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War Production Board

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EVERY LAWYER'S TWO ROLES (1) TECHNICIAN IN SETTLING CONTROVERSIES—WARTIME CONTRACT DEFAULTS (2) SOCIAL LEADER—PROBLEMS OF THE NEW ECONOMY OF PEACE

By Donald S. Frey*

Today it is generally believed that the soldier, not the lawyer, has the outcome of the War in his hands, but that after the War, the task will be largely that of the lawyer for organizing Peace under Law and protecting it from assault by Force. This belief originates from Pre-“total War” days, and today lawyers have a vital role in winning the War. The immediate and gravest problem facing our Nation is for the people to fully understand the Program of Life for which we are fighting this War so that they will want to fight for it now and to live under it in the days of Peace ahead. Known as the “Guardians of Individual Liberties,” lawyers are peculiarly qualified to speak and to show forcibly by example this Program. America must be shown to represent both the freedom that enables life and the discipline without which such freedom becomes anarchy.

The development everywhere of a real goodwill or love of fellowmen is at once the Program and the solution of our ills and not, for example, the modern heresy of material and motorized progress. While law has been called “the negation of love

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of fellowmen (by statutes and rules it deals in minimum standards for man's conduct toward man), every lawyer works for the development of the maximum standard of human brotherhood, when all men may enjoy perfect freedom. To bring a millennium of freedom for all men is the only end likely to come from the War which makes the tremendous sacrifices required worthwhile. For lawyers to effectively work to this end is largely a matter of unselfish, purpose and hard, untramelled thinking.

This article is divided into two parts according to what may be conceived to be the lawyer's two basic functions in society. The vigorous exercise of both of these functions now is directly related to winning the War sooner and providing for a just and durable Peace. Part One reflects the lawyer as serving to preserve order and adjust disputes according to the established law. As an example, a major problem of contract defaults caused by the War is analyzed with suggested methods for early settlement. Part Two reflects the lawyer as lending his experience with human conduct to the direct creation of a better society among men. To this end, several specific problems are discussed which call for the study of every lawyer.

PART ONE—CONTRACT LOSSES FROM WAR

Practically all private and public business is performed according to written contracts. The construction of ships, buildings and highways, the manufacture of millions of different products, and the distribution of these products through various states to the ultimate consumer, all operate upon written contracts in which the various parties to the contracts have sought to clearly state the terms of their understandings. For the past two years, the parties to many of these contracts have been defaulting on their agreements because of various governmental regulations. An inconceivably rapid conversion of private industry to a tremendous war production program (prompted by a dire threat to the Nation's safety) had not been contemplated when these contracts were drawn. Thus, there exists today a rapidly mounting total of unsettled claims for losses resulting from such defaults which in the aggregate constitute a staggering financial loss to industry generally.
A rapid and satisfactory settlement of these losses is urgently required so that each individual business may better measure its resources in order to play its full part in the final stages of the war period, the important transition period, and in the development of a New Economy of Peace. Now, with the Nation having entered the phase of "strategic" war production (the "expansion" and "mass" production phases being fairly well completed) and looking forward to reconversion to peacetime production, the modifications of the current regulations may cause further contract defaults and consequent serious financial losses unless some rules of settlement are evolved. We should clear the decks for reconstruction unencumbered by lawsuits left over from a bygone era.

While the social justification of a legally binding contract is to prevent wasteful controversy between the parties, its commercial advantage is that by its terms the parties believe they have settled upon each other the various burdens of financial risks involved in the agreement and may, therefore, pursue their other business functions accordingly. But even before Pearl Harbor, the war agencies faced the situation of the social necessity of prompt conversion of all possibly useful facilities to war production and the consequent upsetting of the terms of these commercial contracts in which the parties had thought to balance all their financial risks. Thus, the origin of most of these defaults arose from legislation which declared that where the President found that filling our military requirements would result in a shortage of materials and facilities, he should allocate these materials and facilities "in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national

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defense.\(^2\) Largely through the agency of the War Production Board, the President has exercised these powers.\(^3\) Compliance with the WPB orders has prevented in many cases (1) the promised performance of services, or (2) the promised delivery of materials or products, or (3) the full exercise of certain contractual rights, any one of which has resulted in some loss from expenses incurred in anticipation of completion of the contracts.\(^4\)

The origin of other contract defaults was the OPA Regulations and the Trading with the Enemy Act.\(^5\) In the first class of cases, one party found that he had contracted to sell or pay more than the established ceiling price for some article or that the said article had become rationed. In the second class of cases, because some enemy alien had an interest in the property involved under the contract such property could not be transferred pursuant to the terms of the contract.

To settle these contract losses, we must examine (1) the principles of law developed by the courts through centuries of considering, in deciding similar cases, what is just and (2) the new rules enacted by recent legislation, as for example, the Second War Powers Act (referred to henceforth as the "exculpatory provision") which provides "No person shall be held liable for damages or penalties for any default under any

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\(^3\) No. 9024 Executive Order.


contract or order which shall result directly or indirectly from compliance with any rule, regulation or order issued, notwithstanding that any such rule, regulation or order shall thereafter be declared by judicial or other competent authority to be invalid." 6 The Price Control Legislation and Trading with the Enemy Act contain similar provisions. 7

The chief principle of law, applicable to the situations stated above which arise through compliance with governmental regulations, is known as the doctrine of "impossibility of performance," and provides that in the absence of any provision to the contrary in the contract, the party in default is excused from payment of any damages except where there was a "contributing fault" on the part of such a party. 8 The principle exists in varying degrees today in most of our states. Failure to fill an order carrying no preference rating where the entire output was sold on rated orders has been held as a true instance of impossibility without regard to possibility of plant expansion. However, Congress believed that the case of a producer who altered his plants' facilities in order to obtain and fill war orders, perhaps as an escape from filling less profitable non-war contracts, might constitute a "contributing default." Therefore, to encourage producers to switch to war production, Congress enacted the "exculpatory provision," with the purpose of restating the legal principle to include the doubtful case mentioned above. 9 But complementary with the older legal principle is a more recently developed principle known as the doctrine of "frustration of object" which applies to excuse payment by the defaulting party where the object or purpose of a contract is frustrated or its

by 56 Stat. 23, 50 USCA Sec. 901 (b) (Supp. 1942), Sec. 5 (b) (2) of Trading with the Enemy Act, Act of Oct. 6, 1917, 40 Stat. 411 as amended PL. 354, 77th Congress App. Dec. 18, 1941.

6 See footnote 2 supra.
7 See footnote 5 supra.
9 Hearing before the Committee on Military Affairs, United States Senate, Seventy-Seventh Congress, first session on H. R. 4534—Page 995 (May 14, 1941).
enjoyment substantially prevented by law providing, of course, there was no contributing fault in causing the frustration.\(^{10}\) An example is where a party leases a showroom for the express purpose of displaying and selling new automobiles and then subsequent wartime regulations substantially restrict the sale of cars. Such party may cease paying rent the day after he releases possession of the showroom for the reason that the object of the lease has been frustrated or the main consideration for the promised payment of the rent has been severely curtailed, and the lease becomes void. Now, the "exculpatory provision" also embraces this complementary legal principle, for the object of a contract may be frustrated by reason of compliance with some law as in the example of the lease above.

While there is little doubt as to the constitutionality of all of the governmental regulations because of the wide war powers provided in the Constitution, the constitutionality of the "exculpatory provision" might be challenged on the grounds that it (1) deprives those adversely affected of property without due process of law, and (2) is an encroachment by the Federal Government upon police powers reserved to the States by the Tenth Amendment. This writer believes that neither of these objections is sound and that the provision is also a valid exercise of the war powers of Congress.\(^{11}\) It is assumed, of course, that this pro-

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\(^{10}\) For cases on the frustration doctrine, see Federal Sign System v. Palmer, 176 NYS 565; Libby v. National Sewer Pipe Co., 196 Iowa 1320, 195 N.W 749; Restatement of Contracts, Sec. 288; old common law rule to contrary see Paradise v. Gave, Aley P 26 (1647) then see departure in Krell v. Henry (1903) 2 KB 740. See 32 Harv. L. R. 789; Columbia Law Review, June, 1942, P 993; For cases on leases, see 6 Williston on Contracts 1955. See Doherty v. Eckstein Brewery, 198 App. Div. 708, 191 NYS 59 (1921), a different wartime effect on leases is caused by Sec. 304 (1) & (2) of Soldier's and Sailor's Civil Relief Act. An analogous problem in contract defaults is raised by the requisitioning acts. 54 Stat. 1090 (1940), 50 U.S.C.A. 771 (Supp. 1941), 55 Stat. 742, 50 USCA 721 (Supp. 1941) Contract breaches caused by requisitioning do not have the benefit of the exculpatory provision. For case studies of commandeering during the last war see 51 Yale L.J. 282 (1941) and 55 Harv L. Rev 429.

vision will operate as a defense to only those breaches of contract occurring subsequent to the enactment of the statute (May 31,
1943) The exculpatory provision also applies to government agencies and the "contributing fault" exception does not apply to prevent relief for the government from contracts broken or rendered impossible by WPB orders.12

The government agencies have refused requests from business men to interpret the effect of these exculpatory provisions with respect to their particular situations. In answering such requests, the WPB takes the position that the question of proper damages recoverable under a defaulted contract is exclusively a matter for the courts after an examination of the terms of that contract, the law of the particular state involved, and the effect on that contract of the "exculpatory provision."13 Only

Civil War certain Immunity Acts were passed which gave a defense for any act done or omitted by any officer or person on the order of the President or military officer. In one case the court upheld the statutes saying "it is no answer to say that it interferes with the validity of contracts for no provision of the Constitution prohibits Congress from doing this as it does the states," Mitchell v. Clark, 110 U.S. 633, 4 Sup. Ct. 170, 28 L. ed. 279 (1884). Where judicial review is sought of the laws passed by Congress to further the war effort, there is a restraint on the power under the 5th Amendment but this is only about like the restraint on state police powers imposed by the 14th Amendment and the motives of Congress in passing the statute are not subject to review nor is the wisdom of the legislation (Hamilton v. Ky Distilleries & Warehouse Co., 251 U.S. 146, 50 Sup. Ct. 106, 64 L. ed. 94 [1919]). Thus while there is restraint in theory, actual decision of invalidity is almost non-existent. (For a general discussion of the War powers, see (1939) 8 Geo. Wash. L. Rev. 157) Also, although these statutes generally place authority in the hands of the President, he might pass it on to his executive departments with the express declaration, and it is equally valid when exercised by them. (Russell Motor Co. v. U.S., 261 U.S. 514, 43 Sup. Ct. 428, 67 L. ed. 778 [1922]).


13While the "exculpatory provision" is incorporated practically verbatim in Sec. 944.13 of the WPB Priorities Regulation No. 1, the agency believes that the interpretation of statutory words is exclusively a matter for the courts and Sec. 944.13 was included in WPB Priorities Regulation No. 1 only as a matter of information. The orders themselves fall into the following classes according to their method of achieving allocation of the materials and facilities of which there is a critical shortage: (1) Orders assigning preference
in special cases will the federal district courts have jurisdiction over suits involving the "exculpatory provision."" The Supreme Court may review the case by certiorari after final judgment by the state court. In applying this statutory rule and the above discussed legal principles to the countless individual cases of contract losses, the following questions will most frequently arise:

(1) What Degree of Frustration is Necessary to Excuse Default? Extreme hardship such as a sharp increase in the cost of performance by reason of war or increased difficulty of performance, is no excuse. Unless the lease expressly limited the usage of the premises or machine to the prohibited or substantially restricted purpose, the lessee remains liable. Where a lease does not restrict the use of the premises, the "default" may be said to result at least as much from the failure of the dealer to utilize his premises for a new purpose. The general rule must be that where the curtailment operates to leave so unsubstantial a quantity of merchandise for resale that the beneficial use of the premises has been virtually destroyed, the tenant is not liable for future rent. The "exculpatory provision" may be said to stretch the common law rule so as to cover the former peripheral cases. Neither should a party be excused from default on a long term lease where, only for the time being, the use is restricted and unprofitable. In the past it may have been profitable and later on may again be profitable so that the tenant should on principle not be relieved merely because the premises have temporarily become useless to him.

On the jurisdiction of U.S. Courts, see Sec. 24 of Judicial Code, 28 USCA Sec. 41; Sec. 28 of Judicial Code, 28 USCA 71; Tenn. v. Union & Planters' Bank, 152 U.S. 454 (1894); Grand River Dam Authority v. Ganig, 29 F. Supp. 316 (D.C. Okla., 1939).
(2) When is Inability to Secure Materials a Valid Defense? The priority technique applied to the distribution of supplies results in a large number of sellers and contractors, whose undertakings did not justify priority assistance, finding themselves unable to secure materials or goods. Absence of illegality may not defeat the defense of impossibility in other situations such as in the destruction of specific goods. Under the wording of the "exculpatory provision," the seller or contractor, who is unable to secure supplies because of the priorities or allocation program, must show that default in performance is ascribed to "compliance with some regulation or order." When, as sometimes happens, the priority regulation by its terms forbids purchase of the needed material save on license not obtainable by the defendant, a resulting breach of contract is clearly absolved by the statute. With allocation orders directing suppliers to distribute in certain channels, some difficulty in applying the exculpatory provision to save the non-preferred defendant might seem to arise. Nevertheless, the language is broad enough to protect this type of case. Generally, no problem of causation is presented in any case where all of the material or goods is entirely allocated to war or essential civilian production or exhausted by preference rating. If there is, in fact, something available for non-essential use, however, and the defendant loses out because of lack of diligence or because he

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is not an old customer of the supplier, a somewhat troublesome question is presented. In the former situation denial or relief would seem proper. The injured party should ascertain whether the defaulted party may not complete the contract while still complying with the regulation. All steps permitting completion of the contract prescribed by the applicable regulations should be exhausted. Failure to exhaust all remedies would constitute a "contributing fault."16 The defaulting party must not, of course, be required to go to a "black market," for example, to obtain material to complete his contract.

(3) When may Partial or Substituted Performance be Required? War measures interfering with performance of private contracts may prevent complete literal performance but permit a partial or substitute performance.17 Thus a manufacturer may at the time the prohibition order against further production becomes effective, have on hand enough goods to fill half of his outstanding contracts. Likewise, on a construction project the specified material may be unobtainable but a reasonably adequate substitute may be available. With respect to sales contracts, it is the duty of the seller to deliver as much as possible and prorate the supply when there are several outstanding contracts. With respect to substitution of material it would seem the same considerations should apply if the substitution will not impose a greater burden on the contractor, the contractee should be entitled to insist upon it.

16 A considerable number of cases support the proposition that the defendant cannot claim the defense of impossibility unless he has acted zealously. See, for examples, Cheatham v. Wheeling & L.E. Ry. Co., 37 F. (2d) 593 (S.D.N.Y. 1930), Thompson & S. Co. v. Evans, Colemand & Evans, 100 Wash. 277, 170 Pac. 578 (1918), Ingram Day Lumber Co. v. Kola Lumber Co., 122 Miss. 632, 84 So. 693 (1920), Mertens v. Home Freeholds Co. (1921) 2 K.B. 526. Historically, the principle of "impossibility of performance" was found inapplicable in these cases where performance in the technical sense was legally possible but a law exercised such restriction and control as to deprive a promisor of his beneficial use of the contract by "frustrating" a substantial quantity of the performance under the contract for which he had bargained.

17 On the duty to give partial performance when more is not possible, see 6 Williston, Contracts (rev. ed. 1938) No. 1956; Restatement, Contracts (1932) No. 463, Illus. 1, Uniform Sales Act No. 8 (2) (in case of partial destruction the buyer may enforce the contract to the extent possible) For a collection of cases on the duty to prorate delivery where full performance is excused, see note (1927) 51 A.L.R. 990, 992.
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(4) When Must a Contract be Suspended Instead of Cancelled? The type of interference to a contract may suggest that both parties should agree to suspend operation for the present. In cases of governmental interference with charter parties, contracts for sales of unspecified goods and construction contracts, in all of which performance is intended to take place over a period of time, the possibility of suspension rather than dissolution is presented. The formula by which the issue is resolved is that if the prevention as of such duration that performance thereafter would be substantially different from that contemplated under the contract then the impossibility effects a dissolution thereof and the mordinate delay presumptively so alters the character of the undertaking. When the restrictive measure contains a specified expiration date, as is true of some priority regulations, that presents a special problem. Considerations relevant to solution of the suspension-dissolution issue in such cases are the length of time specified for the prevention, the likelihood that the regulation will be extended, the nature of the contract and the probable effectiveness of price control and other governmental measures in stabilizing the cost of performance over the period involved.

(5) When May a Default Be Excused Under Contracts Drawn By Parties Who Contemplated the War? With respect to a contract entered into when both parties had a real appreciation of the possible interposition of performance defeating war

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measures, there are several. American decisions, some ordinary impossibility cases and some war-related where the view has been taken that if the performance-defeating contingency is foresee-able, failure of the seller or contractor to put an exculpatory clause in the contract is fatal, for the defense of impossibility is not available under such circumstances. Therefore, the legal issue in this situation is whether the contingency of cessation of supply through pre-emption by preferred buyers was a commercial risk undertaken in the contract. However, the “exculpatory provision” is not limited to contracts entered into before the war and by its terms it is applicable in any case where default results from compliance with a regulation or order. Moreover, the purpose of the statute, stimulation of war production by easing the pressure on completion of non-essential contracts, requires its application without regard to whether the contracting parties could foresee the course of the war production program. The provision applies to both interstate and intrastate transactions.

It would seem that a provision in any contract in which the party promised to pay damages should he be forced to default due to some governmental regulation would be illegal and such provision would be no protection to the other party. All provisions in contracts dealing with cancellation charges are rendered unenforceable by the statute whether the contract was signed before or after the statute enactment. However, the “exculpatory provision” does not prevent the parties from settling a contract default according to whatever terms are mutually agreeable to the parties. Parties to such defaulted contracts have such questions to settle as the storage charges for the prohibited material, or interest at the bank for financing the purchase or production of the new restricted material. Certainly a manufacturer may recover the reasonable value of the parts

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20 For cases on Agreements in violation of statute, see 12 American Jurisprudence 158.
shipped and accepted by his customer or the return of these parts.

Where the rules stated above provide no assistance in the settlement of a particular financial loss, consideration should be given to (1) provisions in the governmental regulations permitting appeals for granting exceptions to orders in undue hardship cases, (2) provisions in the governmental regulations suggesting methods to minimize the losses. The governmental regulations were drawn with the purpose of lessening as much as possible in the face of the pressing national emergency the number of contract defaults. In many cases, the various orders exempt from the restrictions material already partly assembled or on hand or in transit. Many orders made the restrictions gradually tighter, thus allowing time for many contracts to be completed.

Parties to future contracts may protect themselves against defaults resulting from compliance with new orders or modifications of existing ones by (1) including provisions in their contracts that will clearly provide what the parties shall do in the event some future order prevents manufacture or delivery of the contracted items or performance of some promised service, such as specifying expressly in the contract the duties of parties to complete performance under a contract where an order or regulation makes the promised course of performance impossible. (2) Including a provision for temporarily suspending performance under the contract where the terms are in conflict with an order or regulation, but permitting written notice of cancellation by either party at any time during the existence of the conflict. (3) Carefully specifying in rental and service contracts the precise "object" of the contract and the degree of frustration which will permit cancellation.
PART TWO

With a great heritage behind him, each lawyer has a special responsibility in winning the War and the Peace. He cannot do fairness to this responsibility by simply working on draft boards or helping with a soldier's legal problems. Also with current totalitarian trends, the social need for lawyers has been questioned and they are even charged with obstructing social progress by always representing the vested interests or status quo. Basically, as long as an individual has certain liberties or until the ideal of human brotherhood is reached, just so long will lawyers be needed to protect the individual in his relations with other individuals and with government.21 While the totalitarian state deprives the individual of all liberties and subjects him completely to state control to the end that all its members may have a 'higher level of prosperity, we, in the United States, believe that the same end of higher prosperity for all, as well as an even more important end of spiritual attainment, may be reached by preserving certain individual liberties. To the end that the lawyer is the "Guardian" of these liberties, his services are most important.

Most of these liberties spring from the two principles that men are equal and that men are free (equality of all men and freedom of enterprise), which principles must be constantly redefined and reconciled by the lawyers under the changing conditions of man. The lawyer doctor the man in his social, political and economic relations with his fellowman. The totalitarian state makes the mistake of supposing the constant existence in the hearts of all its members of the Golden Rule with the consequent corruption of the administrators, to the disaster of others. We believe that the preservation of these individual liberties is (1) the only safeguard against the corruption of the governmental administrators, (2) the best incentive toward material progress and consequent higher living standards for all, (3) the best

21 Are Lawyers Performing Services Essential to the Community or for the War Effort? Christopher B. Garnett, Mississippi Law Journal, March 1943, p. 193; See Frey, The Lawyer and Governmental Economic Controls (1943) 15 New York State Bar Assoc. Bulletin 49, for discussion of the lawyer's important wartime function of explaining to clients the purpose of the economic controls and advising on the efficient operation under the controls.
way of permitting the individual to achieve and retain a high Goodwill toward his fellowmen by leaving him with freedom of action to make his own decisions. Thus, the lawyer should conceive of himself as operating as a leader in the forward march of civilization toward the ideal of perfect justice and perfect individual freedom. It is significant that among many primitive communities, the earliest lawyers were priests. A lawyer today who truly comprehends his position in the community should conceive of himself as a priest, a Priest in the Temple of Justice. Following are certain problems which urgently call him for the vigorous but careful exercise of his sacerdotal functions.

The Problems of Reconversion

The first major problem that faces us under this heading is how to handle at the end of the war the sudden cancellation of large blocks of contracts, the effect of which will reach into every community and into every segment of industry and which will call for rapid and fair settlement in order to save the waste of millions of dollars and measureless human energies (as proved by the last war) that should be spent on the job of converting to peacetime production and of winning the Peace.

While efforts are being made to adopt uniform cancellation clauses in the various contracts, there is still a conglomeration of different clauses. Under common law when a contract is cancelled, the contractor may recover the entire contract price less the amount of cost saved to him by not being required to complete the contract. Because this principle is more liberal in respect to profit than the government is willing to permit and because a determination of the profits by court procedure or by arbitration always involves delay and uncertainty, the parties have usually preferred writing into the contract some sort of

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22 On contract terminations, see generally article by Stanley Teele in May 27, 1943 issue of the Journal of Commerce and Commercial, New York; Reports on the drafts of uniform clause by Procurement Policy Division of WPB (article in Journal of Commerce July 25, 1943) The proposed drafts permit some expectant profits, but disallowable is any cost item for reconversion, (article on page 1 of the Wall Street Journal Aug. 7, 1943 by Kenneth Kramer). Already there have been thousands of contracts terminated as a result of cutbacks in war production and for example, thirteen hundred cancelled army orders remain unsettled. However, these interim contract cancellations do not present a serious problem because currently there are other war contracts to be given to these contractors.
an arrangement which gives more certainty. The situation also exists that the prime contractors have agreements with the subcontractors which do not contain effective cancellation clauses. Legally, therefore, it is possible for such a subcontractor to obtain judgment against the prime contractor by reason of his liability for the termination of the subcontract in an amount exceeding that which the contracting officer for the government will approve for reimbursement to the prime contractor.

As regards the government's power to cancel contracts, legislation has granted the President the power to authorize government departments to make contracts, amendments or modifications thereof, and to make advance, progress and other payments thereon without regard to the legal restrictions which usually surround the making, performance, amendment or modifications of government contracts. Thus the act expressly conferred authority upon the President to empower governmental agencies to enter into modifications or amendments of past or future contracts. Of course, the principles controlling the validity and construction of, and the settlement of disputes arising under, agreements between private parties are generally applicable to public contracts, except, that the government

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**Army authorized to negotiate contracts.** The act of July 2, 1940, authorizing the Secretary of War to negotiate defense contracts. Authority to terminate contracts by supplemental agreement—Under the First War Powers Act of 1941 and Executive Order No. 9001, issued pursuant thereto, "the Secretary of War may, where it has been administratively determined that it will facilitate the prosecution of the war, terminate contracts for the convenience of the Government by entering into supplemental agreements providing for negotiated lump sum settlements * * * whether or not such contracts contain clauses authorizing termination by the government and providing a method of settlement in the event the contract is so terminated." See, 1 Bulletin of the Judge Advocate General of the Army 304; **Navy Authorized to negotiate defense contracts.** Section 2(a) of the National Defense Act (Public No. 671) of June 28, 1940 as amended by the Second War Powers Act, 1942 (S. 2,208, 3/26/42) authorized the Secretary of the Navy to negotiate defense contracts. By its own terms, the first twelve sections of this act expired on June 30, 1942. No extension of this section was necessary since it is superseded by the First War Powers Act. The text of Sec. 2(a) is as follows: **Section 2(a),** That whenever deemed by the President of the United States to be in the best interests of the National Defense during the national emergency declared by the President to exist on Sept. 8, 1939, the Secretary of the Navy is hereby authorized to negotiate contracts for the acquisition, construction, repair or alteration of complete naval vessels or aircraft or any portion thereof, including plans, spare parts and equipment thereof, with or without advertising or competitive bidding upon determination that the price is fair and reasonable.
may be sued only with its consent, which may be withdrawn at any time.\textsuperscript{24} The continued existence of that consent, as expressed in the Judicial Code, may be assumed. It does not, however, include consent to enter into an arbitration proceeding. In view of the above, the lawyer should study the following specific problems: (1) Legislation to shorten and unify terminating negotiations with protection to subcontractors, (2) Measures for liquidating losses of employees of war contractors such as loss of expected wages if job were completed and expenses in preparing to take jobs in the plant, and for which measures there is ample legal authority;\textsuperscript{25} (3) The advantages of including arbitration clauses in contracts, which clauses are already being used in an increasing number of cases on the basis that court procedure involves too much delay;\textsuperscript{26} (4) Establishment of an impartial tribunal and procedure for simultaneous settlement at one time of all contracts held by a company, (5) Simplification of price renegotiation procedures so as not to delay termination of contracts.\textsuperscript{27}

\textsuperscript{24}Lynch v. U.S., 292 U.S. 571 (1934)

\textsuperscript{25}There is ample legal authority to support the inclusion of an allowance of this kind in any termination agreement. The decisions of the United States Supreme Court on railroad consolidations and abandonments have held such allowances to be in the public interest and to promote efficiency of railroad operations.

\textsuperscript{26}It will be remembered that after the last World War the courts were long clogged by suits arising from cancelled contracts. Millions of dollars were lost in long drawn out litigation in the last war. During 1940 the panel of arbitrators of the American Arbitration Association was increased to meet the defense emergency and to make sure that defense disagreements are settled quickly without holding up essential production.

\textsuperscript{27}Sixth Supplemental National Defense Appropriation Act (re-negotiation of war Contracts) 56 Stat. 245, as amended, 56 Stat. 482, 41 USCA note prec. Sec. 1 (Supp. 1942). The present Act permitting termination of contract is largely patterned after two similar statutes passed during and after the last war, the Urgent Deficiencies Appropriations Act of June 15, 1917, 40 Stat. 182, and the Dent Act of March 2, 1919, 40 Stat. 1272, except in one important respect. While the early statutes expressly prohibited any consideration of prospective profits in compensating for the cancelled portions of war contracts, no such limitations exist presently. In fact, the Army Procurement Regulations permit the inclusion of profits not realized for the purpose of adjusting the contractor's account. We should all study the proposed uniform cancellation clause because its effect will be so widespread. The procedure for determining profits will be a short period to allow a negotiated settlement and then, if no settlement is reached, a percentage profit formula. The clause provides for payment of full price of all work completed and an adjusted price for materials in process and inventory of raw materials.
This problem is basically the same as the one discussed in Part One, namely, to cut short the crippling tardiness with which contract amputations caused by war are settled. Their importance now is that there is a direct relation between settling these contracts and increasing munitions production. Later in post-war conversion, business firms will be saved much physical and financial stress if these claims are rapidly settled. When production programs are torn out by the roots, firms cannot easily swing into other endeavors without quick payment for the abandoned job in order to meet their financial obligations and to obtain further credit.

The second major problem of reconversion is how to have the government liquidate the 60 billion dollars of materials and over 47 thousand square miles of land that it is estimated will be in its hands at the close of the war—a fifth of the total private investment in American factories and mines. The above mentioned termination clauses also provide for the payment and turning over to the government of all the work completed in process and in inventory. War contracts may be leveled off for industry in such a manner after the war that surplus stocks will not be extensive and might be gradually absorbed into the peacetime plan of distribution. Several disposal methods have been suggested (1) outright sale, (2) short term leases pending sale, (3) auction to highest bidder. There is a proposal that some of the plants be moved to foreign countries which have been wrecked by war. It is generally agreed that the government should not retain its plants and compete with private industry, but we must also see that the disposition of the plants does not result in great private monopolies. Neither should there be any partnership with

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28 For reconversion studies generally, see article in Wall Street Journal, July 19, 1943 (p. 4) Alfred Flynn.
29 In connection with government disposal problem, see generally article in Journal of Commerce, July 8 (proposal legislation). For special disposal of aircraft after war, see article in Journal of Commerce, June 28, page 1. Congress expects to enact legislation providing a definite authority for a board to dispose of the war holdings with its functions and responsibilities clearly outlined for immediate action upon the close of the war. Most recent and comprehensive of such legislative measures is H. R. 3140 just introduced by Representative Carter Manasco (Dem. Ala.) which would set up a surplus lands and war plants board. Land speculation by big syndicates buying government holdings after war may be prevented by preference to original owners or law providing for sale in small tracts.
the government in running the plants. Neither must there be rumous speculation by big syndicates buying government holdings.

The disposal of the government surplus war holdings ties in with the third major problem of reconversion, namely, how to use governmental economic controls in the transition to peace without hindering private initiative. With the scarcity of certain major peacetime materials at the close of the war there will probably be 'priorities' of peacetime goods. An orderly demobilization of manpower and industry is necessary, for otherwise an abrupt transition may bring industrial chaos. Also with the scarcity of goods the sudden end of price control after the war may lead to inflation and dissipation of wartime savings.

While logically it appears to be the responsibility of government to effect a satisfactory transition from war to peace economy, we should study the legality of certain governmental controls. For example, there are presently two types of war and emergency powers which the President has at his disposal to effect reconstruction work. One is the wartime and emergency power inherent in his office as President and as Commander-in-Chief, invoked when the President declared an Unlimited National Emergency on May 27, 1941. The second stems from legislation which Congress has given the President.

See Frey, Governmental Economic Controls in War and Peace (1943) 15 Mississippi Law Journal 199 for an analysis of the problem of preserving a free competitive system in war and peace; Government Business Tomorrow (1943) Donald Richburg; Government Business and Values (1943) Beardley Ruml. The government agencies are studying the problem of reconversion of industry. Certain general conclusions are indicated. Reconversion will begin with the capital goods industries and be aimed at supplying deficiencies in capital goods. There is a natural sequence in the order of industrial operations and a dependency of one industry upon another, and these factors may have to be recognized if there is a scarcity of and maldistribution of essential materials at the close of the war. Reliance upon private initiative has already been undertaken in many cases, as for example, Order M-219, which provides authority for the adjustment of production schedules of individual manufacturers of critical manufactured items and a switching of orders from one manufacturer to another. The appointment of Production Consultants is expected to be a great assistance in relieving bottlenecks of these items and is regarded as a very real trial of the ability of industry to work out the critical shortage problems within itself with a minimum of direction from the government. See also, Harvard Business Review, Interim Report on CMP, John Martin, July 1943.
to enable him to prosecute the war effectively. These powers went into effect when the President declared an Unlimited National Emergency and when Congress declared war upon the Axis. By its own terms, the legislation will expire six months after the close of the war, or at an earlier date if so ordered by concurrent resolution of Congress or by Presidential determination.31 While this appears to set a definite time limit for the expiration of the Act, it must be remembered that a technical state of war may continue for a considerable time after the conclusion of actual hostilities. Under such circumstances, the President could continue to exercise his “war powers” in the post-war reconstruction period. On the other hand, Congress may declare the Act invalid at any time before the end of the war. Furthermore, Congress may soon enact special legislation dealing with post-war reconstruction.

Government agencies are facing post-war reconversion problems now. To effect a gradual transition, certain of the above mentioned war contracts may not be cancelled but utilized in recovery and reconstruction here and abroad. Our fighting armies will then have become armies of occupation and supplies must be sent to them. However, we should see that partial continuation of war contracts in one business should not be made in such a way as to make conversion impossible.

Lawyers should insist that this task of reconversion be essentially in the spirit of reliance upon private initiative. In this connection there is also a natural tendency among government bureaus to display a good deal of inertia toward cutting down or withdrawing restrictions upon and interference with business, after the need for them has passed. To assure the restoration of a free, competitive economy after the war, control agencies should be just as ready to withdraw regulations

31 First War Powers Act (12/18/41) PL 354, 77th Cong., Chap. 593, 1st Session, Tit. I, Coordination of Executive Bureaus. Sec. 401 provides that the Act shall remain in force during the continuance of the present war and for six months after the termination or until such earlier time. Second War Powers Act (3/27/42) PL 507, 77th Cong., Chap. 199, 2d Session, Title III, amended Sec. 2(a) of act of June 28, 1940 (54 Stat. 676 as amended by act of May 31, 1941 (PL 89, 77th Congress) Sec. 1501.) These amendments shall remain in force only until Dec. 31, 1944, or until such earlier time as the Congress by concurrent resolution or the President may designate.
Many of the government regulations provide aids for re-conversion and should be studied. No current government controls prevent firms from planning their post-war needs now, although they understand that detailed engineering work and production can not begin. For example, many firms feel that by placing orders now they will at least get a high place on the waiting lists of the producers of the items they need. Under existing WPB orders and regulations there is no prohibition whatsoever against the placing and acceptance of orders for post-war delivery.

A fourth major problem is whether direct financial assistance should be made by the government to business firms not only during the transition period but during the war itself.\footnote{Business assistance; effect of price adjustment policies, see article in Journal of Commerce, June 30, 1943. Example of business relief by legislation in this war is PL 549, 77th Cong., Chap. 301—2d Sess. (for relief of dealers in certain national articles).} One phase of certain public effort requiring such assistance is the legislation creating the Smaller War Plants Corporation which is to utilize the facilities of all smaller industrial plants for war purposes and to preserve them intact for the period of reconversion. Also an argument is made in connection with the above discussion of contracts defaults where it was shown how the legal principle of "frustration of object" is being extended to cases where the value of the thing bargained for is very substantially depreciated by war measures. Because there is, of course, a distinction between performance prevention, (embraced by the "impossibility principle") and performance depreciation. To expand the latter doctrine may present a substantial threat to commercial contracts as a device for legitimate loss-shifting and open up delaying issues on the real cause of the depreciation and whether the performance is substantially reduced. The best solution of depreciation cases may lie in spreading the loss over society in the hardest type of cases via government relief.

Other suggested solutions are (1) to aid business by governmental loans, as in the last war. This has been done to some small extent. (2) Proposed legislation on the contract
termination clauses may provide some measures of relief to firms which are suddenly deprived of their government source of income. (3) A moratorium on the collection of termination claims, for example, to protect small subcontractors from claims of their suppliers. (4) The government should undertake to insure payments on subcontracts to protect subcontractors from possible insolvency of contractors or other firms against whom they have claims.33

The Problems of a New Economy of Peace

Private industry and governmental planners are cooperatively planning for an economic set-up after the War drastically different from that which has prevailed in the past, a New Economy of Peace. The objective is that our free enterprise system or “Capitalistic System” must be made to operate for the security and happiness of all. To obtain this end, there must be full employment provided by private industry which shall be producing goods at prices available to all. Full employment will produce purchasing power sufficient to buy the mass of goods being produced and to give to firms sufficient profits to turn back to their investors or to more production. Never again must there be the destruction of goods or the restriction of production in order to increase prices.

With full employment by private business firms as the obvious cornerstone of this New Economy the importance is clear of the previously discussed problems which are to see that these firms are not crippled financially or otherwise so that they may quickly build up their peacetime production in order to re-employ the 30 million returning soldiers and displaced war workers. It is estimated that gainful employment for about 56 million will be necessary in the post-bellum period. This level of employment will produce a gross national product.

at current prices of 142 billion dollars. This is a goal higher by 40% than the maximum ever had in a peacetime year. To help purchase this national product if the war should end in 1944, there will be accumulated savings of 100 billion dollars with probably 60 billion available for spending.

For the plans to work, the private enterprise system must be allowed to expand and lawyers must see that no laws prevent such expansion. Perhaps out of the test tubes of science, the major expansions of the immediate future are due. The situation is grave and failure would cause intense disillusionment with consequent resorting to a regimental state and stifling of individual initiative.\footnote{See Frey, "Private Industry and the Lawyer in War and Post War" (1943) 29 American Bar Assn. Journal 187 for a discussion and collection of cases of Pre-War Economic Controls such as restrictions on monopolies and the enforcement of these controls. The article also discusses the wartime financial controls such as the renegotiation of Government Contract Law. For a much more detailed discussion and a projection of pre-war and wartime economic controls into the future, see Frey, "Governmental Controls of Private Industry During and After the War" (1943) The New York Law Journal, Vol. 109, Nos. 137-141. The New Economy of Peace provides for (1) maximum utilization, with low unit costs and low prices; (2) full employment. We will prevent government-financed facilities from contributing to further concentration of wealth and power. The corporations which already own dozens of plants must not acquire the largest proportion of the new facilities after the war. With government protection, huge corporations will not naturally revert to policies of restricting production and charging higher prices per unit. For only if mass production techniques are released from restrictive policies can full employment be achieved. The Defense Plant Corp. now owns about 1,300 of the most modern industrial plants ever built. It possesses more and better facilities for the production of aluminum, magnesium, and aircraft than does private industry. It owns practically all the synthetic rubber plants and a substantial part of our shipyards.}

In this connection, the following problems call for the lawyer's attention.

The first major problem is how to provide a new creative political leadership for the American people which will resolve the fundamental conflicts between reliance on private enterprise and government control of economic life. There is an unhappy cleavage between a keen interest in a better future and cynicism about all the means of obtaining it. The lawyers must show that a third possibility exists, a judicious and practical mixture of free enterprise and government action that will give a common ground over which the extremists on both sides can go forward together to greater national achieve-
ment. To foster public discussion, to create a background of popular opinions and support for sound measures and final crystallization of public purposes upon sound and constructive objectives, lawyers are commonly called upon to express their opinions. It therefore behooves the lawyer, who by training and experience is accustomed to study both sides of a question and weigh with analytical care the arguments of the enthusiastic, to investigate vigorously the facts which militate against some of the proposals currently voiced in regard to this major problem. Lawyers can show what a full employment policy, if run by a socialized state instead of private industry, would imply in terms of privileges, mobility, free choice of job, and so on. Our people, so far, have not sorted out the cost in terms of restricted choice and a certain amount of direction that a full employment policy may entail. Briefly, we want a planned economy but not planned individuals. Because lawyers have not done this work recently, there has been a drift in democracy towards passive citizenship and the dependence of great masses of people on small active groups in the political parties, in business, in local government, and in the labor unions, who do the governing while the rest are content to play follow-my-leader. Therefore many people are going through life consciously or subconsciously frustrated by the sense of being run by other people in a world that is somehow unaccountable.

To offset this grave drift in our democracy, lawyers must show that our industrial plant shall emerge from this war with a plant capable of producing possibly twice the volume of durable goods which the consumers of America have ever had the

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35 This is the only way out of the present impasse between fascism and socialism. So far, all new 20th Century forms have been totalitarian. The form of 20th Century free society has still to be evolved. This negative and distrustful approach to economic and social institutions is at its most obvious in relation to political parties just because they, the principal weapons in the struggle for a better society, look so inefficient for the purpose. This feeling of separation, of no confidence, of detachment and indifference must be changed by the lawyer. This also constitutes the belief in socially responsible risk-taking for the common good and with the hope of private profit. Two specific undisputed aids to the war program performed by the WPB were: (1) raising sights and goals of war production and getting sufficient orders flowing to private firms in order to persuade them to convert to all out war production; (2) Programming the war production by measuring the available supplies with the most essential demands of the military.
buying power to purchase—even in the most prosperous peacetime year. For the first time in history the industry of the nation is physically equipped to give every family in the country what we know in the United States as a middleclass standard for living. With this vision before us for a new tremendous peacetime production, we cannot fail. Lawyers must help in this objective just as in the past they helped in the building of our great industrial systems. The argument against preserving the capitalistic system is that it produces periodical mass unemployment victimizing innocent people who feel that their lives are being run by irresponsible impersonal forces and interests which hold the substance of power with only a facade of democracy. For example, if our production is not greater than 1940, the result will be a total of more than 19 million unemployed. The argument against a socialized state is well known. It may be best expressed by saying that the difference between Democratic Planning and Totalitarian Planning is the difference between individuals planning for themselves and not for others, planning to pay taxes and not to spend public moneys, planning to use persuasion and not power such as giving satisfaction to customers and employees, all of whom are absolutely free to accept or reject plans.

The second major problem, and one closely related to the first, is the proper function of our American bureaucracy. There is a growing revolt in the United States against the increasing bureaucratic regimentation of all national, industrial, and personal activities. The public conception of government agencies has developed to a point where it constitutes a serious problem and requires a reappraisal of the issues. For example, the war agencies have played an important part in the success of our war production program. The big problem the Axis was counting on to win the war, was that the United States could not coordinate its economic program to a war economy. We had production facilities and manpower but no coordinating factor.

There will have to be a large bureaucracy after the war. On the domestic front, during conversion and afterwards, government may have to take up the slack in unemployment
and provide public work. Also we are going to play a big part, for good or ill, in shaping the futures of a billion people in Asia, and even if we do not do anything more enlightening in Germany than to dismantle her industry, that is going to require the work of a number of government employees. To get anything out of our victory, in terms of stability and enduring relationships, our government is going to have to evolve a policy more intelligent than it has been before and advisory bodies larger than before. When measured against these vistas, the fight to return to lost simplicities makes scant sense. Perhaps the biggest danger, right now, is a deterioration of order or coordination of the policy planning in the home front. We may be losing our true comprehension of the problems as we extend our military power and influence. It should be the role of the lawyer to place the bureaus in their proper role of supplying the facts to the President and to the people through Congress and helping to execute the mandate of Congress as based upon the facts supplied.

A third major problem is the clarification of the language of statutes and regulations that are meant for the reading and the understanding of the common man. This problem is serious and many are suspicious of the involved and "too legalistic" wording of our regulations. It makes common sense that a law that affects the lives of people should be expressed in language so clear that all the people can understand it. This requires much harder work than legislators and lawyers are prone to give to public pronouncements but this is absolutely necessary if we are to march forward as a nation. We can contribute to post-war prosperity by keeping statutes so simple and clear that compliance problems will not require an army of men. The problem, of course, is that in drafting, the lawyers strive to cover all contingencies in as brief a manner as possible, which results in a high degree of compression rendering the language remote from normal form of expression. The basic

\footnote{Of course, many governmental plans call for expenditure of public moneys with no hint given as to the source of the funds. American states and cities have plans for four billion dollars worth of public works to be undertaken after the war as a cushion against unemployment. The program contemplates expenditures on highways, hospitals, schools, recreation facilities, public buildings and sewerage systems. Most of the financing problems are unsolved, most expecting support from the Federal Government.}
problem of simplification is not solely a problem of simplifying the style in which regulations are written, but also of simplifying the substance of the requirements. However, the closer the draftsman comes to basic English, the more likely he is to achieve communication to the laymen.

This problem of clarification of the law, however, goes even deeper. The same problem exists in other fields of endeavor, e.g. the theologians. It is so easy for men of special learning to talk in the jargon of their books and their centuries-old labels. But this should never be permitted with men whose services are to benefit all the people only if they understand them. The failure of present day morality points perhaps to the failure of being able to put into twentieth century terms of urbanism and the machine age the glorious spirit of Goodwill preached to an agrarian civilization in the first century. Lawyers, along with other men, should attempt to resolve this problem.

The Problems of One World of Law and Order

To achieve some success now in solving the above discussed problems will have tremendous effect. Knowledge of present accomplishment in this direction by our armed forces (which in World War II are reported to be not a "singing Army") will be a weapon of inconceivable force in their hands with consequent shortening of the war. Also with similar effect, plans for winning the globular peace should be worked upon by lawyers.87 No lawyer should feel any longer that the confines of his services are within the borders of his own country. In the days of "global peace" to come, the problems of any single nation will depend as never before in history on the way international problems have been met.

The first problem is clear, namely, how immediately at

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the end of this war there may exist a Master Plan for the aftermath established in advance in order to prevent anarchy, regional wars, starvation and bloodshed. This will be the hour of supreme crisis. The victors must act with lightning speed, in the very hour of triumph, before the sterility and inertia, the exhaustion and fatalism typical of times immediately following major wars, have again taken possession of the minds of the nation. Here is a challenge for lawyers and all men of great faith who know that strength and safety do not come primarily from material things but from things of the spirit, that true greatness is incompatible with narrow selfishness, and that power such as our nation has cannot be divorced from broad responsibility without consequent internal decay and eventual renewal of wars.

Secondly, in connection with their Master Plan, the plan of a world economy must be evolved. Trade between free and controlled economies after the war will bring obligations not only for the economist but for the lawyer. How is a code of selling practice to be established between controlled, free and mixed economies? What are to be its norms? What are to be the legal standards of that free access to raw materials and to markets placed in the Atlantic charter? Here lies a wide stretch of something like virgin territory for collaboration between lawyers and economists. A mobilized professional opinion might produce beneficient results in a matter which will assume heightened importance in post-war economic life. Lawyers, through their bar associations, should contact lawyer associations in other countries. They should study comparative law, which should result in more uniformity of commercial legislation and further diffusion of knowledge of the laws. There seems to be a special opportunity for lawyers who are apt linguists. There are, of course, many other problems, a discussion of which space does not permit, such as (1) International

[38] Conditions of Peace, Edward Hallet Carr (1942), Research & Post War Planning, Bibliography, Parts IV, V, VI, by United Nations Information Office, 610 Fifth Ave., N.Y.

cartels, to which our government would agree but which might constitute a spearhead in extending government intervention and curtailing the role of private enterprise, (2) The general principle of conducting international trade as a means of mutual aid and letting competition remain but reducing it to a healthy emulation. It is important, for example, to Britain that American industry be not less regulated than her own. (3) European countries are experienced in the use of cartels to promote export. If our manufacturers are permitted to operate contrary to the principles discussed above and have higher unit costs resulting from use of only part of their capacity, they will be undersold by foreign countries which have fewer resources but lower levels of living and labor costs. (4) The rehabilitation and reconstruction of Europe presents a tremendous legal problem, which for every humanitarian reason should engage our attention. Relief to these countries by outright gift and relief by sale or exchange is one problem, for a country’s credit for future reconstruction loans might be impaired by its inability to repay relief advances. Many observers say that property rights will have vanished as a result of Nazi control of legal and financial machinery, that currencies will have lost their value because of the looting of gold reserves, and trade will have been reduced to barter. Some add that roads and rolling stock will have been destroyed and even international boundaries will have grown vague.40

The third major problem is the question of a just and durable peace. It seems basic that there must be a fundamental framework of government to which the people of each constituent nation will voluntarily surrender such portion of their nation’s sovereignty as is essential to an international order. Naturally men will differ widely as to the structure, the machinery and the powers of a supernational government. There should not, however, be much difference of view as to certain fundamental requirements. Some, of course, may say that the nations are not ready to be tied together in a complicated governmental organiza-

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40 The Draft Agreement of United Nations Relief and Rehabilitation Administration is the first blueprint for a piece of United Nations machinery. It may become the model. It reconciles the rights and obligations of smaller nations with those of the larger nations; also see article in N. Y. Times, May 5, 1943 on Post-War Relief in Agreement Form.
tion wholly new and untried. Here the lawyer is needed to study the development in the field of international organization, and to reveal the full inter-relations between international agencies and national institutions. The consequence of constructing collective machinery without taking adequate account of its repercussions on the laws and conventions of the various states concerned is a subject on which the history of the League of Nations is eloquent.

Some will say that the peoples of the democracies, and especially of the United States, will never consent to surrender any portion of their national sovereignty. If this objection be valid or cannot be changed, that ends the discussion. We may as well then throw up our hands and let the world roll on into chaos. The lawyer must see the need and place the magnificent end above the divisions over the less important methods or details, as did those earlier lawyers who erected the framework of our government and, as they likewise did, convince the people that even an imperfect structure of law and peace is preferable to chaos or armed truce.

To work toward the solutions of these problems outlined above, is the great service the lawyer of our time can render. This is the service perhaps he alone can accomplish. Let us have again the spirit of the lawyers of another day who called our people, first to arms that they might have liberty and independence, and then to a way of Peace.

"The answer is that a very simple Bill of Rights—a power to raise and support armies, a commerce power analogous to that exercised in the United States by the Congress, a power to create an international medium of exchange, and a power to create a federal postal system, would be essential, and little, if anything, more should initially be attempted; perhaps not so much."