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WAR POWERS OF THE PRESIDENT

27 April 1948

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MR. NIKLASON: Executive orders, issued by the President, served as the legal basis for much of the authority under which administrative action was taken in World War II. It seems apparent that in a future emergency the President will find it necessary again to exercise his Executive authority. The question as to how far he may go in meeting the exigencies of an emergency is one which requires careful consideration in the preparation of an economic mobilization plan.

We are very fortunate to have a speaker who, as Assistant General Counsel of the War Production Board, developed many of the orders and regulations which were required to mobilize and control the national economy for war production in World War II. In view of the fact that the legal sanctions for many of these orders were based upon the Executive powers of the President, he can speak with authority on the subject, "War Powers of the President."

I take great pleasure in introducing Mr. Henry H. Fowler.

MR. FOWLER: Good morning, gentlemen. It is a great pleasure to be back here. I had the privilege of being with the preceding class, at a similar meeting a year ago, and discussing at that time the legal and legislative aspects of economic mobilization. It is a pleasure to be back here again.

I cannot help but add that the passage of the intervening period of time makes these discussions, and your considerations here, of much more imminent and immediate importance than perhaps it did a year ago. It is in that atmosphere that I should like to address the subject this morning, "The War Powers of the President."

I would like to preface my remarks by saying that a discussion of this subject presents something of a challenge to wring out of it something that may be of practical value to you. The subject is one on which scholars and students of law and political history have written reams. Of necessity, the story of the exercise of the war powers of the President, as it is written in the books, covers such a vast scope that one hesitates to approach it from the historical point of view or from the specific-incident point of view in the span of an hour.

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In World War II, as you all know, we had quite a good deal of time in which to muster up our authority in the Federal Government to deal with the various situations that were presented. I should say a period of several years passed in which enactment succeeded upon enactment until, finally, something approaching the necessary congressional authority had been delegated to the Executive to deal with the variety of situations with which we were confronted.

Undoubtedly the contingency upon which we must plan, in practical terms, today is one in which we shall not have the riches of time to deal with the crucial situation with which we are apt to be confronted. It is always terribly difficult to predict the type of emergency that may arise. And even if we are careful beforehand to anticipate what may be necessary, and to request through the Executive the specific laws of Congress which the defense authorities and those responsible would like to have on the statute books, it is quite likely, and quite possible, that many situations will not be anticipated and those in authority, when the emergency arises, will be forced to cope with situations for which they cannot point to a law on the statute books and say, "That gives the President the necessary authority to act. We can project the action in his name." I believe that situation, which is the result of recent developments in modern warfare, which I need not go into at this time but only advert to, makes the subject of increasing practical importance for you and me today.

What are the powers that the President may exercise with regard to war without reference to whether or not there is a specific act of Congress on the books delegating authority to him?

Let us turn, first, to the written letter of the Constitution itself. We find three classes of powers there: First, those that directly confer authority upon the President to wage or conduct war; secondly, other powers and duties vested in him that may have an important bearing on the conduct of the war; and, thirdly, other clauses that do not refer directly to the President but their necessary implication, by reason of the fact that he is the Executive, concedes him considerable authority.

Specifically, Article II, section 1, of the Constitution--and this is the root and guts of this whole question--reads as follows:

"The Executive Power shall be vested in a President of the United States of America."

That grant of authority to the Federal Government, which must necessarily be executed and carried out through the office of the President, clearly provides considerable responsibility and authority to deal with the type of questions which, happily, we have not had to confront us much in this country, except for the one great instance which we refer to in some quarters as "The War Between the States."

There have been other occasions in which it has been necessary for the President to act and operate under this grant of authority. It is important, certainly in our considerations. I would not venture to have an opinion this morning on the possibility, in another great war with a certain unnamed power, that we might be confronted by serious domestic outbreaks.

There are still other presidential powers with regard to war which are derived directly from the Constitution and exist without benefit of any particular statute. They might be termed the powers that result from custom and usage. A good deal of the power of the President over foreign relations, for example, does not stem directly out of the power to negotiate treaties and the literal wording of the Constitution, but out of the normal practice and custom and common sense that you must have one agency of government dealing with foreign nations and the representatives of foreign nations. A good deal of the power of the President in that particular field, one might say, arises from custom and experience.

How are these direct war powers of the President exercised as a practical matter? Well, the answer to that, in short, is that the most common forms are the Executive order and the proclamation. The proclamation generally contains announcements of decisions of the widest interest, such as a state of emergency existing, making it necessary that such and such be done. The Executive order concerns matters which require the setting up of a special authority and, perhaps, the delegation of that authority from the office of the President to some specific individual head of department or agency to deal with the specific problem which is outlined in the order.

Other forms of presidential action, pursuant to his war powers, may include rules and regulations and lesser instruments, known in different areas as directions, instructions, orders to heads of departments and other agencies, some of which are recorded and published and some of which are oral, on matters that require his approval and come to him through appeals or submissions by his subordinate officials.

Not all of the acts required of the President in the exercise of his war powers can possibly be performed by him personally. The courts, the Congress, and the general public operate on the assumption that he

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In approaching that, I want to say that what is given you now should be considered as personal opinion and if I have to take, or do take, very strong positions, for which, later on, someone could throw the book at me, you will forgive me. I am not going to try to support every statement or every opinion I make by a great wealth of historical precedence. I don't believe you would want to carry that around in your head. As a practical matter, it would be pretty impossible to do so. Certainly in the short time permitted here I could not support the opinions that might be ventured by chapter and verse from the books.

Now I would like to devote most of the remaining time to a discussion of the so-called residual powers of the President as Chief Executive and Commander in Chief to deal with every situation that may arise in the course of the war and see to it that all the necessary measures are taken to wage war successfully in the defense of the Nation. I believe that is the cardinal and fundamental phase of this issue which needs the greatest attention, not only here today in the Industrial College but elsewhere, in view of the type of war we may expect to encounter if there is to be another one. I would prefer to discuss that very real-life question with you rather than to take the time to recite in a somewhat schoolmasterish way from the pages of history the story of the exercise of the war powers in the known and predictable fashion that various good texts on the subject can provide.

Before turning to that question, I do feel the responsibility of bringing some specific matters to your attention and summarizing the various ways in which the President's war powers may be exercised. The latter part of the discussion we will devote to this very real-life, practical question of just what can the President do when the safety and defense of the country requires it and there is nothing on the books you can point to in the way of authority or nothing in the way of historical precedent that supports desired courses of action.

First in connection with the beginning of a war, the President has vast control of our foreign relations and by Constitution and custom is responsible for the initiation and formulation of foreign policy. Of course, when this conduct of foreign policy requires the entry into treaties, the Constitution requires that the consent of two-thirds of the Senate be secured before a treaty becomes effective.

Many so-called Executive agreements, however, have been entered into by the President. This growing practice of using these instruments has steadily enhanced the power of the President to enter into binding arrangements with foreign powers, the principal limitation of the use of the Executive agreement being that if the conduct and execution on our part calls for funds the President must eventually go to Congress and get approval of appropriations. Therefore, there is the natural

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No one doubts the power of the President to begin a defensive war. Since the power to declare war rests with the Congress, the power to begin a war of aggression, tends to flow in that channel, that is, by way of congressional declaration, by reason of the constitutional mandate. Authorities are generally agreed, however, that when war is commenced against this country by aliens or citizens, no declaration of war by the Government, that is, by Congress, is necessary. The President may begin and wage a war of defense. As a matter of fact, that power was vigorously upheld by the Supreme Court of the United States in the famous decision of the Court in the so-called Prize cases in 1862.

The question still remains--and this is the ticklish part of this power of the President to wage a defensive war--just what constitutes a defensive war? Time does not permit me here to recite the various historical precedents in which defensive wars have been waged by the President without the benefit of congressional declaration. The reaches and limitations of the President's power is a matter of some dispute. I would like to make one point at the beginning. It is not always confined to a defense of our own shores of our own Territories against actual invasion. There was one incident, for example, in the early history of the country, of the Barbary pirates in which it was necessary for the President to wage a defensive war a good many miles away from our shores. The holder of the office at that time was not a little concerned, apparently, about the fact he had to wage a defensive war in the Mediterranean and desired some congressional support. Finally, some declaration by Congress, which took care of his mental problems, was enacted. But for quite a period he did, at that early stage in our history, wage a defensive war a good distance away, without benefit of any congressional authorization.

I want to leave that phase of the question by saying we do not need to develop the refinements here. There is one all-important test where certainly our common sense would tell us whether or not a war is a defensive one. If the President feels that the country's life and preservation requires action on his part to wage war, despite the fact that the circumstances have not produced, or are not likely to produce, a congressional declaration before his initial acts, I believe we would agree that action by the President to preserve the country was truly the making of defensive war.

I cannot disassociate in my own mind his power to wage defensive war from his power to preserve the country. If in his judgment it seems necessary, in order to protect and preserve the country, to wage war, then it would seem to be a defensive war and within the power of the President to initiate.

Likewise, the President possesses broad powers to resume diplomatic relationships and carry forward the work of reconstruction in the conquered or occupied territories, or even territories to which our Armed Forces have moved, or must continue to move. His principal resort to Congress for legislative authority in that particular field finds itself largely confined to the request for necessary appropriations to enable him to conduct those operations.

I have omitted from the discussion those war powers of the President which are of greatest importance to your course of training here; namely, the civil power in time of war to mobilize the resources of the Nation in support of the Armed Forces. The powers of economic control over food, fuel, trade, industry, private property, transportation, communication, and various military administrative agencies, as well as the police powers, are those powers which on the home front, spell the difference between victory and defeat. We know they have their principal root in the congressional enactments and I believe it would be more desirable to handle them in connection with the subsequent lecture, where we will be dealing with the broad panoply of legislative authorization for war mobilization.

In leaving this broad subject of the traditional war powers of the President, which are known and tangible and can be spelled out in terms of historical precedent from the various texts available, I would be remiss if I did not leave with you some references to some of the outstanding scholarly treatments of the subject. There are three or four works, which I would commend to you, that will give you a detailed historical recital and discussion of the powers I have just mentioned.

Whiting, "War Powers under the Constitution," first edition 1862, written by the legal adviser to the Secretary of War at that time. This work was in its forty-third edition by 1870 and is considered one source of the important beginnings in this subject.

A rare and extremely valuable book, which ought to be available on a more widespread basis to those concerned with the question, is the one by Berdahl entitled, "War Powers of the Executive of the United States." This is a thesis originally published by the University of Illinois in 1920 and is a very complete analysis of the exercise of war powers up until that time.

A third notable work is that of Corwin entitled, "The President's Office and Powers," published in 1940 by the New York University Press. Mr. Corwin is an eminent constitutional authority. Chapter 5 of that work, on the Commander in Chief, reveals a depth of study and scholarship which I could not hope to approach in the course of a brief lecture.

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In the fall of 1942, President Franklin Roosevelt desired certain action by the Congress in the way of legislation to combat wartime inflation he felt to be endangering the home front and inhibiting the maximum national effort in the total war in which we were then engaged. At that time he made, what I believe to be, a historical and controversial statement which, I think, in succeeding years will be recognized as a classic exposition of the twists and turns of this subject of the war powers of the President. I want to recite it to show you what President Roosevelt thought his powers were in that situation. In this statement he touched on most of the important facets of the subject. He said:

"In the event that Congress should fail to act and act adequately, I shall accept the responsibility and I will act.

"At the same time that fair prices are stabilized, wages can and will be stabilized also. This I will do. The President has the power, under the Constitution and under congressional acts, to take measures necessary to avert a disaster which would interfere with the winning of the war. I have given the most thoughtful consideration to meeting this issue without further reference to the Congress. I have determined, however, on this vital matter to consult with the Congress. \* \* \* \*

"The course of conduct which I am following in this case is consistent with my sense of responsibility as President in time of war, and with my deep and inalterable devotion to the processes of democracy. The responsibilities of the President in wartime to protect the Nation are very grave. This total war, with our fighting fronts all over the world, makes the use of Executive power far more essential than in any previous war. I cannot tell what powers may have to be exercised in order to win this war. The American people can be sure that I will use my powers with a full sense of my responsibility to the Constitution and to my country. The American people can also be sure that I shall not hesitate to use every power vested in me to accomplish the defeat of our enemies in any part of the world where our own safety demands such defeat. When the war is won, the powers under which I act automatically revert to the people--to whom they belong."

I would like to make several observations concerning that statement. First, it embodies the very practical and customary method of exercising the war powers of the President, that is, seeking to exercise them, in so far as it is possible, in conjunction with a similar or simultaneous exercise of legislative or congressional power. That is the modern, tactical, advisable, and sensible way to act. When circumstances permit, the President will take action pursuant to an act of

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the power and authority and resources of the Nation had to be mustered. The President said, in effect, "I expect to use my powers to the utmost to achieve victory and I cannot rightly predict just the extent and limits I may have to go to achieve that result."

The third observation I would make on the statement is that the President, in a sense, is arrogating to himself to do that which is necessary to win the war and preserve the Nation and, in so doing, he nonetheless added to it a profession of his devotion to democracy and an assurance he would exercise those powers with the full sense of his responsibility to the Constitution and to the country; and a promise he would return this residual power to wage war successfully to the people once the defeat of our enemies had been accomplished.

This last note to his statement may be said to be something of a recognition of the power of public opinion and the fundamental doctrine of the democracies that power belongs to the people rather than to the State. The President wanted to express an awareness of this fact and to assure the people that while it might be necessary in time of war for him to arrogate to himself something that seemed to them like total authority, he would promise them to get rid of it just as soon as he could and return total power to the people once the war was over.

That statement, I might interpolate, would not have been one you would have expected to come from the leaders of our enemies. It is clear in this situation that the President saw himself acting as an agent of the people, taking to himself all the powers inherent in the Nation to avert disaster, preserve the Nation and the freedom of the people residing in it.

We may be sure that this statement of 7 September was not off the cuff. Rather, it was an expression of the heartfelt and considered judgment of a great war President who was just coming through the extraordinary process of mobilizing the Nation for waging the greatest war in history. He was, in September of 1942, expressing as best he could his concept of the responsibility to exercise the war powers which were inherent in his office.

The most striking thing about the President's statement was its expression of, what I should like to term, the doctrine of national self-preservation in time of war and the responsibility of the President to exercise his war powers to see to it that the Nation was preserved. The President seems to say, "Now that we are in a war, it is the responsibility of my office to conduct the war and I shall conduct it exercising the powers necessary to victory."

"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 beyond the constitutional competency of Congress."

Here we find Lincoln inferentially expressing the hope that his Executive action would be subsequently regularized by congressional act. Even if his apology had stopped at that point, it would be a significant statement for it embodies the constitutional theory with which we are concerned, since it claims for the President the right in an emergency to take measures which would otherwise be illegal, subject only to the risk of having those measures subsequently disallowed by the Congress.

Lincoln's message went on to say, "The Executive found the duty of employing the War Powers in defense of the Government forced upon him."

Referring specifically to the suspension of the writ of habeas corpus, he puts the question, "Are all of the laws but one to go unexecuted and the Government itself go to pieces lest that one be violated?"

The action of other great war Presidents, notably Woodrow Wilson, confirms generally this expression of view that there is a vague but great power existing in the President to wage war and to undertake the measures necessary for victory without great emphasis on the narrow questions of strict legality.

These men, as I have indicated, feeling conscious and being aware of this vast power, nonetheless have characteristically tried to exercise their powers with some recognition of the practical limitations that exist--not the legal limitations but the practical limitations. They have characteristically sought to move hand in hand with the Congress and thus reduce and leave out of the area of conflict the question of whether or not the power exercised was one the President should have exercised on his own without referring to Congress, or not.

Now that is a sensible and common sense point of view. The President must necessarily, in order to exercise his Executive function, have money. He can only get it when Congress appropriates it. The Constitution orders him to take care that the laws enacted by Congress are faithfully executed; in the last analysis Congress has the right to find him guilty of high crimes and misdemeanors if he abuses a prerogative in office and to impeach him and throw him out.

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Is it, on its factual basis, substantially related to the successful waging of the war? Secondly, is the action the type that, if given the opportunity to authorize by legislative enactment after full explanation and hearing, Congress would be apt to approve? Thirdly, is the action, if time and security regulations permit it, one which could be explained to the average ordinary citizen so that he could be made to feel that whatever inconvenience or sacrifice he might be called on to make by reason of the action was necessary and desirable in order to win the war.

I believe, if one would ask those simple questions--not at great length but incorporate the frame of mind that considers them--they embody the practical limitations and that only when the action taken is apt to affect directly a private individual by taking his property or taking his body any substantial concern with the narrow legalities of the situation is necessary.

That is a very broad statement and I readily admit that it is a debatable one. But I believe that both past experience and the testimony of the men in office indicate that the good common sense of the American people will support our conclusion that the Presidential office possesses the power to do that which is necessary to wage war successfully, and that the only limitations which exist are the practical ones that conform to our form of government, the doctrines of team play, democracy, that are the very warp and woof of our national existence, and which almost any individual in responsible office is apt to weigh heavily in making a decision.

MR. NIKLASON: Are there any questions?

DR. YOSHPE: A recent issue of the Journal of Commerce carried an article to the effect that the NSRB shall have completed within two weeks a legal and legislative annex to the economic mobilization plan for submission to Congress. I wonder whether, through your contacts, you are prepared to comment on the scope and thoroughness of that annex?

MR. FOWLER: No, I am not prepared to comment. I had expected to discuss that situation last week with someone eminently familiar with it in order that I might be prepared. But since it will have a more direct bearing on the subsequent lecture, on the legislative aspects of economic mobilization, we decided to defer our discussion.

MR. NIKLASON: Mr. Fowler, we thank you very much for a most enlightening lecture.

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