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WAR POWERS OF THE PRESIDENT
22 May 1947

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CAPTAIN WORTHINGTON: I take pleasure in welcoming back to the College this morning the officer who established the Research Department two years ago, and who was the one full-time Director of the Research Department.

Colonel Jaeger is a graduate of Columbia University and Georgetown University. He has taught in the University of Maryland and the Naval Postgraduate School at Annapolis. He is now professor of law at Georgetown University. His subject is "War Powers of the President." Colonel Jaeger.

COLONEL JAEGER: Captain Worthington and gentlemen of the Industrial College: I am very happy to be here again with the officers in the Industrial College. The subject that has been assigned to me--I would like to emphasize that it has been assigned--is not one of the easiest but it is a very fascinating one nevertheless.

These powers are derived from two major sources: first, from the Constitution of the United States; and, second, from acts of Congress wherein are delegated to the President certain of the enumerated powers in Article I, Section 8, of the Constitution which normally would be exercised by the Congress.

The President's constitutional power may be divided into two major functions aside from the authority which he exercises by virtue of the separation of powers, that is, that he shall exercise the executive power. Aside from that, he has: (1) the conduct of foreign affairs and (2) the military power as Commander in Chief of the Army and Navy of the United States.

The latter function is one that I do not believe I need to dwell on extensively before this audience. Prima facie you will know more about it than the speaker. But as to the other powers of the President, I shall develop them in some detail.

In addition to the very general statement in Article II, Section 1, that "the executive power shall be vested in the President of the United States of America, "there is a further statement that he is to take care that the laws be faithfully executed.

Gentlemen, it is quite apparent that these are very general statements. As a result, there has been a considerable conflict as to just how far the President can go in seeing to it that the laws are faithfully executed, and also in the attempted definition of what is comprehended by the term "the executive power"--"The executive power shall be vested in the President of the United States of America."

Nowhere in the Constitution is found any definition of "executive power." So there has arisen a very honest and a very genuine controversy as to what this executive power embraces.

It has been aptly said that the domain of the executive power in time of war constitutes a sort of Dark Continent in our jurisprudence, the boundaries of which are indeterminate. In consequence we have an underlying conflict. There are two primary schools of thought: first, the Wilson-Roosevelt doctrine, which holds that whatever is not denied the President by the Constitution is within his province. As Woodrow Wilson said, "In the office of the Chief Executive of the United States a man may grow to his full stature." That is a fine thought, but not all the senators and congressmen are fully agreed. And there is the Taft-Supreme Court doctrine which holds that whatever is not granted to the President by the Constitution expressly or by implication must be deemed to have been denied. And this, says the Supreme Court of the United States, is consonant with the reservation of powers in the Tenth Article of Amendment, wherein, of course, all the powers that have not been granted to the Federal Government, be it the Congress, the Executive, or the Judiciary, have been reserved to the several States, inasmuch as they had the sovereignty originally and are considered to have yielded only so much of the exercise thereof as they have expressly stated in the Constitution or by necessary implication have suggested. This, then, is the Taft-Supreme Court doctrine; and it generally finds favor with the academicians and the lawyers (and others who don't have to get anything done immediately). On the other hand, those who want to see something move, those who must win a war, favor the speed of decision, unity of command, and the force of action that an unhampered president has, especially when surrounded by able military and naval advisers.

But in times of peace we always come back to the doctrine: There is an executive power, but it embraces only those functions authorized or directed to be done by the President, according to the Constitution.

So I have presented, or tried to present, to you the fundamental conflict that we have. You will find in this postwar era many documents that have elaborated upon the Taft and Supreme Court of the United States doctrine which I have just described. On the other hand, should there be another war, I am confident that the Wilson-Roosevelt thesis will be the one contended for and probably employed.

I think perhaps that Mr. Lincoln was the precursor of what is called the Wilson-Roosevelt doctrine, because President Lincoln soon realized that if he waited for the Congress to act, all hell might break loose and nothing would be done about it. So in his message to the Congress on the fourth of July 1861--it sounds like a very historical date, as though the Executive was declaring his independence of the Legislative Branch--he referred to various steps he had taken by the two means usually available to the Executive, namely, by proclamation, which is a broader form of the other, known as the Executive order. Mr. Wilson himself used them interchangeably. If he thought "proclamation" sounded a little better, then he proclaimed. If on the other hand an executive order seemed appropriate for his purposes, he did it by executive order. But the distinction was never quite apparent. Ordinarily the difference is that if you proclaim, it is supposed to cover a very general subject, of interest to everybody in the country, whereas an executive order has a more limited application. That is the theory, but that's all that it was as far as Wilson was concerned.

So here is what Abraham Lincoln said to the Congress on the fourth of July 1861 in his message to the special session: "These measures, whether strictly legal or not, were entered upon under what appeared to be a popular demand and a public necessity. It is believed that nothing has been done"--I might pause here for emphasis. "It is believed that nothing has been done"--meaning by the President--"beyond the Constitutional powers of Congress."

He is now saying in effect, "Yes, I printed the money; but for heaven's sake make it legal," and he had the Congress with him, and the Congress said, "Yes, you had to do something. We realize it. We will ratify everything you have done." And that has been the pattern of executive behavior, mostly in war, I hasten to add, since then.

A moment or two devoted to the historical antecedents of the executive power may not be amiss.

The debates in the Constitutional Convention in Philadelphia demonstrated rather clearly that the framers of the constitution were well aware of the necessity for speed of action and unity of command in time of war. After all, the erstwhile colonies had just emerged from a serious conflict with a rather powerful country, which much to our good fortune was well occupied elsewhere, with what was then thought to be more important international contenders. We like to think, of course, should think, I suppose, that we really whipped the giant, practically with our hands tied behind our backs. It was the other way.

The experience of the committees of the Continental Congress had not been a felicitious one. Quite the contrary. The committees in

the Continental Congress--this is true of all committees except those in the Industrial College, I am informed--spent a great deal of time in holding "bull" sessions. The actual action was taken by the commanders in the field or on the high seas. So the Constitutional Convention was quite prepared in time of war to leave the national defense and the military operations to one supreme commander, described by Alexander Hamilton as "the first general and the first admiral of the land." That is what was intended when the President was called the Commander in Chief of the Army and the Navy of the United States.

Historically at least we may say that the executive power, certainly in time of war, was intended to comprehend every phase of the national defense. So the necessity for the consolidation of authority was recognized by designating the President as the Commander in Chief.

Now, we will observe the nature and extent of the executive power by reference to past practices of other presidents; customs and usages that have developed; the statutes themselves; certain landmark judicial decisions; and the briefest of references to international law, the existence of which is doubted by many people, although the Supreme Court has from time to time referred to it with at least quasi approval as being part of the law of the land. A brief review of the applicable Constitutional provisions may be in point.

Besides Article II and the reference to the Commander in Chief, we find in the same article the power of pardon. Its importance may escape you at first blush. But let us suppose that the Congress of the United States in its proverbially infinite wisdom were to enact a statute at variance with the wishes of the Executive and were to override his veto. Let us also suppose pursuant to this statute there were a certain number of convictions for crimes committed under its provision, the Executive would still have a rather complete power of pardon; that power of pardon can be expanded to cover large groups of people and is called the general amnesty. So the Executive could, to use a far-fetched example, nevertheless set at naught the will of the Congress. I am not even suggesting that it would ever be done, but it could be done constitutionally.

There is the power to recommend measures to the Congress. This is done frequently. You recall, for example, the President wanted discretionary power, in November 1942, to suspend various congressional measures at will, such as the tariff acts. He wanted the power to send our troops around by way of Canada. He wanted to bring prisoners of war in without any difficulty. It seems that under existing statutes any aliens coming into the United States have to pay a head tax of eight dollars. So this head tax of eight dollars was being levied on prisoners of war. That looked strange to the President. It would look strange to anybody. But the law covered the situation so fully and rigidly that no escape clause could be found.

Gentlemen, when the statute was sent to the Congress, it was accompanied by a missive from the President addressed to Senator George and Representative Doughton in which they were told, "It is a must." So they in reporting the measure to the Floor of their respective houses said, "We have been instructed to present this," which was another way of saying, "We don't believe in it, boys; but here it is. We have to put it up to you." Constitutionally, of course, as you can see, the President under Article II has the power to recommend legislative measures. In this instance, the aftermath was that the President did not get exactly the statute he wanted.

The President has the power to call special sessions of the Legislature. That we have seen done from time to time. Then, of course, he has the duty to execute the laws of the United States.

Under Article I there is a significant power (employed by President Lincoln, for example)--suspension of the writ of habeas corpus.

Article IV may have some pertinence. A republican form of government is guaranteed. This is the general republican form of government, and maintaining that form of government would appear to be a part of the duty to execute the law of the land.

In any event, as Chief Executive he is, under the Constitution, the constitutional officer required to take the oath to defend the Constitution. Many authorities have concluded from this that it would devolve upon the President to assure the maintenance of a republican form of government.

Finally, under Article VI of the Constitution, treaties made under the authority of the United States are declared to be the supreme law of the land, together with the acts of Congress that are passed pursuant to the Constitution.

The treaty-making power alone is a most significant one. After all, it is in the President's discretion to decide when and upon what subject and with whom a treaty is to be made; and, if he doesn't want to, he doesn't have to. Thus the President's discretion in the conduct of foreign affairs is relatively untrammeled.

A few observations as to the judicial decisions which constitute the landmarks guiding would-be travellers on the road to exploration of this Dark Continent.

The first really significant decision was Harmony against Mitchell in 1852. A while before that we had had a little trouble with Mexico. Harmony was a Spanish-American camp follower who had a lot of mules and other animals. His mules represented a way to haul supplies that the

Army seemed to need. Furthermore, Colonel Doniphan, in command of this particular regiment of which Harmony was a camp follower, felt that there was a possibility that these animals and wagons might fall into the hands of the enemy. Yet there were no active hostilities and everything was fairly quiet. Nonetheless Colonel Doniphan, the regimental commander, instructed Lieutenant Colonel Mitchell to seize these animals and the wagons.

Now, Mitchell was confronted with an interesting decision. Should he consider this an illegal order and say, "This is an illegal order. I don't have to obey, Colonel."? Or should he obey and take the consequences? Of course he obeyed, naturally. I don't believe he would have been there much longer if he had suggested to the regimental commander that this was an unlawful or illegal order.

Subsequently, to cut the details short, the United States District Court gave Harmony, the plaintiff, a judgment against Mitchell; and Mitchell took the consequences. But he still had his commission. He probably had the good will of Colonel Doniphan as well.

The case was appealed to the Supreme Court of the United States and the Supreme Court affirmed the trial court's decision with a slight modification--that the interest that had accrued in the meantime was added, making a total of more than $97,000.

But the Congress of the United States was very decent about the whole thing; it passed a special relief bill. But it took a while to do it, and in the meantime poor Mitchell was sitting on the anxious seat. You see, even in those days, with the munificent pay that was provided by a grateful republic, a lieutenant colonel's salary could hardly stand the strain of a $97,000 judgment just like that.

But, gentlemen, there is a very serious proposition behind all this. It leads right up to a very modern controversy, and that is the Montgomery Ward case, with which I shall conclude this discussion. This is the point: Our jurisprudence requires that there be an actual, imminent danger and a theater of operations characterized by some hostilities before a military commander may properly take, destroy, utilize, or otherwise deprive the original owner of his property interest in the chattel taken without a consequent responsibility for the payment of the fair value of the object taken.

So that in the case of Mitchell against Harmony we have a realization that the taking may well have been for the convenience of the Government, but it was not essential. It was not essential to the prosecution of the war. There was no imminent danger or peril. There was no destruction of property as the result of a military act. Therefore, there was a personal liability on Mitchell until such time as the Congress was willing to relieve him by the enactment of a private bill. That is the first proposition.

The second proposition, which came much later, and which I present now, is that the Executive has the power to take private property, even when there is no imminence of peril or danger, but when it will serve the best interests of the people at large in time of national emergency and with the absolute requirement that the owner be indemnified the fair value of whatever property is taken.

Next are the Prize Cases, so called, a group of cases decided in 1863; the question presented was whether the executive power included the recognition of belligerency and the proclamation of a blockade, which, of course, would have some bearing on the law of prize. Yet the law of prize, under Article I, Section 8, of the Constitution is within the purview of the Congress of the United States. But in anticipation of congressional action or without regard thereto, the President had already proclaimed a blockade. In the Prize Cases it was decided that the executive power did extend to this matter--the recognition of belligerency, yes, and the taking of the necessary steps to defend the United States, and that that act would include and did include a recognition of belligerency and a consequent proclamation of blockade.

Then we come to a limitation illustrated by the next case, ex parte Milligan. The question was whether or not a military commission appointed by the Executive could properly try a civilian when there were no active hostilities carried on in a given sector, and the civil courts were open and functioning. Lambdin P. Milligan had lived around Indiana some twenty-odd years, and, so far as anybody knew, had been relatively peaceful. He might have had some strenuous objections to the Federal Government. He might have spoken injudiciously at times, but he thought he had at least a vestigial remnant of freedom of speech left. In any event, he did offend the general commanding his district, and that is always considered bad. So the next thing he knew he was being prosecuted before this military commission. On a writ of habeas corpus granted by the Federal Court, the case eventually reached the Supreme Court; and in the decision handed down in 1866 we observe that the jurisdiction of a military commission is limited, according to this opinion, to an area where there are active hostilities, in short, to a theater of war, wherein in effect a civil court cannot remain open and function properly.

There was no question about the right of the President or his duly subordinate commanders by proper delegation to appoint a military commission. That was clearly comprehended within the executive power. The only question was the jurisdictional one. I must say that, reading ex parte Milligan with ex parte Querin, the saboteur case, you will find a statement of the great Chief Justice Stone to the effect that the Milligan decision must be related to the peculiar facts in that case, and apparently must be confined to them. Thus, without

expressly overruling ex parte Milligan, it does appear to me that the Supreme Court has distinguished it so neatly as practically to have extinguished it.

I will now comment briefly on the case of the United States against Curtiss-Wright export Corporation in 1936, wherein the question arose as to the President's authority under a very particular and very significant set of circumstances. You will recall no doubt that a joint resolution was adopted by the Congress of the United States during the difficulties in the Gran Chaco. During that time, Bolivia and Paraguay seemed to be getting into each other's hair, and getting into each other's jungles, swamps, pampases, and so forth. It appeared desirable to stop the arms running that was going on.

We had certain humanitarian citizens, philanthropically inclined, who thought some of our Latin American neighbors should be put out of their misery, it being so hot there, infested with fever and malaria, and the like. So they rushed guns down there. A joint resolution was adopted which gave the President--this is the significant thing--the power to impose an embargo on arms "whenever in his opinion it would serve the interest of peace." The President soon came to the conclusion that it would serve the interest of peace if an embargo was clamped on, and he clamped on an embargo. Curtiss-Wright didn't pay much attention to it. They thought this had nothing to do with the presidential power.

But they learned--the hard way. A remarkable job was done by Mr. Justice Sutherland, gentlemen, in presenting an historical review of the power of the President to conduct foreign affairs. Sutherland went all the way back to the beginning of the Republic to trace a whole series of embargo acts, nonintercourse acts, all of which gave the President embargo discretion. Indeed, the only thing the statutes did for the President was to fix the penalty--How much should the fine be, how long should the fellow stay in jail? Everything else the President could do anything. But it was always discretionary. The Curtiss-Wright case doesn't seem to require that any standards be fixed to make such legislation constitutional.

The court then referred to the Ryan case, where the Supreme Court had said that when Congress delegates powers, it must fix certain standards so the President can't be arbitrary, unreasonable, whimsical, or capricious in the administration of these delegated powers, (as though any president would ever be arbitrary, capricious, whimisical, or unreasonable!).

The court said in the Curtiss-Wright case: "That is true of the powers which under the Constitution have been enumerated for the Congress in Article I, Section 8; but when it comes to the conduct of foreign affairs, that the President has by virtue of being the Chief

Executive." The Congress serves only as an adjunct, and it is the President who has the primary responsibility when it comes to foreign affairs.

The last case that I would like to touch on is this case I have mentioned, the United States against Montgomery Ward and Company. I think for your purposes, gentlemen, this should be about the outstanding case for any industrial mobilization plan of the future, when you will have to advise the President as to what to do next.

There we have a presumably moot point. The United States District Court said, "Why, no. This seizure is illegal." You probably remember the facts. The Federal Government through the Attorney General went into court (under the Declaratory Judgments Act) and said to the court, in layman's terms, "Please tell us whether we have done right. We have taken the plant here in Chicago and have moved Avery out. Now tell us, Have we done right?" And they said, "If we have, we want you to give us a restraining order, preferably a permanent injunction, to keep Avery out. We don't want him back." That is how the case got into court. The Government itself filed the action.

The District Court said, "No. You have asked me and I say, No. You are wrong. You should not have seized the plant. You didn't have the power either under the general presidential power as Commander in Chief or Chief Executive or any other kind of chief. He doesn't have it. And you don't have it under the War Labor Disputes Act, Section 3, because it says there 'production' and Montgomery Ward and Company are engaged in distribution. We see a difference even if you don't."

The Circuit Court of Appeals said, "Oh, no. You are wrong" to the United States District Court. "You are wrong. The Government is right. The President under the broad powers, first, as Chief Executive whether in peace or war, and second and above everything else, as Commander in Chief, has the power. He wouldn't need the statute; but, besides, he has the statute. And, according to certain views of what the language means, distribution is comprehended within production in a broad sense. And, anyway, Montgomery Ward does much more than distribute. They produce in one sense of the word." So the Circuit Court of Appeals said "Yes" to the Government. "You are right. Stay right where you are."

The case then went up to the Supreme Court, and the Supreme Court of the United States granted a writ of certiorari based on the record. When the troops were withdrawn and the Government released the plant, the Supreme Court vacated the writ of certiorari and said, in effect, "We will leave it just where it is"--the question has become moot.

So the question remains moot as to who is right. The Supreme Court apparently must have thought there was something there one way or another when the original writ of certiorari was granted. So far as we can tell, the Circuit Court of Appeals has the best of the argument to date.

In short, then, the President, as Commander in Chief and with the general executive power that he exercises in time of war, has the right to move in to a plant which is impeding or not helping the war effort, and operate it through his designated agents. That appears to be the present state of the law.

On the other hand, this whole question, referring, as it does, distinctly to the Zone of the Interior, may never arise in another conflict. There may be no Zone of the Interior. It may all be an active theater of hostilities. That would solve the problem, because then the Commander in Chief could rush right out in the field and act as any other military commander and take what he needed.

There is precedent for the Commander in Chief, that is, the President of the United States, taking the field. George Washington in the year 1794 rushed right out at the head of the troops. Why? To quell the Whisky Rebellion. That frightened the rebels. It might have resulted in the untold destruction of stimulants. He stayed with his troops a matter of approximately one month, in spite of the fact that Congress was sitting around waiting. He said, "I wouldn't have left the Congress if I hadn't felt it to be highly necessary"; but upon returning, he said that he felt no further necessity for remaining in the field for the Whisky Rebellion was about over.

I propose to discuss various subdivisions under the general foreign relations power of the President, since we have just had a very brief review of the Principal judicial decisions. Naturally there are many other judicial decisions. We could devote hours to them, but I thought I would spare you and just summarize a few of the leading ones.

First of all, recognition.--You will bear in mind that recognition extends not merely to recognition of a state as such, a new state born into the world community, but also to recognition of a government and to the status of belligerency.

Second, the exchange, recall, and dismissal of diplomatic agents.--That started quite early in our history. You will remember that Citizen Genet, "citoyen Genet," French diplomatic agent, caused Washington some unpleasant moments, and was then dismissed.

Third, executive agreements.--There are not many people who appreciate the fact that the executive agreement is something that was not devised in this century at all. It was first recognized as valid in

this country when the case of Watts against the United States was decided in 1870. It concerned the validity of an executive agreement between the United States and Great Britain concerning the administration of San Juan Island off the Northwest Pacific coast. There the court sustained the validity of an executive agreement which had never been submitted to the Senate at all. Thus, the executive agreement was first recognized some 77 years ago.

Then things remained quiescent and dormant until Theodore Roosevelt, feeling that he had a Congress that wasn't altogether with him, in 1905 proceeded to arrange a modus vivendi with the Dominican Republic. Although this was an actual treaty, he did not submit it to the Senate for two more years, until he felt he had a better Senate to work with. He needed only two-thirds of them to agree if he was to be able to ratify it. He held it in abeyance for two years. But, remarkably enough, its provisions were applicable immediately as a working arrangement, he said. Eventually he submitted it to the Senate as a treaty and it was approved.

Besides these executive agreements, of which we have had plenty in the last fifteen or twenty years, we have agreements like those made at Yalta, Teheran, Quebec, and the like, which have never been submitted to the Senate and must be considered "executive agreements" rather than treaties. We have, logically enough, vested this treaty-making power in the President with, of course, the approval of two-thirds the Senators voting as a limitation thereon. Nevertheless, the significant thing is that it is the President, or his representative, who negotiates treaties, who decides on the subjects and who decides when and where to make them.

This is a tremendous responsibility. If the President, for example, decides that for ten years more he will not have any treaty of peace with any of the late belligerents, the belligerent status will continue for that period of time.

There is nothing really mandatory that the Congress can do to compel the Executive to take any particular action in connection with a matter concerning foreign relations. The only direct hold, you might say, that the Congress has is through the Senate, and that is a negative power--a check on the making of treaties, as Mr. Wilson eventually found out in respect to the League of Nations covenant.

There is another important aspect of the treaty-making power; it may be used to reach an objective which might otherwise be unattainable. At one time, it was thought that wild birds should be protected. The wild life conservation program was in full force. The birds fly south in the winter and north in the summer, thereby showing immense intelligence, like the darkey who was up in Massachusetts working there

during the war. When the war seemed to be over, his employer said, "Rastus, I suppose you will be glad to get back to the South?" "Sure boss," said Rastus. "Aren't you all going back there? Does anybody live here 'cept in wartime?" So here are the birds traveling back and forth, North and South.

Now, it was decided by the Congress of the United States that it might be a good plan to protect these birds from people with shotguns and other lethal weapons who were killing them off at certain times when the birds had other things on their minds besides this flying all the time.

So Canada said it would enact a statute if the United States would enact a statute that would relieve matters and leave the birds free to do a little perpetuating. But there the question arose, Where is this power under the Constitution given to the Congress to help wild birds? You will look in vain. The Supreme Court did, just as I assume you would. Article I, Section 8, doesn't cover it. There is no section which says, "Congress shall have the power to protect wild birds."

Therefore, another way must be found. But some bright boy said, "That treaty-making power covers just about anything." A treaty was made with Canada and approved by the Senate for ratification. The President ratified it, and it has been valid ever since Missouri against Holland decided in 1920. The wild birds don't care what it is that protects them, so far as I can tell. They seem just so happy to multiply in peace.

Also under the foreign relations power we have the general direction of foreign policy. That may sound rather broad and somewhat vague, but I will try to state it more definitely. What will the Chief Executive's reaction be to a real or fancied insult? Suppose someone insults the flag of the United States--what will be the repercussions? Sometimes we are quick to take offense. Sometimes we are slow as witness the Panay incident. That could have been a casus belli. It wasn't.

There was the alleged butchery in Cuba. A battery of Hearst's super-reporters sitting in Miami, typewriter to the left, bottle of gin to the right, conjuring up gory stories. Ambrose Bierce's Tales of Pure Horror had nothing on what the boys wrote from Miami. How quick we were to take offense there! Even President McKinley had a visitation in a dream one night which told him he should do it. So how do we know what the reaction of the President will be? That will have a tremendous bearing on what direction the country's foreign policy will take.

The foreign policy will depend on the President's outlook. You can have all kinds of outlooks. One of them might be, "Well you can't live

in a divided world." Thus, there may be an orientation to the right or to the left. I am not satisfied that the majority of the people of this country would endorse either extreme. I am merely endeavoring to show that the executive power is a broad one when it comes to the conduct of foreign relations.

That brings us to the military power of the President, which I shall dispose of briefly.

First of all, there is the general direction of military and naval operations. There the Commander in Chief may intervene a great deal or very little, depending on his personal inclination. Abraham Lincoln frequently conferred with his commanders in the field, and often suggested types of campaigns. By way of contrast, Woodrow Wilson left the actual administration of armies in the field and the direction of their movements to his commanders.

Second, the President has the power of appointment and dismissal of commanders. That is a tremendous power. A mistake by the Chief Executive in relieving an important officer of his command might have incalculably disastrous results.

Third, he has the power of proclamation of martial law under certain circumstances.

Fourth, military government, which, of course, is confined to foreign countries under occupation, or perhaps I should say to non-American areas.

And the President may take certain hostile measures which are short of war. His use of the naval forces on land or sea in protecting the potential or inchoate interests of the United States, especially in Latin America and China, has become almost traditional. Until the adoption of the good-neighbor policy, this "protection" was apparently deemed a part of the Monroe Doctrine or at least a part of our foreign policy. All we have to recall are certain episodes in Mexico, Panama, Nicaragua, Haiti, the Dominican Republic, and China and the reference becomes apparent. Peaceful blockades, landing parties, and the like, have been used to maintain law and order. What would happen if a party of Marines from Nicaragua landed at Jersey City and said, "We would like to lend a hand with the elections" or/should pause for this purpose at Philadelphia, or Memphis? Of course, it won't happen.

Next is the matter of national defense. One of the things that is not fully understood by laymen is that a state of war needs no declaration. It is true that Congress declares war, but the other belligerent party doesn't have to wait for the Congressional declaration. That happened at Pearl Harbor. Nor does the President need to wait for the

Congress to declare war in order to take the necessary steps to defend the United States. As Commander in Chief he has the duty, and ample power to defend this country. So a state of war needs no declaration when the President feels obliged to take the necessary steps to defend the United States when an invasion occurs or is deemed imminent.

The next series of powers are those which the Congress has and may delegate. The significant ones are in Article I, Section 8: to raise and support armies; to provide and maintain a Navy, to declare war, grant letters of marque and reprisal, to provide for calling forth the Militia to execute the laws of the Union, and to suppress insurrections and repel invasions. These include the powers, with the exception of "to declare war," that are normally and usually delegated to the President.

Note especially the power to call forth the Militia, to suppress insurrections, and repel invasions. As far back as 1807 we find statutes wherein these powers have been regularly delegated to the President.

It is a further power of the Congress to make rules for the Government and regulation of the land and naval forces. Under this, the Articles of War, have been enacted.

But the President by himself, simply by virtue of the executive power, has the appointment of military commissions, heretofore mentioned. The significant function of the military commission is that it may try civilians in theaters of hostilities.

There is one significant modern development: formerly Congress was somewhat loathe to delegate these powers to the President without restraint. An innovation has been introduced in this last period of our history. When the Congress delegates powers, it requires reports to be made. Reports must be made by the Executive. In short, the Congress delegates powers, retains investigational functions and requires reports; that is somewhat like locking the door after the colt has bolted.

In conclusion, I shall summarize the controls that the Congress normally has which are regularly delegated, and particularly those which are delegated to the President in time of war or imminence of war.

First, the control of administration.---The President issues the regulations and creates the agencies, as many or as few as he deems best.

Second, the police power.---Safety and security and the successful prosecution of war result in a virtual suspension of civil rights.

The restriction, for example, of American-born Japanese, who by the Constitution are citizens and remain citizens, was one case. They could be restricted to certain areas. They could be held there. The courts sustained this exercise of the executive power. Likewise as to censorship and limitations on the freedom of speech or of the press. Actually there is no readily definable limit to the invasion of individual rights or the suspension of individual liberties in time of war.

Third, the economic controls.--It has been said so often that it is trite by now that modern war is a war of resources. President Wilson said so thirty years ago. It becomes more apparent every moment. The President creates the temporary agencies for the coordination of manpower, material resources, services, utilities, and the like. These agencies are staffed by officers or civilians appointed by the President.

That gives rise to the most modern of these problems--subdelegation, the subdelegation of congressional powers. How far may the President go in saying to one of his subordinate officials, "You administer this one" or "You take charge of that one"? The courts have resolved this problem rather deftly by saying that unless the statute requires the President personally to administer the delegated authority, it will be implied that the Congress intended a further delegation to be permitted.

Fourth, the termination of hostilities.--Eventually, the President will have to decide when he wishes to terminate hostilities and end the state of belligerency by means of a treaty. Furthermore, a military occupation will be ended or continued as the Executive sees fit. It is a matter essentially for the determination of the President.

He also will determine whether he will recommend a loan to a foreign country. If a country is bad and naughty, there may be no loan; Rumania was recently threatened with curtailment of loans unless her behavior improved. The President has certain weapons that are very powerful in their incentive value.

As a prophecy--and I realize how dangerous it is to prophesy--I feel that there is a very clear tendency toward a greater concentration of power in the hands of the President in time of war. This tendency will continue; should there be another emergency, which God forbid, there will be a far greater concentration than there has ever been before. I think that that will be due, of course, to the extraordinarily accelerated tempo of global warfare, requiring speed of decision and the coordination of all resources, human and material, beyond anything ever known. To sum it all up, I think we can look forward to the Commander in Chief exercising the powers of a constitutional dictatorship, because it is within the framework of the Constitution.

Thank you very much.

CAPTAIN WORTHINGTON: Open to questions.

A STUDENT: Is there anything to keep the President from deciding not to have any more Congress or any more Supreme Court during a war?

COLONEL JAEGER: The provision as to the convening of Congress is constitutional. In other words, it is not dependent at all upon the will of the President. The Constitution fixes the exact time when the Congress shall convene; the President has nothing whatsoever to say about that. He may call a special session of the Congress --that is true. He doesn't have to call one if he doesn't want one. But there is nothing to compel Congress to adjourn once it gets into session. It could just go on and on; sometimes it has done so.

As to the Supreme Court, that, again, meets pursuant to the legislation that has been enacted by the Congress. That is, the terms of court are fixed under a broad statute. But actually, they are fixed by the court itself. That being the case, it is hard to conceive of a situation where the Executive could simply say to the court, "You are now suspended." The Court's influence might be suspended to some extent, but the Court could hardly be suspended in the exercise of its functions. There is still basically, even in wartime, that tripartite separation of powers which is the cornerstone of this form of government.

Stated very bluntly, I do not believe that the President could constitutionally suspend the Congress or the Supreme Court.

A STUDENT: As I understand it, the Constitution offers the power of impeachment by the Legislature. Does that continue in wartime, and how far up the scale would it go?

COLONEL JAEGER: I have never heard it suggested that that power would not continue to exist during a time of war. The constitutional provision doesn't impose any limitation on its use. I do not believe, however, unless it was a case of actual treason or something broader than treason, the Legislature would want to undertake it.

A STUDENT: I had in mind a particular case. For instance, propaganda had it during the latter stages of the war in Germany that the people in that state, had the movement been started, would have ousted Hitler long before. He had a dictatorship, which would be different from our case. But even if ours is called a dictatorship also, it would be possible.

COLONEL JAEGER: Possible, yes; but, I think, highly improbable.

A STUDENT: Going back to your talk about the Court, if this be a theater of operations and if the military arbitrarily should take over the courts as they did at Honolulu, how would any questions be submitted to the Supreme Court?

COLONEL JAEGER: I don't think they would actually be submitted under those circumstances, because once you have suspended the writ of habeas corpus because of the existence of an actual theater of hostilities, there would be no real way of getting to the civil courts.

I would, however, like to say one thing in that connection. I have not mentioned this before. You may recall that the President in the saboteur cases by proclamation sought to prevent the saboteurs from getting to the Supreme Court, by stating that the civil courts would not be open to them. This was a very interesting point. The Supreme Court of the United States just brushed it aside and said that in so far as applications for writs of habeas corpus were concerned, so long as the civil courts were open and functioning, that writ existed even for saboteurs. Of course, as to whether or not it should be granted, that was another question; but the Supreme Court did definitely demonstrate that it still had a judicial function to perform in wartime.

A STUDENT: Will you expand a little more on what I believe you called the executive agreement? It seems to me that an irresponsible president could cede away our territory without any ratification as such.

COLONEL JAEGER: I am happy to say that there has been a tremendous amount of criticism in the Congress of the whole concept of the executive agreement because of the very argument you make; namely, that an executive who didn't have the welfare of the country at heart could apparently do incalculable damage. However, this is the argument advanced against that:

First of all, most treaties that have any kind of standing will require an appropriation. That power of appropriation is very firmly lodged in the Congress. The President, even giving all of his executive powers their full due, would not be able to appropriate the money. So he might conceivably promise something, but he still would have to go to the Congress before he could get the money.

The second point is that it hardly seems possible that he could cede away any territory without an actual treaty. In other words, he would certainly receive no backing for such cession from the Legislature, or for that matter, from the courts, either the Supreme Court or the inferior courts, unless it were done by treaty. There I believe the executive agreement would break down.

Normally the executive agreement is conceived of as a rather informal matter which disposes of one controversial issue. For example, when we had our reciprocal trade agreements, the President was authorized , but was authorized by the Congress, to proceed to negotiate these individual bilateral agreements, because of the speed with which they could be made effective. Had they been submitted to Congress, they would have hampered considerably the work of the Foreign Relations Committee of the Senate. So in the interest of expediency, the executive agreement method was decided upon.

But there are certain subjects to which the executive agreement does not extend, and the authoritative writers are generally in accord with the proposition that there is a limit. But there is no accord as to the extent of that limit.

A STUDENT: Are agreements of the character of the Potsdam Agreement binding on this country?

COLONEL JAEGER: I am sorry, but I have to beg the question a little. If they are proper subjects for executive agreement--and, so far as I can now tell, they are--they are binding. But the next problem is, What will happen to this country if it should not abide by them? There might be an international obligation, but who would enforce it?

You realize that the applicable principle is that whichever is later in date will control where there is a conflict between treaties and statutes. If the Congress of the United States should enact a statute contrary to the Potsdam Agreement, the courts of this country, the officers of this country, would be obliged to follow the statute rather than the Potsdam Agreement.

A STUDENT: What do you conceive the President's relation should be to the Economic Mobilization Plan? What would be the status of the plan before it is approved or submitted to Congress for approval? What would be his relation to that plan?

COLONEL JAEGER: Conceding it desirable that the President's power as Commander in Chief be exercised, and conceding that it will be a war of resources, it seems obvious to me that the President would be very materially concerned with the plan.

If he chose, he could acquaint Congress, or at least the Armed Forces Committees of the Congress, with the highlights of the plan and let them work out whatever enabling legislation might be considered essential. I am not even sure that enabling legislation would be needed. Up to a certain point, perhaps. In a future emergency you might very conceivably establish the machinery and put it into operation by executive order.

To do that, of course, would require a definite state of war, because one of the difficulties encountered in this last affray was that instead of a clear-cut break from peace to war, we were like people at the seashore. We first wiggled our feet a little, said the water is a little cold yet; after a while, we managed to get in to the ankles, then the knees were exposed; and then we gradually got in both thighs. That was where the Japs took a hand. That drifting in little by little did not help the Executive's position, because the things he could have done by himself during a war were the things that

perhaps he should have been doing but couldn't because there really wasn't a war. He did enough as it was to cause many people to criticize him. His little destroyer deals, for instance, were considerably in doubt. An ingenious Attorney General, however, relying on no precedent, managed to overcome the Alabama Claims convention, and get by with some of them. But the principal trouble was that we didn't have a quick transition from peace to war.

Now, if you anticipate another situation similar thereto, then, of course, it would be best to have the legislation all ready, provided you don't have to worry about allocations, and then just have the Congress at the first suggestion of the President enact it; so you could put your industrial mobilization plan into effect long before actual hostilities started.

But, if the predictions should happen to be carried out, namely, that the war will begin without any warning and that it will be something more than a shooting war, in other words, an exploding war, the entire plan might go into operation with the speed of a push button, pushed without any help from the Congress. If we once decide that the United States, that is, the territory of the continental United States, becomes an active theater of hostilities, I find it very hard to think of anything the President could not do constitutionally, the peril being imminent and the danger immediate.

CAPTAIN WORTHINGTON: Thank you very much, Colonel Jaeger.

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