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EMERGENCY POWERS OF THE PRESIDENT

21 February 1949

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COLONEL BABCOCK: General Vanaman, guests, gentlemen of the Class: In 1930, when the first Industrial Mobilization Plan for World War II was completed, it had a peculiar passage in it. When Douglas MacArthur, then Chief of Staff of the Army, presented it before the War Policies Commission in 1931, he made a particular point of that passage. He said that the President of the United States possessed authority to back up any plans that we might make regarding industrial mobilization. He said that the President of the United States had authority granted him by the Constitution, by acts of Congress, and, above all, by the power of public opinion.

I have heard the speaker before on the "Emergency Powers of the President." I was very much impressed with his handling of this particular idea. Father Durkin is Professor of History at the Graduate School of Georgetown University and has kindly consented to come over and give us the results of his extensive research in this field.

It is a great honor to present Father Durkin to the Industrial College of the Armed Forces.

FATHER DURKIN: Gentlemen, may I say that I consider it a real privilege to add my few modest thoughts to your very important endeavor.

May I say at the beginning that I would like this talk to be thought of as an opinion, or series of opinions, shall I say, that I have tried to develop.

Let me remind you immediately that, in the question of the President's powers, there is a special difficulty; namely, that the Constitution really puts no bounds at all to the President's powers.

You know, words are very strange things. In the current debate on the European Defense Pact, those who are very careful about maintaining the Constitution are using some rather interesting phrases. It is said, for instance, that in case the President should make a treaty and say nothing to the Senate about it, or act in opposition to the Senate, he really would not be breaking the Constitution, that he would not be violating any particular provision of the Constitution, but that he might be operating, as they put it, "tangentially" to the Constitution. Well, that means that he is not breaking the Constitution exactly, but he is just breaking it at a tangent. You may have heard about Mr. Willie Pep, a pugilist, a week or so ago. When he operated on his opponent's jaw then, he was not exactly acting tangentially to the jaw. But that seems to be the suggestion of certain arguments in defense of the President's action.

What I am going to do is show you what some authorities have said about the President's power. Then, as I understand it, you would like to have questions at the end of the period. So let us have the questions, as many as you please, at the end of the period.

First of all, I am going to quote briefly from a great liberal, John Locke, the man who, of course, was very influential in directing the thinking of the Framers of the Constitution. Locke, in his "Treatise on Civil Government," the second essay, treats in Chapter 14 of what he call the "prerogative," or power, of any executive. He is not talking merely of the King of England. He is talking about any executive. Remember, gentlemen, we are quoting here a man who represents the widest liberal tradition in European political thinking. This is what he said in the seventeenth century about the power of an executive, <u>any</u> executive:

"Where the legislative and executive power are in distinct hands, as they are in all moderated monarchies and well-framed governments, there the good of the society requires that several things should be left to the discretion of him that has the executive power."

I don't want to bore you by quoting too much. It is the beginning of Chapter 14. You can check it.

Then he says, in effect, that it is necessary for the executive at times to act not only without the law but even <u>against</u> the law.

During my talk, by the way, I am not going to confine myself strictly to constitutional law. I suggest to you, gentlemen--and I think you agree with me--that in the matter of the powers of the President, we cannot talk merely as lawyers. We must remember that the lawyers cannot do everything. I hope I am not treading on anybody's toes here. They can do a great deal but not everything. Therefore, I submit to you, this is not merely a constitutional question.

The lawyer would say that Article II of the Constitution says that the executive power shall be placed in the hands of the President of the United States. We ask the question immediately, "How much executive power?"

When the framers wrote Article I, as you remember, describing the powers of the Congress, they answered the question as to how much power the Congress has. Article I, section 8, lists exactly the powers that Congress has. In order that there might not be any confusion about it, they say, in effect, in section 9: "We will tell you the powers that Congress does <u>not</u> have."

When we come to Article II, we would expect that they would do the same thing in regard to the Executive. Not at all. They dispose of the Executive's power in two lines: The executive power of the United States

shall be enjoyed by the President. Well, how much power? "Don't bring it up," they say. That is the way it seems.

Now, I am not going to quote to you Blackstone, who was so influential in forming the framers' thought. Merely let me say that Blackstone, in his "Commentaries," pages 257-262, says the same thing about the Executive, any executive, as Locke does.

Of course, we are more interested in our own great, original political thinkers. Madison, in No. 48 of "The Federalist," says this:

"The founders of our republics...seem never for a moment to have turned their eyes from the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate," always too much frightened of this hereditary magistrate, "supported and fortified by an hereditary branch of the legislative authority. They seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations."

There are other things that Madison said in the same sense. In other words, he did not seem to be very much afraid of giving the President large powers.

Gouverneur Morris went so far as to say in the Constitutional Convention:

"On the due formation of [the executive] must depend the efficacy and utility of the Union among the present and future States."

Read what Morris says in that Federal Convention about the Executive, and you will see that he, too, wanted a very strong Executive.

I am just taking spot examples. You could duplicate these from many places in the debates of the Constitutional Convention. The point I am making is that a great deal of the important men did not seem to be very much afraid of giving the Executive large powers.

You might say, "We know what Alexander Hamilton would say." But he rather surprises us and shows that there is a debate here after all. In No. 69 of "The Federalist" this is what Hamilton says about the Presidents's powers:

"The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it." Hamilton is taking a different line from that of Locke, Blackstone, Madison, and Morris. The quotation continues: "It [President's power] would amount to nothing more than the supreme command and

direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the declaring of war."

What does Hamilton mean? Does he mean that our President's power does not extend to the declaring of war? Mr. Hamilton was very close to the 1949 question. He says that the power of the "British king extends to the declaring of war and to the raising and regulating of fleets and armies,--all which, by the Constitution under consideration, would appertain to the legislature."

That is a very interesting opposite view taken by the Federalist Hamilton, and it is very clear what he says. He is very much for curtailing the President's powers. And this is ammunition, in the current debate, for those members of the Legislature who feel that the Executive Department of the Government is making too bold commitments in regard to the Western Defense Pact, for example. I suggest to you in a very important footnote, however, that No. 69 of "The Federalist" was written by Alexander Hamilton in a very powerful propaganda attempt to get the Constitution passed over the objections of the States; they felt that too much power was being given to the Federal Government. Maybe Hamilton is not speaking completely without wraps in No. 69 of "The Federalist."

From here in, gentlemen, I am going to do what General Vanaman very shrewdly suggested to me. I mean to say, the way he put it was just the way to put it, and his suggestion has made it very much easier for me to prepare this talk. The General saw that what we are interested in, or should be interested in, is, what have the Presidents done with regard to their powers and what have they thought of their powers? By "the Presidents" we don't mean someone like Millard Fillmore or Chester Arthur--ver fine men, but not great Presidents.

Therefore, let us look at the Great Presidents in our history. It may be assumed that they knew what the Constitution meant and what the presidential powers meant. Let us see what they have done in the exercis of their powers.

Let us begin with Washington. Washington signed the Jay Treaty on 12 August 1795. In March of 1796 the House of Representatives demanded documents pertaining to the negotiations which had gone on in getting tha treaty through. It wanted the instructions which had been given to Jay, the negotiator, and all the documents pertaining to that treaty. It thought there was something fishy about the whole thing. Footnote: Ther was. Well, that is apart from our point.

Now, the House claimed that its prerogatives were endangered in tw ways by this treaty, which had been placed before them already signed by Washington. First of all, the treaty provided for the regulation of commerce between the United States and Great Britain, whereas the Constituti

provided that Congress shall have the power to regulate commerce with foreign nations. Secondly, the treaty provided for payment of the pre-Revolutionary debt to the British subjects, whereas the Constitution provided that no payments could be made from the United States Treasury except in virtue of a law appropriating that sum from the Treasury.

Madison strongly upheld these two objections. He said:

"If the Treaty power alone could perform any one act for which the authority of Congress is required by the constitution, it may perform every act for which the authority of that part of the Government is required. Congress have power to regulate trade, to declare war, to raise armies, to levy, to borrow, and to appropriate money, etc. If, by Treaty, therefore, as paramount to the Legislative power, the President and Senate can regulate trade, they can also declare, they can raise armies to carry on war, and they can procure money to support armies..."

He rejected flatly--and this is the very relevant part, I think--the contention that a treaty is paramount to all other acts of the Congress. I would ask you to keep that in mind, gentlemen.

What did Washington do? Washington refused flatly to present any of those papers to the House of Representatives. He accompanied his refusal with the following statement--and I know you won't mind my quoting some of these things at length, because Washington said it better than I could paraphrase it:

"The nature of foreign negotiations requires caution, and their success must often depend on secrecy, and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic."

Then he goes on to say, in effect, therefore, I am not going to give you any of these documents which you have asked for, because I am the chief organ of the United States Government when it acts in the field of foreign affairs.

Washington got his treaty and did not present his papers to them. The Senate and the House of Representatives swallowed that. But one swallow does not make a spring.

What about some other "Great" Presidents? What about Jefferson? Jefferson, as you well know, gentlement, when he purchased the Louisiana Territory, did an act which he himself admitted was against the Constitution. Let me summarize what he said, I have done an act against the Constitution; in other words, I have no authority from the Constitution for the thing I have done in purchasing Louisiana. However, I felt it was absolutely necessary for the national security, and I have the greatest confidence that the Legislature and the people will approve the act.

Then he became a little worried, and two weeks later he wrote the following:

"When an instrument admits two constructions, the one safe, the other dangerous, the one precise, the other indefinite, I prefer that which is safe and precise. I had rather ask an enlargement of power from the nation, where it is found necessary, than to assume it by a construction which would make our powers boundless."

But he did not ask for any authorization from the people or from the Legislature to do what he himself admitted was an unconstitutional act. He is a little bit sorry about it, but still the act is done.

If the treaty-making power of the President is boundless, he said "then we have no Constitution. If it has bounds, they can be no others than the definitions of the powers which that instrument gives. I think it important, in the present case, to set an example...by appealing to the people" to authorize what I have done.

The point is that no appeal was made to the people, and Jefferson did not seem to lose much sleep during the following months because of that omission. Jefferson said, in effect, well, I did not have any power to do this, but it had to be done for the good of the country; so I did it. But don't let anybody else do it, because that is hard on the Constitution. That is about the meaning of his words.

I know you gentlemen are acquainted with the historical background of these things, but just let me relate the matter of the embargo. Here is the picture: A complete embargo is placed on all American shipping--no imports, no exports. The Congress is about to adjourn, so the Congress says to Jefferson in 1807: "You, the President, have power to raise that embargo at any time you think it ought to be raised. If Napoleon becomes good, and if England begins to be more reasonable, then you can raise it. So Congress goes home, and Jefferson raises the embargo.

It was charged that he had no power to do that, that the permission given to him by Congress was an undue handing over to him of legislative power. Philip Barton Key, a Federalist, said: "To suspend or repeal a law is a legislative act, and we, the Congress, cannot transfer the power of legislating from ourselves to the President."

They debated over it hotly and came to no conclusion until 1935, when, in the "Hot Oil" cases, it was decided by the Supreme Court, doubtless with the ghosts of such people as Philip Barton Key standing around chuckling, that President Roosevelt had been given an undue transfer of legislative power when the Congress allowed him to determine how much petroleum should be raised in certain states and sent into interstate commerce. The court said, in effect:

"This is an undue transfer by the Congress of legislative power to the President because you have left it completely to the discretion of the President how much oil is above the quota in any state. Now, if the Congress had put down in a very detailed way just what constitutes exceeding the quota of oil in Arizona /I assume there is oil in Arizona/, then that would be all right. The President is just executing the will of Congress. But the Congress said, 'All right, Mr. President; any time you think the quota is exceeded in any state, you can forbid the sale of that oil in interstate commerce.'"

Mr. Roosevelt might be conceived, by a wild stretch of the imagination, to have said, "Now, Congress, I want to know exactly what your will is and just how much would constitute an excess." But Mr. Roosevelt is not reported to have asked that question, and the Congress left it completely up to him to decide what was in excess of the quota. Therefore, the "old" court, the Supreme Court of 1935, said: "The President is exceeding his powers there, because he cannot do everything that Congress can do. Only Congress can so regulate interstate commerce." The fact that the President's persuasive campaign directed against the court in the interest of more liberal legislation began two years later might be a coincidence.

By the way, gentlemen--I don't think this will break the general continuity of my talk--the Presidents I am going to talk about are no second-raters, if I may use the term. As soon as we study examples of wide use of presidential powers, we find a very interesting fact. When we go down the list of Presidents to see what examples we can find of wide use of presidential powers; to see what Presidents seem to have stretched their powers to the limit; we find that old Millard Fillmore does not appear in the list at all; nor does Chester Arthur. The only second-rater on the list--I hope this does not sound irreverent--is James Polk. He was not a great, outstanding President. He is the only bush leaguer, if you will pardon the term, that we will find.

But the Presidents who have used their powers very widely, we find, are very good Americans: Washington, Jefferson, Jackson, Lincoln--and we will stop there. There will be other examples later if we have time. The thing that interests me is this: Every time we look into American constitutional history for an example of wide use of presidential powers, we bump into one of our greatest Presidents. You see the significance of that, the supposition being that they knew what they were doing and that, if the act was very bad and very unconstitutional and was something that imperiled the Union, they should not have done it. Well; the thought that comes to us is that it is very strange Washington, Jackson, Lincoln, and Jefferson did not see that.

Andrew Jackson on the powers of the President: He exerted those powers in the Nullification Movement, you will remember, and in the action against the second Bank of the United States in 1832. I will just recall

to you the background. Let us put it very briefly. You know this, I am sure, gentlemen. He vetoed a bill which had been passed by the Congress rechartering the second Bank of the United States. He had a Supreme Court decision against him when he vetoed that act of Congress; the Supre Court decision of 1819 had fully approved of that particular law of Congress--in effect and really. Therefore, Jackson was charged as follows: "You are going against the Supreme Court decision, and you are blocking a act of Congress which is fully within the powers of Congress. The Suprem Court has declared it to be so, and about everybody else in the United States in 1832 has declared it to be so."

I take Jackson's answer to that as another development in the Amer can tradition of the wide use of the President's powers. I hope you won' mind if I quote his reply at length. I can picture Andrew Jackson's ghos with great complacency, listening to this. Maybe he is saying, "You migh repeat this over at the Senate chamber." Jackson, in his message of 10 July 1832, vetoing the bank bill, said:

"If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others."

I ask you, gentlemen, is that the sense in which you took the oath to the Constitution of the United States as officers of the Armed Forces? The quotation continues: "It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congre or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve."

In 1834, when Jackson removed William J. Duane as Secretary of the Treasury, he was charged with exceeding the presidential powers. In his Protest Message of 15 April 1834 he said: "The entire executive power is vested in the President." That is all we need quote of that.

Now we come to Lincoln's use of his powers as the Executive in a national crisis. Lincoln, in the first ten months of the War Between the States, before any formal declaration of war had been made by any department of the Government, without any congressional authorization, and so far as I know, with absolutely--and I am saying this very deliberately--with absolutely no constitutional authorization, did the following things He embodied the state militias into a volunteer army; he added 23,000 men

to the Regular Army and 18,000 to the Navy; he pledged the credit of the United States for a quarter of a billion dollars, a great sum then; he paid out 2 million dollars from unappropriated funds in the Treasury to persons unauthorized to receive it; he closed the Post Office to what he called "treasonable correspondence"; he proclaimed a blocade of the Southern ports; he declared all the citizens of the seceded States to be enemies of the United States; he suspended the writ of habeas corpus in various places; and he caused the arrest and military detention of persons who were represented as being engaged in treasonable practices--and all this, as Mr. Edward Corwin says, without one whit of statutory authority, or with the merest figment thereof.

Remember, he did not call the Congress into session until July of 1861. The shooting had begun in the middle of April 1861. From the middle of April until July, Lincoln, as he afterward admitted, deliberately did not call the Congress into session because it would be embarrassing to him in his actions for the national defense. In his special message of 4 July 1861, in defending what some people who must be very strict constructionists of the Constitution have called excessive use of presidential powers, he said: "The executive found the duty of employing the war power in defense of the government forced upon him." May I call your attention to the words "war power," which power, in Article II of the Constitution, is given, it would seem at least, concurrently to the Senate?

Again, he said:

"These measures, whether strictly legal or not, were ventured upon, under what appeared to be a popular demand and a public necessity; trusting then, as now, that Congress would readily ratify them."

Regarding the privilege of habeas corpus, to take only one of the things I mentioned, the Constitution says, in Article I, section 8: "The privilege of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it."

Now, as you know, habeas corpus certainly is one of the basic protections of our civil liberties. There is no need for us to go into a constitutional discussion as to whether, supposing it could be suspended in a given case, it is the Congress that has the power alone to suspend it, or the President. The point is that Lincoln suspended the privilege of habeas corpus, and he did it by appealing to his supreme power as Executive. In doing so, of course, he would seem to have done something to Article I, section 8.

You and I, gentlemen, during the course of this discussion, perhaps have been keeping naturally in our mind, when speaking of presidential powers, the powers of the President in the field of foreign affairs. Many of the actions we have seen here involving wide use of presidential powers have been in the field of foreign affairs. Of course, Lincoln thought he would do the thing right and also did some things in internal affairs.

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Let us come up to 1936 right away. The latest official declaratio in regard to what powers the President has in the field of foreign affai was given by the Supreme Court in the case of United States v. Curtiss-Wright Export Corporation in 1936. I would like to talk about that case with you. It is being talked about very much in the current debate over the power of the President to make a legal or moral commitment in regard to the Western Defense Pact.

The background of the case is, you remember, that Bolivia and Para quay were at war and Congress gave President Roosevelt power to put an embargo on military supplies to either of those countries. That was chal lenged, just as Jefferson had been challenged with regard to the permission he got to raise the embargo, as an undue transference of legislativ power to the President.

The court that gave this decision, may I remind you, was the "old' court. It was a seven-to-one decision, with only Justice McReynolds dissenting and Justice Stone not participating. The decision was written by Justice Sutherland, certainly not one considered to be one of the Roosevc liberals on that court.

What interests me very much is the discussion which takes place with regard to the President's powers. Says Justice Sutherland in upholding this law which gave the President such wide powers: "It results that the investment of the federal government with the powers of external sovereignty," that is, the investment of the Federal Government with powers to act in the field of foreign affairs, "did not depend upon the affirmative grants of the Constitution." See what he is saying? He is saying that the President--and it is the President he is talking about--gets his power to act in foreign affairs not from the Constitution. Wher doe he get it? we might ask. "The powers to declare and wage war, to con clude peace, to make treaties, to maintain diplomatic relations with othe sovereignties, if they had never been mentioned in the Constitution, woul have vested in the federal government as necessary concomitants of natior ality.***

"Not only...is the federal power over external affairs /foreign affairs/ in origin and essential character different from that over inter nal affairs, but participation in the exercise of the power is significantly limited." Congress' power of participation in the managing of foreign affairs is significantly limited. The quotation continues: "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, 'The President is the sole organ of the Nation in its external relations, and its sole representative with foreig nations.'

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"The Senate Committee on Foreign Relations at a very early day in our history (February 15, 1816), reported to the Senate among other things, as follows:

"'The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success.'"

The rest of the declaration of the Senate Foreign Relations Committee in 1816 consists in the affirmation of the widest kind of use of presidential powers in the field of foreign affairs.

What that decision says very plainly--and up to this moment there has been no reversal of it--is this: Here is the Congress, the National Legislature, of the United States. Where does it get its power to act? Every bit of power it has it gets from the Constitution of the United States. We don't have to go behind that. The Congress gets the power from the Constitution. That is a truism in our governmental theory.

Now we come to Article II. Where does the President get his power? He gets it from two sources, says this decision. The first source is the Constitution, and most of the powers he has with regard to internal affairs come from the Constitution: the power to tax, the power to execute the laws, the power to appoint.

Now we come to the field of foreign affairs. Where does the President get his power to make a treaty or to do anything in the field of foreign affairs? He gets it from two sources, says the decision. The first source is the Constitution. But the President has another independent source of power which authorizes him to act in foreign affairs, says the opinion. What is that source? Well, it kind of drops from heaven to him when he becomes President, and it is called the "inherent power" of the President. In other words, by the very fact that he is head of a sovereign state, he must have, and does have, power to do anything which he thinks necessary for the common good. That is the decision.

What happens when a power he gets from himself just because he is President conflicts with some power which the Constitution gives the Congress? Ah, there is the crucial question. Suppose, in other words, the Constitution gives to the Congress the power of veto over treaties made by the United States, as the Constitution certainly seems to do. And suppose the President should say, "Well, by my inherent powers, I have made a treaty, and I don't need the consent of the Senate. The treaty is necessary, and here it is, boys; sign it." What happens then? The Sureme Court says the President wins every time on that. The court decision says, in other words, that a treaty of the United States, when signed by the President, is said by the Constitution to be the supreme law of the

land. No mere act of Congress can supersede a treaty. Also, the Presidents's inherent power of making a treaty can override any claim to participation in that action made by the Congress on the basis of the constitutional grant.

This is not my opinion, gentlemen. I mean to say, I didn't invent it. I am not saying that I disapprove of it or approve of it. That is the meaning of the opinion.

That decision seems to answer the present debate with regard to whether or not the President, or the State Department, can sign a treaty which says that, whenever one of the western European nations, a party to the treaty, is attacked, the United States shall immediately put its arme forces into action. To my mind, there is no question at all, unless that decision of the high court is reversed, but that the President can make that commitment if he thinks it wise. The Congress can protest, and the President can say, "Don't bother me. I'm doing this by my inherent power as Chief of the Government in a crisis." The Congress would then probabl do what it has done in every historic case of the kind; the Congress woul go ahead and sign it. It usually takes anywhere from six months to one year to reach an agreement. That is history.

May I say again that I am just describing this. This would seem to be the present state of our constitutional law.

As you see, my talk centers largely on the immediate question in which we are all interested: the powers of the President as we study them in 1949. I think they are best studied in the setting of the Wester Defense Pact and other things the President feels he has to do in the field of foreign affairs in implementing our new world position, as a result of which we must participate so widely in world affairs.

I took the following quotations out of the "New York Times" of yesterday. I did not have time to check them, but I have no reason to think they are incorrect. These quotations I am going to give you are merely commentary. "Willoughby on the Constitution" (One of the great commentaries) says this:

"An agreement to declare and wage war," such an agreement, for instance, as we would make if we promised the western European nations, "If any one of you is attacked, we will make war immediately." If the President said that, he would be making an agreement to declare and wage war; but he would not be making a formal declaration of war. After all, you see, only the Congress can make a formal declaration of war. Let me repeat it: "An agreement to declare and wage war, and a declaration of war, are distinct and different acts." "Thus, the United States may, by a treaty, pledge its faith that it will, under given circumstances, go to war," he says that flatly, "but the arising of these circumstances cannot operate, of themselves, ipso facto, to place the United States in a state of war." Footnote: What's the difference? one might ask. "For that a declaration or recognition of a state of war by Congress is necessary."

So amid the falling shells and the moving armies, Congress says, "By the way, we declare war." That's about it. The quotation continues: "It may then be confidently stated that, in its extent, the treaty-making power of the United States," he obviously means the Executive and the State Department--that is what he means in the whole context, "is broad enough to enable the United States to enter into any form of political alliance, offensive or defensive, which other sovereign nations are qualified to enter into."

Charles Warren says:

"The argument is also made that, because the Constitution vests in Congress the power 'to declare war,' it is unconstitutional for a treaty to provide that the United States agrees to use force in cooperation with other nations to avert, prevent or repel aggression... The argument is based on a misconception. While...the Congress possesses certain powers, and those powers are exclusive as between the Congress and the State Legislatures, they are not exclusive as between Congress and the treaty-making branch of the...Government."

It is confronting to know that Congress does possess certain powers. I really mean that; I don't mean it as a witticism. It is a very good thing that we should keep some powers in the Congress.

When we are talking about the powers of the President, I would like to hear much more discussion of <u>What</u> President? Who is he? Let's look at him. Who is this man you are giving these powers to? Is it Rutherford Hayes? Better call the Congress in. Is it Abe Lincoln? Give him his head. That is exactly what the American people said. So I suggest to you that that might be talked about a little bit more. Instead of talking about the powers of <u>the</u> President, we might say the powers that should be given to <u>certain</u> Presidents.

I am going to stop at the end of five minutes. Therefore, you will pardon me if the last part of this talk is a little bit crowded. Probably the order will not be perfect, but there are some ideas I would like to suggest for your thought, gentlemen.

Here is a theory to shoot at. I am not quite sure of it yet. Therefore, I hope this does not sound like too dogmatic a statement. This is something I am shooting at myself. It occurred to me about three o'clock one morning, and I couldn't get to sleep again that morning.

Do you think we might say that every major crisis in United States history has been solved by powerful action of the Executive; and whenever a major problem was fumbled, it was usually fumbled by the Congress, or in a period in our history when Congress was dominant? Maybe I ought to ask for an armed guard after that. I have the greatest respect for the National Legislature. I don't mean to be irreverent. But I suggest to you that history is somewhat irreverent on that point.

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We have time to run through only some of the chief crises. The first great crisis which faced this Government was the problem of just keeping alive in the first ten years of its existence. That was solved by a powerful exertion of executive action, Alexander Hamilton acting for the Executive, and John Adams continuing it.

The second great crisis, perhaps one of the three greatest crises in our national history--and the more one studies this period I am going to mention the more he is impressed with the fact--was the time when it seemed imminent that the powerful Napoleon was going to create a big buffer state against the West and was going to get Louisiana. That crisis was solved by a President breaking the Constitution, as Jefferson admitted.

The next great crisis was the Nullification struggle of 1828-1832. That was solved by Andrew Jackson acting very strongly, as we have seen.

The next great crisis which faced us in our national history was the sectional dispute which culminated in the War Between the States. During precisely the period when that crisis grew and broke, there was not a single outstanding President in the White House; and the question was managed and, I think we may safely say--I hope I am not going out too far on a limb--bungled by the Congress.

The next great crisis stretched a long time. It was the crisis after the Civil War and can be described briefly in these terms: The crisis of getting an adjustment between the social and economic classes of the United States consequent upon our rapid rise as an industrial nation--a crisis that is still recurring. That crisis was not solved, I feel safe in saying, until we had two strong Executives. They did not solve it fully, but they came closer to a solution, I think, than anyone before them. The two strong Presidents were Woodrow Wilson and Franklin Delano Roosevelt. We could put Theodore Roosevelt in a long footnote--and then he might make the text.

That is something which may be disproved. I don't wish to be too positive. I suggest it might be worth thinking on.

Before I conclude, if you don't mind, I would like to quote something Woodrow Wilson said about the Presidency. Woodrow Wilson said before he was President:

"Let him once win the admiration and confidence of the country, an no other single force can withstand him, no combination of forces will easily overpower him. His position takes the imagination of the country. He is the representative of no constituency, but of the whole people."

The thing Woodrow Wilson is talking about is this: Nobody dies for the dear old Congress, but the people have been passionately devoted

to individual persons occupying the presidential chair of the United States. The President, in other words, he is suggesting, is the only department of the Government which is a human being, and men can get passionately devoted to a human being, but usually not to a collection, not to a body. Nobody goes out and makes heroic sacrifices for the Congress. We just don't think that way. Men have laid down their lives, as history has recorded, for a leader, but not for the Parliament of France, not for the Parliament of England. "We will die for the dear old Parliament of England?" No. But they said, "We will die for Pitt."

Therefore, the President seizes the imagination of the country, as Wilson says, and he can grip men's feelings and maybe, pardon the expression, get away with a lot--if he is that kind of a man. I don't mean to say that we have had Presidents who have done that. I mean to say, conceivably, that could happen.

Then Woodrow Wilson said:

"His is the vital place of action in the system." and at another place:

"The President is at liberty, both in law and conscience, to be as big a man as he can."

I don't wish to appear to have pushed too hard on one side of this question. I think we ought to close on this note: William Howard Taft said in opposition to that:

"The true view of the executive functions is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary." In other words, he says that the President has no power unless it can be traced directly to some specific or implied grant of the Constitution, and he denies completely the doctrine of inherent powers.

I hope I have not gone too long, gentlemen, but there are just some ideas on the presidential power. I welcome very much any questions you may wish to ask.

QUESTION: I am interested in what happened in the case of Woodrow Wilson, on which you previously commented, that appears to be an exception to the general trend. Would you care to discuss that matter further, in particular with reference to the Senate's refusing to ratify the treaty in which he was going to be involved?

FATHER DURKIN: You are interested in the constitutional aspect of it, I assume. I will stick to that.

The essence, I suppose you would say, of that series of incidents was this: Here was a treaty which was signed conditionally by the Executive in Paris. He said that he might have trouble getting it ratified. The Senate refused to ratify the treaty, and the public opinion of the country apparently was, by a safe majority, in favor of signing the treaty That seems to be the finding of the best scholars at present--Bemis, Bailey, and Latane. The reason why the Senate did not ratify the treaty is that it felt the commitments made by the Executive were dangerous.

A strong President, therefore, was defeated. Why was he defeated? I think he was defeated because, although the public had wanted the treaty, there was a shift of public opinion against Woodrow Wilson during the debate which took place between the Executive and the Congress in this country; therefore, Congress, toward the end of the debate, was conscious that it was backed by a majority of public opinion, that the public had changed as it listened to the debate, therefore, that Congress could stand up against President Wilson.

The moral of it is that Congress can defeat a very strong Executive if Congress is backed by public opinion. It seems to me that treaty was killed by public opinion, which had been switched from a protreaty attitude to an anti-treaty attitude. The Congress could kind of float to victory on public opinion.

Is there something in which you are interested and on which I have not touched?

QUESTION: Only that the President in that case did not have the inherent right to have our country be a party to that treaty.

FATHER DURKIN: Yes, thank you. I should have begun where you ended. You have answered the question.

I would say that, constitutionally, this is what happened: Woodrow Wilson had the power to sign that treaty and make it stick anyway, but he did not use the power. According to the doctrine of the Curtiss-Wright case, which was not so officially announced in 1919, of course, as it was some years later, Woodrow Wilson did not have to get ratification by the Senate of that treaty; therefore, he could have saved his health and finished the whole thing in Paris. He did not do that, you remember. He did not definitely commit us in Paris. According to the new doctrine, if may call it that, according to the current doctrine, he could have signed the treaty in Paris and brought back and presented to the Senate a legal commitment, or at least a big moral commitment, that he had made in the name of the United States of America. Then, according to the new doctrine the Senate could not have blocked that treaty.

That is the only thing I can say, sir. I suppose the moral is that constitutional doctrine has developed very rapidly on the matter since

1919, because nobody very loudly defended Wilson or pointed to his inherent powers as a way by which he could get out of that scrape in 1919.

QUESTION: You have been talking about the assumed powers of the President in foreign affairs. I would like to point out that foreign affairs are not a unilateral business. There is considerable evidence to the effect that Wilson did not sign that treaty because the people who were making the treaty with him would not take his signature at face value, knowing that there was a possibility of reaction to it in this country.

Would you care to comment on the situation, such as it is now, where President Truman might sign a treaty and say legally, "There it stands," but where he could not consummate the treaty because the foreign countries would not give Truman the power which apparently the Constitution does not give him?

FATHER DURKIN: Do you mean you are a bit doubtful as to whether the governments of Britain and France would give him power?

QUESTIONER: I am a bit doubtful as to whether the Norwegians would sign such a treaty now if they thought Congress would not back Truman up.

FATHER DURKIN: I see. Now, set me straight, please, if I am not answering directly. It would seem to me that you are interested in knowing how far the President can go.

QUESTIONER: That is correct.

FATHER DURKIN: Can he go in the face of public opinion in Norway, which demands a straight commitment?

QUESTIONER: That is correct.

FATHER DURKIN: And in the face of American public opinion; and he is not sure what it will allow. Is that it?

QUESTIONER: Yes.

FATHER DURKIN: This is just my personal opinion; I welcome other views.

It seems to me that something which, perhaps, I did not stress enough in my talk is this: Talk about inherent powers as much as you want, talk about the strong character of the President as much as you want; there is one absolutely essential requisite if he is going to get things done that he wants to get done--he must have the confidence of the people. I would say that if he acts strongly in the field of foreign affairs or in internal affairs without the confidence of the people, which is exactly what Wilson was doing in the last days of that fight, all the inherent powers in the world and all the Supreme Court decisions in the world would mean nothing.

That is why I ventured to say in the beginning of our discussion that we cannot solve these problems merely on the basis of constitutiona or any other kind of law. There are human factors--specifically about 130 million human factors--which are required to be in a certain posture if the strong President is going to keep on being strong.

Is that it?

QUESTIONER: Yes.

QUESTION: The other day Secretary Tobin had a few remarks to mak on the inherent powers of a President in an internal emergency. Would you care to comment on that phase of the subject?

FATHER DURKIN: Yes. The Curtiss-Wright decision makes a distinc tion between internal and external powers, as we know; and it seems to say, so far as I can make out, that in any ordinary action by the President, outside of any kind of a crisis, whether it is a nationwide railroad strike or a war crisis, the President's powers to act inside the country come normally from the Constitution. Although I cannot base my opinion on this case, however, I would say that the whole trend of the thinking of constitutional lawyers on presidential powers would seem to say that, if a big internal crisis arises, something like the railroad strike of two years ago, with no reference to foreign affairs at all, fo the settling of which it seems powerful presidential action outside the Constitution is required, the President has such power to act by his inherent powers. If you think it over, you might call the crisis in which Lincoln acted an internal crisis. All might not agree that it was a civil crisis, but it was a civil war--at least many people thought so.

You are familiar with Clinton L. Rossiter's book published about six months ago which he called "Constitutional Dictatorship." Without going into his theory, I think he would agree there with what I have said.

QUESTION: There has been a great deal of emphasis recently on so-called bipartisan foreign policy and on consultation by the President with leaders in Congress. Can you tell us whether this is a new trend; and if so, what effect it may have?

FATHER DURKIN: Yes, I think you could call it a new trend. I don't believe in looking back in history and insisting on getting parallels for these things. Some people say, "Well, we had it in Washington's Cabinet. We had Hamilton and Jefferson cooperating and standing firm on one foreign policy as against France in 1793 and then as against England in 1795." Frankly, the more I think about it the more I think that is a parallel. Jefferson by that time was leader of the opposition party and was cooperating with Hamilton in the field of foreign policy, putting up a firm front against England and France, whereas they were

fighting each other inside. That was a bipartisan foreign policy in a way, but I know it has never been carried to such an extent as it has been today.

I think your question is extremely important, for this reason: Let us forget for a moment that the bipartisan policy implies that Congress is cooperating with the President. Let us look at it more closely and see what it means. Let us assume the two major parties are acting together in Congress in substantially full accord with regard to foreign policy and that there are not any other parties in the Congress, that we have a Congress united strongly and powerfully on the same program with regard to foreign affairs. The question we might consider is this: Does not that build up a very powerful counter-balance to even a strong President? In other words, I suggest that a bipartisan method with regard to foreign policy might work out this way: It would not strengthen the Administration so much as it would coalesce what would otherwise be discordant factions in Congress, thus we would have a solidly united Congress able to say to the President, "We are opposing your measure."

That may seem like cutting at the foundations of everything I have said today. Maybe it would. I think the bipartisan method may strengthen the Congress more than it strengthens the President and might increase the stature of the Congress rather than the power of the President in foreign affairs. But I am not sure of that at all.

COLONEL BABCOCK: Father Durkin, we are certainly grateful for this talk you have given this morning. It shows the results of extremely profound research. On behalf of the Commandant and the Industrial College of the Armed Forces, I thank you.

FATHER DURKIN: Thank you very much.

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