

LEGAL AND LEGISLATIVE ASPECTS OF ECONOMIC
MOBILIZATION

3 February 1956

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COLONEL WALSH: Gentlemen: Within the past day or two we issued an information sheet covering the legal and legislative aspects of economic mobilization. This morning we have another in our series of general lectures on that subject, since it doesn't fit precisely in any one unit of the course, but still we ought to have it to round out our picture of economic mobilization.

As our speaker we have Mr. Charles H. Kendall, of the Office of Defense Mobilization. He is experienced in this field. He first came to Washington as a legal assistant in the Office of Production Management, in World War II. After World War II he was legal counsel for the National Security Resources Board. Currently he is General Counsel for the Office of Defense Mobilization.

Mr. Kendall is a graduate of the short wartime course at the Industrial College, when he was commissioned in the Navy.

One could say from the bulk of the legal and administrative procedures that were required in World War II, that mobilization moves along on the crest of a wave of paper. So I would like to welcome an alumnus back to this platform to speak to us on the subject I have described.

Mr. Kendall, may I present you to this year's class?

MR. KENDALL: Thank you, Colonel. I like to be designated as an alumnus. It makes me feel at home.

Gentlemen, I do feel quite at home, except for the lack of uniforms. The last time I was here, everyone was in better color, more uniform color.

I usually speak on this subject from the legislative framework for mobilization, running through those major statutory provisions which are necessary for the wartime controls--the wartime iron lung, as I think of it. It has been called also a strait jacket. It is

really more of an iron lung, because industry is told what to do, how much it can have, and what it can charge for it. There is really a substitution for the ordinary economic forces that keep industry going and growing in peacetime.

That iron lung has many valves in connection with it. As I say, I usually run through the major statutory requirements of such a program, and I will do so today. But I am going to try to do it a little more quickly than usual, because I want to get on to something that interests me particularly, and I think will interest you, which I consider to be the major or central economic mobilization planning problem today. It is the source of authority, source of controls, in the event of a sudden attack upon the United States without the statutory readiness, so to speak, without the standby laws that we have all heard about, that are debated, and which would certainly be very desirable, but which do not exist.

To go first, however, to the meat of the meal, let me read a proposal of a legislative outline here. This is a draft bill which might be introduced, in the event of war, for purposes of economic mobilization. The purposes are stated to be:

"(a) the maximum utilization of the productive potential of industry through conversion of plants, the spreading of war orders among qualified production facilities, both large and small, and the extensive development of subcontracting practices;

"(b) the maximum utilization of available materials for essential production through conservation, substitution, and the elimination of hoarding and manipulation;

"(c) the maximum utilization of the Nation's manpower;

"(d) the prevention of speculation in essential materials;

"(e) the maintenance of labor standards and the rights of employers and employees to settle their differences through the processes of voluntary collective bargaining, so far as possible; and

"(f) the maintenance of a sound civilian economy and the equitable distribution of essential civilian goods."

Those are a fine set of purposes, and all very important.

The first one we come to in this particular collection is the priorities and allocations authority. On the possibility that that is not clear to all of you, I think I might read that paragraph. This is a very important authority.

"The President is hereby authorized (1) to require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance, and (2) to allocate materials and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense."

It is under that authority, or something like it, that a CMP, a Controlled Materials Plan, is put into effect. This is the machinery whereby a cotton mill is required to transfer its production from chambray or cotton shirts to cotton duck because that is more important to defense. It is the authority whereby the availability of steel and copper and aluminum to a particular producing center is limited and controlled. It is the authority under which all the limitation orders in wartime are issued.

It is important to note of this particular authority that it deals with items and facilities in the stream of commerce. It deals with things which are held for sale, or offered for sale, or used in the production of items for sale. It does not reach something that is intended for use by the individual who owns it and not for sale.

That brings us to the next authority, which is called "Requisitioning" and reads in part:

"Whenever the President determines (1) that the use of any equipment, supplies, munitions, or component parts thereof, or materials or facilities necessary for the manufacture, servicing, or operation of such equipment, supplies, munitions or component parts, is needed for the national defense, (2) that such need is immediate and impending and such as will not admit of delay or resort to any other source of supply and (3) that all other means of obtaining the use of such property upon fair and reasonable

terms have been exhausted; he is authorized to requisition such property or the use thereof for the defense of the United States upon the payment of just compensation for such property or the use thereof to be determined as hereinafter provided; . . . "

Suppose the Army needed your automobile. It wouldn't help to provide that you should prefer the Government as its purchaser, because you had no intention of selling it to anyone. You would be happy to prefer; you wouldn't sell it at all. Under this authority your car could be picked up and its fair value paid. Under this provision in the detailed paragraph following the one which I read, for determining the fair value, you could resort to judicial process if you weren't satisfied with the fair value determined by the Government.

The next in this compilation is called "Expansion of Productive Capacity and Supply." It authorizes the making of loans and the guarantee of loans for the building by private enterprise of industrial capacity--plants, mines, transportation systems, and so on. There is also authority for the Government to buy and sell materials for the same purposes.

We used that same authority in the Korean period to augment our aluminum capacity. As you probably well know, in the years since 1950 our capacity for the production of aluminum in this country has virtually doubled--from about 750,000 tons a year to in the neighborhood of 1,500,000 tons. And with the increase in the Canadian production, we are now in a position where the North American Continent puts out better than 2,000,000 tons a year, nearly three times what we put out in 1949.

Further, this particular provision authorizes the acquisition, construction, development, and expansion of facilities by the Government. In a situation in which private enterprise is unwilling to build a plant, because of lack of foreseeable profits, this would authorize the Government to step in and build it and operate it itself.

The next title is "Acquisition and Disposition of Real Property." That is authority in effect to take real estate on a requisitioning basis, filing a petition in court for its condemnation, but proceeding as soon as the petition is filed and a certain deposit is made, as though it already belonged to the Government.

The next is "Emergency Contracting Authority." This is a very similar one to the one now in existence, under Title II of the War

Powers Act, which has been extended yearly ever since World War II, which authorizes the procurement of goods by the military departments and the General Services Administration without regard to the normal requirements of Government contracts, where justified in the interest of national defense.

It is under that type of authority that amendments without consideration are accomplished--an important legal point. When you amend a contract to increase the amount of money that the contractor will get for his production, it is the general rule that during the contracting period the Government shall receive some consideration for that addition. In time of war or mobilization, when we are experimenting with new planes, new guns, new bombs, we may not know what they will cost. The contractor may find himself bound by contract to produce something for a dollar that costs a dollar and a quarter. So authority to change the contract price without any new consideration to the Government is required.

Nothing like the next provision has been in effect in any of our recent wars--World War I, World War II, or Korea. It has to do with plant seizure.

You may remember the attempt to seize the steel plants back in 1952, which the Supreme Court held was ineffective. That seizure was attempted without reliance upon any specific statute, although, interestingly enough, there was a statute on the books which might have been used and, in fact, did almost fit the situation. If it had been relied on, there is a possibility, in my opinion at least, that the Supreme Court would have pushed on the edges of the facts to make them fit much more readily than it did push on the edges of the law to make it fit what was done. That plant seizure was found to be improper and ineffective.

Now, here is authority that, unlike those relied upon, for example, in World War II to take over several airplane plants and divers other plants, generalizes the whole problem. It doesn't talk about labor stoppages. It doesn't talk about particular types of purchases. It treats in general of the national defense necessity of a seizure. I would like to read this language, because I think it is significant.

"Whenever the President finds

"(1) that a contract or order for materials or services necessary or appropriate to promote the national defense, and identifiable as such, has been placed with or offered to a person operating a plant, mine, or facility producing or furnishing or capable of producing or furnishing such materials or services,

"(2) that such person has failed or is likely to fail to produce or furnish such materials or services within a reasonable time at a reasonable price as determined by the President,

"(3) that such failure will impede the national defense effort, and

"(4) that the public interest requires the operation of such plant, mine, or facility by the Government, he may take immediate possession of such plant, mine, or facility and operate it for the production or furnishing of such materials or services as may be necessary or appropriate to promote the national defense."

There is provision, of course, for the payment of fair value for the use of the plant.

Then there is a provision for emergency foreign assistance--the lend-lease type of thing.

And then a provision for price and wage stabilization. We have learned, and other countries have learned with much greater pain than we have, that in time of mobilization, when demand far exceeds supply, and the nature of the demand is unusual and extraordinary, that uncontrolled profits may mean devaluation of the currency to the point where appropriations are not sufficient to accomplish defense, and where after a while the holding of a piece of property becomes more important than using it or selling it. So price and wage controls are an essential of economic mobilization.

I would like to read from this enactment three short paragraphs, because I think they represent a rather generalized, again, knowingly generalized, approach to the problem, and which I would hope would be effective to take care of any special interests that might have to be recognized.

"Whenever the President finds that immediate steps must be taken to prevent inflationary increases in price, wage, and rent levels, he is authorized to take the following interim action pending enactment by Congress of superseding legislation designed to stabilize price, wage, and rent levels.

"The President is thereupon authorized to establish a general freeze which imposes ceilings with respect to (1) all prices, rentals, commissions, margins, markups, rates, fees, charges, allowances, or any other form of prices paid or received on the sale or delivery, or the purchase or receipt, by or to any person, of commodities and services; (2) all wage and salary rates, and other compensation paid or received with respect to employment; and (3) all rents paid or received for the use or occupancy of housing accommodations.

"The President may make appropriate adjustments, suspensions, exemptions, and exceptions which may be required in the interest of national defense or to further the administration and objectives of this title: Provided, That the authority conferred by this subsection shall not be used to accomplish the general control of either prices or wages without providing for the general control of the other at the same time."

The next item is a rather lengthy provision for the control of consumer and real estate credit. As you have noticed in the papers, there is consideration being given now to the enactment of some sort of credit control authority on a standby basis.

The next item is "Employment Control," so called. This, of course, is one of the more difficult areas of economic controls in wartime. I think this approach is reasonably to be expected to have general acceptance, though it is too much to hope that it would have complete acceptance. Let me read again.

"Whenever the President determines that a labor shortage or threatened labor shortage in any plant or area, or in any type of work, impedes or threatens to impede the national defense effort, he may by regulation or order: (a) limit or reduce the number of persons that may be employed by any employer, and (b) limit employment of workers to activities essential to the national health, safety or interest.

"The President may limit the employment opportunities which workers are authorized to accept to those which are found to be essential to the national health, safety or interest. Such limitations may be imposed based upon age, skill, sex, or other relevant, non-discriminatory classification; provided that nothing in this Act shall be construed to authorize the President to cause any worker to be assigned to employment against the worker's will."

I might pause there to say that assignment to a job against a worker's will is, of course, a sore point. When you draft a man, you don't ask him whether he wants to go in the Army. You draft him and put him in. But assigning a worker to a job against his will is considered by many responsible authorities to be one way to get a job botched; that is there is no way to get work out of a man who doesn't want to work. That is subject to argument, of course. Some of the fellows that you draft may not want to be drafted, but they are required to get out and do some sort of a job.

However, the fact is, I think, that if you cover all those who are economically so situated that they must work in order to live, and you cover all those who want to work, who are willing to make themselves available for a purpose such as national defense, then the percentage that is left of no-goods is very small indeed. So that, while you may have occasion for some excitement, some disappointment, some rancor, because we are not proposing to go as far as the British did in complete control of civilian employment, you may be getting some assets out of it. You may retain the very important concept of cooperation and willingness and still in effect control almost all the effective working force.

That was a parenthetical remark. I will go back to what I was reading.

"The President is authorized and empowered upon terms and conditions in the public interest (a) to provide financial and other help not otherwise available for training persons engaged in or needed to fill jobs in essential production; (b) to provide travel and settlement allowances not otherwise available to persons taking distant employment in essential production; (c) to provide technical assistance to improve labor utilization in mines, plants and facilities engaged in essential production; (d) to provide for the installation of community facilities necessary or appropriate to the effective mobilization and maximum utilization of labor in essential production."

That, of course, is machinery which would be useful in any form of employment control.

The next section is on labor disputes. Here again is a matter of considerable delicacy. The proposal that we have in mind here is, I believe, straightforward, but perhaps leans a little on the side of control and against freedom of bargaining. It starts off with these words:

"It is the purpose of this title to provide for the settlement of labor disputes through the procedures and practices of collective bargaining, subject to the necessities of price and wage stabilization and of uninterrupted production for national defense."

That last phrase is carried out in this language further on in the bill:

"The Board"--that is, a labor board--"shall act upon labor disputes affecting national defense referred to it by the Director of the Federal Mediation and Conciliation Service. It shall hold such hearings as it deems proper, and shall, where the parties to the dispute fail to agree, provide by order the wages and hours and all other terms and conditions (customarily included in collective bargaining agreements) governing the relations between the parties, which shall be in effect until further order of the Board."

The next is a provision for the censorship of communications--of relatively minor importance to our discussion.

Then under "General Provisions" there are some interesting authorities. One of the most important is that for reorganization of the Government itself. This language is the kernel of the authority there:

"The President is authorized to make such redistribution of functions among agencies of the Government, including such agencies as may hereafter be created by the Congress or the President, as he may deem necessary for the more effective administration of the Executive Branch of the Government for purposes of national defense."

There is included in these general provisions, authority, of course, to require appearance, testimony, the production of records--

that sort of thing--the machinery of controls, the creation of the wave of paper that I have been swimming in for many years.

Here is a provision that is interesting in connection with the problem that I am now going to get to:

"All acts, actions, regulations, rules, orders and proclamations taken, promulgated, made or issued by or pursuant to the direction of the President since" a given date "which would have been authorized if the provisions of this Act had been in effect at the time, are hereby approved, ratified, and confirmed."

That is almost self-explanatory. It bears upon what I have called the central problem of economic mobilization planning today--the problem of what we do if an attack comes and substantial damage is done to the country and our legislative readiness is not complete.

We have gone over the major elements, in my opinion, of economic mobilization authority, and it remains now to consider a few assumptions about the attack, to bring the problem into focus.

It was shown that there is available as legislative authority the Defense Production Act, for example, which includes not an ideal, but an adequate, priorities and allocations clause. It includes authority to lend money, to guarantee loans, and to purchase materials for the expansion of capacity. It contains also a very limited authority to exempt cooperative action by industry from the antitrust laws where those actions are in the interest of national defense.

There is also on the statute books a Federal Civil Defense Act, which authorizes the formation of a civil defense body, an organization; and authorizes in time of emergency some limited requisitioning authority for the purposes of civil defense.

There is authority, as I mentioned earlier, in Title II of the First War Powers Act for extraordinary procurement.

There are a number of statutes that come into life upon the occurrence of a war or emergency, some of which are relatively minor, such as making available to the Army a dock that in time of peace is the property of the parks commission of some city, and all the way down to something of substantial substance, such as the National Defense Act of 1916, which includes a mandatory order provision

allowing for the procurement of military goods from a plant capable of producing them on threat of seizure of the plant. That is one type of the seizure authority that I spoke of earlier.

But that is about all. There is no authority for price and wage control. There is no manpower control on the statute books. There is no provision for the solution of labor disputes on a definite-termination, "Go back to work" basis. There is no adequate censorship authority. There is no authority to build plants that might be needed for the production of items other than end products for the military. There is no requisitioning authority except to the extent of the civil defense. So there is a great deal of this legislative framework that doesn't exist today.

But, if we are not mistaken about the Russian capability, the Soviet, if it wishes to become an enemy and do it quickly, can do very substantial damage to the United States in a sudden attack.

Last June there was an exercise called "Operation Alert, 1955;" and the purpose of that exercise, which involved the relocation of several government agencies at points outside of the city, relatively secure, it was thought, from attack, was to run through the actions that would be taken in the event of such a sudden attack upon the United States. I think for the purposes of pointing up our problems that I am entitled at least to go as far as they did with some of the assumptions.

I do not think these assumptions are classified. If they are, the only thing that is likely to be is the assumption that some 25 million people would be casualties in that original sudden attack. This casualty list would be heavily confined to industrial areas and large population areas. So that 25 million becomes even larger proportionately if you consider only the cities and the industrial areas. In particular, it was estimated that Washington would suffer 80 percent casualties.

Now, under such assumptions, of course, we would have to conclude that, for a while at least, there would be no Congress available to give us the statutory authority needed. The reason for that might be one of several. They might not be in Washington at the time. If they were not in the city, there would be, of course, the loss of considerable time in bringing them back. If they were in Washington, then you would expect this 80 percent casualties estimate. So we might not have enough to form a Congress, at least for a while. At

least the assumption--and I think it is entirely reasonable for the purposes of our problem this morning--is that the attack comes so suddenly and is so great that for a while we are without the legislative body to provide the framework that I earlier referred to.

Now, what did we do in Operation Alert, 1955? Well, the first thing that was done was the issuance of a mock martial law declaration. Then there was the issuance of an executive order which claimed and delegated the right to fix prices, to fix wages, to control materials and facilities, and so on pretty generally down the line of the actions that I have been describing.

Now, that action--and I am now, of course, going to have to cover in abbreviated form what went on in Operation Alert, because it was three days of, I won't say, confusion, but it was three days of excitement and difficulty and some misunderstanding--the declaration of martial law and the executive order that followed it, were at the core, at the center, of this problem of governmental action in time of attack without an adequate statutory framework.

Both have been very seriously criticized, and criticized by experts. I don't mean experts in criticism, but experts in the subject matter which they were criticizing. We have had genuine scholars claim that there was no authority for the martial law declaration at all under the circumstances assumed; who say that the Congress and not the President must suspend the writ of habeas corpus; and, most seriously, that there had been a misreading of the Supreme Court's finding as to the Federal Government's War authority by the people who put out this martial law order and the executive order.

To explain that last one, which I think is the most serious charge, in the Curtiss-Wright case, I believe it was, during the war, Chief Justice Hughes stated the war powers of the Federal Government to be "the authority to fight a war successfully."

Now, of course that is the best way you could put it. It won't stand up to use as a test of precise actions, but it does get across the point that the Federal Government may do what is necessary to bring a war to a successful conclusion.

Now, the accusations, shall we say, against those who were responsible for putting out this executive order in Operation Alert in June, 1955, are that they had misread what Justice Hughes said, as though he said "the President's war power is the power to fight a war successfully."

That I don't think is true. Let me point out that the critics in June were rewriting Mr. Hughes to read: "The sum of the war powers of the President and of the Congress are sufficient to win a war." Well, Mr. Hughes didn't say that. He didn't say "the sum of Congress' and the President's powers." He said "the Federal Government's war powers." And if in a given situation the only Federal Government there is, is the Executive, then does his taking action become wrong? Is the Federal Government then helpless because Congress is not available to do its part, its normal part, shall we say? I don't think so.

Now, this question is currently under considerable study in the Government. My remarks in this respect on this subject must be taken as personal opinions. I have every hope that a conclusion roughly along these lines will be reached.

But let us ask if the dilemma that the President is faced with is that he must either submit to defeat for lack of statutory authority to act for victory, or that he must take arbitrary, unconstitutional action to achieve victory. Must we lose the Nation to preserve the Constitution, or violate the Constitution to save the Nation? Is that the dilemma that we are facing?

I think that is ridiculous. It is a false dilemma. It does not exist. It is like suggesting that we slit the skin to let the bones expand. There is no need to do that. Let it distend as the bones grow. They both are part of the same thing.

We take an oath to defend the Constitution of the United States, but that does not refer to a piece of paper in the Library, precious as it is. The Nation is more than the people, or the land or the plants or the farms. It is a body politic. It is, if you will, a corporation of which the Constitution is the charter.

As the lawyers say, it is a charter in perpetuity. There is nothing in the Constitution that suggests that the Nation is to come to an end, or that the Constitution itself is to come to an end. Like the skin and the bones, they are intended to be adequate to growth and to change. There is no way to save the United States, as we know it, and sacrifice the Constitution in doing it. Nor can we do the reverse. It would be ridiculous if we tried to save the Constitution and let the rest of the Nation go down the river. So it is a false dilemma.

I would like to go back a hundred and fifty years almost, to John Marshall's statement about what is constitutional. I read, I think, from the case of McCulloch against Maryland. I say "I think" because I did not make a note of the case when I copied this out.

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

That is the end of the quote. I think that for our purposes we could state it even more briefly and perhaps more usefully by making it a negative statement, something like this: "A rational action"-- that is, an action in which the method is appropriate to the purpose-- "is not unconstitutional unless its purpose is beyond the scope of the Constitution or its method is forbidden by the Constitution."

Now, in such a context I think it is clear that in such an attack as was postulated in June, 1955, and that we have been talking about today, the President not only can, but must, act in every area in which action is necessary to defend the Nation. It is as simple and as difficult as that.

For many years now I have used the example of self-defense in trying to get this point across. If you are walking down the street with your mother, and a ruffian comes along and looks as though he is going to attack her, what may you do?

Now, if there is a policeman handy, he is paid for that and you may properly assume that he could take care of the situation--if he is there. But if he is not there, what do you do? You try to defend her. What does the law say about it? May you defend her? Yes, you certainly may, if there is any justification for your belief that she is about to be injured.

What measures may you use? Can you simply restrain him and no more? Can you punch him? Can you kick him? If you have a knife, may you cut him? If you have a gun, may you shoot him?

The only test is what is necessary to defend you mother. That is the only test. If the man himself has a gun and if he makes as if he might kill your mother, you may shoot him. The law says you may.

It is not all spelled out. The point is that if it is necessary to shoot him to accomplish the end of your mother's defense, you may shoot him.

That sounds like rather extreme law, but it is perfectly good law. It is the same law, it seems to me, that applies to the President and the Nation. If he has to do something to defend the Nation, the Constitution does not forbid such an action on his part.

I think that concludes the lecture. Thank you.

MR. NIKLASON: Gentlemen, Mr. Kendall is ready for your questions.

QUESTION: Would you expand a little on the question of the relationship between the people and the Government as a body politic?

MR. KENDALL: I should be very happy to do so, within limits. When I referred to the body politic as being more than the people or the land or the plants, the factories, the homes, or the systems of government, I was referring to the fact that the United States is all of those together. I used during the lecture a reference to the human body, because there is a certain parallel between a human body and a body politic or a corporation under the law.

If you took all the stockholders, all the officers, and the board of directors of a corporation and put them in a room, you would not have the corporation there. The corporation is the association of those people, with certain rights, certain procedures, and certain obligations. And so it is with the United States as a body politic. You need the charter of the body--the Constitution of the United States--but you need the people, you need the real estate, you need all of them together to constitute the United States as such.

I do not mean to disparage the people as the most important element. No doubt they are the most important element in a nation. But a sovereign state is more than a group of people. It is a group of people in some sort of fixed association with each other, with certain rights, obligations, et cetera.

QUESTION: These powers that the President is going to have--won't he first have to delegate them downward by a universal proclamation, so that some little underling out in the boondocks is going to

automatically assume them himself, and, for instance, take my automobile without any authority until the President has given him specific authority?

MR. KENDALL: To answer that question the way you put it-- Could some fellow out in the boondocks do that automatically?--I would say he could not do it automatically.

I will have to confess that the President cannot, of course, exercise all of these powers himself; that there would have to be some delegation. I would hope such delegation would be on such a reasonable basis that no pip squeak would be allowed to exercise the authority. But there would have to be delegation downward, as was exemplified in Operation Alert, 1955, by executive order, which, as I said, delegated the authority to do those things.

QUESTION: As in Operation Alert, in the absence of these various standby pieces of legislation that are not in effect, isn't the only answer national martial law to get what you want to get through? What were some of the criticisms of it?

MR. KENDALL: That is a very interesting question. The criticisms of the use of martial law last year took many forms. Some of the strongest criticisms came from the Armed Forces, where the Joint Chiefs of Staff and the rest didn't want the job of trying to put out and enforce economic controls. That wasn't the job that they thought they had joined the Army, Navy, and Air Force for. They thought they would have enough to do without that. So that was one of the criticisms of the use of martial law.

Another, and I think not very sensible, criticism was that there is nothing in the Constitution about martial law. A great many state constitutions do have a provision for the governor declaring martial law. The fact that there isn't anything in the Constitution about it makes some people think it is not within the President's powers. I think that is just plain wrong--that criticism.

There is another criticism that has some good authority behind it. Down through the century and a half of our experience with it the courts have universally held that martial law is appropriate only in the actual arena of hostilities, where the civil authorities are enabled to maintain order and to conduct affairs under civilian authority. There is a very respectable body of authority on that score--that

martial law is not appropriate so long as the courts can continue to function, so long as the police are on hand, and order can be maintained in the normal fashion; that we are to use martial law only when we have to; that it is only then that nationwide martial law is appropriate. I am not trying to criticize that position, because the authority seems to lean quite a bit that way. But new concepts may be needed.

There are other criticisms. Take the one about the writ of habeas corpus. Some people have pointed out that the greater weight of authority is that it is the duty of Congress, at least ordinarily, to suspend the writ of habeas corpus, if it is to be suspended. That arises in part, I think, from the fact that a reference to suspending the writ occurs in the Constitution, in Article I, which deals with the legislature. I do not personally agree with that conclusion. I think that the President may in appropriate cases suspend the writ. But that is another type of criticism.

Perhaps the most telling was the one I mentioned first--that martial law means, generally speaking, control by the military; and it is not a job that you have means to do; I mean, I believe it is not particularly a military job. It is one that should, if possible, be handled by the civilian authorities, leaving the military to the job of defeating the enemy.

QUESTION: I am not at all unsympathetic with your ideas on the delegation of power. However, I was under the impression that suspension of the writ is not an inseparable corollary to a declaration of martial law. I would like to know, one, whether you share that view; and, two, what was the basis for the inclusion of suspension of the writ in Operation Alert?

MR. KENDALL: I do share it. I do not think that suspension of the writ is a necessary corollary of martial law.

The reason that suspension of the writ was included in the mock Operation Alert was a very practical one. If we are attacked, one of the first things that will be done under the laws provided already--they are on the books--is to pick up several thousand people who are thought to constitute a danger--subversives, people who might commit sabotage or engage in espionage--and throw those people into some kind of confinement right away before they can do any harm. You probably have heard the law explained and realize the FBI maintains an active list of people who would be dangerous.

Now, if we put those several thousand people in jail at once, and they all applied, as they would, for a writ within a few days, how physically would you be able to present the case against each one of them when the writ came up? You just wouldn't have enough lawyers-- imagine, not enough lawyers--to handle all those applications for writs of habeas corpus. So just to be sure that those people stay in jail for at least a few weeks, until the machinery of reviewing their cases individually is set up, it was thought that there would have to be a suspension of the writ.

That, incidentally, is also the reason that the suspension in that mock order read: "The writ of habeas corpus is suspended with respect to Federal Offenses." It was thought that enough of the country was spared from attack, even though it was a very heavy attack, to let the courts function with respect to the ordinary criminal laws in the states, to take care of the robbers, the burglars, and so forth, and let them apply for writs if they thought they were being improperly held; but not for Federal offenses. There would be need to hold the subversives.

Incidentally, the suspension of the writ for Federal offenses has also been criticized by scholars, largely, I think, because it is new-- something that has never been done before.

QUESTION: Isn't there a lot of precedent for the President taking on those powers, like suspending the writ? Weren't a lot of those things done by President Lincoln during the Civil War?

MR. KENDALL: Yes, indeed.

QUESTION: Didn't he mobilize the Army, suspend the writ, and take some other actions without even calling Congress?

MR. KENDALL: Indeed he did. We have a considerable body of precedent in the Civil War, which, as you know, is the only major war we have had that greatly affected our own land, since the Revolution. Some of that authority, some of the actions that he took, are very pertinent as a guide.

There is one major difficulty with them, sir, and that is that after the war, the declaration of martial law in some states was declared to be illegal. The courts found that he didn't have the right to do some of the things he did.

Incidentally, I might take time here to answer a question that was asked me out in the hall during the recess, which I think is a very good question. That little phrase that I read from the sample bill confirming and ratifying action taken by the President--that sort of thing is not new, because it was done for Lincoln with respect to some of the things he did early in the war, when he, for instance, authorized the use of funds in the Treasury without an appropriation. That was ratified by the Congress at a later date. So we have precedent for that sort of provision.

QUESTION: I wonder if you would clarify for me what the statutory limitation is on the length of congressional extension of war powers, the power of which ended after the emergency ended.

MR. KENDALL: As yet I know of none so long as the emergency continues. You say "the power of which ended after the emergency ended." I assume you mean after hostilities had come to a conclusion. A lot of people thought the emergency was then over. No; I know of no statutory limitation on the length of an emergency declared by the President.

There are, and may be some more, limitations on the effectiveness of a declaration of an emergency by the President. For instance, there is a bill which has recently been reported out in Congress to deprive the Armed Forces of one of their procurement authorities--that in Section 2(c)(1), I believe it is, of the Armed Forces Procurement Act, under which in time of an emergency declared by the President or Congress, contracts may be negotiated if the Secretary of Defense finds that negotiation is in the public interest. That is the authority, incidentally, which has been used to channel contracts into labor-surplus areas, and into disaster areas. It has also been used for at least a time in connection with small business. At any rate, this bill would change the language in Section 2(c)(1) and give the authority only during an emergency declared by the Congress. And there are many statutes on the books which require more than a Presidential emergency declaration for them to come into activity. Some of them even require a declaration of war, which, as you know, is a congressional prerogative by constitutional provision.

QUESTION: Mr. Kendall, I would like to clarify the status of these authorities. You mentioned the fact that there is a body of legal opinion that might not go along with this type of approach, with having these authorities vested in the President, which he might assume in

time of war. What would be the status of them? How would he assume these authorities if they are not on the books? How would they be implemented? Some people in the Government might take the position of yourself and some the contrary. I don't know whether I make that clear.

MR. KENDALL: You make it painfully clear. This is a very difficult problem and a delicate one. The matter is being considered, as I earlier said, right now. It is being wrestled with within the Administration. Possibly the conclusion might come out that it is so advantageous to have standby legislation that it would be requested.

I don't think that any conclusion could possibly come along this line: that the President would be helpless. I don't believe anybody could come to that conclusion. You can't do that. There is no argument for it. The Constitution just does not require that we run out the white flag because of a provision that one half of the members must be present to constitute a quorum, or some other such provision.

I think the most that could come out leaning toward the congressional authority line of reasoning would be a conclusion that we should at once, without the loss of any more time, ask Congress to arm the President with standby legislation. Other conclusions, of course, would vary all the way from that down to: "The President can take care of it the way it is now. We will do nothing further at present."

I don't mean to suggest today that I think it would be better to go about it that way. As a matter of fact, I would welcome on the statute books a great deal more standby legislation than is there now. I would say, however, that there are some difficulties with standby legislation. If at a time when no particular danger, or at least no danger that is widely felt, seems to be present, a provision is introduced in Congress, there is every opportunity for special interests to work on that legislation, even for log rolling, for so many restrictions to be put on its use, or the manner of its use, or special exemptions from it, that very frequently the peacetime legislation for war use is not a clean, strong, sharp tool.

Think of the Defense Production Act as it stands today. There is priorities and allocations authority, as I told you; but there is also a provision that it shall not be used to control the general distribution of any material in the civilian market unless two or three findings are made concerning its scarcity, its importance to national defense, and

so on. This is a limitation upon its use that wouldn't be particularly crippling in the event of attack, because shortages would occur at once. But it is a limitation that would be undesirable if we were going into, shall we say, a peripheral war, Formosa, something of that sort.

There are many other limiting provisions. Let us take an outstanding example. The present authority to exempt from the anti-trust laws the cooperation of businessmen in the production of war goods is, of course, a very effective tool. If you bring together a number of different airplane manufacturers and get them to pool their know-how, you are likely to come up with a quicker answer to the problems of construction than if they have to work by themselves with their own facilities alone. To bring them together and still assure that they can cooperate in national defense with no thought of thereafter being prosecuted for violation of the antitrust laws, you need some exemption authority.

Now, such exemption authority existed in World War II, and was written into the Defense Production Act in 1950, when Korea first came along. Today that authority has been successively limited over the last three extensions and amendments of the act to the point that it could now be used only to cover the precise example I gave--a committee of contractors for the military departments. It cannot be used to cover a new undertaking such as the Foreign Petroleum Committee, which is an arrangement that the Interior Department worked out for the various petroleum industry members to get together and provide the military with reliable information on petroleum supplies all over the world. That could not be done under the provision as it now stands.

So if we were to ask Congress for some of these authorities now as standby legislation, there is a real danger that what we would get would be something less than what we need.

QUESTION: In the provision for the settlement of labor disputes, I understand there is a board of arbitration which is supposed to be the final answer in the case you referred to--the Federal mediation case. Will you tell us what the powers of the board are to enforce their decisions?

MR. KENDALL: Yes. I had better be accurate on this. I quote:

"It is expected that the orders of the Board will be obeyed voluntarily in view of the imperative needs of the nation for uninterrupted production; but in the event of non-compliance with a Board order by any party to a dispute, the Board shall have the power to petition any United States circuit court of appeals within any circuit where a non-complying party to a dispute resides or transacts business, for the enforcement of an order made or issued by it."

That would be an injunction. It is not a popular authority by any means in the labor field.

QUESTION: You spoke of the large casualties in Washington. Suppose Congress is in session and the majority of the leaders are here--the President, the Vice President, and the other heads of Government departments--and they drop one 20-megaton bomb right between the White House and the Capitol, what would happen then? Would they go into the State governments for their authority?

MR. KENDALL: Two things arise from that situation. In the first place, what is the effect on the Congress, assuming there is a substantial casualty rate there?

In the Senate, as you know, the states have authority under the Constitution to provide by legislation for the appointment of new Senators; and most states have enacted laws which make that possible. So that the Senate could be rejuvenated and new blood could be introduced fairly rapidly by the state executives. In the House of Representatives that, unfortunately, is not at present true. Under the Constitution, if a vacancy occurs in the House of Representatives, it must be filled by election. That would take longer.

As far as the executive branch is concerned, the law now provides a dozen successors to the Presidency, which run something like this: from the President to the Vice President, to the Speaker of the House, then the President Pro Tem of the Senate, to the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, the Attorney General, and so on down through the entire Cabinet. Those would provide some twelve successors.

It is not at all likely that a single attack would wipe out that entire line of succession. Even if it did, as the law reads now--and it

has not been tested--I think it would be possible, if the Senate is rejuvenated by the chief executives of the states, for the Senators to get together and elect a President pro tem, who would then take over as Acting President, even if the whole line was wiped out.

QUESTION: Are these laws that you described going to be requested to be enacted now as standby legislation?

MR. KENDALL: That, of course, is part of the issue that is currently being discussed within the Administration. My guess is that we will not ask for standby legislation.

COMMENT: Somebody from ODM has brought up the subject and said that they don't want any standby legislation, because it would give industry a chance to find all the loopholes in it. They said they wanted an executive order that would be put out after the war started.

MR. KENDALL: That is a reason that hadn't occurred to me.

COMMENT: As a practical proposition the President, as you suggested, might succeed better with a declaration of martial law or with an executive order. If we did it the other way, it could happen that a case would be brought up and the Supreme Court say that the action was illegal.

MR. KENDALL: Maybe you shouldn't have mentioned that. That is one of the secret strengths of my position--that by the time the Supreme Court said that martial law in Kentucky as declared by Lincoln was illegal, all the purposes of that declaration had already been served. Of course, I wouldn't want to rely on that as support for my argument, but it is quite true.

But that is not entirely unreasonable, because it more or less flows from the major point that I meant to make today--that if the necessity is there, then the President must act; that he doesn't have to spend an awful lot of time arguing about it. If he must act, he must act, and that is the end of it.

QUESTION: Where do we stand on the possibility of Federalization of the state authorities? Is there any possibility that that could be done?

MR. KENDALL: There are several areas in which that issue will arise. There is an easy example in the Federalization of the state

employment services to serve in this matter of employment control. It would be desirable that any such Federalization be done with the consent of the states.

Again, I think it is possible to have legislative situations arise where the war power of the Federal Government would be so preemptive and so outstandingly the single important governmental authority in the country that state agreement to this sort of thing would be bypassed.

Another area of considerable importance, of course, is that of the cooperation, almost the drafting, of governors and mayors and other officials of the local governments into what amounts to Federal service in time of attack. So that the line of authority down to the grass roots, if I may call it that, might go through the President to the agencies in the Federal Government, and then to the governors of the states and down to the mayors.

Now, such a measure in peacetime is just out of the question. There is no relationship between the two. In some states the state officials are forbidden by law to hold any Federal post or exercise any Federal authority. In some of our own Federal posts there is a similar restriction. But in time of war that might well be the best line of authority that you could find. And you probably know that the Federal Civil Defense Administration is doing a good deal of planning in that direction.

QUESTION: One of the provisions of your draft legislation relates to the taking over of real estate. I am a little surprised at that. I wonder if it was your intent to imply that they could use our private houses for the housing of refugees.

MR. KENDALL: No. That was not my intent. I had intended to make that point, but I didn't. In speaking very briefly about the condemnation provision in this bill, I said the intent is simply to get away from the wait between the filing of the petition in the Federal court for condemnation and the judgment of that court on the value of the property and the transfer of the title. This provision simply makes it possible, when land is needed for any national defense purpose, to proceed with condemnation in the ordinary fashion by filing it in court, but to take over the use of the property immediately upon the filing, with the deposit of a certain sum of money, which is available to the owner if he wishes to accept it in payment. Or he may wait for the court to determine what he should be paid.

Now, the use of such authority to provide housing for refugees is not beyond the limit of the provision. That would be for national defense purposes. It could be done. But it wasn't designed for that purpose, and I doubt if it would be necessary to use it that way. However, the Government taking over the use of that property would be a quicker way than the slow way of condemnation to accomplish that housing purpose. And I suspect that the Civil Defense Administration is working quite actively on that problem, though perhaps it has other ways of doing it.

QUESTION: Is the rent control provision in the draft restricted just to housing?

MR. KENDALL: It is.

QUESTION: What is the reason for that restriction?

MR. KENDALL: I wish I could give you some really good reason. It has resulted in a lot of confusion. When I read those words, I wondered whether anyone would notice that.

We have not tried in the last two wars to control the rent levels on commercial property. The theory of it is that they are not particularly important to the problem of inflation, and that they would be the very devil to handle administratively. So that this is a cowardly retreat from an area of great difficulty, but perhaps one that is not of very great consequence.

That could be put in as standby authority. It is not a question of lack of authority, however. It is just a question of whether it is worth while to engage in that much work for the value which would be achieved.

QUESTION: You mentioned foreign aid as an action under consideration, but did not mention the details. The implications of that, however, are what I am thinking of. In the making and implementing of treaties, what are the emergency powers of the President which might arise under that provision in relation to those which Congress now holds with respect to foreign entanglements? Is there any clarification of that in your provision?

MR. KENDALL: Yes, sir. I think it clarifies the point. It seems that it has to do with the transfer of materials, materiel, and equipment. It is in effect the Lend-Lease Act of 1941.

Now, of course, any substantial economic assistance through the transfer of material and equipment will eventually get us into some sort of entanglements. I had the pleasure, shall we say, of working on some of the terminations of Lend-Lease after World War II. I was actually involved at one point with the Russians in an attempt on our part to get back some Lend-Lease ships, which have, incidentally, since been returned, but were not returned as a result of our negotiations. There is some entanglement involved that way.

But, of course, it is not the major foreign alliance type of entanglement that usually frightens us. It serves the purpose of making it easy to get shells to forces in foreign lands. Those forces may be Italians rather than Americans, but if we can produce shells faster than they can, we will get those shells to them. We will lend them, lease them, or give them to them.

QUESTION: How are you going to administer this condemnation of real estate with all of the lawyers being casualties, since they are all right in the middle of these large cities?

MR. KENDALL: That will be difficult. But it won't be as large a difficulty as some of the other things we face. The assumptions that I made, which correspond roughly, I think, to the June, 1955, assumptions in Operation Alert, did not call for the destruction of every major city in the country. There would be a very large number of lawyers left. There would be a large number of judges and courts untouched. There would be a large number of substantial cities probably untouched.

We get into military matters here, of course, in which I am a babe in the woods. But the capacity of the U. S. S. R., even if it sneaked past our radar defenses, is probably not great enough to substantially wipe out all nine judicial circuits. We would have a lot of courts left even if they did succeed in their wildest dreams in the first time around. It would be awkward, but not a major difficulty.

QUESTION: One thing about these war powers acts is that they expire. Why can't they be put on ice as standby legislation? Why shouldn't your own act, if it becomes an actual wartime act, instead of expiring, go in standby?

MR. KENDALL: Well, sir, some of them have in history. The National Defense Act of 1916 is an example. That was enacted prior

to World War I. That ended at the end of the war, but was allowed to stand on the books. And some of the legislation enacted in World War II was allowed to stand on the books.

Feelings get to be pretty strong about things like wage and price controls, about any sort of manpower utilization direction by the Government. They are characterized as straitjackets, as totalitarian measures. People just don't like to see them at all, don't like to deal with them. They like to get them off the books for one reason or another.

It is a political problem in some respects, as you well know. Maybe with the advent of this greater threat of possible enemy destruction within the country, the feelings of both the Government and Congress, and the feelings of the people at home, whose feelings Congress tries to reflect, might so change that we could put some quite effective legislation on the books. But whether or not it will be tried, I don't know.

MR. NIKLASON: Thank you, Mr. Kendall, for an excellent presentation of a vital subject.

(29 Feb 1956--2950)B/ljt