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WAR POWERS OF THE PRESIDENT

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Dr. Walter H. E. Jaeger, Professor of Law, School of Law, Georgetown University, was born in New York, N. Y. He received his A.B. degree from Columbia University in 1923, his M.S. degree in 1925, and Ph.D. in 1926 from Georgetown University. He attended the University of Paris in 1927. Dr. Jaeger also has an LL.B. and J.D. from Georgetown University Law School. He has held the following positions: professor of history at the University of Maryland, professor and lecturer at the United States Navy Postgraduate School at Annapolis, director of Graduate Research and professor at Georgetown University. During World War II he served in the Office of the Inspector General, U. S. Army. In March 1944 he was detailed to the Army Industrial College as director of the Department of Research, serving in that capacity until October 1946 when he returned to an inactive status and resumed his duties as Director of Graduate Research and Professor of Law at Georgetown University. Dr. Jaeger has served as expert consultant to the Government in many capacities and at present is an adviser to the Maritime Commission, U. S. Department of Commerce.

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DR. REICHLEY: One of the major questions confronting students of economic mobilization is that of the powers of the President in times of national emergency. What are the special responsibilities and problems that a national emergency imposes on him? What are the powers and authority that he has available to discharge his duty and work out these problems? What are the precedents? What are the constitutional and legal limitations, if any?

To assist us in this discussion today we have called on Dr. Jaeger, who is exceptionally well versed in constitutional law, international law, and contract law. In addition to being a professor of law, he is a Reserve officer in the Army Inspector General's Office.

I might also mention that from 1944 to 1946 he was the director of the Department of Research of the Industrial College of the Armed Forces, and in that position he played a very important part in the re-establishment of the Industrial College as a top-level school after the war.

It gives me great pleasure to introduce Dr. Walter Jaeger, Professor of Law, Georgetown University.

DR. JÄEGER: General Holman and fellow students: There are two major sources of the war powers of the President: the Constitution of the United States and various acts of Congress. The constitutional powers may be subdivided into two major functions, aside from the authority that the President exercises by virtue of his office and the separation of powers. Separation of powers results in the three coordinate branches--the legislative, defined in article I of the Constitution; the executive, defined in article II; and the judicial, defined in article III.

It is sometimes forgotten that each of these branches may interpret the Constitution. Of course, the judiciary has in a sense the greatest responsibility for the interpretation of all laws, whether constitutional or statutory. Nevertheless, upon occasion the President has not hesitated to differ even with the Supreme Court's interpretation of the Constitution; and there is truly nothing that the Supreme Court can do about the Executive's refusal to follow a Supreme Court decision. Upon occasion, courts have handed down decisions and the Executive has said: "The court made the decision. Now let the court enforce it."

So the executive power is in a sense elastic and there are two major interpretations of what the Presidential power actually is. We have the "strong arm" theory, propounded by Messrs. Wilson, Roosevelt (Theodore), and Roosevelt (Franklin)--a firm grasp on the Presidential reins. That was

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the theory they had: "We will do what we see fit and take full responsibility for it." That is full realization of the executive power.

There is in a sense some justification for this view in the Constitution, for article II starts right out by stating: "The executive power shall be vested in the President"--period. Ah! But what is the executive power? That would seem to be what the President wants to make it, for he too is entitled to interpret this organic document that we call the Constitution.

Then there is the doctrine of limited Presidential power advocated by William Howard Taft and the Supreme Court. That doctrine says: "Only those things that are definitely indicated in the Constitution as being part of the Presidential prerogative may be included in the executive power." So there you have in a sense a conflict; and the conclusion that you reach, as you examine the precedents and as you examine the constitutional history of the country, is that the extent of the executive power will depend on the personality of the man who is in the White House at the time.

A reason for this that has been suggested is that there is no definition of "executive power" to be found in the Constitution. There are, however, certain duties with which the Executive is definitely charged. One is execution of the laws.

If the President is charged with the execution of the laws, how far may he go in carrying out this responsibility? Is his power, then, overriding insofar as limitations are concerned, since he has sworn to carry out the laws faithfully and diligently?

Is he limited in this? He is limited by certain express provisions. The Constitution guarantees a republican form of government to the various States constituting the Federal Union. Should an attempt be made to establish a monarchy in one of the States, the President would be responsible for restoring a republican form of government. There seems to be no indication of a serious inclination of any of the States to establish a monarchy, even though they do have visits from royalty.

In article II, there is also a statement to the effect that the President is to take care that the laws be faithfully executed. So there is a rather broad statement again--take care to see that the laws are faithfully executed--which gives him quite a bit of discretion and some degree of latitude.

It has been said and repeated (and no article on this subject would be complete without it) 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 undetermined.

Let us think about that statement for a minute. "Dark continent the boundaries of which are undetermined." In short, that is one way of

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saying that the President will determine to a considerable extent what his powers are during wartime.

Actually the belief is growing among political scientists and students of constitutional law that there are actually no limits to the President's power during wartime, for he has the responsibility of maintaining and preserving the Nation. He is finally the number one man in the entire chain of officials, with complete responsibility to the people. That is why he has been elected. (Among other reasons no doubt.)

So, to review very briefly the two fundamental conflicting theses: according to Messrs. Roosevelt and Roosevelt, whatever is not expressly denied by the Constitution is within the Presidential power; the Taft and Supreme Court doctrine states that whatever is not granted to the President under the Constitution, expressly or by implication, must be deemed as being denied. The latter interpretation is consistent with article X of the Amendment.

Lincoln had his own interpretation; and he acted for some 10 months before he submitted any legislative proposals to the Congress. He acted in the interest of internal security and the preservation of the Union. There is a message Lincoln sent to the Congress from which a very brief quotation follows: "These measures, whether strictly legal or not, were entered upon under what appears to be popular demand and public necessity. It is believed that nothing has been done beyond the constitutional competence of Congress."

"Popular demand and public necessity."--In other words Lincoln felt that he had the people--when he said "the people" he meant the majority of the people--behind him at the time that he took these steps. Furthermore, he felt that the measures he took were essential. One thing seems certain: He did borrow certain congressional powers to achieve the results.

Article I, section 8, very clearly declares it to be a congressional power to raise armies and to provide and maintain a navy. That is a congressional power. Abraham Lincoln didn't wait for Congress to debate the issue. He proceeded to increase both the Army and the Navy. Technically this was a congressional power, but yet under the duty to preserve the Union he thought that clearly in an emergency situation such as the one confronting him he had that power.

He likewise suspended the writ of habeas corpus, which previously had only been done during wartime. Yet at the outset of the War Between the States he didn't recognize that there was any war. However, the Supreme Court subsequently, in deciding the so-called "prize cases," having ascertained and determined that the Executive had proclaimed a blockade, could not help concluding that there must have been a state of belligerency, because blockades are distinctly identified with war and with belligerent rights. So, in spite of himself, President Lincoln had a war.

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Examined in the light of history, the Philadelphia Constitutional Convention was in essence a compromise throughout. A very serious argument arose as to whether or not there should be one legislative body, with the same number of representatives from each State, or whether there would be two houses. Eventually a compromise was reached whereby, as you well know, the larger States would have a proportional representation in the House; yet the smaller States would have equal representation in the other body.

The framers of the Constitution were definitely aware that unity of command, speed of decision, and freedom from debate to settle cases were necessary. There was realization that in time of emergency there had to be some unity of command, because the speed requisite to meeting an emergency is not provided by the Congress. It has long been known that large bodies move slowly. Therefore, the Constitution contains a definite provision for an Executive with ample power to take such measures as are necessary to safeguard and preserve the Union. By designating the President the Commander-in-Chief of the Army and Navy, the necessary concentration of authority was achieved; or so the framers of the Constitution believed.

Now, by reference to past practices, customs, and usages, statutes, judicial decisions, and international law, the development of the executive power will be described. The executive power, especially the war power, of the President has certain basic and underlying constitutional provisions. These will be stated very briefly.

As Commander-in-Chief of the armed forces, the President has a wide latitude of action and a broad discretionary power. Next, he has the power of pardon and clemency. When it is realized if that power were carried to the ultimate, the President could virtually nullify the legislative and judicial functions. Congress would enact a law. A person would be tried before a court and found guilty. Next day he would be pardoned. Thus, the legislative and judicial functions, insofar as the criminal laws and punishment are concerned, would be nil. I can't conceive of an executive who would set those two functions so completely at naught, but under the Constitution it is possible.

The President conducts the foreign relations of the United States. Also domestic relations, as critics from time to time have discovered. Since the decision of Mr. Justice Sutherland in the Curtiss-Wright case, a very definite understanding has been reached as to how broad his power to conduct foreign relations is and how great is the Presidential responsibility in that connection. Too, the President has the power and the authority, in fact the duty, to recommend legislative measures to the Congress. He likewise calls Congress into session when special sessions are needed. He has the duty and the authority to execute the laws. He can suspend the writ of habeas corpus in time of grave emergency. It is his duty to assure a republican form of government to each State.

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Under article VI the President has the treaty-making power, which is an essential part of the conduct of foreign relations. Here a very important distinction must be made that is all too often misunderstood by laymen and, for that matter, even by lawyers. That is the distinction between the legislative power of Congress, which makes its laws pursuant to the Constitution, whereas article VI of the Constitution expressly declares that treaties are to be made under the authority of the United States and there is nothing said about any constitutional limitation.

Perhaps the outstanding case which demonstrates this difference, and which will reduce this from the abstract to the concrete, is the case of *Missouri v. Holland*, sometimes known as the "migratory bird case." Canada and the United States were in agreement to protect our feathered friends of a migratory nature. It was thought that the Congress could achieve this by statute. Congress enacted the statute. However, its constitutionality was soon challenged, and challenged very successfully, because immediately the Supreme Court wanted to know by virtue of what constitutional provisions the statute was enacted, inasmuch as there was no provision that could be pointed to as having any direct or indirect bearing on migratory birds. The poor birds got shot just the same as before.

Then some resourceful character decided that, after all, the treaty-making power was something else again. Canada and the United States entered into a treaty, the Migratory Bird Treaty. I am inclined to believe that the ducks and other migratory birds that were involved were quite oblivious to all this negotiating. But many of them are here today because of the treaty.

A case came to the Supreme Court in which the validity of this treaty was challenged. This time the Supreme Court made it very plain that the treaty-making power of the United States was not circumscribed by constitutional limitations, unless the guarantee of a republican form of government constitutes such a limitation.

The case history, following *Missouri v. Holland*, which relates the development of the executive power, would include, among the leading or landmark cases, the "prize cases," which have been referred to, and *ex parte Milligan*, wherein the Supreme Court definitely challenged the authority of the President to establish a military commission for the trial of civilians in nonbelligerent, peaceful areas. It is believed that today *ex parte Milligan* has been superseded by the recent case of the German saboteurs, *In re Quirin*, a 1942 decision, sustaining the conviction of the saboteurs who landed on our shores to do their worst. They got it.

And finally there is the moot case of the *United States v. Montgomery-Ward*, which is a fascinating case. In the *Montgomery-Ward* case, Mr. Sewell Avery did not subscribe to the Presidential interpretation of the executive

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power. He apparently concluded that the War Labor Board had considerably exceeded its powers in telling Sewell Avery how to run his business with respect to his employees. So he would have none of it. That represented a very serious challenge, because, if Sewell Avery could get away with it, there would certainly be others to follow. So the President by Executive order directed the Secretary of Commerce to take over Montgomery-Ward, and mentioned the actual chattels, the choses in action, and everything pertaining to the property rights.

The Secretary of Commerce, as a true executive, turned the job over to the Under Secretary, Mr. Taylor. Taylor moved in with the documents and an attorney from the Department of Justice and went to Sewell Avery's office and announced that on behalf of the Government, they were taking possession. Of course, Sewell Avery didn't take this lying down; he took it sitting down and was carried out in a chair.

Now arose a very serious legal question: Did the President have the power to seize Montgomery-Ward, or did he not? The United States District Court, which first had this problem thrown at it, said: "Oh, no. The President hasn't any power in this case. What does Montgomery-Ward do? What is the function of Montgomery-Ward? A mail-order house, where females order through the mails. What relation has this to the prosecution of the war?"

This was December 1944. The situation was a little dark. There was a bulge in our lines in Europe. The Philippines were being invaded. How seriously did Montgomery-Ward's business affect the national economy? In other words what effect would a strike by Montgomery-Ward employees, which was threatened, have on the prosecution of the war? That is a basic question. The answer lies in a determination of whether or not the President could say: "In my capacity as Commander-in-Chief, in my capacity as Chief Executive, charged with the security and preservation of the Nation, I must seize Montgomery-Ward, because failing to do so would seriously impede and seriously obstruct the prosecution of this magnificent effort, which may mean that the Nation will perish if the war is not successfully prosecuted."

The District Court decided that Montgomery-Ward was not sufficiently significant in the war economy to justify the action of the President. But the Circuit Court of Appeals reversed the District Court and said: "Upon the showing of the Government of the nature of the business of Montgomery-Ward, and the further statement to the effect that with the war situation being what it is, a very important part of the entire war effort is the zone of the interior or the civilian economy, because continued production is essential to the maintenance of the troops at the front." The Court said definitely that the Executive order was legal, was constitutional, and was properly executed. Immediately thereupon, Sewell Avery and Montgomery-Ward applied to the Supreme Court for a writ of certiorari. But the Supreme Court was lucky. The necessity for occupying Montgomery-Ward's premises ceased, Sewell Avery moved back in, the troops moved out, and the Supreme Court said: "It is now a moot question. No decision is required."

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Now, where are we who study constitutional law? Well, we have our choice. There is the District Court and there is the Circuit Court. Eventually, I suppose, the Supreme Court will be called on to decide it, or it will have been decided by the Executive that he has that power and he will use it perhaps when the emergency will be of such a nature that no one will be able to question the significance of any part of production, or distribution even, to the civilian economy at war.

And that appears to be the ultimate conclusion one is driven to, namely, that the tremendous acceleration in the tempo of warfare has almost eliminated that concept of a zone of interior. Heretofore, there has always been the vital question: Is there any emergency condition in the area over which the Presidential power is being exercised? In fact, when the Japanese clearance decree was issued, the west coast was simply declared to be a theater of operations. Being a theater of operations, it could be cleared; and the Commander-in-Chief's words were actually the law. That theory was sustained as part of our constitutional law.

So the next question is: In a future conflict would not the entire country be deemed a theater of operations? If that is so, then the Commander-in-Chief's word is law. The President must have all the power necessary to prosecute a war to the very ultimate goal. This power is inherent in the job that he has. It must be attendant upon the responsibility that legally and constitutionally devolves upon him. To argue otherwise would be to say that he could save the Constitution and lose the country. But that doesn't sound like common sense; surely the Founding Fathers and the framers of the Constitution had no such thought in mind.

A brief summary of the foreign relations power includes: treaty making, recognition of foreign states, governments, and the state of belligerency. Naming an envoy to a new government is sufficient. That constitutes recognition. Or he may withhold recognition. It will be recalled that the presently constituted government, so-called, of the Soviet Union was not recognized de jure for a long time. That is an example of the executive function of conducting foreign relations. Likewise the President may recall or dismiss diplomatic agents. There are many instances of the exercise of this authority in our history. One of the most famous and well-known to all all of us was the Citizen Genet case during Washington's Administration.

Then the President has the power to make executive agreements. Mr. Theodore Roosevelt was one of the first to hit upon this device. He made a hip pocket agreement (modus vivendi) with the Dominican Republic in 1905, which was carried on until 1907. Apparently convinced that the Senate would not approve it if he submitted the treaty for approval, Theodore Roosevelt did not submit it to the Senate at all until the composition of that body had changed to such an extent that the necessary action would be taken. There are other executive agreements. One which received the sanction of the courts is found in the case of Watts v. the United States, where a form of modus vivendi or executive agreement had

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been made between the United States and Great Britain concerning the administration of San Juan Island, off the Northwest Pacific coast. That reached the Federal Court, and the Federal Court sustained the Executive's power to enter into this agreement. Since then, this power has been exercised to an ever-increasing extent.

Briefly summarized, the military power includes the Commander-in-Chief's authority to decide the general direction of military operations of the Army, Navy, and Air Force; and the appointment and dismissal of commanders. There have been recent instances of that. There is also the proclamation of martial law, when in the President's judgment that step becomes imperative, and the establishment of military governments is entirely in the Executive's hands. There are certain hostile measures short of war that may be taken by the President. Thus it has been said that using the naval forces on land or sea in protecting the potential or inchoate interests of the United States is a Presidential function; Latin America and China afford repeated instances. In fact, intervention has almost become traditional, or had at one time become traditional, in Mexico, Nicaragua, Haiti, and the Dominican Republic, to mention just a few; and then China, of course, and now Korea. These are examples of "hostile measures short of war."

Constitutionally, a state of war in the United States requires a congressional declaration to that effect. In international law no such declaration is necessary, according to the famous opinion of the noted British jurist, a long-time judge of the Prize Court, Sir William Scott in *The Nuyade*. Sir William Scott said in effect: "It does not require any defensive action by the party being attacked to achieve a state of war. The mere attack by one state upon another creates a state of war." That is the international concept.

Constitutionally, however--and from this numerous consequences result--unless the Congress actually declares war, we have something short of a full-fledged war. Whether it be termed a police action or an emergency is not of great consequence. In the constitutional sense, it cannot truly be war. But a point that is not too well understood is this: There is no requirement for a declaration of war in order to enable the President to defend this country. That is his duty. He doesn't require any formal legislative action for that.

Another point in conclusion: Congress has many powers as enumerated in article I, section 8; but Congress has also seen fit, and repeatedly, especially in the immediate past, since, say, 1933 or so, to delegate increasingly broad powers to the President. Briefly, from article I, section 8, they are: 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 insurrection and repel invasion. These have been specifically delegated to the President by statute.

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Congress has also the constitutional authority to make rules for the Government and regulation of the land and naval forces. Quite recently this power has been exercised by the legislature in the enactment of the Uniform Code of Military Justice, which became effective on 31 May 1951.

There has been exhibited a clear tendency to recognize the necessity for tremendous speed of decision caused largely by the tremendously accelerated speed of communications, speed of attack, atomic weapons, and all the other newer devices that make war what it is, that demonstrate the tremendous capacity of humanity for self-destruction. That speed of decision can be achieved only where one person has the definite responsibility and the final authority. Constitutionally, the Chief Executive's office has now developed to that point where there are virtually no limitations on the Presidential power in time of war and even in time of extreme national emergency.

He must execute the laws. He must preserve the Union. Should the occasion arise, he must preserve the constitutionally guaranteed republican form of government. Therefore the President, not merely in his capacity as Commander-in-Chief, but by virtue of being the repository of the executive power, has all the necessary authority required to carry on the defense and protect the security of the United States.

Thank you very much.

QUESTION: Dr. Jaeger, we recently heard a so-called great debate in Congress over the right of the President to dispatch ground troops to Europe. I wonder if you would give us the benefit of your views on that matter.

DR. JAEGER: I don't see any particular reason for a debate, since the dispatch of troops to other parts of the world has been accomplished by the Presidents for years, actually. Of course, the naval forces have been in Chilean waters since way back in the 1880's and before. So the debate smacks, to me at least, of politics rather than a very serious question of the executive power. I think there is ample tradition and ample precedent, and it has not ever been seriously challenged.

My view is simply that the President has that power. He doesn't have to have a war to send the armed forces outside the continental limits. I do believe, however, that the Congress might thwart that executive power in a very simple manner. All it would have to do is to refuse to pass the armed forces appropriation bill suggested by the Department of Defense and there would be a quick termination to any foreign venture. Of course I am not saying that it would be done; but if the Congress wanted to thwart that executive power, that would be a simple way to do it.

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QUESTION: That brings up one more question. You mentioned the right of the President to appoint envoys. I am wondering if he would have to secure congressional concurrence in such an appointment.

DR. JAEGER: Of course, the appointment must be confirmed, as you know, by the Senate. But it is still the President who decides whether he will or whether he will not appoint one.

There is also the power of recall. If the President wants to, he can simply tell the envoy to come back home and he must proceed there. That has happened prior to the war, of course. The President ordered the ambassador to Germany to return and left the Embassy under a charge d'affaires. That is a mild way of indicating his feeling toward the action of a foreign government. Leaving an embassy under a charge d'affaires simply means that the relations between the two respective governments are not sufficiently important to justify an envoy of ambassadorial rank.

QUESTION: What do you think would be the powers of the President to continue in military office a person and thereby prevent him from running for a political office?

DR. JAEGER: That is a very interesting question, with some humorous implications. I will answer it on a purely theoretical basis.

I believe that the President, as the principal military officer in this Republic of ours, has the necessary authority to decline to receive the resignation of any officer--so long as an officer is in the military service, he will be answerable to the command of his superior.

QUESTION: You have defined what the President can do in time of war, but I know of no definition of the term "war." We have our own ideas. Somebody gets shot and it usually means a war. But those concepts are changing. Do you see any possibility in the near future or the conceivable future when such a situation as we have at the present time will be defined as war?

DR. JAEGER: In the sense of international law, a mere belligerent attack by one country upon another of any stage or duration will constitute a state of war. Within the United States in our domestic affairs that factor doesn't mean this, but in international affairs it is war.

I might say, however, that the framers, the Founding Fathers, had a very definite idea about it. That was that this state of war, before it can have the necessary internal consequences, carrying with it the tremendous expansion of the powers of the President, requires a legislative recognition. But I have not said, and do not say, that, even in the absence of a declaration of war, the President does not have the authority to take such steps and to carry on such efforts as are needed to preserve the Republic. And I use that term as it was used in the writings of the Founding Fathers.

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QUESTION: In describing the constitutional powers of the President you mentioned his right to establish the Army and Navy, but you said nothing about the Air Force. I was wondering if you would comment on the constitutionality of the establishment of the Department of the Air Force.

DR. JAEGER: I believe that when "Army and Navy" is used, it is used in the broad sense meaning the military service; and I think that everyone will be in accord that the Air Force is part of the military service. I have never seen any evidence to the contrary.

QUESTION: I saw not six months ago a noted Air Force officer who was brought up before a court martial and convicted, and who took his case to the Supreme Court claiming that the Uniform Code of Military Justice did not apply to the Air Force, since the Air Force is not mentioned in the Constitution. Are you by any chance generally familiar with whether that case has ever gone to the Supreme Court and what the decision was?

DR. JAEGER: I have not seen that decision; nor have I seen any mention of the case. I have heard of it, though.

So far as the personnel of the Office of the Judge Advocate General is concerned, there is no doubt in their minds at least that the Air Force is a part of the military establishment. I am fairly confident that with the extraordinary dialectics that the Supreme Court is capable of, there will be a way found judicially to bring the Air Force into the military establishment.

QUESTION: You spoke about the war powers of the President and then you mentioned briefly something about legislative recommendation. I wonder if you would give us some idea of the history and contents of the passage of the War Powers Act.

DR. JAEGER: Yes. That is what I referred to as the delegation of powers. Fortunately, I have here with me a complete enumeration of those, which I will be very happy to read to you at length, now that you have asked for it. I also have here a comprehensive discussion of this Montgomery-Ward case. Here are the delegated congressional powers to which I referred.

1. Authorization to increase the armed forces. Remember that the Congress in article I, section 8, has power to raise armies and provide for the Navy. So here is one delegation--to increase the armed forces. To order the Reserve components to duty, as also the militia, which means the National Guard.

2. To regulate transactions in foreign exchange of the Federal Reserve banks.

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3. To seize power plants, dams, conduits, and reservoirs involving the manufacture of munitions and involving the safety of the United States.

4. To suspend the 8-hour day where persons are employed in the performance of government contracts.

5. To suspend or change regulations regarding the use of radio and telephone equipment.

6. To order priorities in transportation and production.

7. To requisition American flag vessels.

8. To suspend the provisions in regard to the citizenship of officers and crews on commissioned vessels.

9. To regulate the movement of vessels in American territorial waters.

Those, then, are an enumeration of the powers that were specifically conferred upon the President by congressional action.

QUESTION: Dr. Jaeger, there is another case which I think might be of interest. I wonder if you would comment on the case of the Virginia Colonies and their troubles with the Internal Revenue Bureau.

DR. JAEGER: I think that all I can say, because I haven't made any detailed study of it for a long time, is that there will be a way found to support the Federal withholding.

In this connection I might mention the case found in 289 U.S. of Prince of Monaco against State of Mississippi. Nobody wanted to touch that case. What had happened was that somebody had bought some Mississippi bonds. Mississippi then repudiated them and of course, didn't see fit to permit itself to be sued in its own courts.

Inasmuch as the Federal Courts have no jurisdiction over the States, this fellow, being very smart, went to Monaco, and there he found himself in the presence of the prince and said: "Now, Prince, for a very small consideration I will sell you these bonds. Of course you can recover on them because a state can be sued in the Supreme Court of the United States under article III of the Constitution."

"Fine," said the prince. "What can I lose?" So he proceeded to sue the State of Mississippi in the Supreme Court of the United States, it having original jurisdiction over the States.

The Supreme Court said: "What a headache have you got me into?" They didn't want to make the State of Mississippi pay them, because that would set a very bad precedent. Other American citizens might turn their

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bonds over to a citizen of some other country or to some independent potentate like the Maharajah. Who knows?

So, after many years of having the case under advisement, Mr. Chief Justice Hughes wrote a most remarkable decision. It was absolutely superior to any other. He decided, of course, that the Supreme Court did not have jurisdiction over this type of case because it was his opinion that the word "State," as mentioned in article II, referred to the United States.

QUESTION: Not too long ago Congress, under its constitutional authority to raise armies, authorized an increase in the Air Force and duly appropriated the funds to support such Air Force. The Executive Office then in turn effectively nullified this action by withholding the support of the increased Air Force. Will you comment on the legality of the executive action in that case?

DR. JAEGER: I will be glad to, as long as the question has been asked. Congress may say to the Executive: "Here is money if you want to spend it." But to compel him to spend it is something totally different. In other words he is not in any way obliged to spend money that the Congress has put at his disposal. Congress must make the appropriation; it also has discretion not to do so.

Remember one thing--the one instance, gentlemen, where this was patently brought home to one of the executive agencies. The National Labor Relations Board had its Division of Economic Research, headed by one gentleman named David Capehart. There was a committee of Congress, which, incidentally, had the unique record of turning back 22,000 out of the 100,000 dollars appropriated; its chairman said this was perhaps the first time in history that a congressional committee had returned money unexpended. The point of this narrative is that Congress chopped off 76,000 dollars in the appropriation measure for the Labor Board and in effect said: "We want you to get rid of the Division of Economic Research and all the 'pinkos' and reds and Communist fellow travelers who infest that division."

The Labor Board got very smart and abolished the Division of Economic Research and created the Division of Technical Information with the same personnel. Whereupon they had reckoned without their host, because they had to go up to Congress for a deficiency appropriation; and that time Congress in exactly so many words said: "76,000 dollars will be eliminated, which is to pay the salaries of the following" and every person was tabulated, with the salary that was cut out. That time the Board could not do anything and the division ceased to exist.

I cite that merely to show that this power to appropriate can only go so far as making the money available or refusing to make it available. But the decision whether to make the expenditure is a proper function, in my judgment, of the Commander-in-Chief in determining how he will dispose of it.

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I can see plenty of reasons for resentment but really it is not very much a matter of congressional right. Congress can act so far, and then it is the executive power to go the rest of the way.

QUESTION: During the Korean action there was an industrial plant in Detroit that was ready to go on strike. The Governor said he wasn't going to call out the troops, because he didn't think it was necessary in the national security. So the whole thing was laid in the lap of the United States Government. The plant involved top secret contracts. We had quite a lot of research on what can be done when we did not have a national emergency to protect Federal property. It was decided, after much deliberation, that he would go in. I was wondering under what authority he finally went in to protect Federal property.

DR. JAEGER: There is a somewhat similar case that goes back to the strike in the Pullman Parlor Car Company, as it was called then. At that time the Governor of Illinois--I think his name was Alltrop--was a Socialist. There was a traffic strike in the railroad yards in Chicago. Alltrop refused to call out the National Guard in spite of the fact that there was a lot of firing being carried on.

Some ingenious character, probably a lawyer, decided that the Federal Government had a very definite responsibility to protect the mill, since it was functioning for the Federal Government; and he justified the use of Federal troops for that purpose.

So, then, reasoning by analogy, but not pressing it too far, if the Federal Government has functions going on in a plant which is vital to the security of the United States, it is Federal property. So what is the objection to this use of Federal troops to protect Federal property, just as it would protect a postoffice if it were attacked? Definitely there is no interference with the strike. It is just for the protection of Federal property. In fact, there is a duty on the Federal Government to protect its own property.

QUESTION: You have enumerated the powers that were delegated to the President in the War Powers Act. To what extent, if any, could the President have done those things in the absence of the War Powers Act?

DR. JAEGER: That is an interesting question. I think, to the extent that doing these things would be essential to the preservation of the country. He could have substantively submitted to the Congress the facts, and they would then have had to do whatever was needed in the event of an attack on this country. In other words it is the duty of the Executive either in his capacity as Chief Executive, or merely in his capacity as Commander-in-Chief, to defend the security of the Union. Isn't that right? So if he has to take certain action which is absolutely requisite, he can take it.

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COMMENT: While that law was under consideration in Congress, there was quite a lot of effort to impede it on the ground that it was not necessary. From that you could almost arrive at the conclusion that there was no need of the law because the President could do those things if he needed to in order to preserve the Nation. Isn't that right?

DR. JAEGER: Not precisely. Let us take it in this way: What do we mean by "immediate necessity?" In other words does the President always have the time necessary to submit his requirements to Congress: Suppose that all of a sudden we are hit by 5,000; 8,000; or 20,000 atomic missiles. The question arises immediately, how much time would the Chief Executive have for congressional debate? My candid opinion is, none. I cannot conceive of a Chief Executive not taking such action as would be needed; and, furthermore, that it would not be considered constitutional.

However, if he has weeks and months, that is a different thing. Please remember that the first of September 1939 was the beginning of the war in Europe, with the invasion of Poland. That gave the President some little time to get the country into a state of security, shall we say, or national defense or preparedness. But that may not exist again. If the President has the time, then I think he has the duty to consult with Congress, because Congress is the original repository of these powers by law. If there is any reason why he cannot go to Congress for a granting of the powers needed for national defense, he should certainly not fail to act quickly if the emergency is immediate. Otherwise he would just be saving the Constitution and losing the country.

DR. REICHLEY: Walter, all I will say is, on behalf of all of us, thank you.

(7 May 1952--250)s/sgb

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