

DOCUMENTS
BY WAR POLICIES COMMISSION

MESSAGE
FROM
THE PRESIDENT OF THE UNITED STATES
TRANSMITTING
A COMMUNICATION FROM THE SECRETARY OF WAR
CHAIRMAN OF THE WAR POLICIES COMMISSION
SUBMITTING ADDITIONAL DOCUMENTS IN
CONNECTION WITH THE STUDY MADE
BY THE COMMISSION, AS REQUIRED
BY THE PROVISIONS OF THE
PUBLIC RESOLUTION
CREATING THE
COMMISSION



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MESSAGE

To the Congress:

I am transmitting herewith a communication from the Secretary of War, chairman of the War Policies Commission, submitting additional documents in connection with the study made by the commission, as required by the provisions of the Public Resolution creating the commission.

HERBERT HOOVER.

THE WHITE HOUSE, *March 12, 1932.*

DOCUMENTS BY WAR POLICIES COMMISSION

ANALYSIS OF TESTIMONY

LETTER OF TRANSMITTAL

WAR POLICIES COMMISSION,
Washington, D. C., March 10, 1932.

The PRESIDENT,
The White House.

DEAR MR. PRESIDENT: In accordance with the desires of the War Policies Commission I am submitting to you, with the request that they be forwarded to the Congress, documents to complete the record of the testimony furnished the commission. One of these, prepared by the executive secretary of the commission, comprises a summarized analysis of the testimony bearing on certain important questions studied by the commission. Attached also are copies of legal opinions presented by the Attorney General, by the American Legion, and by others.

Respectfully yours,

PATRICK J. HURLEY,
Secretary of War,
Chairman of the Commission.

DOCUMENTS BY WAR POLICIES COMMISSION

ANALYSIS OF TESTIMONY

(Prepared by the Executive Secretary of the Commission)

NOTE.—For a complete list of the witnesses examined and a verbatim record of the testimony presented, see House Document No. 163, Seventy-second Congress, first session.

A. SCOPE OF COMMISSION'S TASK

Under the direction given the commission by Congress there appears to be almost no subject directly or indirectly connected with the conduct of war which was not included in the scope of the commission's authorized investigations. The language of the resolution includes the statement, "together with a study of the policies to be pursued in the event of war," while in its preamble appear the words, "To promote peace". It is apparent, however, that the principal purpose in creating the commission was to develop methods for preventing profiteering and for equalizing, to the greatest extent possible, the burdens and sacrifices of war.

While not unmindful of the futility and horrors of war, the commission considered that its task was essentially a practical one, laid down for it in the hope that should this nation again have to resort to arms, the burdens of defense would fall equitably on all elements of our citizenry. The commission, therefore, was not concerned primarily with causes of war, and made no attempt to develop a panacea for preventing war. Neither did it study, except incidentally, those phases of preparation for war that involve the organization, maintenance, and training of military and naval units and reserve forces.

A few witnesses protested strongly against any type of so-called war preparations, or, in fact, against a study of war policies, on the ground that to consider now measures to be applied in the event of war was not in consonance with our country's expressed attitude toward the abolition of war.

Most of the witnesses, however, were of the opinion that a study of the type herein indicated, and administrative preparation by the United States, could not be resented by any other government. They doubted that such activities would attract any attention whatsoever. To a considerable extent this work deals in intangibles; it seeks to fix upon the national policies that should be pursued in emergency, and not to accumulate specific quantities of military force and material for use under such circumstances.

Dr. Arthur Deerin Call, secretary of the American Peace Society and editor of the Advocate of Peace, extended this thought to include

the present military training program in the United States. He said:

I am quite of the opinion that the "reasonable defensive posture," as phrased by President Washington, remains still a necessary posture on the part of our people. So long as our Army is as small as it is, I can not see how any major power in the world can look upon us as in any sense a danger. It is true, I believe, that we could not wage a war in a foreign country by the Navy alone; it has to be waged by the Navy in cooperation with the Army. Since our Army is as small as it is, I am of the opinion that our Military Establishment as is does not constitute, therefore, a menace to the peace of the world and that it is not necessary to think that it does.

In 1924 President Hoover, then Secretary of Commerce, presented his views in a letter which concluded:

War is an unhappy business * * * and the more evident it is that the whole Nation will be put in the storm and made to bear its share of the sacrifice the less likely we will be to go to war.

Inaugurating the hearings of this commission in March, 1931, Secretary Hurley said:

It is quite generally conceded that the elimination of excessive profits will be a long step toward the insurance of peace. Certainly all must be agreed that it is unjust and unpatriotic to require one man to die in defense of his nation while another is reaping tremendous profits from his war activity.

It was almost universally agreed that the aim expressed in these two quotations can be attained only through the development in peace of an applicable system that will prevent in any war a recurrence of the conditions that in 1917-18 led to injustice, profiteering, and inefficiency.

B. PEACE-TIME PREPARATION

One great aim of peace-time preparation is to adopt and follow constructive measures to insure that in the event of another war preventable errors in the utilization of economic assets will not occur.

Mr. Baruch, speaking out of an unusual experience, fully described the deficiencies in the preparations for the World War and strongly recommended adequate peace-time preparation. He said:

We must plan in such a way that if war comes we shall meet the enemy with our maximum effectiveness, with the least possible injury and violence to our people, and in a manner which shall avoid inflation and waste. Our plans should eliminate war profiteering, and they ought to provide that each man, thing, and dollar shall bear its just proportion of the burden. It should be designed to avoid the prostrating economic and social aftermath of war.

In more specific fashion, in his final report as chairman of the War Industries Board, he urged, in the following words, the necessity for detailed planning work within the War Department:

The experience of the board in this respect suggests the thought that there should be established a large unit of specially qualified officers of the War Department devoted in time of peace to studies of supply programs for supposititious military undertakings. As these programs would always have to be based upon obtainability of the supplies outlined, the bureau should be required to go deeply into a study of the industrial resources and the possibilities of the country as they relate to war needs.

When this country entered the World War the majority of our people would have subscribed to the slogan, "We must win, regardless of cost." No one had a more intimate knowledge of what was

done in 1916 and 1917 than Mr. Gifford, whose comment on the general feeling at that time is significant. He said:

I would suggest that this commission might very well express, in a resolution, or recommend the expression in a resolution of Congress, that it shall be the purpose of this country in case of another war to take the profits out of war and, in so far as possible, equalize the burdens of war. Perhaps had that been expressed before us in the Council of National Defense and Advisory Commission before we entered the late war, I think somewhat more attention would have been paid to it. We had plenty to do as it was, but I do not recall directing particular attention on the part of this particular group to the question of trying to equalize the burdens, or the question of trying to take the profits out of war. We were engaged in trying to get production and getting the supplies the Army needed and to organize satisfactorily the Council of Defense, and all these myriad of committees that had to work on the different lines of endeavor in order that the whole picture of carrying on the war could be carried out.

Specifically, peace-time planning will assist to eliminate the following administrative errors in war, all of which tend to increase prices, promote profiteering, and create injustices:

- (a) Placing of munitions contracts without prior investigation of capacity of the facility to fulfill the contract.
- (b) Placing of contracts in excess of needs.
- (c) Placing of cost-plus percentage contracts.
- (d) Delay in initiating war production.
- (e) Unequal distribution of the production load throughout the country, which creates congestion in particular areas and disturbances in price patterns.
- (f) Competitive bidding by Government agencies for the products of industry.

The history of the World War shows that without efficient peace-time planning all of these mistakes are sure to occur in war when time is at a premium. In addition, planning can provide, in the unhurried atmosphere of peace, for the policies to be observed and the organization to be used in controlling prices, establishing priorities, conserving materials, regulating trade, and so on. The War and Navy Departments have, in cooperation with many civilian agencies, made progress along this line.

Later in this summary there will be listed some of the suggestions made for improving this work.

C. INFLUENCE OF WOULD-BE PROFITEERS IN BRINGING ON WARS

The commission had before it, in the form of the conclusions of congressional committees and other competent evidence, ample proof that in the World War and previous wars so-called profiteering existed to an enormous extent. Nothing further was required to establish the proposition.

The opinion, however, that the activities of would-be profiteers help to bring on wars was seriously questioned by many witnesses. The following statements are typical:

Mr. Baruch said:

That any human could be persuaded by the prospect of personal gain, however magnificent, to invoke the horrors of modern war is almost unthinkable.

He suggested, nevertheless, some statute—

* * * the very existence of which would be a constant warning to everybody that never again in America will any man make as much profit in war as he can make in peace.

Newton D. Baker also was emphatic in his statement that he did not regard the lure of profits as a controlling factor making for war. He said:

I am thinking back, now, to 1918, and I feel confident that I am right when I say that no appreciable part of the devotion of America to the war was based on anticipated profit.

Later he cited instances of drastic price declines in several major items of war supply after the United States entered the conflict.

Tucker Smith, secretary of committee for abolition of militarism in education, said:

In the first place, you have been asked to take the profits out of war. There is back of that assumption the thought that the desire of a small group of individuals for excessive profits has a great deal to do with the making of a war. A great many people say, for example, "If we could take all of the Wall Street capitalists and all of the Washington politicians and line them up against a wall and shoot them, or draft them into the front-line trenches where they would be killed first, we would not have any more wars." That is the common man's crude way of expressing his thoughts on the blame for war; that is his statement of war guilt, if you please. He believes you will make war less probable by a rigid elimination of the profits. It seems to me that assumption is fundamentally unsound, because wars in our day do not come out of the machinations and the devilry of a few men in Washington or of a few men in Wall Street; they come, rather, out of the long-time and broad national policies of imperialism and militarism and all of their ramifications, which bring nations to a point that may make it possible for small groups of individuals to be unusually influential. The thing the public should understand is this—that these particular policies to which they subscribe and which they in the main are in favor of carrying on in peace time are the real causes of modern war, and that the mere catching of a few lucky profiteers will not make a fundamental difference in the making or in the frequency of war.

Nevertheless, strong arguments were presented by those who have formed the conviction that profiteers help bring on wars.

Representative McSwain, who long has been one of the most vigorous advocates of a national policy to curb war profiteering, repeatedly emphasized this aspect of the inquiry in his examination of witnesses. He said:

It has been charged, and I think with some truth, that certain interests are sometimes reckless in rushing the country into war in the prospect of making enormous profits for themselves, at least believing that if they can escape the harshness of personal military service they can not personally suffer from war. They have been willing, therefore, to take the chances of unduly exciting the public mind about matters which otherwise might be relatively trivial and of arousing public sentiment to war fever.

This same idea has been presented often since the World War in the statements and writings of prominent men. It is probably quite generally believed, and the existence of this belief is in itself a sufficient reason for attempting now to devise a program under which everyone will be on notice that war profits are a thing of the past.

Wars have raised plentiful crops of those who have made more money because of the wars than they would have made if the wars had not occurred. It is exceedingly difficult to divide those who so profited into two classes—"innocent profiteers" and "bad profiteers." We, of course, exclude all questions of fraud or corruption, because opinion is unanimous that this class of offenders should be punished as criminals.

Many of those who made their big profits innocently and without the slightest advance knowledge were patriotic citizens. During

most wars wheat and cotton advanced rapidly in price, but growers of wheat and cotton and other annual crops, who did not foresee war conditions when they planted their crops, certainly were innocent beneficiaries and not deserving of the ugly charge that they were war profiteers.

It is apparent that efforts should be devoted toward preventing any type of profiteering. There should be no realized war profits; consequently there should be no profiteers, innocent or blameworthy.

Many witnesses stressed that when and if we should be drawn into another war, our activities and resources must be so correlated and administered that the whole human and material strength of the Nation will be utilized to the highest degree.

Most of these believed that it can be made practically impossible for anyone to profit unduly by a war, either during or afterwards. They urged also that a full discussion of the subject in peace will serve to interest and arouse public opinion and so facilitate the adoption of measures to eliminate war profits. After a war starts such discussion will not lead to satisfactory results. If war itself is to be deplored and made unpopular, even though the causes are held to arise from moral principles, there can be no excuse for any individual to enrich himself while his neighbor dies.

It is evident that public sentiment will support legislation looking to the complete elimination of war profits.

D. CONFISCATION OF PRIVATE PROPERTY

The weight of public opinion is definitely opposed to confiscation of private property at any time. A constitutional amendment to permit a taking of property without compensation was advocated by only a very few witnesses.

In some of the discussions before the commission there were brought out some of the implications in the idea of "taking property without compensation."

In attempting to apply the principle of property confiscation the Government would necessarily take possession of essential factories, transportation systems, and other facilities, and would operate these while continuing to pay normal wages to employees. Tax receipts would diminish rapidly. Lacking receipts the Government would cease paying employees, and would eventually have to feed, clothe, house, and supervise every individual in the country. Thus the whole Nation would soon be on a demonetized socialistic basis. It is obvious that the upheaval certain to accompany any attempt to undertake, under the stress of emergency conditions, such a gigantic experiment in socialization would result in confusion and stagnation of industry, and would so paralyze our productive and military efforts as to make us easy prey to the external enemy.

Mr. Baruch, speaking of World War experiences, had the following to say:

The "draft everything" proponents seem to think that confiscation of productive facilities promises a more effective use of them in the interests of government and for the purposes of war. During the World War, government had power to commandeer factories and to operate them under bureaucratic direction. I do not recall a single important industrial enterprise that was thus taken over. This does not mean that the use of the power was never advocated.

On the contrary it was seriously urged in respect of a great industrial plant which was thought by some not to be giving full cooperation to its government. The proposal split on the rock of this argument:

"Who will run it? Do you know another manufacturer fit to take over its administration? Would you replace a proved expert manager by a problematical mediocrity? After you had taken it over and installed your Government employee as manager, what greater control would you have then than now? Now you can choke it to death, deprive it of transportation, fuel, and power, divert its business, strengthen its rivals. Could any disciplinary means be more effective? If you take it over, you can only give orders to an employee backed by threat of dismissal and with far less effect than you can give them now. Let the management run the plant and you run the management."

Nobody with any familiarity with industry could seriously urge a wholesale assumption by any Federal bureau of the responsibility for management of any or all of the vast congeries of manufacturing establishments upon which we must rely for extraordinary effort in event of war. Even if such bureau management could prove adequate to the task (which it could never do) the mere process of change would destroy efficiency at the outset.

If property were indiscriminately seized, and at the end of the war returned to original owners on an "as is" basis, thousands would face financial ruin, while others might find themselves greatly enriched by reason of the expansion their business had undergone as a result of war-time governmental operation. This, it is apparent, would be the very antithesis of equalizing the burdens incident to war. Another alternative at the end of the war would be continuation of socialization. This can not be entertained as a possible solution for the reason that it must be assumed that the social and economic order developed by our people during the century and a half of the Nation's existence is better adapted to our needs and to our national psychology than would be any system improvised and hurriedly organized during the heat of an international conflict.

Former Secretary of War Baker strongly dissented from the proposal for a constitutional amendment that would enable Congress or the Executive to impose direct capital levies. By dislocating both the financial structure and the productive plant of the Nation in times of abnormal stress, such a plan, he believed, might produce "an almost revolutionary disturbance."

Many of the witnesses stressed the fact that if this Nation should ever be confronted with the necessity for taking up arms in its own defense against powerful aggressors the first requirement would be immediate, aggressive, and effective action to insure its own safety. To do so it must make use of every human and material asset, which, in turn, requires that to the greatest extent possible normal and well-understood methods be used in order to secure the desired result. The evils of profiteering must and can be eliminated by some other method than the confiscation of property.

The conclusion that the taking of property without compensation is not desired by our citizens, and is an impractical suggestion, is of such importance in the further consideration of the problems involved that the actual testimony presented is worthy of some discussion.

Witnesses representing the American Legion and organized labor unhesitatingly testified that the American people do not expect that the private property of any man will be taken for public use unless fair compensation is paid therefor. Almost unanimously the witnesses expressed the thought that thinking men and women are in

favor of paying just compensation for any private property seized for war purposes.

Although the few proponents of confiscation expressed the thought that it would be desirable to take all property, no single witness gave the slightest intimation how such an inclusive taking could be administered. Some of them stated that only part of the property would be taken, but, as was pointed out by others, the inevitable result would be the taking over of all property.

Mr. Wolman presented the following resolution of the Veterans of Foreign Wars, which was adopted in September, 1930:

Be it resolved by the Thirty-first National Encampment, Veterans of Foreign Wars of the United States, That the national council of administration be instructed to give serious thought and full consideration to a plan to be enacted into a national law, part of our national defense, for the universal draft both of man power and of industry in all future wars in which this country may be engaged.

He left it to this commission to work out the details.

Witnesses who seriously advocated, or who seemed to advocate, the taking of property without paying for it were Congressman Johnson and LaGuardia.

The former spoke of it as an ideal which he did not expect to realize. He indicated that any plan which would take profiteering out of war would meet with his approval as a practical rather than an ideal solution. As a matter of fact, a careful reading of Congressman Johnson's testimony leads one to believe that he does not visualize taking any property without compensation. He defined "war profits" as anything more than "normal" profits. It looks as if he would neither confiscate property nor take away profits not due to war activities.

Congressman LaGuardia said:

* * * Now, it is quite possible that one man's factory will be used and abused and he may come out of the war almost ruined, while another man's factory may not have been used at all—yet no one will have made any profits. And I repeat that is also the chances that we take in the military service. * * *

A few quotations showing the opinion of various witnesses on this point follow:

Former Commander McNutt said:

* * * And the man who serves would be perfectly willing to take that which the Government gives him during that period if he knew that all of the others in the country were not making profits out of the war. I do not mean by that you are going to take away all profit from business; but I mean profits arising from the war. * * *

Mr. COLLINS. Well, what do you mean by equalizing the burdens of war, then?

Mr. McNUTT. Keeping them on the same level, in order that the happening of a war will not bring to any person any undue profit.

Colonel Robbins said:

Mr. McSWAIN. I wish to ask Colonel Robbins to help us clarify some ideas of definition. Colonel, when you speak here in general terms of this resolution and various resolutions of conventions of the American Legion, about taking the profits out of war, I do not understand it is conceived by any real thinking legionnaire that we should prevent anybody from making normal peace-time profit, but that this move is to take war profits out of war?

Colonel ROBBINS. Quite right.

Mr. McSWAIN. That is, to take very excessive and unusual profits that would arise from inflation and to keep the rises in prices, which we ordinarily describe as profiteering, out of war?

Colonel ROBBINS. That is right.

Mr. Green said:

Mr. HADLEY. The resolution dealing with the primary subject refers to it as "methods of equalizing the burdens and to remove the profits of war." In your testimony, when speaking of the profits of war, I assume you had in mind the profits which arise by reason of the war in excess of the ordinary and normal profits which would be otherwise realized. Is it your understanding that when we speak of taking the profits out of war we are speaking strictly of war profits above the level of normal profits?

Mr. GREEN. That is my understanding. As I stated, a war creates an emergency and upsets the whole economic order, and, as a result, prices ascend, ascend, and ascend.

Mr. HADLEY. That is my understanding, too; but I wanted to see if our minds were working on the same basis.

Mr. GREEN. I think we all agree, everyone who has studied the economics of the situation, that industry and capital are entitled to a fair return upon their investment under any circumstances—in times of war or times of peace.

In congressional and country-wide discussion there has been a demand for the conscription of property in the event of war. It is apparent, however, that there is no unanimity of opinion as to just what is implied by the term "conscription of property." An analysis of the published remarks and statements of those who favor the "conscription of property" leads to the almost general conclusion that they do not propose the taking of anything without compensation.

In the early discussion of Public Resolution No. 98, Mr. Wainwright, speaking in favor of a "universal draft," quoted with high approval the words of President Harding:

* * * not one penny of war profit shall inure to the benefit of private individual, corporation, or combination, but all above the normal shall flow into the defense chest of the Nation.

He said further:

That to keep down the cost of war and avoid unfairness and inequality in sharing its grievous burdens, all profiteering must be prevented, and the price of everything, including labor, stabilized at the outset and drastically regulated and controlled throughout the war.

In the Seventy-first Congress (2d sess. Cong. Rec., p. 6559) Congressman Johnson said, in referring to the conscription of capital:

There must be compensation.

Congressman Patman said:

We should consider amending our Constitution so that property or wealth should not be permitted to enhance in value during a war.

At the hearings in 1924 a representative of the Christian Science Monitor testified as follows:

The Christian Science Monitor has been advocating universal mobilization in time of war, * * * well, just leave them (the factories) the normal profits.

In the House of Representatives, March 22, 1924, Representative Ramseyer said:

There is no subject that has been before the people of this country that has received such universal indorsement as the subject of conscription of wealth for war purposes * * * not one penny of war profit shall inure to the benefit of private individual, corporation, or combination; but all above the normal shall flow into the defense.

In the present hearings Mr. Kirby was asked, "What would you think about the conscription of property—capital?" He said:

Guarantee them a reasonable return upon their investment.

Commander O'Neil said:

* * * all citizens could contribute (property) * * * owners thereof should receive compensation.

The desire to prevent profiteering comes from capital as well as from labor.

Mr. Barnes, speaking for the United States Chamber of Commerce, quoted from the chamber's declarations in 1917 and 1918 as follows:

During the war it is essential to the maintenance of sound industrial relations that there be no profiteering by producer, distributor, laborer, or manufacturer.

Since the fixing of prices and control of excess profits by taxation go hand in hand, it is our belief that present tax laws should be amended so far as necessary if they prove inadequate to prevent abnormal and unreasonable profits as a result of the war.

And reiterating the chamber's position in 1931, he said:

It may be stated with the utmost assurance that American business opinion opposes any profit interest in war.

The mass of the testimony on this point may be summarized as follows:

The idea of conscripting property in war is synonymous, in the popular mind, with insuring that no profit that is traceable to the circumstance of war will accrue to the owner of property required either for the Government or for essential civilian uses.

E. METHODS FOR REDUCING THE COSTS AND PROFITS OF WAR

Effective methods for reducing the costs and profits of war must comprise a series of interrelated and important processes. No single legislative or executive action can constitute in itself a panacea for profiteering.

The principal methods for reducing costs and minimizing profits will be discussed.

1. FIRST MEANS OF MINIMIZING PROFITS

An effective method of reducing war costs and profits is to reduce war expenditures to the minimum consistent with the highest possible production of war material. One means of keeping down expenditures is to prevent inflation in prices; that is, to fix prices.

All witnesses agreed that the extraordinarily high prices in force at the beginning of the World War enormously increased the cost of the war to the Nation and facilitated the accumulation of large fortunes by some individuals and corporations.

A certain amount of money inflation is probably inevitable in war. Whenever current governmental expenditures can not be met by current tax revenues the Government must resort to some form of inflation or to large scale borrowing, which tends to impair credit and lower the purchasing power of currency.

Prices for services and things, if uncontrolled, surge upward under the influence of unusual demand and of cheapened money, and this

rise in prices in turn creates a need for more money than would otherwise have been necessary. The two tendencies thus act and react upon each other, establishing eventually a most serious situation which is outwardly manifested principally in a constant and rapid increase in all prices.

It is obvious that any measure or sentiment which will tend to stabilize prices and minimize expenditures will do much to reduce the cost and the profits of war. The possibilities of good results are great, and the difficulties are slight in comparison. To have proper effect, the methods for stabilizing prices should be well known to the public.

One proposal to reduce the cost of war without impairing the productive forces of the Nation came from Bernard M. Baruch, who said:

To measure inflation of price and profit we must have some norm. The obvious norm is the whole price structure as it existed on some antecedent date near to the declaration of war on which the normal operation of the natural law of supply and demand can be said to have controlled price. That determined, we need a method of freezing the whole price structure at that level. The obvious way to do this is simple—by proclamation to decree that every price in the whole national pattern as of that determined date shall be the maximum that may thenceforth be charged for anything—rents, wages, interest rates, commissions, fees—in short, the price for every item and service in commerce.

In these few words reside the basic principle of war control of national industry and of the present suggestion for elimination of war inflation in America. The superficial objection is, "you propose to repeal the law of supply and demand." We may as well take this bull by the horns. In modern war administrative control must replace the law of supply and demand.

In the national pattern of peace, all economic forces are operating under the workaday influences of that natural law. Prices, production, and finance, all are factors of competition—in other words, of that law. But in peace the various parts of what will eventually be the economic engine for war are neither coordinated nor subject to any single guiding control. Indeed, to prevent such combination and control is the basic effort of peace-time administration. "Competition is the life of trade."

Suddenly war appears. The whole tempo, volume, and quality of the force of demand becomes distorted. Things that yesterday were of no great importance (e. g., toluol, picric acid, and sodium nitrate) suddenly become the aim of all endeavors. As to these, as well as to all other fundamental commodities, there is an almost instantaneous shortage. Now, in peace-time shortage, the highest bidder takes all. That is the law of supply and demand. In war—at least in major modern war—we can not permit this. The Government must assume control of the whole supply and ration and apportion it—not to the longest purse but to the most necessitous use. Furthermore, the distinguishing characteristic of peace-time economic operation is competition, and basic prices are largely determined thereby. Also it is literally the object of one great competitor to secure as great a proportion of all business as possible. Under war conditions the entire process is reversed. There is more business than all the facilities of the country can handle. Competitors must become cooperators in order to meet the very minimum demand for shortage items. Control of this cooperation rests in government.

Thus, both because governmental determination (and not price) control demand, and because only complete cooperation (and not competition) can produce supply in sufficient quantity, the law of supply and demand adjourns itself.

These principles apply to shortage items. The crystallized price structure is a schedule of maxima. Items in ample supply are left free to fall below the fixed-price level.

Also—

There may remain some question as to whether wholesale price fixing might not itself be construed as a taking of private property without just compensa-

tion. Of course, just compensation is usually taken as "market value." I know of no better way of assessing market value than to refer to the actually existing schedule of prices as they stand under the influence of the law of supply and demand. That is exactly what the present suggestion contemplates as the standard. It would be difficult, I think, to spell confiscation out of that.

There should be no constitutional amendment, not only because it would be unwise and destructive but because it is wholly unnecessary.

Mr. Baruch submitted the following general conclusions:

I am confidently of the belief that on the policies here briefly outlined this country would achieve the following benefits:

(1) It would pass from a peace to a war status with a minimum of confusion, waste, and loss.

(2) It would mobilize war supplies almost as quickly as it could mobilize men.

(3) It would reduce the cost of war by 50 per cent, and I believe by an even greater figure.

(4) It would eliminate war profits and inflation.

(5) It would preserve its credit and its economic prestige throughout the world.

(6) Its war effort would be conducted with less interference with normal economic processes and the lives of the civil population than has ever been the experience of any nation in the history of the world.

(7) It would conserve its resources and preserve the morale of its people to such an extent that it would be able to outlive any antagonist in a long-drawn struggle.

(8) It could pass from a war status back to a peace status with a minimum of the prostrating economic aftermath that has hitherto been the invariable experience of every ex-belligerent in a great war.

(9) The efficiency of the combined military and economic machine that could be derived from these policies would constitute this Nation an instrument for war effective beyond the imagination of any military expert even of this advanced date—powerful beyond the possibilities of any antagonist and perhaps of any combination of antagonists.

(10) Considering the obvious fact that the military aspirations of this Nation will never disturb the peace of the world, the mere acceptance of (and deliberate provision for) the kind of organization here suggested would go very far toward keeping the peace of the world.

And the latter result, I take it, is the hope and aim of all of us.

Some witnesses opposed the idea of attempting to fix or stabilize the whole price pattern in emergency by governmental proclamation. Among those expressing grave doubts as to the practicability of the suggestion were Newton D. Baker, Walter S. Gifford, Howard E. Coffin, William Green, and Homer Ferguson. It is to be noted, however, that all of these believe that some measure of price control will necessarily be exerted by the Government in a major war.

Many other witnesses were of the opinion that if methods can be found for overcoming the obvious practical difficulties in the way of enforcing such a program the necessary laws should be passed now and plans made to institute it at the beginning of a war.

The attitude of labor regarding price stabilization by law is important. Mr. Green, in response to questions, had the following to say:

Secretary HURLEY. Mr. Green, in addition to the theory you are suggesting on recapturing war profits, it is a fact that the War Industries Board did bring about a certain degree of price fixing, or price levels, during the last war.

Mr. GREEN. Oh, yes; and, as I stated, I think that there must be some price-fixing arrangement established and developed.

Mr. O'Neil, national commander of the American Legion, advocated:

Third, the control over prices of commodities for the Government and the civil population, together with control over services.

In response to a question by a member of the commission he said:

Yes, I imagine, under the wording of that resolution, that you could not take hold of labor in the way that you could take hold of industry. I think you should.

Secretary DOAK. I thought you made reference to labor.

Mr. O'NEIL. I did; I said that was the theory of the Legion, but I questioned whether or not you were going into that, and what I said was this, finally, that if the industries were put on a reasonable compensation basis the prices of commodities would not be raised; therefore you would not get the complaint from labor that you had before.

Secretary DOAK. Of course, then, I suppose that you, in fixing the price of commodities, would have that apply to the retailer the same as you would to the wholesaler, would you not?

Mr. O'NEIL. I think so; oh yes.

Secretary DOAK. I agree with you that the prices of commodities have a great deal to do with the wage levels and the necessity of increasing or decreasing wages.

Commander O'Neil further said:

Production must be continued as in peace time and at peace prices. * * * Neither capital nor labor should be permitted to receive more than its normal return by way of increment on the investment they may have. * * * Prices of materials, commodities, and, in fact, all things should be declared fixed as of a definite date, and it should be illegal to buy or sell at a different price. * * * We want that control exercised at the start. * * *

It is Mr. O'Neil's opinion that labor would be content with existing wages if the cost of food, shelter, and clothing were to remain stable.

It has been urged that high prices and big profits are necessary to stimulate production. No trustworthy testimony to that effect was presented. The commission heard convincing testimony to the effect that when prices were mounting contractors could not safely submit bids at fixed prices, and that when confronted with higher and higher wages and prices of materials, large profits were sought to prevent losses.

In his testimony former Secretary Baker said:

I think that it was not necessary to stimulate anybody to produce in America. The spirit of America, in 1918—I am speaking of the people at home—was one of enthusiastic loyalty and desire to produce.

All witnesses were agreed on the desirability of limiting war profits. Some insist on the elimination of 100 per cent of war profits; others see practical difficulties in the actual working out of any plan which visualizes the industry of the country working day and night in war time with the resulting profit exactly equal to prior peace-time results, or in the adoption of a plan which eliminates all profit, unless contractors are guaranteed against any loss.

Many concerns which would be losing money before the war undoubtedly would make some profit during a war if they are essential industries. Some concerns which would be making large profits before the war would find their profits greatly reduced.

It is important to record the assent of organized American business to governmental control and fixing of prices in case of war. At the March hearings there was presented a letter from Julius H.

Barnes, chairman of the board of directors of the United States Chamber of Commerce, dated March 6, 1931, in which he quoted from the declarations of the chamber in 1917 and 1918, and said:

It is the spirit of American business that, however fundamental may be the change in the relation of Government to business, the Government should have the power during the period of the war to control prices and the distribution of production for public and private needs to whatever extent may be necessary for our great national purposes.

All war buying should be assembled under the control of one board or executive department. * * * This war supply board or department should be given full power to procure war supplies to the best advantage to the Government as to price, quality, and delivery, and in a way to maintain essential industrial life without disturbing social and economic conditions, including the power to fix prices not only to the Government but to the public on essential products and to distribute output in a manner to promote the national defense and the maintenance of our industrial structure.

Authority to control prices should extend to all articles which have importance in basic industries as well as in war and which enter into the necessities of everyday life.

With the least possible delay Congress should enact legislation for the control of prices in every line where war needs and the public interest require it on such a basis that the full production vital to success in the war shall be insured.

As further evidence that large profits are not essential in order to stimulate war industry; the testimony of Colonel Ayres indicates that contractors selling directly to the Government in 1917 were not making excessive profits. The large fortunes which are often referred to and generally objected to were not made by those subject to the 80 per cent war-profits tax. (Including the Federal income tax, the maximum Federal tax aggregated 82.4 per cent.)

Most of those whom it was desirable to stimulate were subject to the 80 per cent tax, and in addition and of tremendous bearing on this point they were confronted with having to pay the cost of the war facilities installed by them out of the remaining 17.6 per cent of profit or out of their own capital.

Most contractors did not receive advances from the Government or governmental agencies.

In other words, the greatest and most important producers did not ask for nor expect large profits to produce to the maximum of their ability and capacity.

It is much better to stop profits at the source than attempt to recapture profits already realized. To prevent the accumulation of profits is one of the purposes of stabilizing prices. It was measurably successful during and particularly at the close of the World War. The actual effect will never be known, as authorities differ. Many witnesses pointed out that fixing of prices in itself can not eliminate all profiteering. When a price is fixed at a level that will enable marginal producers to operate, the low cost producers of the same commodity are bound to reap large profits. Nevertheless, the fixing of the price puts a definite limit on the profit—a limit that is nonexistent in a runaway market. This point will be further considered under "War taxes."

All are agreed that in the event of another war prices would necessarily be fixed sooner or later. One reason for having the principle established by inclusion in law is to make publicity possible so that when rumors of war arise no one will have any excuse to speculate in the hope of higher prices. Further, in a period of strained

international relationships the passage of such a law might be interpreted by some other government as an unfriendly act.

In the World War there was almost universal cooperation. People were willing to be led, but none would be driven. Mr. Replogle cited several illustrations of the cooperative method. In 1917 ship plates, for example, had gone up to \$360 per ton. Toward the end of 1917 the price was stabilized, through the conference method, at about \$65 a ton. Projectile steel was reduced from \$400 to \$70 a ton. Vanadium, important for field tanks, never had sold below \$5 a pound. The United States price finally agreed upon was \$1.78 a pound.

Mr. Colver, chairman of the Federal Trade Commission and a member of the price-fixing committee of the War Industries Board, was a firm advocate of a system of paying higher prices to some producers than to others, based on varying costs of production. He believed in fixing prices, but not in stabilizing the price pattern of any particular date. During the World War and since Mr. Colver's theory has found few adherents. His method involves laborious investigations and is difficult to apply. Moreover, experience has shown that our people consider it unfair for the Government to offer different prices to different producers for the same article. Under such a method, also, the opportunity for fraud, or at least evasion, is such as to make necessary an elaborate inspecting and auditing system.

The practical difficulties in applying a price-stabilization program are recognized, but the psychological effect of announcing now our determination to stabilize prices at pre-war levels is enormous. The idea that prices can and will be stabilized is popular. Mr. Ferguson made a statement which bears directly on this point:

But from my association with soldiers—a great many of them went out and into Newport News during the war—the fact that they were offered 30 bucks a month getting shot at, and somebody they knew was making around \$500 a month for pounding rivets, bothered them more than what our company was making, because it was generally understood that the Government was taking most of that back again. The soldiers always discussed that particular point.

The controlling object to be attained is the crystallization of public sentiment against rising prices. Speculators and would-be profiteers must be on notice that prices will be fixed and profits limited.

Colonel Robbins said:

There is no reason why a man employed in civil life in time of war should be receiving wages out of proportion to the man who is risking his life in the Army, and such a situation could be prevented by price fixing. If the laboring man can be assured that his cost of living is not going to increase during a war, there is no reason for him to ask for higher wages than those which he normally receives. The same thought is equally true when applied to both the production of raw materials and the manufacturing interests. It does not seem logical to my mind to permit a man engaged in manufacturing to make enormous profits and then attempt to take them away from him through the imposition of an excess-profits tax. It is far more logical to prevent the making of such profits in the first place, and it can be done.

It should be understood that price stabilization means fixing maximum prices. Mr. Baruch said:

I do not suggest the fixation of any price. The effect of the proposed statute is simply to say: "Unless later adjusted by the President upward, no price shall rise above the figure at which it stood at a certain named day." In a word,

we clamp a ceiling down on the existing price structure. All prices are free to fluctuate below that maximum.

In presenting arguments in favor of stabilizing prices we must not lose sight of inequalities which may exist.

Mr. Peek said:

In connection with the reservation which I want to make in Mr. Baruch's pamphlet, in connection with the freezing of prices, I can not concur in the thought of freezing agricultural prices on anything like the level that they have been since the war, as compared with industrial prices; and to cover that point I suggest in principle a paragraph something like this. I do not mean that it is in legal form as it should be written, but I think it is sufficiently comprehensive to indicate what I mean. After the first paragraph on page 36, where Mr. Baruch reduces his discussion to statutory requirements, I urge the insertion of this paragraph:

"In the case of agriculture, agricultural prices shall be established in relation to industrial prices upon as favorable a basis at least as they bore to industrial prices in the five years immediately preceding the World War from 1909 to 1914."

During the early part of the World War it was necessary to adopt a policy of "cost plus" whenever manufacturers had had no or little experience in producing what the Army or Navy needed. It was a makeshift policy in which no one believed and which was abandoned as soon as other methods could be devised.

The War Department is mindful of the defects of the "cost plus" method and has comprehensive plans to eliminate the evil as much as possible. But in the absence of price freezing or general price fixing it can not be expected that manufacturers will enter into fixed price contracts except at exorbitant levels. The War Department proposes to adopt a policy of adjusted compensation contracts which is infinitely better than "cost plus," but the need for entering into contracts with adjustable compensation features will be greatly lessened in case of general price fixing.

Since practically every witness agrees that in war some measure of price control will be essential, the power of the Federal Government to exercise some control will be discussed at once.

(a) Existing constitutional authority for Congress to fix prices for general observance in emergency has been questioned.

The gist of the argument of those proposing a constitutional amendment is given below:

At the hearings before the House Committee on Military Affairs, April, 1924, Secretary of the Navy Wilbur said:

Gentlemen, I conferred with some of the members of the department yesterday with a view to ascertain just what you are doing and I scanned these bills. Of course, it is not my habit to express an opinion on laws or bills until I have had a chance to study them. I think I ought, though, to say this: It seems to me that the fundamental difficulty confronting the committee is one of constitutional law.

We wrote into the Constitution of this country the provision that property could not be taken without compensation. I think that any lawyer would agree that most of the plans under contemplation in their last analysis involve the taking of property without compensation.

Of course, I realize that there is supposed to be a very great reservoir of undefined powers known as war powers, but I believe any attempt to prepare for war legislation which might be of doubtful constitutionality—and here, perhaps, I speak as a lawyer rather than as the Secretary of the Navy—is an unwise thing. In other words, we ought not to organize our preparation for battle in such a way that by court proceedings attacking the constitu-

tionality or validity of acts there could be any interference with what was needed to be done.

Definition of war powers and, in fact, of any doubtful constitutional questions, must turn in the last analysis upon the Justices of the Supreme Court.

My suggestion then, is this for your consideration. It is a tentative suggestion that any legislation looking to the drafting, or conscription, or mobilization of the entire man power—and that includes woman power and child power—any legislation based upon the mobilization of industry and the taking of property without paying the market price for it, should be bottomed upon a constitutional amendment which would modify those provisions of the Constitution prohibiting the taking of property without just compensation which, as interpreted, means the market price.

A few witnesses appearing before the commission have expressed opinions somewhat similar to the one quoted above. In 1922 Congressman Johnson introduced the following resolution into Congress:

JOINT RESOLUTION Proposing an amendment to the Constitution of the United States

Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That in the event of a declaration of war by the United States of America against any foreign government or other common enemy the Congress shall provide for the conscription of every citizen and of all money, industries, and property of whatsoever nature necessary to the prosecution thereof, and shall limit the profits for the use of such moneys, industries, and property.

It is plain that he believed the limitation of profits (fixing prices) should be effected through an amendment to the Constitution.

Admiral Samuel McGowan in submitting a proposed amendment to the Constitution included in it the following words:

From the day war is declared until peace is finally concluded, there shall be no increase in any price or wage.

The select committee on expenditures, War Department, Sixty-sixth Congress, second session, reported:

That in order to make such control effective, and to prevent the marking up of properties and costs and the boosting of prices because of the mere fact of the existence of a state of war, legislation be now enacted providing that, upon declaration of war by the United States, prices of all properties and commodities necessary in the prosecution of the war, including food, fuel, clothing, building materials, transportation, and all materials used in the production, assembling, or conversion thereof, and of all materials used in or in connection with the manufacture of supplies and equipment for the Army and Navy, including ordnance, quartermasters' supplies, or other articles used by or in connection with the Army or Navy in the prosecution of war, shall come automatically under Government control as a necessary exercise of war power. and likewise all wage scales, and providing that all such prices and wage scales shall remain fixed until further action by the Government in the emergency.

Realizing, as it believes fully, the seriousness of its recommendation because of the seriousness of the need, your committee respectfully recommends that a constitutional amendment be prepared and submitted for ratification, so amending the constitutional definition of treason as to include that form of unconscionable taking of the Nation's resources in time of war which is commonly known as profiteering.

The following extracts are taken from a statement prepared by the Attorney General bearing on the power of Congress to fix prices in war (The complete statement of the Attorney General is attached hereto.)

First. Under the power to declare war and provide for the common defense and conduct military operations, Congress has authority to provide for regulating or fixing prices for property or services if the conditions are such that such measures are reasonably necessary or proper for the efficient conduct of

the war. The decision as to whether such measures are justified rests primarily with the Congress. Its action must not be arbitrary, but must have a reasonable basis in fact. Its conclusion would be presumptively valid but would be open to judicial review, first as to whether there was any reasonable factual basis for the conclusion that the measures resorted to were reasonably necessary for the proper conduct of the war, and second, as to whether the prices fixed were wholly arbitrary or unreasonable.

Second. Whether price fixing would have to be confined to a limited class of necessities or might extend to the whole price structure would depend on conditions at the time, and the extent to which it could be shown that the action taken was reasonably necessary for the national defense and the successful conduct of the war. It can not now be said as a matter of law that the fixing of prices would necessarily be limited to the so-called necessities.

Third. If the commission is satisfied to rely on congressional action subject to the above limitations and open to review by the courts as to their justification and the reasonableness of the manner of their exercise, no constitutional amendment is desirable. On the other hand, if it is deemed advisable that Congress have absolute power with respect to these matters and as to the extent of price fixing in war time and that its judgment shall be conclusive both as to the necessity for price-fixing measures and as to the reasonableness of the prices established, a constitutional amendment would be necessary.

A very important point in the Attorney General's brief is that, within certain limits, the Congress now has complete authority for fixing prices as an essential measure in defending the Nation. In exercising this power, however, the factual basis for the law and the reasonableness of prices fixed would be subject to review by the courts.

From this it appears that a constitutional amendment could not increase the present power of Congress to fix prices as long as the action was actually a necessary war measure and the prices fixed were considered by the courts to be just and reasonable. The true purpose of an amendment therefore would be to extend the present power of Congress so that it alone would be responsible for deciding upon the necessity for fixing prices, and the courts would have no authority to review the reasonableness of prices fixed under the authority of Congress.

An amendment would thus make congressional action clearcut and decisive—but it must not be forgotten that in the absence of an amendment Congress can still proceed, in war, to fix prices, subject only to review by the courts as to necessity for the action and reasonableness of the prices.

From the beginning of the hearings many of the questions propounded to witnesses were intended to elicit definite opinion as to the adequacy of existing congressional power to attain the aims set forth in the resolution creating the commission. Examples of these questions follow:

Secretary HURLEY. Granting that, in your opinion, the result could only be achieved by a constitutional amendment, I would like to pursue this line of thought for just a moment: If an amendment to the Constitution should be adopted, would not that amendment, in effect, to use a term that has been used here so often—a rather generic term without any specific meaning—would it not freeze the capacity of the Congress and of the Chief Executive in handling the industrial situation that might arise in the future? To help you out further on my line of thought, would not it restrict rather than amplify the powers of the legislative body and the Executive in meeting the special economic situation that might prevail at the time of the emergency?

Mr. McNUTT. Without giving that careful thought, my instant reaction would be that it would not; in other words, that the purpose of a constitutional amendment would be to enlarge the power of the Congress and, likewise, of the Executive.

Secretary HURLEY. But if you assume that which has been assumed by most all of the witnesses who have preceded you, with the possible exception of Congressman Royal Johnson of South Dakota—if we assume that all the powers necessary to set up an institution similar to the War Industries Board at the close of the last emergency and assume further that the powers used in that emergency by the President, together with the powers conferred by the Overman and other statutory acts in addition to the constitutional power which the Executive has—if all these things can be done now by legislative enactment, would you still favor an attempt to amend the Constitution on the subject?

Secretary HURLEY. You think the present constitutional powers of Congress and the President, and the present statutory and implied powers of the President, are sufficient to bring about the suggestions of this resolution?

Mr. GREEN. That is my judgment.

Secretary HURLEY. That is the point I am coming to. I wanted to clear the record on that point, because if you had all the statutory, constitutional, and implied powers now that you had at that time, there would not be any reason for this statutory enactment that you suggest, would there?

Secretary HURLEY. And the taking or selling of property for taxes is not taking the property without due process of law, and the right to taxation on the part of the Government is unlimited by any other part of the Constitution, is it not?

Mr. BALLANTINE. That is my understanding, Mr. Secretary.

Secretary HURLEY. Therefore such power to take war profits and cover them into the Federal Treasury through a system of taxation could be exercised without any change in the Constitution?

Mr. BALLANTINE. I so understand the law and the Constitution.

Secretary HURLEY. I just wanted to make that clear, because I see no conflict between the power to tax and the fifth amendment to the Constitution.

Many authorities believe that ample authority now resides in Congress to take any action in a national emergency that will promote the security and welfare of the Nation.

The following is quoted from a brief prepared by Ralph T. O'Neil, Paul V. McNutt, and C. B. Robbins, all of the American Legion:

A constitutional amendment is not necessary to enable the Government to fix prices, upon the basis of a fair return, for all commodities required either by the Government or by the civilian population.

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.

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. (*Public Clearing House v. Coyne*, 194 U. S. 497.)

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 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.

The complete brief submitted by the above-named committee of the American Legion is attached to this report.

Senator Knox, in May, 1917, said:

My position is that the Congress of the United States, after a war has been declared, may pass any law which it believes is necessary for the preservation of the Nation.

Mr. Baruch gave as his opinion that a constitutional amendment was "unwise and unnecessary." He submitted, through General Hugh Johnson, a brief bearing on the point. It is attached hereto.

2. SECOND MEANS OF MINIMIZING WAR PROFITS

War taxes.—In certain cases it will not be possible to prevent an initial accumulation of profits in war time, because of differences in production costs. These profits must be recaptured through special tax laws, which will also assist in placing the war, so far as possible, on a "pay-as-you-go" basis.

In proposing methods for eliminating war profits, it must be realized that in certain lines normal peace-time production will have to be increased materially in order to meet the Government's needs. This will require in some cases the fixing of a price that will permit the high-cost operator to come into production; and this in turn will enable the low-cost producer to make large initial profits. These profits must be taken into the Treasury through special taxes. Mr. Ballantine discussed this point in the following language:

The ideal war-income tax would bring into the Treasury the entire amount of profits due to the war. There is no reason to doubt that the business men of the country would support a war-profits tax properly framed to turn over to the Government all actual war profits. Business men share the general opinion that the place for war profits is in the war chest of the Government. The problem here is not as to the principle to be followed, for that is clear, but as to the technical difficulties of so formulating a war-profits tax that it will measurably accomplish its purpose without preventing the necessary operation of the economic machine. There is no doubt that careful work in advance of the emergency upon such a measure will make possible a much closer approach to the attainment of the ideal war-profits tax than would be possible if formulation is left to the time of the emergency.

It has been recognized in these hearings that war profits, at least in some lines, are inevitable. If it be assumed that the price structure existing at the development of the emergency can be pegged or frozen, as has been so ably urged, it is recognized that to meet the increased war demands for goods higher-cost producers must be drawn into production, and such higher-cost producers must receive higher prices than are needed for low-cost producers. Such higher prices will increase the profits of the low-cost producers. Mere increase in volume of business at the old prices would greatly increase profits in many cases. War profits will exist as the subject of taxation, and the limit of such taxation is, of course, the amount of the profits.

Aside from absorbing into the Treasury the profits accruing to certain producers by reason of their low operating costs, the beneficial effects of special war taxes will be felt in other directions.

General Delafield suggested that high tax rates on nonessential commodities would and should be a deterrent to unnecessary expenditures for luxuries, thus releasing labor and facilities for essential industries.

Possibly even more important than this, special taxes will assist in placing the war on a "pay-as-you-go" basis and thus minimize the debts to be paid by taxation after the war is over.

Mr. McSwain made an interesting comment on this subject at the March hearings. He said:

Now, here is what I am leading up to: I submit this for your consideration, I do not say that you are, or that any of us are, prepared now to offer any categorical answer, but I can hardly conceive of any major emergency in the life of any person now living that would involve the mobilization of more than 5,000,000 men under arms, which would be about 4 per cent of our entire population. Now, with the background you have just been discussing awhile ago, would it not be possible for the 96 per cent of the population to produce enough wealth to live on by observing heatless days, wheatless days, and meatless days, and so on; for them to produce enough wealth to feed themselves and to furnish food and ammunition for the other 4 per cent while fighting, so that when the soldiers are through fighting, the civilians are through paying, so that the war can be conducted on a pay-as-you-go basis? Let the 96 per cent feed themselves and feed and support the other 4 per cent who are out expending energy and rations and ammunition. Now, that is a consideration that is coming in my own mind, in view of the figures that have been marshaled by you and by a number of other economists, whether or not, if we did finance ourselves to the tune of 42 per cent on the pay-as-you-go plan, why can not we, by tightening our belts a little tighter and pushing up our morale a little higher and making fewer profits than we did, and by hiding fewer of those profits in factory overhead charges—why can not we finance the war, by equalizing the burdens, to the tune of 100 per cent?

Mr. MEYER. I must confess that I am not prepared to answer that very big question, Mr. Congressman. It is very interesting to think about.

The importance of making real progress in this direction is best illustrated by the experience of the United States during the postwar years. Little attention has been given in this inquiry to the high tax rates prevailing during the period indicated. The high rates enforced during the war were looked upon as one of the incidents of war times and were cheerfully borne, or, at least, they were so generally expected that it appeared that they were cheerfully borne.

From and after November 11, 1918, public opinion regarding the war and excess-profits taxes and governmental relations underwent a sharp change. Government contracts, executed and unexecuted, were canceled to the extent of hundreds of millions of dollars. Many contractors were ruined. Many who were not ruined were faced with large potential losses. The World War was supposed to be over in November, 1918. But note the income-tax rates in force long after that date:

1921: 73 per cent (including 8 per cent normal tax).

1922: 58 per cent (including 8 per cent normal tax).

1923: 58 per cent (including 8 per cent normal tax).

1924: 46 per cent (including 6 per cent normal tax).

These rates reached some of the war profiteers, but they highly discouraged others whose legitimate businesses were not affected by the war or who were unfavorably affected by the war and should

not have been penalized afterwards by such enormous taxes. It is true that many rich men incorporated their businesses and escaped the payment of surtaxes by withholding dividends, but it was a most uneconomic condition and should not be allowed to recur.

It is to be remembered, of course, that the special taxes imposed during the late war had to attempt to make good enormous expenditures which should never have been incurred. The reasons for these inflated costs have been pointed out in detail by many witnesses and discussed in some measure in this report. Furthermore, taxes imposed during and after the World War were almost foredoomed to failure by reason of their own intricate and cumbersome character. Mr. Ballantine said:

There is no question that the experience of the Government and taxpayers with the determination of invested capital was unsatisfactory and that this basis should not be used again except as a last resort.

He insisted that the method of recapturing war profits should be made simple and effective. Most of the administrative difficulties arising out of the excess-profits tax laws were due to the necessity of ascertaining invested capital. This base should not be used in another war. Some of the provisions of the laws were so highly complicated that they could not even be litigated because they could not be reduced to logical argument, pro and con. The determination of what constituted invested capital was an insoluble problem during the continuance of the tax, and is still unsolved. Some of the fundamental principles of invested capital are now in the courts and will be there for years to come. In some cases mere accidents of incorporation in one year, instead of one year later, meant savings in taxes of millions of dollars.

In order to enforce the law a vast amount of machinery had to be created; a vast number of ameliorating provisions had to be enacted. The Government was compelled to organize a vast army of revenue agents, and taxpayers organized a vast army of tax computers.

The sum total of the human effort and money cost of the excess-profits tax is staggering. It was one of the aftermaths of war which we should try to avoid in any future emergency. If inflation can be avoided, taxes will be lessened.

The late William B Colver, chairman of the Federal Trade Commission in 1918, and a member of the price-fixing committee of the War Industries Board, believed that the war and excess-profits taxes of 1918 and subsequent years were all wrong. In his testimony before the House committee in 1924 he said:

A study of the actual working out of our excess-profits tax during the last war will demonstrate beyond any possible question that it did not recover the excess profits, that it did not keep prices down, and that it did not stimulate production, but that, on the contrary, it slowed production down, it stimulated prices, and it made the cost of the war to the taxpayers, I should say, twice what it should have been. I would say that for every dollar collected in excess-profits taxes that got into the Treasury it cost the people of the United States, or it will cost them, \$10 unnecessarily.

Mr. McSWAIN. So that your belief is that the Treasury of the United States, let alone the civilian population, is worse off than it would have been if the excess-profits tax had never been imposed?

Mr. COLVER. Quite so. As to the excess-profits tax, the very name of it is a contradiction of terms. There should be no excess profits in war, and there should be no excess profits for an excess-profits tax to operate upon.

Regarding the necessity for special study, Mr. Ballantine said:

Working out a carefully formulated war-profits tax is a matter calling for the most careful effort on the part of some body of experts, who uninfluenced by actual emergency conditions could study the problem in the requisite detail and carefully formulated at least the framework of a statute which would be both workable and effective.

High tax rates should become retroactively effective to any period of inflation arising out of war or the rumors of war. The same high rates should apply to individuals and to corporations. This will prevent the evasion of tax payment through increasing salaries of employees and executives.

The temptation to divert profits by this and similar methods, which was present under old laws, will not exist when it is known nothing can be gained by it.

It is evident, of course, that taxes in themselves are no complete cure for profiteering, although many of the witnesses at the March hearings referred to them as such. They do not prevent inflation—and inflation makes costs mount and presents opportunities for the making of increased profit. They are simply a partial cure for something which we must try to prevent.

Proceeding upon the principle that American industry does not seek to reap profits from war, there should be imposed, automatically, upon the declaration of war a special war-income tax on all individual and corporate incomes in excess of the average net income during the three years preceding the declaration of war, with adjustments hereinafter discussed.

Assuming that in time of war the low-cost producers of essential products will initially accumulate large profits, the program must include the best possible method of dealing with these profits, and any other profits which price fixing may not prevent. Therefore, a war-time tax policy must be specific and drastic. It must not be a mere gesture. It is academic to propose that in the event of war high tax rates shall be imposed. We may as well say that another war will cost a lot of money and stop there.

It is believed that prevailing public sentiment is principally concerned with making certain that profits are substantially eliminated, and that our people are more concerned in accomplishing this in a practical, simple, and sure way than in hoping to reach perfection through some untried, intricate, and theoretical process.

In addition to adopting an effective method of stabilizing prices, there should be drafted now a special war tax law, to become effective simultaneously with the declaration of war, which would be as simple and as effective as can be devised by the most intelligent minds in the country.

Tax on income is the simplest method of applying a war tax. Most people are afraid to falsify their income-tax returns. The Government machinery for collection of such taxes already exists. Its method of operation is generally understood. From every standpoint, excess profits should be devised on the basis of income, and not on the basis of invested capital.

Individual and corporation Federal income taxes in force when war is declared should be continued. These may be increased if desired. In addition, and retroactive to a period which will embrace any inflation or profit due to war activities, there should be imposed

an excess-income tax of 95 per cent applicable to individuals and corporations alike, not graduated nor affected by invested capital, but it should be a straight income tax, computed somewhat as follows:

From net income as now computed deduct:

1. Average net income for the three years next preceding the war period.

2. The cost of additional capital facilities required for the war and in due course to be authorized by the proper governmental war agency. Tax deficiencies to bear interest at 6 per cent per annum to prevent the taking of deductions which are not likely to be approved. At the end of the war the residual value of the additional facilities to be adjusted.

3. Receipts of income in excess of a reasonable annual accrual thereof, where the income has been accruing over a period of years and contains no element of war profits, such as fees and commissions of executors and trustees.

4. After deducting 1, 2, and 3, above, impose a tax of 95 per cent on the balance.

One of the advantages of the foregoing is that it should tend to prevent the extravagances which a tax on the excess profits of corporations is supposed to encourage, because it imposes the same high rate on individuals.

The majority of our people are sincere when they say they do not wish to make any profit out of war. Most of them are willing to agree in advance that they will contribute all of their surplus income during the war period to the prosecution of the war. If it were known in advance that profits and income during the war period were to be as completely nil as can be devised, efforts to make profits would hardly be considered worthwhile.

3. THIRD MEANS OF MINIMIZING WAR PROFITS

Commandeering.—Existing powers permit the commandeering of any private property required for war purposes. These powers should not be modified.

Commandeering may be resorted to in the acquisition of property. It may be necessary in special cases even if all prices are fixed. In the absence of complete authority in Congress to fix prices it starts an inevitable prolonged process to determine just compensation. Price fixing by an agency operating from the beginning will probably be acquiesced in by most of the public during the war emergency and thus limit the need for commandeering.

The effectiveness of commandeering in keeping down cost and profit has been greatly overrated. It is not a panacea. Its sole, or almost its sole, purpose is to acquire needed property in a minimum of time.

With few exceptions witnesses have referred to commandeering as if it were a simple process, easy to set in motion, and highly effective in its operation. Such was not the case during the World War. It is easy to generalize about it, but when applied in a particular case we set in motion fundamental questions of a high order.

The courts are not in agreement as to what constitutes "due process of law," and the average citizen has no idea whatever regarding it. He has a very definite idea regarding what he believes to be his

rights in his own property. Usually the question of commandeering does not arise unless and until some one refuses to sell his property. Therefore, the ordinary elements of negotiation between willing or patriotic sellers on one hand and the Government on the other are not usually present.

The commission considered the "final report of senior member of the United States Navy Board for Commandeering," dated February 20, 1919. That report recites the steps which were taken to acquire for the Navy certain machine tools which were on the docks in New York early in 1917. On April 28, 1917, the Navy was informed that the badly needed tools were on the docks and that German interests were trying to get them. On May 10 the Navy decided to try to purchase the tools instead of commandeering them, but found that the prices asked were exorbitant. Much correspondence took place. On July 24 Admiral McGowan issued an order that the Navy commandeer the tools and outlined in detail the procedure to be followed. A long series of indorsements followed. The recommendation and the order went from one officer to another. The eighth indorsement, on August 27, 1917 (from the supply officer, navy yard, New York, to the commandant), concluded, in paragraph 6, with a suggestion that the matter be decided by diplomatic officers. The twelfth indorsement states that if they do not hurry some one else will get the tools. In the thirteenth indorsement Secretary Daniels approves the twelfth indorsement. On September 15 a board was appointed to inventory and take over the tools. On October 9 the tools were taken.

Such are the actual details of one commandeering operation. Nothing was more important in April, 1917, than machine tools. They were located in April; they were wanted at once; they were taken in October. Yet the basic purpose of commandeering is speed in procurement.

Commandeering private property may result in more being paid for it than if it were purchased in the usual manner.—The case of *United States v. New River Collieries Co.* (262 U. S. 341) is a good illustration of commandeering. The Government commandeered coal in September, 1919. It paid about \$20 a ton for coal which had cost about \$5 a ton. The United States Supreme Court decided that market price must be paid, regardless of cost or reasonable profit. This is the usual criticism of commandeering. But when copper was commandeered in 1917 for war purposes the Supreme Court, in *Vogelstein & Co. v. United States* (262 U. S. 337) found that the price agreed on by producers and Government representatives constituted market price, even though Vogelstein did not agree.

The chief objection to war-time commandeering is that there must be a subsequent determination of compensation which always consumes time and effort which, particularly in war times, could be used elsewhere more profitably. It would simplify war operations enormously if compensation could be fixed simultaneously with the taking of the property. To empower the Congress to determine that any price fixed by its agency shall conclusively be deemed to be just compensation is a strong argument in favor of a constitutional amendment. If the people as a whole are committed to the doctrine that war profits are to be eliminated, there will be no hardship in

acquiring property at cost to its owner, or at so near cost that no element of profiteering will be permitted.

Commandeering usually results in paying more for property than it is worth, and paying it to previous owners who have been recalcitrant. In the World War they were often pro-German. It is not an efficient or economical process and we should not plan to extend it.

It remains as an inherent power of Government, however, to deal with the obstinate or recalcitrant owner, and to insure that any needed property may be procured promptly.

4. FOURTH MEANS OF MINIMIZING WAR PROFITS

Peace-time planning.—The purpose of such planning is to prevent the employment of inefficient and wasteful methods in emergency.

In emergency the element of time is vital. The effects of delay and inaction may vary from extravagance to actual defeat. Speed, particularly in the production of needed munitions, will be necessary. Only through the peace-time preparation of detailed plans can the maximum speed in production be assured. Moreover, in this way it can be secured without employing the extravagant methods that characterized our early efforts in the World War. Howard Coffin had the following to say about planning:

Since appearing before you on March 18, I have refreshed my memory on matters incident to my war experience as a member of the advisory commission of the Council of National Defense, and have informed myself more fully as to the industrial phases of the War Department's current program.

I believe the department's plans sound. Differences of opinion as to detail are inconsequential, since no matter how perfect any plan for the handling of such an effort may be, constant adjustments in procedure will of necessity occur.

Let me emphasize, as in my previous testimony before your commission, that through an orderly and businesslike "prearrangement" such as contemplated under the War Department's present well-studied plans, we have our greatest hope (a) of minimizing the "burdens of war" through reduction of costly waste in time, in treasure, and in human life; (b) for "equalizing the burdens" and for removing any excess "profits of war," since competent governmental agencies can constantly advise the Military and Naval Establishments as to costs and fair prices upon both materials and finished products. Should excessive profits here and there appear in connection with either war contracts or production for civil needs, recourse may be had immediately through price adjustments or an exercise of tax powers.

Planning in its various phases is discussed in some detail under the heading, "War Department plans." At this point it is sufficient to say that it is an essential concomitant to all other measures adopted to minimize expenditures, costs, and profits in war.

Mr. Coffin believes also that peace-time planning should include the familiarizing of industry with the problems it would be called upon to solve in war. For this purpose he strongly advocates the placing of "educational orders"—a subject discussed thoroughly in the testimony he gave before the commission.

Some witnesses thought that by drafting bills at this time advantage may be taken of advice from men who had significant experience in the World War. Whether or not any should be enacted into law now is a matter for congressional decision.

Commander O'Neil said:

Undoubtedly, we should have the necessary laws on our statute books by which we can promptly act and get the most efficient service and the necessary

man power and material and everything else that we need, and this, I believe, will do more toward making other nations avoid giving us the necessity of going into war than anything else that perhaps can be devised.

General Crowell said:

The plan to be adopted should be one that will function in war time, and whether or not it functions in peace is comparatively unimportant. In war, time is the important factor. Time once lost can never be regained. Therefore, it would be wise to devise a plan in some detail, to pass such legislation as is needed to give it effect, and to chart the organization with the powers and duties of the principal officials, so that in case of war no time may be lost in its application.

In war, military matters should be handled by the officers of our Army and Navy, but industrial and business matters should be handled by civilians. The military should state what they want and when they want it, and the duty of the civilians should be to supply those wants.

The civilians should draft men into the military service, should furnish the supplies, and organize the country for war. The military would receive the drafted men, train them, receive munitions, and prosecute the war under the direction of the President.

In our past wars the President has often shown a reluctance to act on the strength of his war powers and has often waited for acts of Congress. This situation causes delays and should be remedied.

Mr. Baruch, Mr. Johnson, and others also advocated the drafting of legislation at this time.

F. SCOPE AND PURPOSE OF PLANNING ACTIVITIES IN THE WAR DEPARTMENT, CARRIED ON IN COOPERATION WITH THE NAVY AND WITH INDUSTRIALISTS

The War Department is charged by law with specific planning duties. Briefly, these duties, as given in the national defense act, as amended, are:

The Chief of Staff shall preside over the War Department General Staff and, under the direction of the President, or of the Secretary of War under the direction of the President, shall cause to be made, by the War Department General Staff, the necessary plans for recruiting, organizing, supplying, equipping, mobilizing, training, and demobilizing the Army of the United States and for the use of the military forces for national defense. He shall transmit to the Secretary of War the plans and recommendations prepared for that purpose by the War Department General Staff and advise him in regard thereto;

The duties of the War Department General Staff shall be to prepare plans for national defense and the use of the military forces for that purpose, both separately and in conjunction with the naval forces, and for the mobilization of the manhood of the nation and its material resources in an emergency, to investigate and report upon all questions affecting the efficiency of the Army of the United States and its state of preparation for military operations;

Hereafter, in addition to such other duties as may be assigned him by the Secretary of War, the Assistant Secretary of War, under the direction of the Secretary of War, shall be charged with supervision of the procurement of all military supplies and other business of the War Department pertaining thereto and the assurance of adequate provision for the mobilization of matériel and industrial organizations essential to war-time needs.

The references throughout this report to the "War Department plan" are to the testimony of Frederick H. Payne, the Assistant Secretary of War, Gen. Douglas MacArthur, Chief of Staff, and Gen. George Van Horn Moseley, Deputy Chief of Staff, which will be found in the record, pages 351-486.

Assistant Secretary of War Payne said:

The responsibility of the Assistant Secretary of War under the national defense act involves the Army's business or commercial activities both in peace and war. That act specifically charges the Assistant Secretary of War, under the direction of the Secretary of War, with "supervision of the procurement of all military supplies and other business of the War Department pertaining thereto and the assurance of adequate provision for the mobilization of material and industrial organizations essential to war-time needs."

This statutory mission involves the development of a suitable organization and systematic methods for purchasing promptly and economically the enormous quantities of supplies necessary to the Army to permit the rapid expansion a grave emergency would require. Procurement of Army supplies remains a responsibility of the War Department in peace and in war. The law also imposes on my office the responsibility of evolving plans designed to assist a war-time President in mobilizing our economic resources and in unifying our national industrial effort. This task is obviously one that can not be carried out by the War Department alone. The Navy Department in particular must share equally with us this duty. Through cooperative effort the two departments, assisted by many other agencies and individuals, are developing plans that we believe are adequate to the purpose. These plans include provisions for setting up an organization, basically civilian, through which the President will be enabled to carry out this duty. The War Department, in an emergency, will turn over these particular plans to the civil organization so set up, which will then, under the President, have full responsibility for their execution.

In this quotation are given the scope and purpose of War Department planning in so far as it relates to the economic phases of warfare. Succinctly this preparation seeks to—

(1) Insure prompt, orderly, and economic procurement of munitions in order to provide for the necessary supply of the Army with the minimum of disturbance in the industrial life of the country;

(2) Insure continuous study and investigation, from as broad a viewpoint as possible, of the economic and industrial problems that are certain to arise as an incident of war. The intent is to turn over to the President in emergency concrete proposals for controlling the industrial and economic effort of the Nation in war. These plans are based on two fundamental assumptions—

(a) That Congress, in war, will take prompt action to insure businesslike conduct of war;

(b) That all matters relating to the economic control of the Nation in war will be administered by the President through a civilian branch of government especially set up for the purpose.

Nearly all witnesses expressed themselves in favor of continuous peace-time preparation, and those familiar with the present activities of the office of the Assistant Secretary of War gave their approval to the general lines along which the work is being conducted.

All agree that existing plans should be continuously revised to meet changing conditions and periodically presented to appropriate congressional committees for revision. If this is done it is reasonable to believe, in case of another war, that the delays and unnecessary costs incident to the procurement of munitions for combat activities will be practically eliminated. Some witnesses made specific suggestions for improving details of existing plans, though in general they were considered to be sound and well conceived.

One criticism made was that several suggestions are presented in the plan without supporting data. For instance, it is suggested in the plan that—

A registration of wealth at or soon after the beginning of any war would facilitate fair treatment and have a salutary effect upon the national morale.

Systematic registration of wealth and all accretions thereto during the period of the emergency and tax legislation framed to place an equitable burden thereon.

Other witnesses were of the opinion that it would require more time and money accurately to measure and register the wealth of the Nation than to fight a major war.

The plan appears to lean to the cost-plus method in its approval of one of the Food Administration's bases, viz:

To permit reasonable profit based on costs and to disregard replacement values.

Also in General MacArthur's statement that the War Department would undertake to pay contractors producing munitions a maximum of 6 per cent profit over cost. In its detailed suggestions, however, the War Department proposed to do away with cost-plus percentage contracts.

In questions relating to the general subject of price fixing in war, the suggestions of Mr. Baruch are more comprehensive than those of the War Department. It is apparent, however, that War Department officials and Mr. Baruch are in accord regarding general principles. The following communication (R. 830, 831) indicates that substantial progress is being made in clearing up minor differences:

MAY 22, 1931.

MY DEAR MR. BARUCH: Our recent conversations have served to clear up in my mind many of the doubts that had occurred to me originally in contemplating an application in emergency of the general proposal to "freeze" prices by governmental fiat.

As I now understand it, your plan would fix initially for each locality, under similar conditions of sale, a maximum price for each commodity, to be determined by the highest price prevailing in the particular community at the time of the promulgation of the order. In the original text it was apparently implied that the fixed maxima might be taken as those existing on a relatively remote antecedent date, a procedure that to my mind would cause certain and widespread injustice.

It is my present understanding also that there is contemplated no compulsory sale to the Government or to individuals at the price so determined, but rather a prohibition to buy or sell at a greater price. The citizen's right to appeal to the courts in those cases where his property is commandeered by the Government is unimpaired.

The provisions of the plan, as explained to me, are apparently sufficiently flexible to meet the requirements of special and unusual cases. Further, the administrative power to be reposed in the President should enable him to cope with changing conditions, including those incident to such inflation as is necessarily occasioned by governmental inability completely to meet current obligations out of current tax receipts.

The War Department has long recognized the great desirability in emergency of applying every possible influence to prevent grotesque distortion in normal price patterns. Since every price is a resultant of effects of all other prices, it is apparent that any piecemeal attempt to solve the problem must have as its ultimate aim the establishment of a proper relationship among individual prices on a scale that would insure essential production and cause the minimum of injustice, both to the individual and to the Government. The desirability of finding a formula that would accomplish this end at the outset and effectively limit initial distortion is, of course, obvious. For instance, the problem of determining fair prices for items of munitions not manufactured in peace would be greatly simplified if we could be assured that no sudden price changes would occur in any essential element of production during the life of the contract.

Increased profits would be traceable principally to increased production and consequently much easier to evaluate than if occasioned also by fortunate speculation in a rapidly rising market. War profits would thus be more accurately determined and as a consequence more readily recaptured through adequate tax laws.

I feel that if it should be determined that there exists no constitutional barrier to establishing in any emergency a series of price maxima that shall not be exceeded except upon governmental authority, one important step in minimizing inflation would be accomplished, and the problem of eliminating profiteering and distributing war's economic burdens equitably made easier of solution. Assuming that I have correctly stated the fundamentals of your proposal for a so-called "price freezing" in emergency, I can state that in my opinion it would be a highly desirable war measure.

Inasmuch as your constant cooperation has been of such tremendous value to the War Department in the development of plans and proposals dealing with the economic and industrial problems incident to an emergency, permit me to express my satisfaction that our personal ideas on this particular point seem definitely to be drawing to a close accord.

GEORGE VAN HORN MOSELEY,
Major General, United States Army.

A careful reading of the testimony of General MacArthur indicates that planning in the War Department is specifically intended to attain the ends enumerated in B above. Competitive bidding among governmental bureaus for the products of industry, reckless buying, cost-plus methods, and unnecessary delays in time of war should be minimized as a result of the work now being carried on in our defense departments.

Mr. Coffin and others urged the continuation of this work as one of the most effective means for eliminating profiteering, extravagance, and inefficiency in war.

G. REHABILITATION OF COUNCIL OF NATIONAL DEFENSE

At least two prominent witnesses—Mr. Gifford and Mr. Coffin—urged the rehabilitation and active functioning of the Council of National Defense. This body is now legally authorized, but has not been active for some years.

Urging that peace-time planning must be coordinated on the broadest lines, and that provision must be made for utilizing all branches of the Government as well as civilian authorities in the development of plans, they pointed out the great value of the Council of National Defense as a coordinating and directing body to accomplish this.

Extracts from the law creating the council follow:

[H. R. 17498. Approved Aug. 29, 1916]

SEC. 2. That a Council of National Defense is hereby established for the coordination of industries and resources for the national security and welfare to consist of the Secretary of War, the Secretary of the Navy, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, and the Secretary of Labor.

That the Council of National Defense shall nominate to the President and the President shall appoint an advisory commission, consisting of not more than seven persons, each of whom shall have special knowledge of some industry, public utility, or the development of some natural resource, or be otherwise specially qualified, in the opinion of the council, for the performance of the duties hereinafter provided. The members of the advisory commission shall serve without compensation, but shall be allowed actual expenses of travel and subsistence when attending meetings of the commission or engaged in investigations pertaining to its activities. The advisory commission shall

hold such meetings as shall be called by the council or be provided by the rules and regulations adopted by the council for the conduct of its work.

That it shall be the duty of the Council of National Defense to supervise and direct investigations and make recommendations to the President and the heads of executive departments as to the location of railroads with reference to the frontier of the United States, so as to render possible expeditions concentration of troops and supplies to points of defense; the coordination of military, industrial, and commercial purposes in the location of extensive highways and branch lines of railroad; the utilization of waterways; the mobilization of military and naval resources for defense; the increase of domestic production of articles and materials essential to the support of armies and of the people during the interruption of foreign commerce; the development of sea-going transportation; data as to amounts, location, method and means of production, and availability of military supplies; the giving of information to producers and manufacturers as to the class of supplies needed by the military and other services of the Government, the requirements relating thereto, and the creation of relations which will render possible in time of need the immediate concentration and utilization of the resources of the Nation.

H. ADMINISTRATIVE MACHINERY NECESSARY IN WAR

The commission had access to the findings and conclusions of individuals and of investigating bodies which have preceded this one. Among the recorded opinions of men who have had unusual war-time experiences is one submitted by President Herbert Hoover, then Secretary of Commerce, to the House Committee on Military Affairs, in April, 1924, as follows:

HON. JOHN H. McSWAIN,

House of Representatives, Washington, D. C.

MY DEAR MR. CONGRESSMAN: I have been informed that you desire to have my opinion on the bill you have introduced in respect to organization and mobilization of industry and the civil population generally in war. I am in firm agreement with two principles which you have under consideration: First, to blot out any expectation or realization of a profit as the result of war, and, second, to be forehanded in organization.

While I have the impression that in case of another war some years hence the conditions surrounding it might require a set-up apropos to its nature; on the other hand, greater preparedness in administrative organization would have prevented many losses and much confusion which occurred during the early stages of the last war, owing to the time required to develop adequate administration. The conditions then were unprecedented, and organization had to a considerable degree to be developed by experience.

The form of organization which you propose is to a large extent the enactment of the organization of the last war as it stood at its final stages. I have the feeling that this form of organization was faulty in many places, and that we might well consider a more perfect organization in which these faults should be corrected.

It seems to me that for all administrative functions war especially required single-headed responsibility. Men must make instant decisions and take instant responsibilities, therefore the use of boards or commissions for administrative and executive functions is fundamentally wrong. It results in vacillation, delay, and compromise. On the other hand, questions of semijudicial or policy character can advantageously be determined by more deliberative agencies, such as a board, and some functions or coordination of policies must be performed by them.

With this thought I would, therefore, create an administrator of munitions instead of a war industries board, and would provide that the munitions division of the Army and Navy should be immediately transferred to his direction, and that he should then develop the general coordination of industry necessary for the complete industrial mobilization of munition manufacture and the control of the sequent disturbances which necessarily arise in civilian commerce.

I would exclude from his activities any control of food, fuel, labor, or transportation. I would likewise set up an administrator of overseas trade in place of War Trade Board, and I would give to this administrator practically control of imports and exports and an advisory body for the determination of policies

comprised of representatives of the munitions, food, fuel, shipping, and railway administrators. Such an advisory board to formulate policies. I would set up a power administrator instead of the power commission. I would set up a shipping administrator and a railway or inland transportation administrator in addition to those which you have provided. I would maintain the price-fixing commission as you have outlined, and aside from the chairman, I would comprise this again of representatives of the munitions administrator, food administrator, fuel administrator, shipping administrator, and labor administrator, and would give to it the responsibility of determining prices of all commodities and to determine wages.

I would make the war council comprised of the Secretary of War, Secretary of the Navy, munitions administrator, food administrator, overseas trade administrator, fuel administrator, labor administrator, shipping administrator, railway administrator, chairman of the price-fixing commission, who would sit directly under the authority of the President.

There is a minor addition to the food section I would suggest in that the food administrator should have power to promulgate and enforce rules against waste, destruction, hoarding, speculation, and profiteering.

I would also suggest that from a legal point of view a general clause should be added to the bill giving a blanket authority to the President to fix prices, wages, transportation charges, compensation, embargoes on imports and exports, to exercise the war powers of requisition under circumstances that 75 per cent of the estimated value may be paid and the balance determined by the courts in case of disagreement, suspend habeas corpus, and general complete an absolute authority in all ramifications over the whole civilian life with the provision that he may delegate these authorities through these various agencies.

War is an unhappy business, and the great bulk of our ordinary safeguards of life must be forgotten and the more evident it is that the whole Nation will be put in the storm and made to bear its share of the sacrifices the less likely we are to go to war.

Yours faithfully,

HERBERT C. HOOVER.

There is general agreement among all students that there should be set up promptly in emergency a civilian arm of the President to which he could delegate duties somewhat similar to the functions of the chairman of the War Industries Board in the World War. The War Department proposal on this point will be found on page 418 of the record of the hearings. That plan advocates a system of placing of authority in the hands of individuals and not in boards and commissions.

To illustrate the need for special administrative war agencies it is necessary only to refer to Mr. Baruch's testimony. Recognizing that without special arrangements world prices would in many instances break down the attempt at price fixing at home, he said:

The frozen pattern of price will also have to be protected against the situation in export trade. If, as is almost certain, the inflationary process is in operation in the rest of the world, means will have to be applied to prevent extravagant foreign prices from upsetting our domestic schedule. Government, in its world economic strategy, must have almost plenary control over foreign trade. We shall see the agency for such control purchasing for export at the controlled domestic price, selling in export at world price and using the profit to buy necessitous imports at inflated world prices and sell to domestic needs at the controlled schedule.

* * * * *

During the World War it was handled by a separate administration called the War Trade Board, but (as with the other such functions just described) it was all done in such close contact with the work of the board that there was no conflict or lost motion whatever.

The only point to emphasize in respect of this and the other war administrations mentioned below is that each is a necessary part of the perfected whole of war organization which is so necessary to make this country the very powerful unit which I have tried to picture here. As I have said cen-

tralization of the essence of war powers—i. e., commandeering, price fixing, and priority—in the hands of one agency will synchronize and coordinate the efforts of all others whether they be formally attached to it or not.

The other necessary war administrations were: Food, Fuel, Shipping, and Railroad.

* * * * *

It is impracticable to maintain in peace any such powerful agency as is necessary in war to administer the gigantic effort of national economic mobilization. We should prepare a complete plan for such an organization but even that must be in the broadest of terms. It is impossible to foresee the precise circumstances and requirements of any future war.

Existing War and Navy Department plans conform substantially to the views expressed by Mr. Baruch. (See p. 416 of the record of hearings.)

Senator Robinson asked Mr. Baruch how long it would now take to mobilize industry and regulate prices. Mr. Baruch said:

I think in 48 hours we could get an organization of men here, because of the knowledge and experience they had, that would get this into smooth working order inside of two weeks.

The controlling factor in the foregoing is the meaning of the word "we." At the present time there is no general agreement regarding the industrial personnel who would function in time of war. Careful and comprehensive planning as to personnel is equally important with the development of organizational and functional plans for material requirement should we be plunged into war.

It is contemplated that in the event of war, civilians will be brought into the war organization in great numbers. It is expected that these civilians will include the most able men in American industry.

The War Department plan recognizes this contingency and provides for a continuous contact with leading industrialists during peace time. But the War Department plan does not go far enough. Up to this time its selections necessarily are from men in industry who are known personally to those who do the selecting. Industries as a whole, or through their national organizations, are not consulted as freely as they should be.

One suggestion made on this point follows:

In order to prevent any conflict it is suggested that the War Department invite the Navy, the Department of Labor, the War Industries Board, as now constituted, and the Chamber of Commerce of the United States, each to appoint a representative to form with the Assistant Secretary of War a continuing board, which in turn will select a committee composed of industrial leaders, technical and trade experts, professional men, agriculturists, etc. This committee should meet once every two years to examine the War Department's plan and the degree of effectiveness of the continuing contact which is supposed to be going on between the War Department and essential industries.

The foregoing is only suggestive. The same result might be achieved through the rehabilitation of the Council of National Defense and its advisory commission of civilian members, as urged by several of the witnesses. The purpose would be to have unanimity of opinion regarding the so-called key men who would be recommended

to the President in war as suitable for positions in the emergency organization of government.

Mr. Meyer made a novel suggestion regarding personnel. He said:

There is another matter that has not very much to do with financial control but which struck me at the time and which I still feel is important, and that is that the men in civil life who occupy important positions in war time ought to be subject to physical examination, just like the men in the Army and Navy. I have a strong feeling that the physical condition of men with important responsibilities should be a matter of Government interest and supervision, just as much so as that of the officers in the line.

All agree that the outstanding agency to be used in case of another war is one which corresponds roughly to the War Industries Board, whose functions during the World War are described in the record of hearings, pages 38-43.

The functions of nine war administrations outside of the War Industries Board were also mentioned. (R. 43-46.) The War Department plan (R. 416) contemplates the use of some of these.

The use and direction of the railroads during the World War and existing plans for the use of railroads and other communication instrumentalities were ably presented to the commission by qualified witnesses.

In addition to other war-time agencies there is need for one which will throughout the war devote all of its energies to the problem of transition from war to peace. After the World War the transition was chaotic to an indescribable extent. The War Department plan recognizes that an additional reason for keeping both prices and profits down during a war is to avoid ruinous post-war deflation. The actual effects of inflation and deflation may be unknown, but it is important to deal with public sentiment. This is expressed in one of the suggestions of the American Legion in its "plan to perpetuate peace by equalizing the burdens of and eliminating the profits from war," which was submitted to this commission. It says:

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 in war times. That deflation must follow an abnormal inflation is a mathematical certainty. That deflation is accompanied by public distress can not 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.

Any detailed conclusions and recommendations as to the appropriate preparatory functions of agencies of the Government other than the War and Navy Departments require time and study. However, these other departments and bureaus should be expected to cooperate in every practical way in facilitating the important planning work carried on in these two departments.

I. FACTORS AND CONSIDERATIONS APPLYING TO A MAJOR WAR

The conclusions and discussions herein deal solely with what is known as a major war. It has been assumed that no comprehensive program need be prepared for any other type, because the War and Navy Departments can be depended upon to deal adequately with a minor conflict. In a "little" war competitive bidding by industry for the relatively small war "orders" will prevent profiteering.

MEMORANDUM FOR THE WAR POLICIES COMMISSION ON THE POWER TO
FIX PRICES IN WAR TIME

(By the Attorney General)

At the last meeting of the commission the following tentative recommendations were submitted:

1. We recommend that no amendment to the Constitution be considered at this time.

2. We recommend that bills be drawn and introduced in Congress as soon as practicable, conferring upon the President the specific right to freeze or fix prices at any date before or after the beginning of war, and the power to adjust such prices.

The commission had before it the memorandum on the power of Congress to fix prices of commodities and services in time of war, prepared by Alexander Holtzoff, special assistant to the Attorney General, together with other opinions of members of its legal staff. The meeting was adjourned to allow a fuller consideration of the questions by officers of the Department of Justice and by the Attorney General. Attached hereto, for the consideration of the commission, is an original memorandum by Mr. Holtzoff and memoranda by the Solicitor General, by Mr. Claude R. Branch, his chief assistant, by Mr. Erwin N. Griswold, of the Solicitor General's staff, and by Mr. Hugh S. Johnson, counsel for Mr. Bernard M. Baruch.

An attempt will be made here to sum up as briefly as possible the general conclusions reached as the result of this reexamination of the questions.

(1) Some aspects of the problem require clarification at the outset.

(a) The discussions, including the tentative draft of the report, disclose some confusion of thought between the fixing of prices generally between private persons in general markets and the matter of governmental fixing of prices for articles it needs and takes for public use. The Constitution now requires that just compensation be paid for private property taken for public use and this provision remains operative in time of war as well as in peace. Congress may not constitutionally directly control the prices to be paid by the Government. If the owner of the property taken is dissatisfied with the price offered by the Government, he is entitled to have just compensation ascertained and fixed by the courts. The matter of fixing prices for which property and services may be bought and sold in private transactions is a separate problem. If Congress has the power to provide for fixing prices generally in private transactions, it could thus establish a market price which may be persuasive or controlling in determining just compensation where the Government takes private property for public use, and so through the exercise of one sovereign power that of establishing prices under the war power may thus indirectly affect or control the prices it must pay when exercising the power of eminent domain.

There is no suggestion in the tentative report of the commission that the present constitutional obligation to pay just compensation for private property taken for public use in time of war be abrogated and that aspect of the matter may therefore be laid aside and consideration given only to the power of Congress to fix prices generally in private markets.

(b) The discussions also show some confusion as to the powers of the President in time of war. Power to regulate or fix prices in time of war outside the field of actual military operations is a legislative power. It does not belong to the President and is not conferred upon him by that clause in the Constitution which makes him the Commander in Chief of the naval and military forces. His powers as commander in chief are to govern and direct the military forces and exercise the powers of a military chieftain in the actual field of military operations. Power to provide for regulating or fixing prices as a war measure in areas not in the field of military operations belongs to the legislative branch. It is true that if Congress authorizes the price regulation by valid legislation and defines its limits and prescribes the general conditions and rules for its exercise, it may delegate to the President or to other executive or administrative officers the duty of finding the facts and applying the legislative directions, but the exercise of such a power outside the field of military operations must have its basis in legislation by Congress.

(c) The proposals of the commission respecting price fixing in war time seem to have a double purpose: First, to aid in the effective prosecution of war; and second, to eliminate war profiteering as a matter of national policy and of justice between those engaged in actual military service and those who are not. The fact must not be lost sight of that the only constitutional basis for price fixing under the war power is effective prosecution of the war. The two purposes are closely related and a price fixing program necessary for the proper conduct of war may necessarily result in the prevention of war profiteering, but in testing the validity of price fixing measures the primary consideration is the effectual prosecution of military operations and the conduct of the national defense.

(2) Turning now to major question, Congress has express power to declare war, to prosecute military operations, and to provide for the common defense. It has the express power to make all laws necessary and proper to execute the war power. Whether the fixing of prices for property or services generally bought and sold in the market is necessary or proper for the adequate conduct of war and the defense of the Nation is fundamentally a question of fact and depends on the conditions at the time the exercise of the power is attempted. The decision of this question rests primarily with the Congress, but its decision is not absolute. It is open to judicial review in two respects. If there is a factual basis for the exercise of the power and plausible ground for the contention that the regulation or fixing of prices has a direct bearing on the successful conduct of the war, the conclusion of the Congress would not be overthrown by the courts. If the exercise of the power were sustained, the reasonableness of the action taken and of the prices fixed would be open to judicial review. The measures adopted by Congress would be supported by a strong presumption of validity, and its conclusions as to the necessity for resorting to price fixing and the conclusions of the agencies set up by Congress as to the reasonableness of prices would not be set aside unless shown to be arbitrary and without a substantial basis in fact. The mere existence of a state of war would not support a resort to such measures. There would have to be

ground for the conclusion that resort to them was made reasonably necessary for the proper conduct of the war.

(3) In some of the discussions and memoranda on this subject the suggestion was made that the power of Congress to fix prices in war time is necessarily limited to articles which may be defined as necessities. On the other hand, it is contended that the power extends to a stabilization of the whole price structure, and that Congress has power upon a declaration of war "to freeze" the price of every article and service and establish the existing price level as a maximum, subject to later detailed readjustment.

There is no basis for the contention that power to fix prices in war time is necessarily limited under all conditions to articles defined as necessities. The difference between the two proposals is not one of principle but of degree. Whether the milder or the more drastic measure may be resorted to would depend entirely on existing conditions and the extent of the emergency and the degree to which it could be established or shown that the measures resorted to were reasonably necessary for the effective prosecution of the war. Both public opinion and judicial opinion on such measures develop together as a result of the experience of mankind. Looking back to the Spanish-American War, for example, it is reasonably clear now that the economic conditions of the country were not an important factor in the conduct of military operations and that a resort to any sort of price fixing by Congress at that time would not have had behind it any plausible argument that it was reasonably necessary for the successful conduct of the war. Public opinion would not have sustained it and it is reasonably certain that the courts would not have done so. During the World War Congress resorted to a very limited extent to regulatory measures designed to prevent exorbitant charges with respect to certain necessities and, with respect to some of them such as fuel, provided in the Lever Act for direct price fixing. The economic justification for such measures during the World War was reasonably clear. No one can read the decisions of the Supreme Court of the United States on this war legislation without being satisfied that under the conditions prevailing during the World War regulations fixing, under authority of Congress, prices of certain foods, fuels, and other articles were well within the constitutional powers of Congress as measures reasonably necessary or proper for efficient conduct of the war.

It is far from clear, however, that so drastic a measure as a seizure by the Federal Government of the whole economic structure of the country at the outbreak of that war by freezing of prices of every article and service would have had back of it sufficient experience or factual basis to sustain it in the courts. What the future may develop is a matter of speculation.

Mr. Baruch and his counsel present a persuasive argument that restricting price control to a limited list of commodities throws the whole price structure out of gear, and that without general control and stabilization of the entire price structure the cost of war is doubled, credit of the belligerent is impaired, the supply of armies is more difficult, and civil and military morale is destroyed. Whether this will be so in another war will be a question of fact. We can not categorically say now that price control in war time must constitutionally be limited to a limited class of necessities. The extent

of the power to control and regulate prices will depend on the character of the conflict and the extent to which the whole economic resources of the country may be involved and upon the factual basis which may then develop for the contention that complete stabilization of the whole price structure would be a measure reasonably necessary or proper for the efficient conduct of the war. In time of war the national existence may be at stake. Any measure reasonably necessary to the effective prosecution of the war and to the preservation of the nation could be sustained.

(4) In recommending legislation on this subject, some minor aspects of the problem must be considered.

(a) The support for the validity of measures of this type is found mainly in the conclusion of Congress as to their reasonable necessity. It is desirable to have back of such measures the judgment of Congress exercised in the face of an emergency and under conditions existing at the time the legislation is enacted. This subject is well dealt with in the memorandum of the Solicitor General. For Congress to pass legislation at this time providing for price regulation during the next war would leave the legislation without the support which comes from the exercise of the judgment of Congress upon actual conditions. Congress might now enact legislation authorizing the President to fix prices in the case of a declaration of war, but it would be necessary for the legislation to define and describe the conditions on which the President could act. It would be very difficult to draft a formula or description of the future emergency and conditions which would form the basis of executive action. Legislation might now be adopted providing for the fixing of prices upon the declaration of war and setting up the machinery for that purpose, but with the provision that the price fixing should only become operative in the event of a declaration of war and of a resolution by Congress declaring the existence of an emergency and putting the price-fixing machinery into operation.

Our general conclusions may be stated as follows:

First. Under the power to declare war and provide for the common defense and conduct military operations, Congress has authority to provide for regulating or fixing prices for property or services if the conditions are such that such measures are reasonably necessary or proper for the efficient conduct of the war. The decision as to whether such measures are justified rests primarily with the Congress. Its action must not be arbitrary, but must have a reasonable basis in fact. Its conclusion would be presumptively valid but would be open to judicial review, first, as to whether there was any reasonable factual basis for the conclusion that the measures resorted to were reasonably necessary for the proper conduct of the war, and second, as to whether the prices fixed were wholly arbitrary or unreasonable.

Second. Whether price fixing would have to be confined to a limited class of necessities or might extend to the whole price structure would depend on conditions at the time, and the extent to which it could be shown that the action taken was reasonably necessary for the national defense and the successful conduct of the war. It can not now be said as a matter of law that the fixing of prices would necessarily be limited to the so-called necessities.

Third. If the commission is satisfied to rely on congressional action subject to the above limitations and open to review by the courts as to their justification and the reasonableness of the manner of their exercise, no constitutional amendment is desirable. On the other hand, if it is deemed advisable that Congress have absolute power with respect to these matters and as to the extent of price fixing in war time and that its judgment shall be conclusive both as to the necessity for price fixing measures and as to the reasonableness of the prices established, a constitutional amendment would be necessary.

WILLIAM D. MITCHELL,
Attorney General.

OFFICE OF THE SOLICITOR GENERAL,
Washington, D. C., February 3, 1932.

Memorandum for the Attorney General.

The question outlined in your memorandum of January 9, 1932, has had careful consideration and study in this office. Memoranda prepared by Mr. Branch and Mr. Griswold are sent up to you herewith.

The proposals discussed in Mr. Holtzoff's memorandum seem to be of doubtful constitutionality, and to present questions which can not be answered in advance of the particular emergency which may be relied upon to support such legislation.

The principle underlying the decisions in the Rent cases (*Block v. Hirsh*, 256 U. S. 135; *Marcus Brown Co. v. Feldman*, 256 U. S. 170; *Levy Leasing Co. v. Siegel*, 258 U. S. 242) and in *Wilson v. New* (243 U. S. 342), where the court sustained the constitutionality of the Adamson law, is that a great public emergency may convert a private calling which could not constitutionally be subjected to regulation by law, in the absence of such an emergency, into a business clothed with a public interest and therefore subject to regulation by law.

The theory upon which such legislation is sustained is that the existence of the emergency justifies the legislature in declaring the business to be affected with a public interest, and therefore subject to price regulation. The legislative determination that an emergency exists which justifies the fixing of prices to be charged in a private calling is always open to inquiry in the courts, as is also the extent to which regulation may be permissible. (*Wolff Co. v. Industrial Court*, 262 U. S. 522, 536, 539; *Block v. Hirsh*, 256 U. S. 135, 154.) Furthermore, it is elementary law that such legislation, in order to be valid, must provide for judicial review of the reasonableness of the rates fixed.

The Rent cases and the case sustaining the constitutionality of the Adamson law were all decided by a court which divided five to four. except the *Levy Leasing Co.* case, where Chief Justice Taft may very well have been persuaded that he was bound to follow the decision in the *Marcus Brown Co.* case sustaining the constitutionality of the New York Statute previously decided, with Chief Justice White in the minority of four. Furthermore, these decisions have twice been said to have gone "to the verge of the law." (*Pennsylvania Coal Co.*

v. Mahan, 260 U. S. 393, 416; *Wolff Co. v. Industrial Court*, 262 U. S. 522, 544.) In the latter case it was said:

It is not too much to say that the ruling in *Wilson v. New* went to the border line, although it concerned an interstate common carrier in the presence of a nation-wide emergency and the possibility of great disaster.

The present proposals, as I understand them, are the enactment of a law in peace time under which prices of all the necessities of life would be fixed during war by proclamation of the President, and wages and salaries for services—connected, I assume, with the prosecution of the war or the production of the necessities of life—would be similarly fixed. There is nothing in the cases cited which can be urged in support of such legislation, because in each case the statute was enacted to meet an existing emergency and its validity was upheld solely on that ground. I know of no decision which authorizes the delegation to the Executive of the power to determine when a private calling may be clothed with a public interest justifying price regulation.

Mr. Holtzoff apparently proceeds upon the generalization that war removes the regulative force of competition, and thereby converts all private callings into public business which may be subjected to price regulation. The only authorities cited for this proposition are the cases referred to above, and a dissenting opinion of Mr. Justice Stone in *Tyson v. Banton* (273 U. S. 418, 451). A war creating a national emergency having such an effect may possibly be imagined, but it can not be predicted. Not every war would create an emergency justifying legislation of the kind proposed. Certainly the Spanish war did not. No one in times of peace can foretell the emergencies of war, and their effect upon the public importance of particular industries. Congress can not, therefore, determine in advance how far the emergencies of war, will justify price regulation. To be valid the regulation must be justified by an existing emergency, and since there is none when the statute is passed I gravely doubt its validity.

The decided cases do not go so far as to justify price regulation of all the necessities of life during war time. Nor do they suggest that men may be compelled to perform labor or render services to private individuals at prices fixed by legislative authority. Congress may compel the armed service of any citizen (*United States v. MacIntosh*, 283 U. S. 605, 624; *Selective Draft cases*, 245 U. S. 366), and I have no doubt, in the exercise of its war power, may draft men to labor or render service in connection with industry essential to the prosecution of the war. But the power to draft men for military and other war service does not imply a power to fix the wages or salaries for which they must labor or render service for private individuals. If such legislation may be justified under any circumstances I doubt if it can ever be justified except by emergencies of war, existing or immediately threatened, known to Congress and believed by Congress to justify such invasions of the liberty of the individual.

I do not mean to say that the principle of the *Adamson* law case and the *Rent* cases will not justify price regulation by Congress during war. I think it will. But I do not see how such legislation

can validly be enacted until the emergency justifying it is at least cognizable by Congress.

My conclusion is that you can not soundly advise the commission that any law enacted by Congress before the emergency of war is threatened, which authorizes Executive action fixing prices of goods and services as between private individuals, will be held constitutional, even if it be effective only during war time, requires reasonable prices to be fixed, and affords a method for judicial review. Since it is impossible to foresee the emergencies of war and their effect upon particular industries, is it not the part of wisdom to leave such questions to be dealt with by Congress when the emergency arises or is threatened? If not, then I see no escape from the necessity of a constitutional amendment authorizing Congress to delegate to the President the power to fix prices of goods and services during war time as he may deem necessary in the public interest, subject to review in the courts of the reasonableness of the prices fixed. I seriously question the wisdom of such an amendment to the Constitution.

THOMAS D. THACHER,
Solicitor General.

OFFICE OF THE SOLICITOR GENERAL,
Washington, D. C., January 27, 1932.

Memorandum for the Solicitor General.

I have given consideration to the matter suggested in the Attorney General's memorandum, and have read Holtzoff's opinion and also some of the other papers in the file, as well as all of the Supreme Court cases which seem to me to bear upon the subject. It occurred to me that some of the decisions in cases dealing with the regulations as to prices of wool might throw some light on the question, and I have read a number of these, but I do not find anything in them which is very helpful.

I should not want to give any opinion upon as general a question as that here propounded. I believe that without constitutional amendment statutes could be drawn regulating prices which would be free from constitutional objection, and it is, of course, easy to think of provisions which would be clearly unconstitutional. The question of just how far a statute may go is one which can not be answered upon the authorities. It is noteworthy that in many of the cases which considered legislation arising out of the late war there was a large and sharp dissent.

If I had to give an opinion, I think that I should say that in a great national emergency growing out of a war Congress might fix prices, or create a body which could from time to time fix prices, for commodities necessary to prosecute the war and for the necessities of life for the civilian population, if there was provision for a court review as to the fairness of the price. Further than this I would not be willing to go. I should hardly expect the courts to uphold any absolute fixing of prices either as between private individuals or as the basis of requisition of property by the Government. As applied to property requisitioned by the Government, such a statute would seem to run counter to the numerous statements of the Supreme Court that the matter of just compensation is a judicial

function. (I believe, however, that there is no decision squarely on this point.) If there is a right to a judicial determination of the question of just compensation, I fail to see how a price fixed can be upheld as between individuals, if it is proved to be unreasonably low. The fixing of such a price would seem to me to be a violation of the due process clause, which even the war power would not justify. Even if it could be said that Congress is as able as a court to determine what is a fair price at the time of the passage of any statute, I do not see what sanction its determination could have as to prices for the future, unless it also should control wages of labor and all other elements which enter into the determination of what is a fair price.

Highland v. Russell Motor Car Co. (279 U. S. 253) seems to me to go to the limit. (This case is not mentioned in Griswold's memorandum, but an extract of it appears on pages 2 and 3 of my memorandum dated January 12.)

I do not feel that very much can be based upon the decision in *Fogelstein & Co. v. United States* (262 U. S. 337). That case seems to me to hold little more than that there was no ground for upsetting a finding of the Court of Claims to the effect that a certain price was the market price.

I have not considered at all carefully the plan which Griswold suggests, or the question as to whether it is desirable or undesirable to amend the Constitution so as to grant Congress further powers.

CLAUDE R. BRANCH.

OFFICE OF THE SOLICITOR GENERAL,
Washington, D. C., January 27, 1932.

Memorandum for the Solicitor General.

By the act of June 27, 1930 (ch. 653, 46 Stat. 825), entitled "Joint resolution to promote peace and equalize the burdens and to minimize the profits of war," Congress created a commission—

to study and consider amending the Constitution of the United States to provide that private property may be taken by Congress for public use during war and methods of equalizing the burdens and to remove the profits of war together with a study of the policies to be pursued in event of war.

The commission thus established is known as the War Policies Commission. It has held hearing and has had associated with it a legal staff which has rendered to it opinions upon various legal questions involved.

One of the questions considered by the commission is the power of Congress to fix prices of commodities and services in time of war. The proposal relates to the fixing of prices between private vendors and vendees, to prevent profiteering and at the same time to enable the Government to take advantage of the prices thus fixed. The commission obtained from its legal staff an opinion on the question whether a constitutional amendment would be necessary in order to authorize such price fixing. An opinion was prepared by Alexander Holtzoff, special assistant to the Attorney General, chairman of the legal section, in which it was concluded that—

the proposal for the freezing of wholesale and retail prices is constitutional, provided it is limited to the necessities of life, and provided further, an opportunity is afforded for judicial review of the prices so fixed.

This opinion was prepared without the knowledge of the Attorney General. Thereafter the Attorney General attended a meeting of the commission and was asked to state his opinion on the question. The Attorney General has asked that the matter be considered in this division.

In the absence of some specific proposal it is very difficult to express an opinion, in vacuo, on the constitutionality of possible price fixing legislation which might be passed by Congress. And even were there a specific statute for our consideration, the question would be only slightly less difficult.

Price fixing legislation is not novel in the common law. Starting with the Statute of Labourers (23 Edw. III, Stat. I, ch. 6 (1349)), and very likely even earlier, price-fixing legislation was a well recognized function of the law making power, which it might exercise directly or through administrative officers. Numerous such statutes are cited at pp. 43-44 of the Government's brief in *Addy Co. v. United States*, No. 84, October term, 1923, and at pp. 382-384 of Freund, *Police Power* (1904). Such legislation was also in force in the American Colonies prior to and at the time of the Revolution. Statutes passed by eight of the thirteen States during the Revolution are cited in 33 Harv. L. Rev. 938, 5. These statutes fixed the price of almost every commodity in the market. At the time the fifth amendment was ratified, at least two States had statutes providing for the regulation of the price of bread. (Maryland Laws, 1789, ch. 8, sec. 2; 5 S. C. Stat., 186 (1791)).

In spite of these English, colonial, and early State precedents, the Supreme Court has usually examined price-fixing legislation with a rather hostile eye.

There is no case in the Supreme Court which is directly in point. There are several cases which indicate that the powers of Congress may be more extensive in time of emergency than otherwise. Thus, in *Wilson v. New* (243 U. S. 342), the court upheld the validity of the Adamson law, which in effect granted an increase in wages to railroad employes. But the decision was by a court divided five to four, and in *Charles Wolf Packing Co. v. Industrial Court* (266 U. S. 522, 544, the court said—

It is not too much to say that the ruling in *Wilson v. New* went to the border line.

In *Block v. Hirsh*, 256 U. S. 135, the court upheld the power of Congress through a commission to regulate rents in the District of Columbia in the period following the war, and in *Marcus Brown Co. v. Feldman*, 256 U. S. 170, a similar power in the State of New York was upheld. But again the decisions were by a court divided five to four, and in *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 416, Mr. Justice Holmes (the author of the opinion in *Block v. Hirsh*) said that they "went to the verge of the law."

In *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, the power of Congress to prohibit the sale of intoxicating liquor during war-time was upheld, but this decision is not helpful in considering the present problem, for it had already been held that the 14th Amendment did not prevent the States from prohibiting the sale of liquor.

These cases plainly form an unsubstantial basis for an expression of an opinion one way or another on the question now under consid-

eration. Nor is that doubt lessened by an examination of the cases under the Lever Act by which Congress undertook to regulate the prices of some commodities during the late war. Numerous district courts upheld the constitutionality of the statute which made it a criminal offense to exact "any unjust or unreasonable rate or charge in handling or dealing with any necessities." *C. A. Weed & Co. v. Lockwood*, 264 Fed. 453 (W. D. N. Y.); *United States v. Rosenblum*, 264 Fed. 578 (W. D. Pa.); *United States v. Oglesby Grocery Co.*, 264 Fed. 691 (N. D. Ga.); *United States v. Swedlow*, 264 Fed. 1016 (D. Colo.); *United States v. Myatt*, 264 Fed. 442 (E. D. N. C.); *United States v. Russell*, 265 Fed. 714 (E. D. La.). But when the question was presented to the Supreme Court it found it unnecessary to pass upon the power of Congress to regulate prices. It held that the Act was unconstitutional since it set up no ascertainable standard of guilt. Although there is perhaps no room to question the correctness or the wisdom of this decision, the inhospitable attitude of the Supreme Court to price fixing legislation appears in *Addy Co. v. United States*, 264 U. S. 239, where the court held that orders promulgated by the President fixing the jobbers' commission for the sale of coal should not be construed to apply to coal already purchased by the jobber before the order was issued.

In *American Coal Mining Co. v. Special Coal & Food Commission of Indiana*, 268 Fed. 563 (D. Ind.), it was held that the State might lawfully establish the price of coal. An appeal was taken to the Supreme Court, but this was dismissed on the motion of the appellant. 257 U. S. 632. The power of the United States to fix coal prices was upheld in *United States v. Pennsylvania Central Coal Co.*, 256 Fed. 703 (W. D. Penna.).

Perhaps the case which most nearly approaches the question is *A. M. Holter Hardware Co. v. Boyle*, 263 Fed. 134 (D. Mont.). In that case a statute of Montana, passed August 11, 1919, creating a commission with power to fix the prices for commodities, was held unconstitutional. An appeal to the Supreme Court was dismissed by stipulation of counsel. 257 U. S. 666.

These cases are simply mentioned to show that the question is one which inevitably would result in divergent opinions in the lower Federal courts and on which there would be sharp disagreement in the Supreme Court, with the result depending in large part on circumstances largely fortuitous. As a practical matter it is doubtful whether the Supreme Court would render a decision during a great national emergency which would seriously endanger the national life. But the cost of a war would depend in large part upon litigation which would not reach the Supreme Court until after the emergency had passed.

The foregoing discussion relates to the validity of Acts of Congress directly fixing specific prices for commodities or "freezing" the prices of all commodities at the level of a particular date. It seems to me very doubtful whether such a statute would be upheld even in war time in the absence of a further amendment to the Constitution. The prohibition of the Fifth Amendment against taking private property without just compensation is too plain a bar, and the Supreme Court has declared many times that "war or the conditions which followed it did not suspend or affect these provisions." *United*

States *v.* New River Collieries, 262 U. S. 341, 343; United States *v.* Cohen Grocery Co., 255 U. S. 81, 88.

Nevertheless it seems to me that it would be undesirable to amend the Constitution to give Congress specific power to fix prices in time of war. In the first place such an amendment would tend to negative any price fixing power which Congress may have apart from war. The importance of retaining such power to the fullest is shown in the case of *Wilson v. New*, 243 U. S. 342, where Congress was confronted with a serious emergency in peace time. But, furthermore, it seems to me that the same result can in large measure be obtained without the necessity of a constitutional amendment.

The difficulty with price fixing directly by Congress lies in the fact that it makes no provision for the situation where the price fixed may operate to deprive a person of his property without just compensation or without due process of law. But it seems to me that all constitutional objections would be removed, at least so far as war time is concerned, if Congress were to create a commission to regulate prices. Such a commission might be known as the War Prices Commission. It could be directed by Congress to hold hearings and on the basis of the evidence submitted to it to establish prices of commodities at a level which would provide just compensation to the owners of such commodities.

The act should also provide for the bringing of suits in the United States courts by any interested person who was aggrieved by an order of the commission. Such a suit would be similar to a suit to set aside an order of the Interstate Commerce Commission. Further provisions could be made in the statute for proceedings similar to reparation proceedings before the Interstate Commerce Commission. That is, a person who had been overcharged could get from the commission an order directing the repayment of the amount of the overcharge; or a seller who felt that a price fixed by the commission was unreasonably low could make application before the commission to have payment on a "reasonable" basis, that is, a basis which would afford him just compensation.

It seems to me that the practical effect of such a statute would be to establish market prices of commodities at the price fixed by the commission. The importance of this is demonstrated by the decision of the Supreme Court in *Vogelstein & Co. v. United States*, (262 U. S. 337), where it was held that just compensation for copper seized by the Government should be based on the market price, even though that market price was in large part based on agreements between producers and the Government. Experience in the late war showed that the great majority of citizens will cooperate in an effort to regulate prices and other details in industry. In fact the functions which I have suggested were in large part exercised by the War Industries Board.

In accordance with the views expressed above, I submit the following tentative conclusions:

1. A general statute by Congress fixing the prices of commodities, or "freezing" prices as of a particular date would be of such doubtful constitutionality that it is not safe to express an opinion upon it.
2. It is undesirable to amend the Constitution to grant power to Congress to pass such a statute.

3. The result desired can for all practical purposes be achieved by enacting a statute creating a war prices commission to be effective in time of war only. This commission would have power to establish prices of commodities after a hearing, on a basis which in its opinion would provide just compensation, and there would be provision for recourse to the courts to those who were dissatisfied by the commission's orders. This opportunity for recourse to the courts would insure the constitutionality of the act while experience in the late war leads me to believe that very few persons would seek to upset the orders of the commission.

Respectfully submitted.

ERWIN N. GRISWOLD,
Attorney.

Memorandum for the Attorney General (By Hugh S. Johnson).
Subject: The constitutional question raised by the "Baruch plan."

1. THE FACTUAL ELEMENTS

The War Policies Commission was created to recommend, *inter alia*, policies to be pursued in war and further to report whether a Constitutional amendment will be necessary to effect recommended policies.

The commission called all available witnesses of significant experience in the World War. These witnesses were unanimous in saying that price control is indispensable to industrial mobilization and that industrial mobilization is indispensable to the successful conduct of major modern war. It was further shown that, as the World War progressed, general price control was attempted by every major belligerent.

Two methods of price stabilization were suggested. One was that the price of each one of a list of so-called basic commodities be separately artificially determined, decreed and enforced. The so-called Baruch plan suggested that no price should be artificially "fixed" but that, on a day certain, immediately upon the advent of war, a ceiling should be clamped down over the whole pattern of price relationship and exchange values, as it existed on that day, and that no higher price for anything thereafter be permitted except by authority of the President.

Two complete plans for industrial mobilization were submitted; one captioned the "War Department plan"—the other generally referred to as the "Baruch plan." These plans are in substantial agreement except that the War Department plan at first favored individual price fixing. This difference was reconciled during the hearings and the War Department expressed agreement with the Baruch plan on this point.

The suggestion of individual price fixing was the tentative thought of general and inexperienced observers. The plan for stabilizing the entire structure of price relationship was presented by the man who was personally charged by our Government with responsibility for industrial mobilization and price fixing in the World War. It was a deliberate judgment based on an intense experience. Mr. Baruch's testimony compels the conviction that his proposal is an

irreplacable necessity to national defense in major modern war and that the countersuggestion of individual price fixing proposes a tragic if not fatal error.

He showed (Exhibit A, pp. 11 to 23)—

(1) That the price of a thing is the exchange value thereof in terms of other things—therefore, to fix the price of one thing and let others rise, is to impair the exchange value of that thing.

(2) That, since the price of anything is simply the resultant of the price of all other things, and since free prices rapidly rise in war—

(a) The impairment mentioned in the preceding paragraph rapidly becomes confiscatory, oppressive, and impossible.

(b) Production of the fixed-price commodity would cease unless the fixed price were artificially increased or abandoned altogether and thus—

(c) That individual price fixing is a vain, illogical, and impossible process.

(3) That stabilization of the whole price structure requires no artificial computation, is simple and easy, and that artificial individual price fixing is unsound in economics (for reasons just stated) and is impossible in administrative practice.

A prime purpose of the Baruch plan is to control inflation.

Mr. Baruch showed—

(1) That approximately 100 per cent inflation of the price structure has been a concomitant of every major war.

(2) That inflation destroys defensive strength because it—

(a) Doubles the cost of war.

(b) Impairs the credit of the belligerent.

(c) Makes the supply of armies and nationals doubly difficult.

(d) Destroys civil and military morale.

(3) That wholesale war inflation inevitably entails economic disaster on the ensuing peace because it—

(a) Leaves governmental costs crystallized at insufferable levels.

(b) Leaves debts contracted in inflated figures to be paid for in deflated currencies at double the sweat, sacrifice, and effort at which they were incurred.

(c) Is directly responsible for seasons such as we now suffer.

If this reasoning is correct, restriction of the power of Congress to individual price fixing would be a fatuous stultification.

If these facts and conclusions of expert witnesses are correct, an opinion by the Attorney General that any war-time price fixing is unconstitutional would be tantamount to an opinion that the United States can not—without serious handicap—wage defensive war under modern conditions except by the cumbrous process of constitutional amendment. During peace, war is an academic subject to most people. No such amendment is likely. The question thus presented to the Attorney General is one of first magnitude.

2. OPINIONS OF THE ATTORNEY GENERAL'S OFFICE

The writer of this brief has been accorded by the Attorney General the privilege of examining confidentially an opinion by the Solicitor General and an office memorandum by Mr. Holtzoff. As he understands the former, it is to the general effect—

(1) That price fixing in peace, in the so-called "common callings," is inhibited by the implications of the fifth amendment.

(2) That war-time price-fixing is justified only as a measure of national self-defense in an emergency.

(3) That, since necessity is the measure of justification, Congress may not, in anticipation and with no knowledge of the extent of subsequent emergencies, provided generally for price fixing.

As Mr. Holtzoff's argument is understood, it is:

(1) That price fixing in war or peace is restricted, by the fifth amendment, to "public utilities" or to callings "affected with a public interest."

(2) That the "public interest" is "affected," in this intendment, in circumstances where the "regulative force of competition is impaired," but only as to "necessaries of life."

(3) That whenever war substantially impairs the regulative force of competition, Congress may fix individual prices on the theory that the manufacture and distribution thereof have thus become "public utilities," or, at least, have become "affected with a public interest."

(4) That since this doctrine can only be applied to necessities of life, general price stabilization would not be permitted, even in war, but fixing of individual prices of necessities could be authorized by Congress.

3. THIS BRIEF IS UNDERSTOOD TO CONCUR WITH THE OPINION OF THE
SOLICITOR GENERAL

The opinion of the Solicitor General that Congress ought not to provide generally for price fixing in advance of the definition of a particular war emergency, is in such obvious consonance with the reasoning of the Supreme Court in the various war power cases discussed below that argument seems unnecessary to support it. This brief is in complete concurrence.

On the other hand, Congress, and not the courts, is the judge of the existence of the emergency of war (Constitution, Article I, section 8, clause 11) and the expediency and necessary extent of the exercise of the so-called war powers of the Federal Government (legal tender cases, 110 U. S., 421, 450; *Dakota Central Telephone Co. v. South Dakota*, 250 U. S., 163). This is a technical and complex subject. It requires preparation and deliberate consideration of detailed plans, and this deliberation is not possible in the excitement and haste of actual or threatened war. Indeed, the preparation at this time, of plans to be utilized in war is the specific statutory task of the War Policies Commission. The Baruch plan proposes a statute defining the methods of general stabilization, but it would be completely consistent with that plan if such a statute should provide that its provisions should become effective only "When specifically authorized by Congress during the period of any war declared by Congress." With this qualification, it is understood that there is nothing in the opinion of the Solicitor General even suggestive of the unconstitutionality of the Baruch plan.

4. THE LOGIC OF THE HOLTZOFF MEMORANDUM IS BASED ON DOCTRINE WHICH HAS REPEATEDLY BEEN REJECTED BY THE SUPREME COURT

The Holtzoff memorandum says, in part—

We do not find [in war] any departure from the principle that rates and charges may be regulated only in respect of "callings coupled with a public interest," or as Mr. Justice Stone has said: *As to occupation where there exists a combination of circumstances materially restricting the regulative force of competition.*"

To be sure, in time of war or other emergency, a specific occupation may become a public utility which had not previously been one, because it may become deprived of the regulative force of competition and therefore, for the time being, justify the price regulation when it is not permissible in time of peace.

The italicized words are necessary to Mr. Holtzoff's conclusions and they are not the law.

Yet, based on this error, the reasoning of the office memorandum proceeds:

First (as to price fixing of particular commodities):

The discussion contained in this opinion inescapably leads to the conclusion that such a scheme is within the constitutional power of Congress. * * * The existence of the emergency which would either eliminate or materially lessen the regulative force of competition in the manufacture or sale of certain essential commodities would justify Congress in putting the business of manufacturing or dealing in such commodities in the category of callings coupled with a public interest.

Second (as to general price stabilization):

To justify Congress in regulating all prices of all commodities it would be necessary to hold that either the regulative force of competition has been materially lessened in respect to all manufacturing and marketing transactions, even as to commodities having no relation to the conduct of the war and not constituting necessities of life. * * * It seems hardly likely that the Supreme Court would reach a conclusion. So far as has been shown, it has upheld price regulation in war time when it is limited to specific commodities or sources which are of great interest to the community and which are of themselves obviously affected by the emergency. A blanket regulation of all prices * * * would seem to be beyond the power of Congress.

These conclusions are believed to be in error.

The phrases "affected (or clothed) with a public interest" and "public utility" are words of art and refer to certain specific types of business. They can not, by circumstances impairing the regulative force of competition, be extended to include the so-called common callings.

The Supreme Court has specifically refused to define the phrase "affected with a public interest" except by the gradual process of judicial inclusion and exclusion. (Davis v. New Orleans, 96 U. S. 97, 104.) The court has gone no further than to classify, as stated in the Holtzoff memorandum (p. 7), the types of business which fall within the meaning of the phrase. It has consistently refused to extend that list and the Holtzoff memorandum is not the first attempt to justify price fixing wherever the regulative force of competition is impaired. Repeatedly both counsel and dissenting judges have urged this view. The court not without acerbity and certainly with emphasis has rejected it. The quotations used by the memorandum to support it are from a dissenting opinion in the case of Tyson v. Banton (273 U. S. 418).

In *Wolff Packing Co. v. Court of Industrial Relations* (262 U. S. 522), Kansas, in seeking to avoid labor disputes, attempted to regulate labor wages in packing houses. The court, finding no "affection with the public interest," made the classification of businesses "affected with a public interest" above referred to and was careful to add:

It has never been supposed, since the adoption of the Constitution, that the business of the butcher, the baker, the tailor, the woodchopper, the mining operator or the miner, was "clothed with such a public interest" that the price of his product or his wages could be fixed by State regulation.

In *Tyson v. Banton* (273 U. S. 418) (where counsel and dissenting justices urged the doctrine of the office memorandum, that peculiar circumstances of monopoly by the theater-ticket brokers in New York created a situation in which, because the regulative force of competition was impaired, a New York statute limiting brokers' fees should be upheld) the court said:

* * * if evils such as "fraud, extortion, collusive arrangements between the management and those selling tickets" exist, they are to be suppressed by legislation which comports with the Constitution and not by such as strikes down the essential rights of private property protected by that instrument against undue governmental interference.

In *Ribnick v. McBride* (277 U. S. 350) the contention of the office memorandum (that circumstances "impairing the regulative force of competition" justified a New Jersey statute regulating the fees of employment agencies) was made and stricken down:

To urge that extortion, fraud, imposition, discrimination and the like have been practiced to some or to a great extent in connection with the business here under consideration, or that the business is one lending itself peculiarly to such evils, is simply to restate grounds already fully considered by this court. These are grounds for regulation, but not for price fixing as we have already definitely decided * * * the fixing of prices of food, clothing, or house rental or wages * * * is beyond the legislative power.

The contention again appeared in *Williams v. The Standard Oil Co.*, 49 Sup. Ct., 115, involving a Tennessee attempt to regulate prices of gasoline at filling stations and was again destroyed:

It is settled by recent decisions of this court that a State legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business is "affected with a public interest." Nothing is gained by reiterating the statement that the phrase is indefinite * * * however * * * characterized it has become the essential test by which the legislative power to fix prices of commodities, use of property, or service, must be measured. * * * Gasoline is one of the ordinary commodities of trade, differing, so far as the question here is affected, in no essential respect from a great variety of other articles commonly bought and sold by merchants and private dealers in the country. The decisions referred to above (cases cited supra) make it perfectly clear that the business of dealing in such articles, irrespective of its extent, does not come within the phrase "affected with a public interest."

In these repeated and recent decisions lies direct repudiation by the court of the doctrines advanced in the Holtzoff memorandum. "Impairment of the regulative force of competition" is not the justification of war-time price fixing. With the failure of that proposition falls the conclusion flowing from it—that the prices of commodities in which competition is impaired and only those may be fixed by statute.

5. ENJOYMENT OF PROPERTY IS SUBJECT TO THE POWER OF CONGRESS, IN WAR, TO PASS LAWS NECESSARY TO THE PRESERVATION OF THE NATION

Explicit constitutional guaranties are not suspended in war. *Ex parte Milligan* (4 Wall. 2) involved an attempt to try a civilian by a military commission outside the zone of military operations and with the civil courts in operation. The court, referring to the sixth amendment, held that even in war—

Not one of these safeguards can the President or Congress or the judiciary disturb.

But the inhibition against price fixing in peace is an implication of the due process clause of the fifth amendment. It is a rule with exceptions, as all the "usury," "public utility," and "public calling" cases show. The emergency of war is one of the exceptions mentioned by the Court in every recent decision (*Tyson v. Banton*, 273 U. S. 418; *Ribnick v. McBride*, 277 U. S., 350; *Adkins v. Children's Hospital* 261 U. S. 525; *Williams v. Standard Oil Co.*, 49 Sup. Ct. Rep. 115; *U. S. v. Macintosh*, 283 U. S., 205, 222.)

If, as all witnesses testified, the power to fix prices is indispensable to national defense in major war then certainly, in the absence of any specific inhibition, it is not restricted by the implications of the fifth amendment. It has been upheld in *Wilson v. New*, 243 U. S. 332; *Block v. Hirsh*, 256 U. S. 135; *Brown Co. v. Feldman*, 256 U. S. 170 and, in effect at least, in *Vogelstein v. U. S.*, 262 U. S., 337. It has been denied in no case. In the case last cited a seller contended that the price of copper had been fixed by Government. It had. The court held that, regardless of the validity of the process of price fixing, the price was in fact the generally accepted market price and so became the measure of damages no matter how evolved. In later cases, the court said that the leading "rent case" (*Block v. Hirsh*, supra) "went to the verge of the law." It questioned a Washington, D. C., rent-fixing statute operating after the armistice and supported on the ground of Government convenience and congestion in the capital. What we are here considering is a statute to prevent war inflation and to mobilize industry in the white heat of major war. No definition of the war powers of Congress are possible but general characterizations are plentiful.

The circumstances that endanger the safety of nations are infinite and, for this reason, no constitutional shackles can wisely be imposed.—(*Alexander Hamilton*.)

With what color of prosperity could the force necessary for defense be limited? * * * It is vain to oppose constitutional barriers to the impulse of self preservation.—(*James Madison*.)

I did understand, however, that my oath to preserve the Constitution * * * imposed upon me the duty of preserving by every indispensable means that Government of which the Constitution was the organic law * * * I could not feel that * * * I had even tried to preserve the Constitution if, to preserve slavery or any other minor matter, I should permit the wreck of Government, country, and Constitution altogether.—(*Abraham Lincoln*.)

Under these principles the war powers have been upheld in a variety of circumstances. Conscription was upheld against all argument on the ground of personal liberty. (*Arver v. U. S.* 245 U. S., 366; *Goldman v. U. S.*, 245 U. S., 474; *Ruthenberg v. U. S.*, 245 U. S., 480.) The whole railroad system of the Nation was taken over by

the Government on the authority of a purely incidental power given in the alien property act, and with such taking over, the United States was upheld in the exercise of power to fix intrastate rates—which power had repeatedly been held unconstitutional in peace. (*U. S. v. Chemical Foundation*, 272 U. S. 1; *Northern Pacific Railway v. North Dakota*, 250 U. S., 135.) Telegraph and telephone lines were taken into possession and control of the Government and the court upheld the taking. (*Dakota Central Telephone Co. v. South Dakota*, 250 U. S. 163.) A great railroad was forced to issue new stock certificates to new owners in place of certificates held by alien enemies (*Great Northern Railway v. Sutherland*, 273 U. S. 182), and Congress successfully applied prohibition in advance of the eighteenth amendment (*Hamilton v. Kentucky Distilleries*, 251 U. S. 146; *Ruppert v. Caffrey*, 251 U. S. 264). Of course it had long been well settled that Congress, in peace time, could not pass such a sumptuary law as the war time prohibition act without an amendment to the Constitution. Freedom of speech and of the press were drastically curtailed. (*Schenk v. U. S.*, 249 U. S., 47; *Sugarman v. U. S.*, 249 U. S. 182; *Frohwerk v. U. S.*, 249 U. S., 204; *Debs v. U. S.*, 249 U. S. 211.)

Surely if such specific and unqualified guarantees of the Constitution as were considered in the foregoing cases can be so vitally affected by congressional exercise of war powers, then it can hardly be contended that these same war powers can be restricted by the implied guaranty of freedom of contract in the fifth amendment.

A statement of the war powers which, while not necessary to the decision, is succinct and specifically inclusive of the power to fix prices, is found in *U. S. v. Macintosh*, 283 U. S. 205, 222 (1931):

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 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, theretofore 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.

6. THE POWER TO STABILIZE THE WHOLE PATTERN OF PRICE RELATIONSHIP (AS DISTINGUISHED FROM THE POWER TO FIX INDIVIDUAL PRICES) IS SPECIFICALLY GRANTED TO CONGRESS BY ARTICLE I, SECTION 8, CLAUSE 4 OF THE CONSTITUTION

As shown above the fixing of particular prices in a rapidly rising pattern of price relationship is vain and confiscatory but stabilization of the whole pattern to prevent inflation of prices—deflation of money—is an entirely different thing.

The power of Congress to control fluctuations of the value of money is not left to inference by the Constitution. What we are dealing with here, what the Baruch plan is designed to protect,

is the purchasing power of the dollar, the efficiency and value of the money of the United States in terms of all those things for which money exchanges. As to money the Constitution says specifically, "The Congress shall have power * * * to * * * regulate the value thereof."

If the Baruch plan were confined to the "fixing" of a few prices or of the prices of "necessaries" as Mr. Holtzoff suggests, it would not be a regulation of the value of money because it would not control deflation of that value (inflation of prices) and because, by impairing the exchange value of specific things, it might be depriving owners of property without due process of law. But, as to a statute which says of money during an emergency—

It shall not exchange for fewer things than it exchanged on a day certain—

That is a regulation of the value of the currency within a specifically granted power of Congress and there is no different result if the words be—

No price shall be charged for any service, right, or thing higher than the price charged on a day certain, at the same place and in the same or similar circumstances—

because the latter is an accurate way of saying precisely the same thing as is said in the former. The value of money on any day is the prices of all things on that day.

This subject has been directly addressed in one of the most vigorously contested litigations that ever came before the court, in the legal tender cases, where the precise argument was made that, notwithstanding section 8 of Article 1, the fifth amendment prevented the use of the power to regulate money if such regulation affected the value of things. The court said (110 U. S. 421, 448):

This position [upholding the power of Congress to regulate the purchasing power of money] is fortified by the fact that Congress is vested with the exclusive exercise of the power of coining money and regulating the value thereof * * * and is not defeated or restricted by the fact that its exercise may affect the value of private contracts * * *

And, at page 450—

The question whether at any particular time in war or peace the exigency is such by reason of unusual or pressing demands on the revenue of government or the inadequacy of the supply of gold * * * or whether it is, as a matter of fact, wise or expedient to resort to this means is a question to be determined by Congress when the question of exigency arises and not a judicial question to be determined or passed upon by the courts.

In the first legal tender case (12 Wall. 457) Justice Bradley in supporting the decision of the court, addressed certain remarks to the war powers as fortifying the specific power to regulate the value of money and said:

When the money currency disappears, as it often does in time of war * * * then the Government must have power to renovate its own resources and to revive the energies of the Nation by supplying it with a circulating medium. * * * All property and all right, even that of liberty and life, are held subject to the fundamental risk of being liable to be impaired by calamities and national circumstances * * * taxes * * * condemnations for public defense will sometimes destroy its value to me; conscription may deprive me of my liberty and even of my life. * * *

In *Bank v. Fenno* (8 Wall. 533) the court upheld the exercise by Congress of its power to regulate the value of money by confiscatory taxes on State and private bank notes. The court said:

Congress has undertaken to supply a currency for the entire country * * * it can not be questioned that Congress may secure the benefits of it to the people by appropriate legislation.

The legal tender cases resulted from action (suspension of specie payments) deliberately designed to increase prices, to impair the purchasing power of the dollar, and to leave the creditor class without recourse to courts or compensation.

In *Bank v. Fenno*, supra, as in this case, the regulatory power was exercised to support that purchasing power. If the regulatory power of Congress over the value of money includes such destructive means as dilution of money values, it certainly includes the power to stabilize and preserve that value and to prevent inflation, which is the prime purpose of the Baruch plan.

APPENDIX TO REPORT PREPARED BY HUGH JOHNSON

MARCH 3, 1932.

HON. PATRICK J. HURLEY,
Secretary of War, Washington, D. C.

DEAR MR. SECRETARY: I have received from the Attorney General a copy of his opinion bearing on the constitutionality of the plan to stabilize all prices in event of major war. It is in entire agreement with the position taken by me. I quote:

In time of war the national existence may be at stake. Any measure reasonably necessary to the effective preservation of the Nation could be sustained. * * *

Legislation might now be adopted providing for the fixing of prices upon the declaration of war and setting up the machinery for that purpose, but with the provision that the price fixing should only become operative in the event of a declaration of war and of a resolution by Congress declaring the existence of an emergency and putting the price-fixing machinery into operation.

The brief we submitted to the Attorney General contained this sentence:

The Baruch plan proposes a statute defining the methods of general stabilization, but it would be completely consistent with that plan if such a statute should provide that its provisions should become effective only "when specifically authorized by Congress during the period of any war declared by Congress."

With the amendment just stated in the statutory suggestions contained in my testimony, the latter are in complete consonance with the Attorney General's opinion. The purpose of this letter is to request that it be filed with that testimony to complete the record.

Very truly yours,

BERNARD M. BARUCH.

(Suggested by the American Legion to the War Policies Commission, with supporting brief on the constitutional powers of Congress and the President in time of war)

A PLAN TO PERPETUATE PEACE BY EQUALIZING THE BURDENS OF AND ELIMINATING THE PROFITS FROM WAR

PREFATORY

At the hearings of the War Policies Commission held in March, the national commander of the American Legion, Mr. Ralph T. O'Neil, its past national commander, Mr. Paul V. McNutt, and the chairman of the national defense committee, Col. C. B. Robbins, testified. The members of the commission propounded many questions and requested additional suggestions.

Many of the questions were directed to the powers of the Congress and the President, under the Constitution, and this memorandum is filed in response to such questions and the request for suggestions.

There appears to be no constitutional question of substance involved. An examination of the decisions of the Supreme Court of the United States should leave no doubt in the mind of any lawyer as to the powers of the Government in time of war; but since some of the commission and many of the Congress are not lawyers, we have dealt with the specter of unconstitutionality suggested at the hearings.

This memorandum has been submitted to and approved by many constitutional lawyers of note.

CONCLUSIONS AND RECOMMENDATIONS

I

That a constitutional amendment is not necessary to enable the Government to fix prices, upon the basis of a fair return, for all commodities required either by the Government or by the civilian population.

II

That a bill, in substantially the following form, should be recommended by the commission:

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

SEC. 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 organizations [and/or services]¹ 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.

SEC. 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.

III

That the proposed legislation should not include any specific plans. To enumerate is to limit.

SUPPORTING BRIEF AS TO THE POWERS OF CONGRESS AND THE PRESIDENT

(With some comment as to possible methods of exercising such powers after the emergency has arisen)

Two aspects of the war power will be treated:

- (1) The power to regulate the prices of material and equipment purchased by the Government for its own needs; and
- (2) The power to regulate prices of commodities required by the civilian population.

I. 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 can not 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 out governmental functions. In *Kohl v. United States*, (91 U. S. 367), the Supreme Court said that such power in the Federal Government—

is essential to its independent existence and perpetuity. These can not 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 lighthouses, for customhouses, post offices, and courthouses, 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 can not be.

There is a wilderness of authority supporting this essential power of sovereignty and none to the contrary. A few of them are:

¹ The words in brackets are so placed because this committee is not interpreting that part of Public Resolution No. 98, dealing with the conscription of labor and because it has neither the authority nor the inclination to depart from the policy of the American Legion as declared by all national conventions.

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.

The Constitution confers upon Congress the power "to declare war * * * to raise and support armies * * * to provide and maintain a Navy * * * to suppress insurrections and repel invasions * * * and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." (Art. I, sec. 8.) Wars can not 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 brief.

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 even 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 (Title 50 U. S. C. A., secs. 80, 82) 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.

II. THE POWER TO FIX PRICES OF COMMODITIES REQUIRED BY CIVILIANS

This 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 per cent 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.¹

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 per cent 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 30 years of the history of this country 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* (4 Wheaton, 316), 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 consist with the letter and spirit of the Constitution, are constitutional (p. 421).

¹ 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.

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 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 (245 U. S. 366), 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 can not be regulated in order to win the same war. But because the due-process clause is a bogey 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." (*Davidson v. New Orleans*, 96 U. S. 97, 104.) 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." (*Ex parte Milligan*, 4 Wall. 2.) But we also know that what is due process under one set of circumstances may not be due process under another set of circumstances.² 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 always considered.

That the circumstance of war has a vital bearing upon constitutional rights has been adjudicated by the Supreme Court of the

² 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.)

United States in a number of cases. In *Schenck v. United States* (249 U. S. 47), 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 Constitution, 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, that 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 (p. 52).

Chief Justice Hughes in *Near v. Minnesota*, decided June 1, 1931, 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*, 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, theretofore 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. *Wolff Company v. Industrial Court*, 262 U. S. 522; *Tyson & Brother v. Banton*, 273 U. S. 418; *Ribnick v. McBride*, 277 U. S. 350; *Adkins v. Children's Hospital*, 261 U. S. 525.) 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 regulations, 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 not 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. (*United States v. Macintosh*, *supra*.) There is another decision, that of *Block v. Hirsh*, 256 U. S. 135, that is squarely in point. During the late war Congress passed an act providing that tenants in 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" (p. 157). And likewise the Supreme Court sustained the constitutionality of the Adamson law passed in 1916, which fixed the wages that railroads might pay their employees. (*Wilson v. New*, 243 U. S. 332.) In the *Wolff Packing Co.* 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 (p. 542).

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 Co. v. Public Service Commission*, 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 to 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. (262 U. S. 276, 289.)

See, also, to the same effect *Interstate Commerce Commission v. Chicago Great Western Ry. Co.*, 209 U. S. 108; *Chicago, Milwaukee & St. Paul R. R. Co. v. Wisconsin*, 238 U. S. 491.³

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*, 250 P. S. 135, 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, 245 U. S. 366; *Ex parte Milligan*, 4 Wall. 2; *Legal Tender cases*, 12 Wall. 457; *Stewart v. Kahn*, 11 Wall. 493. (p. 149).)

In *Dakota Cent. Tel. Co. v. South Dakota* (250 U. S. 163), 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 in the *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 (p. 183).

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 (245 U. S. 366). 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; 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.⁴

³ These cases have to do with the situation where the properties are individually owned, and the power of government is exercised 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.

⁴ *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

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 landlords; a government which has the power to fix the wages which a railroad shall pay to its employees; 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 30 days if there were not a greater army back of it. Foodstuffs 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.⁵

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 legislatures. 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 sustained. (*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 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 Co.*, 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.

⁵ We believe no one who had any part in the Government during the recent war will challenge this statement. But if there be a lingering doubt in the minds of anyone 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.

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 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 kilter 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 Co. case*, *supra*, said that the Government might regulate the price of the commodities

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."

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." (262 U. S. 522, 538.)

(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 wage of such a soldier. Half of it is allotted 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 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 50 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 can not 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 everyone. 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 can not 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*, 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 & Quincy R. R. Co. v. McGuire*, 219 U. S. 549, 569. (256 U. S. 135, 158.)

(i) There is a law of physics that says in substance that something can not 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 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 business running to capacity, with a 6 per cent return, rather than make an 80 per cent return and be compelled to return 75 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 Com-

merce approved the principle and that its members cooperated loyally with the war-time commissions is submitted as proof of this statement.

III. 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 purposes 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 necessities.

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. (*Luckenbach v. United States*, 272 U. S. 533.)

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 under-

lying facts as to every factory and wholesaler and retailer in the United States would be unending. There is one other serious objection—such a plan would provide different prices for the same commodity. It is, of course, a known fact that the cost of operating varies with the 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 40 cents 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 60 cents 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. (*La Belle Iron Works v. United States*, 256 U. S. 377.) 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.

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 can not be successfully conducted by debating societies.

If this were done, the President should have power, through boards, to fix prices to-day 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 of intent 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 40 cents, a selling cost of 20 cents, and a milling profit of 5 cents. 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 65 cents, 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 States, 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 to-day; 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 war 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 A 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 can not 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 to-morrow for what he was willing to sell them for to-day, 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* (219 U. S. 104) 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 (p. 110).

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 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. (*Public Clearing House v. Coyne*, 194 U. S. 497.)

Respectfully submitted.

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