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THE CONSTITUTIONALITY OF THE AMERICAN LEGION PLAN TO PERPETUATE PEACE*

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THE POWER OF THE GOVERNMENT TO SUPPLY ITS OWN NEEDS

The power of the government to fix fair prices for services or commodities that are required by the government itself in the carrying on of a war cannot be questioned. It is true that the Federal Constitution confers no express power of eminent domain. Long ago, however, it was expressly decided that the government has the power of eminent domain whenever it may be necessary to acquire property for the purpose of carrying

* The popularly named "Universal Draft" bill espoused by the American Legion was the occasion of extended hearings before the War Policies Commission in March, 1931. During those hearings many questions were raised concerning the powers of the Congress and of the President. The material of this article was incorporated in a memorandum prepared and filed in response to those questions by Mr. McNutt, Mr. O'Neil and Colonel Robbins, acting on behalf of the American Legion. Mr. McNutt and Mr. O'Neil are Past National Commanders of the Legion and are members of the Indiana and Nebraska bars, respectively. Colonel Robbins is Chairman of the National Defense Committee, former Assistant Secretary of War, and a member of the Iowa bar.

The proposed bill which raises the problems discussed in this article is as follows:

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that in the event of war, declared by Congress to exist, which in the judgment of the President demands the increase of the Military and/or Naval establishment, the President be, and he hereby is, authorized to draft into the service of the

out governmental functions. In *Kohl v. United States*,[1] the Supreme Court said that such power in the Federal government

"is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or of any other authority, can prevent the acquisition of the means or instruments by which alone the governmental functions can be performed. The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be."

There is a wilderness of authority supporting this essential power of sovereignty, and none to the contrary. A few of them are as found in the notes.[2]

The Constitution confers upon Congress the power "to declare war, . . . to raise and support Armies, . . . to provide and maintain a Navy, . . . to suppress Insurrection and repel Invasions, . . . and to make all Laws which shall be necessary and proper for carrying into Execution the foregoing

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United States such members of the unorganized militia as he may deem necessary.

Section 2. That in case of such war, or when the President shall judge the same to be imminent, he is authorized and it shall be his duty when, in his opinion, such emergency requires it—

(a) To determine and proclaim the material resources and/or industrial organization (and/or services) over which government control is necessary or appropriate to the successful termination of such emergency, and such control shall be exercised by him through agencies then existing or which he may create for such purposes;

(b) To take such steps as may be necessary to stabilize prices of all commodities (and/or of services) declared to be necessary or appropriate, whether such commodities (and/or services) are required by the government or by the civilian population.

Section 3. That the President be, and he hereby is, authorized to establish immediately such agencies as may be necessary to carry into effect, when the emergency requires it, the powers granted by this Act.

[1] *Kohl v. United States*, 91 U. S. 367.

[2] *United States v. Jones*, 109 U. S. 513; *Cherokee Nation v. South Kansas R. Co.*, 135 U. S. 641; *Luxton v. North River Bridge Co.*, 153 U. S. 525; *United States v. Gettysburg Electric R. Co.*, 160 U. S. 668; *Chappell v. United States*, 160 U. S. 499.

Powers."[3] Wars cannot be conducted without soldiers and sailors, who are clothed, fed, armed and transported. The acquisition of equipment, clothing, food, and munitions of war, is therefore an inseparable ingredient of war, and the government has ample power, under the cited cases, to commandeer, for a fair price, all such commodities as it may require for that purpose. Whether the government may determine what is a "fair price," or whether it must be done by appraisers or by a jury, as is usual in condemnation proceedings in time of peace, is covered by the succeeding portions of this article.

This power of eminent domain is comprehensive, and the government may select its own markets. When the government buys flour for its armies, in time of peace, it buys flour from such millers as it cares to. It has the same power in time of war. Neither the Constitution nor the laws require that the government must buy some flour from all millers. We are not advised that such question has ever been raised, excepting as it was suggested at the hearings before the Commission; but the uniform practice of the Federal government during all of the wars in which this government has been engaged, and the uniform practice of national, state, county and city governments in time of peace, support the proposition that the government is not obligated to distribute its purchases among all the purveyors of a particular commodity.

The National Defense Act[4] authorizes the President to purchase all the commodities required by the government for a compensation that is fair and just, and further authorizes the President, in case the owner declines to sell at a reasonable price, to take immediate possession of his properties and proceed to manufacture such commodities. The Act further provides that any owner who shall refuse, shall be guilty of a felony.

Since the present statutes make provision for the acquisition of such commodities and supplies as the government may require, and since no question of the validity of that statute has, or in our judgment, can be raised, further discussion is unnecessary. We turn, then, to the question of the power of the government to fix prices of all commodities which may be required by the civilian population during time of war.

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[3] Art. I, Sec. 8.

[4] *Tit.*, 50 U. S. C. A., Secs. 80, 82.

THE POWER TO FIX PRICES OF COMMODITIES REQUIRED BY CIVILIANS

The committee further assumes that the price fixed by governmental authority will be sufficient to pay for the cost of the product, plus a reasonable profit. It has been the policy of this government, in time of war, to commandeer the services of its soldiers and sailors, and to provide them with clothing and food. In addition to that, it has compensated them in cash for their services. The American Legion is in favor of that principle. It is the belief of The American Legion that the same principle should be applied to capital, that is, it should be paid a living wage in the shape of a return for its use of somewhere in the immediate neighborhood of 6 percent per annum. The abstract question, suggested at the hearings, as to whether the government has power to exact the use of capital during war without any return, will therefore not be discussed.[5]

The precise question which will be discussed in this brief is, Does Congress have the power, without amendment of our Constitution, to require that the profits of those engaged in the furnishing of raw material, or in the manufacture thereof, or in the distribution of the manufactured product at wholesale and retail, be limited to a reasonable return on the capital invested? Or, to put it more concretely, is there power in Congress to prohibit a miller or a baker from exacting a profit in excess of 6 percent on flour or bread which he may sell for civilian consumption?

The Federal government being one of limited powers, any constitutional inquiry must first start with the question of whether or not the power sought to be exercised has been delegated by the Constitution. If that question is answered in the affirmative, the second question is, whether the exercise of the power violates any of the constitutional rights of a citizen.

Congress has the express power to carry on a war. The Constitution itself authorizes Congress to make all laws which shall be necessary and proper for carrying into execution the war power. During the first thirty years of the history of this coun-

[5] The Supreme Court has twice held, very recently, that even in time of war the government must pay a "just compensation" for property taken over for war purposes. *International Paper Co. v. United States*, 282 U. S. 399; *Russian Volunteer Fleet v. United States*, 282 U. S. 481. A "just compensation" must be predicated upon the value of the property taken.

try, there was a sharp clash between those who believed in a strict construction of constitutional powers, and those who believed in a liberal construction. The question came to a head in 1816, when Congress passed an act incorporating the Bank of the United States. There was no express power in the Constitution authorizing Congress to establish a national bank. The validity of the statute was challenged and was decided by the Supreme Court of the United States in *M'Culloch v. Maryland,*[6] Chief Justice Marshall writing the opinion. The power of Congress was sustained, partly upon the ground that a national bank might become necessary in the exercise of the power to carry on a war. In that case, the Supreme Court laid down a proposition of construction which has become the established law of the land. We quote:

"But we think the sound construction of the constitution must allow the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."[7]

The question remains as to whether or not the exercise of the proposed power to fix prices is plainly adapted to the successful carrying on of a war; or, to put it more accurately, if Congress should so decide, would the courts be compelled to say that no reasonable ground can be assigned for the action of Congress? We postpone the discussion of this question of abuse of the discretion vested in Congress, for the reason that its answer will be found in the same considerations with which we will hereafter deal in connection with the due process clause.

Due Process of Law

But even if the legislation is appropriate to the carrying on of a war, it still could not stand if it invaded any of the constitutional rights of a citizen. At the hearing it was suggested that such legislation might deprive a person of his property without due process of law, in contravention of the Fifth Amendment to the Constitution. In passing, it may be noted that the

[6] 4 Wheaton 316.

[7] p. 421.

same sentence provides that a person may not be deprived of his life or liberty without due process. And when the Supreme Court held, in the Selective Draft Cases[8] that a citizen might be deprived of his liberty or his life by an order of the President, in order to win a war, there is small room to argue that the use of property of another citizen cannot be regulated in order to win the same war. But because the due process clause is a bogy in the minds of many lawyers and most laymen, we proceed with the discussion.

The Supreme Court of the United States has steadfastly declined to define due process of law. The Supreme Court has declared its policy to be that in ascertaining the intent and application of that phrase, it will do so "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require."[9] We do know, however, some things about due process. We know that the clause is a flexible one. It is quite true, as suggested at the hearings, that the existence of war does not suspend constitutional guaranties, and that the constitution is a "law for rulers and people, equally in war and in peace."[10] But we also know that what is due process under one set of circumstances may not be due process under another set of circumstances.[11] So while the constitutional guaranties are not suspended during the time of war, due process of law is always considered in the light of attendant circumstances, and the existence of a war is a circumstance which the courts have aways considered.

That the circumstance of war has a vital bearing upon con-

[8] 245 U. S. 366.

[9] *Davidson v. New Orleans*, 96 U. S. 97, 104.

[10] *Ex parte Milligan*, 4 Wall. 2.

[11] For example, the State of Nebraska passed a Bank Guaranty Law in the year 1909. Certain banks contended that the statute deprived them of their property without due process of law. This contention was denied by the Supreme Court of the United States in 1910 (*Shallenberger v. First State Bank*, 219 U. S. 114), for the reasons given in the case of *Noble State Bank v. Haskell*, 219 U. S. 104, where the Supreme Court said, "It may be said in a general way that the police power extends to all the great public needs." (p. 111.) Notwithstanding this adjudication in 1910, another action contesting the law was brought in 1928, the banks contending that conditions had so changed that the law then deprived the banks of their property without due process. While relief was denied, the Supreme Court of the United States recognized the proposition that there may be such a change in circumstances that a law may be valid at one time and invalid at another. (*Abie State Bank v. Nebraska*, 282 U. S. 765.)

stitutional rights has been adjudicated by the Supreme Court of the United States in a number of cases. In *Schenck v. United States,*[12] the defendant had been indicted for circulating documents intending to induce men to resist the draft. The defense was that the statute under which he was indicted was unconstitutional, in that it violated the First Amendment to the Consitution, protecting the freedom of speech and of the press. The Supreme Court held that while in times of peace the defendant might have been protected by the constitutional guaranty, the statute was valid as a war measure. The Court held:

"When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."[13]

Chief Justice Hughes in *Near v. Minnesota,* decided June 1, 1931,[14] in holding that a Minnesota statute designed to suppress malicious publications was violative of the fundamental guaranties of the Constitution, took occasion to say that in exceptional cases there was a limitation on the freedom of the press, and quoted and approved the above language of Justice Holmes.

Even a more pertinent and pointed statement was made by the Supreme Court of the United States on May 25, 1931, in *United States v. Macintosh,*[15] in which case the Supreme Court denied the privilege of naturalization to one who would not agree to bear arms unless he believed the war was being conducted in accord with his conception of right and wrong. Speaking of the war power, the court said:

"From its very nature the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or its applicable principles of international law. In the words of John Quincy Adams,—'This power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life.' To the end that war may not result in defeat, freedom of speech may, by act of Congress, be curtailed or denied so that the morale of the people and the spirit of the army may not be broken by seditious utterances; freedom of the press curtailed to preserve our military plans and movements from the knowledge of the enemy; deserters and spies put to death without indictment or trial by jury; ships and supplies requisitioned; property of alien enemies, there-

[12] 249 U. S. 47.
[13] p. 52.
[14] 51 Sp. Ct. Rp. 625.
[15] 51 Sp. Ct. Rp. 570.

tofore under the protection of the Constitution, seized without process and converted to the public use without compensation and without due process of law in the ordinary sense of that term; prices of food and other necessities of life fixed or regulated; railways taken over and operated by the government; and other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war."

There are a great many other cases to this effect, but these are sufficient to demonstrate that the existence of war is a circumstance which must be considered in determining whether the power of Congress is appropriately exercised, or whether the constitutional guaranties of the citizens have been invaded.

We also know that due process of law involves more than the proposition of confiscation of property. We are not here concerned with the question of the taking of private property for public use without fair compensation, because if a citizen is permitted to earn a fair return on his property, there can be no question of confiscation. What we are concerned with is freedom of contract, which is within the protection of the due process clause. That is to say, the government has no power to fix and regulate prices charged by a purely private business for its products in times of peace.[16] Can this power, denied to the government in time of peace, be exercised by the government in time of war? The answer to the question will be found in an inquiry into whether there is a reasonable ground for the exercise of that power in time of war. If the public good—the successful carrying on of the war—will be reasonably aided by such price fixing regulation, then it is within the power of the government, and is not a denial of due process.

It would be sufficient, if this were an ordinary lawsuit, to direct attention to the fact that the Supreme Court of the United States no later than May 25, 1931, not only said that during time of war, "ships and supplies (may be) requisitioned," but also deliberately and expressly stated that "prices of food and other necessities of life (may be) fixed or regulated," which answers the precise question we are discussing.[17] There is another decision, that of *Block v. Hirsh*,[18] that is squarely in point. During the late war Congress passed an act providing that tenants in

[16] *Wolff Company v. Industrial Court*, 262 U. S. 522; *Tyson & Brother v. Banton*, 273 U. S. 418; *Ribnich v. McBride*, 277 U. S. 350; *Adkins v. Children's Hospital*, 261 U. S. 525.

[17] *United States v. Macintosh, supra*, note 15.

[18] *Block v. Hirsh*, 256 U. S. 135.

the District of Columbia might not be ousted from apartments, if they were willing to pay a rent which was to be fixed by a public commission. The act declared that it was made necessary by the emergencies growing out of the war. Property owners contended that this act deprived them of the right to contract, fixed rentals for civilians, and deprived them of their property without due process of law. The Supreme Court sustained the law on the ground that "A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."[19] And likewise the Supreme Court sustained the constitutionality of the Adamson Law passed in 1916, which fixed the wages that railroads might pay their employes.[20] In the *Wolff Packing Company* case, *supra,* the question arose as to the power of the state to fix wages in times of peace. The Supreme Court denied the right, but referring to the Adamson Law case, and the Washington rent law cases, said:

"It is enough to say that the great temporary public exigencies recognized by all and declared by Congress, were very different from that upon which the control under this act is asserted."[21]

There is another line of cases which come to the same end. It has been many times held, with reference to public utilities, whose rates are subject to state control in time of peace, that the government does not have power to take over the general management of the properties. For example, in *Southwestern Bell Telephone Company v. Public Service Commission,*[22] decided in 1922 by the Supreme Court of the United States, it was held:

"It must never be forgotten that while the State may regulate with a view of enforcing reasonable rates and charges, it is not the owner of the property of public utility companies and is not clothed with the general power of management incident to ownership."

See, also, to the same effect *Interstate Commerce Commission v. Chicago Great Western Ry. Co.,*[24] *Chicago, Milwaukee & St. Paul R. R. Co. v. Wisconsin.*[25]

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[19] P. 157.

[20] *Wilson v. New,* 243 U. S. 332.

[21] P. 542.

[22] 262 U. S. 276, 289.

[24] 209 U. S. 108.

[25] 238 U. S. 491. These cases have to do with the situation where the properties are individually owned, and the power of government is exercised

Despite this lack of power in time of peace, it will be recalled that the government did take over and operate the railroads and telephone and telegraph companies during the recent war. This act of the government was sustained by the Supreme Court of the United States in *Northern Pac. Ry. Co. v. North Dakota*,[26] where the Supreme Court said:

"The complete and undivided character of the war power of the United States is not disputable." *Selective Draft Law Cases; Ex parte Milligan; Legal Tender Cases; Stewart v. Kahn.*

In *Dakota Cent. Tel. Co. v. South Dakota*,[27] the telephone company challenged the power of the war President to take possession and assume control of all of the telegraph and telephone systems in the United States. The government paid a rental to the telephone companies, and the earnings from the systems accrued to the United States. The Postmaster General fixed the schedule of rates throughout the United States. The power of the President to do this was challenged, but the Supreme Court sustained the exercise of this drastic power, and said:

"That under its war power Congress possessed the right to confer upon the President the authority which it gave him we think needs nothing here but statement, as we have disposed of that subject *North Dakota Railroad Rate Case.* And the completeness of the war power under which the authority was exerted and by which completeness its exercise is to be tested suffices, we think, to dispose of the many other contentions urged as to the want of power in Congress to confer upon the President the authority which it gave him."[28]

The power of the United States government, in time of war, to require its citizens to serve with the colors, and in connection with that service, to go beyond the confines of the United States, has been settled. The Universal Draft Act of 1917 was challenged in *Selective Draft Law Cases*.[29] The Supreme Court of the United States sustained the power of the government to require its citizens to serve in time of war. The American Legion agrees with the principle and the policy of the selective draft;

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only as to rates. The government, like the states, may of course own, and therefore manage as owners, property which customarily is owned by individuals, such as banks, grain elevators or retail fuel stores. *Green v. Frazier*, 253 U. S. 233; *Jones v. City of Portland*, 245 U. S. 217

[26] 250 U. S. 135.

[27] 250 U. S. 163.

[28] p. 183.

[29] 245 U. S. 366.

yet it must be conceded that this is the most drastic exercise of power of which government is capable. It is the power to require men to leave their families and homes, and to risk life itself on the seas and on the battlefield. In so doing, the soldier or sailor gives up his constitutional rights to a trial by jury, freedom of speech, and many other of the most sacred constitutional rights. Many other cases dealing with the powers of Congress in time of war have been decided, and the courts have never, to our knowledge, denied any reasonable power that Congress might see fit to exercise in time of war.[30]

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[30] *Ex parte Milligan*, 4 Wall. 2, is not an exception; in that case the Supreme Court held that a civilian could not be deprived of his liberty without a trial by jury, unless in the actual theater of war, and when the civil courts no longer functioned. If a civilian can be detained during the emergency of war, manifestly it serves no useful public purpose to substitute a court-martial for a jury at his ultimate trial.

The Fourteenth Amendment denies to the states the power to deprive a person of his property without due process. Essentially the same question of the proper exercise of governmental power—due process of law—is presented by the cases decided by the Supreme Court which have sustained state statutes which interfered with the right of contract. There are a great many of these cases. A few will suffice to illustrate the comprehensive powers of government in this respect. These cases will dispel the thought that due process of law bars any governmental interference with the right of private contract. If a proper governmental purpose is served by such interference, due process of law does not forbid it. In determining what is a public need, there is a wide discretion left with the legislature. The absolute prohibition of the sale of intoxicating liquor and of cigarettes, which of course, is a drastic interference with the right of contract, has been sustained by the Supreme Court of the United States because reasonable men do believe that the consumption of liquor and cigarettes is detrimental to the public welfare. (*Mugler v. Kansas*, 123 U. S. 625; *Gundling v. Chicago*, 117 U. S. 183.) And so it has been held that the sale of artificially colored oleomargarine, although not in itself harmful to the health, can be prohibited by the state because it might tend to deceive the public. (*Capital City Dairy Co. v. Attorney General*, 183 U. S. 238.) The charges for the storage of grain in terminal elevators have been regulated, which, of course, is an interference with the right of contract. (*Munn v. Illinois*, 94 U. S. 113.) There is no business in which there is keener competition than in fire insurance, that is to say, every small community has an agent that represents a number of companies. Yet the premium which an insurance company may charge for the writing of a fire insurance policy, in time of peace, has been limited. (*German Alliance v. Lewis*, 233 U. S. 389.) If necessary, property can be taken for public use without any compensation. For example, if a building stands in the path of a fire and it is believed that the destruction of the building may stop the fire, the building may be destroyed by public authority without any compensation. (*Bowditch*

A government which has the power to draft its soldiers and sailors; a government which has the power to fix the rents which the citizens of Washington shall pay to their landlord; a government which has the power to fix the wages which a railroad shall pay to its employes; a government which has the power to take over the entire management of the transportation and communication systems of the country—as has been decided—certainly has the power to prescribe the price which its citizens shall be charged for the necessities of life during the same emergency.

IS THERE ANY FAIR REASON FOR THE PROPOSED LEGISLATION?

In considering all constitutional questions, it is an axiom that a wide discretion is vested in Congress. If Congress should deem that the legislation now proposed is an appropriate means to assist in the carrying on of war, the courts would not hold it to be unconstitutional if any fair reason can be assigned in support of it. While this is a field that is more legislative than legal in character, we take the liberty of suggesting several reasons which may properly be assigned in support of such legislation:

(a) Probably the strongest reason that can be advanced in support of this proposal is the essential fairness and justice of it. War is a community effort. The greatest army ever assembled would be dissipated in thirty days if there were not a greater army back of it. Food stuffs must be grown, and must be conserved; raw materials must be manufactured; and all must be fed in a constant stream to the armies at the front. It takes soldiers and sailors and farmers and labor and capital to conduct a war. It is a partnership enterprise.[31]

v. Boston, 101 U. S. 16.) A municipal ordinance has been sustained which prohibits the doing of laundry work between certain hours. (*Barbier v. Connolly*, 113 U. S. 27.) A man may be prevented from building an apartment house with his own money, on ground that he owns, unless it is located as prescribed by a zoning ordinance; here is a direct and drastic interference with the right of contract and property, sustained only because of the public convenience. (*Euclid v. Amber Realty Company*, 272 U. S. 265.) The state may also prescribe maximum hours of labor for women. (*Muller v. Oregon*, 208 U. S. 412.) All of these cases, and many more that might be cited, demonstrate that the right of contract may be interfered with by public authority whenever it may reasonably be believed that the interference will serve some public need.

[31] We believe no one who had any part in the government during the

A war can be conducted by volunteers, both at the front and behind the lines; or it can be conducted by the power of government. If the government recruits its armies by the exercise of power—compels the service of its citizens in uniform, and prescribes their wage—it is no more than fair and just that the other partners in the enterprise be subjected to the same governmental power. It is not fair, by force of law, to require man-power to serve at the front for a living wage, and to permit the man-power which serves behind the lines to accumulate great fortunes from exorbitant profits. There can be no better reason assigned for a law, and no firmer constitutional foundation upon which it can rest, than that it is essentially fair and just.

(b) The most cogent guide for the requirements of the future is the needs of the past. In order to carry the recent war to a successful conclusion, it was found indispensable to exercise general powers of price fixing and the establishment of priorities. It is our understanding that the identical powers now proposed to be authorized by law, were in fact exercised in the closing months of that war. The powers may not have been so widely used as is now proposed, but the quality of the power exercised was identical, the subjugation of the right of contract to the needs of the government. In the face of this historical fact, we assert with confidence that no court will ever hold that Congress is either arbitrary or exceeds its discretionary power, if it sees fit to authorize in advance what the past has demonstrated to be necessary in order to win a war. In fact, the only argument that occurs to us in opposition to such authorization is that it may not be necessary; that the powers of Congress

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recent war will challenge this statement. But if there be a lingering doubt in the minds of any one as to the correctness of the proposition that war is a community effort, it would be dispelled by a reading of the recent book of General Pershing. A very considerable part of his time and effort, particularly during the first year of the war, was devoted to a mobilization of supplies and labor and material. On page 168 he makes this statement:

"The world war was a struggle involving all national resources, and that fact was particularly emphasized by a close range study of the many requirements for preparation. Every industry and every art, beginning with the farms and mines, must contribute its full share, and every citizen must fulfill his obligation to serve. America's part in the contest will be successful only by the combined efforts of the armies and the people. The man with the rifle was merely the privileged representative of a thousand others who were as deeply concerned in the result as he was."

and the President to carry on a war are now plenary, and a statute can only serve to restrict them. However, restriction can be avoided by the careful use of general terms, and it will serve the purpose of notifying our citizens, and the world, that when the United States goes to war, all of its resources are mobilized, and that exorbitant profits will not be tolerated.

(c) In ordinary times, the economic law of supply and demand, reinforced by statutes that prevent combinations in restraint of trade, is relied upon to protect the public from monopoly. But war throws out of kelter the law of supply and demand, or rather, it disturbs its normal balance. A considerable part of the population of the country is withdrawn from constructive work and is engaged in destructive work. As a result, there is a temporary but artificial stimulus of the demand for commodities, and a temporary but artificial constriction of the supply. The experiences of the last war have demonstrated that the law of supply and demand, supplemented as it is by statutes against monopoly, is entirely incapable of protecting the public against extortion. Many prices increased to more than twice the pre-war levels, and great fortunes were amassed because of the fact that the law of supply and demand had been aborted by the war. Dealing with purely private industries, and in time of peace, Chief Justice Taft in the *Wolff Packing Company Case,* supra,[32] said that the government might regulate the price of the commodities supplied by certain businesses on account of "the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation."[33]

(d) In any army that is recruited, there will be soldiers who leave dependents behind them. During the last war, a provision was made for an allotment of a certain portion of the soldier's pay for their support. The government fixes the wages of such a soldier. Half of it is alloted for the support of his wife and child. If the government exercises no control over what profiteers may charge that wife and child for the necessities of life, the pay of the soldier becomes no longer adequate to meet the plan of the government—a living wage. Take an ordinary instance: A man with wife and child leaves his civilian employment, waives his exemptions, and enters the service. He

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[32] *Wolff Packing Company case, supra,* note 16.

[33] 262 U. S. 522, 538.

is paid $30 a month, half of which he sends to his wife. As long as the dollar is worth a dollar, his wife can make out. But when, as happened in the recent war, the dollars which he sent home became only worth fifty cents, then a great injustice has been done. Wives and children must be cared for. When the government fixes a schedule of wages for its soldiers and sailors, predicated on a dollar being worth a hundred cents, it should have the power to preserve that value. It cannot do so, unless it fixes the price which may be charged to the dependents for the necessities of life.

(e) It is difficult to believe that any citizen would consciously desire a war on account of the profit that might come from it. Yet people are unconsciously affected by the matter of profit or loss. That wars in the past have been immensely profitable to many of those who have been unable to serve, is a fact known to every one. It is probably true that, subconsciously, the public opinion which has so much to do with war or peace is affected by the knowledge that if war does come, it will be a time of great prosperity for those who are unable to serve. Whether this be sound or not, a great many reasonable men entertain this belief; and if reasonable men can fairly believe that taking the profit out of war will have a tendency to prevent war, then this law can be immediately justified on the most fundamental constitutional power, and that is the power of Congress to preserve and protect its peoples from the horrors of war.

(f) There is another reason. During the last war large sums of money were properly expended, both by the government and by civilian societies, to maintain the morale of the soldier. No one knows better than soldiers the tremendous part which morale plays in the life of a fighting man. If the morale of a soldier is crushed, he is little better than useless. The soldier with a strong morale is worth a dozen soldiers whose morale is shattered. We can think of nothing that does more to affect the morale of the soldier than the knowledge that his wife or his dependents are denied the comforts of life while the companions of his school days are amassing fortunes.

(g) The present depression presents another strong reason for the passage of some such law. It will not be denied, we think, that Congress has the power to pass any reasonable measure that tends to relieve the acute conditions through which we

are now passing. The primary function of the Federal Reserve System is to prevent the panics that arise from a rigid currency. What is the reason for the present depression? Men may differ about this, but many reasonable men entertain the belief that its underlying cause is the undue inflation of war times. That deflation must follow an abnormal inflation is a mathematical certainty. That deflation is accompanied by public distress cannot be denied. If the exorbitant profits are taken out of war, there will be no inflation; if there is no inflation, there will be no deflation.

(h) That reasonable men may believe that such a proposal will serve the public good, is proven by the list of distinguished men who have approved of the policy of this legislation. President Wilson exercised such power during the war; and the three occupants of the Presidential chair since the war have expressly approved this proposal. The first President of this country disapproved of the profiteering that accompanied the prosecution of the Revolutionary War. The United States Chamber of Commerce, in 1917, expressly acknowledged the necessity and power of the government "to control prices." That other nations, such as Great Britain and France and Germany, have taken steps to prevent a recurrence of the economic situation attendant upon the last war, is strong proof of the propriety of some such legislation. In *Block v. Hirsh*,[34] Mr. Justice Holmes, in sustaining the Washington Rent Law Cases, supported his opinion in part by saying:

"It is enough that we are not warranted in saying that legislation that has been resorted to for the same purpose all over the world, is futile or has no reasonable relation to the relief sought. *Chicago, Burlington and Quincy R. R. Co. v. McGuire.*"[35]

(i) There is a law of physics that says in substance that something cannot be had from nothing. If men behind the lines amass great fortunes in time of war, those fortunes come from somewhere. War does not increase the national resources, but decreases them. The wealth of a nation is always less after a war than before it. Great fortunes were amassed during the recent war. They came from somewhere. They came, of course, from the great common people. The war time profiteers created no wealth; they were simply acute enough to centralize it. And

[34] *Block v. Hirsh*, 256 U. S. 135.

[35] p. 158.

by doing so, they took from the men and women, in the lines and back of them, who were not engaged in amassing wealth. To prevent the cunning and avaricious from capitalizing the misfortunes of those who are compelled to serve, is certainly a proper end of government.

The war power is as elastic as the law of self-defense, and like the law of self-defense, it is the first law of the land. An examination of the various laws enacted under that power, and the attitude of courts toward that power, leads us to the conclusion that the courts will not interfere with any enactment of Congress, designed to aid in the successful carrying on of war, unless it is so arbitrary and capricious that no reasonable man can say that it is appropriate to the end designed. In our opinion, the proposed legislation is within the power of Congress.

We believe that business men will not insist on more than a fair profit during war times. Most of them would prefer to keep their businesses running to capacity, with a six per cent return, rather than make an eighty per cent return, and be compelled to return seventy-five per cent of the excess profit in taxes, and be bothered by tax-collectors and inspectors for years to follow. That the United States Chamber of Commerce approved the principle, and that its members co-operated loyally with the war-time commissions, is submitted as proof of this statement.

Methods of Exercising the Power Conferred, After the Emergency Has Arisen

Members of the Commission, during the hearing, invited suggestions as to a practical method of carrying out the powers conferred by the proposed statute. Upon this question it is very doubtful whether this committee can be of any service to the Commission. None of the members of this committee had the opportunity of observing the operations of the various war boards which functioned during the recent war. Some of the witnesses before the Commission have an intimate knowledge of the workings of such boards, and a large grasp of business methods, and have a much greater source of information upon which to draw, than do the members of this committee. But in order to respond to the invitation of the Commission, and with great hesitation, we make the following observations as to the possible method of exercise of power when it is called into play.

Such luxuries as tobacco, theaters, pleasure automobiles, and a great many other similar articles, might well be eliminated from the equation for the purpose of simplicity of administration; upon these could be placed a tax, either a sales tax or an excess profits tax, which would help make up the depletion in revenues which will necessarily be occasioned by the elimination of excess profits on necessaries.

In formulating a method for the exercise of the power there are two principal matters, we take it, to be considered: In the first place, the plan should, as nearly as may be, allow to each individual engaged in the production, manufacture, or distribution of essential commodities, the actual cost of the service rendered, plus an allowance for the depreciation of property engaged in the enterprise, plus a reasonable return on the capital invested. Second, the plan must not be so cumbersome as to be unworkable. It is probably true here, as it is in many other affairs of life, that exact justice must to some extent give way to practical considerations.

It has been suggested that there be determined the investment of each citizen in his particular business; ascertain the cost incurred by him in the operation of that business, and add thereto a fixed percentage of the investment to cover depreciation and profit. This seems fair on its face, but it is very doubtful whether this plan is practicable. Certainly the courts as at present constituted, with their present procedure and rights of appeal, could not hope to discharge this task in any reasonable time. It is constitutionally possible to provide additional courts, charged with the exclusive duty of ascertaining such facts, as was done in the case of the Interstate Commerce Court some years ago and as is now done with the Court of Customs and Patent Appeals. There need be no appellate tribunals, unless thought desirable, for the right of appeal is not a constitutional right.[36] The plan of separate courts for that purpose is much more feasible if the ascertainment of investments in individual businesses is attempted, but it would seem that the task of ascertaining the underlying facts as to every factory and wholesaler and retailer in the United States would be unending. There is one other serious objection,—such plan would provide different prices for the same commodity. It is, of course, a known fact that the cost of operation varies with the

[36] *Luckenbach v. United States*, 272 U. S. 533.

particular business; that is to say, an efficiently managed and up-to-date flour mill with low power costs may be able to keep its manufacturing cost to 40c a barrel of flour; the less efficient and less efficiently operated flour mill, of small capacity, and with higher power costs, might very well have an actual manufacturing cost of 60c a barrel. These two mills must compete for the same civilian business. It is said that if you fixed a lower price for the barrel of flour from the efficiently operated mill, the less efficiently operated mill either loses its civilian trade, or operates at a loss. One alternative, of course, is to fix a price that will enable the smaller mill to make 6 per cent and apply that barrel price to the larger mill, which will, of course, result in the larger mill making 10 or 12 or 15 per cent profit. But the milling business is highly competitive in time of peace, and the smaller mills do operate under this handicap; they can do so in time of war. The same dilemma is presented in the effort to fix fire insurance rates, which must be uniform if the small companies survive; the customary solution of the dilemma is to fix a rate that will allow a reasonable profit to the average company. A normal tax should be laid on the 6 per cent profit, and the excess profits of the more efficient operator should be recaptured by an excess profits tax.

Probably the simplest plan would be to make it a criminal offense to charge a price for a commodity that reflected more than a 6 per cent profit on the invested capital. The facts could be ascertained from the income tax reports. Under the Excess Profit Tax Laws of 1917 and 1918, a separate tax was levied upon excessive profits, and profits were figured upon the invested capital of the industry. Invested capital has been construed to mean just what it says, the amount invested in the property, and excludes inflated values.[37] This would put upon each individual, in making his income tax return, the burden of seeing to it that his prices do not reflect an exorbitant profit upon the pain of imprisonment. This offers the same objection as the preceding one, in that it would prescribe varying prices among different individuals for the same commodities, and result in the strong and efficiently operated plants absorbing all of the business. It is necessary in time of war that even the less efficiently operated plants be run to capacity, and any plan that would eliminate the small operator from the picture, should be avoided.

[37] *La Belle Iron Works v. United States*, 256 U. S. 377.

During the late war a percentage up to 75 per cent of the excess profits was absorbed by taxation. Under the taxing power these rates could be adjusted so that there should be a tax of 90 per cent on all profits in excess of 6 per cent. This again would be a simple method of adjustment, but would only serve in part the end desired.

Perhaps the best method of all is the establishment of one or more boards whose duty it would be to fix prices for the various commodities. This puts tremendous power in the hands of individuals, but in war times such becomes necessary. Such individuals would have no more power than a colonel of a regiment has over the lives of the men under him, and it is a necessary concomitant of the proposition that wars cannot be successfully conducted by debating societies.

If this were done, the President should have power, through boards, to fix prices today predicated on prices that existed six months or more ago. It is very unlikely that there will ever be a war without some premonition thereof. With such a statute in existence as the one proposed, some people might begin to get their houses in order long before the actual declaration of war, and gradually increase prices on the theory that when the date came for freezing the prices, they would be ready. It would be impracticable, from a diplomatic standpoint, to exercise this war power a considerable period in advance of war. That in itself would be nearly as serious a declaration as would the mobilization of military forces. But in the Federal government there is no constitutional objection to retroactive legislation, as is indicated by the fact that nearly all of our tax legislation is retroactive. The President, through a board familiar with the particular industry, could look far enough back into the past to enable him to determine that the normal pre-war level of the price of flour was predicated upon a milling cost of 40c, a selling cost of 20c, and a milling profit of 5c. He could look far enough back to see that the pre-war level of the price of wheat was a dollar a bushel. He could proceed to fix the price of wheat at a dollar a bushel, and fix the price of a barrel of flour at the price of 4.6 bushels of wheat, plus 65c, or a price of $5.25 a barrel, even though the prospect of war had stimulated the current price to $8 a barrel. Since the milling cost varies, and in order to keep the smaller mills in operation, the board should probably fix the price of a barrel of flour at $5.50. This would then

become the temporary frozen price, until hearings could be held, at which a permanent war-time price (subject to change) could be fixed with the same general considerations in mind. The so-called permanent price—the one fixed after the hearing—should of course be subject to change if conditions demanded it. If raw materials were required which must be imported, and therefore not subject to the power of the United Sates, the price fixing order could be so worded as to allow for an automatic adjustment as the price of such imported raw materials went up or down. If labor costs increased, or if there became sound reason for increasing the price of wheat, the price of flour could be adjusted accordingly. This plan, of course, would result in some lack of uniformity; it would mean that the more efficiently operated plants would make more than 6 per cent, while the less efficiently operated might have to either increase their efficiency or get along with a little less than 6 per cent. But this is a condition that exists in industry today; the weak are competing with the strong, and are getting along. A large life insurance company with millions of policies outstanding necessarily has a less overhead cost per policy than a small company. Nevertheless they do compete, just as the less efficiently operated flour mills are competing with the more efficiently operated ones. But the spread is not great, and while high class mills might make a little more than 6 per cent, such a plan should at least prevent the exorbitant profits and the amassing of great fortunes which followed in the wake of the recent war.

The statute should be as plenary and as flexible as possible, It would be well to provide therein that the President be authorized to take steps now, either through existing or new officials, to set up the personnel for the emergency, so that there would not be months of delay after the emergency arises. Such officials would now ascertain what boards would be necessary in event of war. Such officials should be required to keep informed as to the men who would be available and willing to serve on such boards, so that when war was declared, members of such boards would be able immediately to assume their responsibilities. Prices should be automatically frozen, pending the hearings before such boards, at the prices existing as of a date to be fixed by the president; summary hearings should be provided by each board for those representing the industry affected, and at the conclusion thereof, a price fixed which in the judgment of the

board would reflect a fair profit for that particular commodity; the board, of course, reserving the right to change that price from time to time as conditions might require it.

CONCEDING THE POWER, IS SUCH A PLAN CONSTITUTIONAL EXERCISE THEREOF?

If the government has power to fix prices in war time, by any method, there is no reason to doubt that the suggested plan is constitutional. The plan proposes, as has been seen, two steps, one a temporary expedient to brook over the time until hearings can be held and a fair price fixed; the second step, the fixing of prices after a hearing. The first step—freezing the prices as they exist or as of a date some time prior—is but a temporary expedient to prevent extortion pending the hearings. It is comparable to the restraining orders regularly issued by Courts to preserve the status until there can be a hearing; courts cannot take property without due process, and yet no one has or can challenge the power of the Courts to issue orders, without notice, which preserve the status until there can be a hearing. Nor do we believe anyone can contend that he has been arbitrarily deprived of his property when he is compelled to sell his goods tomorrow for what he was willing to sell them for today, particularly since all prices of raw materials, manufacture and distribution, are frozen at the same time. But even so, he would not be hurt much or for long, and the philosophy of *Noble State Bank v. Haskell*,[38] is that you can take a little of a man's property without due process, but you can't take much. In that case, the Supreme Court, speaking through Mr. Justice Holmes, said:

> ". . . there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use."[39]

As to the second step—the permanent price—there is still less question, for it has been fixed after a notice and hearing, and is predicated upon a fair return. As to both the temporary and

[38] 219 U. S. 104.
[39] p. 110.

permanent price, it might be well to afford a hearing to an individual merchant or factory owner, upon application, if his particular situation justifies individual treatment. Such applications would probably not be numerous, for individuals would realize that if they tried to sell above the general price, they would get no business. And certainly a poorly managed business has no constitutional right to compel its more efficient competitor to make an exorbitant profit. When prices are fixed, particularly the temporary ones, they should be maximums; that is, business men should be permitted to sell at a lesser price, if for any reason, such as to meet competition, they so desired.

It is urged, however, that the legislation not be encumbered with any of these details. If general power is conferred, all details can be worked out by the President, and altered as circumstances warrant. If, however, it is thought desirable to afford a court review of the findings of the boards—either as to fact or only as to law—and separate courts are required for such purpose, an act of Congress would be necessary to constitute them. It is our judgment, however, that due process is satisfied by the notice and hearing before the board, without court review as to facts found by them on evidence.[40]

[40] *Public Clearing House v. Coyne*, 194 U. S. 497.

EDITOR'S NOTE

Another step in The Legion's ten-year fight for legislation to attain the Universal Draft was accomplished on March 7, when the report of the findings of the War Policies Commission was transmitted to the Congress by President Hoover.

The legislative steps requested by the report are:

1. Authority to "freeze" prices at the inception of war.
2. A law to confiscate ninety-five per cent of all war incomes above normal, so that funds which escape price freezing can contribute to the war cost.
3. A Constitutional amendment to specifically provide for Congressional control of prices during war-time.

In addition the report recommends that detailed studies be made of methods for mobilizing man-power and all national resources, so that these may be promptly available when required by war.

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