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THE LAWYER'S PART IN THE WAR

There is an old saying in the classics that in time of war the laws are silent—"inter arma silent leges." Historically the maxim was no doubt fraught with much truth; and it must be admitted that where during war there is an army in occupation of conquered territory there is little law outside of the will of the conqueror. But the maxim would be misapplied or not fairly understood if it were taken to mean that when a country is at war the necessities of the military supersede the civil law.

When a nation like ours enters into war, instead of there being a suspension of the ordinary rules of law governing the conduct of the people, there is brought into operation, in addition to these rules, a mass of principles applicable only to time of war and an immense enlargement of the statutory law for the regulation and government of the situation which exists at home or may be anticipated abroad.

First in importance, of such new laws, are those for raising and equipping the army and navy; and the revised and extended articles of war. Then there are the acts giving the President and the Departments the requisite powers to provide for the armies and navy in the field.

The Agriculture and Food Administration acts, those for the levying of the immense war taxes and for the borrowing of money, the laws against espionage and trading with the enemy, and for war risk insurance, are a few of the many new laws made necessary by the war.

In place, therefore, of there being less law to be interpreted and applied in time of war than in time of peace, there is in fact an

extensive enlargement of the law and of the rules and regulations which govern both the conduct of the civilian population and of those persons who come within the military authority. The first and most obvious duty, therefore, of lawyers in time of war is to give their trained experience to aid both the civil and the military officers in the making, interpretation and enforcement of the new body of the law, civil and military, which becomes applicable to the situation.

But in any consideration of the contribution of the bar to the needs of the country in time of war, direct military service should take precedence. At the outbreak of war it has always been the experience of this country that the lawyers in great numbers enlist in the army.

Many have enlisted as privates. Our own Law School, connected with Washington University, and other law schools of this city have contributed large numbers of young men, yet students, but already imbued with the traditions of the profession, and many of them actually enrolled as lawyers. This war has been no exception. I have no means of ascertaining what proportion of the men who have volunteered for training in the Officers' Reserve Corps are lawyers, but I think common observation will affirm that the number is immensely greater than the proportion which the legal profession bears to the population generally. A fair share of the new officers created in the army are lawyers, who have cheerfully given up their growing practices, with the emoluments belonging to them, to accept the lesser rewards and the hard experiences of military life.

The patriotism and self sacrifice of the bar is equal to that of any department of social life, and I think exceeds the greater number, as the training and intelligence of lawyers, as a class, exceeds that of any but the other learned professions.

In the personnel of the army the bar, not only here but everywhere in the country, has contributed its share in numbers, and I think more than its share in ability and efficiency. It may be our sad fate to see this body of the splendid youth of the bar, the future professional brains of the nation in the natural order of things if peace had lasted, cut off or decimated by the ravages of war. No other profession as such takes a proportionate risk. We are in the fighting line. This perhaps is the most noticeable and immediate contribution which the bar has made to the war.

It is to be observed that it is not in their professional capacity that lawyers generally enlist, and therefore public attention is not directed to this service as one contributed by the profession as such.

It is otherwise with respect to the medical profession. The doctors who are attached to the military service, with very few exceptions indeed, are utilized in their medical character. No fault can, of course, be found with this fact, for the medical profession is fortunate in having as its chief characteristic a quality which is in the highest sense useful in its technical capacity. It would be worse than waste to put doctors in the firing line as fighters. They get there quite sufficiently in other capacities and on their own initiative. And so, I, of another profession, say all honor to the doctors.

While our brothers of the bar are serving the country in the army, we, the lawyers of an older generation and those whose patriotism is as strong, but whose circumstances will not admit of service in that form, are left to fill other functions and to do other duties. From among these men who have passed their first youth, quite a large number, including many of the distinguished lawyers of the country and legal educators, have been made judge advocates in the army.

The function of the judge advocate in the army is primarily to conduct the proceedings before courts martial, having jurisdiction of military offense under the Articles of War. The courts martial themselves are not, generally speaking, composed of lawyers from among the officers, but are composed, according to the importance of the cases to be heard, of from one to fifteen officers of any grade of rank, appointed by the commanding officer. The judge advocate acts in the triple capacity of prosecuting attorney, marshal and clerk, and the proceedings are of a summary nature. To the judge advocate officers of the higher rank the records of the courts martial go for approval or review; the authoritative and final order for judgment coming from the general in command.

In order that there may be a clearer comprehension of the relation of this military legal service done by lawyers it may not be lacking in interest to note the distinction between several correlated ideas in this connection.

There is a marked distinction between martial law and military government; and military government is for our purposes to be distinguished from the law of military occupation.

Martial law is a condition where, in domestic territory, that is to say, in some locality, within the boundaries of the country, the military authority for the time supersedes and takes the place of civil authority. It is declared only when such a state of disorder exists as to prevent the civil courts from exercising their jurisdiction. It is, in the situations proper for its declaration, the means adopted to restore order and, in a qualified way, to administer the law through military rather than

civil authority. It is in a sense military government, or at least military jurisdiction, but it differs radically from the status which exists on foreign soil, or in territory having for the time being the quality of foreign soil, when an invading army is in occupation and undertakes to govern the inhabitants.

In this country either Congress or the President may declare martial law. There is no occasion for its declaration nor exercise unless some portion of the community gets into such a state of disorder that military control becomes a necessity to protect life and property. We shall, it is to be hoped, have little to do with martial law even in time of war.

In such respects as the exigencies of war are found to create extraordinary dangers requiring the supervision, internment or arrest of persons who may be an injury or a menace to the community in connection with the war, laws have been provided which bring these matters within the Federal civil jurisdiction or take them to the military courts or to executive authorities where they may be taken care of. It perhaps ought not to go unnoticed that this granting of extraordinary powers and the provision for unusual judicial and executive authority in these cases has some analogy to martial law and may serve to a certain extent as a substitute for the more drastic measure. To the extent that this is the case the Government of the United States shows wisdom and conservatism. It is better that these instances of disorder and impropriety, and even of great danger, should be regulated to the greatest extent possible without any declaration of martial law. It remains, however, always in the power of the Government, if the conditions should require it, to place the whole country, or any part that the Government may indicate, completely under the military jurisdiction.

Military law, as we are accustomed to use it, is a term which applies simply to the army jurisdiction over the officers and men enlisted as soldiers and other persons so connected with the military controlled by the military authorities. It is exercised primarily under service as to be within close analogies, and to those comparatively restricted localities which must for military purposes be exclusively the Articles of War, and enforced through the courts martial. The jurisdiction so exercised may be exclusive to the military authorities, the acts in question being solely existent because of the laws of war, or it may be concurrent with the civil authorities, in which event comity of action is required in order to prevent conflict. Not only the personnel of the army comes under military law. Any civilian

may put himself into such a position as to be subject to military jurisdiction; but these instances are comparatively uncommon. The exercise of military law is as a body confined to the conduct of the soldiers or attaches of the army.

The law of military occupation does not come into operation except where the army is on belligerent soil. While our army is in France or on the territory of any other of our associates in the war the personnel is subject to military law—not the law of military occupation. An army, however, which is in possession of the territory of an enemy is an army of occupation, and the law that it imposes on the community by military force is the law of military occupation. It is the part of most humane commanders to reinstate or maintain in this situation the jurisdiction of the local courts and authorities so far as it may be consistent with the military purposes, and to disturb the ordinary current of the conduct of the population as little as possible. The extent to which this is done rests with the general in command. We need make no further reference to the matter here than to note the distinction between this exercise of power and those otherwise mentioned as martial or military laws.

The service which the lawyers of the country, who have been given rank as judge advocates in the army, is up to the present time chiefly rendered in connection with the enforcement of the provisions of the military law as applicable to the army. In this they are of course aided when occasion arises, by the judge of the Federal courts, where jurisdiction has been vested through acts of Congress in matters relating to the draft and military service.

In addition to those lawyers who have been given rank for these purposes in the army, there is a large number of the younger members of the profession employed in various capacities of a professional nature in connection with the departments at Washington, and partly with relation to the offices of the Adjutant General and the Provost Marshal General. Taken all together, the number of lawyers who are directly giving their time to government work in direct connection with the exigencies of the war must be quite large and will, in the nature of things, be constantly increasing as the war develops.

It is understood that a new movement has been authorized by the administration, to be worked out through the assistance of the American Bar Association, for the selection of a very large number of the members of the bar in all parts of the country, who will form a corps of men ready to be called on at any time for government service. This movement has yet to be fully developed, but it is in

progress. The Government has also utilized the services of lawyers throughout the country, particularly in the large cities, for special personal work in connection with and under the direction of the United States District Attorneys, for the enforcement of those laws which are regarded as of importance for the prevention of activities hostile to the nation. Of this character of service, in the nature of things, little can be known or said at the present time. Organizations have also been formed in various parts of the country, notably in the eastern cities, and in centers of population, under which gratuitous advice and assistance is given by committees of lawyers and individuals in taking care of the business affairs of drafted men, drawing their wills, and covering the exigencies which necessarily arise out of the sudden breaks which occur in their changed order of life. This extends to the case of lawyers who have been obliged to give up their professional work at home in the taking over of the practices of such men by their brother members of the bar under conditions which will preserve the good-will of their clientage and a fair portion of the emoluments of the profession.

The most specific service which the members of the bar have rendered in this war up to this time has been in connection with the draft. The first drawing of soldiers to serve in the army was efficiently made, but it was necessarily crude, and did not give the War Department the information needed to properly avail of the relative qualifications of registrants, and to adjust the most difficult problem of preserving to the country the essence of its individual or productive resources while at the same time obtaining the material required to make up the army. The experience of the European nations thrown suddenly into war indicated that there was much waste and productive exhaustion through the mal-adjustment of this problem. In undertaking, in the second draft, the difficult task of classifying the young men of the country in such a manner as to meet all the needs of the country, both for men at the front and for the larger army of men who must support them industrially at home, and contribute to the war activities, which lie at the base of a successful conduct of the war, a very elaborate, carefully prepared system was devised which theoretically would accomplish the result desired. But it was quite apparent that such an intricate system of investigation as is provided for in the recent selective service rules could not be made a success without expert assistance. This service was initiated by the President in a letter to the War Department in which he said:

“The time has come for a more perfect organization of our man power. The selective principle must be carried to its logical

conclusion. We must make a complete inventory of the qualifications of all registrants in order to determine as to each man, not already selected for duty with the colors, the place in the military, industrial or agricultural ranks of the nation in which his experience and training can best be made to serve the common good. This project involves an inquiry by the selection boards into the domestic, industrial and educational qualifications of nearly ten million men.

"I urge men of the legal profession to offer themselves as associate members of the legal advisory boards, to be provided in each community for the purpose of advising registrants of their rights and obligations, and of assisting them in the preparation of their answers to the questions which all men subject to draft are required to submit."

In pursuance of this object the Provost Marshal General addressed a circular letter to the Governors of the States asking them, with the assistance of the American Bar Association and its members, to suggest the names of three representative lawyers in each local registration district to take charge of and be responsible for this work, and to organize the members of the bar generally as associate members to assist the registrants until the work should be completed. The State and local bar associations were ready-made helpers. In thirty days the lawyers of the country were organized and sworn in as special officers of the Government to aid the draft. In this city, for illustration, about six hundred and fifty lawyers volunteered and served, eighty-four of them as regular members of the twenty-eight local districts in the city, and the remainder as associate members, giving business hours and evenings to the registrants in all parts of the city, often at great distances from their homes, until the work was done. The same thing occurred throughout the United States. Judges of the courts, busy practitioners, with such assistants as they might obtain from the personnel of their offices, curtailed their professional work and gave time to the Government. This continued for a period of thirty to forty days during the busiest portion of the year. Individually, it was perhaps not a great deal. Indeed it was nothing in comparison with the service of the man who leaves everything to train in the cantonments and serve in the trenches, but in the aggregate it was the voluntary, patriotic work of perhaps fifty thousand specialists given immediately upon demand for the cause. It might to some seem an amusing spectacle to see a learned judge conferring with a negro youth, or a railroad counsel, whose time is in demand at almost any price, advising workmen and their wives on the intricacies of the dependency and industrial sections of the draft. But I think

myself that it was more inspiring than amusing and I was glad that I could personally contribute to the end.

In connection with the draft activities of the profession it should be noticed as well that a considerable number of the men appointed to the exemption boards are lawyers and many of them have given during the last four or five months the greater part of their time to the Government service. There were also appointed by the Government appeal attorneys to serve as the representatives of the war department in the review of the draft service work.

It is one of the qualities of the legal profession that it trains men to an aptitude for executive work, and particularly to an ability to speedily acquire information with regard to new subjects which may be brought to their attention. This is incidental in their experience in the preparation of cases, which in the nature of things involve great varieties of facts and conditions. In emergencies, therefore, where new situations have to be dealt with and the public is affected by rapidly changing conditions, the profession is generally called upon to contribute its members in larger proportion than any other. In this way the members of the bar have been called upon, since the beginning of the war, to fill and they have filled, many positions of administrative trust, not especially connected with any department of their professional work but which are collateral to their business experience. The bar of this city has contributed its full quota of men for that purpose who are at work under the Government at Washington and elsewhere in positions of power and confidence.

The membership of the bar has also been drawn upon very extensively for the Red Cross and Liberty Loan activities and as speakers for various purposes called "Four Minute Men," who have made hundreds of addresses throughout the city and state in giving publicity to those things which the Government regarded as important to place before the people. Of course all of this work has been gratuitous. These various activities connected with the needs of the war situation cover fairly well up to this time, in a general descriptive way, the services of the legal profession and their part in the war.

It is not, however, in these specific services that the greatest usefulness of lawyers consists in time of war. There is a far greater function for them to perform. As officers and enlisted men, as officials and advisers of the Government, as contributors to the war funds, as subscribers to the war charities and the Liberty Loans, and as assistants in the selective service draft, they are only doing their share

as others are doing, theirs in lines of activity in which they have more or less special qualifications. In one regard, however, the bar is unique. It is trained to conservatism, to respect for law, to the maintenance of governmental institutions and to careful distinction between correlated ideas and because of these abilities it is particularly fitting to exercise a restraining influence upon men's minds in times of popular excitement. In other words, it is the function of the bar to see that people keep their heads when they are in danger of losing them. I am inclined to think that Americans are particularly in danger of losing their heads. The great liberties we have enjoyed and the lack of any real experience with oppression, restraint, suffering, sorrow and disaster tends to cause intensity of feeling when these things come that other less happy peoples would not develop. If we get excited, as we do, over the discomforts of our men in more or less hastily built cantonments, what will we think and feel when the great disasters of the war develop? Can we see, as we are likely to see, daily lists of hundreds of lives lost in battle? How will we take labor disturbances based on the possible necessity of forced hours of work? What will be our attitude if the war should take a disastrous turn and some of our allies drop away instead of keeping up the fight? Could we stand these things without saying and doing that which would make matters worse instead of better? We are used to uniform comfort and little sacrifice. We as yet know nothing whatsoever of the hardships of war nor of the galling suffering of standing these hardships without complaint.

Greater danger than this exists.

I am one of those who believe that the great body of American people are of one mind with respect to their form of government. As reformers we are more or less conservative or radical. But we believe at bottom in constitutional government; that the form of Democracy called a Republic, that is to say, a representative government in which the will of the electors is expressed through the representatives selected by vote, is the best form of government ever devised and is the proper medium between the efficient domination of an autocracy and the lawlessness of an unregulated, ungovernable people. We do not believe in state socialism because we know that such can only be maintained by military power. We are for American individualism tempered by law, controlled by a constitution which is the ultimate source of authority in war or at peace, to give every man and woman a fair chance to earn what he or she deserves, and the just punishment of those whose selfishness interferes with these ends. And so, when we speak of making the world safe for Democracy,

we mean that kind of Democracy and not Bolshevism,—not the kind which ignorantly believes that it can have the protection of government without submitting to its restraints; a Democracy which recognizes duties as well as rights; one which is shared by the people of all constitutionally restrained governments. The danger, therefore, against which above all we must keep our heads is the letting in of the elements of society of which there are always some present, to subvert our institutions, to take advantage of popular indignation and excitement, to sweep aside safeguards, to overthrow sound tradition; in other words, to break down our constitution and throw us into a comparative anarchy. This Bolshevist movement is world wide. It obtains, in such a country as Russia, our commiseration, if not our sympathy, because it is a revolt against oppression, but it must get no hold on a people who are already free from oppression and have greatness of liberty and habitual comfort.

Let me give you for a moment a slight picture, drawn by a Russian of intelligence, with respect to the condition of things which existed in his country a few weeks ago. He says:

“While I am writing, civil strife is running high at St. Petersburg, Moscow and Kief, not to speak of minor places, and we are deprived even of the poor consolation it would have been to hope that these horrors are a boon in disguise; that they might at least serve as a lesson to our would-be government. These gentlemen are too weak-hearted or weak-minded ever to make proof of energy except in speech, and what we are in need of are ideas and not words. We have had plenty of the latter for the last eight months. You cannot imagine the state of anarchy which is systematically enforced upon the country. No discipline, no police, no courts of law, all the prisons emptied and their contents let loose on society, and on top of that, something like two million deserters, most of whom live on plunder, and you will have a fair idea of the state the country is in (not to speak of the army). The great misfortune was that from the beginning the lead of the revolutionary movement has been taken by workmen who would not work and soldiers who would not fight and to counterbalance their influence we had, and still have, only Utopists *a la* Tolstoi, who imagine that they can stop crime with admonitory decrees or resolutions.”

A leading newspaper of Petrograd says:

“The Bolsheviks have conquered. During the past six months we have lived in an atmosphere which, while not truly republican, was certainly free from monarchy. Now the last vestige of freedom is gone; the yells of Bolshevism and of the Soviets reigns supreme. Domiciliary searches and arrests are the order of the day, telephone conversation is under surveillance and the telegraph service is prohibited. The censor is

back again. Already most of the important journals in the provinces have been suppressed; the newspapers of the capital will soon follow suit and the dictatorship of the Soviets will be complete. Let us not delude ourselves; we can judge the coming plant by the early blossoms."

The Springfield *Republican*, in a late issue, presents this prediction:

"A new order is coming into the world. The Christian crusades introduced the Renaissance. The prolonged wars which accompanied the rise of Protestantism broke down the Roman Empire, and left a free field for modern individualism and industrialism. The wars of the French Revolution established political democracy. This war will probably open the way for something equally revolutionary and vital in the life of the world."

A correspondent of the New York *Tribune*, returned from Petrograd, described the Bolsheviki thus:

"The Bolsheviki, as an element of opposition, have constituted a dangerous and sinister menace to the country, poisoning the loyalty of the people, obstructing industry, and defying the Government to exercise its authority. But the Bolshevik party in power, assuming the responsibility of a government, is a helpless and futile anomaly.

"First, there are the innumerable German paid agitators and propagandists, whose sole purpose is to reduce the country to complete anarchy.

"The second class is composed of fanatics, escaped convicts, released political prisoners and expatriated Russians, whom political amnesty brought back to the country. These, the sense of accumulated wrongs, real and imaginary, of half a century has driven into a frenzy of anarchistic revolt, and without sharing the motives of the German leaders, they find their doctrine quite congenial.

"The third and largest class is a tremendous body of ignorant working men and soldiers, with nebulous notions of democracy, who have been taught by their leaders that freedom is a debauch of idleness, and that properly interpreted liberty means a complete reversal of power, which will give them a qualifying tyranny over their old masters.

"This briefly is the Bolshevik, Maximilist, or extreme Socialist faction in Russia. It is made up of the disgruntled, unfit, defective elements of the population, which, without conscious disloyalty to their country, have formed the easiest possible prey for the German propagandists."

And that is what the Bolshevik party in the United States would consist of if it were allowed to gain a foothold.

There can be no doubt that a very large part of the people in this revolutionary movement in Russia are perfectly sincere. Their

political beliefs seem to be based upon a species of internationalism resting upon the universal brotherhood of man. It is partly religious, partly socialistic. It is not accompanied by any practical ideas of Government; in fact excludes them. It is often a very difficult thing to convince even fairly intelligent people that sincerity is not a guaranty of right. History is full of the most egregious mistakes and disastrous blunders committed by people who have been perfectly sincere. Napoleon was sincere when he covered Europe with blood in the name and for the glory of France. Robespierre and Danton, together with the greater number of French revolutionaries, sincerely believed that the guillotine was the proper method to insure to the people of France and to all nations liberty, equality and fraternity. The leaders of the Inquisition which set the civilization of Spain back for five hundred years honestly thought that the way to make the whole world Christian was to burn and strangle all those who were not Christians. The logic of their position was perfect. In the domain of morals it may be that sincerity is an excuse for wrong, but in statesmanship nothing can take the place of a knowledge of history and human character. The clergymen, literati and pacifists in this country who see in Bolshevism the coming of universal peace and perfect order, based upon the Christian principle of the brotherhood of man, are making in a qualified way the same mistake which Torquemada and his fellow Dominicans made in the middle ages. It is reasoning from the particular to the general upon insufficient premises and with insufficient information. Because the slaying of one heretic removed from the path of the church an obstacle to the spread of the Christian religion, the Inquisition jumped to the conclusion that the way to spread the Christian religion was to slay all heretics. Because the brotherhood of mankind may bring good will and peace when applied to individuals, it is assumed that a political structure governing the world can be based upon the same principle. John Fiske once said, very pertinently, that the power of generalization was an excellent servant but a very poor master. And consequently we see in this practical world, where the principles of the Christian religion have not so unified the human race as to make it of one mind, that the cause of Christianity and of democracy and of the free development of popular government has received from the Bolsheviks and their following the most staggering blow of a century, and all in the name of religion, democracy and the rights of man.

Do you say that it is impossible that this movement should gain footing in the United States?

I quote from the statement of a woman, who attended a large organization dinner of the Woman's Peace Party in New York:

"Their after dinner speeches anti-ally and anti-war developed an entirely new trend, and I heard with amazement that the future salvation of the world lay in Bolshevism. Every mention of the name brought forth wild applause, in contradistinction to the derisive laughter which greeted any mention of religion or government. These people are, most of them, sincere dupes, radicals of all types, theorists united with anarchists, and pro-German propagandists under the common banner of discontent."

Movements of this kind never lack able spokesmen and specious leaders. They get together a considerable weight of the press and a political following. The very newness of the picture of a world free from all restraints, of ecstatic liberty, of universal peace, of a society where there are no differences of rank or power, where land will be free, where property will be in common or shared at will, where there is no punishment for crimes, where there will be no crime, where good will and happiness reign supreme, without effort and without restraint, brings to the cause all the impracticable, unsuccessful, discontented elements of society. As it succeeds in gaining a recognition it is cultivated, insincerely, by people who wish to avail of the gathered votes to obtain personal prestige, notoriety and success. The laborites, by which term I mean the extreme kind of the labor following, the I. W. W. and others, gather to the movement because it promises to overturn the power of those to whom they are opposed. More conservative ones palliate it and minimize the dangers by pointing out the good points of the objective and the enormity of existing evils, and think that they are discriminately just in giving the Devil his due. At bottom it is the wild tiger of anarchy showing its teeth, proving how thin the veneer of civilization really is.

The lesson to be learned from Russia is that no men are useful who, whether in the name of religion or humanity, or the essential rights of man, seek to undermine the positive restraints of society unless their desire for justice is accompanied by constructive statesmanship. The blind cannot lead the blind no matter how good may be their intentions, and they invariably fall into the hands of those who direct their energy for the accomplishment of purely selfish ends.

The lawyers of the country do not appreciate, as they ought to, the magnitude of the duty which rests upon them in the presence of such a movement, in times of war, threatening to undermine our institutions. While every intelligent person has in a measure the same duty, it is the lawyers, of all people in the community, who are best

qualified to suppress it. By their education and reading they are familiar with governmental experiments and history from the time of the Roman Commonwealth to the present day. They have been made familiar with the principles of Roman law, with its development and deficiencies under imperial institutions. They know of the governmental chaos of the middle ages. They know of the age of purely monarchical government, with its singular combination of the Divine rights of kings with the favor of proletariats, and of the gradual rise of the middle classes to power and control. They know of the solid yeomanry of England, and the sturdy Barons who forced the declaration of rights of the English people; of the wars of the feudal system, and its gradual downfall, and of the history of the free development of the law and of Constitutional Government as the fruition of a thousand years of civil conflict. They are students of the common law, the greatest of all systems of law, in spite of its defects, and are conscious of the heritage of the Anglo-Saxon people as the guardians and possessors of the largest share of individual liberty given to any race.

They know all these things and for themselves with few exceptions have their feet firmly planted on Constitutional rights and Constitutional Government. But they do not appreciate that it is not so with others, that his sound point of view based on history and experience is peculiarly the heritage of the Anglo-Saxons—the English people and their off-shoots—and that we have most unwisely, but with pardonable generosity, taken into and made part of us immense numbers of people who have never had either the history or experience of such institutions behind them; that this new mass of population, keen, intelligent, forceful and ambitious is constantly thinking on different lines, along the lines of their own national history and experience with governmental oppression in their past, perhaps still operating upon their friends and families at their former homes. They are not trained to love of country or to self-control. And they are given the right to vote. It is small wonder that ideas, like those of the Bolshevists, should find favor among such people and that they should translate the hereditary ill-will against order, which meant cruelty and injustice, against Government, which meant a complete crushing of opportunities, against rulers, who were oppressive, into some beatific dream of absolution from every form of restraint; accompanied by a vicious desire to get even with the world.

It is this mass of people who must be educated, led to a correct view of government and to an appreciation of our institutions. It is

a fearful task. Without our public school system it would be hopeless. And in the exigency and excitement of war all the weaknesses of a generation of work must show.

In spite of all stage play to the contrary, the touch of the lawyers with the community is a potent influence, and it ought to be exerted to its full effort to check off all adventitious and unnatural aids to the reign of anarchy, confining such movements, in the last analysis, to those who are beyond persuasion.

It is a time when it is necessary to solidify and make clear our conceptions of democracy and not fall into the commonplace error of supposing that democracy means the rule of an unregulated proletariat. To obtain order which, after all, is the prime function of government, a democracy more than any other form of government needs constitutional restraints, for democracies are for minorities as well as for majorities. They are neither for the classes nor the masses, but for all.

We are now confronted with dangers to our constitutional form of democracy, both from a foreign enemy and from more insidious, but hardly less dangerous, attacks at home. Indeed much of the domestic danger is the output of the foreign danger. Nothing could possibly aid our enemy as much as disruption at home. This can be seen in the results in Russia. It can be seen partially in the effects of the German propaganda in Italy. It may be hereafter seen in Switzerland. Safeguards must be taken to prevent such results in the United States.

When war comes, as it has come, those well intentioned thinkers, writers, speakers, of whom many exist in university circles, whose humanity tends to draw their minds toward somewhat drastic remedies for what are really, relatively speaking, quite superficial evils, had best keep quiet or revise their thoughts. Human nature cannot be corrected at will. Postpone your hobbies for a while. We can fight them out later. Extend your influence to the more solid causes, chief in our minds, of winning the war and protecting the Constitution.

Deprecate all talk about throwing aside law and getting down to the primal rights of man. The Constitution is a war as well as a peace instrument. No intelligent person doubts the great powers of the Government nor resents their exercise. As was said by Joseph H. Choate in his remarkable argument on the income tax cases in 1894 before the Supreme Court of the United States:

"We believe that Congress has plenary power in the last exigencies of the Government to reach every man, every dollar, every inch of ground, to secure the common defense and the

general welfare; that it was the purpose of the convention that created the Constitution to give Congress that power and that it is one of the absolute essentials of a great sovereignty which was to cover a continent and to last for untold ages."

Of course war powers cease when war ends. Powers necessary to the common defense and to the successful waging of war terminate when peace comes. We need have no substantial fear that such powers will be used or attempted to be used beyond the exigencies which bring them into operation. They are given in trust and will be exercised in trust.

But to return for a moment to my main proposition, that it is the prime duty of lawyers to maintain the principle of Constitutional Government.

"The Constitution which at any time exists till changed by an explicit and authentic act of the whole people is sacredly obligatory on all. The very idea of the power and the right of the people to establish government pre-supposes the duty of every individual to obey the established Government."

These are not my words. They are those of George Washington.

"I believe this to be the strongest Government on earth. I believe it is the only one where every man at the call of the law would fly to the standard of the law, and would resent invasions of the public order as his own personal concern."

This is the statement of Thomas Jefferson.

"If there have been those who doubted whether a confederated representative democracy were a Government competent to the wise and orderly management of the common concerns of a mighty nation, these doubts have been dispelled."

This is the statement of President John Quincy Adams.

It is only during the twenty-five years last past that there has been any serious public deterioration of thought on these questions. In that time, however, it must be recognized by even the most optimistic Americans that there has been a slow erosive process going on tending to undermine the structure erected by our forefathers. There is to be seen a gradual and dangerous omission in the political action of the times, in the press, in the speeches, in our political campaigns and in the literature of late years, of that confident belief in the solidity and success of our constitutional form of government. It is no longer an assured road of popular favor to applaud the structure and its successful development in creating and protecting the happiness and prosperity of the American people. There is a growth of insidious desire for change apparently in the hope that change will necessarily mean betterment. There is a tendency to so enlarge by construction

clauses of the Constitution as to absorb in the Federal Government powers not intended to be there. There is the development of secondary parties having, apparently, political, but really purely selfish motives, regardless of the prime trust to maintain the welfare of the whole people. And now as an indirect result of the war, there is this movement which spreads from Russia. It threatens to spread among the unthinking portions of the public into a dangerous attack upon the fundamental character of our institutions. Efforts to secure amendments to the Constitution are becoming more frequent, and many of these go to the extent of reversing its position as fundamental law. It is claimed that the Constitution does not express the popular will. Victor Berger advocates the abolition of the Senate, others the recall of judicial decisions, easy methods of impeaching the judiciary, general provisions regarding social status, invading the time-honored province of the state governments. In the desire to obtain justice for individuals or classes, efforts are being made to deny the foundation of justice. Justice is the ideal of democracy and needs for its existence a constitution to protect it. It is a time when loose thinking is out of order. Men who are capable of discriminating between license and law, between anarchy and government, between rights and duties, between the reign of order and the troubles of disorder, must speak and act and above all must not allow their own intelligence to be corrupted by false thinking, however much it may purport to be based on either religious or humanitarian grounds. At such times and for such purposes the lawyers must serve as ballast to the ship of state. At such times we cannot overestimate the fervent love of liberty, the intelligent courage and the sum of common sense which our fathers made the experiment of self-government. On December 3, 1900, Mr. McKinley, in one of the last utterances of his life, used these words:

"The Republic was never so strong because never so strongly entrenched in the hearts of the people are now. The Constitution, with few amendments, exists as it left the hands of its authors. The additions which have been made to it proclaim larger freedom and more extended citizenship. Popular government has demonstrated, in its one hundred and twenty-four years of trial here, its stability and security and its efficiency as the best instrument of natural development and the best safeguard of human rights."

I am not so bound by deference for the past or consideration for the future that I do not admit that there are wise and perhaps far-reaching changes in our organic government to come hereafter. Indeed I look, as one of the results of this war, to see many alterations of the Constitution to be made, alterations which are making themselves

necessary or important to adapt our institutions to modern ideas. But the principle of Constitutional Government must stand and the Constitution, with all such changes, must remain the organic law superior to men and measures. Certain fundamentals must remain. The bill of rights, which constitutes the contract between the Government and the individual, for the protection of life, liberty and the gains of industry, the supremacy of the Supreme Court, as the safeguard against unconstitutional legislation, and an orderly and time conserving method of amendment are among these essentials. Without these the Constitution would be but a name.

In an address delivered in St. Louis recently, Dr. Nicholas Murray Butler, president of Columbia University, said :

"A still more subtle enemy of the American democracy is the widespread teaching that there is and should be a class struggle between those who have little and those who have more, between those who work with their hands and those who work in other ways. The notion of fixed economic classes that are at war with each other is in flat contradiction to the principles and ideals of democracy. The doctrine of a class conflict was made in Germany, and it represents a notion of social and political organizations wholly at variance with the principles and conditions of our American life. In this country we have no fixed economic classes and we desire none. The handworker for wages of today is the employer of tomorrow, and the door of opportunity is so wide open that he who begins in industrial, commercial, or financial service at the bottom of the ladder may by competence and character speedily climb to its very top. Those who teach the justice and the necessity of a class struggle are not believers in democracy. They do not wish to lift all men up; they are bent on pulling some men down. Their program is one of destruction, not construction; of reaction, not progress. They do not believe in the equality of men before the law and in the equality of opportunity for all men and all women; they believe in a cruel, relentless, exploiting class. In other words, they believe in privilege and not in free government. Class consciousness and democracy are mutually exclusive. Its logical and necessary result would be to tear up the Declaration of Independence, to destroy the Constitution of the United States, and to put in their stead a charter of Bedlam under whose provisions might, and might alone, would make right. Every movement and every effort to this end should be challenged peremptorily in the name of the American people, their traditions, and their ideals. It is vitally important to oppose autocracy in this form as when it comes clad in imperial robes and accompanied with all the instruments of militarism."

Among those changes which may come in the future is the adoption of the principle of a responsible ministry, which is a part of the

democratic idea in other self-governed countries. The United States Constitution was framed before that principle had fully developed. It is in a sense more democratic than our present methods. Elections of members of Congress every two years is hardly sufficiently responsive to changes of public opinion or the trend of events. As, for instance, it may be noted, the House of Representatives as it stands today was elected before we entered the war and a new house, elected in November, 1918, may not take its place until December, 1919, by which time it may be hoped the war will have ended.

And the choice of the heads of departments from among the members of Congress of the dominant party, with change of such ministry when the opposition as it would then have to be called again came into power, would bring the United States more closely into the modern democratic idea. Such would be true party government, of which we know very little at the present time. Such a change would seem radical to many, but simply because they are not used to it. And I am inclined to think that it would serve to legalize and make more deliberate and responsible what now takes often the shape of mere factional controversy.

A true party opposition is based upon that notable phrase, voiced in the English Parliament at the time of the debate on the reform bills, "His Majesty's opposition," asserting in a picturesque word the common national purpose and loyalty, expressed in a real difference of opinion as to the correct policies of government at the time.

But we have not that system now and it would be absurd to attempt to change it during the war. The result is that while the war lasts party spirit is out of place. It is either futile or it is obstructive. There is room now for nothing but an all-American party, interested in aiding the Government by constructive thought and constructive action.

The natural alignment of parties is between the Conservatives and the Liberals. All great parties take on the one great character or the other. There are always also the ultra-conservatives—we call them plutocrats—and the radicals or irreconcilables—we call them Socialists or I. W. W's. Our party contests, so far as they are not expressive of the ambitions of particular men for office, tend to drive the conservatives to extreme positions and to push the liberals into the ranks of the irreconcilables. Each party does this for the other. But the general mass of the people, who are moderate minded Republicans and Democrats, have little to say and nothing to do, but to vote, often with Hobson's choice, between candidates not acceptable to either.

This may be an interesting and perhaps not seriously harmful game in time of peace but it would be disastrous in time of war. The outside world would not understand it and it would be a fertile field for the pernicious propaganda of our enemies.

I am moved to this digression into political lines because I deem it the duty of the members of the bar, who always take an interest in political affairs, to exercise a restraining influence in this respect upon party leaders and party followers. It would be a service to the country to prevent party opposition from taking on the extreme and bitter tone which is common in national elections. The body of sensible Republican and Democratic voters should be advised to abate all personal ambitions and party prejudice in favor of an all-American Congress which will loyally aid and if necessary press the Government on to victory.

In another form the same stabilizing influence of the bar can be always intelligently and wisely exerted in time of war. This is in the prevention and minimizing of what may be called the mob spirit. Those of you who are familiar with that wonderful book of Prof. LeBon, "The Psychology of the Crowd," will recognize at once what I mean. It is the instinct of human beings acting under strong emotion to follow leaders blindly into all sorts of physical and mental excesses, to act without judgment or consciousness of consequences, to visit punishments upon innocent victims of popular hate; perhaps reversing the verdict in an instant to crown the subject with equally indiscriminating praise. This spirit exists often quite independently of a crowd of people parading the streets, although it is on such occasions that its most dangerous manifestations may appear. Such is the form that it takes in Petrograd; and while, of course, there is danger enough at all times of excitement, of its taking place anywhere, its manifestations are more often in public speech, in the newspapers and in the current magazines. It may exist in the Congressional Chambers, it may be in the mind of a public official. It is always the intemperate boiling-over product of passion and unreason.

It is probable that as the war goes on, if peace does not happily come sooner than the military authorities expect, the disposition which is almost an obsession with the American people to criticize somebody when they are hurt, will tend to disturb the operations of those constitutionally entrusted with the conduct of the war to a point which may seriously impair their efforts. It will be a time to overlook not merely minor differences of judgment but great differences. It will be a time to suppress all partisan feeling and all partisan rea-

soning. Those persons who have been granted power of any kind will do well to devote their exclusive attention to the subjects with which they are entrusted, forgetting the importance which they thereby personally acquire in the importance of their work. The object is everything; the man nothing. And for those who are not so entrusted with power there are fortunately enough of external activities connected with the war to absorb any excess of energy or to drown the sorrows which may come.

To see that this pent up feeling does not express itself in the mob spirit is the part of all self-controlled men. This is not always an easy or a grateful task. Lynch law is in its nature blind to consequences and seeks a victim. He who stands in its way is pretty certain to be charged with sympathy for the object of the public unreason. For illustration, we see perfectly unlawful attacks being made in various communities upon persons suspected of being German sympathizers. Even the statement that they are unlawful raises in the minds of the perpetrators the question whether the makers of the statement may not be a little pro-German. A pacifist minister is tarred and feathered and sent out of town; his defenders are called pacifists like him. To deprecate the use of violence in a strike is to be branded as an enemy of union labor. It takes courage to uphold the law; and that is one of the things which lawyers are for. As war tends to bring people to a more excited state of mind and to translate their emotionalism into active lawlessness, these incidents may become more common and threaten the public order.

One other and last respect in which, in my judgment, the interests of the country are peculiarly confided to the profession of the law at this time is to preserve the freedom of the press. Much superficial thinking has been done in this connection. That the press is often misused is obvious. That not every newspaper or periodical is an advantage to the country or to the people whom it purports to serve is plain. Sedition and treason, and any other war offense, may be committed by the publishers of newspapers and other prints as they may be committed by any individual who owes allegiance, permanent or temporary, but it nevertheless remains the almost fundamental necessity of government which, in the last analysis depends upon public opinion and the intelligent exercise of the suffrage, that the press must be free and unhampered in its disclosure and comment upon public events. The Republic cannot exist without it. I do not care to go very fully either into the history or the arguments which touch the matter of censorship. It is perhaps sufficient here to notice that

the freedom of the press guaranteed by the Constitution in the first amendment adopted through the courageous activity of the Colony of Virginia, and associated in its wording with freedom of religion, is a cardinal precept of American institutions and more strongly fortified in them than in any other country of the world. Even the liberties of the English people from whom we derive the principle, have never been so completely regarded as dependent upon the principle as have those of the United States. From the time when President Jefferson took his historical position with respect to the alien and sedition laws enacted in the last year of his predecessor's administration, the country has had the settled conviction, right in itself, that the press must not be hampered otherwise than by the responsibilities which attach by law to their statements.

In any statement made with respect to the freedom of the press, it ought not to escape mention that this freedom is not unlimited. It rests upon its historical position under the common law. It is subject to the exercise of the police power and to legislation for protection of public health, safety and morals. It is subject to the inherent right of the courts to punish for contempt of their proceedings through improper comment from the press. It is subject to civil liability for damages for libel and slander. Improper and harmful advertising may be prohibited and the use of the mails is a privilege which may be denied by the Government practically at will. What is protected therefore by the Federal Constitution and the State Constitution is the right of free and fair comment upon public men and public affairs without malice and within the limits of reasonable criticism.

As stated by the Supreme Court of Missouri in a comparatively recent case:

"Finally, freedom of speech is guaranteed to the individual and newspaper by the Constitution. Courts are charged with a duty they may not pretermitt, to see that it is not abridged. It is, however, the use and not the abuse of free speech and free press that is guarded by the fundamental law as sacred. So long as a publication is not directed to a public officer by charging criminal misfeasance or non-feasance, so long as it is not directed to the defamation of an individual in his private character or business, but is directed to a matter of live public concern and is for an honest and not a defamatory purpose, it is qualifiedly privileged. Within lines suggested, it would be intolerable to hold that a newspaper or individual—the one the same as the other—might not comment fairly, freely, with vigor and severity."

I am satisfied that any attempt at closure in this respect would, even if patriotically acquiesced in for the time being, result in ulti-

mate suspicion, distrust and subversive action which would tend more to detract and interfere with the unity of effort desirable in this exigency than such harm as may from time to time come through its imprudent or malicious use. The newspapers themselves are in a somewhat weak position with regard to this subject because the disinterestedness of their advocacy of freedom is immediately questioned. It is, of course, to the pecuniary interest of the press to be free. It could hardly exist at all in a repressed condition. Consequently what the newspapers have to say upon the subject can immediately be ascribed to self interest and not to public spirit. If there is any class of people in the community therefore who both understand the soundness of the proposition in itself and the dangers of its neglect, it is the lawyers who should in the proper places and at the proper times make themselves heard when it is threatened.

The part of the lawyers in the war is therefore this:

First: To serve the Government in any capacity, military or civil, to which they may be called.

Second: To use their influence always in favor of Constitutional Government and to repress all subversive attacks upon our fundamental institutions.

Third: To discourage purely party activity while the war lasts.

Fourth: To stand against manifestations of the mob spirit, and

Fifth: To defend the freedom of the press.

EDWARD C. ELIOT.