

LEGISLATIVE ASPECTS OF ECONOMIC MOBILIZATION

13 June 1947

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CAPTAIN WORTHINGTON: The speaker this morning is Mr. Henry H. Fowler. Mr. Fowler served as Assistant General Counsel for the Office of Production Management and the War Production Board before the outbreak of hostilities during the first two years of the war. During that time he was concerned with the planning and execution of the various orders and regulations developed to execute the national and international system of priorities and allocations which were designed to mobilize and control our economy for war production and supply and the maintenance of essential civilian activities. After February 1944, Mr. Fowler served on special assignments for the War Production Board with the U. S. Mission for Economic Affairs in London and the Foreign Economic Administration here. His subject is "Legislative Aspects of Economic Mobilization." I take great pleasure in introducing Mr. Fowler.

MR. FOWLER: I appreciate greatly the opportunity to be here this morning to discuss on a very hot day a very dry subject.

I would like to amend slightly the title of the subject as announced, to "The Legal Aspects of Economic Mobilization for War," because fundamentally it is difficult to separate a discussion of purely legislative aspects, namely, the enactment by Congress of laws, without including a consideration of law taking the form of the orders and regulations which implement those congressional enactments and give them force and effect.

It would be a bold and somewhat foolish man who would attempt to cover this subject definitively in a single sitting. I can only hope to center attention for you here on a few specific targets: first, to outline a few specific aspects of economic mobilization for war which are peculiarly and intimately related to law and legal processes; and, second, to put forward a few suggestions for mobilization planning on what might be termed the legislative or legal level. I should like to take the rather unorthodox course of presenting my conclusions first and then addressing my remarks to these conclusions.

We are all yet close enough to World War II to appreciate the tremendous and ramified task involved in converting a peacetime economy such as ours to an over-all war effort. We must all be impressed, I am sure, with the inescapable truth that the character and pace of the measures of mobilization utilized in World War II may be inadequate to meet any new challenge to our national security. Likewise, we all realize that there is the strong probability that our next total mobilization--and this is, I think, the most fundamental fact that we face--will not permit the luxury of time and the somewhat piecemeal or

ad hoc method of developing legislative and legal measures of mobilization which we were able to employ from 1940 to sometime in 1943, when our total effort began to be expended.

This time we must be prepared to mobilize our total economy not in three years, but--this is anybody's guess--in, let us say, less than three months. We should be able to muster on quick notice our legislative or legal devices, whether they take the form of Acts of Congress, Executive orders, contracting and procurement procedures, priority and allocation orders, voluntary or compulsory national service measures, the commandeering of materials and facilities. We ought at all costs to avoid the delays and confusion in developing the necessary statutory and administrative laws and legal procedures which, without predetermined plans, may prove costly. That is the essence of the very simple and somewhat obvious message that I would like to develop this morning.

The basis for the conclusion, namely, that we must have this time more advanced planning at the legal level, can also be simply stated. The strategy that must stem from the discoveries and developments in the last war undoubtedly cannot yet be fully evaluated; but without fear of exaggeration we can assume that the principal cause of war in which the United States has been attacked in the past and will be attacked in the future is the expectation of the attacking party, whoever it may be, that it will be successful. Likewise, we must assume that for an indefinite time the principal guaranty against the successful use of the atomic bomb or other similar weapons of attack will be the reasonable likelihood that, if attacked, we will still be able to retaliate in kind and ultimately prevail. Many today would agree with a recent commentator that "The political facts of life concerning the United States Government under its present Constitution make it highly likely that, if war comes, we will receive the first blow, rather than deliver it."

On these premises it seems a sound assumption that our most urgent military problem is to organize ourselves to survive a vastly more destructive Pearl Harbor than occurred in 1941. Otherwise we shall not be able to take the offensive at all. Or, I might add, to prepare ourselves so that our ability to mobilize and deliver a decisive initial or responsive blow is so well recognized that the potential aggressor will choose to avoid the attack or allow itself to be checkmated before its aggression is successfully consummated.

Within the framework of these general assumptions regarding the role and difficulties of economic mobilization for war, I should like to discuss, first, the peculiar legal aspects of economic mobilization for war in the United States; second, the use of law in United States economic mobilization for war; and, third, our problem today.

First, as to the peculiar legal aspects of economic mobilization for war in the United States: In any advanced industrial society capable of waging modern war, law and the legal process, using those terms in their broad meaning, of necessity will play a vital role. For, after all, laws are methods of giving order, organization and efficiency to collective action by man. They may be much more than that, but at least they have that functional value. Whether law takes the form of statutes, administrative orders, military orders, manuals of procedure, administrative directions, written directives, or what not, economic mobilization for war moves along on the crest of a wave of paper.

Only the most illiterate and primitive organizer of a national economy capable of supporting a modern war would forego the use of these paper instruments, which embody, in the broadest sense, law and order. Both the levee en masse and the conversion of an economy to the production and supply of the articles men need to fight with in the late eighteenth century signaled the emergence of the written word as an essential component in the process of war making. Now, when the chips are down and modern peoples resort to the use of force to settle their differences, while the pen or mimeograph machine or typewriter does not become mightier than the sword, it takes its place alongside it in the line of battle as an indispensable instrument of effecting total economic mobilization. I am trying to soften you up just a little bit this morning, so you will not think this is too academic.

Hence the soldier, be he a British Montgomery, a German Rommel, a Russian Zukhov, or an American Eisenhower or MacArthur, must depend upon some sort of legal process to marshall behind him and his men those sources of supply necessary to the conduct of war. Law and the legal process become much more directly important concerns to the soldier or sailor who unhappily finds it his line of duty to remain out of field command and engaged on the home front.

At the risk of being trite I offer this emphasis because of the well-known aversion of the trained fighting man for the legalistic red tape which inevitably is associated in the military, as well as the lay, mind with the law, lawyers and the legal process. Further, I make bold to suggest that the successful soldier in the home front battle of effective economic mobilization, in order to do his job well and discharge his mission successfully, must become something of a lawyer, whether he likes it or not, at least to the extent of using law and the legal process, defined broadly, as an aid to the successful performance of his mission.

What I have said up to now is perhaps true of the soldier and sailor in any modern military organization. In the United States the officer of the Army or Navy concerned with the responsibility of production and supply or the mobilization, deployment and training of men and

materials is confronted by a challenge on this score that in many ways is far more difficult than would be the case if he had a similar role in Russia or an economy such as prewar Germany. That peculiar and unusual concern with law and legislation is a derivative of our own unusual constitutional form of government.

The important fact, so ably emphasized by General Eisenhower in his recent remarks to the graduating class at West Point, is that we, perhaps more than any other power, must wage a war on the base of a free society which in the final analysis fights in order to preserve free institutions managed by free men under a so-called rule of law, rather than the dictate of a given individual or select group of individuals. Paradoxically, we fight in order to remain free from the kind of national discipline which victory usually requires. Hence, each war effort must be conducted not only with the objective of victory, but with the long-term objective of emerging from the conflict somewhat the same kind of people that we were when we went in. That longer-term objective, in and of itself, requires the soldier or sailor or airman in the United States, particularly if he is concerned with economic mobilization, to work under a system of law and legal tradition which to many foreigners in a corresponding post would be simply beyond belief or understanding. That deference to and concern with legislation and laws and legal procedures of a higher order is the fundamental difference between the job of the American officer engaged in economic mobilization and his opposite number in almost any other nation's armed force, except those of the English-speaking peoples whose institutions and processes are quite similar to our own.

A leading commentator has summarized this fundamental fact by noting that the power of the United States Government to wage war "obliterates neither those restraints on governmental action which result from the structure and constitutionally prescribed procedures of the national Government, nor yet those which result from the safeguards that the Constitution throws about private rights." As he notes further: "Constitutional liberty and the constitutional structure are mutually involved at every turn."

This does not mean that our constitutional form of government, which is the distinguishing aspect of our effort for economic mobilization, acts as a handicap or obstacle to a successful effort. As former Chief Justice Hughes in one of his opinions in the Supreme Court has quite aptly said: "The war power of the Federal Government ... is a power to wage war successfully, and thus ... permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation."

Our system of law does imply, however, that this huge and total power of self-preservation be exercised to a substantial degree in har-

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mony with our legal institutions, forms of procedure, concepts of liberty, property and fair play, and the national desire to emerge again from that mobilization much the same kind of people as when we went in.

If I can but bring to you a full realization and understanding of that simple truth by the application of good, common sense and judgment, I am sure you will be able to cope with and understand and appreciate the legal aspects of economic mobilization for war, whatever your particular present or future assignment. That is my apology for this somewhat lengthy stress on the peculiar legal aspects of economic mobilization for war in the United States.

Now, to come to the second point--something about the use of law in the United States for economic mobilization for war.

Let me say parenthetically here at the risk of being general that I have tried to avoid any detailed treatment of specific fields such as priorities, allocations, the flow of materials, the use of facilities, the handling of procurement, and commandeering. One could talk endlessly and in detail on the legislative aspects of any one of those subjects. Hence, if you will permit me, I will confine my remarks to a general discussion of the legislative and legal aspects without digging down into any particular phase in detail.

For example, in any discussion of commandeering of private property for war use one could spend quite a period of time in discussing this technical legal question--What is a taking of property? When an artillery range is fixed in such a position that projectiles fly over a stretch of private land or adjacent to it and affect the health and point of view of thousands of chickens to their damage, is that a taking of the farmer's property? Obviously one cannot go into such questions here, although they are very real and they are very important when you are up against one of them, as you will be without doubt in any phase of economic mobilization. Those are the things that time just does not permit discussing today. Only the more general and non-specialized phases of the subject can be treated here. Now, what are some of the important ones?

The first and most important one is that in our system of government we have a doctrine which is called the separation of powers. In the early days, when we were framing our Constitution, it was decided that we would have an executive arm, a legislative arm, and a judicial arm; that it was very, very dangerous to repose complete authority in any one single institution; that we had to avoid the difficult experiences that had been encountered in a system where a king or a single man possessed the complete authority. So the framers of the Constitution very carefully and painfully set up this system of separation of powers, which means in simple, concrete terms for our purposes that in order to

get the most effective economic mobilization for war, somewhere along the line the President, the executive agencies, and the Congress have to get together and work the process out.

Now, the war powers resident under the Constitution in the Federal Government come into active play only by virtue of the passage of a law by Congress and/or the issuance of an Executive order or other instrument by the President through which he delegates and directs the use of the power available to him in his capacity as Chief Executive or Commander-in-Chief. Without these instruments of delegated power--statutes and Executive orders--the whole, huge machinery does not begin to function.

Working together in harmony and cooperation, the Chief Executive and the Congress possess the total power, subject at various points to a review of the exercise of that power by the courts. It is fair to say, however, that past experience in our three wars which have called for a major mobilization on the economic front has demonstrated that the courts, the judicial process, do not come into the full play that one might expect, because that process is a slow and somewhat laborious one. Therefore we find historically that the courts pass oftentimes on questions after the shooting is over, and that their decisions serve mainly as landmarks or red lights to govern our conduct the next time a similar situation is presented.

Without the cooperation of the Chief Executive and the Congress, the legal mobilization can not be as effective as it might be with that coordination. It is true that President Lincoln took many steps to mobilize for war between the attack on Fort Sumter and the convening of Congress in special session on 4 July 1861. A detailed account of the many steps that Lincoln took during that period without calling Congress or without the basic support of laws is a very interesting chapter in our constitutional history. Congress and the courts were engaged for a number of years thereafter with the steps that Lincoln had taken in those intervening months.

President Roosevelt took many steps before the declaration of war on 8 December 1941, and on some occasions afterward, on the basis of inherent powers resting in the Commander-in-Chief and the opening clause of Article II of the Constitution, which reads, "The Executive Power shall be vested in the President of the United States of America." A clever and skillful Chief Executive can be a terrifically powerful force in such an operation. But it would be fair to say that such presidential initiative for the best results should recognize that Congress has great powers to aid the war-making process and seek to win its collaboration in the exercise of these powers. Laying aside the question of legal authority, it is just good sense, good politics, and good operation to have the two working together. Except for critical

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emergencies when, either for reasons of secrecy or for reasons of dire emergency it is not possible for the Executive to go to the Congress, the general counsel invariably would be to the Chief Executive that the collaboration of Congress be sought, and that a statutory enactment be considered unless there is some fairly clear existing authority on the books under which the action could be properly related.

This collaboration of the legislative and executive branches finds its concrete and practical expression in statutes which Congress passes delegating to the President or the Secretary of War or Secretary of the Navy or some executive official the authority to take certain types of action on certain terms and conditions in the interest of the national defense. This implies a persistent and well-organized coordination between the War and Navy Departments or a single Department of National Defense and the various committees of Congress in the interest of seeing that the necessary legislation is prepared and enacted or is prepared in such form that it is available for speedy enactment when and if necessary.

I might interpolate here to say that this job on the part of executive agencies and the responsible individuals in executive agencies working with the committees of Congress on the Hill is a science and an art all unto itself. Every man who had dealt with that has come away with a slightly different experience and a slightly different point of view. All that one can say of value generally on the subject is this: For the executive agencies to get the best results, the closest and most intimate liaison with the chairmen and ranking minority members and influential members of the pertinent congressional committees before and during the war is something of an indispensable requirement.

In addition to contending with this separation of powers between the executive and legislative branches, a legal mobilization for war must necessarily be concerned with another problem. In the Constitution there are concepts of rights of persons and rights of property which require that the laws prepared and/or enacted for economic mobilization do not so encroach upon these private rights guaranteed by the Constitution as to destroy them or their essence. For a simple example, when there is an authorization that private property be taken by the Government for war use through requisitioning or commandeering, the laws must provide the necessary machinery and resources for affording just compensation to the owner, which is a constitutional requirement.

Furthermore, without being too technical, we could say that all encroachments on private rights, be they in the form of allocation orders, directions to persons to report for certain types of military or civilian service, or what not, have to conform to certain standards of fairness, equality of treatment, and to a certain extent our basic way of life, so as to afford the individual directly affected what is described very loosely in the Constitution as "due process of law."

In other words, if you are going to do something to an American, he says: "Let me see the books. What is your authority for doing that? Where do you get it? To whom do I make my squawk if I do not like it?" You are always confronted with that in any type of operation where an order goes from the Government to the individual person or corporation or business interest.

Now, these rather basic considerations which flow from our constitutional system confront those responsible for economic mobilization at the very outset with seeing that the necessary statutes and executive orders are enacted or prepared and "on ice" for enactment. To a considerable extent the same considerations of order, fairness, good sense, and an observance of our legal procedures are necessary in subsequent steps for implementing those laws through the thousands and thousands of individual orders and regulations the responsibility for which is delegated to thousands of individuals in the various departments and agencies. The laws and Executive orders are usually, as we know from reading them, very broad, written instruments, and general in their language and terminology. One is always looking for something that is not very clearly stated there, trying to figure out just what was intended, just what was in the minds of Congress, just how one is going to go about doing the job that is set forth.

Detailed regulations and manuals of procedure must be carefully prepared if these laws are to be administered effectively. As someone has said, you can go into some of what we consider the less advanced countries of the world and ask for the book of laws on a particular subject, and somebody will bring forward one of the most perfect laws providing for social security that you imagine. You can then go out and search for some effective implementation of that social security in the main body of the population, and nobody even knows that that law exists. That, of course, is a great gap between something which is on the books and getting something done about it. That gap has to be filled by administrative law. That is the reason for asking at the outset your permission to broaden the subject a bit.

To take a simple example, Congress, by the Act of 31 May 1941, as amended on 27 March 1942, in the Second War Powers Act, created a now famous authority to enforce a system of priorities and allocations on the flow of materials and utilization of facilities throughout the entire sweep of American industry. In a few lines the basis for the far-reaching regulation of American industry was enacted. It was one of the most, if not the most, sweeping grants of authority or exercise of the Government's war power in our history.

I have brought here today for the use of any of those who are interested, copies of an excellent discussion of the WPB administrative policies and procedures, and will be glad to make them available to anyone

wishing a copy at the conclusion of our meeting. This article was written by Mr. John Lord O'Brian, General Counsel of the WPB, and Mr. Manly Fleischmann, who served as Assistant General Counsel to the Board. The article analyzes, from a lawyer's point of view, the execution of this vast power over priorities and allocations. It describes, in a way which I could not attempt to reproduce here, the following:

First, the foundation of instruments for delegating the statutory authority and relating its exercise to the various activities and agencies affected, the way those delegations of authority were formulated and developed and the considerations which were in the minds of those concerned with the problem.

Second, the delegation of the priority authority within the agency; how the individuals down in the Field Division or the Automotive Equipment Division had to operate in order to pass out to the individual companies or plant executives affected the necessary directions or necessary written authority which would enable each company or factory to take the necessary action in placing one order ahead of another or in stopping the production of nonessential items and concentrating its productive effort on key essential items. It is naturally very important to have a very clear line of authority down to the head of the Steel Division, for instance, if he is going to send out directions of that sort to the U. S. Steel Corporation.

The third item discussed in this article is the development of a regulatory system in the form of a series of specific regulations exercising the authority in a variety of ways--P-orders, M-orders, L-orders, the so-called Production Requirements Plan Regulation, the so-called CMP Regulation, inventory control regulations, and the many forms of certification and procedure leading to individual or project priorities and allocations.

Fourth, the procedure employed for issuing such regulations and orders.

Fifth, the appeals procedure provided for assuring maximum fairness to all concerned from the application of the general regulation and order. That was sort of a pop-off valve to take care of the individual who felt that he was forced to suffer unduly because of the order. He had a chance to come in and make his case and either go away convinced that maybe he was affected just the way everybody was, and after all there was a war on and why should he be an exception or convince the authorities that this order had a very unusual and peculiar effect on him and he could accomplish the same thing for the war effort with a slight modification of the order insofar as his own performance was involved.

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Then, lastly, the compliance procedures, which were carefully established to provide a mechanism for punishing and penalizing those who violated the orders and regulations and yet afford them the prerequisites to due process in the form of a notice, hearing and opportunity to present their defense.

I cite this as an example of the administrative law process that is normally involved in implementing a little three-paragraph statute. In our preparation for an economic mobilization, great emphasis must be placed upon the job that must be done, not only in Congress, but also in the administering agency, where the law is really put to work. There is where you have the major problem of mobilization at the legal level.

The vast sweep of administrative law developed under this system for the government of priorities and allocations is summarized by Messrs. O'Brian and Fleischmann in their article in the following terms:

"More than three million PD-1A priority certificates were issued from January, 1941, through May 31, 1944; 5,353 orders, regulations and amendments were issued by the OPM and the WPB. There is no record available as to the individual directions and allocations issued. When it is recalled that all this gigantic spate of legal and executive activity finds its basis in three sentences of a statute, some notion can be gained of the scope and complexity of the undertaking from the standpoint of legal supervision and direction."

Now, over and above the technical requirements of the Constitution with regard to delegations of power, affording individuals affected due process of law, etc., there is an additional element in the process of economic mobilization which is legal, or, at least, quasi-legal, in its nature. Because of the novel character of the problem and the great scope of the powers granted by Congress, there is always the latent danger that in the process of economic mobilization for war these great powers may be used for ulterior purposes, either intentionally or unintentionally, so as to effect fundamental changes not necessary to or important to the successful waging of war. This is the twilight zone between law and politics which is sometimes expressed in the nebulous term "public policy."

The conversion of an economy such as ours from the ways and customs of ordinary business to collective and coordinated action for war of necessity impinges upon many questions of the public interest. This is where we have most of our trouble, and this is where our foot slips, and this is where we find ourselves suddenly facing a congressional investigating committee trying to explain: "We didn't know you wanted that. We didn't know that this was involved." or "If we had known this

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before, we could have taken steps to take care of it," or perhaps more often persuading the committee that the steps taken, even though they did cut across some other public policy, were necessary for the war effort and therefore we had to go forward with them. It is that field of the public concern for public policy which is important. It is important for our war mobilizers to be sensitive to and aware of this, because sometimes the very effectiveness or accomplishment of their mission may depend upon their ability to provide in their operations through rules and regulations of a legal nature, adequate protection to these public interests which would be affected.

This would be true whether the process involved is procurement or the broad-scale letting and administration of war contracts. In the article which I have referred to there is a very excellent illustration of the use of legal procedures to short-circuit or to accommodate the handling of a certain phase of our war mobilization to a particular public interest. That was the accommodation of our job to the anti-trust laws. I will not go into detail on that, because time does not permit. In brief, an arrangement was worked out between the War Production Board and the Attorney General's Office in the Department of Justice to permit the calling together and the coordinated consideration of war problems of a given industry under the supervision and chaperonage, so to speak, of a government official, a procedure whereby that could be done under certain prescribed rules and regulations. This simple legal procedure would remove from the gentlemen from industry the fear that they were going to be confronted at some later time by a prosecution under the antitrust laws and be exposed to what happened to the oil companies in the famous Madison Oil Case that some of you may have seen reported in the papers a year ago.

By way of summary on this phase of our discussion, namely, the usage of law in United States economic mobilization for war, these are some of the major legal tasks that are involved in the economic mobilization process: the development and enactment of proper and adequate statutory delegations of authority to the President in accordance with our Constitution; the translation of these laws into action by countless enactments of administrative law pursuant to proper delegations and authorities and according to practical rules of legal administrative procedure; and the formulation of procedures to insure that the application of these administrative laws is properly accommodated to other public interests.

Now, the third point, on which I wish to close, is our problem today. As we gather here on this June day, what is the status of our current situation in so far as it involves our ability to institute those legal measures necessary to an effective total economic mobilization for our common defense?

It would require hours to digest in the simplest manner for you the multitude of statutory enactments by Congress which in World War II were notable exercises of the Government's war power. It would take days to describe the multitudinous orders, regulations, manuals, etc., which were developed and utilized pursuant to these statutes. It would take weeks, or maybe months, to contact and bring together the various individuals who in military or civilian capacity handled the delicate legal spadework of translating these legislative enactments into administrative law and order and of providing appropriate procedures for their use. It would take these experts, if gathered together again, in whole or in part, a substantial period of time to analyze the faults and errors of their previous experience and formulate recommendations for those amendments of the statutes or administrative orders which would produce a more effective legal machinery for total economic mobilization.

It would require an entirely new period of mental training to adjust this group of legal experts in World War II to the new conditions that quite likely would confront the legal process in another war.

I spoke at the beginning of these remarks of my assumption, which I take it is yours, that we must be prepared to do in a few short weeks the job of organizing our economy for total war which we did somewhat by trial and error over a period of three years in World War II. I do not feel qualified to discuss in detail or by specific example the new and novel measures which military experts would lay out for the production and supply staffs on the basis of present current war planning. I can only surmise that, as has been the case in every major war, new and drastic measures are the margin of victory. I am sure we all recognize the truth that it is oftentimes fatal to prepare only to fight the last war all over again.

There is still another factor which must be considered in analyzing the present state of our legal preparation. New developments in warfare, if we take their menace with proper seriousness, may have considerable effect upon both our industrial and legal structure; and, more significantly, these effects may not be confined to wartime, but will be spread through peacetime. In other words, the effects of the impact of a new type of total war may become embedded in our peacetime use of our Constitution.

Confronted by this need for time to construct and reconstruct this massive legal and legislative mechanism I have described, what in cold fact do we find? We find the great bulk of our wartime legislation repealed, or terminated, or in process of being terminated. By way of comment, which does not necessarily imply criticism, this termination of wartime legislation has taken the form not of suspension of the executive power to utilize these instruments, but of outright repeal. They have been taken and thrown into the ash can. These laws presumably are being

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wiped off the books. If another crisis develops at some unpredictable point in the future, presumably we would start all over again, perhaps pulling out these old laws as models and trying to modify and adapt them for reenactment.

Without attempting to answer the question pro or con, I pose it: Would it not be wiser to merely suspend the operative effect of the war-time legislation when we as a people do not wish to leave it in the hands of the Executive, rather than to repeal it? The effect of a suspension rather than an outright repeal would be that at a moment's notice Congress could meet and re-enact the basic statutory measures for total economic mobilization by one simple joint resolution. Indeed, I would go further and ask this question: whether or not it would be wise for the appropriate executive departments and committees of Congress to develop and consider now those amendments to the statutes used before which might be necessary to close up the gaps in our legal structure noted in our last experience and keep up to date those enactments in the light of changing conditions?

If we answered these two questions in the affirmative and acted promptly upon these answers, we would have "on ice," as it were, the instruments to a basic, up-to-date legal process for economic mobilization. Parenthetically, I would add a guess that both of these questions would be answered in the affirmative by an overwhelming majority of those who in the early days of our mobilization effort in World War II found themselves painfully searching for the precedents of World War I that all too often were not there, or trying manfully, under terrific pressure, to re-gear their legal thinking and experience to an entirely new field, which after twenty years presented an entirely new set of problems.

Indeed, it might be worth reappraising the wisdom of our complete dissolution and destruction of the administrative law and procedures which were developed on the basis of these major grants of statutory power. Obviously, most of the orders and regulations and manuals have been repealed and have found their way into the archives. Just how much of this accumulated lore could be salvaged and, speaking figuratively, put in grease and stockpiled with an occasional re-examination in the light of new conditions, it is difficult to surmise. The situation may vary with the different phases of the economic mobilization effort.

Certainly it would be useful and desirable to reassemble from time to time on a temporary basis the civilian and military personnel who were charged during the war with the legal responsibility for formulating the orders and regulations and seeing that adequate administrative procedures were established for their enforcement. To acquaint these trained staffs, now scattered to the four winds, in various parts of the legal profession or private business or government and military service, with actual and hypothetical problems of constructing new legal

machinery and situations would enhance and improve the state of our preparedness on this score and, on occasion, produce real dividends in the way of suggestions and recommendations for legal action in the field of war planning. Clearly, new blood should be invited to participate in these occasional gatherings to give emphasis to other points of view, or perhaps different points of view from those of the people who had had the previous experience.

Certainly it would be worth while to include in the various industrial and staff groups which might be assembled to consider the problems of steel, or aircraft, or electric motors, or electric power, some person with legal experience in treating these phases of economic and industrial mobilization. At the risk of some criticism, I would say from our experience in the WPB that somebody usually has to pull the conversation down to a point where a procedure or an order or method of approach can be described on paper and meet the requirements of law, and usually that function falls to a lawyer or someone with legal background and training. Any one of you who has ever had the misfortune to follow the development of an L or M Order or a priority or allocation regulation in the WPB will realize full well that this translation of oral objectives to a written order is no mean task.

I will not attempt at this point to describe the various fields in which this legal process might well be mobilized. They are obvious to you—procurement, priorities and allocation, commandeering, price and fiscal controls, and finally the use of labor in military and civilian capacities.

In addition to those five basic categories under which we could categorize many statutes, there are special problems which in World War II were newly presented to us. I will cite only one for example. That was the problem of undertaking those measures to augment and supplement our national economic mobilization with supplies of equipment from outside the United States, and the related problem of coordinating our production and supply mechanism with that of our allies.

There are seven or eight subjects which I have listed here in my notes as special problems apart from the five major fields which might be worthy of more specific legal or legislative attention at most levels. Because I have gone over my time, I will simply leave those in the notes, and be glad to furnish them to the members of the faculty.

I want in conclusion to say that I have simply raised questions here and posed problems without trying to give answers, because I do not believe any one man can give those answers. To meet at least the future problems and questions encompassed by the subject must be the work of many men trained in many fields with many varieties of legal experience, in the last war, refurbished by education and training in modern war techniques and requirements.

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I trust and recommend most heartily that in your important work of studying the science of mobilization planning you give due emphasis to the provision of appropriate opportunity to keep our legal instruments sharp and keen and reasonably well equipped to meet promptly and adequately any mobilization task that can be reasonably anticipated.

I will furnish the members of your faculty a list of some of the best legal commentaries which are now appearing in the Law Reviews, and in a few books that have been written specializing on the legal aspects of this subject or on particular aspects of economic mobilization, so that any of you who are interested in following up on a particular legal phase will have an opportunity to do so with these writings in a way that we could not do today.

I apologize for running over my time. I will be glad to answer any questions.

COLONEL CLABAUGH: I have two questions. In view of the fact that the first step in any future economic mobilization would be the enactment of legislation and executive orders, would you recommend that any economic mobilization plan include a legislative or legal annex with drafts of enabling legislation?

MR. FOWLER: Very definitely, sir. It does seem to me to be inescapable that a great deal of time and effort under considerable pressure is expended when one is forced to do that drafting in a period of emergency. The experience of all of us in the last war was that whenever we were confronted with a situation which required a bill, the usual request was, "Get me something by tomorrow morning which I can take over and discuss with so-and-so." I do not believe that we did nearly so good a job, as we could have done given adequate time and opportunity for study. It would be very important to do that when the pressure is off and you have time for considerable reflection and exchange and study. Too often in the last war we simply had to go back to World War I, take some very rough statutory enactment designed to meet a situation at that time, and twist it about a little bit and produce something that perhaps served the purpose in a way. But I believe it would be fair to say we could have done a much better job had there been through the twenties and thirties a constant effort to analyze and prepare statutes or types of amendments or administrative regulations that the Armed Services or responsible agencies would find necessary in event total economic mobilization became necessary.

COLONEL CLABAUGH: My second question has to do with particular legislation on the proclaimed list of blocked nationals. In a recent issue of the "Law Review" there is a challenge for the legal basis for the blocking of people on the proclaimed list. Would you comment on that?

MR. FOWLER: I think it is fair to say that post hoc there is quite a controversy raging among lawyers as to the status of the so-called Trading with the Enemy Act, which was passed during the last war and to some extent kept on the books, though certain parts of it were repealed. There is considerable debate as to whether or not those repealed sections did not undercut the authority of the Executive to go forward with the proclaimed list and blockade procedures.

I cite that as an illustration of the fact that at least it is very questionable as to whether or not we should take all these laws, which by now have a fairly concrete interpretation or generally agreed interpretation, and cast them to one side, and then be confronted at some future time with the question of whether or not parts of those laws are still in effect, or whether or not they were repealed in whole or in part, or whether or not the executive authority could go ahead anyway despite the fact that the law was repealed and under his general authority as Commander-in-Chief take the same steps. We would avoid a lot of those very difficult questions if we would suspend these laws or take a more conservative approach to the maintenance of an adequate legal structure in peacetime to permit executive action when the situation required it.

I have some citations of those articles, by the way, here, about the proclaimed list, in case anybody would like to follow up the subject.

A STUDENT: Would you discuss the liaison between Congress and the executive agencies with particular reference as to whether to implement it is just a practical matter or whether it carries some stigma in relationship of drawing together the legislators and executives which were particularly set apart by the Constitution.

MR. FOWLER: It is a practical matter. I have never found anyone close to the subject or with experience in the field who felt that there was any particular code or any particular tradition of contact between the agency and the appropriate committee that ought to be followed. One or two comments, however, about tactics might be in order.

It is generally desirable, I think, and experience has proven it to be so, to centralize that liaison in a given department or agency at one point; so that we do not have every Tom, Dick and Harry without any experience in the field going up on the Hill and laying his problem out before someone who he happens to think might be able to do something about it.

Now, I do not mean to imply that there should be a censorship or a restraint on individuals going and discussing problems with senators and congressmen. But that kind of unorganized or disorganized liaison does not do the job. You must have someone in each agency who has a primary responsibility for providing Congress with information, for providing

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congressional committees with witnesses for public or executive hearings, for acquainting Congress with the problems on which it may likely be called upon to act. The centralization of authority and responsibility for that liaison at some responsible point in the agency is a most important practical aspect in the picture. From there on out it is just the old give and take between individuals that produces results.

A STUDENT: In your opinion what individual or agency should be charged with the preparation of this legal annex to the economic mobilization plan?

MR. FOWLER: I just think it will have to fit in intimately as a part of this whole picture. I do not think it should be chopped off and handed to the Department of Justice or to any regular agency. I think you should pull in lawyers or people who have had experience in that field and in the last war, just as you would pull in steel experts or the other types of experts, and try to integrate the lawyers into that mobilization planning.

In the War Production Board, under the direction of Mr. O'Brian our General Counsel, generally agreed by all to be an extremely wise man, we assigned our legal staff members to work as counsels to the responsible executives, who were carrying on the job, be it in steel, automotive, or what not. So the lawyers became integrated into the whole structure rather than merely sitting off as a separate division working more or less to themselves.

There were other agencies, frankly, which tried the other tactics. But I would feel that for the working out of mobilization planning it is very important, in addition to collecting your lawyers at one single point, we will say, to discuss "What kind of statute ought we have to handle the problem the next time?"; to also have an individual lawyer sitting in at whatever gathering you may have where the prosecution of the work may call for the development or application of a statute or executive order or the preparation of regulations or manuals of procedure. In other words, both types of participation by lawyers should be helpful to mobilization planning; but it ought to be integrated into whichever agency is doing the mobilization planning. I do not think you dare to farm it out.

COLONEL McCARTHY: I refer to your proposal that certain valuable emergency legislation be suspended and later on in case of another emergency it be re-established and given full force and effect. May I ask if there are any precedents for such action?

MR. FOWLER: The answer to that is, I think, no. After the last war certain acts were repealed in part and certain other parts were continued on the books. The Trading with the Enemy Act was an illustra-

tion. But, so far as I have been able to find, there is no at least substantial precedent for an act of suspension as distinguished from an act of repeal.

Of course, the simplicity of it is that Congress would simply say, "From such-and-such a date forward the President shall not exercise the authority granted to him under the following, described acts until and unless Congress by appropriate resolution has restored these acts to full force and effect." Then your drafting problem, come the emergency, is a very simple one: a simple resolution indicating those particular acts on which the suspension has been lifted.

In the process that I referred to you would certainly consider the worth-while amendments with the committees now working there on the Hill, who oftentimes are not as active in this field in peacetime as they would be in wartime, and have fairly general agreement as to the type of amendatory legislation that would be necessary, so that, come your emergency, your problem would not be starting all over again, but simply enacting those modifications and amendments that considered reflection and study indicated are necessary.

CAPTAIN WORTHINGTON: I want to thank you very much, Mr. Fowler, for a very valuable discussion.

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