SOME RECENT DEVELOPMENTS IN RENEGOTIATION OF WAR CONTRACTS *

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I RENEGOTIATION—A LEGAL NOVELTY

"Renegotiation" is definitely a new word in the language of the law. It did not appear in legal literature prior to last year. In vain will one search for it in standard dictionaries and texts; like Bouvier's Law Dictionary,1 Words and Phrases,2 Williston on Contracts,3 or The Restatement of Contracts.4 Nor was there any reference to it in texts on Government contracts, prior to 1942.5 Corpus Juris, Corpus Juris Secundum, and American Jurisprudence similarly fail to include the term. Even general dictionaries are none too specific. "Renegotiation" does not appear at all in Winston's Dictionary,6 nor in the Encyclopedia Britannica.7 Webster's Dictionary8 merely lists the term.

Renegotiation is truly a novelty in American law.9 It presents in some ways a completely new set of problems. Industrialists, writers, editors, trade associations and others have come out strongly for or against this legal innovation. Some wholeheartedly support the principle of renegotiation of wartime Government contracts, stating: it furnishes the method by which prices on contracts awarded under extraordinary war conditions can be adjusted to a fair and reasonable basis; tends to keep costs at a minimum; is superior and preferable to a broad profit limitation, which affords no incentive to reduce costs; permits rewards for performance; results in final settlements under war contracts during war period;10 and finally that it is saving business much future castigation and abuse.11

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* The views expressed herein are personal and are not to be construed as official, or as reflecting those of the War Department or the Signal Corps.
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1. BOUVIER, LAW DICTIONARY (Rawle's ed. 1914).
4. RESTATEMENT, CONTRACTS.
5. FEDERAL LAW OF CONTRACTS (1934); SHEALEY, LAW OF GOVERNMENT CONTRACTS (3d ed. 1938). A "War Supplement", dated November 1, 1942, recently published, contains a discussion of Renegotiation. GRASKE, LAW OF GOVERNMENT DEFENSE CONTRACTS (1941). Renegotiation is discussed in a recently published supplement to this volume, entitled "Renegotiation of War Contracts", dated April 5, 1943.
7. Copyright, 1942, by Encyclopedia Britannica, Inc.
9. PRENTICE-HALL, GOVERNMENT CONTRACTS, §§2501.
RENegotiation of war contracts

Others condemn it as far-reaching, dangerous and unnecessary; the greatest possible deterrent to increased war production; that satisfactory administration is impossible; that it will cause war costs to soar and production to slow down; that it penalizes the most efficient and lowest cost producer, leaving the inefficient and high cost producer undisturbed; is destructive of business morale; that it is proving a serious detriment to the continuation and expansion of war production; and that the whole war contract situation has been thrown into utmost confusion.

Some of these criticisms were summarized in an address by Colonel Albert J. Browning, Director of the Purchases Division, Army Service Forces, War Department, as follows: The statute, it is said, allows the Government to revise its bargains at the expense of the contractor; provides no standards for fixing excessive profits; leaves contractors uncertain about their profits and financial position; and penalizes efficient producers.

Another summary of criticisms and answers has been made by Dr. T. H. Sanders, of WPB.

II History of Profit Limitation

During World War I there were no laws of general application to control profits on war contracts directly. Indirect brakes on profiteering, such as excess profits taxes, limited price control, priorities, and profit limitations based on percentage of cost, were attempted. Both the Army and Navy tried to limit profits by adopting the policy of allowing no more than 10 per cent. on the actual cost. The limitations imposed were not fixed by law and no attempt to recover excess profits was made. Price fixing by the War Industries Board did little to

12. Seybold, The Dangers and Inequities of Contract Renegotiation (1942) 10
14. Ernest R. Breech, President of Bendix Aviation, as reported in Time Magazine, October 5, 1942, p. 83.
17. Chamber of Commerce of New York State: Interim Report of Special Committee on Corporate Management, October 15, 1942; reported in Commercial and Financial Chronicle, October 22, 1942.
22. Lyon, Abramson and Associates, Government and Economic Life (1940) ch. 28; Hardy, Wartime Control of Prices (1940) chs. 7 to 12.
eliminate excess profits.\textsuperscript{23} After investigation brought about by Congress,\textsuperscript{24} excess profit tax legislation was enacted upon which the Government relied to control war profits.\textsuperscript{25}

After World War I there was widespread criticism of the high level of industrial profits realized during the War. As early as 1919 the American Legion assumed the lead to "take the profits out of war."\textsuperscript{26} However, it was not until 1930 that Congress recognized this growing demand by the establishment of the War Policy Commission,\textsuperscript{27} and Congressional investigations began in 1935.\textsuperscript{28}

The first legislative attempt at profit limitation was the Vinson-Trammel Act of March 27, 1934.\textsuperscript{29} This limited profits on contracts for naval construction and naval aircraft to 10 per cent. of the contract price. Next followed the Merchant Marine Act of 1936, which similarly put a 10 per cent. limitation on profits covering contracts for merchant ships built for the Maritime Commission.\textsuperscript{30} The Vinson-Trammel Act was amended April 3, 1939,\textsuperscript{31} by extending its provisions to Army aircraft, on which a profit allowance of 12 per cent. was granted. Permissible profits on Naval aircraft construction were also increased to 12 per cent. By the Act to Expedite National Defense, approved June 28, 1940,\textsuperscript{32} allowable profits on Naval vessels and Army and Navy aircraft were cut to 8 per cent. of the contract price, or 8.7 per cent. of the costs incurred in completing the contract.

Then came a change in Congressional attitude. From a conviction in the efficacy of contract profit limitation, Congress swung to a belief in excess profit taxation as a means of controlling war profits. The result was the suspension of the provisions of the Vinson-Trammel Act and the Merchant Marine Act of 1936 by the Second Revenue Act of 1940.\textsuperscript{33}

With the suspension of profit limitation the Revenue Acts became the chief damper on war profits. These Revenue Acts, suc-
cessively increasing the excess profit rates, were intended to supersede the laws limiting profits to a particular percentage.

Congress began to realize however that taxation was not the answer to the problem of taking the "profit out of war." The legislators began to cast about for some method which would answer the burning question and still not be subject to the criticisms levelled at profit limitation and taxation.

While this trend toward compulsory renegotiation of war contracts was developing, the Supreme Court of the United States handed down its decision in the Bethlehem Steel Corp. case. Mr. Justice Black's statement that "If the executive is in need of additional laws by which to protect the nation against war profiteering the Constitution has given to Congress, not this Court, the power to make them," gave impetus to the renegotiation movement. Congress discussed various methods and the legal effect of renegotiation legislation in the light of Mr. Justice Black's statement in the Bethlehem Steel Corp. case.

Then came the Jack and Heintz case before the House Naval Affairs Committee. That exposé together with the Bethlehem Steel Corp. case undoubtedly was responsible for Congressional adoption of an amendment to the Sixth Supplemental National Defense Appropriation Act of April 28, 1942, authorizing renegotiation of certain Government contracts.

Before discussing renegotiation in the United States it may be of interest to examine briefly the experience of foreign nations. Government contracts providing for price adjustment are extensively used in England. Cost-plus contracts, however, are definitely frowned upon. Such contracts "have no other merit than simplicity," according to the Select Committee on National Expenditures. In Germany contract renegotiation is in vogue. Profit limitation is there used as a weapon to encourage efficiency of production. Contract prices are based in general on the costs of a representative producer. Manufacturers are grouped according to their costs of production. The prices of the

37. It was, in fact, after a debate on the Bethlehem Steel Corp. case that the Renegotiation Act was passed. See 88 Cong. Rec., April 2, 1942, at 3390.
38. See also Hearings before Committee on Naval Affairs on H. R. 6790 (The Smith Bill) 77th Congress, 2d Session, 2625-26, 2670-2681; and article in Life Magazine, March 22, 1943, condensed in Reader's Digest, May, 1943: "Jack & Heintz".
40. Fourth Report from the Select Committee on National Expenditures, Sec. 1940-1941.
lowest cost producers determine the uniform price for the particular war material. This price is enforced even with respect to contracts already made. The lowest cost groups are relieved of the excess profits tax; priorities with respect to labor and materials are also granted them. Producers in other price groups are subject to the excess profits tax, and suffer other disadvantages as well.\textsuperscript{41}

III LEGISLATIVE HISTORY OF THE RENEGOTIATION ACT \textsuperscript{42}

The First War Powers Act, approved December 18, 1941,\textsuperscript{48} authorized the President to allow any Department to negotiate and renegotiate existing or future contracts whenever this would facilitate the prosecution of the war. By Executive Order No. 9001,\textsuperscript{44} issued December 27, 1941, the President authorized the Army, Navy and Maritime Commission to negotiate contracts.

The Second War Powers Act of March 27, 1942,\textsuperscript{45} granted large powers of audit of war contracts. Pursuant to that Act, the President issued Executive Order No. 9127\textsuperscript{46} on April 10, 1942. This authorized the War Production Board, War Department, Navy Department, and the Maritime Commission to inspect and audit the books of Government contractors “to prevent the accumulation of unreasonable profits.”

The War Department, Navy Department and Maritime Commission, on April 25, 1942, established Cost Analysis Sections and Price Adjustment Boards.\textsuperscript{47} The Cost Analysis Sections were set up as fact-finding bodies. The Price Adjustment Boards were designed to assist the Departments and Commission in securing voluntary adjustments or refunds whenever profits were deemed excessive.\textsuperscript{48} The procedure was entirely voluntary. No power existed to compel a reduction in profits.

The beginnings of the Price Renegotiation Law are to be found in the Smith-Vinson Bill.\textsuperscript{49} This again represented a swing of the pendulum away from the notion of recapture of excess profits by taxation, back to the theory of limiting contract profits by a percentage

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\item[\textsuperscript{42}] Stimson, Limitation of War Profits (1942) 91 U. of Pa. L. Rev. 29.
\item[\textsuperscript{43}] 55 Stat. 841, 44 U. S. C. A. §§ 301-314 (1941).
\item[\textsuperscript{44}] See Opinion of Attorney-General of August 29, 1942, construing this Act and Executive Order.
\item[\textsuperscript{45}] Pub. L. No. 507, 77th Cong., 2d Sess.
\item[\textsuperscript{46}] 7 Fed. Reg. 2753.
\item[\textsuperscript{47}] W. P. B. Release No. 1017, April 30, 1942.
\item[\textsuperscript{48}] Withrow, The Control of War Profits in the United States and Canada (1942) 91 U. of Pa. L. Rev. 194, 209.
\item[\textsuperscript{49}] H. R. 6790, 77th Cong., 2d Sess., introduced into House, March 16, 1942.
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RENEGOTIATION OF WAR CONTRACTS

The Bill as introduced limited the profit on war contracts to six per cent.

The administration opposed the Bill. The War Department and the War Production Board thought that the excess profits tax was the only means needed for wartime profit limitation. The rigid profit limitation was opposed by the Navy, the Treasury and the National Association of Manufacturers.

The House passed the Bill in the form of an amendment to the Sixth Supplemental National Defense Appropriation Act, 1942. The Senate Committee on Appropriations provided for the renegotiation of the contract price and included in the Bill a sliding scale of allowable profits ranging from 10 per cent. for the first hundred thousand dollars of the contract price down to as low as two per cent. on so much of the contract price as exceeded fifty million dollars.

The Senate, however, rejected its Committee's sliding scale provision. It adopted the balance of its Committee's recommendation and the present renegotiation act, after concurrence by the House of Representatives, came into existence. Procedural and limitation amendments to the Renegotiation Act were approved October 21, 1942.

IV PROVISIONS OF THE RENEGOTIATION ACT

Some of the more important provisions of the Renegotiation Act as amended may be summarized as follows:

Sub-Section A defines Department, Secretary, Renegotiate, Excessive Profits and Subcontract.

Sub-Section B requires the Secretaries of the three departments and the Commission to insert a clause in all contracts over $100,000 providing for renegotiation and for the retention or payment of excess profits; a clause requiring the contractor to insert renegotiation provisions in all his subcontracts over $100,000; and a clause providing for retention by the contractor of excessive profits from his subcontractor. The Secretary may limit or exempt certain types of contracts from renegotiation.

Sub-Section C directs the Secretary to require renegotiation whenever in his opinion excessive profits have been realized or are likely to be realized; provides the means whereby the Secretary may eliminate

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52. 88 Cong. Rec, April 6, 1942, at 3441.
53. Supra note 39.
54. War Department, Navy Department, Treasury Department, and Maritime Commission.
excessive profits; makes provisions for suit in the Federal Courts; relieves the surety of liability; indicates certain exclusions and deductions as allowed under the Internal Revenue Code; makes provision for tax credit; gives conclusiveness to final agreements in the absence of fraud; and provides for a limitation of time within which renegotiation can be instituted.

Sub-Section D directs that unreasonable salaries, bonuses and other compensation be excluded in determining profits; and confers the powers of Title XIII of the Second War Powers Act upon the Secretaries, regarding inspection and audit of contractors’ books.

Sub-Section E authorizes the Secretaries to demand statements of cost; and provides for penalties.

Sub-Section F authorizes delegation by the Secretary to others in his department, or to other departments with provision for further delegation.

Sub-Section G contains the usual severability clause.

Sub-Section H continues the law in force during the present war and for three years thereafter.

Sub-Section I provides certain absolute exemptions, as well as certain discretionary exemptions.

V Administration of Renegotiation Act

The Departments have not been uniform in the machinery which they set up for the administration of the Act. The Price Adjustment Boards, set up in the War Department, Navy Department and Maritime Commission several days prior to the enactment of the Renegotiation Statute were delegated, by directive, the authority to administer war contract renegotiation.

The machinery set up by the War Department consists of (a) the War Department Price Adjustment Board and (b) some forty-five Price Adjustment Sections, each designated by the various services of the Army to conduct renegotiation covering contracts let by their respective services. The War Department Price Adjustment Board itself is not in the main a renegotiating unit. It is rather concerned with policy and distribution of contractors to be renegotiated among the various services.

The Navy Department Price Adjustment Board, on the contrary, actually conducts renegotiation conferences. Regional Boards have been set up by the Navy in Chicago, San Francisco, and New York.

55. Supra note 47.
The Maritime Commission Price Adjustment Board consists of four members. Two of them actively participate in the renegotiation of contracts.

The Treasury Department Price Adjustment Board is still in the organization stage and has not yet set up a complete administrative organization. In addition to the four departments mentioned in the Act, a Price Adjustment Board has been set up by the War Shipping Administration. This is not provided for by statute, but contemplates voluntary adjustments.

Although the Departments and Commission are independent units, there has been a studied attempt to obtain uniformity by co-ordination of activities. Uniformity has been sought by interlocking members, and by joint statements, regulations, directives and interpretations issued by all or several of the named agencies.

VI LEGAL ASPECTS OF RENEGOTIATION

It is inevitable that the newness of the concept of renegotiation should result in many and complex legal problems.

A. Subcontracts

Prime contractors as well as their subcontractors all the way down the line through successive tiers of subcontractors are subject to renegotiation. The Act as amended defines a subcontract as: "Any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of another contract or subcontract. The term 'article' includes any material, part, assembly, machinery, equipment, or other personal property." It therefore becomes quite a problem in the cases of some subcontractors several tiers away from the prime contractor to determine whether a specific contract is or is not subject to renegotiation. Furthermore, contracts with other agencies of the Government are not renegotiable.

The renegotiating agencies have interpreted the Renegotiation Statute to mean that subcontracts which are performed for a prime
contractor covered by one of the fixed exemptions, because a governmental bureau, are also exempt; and under the statute subcontracts are exempt for the sale of machinery to a mine whose business in turn is exempt from renegotiation. On the other hand, there are optional exemptions that may be extended to a prime contractor at the discretion of the Secretary. In this case, according to this Departmental interpretation, subcontracts on this prime contract would not be exempt from renegotiation. Thus, a subcontract to be performed in this country under a prime contract to be performed outside of the United States, where the Secretary has exempted the prime contract from renegotiation, would nevertheless be subject to the Act.

A distinction is also made between subcontracts for real and personal property. Subcontracts for items which become part of the real estate of a prime contractor are not subject to renegotiation, in the light of the above-quoted statutory definition of a subcontract: "... or other personal property." On the other hand, a prime contract for the construction of real estate is renegotiable.

It will be seen that the scope of the present Renegotiation Law is far greater than that of the Vinson-Trammel Act already cited. In the latter, the word "Subcontract" was not defined; and the judicial interpretation given it in the Aluminum Company case excluded materialmen and suppliers of standard commercial items.

B. Are Post-War Contracts Subject to Renegotiation?

The Act provides that it shall remain in effect for three years after the war. However, after the war the urgency of speedy procurement will no longer be present. The emphasis will then probably be on the sale of excess war goods by the Government. It has been held that the Government need not sell war goods at a sacrifice but can hold the goods for a better price and wait until a better time. There would therefore seem to be no reason in principle for renegotiating post-war contracts in order to protect the Government’s business.

C. Is Renegotiation Unilateral or Bilateral?

"Renegotiation" according to its dictionary meaning implies a second negotiation: a second agreement. However, the Act defines

62. Id. at § 1 (1).
63. Id. at § 1 (2).
64. Supra note 59; J-PAB-3, quoted in Prentice-Hall, Government Contracts, ¶ 25,134.
65. Supra note 29.
67. Supra note 60, at § h.
renegotiation as: "Therefixing by the Secretary . . . of the contract price." 70 This statutory language infers a unilateral determination. The Congressional debate on this section indicates the uncertainty of the legislators on the point. 71 Senator Vandenburg asked whether the determination of excessive profits must be by agreement, or by the Secretary alone. Senator McKellar at first answered by saying that the Secretary would have a "tremendous leverage;" later, that an agreement would be necessary. Senator Overton said there must be a meeting of the minds. Upon being referred to the statutory definition of renegotiation, Senator McKellar said, "In the end the Government has the right to fix the amount of profit." Disagreement existed among the Joint Committee members. The concluding word on the subject was by Senator McKellar, that the question of excessive profits would be left entirely to the consciences of the various Secretaries.

One writer 72 has suggested that significance be given to the word "include", in the statutory definition of renegotiation in the phrase "include the refixing by the Secretary [of the Department], of the contract price." The phrase means that while the Secretary has the ultimate power to fix the price, this must be preceded by an honest effort to renegotiate by agreement. To take the view that renegotiation must be by agreement falls short of the desired result. The avowed purpose of the Renegotiation Act is to recapture excessive profits. If the recapture process must be by agreement of the contractor, it is easy to foresee the possibility that there will be less than unanimous consent to give up questioned profits. It is obvious that something more than a voluntary agreement to refund profits must be relied upon in some cases to accomplish the desired result.

D. How Conclusive is the Secretary's Determination?

The Secretary may fix the amount of excessive profits. The remedy afforded the contractor who is aggrieved by the action of the Secretary is probably by resort to the courts if such action is followed up by a withholding of sums due. The courts will no doubt adopt the substantial evidence rule and accept the findings of the Secretary concerning costs, reasonable profits and other factual questions as conclusive, if supported by substantial evidence. 73

It is, of course, quite possible that a contractor may claim that the action of the Secretary or of his delegated representatives, the

70 Supra note 60, at § a (3).
72 Note, Renegotiation of War Contracts (1942) 16 So. Calif. L. Rev. 31, 32.
Price Adjustment Boards, is confiscatory. Such claim would also probably be reviewed by the courts. It should be possible for the Secretary and his representatives, aided by their wide powers of inspection and audit, to present substantial evidence in support of the determination of excessive profits.\(^74\)

**E. Has Congress Unlawfully Delegated Its Legislative Power?**

The Renegotiation Act\(^75\) authorizes and directs the Secretary of a Department to determine when profits are excessive. There is no doubt that Congress itself can lawfully determine what constitutes excessive profits. But can Congress confer the power to determine that fact upon an administrative official?\(^76\) Fundamentally the power conferred upon the legislature to make laws cannot be delegated to any other authority.\(^77\)

In two recent cases this principal was invoked to decide that the delegation of power in the two statutes there considered was unlawful and could therefore not be sustained.\(^78\) On the other hand, it is well settled that Congress may set up an "intelligible principle" and give to other officials the right "to fill in the details." Congress may thus set up a standard, and permit administrative agencies to determine whether particular instances fall within or without the standard.\(^79\)

Writing on this subject, two authors, citing the same cases, have come to opposite conclusions. One\(^80\) states that this delegation of authority by Congress is unconstitutional; the other,\(^81\) reaches the conclusion that Congress has laid down an "intelligible principle" of eliminating excessive profits; that Congress has not delegated legislative power to the Secretary, but only the authority and discretion to "fill in the details" by establishing rules and procedures for carrying out the expressed will of Congress.

It is necessary to adopt a practical approach to the problem involved. Thousands of war contracts must be reviewed to determine whether excessive profits have been earned. For Congress to review these contracts would be practically impossible. Delegation here is

\(^74\) Supra note 69, at 165.
\(^75\) Supra note 60, at § c (1).
\(^76\) See articles collected in 4 Selected Essays on Constitutional Law (Assoc. of Amer. L. Schools) (1938) ch. 2, § 2, for discussion of delegation of power. See Frankfurter and Davis, Cases on Administrative Law (2d ed. 1935) for cases on this subject.
\(^77\) I Cooley, Constitutional Limitations (8th ed. 1927) 224.
\(^79\) United States v. Grimaud, 220 U. S. 506 (1911).
\(^80\) Withrow, supra note 48, at 215.
\(^81\) Supra note 73, at 230.
obviously necessary in some measure. The "necessity of the case" doctrine has been applied in an analogous case.\textsuperscript{82}

The Secretary may delegate\textsuperscript{83} his authority and discretion in whole or in part to other individuals or agencies within his Department or any other of the Departments having renegotiation powers, with the consent of the Secretary thereof; and may authorize them to make further delegation of such authority and discretion.\textsuperscript{84} While unreasonable delegation might be held to be unconstitutional, in fact the delegation has been reasonable and undoubtedly would be upheld.

\textbf{F. Is the Retroactive Provision of the Law Valid?}

On this point too there exists a clear division of opinion as to the validity of the section in question. One author\textsuperscript{85} has concluded that the Act is unconstitutional in this respect; another\textsuperscript{86} reasons that the constitutional power of Congress over war contract profits-limitation is secure and permits the retroactive provisions of the renegotiation law. A third\textsuperscript{87} recognizes the possibility of cogent argument both ways, but concludes that expediency, perhaps necessity, will dictate that the courts sustain the particular provision.

The relevant section of the Act\textsuperscript{88} provides that renegotiation shall apply to all contracts except those for which final payment was made prior to April 28, 1942, the date of enactment of the statute. This authorizes renegotiation of contracts entered into prior to April 28, 1942, payment for which was not made until after that date. May Congress thus tamper with contracts already in existence at the time of enactment of the statute?

Any discussion of the right to impair contracts brings to mind the constitutional prohibition against passing laws impairing the obligation of contracts. This inhibition exists only against legislation by the States.\textsuperscript{89} A federal statute, however, is valid even though it incidentally results in the impairment of contractual rights between private parties.\textsuperscript{90} If the law were otherwise, it is obvious that it would be impossible for the United States to exercise its sovereign rights.

But the problem arising under the renegotiation law is that of a statute impairing a contract, not between two private parties, but one

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  \item \textsuperscript{82} United States v. Grimaud, 220 U. S. 506 (1911).
  \item \textsuperscript{83} Supra note 60, at \$f.
  \item \textsuperscript{84} Supra note 73, at 237.
  \item \textsuperscript{85} McGuire, \textit{Renegotiation of Contracts and Recovery of Excessive Profits (1942)} \& \textit{Qualified Contractor 18}.
  \item \textsuperscript{86} Graske, \textit{Renegotiation of War Contracts (1943)} II.
  \item \textsuperscript{87} Supra note 72, at 38.
  \item \textsuperscript{88} Supra note 60, at \$ c (6) (i).
  \item \textsuperscript{89} U. S. Const. Art. I, \$ 10.
  \item \textsuperscript{90} Collier, \textit{Gold Contracts and Legislative Power (1934)} 2 Geo. Wash. L. Rev. 303 et seq.
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to which the Government is a party. It is well established that a contract with the Government confers a property right on the contractor. This right is protected by the due process clause of the Fifth Amendment. But property rights, it has been seen, are not immune where Congress legislates under one of the powers expressly delegated to it by the Constitution.91

Article I, Section 8, of the Federal Constitution authorizes Congress to make all laws "necessary and proper" to carry out Federal powers. One writer92 entertains no doubt that the renegotiation law comes properly within this section of the Federal Constitution.

There is, however, another concept which holds that when the sovereign itself is a party to a contract it loses its sovereign attributes and becomes bound by the same rules of law that govern private contractors. That concept was stated many years ago by Alexander Hamilton93 in the following words: "... when a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promise may be justly considered as excepted out of its power to legislate. ... It is in theory impossible to reconcile the idea of a promise which obliges, with a power to make a law which can vary the effect of it." A long line of cases has adhered to this doctrine.94

There is, however, dictum in a recent case95 which might afford support to an opposing doctrine that the United States may impair the obligations of even its own contracts. In that case the Court said of contracts of war risk insurance: "As Congress had the power to authorize the Bureau of War Risk Insurance to issue them, the due process clause prohibits the United States from annulling them, unless, indeed, the action taken falls within the federal police power or some other paramount power."

In this connection, the words of Mr. Justice Black in the Bethlehem Steel Corp. case96 again becomes relevant: namely, that the Constitution has given Congress the power to enact laws against war profiteering.

91. Legal Tender Cases, 12 Wall. (N. S.) 457, 20 L. ed. 287 (1870); ROTTSCHAEFER, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW (1939) 558-559.
92. Supra note 69, at 156.
93. 3 HAMILTON'S WORKS 518-519; cited in Sinking Fund Cases, 99 U. S. 700, 731 (1878).
96. Supra note 36.
G. Does the Renegotiation Law Render a Government Contract So Indefinite as to be Unenforceable?

A contract is unenforceable where its terms are not reasonably certain. Renegotiation in a sense makes the contract uncertain. The stated price can be revised downward by subsequent renegotiation proceedings.

The standard set up by the statute is a determination by the Secretary of the Department involved that excessive profits have been or are likely to be realized.

One writer points out that the term "reasonable" can acquire a fixed legal definite meaning. In *U. S. v. Swift*, the Court said: "Under ordinary conditions, a valid agreement can be made for purchase and sale without the fixing of a specific price. In such a case a reasonable price is presumed to have been intended."

The renegotiation statute renders the contract indefinite only in the event that there are excessive profits. Past experience, weighed in the light of considering as many pertinent factors as possible, can be relied upon to indicate when a profit is excessive. It will be noted that there is no requirement that the actual amount of the profit be fixed by the Secretary. The only requirement is that the contract does not result in excessive profits for the contractor. Only upon the appearance of excessive profits does any uncertainty exist as to the contract price. It has been suggested that the net effect of the Renegotiation Act is to insert a condition subsequent into each contract: that the contractual rights of the parties are fixed, subject, however, to the possibility of change by the happening of a condition subsequent, i. e., that excessive profits appear. It has been held that an economic fact or condition may be established as a condition subsequent.

H. What Constitutes "Excessive Profits"?

The Renegotiation Act defines excessive profits as "Any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits." This has been criticized as "double talk." It seeks to define by using the term defined in the definition itself.

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98. *Supra* note 72, at 39.
99. *Supra* note 72, at 40.
100. *Supra* note 72, at 40.
102. *Supra* note 60, at § a (4).
It has been said that the renegotiation idea of excessive profits is more accurately described as *unexpected* profits. Various attempts have been made to define excessive profits. These definitions, however, are more in the nature of statements of policy.

Thus the Chairman of the War Department Price Adjustment Board gives the following two concepts of excessive profit: “That profit which neither the company nor the Government could justify and defend in the Court of public opinion as fair and right and proper for arming our Country for war;” and also, “That amount of profit which two or three experienced men of character, background and public confidence (and without any personal interest in that situation) would agree in the light of the facts of the company and the industry—is excessive and unjustifiable.”

The War Department Price Adjustment Board has defined excessive profits in its official instructions as “those inordinate, unjustified or perhaps unanticipated profits which reasonable men would agree the contractor should not retain.”

I. What is the Relationship of the Procurement Officer to the Price Adjustment Board?

Prior to the Renegotiation Act the concept of renegotiation was one of voluntary adjustment arrived at after cost and production experience. There was, it is true, no power given to the contracting officer to compel renegotiation. Nevertheless, it has always been considered the duty of the contracting officer to be prepared to defend the particular contract as one calling for a fair and reasonable price. In order to encourage contractors to make voluntary adjustments on all contracts, contracting officers have been given the power to accept such reductions at any time, even when the case is pending before a Price Adjustment Section.

A comprehensive examination was recently made by the Truman Committee covering renegotiation, its history, functions and administrative problems.

104. *Supra* note 73, at 231.
109. “Special Committee Investigating the National Defense Program” pursuant to S. Res. 71 (77th Congress).
VII Pending Legislation on Renegotiation

A. The Truman Committee Bill (H. R. 2324)

The Truman Committee's Subcommittee on Renegotiation of Contracts110 heard testimony by Under-Secretary of War Robert Patterson; Maurice H. Karker, Chairman of the War Department Price Adjustment Board; Charles O. Pengra, Counsel to the War Department Price Adjustment Board; Under-Secretary of the Navy James Forrestal; Kenneth H. Rockey, Chairman of the Price Adjustment Board of the Navy, and John Kenney, Counsel and a Member of the Navy Price Adjustment Board; Lt. Commander Arthur G. Rydstrom, Operating Head of the Maritime Commission Price Adjustment Board, and others.111

Judge Patterson urged an amendment to the Act which would exempt from renegotiation "standard commercial fabricated or semi-fabricated articles ordinarily sold for civilian use."112 He estimated that under the present law over three million prime and subcontracts were held by more than eighty thousand companies. Of these, less than 9000 have been assigned for renegotiation, and renegotiation has been started with less than 4000 of the companies so assigned. He felt that the elimination of standard commercial items would do much to relieve the administrative burden now placed upon the renegotiating agencies.

In the Aluminum Company case113 where it was necessary to define the term "subcontract" under the Vinson Act,114 the Board of Tax Appeals (now Tax Court) held that vendors of ordinary commercial articles were not "subcontractors."

In his testimony115 Judge Patterson also urged an increase in the overall exemption of contractors subject to renegotiation from $100,000 to $500,000. This, he stated, would materially decrease the administrative problem confronting the Price Adjustment Boards of the various Army services.

Under-Secretary Forrestal testified116 that up to that date (January 20, 1943), all of the major renegotiations of the Navy Depart-

110. The Subcommittee consists of Senator Carl A. Hatch (D. N. Mex.), Chairman; and Senators James M. Mead (D. N. Y.), Mon C. Wallgren (D. Wash.), Ralph O. Brewster (R. Me.), and Joseph H. Ball (R. Minn.).
111. Press Release of Truman Committee, January 22, 1943.
112. The War Department has consistently advocated the exclusion of such articles. See testimony of same witness before Committee on Finance; reported in "Renegotiation of Contracts: Hearings before a Sub-Committee of the Committee on Finance." September 29 and 30, 1942, page 22.
114. Supra note 29.
115. Supra note 111.
116. Ibid.
ment had ended in voluntary agreements. This is illuminating on the legal question of whether renegotiation requires a bilateral agreement, or whether the Secretary can, by unilateral action, fix the amount of excessive profits. Thus far, the Navy Department has not had to cope with this problem.

Mr. Forrestal gave four principles in renegotiation to which the Navy was committed:

1. That profits be held to reasonable levels.
2. Renegotiation should not be a punitive weapon.
3. Renegotiation should encourage efficiency in production, and should not tend to a cost-plus basis.
4. Renegotiation should be a bilateral process, with ample opportunity to the contractor to present his case. Neither taxation nor a flat percentage of profits, he stated, could accomplish the desired objectives.

Commander Rydstrom, in his testimony, pointed out that the situation with respect to the Maritime Commission was different from that of other renegotiating agencies. The great dollar percentage of the Commission's contracts, he said, are for construction of ships. These contracts contain automatic profit limitations either required by statute or considered advisable in negotiating the contracts. By experience gained in ship building prior to the war, the Commission is able accurately to gauge profit margins. Consequently renegotiation, insofar as affects the Maritime Commission, is confined chiefly to machinery and equipment.

In its report the Truman Committee considered the past, present and future of renegotiation. It summarized the necessity and desirability of the renegotiation law as follows:

1. The wartime need for rapid procurement of new materials; or materials in unprecedently large volume.
2. Inability of taxes to do the job.
3. While contractors can protect themselves against unduly low prices by escalator clauses and contingency provisions, the Government must rely only on renegotiation to remedy unduly high contract prices.
4. Cost-plus contracts are worse than worthless.

The following recommendations were made by the Committee:

1. Unification of the four Price Adjustment Boards.

118. Id. at page 2.
119. A certain amount of unification already exists. Each Board has one or more members in common. The Chief of Contract Review Branch, WPB, sits on each of the Price Adjustment Boards. No audit may be made by any of the other Cost Analysis Sections without first notifying the Cost Analysis Section of the WPB.
2. Adoption of uniform price adjustment policies, based upon rewarding quality and economy of production.\textsuperscript{120}

3. Increasing the overall exemption from $100,000 to $500,000; and requiring contractors to file copies of their income tax returns.

4. Use of a presumption that production completed before the bombing of Pearl Harbor \textsuperscript{121} was done pursuant to contracts fully paid for by April 28, 1942. In this way, renegotiation would apply to production after Pearl Harbor.\textsuperscript{122}

5. Consolidate the allowance of costs for purposes for renegotiation and tax determination in one operation.

6. Avoid forcing refunds out of contractors in a manner which would result in hindering their war production.

7. Gradually overcome the need for renegotiation by utilizing presently acquired cost experience in later contracts. "An important objective of renegotiation should be the writing of its own death warrant." \textsuperscript{123} This could be accomplished by exempting contracts from renegotiation where they contain provisions which otherwise protect the Government. Such contract provisions are:

(a) Forward pricing policy clauses. Thus in a contract covering a year's production, the price could be fixed for the first four months of production; with an agreement to adjust prices for each period of four months based on the cost experience of the preceding period.

(b) Exempting standard commercial articles on which costs have been accurately established in the past.

(c) Use of "target price" contracts.

(d) Purchase order business—that is, contracts to be performed within thirty days.

8. Educate contractors to their responsibility to voluntarily offer refunds of excess profits.

The Committee considered several items which have proved a source of administrative difficulty. One of these was the problem of post-war reserves. The renegotiating boards have thus far consistently declined to consider post-war reserves as a valid deduction. The Committee stated that sound national policy requires that manufacturers be encouraged to set up fair and reasonable post-war reserves. It frowned, of course, on excessive or padded allowances for this purpose.

\textsuperscript{120} A Joint Statement by the three Departments and the Maritime Commission was issued on March 31, 1943. \textit{Supra} note 59.

\textsuperscript{121} December 7, 1941.

\textsuperscript{122} At present, all contracts are subject to renegotiation except those for which final payment was made prior to April 28, 1942, the date of enactment of the Renegotiation Act. Renegotiation Act (\textit{supra} note 60), § c (6) (i).

\textsuperscript{123} \textit{Supra} note 117, at page 5.
Following the Committee’s report, a Bill\textsuperscript{124} was introduced on March 29, 1943, in the House, effecting two amendments in the Re-negotiation Act. These are: (1) Requiring contractors and sub-contractors to file financial statements for each fiscal year; and (2) Increasing the overall exemption from $100,000 to $500,000. The Bill was referred to the Committee on Ways and Means, which has not yet reported it out of committee.

B. Vinson Bill (H. R. 1900)

In the summer of 1942, the House Committee on Naval Affairs heard testimony\textsuperscript{125} that contingent fees and commissions in exorbitant amounts were being received by sales representatives or “war brokers” of contractors in connection with Government business. Agents who testified told of receiving fees in unbelievable amounts—far in excess of any legitimate service they were rendering.

A Bill\textsuperscript{126} supported by the War and Navy Departments, was reported out by the Committee, seeking to outlaw the payment of contingent fees in connection with Government procurement. The Bill passed the House on July 20, 1942, and went to the Senate. There it was referred to the Senate Naval Affairs Committee.

A considerable lobby developed against it. The textile and food industries protested that they would be seriously affected by any tampering with their long established practice of paying commissions based on the amount of the business involved. The Navy Department suggested excepting these industries. The War Department countered with a proposal that the Bill permit administrative exception of other industries. The Navy demurred that this would open the door too wide. The Bill died in committee.\textsuperscript{127}

The House Naval Affairs Committee later took testimony on another Bill, H. R. 1900.\textsuperscript{128} As originally introduced, the Bill proposed to amend Section 2 (a) of the Act of June 28, 1940, by authorizing the Navy to limit compensation for securing a naval contract to a reasonable amount as fixed by the Secretary of the Navy. Another procession of “war brokers,” or manufacturer’s agents, testified. Testimony was adduced on fees and commissions so excessive as to scandalize the nation. In some cases the fees paid to agents amounted to more than the profit made by the prime contractor or subcontractor.

\textsuperscript{124} H. R. 2324, 78th Cong., 1st Sess.
\textsuperscript{125} Referred to in “Investigation of the Progress of the War Effort: Hearings before the Committee on Naval Affairs, House of Representatives”, 78th Cong., 1st Sess., pursuant to H. Res. 30.
\textsuperscript{126} H. R. 7304 (1942).
\textsuperscript{127} A legislative history of this Bill will be found in Cong. Rec., April 20, 1943, at 3686-87.
\textsuperscript{128} Supra note 125.
The Committee in its report discussed the warranty clause covenanting against contingent fees, which is included in all Government contracts. The clause, however, contains an exception in favor of "bona fide established commercial or selling agents maintained by the contractor for the purpose of securing business."

The meaning of the exception is none too clear as it had not yet been interpreted by the Courts. The Committee, therefore, changed the proposed Bill by striking out everything but the enacting clause, and inserting in lieu thereof clauses amending the Renegotiation Act, so as to add to the present definition of "subcontract" any contract to pay any amount contingent upon the procurement of a war contract, or determined with reference to the amount of such war contract; or a contract under which the services performed consisted of procuring a war contract. Overall exemption is provided for contractors who do not gross more than $25,000 for the fiscal year.

The Bill as amended was passed by the House on April 20, 1943. In the Senate it was referred to the Committee on Naval Affairs.

Hearings were held by that Committee on May 12, 1943, and on the same day it reported favorably on the Bill, recommending its passage without amendment.

VIII Conclusion—Importance of Subject

The actual cash expenditures of the Government in World War I totaled twenty-one billions. Contrast this with World War II. Between June, 1940, and October 21, 1942, Congressional appropriations for defense and war aggregated two hundred forty billions. On January 1, 1943, the President asked Congress to approve a budget for the 1944 fiscal year of which one hundred billions was for war material. The Renegotiation Law has been called one of the most important and least understood of any Act. In the first year of its operation, according to the latest published figures, renegotiation resulted in price

130. Covenant against contingent fees. Procurement Regulations Par. 323: COMMERCE CLEARING HOUSE WAR LAW SERVICE, GOVERNMENT CONTRACTS, ¶ 22,700.
131. Since the publication of House Report No. 353, the Standard Article Covenanting against contingent fees was considered by the United States District Court for the District of Columbia, on April 15, 1943, in the case of U. S. v. Buckley et al., Criminal Case No. 70,758. In that case, a wide interpretation was given to the exception in the Standard Article which relates to bona-fide selling agencies. See infra note 132, pages 22-24, for a full copy of the Court's opinion.
132. Hearing before the Committee on Naval Affairs on H. R. 1900: "Preventing Payment of Excessive Fees or Compensation in Connection with Negotiation of War Contracts."
135. Time Magazine, April 5, 1943, p. 93.
reductions and recoveries aggregating $2,849,000,000. For us, the lawyers of this country, the scene will well bear watching. Changes are inevitable. Conflicting opinions on the part of legislators, business men, Government officials, taxation authorities, and procurement officers, will necessarily sway the picture backward and forward. The only thing which is uniform is a universal desire to speed war production. Honest differences of opinion exist. Disagreements will continue as to the best method of accomplishing the desired result. These disputes will be reflected in future Congressional action, court decisions, and administrative policy.

136. Statement of Senator McKellar, 89 Cong. Rec., June 18, 1943, at page 6169: "It is the most stupendous single saving that has ever been made in the conduct of any Government."