

The Lawyer and the War

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these little nations will have their representatives at the peace table and their rights must be determined at the peace conference, not only determined, but steps taken to protect them. All of them apparently have adopted democracy as the panacea for all their ills. The countries associated with the United States in this world war, Great Britain, France and Italy, are exhausted by the four years' contest and will have all that they can do to rehabilitate themselves. The United States is the only large nation that has come nowhere near exhaustion, with its great resources practically unimpaired and its manpower, not only virile, but practically in full force. Hence, the task of teaching all these nations, large and small, the ways of democracy, rests upon us alone, and if we should fail, then democracy again will become a dream. While the war against autocratic militarism is over, the contest to make democracy safe and workable has but just begun.

THE LAWYER AND THE WAR*

The nineteen months which have passed since America drew her sword and joined the hosts of freedom have been months of intense effort and of no small achievement, prophetic of a greater future. A great urge has come upon us, marking the swelling tide of America's purpose. The farmer has bent with renewed energy above his furrow; the miner has redoubled the blows of his pick; the shipwright has made the air tremble with the sound of his hammer, and the inventor has given us machine guns for our army, depth bombs and detectors for our navy, tractors for our artillery and engines for our airplanes. Even the artist and the painter have put their peaceful talents to war-like use and have created a new art of disguise for men on land and ships at sea. Whether it has been of men or money, of labor or loyalty, of service or sacrifice, no draft has been made that has not been fully honored. "The heart of the citizen is a perennial spring of energy to the state," and the hearts of Americans are in this war.

I need not argue that in this turmoil of action and achievement the lawyer has fully played his part. To him, as to others, has come the call to arms, and he has gone freely and willingly,

* Revision of an address delivered by Solicitor General John W. Davis, before the Kentucky Bar Association, July 2, 1918.

notwithstanding the fact, as stated by the Attorney General of Great Britain upon his recent visit to this country, that

“When a lawyer enlists he leaves everything. His is a single-handed business; in other words, no member of the bar has any practice which lasts for one moment after he, as an individual, disappears from the scene of his efforts. If a member of the bar goes, as thousands have gone, his business disappears from the very day he takes up his hat, on the day he leaves his chambers, and nobody can keep it alive for him. Of all the young lawyers who have gone to war there is not one who left anything behind except the hope that his colleagues would treasure his memory and his countrymen would attempt to make good, as far as in their power, the sacrifices he had made in behalf of the common cause. If you take all the businesses of the world, and all the professions, you will not find any profession that has made more gladly such bitter sacrifices for this war than the profession to which you and I belong.”

Much of the labor involved in the administration of the draft law has fallen upon the lawyer, and he has borne his share of those other activities and duties within reach of the home-keeping civilian. But undeniably there exists among those members of the bar to whom military service is impossible a widespread desire to turn their purely professional talents to public use, and there is no department at Washington whose files are not crowded with sincere and patriotic tenders of such service.

It is to those of this temper that I wish to suggest a study of the legal weapons which have been forged for the country at this time and the additions to them which the future may demand; for, after all, the duty of the lawyer, whether in peace or war, is not merely to know the law as it is, with its bearing upon the rights of his client, but whether in the courtroom, the Legislature or the forum of public opinion, to assist in framing the law as it ought to be; always remembering, however, that those rules of conduct which may evolve in time of peace from leisurely debate or by the slow process of judicial accretion must emerge in haste under the stress of war full-armed in statutory vigor.

In no way are the changed conditions of the times more emphasized than by the long list of Federal statutes whose passage has been witnessed within the year. Even before we assumed the attitude of a belligerent it had become clear that laws which had been adequate under normal circumstances must be supplemented and enlarged to meet unforeseen situations, and with the

coming of war itself increasing drafts upon the reservoir of governmental power became necessary. I put to one side those acts having especially to do with the training of the army and navy and their kindred branches, the great appropriation and revenue bills and the series of measures by which the Government's finances have been so successfully conducted, and instance only such statutes as the "Espionage Act", so called, although it deals also with many other subjects, and its amendments; the "Food and Fuel Control Act"; the "Trading with the Enemy Act"; the "War Risk Insurance Act"; the "Soldiers' and Sailors' Civil Relief Act"; the "Railroad Control and Operation Act"; the act establishing the "War Finance Corporation and Housing Bill"; the "Overman Act", authorizing the President to rearrange and redistribute the executive functions of the Government, and the act "Regulating the Entry and Departure of Persons from the Country".

Nor should the list be closed without mentioning the "Selective Draft Act", of May 18, 1917, which stands in the front rank, and whose author, Maj. Gen. Crowder, is not only a skilled soldier, but an accomplished lawyer as well. It may be said for this statute that it has not only given us an army such as could have been assembled by no other method, but it has done even more. By its equal distribution of the common burden it has unified the country, wiped out discord and disloyalty and roused the courage and earnestness of the people as nothing else could have done. One of the most distinguished Englishmen who has visited us since the war began recently expressed his deliberate opinion that this act, in the promptitude with which it was adopted, the readiness with which it was accepted and the efficiency with which it has been administered, was the greatest single achievement of the entire war. I do not believe this to be the language either of compliment or exaggeration.

I do not wish to attempt a serious survey of the contents of these statutes; nor is it my desire to weary the reader with any detailed discussion of their merits.

Some of them are designed to occupy a permanent place upon the statute books; others, either by their essential character or express terms, are limited to the duration of the war; and still others embody policies experimental in character but whose success or failure will inevitably leave a lasting impress upon the future destiny of the country. Certain characteristics which they present are obvious to even the most casual observer. They

exhibit the Federal Government invading new fields of activity; they make large additions to the functions and powers of the Executive, and they impose material limitations upon the traditional freedom of action of the individual citizen.

Among the unaccustomed characters which the Federal Government has assumed are those of merchant under the Food and Fuel Act; of landlord under the Housing Bill; of money lender through the War Finance Corporation, and through the agency of the Director General of Railroads and the Shipping Board, that of common carrier, both by land and sea. Through the Alien Property Custodian the Government is conducting what is in effect a gigantic trust company of unlimited corporate powers; and by means of its Bureau of War Risk Insurance it has now become the largest underwriter of life insurance in the world.

It is a truism that in time of war the power of the Executive inevitably undergoes an enormous expansion. He is not only the Commander-in-Chief of the army and navy, but he is also charged with the execution of all those statutes which Congress in its discretion deems necessary for the common defense. The early act of July 6, 1798, now Section 4067 of the Revised Statutes, vested in him in his civilian capacity unlimited power over the conduct, the whereabouts and the liberties of resident alien enemies in time of war, but the statutes we are discussing give him in certain respects powers hardly less absolute over the person and property of the citizen and the civil establishment. They authorize him to readjust the civil machinery of the Government, to requisition and confiscate property, to regulate and prohibit commerce, and to control in many ways the conduct of the individual.

Thus he may take possession of any factory or establishment engaged in the manufacture of ships or other war material and operate the same; may place compulsory orders for arms, ammunition or naval supplies and seize and take over any recalcitrant plant refusing to manufacture the kind, quantity or quality desired; may take over to the Government use any ships constructed or in process of construction; may extinguish or requisition existing contracts for the building, purchase or construction of war materials; may requisition foods, feeds, fuels and other supplies necessary to the support of the army or the maintenance of the navy, or any other public use connected with the common defense, as also any factory, packing house, oil pipe line, mine or other plant in which any necessities are or may be produced, prepared or mined. He may require producers of coal

or coke to sell their entire product to the United States; he may, under various statutes, take land necessary for camps, cantonments, aviation stations, shipyards, proving stations, nitrate plants, and the housing of Government employes; and may commandeer distilled spirits, in bond or in stock, as well as fix the alcoholic content of malt liquors.

In the regulation of commerce, both foreign and domestic, powers equally broad have been conferred.

By the fifth section of the food control act a licensing system is authorized in regard to the importation, manufacture, storage, mining or distribution of any necessities, by virtue of which the President is empowered to forbid any unjust, unreasonable, discriminatory, unfair or wasteful storage charge, commission, profit or practice. To this licensing power is subjoined the express authority to fix the price of coal or coke, to name a reasonable guaranteed price on wheat in order to assure its producers a reasonable profit, and to purchase and sell for cash at reasonable prices wheat, flour, meal, beans and potatoes; while transactions upon stock exchanges or boards of trade which tend unduly to affect the price of necessities may be regulated, or in whole or in part prohibited. In like manner, the use of patents and copyrights owned by enemies or their allies may be licensed by the President, and the price of articles produced thereunder and necessary to the successful prosecution of the war may be fixed.

By the so-called priority act of August 10, 1917, he was authorized to direct that such traffic or shipments of commodities as might be essential to the national defense and security should have preference or priority in transportation by any common carrier by railroad, water or otherwise; and was further empowered to employ the armed forces of the United States to prevent any obstruction or retardation by physical force or by intimidation through threats of physical force, or the passage of the mail or of the orderly conduct or movement of interstate or foreign commerce — a clause whose presence on the statute books some twenty-five years ago might have saved no little acrimonious debate. Even these powers, however, are overshadowed by the still greater bulk of the railroad control act, under which the railroads are being operated by the Government, and by virtue of which the President may also “make or order any carrier to make any additions, betterments or road extensions, and to provide terminals, motive power, cars and other equipment necessary

or desirable for war purposes or in the public interest or in connection with the property of any carrier."

Over foreign commerce the power of the executive is made well nigh supreme, for by Title VII. of the Espionage Act, it is provided that "whenever during the present war the President shall find that the public safety shall so require, and shall make proclamation thereof, it shall be unlawful to export from or take out of the United States to any country named in such proclamation any article or articles mentioned in such proclamation, except at such time or times and under such regulations or orders and subject to such limitations and exceptions as the President shall prescribe, until otherwise ordered by the President or by Congress"; while the Trading with the Enemy Act contains a provision in all respects identical as to imports. So also he may regulate or prohibit transactions in foreign exchange and the export of gold or silver coin, bullion or currency, and the transfer of credit in any form between the United States and any foreign country; may cause to be censored any communications by mail, cable, radio or other means of transmission, passing between the United States and any foreign country; and any alien or any citizen not bearing a passport is forbidden to depart from or enter the country otherwise than as the President shall prescribe.

It is unnecessary to say that the broad powers which these acts confer have not been left to perish in dull desuetude. They were entrusted to the hands of one not accustomed to shirk or evade responsibility. In the cheerful compliance with which the public at large has met each new restraint upon its daily life no less than in the promptitude with which the statutes themselves have been passed, I read a tribute more eloquent than any words to the integrity, patriotism, courage, wisdom and prudence of the far-seeing statesman whom Providence in this hour has made President of the United States.

Penal sanctions, of course, attend the statutes which I have so far described, but in addition substantial increments have been added to the criminal laws. The definition of old crimes has been extended and statutes have been adopted for the better punishment of crimes whose possibility we have been compelled to learn from our enemies. Who, for instance, would have thought four years ago that it was necessary in this country to enact laws specifically denouncing the deliberate destruction or injury of a vessel in our ports by its owner or master, or to forbid its being made a resort for conspirators against the law? What ingenuity

could have provided in advance for the crime of tampering with the motive power, or the putting of bombs and explosives aboard a vessel in order to destroy the ship, its crew and passengers, spurlos versenkt? So as to the manufacture and use of fraudulent passports, the destruction of articles intended for export, the counterfeiting of Government seals, the making and circulation of false reports designed to interfere with the military and naval forces of the United States — in all these things it was necessary that we should be enlightened by the gentle exponents of German kultur. This is the parentage of the crimes of sabotage and sedition which have been effectively legislated against; and it is to cut the channel of communication with this fountain of evil that citizens are forbidden to send or take out of the country any letter or other writing or tangible form of communication except in the regular course of the mail, and that papers published in any foreign tongue must make and file under penalty accurate translations of their contents.

With the suggestion that the lawyer in active practice will find much to interest him in the Soldiers' and Sailors' Civil Relief Act, I desist for fear of growing tedious from further effort to state even in meager outlines the cardinal features of this great body of new-born law. It is interesting not only in its variety and scope, but in its exhibition of the vast energy which slumbers in times of peace in our governmental system and awakens when the bugle calls to arms. Those to whom these statutes are alarming by their very novelty will find much comfort in historic parallels. The power to requisition supplies for military use, for instance, has been a concomitant of every war in which the nation has been engaged. Nor is there anything older on the statute books than compulsory military service. It came with the fighting men who settled these shores, and has never been shirked by their successors. So far as I am aware the earliest recorded legislation of the sort this side the water was the act and order for the colony of Providence, adopted in May, 1647, whereby it was ordained that

“All ye inhabitants in each towne shall choose their military officers from among themselves,” and — at stated seasons — “shall openlie in the field be exercised and disciplined by them”; and that

“Every inhabitant of the island above sixteen or under sixty years of age, shall always be provided of a musket, one pound of

powder, twenty bullets and two fadom of match, with sword, rest, bandaleers all completely furnished."

The calling of this majestic force into the field was accomplished in summary fashion, for it was ordered, further, "that in regard of ye many incursions that we are subjected to, and that an alarum for ye giving of notice thereof is necessary when occasion is offered. It is agreed that this form be observed, vidg't: Three muskets distinctly discharged and a herauld appointed to go speedilie through the towns and, crie Alarum! Alarum! and the drum to beate incessantly; upon which all to repair (upon forfeiture as the Town Council shall order) unto the Towne House, there to receive information of the Town Council what is farther to be done."

From that good day to this the country has never doubted nor failed to exercise its power to call upon any and all of its sons to defend it when necessity arose.

In the legislation which accompanied the progress of the Revolution we find in practically all of the States laws requiring licenses for the sale or purchase of food stuffs; authorizing impressment of supplies, and to some extent of labor also, for the use of the army and navy; forbidding forestalling, engrossing and regrating of necessaries; limiting the amount of corn and wheat and other articles of food which the individual might purchase; laying embargoes on the importation and exportation of commodities; and forbidding the distilling of spirits and strong liquors from grain.

In November, 1777, the Continental Congress, the "Government by Petition," besought the several States to pass laws regulating the prices of commodities, in order to check their ruinous rise. The States with practical unanimity complied, fixing prices on everything from cheese to rum, but the result must have been disappointing, for Congress in June of the following year recommended the repeal of the laws which had been passed.

Listen, if you will, to the way in which the General Assembly of Virginia thundered against the profiteer:

"Whereas," they say, "divers persons, devoting themselves to avarice and extortion, and intending to amass riches out of the ruin of their country or treacherously betray it into the hands of its enemies, have industriously bought up and already got in their power so great a proportion of the provisions usually brought to market at this season, that there is little hope of our being able

to lay up such stores thereof as will be requisite for the purpose of the ensuing campaign, unless an embargo be laid upon the exportation thereof," etc.¹

And when, in their judgment, the peril was intense, they gave to the executive in 1781 unlimited power to call forth the forces and resources of the State, and to impress all things which might be needed, declaring:

"Whereas, In this time of public danger, it is necessary to invest the executive with the most ample powers, both for the purpose of strenuous opposition to the enemy, and also to provide for the punctual execution of the laws on which the safety and welfare of the Commonwealth depends. * * *"²

The War of 1812 brought its embargo acts and its law against trading with the enemy; while the present statute under which the President has taken over the railroads of the country is the lineal descendant of the act of January 31, 1862, conferring like powers upon President Lincoln.

But rightly fond as our profession has ever been of precedents, the defense of these various statutes is not to be pitched upon the sole ground of historical analogy. I, for one, heartily agree that the Constitution of the United States is a law for rulers and people equally in war and in peace; and in the vigorous language of an early court, when discussing the Embargo Act of 1807,

"A comparison of the law with the Constitution is the right of the citizen. Those who deny this right, and the duty of the court resulting from it, must regard with strange indifference a precious security to the individual, and have studied to little profit the peculiar genius and structure of our limited Government."³

But it cannot be that our Government under this great charter is lacking in any faculty necessary to the full discharge of the primal duty of self-preservation. Those who assembled to ordain and establish a Constitution in order "to provide for the common defense" and "to secure the blessings of liberty" to themselves and their posterity had learned from bitter experience the folly of divided counsel and scattered resources. They were ringed about by recent enemies, and had but lately been the unhappy witnesses of internal treason. It was no part of their plan to leave the

1. 9 Hening's Stat. 385.

2. 10 Hening's Stat. 413.

3. *U. S. vs. The Brigantine William*, 1808, 2 Hall's Law Journal 255.

nascent Government impotent against either foe. The express grants of power which the Constitution contains and those necessarily to be implied from them were believed by the founders, not with faint or doubting reason, to be adequate for the perpetual maintenance both of the nation itself and the independence and freedom of its citizens.

Insofar as this legislation has been challenged to comparison with the Constitution it has stood the test. In the cases arising under the selective draft law it was vainly insisted that the power to raise and support armies was not one which embraced conscription; that it was in no way aided by the more general grant of power to declare war; that the service which the law compelled was of the quality of involuntary servitude forbidden by the Thirteenth Amendment; and that its exemption of conscientious objectors who belonged to any well recognized religious sect or organization was a violation of the First Amendment in that it established a religion. While in a later case the still more curious contention was advanced that none but volunteers had ever entered or could ever enter any army which Congress might raise under the general clause, and that all others being in law militiamen could not be sent out of the country.

The First Amendment and its inhibition of any law which abridges the freedom of speech or of the press has been appealed to as against Section 3 of the Espionage Act. But those who so contend mistake the meaning of the liberty which it was the purpose of that amendment to preserve.

As was remarked by Lord Mansfield in *Rex vs. St. Asaph*,⁴ "The liberty of the press consists in printing without any previous license, subject to the consequences of the law." Or, as the Supreme Court puts it in *Patterson vs. Colorado*:⁵

"The main purpose of such constitutional provisions is to 'prevent all such previous restraints upon publication as had been practiced by other Governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false."

As recently as the tenth of June, 1918, that great tribunal, speaking through the Chief Justice, in the case of the *Toledo*

4. 3 T. R. 428.

5. 205 U. S. 454.

Newspaper Company vs. the United States, restated the matter thus:

"The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions. It suffices to say that however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrong-doing."

Freedom of speech, also, is a right to be exercised like all others in the pursuit of lawful and not unlawful ends. There is no protection extended by the Constitution to its licentious abuse.

The lawless who chafe under any exterior restraint and the timorous who flinch at any unusual exercise of governmental power find much in the existing circumstances which seems to them a paradox. It is paradoxical, say they, that in a war against militarism the citizen shall be compelled against his will to take up arms; it is illogical that in the effort to make the world safe for democracy, authority autocratic even in seeming shall for a moment be conferred upon the head of a democratic State; it is inconsistent that in a struggle, which is at bottom one for the freedom of the individual, men shall be forbidden to speak or write what belief or fancy may dictate, or to go where choice or interest leads them. "Madam," said a French officer to an American lady who asked him to feed her curiosity with tales of German atrocities, "Madam, the war is the atrocity." It is the war, with all its disturbance of human life and all its loosening of the bonds of normal thought and action, which constitutes the paradox. It is the emergency which is startling, rather than the manner in which it is being met.

What I have said will suffice, I trust, to show that while others in the community were contributing to the armed defense of the country the lawyer has not been entirely idle. But I shall speak to better purpose if I do not also suggest that, much as may have been done, still more remains to do. The greatest lawyer of the ancient world proudly wrote that "The house of the lawyer is without doubt the oracle of the whole State." The laws we are discussing remain not only to be administered but also to be interpreted and expounded. Defects will appear which demand amendment, and inadequacies which must be corrected and supplied.

Nor if the profession is to make adequate return for the confidence it has hitherto enjoyed and the high and honorable place it has been permitted to occupy in the public favor will this fill up the measure of our duty. We have some access to the public ear and constant opportunity which must not be neglected to keep before our countrymen the issues of the combat, and to cry and cry again, "Stand fast, ye free!" If it be not now, yet there will come, soon or late, the day when peace will revisit this harassed planet. The work of the soldier will be ended with the victory of the cause for which he has been fighting, and the work of readjustment and restoration will be at hand. Then will enter again the lawyer to guard the temple of constitutional government and popular liberty and, showing how safe a shelter it has been through all the story, to call men everywhere to worship in its gates.

Late in the afternoon of the 28th day of July, 1914, I was walking down one of the streets of the city of Tours, in France, when my attention was attracted by a vertical sun dial, curiously placed on the high wall of a building. It was constructed to mark the single hour of XII. and bore the legend, "Quand je parle, l'heure est loin de moi" — or, liberally translated, "Even as I speak, the hour has fled." Further down the street I encountered a crowd of eager men and women, both soldiers and civilians, grouped around what proved to be a newspaper bulletin board. It carried the news that Austria had that day declared war upon Serbia. And even as it spoke its message, as simple and direct as that of the dial itself, one hour in the history of mankind fled away and a new one was upon us. High noon had struck, and the shadows which had fallen forward on the pathway of many ardent lives were shortly to reverse their course. But the sun which that day was hastening to its setting was the sun of autocracy and despotism, and that which was to rise upon the morrow was the sun of freedom and democracy. God speed the day when under its unclouded rays not only we but all mankind will enter upon a life of larger liberty and more enduring peace.

JOHN W. DAVIS.

Washington, D. C.