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In the Name of Emergency

By Robert Higgs*

"Few indeed have been the invasions upon essential liberties which have not been accompanied by pleas of urgent necessity advanced in good faith by responsible men . . ."
— Justice Frank Murphy

Time and chance have been unkind to the hopes of the Founding Fathers. They established the Constitution to "secure the Blessings of Liberty" to themselves *and* their posterity, intending their framework of freedom and government to endure through storm as well as sunshine. But the dead could not forever bind the living, and the unfolding of our history during the 20th century has brought into being a second Constitution. Besides the Normal Constitution, protective of individual rights, we now have a Crisis Constitution, hostile to individual rights and friendly to the unchecked power of government officials. In national emergencies the Crisis Constitution overrides the Normal Constitution.

The great danger is that in an age of permanent emergency—the age we live in, the age we are likely to go on living in—the Crisis Constitution will simply swallow up the Normal Constitution, depriving us *at all times* of the very rights the original Constitution was created to protect *at all times*. The outlook can only dishearten those who believe that the fundamental purpose of the Constitution is to protect individuals' rights to life, liberty, and property. Though earlier events, especially during the Civil War, foreshadowed the Crisis Constitution, World War I witnessed its unmistakable emergence. Even before the United States formally entered the war, the railroad labor troubles of 1916-17 provoked unprecedented government actions. Facing the prospect of a nationwide railroad strike when the operating brotherhoods and the railroad managers could not agree on wages and hours, President Woodrow Wilson turned to Congress, gaining passage of the Adamson Act in September 1916. In effect the act simply imposed on the interstate railroad industry a 25 percent increase in wage rates.

The railroads challenged the law, but the Supreme Court upheld its constitutionality. While the government has no emergency power as such, argued the Court, it has a reservoir of reserved power legitimately drawn on during emergencies. The outcome: railroad owners were deprived of a great deal of property, without compensation, for a use not public, namely, raising the pay of unionized railroad workers holding the economy hostage.

After the United States formally entered the war, the government enacted legislation providing for conscription of soldiers. Though men had been drafted during the Civil War, the Supreme Court had never ruled on the constitutionality of the draft. Besides, the issues now differed: men were being drafted not to defend the government against violent domestic rebellion or invasion but to do battle in the trenches of faraway France, ostensibly to foster such abstract ideological aims as "making the world safe for democracy."

The Supreme Court readily affirmed, however, the constitutionality of the draft, refusing to consider seriously the claim that conscription constitutes a form of involuntary servitude forbidden by the Thirteenth Amendment. The outcome: many draftees were deprived of life itself by the actions of political authorities intent on the prosecution of war but unwilling to impose enough explicit taxes to hire the desired military personnel.

The Great Depression, which Justice Louis Brandeis called "an emergency more serious than war," prompted a welter of actions by government at all levels. In 1932-45, 25 states enacted a moratorium on mortgage foreclosures. Such laws appeared to be unambiguous impairments of the obligation of contract and therefore in clear violation of the U.S. Constitution. But when Minnesota's moratorium law came before the Supreme Court, the majority pronounced this self-declared emergency legislation as a valid exercise of the state's police powers.

Harkening back to the railroad case of 1917, Chief Justice Charles Evans Hughes reasoned that "while emergency does not create power, emergency may furnish the occasion for the exercise of power." The Constitution's clause protecting contracts, said Hughes, "is not to be read with literal exactness." The outcome: many thousands of mortgagees were deprived of the rights of foreclosure stipulated in their contracts and compelled to make do with the alternatives provided by emergency statutes.

Also in the depths of the Great Depression the federal government abandoned the gold standard, nationalized the monetary gold stock, and abrogated the gold clauses of all contracts, public and private, past and future. This "act of absolute bad faith" astonished even some members of Congress. Senator Thomas P. Gore declared it "just plain stealing."

But the Supreme Court held that "if the gold clauses... interfere with the policy of the Congress in the exercise of the [monetary] authority they cannot stand." The Court argued that "contracts, however express, cannot fetter the constitutional authority of Congress." The outcome: thousands, perhaps millions, of parties to contracts containing gold clauses, including the many holders of U.S. government bonds stipulating payment in gold, were deprived of property rights, victimized by their own government.

Citizens Surrender

In the war emergency that followed the Japanese attack on Pearl Harbor, the government built an awesome command economy, suspending many individual rights. Ten million men were conscripted. The Supreme Court refused even to review challenges to the draft. Some 110,000 Japanese-Americans, two-thirds of them U.S. citizens and not one of them proven guilty of a crime, were herded into concentration camps, losing their liberty and sustaining property losses estimated at some $400 million. All quite constitutional, said the justices.

Raw materials and plants were allocated by government order; production facilities, sometimes entire industries, were seized and operated by the government; many consumer goods were rationed. None of these actions elicited so much as a ruling from the Supreme Court. Sweeping price and rent controls did come before the Court, but the cases focused on procedural, not substantive, questions, and even then the Court found no reason to deny the government any of the powers it was exercising at the expense of private rights. Said Justice Wiley Rutledge, one of the *least* single-mindedly bellicose justices, "Citizens much surrender or forego [sic] exercising rights which in other times could not be impaired."

During the Korean War emergency the government reinstituted controls over raw materials, production, shipping, credit, wages, and prices. When the wage-price controls created a collective-bargaining impasse in the steel industry, threatening a nationwide strike, President Harry Truman ordered the secretary of commerce to seize the industry. The Supreme Court, unconvinced that a genuine national emergency existed, ruled that the president had no constitutional authority for the seizure.

The ruling, however, in no way signified a triumph for individuals' rights or a significant check on the exercise of the government's emergency powers. The Court's decision found intolerable the president's failure to cite specific legislative authority for his action; but on emergency powers, the justices' multiple opinions—seven in all—spoke more in favor than in opposition. Only two justices explicitly rejected Truman's claim of inherent presidential power. The outcome: the steel seizure itself was forbidden; but, given the reasoning of the justices and the fragmentation of their opinions, the vulnerability of private property rights to emergency suspension remained virtually as great as before.

In the 1970s, the National Emergencies Act (1976) and the International Emergency Economic Powers Act (1977) imposed new procedural requirements but did little to detract from the substance of presidential emergency powers, which continue to be employed routinely. Recent Supreme Court rulings have sustained a wide scope for the exercise of these powers.

In 1981 the Court gave broad construction to the president's power to act under the International Emergency Economic Powers Act, even ruling that the president has constitutional power to act in the absence of statutory authority. The Court's 1983 ruling against congressional vetoes effectively demolished the check of a concurrent resolution provided in the National Emergencies Act. The Court further eroded the restraints on the president stipulated in the emergency acts when it ruled in 1984 that the executive branch could impose a major new curtailment of private travel to Cuba without even declaring a national emergency or complying with the procedural requirements of the National Emergencies Act.

The outcome: during the past decade, American citizens have been forbidden to travel to various countries, to borrow or buy from or lend or sell to the citizens or governments of various countries, to fulfill the terms of valid contracts, or to pursue in U.S. courts legal remedies for injuries and takings. Far from having their rights to life, liberty, and property upheld by the federal government, Americans have been routinely deprived of such rights under declarations of emergency.

Lowly Sentry

If the Framers intended the powers of government officials or the rights of private citizens to be any different in national emergencies, they neglected to express that intention in the Sacred Text. But the Constitution is more than the document itself. As Charles A. Beard observed, it is "what living men and women think it is, recognize as such, carry into action, and obey." And clearly, the Crisis Constitution is, and long has been, as much a part of the American constitutional system as the Normal Constitution.

Perhaps the best way to understand how the Crisis Constitution became embedded in the constitutional system is to examine the major episodes of its development, asking of each: Might it have been different? For each episode one can scarcely imagine that, given the political realities and the prevailing crisis conditions, the outcome could have been avoided.

Consider whether the Court might have found the Adamson Act unconstitutional in 1917. What would have been the consequence of such a ruling? Presumably a national railroad strike would have occurred, causing, in the words of the Court, the "destruction of interstate commerce" and "infinite injury to the public interest."

Bad enough, but the United States also stood on the brink of war. Thomas Gregory, the attorney general at the time, later recalled that Chief Justice Edward White "knew, as we all knew, that we were on the very verge of war; for the moment he forgot the facts of the case that was before him and his prophetic eye was resting on the immediate future when every proper energy of our country would be called upon to sustain it in its hour of greatest need."

The majority simply was not willing to issue a ruling fraught with danger to the military strength of the nation, no matter what the Normal Constitution might require. In retrospect, the most remarkable aspect of the ruling is that four justices dissented, two of them recording vigorous opposition to the majority's derogation from private property rights in the crisis.

The division within the Court disappeared completely when the justices ruled on the military draft in 1918: the decision was unanimous. Under the prevailing political and social conditions, permeated by war hysteria, superheated patriotism, and vigilante attacks on "slackers," the ruling was well-nigh inevitable. Men were, after all, being thrown into jail merely for *questioning* the constitutionality of the draft. (The attorney general went so far as to request the aid of the American Protective League, a private organization of superpatriots, to locate draft resisters. Members of the league conducted numerous "slacker raids," made some 40,000 citizens' arrests, and investigated about 3 million suspected subversives.)

Leon Friendman has argued that the draft-law cases "were based upon superficial arguments, disregard of substantial historical evidence, and undue deference to the exigencies of the First World War—in short, that they were incorrectly decided." Nonetheless, one can see why the justices chose to transcend the Normal Constitution

and uphold the draft: political elites throughout the land were howling for conscription, and without it the government's war effort would have collapsed.

Might the Supreme Court have upheld private property rights in the Minnesota mortgage moratorium case? Of course, it might have, and the actual decision rested on only a 5-to-4 margin. But farmers had suffered disproportionately in the Great Contraction. Angry and frustrated, some had resorted to violence and many others had brought ominous political pressures to bear on state legislatures. To strike down, in January 1934, the moratorium laws already enacted by 22 states would have risked setting off an explosion of farm protest and perhaps widespread violence. Forced to choose between upholding the Normal Constitution and averting a potential social and political calamity, the majority decided to avert the calamity.

When the Court ruled on the gold-clause cases, early in 1935, it faced—as it often does in cases involving public policies with pervasive impacts—an executive *fait accompli*. Was the Court to say that the government must return gold coins and certificates to millions of citizens who had surrendered them and that all those who had paid legal tender instead of gold must turn around and pay the gold as initially stipulated in their contracts? The far-reaching economic consequences of such a ruling must have given the justices pause. (So disastrous did the president consider an adverse ruling on the gold clause that, in anticipation, he prepared a radio address announcing that he would not enforce it.)

Beyond the utter confusion of the marketplace lay the disruption of the administration's monetary policy, now almost two years old. The attorney general's argument before the Court emphasized the doctrine of emergency powers and the gravity of the prevailing depression crisis; the "power of self-preservation," he declared, required transcending the "supposed sanctity and inviolability of contractual obligations." Again, given the prevailing economic and political conditions, the remarkable aspect of the decision is that four justices dissented—Justice James McReynolds read their objections with muttered asides that "the Constitution is gone" and "this is Nero at his worst.'

The Supreme Court's virtual abdication during World War II reflected, even more clearly than the gold-clause cases, a *fait accompli* by the legislative and executive branches of government. The political branches had created a full-blown command economy. Was the Court, deciding cases in 1944 after such policies had been in force for years, to say that they were unconstitutional? It is unconceivable. It would, in any event, have been futile. The Court, wrote Alpheus Mason, occupied "the position of a private on sentry duty accosting a commanding general without his pass."

Precarious Position

Events during World War II demonstrate in its clearest form the logic of the Crisis Constitution. When elites and masses alike believe that national emergency is upon them, they call on the government to "do something." The political branches, acting more or less autonomously, adopt policies. By their very nature such policies entail costs to the public. The greater the costs, the more likely the public resistance. So governments take steps to conceal or obscure the costs, invariably substituting cost-hiding command-and-control measures for cost-revealing fiscal-and-market means of resource allocation. The necessary implication of this substitution is the attenuation or destruction of private citizen's rights—rights previously protected by the Normal Constitution.

After the fall of France and even more so after the Japanese attack on Pearl Harbor and the ensuing declarations of war, Americans demanded effective military action to defend the nation and subdue its powerful enemies. The political branches responded by imposing a sweeping command-and-control system. Dependent on the executive branch enforcement of its rulings, the Supreme Court could not have prevented this development even had it wanted to; as Aristotle said, "those who carry arms can always determine the fate of the constitution."

But even more fundamental than arms themselves—for arms must be wielded by people conscious of what they are doing—is the dominant ideology. People anxiously seeking security against imminent threats to the economic viability, independence, or survival of the nation submit far more readily to a deprivation of normal rights. Many people who ordinarily would have refused to comply with intrusive government directives accepted them during World War II as appropriate to the prevailing national condition. Only because of such public support did the government's emergency measures prove reasonably effective.

In sum, the Crisis Constitution, like the Normal Constitution, rests on a broad ideological base. In the 20th century

the American people have come to expect, tolerate, and in many instances demand that the Normal Constitution be displaced during national emergencies.

To make matters worse, however, the Normal Constitution to which we revert after a national emergency has ended *is never the same as it was before the crisis*. To some degree, aspects of the Crisis Constitution, as expressed in judicial interpretation and even more so in the body of belief that supports the constitutional system, are incorporated into the Normal Constitution. Such legacies marked the aftermaths of both world wars and the Great Depression.

After World War I the Normal Constitution included massive government participation in credit markets, communications, and transportation industries as well as enduring precedents for rent controls, military conscription, and the suppression of free speech. The Great Depression, of course, brought a profusion of government restraints and regulatory agencies and a corresponding constriction of private property rights. During 1937-42, a veritable Constitutional Revolution took place, submerging the doctrine of substantive due process in economic matters and giving unrestricted scope to federal regulatory power.

Then the events of World War II carried the Crisis Constitution to new heights, and the legacies are legion. Even after enactment of a joint resolution repealing many of the wartime statutes in July 1947, more than 100 wartime statutory provisions remained active; official states of emergency continued in force; and various new emergency measures, including a rent-control act and a peacetime military-conscription law, were enacted.

As Edward S. Corwin noted in *Total War and the Constitution* in 1947, after war, for the first time in American history, the country did not return to a "peacetime Constitution." Now the Normal Constitution included: (1) "legislative power of indefinite scope"; (2) executive power "to stimulate constantly" the use of this indefinite power "for enlarged social ends"; (3) the right of Congress to delegate its powers to the president; (4) a broad presidential prerogative to meet self-defined emergencies and to create executive agencies to assist him; and (5) "progressively expanding" administrative instead of judicial enforcement of the law.

In the four decades that have passed since Corwin made this summary, nothing he mentioned has changed. Thus the Normal Constitution of the post-World War II era has fully validated Big Government in the sense of an active, powerful, highly arbitrary government far less restrained by the constitutional checks and balances of the old Normal Constitution, a system that once curbed the interventions if not the ambitions of government officials.

Emergency powers as such continue to undergird the government's denial of numerous rights, especially in relation to international travel, commercial, and financial transactions. In upholding government actions under the International Emergency Economic Powers Act, the Court quoted with approval a lower-court decision noting that the act's language "is sweeping and unqualified. It provides broadly that the President may void or nullify the 'exercising [by *any* person of] *any* right, power or privilege with respect to... any property in which any foreign country has any interest.'" Thus, even in the early 1980s, as normal a time as one can expect in our era, the Crisis Constitution overrides and displaces the Normal Constitution.

Should a genuine national emergency arise, there can be no doubt about how the government would react. (Recall its actions in dealing with the partly spurious, partly self-inflicted "energy crisis" in the 1970s.) The private rights of Americans—such as remain—are balanced on a very thin constitutional edge.

Deadly Ratchet

Effective protection of private rights against future government invasion under color of emergency is unlikely. The experience of the past decade has shown that the procedural safeguards stipulated in the National Emergencies Act have no real effect. In any event, the problem is not procedure; it is substance—and the abuse of substantive powers.

Not much more hope can be placed in a reconstituted Supreme Court, one more devoted to individual rights and restoration of the old Normal Constitution. Even if such judges could be found and appointed—an unlikely prospect—their resistance to the Crisis Constitution could not have more than a temporary effect in an emergency. This lesson we have learned from the constitutional crisis of the mid-1930s. Even a court containing the Four Horsemen, a court willing to plunge a constitutional dagger into the collectivist heart of the New Deal, could not hold out indefinitely in the face of preponderant public support for the government's policies.

George Sutherland, as staunch a friend as the Normal Constitution ever had, expressed doubt that judges "are indifferent to what others think about their decisions" and avowed that he himself was not indifferent. Justice Owen Roberts, the "swing man" who more than anyone else bore responsibility for the Court's turnaround in 1937, later observed: "Looking back, it is difficult to see how the Court could have resisted the popular urge." He referred obliquely to the "tremendous strain and the threat to the existing Court, of which I was fully conscious." On the Court, as in other branches of government, good men are not enough.

Ultimately the Normal Constitution can be preserved against the inroads of the Crisis Constitution only if the politically influential elites who make policies and mold the opinions of the majority are willing to resist the passions of national emergency. If such understanding, and a concomitant commitment to individual rights, were widespread, we would have little to fear. As Abraham Lincoln said, "With public sentiment nothing can fail; without it, nothing can succeed." If the dominant ideology gives strong support to the Normal Constitution, it will survive, no matter what else happens.

But if the dominant ideology does not give strong support to the Normal Constitution, it will eventually be overwhelmed by the Crisis Constitution. Step by step, a ratcheting loss of rights will attend each episode of national emergency. And we may as well admit that such emergencies are inevitable.

Unfortunately, citizens in the United States today, with only a few notable exceptions, have neither an appreciation of this ratchet process nor a strong commitment to individual rights to life, liberty, and property. Therefore, the most likely prospect is for further expansion of the Crisis Constitution and a corresponding loss of the liberty our Founding Fathers sought to secure for us.

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