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The Lawyer in Wartime

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BY FRANCIS BIDDLE†

It is too early in the struggle to appraise the contribution of American lawyers to the effective prosecution of the war. We may be confident, however, that when the appraisal is made the result will do honor to the profession. A substantial segment of the bar is already serving in the armed forces; the Army alone has well over 15,000 lawyers, a high proportion of them commissioned officers. Civilian agencies engaged in war work or in less dramatic but none the less essential supporting activities have drawn heavily on the bar to provide new personnel as well as to replace younger men as they are called to the colors. More than 4,000 attorneys, drawn for the most part from the active bar, have thus entered the Civil Service since the emergency began. Many more, without surrendering private practice, have responded to the repeated calls for personnel to staff the numerous boards performing such wartime functions as the administration of the Selective Service Act, the control of enemy aliens, the maintenance of harmonious labor relations, price control, rationing, local defense councils and the multifarious activities of relief organizations. The War Committee of the American Bar Association has already accomplished much in mobilizing the talent and energies of the organized bar behind the war program. And in every community lawyers, whatever else they may already be doing, are called upon to help explain the many government regulations which have become a painful necessity in wartime America.

Despite the great and growing contribution of the bar as a whole, it is, of course, true that many lawyers have not yet found a satisfactory mode of service. Taken by itself, the practice of law seems far away from the war. In many areas there has been a marked decline in the volume of ordinary peacetime legal work without compensating activity incident to the war. Where that has been so, lawyers have understandably been seized with a sense of futility. Sharing the universal desire to be of service, they ask what the lawyer can do if he is unable to enter the armed forces or to participate in the civilian government. Must a lawyer

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surrender his practice and his place in his home community in order to be of genuine service? The answer is that the lawyer has an important role to play in his own community—for which he is fitted by training, experience and professional tradition. The lawyer's capacity for appraising evidence and defining issues, his understanding of American values and his sense of historical perspective can be of constant service in the most important enterprise on the home front—the clarification and leadership of American opinion.

The people of America today, perhaps more than ever in their national history, are receiving a constant stream of news, speeches, books, pamphlets and reports which have a direct influence upon their daily lives. Momentous issues in the post-war world are now in the making and it is necessary for the people to think clearly on these issues. The strongest and most intelligent leadership cannot function without a responsive and thoughtful country back of it. The lawyer must, of course, express his own opinions and work for the particular type of post-war world in which he believes. There is a broader function, however, which he can perform. This is the function of clarifying the issues, of separating the important facts from the immaterial facts, of isolating the fundamental problems from the small accidental questions, so that these great issues can be decided through the democratic processes by an informed and clear-thinking nation.

Part of every lawyer's equipment is a history of American constitutional law. It is a body of knowledge which stands the lawyer in good stead in time of war. When it is said, for instance, that the delegation of broad war powers to the President by Congress is subversive of our democracy and unjustified by our constitutional history, the lawyer will know that this is untrue. He knows that every major war in which the United States has taken part has necessitated broad presidential discretion in war matters and that Congress has invariably given the President this discretion. He knows that it is as impossible to provide by statute specific solutions for each domestic wartime problem as it is to issue orders to a commanding general in the field, telling him what to do under every possible circumstance of battle. It is the lawyer's duty to explain this historical American tradition to the members of his community, to make clear that it is our democracy's historic method of preserving itself during time of peril.

Perhaps the most important lesson which the lawyer's knowledge of our constitutional history has taught him is the need for constant and

vigilant safeguarding of civil liberties during time of war. He knows that in times of greatest peril we have always preserved a wide range of popular criticism; that, indeed, the wartime strength of democracy depends upon a constant flow of new ideas to the Government from the people. He knows that in every war many persons become so overzealous in their attempts to stamp out enemy-inspired propaganda and defeatist doctrines that they attempt to silence all criticism of the war, no matter how patriotic and responsible it may be. It is the lawyer's duty to be on the alert for these excesses of patriotic fervor and to do all in his power to preserve the right of all loyal citizens freely to offer their ideas and comments on the conduct of the war.

A striking example of the misunderstanding and intolerance which can arise during war came to my attention when the Judge Advocate General of the United States and I were prosecuting the eight Nazi saboteurs before a military commission during the summer of 1942. Two Army officers, both distinguished lawyers, had been ordered by the President to defend the saboteurs. Putting aside any personal feelings they may have had in the matter, these men and their assistants conducted a most able defense. During the course of the trial I received several indignant letters which accused counsel for the saboteurs of all manner of traitorous and treasonable conduct. I also heard people say that the saboteurs should be taken out and shot instantly with no hearing.

It is the lawyer's duty to explain to people with such views our American tradition of offering every man, whether before a civil or a military tribunal, an opportunity to prove his innocence. The lawyer knows how easy it is for powerful emotions to overcome a reasoned sense of justice, and he knows that in such cases it is particularly important to insist on a fair and thorough hearing. No nation ever benefits by the conviction of innocent men. The surest way to prevent this is to provide the accused person with counsel whose duty it is to make as strong a defense as possible. The Army officers who defended the saboteurs were performing a function which is essential if our basic concepts of due process and fairness in judicial proceedings are to be preserved. The lawyer knows this from his study of American and English legal history. It is his duty to use that knowledge to combat any form of intolerance and short-sighted patriotic zeal.

In time of war the lawyer has important duties as one of the intellectual leaders of his community. He must help sustain the morale of the people under the burdens of war; he must help them to avoid the fears and doubts which are bred by false rumors; and he must keep ever

before them our American traditions of democracy and liberty. Thus may be continued the historic function of the American lawyer in time of crisis. In the very beginning of our national history, lawyers made up the Revolutionary Committees of Correspondence which played so large a part in crystallizing the united will of the American people. Many lawyers took part in the actual conduct of the Revolutionary War: when it had been won, lawyers were responsible for embodying the democratic ideals of the people in the Constitution. As Justice Stone has said:

"They not only kindled the flame of the Revolution but they translated the Revolution into institutions under the forms of law with a passionate devotion to liberty and a skill and statesmanlike grasp which has excited the wonder and admiration of the historian."

Perhaps the finest tribute ever paid the American bar is that contained in Edmund Burke's speech, "Conciliation with America." In explaining the extraordinary advance which the colonies had made during the eighteenth century, he said:

"Permit me, sir, to add another circumstance in our colonies, which contributes no mean part towards the growth and effect of this untractable spirit—I mean their education. In no country perhaps in the world is the law so general a study. The profession itself is numerous and powerful: and in most provinces it takes the lead. The greater number of the deputies sent to Congress were lawyers. But all who read, and most do read, endeavor to obtain some smattering in that science * * *. This study renders men acute, inquisitive, dexterous, prompt in attack, ready in defense, full of resources. In other countries the people, more simple and of a less mercurial cast, judge of an ill principle in government only by an actual grievance. Here they anticipate the evil, and judge of the pressure of the grievance by the badness of the principle. They augur misgovernment at a distance; and sniff the approach of tyranny in every tainted breeze."

It is today the destiny of the American people to fight for liberty and democracy not on a national, but on a world-wide scale. American lawyers will serve in many ways as this great enterprise unfolds, but none of the services they render will prove more important in the end than their historic function of maintaining the best in our tradition and translating the desire for freedom into positive programs consistent with national ideals.

In Wisconsin, the legislature passed, over the governor's veto, a bill integrating the bar. Wisconsin, therefore, becomes the twenty-fourth state to have the integrated bar.