Book Reviews

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As the title accurately indicates, the book deals with the broad and loosely-defined topic of "crises" rather than being restricted to the more narrow concept of "emergency power of the President", with which most Americans have had direct contact during the recent depressions and armed conflicts involving the United States.

The sphere of investigation presented by the authors concerns the right and the duty of a nation-state to protect itself as a political entity and the well-being of its citizenry, during a period of emergency in a fashion consistent with constitutional guarantees. Thus, the problem running throughout the book involves the basic question: "Is the United States Constitution a rigid unyielding document, or, on the other hand, can it be conceived of as a flexible instrument allowing the Executive Branch all of the power and authority actually required—even if dictatorial and contra to individual rights and freedoms—to meet the emergency in order to preserve the nation?" This use of executive power in our present system is termed "constitutional dictatorship." Actually, the strongest examples of such executive rule can be found in the war powers utilized on several occasions in the present century. As stated in the "Forward" by Robert S. Rankin:

The use of emergency power in a democracy raises many questions relative to the constitutional basis for its authorization and the manner of its exercise. If used too little and too late a democratic state might be destroyed when the proper use of the emergency power possibly could have saved it. If used arbitrarily and capriciously, its use could degenerate into the worst form of dictatorship (p. v).

However, while Smith and Cotter contend that the use of such emergency powers by the Chief-Executive was contemplated and provided for in the Constitution, they rightly maintain that at the present time such powers are conferred by a disorganized mass of individual statutes passed to meet specific problems, resolutions of Congress (joint and concurring), and utilization of the President's inherent and "implied" powers, rather than an all-embracing statutory framework con-
taining definite safeguards and procedures established under which emergency actions may be terminated as quickly as possible when conditions have returned to normalcy. Such definite recommendations are offered in the Concluding Chapter (Chapt. IX).

The book accepts the basic premise, which would not be open to serious dispute at the more extreme levels, that any democratic government must be able to react to the extent required in order to meet any serious crises; nevertheless, the problem concerns the extent of such authority. Accordingly, they state the issue as follows:

How can a virtually unlimited emergency power and a systematic body of constitutional limitations upon government action logically coexist? How can constitutionalism be ought but an anachronism in the twentieth century unless constitutional governments are equipped with adequate legal authority to carry the body politic through economic and military emergencies of staggering dimensions (p. 2)?

In Chapter II, "The Concept of Emergency In Democratic Political Thought" the authors state their aim in writing the book, which is merely to present a complete survey of the existing federal legislation on the statute books and a summary of "assumed Presidential powers" as yet unchallenged in the courts. In other words, the purpose of this volume is to:

review the work of the Supreme Court in assessing the validity of governmental exercises of emergency powers . . . and, in conclusion, to submit tentatively an approach to emergency which they consider related to the needs of today and the realities of recent experience (p. 5).

In this chapter, in reality a historical and theoretical discussion of the democratic political theories that have influenced our governmental leaders, the positions of such men as John Locke, Rousseau, John Stuart Mill, and Machiavelli are briefly analyzed. Finally, the Chapter is concluded with a significant sub-section entitled "Contemporary Theories" containing a discussion of some main standards employed in the exercise of emergency power at the present time, including the position of Clinton L. Rossiter, who sets forth the conditions required

1 In addition, the thought is advanced: "An effort is made below to distinguish between those who mean dictatorship when they say dictatorship, and those who say dictatorship when they mean to refer to any effort by constitutional government to respond adequately to emergency conditions" (p. 8).

2 Constitutional Dictatorship (1948) 288ff.
for success in a "constitutional dictatorship". It is significant to note the high degree of similarity between these theories of Rossiter and the proposals advanced by the writers at the conclusion of the book (Supra). The basic position of the authors is stated in the concluding paragraph of the Chapter as follows:

[E]mergency governance is one form of an acute and continuing problem in modern constitutional democracies: that of allotting increasing areas of discretionary powers to the executive, while insuring that such powers will be exercised with a sense of political responsibility and under effective limitations and checks. In time of emergency, governmental action may vary in breadth and intensity from more normal times, yet it need not be less constitutional. In time of war as in peace government responsible to the orderly procedure of the law, and government responsible to the governed, has proven its ability to meet the needs imposed by the accelerated tempo and the growing complexity of the twentieth century (p. 13).

Chapters II through IX contain the factual data of the publication; for a very systematic presentation—involving numerous sub-headings and italicized key phrases—in which the various categories of crises, such as depressions, inflation, strikes, housing, agricultural commodities, drought, famine, etc., are presented along with an exhaustive explanation of the statutory legislation too extensive to cover in this brief review. Unfortunately, the numerous footnote references containing a

3 "1. No general regime or particular institution of constitutional dictatorship should be initiated unless it is necessary or even indispensable to the preservation of the state and its constitutional order . . . 2. . . . the decision to institute a constitutional dictatorship should never be in the hands of the man or men who will constitute the dictator . . . 3. No government should initiate a constitutional dictatorship without making specific provision for its termination . . . 4. . . . all uses of emergency powers and all readjustments in the organization of the government should be effected in pursuit of constitutional or legal requirements . . . 5. . . . no dictatorial institution should be adopted, no right invaded, no regular procedure altered any more than is absolutely necessary for the conquest of the particular crisis . . . 6. The measures adopted in the prosecution of a constitutional dictatorship should never be permanent in character or effect . . . 7. The dictatorship should be carried on by persons representative of every part of the citizenry interested in the defense of the existing constitutional order . . . 8. Ultimate responsibility should be maintained for every action taken under a constitutional dictatorship . . . 9. The decision to terminate a constitutional dictatorship, like the decision to institute one, should never be in the hands of the man or men who constitute the dictator . . . 10. No constitutional dictatorship should extend beyond the termination of the crisis for which it was instituted . . . 11. . . . the termination of the crisis must be followed by as complete a return as possible to the political and governmental conditions existing prior to the initiation of the constitutional dictatorship . . . ." Rossiter, Ibid., 298-306 cited by Smith and Cotter at 10-11.
large amount of additional data are all contained in the back of the
volume, with the effect that the reader is confronted with some difficulty
in exhaustively reading the book. It is submitted, therefore, that such
footnoting is a "fundamental right of authors and publishers" that
could well be suppressed.

In particular, the main economic divisions presented in Chapter III
include "Economic Emergencies", "Emergencies By National Catastro-
phies", and "National Security Emergencies". The value of this Chapter
lies in the fact that existing legislation in the areas of economic, mone-
tary, and fiscal control are brought together.

Chapter IV "Emergency Powers Over Persons" is, in the opinion of
the reviewer, the most significant portion of the work for the reason that
the protection of individual constitutional rights is much more funda-
mental than the preservation of vested property interests. Undoubtedly,
the reader will recall the experiences of World Wars I and II and the
recent flood of legislation attempting to control subversion during the
present decade. Moreover, the authors present considerable statutory
authority, arising in the 1930's, for controlling individual activity and
freedom of choice. For example, control of: reserve units of the armed
forces and the National Guard, the civilian labor force, essential defense
and civilian production and services, persons possessing particular vital
skills, etc., is cited. It must be borne in mind, however, that the areas
of control are exercised in periods of "crises," that according to the
writers, is a situation much less than one involving "emergency," "na-
tional emergency," or "state of war."

The sub-section dealing with "Negative Integration" containing such
topics as "Preventive Detention" of aliens and American citizens is dis-
cussed in some detail. Naturally, the internment of Americans of Ja-
pinese descent in World War II and the Internal Security Act,\(^4\) the Ex-
patriation Act of 1954,\(^5\) the Proclamation of July 1941, providing for
"The Proclaimed List of Certain Blocked Nationals,"\(^6\) the severe restric-
tions designed to prevent the entrance of undesirable aliens into the
United States, the provisions for removing United States citizenship from
persons who "were not attached to the principles of the Constitution at
the time of naturalization," and numerous acts circumscribing the move-
ment of persons, registration of persons, and listing of organizations is
covered in detail. Likewise, the use of riders to appropriation bills pro-

\(6\) 55 Stat. 1657, July 17, 1941, § 1 (a), (b).
viding that no federal funds were to be paid a particular individual or category of persons has become very common in recent history. In short, the general attitude of the authors is well summarized when they hold:

It has become an axiom of democratic government that in time of emergency threatening the health or safety of the community or the territorial integrity of the nation, the objective of communal survival takes precedence over the desires and conveniences of the individual. The energies, wealth, talents of individuals may be conscripted in the national interest. Democratic governments also have asserted the right to constrict the range of permissible activities of individuals whose freedom, if unlimited, is calculated to exacerbate the emergency. Such limitations may apply to the population generally or to defined segments of it. The intensity of such limitations may be measured on a continuum ranging from precautionary detention to the relatively mild requirement that persons in defined categories register with the government (p. 33).

The authors tend to refrain from taking a strong position either pro or con as to the exercise of extreme governmental power, rather they are content to merely let the reader draw his own conclusions, which are usually very shocking, in the opinion of the reviewer. Viewed in light of the express purpose of the book, the authors have achieved their objectives in a forthright and direct fashion and have made a real contribution to the preservation of American freedom and democracy.

Closely allied to individual liberty is the field of "Control of Communications" described in Chapter III. Whereas most legally trained persons are familiar with the emergency restraints imposed upon individual freedom of speech, considerably less attention is usually devoted to governmental regulation of entire communication systems. Consequently, the Chapter "... is limited to a survey and classification of statutory provisions relating to the withholding and release of information by the government, [and no attempt is made to indicate] ... to what extent public opinion has been prejudiced, distorted, or confused by the federal government's policies concerning the release of information" (p. 73). The Chapter is, therefore, broken down into the following specific main areas: "The Release of Information By the Government," "Regulation of Propaganda Activities," "Censorship," "Acquisition of Information By the Government," and "Government Investigation."

Surprisingly, in the Chapter on "Judicial Review" extreme criticism of the United States Supreme Court, on the ground that this highest judi-
cial body has failed to definitely meet the problem squarely, is offered. Accordingly:

... the Court not only assumes a task for which it is ill-suited but frequently shirks its responsibilities in the performance thereof. Too often when it dares to condemn as ultra vires action believed unavoidable in the prosecution of a war, it postpones its invalidation until after hostilities have terminated. Such post mortem judicial observations afford most inadequate guides for ascertaining what will be constitutionally permissible in time of crises (p. 126).7

They next consider, in the above mentioned context, the basic issue as to whether the Constitution is a rigidly restrictive document or, on the other hand, possesses a flexible character, allowing the Government to operate under a "constitutional relativity" designed to enable the organs of government to meet the pressing crisis at the precise moment. Actually, instances are cited in support of both propositions; thus, the significant conclusion reached is that the Highest Court in the Nation is not consistent with its own rulings, although—according to Smith and Cotter—the latter position tends to be the most commonly adhered to.

Nevertheless, the sharpest indictment levied against the United States Supreme Court, and properly so, concerns the inability of most injured parties—whose rights have been infringed by the Federal Government—to secure justice in the first instance notwithstanding an even greater disability to secure effective judicial review before the Highest Tribunal. In fact, after presenting numerous instances where: 1) no judicial review of any type was secured, 2) the Executive Branch of the Government merely ignored the Supreme Court's ruling, 3) the High Court refused to question the "political" or "military actions" of the other branches of the Government, or 4) certiorari was denied it is maintained:

... the judicial process with its haphazard accretion of cases, the manifest capacity of government to make cases moot, or failure to prosecute, frequently makes it impossible for the Court even to review significant controversies produced by action of the political depart-

7 Cf. the statement, "The United States Supreme Court, rather than the judicial system, is popularly-conceived to have a distinctive role to play in checking arbitrary government in time of emergency, and it endeavors to perform that role, albeit none too successfully at times by ruling on the constitutionality of the government power asserted during such period of crises. However, as the chief appellate body in a judicial system which as a whole 'handles a mere trickle of the great issues arising' during an emergency, the Supreme Court cannot reasonably be expected to formulate a coherent theory of democratic response to emergency whereby action designed to meet the exigencies of war can be harmonized with our constitutional system with only minimum risk to the preservation thereof" (p. 125).
ments. For every Milligan\(^8\) or Duncan\(^9\) who manages to bring his case to the Court (usually for post mortem relief), there are hundreds who submit to abusive governmental action without ever contesting the validity thereof. This alone affords adequate demonstration that the court is ineffective in maintaining constitutionalism in time of war (Emphasis added, p. 133).

The reviewer can only add a "strong second" to the aforementioned statement because numerous other examples of ineffective judicial review could be cited. Specifically, it is pointed out that in the case of disputes involving the abuse of military power or the usurpation of the jurisdiction of military tribunals, the United States Supreme Court has not—in a single instance—offered the oppressed persons relief until after the "emergency" had ended; consequently, the long delay in rendering a final verdict results in effective justice denied.

The remainder of the Chapter is devoted to a splendid discussion of *Youngstown Sheet and Tube Co. v. Sawyer*,\(^{10}\) "... for in that decision are to be found signally important indications of the most effective contribution which the Federal judiciary hereafter may make in sustaining responsible government" (p. 126). Further, it is believed that the "legal statesmanship" shown by the Court in this case may serve to indicate a future path for all of the federal courts.

The book concludes with a definite proposal to be—they hope—adopted by Congress; in addition, it is finally surmised that "[t]he doctrine of constitutional dictatorship is inappropriate for analysis of the problem of democratic response to emergency" (p. 144).

Specifically, they
"... propose a generic statute to empower the President to proclaim a national or regional emergency. Under such a proclamation the President may issue rules and regulations which have the force of law. A proclamation of emergency would be placed before the Congress within twenty-four hours of its issuance. If Congress were not in session, it would be called into session within five days from the time of the declaration of emergency. The proclamation of emergency would stand unless revoked by concurrent resolution by both Houses of Congress within five days of Congress' coming into special session.

8 Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281 (1866).
The rules and regulations issued under the proclamation would be similarly subject to revocation by concurrent resolution and Congress should possess the item veto in this respect; i.e., it may revoke one rule, while permitting other to stand. An emergency proclamation and regulations issued under it, would automatically expire after thirty days, but would be subject to reissuance by the President, provided the Congress concurred. Congress, upon the issuance of an emergency proclamation would establish a scrutiny committee on emergency powers, patterned after the Joint Committee on Atomic Energy. Congress would maintain continuous scrutiny of the administration of powers exercised under the proclamation. The Committee's primary responsibility would be to keep Congress sufficiently advised as to whether powers had been responsibly administered (p. 144-145).

Therefore, the present mass of disorganized proclamations, statutes, use of implied or "inherent" powers, joint resolutions, etc., would be replaced by an all-encompassing federal statute—the authors assume it is constitutional (the reviewer is not quite so certain)—permitting 1) a definite legally constituted procedure to be followed in all cases of crises, 2) an iron-clad protection against any unwarranted extension of such power or unnecessary prolongation of the emergency, and 3) a legislative check or executive action during the period of crisis.

The final conclusion seems to strike at the heart of the problem when it is indicated that in any democracy the Chief Executive must possess great discretionary power; moreover, it must be assumed that he will exercise this great authority in good faith and not injure or destroy the institutions he has sworn to uphold.

Today our Nation is facing additional crises that have arisen since the publication date, such as the export of American stocks of gold; therefore, it is only too evident that one of the main safeguards of our fundamental freedoms lies in the competence and integrity of the President of the United States because of the vast powers he must of necessity possess under our constitutional government.

W. Paul Gormley
BOOK REVIEWS


For some years the American Judicature Society, welcoming each new judge to the bench, has presented him or her with a collection of materials designed to familiarize the novitiate with his or her new office. To this collection can now be added the first of these books, a handsome volume of inspirational material collected from many diverse sources and compiled and edited by one who is himself a judge. The publication, so the author notes, had its origin in an inscription placed on the flyleaf of the Bible used at the time he took the oath of office. The felicitous phrase "Do Justice and fear only the Lord" so inscribed triggered the idea of compiling an anthology which might prove helpful to other judges. The execution of that concept, while intended to be particularly helpful to judges, should serve the bar and the public as well for, contained in the book, is the crystallized essence of the ethical, practical and spiritual experiences of generations of men who, serving as judges or as writers, have placed emphasis on the concept of government under Law.

Composed as the book is of passages, some brief, some lengthy, from many different pens, it might be expected that the overall impression, the one too frequently gathered by any busy reviewer who must run as he reads, would be a disjointed one. Such, however, is not the case for, despite an occasional reiteration of an already expressed concept, the flow of thought is sustained even as it is enriched by the excerpts which follow one another. For greatest value, of course, each of the many passages included in the anthology should be read singly and savored to the utmost before another is attempted. If so considered and understood by every occupant of the judicial chair, the country would then indeed have at its service a veritable legion of judges who, as Socrates once said, would "hear courteously, answer wisely, consider soberly, and decide impartially."

The second work, again something of an anthology but not entirely so, deals with the problems of decision making by the judiciary, but carries the process over into the legislative, executive and administrative fields. Intended primarily for beginning law students or college upperclassmen, being those who would most likely seek for an understanding of the processes and methods traditionally developed and followed by an Anglo-
American legal system as aids in the development of law and the legal order, the book is nevertheless worthy of wider attention.

Begun originally by former Dean Garrison and Professor Hurst, under the title "Law in Society," for use by students at the University of Wisconsin, the collection has been expanded and revised by Professors Auerbach and Mermin to the point where it now serves to correlate the techniques used in all aspects of law making. The core of the work still centers around one topic, the burden of industrial accidents, as handled in one state, Wisconsin, but developments elsewhere are not neglected. Accordingly, the book weaves together the fundamental pattern of a legal system in operation such as may be found in any American jurisdiction, including, as such a system necessarily does, aspects of history, sociology, economics, politics and philosophy.

No one could read this collection of materials, actually much longer than the number of pages would indicate because of the variation in type sizes, without being both informed about and impressed by all that goes into the making of a legal doctrine. It is composed of stuff on which a law student should chew if he wishes to cut and sharpen his eye-teeth.

W. F. Zacharias