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## The Foreign Direct Investment Regulations: Constitutional Questions and Operational Aspects Examined

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## THE FOREIGN DIRECT INVESTMENT REGULATIONS: CONSTITUTIONAL QUESTIONS AND OPERATIONAL ASPECTS EXAMINED

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### PART ONE: THE CONSTITUTIONALITY AND PROPRIETY OF EXECUTIVE EMERGENCY POWERS

On January 1, 1968, President Johnson signed Executive Order 11387, "Governing Certain Transfers Abroad."<sup>1</sup> The Department of Commerce implemented the Executive Order the same day with the issuance of the Foreign Direct Investment Regulations (FDIR).<sup>2</sup> The Executive Order and the FDIR restrict the amounts of capital that American investors may transfer to or accumulate in foreign affiliates,<sup>3</sup> and compel repatriation of short-term liquid balances such as foreign bank deposits.<sup>4</sup> The Executive Order and the FDIR are based on the President's authority under Section 5(b) of the Trading with the Enemy Act of 1917, as amended.<sup>5</sup> Section 5(b) authorizes the President, during war or presidentially declared national emergency, to

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<sup>1</sup> Exec. Order No. 11387, 3 C.F.R. 90 (Comp. 1968), 12 U.S.C. § 95(a) (Supp. IV, 1969).

<sup>2</sup> 15 C.F.R. §§ 1000.101-1301 (Supp. 1969), as amended, 33 Fed. Reg. 806 (1968). For a detailed discussion of the application of the FDIR see "Part Two: Operational Aspects of the Foreign Direct Investment Regulations," *infra* p. 175.

<sup>3</sup> Exec. Order No. 11387(1)(a), 3 C.F.R. 90 (Comp. 1968), 12 U.S.C. § 95(a) (Supp. IV, 1969); 15 C.F.R. § 1000.201 (1969).

<sup>4</sup> *Id.*

<sup>5</sup> 12 U.S.C. § 95(a) (1964).

regulate trade and financial transactions between Americans and foreign persons.<sup>6</sup>

Section 5(b) and subsequent amendments to it authorize regulations only in response to conditions of extreme emergency.<sup>7</sup> The primary purpose of the FDIR is to reduce the American balance of payments deficit.<sup>8</sup> However, the continued tolerance of that deficit by Congress and the President for several years prior to the issuance of the FDIR, indicates that the deficit itself cannot be regarded as a national emergency of sufficient magnitude to warrant the invocation of the President's section 5(b) powers. In recognition of this, the President justified the Executive Order by citing the continued existence of the national emergency declared by President Truman in 1950, in response to both the invasion of Korea by Communist China and the dangers of communist aggression (the Korean emergency).<sup>9</sup> But clearly by 1968 the Korean War was over and the dangers of communist aggression were not nearly as imminent as they had been in 1950. Thus, the propriety and, indeed, the constitutional validity of basing the FDIR on a national emergency declared in re-

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<sup>6</sup> Section 5(b), as amended, reads in part:

(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency, or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving any property in which any foreign country or a national thereof has any interest.

12 U.S.C. § 95(a) (1) (A)-(B) (1964).

<sup>7</sup> See Act of March 9, 1933, ch. 1, § 2, 48 Stat. 1.

<sup>8</sup> Exec. Order No. 11387, 3 C.F.R. 90 (Comp. 1968), 12 U.S.C. § 95(a) (Supp. IV, 1969).

<sup>9</sup> Proclamation No. 2914, 3 C.F.R. 99 (Comp. 1949-53), 50 U.S.C. App. (notes preceding § 1) (1964). The prologue to the Proclamation reads in part:

[R]ecent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict . . . .

[W]orld conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world . . . .

[T]he increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible . . . .

Presidents Eisenhower, Kennedy, and Johnson noted the continuance of this emergency in their executive orders. Exec. Order No. 10896, 3 C.F.R. 425 (Comp. 1959-63); Exec. Order No. 10905, 3 C.F.R. 436 (Comp. 1959-63); Exec. Order No. 11037, 3 C.F.R. 621 (Comp. 1959-63), 12 U.S.C. § 95(a) (1964); Exec. Order No. 11387, 3 C.F.R. 90 (Comp. 1968), 12 U.S.C. § 95(a) (Supp. IV, 1969).

sponse to an international situation which no longer existed were seriously questioned at the time.<sup>10</sup> Moreover, President Nixon's recent statements that the United States and the communist nations can and must live together in harmony is further indication that the assumptions underlying the declaration of the Korean emergency are no longer valid, and that its continued use as support for the FDIR is of dubious propriety.<sup>11</sup>

<sup>10</sup> See, e.g., Address by Russell Baker, American Management Association Meeting, April 8-10, 1968, in CCH Balance of Payments Rep. ¶ 9032.

<sup>11</sup> The FDIR are not the only regulations adopted pursuant to § 5(b) which fail to respond to the national emergencies they were designed to cure. The Foreign Assets Control Regulations, 31 C.F.R. §§ 500.101-809 (Supp. 1969), which prohibit unlicensed commercial transactions of any kind between China, North Korea, North Vietnam, including nationals thereof, and American persons or foreign affiliates of American persons, block American assets owned by nationals of the designated countries, and which prohibit the unlicensed importation of "presumptively Chinese" merchandise from any country, were issued in 1950 in response to the Chinese invasion of Korea and after the declaration of the Korean emergency. Although justified at the time by events in Korea, the propriety of their continued existence pursuant to the Korean emergency is questionable.

The Egyptian Assets Control Regulations, 21 Fed. Reg. 5777 (1956), as amended, 21 Fed. Reg. 5861-62 (1956) (repealed 1958), which were almost identical to the Foreign Assets Control Regulations, were issued in 1956 in response to the Suez crisis, but again pursuant to the Korean emergency.

The Cuban Assets Control Regulations, 31 C.F.R. §§ 515.101-809 (Supp. 1969), which prohibit unlicensed commercial transactions of any kind between Cuba, or nationals thereof, and American persons, and block American assets owned by Cuban nationals, are also almost identical to the Foreign Assets Control Regulations, except for a limited exemption in respect of trade with Cuba by foreign affiliates of United States persons. These regulations were issued in 1961 in response to communist ascendancy in Cuba, but partly pursuant to the Korean emergency.

A trade embargo, in the form of a prohibition of imports from Cuba, was declared by President Kennedy, Proclamation No. 3447, 3 C.F.R. 157 (Comp. 1959-63), pursuant to authority vested in him by § 620 of the Foreign Assistance Act of 1961. 22 U.S.C. § 2370 (1964). The Secretary of the Treasury issued the original Cuba embargo pursuant to power delegated to him in that Proclamation. That embargo was limited to a prohibition against imports from Cuba. Cuba Import Regulations, 27 Fed. Reg. 1116 (1962). It was revoked and replaced by the present Cuba embargo on July 19, 1963. 31 C.F.R. §§ 515.101-809 (Supp. 1969). The present Cuba embargo is much broader in scope than the mere prohibition of imports contained in Proclamation No. 3447. For example, under the present regulations the contents of a safe deposit box in which a Cuban national has any interest are virtually frozen. 31 C.F.R. §§ 515.201(b)(1), 311 (1969).

The new regulations were not issued pursuant to a new executive order or proclamation. As authority, in addition to the Foreign Assistance Act of 1961, they cite § 5(b) and Executive Orders 9193 and 9989. 31 C.F.R. 467 (Supp. 1966). These executive orders were issued on July 6, 1942 and August 20, 1948, respectively. In these orders the President delegated his powers under § 5(b) to the Secretary of the Treasury. Exec. Order No. 9193, 3 C.F.R. 1174 (Comp. 1938-43), 50 U.S.C. App. § 6 (1964); Exec. Order No. 9989, 3 C.F.R. 748 (Comp. 1943-48), 50 U.S.C. App. § 6 (1964). Thus, in issuing the present Cuba embargo the Secretary drew both on power delegated to him in 1962 under the Foreign Assistance Act of 1961 and power delegated to his predecessor during and immediately after World War II under § 5(b). In *Sardino v. Federal Reserve Bank*, 361 F.2d 106 (2d Cir. 1966), a case in which the constitutionality of the Cuba embargo was challenged, the court assumed that the

When the Department of Commerce implemented President Johnson's order by issuing the FDIR the Executive Department was severely criticized.<sup>12</sup> The vehemence of the criticism stemmed largely from the suddenness and great restrictive impact of the regulations, and the power of the affected interests.<sup>13</sup> This criticism sufficiently disturbed Secretary of Commerce Trowbridge that he requested an advocate's brief establishing the legality of the FDIR. The Attorney General complied in a letter to the Secretary in which he concluded that the FDIR were "authorized by the statutory provisions codified" in Section 5(b) of the Trading with the Enemy Act.<sup>14</sup>

While the language of section 5(b) is undoubtedly broad enough to sustain, under certain circumstances, regulations requiring the repatriation of foreign assets and limiting foreign investments, the Attorney General disregarded some hard questions of law in asserting that the necessary circumstances in fact existed. In particular, two questions are presented by President Johnson's use of "the continued existence of the national emergency declared by [President Truman—

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regulations were issued pursuant only to § 5(b) and did not discuss the authority of the Foreign Assistance Act of 1961.

Regulations governing the hoarding of gold were issued by President Roosevelt in 1933 in response to economic effects of the Depression, and pursuant to the national emergency declared by him on August 28, 1933. Exec. Order No. 6260, 1 C.F.R. 2.2 (1933), 12 U.S.C. § 95 (a) 1964. But the Gold Hoarding Regulations were continued by later Presidents, pursuant to the Korean emergency. Exec. Order No. 8785, 3 C.F.R. 948 (Comp. 1938-43), 12 U.S.C. § 95(a) (1964). Neither the Egypt embargo, the Cuba embargo, nor the Gold Hoarding Regulations can reasonably be considered as responsive to the Chinese invasion of Korea and only the China and Cuba embargoes can fairly be said to be responsive to the dangers of communist aggression.

An additional question as to the propriety and constitutionality of the embargoes and regulations presently in effect is raised by the fact that they were issued by the Secretary of the Treasury. In 1942, President Roosevelt, acting within the purview of § 5(b) delegated his authority to the Secretary of the Treasury. President Truman, by executive order, reaffirmed this delegation of authority in 1948. Exec. Order No. 9193, 3 C.F.R. 1174 (Comp. 1938-43), 50 U.S.C. App. § 6 (1964); Exec. Order No. 9989, 3 C.F.R. 748 (Comp. 1943-48), 50 U.S.C. App. § 6 (1964). From 1942 to 1948 two declared national emergencies were in existence, a limited national emergency dating from 1939 to protect American neutrality, and an unlimited national emergency dating from 1941 in response to the emerging war. Proclamation No. 2350, 3 C.F.R. 112 (Comp. 1938-43), 50 U.S.C. App. (notes preceding § 1) (1964); Proclamation No. 2487, 3 C.F.R. 234 (Comp. 1938-43), 50 U.S.C. App. (notes preceding § 1) (1964). Both emergencies have since been terminated and the delegations not renewed. Proclamation No. 2947, 3 C.F.R. 158 (Comp. 1949-53), 50 U.S.C. App. (notes preceding § 1) (1964). There have been no § 5(b) delegations of presidential power to the Secretary under the Korean emergency, and, with the exception of the Cuba embargo declared by President Kennedy, there has not been a delegation of the President's powers to the Secretary to effect the embargoes in question. Yet in spite of the fact that the power has not been formally delegated to him, the Secretary of the Treasury has issued the China, Egypt and Cuba embargoes.

<sup>12</sup> Address by Russell Baker, *supra* note 10.

<sup>13</sup> *Id.*

<sup>14</sup> CCH Balance of Payments Rep. ¶ 9031.

the Korean emergency],”<sup>15</sup> and the necessity of reducing the balance of payments deficit during the national emergency, as authority for the promulgation of the FDIR: (1) Does that emergency still exist and (2) if so, does it justify these regulations? These are but variants of the more basic questions of what justifies the declaration and continuance of a national emergency under section 5(b), and whether a declaration of national emergency under that section justifies the issuance of particular regulations promulgated in response thereto. These questions have been raised before but courts have avoided exploring them fully and candidly.<sup>16</sup>

This article examines the constitutionality of the FDIR and similar regulations issued pursuant to section 5(b), and comments upon the basic propriety and desirability of delegations of broad emergency powers to the President. The development of executive powers under section 5(b) will first be discussed with an eye toward determining, through the legislative history, congressional intent underlying the section. The role of judicial review of the exercise of executive emergency powers will be examined, followed by an analysis of the theory underlying the delegation of such powers to the President. Finally, the constitutional limitations on the emergency powers of the executive will be examined.

It is concluded that, although the limits of presidential power are not clearly defined, the Constitution vests primary authority for the exercise of section 5(b) powers in Congress, and that the President, particularly in non-wartime situations, exercises those powers as an agent of Congress. While it has not as yet provided clear guidelines for determining the existence of a “national emergency,” Congress should establish such criteria, including provisions for judicial review of executive actions under section 5(b), so as to retain the power originally vested in that body by the Constitution.

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<sup>15</sup> Proclamation No. 2914, 3 C.F.R. 99 (Comp. 1949-53), 50 U.S.C. App. (notes preceding § 1) (1964).

<sup>16</sup> The FDIR and other regulations issued pursuant to § 5(b) have raised additional constitutional issues. One of the most persistent questions relates to due process considerations in the denial of authorizations or licenses. For a discussion of this problem in relation to the Cuba embargo, see *Sardino v. Federal Reserve Bank*, 361 F.2d 106 (2d Cir. 1966). Another question arising under the China, Egypt and Cuba embargoes, relates to possible violations of freedom of speech and the press in prohibiting the importation of printed matter from embargoed countries. Although it was held in *Teague v. Regional Comm'r of Customs*, 404 F.2d 441 (2d Cir. 1968), cert. denied, 89 S.Ct. 1457 (1969), that such prohibition violated no constitutional rights, it seems clear from the principles of *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965), that such were violated. Justice Black enunciated this in his dissent to the denial of certiorari in the *Teague* case and pointed out that certiorari was denied only because the petition was delayed beyond the 90-day deadline by a snowstorm. 89 S. Ct. at 1457.

# I. THE DEVELOPMENT AND LEGISLATIVE HISTORY OF SECTION 5(b)

Originally, section 5(b) authorized presidential action only during time of war. It was enacted as part of the Trading with the Enemy Act<sup>17</sup> six months after America's entry into World War I. The Act was regarded solely as a war measure; its purpose was to prevent the use of American property to aid the enemy, and to assure that the debts of alien enemies to Americans would be paid.<sup>18</sup> During World War I, section 5(b) was amended to authorize the President to regulate the hoarding of gold up to two years after the end of the War.<sup>19</sup>

After World War I, section 5(b) was not invoked until President Franklin D. Roosevelt, believing that the economic emergency of the Depression warranted the use of the President's war powers,<sup>20</sup> declared a bank holiday.<sup>21</sup> Since section 5(b) at that time authorized presidential action only during war, the President's authority for this proclamation was far from clear. One court commented:

Although this section was cheerfully accepted, and even welcomed, at the time, it was clearly unauthorized, since nowhere in the Constitution is the President given authority to act in an "emergency" as such, and the requisite war conditions which might have called into play his granted power as Commander-in-Chief or his delegated power under the Trading with the Enemy Act of 1917 did not obtain.<sup>22</sup>

On March 9, 1933, at the President's request, Congress passed the Emergency Banking Act<sup>23</sup> which ratified the President's actions<sup>24</sup> and amended the Act to allow the President to exercise section 5(b) powers during declared national emergencies as well as during wars.<sup>25</sup> That

<sup>17</sup> Act of Oct. 6, 1917, ch. 106, 40 Stat. 411.

<sup>18</sup> *Koehler v. Clark*, 170 F.2d 779 (9th Cir. 1948); *Plfueger v. United States*, 121 F.2d 732 (D.C. Cir. 1941), cert. denied, 314 U.S. 617 (1941).

To accomplish these purposes, the Act forbade foreign trade without a license, provided for the seizure of enemy owned property in the United States, and authorized the President to regulate transactions in foreign exchange.

The Act was repeatedly challenged as violating the due process and just compensation clauses of the Fifth Amendment by authorizing the Alien Property Custodian to seize and hold enemy owned property with deferred or perhaps no compensation. But courts found that the Act was based on the power of Congress to make rules for capture on land and sea, a war power, and such was not subject to the restraints of the Fifth Amendment, at least during time of war. See *Stoehr v. Wallace*, 255 U.S. 239 (1921); *N.V. Montan Export-Metaal, etc. v. United States*, 102 F. Supp. 1016 (Ct. Cl. 1952).

<sup>19</sup> Act of Sept. 24, 1918, ch. 176, § 5, 40 Stat. 966.

<sup>20</sup> See G. Schubert, *The Presidency in the Courts* 257 (1957).

<sup>21</sup> Proclamation No. 2039, 31 C.F.R. § 120.1 (1933).

<sup>22</sup> *United States v. Briddle*, 212 F. Supp. 584, 586 (S.D. Cal. 1962).

<sup>23</sup> Act of March 9, 1933, ch. 1, 48 Stat. 1.

<sup>24</sup> Act of March 9, 1933, ch. 1, § 1 48 Stat. 1. Congress again ratified actions taken by the President under § 5(b) in the Act of Jan. 30, 1934, ch. 6, § 13, 48 Stat. 343.

<sup>25</sup> Act of March 9, 1933, ch. 1, § 2, 48 Stat. 1.

legislation also authorized the President to exercise these powers "through any agency he may delegate."<sup>26</sup>

In 1940, as the nation moved toward war, the President requested that Congress further amend the section to authorize him to regulate transactions in which foreign countries and foreign nationals have an interest. Congress complied with the request,<sup>27</sup> but the debate indicated that it regarded the amendment as a war measure.<sup>28</sup> In 1931, when President Roosevelt issued Executive Order 8785 further restricting such international transactions,<sup>29</sup> he again asked Congress to ratify his actions and to broaden the scope of section 5(b).<sup>30</sup> It did so in the First War Powers Act<sup>31</sup> on December 18, 1941.

Nowhere in section 5(b) did Congress define the term "national emergency." Some indication of its intent, however, may be gained by reviewing the legislative history of the section. It has been mentioned that the section as originally enacted in 1917 delegated powers to the President only in time of war,<sup>32</sup> and was part of a statute which was regarded solely as a war measure.<sup>33</sup> When it was amended in 1933 to delegate powers to the President during declared national emergencies, the debate indicates that Congress intended to act only in regard to the Depression emergency. The circumstances surrounding passage of the amendment bear this out. The amendment was imbedded in a bill reorganizing the nation's banking structure<sup>34</sup> which the President presented to Congress in fully drafted form. He requested Congress to pass the Act before midnight, when the previously declared bank holiday would expire. Several Senators and Congressmen indicated that they would never vote for an act which contained so many objectionable provisions, of which the amendment to section 5(b) was one, but for the immediate necessity of meeting the crisis at hand.<sup>35</sup> And when section 5(b) was amended

<sup>26</sup> Act of March 9, 1933, ch. 1, § 2, 48 Stat. 1.

<sup>27</sup> Act of May 7, 1940, ch. 185, § 1, 54 Stat. 179.

<sup>28</sup> 86 Cong. Rec. 5183 (1940) (remarks of Senator Taft).

<sup>29</sup> Exec. Order No. 8785, 3 C.F.R. 948 (Comp. 1938-43), 12 U.S.C. § 95(a) (1964).

<sup>30</sup> Exec. Order No. 8389, 3 C.F.R. 645 (Comp. 1938-43), 12 U.S.C. § 95(a) (1964); Exec. Order No. 8405, 3 C.F.R. 657 (Comp. 1938-43), 12 U.S.C. § 95(a) (1964); Exec. Order No. 8446, 3 C.F.R. 674 (Comp. 1938-43), 12 U.S.C. § 95(a) (1964); Exec. Order No. 8484, 3 C.F.R. 687 (Comp. 1938-43), 12 U.S.C. § 95(a) (1964).

<sup>31</sup> Act of Dec. 18, 1941, ch. 593, § 301, 55 Stat. 839.

<sup>32</sup> Act of Oct. 6, 1917, ch. 106, 40 Stat. 411.

<sup>33</sup> *Stoehr v. Wallace*, 255 U.S. 239 (1921).

<sup>34</sup> Act of March 9, 1933, ch. 1, 48 Stat. 1.

<sup>35</sup> The amendment to § 5(b) delegating power to the President during a national emergency as well as during war must constitute one of the most extraordinary chapters in Congressional history. President Roosevelt's declaration of a bank holiday on March 6, 1933 was based on the then dubious authority of § 5(b). The holiday was due to expire at midnight of March 9, 1933. Congress was not in session at the time but Roosevelt called it into session on March 9th, presented it with a sweeping bill dealing

again during World War II, congressional debate indicates that Congress was responding only to the demands of the War.<sup>36</sup> Although Congress has never defined the term "national emergency," the contexts within which it enacted and amended the section indicate that it intended the term to denote a crisis of drastic proportions. This would comport with the popular understanding of the term.

Some further indication of congressional intent may be gleaned from the rationale behind the congressional delegation of emergency powers generally. In this regard Professor Corwin points out that, whereas legislative power is fairly well defined by method as well as by function, executive power

is still indefinite as to function and retains, particularly when exercised by single individual, much of its original plasticity as to method. It is consequently the power of government that is the most spontaneously responsive to emergency conditions; conditions that is which have not attained enough stability of recurrency to admit of their being dealt with according to rule.<sup>37</sup>

Emergencies and crises require the ability to respond quickly and decisively, with one purpose and direction, as well as with flexibility of method. It is the inability of Congress to act in this manner that necessitates delegation of power to the President in time of crisis,

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with the banking crisis, of which the amendment to § 5(b) was part, and demanded passage of the unaltered bill by midnight. Senator Fletcher, who introduced and managed the bill in the Senate, asked that it be sent immediately to the Banking and Currency Committee and that the Committee be instructed to report the bill out in an hour. Senator Long complained that he had been unable to discover the contents of the bill before it was read by the clerk. Other senators complained that it had not been printed and was not available to read. Most of the debate centered on what many senators thought to be unfair treatment of small state banks in favor of members of the Federal Reserve System in some of the substantive sections of the bill. Senator Long made a passing remark on the extraordinary powers being given to the President in the amendment to § 5(b). Senator Robinson of Indiana objected to a provision ratifying actions taken by the President "heretofore and hereafter" pursuant to § 5(b), feeling that open-ended prospective ratification was out of order. Senator Reed reassured Robinson that the language was surplusage. "If President Roosevelt should go beyond the section of the Trading with the Enemy Act, the approval we are giving him would be of no effect . . . [W]e do not confirm and approve any future act unless it is in compliance with Section 5 of the Act of October 16, 1917. . . ." 77 Cong. Rec. 60 (1933). Most senators seemed to have serious reservations on many of the bill's sections and agreed they would not vote for it under ordinary circumstances. The bill was passed before midnight. *Id.* at 49-67. The action on the bill in the House was similar. *Id.* at 75-85.

<sup>36</sup> In the Congressional debates on December 16, 1941, Representative Fish, insisting that the powers being delegated to President Roosevelt were no greater than those delegated to President Wilson during World War I, said that they were "[p]owers that are necessary in time of war and which we would not consider giving to any President in peace time . . . that should be returned to the Congress when the war has been won." 87 Cong. Rec. 9856 (1941).

<sup>37</sup> E. Corwin, *The President* 3 (4th ed. 1957).

and may account for the fact that many of our great Presidents held office during crisis or war. However, once the crisis has passed Congress is again capable of responding to the policy making needs of the nation. Therefore, by way of defining the limits of section 5(b) emergencies, when Congress is again capable of responding to those needs the national emergency, it would seem, no longer exists.

## II. JUDICIAL REVIEW OF EXECUTIVE REGULATIONS ISSUED IN RESPONSE TO NATIONAL EMERGENCIES

As the legislative history of section 5(b) and the rationale behind congressional delegation of emergency power indicate, it is possible to construct a method by which courts can review the propriety of the issuance or continuance of regulations pursuant to a particular national emergency. Congress delegates its power to effect remedial measures during a national emergency because the existence of the emergency makes it difficult, if not impossible, for Congress to effectively respond to the crisis. The propriety of presidential exercise of this delegated power, therefore, turns on whether conditions exist which make it difficult or impossible for Congress to legislate measures which will have the desired effect. Although this criteria is somewhat vague, it can easily be applied to those cases where the conditions underlying a declared national emergency obviously do or do not lend themselves to effective congressional action. As to those cases covering the middle ground, courts will, in all likelihood, always defer to the President's discretion in exercising his delegated powers, no matter how clearly developed the criteria for judging the exercise of that discretion may be.

But although courts could have developed the suggested criteria for reviewing the appropriateness of the issuance of regulations pursuant to section 5(b), they have been reluctant to undertake such review. The opinion of the District Court for the Southern District of California in *Werner v. United States*<sup>38</sup> epitomizes this reluctance. There the plaintiff sought to recover land which he had been forced to lease to the government at nominal rent during World War II. The lease, pursuant to statute, provided for termination six months following the expiration of the World War II emergencies. Congress by joint resolution terminated several statutes, including the statute on which the lease was based. The expiration dates of these statutes would have otherwise depended on the expiration of those emergencies. The owner argued that the emergencies, and hence his lease, had been terminated by this joint resolution. The court, rather than rejecting the plaintiff's argument by referring to the obvious meaning and intent of the res-

<sup>38</sup> 119 F. Supp. 894 (S.D. Cal. 1954), aff'd on other grounds, 233 F.2d 52 (9th Cir.), cert. denied, 352 U.S. 842 (1956).

olution, developed an elaborate opinion holding that a court cannot terminate a presidentially declared national emergency:

There has been no contention that anyone other than the President may issue a Proclamation determining the existence of a national emergency. There is no suggestion that the other two branches of government, or either of them—judicial or legislative—may in any way usurp the duties of the President by declaring the existence of a national emergency. If the President is the only one who may declare a national emergency, is he alone empowered to terminate it?

. . . .

It seems to this court the determination that a national emergency existed is a matter of political judgment, and determination that the national emergency no longer exists is also a matter of political discernment, which judges have "neither technical competence nor official responsibility" to decide. If this is a matter which has been given exclusively to the executive branch of government and the judicial branch has no official responsibility therein, it would also seem to this court that the legislative branch has no right to determine matters of political judgment.<sup>39</sup>

The opinion was affirmed on other grounds by the Court of Appeals for the Ninth Circuit. However, the court of appeals suggested in a footnote to its opinion that a court, in appropriate circumstances, could hold that a declared national emergency in fact no longer existed.<sup>40</sup> The circuit court's suggestion that the lower court's analysis is deficient is correct for several reasons. It is meaningless to contend that Congress is not a political branch of the government, fully competent to determine matters of political judgment. Therefore, it is clear that Congress as well as the President may declare that an emergency exists and take appropriate action.<sup>41</sup> Moreover, it is not at all established that courts have no "official responsibility" in the matter of determining the existence of a national emergency.<sup>42</sup> Although national emergencies under section 5(b) are declared by the President, they are declared pursuant to authority delegated by Congress. And, of course, it is the "official responsibility" of courts to declare whether the executive branch is within its statutory or constitutional authority in taking a particular action.

Just as in the district court decision in *Werner*, the court in

<sup>39</sup> 119 F. Supp. at 896.

<sup>40</sup> 233 F.2d at 55 n.2.

<sup>41</sup> The Court approved legislation of this type in *Block v. Hirsch*, 256 U.S. 135 (1921).

<sup>42</sup> See *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1923).

*MacEwan v. Rusk*<sup>43</sup> refused to consider whether a declared national emergency continued to exist. There a declaratory judgment was sought to invalidate regulations of the Secretary of State which denied endorsement of passports for travel to and from Cuba. These regulations were based on the Immigration and Nationality Act of 1952, which provides that the President may restrict the travel of American citizens during a declared national emergency.<sup>44</sup> When the regulations were challenged on the ground that they were issued pursuant to the Korean emergency which no longer in fact existed, the Court of Appeals for the Third Circuit bluntly replied that "a court may not lightly hold that an executive proclamation of a national emergency has expired by lapse of time,"<sup>45</sup> and concluded that, in any event, "[w]orld-wide events make it clear to everyone that the national emergency is not ended."<sup>46</sup>

Similarly, in *Sardino v. Federal Reserve Bank*,<sup>47</sup> the plaintiff challenged the continued duration of the Korean emergency, contending that it could not support the Cuba embargo. Although Judge Friendly, writing for the Court of Appeals for the Second Circuit, could easily have disposed of this question by ruling that the embargo was specifically authorized by the Foreign Assistance Act of 1961,<sup>48</sup> he was not content to base his decision on this ground. Rather, he ruled against the plaintiff, for the reason that "courts will not review a determination so peculiarly within the province of the chief executive . . . ."<sup>49</sup> His ruling, that the determination of the existence of a national emergency is solely within the province of the President, comes closer to traditional doctrine than the rationale of the *Werner* and *MacEwan* courts. In fact, this doctrine may be traced to Justice Story who, in 1812, said, "[i]t does not belong to the court to superintend the acts of the executive, nor to decide on circumstances left to his sole discretion."<sup>50</sup>

The reticence exhibited by the courts in reviewing the continued existence of declared national emergencies results, as Judge Friendly indicated, from a reluctance to interfere in matters left to presidential discretion. In this regard Professor Corwin has pointed out that judicial review has been of minor importance in delineating the scope of presidential powers:

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<sup>43</sup> 228 F. Supp. 306 (E.D. Pa. 1964), aff'd, 344 F.2d 963 (3d Cir. 1965).

<sup>44</sup> 8 U.S.C. § 1185 (1964).

<sup>45</sup> 228 F. Supp. at 312.

<sup>46</sup> Id.

<sup>47</sup> 361 F.2d 106 (2d Cir. 1966).

<sup>48</sup> 22 U.S.C. § 2364 (1964). See note 11, supra.

<sup>49</sup> 361 F.2d at 109. However, he indicated that the existence of a national emergency could hardly be doubted when thousands of American troops were in combat abroad and stationed in readiness around the globe. Id.

<sup>50</sup> The *Orono*, 18 F. Cas. 830 (No. 10,585) (C.C.D. Mass. 1812).

While the Court has sometimes rebuffed presidential pretensions, it has more often labored to rationalize them; but most of all it has sought on one pretext or another to keep its sickle out of this "dread field."<sup>51</sup>

This conclusion is based on a line of cases beginning in 1827 with *Martin v. Mott*,<sup>52</sup> wherein the President's power to call the militia into service during an invasion or threat of invasion, pursuant to a statute delegating him that power, was challenged by a militiaman who had been fined for refusing to answer such a call during the War of 1812. Justice Story asserted that the Court had no business second-guessing a determination made by the President concerning a matter left to his discretion by Congress.<sup>53</sup> This case has been cited in recent opinions which have refused to question the President's judgment concerning the existence of a national emergency.<sup>54</sup>

Constitutional attitudes have not remained static since 1827. In reviewing the evolution of judicial review of executive determinations, Professors Jaffe and Davis have stated that the attitudes and actions of the judiciary in regard to such review are far from settled. In fact, they conclude that a presumption of reviewability has slowly emerged over the past few decades; a presumption which is rebuttable, however, by an indication of legislative intent to the contrary or a special reason for nonreviewability.<sup>55</sup>

One such basis for nonreviewability arises when the matter in question concerns foreign affairs.<sup>56</sup> It was for this reason that the Court in *Oetjen v. Central Leather Co.*<sup>57</sup> and *United States v. Pink*<sup>58</sup> refused to review executive determinations concerning the recognition of foreign governments, and in *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*<sup>59</sup> refused to review the President's determination that an international air route should be granted to one domestic air line rather than to another. The Court in the latter case said:

It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret . . . . But even if courts could require full disclosure, the very nature

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<sup>51</sup> E. Corwin, *supra* note 37, at 16. Professor Corwin is not alone in making this observation. See also G. Schubert, *The Presidency in the Courts* 271 (1957).

<sup>52</sup> 25 U.S. (12 Wheat.) 19 (1827).

<sup>53</sup> *Id.* at 27-28.

<sup>54</sup> See, e.g., *Brown v. Bernstein*, 49 F. Supp. 728, 732 (M.D. Pa. 1943); *United States v. Switchmens Union*, 97 F. Supp. 97, 101 (W.D.N.Y. 1950).

<sup>55</sup> 4 K. Davis, *Administrative Law* §§ 28.01, .07 (1958); L. Jaffe, *Judicial Control of Administrative Action*, ch. 9 (1965).

<sup>56</sup> L. Jaffe, *supra* note 55 at 363-66.

<sup>57</sup> 246 U.S. 297 (1918).

<sup>58</sup> 315 U.S. 203 (1942).

<sup>59</sup> 333 U.S. 103 (1948).

of executive decisions as to foreign policy is political, not judicial. . . . They are delicate, complex, and involve large elements of prophecy. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility . . . .<sup>60</sup>

But these considerations are largely irrelevant to a judicial consideration of the continued existence of a national emergency, even if it has been declared in response to international events. In making such a determination a court does not act on incomplete information, for an emergency of the sort justifying the exercise of delegated emergency powers depends on apparent facts, which are readily ascertainable without the sophisticated information-gathering apparatus available to the President. In making such a determination, a court does not directly challenge a presidential decision, for the continued existence of an emergency does not result as much from a presidential decision, that is, a conscious choice, as from inertia or the absence of any decision.

In the case of *Chastleton Corp. v. Sinclair*,<sup>61</sup> the Supreme Court not only indicated that judicial review of the continued existence of emergencies is proper, but ordered that the review be made. This case arose from a bill in equity to restrain the Rent Commissioner of Washington, D.C. from lowering rents for apartments in an order of August 7, 1922. The Rent Commission was created by Congress in 1919 to deal with a housing shortage created by the vastly increased government personnel requirements during World War I. The measure was declared to be emergency legislation and was to terminate in two years unless repealed. When initially asked in *Block v. Hirsch*<sup>62</sup> to consider the deprivation of landlords' property rights by the rent control law, the Court was reluctant to question the emergency measure. "A limit in time, to tide over a passing trouble, may well justify a law that could not be upheld as a permanent change."<sup>63</sup>

However, when Congress extended the Act until 1924, Justice Holmes, in *Chastleton*, reiterated the Court's earlier statements regarding the respect due congressional declarations of emergency, but qualified the extent to which such declarations would be respected.

But even as to them a court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. . . . A law depending upon the existence of an emergency or other certain state of facts

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<sup>60</sup> Id. at 111.

<sup>61</sup> 264 U.S. 543 (1923).

<sup>62</sup> 256 U.S. 135 (1921).

<sup>63</sup> Id. at 157.

to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed.<sup>64</sup>

But rather than determine itself whether an emergency continued to exist, the Court remanded the case for that determination. Of course, the rent control regulations under consideration in *Chastleton* were based upon a congressionally declared emergency, whereas the FDIR are based upon a presidentially declared emergency. But the reasoning of Holmes, quoted above, is equally applicable to both types of declarations. Moreover, regulations issued pursuant to section 5(b) depend on a delegation of authority from Congress. Presidential action pursuant to that delegation should be no more immune from judicial scrutiny than the underlying congressional action. If Congress' declaration of an emergency is reviewable, then the President's declaration of an emergency when he is acting for Congress should also be reviewable. This position was supported by the Ninth Circuit Court of Appeals in a footnote to its opinion in *Werner v. United States*<sup>65</sup> wherein it indicated that it considered executive declarations of emergency, under proper circumstances, to be reviewable:

While the tendency is to leave the determination of the end of emergency to the executive branch, it is conceivable that international affairs could again achieve such placidity that a court could venture to take judicial notice that an emergency had ended, absent any such determination by the executive.<sup>66</sup>

Later, in the case of *Bauer v. United States*<sup>67</sup> the court partially re-

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<sup>64</sup> 264 U.S. at 547-48.

<sup>65</sup> 233 F.2d 52 (9th Cir. 1956).

<sup>66</sup> *Id.* at 55 n.2.

<sup>67</sup> 244 F.2d 794 (9th Cir. 1957).

In this 1957 case the Ninth Circuit Court of Appeals was asked to overturn a conviction for the possession of gold bullion in violation of the Gold Hoarding Regulations issued under the authority of § 5(b). Those regulations were challenged on the ground that the economic emergency of the Depression no longer existed and therefore no longer could justify criminal prosecutions in the 1950's. The court acknowledged the merit of this argument:

It seems vital as a matter of national policy that emergency regulations and almost dictatorial powers granted or conceded in the turmoil of war, cold war, economic revolution and the struggle to preserve a balanced democratic way of life, should be discarded upon return to normal conditions, lest we grow used to them as the fittings of ordinary existence. Executive regulations drafted and confirmed for an emergency should expire with the emergency. There will be time enough to revivify these if another emergency requires and Congress be willing. Of course, if it seems essential to continue the subject matter of these criminal regulations now, Congress can so declare. But the power lies in Congress.

*Id.* at 797.

However, the court was unwilling to follow the logic of this reasoning to its conclusion and refused to consider whether the Depression emergency had ended by 1957. "This Court should not declare the end of any emergency as matter of law. Nor,

affirmed this position when it remanded the case for a determination of the continued existence of the Depression emergency.

Finally, in 1962 the District Court for the Southern District of California judicially noted the end of a presidentially declared national emergency in *United States v. Briddle*.<sup>68</sup> This case arose from another conviction for the possession of gold bullion in violation of the same Gold Hoarding Regulations at issue in the *Bauer* case. The court declared:

It is a simple matter, of course, to date the commencement of a "national emergency" by its declaration. But unless the ending be marked by proclamation also it is sometimes difficult indeed to determine. Yet, always at some point the "national emergency" does end, and the Orders which find their authority in the existence of the emergency lose their validity. . . . [I]t is now too clear for debate, as a matter of common knowledge, that the 1933 economic emergency ended long before 1962. Accordingly, this court should and does now judicially notice the fact.<sup>69</sup>

*Briddle* was disapproved in *United States v. Lane*<sup>70</sup> and overruled in *Pike v. United States*.<sup>71</sup> However, the basis of these later opinions was not that the Depression emergency survived and continued to justify the Gold Hoarding Regulations, but rather that the regulations were supported by other, subsequently declared emergencies. Significantly, the government conceded in the *Pike* case that the Depression emergency no longer existed, despite the failure of the President to terminate it formally.

### III. THE THEORY OF EXECUTIVE EMERGENCY POWERS RE-EXAMINED

Emerging from this line of cases is judicial recognition of a fact that must have been obvious to the general public throughout the 1950's and 1960's: the Depression emergency no longer exists. A court has declared it so; the government has conceded the fact. This leads to the significant conclusion that declared national emergencies not only end when formally terminated by the President, as the World War II emergencies were terminated by President Truman in 1952,<sup>72</sup>

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except under most exceptional circumstances, should judicial notice be taken by us of conditions from which we might be inclined to conclude an emergency has ended." *Id.* The court remanded the case for a finding on the issue. *Id.*

<sup>68</sup> 212 F. Supp. 584 (S.D. Cal. 1962).

<sup>69</sup> *Id.* at 588-89.

<sup>70</sup> 218 F. Supp. 459 (S.D.N.Y. 1963).

<sup>71</sup> 340 F.2d 487 (9th Cir. 1965).

<sup>72</sup> Proclamation No. 2974, 3 C.F.R. 158 (Comp. 1949-53), 50 U.S.C. App. (notes preceding § 1) (1964).

but also can die natural deaths. From this determination that an emergency can and does cease to exist when the conditions underlying it have disappeared, it follows that the regulations dependent on that emergency should be considered terminated. If the President fails to act in this regard, it is the duty of courts to do so.

It must be admitted that the Depression emergency, under consideration in the *Bauer* and *Briddle* cases, was undeniably more dead in the 1950's than the Korean emergency, under consideration in the *Sardino* and *MacEwan* cases, was in the 1960's. The Depression emergency was declared solely in response to the economic crisis of the Depression—a crisis which had wholly passed by the mid-1950's. The Korean emergency, however, was declared in response to both the Chinese invasion of South Korea and "communist aggression" in general. While the Korean incident has receded far enough into the background so that it no longer merits national emergency status, and in any event bears no relation to the various regulations the Korean emergency now supports, the dangers of communist aggression, however diminished, still exist and do bear a relation to many of these regulations. This raises the first question initially posed; whether *potential* communist aggression, as opposed to particular manifestations of communist aggression, is too general a matter to support the declaration of a national emergency. Today, when any hostile or even defensive act by an unfriendly nation may be labeled aggressive, and when any act of violence, internal or external, will be viewed by many to be communist inspired, any national emergency declared in response to potential communist aggression may well be viewed as continuous in nature.<sup>73</sup> If Congress had intended to delegate the section 5(b) powers in such an open-ended manner it would have done so by delegating them without the necessity of declaring a national emergency. However, since Congress delegated those powers only during time of war or national emergency it must have meant those phrases as limitations upon the president's authority. For these limitations to be meaningful the emergency must denote a crisis of sufficient specificity to have a definite, ascertainable end. If the operative language in the declaration of the Korean emergency includes all the dangers of communist aggression and not just the dangers surrounding the war crisis, that declaration may well be too intangible and too general to actually be a national emergency.

The FDIR were issued by President Johnson to meet the balance of payments problem. He issued them pursuant to his section

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<sup>73</sup> That this seems to have been forgotten becomes apparent when one comes to realize that some 60% of the nation's population have lived their entire lives during a continuous, unbroken chain of national emergencies. Yet some of the years since 1933 have seemed relatively calm and no one continuing emergency has pervaded all of them.

5(b) powers, under the presupposition that the Korean emergency continued to exist. If a court were to review the validity of the FDIR using the criteria suggested above, it might determine that the events underlying the Korean emergency no longer exist and, thus, no longer prevent Congress from fully and effectively legislating in regard to foreign investment by Americans. It could therefore be concluded that the Korean emergency no longer supports the issuance of the FDIR under section 5(b).

The second question initially posed and raised again by the *Lane* and *Pike* cases is: if a declared national emergency continues to exist, what regulations may it justify? Circumstances of varying types and severity, from near war to the flooding of the Ohio River, could justify the declaration of a national emergency. Clearly, regulations justified by a near war would not be responsive to, and therefore could not be justified by, an emergency declared in response to a regional natural disaster, as this would be inconsistent with the rationale underlying emergency delegation. Congress delegates those powers which, because of the particular emergency conditions involved, it cannot otherwise effectively exercise. While near war conditions might render it difficult for Congress to effectively regulate foreign commerce by preventing trade with and, hence, aid to a potential enemy, the flooding of the Ohio River obviously does not raise the same problems. Thus, the President's use of section 5(b) powers to regulate the flow of American goods abroad would be justified by near war, but not by a natural disaster.

Since courts have not considered the rationale behind emergency delegation at any length, it is not surprising that they have failed to consider whether specific regulations are justified by the particular declared and existing national emergencies underlying them. Thus, when the government admitted in the *Pike* case that the Depression emergency, pursuant to which the Gold Hoarding Regulations were issued, no longer existed, the court found only that the Korean emergency still existed. It did not consider whether those regulations were responsive to and justified by the conditions underlying the Korean emergency. Under its reasoning the regulations would, apparently, be equally well supported by any national emergency, including natural disasters.

If the requirement of a logical relationship between a declared national emergency and the regulations issued under it is implicit in section 5(b), it appears that many of the regulations outstanding under section 5(b) are of questionable validity. Since the Depression emergency no longer exists and the World War II emergencies have been terminated, it must be concluded that the FDIR and similar regulations under section 5(b), such as the Gold Hoarding Regulations,

and the China and Cuba embargoes,<sup>74</sup> exist pursuant solely to the Korean emergency. Yet President Truman did not mention gold hoarding, Cuba or the balance of payments deficits in proclaiming the Korean emergency, and gold hoarding, Cuba and the balance of payments deficit seem to have little relation to events in Korea. Even potential communist aggression, if a term so broad can properly support a declaration of national emergency, seems to have little to do with gold hoarding or the balance of payments. Neither events in Korea nor potential communist aggression presently prevent Congress from conveniently and effectively dealing with the subjects of these various regulations. In short, the issuance and continuance of these regulations pursuant to the Korean emergency seriously distort the rationale behind emergency delegation and may represent an abuse of delegated emergency powers.

If a court were to judicially recognize the fact that the Korean emergency has ended, it might be argued that the President, in effect, could make its decision moot by declaring a Vietnamese emergency and reissuing many of the present regulations pursuant to it. While this is true, it oversimplifies the situation. If the President were compelled to phase out declared national emergencies when the conditions underlying them disappear, several developments might occur. One is that for various periods of time there would probably be no declared national emergencies and, hence, no emergency regulations in existence. Presidents might also begin to issue responsive regulations pursuant to particular, clearly defined emergencies. Both of these developments are desirable for they focus attention on the fact that emergency delegation is not permanent but is intended to cease when emergency conditions disappear.

The danger of allowing emergency powers to assume the nature of normal presidential powers is that this process contributes to the unfettered growth of concentrated power in the Chief Executive. Section 5(b) is just one of many statutes delegating emergency powers to the President, powers ranging from arming merchant vessels<sup>75</sup> to imposing travel restrictions on American citizens.<sup>76</sup> It should be remembered that the President alone determines when and under what conditions he may exercise the extraordinary powers delegated to him. He alone declares the existence of the national emergency which gives rise to such powers. In making this declaration he is guided, if at all, only by the congressional guidelines suggested above, and is not required by the judiciary to follow even these guidelines. If he disregards the intent of Congress, it can withdraw or modify the delegated

<sup>74</sup> See *supra* note 11.

<sup>75</sup> Act of June 29, 1948 at ch. 715, § 1, 62 Stat. 1095 (repealed 1956).

<sup>76</sup> 8 U.S.C. § 1185 (1964).

powers only over a presidential veto. The dangers of this situation have not gone unrecognized. It was stated in the 1941 congressional debates relating to the amendment of section 5(b): "we have to retain power to control [the exercise of these delegated emergency powers] . . . and we have to retain the power to recapture and distribute them when the emergency is over."<sup>77</sup> In this regard the warning issued by the *Bauer* court deserves close re-examination:

It seems vital as a matter of national policy that emergency regulations and almost dictatorial powers granted or conceded in the turmoil of war, cold war, economic revolution and the struggle to preserve a balanced democratic way of life, should be discarded upon return to normal conditions, lest we grow used to them as the fittings of ordinary existence.<sup>78</sup>

One respected student of executive authority has suggested that a constitutional dictatorship can be, has been, and under proper circumstances should be, brought about through the use of such delegation of legislative authority.<sup>79</sup> However, while Presidents have enjoyed relatively unfettered power during the Civil War and both world wars, and while such powers may be necessary during active wartime conflict, they are inappropriate when such conflict has passed or during an "emergency" which by its own terms may never end despite the passing of the crisis associated with it. The dangers of broad delegations of emergency power could be reduced by providing for judicial review of emergency delegations under existing statutes. However, the position assumed by the courts indicates that judicial review in all situations, not just the obvious extremes, is unlikely to occur. A more effective approach may be the more careful structuring of statutes delegating emergency powers. Congress should establish criteria for the declaration of a national emergency and should charge courts with the responsibility of reviewing regulations issued under an emergency to assure that those criteria are met and that the regulations are responsive to the emergency. Congress should also provide either that emergencies and regulations issued pursuant to them expire automatically after a short, stated period of time,<sup>80</sup> or that Congress by joint resolution may terminate any delegation of

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<sup>77</sup> 87 Cong. Rec. 9858 (1941) (remarks of Congressman Sumners).

<sup>78</sup> 244 F.2d at 797.

<sup>79</sup> C. Rossiter, *Constitutional Dictatorship* (1948).

<sup>80</sup> Limiting emergency delegations to a short stated period of time has a curious precedent in a practice of the Roman Republic which made prominent private citizens dictators in times of crisis but limited their terms to six months and provided that they could not succeed themselves or that dictators could not exist for more than six months in a year. The six month period is explained by the fact that the Romans fought only during the summer at that time. *Id.* at 23.

emergency powers, declared emergency, or regulation issued pursuant to such emergency.

Congressional action to tighten control over the exercise of emergency powers delegated to the President must, of course, be based upon the existence of such powers in Congress. That is, the entire question of the extent of congressional control over such presidential actions depends upon whether the Constitution originally vests the power delegated in Congress or the President. Thus, before determining to what degree Congress can limit the exercise of section 5(b) powers by the President, it is necessary to determine the extent to which Congress or the President may constitutionally exercise the powers upon which the section focuses.

#### IV. CONSTITUTIONAL LIMITATIONS ON THE EXECUTIVE'S EMERGENCY POWERS

There can be no doubt that Congress, under its war powers,<sup>81</sup> can enact regulations of the sort contemplated in section 5(b) during time of war. These war powers would also authorize such action during a war-related national emergency, when war appeared imminent or during the aftermath of war.<sup>82</sup> At all other times Congress' foreign commerce and currency powers<sup>83</sup> would justify such action. Congress' ability under these powers to take actions of the sort contemplated in section 5(b) has never been challenged. Its ability to delegate authority to the President to take such actions, however, has been challenged in cases arising under section 5(b) regulations,<sup>84</sup> although these challenges have been based on the now discredited doctrine that Congress may not delegate its "legislative" powers.<sup>85</sup>

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<sup>81</sup> "War powers" is used here to describe various powers given to Congress in the Constitution, including the powers to provide for the common defense, declare war, grant letters of marquis and reprisal, make rules concerning captures on land and sea, raise and support the army and navy, provide for the militia, call forth the militia, and make such laws as are necessary and proper to carry out those powers. U.S. Const. art. II, § 8.

<sup>82</sup> See *Silesian-American Corp. v. Clark*, 332 U.S. 469 (1947).

While a natural hesitancy exists against so interpreting the war power clause as to expand its scope to cover incidents not intimately connected with war, we think reasonable preparation for the storm of war is a proper exercise of the war power. This seizure of alien property, in a time of emergency, is of that character.

*Id.* at 476.

<sup>83</sup> These include the power to regulate commerce with foreign nations, coin money, regulate the value of foreign and domestic money and make such laws as are necessary and proper to carry out those powers. U.S. Const. art. I, § 8.

<sup>84</sup> *Teague v. Regional Comm'r of Customs*, 404 F.2d 441 (2d Cir. 1968); *Sardino v. Federal Reserve Bank*, 361 F.2d 106 (2d Cir. 1966); *United States v. Von Clemm*, 136 F.2d 968 (2d Cir. 1943).

<sup>85</sup> The idea that Congress cannot delegate its "legislative" function may be traced back at least to John Locke. Locke, *Second Treatise on Civil Government*, ch. XI (1690). But it did not receive judicial sanction until the 1930's, when the Supreme Court

The Constitution also vests certain war powers in the President, the most notable of which is his designation as commander in chief

struck down the National Industrial Recovery Act of 1933 in the "Hot Oil" and "Sick Chicken" cases. *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The Court reasoned in both of these cases that Congress had delegated such sweeping powers, without setting any standards for the exercise of them, that it had abdicated its legislative responsibilities and thereby violated the principle of separation of powers. The Court has not applied these cases or the reasoning behind them since the 1930's. When the question of delegation of powers is raised it is customarily disposed of by finding that Congress has provided reasonable standards for the exercise of the delegated power, thus establishing the policy and goal for the regulations to be promulgated, and merely delegating the ministerial function of specific application. But since the standards recognized as reasonable have been so broad as to be meaningless in determining the scope and content of regulations promulgated pursuant to them, see *K. Davis*, *supra* note 55, at § 2.03, it must be concluded that the Court has turned its back on the "Hot Oil" and "Sick Chicken" cases. Professor Davis goes to the length of suggesting that a lawyer does a disservice to his client by raising the delegation issue. *Id.* § 2.01, and Professor Corwin believed that "[n]either of these precedents materially influenced Congressional policy even at the time, and both have been subsequently relegated by the Court to its increasingly crowded cabinet of juridical curiosities." *E. Corwin*, *supra* note 37, at 127. But Professor Jaffe is not as certain that the doctrine is dead:

Undoubtedly it can be argued that considered realistically, *Schechter* has been put in the museum of constitutional history. But granting the existence of a doctrine limiting delegation (and almost no court has ever denied it), the doctrine is intelligible only in terms of the degree of delegation which the judiciary regards as appropriate in the circumstances. There are still differences of degree between the NRA on the one hand and the AA and the OPA on the other. Those examples suggest—and there are others including projected legislation not passed—that *Schechter* prods Congress into awareness of its responsibility for bringing major policy decisions into focus.

*L. Jaffe*, *supra* note 55, at 71-72.

To the extent that there is a doctrine limiting the delegation of legislative power, it would not affect § 5(b) since that section has to do with foreign affairs, in which great latitude is generally allowed. This was clearly enunciated by the landmark case, *United States v. Curtiss-Wright Corp.* 299 U.S. 304 (1936). The case was an appeal from an indictment for conspiring to sell arms to Bolivia, in violation of a Joint Resolution of Congress. The Resolution prohibited the sale of arms to Bolivia and two countries then at war, and delegated to the President the power to limit the application of and make exceptions to the Resolution. The Resolution by its terms became effective only when the President, after consultation with the assurances of cooperation from other American countries, found that such prohibition would contribute to the re-establishment of peace and so proclaimed. The President's Proclamation recited that the consultations had been made, the assurances of cooperation received, and that the embargo would contribute to the re-establishment of peace. It then delegated to the Secretary of State the power to prescribe exceptions and limitations to the Resolution. The Resolution was challenged as an unconstitutional delegation of power to the President.

The Court began its analysis by assuming that the Resolution would have been unconstitutional had it related solely to internal affairs (on the assumption that the doctrines of separation of powers and of nondelegation of legislative power would govern). But it found a significant difference between the powers of the federal government with respect to internal and external affairs. The internal powers were carved out of legislative powers originally possessed by the states but given to the Congress in the Constitution. The external powers, however, were composed of various manifestations of external sovereignty, not possessed by the states prior to the Constitution, and of which only a few were specifically conferred on Congress or the President in the Constitution.

of the nation's armed forces.<sup>86</sup> This designation was originally thought of in purely military terms. Hamilton wrote in *The Federalist*:

In this respect his authority would be nominally the same as that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy: while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies.<sup>87</sup>

The commander in chief clause was largely neglected as a source of presidential power until the weeks following the fall of Fort Sumter when President Lincoln, without congressional authority, "summoned troops and paid them out of the Treasury without appro-

As to them the Court found that "if they had never been mentioned in the Constitution [they] would have vested in the federal government as necessary concomitants of nationality." *Id.* at 318. The Court found that these external, foreign relations powers vested in the President rather than in Congress as a result of the nature of their respective offices. The Court found it was

[d]ealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress.

*Id.* at 319-20.

Since many of the external, foreign relations powers are vested in the President, Congress is unrestricted in delegating to him such external, foreign relations powers as are vested in it.

The Joint Resolution under consideration in the *Curtiss-Wright* case was, of course, far different in nature from § 5(b). It related to a specific event, whereas § 5(b) is open-ended. It related to a particular type of trade with particular nations, whereas § 5(b) relates to any or all trade with any or all nations. It established particular prohibitions, whereas § 5(b) leaves it to the President to do so. Nevertheless the rationale of the *Curtiss-Wright* case has been uniformly accepted as establishing that Congress has virtually unlimited discretion in delegating foreign affairs powers to the President, despite the limited delegation of power under consideration in that case. The second circuit rested on this reading of the *Curtiss-Wright* case when the Cuba embargo was challenged as an exercise of unconstitutionally delegated power in *Sardino v. Federal Reserve Bank*, 361 F.2d 106 (2d Cir. 1966).

The claim that the statute constitutes an unconstitutional delegation of legislative power is foreclosed by *United States v. Curtiss-Wright Export Co.* . . . Although the delegation there sustained was narrower than that in § 5(b) of the Trading with the Enemy Act, the Court's opinion was not thus circumscribed.

*Id.* at 110.

<sup>86</sup> These include the designation of the President as the commander in chief of the armed forces, the power, with the advice and consent of the Senate, to make treaties, the power to appoint officers, and the duty to faithfully execute the laws. U.S. Const. art. II, §§ 2, 3.

<sup>87</sup> *The Federalist* No. 69, at 417-18 (C. Rossiter ed. 1969) (A. Hamilton).

There is evidence that debate at the Philadelphia convention over the clause and at sessions of state legislatures held to consider ratification of the Constitution centered on the advisability of allowing the President to expose himself to the dangers inherent in physically leading his troops in battle. C. Warren, *The Making of the Constitution* 530 (1937).

priation therefor . . . proclaimed a naval blockade of the Confederacy and seized ships violating that blockade.”<sup>88</sup> Such actions clearly involved matters normally governed by the powers to call the militia into service, to make appropriations, to declare war and to regulate captures on land and sea—powers vested by the Constitution in Congress.<sup>89</sup>

Lincoln justified his actions partly on the basis that Congress was not in session at the time and that the preservation of the Union required that they be taken. This justification is somewhat belied by the fact that even after Congress was assembled, Lincoln continued to use the new-found presidential war powers rather than seek a delegation of congressional authority or wait for congressional action. In addition, the President later instituted a military draft, proclaimed a national suspension of the writ of habeas corpus and issued the Emancipation Proclamation, all without congressional authorization.<sup>90</sup>

Subsequent war Presidents have not relied on their powers as commander in chief to the same extent because Congress delegated broad war powers to them in such statutes as the Trading with the Enemy Act.<sup>91</sup> But in regard to matters not covered by such statutes, Presidents have continued to take actions within the constitutional competence of Congress, relying on presidential war powers. Thus, without any statutory justification, President Wilson created the War Labor Board to prevent strikes and lockouts from interfering with the production of goods needed for the war effort during World War I,<sup>92</sup> and President Roosevelt created several agencies to deal with various aspects of the crisis during World War II.<sup>93</sup> President Roose-

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<sup>88</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 685 (1952) (Vinson, C.J., Reed, & Minton, J.J., dissenting).

<sup>89</sup> U.S. Const. art. I, § 8.

<sup>90</sup> 6 J. Richardson, *Messages and Papers of the Presidents* 96-99, 120 (1911). See generally C. Rossiter, *supra* note 79, for a concise account of President Lincoln's extraordinary presidential activities.

<sup>91</sup> Statutes of particular importance in this regard include: National Defense Act of June 3, 1916, ch. 134, 39 Stat. 166; Lever Act (Food Control) of Aug. 10, 1917, ch. 53, 40 Stat. 276; Selective Training and Service Act of Sept. 16, 1940, ch. 720, 54 Stat. 885; Lend-Lease Act of March 11, 1941, ch. 11, 55 Stat. 31 (codified at 22 U.S.C. §§ 411-19 (1964)); Emergency Price Control Act of Jan. 30, 1942, ch. 26, 56 Stat. 23; and, Second War Powers Act of March 27, 1942, ch. 199, 56 Stat. 176 (codified at 12 U.S.C. § 355 (1964); 49 U.S.C. §§ 304-10a, 911 (1964); 50 U.S.C. App. §§ 643-43c, 645-45b, 1152 (1964)).

<sup>92</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 693 (1952).

<sup>93</sup> Professor Corwin received a statement from the Executive Office of the President in April of 1942 listing 35 agencies of “purely presidential creation.” In creating most of the agencies the President had invoked his powers as commander in chief and under the First War Powers Act. But since several of the agencies were created before that Act and the Act did not authorize the creation of new offices but only a redistribution of functions, these actions were based primarily on the President's constitutional powers. E. Corwin, *supra* note 37, at 242-43.

velt also seized various industrial plants prior to the Japanese invasion of Pearl Harbor when strikes threatened to disrupt the production of needed war materials.<sup>94</sup> No statute authorized such seizures, but the President justified them by citing his constitutional war powers.<sup>95</sup>

A relatively recent example of the attempted use of these powers was President Truman's seizure of the steel industry to prevent a nation-wide steel strike during the Korean incident.<sup>96</sup> Although the Court denied him the power to make this seizure in *Youngstown Sheet & Tube Co. v. Sawyer*<sup>97</sup> ("Steel Seizure" case) the consensus of the

<sup>94</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 621 (1952).

<sup>95</sup> 89 Cong. Rec. 3992 (1943) (statement by the Attorney General read into the record by Senator Barkley).

<sup>96</sup> Exec. Order No. 10340, 3 C.F.R. 861 (Comp. 1949-53).

<sup>97</sup> 343 U.S. 579 (1952). The holding of this case and its value as precedent are difficult to determine since each of the six justices in the majority wrote a separate opinion.

The opinion of the Court, written by Justice Black, rested on the proposition that Congress could have seized the steel mills and insofar as it could have done so, the President could not do so. To support this proposition Justice Black adduces the doctrine of separation of powers, citing no precedent or governmental practice. The dissenting opinion, however, recites a long list of presidential actions, dating back to Washington's Declaration of Neutrality during the French Revolution taken without congressional authorization and judicial precedents supporting such actions. Justice Black's opinion was, as is pointed out by Professor Corwin, earmarked by "hasty improvisation as well as . . . [by] strong prepossession, being unquestionably contradicted by a long record of presidential pioneering in territory eventually occupied by Congress." E. Corwin, *supra* note 37, at 155.

The opinions of the other justices constituting the majority generally developed two lines of reasoning. They regarded the seizure in question as an exercise of the power of eminent domain, a legislative function, and therefore a power vested by the Constitution in Congress rather than in the President. Although they generally conceded that the President had such extraordinary powers in time of emergency and war that he might, under some circumstances, justifiably affect the seizure in question, they agreed that such circumstances did not exist. They also looked to Congressional measures affecting the question: the Taft-Hartley Act for settling labor disputes, which did not include seizure as an authorized method of resolution, and the Selective Service Act of 1948 and the Defense Production Act of 1956, which did authorize seizure to end labor disputes. From these and other acts they concluded that Congress had disapproved of seizure as a method of resolving labor disputes except in certain specified circumstances.

The dissenting opinion develops the case for the existence of an emergency power in the President. It centers on a recitation of presidential actions, dating to Washington's Proclamation of Neutrality during the French Revolution, taken without congressional authorization, and on judicial precedents supporting those actions. Besides stressing the President's powers as commander in chief, it points out that the president had the constitutional duty to faithfully execute numerous statutes for which the continued production of steel was necessary. The dissenting justices felt that the existing international crisis, which was aggravated by the steel stoppage, transcended the situations which the Taft-Hartley Act was designed to meet and justified the exercise of the President's emergency powers. That the dissent has a certain logic to it is suggested by the fact that it is the only opinion in which three justices could concur. The inability of the justices to agree on any one rationale for deciding the case indicates that the decision will likely be confined to its facts in the future.

six separate opinions of the justices in the majority seems not to deny that the President can take such actions under appropriate circumstances, but that Congress had already "occupied the field" with the Taft-Hartley Act of 1947 and had thereby dictated the procedures the President was to follow in resolving labor disputes.

The President's war powers, and particularly his designation as commander in chief, may enable him during wartime to take many of the actions contemplated in section 5(b) without delegation from Congress of the power to do so. Regulations typified by the China embargo and the FDIR certainly could bear as close a relation to, and be as important to the prosecution of, a war as the actions cited above of Presidents Lincoln, Wilson, Roosevelt and Truman. The same reasons that justify congressional action pursuant to congressional war powers during war-related national emergencies, when war appears imminent and during the aftermath of war, also justify presidential action pursuant to presidential war powers during such times. In this regard it should be noted that many of the examples of the President's use of his war powers cited above occurred in times other than during a declared war.

It stretches the imagination, however, to assert that the President may, at any time, issue regulations such as the FDIR in reliance on his powers as commander in chief. In the absence of imminent war such measures appear to be concerned solely with international trade and the national economy. The Constitution does not vest any powers with regard to foreign commerce or currency in the President. These are given solely to Congress, and Congress' control over them is considered plenary.<sup>98</sup> It would follow, therefore, that except as the President could justify his actions by his war powers, he could justify issuing regulations of the type contemplated in section 5(b) only by a congressional delegation of authority to him. In this regard it was held in *United States v. Guy W. Capps, Inc.*<sup>99</sup> that insofar as foreign commerce is concerned:

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<sup>98</sup> *Trustees of Univ. of Ill. v. United States*, 289 U.S. 48 (1933). The foreign commerce power would easily encompass the types of regulations envisaged by § 5(b). The power comprehends "every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend. It has been truly said, that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 193-94 (1824).

<sup>99</sup> 204 F.2d 655 (4th Cir. 1953). This case arose under an executive agreement with Canada requiring that all contracts to export potatoes from Canada to the United States contain provisions that such potatoes would be used for seed rather than table purposes in the United States. This agreement was reached in conjunction with the Agricultural Act of July 3, 1948, Pub. L. No. 80-897, 62 Stat. 1248, under which the government committed itself to purchase all domestically produced table potatoes that could not be sold at parity price for such price. The government sought damages for the breach of such a provision in an export contract. The court could have decided the case on the

While the President has certain inherent powers under the Constitution such as the power pertaining to his position as Commander in Chief of the Army and Navy and the power necessary to see that the laws are faithfully executed, the power to regulate interstate and foreign commerce is not among the powers incident to the Presidential office, but is expressly vested by the Constitution in Congress.<sup>100</sup>

This reasoning draws considerable support from early judicial attitudes toward the regulation of foreign commerce. During the French and English conflicts of the early nineteenth century,<sup>101</sup> courts faced the question whether the President could implement an embargo in the absence of congressional delegation of the authority to do so. To provide an incentive for recognition of America's rights as a neutral during those conflicts, Congress enacted an embargo against both belligerents but provided that the President could suspend its operation against either country if and when he had reason to believe that that country would observe American rights.<sup>102</sup> At one point the British Ambassador to the United States purported to arrange for British recognition of American neutral rights and President Madison suspended the embargo against England by proclamation on April 19, 1809. The British government, however, disavowed the arrangements. President Madison therefore revived the embargo against England by proclamation on August 19, 1809, although the embargo statute did

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more narrow ground of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 519, since Congress had clearly set out in the Act a procedure for dealing with the problem of imports other than the one the President adopted. The Act provided that if imports interfered with the program the President could direct the Tariff Commission to hold public hearings and could, based on the findings of the Commission, prohibit within certain percentage limits such interfering imports by proclamation.

<sup>100</sup> 204 F.2d at 659.

<sup>101</sup> At this time both contending European powers so violated the right of neutral shippers, i.e., of American merchantmen, that America was at times on the brink of war with each. Violations included the impressment of American seamen into the English navy and the seizure of American ships and cargos bound to the other power.

Indignation over impressment reached its climax in 1807 when the British warship H.M.S. *Leopard* attacked and boarded the U.S.S. *Chesapeake* and seized three crewmen. With Congress on the point of declaring war against England after this incident, President Jefferson decided that economic retaliation would be more appropriate and effective than military action and asked instead for an embargo against both England and France. Although the embargo was an economic disaster for the maritime regions of the country and politically disastrous for Jefferson's followers in those regions, it was periodically renewed until the underlying European conflict was resolved and outrages to American merchantmen consequently ceased. See L. Sears, *Jefferson and the Embargo* (1966); E. Atwater, *American Regulation of Arms Export* (1941).

<sup>102</sup> Act of Jan. 9, 1809, ch. 5, 2 Stat. 506. A series of embargo acts, listed below, beginning in 1806 succeeded one another with evolution to this act. Act of Apr. 18, 1806, ch. 29, 2 Stat. 379; Act of Dec. 22, 1807, ch. 5, 2 Stat. 451; Act of Jan. 9, 1808, ch. 8, 2 Stat. 453; Act of Apr. 25, 1808, ch. 66, 2 Stat. 499; Act of Mar. 12, 1808, ch. 33, 2 Stat. 473.

not provide a revival procedure. In a case arising from seizures pursuant to this reimposed embargo, Justice Story held in *The Orono* that the President had no inherent power to regulate foreign commerce by reviving the embargo, and that the statute had conferred no such power on him.<sup>103</sup>

The inference in *The Orono* that Congress could delegate power to the President to regulate foreign commerce was verified by the Court in *The Brig Aurora*.<sup>104</sup> This case involved a challenged seizure under a later embargo act which provided that an embargo against either England or France would arise only when the President determined that the other belligerent had ceased to violate neutral rights. President Madison determined and proclaimed on November 2, 1810, that France had ceased to violate neutral rights whereas England had not, thus raising the embargo against England. English cargo from the *Aurora* was seized pursuant to the embargo so created. The Court held that when Congress has the power to enact a measure such as an embargo, it has the concomitant power to make the effectiveness of that measure contingent on the occurrence of a certain event, including a proclamation by the President. It appears from these two cases that early judges believed that the President could not regulate foreign commerce in his own right, but that Congress could do so through any vehicle it chose, including a presidential proclamation. Although this inference lends some support to the theory of the *Capps* opinion, several trends in constitutional interpretation and analysis since 1813 render that opinion doubtful, especially as it might be precedent for actions of the kind taken under section 5(b).

The possibility of presidential actions that may usurp Congress' power to regulate foreign commerce in time of war or war-related national emergency has already been discussed, but congressional power to regulate foreign commerce in peace time also may be affected by the President's foreign relations powers. These powers derive from the Constitution and include the President's powers to make treaties, appoint ambassadors and receive foreign ambassadors.<sup>105</sup> The President's special role in foreign affairs was recognized very early in the country's history. In an argument on the floor of the House of Representatives in 1800 John Marshall said, "the President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."<sup>106</sup>

<sup>103</sup> *The Orono*, 18 F. Cas. 830 (No. 10,585) (C.C.D. Mass. 1812); see also *President's Proclamation Declared Illegal*, 19 F. Cas. 1289 (No. 11,391) (C.C.D.N.C. 1812).

<sup>104</sup> *The Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813). This case has become the basis for holding that contingency legislation is constitutionally justified.

<sup>105</sup> U.S. Const. art. II, § 2.

<sup>106</sup> 10 Annals of Cong. 613 (1800).

Although this theory had its passionate adherents at the time,<sup>107</sup> and approximates reality today, it did not accurately reflect the distribution of powers made at the Philadelphia Convention. While the President is given the power to make treaties and appoint ambassadors, he can exercise that power only with the consent of the Senate.<sup>108</sup> Although he can shape foreign policy, he can implement it only with appropriations from Congress.<sup>109</sup> And Congress is vested with the powers to regulate foreign commerce, lay duties, establish rules of naturalization, define offenses against the Law of Nations and with the ultimate power in respect to relations with foreign countries—the power to declare war.<sup>110</sup> In making this distribution of powers, the founding fathers departed markedly from the political philosophers they followed in other respects, Locke and Montesquieu, who placed the direction of foreign relations solely in the executive branch.<sup>111</sup>

In practice the direction of foreign affairs has tended to shift between the executive and legislative branches at particular times, but the executive has become progressively more dominant, so that today the President does assume supreme powers in the sphere of foreign relations. He has successfully by-passed many of the foreign relations powers vested by the Constitution in Congress. Where the Senate must confirm ambassadorial appointments, the President may send his personal emissaries on diplomatic missions without Senate approval.<sup>112</sup> Where the Senate must confirm treaties, the President may enter an executive agreement without Senate approval and achieve the same result as with a treaty.<sup>113</sup> Where Congress must declare war,

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<sup>107</sup> For an account of the sharp debate between Hamilton, a proponent of this view, and Madison, an opponent of this view, see E. Corwin, *supra* note 37, at 177-84.

<sup>108</sup> U.S. Const. art. II, § 2.

<sup>109</sup> U.S. Const. art. I, § 8.

<sup>110</sup> U.S. Const. art. I, § 8.

<sup>111</sup> J. Locke, *Two Treatises on Civil Government* §§ 145-46, 148 (1690); C. Montesquieu, *Spirit of the Laws* ch. 6 (1748).

<sup>112</sup> Thus, in 1791 President Washington deputized Gouverneur Morris to confer with the British government regarding the Treaty of Paris. Perhaps the most famous presidential emissary was Colonel House, President Wilson's man in Europe. President Nixon's recent dispatch of Governor Rockefeller to Latin America confirms that the practice is still very much alive.

<sup>113</sup> The Senate's roll in advising the President on treaties foundered in the first instance. When President Washington attempted to consult in person with the Senate regarding the terms of a proposed treaty with southern Indians, the Senate spent its energy debating the procedural manner in which it would advise the President, rather than debating the substance of the treaty. It finally referred the matter to a committee and told the President to return another day. E. Corwin, *supra* note 7, at 209-10. The advice and consent of the Senate proved so cumbersome in instances where time was of the essence, or in matters involving great technicality, that Presidents soon began to define American relations with foreign nations by executive agreements rather than by treaties, for executive agreements have the great advantage of necessitating no action by the Senate. But they are subject to abuse, enabling Presidents

the President may achieve the same result without Senate approval simply by sending troops into combat using his powers as commander in chief.<sup>114</sup> Although alarm is frequently expressed over the President's increasing disregard of Congress in formulating foreign policy, it is sometimes difficult to determine whether this alarm merely expresses basic disagreement with the President's policies rather than with his disregard of the constitutional distribution of powers.<sup>115</sup>

The President's special competence in foreign relations is well recognized by the judiciary. In the landmark case of *United States v. Curtiss-Wright Export Corp.*,<sup>116</sup> the Court found that the President has "very delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress . . ."<sup>117</sup> The Court believed this to be an appropriate allocation of power, for the President

not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of its productive or harmful results.<sup>118</sup>

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to do what has been expressly denied them the power to do. Theodore Roosevelt, for instance, entered into an executive agreement with bankrupt Santo Domingo to run that nation's customs system with American personnel to prevent its European creditors from seizing the system after the Senate had failed to consent to a treaty to the same effect. *Id.* at 212. And the Supreme Court has held that despite their possible abuses, executive agreements are nevertheless the law of the land, as are treaties. *United States v. Belmont*, 301 U.S. 324 (1937).

<sup>114</sup> Presidential actions in sending combat troops to Vietnam, Thailand, the Dominican Republic and Korea in recent years are just the latest in a long series of such actions. The power of a President to involve the nation in what can realistically only be called a war has not gone completely unquestioned. See *Holmes v. United States*, 391 U.S. 936 (1968) (Douglas, J., dissenting); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 642 (1952) (Jackson, J., concurring). A court has nevertheless sanctioned the executive's use of force abroad without the prior consent of Congress. *Durand v. Hollins*, 8 F. Cas. 111 (No. 4,186) (C.C.S.D.N.Y. 1860).

<sup>115</sup> Thus, Senator Fulbright's well-known attempts to reassert the power of the Senate over the direction of foreign policy are an interesting volte-face from his earlier view that the President's ability to pursue an effective and coherent foreign policy was hamstrung by the fragmentation of foreign policy powers among a variety of Congressional committees. See Fulbright, *American Foreign Policy in the 20th Century under an 18th Century Constitution*, 47 Cornell L. Rev. 1 (1961). This transition may reflect the Senator's growing disenchantment with our involvement in Vietnam.

<sup>116</sup> 299 U.S. 304 (1936).

<sup>117</sup> *Id.* at 320.

<sup>118</sup> *Id.* See also *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

In addition to the President's superior access to information and the frequent necessity to keep such information secret, as *The Federalist* papers point out, he is also better suited to conduct the nation's foreign affairs than Congress because he may speak with one voice rather than many, and because he is capable of continuous action rather than being in frequent adjournment.<sup>119</sup>

But in taking an action pursuant to his foreign relations powers the President does not thereby preclude Congress from the exercise of its constitutional powers. Congress may use these powers to limit a President's choices in formulating foreign policy. No President, for instance, can formulate an expansive foreign aid program if Congress will not appropriate funds for foreign aid.<sup>120</sup> And if any message emerges from the "Steel Seizure" case, it is that once Congress has expressed its will in regard to a matter within its constitutional grant of power, its determination will be binding on the President. As Justice Jackson stated in his concurring opinion:

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.<sup>121</sup>

This reasoning applies equally well whether the President is acting pursuant to his war powers or his foreign relations powers. As a practical matter, however, courts will defer considering the constitutional validity of presidential actions taken during war, and purportedly pursuant to the President's war powers, until the war crisis is passed.<sup>122</sup> Courts will not necessarily accord such deference to actions taken pursuant to the President's foreign relations powers.

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<sup>119</sup> *The Federalist*, supra note 87, Nos. 69 and 75. Of course this is not unlike the justification for the delegation of legislative power to the executive generally. See L. Jaffe, supra note 55, at 33-40.

<sup>120</sup> See *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918), where the Court stated: "[T]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative Departments . . . of the Government." See also *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 183 (2d Cir. 1967), in which the constitutionality of the Hickenlooper Amendment was upheld despite its interference with the President's "delicate, plenary and exclusive" power over foreign relations.

<sup>121</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952).

<sup>122</sup> See, e.g., *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Korematsu v. United States*, 323 U.S. 214 (1944).

From this analysis it appears that the President and Congress have "concurrent powers" over the substantive matters on which regulations are contemplated under section 5(b). The President's claims to such powers are stronger during war or war-related emergencies than during peace. Thus, in time of war the President probably has the power under the war clauses to issue many regulations of the sort contemplated by section 5(b), including the FDIR, even without a specific delegation of power from Congress. If his power to do so is not clearly established courts nevertheless are unlikely to question the authority of the President while the crisis in response to which he has acted still exists. In time of national emergency the President has similar power, and although it may be more restricted than in time of war, the extent of the restriction is unclear and may even be insignificant in the "cold war" context.

On the other hand, it is clear that the Constitution vests primary responsibility for effecting measures of the type contemplated in section 5(b), including the FDIR, in Congress rather than in the President. As a consequence, the President may be precluded from taking many such measures in time of peace without congressional authorization. Insofar as those measures affect foreign relations and have not been dealt with by prior congressional action, however, the President may have authority to act in regard to them pursuant to his foreign relations power, even in time of peace. The measures contemplated in section 5(b) and contained in the FDIR are, therefore, within the area of the concurrent powers of Congress and the President in time of war and, to a lesser extent, in time of peace. But since they are primarily within the constitutional grant of power to Congress, Congress' will should prevail over the President's in case of a confrontation between the two.

Since most of these measures are necessarily of a fluid and highly complex nature requiring quick responses to changing conditions and technical evaluations of existing conditions, they are of the type which must be exercised by the executive, whether by the President's own initiative or pursuant to a delegation of authority by Congress. On the other hand, since they have a potentially pervasive effect on the nation's entire economy and on the rights and privileges of its citizenry, under traditional democratic philosophy, the legislative branch of government should exercise ultimate control over their dimension and contour. Congress has clearly taken the first step in this direction by delegating the section 5(b) powers to the President. Regardless of the uncertainty as to the limitations of the President's power under section 5(b), it is clear from the existence of section 5(b) that he exercises that power under a mandate from, and as an agent of, Congress. Congress has provided guidelines for the exercise of that power only by inference,

and any attempt to establish guidelines for, or to revoke the delegation of power in, section 5(b) can be accomplished only over the presidential veto. While it is unlikely that such a veto is politically possible in normal times, it is quite likely that it could be politically justified in times of crisis.

#### CONCLUSION

In order to retain control over the power vested in it by the Constitution and to remove the temptation of potentially dictatorial power from the President, Congress should act to restrict the exercise of power delegated in section 5(b) and of similar emergency powers delegated to the President. Such action could take the form of legislation which would: (1) require that the President activate delegated emergency powers by declaring national emergencies only under established criteria; (2) require that regulations be promulgated pursuant to particular emergencies and be responsive to the conditions leading to the declarations of those emergencies; (3) provide for the automatic termination of declared emergencies and regulations promulgated pursuant to them after a stated period of time unless they are redeclared and repromulgated pursuant to the same criteria; (4) charge the courts with the responsibility of reviewing the declarations and redeclarations of emergencies and the promulgations and repromulgations of regulations pursuant to those emergencies to assure that they conform to the established criteria; and (5) provide that Congress, by joint resolution, may terminate any delegated emergency power as well as any emergency declared pursuant to such power and regulation promulgated pursuant to such emergency. Congressional action to tighten its control over the delegation of emergency powers in section 5(b) should evidence a congressional "occupation of the field" and preclude, at least during peacetime, presidential action except as authorized and directed by Congress.