

**STATEMENT BY HAROLD C. RELYEA  
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BEFORE  
HOUSE COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON THE CONSTITUTION,  
CIVIL RIGHTS, AND CIVIL LIBERTIES  
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CONTINUITY OF CONGRESS IN THE WAKE OF A  
CATASTROPHIC ATTACK**

Mr. Chairman, thank you for your invitation to appear before this subcommittee to testify on the continuity of Congress in the wake of a catastrophic attack. My statement, which is brief, recounts emergency conditions occurring in the nation in the early months of 1861 when Congress was not in session and the newly elected President, for a time, chose to address the crisis at hand unilaterally, taking actions of necessity which he trusted a reconvened Congress would ratify. My purpose in this presentation is twofold: to provide some historical, as well as presidential, context for the hearing.

**Introduction**

At various times in American history, emergencies have arisen — posing, in varying degrees of severity, the loss of life, property, or public order — and threatened the well-being of the nation. In response, Presidents have exercised such powers as were available by explicit grant or interpretive implication, or otherwise acted of necessity, trusting to a subsequent acceptance of their actions by Congress, the courts, and the citizenry. Moreover, as the historical record reflects, the response to such emergencies, whether by the executive, legislature, judiciary, or some combination thereof, may bear concomitant dangers for citizens' rights and liberties.

Among the initial efforts of Congress to legislate emergency authority were acts of September 29, 1789, and May 8, 1792, authorizing the President to call forth the militia of the states, initially to protect the inhabitants of the frontiers, and, subsequently, to execute federal laws, suppress insurrections, and repel invasions.<sup>1</sup> The first presidential response to an emergency occurred in August 1794 when George Washington, utilizing the 1792 statute, mobilized the militia to suppress the Whiskey Rebellion, the insurrection provoked by a federal excise tax on whiskey that residents of western Pennsylvania, Virginia, and the Carolinas forcefully opposed. Washington obtained the required judicial verification that a state was unable to suppress an insurrection, and personally took command of the forces that were called up.<sup>2</sup> In the case of the judicial branch, the Supreme Court's 1803 decision in the *Marbury* case was a critical ruling concerning emergency powers, although it did not specifically address the issue. Rather, in declaring for the first time an act of Congress unconstitutional, the Court established its authority for determining ultimately what is law under the Constitution.<sup>3</sup>

Underlying these early developments was the expectation that the federal government should have the means to protect itself and its citizenry, and that the balance of authority among the three coequal branches should not long be disrupted or sacrificed as a consequence of responding to an emergency. It is likely that most Americans did not give much consideration to the adequacy of these arrangements until the summer of 1814 when, in the latter days of August, British troops, having landed near Benedict, Maryland, on the Patuxent River, marched 55 miles to invade the U.S. capital, rout its officials, and burn most of its buildings (the edifice housing the Patent Office and the Post Office was spared due to the pleadings of Dr. William Thornton, the Commissioner of Patents).<sup>4</sup> It was perhaps then that the possibility of the incapacitation of the federal government for a protracted period of time first entered the popular mind.

### **The Lincoln Experience**

Almost 50 years later, the matter of an incapacitated, or, at least, an only partially operable, federal government occurred as the nation disintegrated with rebellion in the southern states. New of the election of Abraham Lincoln, who was known to be hostile to slavery, prompted a public convention in South Carolina. It met a few days before Christmas 1860 and voted unanimously to dissolve the union between that state and the other states. During the next two months, seven states of the Lower South followed South Carolina in secession. Simultaneously, state troops began seizing federal arsenals and forts located within the secessionist territory.<sup>5</sup>

In his fourth and final message to Congress on December 3, 1860, President James Buchanan had conceded that, due to the resignation of federal officials throughout South Carolina, “the whole machinery of the Federal Government necessary for the distribution of remedial justice among the people has been demolished.” He contended, however, that “the Executive has no authority to decide what shall be the relations between the Federal Government and South Carolina.” Any attempt in this regard, he felt, would “be a naked act of usurpation.” Consequently, Buchanan had indicated that it was his “duty to submit to Congress the whole question in all its bearings,” observing that “the emergency may soon arise when you may be called upon to decide the momentous question whether you possess the power by force of arms to compel a State to remain in the Union.” Having “arrived at the conclusion that no such power has been delegated to Congress or to any other department of the Federal Government,” he proposed that Congress should call a constitutional convention, or ask the states to call one, for purposes of adopting a constitutional amendment recognizing the right of property in slaves in the states where slavery existed or might thereafter occur.”<sup>6</sup>

Moving on, by the time of Lincoln’s inauguration (March 4, 1861), the Confederate provisional government had been established (February 4); Jefferson Davis had been elected (February 9) and installed as the President of the Confederacy (February 18); an army had been assembled by the secessionist states; federal troops, who had been withdrawn to Fort Sumter in Charleston harbor, were becoming desperate for relief and resupply; and the 36<sup>th</sup> Congress had adjourned (March 3). A divided nation was poised to witness, as the late Wilfred Binkley wrote,

“the high-water mark of the exercise of executive power in the United States.” Indeed, he continued, “No one can ever know just what Lincoln conceived to be limits of his powers.”<sup>7</sup>

### **Lincoln’s Actions**

A month after his inauguration, Lincoln notified South Carolina authorities that an expedition was en route solely to provision the Fort Sumter troops, which prompted those state officials to demand that the garrison’s commander immediately surrender. He demurred, and, on April 12, the fort and its inhabitants were subjected to continuous, intense fire from shore batteries until they finally surrendered. The attacks galvanized the North for a defense of the Union. Lincoln, however, did not straightaway call Congress into special session. Instead, for reasons not altogether clear, he not only delayed convening Congress, but he also, with broad support in the North, engaged in a series of actions which intruded upon the constitutional authority of the legislature. Lincoln’s rationale for his conduct may be revealed in a comment he reportedly made in 1864: “I conceive I may in an emergency do things on military grounds which cannot constitutionally be done by the Congress.”<sup>8</sup>

In a proclamation of April 15, 1861, Lincoln, recognizing “combinations too powerful to be suppressed by the ordinary course of judicial proceedings” or the United States marshals in the seven southernmost states, called 75,000 of “the militia of the several States of the Union” into federal service “to cause the laws to be duly executed.” He also called Congress to convene in special session on July 4 “to consider and determine, such measures, as, in their wisdom, the public safety, and interest may seem to demand.”<sup>9</sup>

Then, in a proclamation of April 19, Lincoln established a blockade of the ports of the secessionist states,<sup>10</sup> “a measure hitherto regarded as contrary to both the Constitution and the law of nations except when the government was embroiled in a declared, foreign war,” noted political scientist Clinton Rossiter.<sup>11</sup> Congress, of course, had not been given an opportunity to consider a declaration of war.

The next day, the President ordered that 19 vessels be added to the navy “for purposes of public defense.”<sup>12</sup> Shortly thereafter, the blockade was extended to the ports of Virginia and North Carolina.<sup>13</sup>

In a proclamation of May 3, Lincoln ordered that the regular army be enlarged by 22,714 men, that navy personnel be increased by 18,000, and that 42,032 volunteers be accommodated by three-year terms of service.<sup>14</sup> The Constitution, however, specifically empowers only Congress “to raise and support armies.”

In his July 4 special message to Congress, Lincoln indicated that his actions expanding the armed forces, “whether strictly legal or not, were ventured upon under what appeared to be a popular and a public necessity, trusting then, as now, that Congress would readily ratify them. It is believed,” he continued, “that nothing has been done beyond the constitutional competency of

Congress.”<sup>15</sup> Indeed, in an act of August 6, 1861, Lincoln’s “acts, proclamations, and orders” concerning the army, navy, militia, and volunteers from the states were “approved and in all respects legalized and made valid, to the same intent and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress.”<sup>16</sup>

The 37<sup>th</sup> Congress, which Lincoln convened in July, initially met for about a month “to consider only the measures necessary to sustain the war effort.” Members returned in December for a second session, which consumed about 200 days of the next year, and a third session, beginning in December 1862, which ended in early March 1863.<sup>17</sup> The President had party majorities in both chambers: about two-thirds of the Senate was Republican and the House counted 106 Republicans, 42 Democrats, and 28 Unionists. The 1862 elections shifted the House balance to 102 Republicans and 75 Democrats. Despite the numerical dominance of the Republicans, presidential leadership was needed for legislative accomplishments because, by one assessment, within the House and the Senate, “no one individual or faction was able to establish firm control of congressional agendas during the Civil War.” A crucial factor in Lincoln’s dealings with the legislators was his role as “chief patronage dispenser in the American political system” and his serving, as well, as “a kind of court of last resort to whom congressmen could appeal lower-level decisions or whom they might use to manipulate the federal system to their particular advantage.”<sup>18</sup>

### Nexus

In early 1861, as the nation experienced rebellion within the southern states, the newly elected President, Abraham Lincoln, took extraordinary, remedial actions, some of which he realized were of doubtful legality. He knew he needed legislative ratification of those actions, but he was not willing to convene immediately a new Congress, in extraordinary session, to obtain the necessary approval. Instead, the new Congress did not convene for 122 days, or about 17 weeks, before meeting in special session on July 4 at the request of Lincoln. The time frame is important in view of the schedule set in the Continuity of Representation Act of 2005: the holding of a special election within 49 days following an announcement by the Speaker of the House that, because of extraordinary circumstances, vacancies in representation from states have exceeded 100 seats, but waiving the 49-day requirement if, during the 75-day period beginning on the date of the vacancy announcement, a regularly scheduled general election or another special election for the office involved, is scheduled to occur.<sup>19</sup> Exploratory congressional hearings a few years ago provided an opportunity for the airing of views questioning that a national standard of 45-50 days was sufficient for the holding of mass elections after a national catastrophe. Some, representing, among others, election officials and other pertinent professional organizations, testified at that hearing that the 45-50-day time period would be a bare minimum to hold special elections after a catastrophe. Longer periods of time, from an election administration perspective, it was suggested, would yield a better opportunity to include more of the electorate, such as Americans living overseas, armed forces personnel, travelers, and older people, and better ensure the integrity of the electoral process.<sup>20</sup> The Lincoln-era example suggests that upwards of 120 days might elapse before the occurrence of special elections

facilitating a reconvening of Congress.

When Congress, in the aftermath of catastrophic events, reconvenes, with or without the occurrence of special elections, what is the expectation? In the case of Lincoln in 1861, it was, at his invitation, to ratify readily his emergency actions which, “whether strictly legal or not, were ventured upon under what appeared to be a popular and a public necessity.” Among these were increases in the armed forces, a constitutional responsibility clearly vested in Congress. In the aftermath of the terrorist attacks of September 11, 2001, President George W. Bush was better prepared to ensure the availability of essential government personnel to deal with the emergency resulting from that exigency. Pursuant to the National Emergencies Act of 1976, as amended,<sup>21</sup> he declared a national emergency for purposes of activating certain standby authority regarding armed forces and U. S. Coast Guard personnel.<sup>22</sup> His action followed a long-standing tradition, dating, in the federal experience, to President Washington’s 1794 proclamation activating militia to suppress the whiskey rebellion in locales of western Pennsylvania, Virginia, and the Carolinas.

President Bush would issue a second national emergency declaration on September 23 regarding the September 11 terrorist attacks, when he invoked the International Emergency Economic Powers Act (IEEPA),<sup>23</sup> and ordered its implementation to block property and prohibit transactions with persons who commit, threaten to commit, or support terrorism.<sup>24</sup> The IEEPA authorizes the President to regulate or prohibit any transactions in foreign exchange, bank transfers of credit or payments involving any interest of any foreign country or a national thereof, or transactions involving any property in which any foreign country or a national thereof has any interest. Earlier, President William Clinton had declared a national emergency and invoked the IEEPA to prohibit transactions with terrorists who threatened to disrupt the Middle East peace process.<sup>25</sup>

While Congress may wish to explore the possibilities of enacting additional standby statutory authority to be activated by presidential national emergency declarations relative to ensuring the continuity of the federal government, including Congress, it should also be remembered that Congress, pursuant to the National Emergencies Act, may, by joint resolution, rescind a presidential emergency proclamation or authorities so activated — certainly a reason for ensuring the operational capability of Congress in the aftermath of a catastrophic attack. Ratifying the extraordinary emergency actions of a President, providing needed resources for responding to such a crisis, and oversight of the response of the executive branch to an exigency are also reasons for assuring that Congress will be an active and continuous participant in federal government operations.

Mr. Chairman, thank you, again, for your invitation to appear here today before this subcommittee.

1. 1 Stat. 95 (1789); 1 Stat. 264 (1792).
2. See Leland D. Baldwin, *Whiskey Rebels: The Story of a Frontier Uprising* (Pittsburgh, PA: University of Pittsburgh Press, 1939); William Hogeland, *The Whiskey Rebellion* (New York: Lisa Drew/Scribner, 2006); Thomas P. Slaughter, *The Whiskey Rebellion: Frontier Epilogue to the American Revolution* (New York: Oxford University Press, 1986).
3. *Marbury v. Madison*, 1 Cr. (5 U.S.) 137 (1803).
4. Anthony S. Pitch, *The Burning of Washington: The British Invasion of 1814* (Annapolis, MD: Naval Institute Press, 1998).
5. See Harold Holzer, *Lincoln President-Elect: Abraham Lincoln and the Great Secession Winter 1860-1861* (New York: Simon and Schuster, 2008); Russell McClintock, *Lincoln and the Decision for War: The Northern Response to Secession* (Chapel Hill, NC: University of North Carolina Press, 2008).
6. James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents*, Vol. 7 (New York: Bureau of National Literature, 1897), pp. 3165-3167.
7. Wilfred E. Binkley, *President and Congress* (New York: Alfred A. Knopf., 1947), p. 126.
8. George Fort Milton, *The Use of Presidential Power, 1789-1943* (Boston, MS: Little, Brown, 1944), p. 111; contemporary legal support for Lincoln's point of view may be found in a treatise by the Solicitor of the Department of War, William Whiting, *War Powers Under the Constitution of the United States* (Boston, MA: Little Brown, initially published 1862).
9. Richardson, *A Compilation of the Messages and Papers of the President*, Vol. 7, pp. 3214-3215.
10. *Ibid.*, pp. 3215-3216.
11. Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton, NJ: Princeton University Press, 1948), p. 225.
12. *Ibid.*
13. Richardson, *A Compilation of the Messages and Papers of the Presidents*, Vol. 7, p. 3216.
14. *Ibid.*, pp. 3216-3217.
15. *Ibid.*, pp. 3325.
16. 12 Stat. 326.

17. Explaining the practices of the mid-19th century, historian David Potter has written: “Unless called into special session, Congress did not meet for its first session until thirteen months after its election, nor for its second session until after its successor had been elected.” David M. Potter, *The Impending Crisis: 1848-1861* (New York: Harper and Row, 1976), p. 385.
18. Allan G. Bogue, *The Congressman’s Civil War* (Cambridge, UK: Cambridge University Press, 1989), pp. xiv-xv, xviii, 57.
19. 119 Stat. 565 at 588.
20. U. S. Congress, Senate Committee on the Judiciary, *Ensuring the Continuity of the United States Government: The Congress*, hearing, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., Sept. 9, 2003 (Washington: GPO, 2004).
21. 50 U.S.C. 1601-1651.
22. Proclamation 7463, *Federal Register*, vol. 66, Sept. 18, 2001, pp. 48197-48199; statutory authority so activated included 10 U.S.C. 123, 123a, 527, 2201©, 12006, 12302; 14 U.S.C. 331, 359, 367.
23. 50 U.S.C. 1701-1706.
24. E.O. 13224, *Federal Register*, vol. 66, Sept. 25, 2001, pp. 49079-49082.
25. E.O. 12947, 3 C.F.R., 1995 Comp., pp. 319-320.

## Biographical Profile

**Dr. Harold C. Relyea**, for over three and a half decades, was a Specialist in American National Government with the Congressional Research Service (CRS) of the Library of Congress. A member of the CRS staff since 1971, he held both managerial and research positions during his career. His principal areas of research responsibility included the presidential office and powers, executive branch organization and management, executive-congressional relations, congressional oversight, and various aspects of government information policy and practice. In addition to his CRS duties, Dr. Relyea has authored numerous articles for scholarly and professional publications in the United States and abroad. Currently in private practice, he is preparing a book on national emergency powers. His recently published titles include *Silencing Science: National Security Controls and Scientific Communication* (1994), *Federal Information Policies in the 1990s* (1996), *The Executive Office of the President* (1997), *United States Government Information: Policies and Sources* (2002), and *Comparative Perspectives on E-government* (2006). He serves on the editorial board of *Government Information Quarterly* and has held similar positions with several other journals in the past. An undergraduate of Drew University, he received his doctoral degree in government from The American University. His biography appears in *Who's Who in America* and *Who's Who in the World*. Contact: relyea\_harold@yahoo.com.