THE VOICE OF SCIENCE ON CAPITOL HILL

F.A.S. PUBLIC INTEREST REPORT

Formerly the FAS Newsletter

SPECIAL ISSUE ON
CONTROLLING
THE EXECUTIVE BRANCH

Vol. 26, No. 10 December, 1973

MAINTAINING THE BALANCE OF LEGAL POWER

The frontlines of the rule of law are manned by lawyers. Neither persons, nor agencies, nor branches of Government can maintain their rights without practioners in the law. It is, therefore, astonishing to discover how ill-equipped with legal advice and help is that very branch concerned with legislation: the Congress of the United States.

Congress has traditionally been exceedingly slow to provide itself with legal help. It had been drafting legislation for more than one hundred and twenty-five years before it set up, in 1919, the Legislative Counsel's Office in each House. Designed to respond to requests of Committees, this office has come by tradition to serve any Congressman or Senator that needs help.

Unfortunately, the help is limited: perhaps 90% of this office's time is spent drafting legislation along the lines requested by individual members. It sometimes prepares opinions, most often given verbally, on the suitability of legislation. But it virtually never testifies before Congress to provide legal opinions on legislation. It never serves as a legal arm of Congress itself in filing briefs before the Supreme Court, or in defending the members or the institution against legal infringements of Congressional power. It concerns itself little, or not at all, with legislative oversight. In short, it simply puts the legislative ideas of members into legal form; and through drafting it makes a first approximation at preventing that legislation from being easily outflanked.

Legislation is not just the heart of the Congressional operation, it is the be-all and end-all. The struggle between the Executive and Legislative Branches is as much a struggle to interpret, perfect, and oversee legislation as it is to pass it. Power struggles between the branches have often been resolved in favor of the Executive Branch only because it had the legal talent to search, and keep abreast of, the enormous amount of legislation that now exists. This has clearly been the case with regard to the obscure emergency powers legislation. But the phenomenon is widespread. And Congress can no longer just assume the effective enforcement of the civil and criminal laws.

Congress is itself made up in large part of lawyers, often of the small-town variety. And its self-contained legal expertise may have retarded its hiring of its own lawyer. But in any case, as is well known, to be one's own lawyer is to have a fool for a client; this applies, perhaps, to Congress.

Senator Vance Hartke (D. Indiana) has recently renewed his long standing call for a "Congressional

—Continued on page 2

PRESIDENTIAL POWER: PEAKED BUT NOT DECLINING

From the Depression, through World War II, and through a quarter century of Cold War, the Executive Branch fed on crisis. Backed by non-partisan support, which traditionally begins "at the water's edge", the Executive Branch systematically subverted earlier public attitudes toward the relations between the branches. A Government in which three branches are separate and equal, but interdependent, has some of the characteristics of a mobile. It can hang together in a variety of positions and it can move slowly enough so that, at any given moment, it may not seem to be moving at all.

During the emergencies, the presidents did pretty much as they pleased. If something necessary could not be done under one law, it could be done under another. There was always an economic emergency, a state of war, or a Korean emergency to fall back upon. And if these were not suitable to invoke the necessary powers, one could always whip up public opinion by referring to outside threats and get Congress to do one's bidding. For those really far-out matters, which the public might not stomach under any conditions, such as bombing of neutral Cambodia, or fixing elections abroad, there was respectively, either injunctions of secrecy or the Directorate of Plans in CIA.

Thus an illusion of compliance with law could be maintained either through subterfuge or by reshaping the law to provide enormous powers. The primacy of rule through law was maintained but not tested.

It was President Nixon's fate to overreach himself while, simultaneously, ending that world-wide confrontation which might otherwise have served to excuse his violations. The national security justification was gone just when he needed it most. Cynics noted that the efforts of the two major communist powers to protect the President by refusing to report on his domestic troubles had closed off his only escape hatch—blaming it on the "commies".

—Continued on page 2

FAS URGES CONTROLS ON NATIONAL EMERGENCIES pages 5-7

Counsel General." We endorse it. Such an office would have several functions. It would provide advisory opinions on the likely effectiveness of legislation, as legislation. It could provide authoritative interpretations of the validity of the very important, but little overseen, enabling regulations worked out in the Executive Branch. Under suitable authorization, it could represent the Congress or its Judiciary Committees before the Courts or file amicus briefs. And it could prepare studies suggesting fruitful areas for oversight hearings.

Over and above the exact ground rules for this new legal body, it would importantly widen the Congressional orbit and its pool of legal expertise. As grows the law, so must grow the Congress' legal institutions. It would also defend the prerogatives of Congress. We cannot rely indefinitely on having a Sam Ervin plead for the Senate before the Supreme Court.

Independent Prosecutor

Besides strengthening the legal capabilities of Congress, there is need to provide on-going methods of prosecuting Executive Branch wrong-doing. There exists, after all, a variety of categories of situations in which it would be naive to expect the Executive Branch to prosecute itself. These include cases of perjury by Administration officials, election financing by the Administration, or charges of high-level corrupt political influence.

Such cases deserve some kind of on-going prosecutor with a modicum of independence from the everyday control of the Attorney-General and President. The prosecutor might well be within the Executive Branch but he should have long tenure. The President could, presumably, still fire the prosecutor but such actions would trigger precisely the same outcry produced by the "Saturday Night Massacre." Thus, an office of special prosecutor would become, in part, a tripwire signal of serious corruption and, in part, an investigatory arm beyond political control. And none of this raises Constitutional questions.

Thus, without risking rejection of the office by the courts, we could institutionalize significant further checks and balances inside the administration of justice. For too long, Presidents have been able to overlook various violations of law by asking aides rhetorically "Who's going to sue us?" For too long, the Attorney-General's office has been considered as political an appointment as any other cabinet office.

No President has the right to control quietly the bringing of cases against his subordinates or Administration. Watergate has revealed clearly how extraordinarily deep and wide must Administration offenses be before press, public and Congress can force even limited disclosures. Some new mechanism is in order to make executive concealment more difficult in future. (See also page 8)

—Council of The Federation of American Scientists

PRESIDENTIAL POWER—from page 1

Clearly Presidential power has peaked. But how far down is it going? Not far, according to evidence within this Report. Fundamentally, the Congress is trying desperately to legitimize and regularize those Executive Branch seizures of power that it cannot reverse. In the War Powers Bill, for example, one sees the Congress trying to roll with the punches. The law tries to preemptively authorize those Presidential war powers which seem beyond recapture. Thus it devises methods for Presidential activity short of declarations of war. And it seeks to insist on lesser conditions than advance approval, asking for reporting and consulting, and methods of Congressional termination. The effort to regulate other Presidential emergency powers is taking the same course even though some of the emergencies (e.g. economic emergencies) provide ample time for advance consultation. Like a woman who cannot prevent her husband from stepping out on her, we are asking the President to explain, at least, where he is going.

In this way, one retains some influence over events and preserves the structure of constitutionality. But no one should bemuse himself about what is happening. The trend to Executive Branch authority continues. □

THE CONSTITUTION— AN UNSTEADY TRIPOD

There is little doubt that the Founding Fathers saw the Legislative Branch as first among the three branches of Government. It is the first Article of the Constitution that enumerates the powers of the legislature. The legislature is given the authority "To make all Laws which shall be necessary and proper for carrying into execution 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" (italics added). It has further the power to impeach, convict and, hence, dismiss the Chief Executive as well as his subordinates.

By contrast, the executive power described in the Constitution is instructed to "take Care that the Laws be faithfully executed." For his part, he can convene the Congress (on extraordinary occasions) but not dismiss it.

And while the Legislature can dismember and rearrange the Executive Branch by passing appropriate statutes, the President cannot influence the structure of Congress.

The Constitution further specifically protects the legislators from being "questioned in any other place" for their speeches and debates. While the Executive Branch has claimed an analogous "executive privilege," this is nowhere to be found in the Constitution. On the contrary, much tradition suggests that the Executive can be questioned by Congress about all of his official duties and required to produce all papers.

How then does it come that, today, so many persons consider the Executive Branch first among equals of the three branches? One analyst, Dean Roscoe Pound, suggested a steady evolution of American thought. (See box.)

The Executive Branch is shaped like a pyramid; the legislature like a rectangular solid. In human affairs, it seems to be a universal rule that power gravitates to the executive officer; rather than to the ruling committee—whether that executive is called the president, the secretary-general, the general-secretary, the party secretary, the executive director or whatever. To be in charge of the administrative details and the staff is half the game—the information half. And the other half is to be unified where the ruling committee is divided.

The rising strength and authority of the executive need not threaten American liberty if other countervailing changes take place at the same time. A growing sophistication in the electorate about public events, based on higher education, better news coverage (including television) could help monitor executive branch operations so as to deter misuse of discretion. A decline in citizen loyalties to specific parties could enhance the responsiveness of the voter. Citizen groups with standing to sue might better utilize the courts to redress illegal action.

But underlying the maintenance of the American system is reliance upon law. And underlying the imbalance in strength between the branches is the imbalance of legal resources. The branch which makes the laws must maintain parity in legal expertise with the executor of our laws. In this case no executive branch excess will go unnoticed and therefore none can avoid the risk of redressing legislative initiative.

So long as the Constitution stands, the legislature will have the dominant—if latent—rights. But whether Congress will provide itself, and the Government more generally, with the tools to maintain a Constitutional balance remains to be seen. □

HEGEMONY: LEGISLATIVE TO JUDICIAL TO EXECUTIVE

"In our political theory the executive, the legislative and the judiciary are co-equal. Nevertheless at different stages of our history now one and now another has in practice attained a distinct leadership. In the beginning of our political history the legislative department was the leader. Legislatures were fully persuaded that the other departments, if accountable ultimately to the people, were directly and immediately accountable to them. They thought of themselves as in a special sense the representatives of the people. They believed themselves competent to call upon judges to explain and defend their decisions and were wont to interfere as of right with the disposition of particular controversies. The first half of the century had gone by before legislative appellate power had come to an end.

Next for a time, and notably from the enactment of the Fourteenth Amendment to the first decade of the present century, the courts achieved a definite leadership. They thought of themselves as custodians of a fundamental law, running back of all constitutions, and merely declared thereby, to which all lawmaking and all executive action must yield . . . For nearly half a century the judicial hegemony was scarely disputed.

Today the executive thinks of itself and is thought of as peculiarly representing the whole people. Legislative and judiciary, if ultimately accountable to the people, are more and more thought of as liable to be called to account by the Executive. It calls the legislature to its duty and demands enactment of this or that; it formulates laws and calls on legislatures to add the mere formality of enactment; it reviews the decisions of courts by administrative investigations and challenges their judgments. It even obtains for administrative commissions something like a Roman lex regia; **if not a grant of lawmaking power, at least a power of filling in details, a power of making rules, a power of giving definite content to legal standards, which may yet lead us a long way. The hegemony of the executive is at hand. As the eighteenth century and the fore part of the nineteenth century relied upon the legislative and the last half of the nineteenth century relied upon the courts, the twentieth century is no less clearly relying upon administration.**

—Dean Roscoe Pound, 42nd meeting of American Bar Association, Sept. 3, 1919

CONGRESS PASSES WAR POWERS BILL OVER VETO

The Constitution makes the President "Commander-in-Chief" but it gives to the Congress the power to "declare" war. While it nowhere discusses limited war, it does touch upon the problem of hostilities that constitute less than a declared war when it mentions "Letters of Marque and Reprisal." Significantly, it gives to Congress, not to the President, the right to grant this authority for limited action.

Nevertheless, Congress has long faced the problem of controlling the President in twilight situations between war and peace. In the 1800's there were numerous occasions in which limited hostilities were undertaken without Congressional authorization, especially uses of force against entities that were not sovereign states (pirates, smugglers, Indians and such) and efforts to protect American citizens abroad. While Congress acquiesced in more than one hundred such incidents, it refused on half a dozen occasions in 1857, 1858, and 1859 to give the President conditional authority for *future* occurences to protect citizens.

At quite the opposite extreme of danger, President Lincoln faced the problem not only of war, but of civil war. Without consulting Congress, he proclaimed martial law, arrested people without warrant, seized property, and suppressed newspapers. As justification for his acts, Lincoln emphasized his rights as Commander-in-Chief and his oath to "preserve, protect, and defend the Constitution." A legal challenge was brought against his right to blockade the South before the war had been sanctioned by Congress. It failed by 5-4 when the Court argued that the insurrection had created war as a legal fact.

In the case of the Korean War, President Truman waited two days after his decision to commit troops to South Korea before consulting with Congress. He gave as his authority the UN resolution although it had not specified military intervention. Subsequently a second UN resolution was passed calling for "urgent military measures". Later, after some thought, Truman decided not to ask the Congress to approve his action but simply to rely upon his powers as Commander-in-Chief. He was not challenged and his success was a giant step forward in the struggle for executive branch powers in waging war. For a fuller discussion of the above few paragraphs, see Arthur Schlesinger's new "The Imperial Presidency."

The recent story in Vietnam and Cambodia is only too well known.

Congressional Response

The Congress' answer to all this has been the War Powers Bill passed on November 7, 1973 over the President's veto. The law first instructs the President that his powers as Commander-in-Chief to introduce U.S. forces into hostilities can only be used in three circumstances: pursuant to a declaration of war; pursuant to statutory authority; or pursuant to an emergency created by an attack upon the United States, its territories or possessions, or its armed forces.

What is to prevent the President from moving his armed forces into an area in which they would then be attacked, thus permitting him to create the above national emergency? The law precludes the President from moving forces "into situations where imminent involvment in hostilities is clearly indicated by the circumstances" unless one of the three conditions above is satisfied.

The law requires the President to consult with Congress "in every possible instance" before committing troops. And it requires regular reports from the President if he introduces armed forces, without a declaration of war, into a) hostilities or circumstances where they are likely; b) into foreign territory while equipped for combat; or c) in numbers which substantially enlarge U.S. forces equipped for combat that are already there.

The President must submit within 48 hours, in these cases, a report explaining his actions, detailing his legal authority, and estimating the scope and duration of the involvement. Thereafter, he must report at least every six months.

If, upon receiving this report, Congress does not declare war, or pass specific authorization for the use of the U.S. forces, or extend the sixty day period, the President must cease the use of the forces. He has 30 days more with which to continue, if necessary, for the purpose of bringing about a prompt removal of the forces.

Some Congressmen opposed the bill on the grounds that it implicitly authorizes the President to engage in hostilities—if only for 60 or 90 days—without a declaration of war. But response to attacks upon U.S. territory, possessions or armed forces would have been rather easily justified by a President as a kind of self-defense that required immediate action. Such actions have long been accepted by all concerned throughout U.S. history.*

Of course, the statute provides for more than self-defense since it provides the President with authority to continue fighting for 60 or 90 days—more than might be required by defensive operations. On the other hand, the law provides that—in this case—the President must remove the forces any time that Congress passes a concurrent resolution. Such a resolution cannot be vetoed. Hence, the President could be prevented from going onto the offensive from the defense. □

---

* The assertion that the President's powers to use forces are limited to these three cases is not in the resolving part of the law but in a preface. Some Senators, such as Senator Fulbright, considered these three conditions too *broad* a grant of authority and fought to be sure that they were not mentioned in the resolving part of the law.

Paradoxically, other Senators equally interested in restricting the President's war powers, such as Senator Eagleton, shifted from support of the law to opposition precisely because the Conference Committee placed these restraints in a less binding part of the law. The latter reasoned that the result would be to leave the resolving sections of the law quite unrestricted and the effort to restrict Presidential powers would simply boomerang. (Senator Fulbright, by contrast, would emphasize that the law contains an assertion noting that it does not change the former Constitutional situation preserving the right to future Congressional objection.)

This episode underlines how vulnerable the Congress is when drafting legislation without the authoritative and systematic legal help which we propose on page 1.

TERMINATING THE NATIONAL EMERGENCY

Presidents declare national emergencies by proclamation. It's as simple as that. Unfortunately no standard procedure exists for terminating such states of emergency. For this reason, Americans are still living under at least four past emergencies that provide the President with enormous discretionary power.

The first, proclaimed by President Roosevelt immediately after his inauguration of March 4, 1933, was ratified by Congressional statute. It authorized him to invoke emergency provisions of the 1917 Trading with the Enemy Act. Inasmuch as this proclamation and statute have never been revoked, the Executive Branch retains in principle, enormous powers over banking transactions for this emergency alone.

The Korean War began on June 24, 1950 but troops were sent under the claimed authority (see page 4) of a *UN resolution*. Six months later, on December 16, President Truman proclaimed a national emergency associated with "recent events in Korea and elsewhere." It was exhortatory in tone, urging a strengthening of military defenses and of production, and a spirit of loyalty and sacrifice. It invoked no particular emergency statutes. Nor was it confirmed by Congress. Nevertheless, it was being used more than 20 years later, as authority for a vast array of statutory emergency powers.

On March 23, 1970, President Nixon proclaimed that a postal strike would "cripple or halt the official and commercial intercourse which is essential". He specifically invoked emergency provisions. (Section 673 of Title 10) permitting the Secretary of Defense to order to active duty up to 1,000,000 ready reservists.

On August 15, 1971, concerned over a decline in the U.S. balance of payments, President Nixon declared a national emergency during which he called upon the public and private sector "to strengthen the international economic situation" of the country. Referring to two trade acts, he ordered a ten percent ad valorem surcharge on imports.

Emergencies Trigger Obscure Statues

It turns out that once an emergency is declared, a hodge-podge of these "emergency" clauses in about 500 existing statutes may be activated. These are clauses that give the President the power to do some specific thing under circumstances described variously as: "national economic or other emergency," "hostilities imminent or threat of hostilities," "state of public peril or disaster," "internal security emergency," "public exigency" and so on. Congress has not followed a consistent pattern in drafting these laws. The result leaves even the Justice Department unsure what powers it has under what kinds of emergencies.

In 1972, Congress established a Special Committee on the Termination of the National Emergency under co-chairmen Senators Charles McC. Mathias, Jr. and Frank Church. The Committee promptly discovered the above unterminated national emergencies. Using a computer search based on an Air Force tabulation on the U.S. code, the Commission proceeded to uncover an ever widening set of national emergency legislation.

The national emergency game can get amusing. Adrian Fisher, Dean of Georgetown Law School testified that there was concern inside the Justice Department in 1953 that the Japanese peace treaty would terminate the state of war in which the United States had been operating and thus destroy the legal basis for certain on-going Governmental activities. Secretary of State John Foster Dulles sought to avoid a delay of the peace treaty.

A subsequent search discovered 60 laws, considered necessary, that would be thrown out. Congress collaborated in retaining them temporarily on an individual basis; later three or four were continued on the basis of the National Emergency proclaimed by President Truman at the time of the Korean War. Interestingly, that proclamation had been made as much for national morale purposes as for legal reasons since the then existing state of war with Japan was sufficient reason for emergency legislation.

Basically there are three kinds of emergencies: economic emergencies, catastrophies, and national or internal security emergencies. The Constitution says little or nothing about any of these emergencies and what it says suggests no special Executive Branch authority—quite the opposite. Article II, Section 3 provides that the President can "on extraordinary occasions convene both Houses of Congress;" presumably, it was expected he would do so to get legislative authority for whatever was necessary. Article IV, Section 4 requires the United States Government to protect the individual states against "domestic violence" but only upon application of State legislatures or State executive branches.

How Far Can The President Go?

There is no doubt that the President can be given emergency powers by Congress, under emergency statutes, so long as those statutes are constitutional. But can the President go beyond this, and in what circumstances? Can he, for example, violate the law (or Constitution) if the emergency demands it?

The Courts have taken different approaches. In some cases—Ex parte Merriman (1861) and in United States v. Curtiss-Wright Export Corporation (1936)—they suggest that the President has inherent powers stemming from beyond the Constitution. This approach is usually associated with the philosopher John Locke who thought the responsibilities of Chief Executive—and the time required to consult the legislature—required that great latitude be given the former. Another court view in 1952 (Youngstown Sheet & Tube Co. v. Sawyer) stresses the interaction between the three branches in solving emergencies. But obviously this is not a problem that can be solved once and for all or independent of the nature or kind of the emergency.

Under modern conditions, Congress can be called into session (if it is not already) quite swiftly. And Congress has shown that it acts quickly in emergencies, even too quickly. As in Tonkin Gulf, the Congress acts with high unanimity when a national security danger is alleged. The foregoing is probably also true of catastrophies.

Economic emergencies may raise more controversy both as to existence and as to solution. But, by the same token, they are less threatening.

Under these conditions, the doctrine of "inherent" powers for the Executive would seem to raise more dangers for the country than it would protect against. Thus in the Steel Seizure Case, Justice Jackson said:

> "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law and that the law be made by parlimentary deliberations."

But it is also evident that the doctrine of inherent executive powers would gain sway to whatever extent the Executive was denied the tools to deal with crises that did arise. Thus the same Justice noted:

> "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."

Problems Posed by National Emergencies

Therefore, the problem posed by national emergencies would seem to be one of providing appropriate legislation for the Executive to use, but monitoring its use carefully. Such advance provision of law pre-empts the Executive Branch tendency to go beyond the law or Constitution. Also since emergencies differ widely, one would like some mechanism to ensure that only relevant and necessary emergency laws are triggered by the proclamation. Finally, one needs mechanisms for terminating the emergency. The Committee to Terminate the National Emergency is considering the following formula:

> "That the President alone, or the President and the Congress jointly, can declare a state of national emergency if they perceive that an emergency exists. The President alone or the President with the Congress can declare that the following specific statutes —to be then cited—are in force. The President, when he alone declares a state of emergency, must inform the Congress in writing immediately of his declaration, the reasons therefore, and the particular statutes he wishes to come into force. The Congress would then consider whether to affirm the state of emergency declared by the President and would act within 30 days on whether to continue the state of emergency in effect or, failing to act, the state of emergency would automatically be terminated. In no case would a state of national emergency be extended longer than six months; a new and updated declaration would be required at that point, and affirmative actions by the Congress would be required for any and all extensions."

The provisions requiring specification of the statutes to come into force is of some importance. Because so many emergency statutes are loosely drafted and obscure, life under an emergency proclamation is not so much "rule of law" as "rule of ingenuity of lawyers." Former Attorney General Ramsey Clark testified:

> "The hundreds of statutes now on the books vesting enormous and often loosely defined emergency powers in the executive branch makes law and government action depend as often on the ingenuity of the legal staff of the executive departments as the deliberative processes of the Congress. And that is not law."

Thus one statute (10 USC 712) permits the President "During a war or a declared national emergency" to "detail members of the Army, Navy, Air Force and Marine Corps to assist in military matters" to any country he wants. The Defense Department states that it considers this law to provide only for military advice and liaison. But it might be used otherwise if necessary—the record of the Department is one of shamelessness. (During the argument over the use of funds for military activity in Cambodia, the Defense Department used an obscure law of more than a hundred years vintage to justify ignoring Congressional prohibitions on transfers of funds. The law had been passed to permit the calvary to feed and provision its horses when Congress might be out of session; in this way a law passed to protect against an absence of Congress was used to oppose its will during its presence.)

Energy Emergency

These problems are posed currently by the energy emergency. Senator Jackson introduced a bill S. 2589 which would have permitted the President to declare and extend an "energy emergency" for so long as energy supplies were short in excess of 5%. Through intervention by members of the Special Committee on the Termination of the National Emergency the bill was changed to call for a Congressionally authorized national emergency to terminate within one year unless renewed.

But the new draft does not conform to another aspect of the above cited Special Committee guidelines—requiring specification in advance of which of the 470 latent national emergency statutes will be considered activated. Thus, termination but not specification has been achieved and Congressional authority has been placed behind the emergency.

The existing emergency statutes contain a good deal of uncontrolled Presidential authority—some of it raising interesting Constitution questions—even without distortion. Under 10 USC 333, the President can use the militia or armed forces to suppress "conspiracy" if it threatens to deprive "any part" of the people of a state of some Constitutional right and the State refuses to act. Under this statute, it could be argued that the President did not need to wait for the State Legislatures or Executives to request help (as suggested above is a Constitutional requirement in Article IV, Section 4). Furthermore, a conspiracy would be easy to charge.

Under 18 USC 1383, the President has authority to declare areas military zones. Persons in such military area or military zones can be jailed for a year for violating an "executive order of the President." Thus a President could declare the entire United States a military zone, under the pretext of some conspiracy, and place in jail anyone who violated his executive orders. Would those matters be reviewable in a court? It is not clear.

Judicial review of agency actions is guaranteed in 5 USC 702 but in 5 USC 701, the definition of "Agency" excludes actions taken under declarations of martial law.

A President so inclined could refer to Public Law 733 expressing the determination of the United States "to prevent by whatever means may be necessary including the use of arms", any "subversive" activities of the Government of Cuba with regard to any part of this hemisphere. This could provide the pretext for a state of war.

Under 47 USC 308, the Federal Communications Commission during an emergency, could modify existing licenses under terms it might prescribe. Under 47 USC 606, the President can amend "as he sees fit" the rules and regulations of the Federal Communications Commission and, in particular can "cause the closing of any facility or station for wire communications."

If the President finds the Nation "threatened by attack", he could, under 44 USC 1505, cease to publish his regulations in the Federal Register upon his determination that it was "impracticable". This would open the way to secret laws.

Under Title 50, which concerns trading with the enemy, the President's permission is required to permit a citizen even to direct a letter to an "enemy or ally of enemy" and the President may censor communications by mail, cable, or radio passing between the United States and "any foreign country he may from time to time specify." He may also regulate all transactions in foreign exchange.

Danger of Existing National Emergency Laws

The existence of national emergency laws, and of a semi-permanent national emergency, can create two quite different threats to democracy in America. The first—least likely but most dramatic—is the seizure of power by persons unwilling to subordinate themselves to rule of law and seeking continuous power. Such persons would have to anticipate eventually going beyond invocation of the emergency powers statutes on the books today and coping with such things as the (Constitutional) two-term limitations on the President's tenure.

The second and related threat is an evolutionary one. The notion of a "state of emergency", like the notion of "national security" can be used to soften up public opinion to accept further emergency statutes or measures; to accept still more tortured applications of law; and to permit the Chief Executive to achieve a hegemony over the other two Branches. Here we have the threat referred to by Dr. Cornelius P. Cotter when he testified:

> . . . it has been said—and, I think widely so—that if the United States ever developed into a totalitarian state we would not know it. We would not know that it had happened. It would all be so gradual, the ritualism would all be retained as a facade to disguise what had happened. Most people in the United States, in official position, would continue to do the sorts of things that they are doing now. The changes would have all been so subtle—although so fundamental—that people generally would be unaware." □

FAS URGES CONTROLS ON EMERGENCY POWERS

Nothing is more dangerous to our democratic freedom, and to rule the law, than crises, emergencies and wars. They invariably encourage, justify, and require emergency grants of power which Americans would not otherwise countenance. And then, in due course, they present us with the difficult and critical task of recapturing authority, reestablishing democratic rule, and regaining the peacetime consensus upon which the earlier structure of rule had rested.

The recent survey and report of the Senate Special Committee on the Termination of the National Emergency has documented, beyond any doubt, the dangerous disarray into which U.S. procedures for dealing with emergencies have fallen. Almost 500 emergency statutes heretofore never tabulated confer emergency powers of the most extraordinary and far-reaching kind. All can be triggered by nothing more than a Presidential proclamation. And no procedure exists for terminating the proclamation and powers! The discovery that we are still living under both the Roosevelt banking emergency and the Truman Korean War emergency is quite enough to give any citizen pause.

This unhealthy situation must be changed promptly. Congress must devise methods for recapturing any emergency legislative grants of power that it provides. If it can be done in the war powers, as it has, than it can be done for emergency powers more generally. Not to do so leaves the Executive Branch with a loaded weapon aimed at the heart of our Republic—one that not only threatens our liberties directly but also subverts the citizen's conception of where power and responsibility should lie.

One must, however, be careful not to legitimatize Presidential claims to proclaim emergencies in cases that lack overriding urgency. Particularly in the evermore important cases of "economic" emergencies, President can almost always consult Congress in advance and secure whatever special powers are required in the normal way. In these cases, they should do so. In legislating the recapture of Presidential emergency powers, we ought not inadvertently authorize unnecessary emergency proclamations.

No Administration in our long history is more vulnerable to the charge that it sought improperly to enhance and retain executive power than the present Administration. In this context, it would go some distance toward reestablishing public confidence if the Administration would cooperate wholeheartedly in the Congressional struggle to regain control over the Pandora's box of emergency power.

—Council of The Federation of American Scientists

ESTABLISHING A PERMANENT SPECIAL PROSECUTOR

There is no doubt that Congress can create, by statute, a permanent special prosecutor to investigate, and prosecute, executive branch wrong-doing. Such powers are now assigned to the Attorney-General and they could be reassigned to, or shared with, a new body. In addition, the special prosecutor could be given a long term of office. The questions at issue are these: Who would appoint the special prosecutor; who would have what power to remove him?

Normally, the President would appoint such an officer with the advice and consent of the Senate. And if the officer were considered to be engaged in a purely executive office, the courts have held in Myers v. United States (1926) that he could be summarily removed by the President—the legislature could not put statutory fetters on his right of removal. However, this Presidential authority was held in Humphrey's Executor v. United States (1935) not to apply to officers involved in quasi-judicial or quasi-legislative tasks (especially, for example, to officers in the Administrative Agencies). Conceivably the courts might hold the special prosecutor, though exercising executive functions, was not "an arm or an eye" of the executive in the sense of this decision. In this case, statutory restraints on removal by the President might be possible. Indeed, the Humphrey's decision was rationalized on the grounds that the functions in question needed independence and that:

> "it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will."

Paradoxically, the courts have held that Congress can "limit, restrict, and regulate" the removal of officers who are *not* appointed by the President. These exist under Article II, section 2 of the Constitution where Congress has authority to vest the appointment of such officers as it thinks proper, not only in the President but in the "Courts of Law or in the Heads of Departments."

Thus, the independence of a special prosecutor could be buttressed by appropriate regulations in a statute calling upon the Attorney-General to appoint the officer. In this case, a decision by the President to dismiss the special prosecutor without justifiable cause would seem likely to trigger either the resignation of the department head instructed to order the dismissal, or suits against that officer for an illegal dismissal or both. The removal and resignation of Richardson and Ruckelshaus, and the subsequent court suit by Nader, are examples of this possibility. Obviously it would have a deterrent effect on a President to set in motion such consequences.

Finally, there is precedent for vesting the appointment and removal powers of a special prosecutor in the Courts. Ex Parte Siebold (1879) established the right of Congress to vest the appointment of election supervisors in the courts. It argued for applying rules of "practicality" on the one hand, and "incongruity" on the other, in deciding where to vest the appointment of unusual positions straddling the branches. It would certainly be "practical" to vest the appointment of such a prosecutor somewhere else.

But it might well seem "incongruous" to have a standing special prosecutor appointed by the courts since prosecution is normally considered an executive branch function. And the appointment by the courts could provide some due process problems if the appointing judge or judges presided over proceedings brought by the prosecutor. In any case, there is no provision for vesting any appointments (outside Congress) in the legislative branch.

Finally the most recent decision of Judge Gesell, declaring illegal the firing of Cox, suggests that Administrations must follow their own regulations. Congress could therefore insist that Administration adopt regulations protecting the independence of an office, and the Courts would enforce them.

One thing seems clear. Many Congressmen will use as an excuse for inaction any suggestion that a method of setting up a permanent special prosecutor might be unconstitutional. This puts a high premium on setting up the office in a way which raises no constitutional questions. That it is better to have a tripwire than no safeguard at all is one consideration underlying the FAS position on page 1. ☐

FAS PUBLIC INTEREST REPORT (202) 546-3300
203 C Street, N.E., Washington, D. C. 20002
December 1973, Vol. 26, No. 10

☐ I wish to join FAS and receive the Newsletters as a **Full Member.** Enclosed is my check for 1973 calendar year dues. (☐ I am not a natural or social scientist or engineer, but wish to become a non-voting **Associate Member.)**

☐ **$15 Member** ☐ **$50 Supporting** ☐ **$100 Patron** ☐ **$500 Life** ☐ **$7.50 Student or Retired**

☐ **NEWSLETTER ONLY:** I do not wish to become a member, but would like a subscription to the FAS Newsletters. Rates: $15 per calendar year for individuals or institutions, (libraries, government, etc.).

NAME AND TITLE _____
Please Print

ADDRESS _____

CITY AND STATE _____
Zip

PRIMARY PROFESSIONAL DISCIPLINE: _____

_____

Second Class Postage Paid at Washington, D. C.

Return Postage Guaranteed