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POWERS OF THE PRESIDENT IN WAR AND EMERGENCY

28 November 1952

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Dr. Edward S. Corwin, Professor Emeritus of Princeton University and nationally recognized authority in constitutional law, was born near Plymouth, Michigan, 19 January 1878. He holds the following degrees: Ph.B., University of Michigan, 1900; Ph.D., University of Pennsylvania, 1905; LL.D., University of Michigan, 1925; Litt.D., Harvard University, 1936. He was preceptor with rank of assistant professor, Princeton University, 1905-1911; professor, politics, 1911-1918; McCormick professor jurisprudence, 1918-1946; emeritus, 1946 to date. In addition to his teaching at Princeton, Dr. Corwin has served for many years in various capacities of consulting and lecturing on constitutional questions, including endowed lectures at many leading colleges and universities. He was president, American Political Science Association, 1931; consultant to the Attorney General, 1937; and editor, Library of Congress, 1949-1952. He has been a prolific writer in constitutional law and related fields for the past 40 years. Among his most recent works are: "The Constitution and What It Means Today, 1920," seventh edition, 1941; "The President: Office and Powers," 1940-1941; "The Constitution and World Organization," 1944; "Total War and the Constitution," 1947; "Liberty against Government," 1948; "A Constitution of Powers in a Secular State," 1951. This is Dr. Corwin's first lecture at the Industrial College.

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DR. HUNTER: Admiral Hague, General Greeley, and gentlemen: Our lecture this morning is the first of the so-called vertical lectures. These vertical lectures deal with subjects that cut across the entire field of study in the course. They serve to develop topics which can't be treated adequately within the limits of any one curriculum unit. Since they usually cut across a number of fields, they also serve an important purpose in integrating and tying together in a measure the course as a whole.

This morning's lecture, "Powers of the President in War and Emergency," is obviously of this character. In the emergency management of the national economy, the President is the top manager. What he can and cannot do in an emergency is a matter of vital importance.

It would be difficult to find a more appropriate and a more competent speaker for the consideration of this important topic than Professor Corwin. As you know from the biographical sketch, he is one of the leading authorities in the field of constitutional government and law, with a long and distinguished career. In fact some have gone so far as to say that the court of last appeal is not that group of black-coated gentlemen in the building opposite the Capitol, but Professor Corwin himself.

Now, the elder statesmen in this country are not confined to the field of public office, finance, or industry. The field of scholarship also has its elder statesmen. It is as one of this small and honored group that I want to introduce Professor Corwin this morning.

PROFESSOR CORWIN: Admiral Hague, General Greeley, Dr. Hunter, and gentlemen: It is a great pleasure to be here addressing this group. I have already learned of its special qualities. Now you have learned from Dr. Hunter my special qualities. So we can admire one another.

I am going to start at the beginning of things, more or less. During our history the power of the President has been increasing. This increase has not been steady. Sometimes there has been a lapse. One lapse occurred after Jefferson, between Jefferson and Jackson. The Presidency was in commission at that time, as it were. Thus it was the habit of Monroe to consult his Cabinet on everything. Then the matter was put to vote, the President casting one vote. That was quite different from Lincoln. When he brought in the Emancipation Proclamation he polled the Cabinet and they all voted against him. Then Lincoln raised his hand and said, "The Ayes have it."

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In the last 50 years, the managerial power of the President has increased with considerable rapidity on account of some rather strong-minded men, beginning with T. R.; on account also, of course, later of another strong-minded man--F.D.R. Sandwiched in between them was the First World War. Then came the Second World War, when the Presidency did advance, by strides. Now to continue this stimulation of the powers of the President we have the "cold war," which in some ways raises more difficult questions than war itself, particularly within the areas of dubious power, or overlapping power. The "steel case" is an illustration of that.

The Constitution--the part of the Constitution we are interested in in this connection--is primarily article II, which deals with the Presidency. The first clause of that says that "the executive power shall be vested in a President of the United States of America." That clause has been a very important element in the rationalization of increases in Presidential power. It raises the question: What is "executive power"?

There are two possible views. One is that the executive power comprises the ensuing specifically granted powers of the President: the power to make treaties, to make appointments to the Cabinet and other public offices, to receive ambassadors and other public officers and consuls. At the same time, he has the duty to take care that the laws are faithfully executed, and to inform Congress from time to time of the state of the Union and to recommend necessary measures.

On the other hand, there is the view that the executive power clause includes indefinitely more than that, that it includes all power which is "in its nature" executive. What standards are we going to have to judge that by? One standard would be the prerogative of the British king. Undoubtedly the President had, in the minds of the framers of the Constitution, some similarity to the British monarch, whose prerogative was delineated for them by Blackstone, in his widely read commentaries.

But to go back to the Constitutional Convention itself, we find that this clause, "The executive power shall be vested in a President of the United States of America," was put in primarily to settle the question whether the executive should be a council--some members felt it should be a council, an executive council--or, on the other hand, a single person. The executive power clause of course settled that question. Curiously enough, this clause was never acted on separately, but only in conjunction with the whole of the rest of the Constitution.

Of course, another purpose of the clause was to give the President a proper title, although when the first Congress met, it felt that he still didn't have title enough. So some urged the title "His Highness President of the United States of America and Protector of the Rights of the Same". Others urged simply "His Excellency". Then the question came up, what should the Vice-President be called? Someone

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moved that he be called "His Superfluous Excellency." That suggestion appears to have killed the whole idea, for the President of the United States has always had to be content to be known simply as the President, or "Mr. President".

To initiate the debate on the powers of the President, an important episode occurred in the very first Congress of the United States. A bill was introduced by James Madison, as chairman of a committee, providing for the Department of Foreign Affairs, which afterward became the Department of State. The head of it was to be appointed, of course, by the President, with the advice and consent of the Senate. But, the question was raised, how could he be removed? Suppose the President wanted to get rid of him. The President has very important duties in the field of foreign relations. This secretary, one man said, would be hardly anything more than his amanuensis. How then to get rid of him? The debate on that fills several hundred pages of the annals of the Congress.

The astonishing thing about this business, to many people, was the discovery that the Constitution apparently had a gap, it being generally supposed that it contained an answer for any question which human ingenuity could put to it. And in fact the answer was soon found on this occasion, namely, in the opening clause of article II--"The executive power shall be vested in a President of the United States of America."

And that view prevailed in effect, although the Supreme Court of the United States didn't get around to indorsing it until 1926, in the famous "Oregon postmaster" case. The law provided: "He shall be removed with the advice and consent of the Senate" as well as being appointed that way, but President Wilson went ahead and removed the gentleman anyway, who thereupon started suit for his salary, a suit which, after his death his widow inherited. But the Court, speaking through Chief Justice Taft, in one of its most elaborate opinions, ruled that the power to remove was a part of "the executive power" of the President. In short, the idea that the opening clause of article II is a source of power received the Court's sanction.

Then in 1793 President Washington issued his Proclamation of Impartiality on the outbreak of war between France and Great Britain. Jefferson was then Secretary of State, but was inclined to get off the reservation on account of his feud with Hamilton. So, although it would seem that he must have approved of this proclamation, yet, when Hamilton took up the cudgels in favor of it, he wrote to Madison: "For God's sake, dear sir, take up your pen and cut him to pieces in face of the public," and Madison got to work, later telling Jefferson, however, that this was the most disagreeable job he had ever done in his life. Jefferson himself had expounded the broadest possible view of the executive power three years earlier, in an opinion which he rendered to Washington

as Secretary of State, saying that "the executive branch of the Government, possessing rights of self-government from nature, cannot be controlled in the exercise of them but by a law passed in the forms of the Constitution." I think that is probably the correct legal doctrine right at this minute.

As to Hamilton's argument in defense of the Proclamation--he appealed both to the opening clause of article II and also the clause which says: "the President shall take care that the laws are faithfully executed." In this connection he pointed out that treaties are part of the law of the land, and that international law is part of the law of the land, too.

This time the Supreme Court was a little quicker with its endorsement. In 1803, in the famous case of Marbury v. Madison, the doctrine was established that the Supreme Court could pass upon the constitutionality of acts of Congress, and presumably could void those that didn't square with its view of the Constitution. At the same time, however, Chief Justice Marshall said: "The President is vested with great political powers, in the exercise of which he is responsible only to the country in his political capacity, and to his own conscience."

Let us turn to another clause in the Constitution, which also has been a very potent source of Presidential authority. That is the one which says the President shall be the "Commander-in-chief of the Army and Navy and of the militia of the several states when called into the actual service of the United States." Expounding this clause in the Federalist Hamilton says that it would be altogether erroneous to compare the President's power in relation to the Army and Navy and the military forces to that of the King of Great Britain. The President was top admiral and top general, so that nobody can give a military command to him; but that was all. And in 1850 in a case growing out of the Mexican War, the Supreme Court substantially repeated Hamilton's language. The Commander-in-chief clause was the forgotten clause of the Constitution and continued to be until 14 April 1861; and then the great break-through occurred under Abraham Lincoln.

Fort Sumter had surrendered. Lincoln, after summoning Congress to meet on the 4th of July, which was 10 weeks away, took a number of steps on his own, claiming that in the circumstances "the war power" belonged to him. Thus, he proclaimed a blockade of southern ports, summoned an army of volunteers, and increased the Regular Army and Navy. Furthermore, he took over the railroad between Washington and Baltimore, and declared a suspension of the writ of habeas corpus along the line, finally as far as Boston.

He also drew 2 million dollars out of the United States Treasury, although the Constitution says that no money shall be paid out of the Treasury except by appropriation by law, and sent it up to General Dix, Edwards Pierpont, and Mayor Opdycke of New York City, for certain propaganda work.

To be sure Lincoln reported most of these things to Congress when Congressmen came together and asked them to ratify what he had done; while he didn't claim that he had a right to do everything he had done, he said, "I don't think I have done anything that Congress could not have authorized me to do."

So, on 12 August 1861, Congress passed a law ratifying everything that the President had done "with reference to the armed forces," that is, the enlargement of the Army and the enlargement of the Navy, and the volunteer army of 300,000 men, and possibly with the blockade in mind. At any rate, that was one of the questions raised in the famous "Prize" cases, which were not decided until 1863.

Among the vessels seized for trying to run the blockade was one that belonged to an American citizen who lived in Richmond. The Supreme Court was asked to say whether an American citizen's property could be seized in that way. A closely divided Court answered that the size and dimensions of the insurrection were notorious and constituted it a real war, and that the President accordingly had the power, as Commander-in-chief of the Army and Navy, to proclaim a blockade of any port of the rebellious region.

The question of habeas corpus still remained. But on 22 September 1862 the President suspended the writ of habeas corpus throughout the whole country, with reference to "disloyal persons," and on 3 March 1863 Congress ratified that action.

In the famous Milligan case decided in 1866, it was held, however, that the President, in providing for the trial of "disloyal persons" by military commission had exceeded his powers. Inasmuch as Congress had itself provided for the trial of such persons in the civil courts, the Court was well justified in taking the view it did.

Let us now turn to World War I. In World War I President Wilson exercised extraordinary powers, but the situation was very different from what it had been in 1861-1865. Lincoln was right in the midst of the war, so to speak, but Mr. Wilson was 3,000 miles outside the theatre of operations; so he could wait. As a matter of fact, most of the extraordinary powers that were exercised by him were delegated to him by Congress.

That fact, nevertheless, gives rise to a question. There is a maxim of constitutional law--there is nothing about it in the Constitution itself--that the legislature cannot delegate its powers. This comes from John Locke, whose treatise on "Civil Government" was regarded as just about the acme of political wisdom by the framers of the Constitution. At the same time, however, Locke also gives a very broad description of what he calls "preogative." Defining an emergency as a situation for the handling of which no rule has been laid down, he says,

that the power to provide for the public good in such cases devolves on the Executive. Indeed, he adds that if the emergency be sufficient, he can even set the law aside, and no one will criticize him for doing so, so long as the public good is forwarded. It is well to remember that the framers of the Constitution wrought with Locke's words before them.

But to come back to Mr. Wilson, he, as I say, got most of his extraordinary powers from Congress by delegation. But he did avail himself of Lincoln's precedents in appealing to the executive power clause in one or two instances. For example, the Committee on Public Information was created by the President without any warrant from an act of Congress. So, too, he created the War Industries Board. That Board, with Mr. Baruch as chairman, about governed the country till the end of the war, and there was not a line in the statute books which authorized its activities.

We now come to World War II. In the first place, I wish to point out how the draft has been extended in the course of our history.

The first suggestion of conscription in this country for the raising of a national army was made by James Monroe when he was President Madison's Secretary of War during the War of 1812. Daniel Webster, then a member of the House of Representatives, made a most ferocious attack on the measure, calling it a "dance of blood" and a "gamble with death"; and the House of Representatives by calculated dawdling managed not to act till the end of the war made it unnecessary to do so.

During the Civil War we get a draft to suppress "insurrection"; that at least was the theory of the Federal Government. So, you see, the draft is still kept within the categories of repelling invasion, suppressing insurrection, and enforcement of the laws.

During World War I we had the Selective Service Act, under which an army was raised for foreign service. That circumstance gave rise to a case in which Mr. Hannis Taylor made an attack on the constitutionality of the act, but he didn't get anywhere.

In 1940, September 1st, we got the first peacetime draft, but assurance was given in the act itself, and repeated by the President "again and again and again," that these men would not have to serve abroad. Nevertheless, when war came 15 months later, that clause of the act was repealed pronto. But the final step was President Roosevelt's surprise message, 11 January 1944, in which he asked for a conscription of labor. This didn't get to first base, but a similar proposal may sometime.

During World War II itself, the most extreme measures of the Government were those which were taken against Japanese residents on the west coast under the President's order of 19 February 1942. This authorized

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military commanders anywhere in the country to create defense zones from which they would be empowered to exclude all persons whose presence was deemed by them to be dangerous. That was done by Presidential order.

Nevertheless, the President had some members of the Cabinet who didn't like this very much. Among them was Secretary Stimson. So at last Mr. Roosevelt authorized Mr. Stimson to go to Congress and ask for supporting legislation. The result was The Act of 21 March 1942 by which the national legislature underwrote in advance everything that the Army might do in pursuance of the President's order. So it became impossible under that act to challenge the order of a military commander on common law grounds. Thus, if a military order issued in pursuance of the President's order was disobeyed, the culprit would not be court-martialed, but would be tried in the civil courts for an offense against the United States. By the same token, a military commander operating under the protection of the act would not be answerable to the civil courts.

In pursuance of the order of 19 February 1942, as fortified by the act of 21 March, 112,000 Japanese residents of the United States, two-thirds of them citizens of the United States by birth, were eventually removed from their farms and homes. They were herded into temporary camps and then into "relocation centers" in the desert country of California, Idaho, Utah, Arizona, and the delta areas of Arkansas. This seems to me to have been entirely unnecessary.

Consider the chronological aspect of the business. Although Pearl Harbor occurred on December 7th, the President's order did not issue until February 19th. But nothing more was done by Congress for more than a month. Then two or three weeks later a curfew order was issued by General DeWitt. This was a very sensible measure; and, if the general had stopped there, it would have been entirely defensible. Not until 24 May, nearly seven months after Pearl Harbor, was General DeWitt at last persuaded that it was necessary to issue his "exclusion order," the operation of which I have just described.

Throughout the war not one single Japanese was detected either here or in Hawaii in one single act of espionage or sabotage. General DeWitt contended that this fact was itself proof that they intended to do something!

Continuing still on World War II, you get a vast expansion of this quasi-legislative power of the President, one that is simply amazing when you come to study it in detail. The precedents were there, to be sure, but these precedents were certainly blessed with a prolific progeny. What is more, Mr. Roosevelt took his first step of this nature some 15 months before the outbreak of the shooting war, a very significant fact. The term "war" had expanded into "war emergency."

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Hence the well-calculated title of my address--"Powers of the President in War and Emergency"--because the two terms have become hopelessly mixed up one with the other, especially in the apologetics of Attorneys General for what the President has done. You see, the Attorney General is the Administration's family lawyer. It is not his business to tell the family they can't do something. It is his business to show them why they can do it. Sometimes they have been fairly successful; sometimes rather less so.

For example, Mr. Roosevelt took his first step toward war, that is toward getting into war, in September 1940, when he handed over 50 so-called "overage" destroyers to Great Britain. In fact, they weren't overage at all. They had been recently recommissioned and reconditioned. Mr. Jackson, now on the Supreme Court, duly wrote an opinion on the subject and justified the President in this way: He said, in effect, "Everybody admits that the President can, as Commander-in-chief, dispose the forces of the United States." Then he wrote in the little word "of". It is interesting to note that Walter Bagehot says in his book on the English Constitution that the King can dispose of the forces, that he can sell the ships of the Navy and discharge the Army, at any time he wants to, by virtue of his prerogative. Today, of course, this prerogative has been absorbed into the powers of the House of Commons, or, really, into those of the prime minister.

But the most remarkable development of Presidential legislative power is to be found in the creation of the so-called war agencies. I told you that Mr. Wilson created a couple of them on his own authority as Chief Executive. This is what Mr. Roosevelt did:

In April 1942, I wrote the Executive Office of the President and asked it to give me a list of all the war agencies and to specify to me the supposed legal warrant by which they had been brought into existence. I got back a detailed answer which listed 43 executive agencies, of which 35 were admitted to be of purely executive provenience.

Six of these raised no question, because what they amounted to was an assignment by the President of additional duties to already existing officers, and of officers whose appointment had been, in most cases, ratified by the Senate. Thus, our participation in the Combined Chiefs of Staff became an additional duty of certain military and naval commanders, and the Combined Raw Materials Board was a similar creation. Nobody was assigned to such duties who was not already in an office to which the duties were logically referable. But take the Board of Economic Warfare, the National Housing Agency, the National War Labor Board, the Office of Censorship, the Office of Civilian Defense, the Office of Defense Transportation, the Office of Facts and Figures, and Office of War Information, the War Production Board (which superseded the earlier Office of Production Management), the War Manpower Commission, and later on the Economic Stabilization Board. All of these were created by President Roosevelt by virtue of his powers, as he usually expressed

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it, as "Commander-in-chief in wartime". Furthermore, he often put duties upon these bodies which did not come from any statute, and a violation of which was, therefore, not "an offense against the United States". How then was the offender to be brought to book? In this connection the Roosevelt administration developed what is called "sanctions" or "administrative sanctions" or "indirect sanctions".

I will give you one illustration which occurred during World War I, for it was Mr. Wilson who first invented this device. I refer to an episode involving the Remington Arms Company, of Bridgeport, Connecticut, in the fall of 1918. I am following the narrative of a member of President Wilson's War Labor Board. After a prolonged strike and the Board had rendered a decision, the strikers still refused to return to work. President Wilson thereupon wrote them upholding the Board, pointing out that an appeal from it should be made through the regular channels and not by strike, and informing them that if they did not return to work, they would be barred from any work in Bridgeport for a year; that the United States Employment Service would not obtain positions for them elsewhere; and that the Government would no longer consider their exemptions based on the theory that they were useful in war production. That ended the strike. The strikers didn't relish the idea of being put on the firing line.

F.D.R. also governed labor relations with a high hand and without any legislative authority to do so, from 7 June 1941 to 25 June 1943. His technique was to seize the plants in which strikes occurred; and some plants for other reasons. For example, he ordered Montgomery Ward to adopt a maintenance of membership rule. Montgomery Ward at first said O. K. Then, after Sewell Avery got to thinking the matter over, he decided the President didn't have any authority to issue such an order; so he reneged.

What next happened was this: A morning or two later, when Mr. Avery got down to work, he found that the 70 people that the Chicago post office was accustomed to send down there to look out for their parcel post orders hadn't shown up. So he yielded, after the episode in which he was carried out of his office between Sergeant Lepak and Private Dies.

I think I have time here to read another document. Mr. Roosevelt being a very articulate gentleman, elaborated rather early in the game the theory he was going to proceed on. He didn't like the provisions of the Price Control Act. So on 7 September 1942, he demanded that Congress repeal those provisions; this is what he said:

"I ask the Congress to take this action by the first of October. Inaction on your part by that date will leave me an inescapable responsibility to the people of this country to see to it that the war effort is no longer imperiled by threat of economic chaos."

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That is all good prerogative stuff.

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

"At the same time that fair prices are stabilized, wages can and will be stabilized also. This I will do.

"The President has the powers, under the Constitution and under Congressional acts, to take measures necessary to avert a disaster which would interfere with the winning of the war."

That is good John Locke.

"I have given the most thoughtful consideration to meeting this issue without further reference to the Congress. I have determined, however, on this vital matter to consult with the Congress.

"The American people can be sure that I will use my powers with a full sense of my responsibility to the Constitution and to my country. The American people can also be sure that I shall not hesitate to use every power vested in me to accomplish the defeat of our enemies in any part of the world where our own safety demands such defeat.

"When the war is won, the powers under which I act automatically revert to the people--to whom they belong."

This goes beyond John Locke. It sounds more like Charles I: the President claims to stand in a peculiarly close relationship to the people, is the suggestion.

What we have here is certainly a rather remarkable proposition. The President of the United States is claiming the right to repeal an act of Congress, although he does not deny that Congress had the power to pass the act. To be sure, other Presidents have occasionally refused to enforce acts of Congress, though very rarely, and always on the ground that the acts in question were unconstitutional. This was Andrew Jackson's contention in 1837 about the Tenure of Office Act. Nobody can deny that Congress had the right to pass the Emergency Price Control Act or that it was the only organ of the Government that did have that right; and yet the President claimed the right to repeal the law. That was a claim of power to suspend the Constitution, and, moreover, as to the most important feature of it, namely, the division of power between the President and Congress.

Any candid person must admit that a situation may arise in which it would be necessary to suspend the Constitution. Thus Abraham Lincoln admitted that he did not know whether or not he had suspended a part of

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it when he suspended the writ of habeas corpus; but, said he, "Are all the laws to go unenforced in order that one law may be preserved?" On the occasion when Mr. Roosevelt spoke, however, Congress was in session, and it seems to me that if the situation is so desperate as to require suspension of the Constitution, the safe view to take is that Congress ought to be considered to be aware of the fact as well as the President, and so be joined in the enterprise.

Nevertheless it must be admitted that the President's attempt to establish a whole series of new offices, and his attempt to rule labor for two years without a whit of authorization by Congress, prevailed. Moreover, the President during this period of time seized many properties. He made nine seizures of property without any authorization by act of Congress; not one of those was set aside by any court and one of them was impliedly sustained.

This was of the Pewee Coal Company, in May 1943. The company successfully sued the Government for damages and the Supreme Court sustained the award, although had the seizure been tortious it could not have done so.

And that leads me to remark that, in arguing the "steel seizure" case, recently the Solicitor General to my mind, missed the bus. He cited the Pewee Coal Company case, but he didn't say anything at all about its being on all fours with the seizure of the steel industry--except that between the Pewee Coal Company on the one hand and the steel industry on the other there was a slight difference in size.

Now, gentlemen, what I have done is to show that the President of the United States, by one course of reasoning or another, and as a matter of fact by the success of the measures he has taken, has laid claim for the office of President to tremendous powers in time of war, "war emergency," or just "emergency."

"In time of peace," said Jefferson, "the people look most to their representatives; but in time of war to the Executive solely." That, I think, is just about the essence of the situation. If we should have an atom bomb dropped on New York, Washington, Chicago, or Detroit, I think the country would overnight be turned over to the military powers of the United States, because the confusion would be so great that we would have to have a group of men in authority who are accustomed to act in emergencies. In that case, however, I should hope that the military would not resort to the logic of General DeWitt--that because somebody hadn't done something, it was a sure sign he was planning to do it.

QUESTION: Doctor, would you care to express any opinion as to the effect that the Bricker Amendment would have on the President's treaty-making powers and his power to make executive agreements.

DR. CORWIN: I was on a committee created by the United States Chamber of Commerce to give that question a little study. Maybe you

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are not asking my opinion about it, but I think the proposal a mixture of sense and nonsense. We have managed to survive 163 years with the present arrangement.

In the first place, Mr. Bricker seems to think that the treaty-making power is going beyond bounds when it makes a treaty which sets aside state laws in matters that the state has a right to govern and has always had the right to govern. I may cite by way of illustration the case of *Missouri v. Holland*. Here certain orders of the Secretary of Agriculture made pursuant to an act of Congress, which in turn was passed to implement a treaty between the United States and Great Britain with reference to migratory game birds going from Canada to the United States and from the United States into Canada, were sustained.

These regulations decreed, for example, among other things, that these birds could be shot only at certain periods; also that they should not be shot after dark, and things like that. The treaty was upheld by the Supreme Court as, among other things, making provision for an important food supply. In other words, the United States did have a real interest in that case. The treaty was not a mere stalking-horse for the purpose of gathering additional legislative powers into the hands of Congress; it had a genuine, tangible basis and so was within the treaty-making power. It dealt with a negotiable subject.

As for precedents--the very first treaty that the United States made after the Constitution went into effect, the Jay Treaty, had a provision in it to this effect: that British subjects in Great Britain could inherit real property in the United States; and then they would be given a certain time to sell that property and take the proceeds home. On the other hand, Americans received the reciprocal privilege in Great Britain.

The treaty was attacked on the ground that there is no clause in the Constitution which gives Congress the power to regulate the holding of land, that this matter had always been governed by the states, and that therefore the treaty was unconstitutional. But the treaty was sustained none the less. And similar treaty provisions were sustained clear down until, well, nobody ever thinks it worth while any more to challenge them. A good case to review the law on the subject is *Hauenstein v. Lynham* in 100 U.S. So much for that.

In the second place, Mr. Bricker also thinks that it is a bad thing that treaties should supersede earlier acts of Congress. I agree that he has something there. Here is another instance where the Supreme Court thought that there was a gap in the Constitution. A treaty was made with China providing for the migration of Chinese into this country. Then Congress came along and limited that migration very drastically. But could Congress repeal a treaty that way? The Supreme

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Court held that it could, piecing out the Constitution by resorting to a legal maxim. If courts can't find anything better, they can always turn to a maxim. The maxim they turned to this time was that "Later laws repeal earlier ones (leges posteriores priores abrogant)," and held that the law, being of later date than the treaty, prevailed. Unfortunately, this is a rule that can be worked both ways, with the result that treaties of later date can repeal acts of Congress or so the Court has stated.

That to my mind is unsound doctrine. What they should have said was: Now, let us look at the Constitution, at article VI, paragraph 2. What does it say? "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Obviously, here is a graded hierarchy of laws. The Constitution is the supreme law. Then an act of Congress which is in pursuance of the Constitution is the next in authority. Last of all come treaties. Thus if there is a conflict between an act of Congress and a treaty, the act of Congress prevails, whether it is of later or earlier date than the treaty. Actually all the cases but one have involved treaties which were repealed by later acts of Congress. But the Court has kept on parroting the "leges posteriores" formula. Then finally in 286 U. S. in the case of Cook v. the United States, they held that a treaty had actually repealed an earlier act of Congress. The holding was probably dictated by political considerations.

The fact of the matter is that the State Department got into a row with Great Britain over the seizure under the Volstead Act of some vessels off the coast, which seizure was alleged to contravene a later treaty with Great Britain. By that time the Eighteenth Amendment was on the way out; and it is my surmise that the Department of State told Justice Brandeis what the situation was, with the result that he wrote an opinion which upheld the treaty.

The true law, to my mind, is that an act of Congress can at any time repeal a treaty provision, but not vice versa.

I told the United States Chamber of Commerce people that I thought it might be a good thing to adopt an amendment to the Constitution making it perfectly clear that treaties shall not be cognizable by the courts of the United States until they have been implemented by an act of Congress. For that would put us on a basis of equality in the matter of treaty making with all other countries. A treaty is not known to the courts of Great Britain, and no court in Great Britain would think of enforcing a treaty provision unless and until and to the extent that Parliament had enacted it as law. And I think Senator Bricker is right in contending that the same rule ought to hold in

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this country. Indeed, Congress should have the right and duty to take upon itself the business of trimming certain loosely drawn treaties of recent date. The U. N. Charter is one such, and some of our state courts have reached some remarkable results from their reading of it. Thus a municipal court out in Los Angeles held that the California law which provides that persons not eligible for naturalization may not own realty in that state, was invalid as being contrary to the Charter.

The decision was absurd; there is not one word in the U. N. Charter which indicates that it is intended as a rule enforceable in court. It is a political document pure and simple. Fortunately, the Supreme Court of California has since overturned that part of the decision. It sustained the decision of the municipal court under the equal protection clause of Amendment XIV; not under the Charter. But yesterday I saw in some Washington paper, that out there in Moscow, Idaho--a very suspicious name--a court had gone and done the same thing that the municipal court of Los Angeles did. I don't think they will get very far with it.

Finally, as to this executive agreement business, I don't believe that we ought to take away from the President the power to make executive agreements. I think that power has been abused at times. But we should not forget that the Congress of the United States has power to tie up the President any time it wants to. The idea that the Presidency is a possible dictatorship simply assumes that the Congress of the United States is going to lie down and be walked over, that it is not going to exercise its functions. The President can't do much without appropriations from the Congress. Nor is that all the control it has over him.

QUESTION: By what authority did the President order our active military forces into combat in Korea? And is there any conflict there with the authority of Congress to declare war?

DR. CORWIN: That is a good question. It is a question, of course, that has been raised a great many times in other connections. I refer you to Mr. James Grafton Rogers' book called, "World Policing and the Constitution." He reviews there some 149 episodes in which the President has employed United States armed forces in hostile ways against other countries, and has performed acts which would be legitimate casus belli, without any previous authorization by Congress.

One of these happened in 1853 when some people down in Nicaragua destroyed some property of American citizens. President Pierce sent a vessel down there to collect reparations. These not being forthcoming, so Lieutenant Hollins, a rather peppery fellow apparently, bombarded Greytown, incidentally destroying some property belonging to an American citizen named Durand. Later Durand brought an action in the United States District Court against Hollins, but the court upheld the latter. It said his authority must be deemed to have come from the Secretary of the Navy,

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that the Secretary of the Navy's authority came from the President; and that it was a poor kind of government that couldn't protect the lives and property of its citizens abroad.

Again in 1900 the so-called Boxers got control in Peking, and the Empress became their prisoner. Though she escaped, the Boxers took control of the city and ultimately threatened the foreign legations. Thereupon Great Britain, France, the United States, Germany, and, I think, Italy supplied armed contingents to march upon Peking and rescue the legations. Our contribution, made by President McKinley, comprised 5,000 troops and a naval force. Subsequently the Empress recovered her palace, and considerable negotiation ensued with the United States Government. The Empress' government recognized that what had been done was not an "act of war" but one of self-defense. In fact it was China that paid reparations to us, not we to China.

Now, as to Korea--Mr. Truman says that this is a police action. I want to read you something. Here is what Mr. Truman said:

"When Jefferson was President, our merchant ships were attacked by the Barbary pirates, who ruled the north coast of Africa. These pirates lived by robbery and human slavery. They were collecting huge sums of money in tribute from European nations. Then the Barbary pirates began to demand that the United States pay them millions of dollars for leaving our ships alone. They were arrogant and they were brutal, and they got away with it until someone finally stood up against them.

"Jefferson decided to put a stop to the whole thing. He knew that there were times when a country has to fight against international crime. He sent the United States Navy to Africa. He sent the Marines ashore at Tripoli. He carried the battle to the enemy nearly 5,000 miles away from the United States.

"We smashed the power of those bandits, and we won the praise and gratitude of the world. The Pope, at that time Pius VII, declared 'The American commander, with a small force and in a short space of time, has done more for the cause of Christianity than the most powerful nations of Christendom have done for ages.'

"Jefferson did not believe this nation could submit to pirates, and neither do we.

"Now, as then, there is no room for piracy in a free world."

One thing Mr. Truman overlooked, that is, Jefferson had been so doubtful about his authority in the matter that he instructed the naval commander that if he took any prisoners, he must release them. Also they could disarm vessels, but they would have to release those too.

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At the same time Jefferson asked Congress to authorize hostilities, whereupon, on 6 February 1802, Congress passed the following act:

"Whereas the regency of Tripoli, on the coast of Barbary, has commenced a predatory war against the United States;

"Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That it shall be lawful fully to equip, officer, man, and employ such of the armed vessels of the United States as may be judged requisite by the President of the United States, for protecting effectually the commerce and seamen thereof, in the Atlantic Ocean, the Mediterranean, and the adjoining seas.

"Sec. 2. And be it further enacted that it shall be lawful for the President of the United States to instruct the commanders of the respective public vessels aforesaid, to subdue, seize and make prize of all vessels, goods and effects, belonging to the Bey of Tripoli, or to his subjects, and to bring the same into port, and distribute according to law; and also to cause to be done all such acts of precaution or hostility as the state of war may justify, and may, in his opinion, require."

So Mr. Jefferson really didn't take the action that Mr. Truman thinks he took until after he had appealed to Congress and gotten authorization to do so. The total history of the episode is against Mr. Truman.

I am inclined to agree with the President, nevertheless, that this is a police action. And I don't see why it should be thought to have ceased being one. We had a boundary line there to defend. Are we going to send a note saying: "Please wait until we can get Congress to declare war"? What would be gained? The final word still rests with Congress which could have withheld the necessary funds at any time.

As a matter of historical fact, while there is evidence on the other side, yet overwhelming evidence favors the doctrine that there is a distinction between acts of defense against hostilities begun by the other party, and those which produce a state of war ab initio. In the former case the President acts as Commander-in-chief; in the other, only Congress can take the country from a state of peace into a state of war.

COLONEL BARNES: We have run overtime. I regret to say that we won't be able to take any more questions. On behalf of all present I express my real thanks for this very entertaining and instructive lecture. We are deeply indebted to you.

DR. CORWIN: Thank you, Colonel Barnes, and thank you, Admiral, for this opportunity you have given me to address this fine audience.

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ERRATA SHEET

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TITLE: "Powers of the President in War and Emergency"

Page 10, lines 6 and 7 of next to last paragraph: For Andrew Jackson's
contention in 1837 read Andrew Johnson's contention in 1867

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