resolution seemed to be, however, useful in that the president could not interfere with congressional proposals to terminate a national emergency. If both houses must agree to the termination, the president may be rather easily able to prolong a national emergency, particularly in a situation where the president’s party controls the majority in one of the houses.

Distinguishing the normal from the exceptional was the main theme in the NEA discussions. By enacting NEA legislation Congress wanted to get rid of the vagueness of national emergencies, requiring, for instance, that the President not only proclaim when the national emergency exists, but also specify

3 According to the National Emergencies Act of 1976: “Any national emergency declared by the President in accordance with this subchapter, and not otherwise previously terminated, shall terminate on the anniversary of the declaration of that emergency if, within the ninety-day period prior to each anniversary date, the President does not publish in the Federal Register and transmit to the Congress a notice stating that such emergency is to continue in effect after such anniversary” (Public Law 94-412).

4 The Article I, section 7 of the US Constitution requires that “Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States”.

what actions the administration would pursue under the emergency proclamation. Following the example of Justice Jackson's concurring opinion in *Youngstown v. Sawyer* case (1952), Congress intention was to create statutory foundations for the use of emergency powers. In other words, when statutory guidelines exist, the President is obliged to follow them. (See more in detail NEA Source Book, 1976).

By creating a statutory framework, it might seem that the problematic of inherent or unilateral presidential emergency powers disappears. This, however, is not the case. Indeed, it was several times emphasised in the discussions that Congress should not infringe on the constitutional powers of the president. The bill has not affected the way the emergency powers are legitimatised. The normal framework for enacting emergency powers in the United States has been Congress granting extraordinary (short-term) authorities for the president, which the president can invoke as deemed necessary. According to Justice Jackson's opinion in *Youngstown v. Sawyer* by doing this "we retain Government by law – special, temporary law, perhaps, but law nonetheless" (Jackson, 1952). However, a problem with this kind of statutory framework seems to be that, on one hand, it does not remove the possibility of "extra-legal use of emergency powers", and on the other hand, the bills that Congress enacts in times of crisis are often anything but short-term or temporary, becoming instead a permanent part of normal governmental activity. One could cite the Patriot Act for instance, which Congress enacted after 9/11. The bill contained some sunset provisions, because sections of it were considered legitimate only because of 9/11. Nevertheless, USA Patriot Improvement and Reauthorization Act of 2005 (Public Law 109-177) made 14 sections of the bill, originally meant to expire, permanent in 2006.⁵

CONCLUDING REMARKS

Despite good intentions, the NEA bill has not succeeded in providing congressional oversight and accountability concerning the use of emergency powers. The law provided a normative framework but was not able to overcome problems related to the actual content of the bill. One major problem is that the president alone is empowered to decide when, where and for what reason a national emergency exists. Another difficulty is that it puts the burden on Congress to terminate the use of emergency powers. Currently the president can veto a termination request from Congress, which Congress can override only with a 2/3 majority. National emergencies continue to be long-

⁵ See more in detail CRS Report for Congress USA Patriot Improvement and Reauthorization Act of 2005: A Legal Analysis. Brian T. Yeh & Charles Doyle, 2006: <http://www.fas.org/sgp/crs/intel/RL33332.pdf>.

term affairs. For instance, the national emergency proclaimed by President Bush after 9/11 is still valid, and was continued by President Obama once again in September 2012⁶. Further, it seems that the NEA was unable to create specific framework to abolish the vagueness surrounding emergency powers discussions in the United States.

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⁶ See more in detail Continuation of the National Emergency with Respect to Certain Terrorist Attacks: <http://www.whitehouse.gov/the-press-office/2012/09/11/message-continuation-national-emergency-respect-certain-terrorist-attack>.

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