

War Powers of the Executive in the United States

by
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William S. Hein & Co., Inc.
Buffalo, New York
2003

Library of Congress Cataloging-in-Publication Data

Berdahl, Clarence A. (Clarence Arthur), 1890-1990

War powers of the Executive of the United States / by Clarence A. Berdahl.

p. cm.

Includes bibliographical references and index.

ISBN (invalid) 1-57588-777-0 (cloth : alk. paper)

1. War and emergency powers--United States. 2. Executive power--United States. I. Title.

JK558.B4 2003

342.73'062--dc21

2003045294

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Printed in the United States of America.

UNIVERSITY OF ILLINOIS STUDIES
IN THE
SOCIAL SCIENCES

VOL. IX

MARCH-JUNE, 1920

Nos. 1 and 2

BOARD OF EDITORS:

ERNEST L. BOGART

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PUBLISHED BY THE UNIVERSITY OF ILLINOIS
UNDER THE AUSPICES OF THE GRADUATE SCHOOL
URBANA, ILLINOIS

JOHNSON REPRINT CORPORATION
111 Fifth Avenue, New York, N.Y. 10003

JOHNSON REPRINT COMPANY LTD.
Berkeley Square House, London, W1X6BA

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Library of Congress Catalog Card Number: 72-138452

First reprinting 1970, Johnson Reprint Corporation

Printed in the United States of America

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PREFACE

The powers of the Executive relating to war have received surprisingly little attention in treatises and commentaries on the Constitution. They are usually passed by with little more than a repetition of the constitutional provision making the President the Commander-in-Chief of the armed forces of the nation. This study is an attempt to describe these war powers more fully and systematically than has heretofore been done. For this purpose, the term "war powers" has been interpreted somewhat liberally, so as to include not only the powers that may be exercised during the actual conduct of war, but also those that relate to the initiation and termination of war and to the reconstruction period following war. It has been necessary, in great measure, to work over old material and to make use of familiar historical incidents. Nevertheless, it is hoped that something has been contributed to show more clearly the comprehensive scope and the almost unlimited nature of this phase of the President's power.

The writer is indebted to members of the Political Science Seminar of the University of Illinois, and more especially to Professors Garner and Fairlie, for valuable suggestions and kindly criticism. He is alone responsible for any errors of fact or conclusion.

UNIVERSITY OF ILLINOIS

“It is difficult to describe any single part of a great governmental system without describing the whole of it. Governments are living things and operate as organic wholes.”

—Woodrow Wilson.
*Constitutional Government
in the United States*

CHAPTER I

INTRODUCTION

“The executive power shall be vested in a President of the United States of America.”¹ The language here used by the Constitution in describing the executive power in the government of the United States is strikingly different from that describing the general power of either of the other two great departments. The article dealing with the legislative department uses the words, “All legislative powers herein granted . . .”² showing that the following specified powers clearly constitute a limitation on the possible claims of that department to power; while the article devoted to the judiciary also expressly states that the judicial power of the United States “shall extend to” certain enumerated cases,³ thereby obviously excluding all other cases over which the judiciary might otherwise claim jurisdiction.

The lack of such express limitations in the article dealing with the Executive has led to some difference of opinion as to whether the executive power vested in the President by the Constitution is defined and limited by the following specified powers, or whether it includes other powers not enumerated but naturally executive in character. Even if the former interpretation of the Constitution is accepted as correct, the conception of the term “executive power” still remains somewhat vague, since several of the expressly enumerated powers of the President, such as his powers as Commander-in-Chief and his power to see that the laws are executed, are in themselves undefined in the Constitution, uncertain as to their limits, and therefore subject to various interpretations.

¹ *Constitution*, Art. II, Sec. 1.

² *Ibid.*, Art. I, Sec. 1.

³ *Ibid.*, Art. III, Sec. 2.

The article dealing with the Executive has therefore been characterized as "the most defective part of the Constitution," its loose and general expressions enabling the President, by implication and construction, "either to neglect his duties or to enlarge his powers."⁴ A distinguished historian says that while our Constitution in the main is of the rigid type, its flexible character is shown in the provisions conferring the powers and defining the duties of the Executive. "Everything is clearly stated, but the statements do not go beyond the elementary." Pointing out that while the Constitution did not authorize certain of Lincoln's acts, neither did it expressly forbid them, he holds that there is "room for inference, a chance for development, and an opportunity for a strong man to imprint his character upon the office."⁵ Somewhat the same idea was expressed by President Wilson some years ago when he wrote: "The President is at liberty, both in law and conscience, to be as big a man as he can. His capacity will set the limit."⁶

A doctrine of constitutional construction — the so-called Wilson-Roosevelt doctrine with regard to the control of matters within the "twilight zone" between the national and state jurisdictions⁷ — was translated by President Roosevelt into terms of inherent executive power. He said: "The most important factor in getting the right spirit in my Administration, next to insistence upon courage, honesty, and a genuine democracy of desire to serve the plain people, was my insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by Congress under its constitutional powers. My view

⁴ View of Secretary of State Upshur. See his more extended statement, quoted in Taft, *Our Chief Magistrate and His Powers*, 141.

⁵ Rhodes, *Historical Essays*, 204, 214.

⁶ *Constitutional Government in the United States*, 70.

⁷ First enunciated by James Wilson in 1785, recently advocated by President Roosevelt, and stated as follows: "That when a subject has been neither expressly excluded from the regulating power of the Federal Government, nor expressly placed within the exclusive control of the States, it may be regulated by Congress if it be, or become, a matter the regulation of which is of general importance to the whole nation, and at the same time a matter over which the States are, in practical fact, unable to exercise the necessary controlling power." Willoughby, *Constitutional Law*, I, 47.

was that every executive officer in high position was a steward of the people bound actively and affirmatively to do all he could for the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin. I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws. Under this interpretation I did and caused to be done many things not previously done by the President and the heads of the departments. I did not usurp power but did greatly broaden the use of executive power. In other words, I acted for the public welfare, I acted for the common well being of all our people, whenever and in whatever measure was necessary, unless prevented by direct constitutional or legislative prohibition."⁸

Roosevelt's theory of executive power is disputed, however, by equally eminent authority. Senator Rayner, one of the leading constitutional lawyers of his time, contended that the clause dealing with the executive power relates simply to the distribution of governmental functions, and should not be considered as a grant of power at all.⁹ Professor Goodnow says that the holder of executive power "is for the most part to exercise the powers which have clearly been given to him by the Constitution, and the Constitution itself is regarded as a grant of power not otherwise possessed, rather than as a limitation of power already in existence."¹⁰

The Supreme Court has likewise not only repudiated the Wilson-Roosevelt doctrine of constitutional construction as being contrary to the 10th Amendment,¹¹ but it has also definitely refuted the Roosevelt theory of executive power. "We have no officers in this government," says the Court, "from the Presi-

⁸ Roosevelt, *Autobiography*, 388-389.

⁹ Speech in U. S. Senate, Jan. 31, 1907. *Cong. Record*, XLI, Pt. II (59 Cong., 2 Sess.), 2010.

¹⁰ *Principles of Constitutional Government*, 89.

¹¹ *Kansas v. Colorado*, 206 U. S., 46, 89-90 (1907). The 10th Amendment reads as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

dent down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority.”¹² It would therefore seem that ex-President Taft reflected the better opinion when he stated the true view of executive power to be “that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an Act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest The grants of Executive power are necessarily in general terms in order not to embarrass the Executive within the field of action plainly marked for him, but his jurisdiction must be justified and vindicated by affirmative constitutional or statutory provisions or it does not exist.”¹³

Altho the weight of authority upholds the contention that executive power in the United States is limited definitely to the powers enumerated in the Constitution, or clearly implied therefrom, the interpretation of those enumerated powers is frequently such as to give to the President an extraordinary and practically undefined range of authority. Thus, for example, it has been authoritatively held that the President, under his power “to take care that the laws be faithfully executed,” may undertake measures and exercise authority, for the enforcement of the law or the protection of federal rights, not specifically granted by Constitution or statute.¹⁴ Other of the President’s enumerated powers, such as his power as Commander-in-Chief

¹² *The Floyd Acceptances*, 7 Wall., 666, 676 (1868).

¹³ *Our Chief Magistrate and His Powers*, 139-140.

¹⁴ *In re Neagle*, 135 U. S., 1, 63-64, 67 (1890). Cf. dissenting opinion, which held that such enforcement or protection “must proceed not from the President, but primarily from Congress,” and that if Congress does not pass laws in reference to such matters, “there is not the slightest legal necessity out of which to imply any such power in the President.” *Ibid.*, 82, 83. See also view of W. W. Willoughby: “The obligation to take care that the laws of the United States are faithfully executed, is an obligation which is to be fulfilled by the exercise of those powers which the Constitution and Congress have seen fit to confer.” *Constitutional Law*, II, 1151.

and his power to receive and send ambassadors and ministers, are likewise subject to the same broad interpretation.

If the general conception of executive power in the United States is somewhat vague and open to various interpretations, that is especially true of the nature and extent of executive power with regard to war. It has rightly been said 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."¹⁵

From the very beginning of our history as a nation, statesmen and commentators have held that since it is impossible to foresee what may be the exigencies or circumstances endangering the public safety, therefore "no constitutional shackles can wisely be imposed," and none are imposed upon the so-called war powers.¹⁶ They have held that there are two distinct classes of powers under the Constitution — the peace powers, which are subject to the restrictions of the Constitution, and the war powers, which are limited only by the laws and usages of nations,¹⁷

¹⁵ J. W. Garner, in *Revue du Droit Public et de la Science Politique*, XXXV, 13 (Jan.-Mar., 1918).

¹⁶ See argument of Hamilton, in *The Federalist*, No. 23 (Goldwin Smith ed., pp. 119-120). Cf. Speech of Senator Sumner, in U. S. Senate, June 27, 1862: "Pray, Sir, where in the Constitution is any limitation of the War Powers? Let Senators who would limit them mention a single section, line, or phrase, which even hints at any limitation. . . . The War Powers are derived from the Constitution, but, when once set in motion, are without any restraint from the Constitution; so that what is done in pursuance of them is at the same time under the Constitution and outside the Constitution. It is under the Constitution in the latitude with which it is conducted; but, whether under the Constitution or outside the Constitution, all that is done in pursuance of the War Powers is constitutional." *Works of Charles Sumner*, VII, 131-132. See also Fisher, *Trial of the Constitution*, 199.

¹⁷ "There are, then, in the authority of Congress and of the Executive, two classes of powers, altogether different in their nature and often incompatible with each other — the war power and the peace power. The *peace power* is limited by regulations and restricted by provisions prescribed within the Constitution itself. The *war power* is limited only by the laws and usages of nations. This power is tremendous; it is strictly constitutional, but it breaks down every barrier so anxiously erected for the protection of liberty, of property and of life. . . . The powers of war are all regulated by the laws of nations, and are subject to no other limitations." Speech of John Quincy Adams, in House of Representatives, May 25, 1836. *Cong. Debates*, XII, Pt. IV (24 Cong., 1 Sess.), 4038, 4039.

and under which the rights of peace may even be disregarded or curtailed.¹⁸ They have asserted that the war power implies the right to do anything that may seem necessary to carry on the war successfully, even to the extent of performing otherwise unconstitutional acts.¹⁹

These claims with regard to the extent of the war power have also been sanctioned by the Supreme Court. Thus, in upholding the Confiscation Acts of the Civil War, the Court said: "If the statutes were not enacted under the municipal power of Congress to legislate for the punishment of crimes against the sovereignty of the United States; if, on the contrary, they are an exercise of the war powers of the government, it is clear they are not affected by the restrictions imposed by the 5th and 6th Amendments. . . . Of course the power to declare war

¹⁸ "But in bestowing upon the Government War Powers without limitation, they [the makers of the Constitution] embodied in the Constitution all the Rights of War as completely as if those rights had been severally set down and enumerated; and among the first of these is the right to disregard the Rights of Peace." *Works of Charles Sumner*, VII, 136-137.

"It seems to be pretty well settled by the common sense of mankind that when a nation is fighting for its existence it cannot be fettered by all the legal technicalities which obtain in time of peace." Rhodes, *Historical Essays*, 214.

"What is the effect of our entering upon the war? The effect is that we have surrendered and are obliged to surrender a great measure of that liberty which you and I have been asserting in court during all our lives; power over property, power over persons. This has to be vested in a military commander in order to carry on war successfully." Speech of Elihu Root at Saratoga Springs, Sept., 1917, quoted in *Va. Law Rev.*, V, 179.

¹⁹ "When the Constitution conferred upon Congress the right to declare war, it by necessary implication conferred upon Congress the right to do anything that in its judgment is necessary to carry that war to a successful conclusion." Senator P. C. Knox, in U. S. Senate, May 29, 1917. *Cong. Record*, 65 Cong., 1 Sess., 3276.

"I felt that measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation." Letter of Lincoln to A. G. Hodges, Apr. 4, 1864. Nicolay & Hay, *Complete Works of Abraham Lincoln*, II, 508.

"If the Union and the Government cannot be saved out of this terrible shock of war constitutionally, a Union and a Government must be saved unconstitutionally." Fisher, *Trial of the Constitution*, 199.

involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted.”²⁰ Even the dissenting justices in this case admitted that legislation founded upon the war power is subject to quite different considerations from that based upon the municipal power of the government, and “is subject to no limitations, except such as are imposed by the law of nations in the conduct of war . . . The war powers of the government have no express limitations in the Constitution, and the only limitation to which their exercise is subject is the law of nations.”²¹ The same principle has also been upheld by the Court in other cases.²²

The authorities thus seem to agree regarding the nature and unlimited extent of the “war powers” as such, the extent to which the exercise of these war powers is vested in the President or in Congress is a matter of some dispute. For example, Senator Browning, during the Civil War, asserted the complete authority of the Executive in determining upon the measures necessary to meet any war emergency, denying that Congress had even coordinate power with the President in that respect. “It is not true,” he said, “that Congress may decide upon the measures demanded by military necessities and order them to be enforced. . . These necessities can be determined only by the military commander, and to him the Constitution has intrusted the prerogative of judging of them. When the Constitution made the President ‘Commander-in-Chief of the Army and Navy of the United States,’ it clothed him with the incidental powers necessary to a full, faithful and sufficient performance of the duties of that high office; and to decide what are military necessities, and to devise and execute the requisite measures to meet them, is one of these incidents. It is not a legislative, but an executive function, and Congress has nothing to do with it.”²³

On the other hand, Senator Sumner disputed this claim to executive power, and held that the exercise of the war powers

²⁰ *Miller v. United States*, 11 Wall., 268, 304-305 (1870).

²¹ *Ibid.*, 315.

²² *Stewart v. Kahn*, 11 Wall., 493, 506-507 (1870); *Mechanics and Traders Bank v. Union Bank*, 22 Wall., 276, 295 (1874); *McCormick et al. v. Humphrey*, 27 Ind., 144, 154 (1866).

²³ Speech in U. S. Senate, June 25, 1862. *Cong. Globe*, 37 Cong., 2 Sess., 2919, 2920, 2922.

rested with Congress. "Of the pretension that all these enormous powers belong to the President, and not to Congress, I try to speak calmly and within bounds. I mean always to be parliamentary. But a pretension so irrational and unconstitutional; so absurd and tyrannical, is not entitled to respect. Such a pretension would change the National Government from a government of law to that of a military dictator . . ." ²⁴

As a matter of fact, the growth of executive power into a practical dictatorship in time of war, does not seem to have been especially feared in this country. During the Revolution, attempts were made, both in New York and Virginia, to create a dictator, who in the latter state was to be "invested with every power legislative, executive, and judiciary, civil and military, of life and death over our persons and over our properties," ²⁵ a proposal apparently approved by such a democrat as Patrick Henry.²⁶ Washington was actually given the power of a dictator on three separate occasions;²⁷ while Lincoln has been referred to by impartial writers as exercising "more arbitrary power than any Englishman since Oliver Cromwell," and as one whose acts were "worthy of a Tudor."²⁸ During the recent World War, the necessity of making the President the supreme dictator in order to win the war was seriously suggested in Congress.²⁹

²⁴ Speech in U. S. Senate, June 27, 1862. *Works of Charles Sumner*, VII, 139-140. But *of*. Sumner's remarks in a speech at Boston, only a few months later (Oct. 6): "In war there is no constitutional limit to the activity of the executive, except the emergency. The safety of the people is the highest law. There is no blow the President can strike; there is nothing he can do against the Rebellion, that is not constitutional. Only inaction can be unconstitutional." *Ibid.*, 217.

²⁵ *Elliot's Debates*, II, 357-361; *Writings of Thomas Jefferson*, III, 231.

²⁶ It was, however, bitterly opposed by Jefferson. *Elliot's Debates*, III, 160; *Writings of Thomas Jefferson*, III, 231.

²⁷ See resolves of Dec. 27, 1776, Sept. 17 and Nov. 14, 1777. *Jour. Cont. Cong.*, VI, 1045-1046; VIII, 752; IX, 905. See also *Elliot's Debates*, III, 79.

²⁸ Rhodes, *Historical Essays*, 213; *cf.* Bryce, *American Commonwealth*, I, 65-66, 72; Ford, *Rise and Growth of American Politics*, 280.

²⁹ Senator Harding (Ohio) made the suggestion in August, 1917: "What the United States needs and what it must have if it is to win the war is a supreme dictator, with sole control of and sole responsibility for every phase of war activity, and this today means practically every phase of Government. Not only does this country need such a dictator,

That the President can of his own accord constitutionally assume dictatorial power in time of war has been denied by the courts as "an extravagant assumption;"³⁰ altho most authorities hold that the war powers of the President constitute a "latent power of discretionary action" capable of almost unlimited expansion in times of emergency and making the President practically absolute within a certain sphere of action.³¹

The exact limits of this sphere of action for the President and the line of demarcation between his war powers and those of Congress, are difficult to determine. An attempt to draw such a line and to delimit such a sphere of action was made in a famous case in the following language: "Congress has the power not only to raise and support and govern armies, but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interfere with the command of the forces and the conduct of campaigns. That power and duty belong to the President as Commander-in-Chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature and by the principles of our institutions. The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxilliary powers. Each includes all authorities essential to its due exercise. But neither can the President in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law."³² Other authorities have

in my opinion it is sure to have one before the war goes much further... The sooner it comes the better for all of us. . . . For supreme dictator at the present moment there is but one possible man, the President of the United States." *N. Y. Times*, Feb. 10, 1918.

³⁰ *Jones v. Seward*, 40 Barb. (N. Y.), 563, 571 (1863).

³¹ Goodnow, *Comparative Administrative Law*, I, 32; Watson, *On the Constitution*, II, 914; Baldwin, *Modern Political Institutions*, 91-92; Channing, *History of the United States*, III, 513; W. A. Dunning, "The War Power of the President," *New Republic*, XI, 76-79 (May 19, 1917). For a somewhat extravagant claim as to the absolute nature of the President's war powers, see remarks of Senator Lewis, in U. S. Senate, June 30, 1917. *Cong. Record*, LV, Pt. 5 (65 Cong., 1 Sess.), 4552, 4553.

³² *Ex parte Milligan*, 4 Wall., 2, 139 (1866).

attempted a briefer and simpler delimitation by saying that "Congress regulates whatever is of general and permanent importance, while the President determines all matters temporary and not general in their nature."³³

The main source of the President's war powers is of course the Constitution. Besides certain powers relating directly to war that are expressly conferred upon the President by that instrument,³⁴ other powers and duties are vested in him that may have an important bearing on the conduct of war;³⁵ while still other clauses of the Constitution not referring directly to the President may by necessary implication add to his war powers.³⁶ Other of the President's powers with regard to war are derived from international law and practise, are conferred by statute, or are established as a result of custom and usage. To define more clearly these war powers of the President, to determine their nature and source, and to discover the manner of their exercise, is the purpose of this study.

The most common forms through which the President in person exercises his powers, are by proclamations and executive orders, the former generally containing announcements and decisions of the widest interest and broadest scope, the latter usually concerning matters not of such general interest. Either may be issued as a result of express or implied statutory authorization, or by virtue of the President's constitutional position as Chief Executive. The great increase in the number of these proclamations and executive orders issued in war time is also an excellent indication of the growth of the war powers of the Executive over his power in time of peace.

Other forms of presidential action include rules and regulations issued under statutory authority or by virtue of the President's constitutional power; directions, instructions, or orders to heads of departments and other agencies; and decisions on

³³ Fairlie, *National Administration of the United States*, 33; cf. Von Holst, *Constitutional Law of the United States*, 193.

³⁴ Art II, Sec. 2, Cl. 1 (commander-in-chief).

³⁵ Art I, Sec. 7, Cl. 2, 3 (sign and veto bills); Art II, Sec. 1, Cl. 8 (oath of office); Sec. 2, Cl. 1 (power of pardon); Sec. 2, Cl. 2 (power with regard to foreign relations and appointment of officers); Sec. 3 (recommend measures, call special session, and execute the laws).

³⁶ Art. I, Sec. 9, Cl. 2 (habeas corpus); Art IV, Sec. 4 (guaranty of republican government and of protection).

matters requiring his approval or coming to him through appeals from the decisions of subordinate officials. Finally, the commissioning of officers appointed by him with or without the consent of the Senate, the recommendation of measures to Congress, and the signing or vetoing of bills, may be included among the means through which the President exercises his authority, and which must be considered in connection with this study of his powers.³⁷

Not all of the acts required of the President can possibly be performed by him personally, and the courts have definitely recognized that he may act through the heads of departments. "The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties," and the acts of the heads of departments are "in legal contemplation the act of the President."³⁸

It has also been held that heads of departments may in turn act through subordinate officials in the departments;³⁹ but the question as to how far this delegation of power may be carried and still be considered the act of the President seems as yet to be unsettled by the courts. It has been pointed out that most orders and regulations are in fact prepared by subordinate officials in the several departments, altho issued in the name of the head of the department or in the name of the President; and also that in some cases, and especially during the recent war, such orders and regulations have been issued by subordinate officials, acting by authority of the head of the department, in matters where the statutes vested the power in the President.⁴⁰ This practise, undoubtedly becoming more common, opens up a vast new field for a study of the exercise of Presidential powers. Since, however, as has been suggested, it is still an open question how far such exercise of authority by subordinate officials can be considered as the act of the President, this study makes no attempt to include any exercise of power but by the President himself, or for which he may clearly be immediately responsible.

³⁷ Cf. Fairlie, *National Administration of the United States*, 41-42.

³⁸ *Wilcox v. Jackson*, 13 Pet., 498, 513 (1839); *United States v. Eliason*, 16 Pet., 291 (1842).

³⁹ *United States v. Warfield*, 170 Fed. Rep., 43 (1909).

⁴⁰ J. A. Fairlie, in *Michigan Law Rev.*, XVIII, 188 (Jan., 1920).

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