National Emergency and the Erosion of Private Property Rights

Robert Higgs and Charlotte Twight

> Only an emergency can justify repression.
> —*Justice Brandeis*

The scope of private property rights in the United States has been greatly reduced during the 20th century. Much of the reduction occurred episodically, as governmental officials took control of economic affairs during national emergencies—mainly wars, depressions, and actual or threatened strikes in critical industries. Derogations from private rights that occurred during national emergencies often remained after the crises had passed. A "ratchet" took hold. People adjusted first their actions, then their thinking, to accommodate themselves to emergency governmental controls. Later, lacking the previous degree of public support, private property rights failed to regain their pre-crisis scope.

Emergency restrictions of private property rights are by no means of concern only to historians of the growth of governmental power. Today, emergency restrictions limit many private rights, and many more sweeping restrictions could be lawfully imposed at the President's discretion. The possibility is real. Like several presidents before him, Ronald Reagan has dipped repeatedly into the government's reservoir of emergency economic powers. The potential exists for the greatly expanded use—and abuse—of such powers.

Presuppositions

Rulers prefer more power to less, but in a liberal democracy the rulers are constrained by institutions that sustain private rights.[1]

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[1]The ideas in this section are elaborated in Twight (1983, chap. 2), Higgs (1985), and Higgs (1987, chaps. 1–4).

Specifically, private property rights place the power of resource allocation in the hands of private citizens, thereby limiting the capacity of governmental officials to shape the economy. Governmental officials have interests of their own, which are not necessarily representative of or even in harmony with the interests of people outside government. Therefore, the rulers and the ruled normally struggle in various ways to determine who will control the use of resources. The greater the scope of private property rights, the more limited is the capacity of the rulers to achieve the ends they prefer at the expense of those preferred by the citizenry.

But citizens rely on the government for certain essential services, especially for the maintenance of social order and the protection of life and property; this dependence episodically creates opportunities for governments to take over previously private rights. If national emergencies did not just happen from time to time, governmental officials would be tempted to create them. In a genuine emergency, citizens are exceptionally willing to surrender their rights to governmental officials who offer plausible promises that they will restore social order, national security, or economic prosperity by wielding extraordinary powers. War, as Randolph Bourne aptly expressed it, is "the health of the state." Business depressions also promote robust government, as do nationwide strikes in strategic industries, especially those involving essential means of transportation or communication. Under modern ideological conditions—that is, if people insist that governments "do something" to rectify perceived socioeconomic problems—national emergencies invariably witness a transfer of economic rights from private citizens to governmental officials.

For several reasons, rights taken over by governmental officials during an emergency are unlikely to revert fully to their previous holders when normal times return. First, during the emergency the government learns how to operate its command-and-control system more successfully; that is, how to get necessary information, how to resolve competing claims on resources, and how to placate and respond to the complaints of politically influential aggrieved parties. Second, the imposition of a less-than-comprehensive system of controls—for example, regulating the economy but not the exercise of religious or political rights—discredits the conservative all-or-nothing warnings that normally inhibit governmental takeovers of private economic rights by representing them as steps toward totalitarianism. Third, many people discover, not only in the government's bureaus but in the more regulated "private" sector, that the controlled economy offers its own characteristic avenues to personal success. Those who

travel happily along these avenues naturally come to regard the entire system in which they thrive as essentially desirable. Some who adapt only out of necessity are eventually won over. Of course, during the emergency the government does all it can to justify its exercise of new powers, trumpeting the necessity and virtues of its controls, belittling the attendant costs and inequities, and defaming those who criticize its policies. Such propaganda is especially likely to hit its targets during a crisis, when the dogs of patriotism howl at their loudest and citizens rally more closely around the flag. Opponents of the government's emergency measures can be stigmatized as "slackers" or "draft-dodgers" or worse; in extreme cases, they may be imprisoned, deported, or deprived of normal civil liberties.

A great emergency, therefore, produces a ratchet: At an early stage the government, responding to an urgent and widespread insistence that it "do something," takes over rights previously held by private citizens; when the crisis wanes, public attitudes—the dominant ideology, some would say—have been so altered by the experience of governmental controls and the pervasive adaptations of behavior and thinking to those controls that public support for the recovery of the private rights is insufficient to produce their full restoration. While the hard residues of crisis-spawned laws, administrative agencies, and constitutional pronouncements are important, ultimately the most significant consequence of the emergency experience is the ideological change it fosters. As William Graham Sumner (1934, p. 473) wrote, "it is not possible to experiment with a society and just drop the experiment whenever we choose. The experiment enters into the life of the society and never can be got out again."

How Emergencies Eroded Private Rights Historically

At the turn of the 20th century, Americans enjoyed a wide scope of private property rights.[2] The prevailing ideology of both elites and masses greatly emphasized economic liberty. As James Bryce (1895, pp. 536–37) observed, the typical American regarded the "right to the enjoyment of what he has earned" as "primordial and sacred." Most Americans believed that all governmental authorities "ought to be strictly limited" and "the less of government the better."

Federal officials and judges typically acted in conformity with the belief that government ought to be confined to protective functions,

[2]Documentation of the historical events described in this and the following section may be found in Higgs (1987, chaps. 5–10).

refraining from redistributionist policies and leaving citizens free to conduct their economic affairs as they pleased. There were exceptions, of course, but they only highlight how limited the government, especially the federal government, was as a rule. In *Allgeyer v. Louisiana* (165 U.S. 578 [1897] at 589), the Supreme Court articulated the prevailing sentiment, declaring that the Constitution protects

> not only the right of the citizen to be free from the mere physical restraint of his person . . . but . . . the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out [these purposes] to a successful conclusion.

When citizens were guaranteed such extensive freedom of contract, governments had little ability to fix prices and wages, restrict hours or other conditions of employment, compel collective bargaining, regulate the locations of enterprises, or set aside the terms of private agreements; nor did governments have much justification for increasing the burden of taxation. Although governments, especially at the state and local levels, increased their economic functions somewhat during the late 19th and early 20th centuries and, more importantly, the dominant ideology gradually became more sympathetic to more-than-minimal government, the economy remained essentially a market system as late as 1914.

In a violent break with American tradition, private property rights were suppressed on a wide scale during World War I. In 1916, in anticipation of a future state of war, Congress granted the President emergency powers to seize materials, plants, and transport systems. During the year and a half of official U.S. belligerency that followed, the federal government took over the railroad, ocean shipping, telephone, and telegraph industries; suspended the gold standard and controlled all international exchanges of goods and financial assets; commandeered hundreds of manufacturing plants; entered into massive economic enterprises on its own account in such varied departments as shipbuilding, wheat and sugar trading, and building construction; lent huge sums to businesses directly or indirectly; regulated the private issuance of securities; established official priorities for the use of transport facilities, food, fuel, and many other goods; fixed the prices of dozens of important commodities; intervened in hundreds of labor disputes; and conscripted nearly three million men into the army. In short, the government extensively attenuated or destroyed private rights, creating what some contemporaries called

"war socialism." The Supreme Court did nothing to restrain the government's suppression of private rights; evidently, constitutional war powers covered all cases.

Although most private rights were restored after the war, not all were. Tax rates remained higher, the tax structure was more "progressive," and the income tax became a much more important source of federal revenues relative to traditional consumption taxes. The Transportation Act of 1920, by which the government relinquished its emergency control of the railroads, came close to nationalizing them; government remained in the ocean-shipping business; and the War Finance Corporation episodically participated in the credit markets until 1925. Most significantly, the war left a legacy of ideological change. As Bernard Baruch (1960, p. 74) observed, the war experience convinced many prominent businessmen and others that "government direction of the economy need not be inefficient or undemocratic, and suggested that in time of danger it was imperative."

The next "time of danger" was occasioned not by war but by the Great Depression, a national catastrophe that Justice Brandeis called "an emergency more serious than war." After three years of widespread bankruptcies, foreclosures, and bank failures, and of rapidly falling income and massively rising unemployment, it seemed that the market economy would never recover. All classes of Americans increasingly clamored for relief.

Recalling how the government had wielded sweeping emergency powers to manage the economy during the war, many politically influential people believed that similar governmental controls could be used effectively to "fight" the depression. In 1933, the federal government launched a fleet of emergency measures: huge work-relief projects; a program to cartelize virtually all industries; abandonment of the gold standard and prohibition of private domestic monetary transactions in gold; price and production controls in agriculture; detailed regulation of securities markets; extensive federal intrusion into labor markets and union-management relations; federal production and sale of electrical power; and, before the New Deal had spent itself in 1938, a multitude of federal insurance and credit programs, Social Security pensions and welfare payments, the minimum wage, national unemployment insurance, and many other forms of governmental intervention in the market economy.

For a while the Supreme Court resisted. The National Industrial Recovery Act and the first Agricultural Adjustment Act, centerpieces of the early New Deal, were declared unconstitutional. But the Court was of two minds. In 1934, in *Nebbia v. New York*, it upheld an emergency-inspired state law fixing milk prices and imposing criminal

sanctions on those who transacted at lower prices. The Court ruled (291 U.S. 502 [1934] at 523) that "neither property rights nor contract rights are absolute." In 1935, in the *Norman* case, sustaining the government's crisis-induced abrogation of the gold standard, the Court put private contractual rights in a clearly inferior position (294 U.S. 240 [1935] at 309–10): "There is no constitutional ground for denying to the Congress the power expressly to prohibit and invalidate contracts although previously made, and valid when made, when they interfere with the carrying out of the [monetary] policy it is free to adopt."

After vacillating during 1934–36, sometimes sustaining and sometimes striking down the government's unprecedented derogations from private property rights, the Court caved in completely in 1937. Since then it has maintained that virtually any state or federal governmental interference with private property rights is constitutional. Only a law that is manifestly arbitrary and lacking any imaginable relation to a public purpose will be disallowed. In a bloodless revolution, the U.S. Supreme Court overturned constitutional protections of private property rights that had existed for 150 years.[3]

The justices were only registering the ideological transformation going on around them. The Great Depression deeply discredited longstanding beliefs in individualism, private property rights, free markets, and limited government. The New Deal gave desperate people money, jobs, and protection from market competition, for which they were grateful. More importantly, it taught many people, including a new generation of Americans who had no personal experience with anything else, to value collectivist policies and governmental promises of economic security.

Drawing on the collectivist programs and sentiments of World War I and the New Deal, the federal government during World War II built an unprecedented apparatus of economic control. Clinton L. Rossiter (1948, p. 279) concluded: "Of all the time-honored Anglo-Saxon liberties, the freedom of contract took the worst beating in the war." Governmental authorities drafted 10 million men for service in the armed forces; allocated strategic materials; established priorities for the use of transport, food, fuel, and other goods; commandeered plants and sometimes whole industries; fixed prices and rents; rationed many consumer goods; and built and operated entire new industries. In short, the free market virtually disappeared during 1942–45.

[3]On the constitutional revolution of the late 1930s, see Murphy (1972), Siegan (1980), and Karlin (1983).

While private property rights were being suppressed, the Supreme Court only approved. As Justice Douglas wrote in *Bowles v. Willingham* (321 U.S. 503 [1944] at 521), a case involving rent controls, "where Congress has provided for judicial review after the regulations or orders have been made effective it has done all that due process under the war emergency requires." But Justice Roberts, dissenting in a related case, *Yakus v. United States* (321 U.S. 414 [1944] at 458), correctly described the judicial review as "a solemn farce." The government simply did as it pleased, showing no regard for private property rights. As Rossiter (1976, p. 91) commented, "the Court, too, likes to win wars." Even when the government herded some 110,000 persons of Japanese descent, two-thirds of them U.S. citizens, into concentration camps, the Court stood aside, declaring the peremptory imprisonment of these innocent persons "in the crisis of war" to be "not wholly beyond the limits of the Constitution" (*Hirabayashi v. United States*, 320 U.S. 81 [1943] at 101). Where, one wonders, *are* the constitutional limits on governmental invasion of private rights during emergencies? During World War II, not even the most elementary private rights could withstand the government's determination to exercise emergency powers.

Enduring legacies of the war include the Employment Act of 1946, which committed the federal government to a policy of ongoing macroeconomic management; the Taft-Hartley Act of 1947, which preserved many of the federal powers first stipulated in the War Labor Disputes Act of 1943; and the Selective Service Act of 1948, which extended into peacetime the military conscription by which the government had coercively obtained the bulk of its military manpower at below-market rates during the war. The emergency rationale held sway. As a congressman (quoted by Gillam 1968, p. 509) said during the debate on the peacetime draft bill, "What we propose to do today is, under ordinary conditions, contrary to our traditions. . . . We are not living in an ordinary time. . . . We are living in a world of fear, of chaos, of uncertainty. . . ."

Most significantly, as Calvin B. Hoover (1959, p. 212) observed, the war experience "conditioned [businessmen] to accept a degree of governmental intervention and control after the war which they had deeply resented prior to it." Even under the pro-business Eisenhower administration, no serious attempt was made to overthrow the economic controls inherited from past emergencies. Having so greatly adjusted their actions and their thinking to the emergency suppression of private property rights, most Americans seemed to fear a return to a free market regime more than they feared the denial of private rights, actual and potential, under the postwar politico-economic arrangements.

A Case in Point: The Labor Market

The inverse relation of national emergency and private property rights seems clear enough. Can a closer inspection of the historical record sustain the same conclusion? We think so. Elsewhere we have described and analyzed in much greater detail the economic policies adopted during the world wars and the Great Depression (see Higgs 1987, chaps. 7–9), and we have documented the emergency ratchet with regard to private rights in international trade, a glaringly clear case (see Twight 1985).

Here we shall extend our examination of the historical record by looking at the emergency ratchet as it pertains to private rights in labor markets. Before World War I, private transactors possessed extensive freedom of contract in labor markets. Today, such rights are greatly attenuated by, inter alia, many federal restrictions: minimum wage law, wage-and-hour laws, compulsory collective bargaining laws, retirement and pension laws, anti-discrimination laws, and others. How did the American people get from there to here?

So far as federal restrictions are concerned (state and local restrictions have a much longer and more complicated history), the first significant step was taken in 1916 with the passage of the Adamson Act. The railroad-operating brotherhoods had demanded a reduction of the standard working day from 10 to 8 hours without any reduction in daily pay. Caught between the unions' impending increase of railroad labor costs and the Interstate Commerce Commission's (ICC's) stubborn restraint of railroad rates and fares, the employers refused to accept the proposal; the unions scheduled a nationwide strike. The prospect of such a calamitous work stoppage terrified President Wilson, who decided to intervene. Failing to bring the two sides into agreement, Wilson induced Congress, which was controlled by his fellow Democrats, to enact legislation establishing the eight-hour day with daily pay unchanged, that is, mandating a 25 percent increase in the wage rates of operating employees of interstate railroad companies (39 *Stat.* 721, 3, 5 Sept. 1916). With this legislative action, as Jonathan R. T. Hughes (1977, pp. 138–39) wrote, the nation began a "long and irregular movement away from the ideal of the wage bargain as a sacred bond between the employer and the individual employee"—in particular, a movement away from federal support for private rights of contract in the labor market.

The emergency of the threatened railroad strike in the winter of 1916–17 merged immediately into the emergency of economic mobilization after the American declaration of war the following April. Unsatisfied with their recently mandated wage increase, the railroad-operating brotherhoods renewed their threat to strike toward the end

of 1917. The railroad companies, still caught between the unions' wage pressure and the ICC's rate restraint (with threats of antitrust prosecution further complicating the situation and impeding cooperation among the companies) struggled ever more unsatisfactorily to meet the extraordinary demands for service occasioned by the government's massive, ill-coordinated procurement program. Traffic slowed and facilities grew increasingly snarled. Knowing no other way to break the impasse, which was almost entirely of the government's own creation, President Wilson took over the railroad industry under the powers granted to him by the Army Appropriations Act of 1916. "It was done," wrote Treasury Secretary William G. McAdoo (1931, p. 458), only "as an imperative war measure." McAdoo, who became the Director-General of the Railroad Administration, soon ordered substantial increases of railroad wage rates. The Railroad Administration's resulting losses were conveniently covered by drawing on the U.S. Treasury.

Beyond the railroad industry, the government faced the same threat that strikes might cripple its mobilization of resources for war purposes. During 1917, there were an unprecedented 4,450 work stoppages (U.S. Bureau of the Census 1975, pp. 178–79). To allay the threat, the Wilson administration adopted a policy of supporting union organization and compulsory collective bargaining, the eight-hour day, and union work rules. If necessary, employers could be indemnified by cost-plus contracts with governmental procurement agencies. In 1918, a National War Labor Board was created to intervene in labor-management bargaining and bring the collective agreements into forms acceptable to the government. In extreme cases, the President and his lieutenants threatened to draft recalcitrant unionists or to commandeer plants owned by recalcitrant employers. Legacies of the government's wartime labor policies included the Railroad Labor Board, an agency created by the Transportation Act of 1920, and the Railway Labor Act of 1926 and of 1934.

When the Great Depression of the early 1930s prompted the Roosevelt administration to devise an emergency industrial relief program, the labor provisions of the Wilsonian war policy reappeared—a sop to unionists to keep them from opposing the cartels being established for producers. Along with clearly specified collective bargaining rights, the labor provisions of the National Industrial Recovery Act (48 *Stat.* at 198–99) provided "that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President." So much for freedom of contract in the labor market. The Supreme Court invalidated the NIRA early in 1935, but Senator

Robert Wagner and his congressional colleagues quickly enacted the National Labor Relations Act to preserve governmental support for compulsory collective bargaining. Three years later the Fair Labor Standards Act established minimum-wage and wage-and-hour provisions similar to those lost when the NIRA was struck down.[4]

The next great emergency, World War II, brought much greater attenuation of private rights in the labor market. Ten million men were drafted into the armed forces. A War Manpower Commission made various attempts to impede labor mobility, reallocate workers, and control hiring practices; at one point it issued a "work-or-fight" order, threatening men in "nonessential" jobs with conscription. The National War Labor Board intervened extensively in collective bargaining negotiations, generally supporting union demands for representation and backing up its authority with dozens of seizures, some involving entire industries (coal mining and, no surprise, railroads). Irritated by strikes in strategic industries and most of all by John L. Lewis's plain defiance of the President, Congress enacted the War Labor Disputes Act of 1943. This law, inter alia, expanded the President's power to seize production facilities. (The Taft-Hartley Act of 1947 drew heavily on the provisions of the wartime labor law.)

Proposals for compulsory universal service received serious consideration during 1943–45 (FDR himself favored such a system)but Congress never enacted any of the proposed bills. Military conscription, on the other hand, became firmly entrenched. After the war, "temporary, emergency" extensions of the draft followed in succession. Not until the early 1970s did the government abandon its use of coercion to secure the manpower deemed necessary for national defense. Today's registration requirement makes clear, however, that the government stands ready to reinstate the military draft whenever political authorities deem it expedient. Young men no longer hold a constitutionally guaranteed right of ownership over their bodies, their labor power, or their lives.

It would not be difficult to relate the additional federal attenuation of private labor-market rights during 1964–74 (Civil Rights Act, Age Discrimination in Employment Act, Economic Stabilization Act of 1970, Occupational Safety and Health Act, Equal Employment Opportunity Act, Employee Retirement Income Security Act) to the

[4]In the interest of brevity, we only mention the New Deal's massive work-relief programs, emergency measures that established a permanent precedent for the federal government to function as an employer of last resort. Legacies include the Employment Act of 1946, the Comprehensive Employment and Training Act, and other such intrusions in the labor markets.

quasi-emergency conditions that prevailed during the Great Society-Vietnam War era, a time of race riots, antiwar protests, massive public demonstrations, and political assassinations. But enough has already been shown to establish a clear historical link between national emergency and the attenuation of private property rights in the labor market. The landmark federal intrusions in this area occurred when governmental officials undertook to "do something" to deal with conditions widely regarded as national emergencies—great strikes, war mobilization, deep depression. And doing something almost always meant transferring rights from private citizens to governmental officials.

How Emergency Powers Continue to Be Exercised

Until the late 1970s, unrevoked presidential declarations of national emergency, left over from long-past crises, continued to sustain extraordinary governmental authority. As late as 1976 the national emergencies declared by Roosevelt in 1933 and by Truman in 1950 had not been terminated. After the end of the Korean War, even though economic and political conditions in the United States were often as normal as possible in an age of Cold War and nuclear weapons, the government continued to use a fictitious emergency rationale to augment its statutory power—and thereby to diminish the scope of private property rights.

Few people worried about the emergency-spawned powers until the Nixon years. President Nixon himself added to the perpetual official crisis by declaring national emergencies in order to deal with the postal workers' strike in 1970 and the balance-of-payments "crisis" in 1971. These declarations remained unrevoked when their precipitating crises passed. Only when the Watergate scandal and Nixon's impoundment of congressionally authorized funds engendered widespread fear of an imperial presidency did Congress begin to investigate seriously the web of governmental authority spun on the pillars of unrevoked executive declarations of national emergency.

In 1973, the Senate created a Special Committee on the Termination of the National Emergency (subsequently redesignated the Special Committee on National Emergencies and Delegated Emergency Powers) to investigate the matter and to propose reforms. Ascertaining the continued existence of four presidential declarations of national emergency, the Special Committee (U.S. Senate 1973, p. iii) reported:

> These proclamations give force to 470 provisions of Federal law. . . . taken together, [they] confer enough authority to rule the country

> without reference to normal constitutional processes. Under the powers delegated by these statutes, the President may: seize property; organize and control the means of production; seize commodities; assign military forces abroad; institute martial law; seize and control all transportation and communication; regulate the operation of private enterprise; restrict travel; and, in a plethora of particular ways, control the lives of all American citizens.

Yet, there was no statutory definition of what constitutes an emergency; as with the fabled emperor's clothes, the assertion could belie the reality. As its investigation proceeded, the committee repeatedly voiced concern about both the longevity of the claimed emergencies and the use of a single national emergency decree to effectuate widely scattered emergency powers wholly unrelated to the emergency at hand.

The ultimate outgrowth of the committee's work was the enactment of two significant laws: the National Emergencies Act (NEA) of 1976 and the International Emergency Economic Powers Act (IEEPA) of 1977.[5] The NEA represented an attempt to reassert congressional control over burgeoning national emergency authority. Terminating all existing national emergencies two years after its enactment, it permits future presidential declarations of national emergency only under strict procedures guaranteeing periodic executive and congressional review of each emergency decree. The act also requires that no statutory authority contingent on a state of emergency be triggered by a national emergency decree unless the President specifically states his intent to exercise authority under that particular statute. Moreover, the act declares that national emergencies may be terminated by concurrent resolution of Congress as well as by presidential proclamation or automatic lapse if not renewed annually by the President.

As originally enacted, the NEA *exempted* Section 5(b) of the Trading with the Enemy Act (TWEA) from its provisions, simultaneously mandating immediate congressional review of national emergency powers and programs under that authority. The exemption was significant because since 1917 the TWEA had given the President virtually unlimited power during war or (since 1933) other national emergencies to regulate or prohibit transactions in foreign exchange or international credit as well as purely domestic banking activities. As Representative Jonathan Bingham (U.S. House of Representatives

[5]National Emergencies Act, Pub. L. 94-412, 90 *Stat.* 1255 (Sept. 14, 1976), codified as 50 *U.S.C.*, Sections 1601–51 (1976); International Emergency Economic Powers Act, Pub. L. 95-223, 91 *Stat.* 1625 (Dec. 28, 1977), codified as 50 *U.S.C.*, Section 1701 et seq. (1976 ed., Supp. V, 1981).

1977a, p. 5) later described it, "the TWEA was so broad that the President could do virtually what he wanted under it under any kind of an emergency and it did not have to involve war or hostility or anything else." The congressman believed these powers to be "enormously broad" and potentially "dictatorial" and worried that they could be employed "without any restraint by the Congress."

In the 1977 TWEA committee hearings, the clash between members of Congress seeking to control this executive power and officials of the executive branch intent on sustaining it became intense. Incredulous congressmen learned the full reach of executive encroachments on private property rights undertaken in the name of obsolete emergency decrees, as the exchange between Representative Bingham and State Department official Julius Katz illustrates (U.S. House of Representatives 1977b, p. 110):

> Mr. BINGHAM. Mr. Katz, what is the national emergency currently facing us which warrants the use of powers under the Trading with the Enemy Act? . . . What is the national emergency today?
>
> Mr. KATZ. It continues to be the emergency involving the threat of Communist aggression which was declared in 1950 at the time of the aggression in Korea.
>
> Mr. BINGHAM. *Are you serious?*

Moments later, referring to "this 'Alice in Wonderland' situation that we are in today with the Trading With the Enemy Act," Bingham (pp. 111–12) complained that

> the administration wants to continue exercising powers which in the mind of any fair-minded observer . . . are totally unrelated to the purposes of the act. We don't know who the enemy is that we are talking about. We don't have an emergency that is current. . . . we are playing fast and loose with the Constitution. We are relying on an emergency that does not exist to justify a taking, or actions taken by the administration.

Ultimately, even administration witnesses acknowledged the historical vulnerability of private rights to the political imperatives of crisis as reflected in the evolution of the TWEA. Treasury official C. Fred Bergsten, a key administration spokesman on the issue, said that he was "keenly aware" that "on several occasions section 5(b) has been hurriedly broadened during moments of national crisis, such as the banking emergency in 1933 and World War II breakout in 1941, during which cases very little attention, frankly, was given to procedural safeguards consonant with the constitutional balance of power" (U.S. Senate 1977, p. 2).

To narrow the TWEA's exemption from the NEA, Congress passed the IEEPA in 1977. Viewed broadly, the effect of its enactment is to

separate presidential power over transactions previously covered by Section 5(b) into two categories. The TWEA is amended to authorize presidential action exclusively during wartime, while the IEEPA becomes a repository for executive economic power wielded during other national emergencies. Significant also is the IEEPA's restriction that the emergency powers it authorizes apply to international transactions only. Withheld are the purely domestic emergency powers previously exercised under the all-inclusive TWEA.

Presidential emergency authority over international transactions, however, remains virtually unchanged. In language parallel to the wartime provisions of the TWEA, the IEEPA grants the President emergency authority to

> (A) investigate, regulate or prohibit—
> (i) any transactions in foreign exchange,
> (ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,
> (iii) the importing or exporting of 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;
> by any person, or with respect to any property, subject to the jurisdiction of the United States.

These copious powers are to be used "to deal with any unusual and extraordinary threat, which has its source in whole *or substantial part* outside the United States, to the national security, foreign policy, *or economy* of the United States, if the President declares a national emergency with respect to such threat."[6]

Although the President's emergency authority over international transactions retained its previous scope, the power to effect the requisite emergency was narrowed. In enacting the IEEPA, Congress repealed the exemption that had shielded Section 5(b) of the TWEA from the NEA. The IEEPA thus guaranteed that *future* declarations of national emergency within its scope would be subject to the NEA and that current "emergencies" could be terminated as specified in that statute. Nevertheless, *existing uses* of Section 5(b) powers continued to be insulated from the NEA by provisions enabling the President to extend current Section 5(b) programs annually upon

[6]50 *U.S.C.*, Section 1701(a) (1976 ed., Supp. V, 1981), emphasis added.

executive determination that such extension "is in the national interest"—that is, without the necessity of a continuing national emergency. Existing Section 5(b) programs included the Foreign Assets Control Regulations (restricting American citizens' rights to enter into trade or financial transactions with citizens of North Korea, Vietnam, Cambodia, and, to a lesser extent, China), Cuban Assets Control Regulations, Transactions Control Regulations (prohibiting U.S. citizens from engaging in certain transactions involving strategic goods of foreign origin), and Foreign Funds Control Regulations (affecting assets of citizens of East Germany, Czechoslovakia, Latvia, Lithuania, and Estonia that were blocked during World War II).

How well have the NEA and the IEEPA served their intended purpose? In the decade since their enactment, the attempted curtailment of executive power has proved to be significantly less successful than the statutory language suggested it would be.

In one sense, the dramatic and frequent use of executive emergency power that persists under the two statutes speaks for itself. President Carter and President Reagan have declared national emergencies repeatedly to impose sweeping economic restrictions on the dealings of Americans with citizens of other nations, including Iran, Nicaragua, South Africa, and Libya. Most recently, invoking the NEA and the IEEPA, President Reagan declared a national emergency to warrant a prohibition of the economic activities of Americans in Libya and ordered all U.S. citizens residing in Libya to leave or face criminal sanctions. Also under claim of national emergency, President Reagan recently used the IEEPA to sustain an important trade restriction, the Export Administration Act, for more than a year during which Congress had allowed it to expire.

The Libyan episode is particularly revealing of the fundamental issues involved in recent emergency declarations. Although the President and the popular press invite us to view the restrictions as impinging on the Libyan government, in reality the emergency decrees restrict the rights of American citizens. In his Executive Order 12543 of January 7, 1986 (51 *Fed. Reg.* 875, Jan. 9, 1986), President Reagan explicitly forbade U.S. citizens to engage in

> (a) The import into the United States of any goods or services of Libyan origin. . . ;
>
> (b) The export to Libya of any goods, technology (including technical data or other information) or services from the United States. . . ;
>
> (c) Any transaction by a United States person relating to transportation to or from Libya; . . . or the sale in the United States by any person holding authority under the Federal Aviation Act of any transportation by air which includes any stop in Libya;

> (d) The purchase by any United States person of goods for export from Libya to any country;
>
> (e) The performance by any United States person of any contract in support of an industrial or other commercial or governmental project in Libya;
>
> (f) The grant or extension of credits or loans by any United States person to the Government of Libya, its instrumentalities and controlled entities;
>
> (g) Any transaction by a United States person relating to travel by any United States citizen or permanent resident alien to Libya, or to activities by any such person within Libya, after the date of this Order, other than transactions necessary to effect such person's departure from Libya. . . ; and
>
> (h) Any transaction by any United States person which evades or avoids, or has the purpose of evading or avoiding, any of the prohibitions set forth in this Order.

Whatever one's views of the events that prompted the President's actions, one cannot escape the conclusion that the economic activities of *Americans*, not Libyans, are controlled directly by the emergency restrictions. It became evident that the valuable investments of Americans in plant and equipment stood a good chance of being relinquished to the Libyan government, without compensation, by the terms of the President's executive order (see Kempe 1986a).

Caught in its own snare, the Reagan administration changed the program, making exceptions to and deferrals of its original orders in hopes of avoiding the enormous financial gains to Qadhafi's regime that rigid enforcement of the edicts would create (see Greenberger 1986 and Kempe 1986b). While observing the government's confused thrashing, one might well have reflected on who was supposed to suffer as a result of the emergency economic sanctions and on whether or not such suffering could reasonably be expected to result from such restrictions of American rights. These events prompt one to wonder about what events might provoke a charismatic President to impose sanctions that selectively restrict the property rights of an unpopular subgroup of Americans—such as the Japanese-Americans in 1942—under the pretext of emergency.

The Constitutionality of Emergency Powers

Are emergency powers constitutional? The short answer is yes. One sense of "constitutional" is whatever the government makes a practice of doing. Since the federal government took emergency action to head off the threatened railroad strike in 1916, it has repeat-

edly exercised emergency powers. To conduct a practice for 70 years is to establish that it is not simply an aberration.

Another meaning of "constitutional" is whatever accords with the U.S. Constitution. Ours is a written document that completely enumerates the powers that may be exercised by the federal government. The Tenth Amendment guarantees that powers not explicitly assigned to the central government nor prohibited to the state governments belong to the states and the people. The Constitution makes no provision for the exercise of emergency powers. Evidently, it was meant to govern the actions of federal authorities in foul weather as well as in fair. How, then, has it been possible for federal officials to exercise—eventually as a matter of routine—extraordinary powers for which the Constitution provides no warrant?

The answer lies in a third meaning of "constitutional"; that is, whatever the Supreme Court allows. The Court has ruled on several occasions on the permissibility of emergency powers; these decisions constitute a melancholy chapter of constitutional history, a record of evasion and capitulation of the judicial function against which many justices on the minority side have objected.

The first modern ruling, still a leading precedent, was handed down in *Wilson v. New* (243 U.S. 332 [1917]), a case arising from a challenge to the government's emergency appeasement of the railroad unions in 1916. By a 5-4 margin, the justices upheld the government's actions. Speaking for the Court, Chief Justice White (pp. 350–51) argued that the Adamson Act was a legitimate exercise of the legislative will "to the end that no individual dispute or difference might bring ruin to the vast interests concerned in the movement of interstate commerce. . . ." The dispute, he observed, "if not remedied, would leave the public helpless, the whole people ruined and all the homes of the land submitted to a danger of the most serious character."

The Chief Justice (pp. 348, 352) repeatedly emphasized the gravity of the circumstances prompting the Adamson Act: "the impediment and destruction of interstate commerce which was threatened" and "the infinite injury to the public interest which was imminent." Oddly, he took pains to *deny* that the emergency *per se* gave rise to the government's authority under the act: "although an emergency may not call into life a [constitutional] power which has never lived," he reasoned, "nevertheless emergency may afford a reason for the exertion of a living power already enjoyed." In view of the unprecedented character of the government's actions, White's distinction was a most delicate one; not everyone could see the sense of it.

The dissenting justices declared that emergency conditions, however threatening, could not excuse the denial of constitutional rights.

In their view, the Constitution had been adopted to protect private property *especially* under such conditions. "The suggestion," wrote Justice Pitney (pp. 376–77), that the Adamson Act "was passed to prevent a threatened strike . . . amounts to no more than saying that it was enacted to take care of an emergency. But an emergency can neither create a power nor excuse a defiance of the limitations upon the powers of the Government." Despite their strong arguments, the dissenters could do no more than register their dissatisfaction. The majority's curious doctrine, that emergencies may call forth extraordinary powers from some previously untapped yet still legitimate reservoir, carried the day and established the precedent.

A broad construction of the war powers excused the government's suppression of private rights during World War I, but legal challenges persisted into the postwar era. In the spring of 1921, the Supreme Court ruled that a rent-control ordinance that Congress had imposed in late 1919 in the District of Columbia—"its provisions were made necessary by emergencies growing out of the war"—"was not, in the prevailing circumstances, an unconstitutional restriction of the owner's dominion and right of contract or a taking of his property for a use not public." The ruling, which emphasized the temporariness of the disputed rent controls, seemed to the dissenters to open the door to all kinds of governmental restrictions of the private right of contract. "As a power in government," wrote Justice McKenna, "if it exist at all, it is perennial and universal. . . . necessarily, if one contract can be disregarded in the public interest every contract can be. . . . other exigencies may come to the Government making necessary other appeals."[7] Indeed they would.

Early in 1934 the Court issued what is perhaps the classic decision on the emergency powers of government and the protection to be afforded or withheld from private property rights during economic crises (*Home Building and Loan Association v. Blaisdell*, 290 U.S. 398 [1934]). The case involved a legislative moratorium—one of 25 such state laws enacted during 1932–33—on mortgage foreclosures

[7]Block v. Hirsch, 256 U.S. 135 (1921) at 136, 168–69. Also Marcus Brown Holding Company, Inc. v. Feldman et al., 256 U.S. 170 (1921). Not until 1923 did the Supreme Court decide that the emergency had passed and refuse to validate a 1921 extension of the 1919 rent-control act in the District of Columbia (see Chastleton Corp. v. Sinclair, 264 U.S. 543 [1924]). Commenting on this decision, Edward S. Corwin (1947, p. 83) wrote: "The power of the Court to take notice of an emergency is, it appears, a two-edged sword, but its anti-government edge descends only after the emergency is over." Fifty years after the court ruled on *Block* and *Marcus Brown*, these decisions were employed to establish the constitutionality of a Rent Control Enabling Act when the government of Cambridge, Massachusetts, declared a "housing emergency" and imposed local rent controls. See Navarro (1984, pp. 14, 302).

(see Alston 1984). A statute approved by the government of Minnesota on April 18, 1933, under ominous pressures by indebted farmers, declared an economic emergency and extended temporarily the period during which creditors were prevented from foreclosing on and selling mortgaged real estate. At the discretion of local courts the owners of foreclosed property could be allowed up to two years to redeem their property. During the extended redemption period the mortgagor was required to pay the mortgagee what amounted to rent, but the mortgagee was deprived of the right to take control over the property. The Home Building and Loan Association of Minneapolis challenged the law as an unconstitutional impairment of the obligation of contract. Its position was upheld by a county court but overturned by the state supreme court; the case then came before the U.S. Supreme Court on appeal.

The main issue was whether emergency conditions justified the exercise of otherwise unconstitutional powers by a state government. The most compelling precedents for an affirmative answer were *Wilson v. New* and the 1921 rent-control cases. The force of the rent-control decisions was uncertain, however, as Justice Holmes had previously declared that "they went to the very verge of the law" (*Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 [1921]). Counsel for the state of Minnesota conceded (290 U.S. at 409) that "in normal times and under normal conditions" the state's moratorium law would be unconstitutional. "But these," he urged, "are not normal times nor normal conditions. A great economic emergency has arisen in which the State has been compelled to invoke the police power. . . ." The justices would have to decide again whether or not an emergency altered the protections of the Constitution and, if so, what qualified as an emergency. Their decision could have wide repercussions, because virtually all of the important federal statutes enacted during Franklin D. Roosevelt's first 100 days had appealed to emergency conditions, evidently with an eye toward the Supreme Court (see Clark 1934 and Belknap 1983).

Although the Court upheld the Minnesota moratorium law and by implication all the others, it failed to clarify whether or not an emergency justified setting aside the constitutional protection of private property rights. Perhaps the most important aspect of the decision is simply that state infringement of contractual obligations was validated. Paradoxically, however, the Court *denied* that it had sustained the Minnesota statute because of emergency (290 U.S. at 425, 426, 428, 437, 440–41, 444). "Emergency does not create power," said Chief Justice Hughes, speaking for the five-man majority. "Emergency does not increase granted power or remove or diminish the

restrictions imposed upon power granted or reserved." What could be plainer? Yet, wrote Hughes, referring to the slippery doctrine enunciated in *Wilson v. New*, "while emergency does not create power, emergency may furnish the occasion for the exercise of power." The prohibition of governmental intervention guaranteed by the Contracts Clause, he added, "is not an absolute one and is not to be read with literal exactness like a mathematical formula. . . . The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts." Any doubts about the capaciousness of the police powers of the state government and the implied limitation on the protection of private contractual rights, he believed, should have been removed by the rent-control decisions, where "the relief afforded was temporary and conditional . . . sustained because of the emergency." The Chief Justice insisted that "the reservation of the reasonable exercise of the protective power of the State is read into all contracts. . . ." He concluded: "An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the State to protect the vital interests of the community."

The four dissenting justices disagreed emphatically (pp. 448, 465, 471). "He simply closes his eyes to the necessary implications of the decision," said their spokesman, Justice Sutherland, "who fails to see in it the potentiality of future gradual but ever-advancing encroachments upon the sanctity of private and public contracts." The correct doctrine, they believed, was to be found in the classic decision of *Ex parte Milligan* (1866), which declared constitutional guarantees and restrictions to be absolutely invariant with respect to emergencies or any other social conditions. Quoting from a considerable collection of historical works, Sutherland established that the framers had intended the Contracts Clause to apply *"primarily and especially"* during economic crises; a crisis similar to the current depression had provoked them to add it to the Constitution in the first place. "The present exigency is nothing new," Sutherland pointed out. The rent-control decisions were dismissed as too weakly justified at the time and as dealing with a matter too dissimilar to the present one to afford a binding precedent.

The dissenters on the Court rejected Hughes's sophistical distinction between genuine emergency powers and reserved powers brought into play by emergency conditions (pp. 473–74):

> The question is not whether an emergency furnishes the occasion for the exercise of that state power, but whether an emergency furnishes an occasion for the relaxation of the restrictions upon the power imposed by the contract impairment clause; and the difficulty

> is that the contract impairment clause forbids state action under any circumstances, if it have the effect of impairing the obligation of contracts. . . . The Minnesota statute either impairs the obligation of contracts or it does not. If it does not, the occasion to which it relates becomes immaterial, since then the passage of the statute is the exercise of a normal, unrestricted, state power and requires no special occasion to render it effective. If it does, the emergency no more furnishes a proper occasion for its exercise than if the emergency were non-existent. And so, while, in form, the suggested distinction seems to put us forward in a straight line, in reality it simply carries us back in a circle, like bewildered travelers lost in a wood.

The dissenting opinion concluded: "If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned." The dissenters feared that the Court, to facilitate the extraordinary governmental measures being implemented at all levels, had begun to abandon the Constitution by embracing a reinterpretation so sweeping as to effectively destroy the traditional understanding and force of the constitutional protection of private rights.

During the Korean War, the Court had another occasion to consider its doctrine regarding emergency powers. President Truman, placed in an uncomfortable political position by a deadlocked union-management dispute that threatened a nationwide strike, directed the Secretary of Commerce in April 1952 to seize and operate several steel mills. The owners obtained an injunction to prevent the seizure. The Supreme Court upheld the injunction by a 6-3 vote in the *Youngstown* case decided June 2, 1952 (343 U.S. 579).

Although the Court denied Truman—by that time a very unpopular President—a power previously exercised freely by Wilson and FDR, the decision did not impose a restriction on the *government's* power to take private property in an emergency; it restrained only a *presidential* taking without specific statutory authorization (pp. 587, 653, 700). As Justice Black said in announcing the majority's opinion, "This is a job for the Nation's lawmakers, not for its military authorities." In a concurring opinion, Justice Jackson emphasized "the ease, expedition and safety with which Congress can grant and has granted large emergency powers." Neither the majority nor the minority gave any weight to private property rights. While the majority objected only to Truman's presidential high-handedness, the minority grumbled that "such a [presidential] power of seizure has been accepted throughout our history." The Constitution was read in this case, as in many orders, not as a bulwark against governmental oppression of private citizens but as the institutional setting within

which high officials in the different branches of government conduct their internecine struggles for supremacy.

By enacting the NEA and the IEEPA, Congress sought to institutionalize its regulation of the presidential exercise of emergency powers, but the Supreme Court has recently breathed new life into those powers, countermanding restraints codified in the 1976 and 1977 statutes. In 1983, the Court ruled in *Immigration and Naturalization Service v. Chadha* (103 *S. Ct.* 2764) that Congress may not use a one-house resolution *or any other method short of the full constitutional requirements for enactment of legislation* to overturn a decision delegated to the President. By implication, the ruling invalidated the use of a concurrent resolution, as provided in the NEA, as a restraint on the presidential exercise of emergency authority. Congress might have foreseen this outcome. In hearings on national emergency legislation in 1977, members of Congress were warned by administration witnesses and legal scholars that the proposed use of the concurrent resolution was constitutionally vulnerable. Against this background, skeptics might argue that Congress adopted the provision in order to achieve the appearance rather than the reality of congressional control. Whatever the congressional intention may have been, in *Chadha* one potential counterweight to the President's use of emergency powers was demolished by the judicial interpretation of the doctrine of separation of powers.

More significantly, the Supreme Court's two recent decisions directly involving the IEEPA all but gutted certain congressional constraints on presidential power set forth in the NEA. In *Dames & Moore v. Regan* (101 S. *Ct.* 2972 [1981]), the Court gave broad construction to the President's power to act under the IEEPA, endorsing President Carter's use of that act first to block Iranian funds and later to compel their return to Iran (thereby nullifying certain attachments issued by U.S. courts) as part of his effort to secure the release of American hostages. Noting other disputes over Carter's attempt to nullify Americans' legal claims to Iranian assets, the Supreme Court quoted approvingly a lower court's ruling in upholding these powers that "the language of IEEPA is sweeping and unqualified."[8] The Supreme Court (101 *S. Ct.* at 2983) ruled that the President did have the power to nullify the judicial attachments of Iranian assets secured by the American petitioners: "We . . . refuse to read out of Section 1702 [of the IEEPA] all meaning to the words 'transfer,' 'compel,' or 'nullify.' . . . both the legislative history and cases interpreting the TWEA fully

[8]Chas. T. Main Int'l. Inc. v. Khuzestan Water & Power Authority, 651 F. 2d 800 (1st Cir., 1981) at 806–807.

sustain the broad authority of the Executive when acting under this congressional grant of power."

Equally significant was the Court's ruling on the scope of executive power to deal with such foreign policy disputes in the *absence* of statutory authority. While holding that President Reagan lacked statutory authority under the IEEPA to "suspend" U.S. citizens' claims against Iran pursuant to President Carter's agreement with the Iranian government, the Court nevertheless ruled that the President did not lack *constitutional* power to terminate the claims. Citing with approval Justice Frankfurter's statement in *Youngstown* that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'Executive Power,' " the Court held that "where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims" (pp. 2990–91).

Lest anyone think that the judges did not understand the economic consequences of their decision, the Court rationalized its invalidation of the property rights involved by referring to the Iran-United States Claims Tribunal as an alternative forum established to provide relief in these cases. While unabashedly admitting that the American claimants had scant chance of success before the Claims Tribunal, the justices offered the consolation that the deprived parties "may well recover something on their claims" (p. 2990).

Further erosion of the NEA and the IEEPA came in *Regan v. Wald* (104 S. *Ct.* 3026), decided by the Supreme Court on June 28, 1984. At issue was the scope of the "grandfather" provision of the IEEPA, which exempts "existing uses" of Section 5(b) powers from the NEA's restrictions. The dispute arose over use of the Cuban Assets Control Regulations, first promulgated under the old TWEA, to prohibit Americans from engaging in economic transactions related to tourist and business travel to Cuba. At the time of the IEEPA's enactment, such transactions were permitted under a general license issued by the Treasury Department. In 1982, without a presidential declaration of national emergency or executive compliance with the procedures of the NEA and the IEEPA, the Treasury Department changed the regulations to prohibit most of the transactions. The issue before the Court was whether or not the dramatic change in the regulations was covered by the grandfather provision of the IEEPA and, therefore, exempt from the NEA procedures.

The issue had been discussed in congressional hearings on the IEEPA. The original grandfather proposal contained language that would have grandfathered not only existing uses of statutory authority but also any other authority exercised to deal with the same set of circumstances. Representative Bingham balked at such a broad formulation; he wondered "why it should be necessary to give [the President] authority to expand what has already been done." His understanding was that "grandfathering applies to *what has been done to date*, and that should be ample authority." The subcommittee's staff director, Roger Majak, responded that "it boils down to a question of whether we are grandfathering a particular situation, and all the powers that may be necessary to deal with the situation, or whether we are grandfathering the particular authorities themselves and their usage" (U.S. House of Representatives 1977b, p. 167, emphasis added). The upshot of the discussion was that the language of the grandfather provision was changed, eliminating any reference to the use of other authorities relevant to existing situations. A stripped-down clause emerged, grandfathering only "existing uses" of Section 5(b) authorities.

When the bill was presented for markup before the full House Committee on International Relations, Bingham stated unequivocally: ". . . we have grandfathered in *those actions currently being taken* under the Trading With the Enemy Act" (U.S. House of Representatives 1977a, p. 2, emphasis added). Under questioning by Representative Cavanaugh, Assistant Treasury Secretary Bergsten, the administration's spokesman for the IEEPA, reiterated the narrow purpose of the revised grandfather provision (p. 21):

> Mr. CAVANAUGH. First of all, Mr. Bergsten, would it be your understanding that [the grandfather clause] would strictly limit and restrict the grandfathering of powers currently being exercised under 5(b) to those specific uses of the authorities granted in 5(b) being employed as of June 1, 1977.
>
> Mr. BERGSTEN. Yes, sir.
>
> Mr. CAVANAUGH. And it would preclude the expansion by the President of the authorities that might be included in 5(b) but are not being employed as of June 1, 1977.
>
> Mr. BERGSTEN. That is right.

Notwithstanding this unmistakably explicit legislative history, the Supreme Court ruled by a vote of 5-4 that the grandfather provision *does* encompass changes in existing restrictions if they pertain to the same general "authority" previously exercised under the TWEA. The four dissenting justices (104 *S. Ct.* at 3046) could only observe that

"there is nothing in the language of the statute to suggest . . . that Congress intended the grandfather clause to provide a President with the authority to increase the restrictions applicable to a particular country without following the IEEPA procedures."

The immediate result of the Court's decision was that a major new curtailment of private travel to Cuba was implemented under the Cuban Assets Control Regulations without a declaration of national emergency or compliance with NEA procedures. With the stroke of a judicial pen, an apparent pinprick in the statutory armor against the abuse of emergency powers became a gaping hole.

Conclusion

The history of the United States in the 20th century provides strong evidence that derogations from private property rights in a liberal democracy occur chiefly during national emergencies and that, once curtailed, private rights seldom regain their previous scope. The pattern should not be surprising. Crisis clearly alters the expected benefits and costs of curtailment of private rights on both sides of the political equation. A fearful public, ideologically predisposed to believe in the efficacy of governmental action, insists that the government "do something" to diminish the threat, perceiving the benefits of such action to be immediate and direct and the costs to be remote and largely external. This public perception is nurtured by those who, for material or ideological reasons, would use the occasion to further their economic or political aims. From a cost-benefit perspective, governmental officials experience reduced political costs and increased political benefits from curtailing private rights in crisis as compared to non-crisis conditions.

As people adjust to the crisis-expanded role of government, many variables change in ways that diminish the likelihood that the post-crisis retrenchment of the government will restore private rights to their previous scope. Private citizens discover that governmental action in a liberal democracy need not lead to the establishment of totalitarianism, as some conservatives have predicted. Governmental officials develop the bureaucratic technology to administer their controls less abrasively and more effectively. Many people find the politically and economically rewarding paths to personal advancement unique to systems powered by discretionary governmental authority. Thus, history is irrevocably altered by the crisis-induced expansion of governmental authority. The change is consolidated and compounded as new generations never experience the broader realm of private rights that once prevailed. For the younger genera-

tions, the status quo is the current, high degree of governmental power; for them there is no personal experience and, therefore, no genuine appreciation of the old regime.

The legal legacies of crisis tilt the polity in the same direction: Statutes, regulations, and judicial decisions expressing and facilitating expanded governmental powers become embedded in the law as well as in the public's consciousness. The plethora of crisis-engendered statutes and judicial decisions attests to the magnitude of this aspect of the politico-economic dynamics. The discretionary nature of governmental powers thereby created provides an easy avenue to their expanded use in future situations that the public perceives, or can be induced to perceive, as "crises."

Thus, private property rights, historically truncated during national emergencies, remain vulnerable to further erosion during future crises. Attempts to restrain the abuse of emergency powers have not eliminated the ratcheting effect of actual or purported emergency in augmenting governmental power. Only the respite of non-crisis affords time to contemplate and forestall the threat to liberty and private property rights inherent in the emergency psychology of the public and its exploitation by governmental officials.

References

Alston, Lee J. "Farm Foreclosure Moratorium Legislation: A Lesson from the Past." *American Economic Review* 74 (June 1984): 445–57.

Baruch, Bernard. *Baruch: The Public Years*. New York: Holt, Rinehart and Winston, 1960.

Belknap, Michal R. "The New Deal and the Emergency Powers Doctrine." *Texas Law Review* 62 (1983): 67–109.

Bryce, James. *The American Commonwealth*, vol. 2. 3rd ed. New York: Macmillan, 1895.

Clark, Jane Perry. "Emergencies and the Law." *Political Science Quarterly* 49 (June 1934): 268–83.

Corwin, Edward S. *Total War and the Constitution*. New York: Knopf, 1947.

Gillam, Richard. "The Peacetime Draft: Voluntarism to Coercion." *Yale Review* 57 (June 1968): 495–517.

Greenberger, Robert S. "Reagan Plans More Sanctions On Libya Trade. Measure Would Ban Exports of Some Parts, Imports of Refined Oil Products." *Wall Street Journal*, May 28, 1986.

Higgs, Robert. "Crisis, Bigger Government, and Ideological Change: Two Hypotheses on the Ratchet Phenomenon." *Explorations in Economic History* 22 (January 1985): 1–28.

Higgs, Robert. *Crisis and Leviathan: Critical Episodes in the Growth of American Government*. New York: Oxford University Press, 1987.

Hoover, Calvin B. *The Economy, Liberty and the State*. New York: Twentieth Century Fund, 1959.

Hughes, Jonathan R. T. *The Governmental Habit: Economic Controls from Colonial Times to the Present.* New York: Basic Books, 1977.

Karlin, Norman. "Substantive Due Process: A Doctrine for Regulatory Control." In *Rights and Regulation: Ethical, Political, and Economic Issues,* pp. 43–70. Edited by Tibor R. Machan and M. Bruce Johnson. Cambridge, Mass.: Ballinger, 1983.

Kempe, Frederick. "U.S. Officials May Loosen Libya Sanctions; Object Is to Prevent Qadhafi From Reaping $1 Billion Windfall From Firms." *Wall Street Journal,* February 3, 1986a.

Kempe, Frederick. "U.S. Plans New Sanctions Against Libya But Hopes to Avoid a Dispute with Allies." *Wall Street Journal,* August 26, 1986b.

McAdoo, William Gibbs. *Crowded Years.* Boston: Houghton Mifflin, 1931.

Murphy, Paul L. *The Constitution in Crisis Times, 1918–1969.* New York: Harper Torchbooks, 1972.

Navarro, Peter. *The Policy Game: How Special Interests and Ideologues Are Stealing America.* New York: Wiley, 1984.

Rossiter, Clinton. *Constitutional Dictatorship: Crisis Government in the Modern Democracies.* Princeton, N.J.: Princeton University Press, 1948.

Rossiter, Clinton, and Longaker, Richard P. *The Supreme Court and the Commander in Chief.* Ithaca, N.Y.: Cornell University Press, 1976.

Siegan, Bernard H. *Economic Liberties and the Constitution.* Chicago: University of Chicago Press, 1980.

Sumner, William G. *Essays of William Graham Sumner,* vol. 2. Edited by A. G. Keller and M. R. Davie. New Haven: Yale University Press, 1934.

Twight, Charlotte. "Government Manipulation of Constitutional-Level Transaction Costs: An Economic Theory and Its Application to Off-Budget Expenditure Through the Federal Financing Bank." Ph.D. diss., University of Washington, Seattle, 1983.

Twight, Charlotte. "U.S. Regulation of International Trade: A Retrospective Inquiry." In *Emergence of the Modern Political Economy,* pp. 139–95. Edited by Robert Higgs. Greenwich, Conn.: JAI Press, 1985.

U.S. Bureau of the Census. *Historical Statistics of the United States. Colonial Times to 1970.* Washington, D.C.: Government Printing Office, 1975.

U.S. House of Representatives. Committee on International Relations. *Revision of Trading with the Enemy Act.* Markup. 95th Congress, 1st Sess., 1977a.

U.S. House of Representatives. Committee on International Relations, Subcommittee on International Economic Policy and Trade. *Emergency Controls on International Economic Transactions and Markup of Trading with the Enemy Reform Legislation.* Hearings on H.R. 1560 and H.R. 2382. 95th Cong., 1st Sess., 1977b.

U.S. Senate. Committee on Banking, Housing, and Urban Affairs, Subcommittee on International Finance. *Amending the Trading with the Enemy Act.* Hearing on H.R. 7738. 95th Cong., 1st Sess., September 8, 1977.

U.S. Senate. Special Committee on the Termination of the National Emergency. *Emergency Powers Statutes: Provisions of Federal Law Now in Effect Delegating to the Executive Extraordinary Authority in Time of National Emergency.* Senate Report 93-549. 93rd Cong., 1st Sess., 1973.