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LEGAL AND LEGISLATIVE ASPECTS OF ECONOMIC MOBILIZATION

25 May 1948

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MR. NIKLASON: In his recent address on the war powers of the President, Mr. Fowler discussed the war powers of the Chief Executive which are derived from the Constitution. The legal basis for a much wider area of administrative power in an emergency rests on the specific acts of Congress which delegate authority to the President. It is this aspect of the legislative and legal problems involved in economic mobilization which Mr. Fowler will discuss this morning.

It is a pleasure to welcome back to this platform Mr. Henry H. Fowler.

MR. FOWLER: Gentlemen, it is a pleasure to be back, but a distinct challenge to discuss with you a subject of such generality and breadth that one cannot hope to bring much but a rather superficial analysis of some of the general elements that are common to any phase of economic mobilization when it touches and concerns the term "law and legal procedure."

The initial question that we face is, of course, Why law and legislation? What do they have to do with the mobilization of our economy for war? Well, I suppose the answer to that is that in any advanced industrial society capable of waging modern war, law and the legal process, using those terms in their broad meaning, play a vital role because they are methods of giving order, organization, and efficiency to collective action. There may be much more involved in law and legislation than that, but at least they have that functional value. Whether law takes the form of statutes, administrative orders, military orders, directives, manuals of procedure, administrative directions, or what not, I think we all realize that economic mobilization particularly moves along on the crest of a wave of paper. Whether we would like it some other way or not, that happens to be the device and the method by which we can make this great economic and industrial complex move and rise to the challenge that it must face, the unusual challenge, the extraordinary challenge, that it must face in time of war.

I am sure 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 law and order. The levee en masse and the conversion of an economy to the production and supply of the articles men needed to fight with in the late eighteenth century really signaled the emergence of the written word as an essential component in the process of war making. And, while the pen or the mimeograph machine or typewriter is not mightier than the sword, they edge their way alongside of it in a position of great importance.

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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." And 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 must be exercised in a substantial degree in harmony 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 we were when we went in.

Now, that is, if I must term it so, the excuse, the rationale, the reason why this topic has a place on your agenda and why you find yourself constantly concerned with it in every phase, in every individual part, of your curriculum here.

To some extent that means that in carrying through a function in the field of economic mobilization for war you are called on to practice law, certainly in a specialized sense, if not in the traditional sense of preparing papers and going into court. You will practice that kind of law which has come to be generally known in the law schools as administrative law. Whether you realize it or not, when you do perform this job, you are to some extent, depending upon your particular responsibility, engaged in the practice of administrative law.

Now, what types of practice of law are involved in this work of economic mobilization? By way of summarizing first how the practice of law in the United States works in economic mobilization for war, let me say that these are some of the major tasks that are involved:

First, the development of and the enactment of proper and adequate statutory delegations of authority to the President in accordance with the Constitution. Now, that seems simple and obvious. We will have a great deal more to say about the present-day realities of that problem later.

The second form of law practice is the translation of these general statutory enactments into countless enactments of administrative law

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expression, will proceed in any specific field such as priorities or allocations, the flow of materials, the use of facilities, and so forth. Time does not permit here the treatment of the legal or legislative aspects of any of these subjects in detail. I am sure that as you have treated each one of these or been assigned to a particular one, you have sensed that in the background there is that question of, What is the statutory basis for this? If it is not clearly ascertainable, what should be done? What general form should it take? What are the types of detailed administrative arrangements that we used the last time to effectuate this type of particular program? What were the headaches that came up in connection with Congress and congressional investigations, unfavorable newspaper comment, and so on that ought to be guarded against next time if the job is to be done creditably and smoothly? Those are the things that are in the back drop whether you are dealing with priorities, with allocations, with procurement or manpower or what not. And I must confine the discussion this morning to the general, nonspecialized phases of the subject at the risk of being somewhat nebulous.

Now, coming back, the first important phase of this subject is the necessity for adequate statutory or legislative authority for whatever phase of economic mobilization is being carried through, according to the accepted principles of due process of law. As was indicated in my lecture some weeks ago, the war powers that are 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 by which he delegates that authority to the appropriate administering official or organization and directs its use, just as he could be using it in his capacity as Chief Executive or Commander in Chief. Without these instruments of delegated power--statutes and Executive orders--the whole huge machine of economic mobilization just does not function.

And parenthetically I might assert that the situation could be fraught with national disaster. There could be the very best of intention all around, everybody wanting to help; but unless somebody gets down to the dirty detail of getting these laws on the books and getting the laws translated into complicated and somewhat laborious administrative regulations and orders, this whole machine just does not function. And so, although the process may seem outwardly to be quite secondary, I think we could attribute to it most of the major delays and headaches and ineffectiveness that have been complained about in World War I and World War II. Furthermore, an inadequate handling of this phase is what most of us are afraid and upset and concerned about in connection with future plans. There has been nothing wrong with the general plans. I say, nothing wrong--of course, there have been defects. But in general the plans have been there, the materials have been there, the will has been there. What has been lacking to make it click and make it move fast, the way we would like to have it move when a situation occurs, is these appropriate instruments of legal authority.

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Now, this collaboration of the Legislative and Executive Branches finds its concrete and practical expression in the typical statute delegating authority to the President or some other executive official to take certain types of action under certain terms and conditions in the interest of national defense. This implies a persistent and well-organized coordination between the executive departments and agencies and the various committees of Congress in the interest of seeing that the necessary legislation is prepared and enacted.

I might interpolate here to say that this job on the part of the executive agencies and the responsible individuals in them, of working with committees of Congress on the Hill, is a science and an art all unto itself. Every man who has dealt with it comes away with a slightly different point of view as to just what the best approach is and how situations should best be handled. That, of course, is quite right, because it is always a question of personalities. You are dealing at one time on the Hill with one set of personalities and individuals and another individual goes up at a different time and is dealing perhaps with a different group; the personal element is bound to enter in.

All one can say of value on this subject of liaison with Capitol Hill 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. So in practicing this law I think it behooves any one of us, if you have an important responsibility for a particular phase of economic mobilization, to be sure that somewhere in the agency or department in which you are serving there is a responsibility which is being adequately discharged to see that the chairman or the ranking member or the staff of the appropriate legislative committee knows what it is you are doing, under what laws you think you are operating, and what your general opinion is as to the effectiveness of those laws. So that when the time comes for amendment and modification, as it always will--the law will never be exactly like you would like to have it to do the best job--you will have there an understanding and a working relationship that will make this job of securing the adequate charter, the adequate authority, an easy one or at least minimize the difficulty.

Now, in addition to being concerned with the existence of proper statutory enactments, we have another general problem which is legal in its nature. In the Constitution there are concepts of rights of persons and rights of property which require that laws prepared and enacted in economic mobilization do not so encroach upon these private rights guaranteed by the Constitution as to destroy them or their essence without what we call due process of law, which is a phrase in the Fifth Amendment concerning acts of the Federal Government and in the Fourteenth Amendment concerning acts of states. It has a very broad content, but it means that when the Government acts and that act affects private individuals, the Government ought to accord those individuals due process

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embarrassed by the richness of the generosity of the Congress in reposing this vast authority to handle priority, allocation of materials, and facilities, without any general indication as to policy other than that it be done in the interest of national defense, and without prescribing any procedures that would be equivalent to the due process concept. And so one of the functions of the Legal Division was to see that in every order there was a little appeal clause. You will find, if you look in the L Order or M Order, that at the front of the order there was a reference to why this particular order was being issued and what the authority was for it. Also you will find that appeals machinery was set up where the individual affected by an order could come into the War Production Board if he thought there was some very especial reason why he had been unfairly treated. He would have an opportunity to first lay his case out before the fellow who issued the order; if he didn't go away happy, then before some neutral source, which took the form of this Appeals Board. That kind of improvisation we did not abandon, although we thought very seriously about whether we should go back to Congress and ask that it be formally provided for in the law. We decided there was not time to do that, and, of course, there were certain difficulties about that process, because, once you got it started, there might be too much included. So we decided we would just handle it as a voluntary matter. So you will find, if you go through any written analysis of the work of the WPB--and I will refer to one such analysis later on in the lecture--that a great deal of care was taken to make sure that this concept of due process of law was given some consideration.

Now, coming to the second step, which is in the enactment of the adequate administrative regulations and procedures, it is very difficult, in view of the great scope and coverage that they have, to do anything more here than stress their importance. I will have occasion to refer to this later, but I will throw out now, that one of the most valuable emphasis that the work here will give to mobilization planning is the very clear notion that you have not solved the problem, you don't have the plan, if you simply have the general authority to deal with these things. It is much more. It is getting into more or less exact form the administrative procedures that you would call into play in the event of an emergency, that is, getting right down to the vitals of planning and preparation. To use one of the more popular illustrations, it is not enough to have a priorities act or the authority to use priorities on the books or ready to be called forth. You have to have a great deal more than that, that is, an equivalent of the Controlled Materials Plan in the field of materials, and equivalent plans in other fields.

In the preparation of those detailed instruments of implementation of these various laws we get what is called the practice of administrative law. To take again a simple example, in the Second War Powers Act there was 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 very few lines there was a legislative basis for one of the most far-reaching

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Now, of course, in a kind of half effort or a third-degree effort, where we are not too serious about it, where we are just laying over a little additional procurement, we don't see these problems of priority and allocation as being so severe. There is always in an individual plant or company a certain flexibility in operation; so if the manager wants to take care of a certain particular customer's requirements, and that customer's requirements are not too tremendous in terms of the total load, he can do it. But where you have a situation where it is chock-a-block and everything is fully loaded and it is a question of what should come first and what order the production should proceed or the supply should proceed, then unfortunately but very necessarily the paper work comes into the picture.

Now, the third item discussed in this article is the development of a regulatory system by which this vast mass of paper work can proceed. That took the form of various types of orders that you are generally familiar with--P Orders, L Orders, M Orders, the so-called Production Requirements Plan, subsequently the Controlled Materials Plan, inventory control regulations, and many forms of certification and procedures.

The fourth topic is the procedure employed for issuing these instructions and orders.

Fifth, there is what I have already adverted to--the appeals procedure--provision for insuring maximum fairness to all concerned in the application of the general regulations and orders. This is a sort of pop-off valve to take care of the individual who thinks he has been forced to suffer unduly under the order.

Now, these five general procedures which I have referred to here in connection with the exercise of priority and allocation power illustrate to a more or less degree the process that would have to be followed in administering any one of these broad economic mobilization authorities that touch on or concern and directly affect individuals and companies outside the government agencies.

Then there is one last topic that is, of course, very important, that is the erection of compliance procedures, which were very carefully established so as to provide the mechanism for punishing or penalizing those who violated the orders and regulations and yet afford them the prerequisite of due process, implying notice of hearing and an opportunity to present their defense. We do assume a kind of 99.44 percent compliance by the individual citizenry with the orders of his government in time of war. But there is always that small residue who do not comply, and it becomes a question of one bad apple spoiling the barrel. The rest of the other 99 percent don't feel too happy about going along with a restriction or regulation if they feel that some fellow over here is violating it with impunity and getting away with it; he is in a sense flouting the authority of his government. So there must be the erection

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"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 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

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on the books, ready for application in emergency, is the first essential in the political sphere of security.

"In this regard many Americans will object that legislation for total mobilization may invite peacetime regimentation. These fears are idle. Legislative danger to our way of life is most likely to appear in a wave of hysterical measures hastily improvised to meet a war crisis. But in the immediate future, deliberately, in full and open debate, seeking information from all sources, the Congress can enact laws that will assure both the maximum conversion of the Nation to defense in time of need and complete safeguards against damage to our democratic system."

In the report farther on there are references to and quotations from various eminent authorities on this subject on the importance of enacting now the legislation that would be necessary in the event of an emergency and then suspending it and putting it on ice so that it comes into being either by a declaration of war or by joint resolution of Congress before war. I won't go into the quotations from Secretary Forrestal; from Mr. Hargrave, Chairman of the Munitions Board; Mr. Ferdinand Eberstadt, quite an authority on this subject; Mr. Louis Johnson, former Assistant Secretary of war; Arthur M. Hill, Chairman of the National Security Resources Board; and finally and most important, Mr. Baruch, who is the recognized authority of greatest rank in this field. Suffice it to say that all these authorities are unanimous on that one point—the desirability of the enactment now of the necessary legislation that would come into effect in time of an emergency or war.

And so the committee's report concludes:

"In the preliminary phases of both World Wars the same public psychology has been evident. As conditions grow more tense there is increasing reluctance to recognize the critical character of the situation by what may seem an overt act such as a move toward industrial mobilization. In the old days military mobilization was often the signal for war. Today it is subtly suggested to peace-loving people that any action looking to industrial mobilization may prove provocative.

"As a result, the nearer a crisis approaches the more difficult it is to secure legislative action looking to adequate preparedness on the industrial front, which now ranks equally with the military in its importance in this era of total war.

"In 1939, as world conditions grew more and more menacing, the President of the United States was obliged to turn to the utterly outmoded statute of 1916 for any semblance of authority for industrial mobilization. Every experience of the First World War and

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Now, of course, the fact that the opportunity is here to do a job in this field in a way in which it has never quite been done before means that we cannot sit back and relax; once these enactments, this skeleton framework, is on the books, there must be, it would seem, adequate appropriations for training the staff and personnel to prepare the way for the quick and ready implementation of these laws should the occasion present itself for their use.

In most of the fields of economic mobilization the type of legislative action and administrative action is fairly apparent. We have come out of a very long and intensive effort. We have a very rich experience in most of the problems. Perhaps the most serious challenge is the usual one for the soldier, and that is to try to analyze the trends at the end of the last war and predict what new and unexpected types of development in the future may call for new and unexpected measures of economic mobilization. You never can fight the next war with the weapons and procedures of the last one if you are to be successful. There is, I think, a considerable challenge now to smoke the opium pipe or spin the crystal ball, to try to let our imaginations run, if you will, and try to envisage what will be the new problems for which the old laws and procedures will be inadequate.

At this point I want to say that I think it is extremely important that new minds and new blood go to work on that phase of the problem. It is just human nature that if you bring somebody back here to consider the problems of economic mobilization today, he is going to approach them in the light of his particular experience if he had a broad and rich one in the last situation. It is going to be awfully hard, I think, for the civilian in private industry or private life to give the intensive imaginative application to this job of figuring out the new methods and procedures that it requires. That is a professional, full-time job. I trust that the emphasis of the Security Act and these new institutions which have developed will provide an outline for you here in the Industrial College and those others who would dedicate themselves to that particular type of service.

In closing I want to mention just two or three fields which, it seems to me, illustrate this point of continuing our search for new procedures.

The first one I will mention is in the field of commandeering. One of the obvious war problems here is to delineate measures that might be utilized to effect both a dispersal and a reconcentration of facilities and materials in the event that atomic or other forms of attack cripple at the outset some of our main centers of production and supply. Certainly in such case we should have to cut across property rights and titles in a fairly novel fashion. It presents no problem to the USSR to move industry in bulk from an old area of industrial production to a new one. It is just the Government moving one plant of its own from

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have economically achieved from other areas in that connection. Legal arrangements and machinery, including provisions for financing, present special problems which we did not wholly master.

Allied with this problem is another one of great importance, namely, of coordinating our own national economic mobilization with that of our allies in the next war. That was effected in the last war through such agencies as the Combined Raw Materials Board, the Combined Production Resources Board, and the Combined Food Board. The techniques, methods, and procedures of those boards and agencies I call to your attention, because they will, I am sure, represent a very important phase in any subsequent difficulty.

Finally, the consequences of the atomic bomb and its possible variable use place an extraordinarily high premium upon measures of protection to industrial plants from sabotage. The little known but valuable work of the Resources Protection Board and other related agencies, as well as the coordination of the FBI with industrial management and trades union organizations, may call for legal machinery which we did not envision in World War II, when the threat of air invasion was never fully brought home and industrial sabotage was relatively limited.

I merely cite those examples of the types of problems to show that this subject is an ever-changing one and one that requires not only a careful, detailed use of previous experience, but a touch of original thought and imagination, if you will, for the problems of the future.

QUESTION: You refer to the effective delegation of authority from the top down. Then you say that as well as that authority it was necessary to give a general guide to accompany the authority. I visualize that as being a general guide successively down to the different levels of organizational structure. What is that general guide; that is, what does it look like? What form does it take? About how is it expressed, and what basis has it?

MR. FOWLER: Sometimes I think it is included in the order itself. Sometimes it is perhaps better included in an accompanying instrument. But again, to take the War Production Board's experience, quite often you will find in the orders and regulations that announced a policy they indicated that the authority was to be used in certain concepts but not in others and be used with certain accompanying procedures. Or it might be included in the wording of the instrument. When the instrument is to be a public instrument and you want the public to know what the general policies are that the top has indicated the operating officials are to follow, for example, such as one which says that in connection with the letting of contracts, consideration will be given to taking care of the small business facilities that might be available, that type of thing might be incorporated in the regulation itself, so that there would be a general recognition by that part of the public

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