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DEFENSE IN THE ATOMIC AGE, THE LAW, AND THE BAR

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This subject, "Defense in the Atomic Age, the Law, and the Bar" perhaps divides itself up into three main categories. Thus I am going to try to talk to you first of the relationship between defense and logistics; secondly, of the relationship between logistics and law; and third, of the relationship between logistics and the Bar. And I am going to discuss these from the standpoint of the Navy, which is what I know best.

DEFENSE AND LOGISTICS — IN OUR EARLY HISTORY

There has been a basic relationship between defense and logistics since the dawn of civilization; for even when weapons were primitive, there were perfectly clear problems of supplying and obtaining them. However, in primitive times, the element of manpower was relatively much more prominent than the element of weapons. It was as we moved along in history that we found weapons increasing in complexity and importance, and logistics increasing correspondingly in importance. In our own Revolutionary War, in the autumn of 1775 when General Washington lay siege to General Gage's forces in Boston, we may remember that it was he who first organized the American Navy sending its armed vessels out to capture British supply ships entering Boston. This was perhaps our earliest recognition as a nation of the importance of sea power. The first ship of the American Navy, the schooner HANNAH of Marblehead, Massachusetts, with her small squadron of five other schooners and a brigantine soon captured several prizes in the seas off Boston. The best prize taken during the autumn of 1775 was the NANCY. She contained a cargo of two thousand muskets, 31 tons of musket shot, 3,000 round shot, several barrels of powder, and a 13-inch brass mortar, "the noblest piece of ordnance ever landed in America", according to a newspaper of that time. Now, this may not sound like much today; but an American historian has estimated that it would have taken the entire thirteen American colonies eighteen months to have manufactured a like quanity of ordnance, that is, the muskets and shot, and that 13-inch brass mortar. Thus, a logistics problem which would otherwise have required eighteen months of industrial production by our entire nation was solved by a single capture at sea.

After the Revolution we became faced with harrassment by the powers of the Barbary Coast — Morocco, Algiers, Tunis and Tripoli. In 1785, Algerian warships seized two American vessels off the Portuguese coast, because we would not pay the "protection" money which was then exacted of all small maritime states. Congress temporized about it; and meanwhile

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21 American citizens languished as captives in Algiers. However, failure to pay "protection" money was not our only source of irritation to the Barbary pirates. With the adoption of the Constitution in 1789, we acquired a remarkable political stability almost overnight, and there followed a new era of development of American maritime trade which excited the envy of the Barbary powers and increased their desire to be paid off. A few years later, in 1793, when the war between Portugal and Algiers came to an end, the ocean beyond Gibraltar became open to the latter's corsairs. The Dey's demands for a treaty settlement with the United States were pressed stronger than ever but they remained unsatisfied with the result that, in October and November, 1793, Algerian warships again fell on American merchant shipping. Eleven merchantmen were seized and 113 American citizens taken prisoners to Algiers. By this time, however ,a spectacular happening had taken place; after the adoption of the Constitution empowering Congress to provide for the common defense and to levy and collect taxes, Hamilton's financial genius had stabilized the public finances and had established credit of the United States. Thus moneys were now available for the public purposes of the Government. Our new Republic was stirring; and feeling the impact of the Constitution and our beginnings of life as a growing nation of the world, our Minister to Spain wrote to Secretary of State Pickering in December, 1793, saying, "If we mean to have a commerce, we must have a naval force to defend it."

As a result, in January, 1794, a resolution was passed recommending the establishment of a naval force; and the Committee appointed to draw up a program reported in favor of building six frigates. One of these, and perhaps the best known, was the frigate CONSTITUTION. Originally laid down in 1794, after various stop-and-go orders affecting the construction, and with the help of the undeclared war with France, the Department of the Navy was created on April 20, 1798, and the CONSTITUTION was completed soon thereafter.

Responsibility for the construction of the CONSTITUTION and her five sister frigates was given to a remarkable naval architect, Joshua Humphreys; and he gave the CONSTITUTION and her sister ships an original design. Indeed, they emerged as the pocket battleships of their time. They could sink anything that they could overtake; they could outsail any heavier ship; and in heavy weather they were more than a match for two-decker ships of the line. They were longer; they were faster; their ordnance was heavier than that of all other frigates on the sea; and their timber construction was as heavy as that of a British line-of-battle-ship. Except for the big three-decker and four-decker line-of-battle ships, our new frigates came out on the high seas as the most terrible fighting machines of their day.

But the construction of these ships was something unprecedented in our history, and building them presented a substantial logistics problem

to a new and struggling nation. Nobody knew what they would cost; and the new Government had to work out a system of construction. As a result, the responsibility was divided up in a way which seems unthinkable in our time. First the Government chartered shipyards in six places for the construction of the six frigates. Then it detailed to each ship a Captain, who had some of the responsibility for construction.

It also appointed a "naval constructor" and then a "naval agent" to procure labor and construction materials. Hence four different individuals or groups participated in the construction. But in those more informal times, these people, all imbued with the high patriotic spirit of the period, apparently worked together at least reasonably well. Incidentally, the "naval agent" procured labor and materials under a cost-plus-a-percentage of cost contract of two and one-half per cent, a type of Government contract which was used extensively throughout American military history, and which was only outlawed by Congress shortly before we entered the Second World War. Apparently that type of contract worked, however, as an effective instrument of logistics in the setting of that time.

Later it was a squadron led by the CONSTITUTION under her able skipper, Commondore Preble, who, by carrying the war aggressively to the Barbary Coast, capturing the ships and disrupting the trade of the Barbary pirates, assaulting the very fortifications in the harbor of Tripoli, and compelling the last of the Barbary pirates in the Bay of Tripoli to sue for peace on terms favorable to the United States, which put an end to the demand for "protection" money; and indeed, an end to Mediterranean piracy.

Let us pass now to the time of the Civil War, when there was, fortunately, a great Secretary of the Navy at the helm, Gideon Welles. He found himself faced with the sudden demands upon the Navy for a blockade of the Confederate coastline, and the purchase of a large number of ships and enormous stores and supplies to accomplish that purpose. The result was that he appointed "brokers" with very wide discretion to act as contracting officers, or purchasing agents, for the Navy. And apparently they operated successfully.

In the first World War again, there were sudden problems of logistics and procurement which had to be faced and handled on relatively short notice.

LOGISTICS IN THE SECOND WORLD WAR AND THEREAFTER

In the second World War, we gradually realized that we were up against problems of logistics and procurement which were more formidable than at any other time in history. Foremost among these was the problem of building a two-ocean Navy; and finally it became clear that the existing system of procurement was completely inadequate to cope with the prob-

lems. On December 13, 1942, an immensely important decision was made in the Department of the Navy which played no small part in setting up the system of procurement which worked smoothly and which provided much of the necessary logistical support for the successful Naval operations of World War II. This was the decision reached by Under Secretary of the Navy James V. Forrestal, who later became one of the great Secretaries of the Navy, acting upon recommendations made by H. Struve Hensel, then Counsel for the Procurement Legal Division of the Navy and now an Assistant Secretary of Denfense, providing for the decentralizing of the preparation and execution of contracts to the Bureaus who had the practical problems of procurement. Pior to that time most of the contracts had been drafted, not by the administrators who were directly faced with the practical problems of procurement, but by an entirely separate group who were not even lawyers. These contracts were then passed upward and then variously signed by a conglomeration of people, different Bureau Chiefs, the Judge Advocate General, or the Secretary of the Navy, all of whom had no direct participation in the negotiations and no personal knowledge of the business aspects of the transactions. This system, or lack of one, was purely the result, not of logic, but of the devious course of history. As the result of this decision of December 13, 1942, however, the responsibility for the drafting and execution of contracts was decentralized to the administrators who had the practical problems of procurement and who were actually negotiating with the potential contractors. The basic theory of the decision was that Government contracts should be written once, wih the participation of Counsel from the beginning; that they should be written right; and that we should forget about their execution phase and pass on to performance. This was an immense step forward. Not only did it provide a completely practical mode of dealing with the mushooming problems of procurement and logistics in an extreme period of war emergency; it also provided a monument of recognition of the role of logistics in modern day defense, and of the role of the law as an effective instrument of logistics.

Today, however, we are moving on. We are moving into an age of logistics, of weapons and their procurement that is the most complex of all. Just as the weapons of the second World War were very different from the cargo of the brig NANCY, that captured supply ship of the autumn of 1775 which equalled eighteen months' production of the then entire United States; just as the methods of procurement of the Second World War were different from the heterogeneous methods of constructing the CONSTITUTION in the 1790s; just as the whole logistics system in the 1940s was different from the problems of supply and logistics which Gideon Welles faced in the Civil War; so today, the atomic age poses even greater problems of logistics, of procurement of complex ships, airplanes, guns, ammunition, and atomic weapons. And there is no escape from main-

taining our competitive position in this complex world, if we are to have effective defense.

So today, summing it all up, as was said recently, defense today is perhaps four-fifths logistics and one-fifth pure military naval strategy. In this changing world, logistics has gradually assumed a role very different from its role during the siege of Boston in 1775, a role which today requires separate and distinct study and treatment.

LOGISTICS AND LAW

So, after a view of logistics, we come to the relationship between logistics and the law. Logistics, meaning as it does the furnishing of supplies of all kinds, as well as troops, to the fighting forces in the fighting areas, usually means that something must be purchased. That, in turn, means that these things, ships, airplanes, munitions, and supplies, must be purchased according to law. And so in our time, so different from the informal period of the construction of the CONSTITUTION, Congress has enacted a fairly larged body of legislation regulating the entering – into of Government contracts. That means that today no purchase may be made except on a distinct legal theory and distinct legal authority, channeled through a variety of prohibitions and restrictions. Except for purchases in small amounts, that means also, in practical terms, that Government purchases for the military must be made pursuant to a contract. And so there has arisen a body of law which generally goes by the name of Government Contract Law.

"GETTING IN ON THE GRAVY"

I believe there has been a great deal of misunderstanding about the very character of a Government contract. There are some people who apparently have felt that getting a Government contract means "getting in on the gravy" – that you just sign up with the Government, and the money begins to roll in. But nothing could be farther from the truth. The Government has a carefully-worked-out, meticulous and responsible system of purchasing, designed to provide quality, as well as quantity, which meets the complex and precise requirements of defense and at the very best price. As a result, the so-called "Government contract" that we hear about has become, not a simple document that can be disposed of with a casual glance; on the contrary, just as the legal requirements and many of the goods which are called for by a Government contract are highly complex, the Government contract has also become complex. Hence, before a would-be Government contractor actually obtains a contract, there is, in my opinion, a distinct need for him to recognize that he is entering the field of law, as well as that of manufacturing or engineering. Indeed, let us take a look at the average Government contract.

THE AVERAGE GOVERNMENT CONTRACT

First, it contains technical specifications, which in their turn are just

as complex as the complex weapons which are intended to be procured. They must be complied with strictly. No would-be Government contractor should endeavor to bid on such a contract unless he has available the technical people, the industrial capacity and the know-how, and is fully capable of producing in accordance with the specifications. Second, there may be certain fiscal and accounting procedures required by the contract, and again, no would-be contractor should try to enter into a contract with the Government unless his accounting methods and manufacturing system can meet these requirements. Third, there are a large number of contract provisions or so-called "boiler-plate", based mostly upon the various statutory restrictions, prohibitions, or standards laid down by Congress for the entering into of Government contracts, which may impose novel requirements. Fourth, there are provisions for rigid inspection by Inspectors of Naval Material and others, and it should be realized by the would-be contractor, again, that when the Government enters into a contract for a certain item, it really means business, and that the item to be produced will be subject to careful inspection to make sure that it fully meets the requirements set up by the specifications. Indeed, human life as well as tactical effectiveness are involved when the Government orders weapons military devices, and they have to be exactly right. The Government is responsible to the people for defense, and it can take no chances; hence the requirement for inspection.

Fifth, there are provisions for change orders. That is, the ordinary Government contract empowers the contracting officer to make unilateral changes in the specifications within the scope of the contract, and this provision is essential to the whole process of Government procurement. Weapons, designs, specifications, and the needs of the military, are constantly changing within the kaleidoscope of the technology of modern defense, and if the Department of Defense is to keep up with the shifting scientific concepts of warfare, changes within the general scope of the contract must be made in the process of manufacture. To be sure, the Government pays for any increase in cost occasioned by a change order, but the very making of a change order presents the contractor with new problems. It necessarily requires him to put up additional working capital in the interim before the change order is finalized and any increase in cost is paid. Thus, when a manufacturing concern enters into such a contract, it must be prepared to meet the financial and other problems which will be raised by possible change orders.

And last but not least, there is the disputes clause, which gives the contracting officer the power to decide disputes over questions of fact which may arise under the contract. Involved in this is the right to appeal from the decision of the contracting officer to the Armed Service Board of Contract Appeals, as the designee of the Secretaries of the military departments. These appeals are generally comparable to lawsuits in the Courts vested with judicial power.

Thus we see that a would-be contractor seeking a Government contract, should understand perfectly clearly what he is getting into. If he does not understand what he is getting into and that he is plunging deeply into the field of law, he may later find himself very disagreeably surprised at the contents of the writing to which he has subscribed. And if the contractor becomes surprised at the contents of his contract, then there will be nothing but friction and trouble in the administration and performance of the contract, something which is desirable enither for the Government nor for the contractor. In short, it might do no harm if at the top of every Government contract there were placed a large heading, "Stop – Look – and Listen – This is *Law.*"

LOGISTICS AND THE BAR

Since logistics involves law as one of its principal instrumentalities, we may perhaps turn to the third and final phase of what I would like to discuss with you tonight, and that is the subject of Logistics and the Bar. First in this connection, I think we should recognize that the present system of Government procurement has quite definitely proven its general effectiveness where contractors understand their obligations before they are entered into and are able to perform them afterward. But a big problem arises when contractors do not understand the nature of their contractual obligations before they are entered into, with the result that there are misunderstandings and trouble in the course of the contract's performance.

THE NEED FOR A BETTER UNDERSTANDING OF GOVERNMENT CONTRACT LAW

In my opinion, there is presently in the United States a widespread lack of understanding of the principles of Government Contract Law. For instance, there are contractors who apparently do not realize that Government contract law is part of our general body of contract law; that the relations between a contractor and the United States are governed, basically, by the same body of principles which governs contracts between private parties. Neither the Government in its contracting capacity nor the contractor is under any preferred position under our law. Each party to the contract is bound just as if the contract were between private parties. But there are some serious misapprehensions on this subject. For instance, some contractors ,after their contract has gotten into trouble, actually come into the Navy Department and complain that they thought that, for one reason or another, the Government would "take care" of them. Others say that they were under the impression that the Government would "guarantee" them against loss; and so it goes. But the Government does not sit in a paternalistic capacity with its contractors. It does not undertake to "take care" of anybody or to "guarantee" them against loss or against anything else. Its only position is that of a contractor dealing at arms length.

Since we have this widespread lack of understanding of Government Contract Law, we inevitably come to the question as to how a better understanding of the subject may be obtained. In my view, a better understanding of that subject is of very great importance to contractors generally, and particularly to small business concerns. In addition, a better understanding of this subject is of very great importance to the Navy. If a contractor does not understand what he is getting into before he takes a Government contract, that almost always means that there will be misunderstandings and trouble in the performance of the contract, and that means expense, economic waste, and difficult relations for the Government. Thus it is to the Navy's interest, as well as to the interest of contractors, for contractors to have a perfectly clear understanding of the nature of the rights and obligations that they assume when entering into Government contracts. When contractors have that understanding, the administration and performance of Government contracts become so much easier, and the whole procurement program of the Government will move ahead expeditiously and much more smoothly. We in the Navy, at least, do not want trouble with our contractors; we want perfectly clear understandings with them so that we may have orderly and precise performance of contracts and all the friendly and confident relations which go with orderly and precise performance. All these things, however, depend upon a better understanding of Government law by contractors generally.

THE NEED FOR CONTRACTORS TO BE REPRESENTED BY LAWYERS

This brings me directly to the role of the Bar. For Government contracts are major subjects in the realm of law, and we cannot very well expect Government contractors to understand the nature of the rights and obligations contained in them, except through the advice of lawyers. There is certainly nothing mysterious about Government contract law to a lawyer who studies the available legal materials. However, there are some Government contractors who appear to feel that they do not need legal advice. The sometimes enter into contracts with the Government without benefit of counsel, and sometimes afterwards complain bitterly when they find out the exact nature of the rights and obligations which they have unwittingly assumed. True, the Government cannot insist that a contractor be represented by counsel. That is his own personal business. But I may say frankly, speaking personally at least, that in my opinion it is very greatly to the advantage of the Government, as well as to that of the contractor, to have him represented by a lawyer. He should be so represented not only at the outset of the negotiations so that the contractor may understand clearly what he is getting into, but also in the course of the performance of the contract, and in cases before the Armed Service Board of Contract Appeals.

Let me say a word about this litigation before the Armed Services Board of Contract Appeals, for, it is litigation in the substantial sense.

It is an adversary proceeding with the Government on one side, and the contractor on the other. A trial or hearing is held in the classic Anglo-Saxon tradition of question-and-answer form and the proving of documents. While the rules of evidence do not strictly control, the hearing or trial at least follows the pattern of court trials. In addition, the Government in each case is represented by a lawyer who will object to questions and documents offered in evidence which he things are improper. To me it seems fairly clear that when the Government, which knows this type of activity pretty well, is represented by a lawyer, the contractor should also be represented by one.

KEEPING UP WITH THE NEW DEVELOPMENTS IN GOVERNMENT CONTRACT LAW

This means, however, that if the legal profession is to adequately represent contractors with the Government, the Bar itself must be adequately informed on this subject of Government contract law so as to give prompt and effective advice. One of the obstacles that has stood in the way of this is, that, while the subject is an old one, it has undergone an intense recent development, having mushroomed up ernormously in the last 15 years. The basic written material, on the subject, in my view, is not yet sufficiently well organized and available to the general public to make absorption by a fresh mind easy. And the result, to be frank, is that the subject is not as well understood by the Bar is might be. This is not anybody's fault; it is simply the result of the intensive development of the subject occasioned by the Second World War. However, if the legal profession is to give proper and competent advice to Government contractors generally, it must keep up with the times, and take the necessary lead to come to understand the subject pretty well itself. For our part, we in the Navy have been trying to encourage a better understanding of Government contract law throughout the country. For one thing, we have been encouraging the better dissemination of written materials. For instance, the Armed Services Board of Contract Appeals hands down opinions which are comparable to the opinions of the courts vested with judicial power, in that they summarize evidence, analyze judicial decisions, and make findings of fact and conclusions of law. We are presently endeavoring to find a way to have all decisions of the Board reported and made available throughout the country so that they will be more readily accessible to the Bar and the public. In addition, we are getting out a new edition of "Navy Contract Law", the first edition of which was published in 1949. This second edition, which should be ready for distribution early in 1955, will be made available for purchase by the general public from the Government Printing Office.

Possibly, also ,in areas where Government contractors exist in sufficient quantity, Bar Associations could hold institutes at which Government contract law could be explained and discussed.

All in all, however, with this development of Government contract law, and the need for a bettter understanding of the subject on the part of both contractors and the Bar, we are only repeating an ancient process in Ango-Saxon jurisprudence. Today, as in the past, the panorama of law is still that seamless web described by me of the great legal writers of the past. That is, it contains many different fields or branches, but all of them are connected together by common threads and principles which make up a single over-all pattern and framework. One of the things that a lawyer must learn in the course of his study and qualifications for admission to the Bar is the nature and form of this over-all pattern and framework of the law, and that he must be ready to delve into and absorb the details of any particular branch of the law that he may encounter. No lawyer can be a specialist in every branch of the law, but he is given that general training and perspective which enables him, by study and application, to search out and to learn any special field of the law necessary to advance his client's interests in that field.

THE CHALLENGE TO THE BAR

This is our basic problem with Government contract law today. It is a newly-developed subject and we cannot expect contractors and particularly small business contractors, to better understand the subject except through the legal profession. I think it is up to us in the Government to make written materials on the subject better available so as to facilitate a better understanding generally, but the basic problem of a better nation-wide understanding of the subject is directly up to the Bar.

In summary, therefore, I think we may conclude that defense in the atomic age depends more and more upon logistics, and so upon law as one of the main instrumentalities of logistics. And the principles of this branch of the law, commonly called Government contract law, must be adequately understood by contractors and the public if logistics and procurement in the defense of the United States are to proceed effectively. For through such a better understanding of Government contract law the whole procurement program of the Government must necessarily move along more smoothly and with less cost and difficulty to all concerned.

But this better understanding of the subject can only be obtained through the Bar. Only the lawyers of the country are basically qualified to serve as the analysts, summarizers, and advisers on Government Contract Law. Hence not only is law acquiring a role in defense in the atomic age which completely transcends its role in any preceding period of our history. In addition, history is presenting the legal profession with the challenge of making the role of law in the defense of the United States work for contractors and the public as well as for the Government.