THE LAWYER AND GOVERNMENTAL ADMINISTRATION

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Much time has been devoted and thousands of words written and spoken concerning the many reconstruction problems which will follow the war. This is as it should be for none of those problems, including those of the legal profession, can be solved overnight. Any time and energy now devoted to their solution is well spent even if it does no more than create an awareness of specific needs and possible courses of action. In a large measure those of the legal profession, and particularly the government lawyers, are not new but have become more pressing and complex with war.

In considering a few of the many internal post war problems, the government lawyer may anticipate a continued search for specific remedies in three chronic cases. In neither can a sudden and miraculous cure be expected, but the patient can be made more comfortable.

The first and oldest as a chronic, but manifesting some new, and to many, alarming symptoms, is our old friend Federal-State relationship.[1] The lament that a union of states is becoming a federalized state is not a new one. From colonial times new economic and social conditions have from time to time required increased exercise of Federal powers affecting the day to day activities of everyone. Currently, and within the past two decades, we have witnessed an enormous acceleration in the application of Federal statutory remedies to current situations. Most of those remedies have sprung from an extended use of such well known Federal powers as those over interstate and foreign commerce and internal revenue.

In passing, however, it is well to note a new device of no little potentiality which although not directly limiting State action, indirectly has that result—Federal grants of money to States on condition that the State statutes and

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1. See Vol. 1, Story on the Constitution, 5th Ed., p. 191. Arguments of Counsel in the License Cases, 5 How. 504, 1847, 10 A.L.R. 1568, 1920, where the annotator says: "The decisions in the reported case (Re Guerra, anta, 1560) upon the effect of Federal legislation upon state legislation relates to a question of growing importance in this country."

regulations conform to Federal standards. Typical are public welfare grants under the Social Security Act.[2]

Finally the conduct of war has called into being under national war powers a wide variety of enactments which while impressing all with a sense of unified effort, have nevertheless served to make the individual "Washington conscious"—with varied reactions. At the end of the war many emergency measures will necessarily disappear, but in the meantime it is to be expected that they will have stimulated a reappraisal of the spheres of Federal and State influence—a general cataloguing of those things deemed essentially national, and those to be left to the States. We have seen early manifestations of renewed demand for such a reappraisal in the controversy touched off by the recent Federal anti-trust action against an insurance company,[3] the resultant public and congressional discussion and the filing of an amicus curiae brief in the Supreme Court of the United States by thirty-four States, including Indiana.[4]

In addition to the many questions of Federal and State regulatory jurisdiction, the work of the government lawyer has been complicated by the enormous increase of Federal proprietary interests. Within the State of Indiana for example, we have camps, hospitals, ordnance plants. airports, supply depots and one housing project.[5] Incident to these have arisen questions concerning taxation, residence, state police power and schools.[6] Many of these will remain to be settled after the

2. 49 Stat. 620, Title 42 U.S.C.A., Sec. 301 et seq., Title 42 F.C.A., Sec. 301 et seq.

3. U. S. v. Southeastern Underwriters Association, et al, 51 Fed. Supp. 712. On page 713 Judge Underwood said, "The whole case, therefore, depends upon the question as to whether or not the business of insurance is interstate trade or commerce, and if so, whether the transactions alleged in the indictment constitute interstate commerce."

4. U. S. v. Southeastern Underwriters Association, et al. Case No. 354, on appeal in United States Supreme Court.

5. See Sec. 1, Ch. 7, Acts Indiana General Assembly 1883, 62-1001 Burns Indiana Statutes, 1943 Replacement, Sec. 15249 Baldwin's Indiana Statutes 1934.

6. For illustrations of this type of problem in other jurisdictions see, Penn Dairies, Inc., et al v. Milk Control Commission of Pennsylvania, 318 U. S. 261, 63 Sup. Ct. 617, and Pacific Coast Dairy, Inc. v. Department of Agriculture of California, et al, 318 U. S. 285, 63 S. Ct. 628. Federal proprietary interests in war plants also have raised and will continue to raise perplexing tax problems. For a late case see United States et al v. County of Allegheny, Case No. 417, October Term, 1943 (May 1, 1944). In beginning his opinion, Justice Jackson says, "We are called upon

war and will probably be augmented by problems of post-war reconversion of war installations found unnecessary in peacetime.

Secondly, and so closely related to questions of Federal and State jurisdiction that they merit consideration with them, are the many political questions incident to the trend to centralize more power in the executive branches of government. Obviously, no one post-war measure can produce the whole solution. But a vigilant regard by courts, legislators and lawyers to the fundamental democratic principle that the ultimate source of governmental power is in the people and that officials exercising such power should be answerable to the people, will serve to produce a proper balance of centralization consistent with efficient government. Applied to the government lawyer and particularly the Attorney General, whether of the Federal or State government, he is in an excellent position to materially assist in producing a proper balance. In an advisory capacity to State and Federal officials he can suggest and guide in the formulation of new legislation and the administration of old. Some of his functions, both in rendering opinions and in conducting litigation, are ministerial and even quasi-judicial.[7] In the performance of those he should represent the people as well as the governmental sovereignty. But, although he is in a key position to advise and limit executive and administrative exercise of power, as a practical matter his representation of the people and his discretionary powers are in name only, unless he too, is answerable to the people. In that light there is considerable merit to the suggestion that the Attorney General should be elected as he is in Indiana, instead of appointed by the executive and answerable only to the executive.

On attempting a rational approach to the third chronic question—Administrative law and procedure—a lawyer soon acquires about the same feeling he has toward an old razor blade: much better to forget the whole thing, but there it is and something has to be done about it. Boards, bureaus, commissions and administrative rules, regulations, orders and directives are not exclusively problems of the Federal govern-

to solve another of the recurring conflicts between the power to tax and the right to be free from taxation which are inevitable where two governments function at the same time and in the same territory . . . . "

7. See dissent of Justice Spencer in Stato ex rel v. Ellis, 184 Ind. 307.

ment. On a correspondingly smaller scale, Indiana is experiencing somewhat the same adventure in administrative regulation.

Roughly, substantive and procedural administrative law presents three problems to the lawyer whether in government or private practice:

1. Information. Has there been an administrative regulation which would affect the point to be decided and if so, where can it be found? Recently some strides have been made by both Federal and State governments to make rules and regulations public and accessible. In 1935, by Congressional act,[8] the Federal Register was created and mandatory provisions required the filing, among other, of " . . . such documents or classes of documents as the President shall determine from time to time have general applicability and legal effect; . . . ," for publication in the Federal Register and for codification.[9] In Indiana, Section 1 of Chapter 213 of the Acts of the 1943 General Assembly[10] requires rules and regulations having "the force and effect of law" to be approved by the Governor, by the Attorney General as to legality, then filed with the Secretary of State and Legislative Bureau. Although thus available to the government lawyer, it must be admitted that the filing of copies at the seat of government is not a great amount of practical assistance to most lawyers. Yet those are steps in the right direction and efforts to provide a quick and simplified search as well as the text of rules and regulations may be renewed after the war.[11] Means might be found for periodic publication and distribution of state administrative rules and regulations as Acts of the General Assembly are published and distributed.

2. Fair and uniform procedure. Among the many broadsides fired at boards and commissions, the most frequently heard are that the lawyer often has no way of knowing how to proceed, that many times the same men act as law makers, prosecutors, judge and jury, and that appeals

8. 49 Stat. 500, Title 44 U.S.C.A. 301 et seq., Title 44 F.C.A. 301 et seq.

9. By Sec. 1, 56 Stat. 1045, 1942, the codification provisions were suspended during the war emergency.

10. 60-1501 Burns Indiana Statutes, 1943 Replacement.

11. In Indiana, a private publication (Horack's Indiana Administrative Code, keyed to Burns' Statutes) provides valuable assistance in so far as state rules and regulations are concerned.

from the board are non-existent or inadequate. Hence, an urgent need for a uniform code of administrative procedure which in all respects conforms to our conception of impartial and just process has become well recognized. A code of procedure which, among other things, will require a basic finding of fact when the rule or regulation is to have the force and effect of law, and a complete hearing and finding when the order is to be judicial in nature; one which will completely separate the rule making, enforcement and judicial functions of a board and provide adequate judicial review of facts as well as law is of prime impartance. Finally, a procedure which is uniform for all departments, boards and commissions. Considerable preliminary work has already been done upon a Federal Code of administrative procedure,[12] and some thought of post-war legislation in Indiana on similar lines would be in order.

3. Restriction of the administrative functions of government to proper fields. Admittedly this is largely a question of legislative policy as to the necessity and feasibility of delegated powers. The end of the war will, as a matter of course, obviate the necessity for many delegations and particularly those expressly dependent upon the national emergency. But here, too, a national and state survey of delegation of power aimed at elimination of unnecessary and overlapping delegations should be made. Since we cannot avoid some administrative delegations of legislative, executive and judicial functions, every effort should be made to mould them into useful implements of our legal system.

Although the lawyer is chiefly preoccupied with interpretations of written codes and recorded precedents, in a large sense, his professional mission is the establishment and maintenance of orderly government. If it is agreed that to achieve permanent peace it must be firmly founded upon international law and order, then merely because of the lack of codes and precedents, no lawyer can avoid a direct professional obligation to devote some consideration to the establishment of international as well as internal law and order. To a certain extent that professional responsibility has always existed, but this war, as no other thing, has

12. See report of Attorney General's Committee, 27 A.B.A. Journal 91, Proposed Federal Administrative Procedure Act. 30 A.B.A. Journal (April, 1944) 226.

served to emphasize the extent to which our internal peace and security may be affected by a collapse of peaceful procedures in Abyssinia or Manchuria. A growing concern that no break-down in external law and order again disrupt our national existence can hardly be classed as internationalism.

If the writer is guilty of approaching the question of external policies with something of the awe and prayerful attitude with which the average man approaches the back end of his dead radio, it is only a reflection of the all too common attitude: that foreign policy is a matter for experts only. Although the execution of a foreign policy is well placed in the hands of expertly trained diplomats, as lawyers we can not escape the obligation to devote some time and discussion to the formulation of general plans and policies. As a profession the bar is particularly trained and fitted to enter fully into such a discussion.

It is not the purpose of this contribution to advocate any particular scheme or plan. Whether an individual lawyer believes peace may be achieved by a nationalistic and ex parte enforcement of law and order by one or a combination of great nations or that it may be procured by multilateral agreement in the nature of a league or super-government of nations, the fact remains that the area of his professional thought and responsibility has been enlarged.