

Amendments to the Trading With the Enemy Act

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AMENDMENTS TO THE TRADING WITH THE ENEMY ACT LIMIT PRESIDENTIAL POWER TO REGULATE INTERNATIONAL ECONOMIC TRANSACTIONS

The Trading with the Enemy Act¹ was passed by Congress in 1917 as a wartime measure to regulate economic transactions with enemy countries and their allies. Section 5(b) of the Act grants the President unlimited powers to regulate economic transactions during any declared period of national emergency. Congress recently amended Section 5(b) of the TWEA to restrict the authorized presidential powers.²

The purpose of the TWEA was to "define, regulate and punish trading with the enemy."³ Section 5(b) of the original act gave the President power to regulate or prohibit transactions in foreign exchange and currency, and transfers of credit or property with any foreign country or the resident of any foreign country during war.⁴ This section has been amended four times.⁵

In 1933 Section 5(b) was amended to provide that its authorities could be used in time of a national emergency declared by the President;⁶ previously, the grants of power could be used only during wartime. President Roosevelt cited the emergency authority of 5(b) to declare a bank holiday during the depression.⁷ The national emergency declared by Roosevelt is still in effect today.

1. Trading With the Enemy Act, 50 U.S.C. app. §§ 1-39, 41-44 (1970) [hereinafter cited as TWEA].

2. Amendments to the Trading with the Enemy Act, Pub. L. No. 95-223, 91 Stat. 1625 (1977). For legislative history see H.R. 7738, 95th Cong., 1st Sess., 123 CONG. REC. H6868 (daily ed. July 12, 1977) (House version); H.R. 7738, 95th Cong., 1st Sess., 123 CONG. REC. S16912 (daily ed. Oct. 11, 1977), (Senate version). The House concurred in the Senate amendments with its own amendments on Nov. 30, 1977, 123 CONG. REC. H12558 (daily ed. Nov. 30, 1977). The Senate concurred in the House amendments with amendments on Dec. 7, 1977, 123 CONG. REC. S19439 (daily ed. Dec. 7, 1977).

3. Memorandum for the Special Committee on the Termination of the National Emergency, Department of Justice, May 21, 1973. 120 CONG. REC. S34016 (1974).

4. Trading With the Enemy Act, 50 U.S.C. app. § 5(b) (1970).

5. 40 Stat. 966 (1918); 48 Stat. 1 (1933); 54 Stat. 179 (1940); 55 Stat. 839 (1941).

6. 48 Stat. 1 (1933).

7. Exec. Proc. No. 2039, 48 Stat. 1691 (1933). This Proclamation declared that a national emergency existed because of heavy withdrawals from banking institutions.

Three other national emergencies declared pursuant to 5(b) are still in effect at the present time. In 1950, President Truman declared the existence of a national emergency to aid in furthering the Korean War.⁸ President Nixon declared a national emergency during the postal strike in 1970.⁹ Another national emergency was declared in 1971 to deal with the balance of payments crisis.¹⁰ Other than President Truman's declaration, the three declared national emergencies illustrate the President's expansion of the original wartime powers of 5(b) to include regulation of economic transactions during peacetime. In 1968, President Johnson imposed foreign direct investment controls on U.S. investors.¹¹ He based these regulations on the national emergency declared by President Truman in 1950. In 1971, President Nixon imposed a 10% surcharge on imports, based on the national emergency declared to ease the balance of payments crisis.¹² When the Export Administration Act expired, section 5(b) of the TWEA was used as authority for the Export Administration Regulations.¹³

Four sets of regulations pursuant to section 5(b) are still in force, all based on the national emergency declared by Truman during the Korean War. The Foreign Assets Control Regulations¹⁴ place a complete embargo on trade with North Korea, Cambodia and Viet Nam in the absence of a license from the Treasury Department.¹⁵ A second set of regulations, entitled Regulations Prohibiting Transactions Involving the Shipment of Certain Merchandise Between Foreign Countries,¹⁶ limits trading with Communist countries unless the goods are shipped via certain western countries.¹⁷ The Cuban Assets Control Regulations¹⁸ withhold Cuban assets located in the U.S. and limit transactions with Cuba. The Foreign Funds Control Regulations¹⁹ block assets

8. Exec. Proc. No. 2914, 3 C.F.R. 99 (1950).

9. Exec. Proc. No. 3972, 3 C.F.R. 473 (1970).

10. Exec. Proc. No. 4074, 36 Fed. Reg. 15724 (1971).

11. Exec. Order No. 11387, 33 C.F.R. 47 (1969).

12. Exec. Proc. No. 4074, 36 Fed. Reg. 15724 (1971).

13. Exec. Order No. 11677, 37 Fed. Reg. 15483 (1972).

14. 31 C.F.R. §§ 500.101-.809 (1976).

15. *Id.* § 500.201.

16. *Id.* §§ 505.01-.60.

17. *Id.* § 505.31.

18. *Id.* §§ 515.01-.809.

19. *Id.* §§ 520.01-.809.

of countries pending settlement of claims by U.S. citizens for compensation of property confiscated by the Communist governments after World War II.

The power of the President to control economic transactions pursuant to 5(b) has been upheld by the courts. In *U.S. v. Yoshida International Inc.*,²⁰ an importer challenged the validity of President Nixon's 10% import surcharge issued pursuant to the declared emergency of the balance of payments crisis. Judge Markey of the Court of Customs and Patent Appeals held that section 5(b) of the TWEA clearly delegated power to the President to regulate imports during declared national emergencies, and that the President acted properly by issuing the 10% surcharge.²¹

To partially delimit the President's broad powers in the area, in 1976 Congress enacted the National Emergencies Act²² which terminated any emergency in effect two years from the date of enactment. New procedures were established for declaring future national emergencies. However, section 5(b) of the TWEA was specifically exempted from the provisions of the National Emergencies Act to allow Congress to study proposed revisions of 5(b) which would not disrupt policies currently in effect.²³

Public Law, 95-223, the new act amending section 5(b), is a result of this study.²⁴ Both House and Senate Reports on the act note that Presidents have extensively used the authorities of 5(b) to regulate economic transactions unrelated to war or national emergency,²⁵ and that 5(b) had thus become an almost unlimited grant of power to the President. The purpose of the new act is to redefine and codify the President's authority to regulate international economic transactions in future times of war or national emergency.²⁶ The legislation "would separate war and non-war

20. 526 F.2d 582 (C.C.P.A. 1975).

21. *Id.* at 583.

22. 50 U.S.C.A. §§ 1601-1651 (1977). For legislative history and purpose of the act, see [1976] U.S. CODE CONG. & AD. NEWS.

23. H.R. REP. NO. 459, 95th Cong., 1st Sess. (1977).

24. SUBCOMMITTEE ON INTERNATIONAL TRADE AND COMMERCE, COMMITTEE ON INTERNATIONAL RELATIONS, 94TH CONG. 2D SESS., TRADING WITH THE ENEMY, LEGISLATIVE AND EXECUTIVE DOCUMENTS CONCERNING REGULATION OF INTERNATIONAL TRANSACTIONS IN TIME OF DECLARED NATIONAL EMERGENCY. (Comm. Print 1976).

25. H.R. REP. NO. 459, 95th Cong., 1st Sess. 4 (1977), and S. REP. NO. 466, 95th Cong., 1st Sess. 2 (1977).

26. H.R. REP. NO. 459, 95th Cong., 1st Sess. 1 (1977); S. REP. NO. 466, 95th Cong., 1st Sess. 2 (1977).

authorities and procedures, preserving existing presidential powers in time of war declared by Congress, and providing somewhat narrower powers subject to Congressional review in times of national emergency."²⁷ The act itself is divided into three sections.

Title I removes national emergency powers from section 5(b) of the TWEA. However, the wartime powers of 5(b) remain intact. The title includes a grandfather clause tied to existing regulations to prevent their termination by the amendment. The act states that the powers exercised under 5(b) before July 1, 1977 may continue only for a two-year period beginning on the date of enactment of the National Emergencies Act. The President can then extend the authorities for one-year periods if he believes it is in the national interest.²⁸ Finally, the criminal penalties for violation of the TWEA are increased from \$10,000 to \$50,000.²⁹

The last section of Title I states that a Presidential decision to extend or terminate existing uses under 5(b) would not be subject to provisions of the National Emergencies Act.³⁰ This section is necessary because the National Emergencies Act states that it governs unless specifically superseded by subsequent legislation.³¹

The act's major significance lies within Title II, the International Emergency Economic Powers Act. This section provides for Presidential regulation of economic transactions in times of national emergencies. A national emergency is defined as an "unusual and extraordinary threat to the national security, foreign policy or economy of the U.S. which has its source wholly or partly outside the U.S."³² Any exercise of authority to deal with a new threat must be based on a new declaration of national emergency.³³

27. H.R. REP. NO. 459, 95th Cong., 1st Sess. 1 (1977).

28. Amendments to the Trading with the Enemy Act, Pub. L. No. 95-223, § 101(b), 91 Stat. 1625 (1977) [hereinafter cited as the Act].

29. The House Report says that this increase brings fines of the TWEA into conformity with those for violation of national security and foreign policy provisions of the Export Administration Act.

30. Amendments to the Trading with the Enemy Act, Pub. L. No. 95-223, § 101(c), 91 Stat. 1625 (1977).

31. National Emergencies Act, 50 U.S.C.A. §§ 1601-1651 (1977), says "no law enacted after September 14, 1976 shall supersede this subchapter unless it does so in specific terms, referring to this subchapter and declaring that the new law supersedes the provisions of this subchapter."

32. Amendments to the Trading with the Enemy Act, Pub. L. No. 95-223, § 202, 91 Stat. 1625 (1977).

33. *Id.* § 202(b).

The grant of authorities under the International Emergency Economic Powers Act is similar to the grant under 5(b) of the TWEA. Under the new section, the President may investigate, regulate or prohibit transactions in foreign exchange, banking transactions, importing and exporting of currency or securities and regulate or freeze any property in which any foreign country or national thereof has any interest.³⁴ This section of the act also has a provision similar to that of 5(b) which allows the President to require that records be kept of these transactions.³⁵

Title II does not include the powers to 1) vest foreign property; 2) regulate gold or silver coin or bullion; 3) seize records; or 4) regulate domestic transactions which were included in the President's national emergency powers in 5(b).³⁶ The International Emergency Economic Powers Act specifically limits the President's power during a national emergency. The President would be restricted from "regulating or prohibiting directly or indirectly personal communications not involving transfers of value."³⁷

The final version excludes Presidential authority over "donations of articles, such as food, clothing and medicine intended to be used to relieve human suffering."³⁸ The Act prohibits monetary contributions because "the person making the contributions has no control over the end use of his funds."³⁹ However, the Act provides that the President may regulate or

34. *Id.* § 203(a)(1).

35. *Id.* § 203(a)(2).

36. H.R. REP. No. 459, 95th Cong., 1st Sess. 15 (1977); S. Rep. No. 466, 95th Cong., 1st Sess. 5 (1977).

37. Amendments to the Trading with the Enemy Act, Pub. L. No. 95-223, § 203(b)(1), 91 Stat. 1625 (1977).

38. The House version of the bill would have only excluded from the President's authority "uncompensated transfers of anything of value." H.R. 7738, 95th Cong., 1st Sess., § 203(b)2, 123 CONG. REC. H6868 (daily ed. July 12, 1977). The House concurred in the Senate version with its own amendments, 123 CONG. REC. H12558 (daily ed. Nov. 30, 1977). The Senate version originally read, "donations of articles, *including* food, clothing, and medicine intended to be used *solely* to relieve human suffering." H.R. 7738, 95th Cong., 1st Sess., § 203(b)2, 123 CONG. REC. S16912 (daily ed. Oct. 11, 1977). The House amendments deleted "including", substituted "such as" and deleted "solely." "Such as" was substituted so that the listed items would only be illustrative of the donations covered by the exemption. "Solely" was deleted since items of a humanitarian character would have some economic benefit in addition to relieving human suffering. 123 CONG. REC. H12558 (daily ed. Nov. 30, 1977).

39. S. REP. No. 466, 95th Cong., 1st Sess. 5 (1977).

prohibit these items if he determines that otherwise his authority to deal with the emergency would be seriously impaired, if they are in response to coercion, or if they would endanger U.S. armed forces.⁴⁰

Title II also requires that the President consult with Congress before exercising authority granted under the Act unless prompt action is required in an emergency.⁴¹ The Act calls for a report to be submitted to Congress which specifies 1) the circumstances which necessitate the authority, 2) why these circumstances constitute an emergency, 3) the action to be taken, 4) why this action is necessary, and 5) which foreign countries are involved. The President must then report to Congress at six month intervals any changes which have occurred and what action has been taken.⁴²

Title II of the House bill had a provision for Congressional veto of any regulation issued pursuant to the Act.⁴³ The Senate Committee⁴⁴ completely deleted this provision from their version. The Committee felt that the provision would violate constitutional principles of separation of powers.⁴⁵ The House version stated that if Congress adopts a concurrent resolution disapproving a regulation, then such regulation shall cease to be effective.⁴⁶ The House Committee thought that this provision was necessary in view of past instances where Presidents have used the authority to expand the scope of 5(b).⁴⁷ The House finally agreed to the

40. Amendments to the Trading with the Enemy Act, Pub. L. No. 95-223, § 203, 91 Stat. 1625 (1977).

41. *Id.* § 204(a), states that Congress should be consulted "in every possible instance." The House Committee Report says, "[n]othing in this section shall be construed as requiring submission of a report as a precondition of taking action where circumstances require prompt action prior to or simultaneously with submission of a report."

42. Amendments to the Trading with the Enemy Act, Pub. L. No. 95-223, § 204(b), 91 Stat. 1625 (1977).

43. *Id.* § 206.

44. The Senate Committee on Banking, Housing & Urban Affairs has control over International banking.

45. Amending the Trading with the Enemy Act, H.R. 7738. *Hearings before the Senate Subcommittee on International Finance of the Committee on Banking, Housing & Urban Affairs*, 95th Cong., 1st Sess. 3 (1977) (statement of C. Fred Bergsten, Assistant Secretary of the Treasury for International Affairs).

46. Amendments to the Trading with the Enemy Act, Pub. L. No. 95-223, § 206(b)(1), 91 Stat. 1625 (1977).

47. H. REP. NO. 459, 95th Cong., 1st Sess. 16 (1977). The report cites as an example when President Roosevelt ordered the Federal Reserve Board to impose

Senate amendment because Congress already had authority under the National Emergencies Act to overrule or veto the President's declaration of emergency.⁴⁸

The Act has a savings provision similar to that of the National Emergencies Act.⁴⁹ It provides that the President may continue to block any assets of a foreign country if he determines that this is necessary because of U.S. claims against the country involved.⁵⁰ This provision, however, cannot save the regulation if Congress terminates the national emergency under the National Emergencies Act.⁵¹ The Act also contains a section stating that if any provision of it is held invalid, the remainder shall not be affected.⁵²

Title III of the Act contains amendments to the Export Administration Act. The amendments confer authority to the act to control non-U.S. origin exports by foreign subsidiaries of U.S. concerns. Section 5(b) of the TWEA had previously been cited as the authority for this act. Now, the non-wartime powers of this Act have been removed from the authority of 5(b). The final version of the Act was basically the Senate version with several minor technical corrections.

The effect of the new legislation will be to take away the broad Presidential power to regulate international economic transactions during peacetime by using 5(b) of the TWEA. The wartime provisions of the TWEA remain the same. The new Act gives the President specific procedures and guidelines to follow in exercising the act's powers when a national emergency is declared. The President is subject to Congressional review.

consumer credit controls in 1941, the authority of 5(b) to regulate transactions involving banking institutions was found to extend to a "vendor of consumer durable goods."

48. 123 CONG. REC. S12558 (daily ed. Nov. 30, 1977).

49. 50 U.S.C.A. § 1601(a) (1977) of the National Emergencies Act excludes from termination 1) any action taken or proceeding pending not finally concluded or determined on such date; 2) any action or proceeding based on any act committed prior to such date; or 3) any rights or duties that matured or penalties that were incurred prior to such date.

50. Amendments to the Trading with the Enemy Act, Pub. L. No. 95-223, § 207, 91 Stat. 1625 (1977). The House Committee Report states that holding the asset of a foreign country is generally the most effective means of achieving settlement of U.S. claims.

51. 50 U.S.C.A. § 1622(a)(1) (1977) of the National Emergencies Act provides that the national emergency shall terminate if Congress terminates the emergency by concurrent resolution.

52. This would save the whole bill from being declared invalid.

In 1976, the National Emergencies Act ended the national emergencies still in effect with the exception of those declared pursuant to 5(b). The International Emergency Economic Powers Act will provide guidelines and authorities for future emergencies. The Act has specific limitations to prevent abuses by the President. It restricts the President's power to invoke foreign economic controls for national emergency reasons.

It must be emphasized that because of the savings provision in the Act,⁵³ existing regulations will be excluded from the control of the Act. The Foreign Assets Control Regulations, Regulations Prohibiting Transactions Involving the Shipment of Certain Merchandise Between Foreign Countries, the Cuban Assets Control Regulation and the Foreign Funds Control Regulations will not be affected by this Act. These regulations have been criticized because they control trade of many foreign countries by regulating the U.S. multinational corporations within those countries.⁵⁴ Many of the foreign host countries have policies which permit trade with countries with which trade is prohibited by U.S. regulations. Thus, the multinational subsidiary cannot trade with the prohibited countries or they risk violating the U.S. regulations. These regulations will only terminate if the President fails to extend them each year.⁵⁵

The Act was approved by the President on December 28, 1977.⁵⁶

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53. Amendments to the Trading with the Enemy Act, Pub. L. No. 95-223, § 207, 91 Stat. 1625 (1977).

54. Sawyer, *Encouraging Foreign Investments in the U.S. by Limiting the President's Emergency Authority under the Trading with the Enemy Act*, 27 MERCER L. REV. 68 (1976); Skol and Peterson, *Export Control Laws and Multinational Enterprises*, 11 INT'L LAW 29 (1977); *The Trading with the Enemy Act of 1917 and Foreign Based Subsidiaries of American Multinational Corporations: A Time to Abstain from Restraining*, 11 SAN DIEGO L. REV. 206 (1973).

55. Amendments to the Trading with the Enemy Act, Pub. L. No. 95-223, § 207, 91 Stat. 1625 (1977).

56. 123 CONG. REC. S19439 (daily ed. Dec. 7, 1977); 123 CONG. REC. H12558 (daily ed. Nov. 30, 1977).