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*Presidential Emergency Powers: The So-Called "War Powers Act of 1933"*

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## Presidential Emergency Powers: The So-Called "War Powers Act of 1933"

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### Summary

The "War Powers Act of 1933" is a name given by some members of the militia and patriot movement to emergency banking legislation passed in 1933 five days after President Roosevelt came into office.<sup>1</sup> The legislation did not, in fact, have the title attributed to it. It has apparently been so labelled by some because the banking legislation amended the "Trading with the Enemy Act of 1917" in order to give legal underpinning to President Roosevelt's efforts to cope with the banking crisis. It is alleged by its modern-day critics that by that amendment the government in effect declared war on the American people and began a reign of unconstitutional rule through Presidential emergency powers. These allegations overlook the facts that the amendment of the Trading with the Enemy Act has subsequently been repealed, that President Roosevelt's proclamation of national emergency has been effectively terminated, and that any President's exercise of emergency powers is now regulated under the "National Emergencies Act."

### Background

President Roosevelt came into office on March 5, 1933, during the most severe economic depression in the Nation's history. On his first day in office, he summoned Congress to a special session beginning on March 9 "to receive such communication as

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<sup>1</sup> It should also be noted that this legislation has nothing to do with the "War Powers Resolution of 1973." See P.L. 93-148 (Nov. 7, 1973); 87 Stat. 555; 15 U.S.C. 1541 et seq. The War Powers Resolution imposes responsibilities on the President relating to the commitment of U.S. military forces into "hostilities or situations where imminent involvement in hostilities is clearly indicated by the circumstances." Like the exercise of Presidential emergency powers, the issue of Presidential and Congressional war powers is a subject of continuing debate. But the so-called "War Powers Act of 1933" should not be confused with the War Powers Resolution.

may be made by the Executive."<sup>2</sup> On the second day he declared that massive withdrawals of gold and currency from the banks had created a "national emergency" and ordered that the banks be closed from March 6-9 "in order to prevent the export, hoarding, or earmarking of gold or silver coin or bullion or currency ...."<sup>3</sup> As the legal authority for this proclamation, he cited the portion of § 5(b) of the "Trading with the Enemy Act"<sup>4</sup> providing that

*the President may investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, export, hoarding, melting or earmarkings of gold or silver coin or bullion or currency*

....

40 Stat. 411, 415 (1917), as amended by 40 Stat. 965, 966 (1918).

The Trading with the Enemy Act had been enacted in 1917 to give the President authority to regulate all economic and other transactions between persons in the United States and foreign countries during World War I. By its terms, however, the Act seemed intended for use only in time of war.

On March 9 Congress convened and promptly enacted the President's emergency banking legislation.<sup>5</sup> Recognizing the limitations of the legal authority the President had cited for his declaration of a national bank holiday, the legislation amended § 5(b) of the Trading with the Enemy Act to allow it to be used not only in time of war but also "during any other period of national emergency declared by the President."<sup>6</sup> The banking legislation also declared that "a serious emergency exists," conferred extensive discretionary powers over the banking and currency systems on the President and the Federal Reserve Board, and gave both retroactive and prospective congressional approval to any and all actions taken by the President pursuant to the authority of § 5(b).<sup>7</sup> On the

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<sup>2</sup> Proclamation No. 2038 (March 5, 1933); 48 Stat. 1689.

<sup>3</sup> Proclamation No. 2039 (March 6, 1933); 48 Stat. 1690.

<sup>4</sup> 40 Stat. 415.

<sup>5</sup> Ch. 1, 73d Cong., 1<sup>st</sup> Sess. (March 9, 1933); 48 Stat. 1.

<sup>6</sup> Ch. 1, Title I, § 2 (March 9, 1933); 48 Stat. 1; 12 U.S.C. 95a and 50 U.S.C. App. 5(b). As amended, § 5(b) read in pertinent part as follows:

During time of war or during any other period of national emergency declared by the President, the President may, through any agency he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, by any person within the United States or any place subject to the jurisdiction thereof ....

<sup>7</sup> The latter provision stated as follows:

The actions, regulations, rules, licenses, orders, and proclamations heretofore or hereafter taken, promulgated, made, or issued by the President ... since March 4, 1933, pursuant to the authority  
(continued...)

basis of this expansive statutory authority, the President in Proclamation No. 2040 on March 9 extended the national emergency and the bank holiday he had declared on March 6 "until further proclamation by the President"<sup>8</sup>; and subsequently he issued a number of executive orders regulating the banking and currency systems, including one barring the private ownership of gold coins and bullion.<sup>9</sup>

The part of the emergency banking statute quoted above giving retroactive and prospective approval to the actions of the President taken pursuant to § 5(b) of the Trading with the Enemy Act has not been repealed, and that has led some to assert that the U.S. is still under emergency rule. But in fact President Roosevelt's declaration of national emergency has been terminated, the amendment of § 5(b) of the Trading with the Enemy Act has been repealed, and the Presidential proclamations and executive orders issued pursuant to that authority have been eliminated. In addition, Congress has enacted legislation regulating future declarations of national emergency by the President.

Most of these actions occurred during the 1970s. In the middle of that decade the Senate created a Special Committee on National Emergencies and Delegated Emergency Powers to conduct an investigation into Presidential use and abuse of emergency powers. On the basis of that Committee's findings and recommendations,<sup>10</sup> Congress in 1976 enacted the "National Emergencies Act."<sup>11</sup> The Act repealed several statutory delegations of emergency powers and, in addition, imposed a number of controls on the President's exercise of emergency powers, as follows:

(1) With one pertinent exception, it terminated "all powers and authorities possessed by the President, any other officer or employee of the Federal Government, or any executive agency, ... as a result of the existence of any declaration of national emergency in effect on September 14, 1976."<sup>12</sup> The Senate Special Committee had found that not only President Roosevelt's 1933 proclamation of a national emergency but also a proclamation by President Truman and two by President Nixon were still extant. Technically, the National Emergencies Act did not repeal or terminate those four declarations of national emergency, but with the exception noted below, this section of the Act did render them hollow shells.

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<sup>7</sup>(...continued)

conferred by subdivision (b) of section 5 of the Act of October 6, 1917, as amended, are hereby approved and confirmed.

Act of March 9, 1933, supra, § 1; 12 U.S.C. 95b.

<sup>8</sup> Proclamation No. 2040 (March 9, 1933); 48 Stat. 1691.

<sup>9</sup> E.O. 6260 (Aug. 28, 1933).

<sup>10</sup> SENATE SPECIAL COMMITTEE ON NATIONAL EMERGENCIES AND DELEGATED EMERGENCY POWERS, FINAL REPORT: NATIONAL EMERGENCIES AND DELEGATED EMERGENCY POWERS, S. Rept. No. 94-922, 94<sup>th</sup> Cong., 2d Sess. (1976).

<sup>11</sup> P.L. 94-412 (Sept. 14, 1976); 90 Stat. 1255; 50 U.S.C. 1601 et seq.

<sup>12</sup> Id., § 1601(a).

(2) The Act provided that any standby emergency authority provided to the President by statute (the Senate Special Committee had found 470 such statutes) could be activated in the future only by a new Presidential declaration of national emergency that was transmitted to Congress and published in the *Federal Register*.<sup>13</sup>

(3) The Act required that in any future declared national emergency, the President could only use those standby statutory authorities which he specifically identified and communicated to Congress and the public.<sup>14</sup> That is, a declaration of national emergency would no longer automatically activate all of the standby authorities which the Special Committee had identified in its study or which Congress enacted in the future but only those specified and publicized by the President as pertinent to the crisis at hand.

(4) The Act provided that any future declaration of national emergency by the President would terminate automatically one year after its declaration unless the President explicitly renewed it each year, and could also be terminated at any time by joint resolution of Congress or a Presidential proclamation.<sup>15</sup>

(5) The Act required the President to make periodic reports to Congress on all actions taken with respect to a declared emergency.<sup>16</sup>

In sum, the National Emergencies Act now subjects any Presidential exercise of Congressionally delegated emergency powers to the requirements of public declaration, specification of powers to be used, periodic reporting, Congressional oversight, and automatic termination.

The one initial exception to the foregoing framework for national emergencies concerned the Trading with the Enemy Act. As first adopted in 1976, the National Emergencies Act excluded from its purview Section 5(b) of the Trading with the Enemy Act. As noted above, that is the provision of law under which President Roosevelt issued his declaration of national emergency with respect to the banking crisis. But with the advent of the Cold War that section had also been used by the executive branch as the legal basis for imposing economic sanctions on the communist nations of North Korea, Cuba, China, and North Vietnam; and at the time the National Emergencies Act was enacted, there was no other legal basis for continuing the sanctions against those countries. As a consequence, the State Department asked that Section 5(b) be excluded from the National Emergencies Act until other legislation providing a basis for the continuation of economic sanctions against those countries could be enacted.

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<sup>13</sup> Id., § 1621(a).

<sup>14</sup> Id., § 1631.

<sup>15</sup> Id., § 1622.

<sup>16</sup> Id., § 1641.

In 1977 in the "International Emergency Economic Powers Act" (IEEPA) Congress enacted that alternative basis for economic sanctions against foreign countries.<sup>17</sup> IEEPA gives the President broad discretionary authority to impose economic sanctions on foreign countries

*to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.*<sup>18</sup>

With this alternative legal basis for economic sanctions in place, Congress eliminated the former exclusion of § 5(b) of the Trading with the Enemy Act from the National Emergencies Act and also amended § 5(b) so that it could no longer be triggered by a declaration of national emergency. The amendment of § 5(b) provided that the Act can only be invoked "(d)uring the time of war."<sup>19</sup> The elimination of the exclusion made clear that any and all emergency powers that might have previously been available pursuant to a national emergency declared under § 5(b) (including President Roosevelt's 1933 Proclamation No. 2040) were terminated.<sup>20</sup> As with the other pre-existing Presidential declarations of national emergency, Congress did not formally terminate the one declared by President Roosevelt (apparently believing that only the President could do so). But it did render it toothless.

Finally, in 1982 the Treasury Department formally eliminated the Presidential proclamations and executive orders pertaining to the 1933 banking crisis. Citing Congress' restriction of § 5(b) of the Trading with the Enemy Act and the enactment of IEEPA, and terming the various proclamations and executive orders to have been "obsolete for many years," the Department issued a regulation specifically terminating them.<sup>21</sup> The measures eliminated included President Roosevelt's Proclamations 2039 and 2040. His executive order barring the private ownership of gold had previously been overturned by statute.<sup>22</sup>

## Conclusion

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<sup>17</sup> P.L. 95-223, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. (Dec. 28, 1977); 91 Stat. 1626; 50 U.S.C. 1701 et seq.

<sup>18</sup> *Id.*, § 1701(a).

<sup>19</sup> 50 U.S.C. App. 5(b); 12 U.S.C. 95a. In amending TWEA, Congress did provide for the continuation of any economic sanctions that were the result of a Presidential declaration of national emergency and were in effect on July 1, 1977, subject to automatic termination unless they were renewed annually. This provision allowed the sanctions regimes against Cuba, North Korea, China, and North Vietnam to continue without the President having to declare a new national emergency under IEEPA. See 50 U.S.C.A. App. 5, note.

<sup>20</sup> P.L. 95-223, *supra*, § 101(d); 50 U.S.C. 1651(a)(1).

<sup>21</sup> 47 Fed. Reg. 56351-54 (Dec. 16, 1982).

<sup>22</sup> P.L. 93-110 (Sept. 21, 1973), 87 Stat. 352, as amended by P.L. 93-373 (Aug. 14, 1974), 88 Stat. 445.

The issue of Presidential emergency powers is necessarily a matter of continuing concern in a democracy, because the potential for the concentration and abuse of power is ever-present. The emergency banking legislation of 1933, denominated by some as the "War Powers Act of 1933," conferred extraordinary powers on the President with respect to the banking and currency systems as an initial step in trying to cope with the Depression. It also made the powers conferred by § 5(b) of the Trading with the Enemy Act available in times of national emergency as well as in times of war. Subsequently, § 5(b) was used as the basis for certain actions unrelated to the Depression, most notably the imposition of economic sanctions on certain foreign countries.

But President Roosevelt's 1933 declaration of national emergency and the various measures taken pursuant to that declaration have been terminated. Moreover, Section 5(b) of the Trading with the Enemy Act is now explicitly restricted to use only in time of war and is no longer available for use in a national emergency. Finally, the National Emergencies Act subjects any future exercise of emergency power by the President to the constraints of public declaration of the emergency, specific designation of the statutory authorities to be used during the emergency, Congressional oversight, and automatic termination. Whether those constraints are sufficient may be debatable. But the so-called "War Powers Act of 1933" is no longer a source of Presidential emergency power.