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LEGAL ASPECTS OF BUSINESS

by

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COLONEL JORDAN'S REMARKS INTRODUCING  
PROFESSOR NATHAN ISAACS, HARVARD GRADUATE SCHOOL  
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Gentlemen:

In presenting the speaker this morning I am not going to recite to you all the degrees that have been conferred upon him by the universities of this country but I am going to tell you of the positions which the various universities have called upon him to fill. He has been Professor and Assistant Dean at the Cincinnati Law School; Professor of Law at the University of Pittsburgh; Professor of Business Law at Columbia University, and he is now Professor of Business Law at the Harvard Graduate School of Business Administration - truly a record of which any man might be proud.

Professor Isaacs is a distinguished scholar in many lines, an author of note, and a veteran of the World War. He is a valued friend of the Army Industrial College and his lectures are eagerly looked forward to each year. We are delighted to have him with us this morning. His subject is "Legal Aspects of Business."

Professor Nathan Isaacs.

LEGAL ASPECTS OF BUSINESS

I am always glad to get back to the Army especially under conditions of this kind when you find bayonets bristling and all that sort of thing in your morning's paper; then the average citizen begins to feel it is a good thing we still have the Army. Not that the average citizen becomes more militaristic under these conditions - quite the contrary. It is rather that he shares the realization that the Army is what the Army understands itself to be - a great bulwark against the necessity of war.

I was very much pleased to be invited to come back again this year to carry forward the series of talks that I have been privileged to give here. I will use a moment to summarize what I said last year and then you will see that what I want to give today is just a close-up picture, as the moving-picture industry puts it, of one of the matters suggested or flashed before you in the course of last year's discussion. I know that you were not all here last year; some of you were, but I believe the talk was mimeographed so that if anyone's curiosity is aroused he may be able to see where this close-up fits into the larger picture.

I spoke last year of the Government as a legal person - a person in the eyes of the law. That is a little legal fiction that we indulge in. It is a convenient sort of fiction. It means that the whole law of contract can just be thrown into a new field - a law that was meant to operate between two real persons now will operate between the Government and a person. The law of trusteeship which was made with two persons in view becomes applicable and the Government can become a trustee or a beneficiary. The law of agency comes in and the Government may be the principal or agent, the employer or employee. So all through the whole law rules which grew up with natural persons in view now may be adapted and applied to Government relations.

The question that I raised last time and that I left with you was this: To what extent it was desirable to deviate from that convenient scheme in which the Government is looked upon as just another person, and I pointed out to you that though we could not go on indefinitely with the theory that the Government is subject to all the laws of contract, we had to deviate even for petty municipal governments in their dealings as purchasers.

For them we had to have some kind of special regulations, hence the requirement of bids before purchase, etc. It was much more true of the larger governments, the State Government, and the Federal Government. There were deviations that had been found necessary in history and that were made in the law, and we considered the possibility that still greater deviations would be required in the future. Certainly in time of emergency and especially for military purposes, particularly in time of war, it seemed necessary to deviate from the simple pattern of contract in certain respects. Merely to have the Government go into the market as a buyer and compete, merely to have it go into the market as an employer, subject to all the rules and regulations of the individual employer, was obviously not an adequate solution of the whole thing.

There are two sides to the question. In the first place, in our legal system, which you may visualize as a sort of solar system, it is disturbing to have a vast body or group of bodies moving around without an orbit. It is disturbing to the whole business system as well as the legal system, which is just one way of looking at the business system of a country, if one body can act and is expected to act on different business and legal principles than others; so it is obviously desirable to try to stick to the idea that the Government is, after all, just a person. On the other hand we have this principle: a fiction of the law is not a fact, after all. To say the Government is a person is not to tell the truth. So long as a fiction is useful it can be utilized but it should not be stretched to a point where it ceases to correspond to the realities. Hard facts, and emergencies are very hard facts, must control the situation.

With that general problem in mind, let us concentrate our attention on just one of these Government relations. We could of course illustrate our point with cases and historical facts about the Government as a stockholder or as an employer of labor, or the Government as a competitor in business, or the Government - State, Federal or City - as a guarantor or insurer or as a land owner or tenant. Any one of these subjects would give an exceedingly interesting history but the one I am taking up today is the Government as a purchaser.

When I talked to you last year I was working on a little series of essays, that have since appeared in print, on the various kinds of purchasers. One dealt with the consumer

as a purchaser.<sup>1</sup> To what extent does the Uniform Sales Act meet his needs by giving the standardized implied contract that would ordinarily be understood in his dealings? When he goes into a store and buys an article and says nothing, that Sales Act, covering about fifty pages of ordinary print, says: This is his contract; on the question of when title passes, on the question of rights of the disappointed buyer, what implications are to be read into the description of goods, etc.

Another study was with reference to another type of purchaser entirely - the dealer purchaser<sup>2</sup> - what actually happens in the way of developing human relations when a dealer fills his shelves. Obviously his position is a little different from that of a consumer. His special terms are different. He knows a little more about the goods. He is more of a specialist and the chief thing he is interested in is that the goods should be merchantable. The consumer is interested in their usefulness for other purposes. The credit basis is different. Roughly speaking, we may say that consumer credit is based on willingness to pay. Dealer credit is based on ability to pay.

There is another type of purchaser, the industrial purchaser.<sup>3</sup> There we have a different picture. The manufacturer has an organization very frequently to handle his purchases. The manufacturer probably knows more about the goods that he wants than does the person from whom he buys. The manufacturer sends out specifications in advance and tests and examines his goods. He wants a set of promises and warranties based on his specifications that differ radically from the promises wished in connection with the quality of goods and description of goods by either dealer or consumer. He has a different relation in many other respects from these others, so different that if you examine a batch of order forms you will find that they read many modifications of the implied contract of the Sales Act into their transactions. Take one illustration. The Sales Act lists a great many implied warranties where you buy goods from a dealer. There is an implied warranty that they are merchantable, standard goods. Where you rely on his judgment, and he knows what purpose the goods are bought for, there is an implied warranty that the goods are fit

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<sup>1</sup>"The Consumer at Law," 173 Annals of the American Academy of Political and Social Science. p. 177 (May, 1934)

<sup>2</sup>"The Dealer-Purchaser," 1 Cincinnati Law Review 373, (1927)

<sup>3</sup>"The Industrial Purchaser and the Sales Act." 34 Columbia Law Rev. 262 (1934) The subject matter of these three articles is touched on in the article on "Sales" by the author in Vol. XIII of the Encyclopedia of the Social Sciences.

for that purpose. When you turn to the manufacturer who buys goods, the industrial purchaser, he is worried about very different matters. He would like to have a warranty that he will be protected from any kind of patent litigation. That matter does not bother the ordinary consumer. If I happen to buy a lamp that violates somebody's patent, what of it? Nobody is going to come into my house and take it away. Nobody is going to sue me for any amount of money nor ask for an injunction against me. They haven't the ammunition to go after such small purchasers. So, the consumer does not worry very much about the patent situation although the patent law does not say merely that no one else but the patentee can make or sell but also that no one else may use the article, so you are technically violating the patent by using it.

But suppose I manufacture and buy ten thousand radio tubes or automobile wheels to be incorporated in articles that I am making and that will be sold. Then I am big enough to be fought and it may be very inconvenient to discover that the articles I am buying in large quantities violate somebody's patent. So you will find in practically every order form a special warranty that the goods do not violate any patent and that if any trouble results the seller of the goods will assume the responsibility of handling the case and meeting expenses. So the industrial purchaser has a different set of realities about which to make his contract from either of the other two.

Now I reach a fourth kind of purchaser with Governmental purchasers. Their needs, too, are distinct. To make a single sales law, or code, or contract to meet the private purchaser's need and the Government purchaser's need is just as unfortunate as it is to make one system on the theory that it will meet the needs of these other three types. In making a close-up examination of the Government as a purchaser, let us think of the theoretical possibilities as to the place in which we put the Government on these purchase arrangements. I can think of nine of them at least.

First, we may simply think of the Government as either a consumer-purchaser, as you think of yourself in buying a pencil (when the Government buys several gross of pencils); secondly, you may think of the Government as just a dealer purchaser, or thirdly, as an industrial purchaser. It is like the industrial purchaser in many ways - it has a force for the examination of the goods, has ability to notify the producer what it wants. But that is not all. The Government may have a special practice for itself in certain things; rather than special laws, special practices, in connection with its specifications, its standards, its tests and

inspections, which may put it in a class a little different from these three, perhaps in a class with the very largest of industrial purchasers or even in a separate class. You are familiar with that in the Army. You know of the lists, of the books of specifications that are prepared from time to time - not merely for ammunition but for everything else that the Commissary Department or any other department of the Army would handle. Take a case somewhat out of the ordinary commercial channels. It is illustrated in the matter of trade names purely as a matter of practice, not of law. There may be no law against buying goods by trade names instead of by specifications yet there is a great tendency on the part of the purchaser to specify by descriptions rather than trade names. In fact, when a Government officer whose business it is to make specifications uses a trade name trouble usually results. In one instance during the War, a specification called for Camel cigarettes and the officer in charge of approving the shipment said he had no way of finding out if they were Camel cigarettes. The machinery does not fit, but for a purchaser within the channels of commerce it may very well fit.

Still, this fourth class into which the Government purchaser may be put, differs from the others only in degree rather than kind.

The fifth possibility, one actually used a great deal, is to give the Government as a purchaser special laws generally for its protection. There is nothing new about that. From a very early age the old books used to say that the Crown - the Government - is always under age. That is a curious way of stating, through a fiction, a simple legal result. If the Government is a person it never reaches the age of twenty-one in the sense that it can always, as an infant, repudiate the contract in which it has not received value. Furthermore, the Statute of Limitations does not run against it any more than it does against an infant. If I have been cheated personally, and I wait too long, maybe three years, maybe five, my right has gone forever. But as for the Government, there is no Statute of Limitations. Whenever the Government sees fit to prosecute its claims that arise through purchases that are not according to specifications the Government can act as it sees fit. The Government has been somewhat in the position of an infant rather than in the position of an ordinary dealer. Furthermore, this doctrine that you hear so much about and which is not the law and never was - caveat emptor - in the sense that the buyer must take what he gets and cannot complain of his own folly - that doctrine which does not generally apply to ordinary buyers, does not apply to the Government at all. It applies to ordinary buyers in a very modified form. You are held to have waived certain clauses, to have given up certain claims if you had a fair chance to inspect, and if you have inspected and accepted the goods after knowing the defects you, as an individual, may have no standing in

court. To that extent perhaps, caveat emptor applies. Special laws have developed giving the Government a different legal position when we consider it as a buying person. We have added to these laws by statute.

I have already mentioned laws as to bidding. The City Council or School Board may find that it cannot go out into the market and buy the simple things it needs. There are laws to the effect that these Government departments must advertise for bids in certain definite ways, and must receive these bids and open them in certain ways, and then are bound within limits that differ, to accept the best bid. What is the best bid is a matter of definition. It is not necessarily the lowest bid and whether the Government is bound to take the best or may choose between one or two, depends on terms of the statute, but this whole law of requiring bids is a development of recent years in recognition of the fact that the Government is a very peculiar kind of purchaser and every day we run into cases where people have overlooked this fact. We find cases where it is contended that the bidding was not open, fair and square as it should have been. We find many cases where people have sold materials to counties through high-powered salesmanship, and even one case where a bridge was built without the necessary preliminary steps and the county could not be held to pay a cent on the theory that it had not made a contract and could not make it except by the channels of these special laws. So there are special rules for the Government as a bidder, and they are different for different parts of the Government. For the Army you know how closely they have to be followed in order to make a satisfactory and binding contract, and the Government may increasingly be looked upon as a purchaser to be described under this fifth head I have suggested - a purchaser with special laws.

There is a sixth possibility that I want to look into. The Government may hide behind its exemptions. There is an old English doctrine that we inherited, "The King can do no wrong." In England, on this basis, they recognize the various crowned heads, of India, for example, as a matter of expediency - as independent, crowned sovereigns - and these gentlemen who wear these crowns are immune to every kind of prosecution in England, civil and criminal, if they want to plead their privileges. Some of our states have repudiated debts and you can't do anything about it. You can't sue the United States without its consent. The United States has been more liberal than most states of the Union or than most foreign governments.

It has established a procedure through which you can practically sue the United States on contract claims by a sweeping general statutory consent. We have a Court of Claims; it is not really a court in the ordinary sense. Its jurisdiction is limited and its judgments cannot be executed against the will of the United States. It cannot handle tort cases, but in contract cases it can give a hearing resulting in a finding; then if the United States respects its finding the United States can pay damages.

We have been even more liberal than that. We have passed laws which set aside money to pay claims successfully prosecuted in the Court of Claims, but any time the United States sees fit to leave out that section of its Appropriation Bill or not to pay damages, there is no power on earth that can make it do so. We cannot sue a foreign government in the United States even if the foreign government is represented here by an agent; the fact that it is a government we are suing is enough to throw the case out. The matter leads to some very unpleasant complications in everyday life. If you are so unfortunate as to have your machine smashed by a patrol wagon there is nothing you can do under the law in the courts. On the other hand, if it happens to be a garbage collection wagon owned by the city, you can sue the city, the theory being that when the city is acting as a corporation on its business side it is subject to liabilities, but on its government side it has an immunity inherited from the old kings of England, the sovereign's immunity. If you are going to be hit by a ceiling falling down on you in the City Hall, you had better do it while paying your water bill rather than your tax bill. Personally, I think this relic of the past is nonsense and I think such steps as have been taken to do away with the vested right of sovereigns to do wrong are in the right direction, and yet, speaking as a lawyer telling you not what the law should be but what it is, there are many vestiges with us, the Farley case for example, of the doctrine that you cannot sue the sovereign.

That in itself distinguishes the Government as a purchaser from all of the other types and if the Government is not liberal and sees fit to depart from the ordinary rules of the game (because a rule of law that has no means of enforcement may just as well not be a rule) it can do so. To say the Government is bound by contract but that it does not have to pay any attention to you in Court is just a way of saying it is not bound. The law is incomplete unless the means of enforcement go with it.

There is a seventh possibility sometimes used to handle cases of the Government as a purchaser. I will just

mention eminent domain, where the Government needs real estate (or for that matter anything else). There is generally a statute provided by which the Government can take any thing through a forced purchase if the owner is not willing to sell it, and pay the individual not the price that he sets on the thing nor the price that the Government sets, but the price set by a jury. That power is not limited in the Government's needs. The Government might delegate the power to various other kinds of activity, such as railroads, many public utilities and some kinds of endeavors which are not public utilities even. Certainly if the railroad lays out its right of way through your back yard you cannot stop it, but it must pay you for what it takes. Public utilities can lay wires across your property, or put pipes under your property under this power of eminent domain, but you must be paid. Of course the state itself can exercise the power of eminent domain. If it needs land for a park or city hall or street or anything else it is making, it may proceed by this power in which it becomes purchaser through forced sale.

I may say in passing that once upon a time there was a question as to whether the United States had this power of eminent domain. There is nothing in the Constitution about it, but the Constitution says: "Powers not expressly delegated to the Congress are reserved to the States." Since there is nothing about it, it was argued that states can exercise such a power but the United States cannot. The first case that came up had to do with the Post Office in my home town, Cincinnati, when they could not induce the owners of the land they wanted for the Post Office to sell. They went to court to get it through the power of eminent domain, all the way through the Supreme Court, and they said the United States had that power. It was an understood power of the sovereign. The United States was a sovereign, and since it could build a Post Office of course it could exercise the right of eminent domain to get the land.

There is an eighth possibility, at least in some matters, of finding a legal niche for the Government as a purchaser. Or, perhaps you would say that is not the position of a purchaser, but of a taker. The power of confiscating for the public good under police power. That is a dangerous power and it is arguable that it does not exist. The very fact that eminent domain exists as a reasonable way for the Government to take, is a Constitutional argument against it's having power to take or destroy what it needs without paying for it. Yet this police power of the state to protect itself in special situations and proper cases is older than the Constitution, and in a great many cases of special importance we go back to these old theories with reference to public health, safety and morals.

The state can take forcibly, without compensation. For example, it may be a matter of police regulations such as we saw during the days of prohibition when, as a means of enforcing the law, the state or Government confiscated the liquor that was illicitly in the market and destroyed it. (They were supposed to destroy it). They confiscated automobiles and other vehicles used in carrying illicit liquor. Special statute said they could do it and they did. The police go into a gambling den and smash the apparatus, and it is curious what they will smash when they get started. An ordinary chair they figure was used in the gambling, so they smash it, and there is nothing to be done about it.

The cattle inspector of a state might destroy diseased cattle, or an inspector might go on your land and destroy diseased plants. Or, if there is a fire raging such as raged in Baltimore some years ago that threatens to destroy a great part of the city they might use dynamite and blast some of the houses without promising to pay or paying for them unless the state sees fit. So there are many situations where the state can destroy without due process of law, as we generally understand the expression, without eminent domain, and without really purchasing at all, but they are exceptional situations and governments refrain so far as possible from it. If they have done it, except in punishment or prevention of crime they will frequently reimburse the person from whom the property has been taken.

The ninth heading suggesting a possibility for handling the Government as a purchaser or procurer of things it needs, is where the Government assumes control of industrial plants. That is a matter of degree. The control assumed may be a slight degree of control but the Government has constantly assumed more and more control of industry. But the control that the Government assumes in an emergency may be extensive or even complete. In war we use the expression "Commandeer" or some similar expression. The Government may go in and say to the owner of a plant, after it has made an attempt to get him to produce what it needs: "We will take your plant and run it. Of course we will compensate you." As time goes on I think this last move will become more common. It will have to be worked out in more detail. It is not a matter we can safely leave to the emergency; legal machinery should be provided in advance. In the late war it was done on doubtful legal ground more or less with the consent of the person whose plant was commandeered, sometimes with more or less of a threat as to what would be done if the owner would resist. Some times the owner did not resist in fear that he would just be ignored or that the Government would produce its own goods in its own plants. The matter has not been successfully

worked out. In the war there was a strong feeling on the part of many men that certainly it is less interference with one's rights to have his wealth commandeered than it is simply to have his liberty taken for the same general end. Many utterances from important sources have been heard from time to time that if there ever is such a war again industry will not be allowed to profiteer but will be commandeered for the general purposes of the nation as well as man power.

I have suggested to you that the Government is a peculiar kind of purchaser and may be dealt with and is dealt with as such a peculiar purchaser in these various ways: the first three do not put it down as a peculiar purchaser; the others are not complete in their operations, they are not always clear; some are very obscure, such as confiscation and commandeering, but they all represent a hierarchy or Government exertion of power in connection with the acquisition of the things it needs. From a legal point of view the first things I have mentioned are simplest and to a lawyer that is likely to be a tremendously strong argument. The Government is disturbing his scheme by being exorbitant and acting otherwise than industry itself, and for a long time that conservative attitude of the lawyer has been read into the statutes. At most the Government can make its own rules and regulations very much as industry can. That was the lawyer's attitude. He resists the later theoretical possibilities and resists them in the order in which I have placed them more and more as being outside of the ordinary legal orbit. He has in truth something more than a mere lawyer's prejudice in favor of the more regular way of doing things. There are clauses in the Constitution that indicate that the Government must try to assimilate itself to the position of an ordinary purchaser when it goes out into the market to acquire what it wishes or needs. There is another disadvantage in getting into the law all these methods when the earlier of the methods listed will work at all. The departure from standard ways of doing things is upsetting - upsetting in more ways than you might realize if you haven't thought about it.

That is to say, the standard contracts of purchase take care of so many details one never thinks of, that when one uses non-standard methods or forms he is quite likely to find out he has destroyed the whole picture. If, instead of buying without saying a word, in which case a fairly reasonable contract is made, you sign on the dotted line of a paper prepared by the seller you have an entirely different story confronting you. You may find when your automobile does not work or your radio does not work that the paper you signed has

denied you certain rights which you would ordinarily expect,

Yet we have to face the fact that the tendency of the Government as a purchaser is more and more away from the simple doctrine that the Government is just a person. From the practical viewpoint this is what it means to you. In a war instead of going out into the market and seeing what is there and buying it or insisting, as in the late war, on having new specifications and ordering things to be made according to them (which is harder), if we go to a firm and say "We will take your factories and put officers in charge," we throw on you the burden of all that there is in industrial management, and that is distinctly the tendency. A different legal framework sets up a different set of functions requiring different training from that of the simple legal framework with which we started.

In closing I want to call attention to one case that has disturbed business very much since last year. The case is very familiar to you so I don't have to say very much about the facts. It is the case in which the air mail contracts were canceled. What is interesting to me, and to business, is the way the matter was handled in the courts when some of the holders of these contracts attempted to sue the Postmaster General and the Postmaster in New York on the theory that they had contracts with the Government, that there had been no hearing and they had had no chance to defend themselves. Congress had simply passed an Act making it possible for the Postmaster General to decide the question in his own way and if he decided that any particular airmail company had been guilty of bidding in a way that was not according to law, then not only would the contract be canceled, that was bad enough, but the person would be excluded from any other air mail contract for five years thereafter. This matter was brought into Court by someone who claimed he had spent millions of dollars in the belief that the contract ran to April 1936. He was informed that he was out of the picture so far as this contract was concerned and for five years thereafter. The Court refused to entertain the case, on the ground that the United States could not be sued without its consent. The fact that it was an officer and not the United States that was normally being sued did not make any difference. The real party in the case, the Court said, was the United States. The case decided on that ground has awakened the business world to the fact that when one deals with the United States he is dealing with a peculiar purchaser, and here the United States differs from a state. No state can pass an act canceling its obligation of contract. If a state repudiates a contract you can go into the Supreme Court and it will say that the act is unconstitutional. The Dartmouth College case, for instance, was founded on a contract of the state.

The United States can pass an act impairing the obligation of contract. The mere fact that this is possible has been exceedingly disturbing to business; regardless of the merits of the case it is the fact that a case of this kind can be handled by saying the United States does not see fit to pay. There is the same repudiation in merely changing the gold content of the dollar. It is exceedingly disturbing to business.

From the point of view of the question presented here today, the study of the specific phase of my last year's discussion - that being whether the Government is just an ordinary party and can be made such - and this year's - whether in contracts of sale the Government should be made an ordinary purchaser - the case has this force: it is highly undesirable to depart from the self-imposed obligation of the Federal Government or of the states. In general, they should act as nearly as possible like ordinary contractual parties. It is highly undesirable to depart from that. It is a self-imposed obligation as a matter of law; it calls for modification in times of emergency. Such modification is not new, it is developing and growing stronger, and with change of legal set-up there is a change in the factual set-up involving, I believe, a very, very serious consideration for these Government agencies which have heretofore been great buyers and which under a new legal set-up become buyers with more detailed industrial duties - even with the possible extremity in an emergency of having to take over the detailed work of industry - substituting the Government as a producer for the Government as a purchaser.

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Colonel Jordan:

Professor Isaacs has very kindly consented to answer any questions which the Class may desire to ask.

Q. - At the time the body of the Unknown Soldier was brought to Arlington the car of the President was blocked in a traffic jam. A number of automobiles were removed from the roadway there and badly damaged. I wonder if you recall whether any claims were made.

A. - No, I do not, but let us treat the question as an abstract, theoretical one. In the first place, I doubt whether that particular kind of activity of destroying automobiles in order to clear a traffic jam is justified. It may have been a dangerous sort of situation. Assuming that the police were justified because of a terrible police emergency, suppose it were considered to be in the same class with getting at a fire plug by smashing a hole through the window of your car - you are not entitled to compensation. It comes to this: if they were not justified in doing it, you can claim compensation.

Q. - The cancelation of the air mail contracts brings to my mind that right after the Armistice cancelation of contracts was very generally done. In the Ordnance Department we had four thousand contracts involving four billions of dollars which were canceled and most of them had no cancelation clauses. The Government was not bound by the contracts and did not want to be. They were canceled but we got by.

A. - If the Government wanted to stick to its rights it could say "Go ahead and sue me." The Government could not be forced by court procedure to pay. On the other hand, that would have been exceedingly bad policy. We might be involved again and business would be afraid to get into such a situation. The Government did a very wise thing to pass laws for compensation of those people whose contracts were canceled. The actual administration of that sort of thing is exceedingly difficult and time after time the Government got through with it with the minimum of deserved criticism. There were situations where people were undoubtedly overpaid or underpaid. I do not believe the Government will be caught again without a cancelation clause.

Q. - Assuming in time of peace the Government does not desire to ask for power of commandeering, and yet business gets so disturbed from this upsetting of contracts to the point where no corporation will bid, is there any power by which the Government can get what it needs?

A. - It is exceedingly dangerous to spread the idea among business men that the Government is an unreliable customer, so that business will be afraid to spend money on Government needs. If such an idea were to become general it would mean that whoever deals with the Government will be skimpier and do a less effective job, and that sort of thing would force the Government to get down to this other end of the scale and be in a poorer position to go out and buy what it needs.

Q. - As I understand your statement about the man going in to pay his taxes and if the ceiling fell on him he would not have redress, but if paying his water rent he would, does that mean that the Government would be on the same basis as the person?

A. - This distinction between the business side and Government side applies only to cities and even there it is objected to as obsolete and undesirable. After all, a city is a corporation. It does not apply to a true government but it may apply to some new institutions to which the Government is resorting today. Suppose, instead of doing something by employing officers, it undertakes to accomplish a task by means of a Government-controlled corporation (and Washington is just full of them today), it might conceivably lay itself open to damages. Is it protected by reason of the fact that it is a Government agency, or, has the Government withdrawn its protection by giving it a different form? An exceedingly difficult question that has been shied at rather than decided.

Q. - What was the idea behind the Government agencies as corporations?

A. - There is a case in one of the lower Federal courts in which the contention was just that. The Government was free to claim immunity if it wanted to but from the fact that it acted this way, it was implied that it consented to have the agency sued.

Q. - In 1933 a business man entered into a contract with the Government to supply materials in 1934. Those materials were alloys of gold. The price was fair and based on long experience. He entered into the contract in good faith and later the Government changed the price of that gold so he could not buy it and sell it to the Government on the bid price and make a profit. The legal principle of that was sound, but what of the moral and practical aspects?

A. - There is no doubt about the moral and practical aspects. Even from a legal point of view the man might argue that by implication when the Government passed the Act taking gold out of the ordinary channels it destroyed its contractual relation, so he was under no further obligation. I think that last year there was a great deal of discussion as to just what was happening to gold under legislation at that time. My suggestion was that they were putting gold into the Eighteenth Amendment instead of liquor. Seriously I meant that. From the legal point of view, that is the present situation about gold. You cannot traffic in

it except as the Government allows. They allowed liquor for medicinal purposes and now they allow gold for industrial purposes. It is not an ordinary article of commerce. Suppose a man had a contract to furnish liquor to the Navy and then Prohibition went into effect. The man could not furnish it.

Q. - You have argued about Government corporations here in Washington. What about the Tennessee Valley Corporation? That engages in all kinds of contracts.

A. - I would have to look at the statute again to make sure if it was in the nature of a subsidiary. I think it is. If it is, then of course the argument we put forward before would hold. There is a possibility of the Government doing this in a half-hearted way and creating an agency of which no one can say whether it is a corporation with a separate entity or a bureau with no separate entity. Some of these cases are going to be argued in court because Congress did not always have a clear idea of what it was creating. Everything depends upon whether it is a corporation or not - whether a corporation or like a bureau. It is a question I am not prepared to answer.

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Colonel Jordan:

Professor Isaacs, on behalf of the class I want to thank you for a very wonderful address.