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CIVIL DEFENSE AND LAW, PART II

Val Peterson*

American lawyers dare not ignore the legal dislocations that would result from an attack upon this country. A new dimension to the responsibilities of the legal expert is the protection of the legal structure around which is built the nation's economy. The threat to the national legal machinery is a real one. This danger probably cannot be eliminated; however, intelligent planning can very definitely lessen the impact of severe destruction. Careful, skillful planning, reduced to practical terms and applied judiciously to the daily problems with which we are most familiar, can do much toward reducing the effects of devastating disaster.

Civil defense is not concerned exclusively with the tangible aspects of defense. True, much emphasis has been placed upon the physical facilities. There must be evacuation and shelter, a warning and communications network, a radiological defense, medical and engineering stockpiles, supplies of food and clothing, and extensively trained organizations.

However, these capabilities and resources will be menaced in the absence of planning that will lessen the dislocations of the legal processes resulting from attack. A thermonuclear attack will thrust upon our society many unprecedented social, economic, and psychological problems which in turn will generate and intensify legal issues. This article undertakes to identify some of the legal problems that will arise. The legal implications are manifold and fall within most of the established fields of law. Anticipation and identification of them will make legal planning more effective, meaningful, and realistic.

When the incredible effects of a thermonuclear attack upon any one of our great concentrations of population and industry are depicted, stress is placed upon the physical destruction, the horrible loss of life, the devastation wrought upon industry, upon housing and community facilities, and all of its consequences. While never mentioned, included in the complete obliteration or mass devastation were the court buildings and records, court personnel and many members of the bar.

Continuity of administration is vital to the effective operation of the judicial system. But even minimum capabilities to resume activity may be hopelessly buried in the debris along

* Federal Civil Defense Administrator; Governor of Nebraska, 1947-53.

with court officers, a decimated bar, and large quantities of public and private records and instruments. In planning efforts to avert the disintegration of our judicial system and paralysis of our courts, those three basic elements must be considered.

In most states the chief executive has authority to fill judicial vacancies. Some state constitutions set out a reasonably long line of succession in the event a vacancy occurs in the governorship, while in others the constitutions are silent as to what happens when a comparatively short line of succession runs out. Assuming the gubernatorial vacancy is filled and judges are appointed, there will be little progress until other essential officials are appointed including those within the county or city.

An evaluation, in context of disaster, should be made of the adequacy of the succession and vacancy filling provisions of state constitutions and codes, and of local government charters. These must be studied and appropriate amendments for emergency should be proposed. Such proposals demand a maximum flexibility, perhaps eliminating some of the more legalistic qualifications for office such as residency.

The tremendous increase in the volume of legal business will overwhelm the surviving members of the local bar. This shortage of manpower will further delay the resumption of legal service so badly needed. In the horror of human slaughter and devastation of whole cities, legal services may seem a luxury to some—a luxury that might well be deferred to some date after the war. However, our whole economic system and legal structure will not lend themselves to so simple a course.

Most states have entered into the Interstate Civil Defense and Disaster Compact wherein provision is made that a member of the bar in one state may practice law in another state for the duration of the emergency during which his professional services are required.¹ To assure a reasonably prompt continuity of service to a greatly increased number of clients, arrangements ought to be made with correspondent firms outside critical target areas. Lawyers from other parts of the country will be needed in stricken areas to assist in the high volume of work which has accumulated as a consequence of the attack.

Courts are likely to be deluged with lost record proceedings. The difficulties of proof in these circumstances will only delay the availability of badly needed assets and clutter up court calendars.

¹ Interstate Civil Defense and Disaster Compact, Article 4.

Some of the lost records problems can be allayed by precautionary measures, such as those initiated by some industries and business houses where vital records are duplicated and stored away from danger areas.

Many lawyers retain for their clients, in their own offices, the original wills, leases, and other important documents. The legal profession must be alert to the obvious problems which destruction of these papers would involve. There will be many situations where it will be important to restore or re-establish the destroyed writings. The "best evidence" rule is not a model of simplicity, and the power of courts of equity to restore lost or destroyed documents has proved inadequate. Current requirements and procedures as well as statutes bearing upon the subject should be studied and appraised.

The awesome explosion of a thermonuclear weapon whose effects can engulf an entire metropolitan area knows not the intricacies of our political boundaries, state, city, county, or district. Similarly erased will be the boundaries of jurisdiction upon which is based much of our court system. Provision must be made for transferring the case load of a destroyed court to other courts outside the territorial jurisdiction, or allowing the holding of court of a destroyed city at a site outside its normal locale.

Are the statutes and rules of court in each state ample and flexible enough to meet the needs of this kind of emergency? Readily apparent are all the other related problems such as the service of process, time tables on filing pleadings and observing normal procedures, the running of statutes of limitations, constitutional limitations on venue, subpoenaing evacuated witnesses, restrictions on the use of depositions, and the extreme difficulties of developing legal proof. The entire problem of legal proof will be of critical importance following an attack.

Unquestionably, a thermonuclear attack will result in unprecedented loss of life. For example, Operation Alert, 1955, was a simulated mass attack upon sixty of our great cities. In that test exercise a five-megaton weapon substantially destroyed Washington, D. C., with an estimated six hundred thousand people killed in that city alone. Other results estimated for that training exercise were in this order of magnitude: ten million houses destroyed leaving twenty-five million people homeless; eight million casualties demanding medical care and sixteen million Americans dead or dying.

These are figures that stagger the imagination because it is

hard for the mind to visualize so vast a slaughter in terms of human beings. Our enemies have been able to reap an advantage from the very size of these numbers. These are harshly realistic figures. They are so big we just don't grasp their meaning. Finding this monstrous funeral pyre so incredible, we have equal difficulty in evaluating our efforts to prevent it.

A real danger in all of this is that we often read such planning estimates without actually taking the time to seriously contemplate their significance. In these numbing circumstances, what equitable procedures should be devised for the proof of death and survivorship? Techniques for safeguarding the interests of persons living and dead, evacuated or critically injured, must not only be practical in their concept and realistic in their application, but simple in their utilization and swift in their results.² The great increase in court proceedings, particularly in the field of estates, makes this kind of planning mandatory.

An attack will explode many of the values that today are so relatively stable that we take most of them for granted. The vast and complex network of contractual relations that bind together our economic system will be badly ruptured, not only by the loss of personnel and records, but by the sudden change in the value of estate assets, the impairment of security values, the extensive obliteration and destruction of structures and facilities, and the consequent decline in real estate values and other assets. As a result of countless issues involving questions of new value, of ownership, and rights of management or disposition, assets and liabilities will remain unsettled in the absence of soundly conceived remedies.

A plan of protection cannot overlook the shambles to which a well planned estate might be reduced, leaving the dependents without support. Perhaps the probate courts need emergency authority to divert the income from unharmed portions of an estate, intended for other uses, to the support of dependents of the testator or settlor where it is reasonably apparent that this would have been done anyway if the circumstances could have been anticipated. Appropriate provisions inserted in wills, trust instruments, insurance policies and other documents might alleviate the necessity for providing the courts with extraordinary powers to rearrange an estate plan or reallocate a testator's estate.

²An interesting supplement to the New York Civil Practice Act concerning the statutory presumption of death has been suggested. See, Granirer, Two Proposed Extensions of the Civil Defense Program, 17 Queens B. Bull. 161, 162 (1954).

Prior planning can minimize the difficulties inherent in the usual mechanism for management of a corporation. The corporation statutes and corporate bylaws should be subject to early scrutiny to determine the necessary amendments that will assure continuity of business operations.

This article makes no claim of completeness. On the contrary, only a few of the major areas have been mentioned, all of which, and many more, require thorough and detailed exploration and discussion. A surprisingly large amount of legal research and planning has actually taken place in the larger business institutions and public utility companies. However, the chief problem remains the educational one of making lawyers conscious of the contingency of a thermonuclear attack. If the legal profession is made aware of the problems, it will undoubtedly respond in an effective and thoughtful way.

Initiative and imagination on the part of the legal profession are vital. The role of the attorney in contributing to the development of the civil defense of the nation cannot be a passive one. Waiting for government leadership to identify and spell out every problem is not enough. Much of the job can be done only by members of the bar and students of the law.

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