



# DID YOU KNOW

The legal effect of the Roosevelt-Churchill "Eight Points" on our foreign policy?

-----  
EIGHT POINTS FOR WAR OR PEACE:

2) WHAT LEGAL EFFECT DO THEY HAVE?

"Some of the most gifted Americans whom I have met - 'men of light and leading' - as the saying goes, have said 'European politicians ought to have understood the Constitution of the United States. You ought to have known that the President without the Senate could do nothing. You have only yourselves to blame if you have suffered through counting on his personal decisions or undertakings. They had no validity'."

(Winston Churchill, in The Aftermath, p. 149, commenting on President Wilson's powers at the World War Peace Conference.)

NEARER PEACE?

Having discussed the implications of the Roosevelt-Churchill "Eight Points" (Did You Know #19), the question arises of the legal effect of the declaration of those points on our foreign policy. Does the declaration of the Eight Points (apart from whatever military or naval agreements may have been reached at the conference) commit us to participation in the war, or does it merely involve us in responsibility for the peace to come? It should be recalled that the President told the press, after his return from the conference, that he would say no, in reply to the question "Are we any closer to entering the war?", but "he declined however, to permit direct quotation of this answer when a reporter asked whether it might be enclosed in quotation marks" (New York Times, Aug. 17, 1941). He stated further, when reminded that the Eight Points did not state how "Nazi tyranny" was to be destroyed, that that was a narrow way to look at it, and that the conference was primarily an interchange of views, a swapping of information (New York Times, Aug. 17, 1941). Senator Barkley, Administration leader, also expressed the view in Senate debate, that the Eight Points constituted merely an expression of hopes and aspirations (Congressional Record, Aug. 19, 1941 pages 7370-7371).

NEARER WAR

But the other side of the medallion appears in more striking colors. The President admitted that he and Mr. Churchill had



reached a complete understanding with regard to all aspects of the war situation (New York Times, Aug. 17, 1941), and that a new era was to open in anti-Axis collaboration to achieve the "final destruction of the Nazi tyranny". That meaning was further interpreted by the President in his message of August 21 to the convention of the Young Democrats, wherein he said: "...it soon became evident that only by defeating the sinister powers of cynical conquest before they reach our shores, could we even have the slightest chance of staying out of actual war" (New York Times, Aug. 22, 1941). In a friendly interpretation, U.S. Week comments of the decisions at the Roosevelt-Churchill conference: "Primarily they concern war and its successful prosecution" (Aug. 22, 1941, p. 7).

THE PRESIDENT'S  
EIGHT POINTS

Of what binding force are the Eight Points? They were formulated by the President, upon his own initiative, without prior consultation with, or approval by, the Senate, or Congress as a whole. In his special message to Congress of Aug. 21, he advised Congress of the declaration, but apparently did not consider it as constituting a treaty or alliance, since he did not ask for any action upon it by Congress. In their present form, the Eight Points call for no specific action at any specified time, and are not formulated in any manner which could be acted upon by Congress or the Senate. Because of the lack of clarity of the Constitutional provisions defining the powers of, and limitations upon, the President, the Senate, and the Congress as a whole, in the field of international relations, the constitutional law and the precedents concerning such declarations is unsettled. But this much can be said with certainty: as the Eight Points stand today, they are not binding upon either the Senate or the Congress. They represent an attempted formulation of foreign policy by the President. They do not have the formal legal status of either a treaty or an alliance. As is indicated later, they might possibly be held to have the character and force of an executive agreement.

PRESIDENT  
VERSUS  
CONGRESS

But it would be a mistake to assume from their present failure to bind Congress or the Senate, that nothing can be done by the President to carry out the Eight Points. There is no occasion for discussing in detail the long history of the conflict between the President and the Senate (and, occasionally, the House of Representatives) over the power to formulate and control our foreign policy. It is sufficient here to point out that early Presidents (Washington, Adams, Jefferson, Madison and Monroe) exercised a dominant influence over foreign policy; that during the rest of the nineteenth century, the authority of Congress was predominant; that Theodore Roosevelt greatly expanded the President's control; that President Wilson's power over foreign policy during the World War reached the high point of such control; that from 1918 to 1930, the Senate was the dominating power; and that under the administrations of Franklin D. Roosevelt, Presidential predominance has once more sought to assert itself (see: Corwin, "The President - Office and Powers (1940), Ch. VI; "The President's Control of Foreign Policy, by James Frederick Green, Foreign Policy Reports, April 1, 1939; "Participation by Congress in Control of Foreign Policy", by Bryant Putney, Editorial Research Reports, Nov. 9, 1939, vol. II, #18; Corwin, "The President's Control of Foreign Relations." (1917).)

DIVIDED  
POWERS

The reasons for the unsettled nature of constitutional law in this field, and the reasons why President Roosevelt can take steps to carry out the Eight Points have thus been summarized by a leading constitutional authority, Edward S. Corwin,



Professor, Princeton University, in "The President - Office and Powers", pages 252-254):

- 1) "The powers which under the Constitution are capable of determining the policy of the National Government towards other governments are divided .... The prime division is between the President - sometimes acting with the Senate, more often alone - and Congress, that is, the national legislative power; a secondary division is that between President and Senate. Not only is a struggle for power in this field thus invited; in the absence of a cooperative disposition all around it is well-nigh inevitable."
- 2) ".... by the principle of concurrent powers neither Congress nor the Senate is constitutionally concluded by anything done by the President, while he - because of his obligation to the law - is usually concluded by what Congress has done."
- 3) "The President today is not only the organ of communication of the United States with foreign governments - he is the only organ of communication therewith; and as such he is entitled to shape the foreign policies of the United States so far as he is actually able to do so within the conditions which are imposed by the acts of Congress; and more often than not Congress chooses to follow the leadership which his conspicuous advantages of position serve to confer upon him."
- 4) "Moreover, it is necessary to remember that the President is not only the organ of foreign relations but also Chief Executive and Commander-In-Chief, since on the basis of these blended powers he has been able to lay claim successfully to a kind of international capacity as executive of the Law of Nations, especially when American interests abroad are menaced by other countries. He has thus come to exercise at times the war-making power without prior consultation of Congress, especially in the region of the Caribbean. What is of vastly greater importance, however, is the ability of the President simply by his day-to-day conduct of our foreign relations to create situations from which escape except by the route of war is difficult or impossible."
- 5) "At the same time presidential prerogative in the diplomatic field is not even today unlimited, either theoretically or practically. No President has a mandate from the Constitution to conduct our foreign relations according to his own sweet will. If his power in that field is indefinite, so is Congress's legislative power; and if he holds 'the sword', so does Congress hold 'the purse-strings'".

CONGRESSIONAL  
VETO

Let us determine the status of the Eight Points in the light of these principles. These Points, as they stand today, do not bind Congress, and there seems to be no reason why the Senate, or the House, could not voice its approval or disapproval of any or all of them, or could not appoint a committee to inquire into their



adoption and the manner of their formulation (Corwin, "The President", *ibid.*, pages 205-206, 227-228). While congressional investigating committees have seldom been authorized in the field of foreign relations, they seem just as proper in that field as in connection with domestic affairs (Corwin, *ibid.*, pages 227-228). Of course, the President might refuse to disclose matters he considered military secrets or affecting the national safety. If the Eight Points should be embodied in a treaty or alliance hereafter negotiated by the President with Britain, ratification by the Senate would be essential, and the Senate could amend, or modify, or reject, the treaty; moreover, the House could refuse to make such appropriations as were sought to carry out the treaty, even if it had been signed by the President (Corwin, *ibid.*, pages 200, 233-234, 235, 240). The case would be the same if the President, in order to avoid the requirement that a treaty must be approved by two-thirds of the Senate, should simply ask Congress to approve a joint resolution endorsing the Eight Points, which requires only a majority vote in each house (Green, *ibid.*, page 12; Putney, *ibid.*, 343-344, 349-351).

ON HIS OWN

But there are still steps which the President might take in connection with the Eight Points on his own initiative, and without being subject to Congressional control if he wished to disregard the will of Congress and the people. There are two possible general categories: steps taken under the President's undefined powers as our organ of international relations, and steps taken under powers granted by existing laws. In the first category are "executive agreements" and an undefinable variety of actions which are limited only by the ingenuity of a President. "Executive agreements" are of two kinds: those whose formulation/ <sup>authorized</sup> by existing laws, and those which the President may make by virtue of his broad powers as our representative in international relations (Corwin, *ibid.*, pp. 236-238). The former would not apply to the Eight Points, since no existing law authorizes such a declaration. The Eight Points themselves bear none of the earmarks of the normal executive agreement, but the precedents are so vague that they might possibly be considered to constitute such an agreement (see Green, *ibid.*, p. 12). Moreover, President Roosevelt might be able to implement the Eight Points themselves by making executive agreements of a limited nature under the powers granted him by some of the existing laws which are discussed below. Further, he might be able to enter into an executive agreement under his international relations powers, in order to effectuate some or all of the Eight Points. The possible agreements are too numerous to be described here in detail, but it should be noted that previous Presidents dared to authorize or enter into such secret executive agreements as the Taft-Katsura note of 1905, giving Japan a free hand in Korea, the Lansing-Ishii note of 1917, defining Japan's influence in Asia, and the House-Grey memorandum of 1916, pledging probable American assistance to the Allies (Green, *ibid.*, p. 12).

MORE MOVES  
ON HIS OWN

There are numerous existing laws granting sweeping powers to the President which he can possibly exercise to implement the Eight Points without effective Congressional control (unless Congress repeals those laws) unless ratification or appropriations by Congress should later be necessary to effectuate them. They are numerous, and but a few can be mentioned here (many of them are listed in Senate Document 64, 77th Congress, listing the "emergency" laws - which have been analyzed in *Did You Know* #13 and #14). Some of them deal exclusively with international relations; others deal with domestic affairs, but are capable of use in foreign relations. To cite some of many possible examples, the President, in order to demonstrate publicly the sincerity behind the Eight Points or in order to convince the Petain government of France or some other Axis satellite whose loyalty to the dictators showed signs of



weakening, of the sincerity of the United States in connection with the "economic equality and economic collaboration" points of the Eight Points (Points 4, 5), or to coerce such a government into support of the Allies, might use his powers over foreign exchange, transfer of credit, revaluation of silver, devaluation of the dollar, and the equalization and currency stabilization fund, his power to make reciprocal trade agreements without Congressional approval, his power to lower tariff duties up to 50%, or his power to finance trade with foreign countries (see Green, *ibid.*, pages 17-18), to accomplish such a result.

AT THE PEACE  
TABLE

And, of course, in the exercise of his powers as our organ in the international relations, the President could attend (in person or through representatives) the peace conference which would draft the peace treaty at the end of the current war, and could select an American delegation without members of the Senate, as did President Wilson (Putney, *ibid.*, pages 347-348), even if we had not actually entered the war-- since the Eight Points at least commit us to some responsibility for the peace. The Senate might then have an opportunity to pass upon the peace treaty, and upon the commitments entered into by the President in order to effectuate the Eight Points -- after the treaty had been formulated at the peace conference.

67 PRESIDENTIAL  
STEPS

One final factor must be considered in attempting to forecast the actions which might be taken to effectuate the Eight Points-- the nature of foreign policy under the Roosevelt Administrations. One observer has listed 45 known instances - from the President's "quarantine" speech on Oct. 5, 1937 to Jan. 1, 1940,- in which the President has taken the initiative in attempting to formulate new foreign policy for the United States (Corwin, *ibid.*, pages 421-423). An independent study by the writers, bringing that list up to the date of the Eight Points, reveals 22 additional instances, for a total of 67 between Oct., 1937 and Aug., 1941 whose cumulative result has been to bring the U.S. closer to involvement in the war. Of these, 33 instances represented clear examples of action taken by the President without specific Congressional approval (10 public statements for or against a warring nation; 10 instances of actual aid rendered to a warring nation; 7 instances of punitive action taken against a warring nation; 3 instances of protective alliances, in effect (Canada, Greenland, Iceland); and 3 actions under the claim of "national defense" which heightened the danger of actual involvement). The declaration of the Eight Points, seeking to commit this nation to responsibility for the nature and enforcement of the peace which is to end a war in which we are not a formal participant, is the latest instance of Presidential efforts to determine the foreign policies of the nation.

DEMOCRATIC  
SAFEGUARD

From what had been described above, it is clear that, while the President may not have the moral "right" to embark upon a course of action which is not approved by Congress or the people, he has the legal "power" to undertake many dangerous actions on his own initiative because of the lack of clarity of the Constitution in this regard. The most effective check is the strength of the opposition sentiment in Congress and the support which that sentiment receives from the people of the nation. That check has often proved effective in the past and undoubtedly can be effective in the future. Even President Roosevelt has suffered setbacks in his attempts to control foreign policy. For example, treaties for the St. Lawrence Seaway and adherence to the World Court were rejected. (Green, *ibid.*, p. 11).