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TITLE II – ONE YEAR LATER:† A LEGISLATIVE MIDSUMMER NIGHT'S DREAM

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"Nothing can come out of nothing . . ." ‡

IN THE race for space, the legislative branch of the Government launched its own missile last August. The missile had at least one distinction. It was itself nothing; it was hurled into nothingness. Launched in the heat of summer, the contraptions used to fire it have all the earmarks of being contrived by harassed staff members and bureaucrats after a horrifying nightmare in which they sought to extricate themselves from a comedy of errors that dated at least as far back as July 1, 1953, and which threatened to ground the projectile permanently. The missile which that midsummer night's dream proposed to launch was a dead Act which Congress later attempted to resurrect by merely legislating a change in its expiration date after securing agreements from the executive agencies as to its use, without regard to the fact that the Act placed the discretion as to its use in the incumbent President alone. Accordingly, government contractors should realize that title II of the First War Powers Act may be a snare and a delusion.

Those beneficiaries of the Act, who received public funds to which their contracts do not entitle them, under well established principles of contract law, have no reassurance by last summer's legislative performance that the Government may not eventually compel them to refund the amounts involved, by set-off or otherwise; since the Government is obligated to collect public funds paid out in contravention of law. Those contractors who have not received such funds have no assurance that they were not equally entitled to receive them, because Congress has never required the executive agencies to prove to its satisfaction that the standards they apply in exercising the powers under the Act are sufficiently definite and relevant to assure all contractors of uniform treatment, uninfluenced by the whims and caprices of those who administer the Act.

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† Editor's Note: *The Administration of Title II of the First War Powers Act,* 62 DICK. L. REV. (March 1957), was an extensive evaluation and criticism of the topic. The present article is a sequel thereto, less narrow in scope, but illuminated by the happenings and events of the past year.

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‡ Marcus Aurelius Antonius, Meditations II, 17.

To the extent that the Act purports to exist on the statute books as it has since 1951, on the basis of last summer's attempted amendment of an expired Act, contractors should be aware that the executive agencies have made a "side agreement" with the Senate Judiciary Committee. The "agreement" excludes the functioning of the President's discretion, on which the language of the Act entirely predicates the right of those agencies to use the powers of the Act, and commits them to use only certain powers of the Act. The Pentagon has learned from an experience in 1950 that it needs only to waive a distress flag, emblazoned with stars of so-called "hardship" contractors, to overcome any hesitation by the Committee on extending the Act. The Judiciary Committee appears to have become so absorbed in its desire not "to visit hardship upon those who contracted with the Government in good faith and in knowledge that this extraordinary authority was available," they overlooked the fact that it added to the hardship of those contractors by allowing an amendment purportedly reinstating on the statute books an expired Act which as reinstated does not authorize what it expressly states and therefore misleads any contractor who reads it without knowledge of its legislative history.

On September 7, 1957, approval was given to an Act which merely provides: "That section 2 of the Act of January 12, 1951 (64 Stat. 1257), as amended, is further amended by striking out '1957' and inserting in lieu thereof '1958'." [1] However, the Act of January 12, 1951, was not in existence on September 7, 1957. Nevertheless, by a mere change in the year designation, the Act of September 7, 1957, purports to reactivate as well as amend a law which no longer existed as a functioning statute, by reason of its expiration two months before. The extension was predicated on agreements as to its use, not with the President in whom the Act vests sole discretion as to its use but with executive agencies to whom it is said the authority of the Act has been delegated. But the Act does not permit such delegation and the incumbent President has never authorized any of the executive agencies to exercise any of the powers under the Act, much less delegated his authority to such agencies.

Approximately one year ago, in an article published in this law review,[2] the writer discussed certain deficiencies in the administration of title II of the First War Powers Act. The article referred to the fact that it seems to have become almost commonplace to expect that each year, without any consideration or presentation of the facts concerning the administration of many of the unprecedented powers granted by the Act, Congress will extend the Act as "unduly automatically" (as a Defense Department official has described that

[1] 71 Stat. 628, 50 U.S.C. App. 611 (1952).
[2] 61 DICK. L. REV. 215 (1957).

Department's policy) granting progress payments.[3] In June 1957, both Houses of Congress appeared to be in agreement with the writer. For the first time in all of the years in which it has been extended, when the bill to extend the Act (H. R. 7536) was presented on the floor of the House of Representatives, it was stated to be the opinion of a majority of the committee "that emergency legislation such as this should not be automatically extended for long periods of time without sufficient study and understanding by the committee." [4] Accordingly, on June 30, 1957, the Act was allowed to lapse, although the House bill to extend passed the House on June 17, 1957.

The reported reason for allowing it to lapse was "because Senators want to investigate the operation of the law." [5] It was further reported that several members of the Senate Judiciary Committee were so concerned with the matter that they would probably press for public hearings, the main purpose of which would be to determine whether the Act should continue year after year, and whether its administration has been costly to the Government or in any way unfair to private contractors. The report expressed doubt that such hearings would be held or any committee action taken in time for Senate action on an extension of the bill in 1957. However, committee members were reported to believe that no damage would be done if the extension was not approved in the near future since "adequate moves could be made by the President under other emergency powers if specific need developed." [6] The same report quoted a member of the House Judiciary Committee as stating that most members "feel emergency legislation such as this should not be extended for long periods of time without sufficient study and understanding." [7]

Later, in August 1957, the Senate Judiciary Committee also for the first time in the long history of the Act, proceeded "to put on notice those who contract with the Government in the future that this authority is *no longer* to be automatically extended during periods in which the United States is not engaged in armed conflict." [8] Nevertheless, no hearings were conducted by either House of Congress, and notwithstanding its expressed conviction that when the United States is not engaged in war, the extraordinary powers of the Act should not be extended, except upon a detailed showing of necessity, the Senate Judiciary Committee eventually capitulated to the same argument that was so vigorously and successfully advanced seven years earlier in an

[3] *Id.* at 219, f.n. 16.
[4] 103 Cong. Rec. 8396-8397 (June 17, 1957).
[5] The Evening Star, Washington, D. C., August 1, 1957, sect. B, p. 10.
[6] *Ibid.*
[7] *Ibid.*
[8] S. Rep. No. 1152, 85th Cong., 1st Sess. 2 (1957).

attempt to secure the continuation of the powers.[9] The military departments informed the committee that a total of 184 applications were pending on June 30, 1957, claiming $20,917,739 for amendments without consideration; corrections of mistakes; and formalizations of oral agreements previously made. The committee also reported the receipt of numerous communications from individuals representing corporations which had claims pending as of June 30, 1957, when Congeess allowed the Act to expire. It therefore appeared to the Committee that insofar as those who had claims pending at the time of the expiration of the Act, further processing of their claims could not be effected and a considerable hardship could thereby ensue. The Committee report stated that it:

> . . . has no desire to visit hardship upon those who contracted with the Government in good faith and in the knowledge that this extraordinary authority was available to certain departments of Government should difficulties be encountered during the period of the performance of the contract.[10]

At the same time, the Committee said it was reluctant to agree to further extension of the authority without adequate examination into its operation and the specific necessity for each of the powers granted. At the direction of the Committee, the Chairman addressed a letter "to each of the departments *to whom this authority has been delegated,*" requesting their agreement to apply the authority only with respect to contracts entered into on or before June 30, 1957, and to use only certain powers under the Act. The departments were fairly responsive to the request of the Committee, but for obvious reasons. They had everything to gain and nothing to lose, in the event the action of Congress actually extended the Act.

The Senate Judiciary report appears in error in speaking of "the departments to whom this authority has been delegated." The authority under the Act is the President's and it is to authorize certain departments and agencies, both referred to in this article as executive agencies, to exercise the powers described in the Act, whenever the President deems such action will facilitate the national defense. The Act contains no language allowing the President to delegate that authority. On the contrary, delegation of the President's authority to the executive agencies appears precluded by the express language of the Act and by its legislative history.[11] There is no record that the in-

[9] Hearings before the Senate Committee on Expenditures in the Executive Departments, on S. 4266. To Amend and Extend Title II of the First War Powers Act, Emergency Powers of the President, 81st Cong., 2d Sess., 27-30 (1950).

[10] S. Rep. No. 1152, 85th Cong., 1st, 3 (1957).

[11] Hearings before the Senate Committee on Expenditures in the Executive Departments, on S. 4266, To Amend and Extend Title II of the First War Powers Act, Emergency Powers of the President, 81st Cong., 2d Sess. 33-35 (1950).

cumbent President since January 20, 1953, has ever attempted to delegate his authority under the Act to any executive agency or that he has ever authorized any of the agencies to take any of the actions described in the Act. The Senate Judiciary Committee overlooks the fact that the President has failed to take the very action which it has said he must take to make the Act function for the executive agencies. This fact also is ignored by the executive agencies, which, since Mr. Eisenhower was inaugurated in January 1953, have for over five years been citing a determination by Mr. Truman in February 1951, that the actions permitted by the Act were necessary to facilitate the national defense. Five years seems a rather long time to allow a determination by a President no longer in office to govern the use of powers once described as "practically upsetting the law of contracts" [12] and considered by Congress as so extraordinary and unprecedented as to require its *annual* reconsideration. In allowing the agencies to use powers granted to them by Mr. Truman, pursuant to his determination, years after Mr. Truman is no longer in office, is to ignore the discretion which Congress designedly restricted to the chief executive with respect to determining when the use of the powers of the Act is necessary.

Last summer, despite its earlier expressions of concern, the Senate Judiciary Committee, as in prior extensions of the Act, appears to have treated Mr. Truman's executive orders as something permanently attached to the Act itself, even though it had expired on June 30, 1957. Thus, by relying on Mr. Truman's determination years ago when the Act was in existence, the committee could exercise the discretion of President Eisenhower, as well as its own, in determining whether the use of the powers involved was still necessary to facilitate the national defense. If the Committee's action was not an exercise of the discretion of the President, it would appear that the Committee treated Mr. Truman's determination as sufficient to constitute an exercise of the discretion which President Eisenhower is required to perform under the Act. Also, in last summer's action on the matter, as in previous years, there is no record to indicate that either House of Congress requested those who used the powers of the Act and sought their continuation, to state their authority for using them without the authorization of the incumbent President and without his determination that such use was necessary to facilitate the national defense, as required by the Act.

In entering into "agreements" in August 1957 with respect to the use of the Act until June 30, 1958, Congress, instead of seeking an accord with

[12] Hearings before Subcommittee No. 4 of the House Committee on the Judiciary, on H. R. 5944 and S. 2421, to Amend the Act of January 12, 1951, Amending and Extending Title II of the First War Powers Act, 1941, Serial No. 18, 82d Cong., 2d Sess. 10-11 (1952).

Mr. Eisenhower (to whom Congress gave the authority and the sole discretion under the Act), ignored him as well as the plain language of the Act, and bargained with the executive agencies which, without authorization to use the Act were incompetent as contracting parties on the matter and had nothing to offer, and none of which have any authorization to use the powers of the Act unless and until Mr. Eisenhower determines such authorization will facilitate the national defense and for that reason grants the authorization.

Since Mr. Eisenhower has never made the authority, or the powers, of the Act available to any of the executive agencies, there appears to be no basis for the reference in the Senate Judiciary report to those who contracted "in good faith and knowledge that this extraordinary authority was [13] available to certain departments . . . should difficulties be encountered during the period of the performance of the contract." [14] Moreover, even if such authority could be said to be available, no contractor would be justified in assuming, as the Senate report infers, that the powers of the Act could be exercised "during the period of the performance of the contract," if the performance period extended beyond June 30, 1957, or if, prior to that date, there had been no determination that performance of the contract would facilitate the national defense. Any difficulties which contractors might encounter in such performance, as suggested by the Senate report, would not entitle them to any relief under the Act unless such relief would facilitate the national defense. Nevertheless, the available evidence shows that the administrative standards used to determine entitlement to such relief are not sufficiently well defined to avoid arbitrary and capricious evaluation of a contractor's right to relief [15] and Congress has never required the agencies to jusify their extensive use of the Act or to file a comprehensive report of the standards used in specific cases. Instead it appears to accept, as conclusive of entitlement to relief under title II of the Act, any "hardship" report which the Defense Department relates, and thereupon extends the Act for another year.

There is no indication that the Judiciary Committee required the Defense Department to allow Committee staff members to evaluate the merits of some of those 184 applications for relief, which the Department reported as pending in August 1957 and apparently pressed as a persuasive argument for the customary extention of the Act, without a thorough consideration of the justification for it. In the rush for adjournment at the time, the Committee appears to have made no more of an attempt to compel the Defense Department to present sound reasons for the extension of the Act than Congress required in

[13] See note 10, *supra.*
[14] *Ibid.*
[15] 61 DICK. L. REV. 215, 250-252 (1957).

1950 when a similar "hard luck" story was advanced to obtain an extension of the Act.[16]

In 1950, the Defense Department reported that there were 45 "distress" contracts in the Army alone and the involved contractors were facing possible bankruptcy because fixed prices in such contracts were "entirely inadequate to meet increased costs." [17] The Department reported that unless Congress took immediate action many of those sources of supply would be denied the Government, and, in certain cases, contract price adjustments were said to be essential to keep the firms in production and to avoid bankruptcy. The main object was explained not to be *prevention of losses* on Government contracts because of increased costs (except in extreme hardship cases), but to afford relief to small business firms which might otherwise be prevented from completing deliveries on such contracts due to increased costs.[18] But the Act does not offer relief on such facts in the absence of a determination that such relief would facilitate the national defense. No record has been found that the Defense Department was ever required to furnish Congress a report which would specifically identify the 45 contractors involved [19] and such description of the standards used as would disclose whether relief was granted, or refused, on the basis of definite and relevant factors clearly within the contemplation of the Act.

So long as Congress permits the powers of the Act to be used without regard to the standards applied, or allows the use of indefinite and irrelevant standards in determining whether relief under the Act will facilitate the national defense, contractors seeking relief under the Act will be subject to the whims and caprices of those who administer the Act and the taxpayer will have no assurance that public funds are properly protected. Facilitation of the national defense was the standard set by Congress itself and it was Congress which said the standard shall be applied by the President. If Congress continues to encourage and upholds the executive agencies in ignoring that standard and the requirement that it be applied by the President, periodic expressions of Congressional concern over the failure of the executive agencies to administer the laws as intended by Congress appear irreconcilable, to say

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[16] See note 9, *supra.*

[17] S. Rep. No. 2686, 81st Cong., 2d Sess. 2 (1957).

[18] *Ibid.*

[19] If they were not contractors whose products or services could not be obtained elsewhere, their "rescue" to facilitate the national defense seems unwarranted. This is not to say that they might not have been entitled to some form of relief from the Government. But the Senate report on why the 45 contractors should be entitled to relief under the First War Powers Act appears as vague as the standards used by the agencies who administer the Act.

the least. With so little observance of the language of the Act, and so much relief granted without regard to what the Act requires to afford relief, it is not difficult to understand why there is great pressure each year to perpetuate the Act.