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LEGAL AND LEGISLATIVE ASPECTS OF
ECONOMIC MOBILIZATION

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MR. NIKLASON: General Holman, gentlemen: Contemporary authorities on the war powers of the President which are derived from the Constitution agree that, in a national emergency, the Chief Executive has authority to take any action that may be necessary to defend the Nation. It seems obvious, however, that a President who persisted in relying solely upon his broad constitutional powers in the conduct of a war soon would lose the confidence of the people and Congress, thereby jeopardizing the entire war program. The occasional exercise of these powers may be tolerated if limited to dire emergencies, but, otherwise, best results will be obtained if the President collaborates with Congress in the passage of statutory authorizations for administrative actions which are necessary in conducting a war.

Much remains to be done after the President has received his statutory delegation of authority. He must delegate his authority, in turn, to the appropriate administrative agencies. Usually this is accomplished by the issuance of Executive orders, and these are then amplified by administrative orders, directives, manuals of procedure, or other forms of administrative directions, all of which have the force of law.

To what extent is it feasible in time of peace to provide for the statutory authorizations and their supporting administrative laws which are necessary to implement a war program? This important question, and many others relating to the legal and legislative aspects of economic mobilization, will be discussed by our speaker, who, as Associate General Counsel of the National Security Resources Board, has given much thought to this vital subject. It is a pleasure to introduce Mr. Charles H. Kendall.

MR. KENDALL: General Holman, gentlemen: You heard a little over a month ago a scholarly and, at the same time, witty address by Professor Durkin of the Graduate School of Georgetown University on the subject of the war powers of the President. I take it that I am to follow the general thought of that lead and go on from there.

Before doing so, however, I would like to point out that, while Professor Durkin, I am sure, impressed you that the President has a very broad power, he did not use some of the more modern examples which all of us, I believe, will remember and which are very good examples of the type of extraordinary power that the President has when there is a national emergency. For example, President Wilson, in the First World War, created a sort of censorship without any specific statutory basis for it, and he created the War Industries Board itself without a statutory basis. President Roosevelt transferred 50 destroyers to the

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British; and at the time, as you will remember, there was a law on the books which said no warships shall go into foreign waters with the purpose of being transferred to a belligerent. But his war power, the Attorney General said, transcended that statute.

To use Father Durkin's expression, if we have a President who is a "big leaguer," all he needs to do to extend his authority is hunch his shoulders and push--and President Roosevelt pushed on several occasions.

Perhaps the greatest claim for presidential power was made by Franklin Roosevelt in 1942. In the fall of 1942 he came to the conclusion that he wanted to control wages, and the Price Control Act told him that he could not control wages, in so many words: "This act shall not be used to limit the amount of wages paid by an employer to an employee. So in September he said to the Congress, "I'll give you until October 1 to change that law. If you don't change it, I am going to go ahead." He went even further than Teddy Roosevelt, who was no "bush leaguer" himself. Teddy Roosevelt held the "Stewardship Theory" of the presidential office: that the President has power to do something that is needed for the Nation, so long as it is not prohibited by the Constitution or the statutes. Franklin Roosevelt said, "Even if it is prohibited by the statutes, I'll go ahead." Actually, you will remember, the Congress did act, and on October 2 it passed the Wage Stabilization Act I believe it was called.

At any rate, the conclusion to be reached is that the President's power in time of emergency reaches to the very limits of government power.

However, we have to remember one thing about government power, in this country and essentially in any country, that the source of all government is the consent of the governed. If you do not have that consent, if you are not riding on the swell of public opinion, you may get into trouble. All the branches of our Federal Government have found that out--the Supreme Court in the Dred Scott decision, the Congress and the state legislatures in the Prohibition Amendment, and the late President in the proposal to pack the Supreme Court. You have to have the people with you, or your power is not so great as the books might seem to make it.

As a matter of fact, then, we might come readily to the conclusion that Mr. Niklason has already stated, that you should get the Legislature with you, for the reason, primarily, that the Legislature is the most direct expression in our plan of government of the will of the people. So if we have legislation, and the legislation says the President may do this or that, he may be fairly certain that in doing this or that he will have the people with him and not against him.

Before I leave this subject, I would like to tell a story about one of the examples of the President's powers that Professor Durkin gave you. He mentioned that President Lincoln suspended the writ of habeas corpus

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for a while. I think you will be interested to know that President Lincoln authorized General Cadwalader at Fort McHenry near Baltimore to use the authority of suspension of habeas corpus, and General Cadwalader did so.

Roger Taney was then the Chief Justice of the United States Supreme Court and had been for a quarter of a century. He disagreed violently with President Lincoln's conclusion that the latter had the right to do anything of this sort and required that General Cadwalader produce a prisoner before him (Taney) for inquiry as to the reasons for his detention. General Cadwalader sent a very polite note saying he was not able to do that because his Commander in Chief had told him not to.

Taney sent a United States marshal out to Fort McHenry to pick up the General and bring him in. The United States marshal returned two hours later--alone. He explained that he had gotten out to the fort and was stopped by the sentry, that he had sent his card into the General, telling the General he was there, and that the General did not pay any attention to his card at all. After waiting a while, he let discretion be the better part of valor and came back without the General.

The point of that story, I think, is that it is a little odd that the Supreme Court should find itself so helpless in this country, because, ordinarily, nine men in judicial robes, backed by a couple of bailiffs, do tell us all what we can do, including the Army. But that time they were not allowed to. That situation should not be the normal situation. I think we all agree that we would like to make the normal situation one in which the Congress has its part to play, the Supreme Court its part, and the President his part, even in time of war.

We used the legislative approach in the two world wars, as you will remember. We had a good deal of legislation on the books to back up the President's inherent authority.

In the First World War there were only a few statutes. Still, they were important. There was the Army Appropriation Act of 1916, which established the National Defense Council, an advisory body charged with the coordination of industries and resources for the national security and welfare; and the National Defense Act of 1916, which included a very real tool for control of industry, the familiar mandatory-order authority. That same 1916 mandatory-order authority was in existence during the late war; was occasionally used, and is in existence today. Subsequently, the Lever Act, which controlled food and fuel; the Transportation Priority Act, regulating car service; the Espionage Act; and the Trading with the Enemy Act were added to the books in the First World War.

There was no statute, however, which provided regulatory authority over industry in general, with the result that the more comprehensive controls imposed by Wilson's War Industries Board were backed by the

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threat of using these limited controls to cut down on fuel, for instance for a factory that did not want to deliver guns according to a specified schedule. The Board grew out of the advisory body that was created under the National Defense Council, and it relied substantially on the cooperation of industry in carrying out its program.

The President at that time also had in his bag of tools the Overman Act, which authorized him to transfer functions from one government department or agency to another. That Overman Act was re-enacted in the Second World War and would be needed again.

The Second World War got going legislative-wise before it broke out. There were, for instance, the Army and Navy expediting acts in advance of our participation in combat, authorizing negotiated contracts on a cost-plus-fixed-fee basis, permitting advance payments to contractors, and directing deliveries on Army-Navy contracts in preference to deliveries for private account or for export. It was on the basis of that one-sentence authority, incidentally, that the Office of Production Management was founded, and the Second War Powers Act grew out of it.

The Lend-Lease Act, the First and Second War Powers Acts, the Requisitioning Act, and the Price Control Act all placed, as you remember, tremendous powers in the hands of the Executive. However, in some cases there were restrictive features in the acts, and it became necessary to fill some gaps in the legislation with Executive action. You will remember that manpower controls were pretty largely based on cooperation or on threats of action under some other statute. For instance, if a manpower ceiling was placed on a plant and it was ignored, there was always the possibility that the plant's materials would be cut off under the priority and allocation authority.

If we are going to go into another war--and we may have to--we must ask ourselves, What sort of legislation do we need? You will be making a student committee report and will be attempting to answer that question and I hope that I can help you a little on it.

Here are some suggestions from foreign countries:

Back in 1793 the French Committee of Public Safety issued this: "The young men will go to battle; married men will forge arms and transport food; the women will make tents, garments, and help in hospitals; the children will cut old rags into strips; the old men will place themselves in the public square to inflame the courage of the warriors, incite hatred against the kings, and recommend the unity of the Republic."

There, in one sentence, was mobilization, including propaganda.

Here is another sort of national service act. Haile Selassie, Ethiopia, 1935: "All men from 14 to 80 report. Bring weapons. Married men bring wives to cook and work. Single men bring any convenient women. Men found at home will be shot." That is what he issued. I didn't make that up.

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The British, you will remember, during this late difficulty, had some very broad statutes authorizing His Majesty (which meant, in effect, the cabinet) to take steps for mobilization of the nation, including the most famous, I believe, amendment of May 22, 1940 to the Emergency Powers Act of 1939, which said that the general defense powers of His Majesty should include power, by Order in Council, to make such regulations making provision for requiring persons to place themselves, their services, and their property at the disposal of His Majesty as appear to him to be necessary or expedient for securing the public safety. That includes priorities and allocation, price control, national service, and anything else you can think of. It has the difficulty, though, at least on the basis of our tradition, that it does not express to the cabinet what the legislature thinks should be general procedure, what care should be taken to avoid unnecessary injury to individual rights, and the like. I think it preferable, as we have obviously thought it preferable in the last two wars, to spell out in more detail what the President may and may not do, leaving it to him to come back to the Congress for additional authority if he needs it, or, if the emergency is so great that he does not have time to do it, to fall back on his inherent powers.

Now for a quick review of suggestions on emergency legislation. Of course, there are hundreds of pieces of legislation that will have to be enacted if war comes again. But a few are outstandingly important, and I shall confine my remarks to those.

1. We would have to re-enact, I believe, the Overman Act and give authority to the President to redistribute functions among the agencies of government and create new agencies where required. That is a new thought, incidentally. The Overman Act never did specifically authorize the President to create a War Industries Board or the War Production Board, and that authority, perhaps, should be spelled out. At least, I suggest it for your consideration.

2. Legislation should be enacted giving the President the right to bring persons in from industry to help run this tremendous economic control mechanism that we have to set up when a war occurs.

As you well know, our economy is not centered in Washington normally; and when all of a sudden the Government steps in and tells a plant what it shall produce and when, it needs a good deal of know-how that it does not have in peacetime. So it is essential to bring to Washington the Charles Wilsons, the Nelsons, and the rest of those people who know something about how business works; not only, incidentally, the Wilsons and the Nelsons, but the fellows down the line who understand why we put manganese into steel.

In order to bring them here, we must make some changes in the law. Most of them are either not willing or able to come on the basis of civil service, so we will need a change in the statutes which set aside

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certain criminal provisions making it a crime to receive pay, for instance, from other persons in connection with employment by the Government, and statutes that prohibit dealing with government contractors while one is employed both by the Government and by the contractor or has some relation with the contractor, and so on.

Last time we did all this under a single line in one of the appropriation acts that said the President might employ persons of outstanding experience and ability at one dollar per year. That is all it said. The Attorney General enlarged that a little to indicate that if he did employ such persons, they were on leave of absence from their companies and, therefore, not subject to some of these criminal statutes

That dollar-a-year proposition caused some difficulty, as you will remember, and some of it is unavoidable; but we can at least get away from the idea of having to issue a pay check once a year to these men and simplify the job for the General Accounting Office by authorizing the employment, without compensation, of experts from industry. That I make as suggestion No. 2.

3. There should be an emergency contracting authority in the President which would get away from some of the limitations of normal peacetime procurement.

You men have, in the Armed Services Procurement Act, most of the things that were accomplished by the First War Powers Act during the late war. You have the right to negotiate contracts where the circumstances are exigent, and the job is pretty well done, I believe, in the existing statutes for the Armed Services.

There are several things that would be covered by a general set-aside of limiting laws in time of war for your own benefit; also, there are the other agencies of government that have to do procurement of an extraordinary sort during war, and the Armed Services Procurement Act simply does not apply to them. So that a provision for the suspension of limiting legislation on procurement during war would be a necessary enactment.

4. There should be authority, now nonexistent, for the creation of government-owned corporations that can do business on a corporate basis, taking losses, for instance, and making contracts of a non-governmental type.

We used them extensively, as you remember, in the late war. They were created under Section 5(d), I believe, of the Reconstruction Finance Corporation Act. That authority is no longer in effect.

In that connection, I think the statute authorizing corporations might authorize the creation of an insurance corporation, as did the late war's statute, not only for property damage, but perhaps also for

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personal injury. Remember that next time we may have the situation that Britain had in World War II, with some substantial destruction at home and the loss of lives. The British provided for some benefits for survivors of persons killed by the bombing, and perhaps we could afford to do the same thing to a limited degree; or, perhaps, we could reinsure insurance companies, whose load at such a time might get beyond their financial capacities.

5. The President must again be enabled to cause the construction of plants and facilities and the installation of equipment at private-owned plants and facilities at government expense, for the production and handling of war goods.

6. Again, the President should be authorized to support private financing of government contractors by making guarantees of bank loans to those contractors. The V-loan procedure in the late war, based upon an Executive order, might well be made legislative, the authority going, perhaps, to the Federal Reserve Board or, perhaps, to an agency set up by the President for the purpose.

7. The President should be authorized to acquire real property without the rather tremendous formalities that are now attendant upon the taking of real property by the Government.

8. Of course, we must have a priorities and allocation authority. We had a pretty good one in the late war, but it had a few shortcomings. If you will bear with me, I would like to read to you the sort of language I think might well be used in authorizing the President to give priority to certain contracts in wartime:

"That performance under contracts or orders (other than contract of employment) which the President deems necessary or appropriate to promote the national defense shall, in the discretion of the President, take priority over performance under any other contract or order; and for the purpose of assuring such priority, the President may require acceptance of such contracts or orders by any person he finds to be capable of their performance; and the President may allocate materials and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to the national defense."

Let me point out some of the variations in that sentence from the authority under which we operated during the late war.

First, it is performance that is referred to in this sentence-- performance under contracts. The last time, the Second War Powers Act spoke of deliveries under contracts, which, of course, raised the question of whether the digging of a well could be given a priority, since there was no delivery of materials. This was the performance of a service. However, when it is widened to the point of performance of

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a contract, it might be thought to include the possibility of requiring services, a "slavery" provision. So we have put in parentheses "other than contracts of employment."

Secondly, this sentence includes the phrase: "the President may require acceptance of contracts by any person he finds to be capable of their performance." That, in effect, is a one-phrase mandatory-order statute, since, whenever the President thought that a contract should be performed, he might, under this statute, require the person's acceptance of it, and then, under this statute, also give that performance top priority.

Now, that has an advantage over the mandatory-order provision in the present Selective Service Act (and in the old Selective Service Act) in this respect--and it is a very important one--that heretofore all mandatory-order authority has referred to the Government's contracting. The President was authorized, through the Secretary of Defense (the Secretary of War in the older statute), to place a contract and require the performance of the contract, but that meant that the Government had to place it. You could not do anything with subcontracts under that authority unless you found some money and went in and had the Government duplicate the subcontract. You will remember the experience we had with it. This provision provides that the President may require such acceptance in any case if he finds the contract to be of importance to the war effort. Thus the mandatory-order authority is sent right to the base of the whole procurement scheme.

Finally, in referring to the allocation of materials and facilities the language I have given you omits a phrase which appeared in the Second War Powers Act. That phrase was, roughly, that when the President finds there is a shortage, he may allocate the material. That finding of a shortage was embarrassing from time to time because it was not always short materials that we needed to allocate. Sometimes we needed to allocate materials which were not short, in order to avoid the usage of those short materials. An example I remember very well is our attempt to get additional cotton duck in 1942. There were a number of rug-weaving concerns in the country that could have made cotton duck; there was no shortage of rug-weaving facilities. So that when the proposition was first put up to require rug weavers to make cotton duck, there was a very real legal question as to the authority of the President to require it. He was not allocating a short material at all; he was allocating a plentiful facility to the production of a short material. That has been avoided in the language which I quoted to you.

9. There should be authority in the President to seize plants.

During the late war, in at least two areas, the President had the plant-seizure authority. One of them was the mandatory-order provision, and the other was the War Labor Disputes Act. In case of strikes and in case of failure to fill a mandatory order, the President could seize a

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plant. Instead of retaining that sort of enforcement of these provisions, I suggest that we might provide for the general authority in the President, whenever he finds that the operation of a plant is being interfered with, or any contract essential to the war effort is not being fulfilled by reason of the failure of some plant to operate, to seize it; not conditioning it upon a strike, not conditioning it upon nonperformance of a mandatory order, but giving him a general authority quite in line, as a matter of fact, with his inherent authority. This would serve the purpose, again, of making it possible to move into a plant which had failed to fill a subcontract, one in which the Government had not appeared as a contracting party.

10. I think that we would need, again, an exemption, for certain purposes, from the antitrust laws.

You will remember that in the Small Business Mobilization Act of the late war, there was a provision that the chairman of the War Production Board could certify to the Attorney General that a certain program was requisite to the prosecution of the war, and, upon such certification, the action taken in carrying out that program at the request of the chairman of the War Production Board was not to be prosecuted as a violation of antitrust laws; it would not support an action.

I think the next time we might provide that when the President finds a program is essential to the prosecution of the war it shall not be deemed a violation of the antitrust laws. Perhaps that is a rather legalistic distinction, but the fact is that when the War Production Board chairman last time certified a program was requisite to the war the effect was not to make it lawful; the effect was simply to prohibit any action to put the criminals in jail or to collect any fines from them.

11. Again, we would need authority to requisition property. I think that might follow very closely the authority granted the last time.

12. You will remember, also, that during the late war we had export control on the statutes--we still have, as a matter of fact--but we did not have any import control, resulting in the remarkable situation that the War Production Board was controlling the importation of things into this country by allocating incoming shipping space. We would allocate incoming shipping space from the Philippines away from the mother-of-pearl; that is, we would negatively allocate it, the purpose of which was to keep the Philippines from producing mother-of-pearl when the workers should be cutting copra. That was a rather back-handed way to control imports.

I think we should have the next time a straightforward export and import control authority in the President.

13. Then we would need a censorship authority.

Here you may debate among yourselves, with some profit, the question of whether, as we did last time, we should confine the censorship to communications between persons by mail, telegram, and radio and leave the censorship of magazines, newspapers, and commentators on a voluntary basis. That is what we relied on in World War II. In the first World War we relied on the President's authority throughout. In the Second World War we moved into a statutory control of communication between persons. Now the question is, Should we move further into censorship on communications and also upon comment and news reports in the next war? I don't make a suggestion to that effect.

14. Then we will need, of course, a price and wage stabilization authority. I submit that next time we had better have an across-the-board, Bernard Baruch type of price and wage control, particularly if there is any chance--and I suppose there is a very real chance--that war would come in the economic situation in which we find ourselves now.

The country is so busy at the moment that if we loaded war procurement on top of the present load we would have tremendous inflation of values almost at once. I submit that if we had to go six months without an effective price control after the declaration of war it might spell defeat. If any of you have been in China in the last few years, you know what I mean. It is not easy to try to negotiate a contract when something that cost \$1,000 last August now costs \$75,000, and nobody wants to sell it to you at that price because he knows it will be worth \$100,000 in two more months.

15. Now we come to some fiscal provisions, and they are more or less debatable. I mention two of them which may be considered together: the excess-profits tax and the renegotiation of contracts. They are both methods of getting excessive profits back from contractors during war. The excess-profits tax applies, of course, to all profits, whether they are war-contracts profits or otherwise, while the renegotiation control ordinarily applies only to government contracts and subcontracts under them.

It is theoretically true that an excess-profits tax alone could do the job if it were a 100-percent tax rather than a 95-percent tax as it was in the late war. The difficulty with the 95-percent tax was that when some fellow made \$1,000 excess profit, 95 percent of that was taken away from him in the excess-profits tax, and he was left with \$50. But if he had a \$100,000 excess profit, the excess-profits tax left him with a substantial piece of change. So the Renegotiation Act had to take care of those really tremendously excessive profits. In renegotiation the \$100,000 profit would be reduced, perhaps, to the \$1,000 excess, and then the tax collector would come along and get that last \$950. If the excess-profits tax, however, is itself 100 percent of the excess, then, actually, there is no need for a renegotiation act at all.

The difficulty with that will have occurred to many of you at once; and that is that under the Renegotiation Act a board of competent procurement officials would look the thing over and decide what is a reasonable profit with respect to this particular type of contract, whereas the tax authorities of the Treasury Department are not procurement officials, in the first place, and don't have time, in the second place, to look every contract over country-wide to determine whether in any particular case 10 percent or 12 percent or 8 percent should be allowed as a profit.

So we may have to have, again, both a renegotiation act and an excess-profits tax.

16. There should be, I believe, a re-enactment, in one form or another, of the special amortization authority which existed during the late war, which made possible the more rapid amortization of new construction for tax purposes when that construction was for a war purpose.

17. There must be some sort of employment control, I think, next time other than the voluntary control upon which we relied in the late war, and I suggest that it might well take the form of mandatory employment ceilings on plants and the further requirement, in shortage areas, of employment only through government employment offices.

All of you think of the words "national service" at this point. I might say that I have a visceral reaction in favor of national service, the idea that everyone, as the British express it, owes his person and his property to the service of His Majesty in time of war. But that is a big assignment for the Government to take on. Some of you have had experience in placement in the Armed Forces, and you know what a difficult job it was to use a man's background effectively in the Army or Navy. There were 10 million men, or a little more, in the Army and Navy, and there will be 60 or 70 million in the labor force of the United States in the next war. So multiply that placement problem as you remember it by six or seven, and you see why I am a little afraid of a national service law. Where are we going to get the tremendous numbers of trained personnel to run such a program and see that a man's skills are properly used? I think that the necessity for it--and many people urge that it is a necessity--begins to fade when you place it against some such proposal as I have just outlined about employment control through government employment offices.

The only people who will not be reached by a combination of employment ceilings in plants and the requirement that when somebody changes a job he must change it through a United States Employment Service office, so that he is sent to an essential job and not allowed to take another, are those who don't have to work and don't want to work. There are not very many of those people. Most persons have to work for economic reasons. Of the balance, I suggest that in time of war a majority want to work, even though they may not have to, for patriotic or other

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reasons. So we have left the "spivs," as the English call them, the few people who don't want to work and don't have to. I don't know whether it would be worth while to put a large number of trained personnel on the job of running a national service law in order to get those persons into employment, and I don't know how much good they would be when we get them there.

However, you are entitled to debate among yourselves whether national service is the thing and whether it would be fairer, shall we say, to men in the Armed Forces and would result in more production than would the scheme that I have outlined of employment controls for people who are willing to work and mandatory ceilings on personnel in plants throughout the country.

18. In the settlement of disputes, we had a law that read pretty well the last time. It said that the War Labor Board should listen to a dispute, decide it, and direct what should be done; but the courts said that the language used was not sufficient upon which to hang an injunction. As a matter of fact, the War Labor Board's job was simply advisory, and the unions and employers could accept the decision or let it alone, as they wished. So that the President was left, actually with the alternative of resorting to his plant-seizure authority if the parties to a dispute did not want to abide by the War Labor Board's conclusion.

I think in the next war we should make it perfectly clear that a War Labor Board should be set up and that its decision as to disputes causing strikes could be enforced by injunction.

Now, these various titles are, I submit, the foundation stones of an economic mobilization. When we go from economic mobilization to military mobilization, I am not too sure. Certainly, for military mobilization, you will need more statutes. I think of the Selective Service Act as a military mobilization measure, and we shall need one. There are, of course, various statutes having to do with the inviolability of certain areas in the country for defense purposes during a war. Those are things of particular military significance.

Then there is authority for a civil defense program. It is a matter of debate right now whether the civil defense program should be under the Secretary of Defense or under a civilian agency.

Then there are other authorities that you probably remember and wonder why I haven't mentioned, such as the chartering of merchant vessels, which, in large part, flow from peacetime authorities and require, if any legislation, only clarifying legislation in time of war.

There is a real issue that I would like to leave with you in connection with all of these measures, and that is the issue of whether

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they should be enacted now, in advance of the emergency against which they are directed, or whether we should wait until the emergency is upon us before asking Congress for action.

The arguments for and against enactment of stand-by legislation to meet war emergencies fall more or less into two categories: (1) those having to do with the desirability of legislation on the books ready to go, and (2) those having to do with the practicability of securing such legislation.

The arguments for stand-by legislation on the basis of its desirability are almost overwhelming. The Brewster Committee, General Eisenhower, Bernard Baruch, Ferdinand Eberstadt, and a great many other authorities have expressed themselves as being convinced that there should be legislation on the books in advance of an emergency upon which mobilization measures might be hung. It is true that if war comes again it might well come suddenly, and that if it comes soon its economic impact would be severe. On these assumptions, it is obvious that the machinery of legislation would not have a normal time in which to operate after the emergency arose and before the need for the legislation. It is also apparent that the existence of stand-by legislation would make possible a detailed planning of methods of operation under the legislation. For example, if we are going to have a priorities statute next time, and we know that because it is on the books, then we can go ahead and plan the "P" orders and the "L" orders and the "M" orders for various industries relating to that statute, knowing how far we can go, because the law is there at which to look. That would be of advantage. Also, the existence on the books of such authority would probably encourage private business to do some preparing for mobilization on its own hook. That argument can be used both ways.

On the side of practicability, it may be urged that the Nation will be more ready to promise full mobilization in advance of the emergency than when the emergency actually arises. The idea there is that I might be quite willing to say that I will go on a diet next month, but I don't want to say that I will go on a diet tomorrow. The Congress, under that theory, might enact pretty stiff legislation now, thinking that it will not be used for some time, whereas, if we had to use it at once, it might be inclined to put some weakeners in it; if the proposal had to be accepted as an immediate thing, it is possible Congress would hesitate. On this theory, more stringent and effective measures could be enacted now, while war is more or less remote, than could be enacted when the need actually arises.

The arguments against stand-by legislation are not less numerous. On the issue of desirability, it is urged that our best thinking at this time as to what we will need in case of mobilization may be woefully inadequate when mobilization actually occurs, that the enactment of war-powers legislation would tend to freeze the concept of mobilization

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in a form that might be appropriate only for the kind of war which has earlier happened. It is possible that a future war would employ such refined methods of destruction and defense as to bring into play only a relatively small part of our economy, which eventuality might make some preparedness measures inappropriate if not actually harmful. It has also been said that what we have come to think of as being a necessary measure of regimentation in time of war is so repugnant to our national ideas of democratic government and a free economy as to make the existence of such statutory war powers also repugnant in time of peace. Related to this idea is the idea that a temptation might exist for a President to make use of those emergency powers, if they were available to him, in advance of the sort of emergency for which they were planned.

As for practicability, there is first the argument that without the necessity for stringent controls legislation authorizing them cannot be obtained; that only in time of stress will the people or the Congress be ready to consider the creation of a superexecutive with dictatorial powers. That, of course, is the other side of the coin. Are we more ready now to think of total mobilization, or would we be more ready when the war is practically upon us? Secondly, it is pointed out that if the legislative mill is not fully occupied with grist of first importance it will grind exceedingly fine. If we put a statute before Congress now, when there are not a hundred others that need enactment today right behind it, the hearings are likely to be protracted and the objections of special interests are likely to be listened to at some length. The result may be a statute which is, in fact, not workable and which might be a good deal worse than no statute at all. If we had a price-control statute on the books which would not do the job, then when war came Congress would be unwilling to take action, the answer being that it had already taken action in that field, whereas, in fact, the statute might be worse than useless.

I am personally equally impressed by the arguments for and against the stand-by legislation proposal, the arguments for it on the basis of desirability and the arguments against it on the basis of practicability. But there may be some middle ground, and that is the thought I would like to leave with you for consideration in connection with your student committee report this year: What of these authorities should be and can be enacted in advance? And I submit that some such consideration as this might be in your minds--I have noted down some positive factors and some negative factors that you might consider in connection with each measure:

1. Is the proposed Executive authority essential to mobilization
2. Is it important that the authority exist within a matter of days or weeks after the outbreak of hostilities?

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3. Is the statutory language adequate to the needs of the foreseeable economic, military, and psychological situations?

4. Is the power granted one which, for historical or other reasons, will be recognized by the people of the country as a mobilization essential?

And then a couple of negative factors:

1. Would the authority sought be so distasteful to the public generally or to special groups as to make it improbable that it could be enacted in usable form prior to an actual emergency?

2. Would publication of the legislation open the door to the adoption of practices and procedures substantially impairing its effectiveness?

By way of comment on that last one, the Treasury Department has said that it does not want to suggest the form of an excess-profits tax now because it would enable the tax lawyers of the country not hired by the Internal Revenue Bureau to figure out ways to avoid that tax at their leisure over the next few months. The Treasury Department wants to keep it under wraps. That is the sort of thing I have in mind in that last negative factor.

If, with respect to the positive factors, you can say "yes" when considering a particular measure of mobilization legislation, and to each of the negative factors you can reply "no," then, I submit, you have made out a very good case for offering that legislation to the Congress at this time.

That is all I have to say, gentlemen.

QUESTION: What are your thoughts, sir, on lend-lease stand-by legislation?

MR. KENDALL: The Lend-Lease Act was a most remarkable piece of statutory authority. I will give you a personal opinion. I think, if we decided that we had to support allies again, that we could do a lot worse than re-enact the Lend-Lease Act just as it stood at the end of the late war. It is a tremendous authority.

Some drafting work has been done in the Department of State. Its draft does not look much like the old Lend-Lease Act--it is much more particularized and it may well be an improvement--but it does not authorize anything that the old act did not authorize. I will almost guarantee that.

QUESTION: You have given us quite a few fields in which you say legislation ought to be enacted, and you have given us two in which

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you thought there was some question. I think one of the latter two is national service and the other is the matter of censorship of the press. Can you tell us of any fields that definitely should not be controlled by legislation? Are there any?

MR. KENDALL: I do not think of any in the economic field in which the Government should not have a finger in time of war.

Incidentally, when I say that I want you to debate the question of national service, I think you should limit your debate to choices of ways of seeing that people get to work where they should work--only the form that the authority should take, its extent, and nature--and not debate the question of whether there should be any such authority.

QUESTION: To whom would you give the responsibility for setting ceilings in manufacturing plants?

MR. KENDALL: The President of the United States. The President would have to find, of course, as he did the last time, fellows like Knudsen to come down here and help determine the proper ceilings for plants.

Many of you have in mind, no doubt, that there was a mistake made last time in separating manpower control from production control. I think it was a mistake. I think, however, that a cure was, at least in form, made late in the war when the Office of War Mobilization was created. There was someone in that organization below the presidential level who could tell the War Manpower Commission and the War Production Chief how the thing should be worked out; it brought together those two authorities. But prior to that it was a fact that the man who had the say-so as to where manpower should be and the man who was trying to decide where production would be accomplished were two different fellows and they had no authority over each other--an unsatisfactory situation.

So far as the legislation is concerned, the authority would go to the President and he would then have the problem of delegating it effectively through an organization. And the job of determining an organization, of course, will be one of your pleasures in connection with your student report.

QUESTION: In the course of your talk you mentioned contracts and mandatory orders more or less together. Does that imply that a contract is somewhat different, legally, in time of war from what it is in time of peace?

MR. KENDALL: A mandatory order is a little different from a peacetime contract, it is true, because in peacetime a contract is not made until the offer is accepted. Since a mandatory order, under the statute, has to be accepted, it may be treated, so far as the law is

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concerned, as a contract from the minute it is issued; that is, as soon as the order is issued you have a contract because the other party does not have any choice about it; he has to accept it. In that sense they are quite different.

QUESTION: You mentioned, when talking about the Emergency Powers Act in Britain, that you thought probably in America it would have to be spelled out a bit more clearly. So far as I know, in England a ministry acted on those Emergency Powers Acts, and the minister still has to answer in Parliament to any questions that may be raised, so that the matter is still subject to control.

I wonder what controls there are in this country for any emergency powers that are given to the Executive. How can he be controlled if he exceeds his powers?

MR. KENDALL: I mentioned our own tradition in justifying the statement that we should be more detailed in making our legislation, but you point to another very real distinction between our systems that makes it important that the Congress, in our case, spell out the President's authority, because he is reviewed only once every four years unless he is impeached in the meanwhile. Under the British system, it is possible to have a review by Parliament and a vote of no confidence and go to the people at any time. That is a difference in our political setup which is a very good reason for having the Congress, which is presumably more responsive to the people, having to be elected every two years, tell the President how he is to carry out his authority. Then if the people don't like it, they wait only two years to get at the congressmen and see that the next congressmen change the law in that respect. That is a very good reason for that distinction in type of legislation.

QUESTION: I would like to know what kind of legislation we should have on the books so that, in the event of a sudden war, we will be able to stop migration at the beginning of the war. It seems to me there would be a big problem of migration at the very beginning.

MR. KENDALL: The migration of employment?

QUESTION: The migration of people throughout the United States.

MR. KENDALL: You mean to the best-paying jobs, out of the dirty jobs into the high-paying jobs?

QUESTION: I am not worried so much about the question of jobs at that particular point as I am about people trying to get out of cities to other parts of the country where they would rather live.

MR. KENDALL: Except in terms of the transfer of personnel from heavy work in the foundries to lighter and better-paid work in the new

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airplane plants, and the like, I have not been in contact with thinking on that problem. The migration of persons in the country might be a terrific drain on our transportation system. If it is something that will occur in substantial numbers, we should be worrying about it; and I hope someone is worrying about it at the National Security Resources Board. I am not familiar with the thinking on it, however.

QUESTION: You mentioned that there are several points of view on a war emergency powers act. I am wondering if you could give us your own personal observation as to whether it should be presented to Congress at this time or at a later time.

MR. KENDALL: Yes. I will bring you right up to yesterday on that I think that of the various titles to which I referred today there are not less than eight, and not more than ten, say, which, when you apply the positive-negative-factor approach, come out pretty well. They are the sort of things that I believe could be enacted in advance practical and are essential very soon after an emergency develops. Just as an example, I think that the priorities and allocation power--because the people of the country are used to it as a mobilization measure, they remember how it operated, and I think most of them are convinced that it has to operate--might well be enacted in advance; and so with not less than seven others. That is a personal opinion.

QUESTION: I gather that you feel it unlikely that we would find any better solution for the control of profits than a combination, as we had in the past, of both renegotiation on government contracts and an excess-profits tax. However, you mentioned the 95-percent feature of the excess-profits taxing procedure. Do you feel there is a possibility of getting better performance under that tax by changing to a 100-percent feature in trying to establish what the profits would be?

MR. KENDALL: It would simplify the matter if we could have one instead of two laws, because, in a sense, it is a little unfair for the war contractor to have to go through the wringer twice, while the fellow who stays in peacetime production and manages to avoid government contracts goes through only once. So I think there would be advantages in a single law that applied to everyone and got the water out of the contract price in one operation.

Whether it is feasible is a pretty technical question. The Treasury Department is currently working on proposed excess-profits taxes in the event war should come again, and I know that at least one of its counsel has expressed the thought that it might be possible to work out an excess-profits tax on a 100-percent basis which would still make a reasonable allowance for those special cases in which the risk involved in taking the contract, and the skill required in performing it, justify a larger profit than that in the next case.

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You will remember that the excess-profits tax operated during the war on two alternative bases: either on the basis of profits earlier made by the company, profits in excess of those being excessive profits; or on a capitalization basis, a certain percentage of capitalization. The use of those two methods means that there is no recognition of the distinction between asking a refrigerator company to make refrigerators and an automobile company to make tanks.

The renegotiation people quite properly, I think, believed that when a company takes on something new and has to do substantial experimentation and takes a risk of substantial loss, it should be allowed a somewhat larger profit, even though it might get into what is generally called the excess-profits area. Whether an excess-profits tax can make such individual allowances is the problem before the Treasury Department experts.

QUESTION: Do you think it could be worked out so that there would be an exception in the excess-profits law that anybody who had been through the wringer of renegotiation would be presumed to be clean and would be exempt from an excess-profits tax?

MR. KENDALL: Except for the opposition of persons who considered that to be unfair, I think it a feasible approach.

MR. NIKLASON: Thank you very much, Mr. Kendall, for a very enlightening lecture and discussion.

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