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If any question see Kathys

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MEMORANDUM

The power of the President to send American troops to Palestine

At the present time Palestine is a mandated territory under the tutelage of the British Government. The nature of the mandate is indicated by the following excerpts from Article 22 of the Covenant of the League of Nations (Hackworth, Digest of International Law, Vol. 1, p. 103):

> "To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.
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> "The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.
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> "The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.
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> "Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory."

The United States Government, however, has asserted through its executive branch an interest in Palestine and other mandated territories, its

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interest being, as stated in 1936 to the British Government, "based exclusively on its obligation and purpose to provide for the protection of American interests in Palestine on a basis of equality with those of other governments and their nationals" (Hackworth, id., Vol. 1, p. 117).

It is understood that in May of this year the British Government will give up its mandate on Palestine and will withdraw its forces which are stationed there. Whether at that time the President, in the absence of congressional action and without regard to such action as this country might take as a member of the United Nations, may send troops to Palestine must be considered in the light of historical precedents and decided apart from statute. There is no existing legislation which either authorizes or prohibits the President from sending American troops to Palestine.[1]

The use of American military forces abroad by executive direction alone has historically been limited to instances of (1) the protection of the rights or property of American citizens or of the United States Government itself, (2) intervention and police supervision over the affairs of nations in the Caribbean area, and (3) the protection of so-called "inchoate interests" of the United States.

1. Protection of American rights and property abroad. The power of the President, without authorizing legislation, to send American troops abroad for this purpose is thus set forth in Corwin, The President, Office

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1/ Section 540 of Title 10, U.S.C., and section 441(a) of Title 34, U.S.C., which authorize the President, on application of foreign governments, to detail officers and men of the Army and Navy to assist those governments "in military matters," are not helpful here. Those statutes were intended merely to provide instruction and other assistance to foreign governments in training their military forces, teaching military science and techniques, etc., and not to authorize military expeditions on the part of this Government.

and Powers (1940), pp. 246-248:

10 "Far more important is the question whether the President may, without authorization by Congress, take measures which are technically acts of war in protection of American rights and interests abroad. The answer returned both by practice and by judicial doctrine is yes. The leading precedent was an outgrowth of the bombardment in 1854, by Lieutenant Hollins of the U.S.S. Cyane, of Greytown, Nicaragua, in default of reparation from the local authorities for an attack on the United States consul. Upon his return to the United States Hollins was sued in a federal court by one Durand for the value of certain property which was alleged to have been destroyed in the bombardment. His defense was based upon the orders of the President and Secretary of Navy, and was sustained by Justice Nelson in the following words:

10 "'As the Executive head of the nation, the President is made the only legitimate organ of the General Government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens. It is to him, also, that citizens abroad must look for protection of person and property, and for the faithful execution of the laws existing and intended for their protection. For this purpose, the whole Executive power of the country is placed in his hands, under the Constitution, and the laws passed in pursuance thereof; and different Departments of government have been organized, through which this power may be most conveniently executed, whether by negotiation or by force--a Department of State and a Department of the Navy.

"'Now, as respects the interposition of the Executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the President. Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not unfrequently, require the most prompt and decided action. Under our system of Government, the citizen abroad is as much entitled to protection as the citizen at home. The great object and duty of Government is the protection of the lives, liberty, and property of the people composing it, whether abroad or at home; and any Government failing in the accomplishment of the object, or the performance of the duty, is not worth preserving.' [Durand v. Hollins, 4 Blatch. 451, 454]

"And further illustrative of the President's power and duty to protect American rights abroad was President McKinley's des-

patch of a naval force and an army of some five thousand men under General Chaffee to China in 1900, at the time of the Boxer Rebellion. In his annual message the President referred to his action thus:

"'Our declared aims involved no war against the Chinese nation. We adhered to the legitimate office of rescuing the imperiled legation, obtaining redress for wrongs already suffered, securing wherever possible the safety of American life and property in China, and preventing a spread of the disorders or their recurrence.'"

There have been many instances other than those cited in the above quotation. They are set forth rather fully in a memorandum of the Solicitor of the State Department of October 5, 1912, entitled "Right to Protect Citizens in Foreign Countries by Landing Forces" (2d Rev. Ed., 1929), pp. 51, et seq. Typical instances are the following:

In 1853 one Koszta, a native of Hungary who had become an American declarant, but not yet fully naturalized, was seized at Smyrna by the Austrian authorities. He was released only after an American naval captain had trained his guns on the Austrian vessel upon which he had been held. See In Re Koszta, 135 U.S. 1, 64; see, also, Berdahl, War Powers of the Executive of the United States (1921), p. 50; Corwin, The President's Control of Foreign Relations (1917), p. 142.

In 1856 American war vessels attacked the Barrier Forts in China to avenge an alleged insult to the American flag. This action was undertaken by President Buchanan without authority of the Congress. See Corwin, The President's Control of Foreign Relations, supra, pp. 145-146; Berdahl, p. 51.[2] President Buchanan, also without authority from the Congress, or-

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[2] Secretary of State Cass stated the position of our Government in a note to Lord Napier, the British Minister at Washington: "Our naval officers

dered a naval force to Cuban waters with directions "to protect all vessels of the United States on the high seas from search or detention by the vessels of war of any other nation." Berdahl, p. 51.

Again, in 1914, President Wilson ordered a force of sailors and marines to capture the city of Vera Cruz by way of reparation for Huerta's affront to the United States flag and violation of American rights. The city was occupied by United States forces for a period of seven months. Berdahl, p. 52; Corwin, The President's Control of Foreign Relations, supra, p. 151.

2. Intervention and police supervision over the affairs of other nations, particularly in the Caribbean area. Activity of this nature of American troops is described by Mr. Berdahl as follows:

10 "This power of intervention and police supervision was probably first exercised by President Cleveland in 1885, when during the course of a civil war in Colombia, he sent troops to keep open the transit across the Isthmus of Panama. Altho this action was taken under authority of a provision (Article 35) in the treaty of 1846 with Colombia, its execution, as the President informed Congress, 'necessarily involved police control where the local authority was temporarily powerless, but always in aid of the sovereignty of Colombia.'

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10 "The doctrine upon which the exercise of such police control might be justified was laid down by President Roosevelt in his message to Congress, December 6, 1904, when he said: 'Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society, may in America, as elsewhere, ultimately require intervention by some civilized nation, and in the Western Hemisphere the adherence of the United States to the Monroe Doctrine may force the United States, however reluctantly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power.'

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have the right--it is their duty, indeed--to employ the forces under their command, not only in self defense, but for the protection of persons and property of our citizens when exposed to acts of lawless outrage, and this they have done in China and elsewhere, and will do again when necessary."

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10 "The doctrine here laid down has since been developed into a definite policy largely through numerous military measures undertaken on the sole authority of the President. Thus, in 1905, even before he entered into the executive agreement with Santo Domingo already referred to, President Roosevelt directed United States naval forces to interfere and prevent any fighting in that country which might menace the customhouses. United States marines have since been landed on several occasions both in Hayti and Santo Domingo to preserve order and to maintain the customs service; since 1912 the latter country has been favored with at least one visit a year from United States cruisers; and in 1916 a military occupation of the island was established that has apparently not yet been abandoned (June, 1920).

10 "In February, 1907, during the course of a war between Nicaragua and Honduras, American warships actively intervened in order to protect life and property from needless destruction and to prevent the spreading of the war, and the American chargé (Philip Marshall Brown) even assumed temporary authority in Honduras when the government fled. In 1909-1910, by the use of naval vessels and marines, the resignation and flight of an obnoxious president of Nicaragua (Zelaya) was forced and the success of a revolution assured; while in 1912 and 1914, United States marines again actively intervened in Nicaragua, but on these occasions on the side of the government, to put down revolutions that might otherwise have succeeded. In Honduras, the joint intervention of American and British marines prevented fighting between the two factions in that country, and secured the election of a provisional president agreeable to both factions; while only recently an American naval force was again landed in that country to preserve order during a change of government." (pp. 53-55)

3. Protection of "inchoate interests" of the United States. In 1844 President Tyler, having entered into negotiations with Texas for its annexation to the United States, ordered a military expedition there to protect Texas against the danger of a Mexican invasion while the treaty of annexation was being considered in the Senate. Similar action was taken by President Grant in connection with his efforts to secure Santo Domingo for the United States in 1871. He sent naval forces there to prevent any hostile move by Haiti and continued them there even after the

treaty which he had negotiated was actually rejected by the Senate. These actions of Presidents Tyler and Grant were severely condemned by many Senators. See Berdahl, pp. 47-49; Corwin, The President's Control of Foreign Relations, supra, pp. 156-158.

President Theodore Roosevelt's action in 1903 in sending troops to prevent the interference by Colombia in the Panama revolution was similarly based on the inchoate interests on the part of the United States in the Panama Canal and therefore in the success of the revolution. Berdahl, p. 49; Corwin, The President's Control of Foreign Relations, supra, p. 162.

On the basis of the foregoing it seems clear that precedent will sustain the sending of troops to Palestine by presidential action alone for the purpose of protecting the lives and property of American citizens there or the property of the United States Government itself. With this limited purpose in view, however, troops so dispatched could probably do no more than what might be necessary to protect our property interests there or to secure redress for damage actually done. Military activity designed to enforce peace or to prevent civil strife between warring factions could probably not be undertaken unless such activity were closely related to and reasonably necessary to protect our property interests there.

Whether the President may send troops to Palestine in order to protect an "inchoate interest" of the United States in Palestine is a much more difficult question. It is doubtful whether this Government has an

inchoate interest in Palestine within the scope of the precedents set forth above. Moreover, if troops were dispatched there under this theory, it might be that the interests under our troops' protection would be adverse to those of other sovereigns which had similarly sent troops to Palestine.

In the past, as shown above, so-called intervention in the affairs of other nations by way of police supervision has been limited to the Caribbean area where the interests of our Government were clear and direct and where our action was in accordance with the Monroe Doctrine. For the President to send troops to Palestine, without congressional mandate, as part of a police force empowered to do all things necessary to maintain law and order and prevent civil strife, would be to go considerably beyond existing precedents and would constitute a great extension of the Monroe Doctrine. In this connection it may be noted that in 1920 President Wilson urged the Congress to grant him power to accept a mandate for the United States over Armenia, but the Congress declined to do so. (Hackworth, Digest of International Law, Vol. 1, p. 106)