

THE PROBLEM OF MAINTAINING GOVERNMENTAL AUTHORITY  
UNDER CONDITIONS OF NUCLEAR ATTACK

12 April 1957

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12 April 1957

GENERAL CALHOUN: The subject of our lecture this morning is "The Problem of Maintaining Governmental Authority Under Conditions of Nuclear Attack." We are fortunate in having as our speaker Dr. Charles Fairman, Professor of Law at the Harvard University Law School.

This is the third occasion of Dr. Fairman's appearance here at the College to discuss this or similar problems, and you will shortly discover for yourselves why it is that we invite him back again and again. He has made a very thorough study of this problem and is considered to be the outstanding authority in this country on this subject.

He brings to us not only a distinguished career as a student and a teacher of the law but a broad background of public service.

Dr. Fairman, it is a privilege to introduce you to this class today on the 57th anniversary of the Submarine Service, I believe.

DR. FAIRMAN: Thank you, General Calhoun. Tomorrow will be the anniversary of my appearance here last time, but I think that is of less significance.

General Hollis, Staff and Student Officers, and Guests:

The matter with which we are concerned today is set in an ever-evolving context. I am struck with this when I look back at the earlier talks I made here in May 1954 and in April 1956. Each of those papers was placed in the setting of the moment. Now, taking bearings, I observe that the country has been learning. That is encouraging, even though our position today is still very far from satisfactory.

The question is, how to maintain governmental authority under conditions of nuclear attack. I will take note of where we are today, and go on to what, as I see it, can most usefully be said to officers of the Armed Forces about their relation to the problem.

Our discussion may proceed upon this basis: That it is our national policy, in event of a nuclear attack, to maintain effective civil government throughout the entire country; that we will constantly endeavor to strengthen the institutions of civil government against the nuclear danger; and that if they were overborne by an attack it would be our national purpose to restore them as rapidly as possible.

We must prepare for the civil administration of Government after an attack. What is the authority for setting this down so flatly? It had been official doctrine all along, down to Operation Alert 1955, that "martial law" was not a part of our program for survival. I developed this in the paper I read here in 1954. Then came Alert 1955, with the simulated declaration of so-called "limited martial law." In my paper last year I called it "an on-the-spot decision--unstudied, uncoordinated, an improvisation of the moment." Describing it as "a terrible mistake," I traced how it came to be made, with citation to the documents. It now seems clear that the administration recognizes that it was indeed an error. Operation Alert 1956 was run on an entirely different theory; the episode of 1955, so far as it is referred to in official quarters, has been minimized and swept under the carpet.

The Military Operations Subcommittee of the House of Representatives--the Holifield subcommittee--began its hearings on Civil Defense for National Survival in January 1956. I note what I didn't know until an hour ago, that Mr. Holifield came over and spoke to you. I have scanned the paper that he read and, if I had known that you had heard from him, I would have woven that into my paper here today. Very soon the subcommittee came to grips with this business of "martial law." Perhaps you have studied the hearings--3,145 pages of exceedingly valuable testimony--and the resulting report--H. R. No. 2946, 84th Congress, 2d session. Since I wrote that I have learned that you do have those documents and that at least some of you have studied them. This is infinitely the best study we have had of this great problem of national security--far more penetrating and constructive than anything that has emerged from the executive branch of Government. Admiral Radford, 1/ General Taylor, 2/ General Twining, 3/ and Admiral Burke, 4/--every

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- 1/ P. 341 et seq., esp. 351-72.  
2/ P. 428 et seq., esp. 445-56.  
3/ P. 373 et seq., esp. 375, 393.  
4/ P. 403 et seq., esp. 404, 424.

member of the Joint Chiefs of Staff--testified: 5/ they recognized the utter impracticability of shifting to a military administration as the method of restoring our national community. Whatever faith any of the committee members may have had in resorting to "martial law"--and I think it was not great--was completely disabused by the response of the Joint Chiefs. Clearly they did not want the responsibility, clearly their organizations were not competent to discharge it.

The civil representatives of the administration appearing before the subcommittee made a brave attempt to reinterpret the "martial law" of 1955 as having meant nothing more than "the maximum possible military support of the civilian authorities." 6/ The gist of their testimony on this point is summarized in one sentence that I quote from Dr. Flemming, then Director of ODM:

'Let's forget Operation Alert 1955.' 7/

The subcommittee chairman tried repeatedly to obtain the attendance of the Attorney General to discuss the declaration of "martial law"--which had been made when the Attorney General was at the President's side. The Attorney General declined to appear, explaining that:

'Our study of the many ramifications of this subject has not been completed.' 8/

The present Solicitor General, who, as Assistant Attorney General, was also on the spot when this action was taken, now as a member of the American Bar Association's Special Committee on Impact of Attack on Legal and Administrative Processes has joined in a Statement of Objectives which in part reads as follows:

The Relation of Civilian to Military Authority.

"Civilian authority should be prepared to govern the country in the event of atomic attack. It is no task for the Armed Forces, who in war must give priority to their military missions and should

5/ Their testimony is summarized in the subcommittee report, p. 60-72.

6/ Dr. Flemming, Hearings, p. 1046. Similarly Governor Peterson, Administrator of the Federal Civil Defense Administration, Hearings, p. 1421, 1426.

7/ Ibid., p. 1069.

8/ Ibid., p. 3139.

not be compelled to divert manpower and organization to the vast complex operations needed to keep our shattered economy and Government functioning. Nor is martial law a solution. It is, at best, a form of authority and organization that can rapidly be invoked if we as a country have not adequately prepared for civilian defense but permit ourselves to be surprised by what, instead, we could anticipate and prepare for. The critical question should be stated not in terms of military versus civilian authority, or of martial law, but rather in terms of the proper spheres of activity of the military and the civilian, respectively, and the effective working relationship required between them. . . . 9/

The statement was approved by the House of Delegates of the American Bar Association in February 1957.

The Military Operations Subcommittee was emphatic that "Civil defense is properly a civilian function, as indeed, almost every witness before the subcommittee including the military emphasized." and yet that:

"Unless a strong civilian effort is made at the higher levels of Government to plan for civil defense and to build up the necessary Federal, State and local organizations, civil defense will become increasingly a military responsibility. 10/

That the Armed Forces be called upon to administer Government in this country should be regarded as nothing better than the last tragic extremity. The country now needs leadership to develop civil institutions strong enough to stand up under a nuclear attack. This brings me to my next point.

The primary responsibility of the Federal Government for the non-military as well as the military aspects of national defense should be recognized and effectively discharged.

The Act of 12 January 1951, declared that "responsibility for civil defense shall be vested primarily in the several States and their political subdivisions." Everyone conversant with the realities now knows that that will not do. The Holifield Subcommittee would have Congress declare:

9/ Mimeographed Statement of Objectives, 14 Jan 1957, p. 2.

10/ Report, p. 67.

" . . . that civil defense is an integral part of national defense and a direct responsibility of the Federal Government in keeping with its constitutional duties to provide for the common defense. . . ." 11/

That, it seems to me, is exactly right. It has the support--virtually the unanimous support, I believe--of all persons responsibly concerned with civil defense at the State and local levels.

The present administration, while recognizing the need for "vesting in the Federal Government a larger responsibility," would "avoid Federal preemption of all civil defense programs which are so dependent upon widespread citizen participation." "The Federal Government, despite its increased civil defense role, must remain in partnership with States, cities, and towns." 12/ "Partnership" has a beguiling sound: everybody ought to pitch in and work for the common good. "Partnership" tends to produce obscurity of thought in a matter where rigorous analysis is desperately needed.

Let me state the case as in truth it seems to be. Of course the common defense is a responsibility of the Federal Government; that always has been true and is inescapable. Normally, when the Federal Government bears responsibility, it acts through its own agents, independently of the States. We have United States courts, attorneys, and marshals; United States Army, Navy, and Air Force; by its own letter carriers the Post Office comes to your door, and the Bureau of Internal Revenue comes even closer. So when we say that a certain function pertains to the Federal Government, it seems to result that the States have nothing to do with it. With civil defense it must be otherwise, for only by means of the energetic action of State and local governments can the Federal Government discharge its primary responsibility.

This is an unprecedented problem: that is why we find it so hard to think straight. The United States is the only Government that can defend us all; but here it must, by exerting its constitutional and its moral authority, induce action by the several States and their subdivisions. The preservation in full vigor of the civil institutions of the several States, at all times, is itself one of the great objectives. The national system must rely upon State and local action wherever such action would be of superior fitness or propriety. Many of the concerns

11/ Declaration of policy in H. R. 2125 and companion bills.

12/ President Eisenhower's letter to Administrator Peterson, 17 July 1956, in preparation for Operation Alert 1956.

of civil defense involve merely the normal functions of State and local government as carried on at a time of national distress. It is essential to the safety of us all that the National Government makes sure that every State will carry on and do its duty. <sup>13/</sup> Some of the concerns of civil defense involve the safeguarding against enemy action of vital records kept under State or local authority, and the inducing of State or local action on matters essential to national survival. For example, business corporations are creatures of the State; the powers of management are governed by State law. Registers of deeds and of probate are matters of State concern. But it is a matter of national concern to assure that, come a nuclear attack, the Nation's business will carry on <sup>14/</sup>--and that runs down to assuring the maintenance of managers competent to act for the corporation, and to assuring that property and bank accounts will not be rendered unavailable because ownership cannot be determined. Civil defense must in large part be carried out through the agency of the governmental machinery, personnel, and facilities of the States and their subdivisions. But the responsibility for establishing the national plan and for exerting leadership, by whatever means that appear best suited and to whatever degree that may be found necessary--that primary responsibility rests upon the United States Government.

The Holifield bill, in adequate language states:

" . . . recognizes that the States and their political subdivisions have an important supporting role and should be assisted and encouraged to perform appropriate civil defense tasks consistent with the national plan . . . ."

The bill would provide means, far more effective than what we now have, for evoking and encouraging such supporting action.

The Federal Government--Congress and Executive--has never provided adequate national leadership in civil defense. We need, of course, national planning, comparable to the planning for varied eventualities carried on under the Joint Chiefs of Staff. What is called the National

<sup>13/</sup> I draw attention to the work being done in the California Legislature, in the Assembly Subcommittee on Impact of Enemy Attack on Constitutional Government, of which Mr. Vernon Kilpatrick is chairman.

<sup>14/</sup> Perkins, James W., and Livingston Hall, "Agency Powers in Time of Atomic Attack," Massachusetts Law Quarterly, Mar 1957, p. 37-44.



Plan for Civil Defense--NSRB Document 128 of 8 September 1950-- does not approach to being such a plan as would enable State directors to deduce their respective parts in a grand design. It is simply a recommended scheme of State and local organization. It's a suggested table of organization, rather than an operational plan. Are we to dig shelters, or are we to prepare to evacuate? Clearly that must be a national decision: the States do not have the information necessary for a wise conclusion; they do not have the means to provide either the highways or the shelters. How much warning may be expected? How imminent is the danger of a nuclear attack? Basic questions such as these can be answered only by the Federal Government. If we are ever to have adequate civil defense, the Federal Government, earnestly and purposefully, must exercise primary responsibility--by establishing courses of action and disclosing to each State what is its part in the whole; by making the material contribution which only the Federal taxing power can provide; and by enlisting intelligent popular support through that executive leadership to which this Nation is accustomed in all matters touching the national safety. Such planning, such support, such frank disclosure and leadership have never yet been provided--not in any adequate measure.

There seems to be a fear that, once the United States Government acknowledged its primary responsibility, the States and subdivisions would lie down on the job. I think this turns the picture upside down. The best way to induce the States and their subdivisions to perform their essential supporting role is to give them something adequate to support.

The Federal agency must be raised in dignity and power. All agree to this. All, I believe, now agree that it should not be made a fourth department under Defense: that notion was always faulty. The Military Operations Subcommittee reached the conclusion that civil defense should be made an executive department--that only so would the function have the requisite standing. I have slowly come to the same conclusion. I note with regret that the administration opposes that step. The Federal Civil Defense Administrator is invited to participate in Cabinet meetings--but that is no more than a palliative.

"The American Bar Association Committee reached the conclusion that civilian defense, comparable in scale to the vast and many-sided problems a thermonuclear attack would create, calls for a new and clearer definition of central planning and administrative authority, and that it is unwise to continue to divide central

responsibility between two major executive agencies of the Federal Government [that is, between FCDA and ODM]. Nor do we believe that civilian defense duties can any longer effectively be delegated among a number of Federal agencies, or shared with State and local agencies, unless a comprehensive, if elastic, plan is first developed into which their respective efforts can clearly be fitted."

The Holifield Subcommittee's bill would concentrate in the new Department of Civil Defense responsibility for planning the nonmilitary part of national survival. I believe that is right. I recognize that in time of war, when the Civil Defense Department was directing active operations, it should not preside over manpower, industrial production, or continuity of the economy. My thought is that the planning units that had been preparing for those functions would drop out of the Civil Defense Department, like peas that had been ripening in a pod, and move into place as separate agencies in the structure of wartime administration. I have come to the view that, to vest power and fasten responsibility for nonmilitary defense at some definite point in the national administration, we should not rely on any transitory agency with no corporate spirit or traditions, identified only by some unfamiliar letters, and presenting no clear image to the public consciousness.

The Department of Defense and the Armed Forces should, I suggest, display a much greater concern for assuring readiness on the nonmilitary side of national defense. While it is not for them to assume that function, they should declare insistently that it is a matter of vital importance. While service chiefs have been looking overseas, in the air, on the waters and beneath, where their own guard must be kept, they have scarcely reflected, I think, on the situation in the interior in event of a nuclear attack. I am too well acquainted with the manifold tasks of the Joint Chiefs of Staff--tasks already too great for any men--to ask them to take on larger responsibilities. I mean simply that they should press for assurance that the nonmilitary part of defense, in the interior, be given as adequate institutional expression as has been given to military defense by the reforms since World War II. Even from a narrow professional point of view, a disorganized homeland could not long support an adequate military offensive. Conversely, a conspicuously effective shoring up of domestic institutions should be a deterrent by making a nuclear attack seem less profitable.

Officers of the Armed Forces must, however, plan for eventualities where things have gone badly. I turn, accordingly, to suppose that a

nuclear attack has been made and, realistically, that the machinery of Government has been very seriously damaged. How should the Armed Forces respond to this situation? (I assume for present discussion that some units or selected personnel have been diverted from the primary military mission and assigned to the task of restoring governmental functions.)

In so far as Armed Forces are assigned to domestic governmental functions, it is to be expected that they will be directed to play a supporting role; they should so act as to promote their own withdrawal at the earliest practicable moment. (The idea of military support to civil government is, I know, a somewhat refined conception--to which I will come in a moment.)

Certainly civil administration would be in a very bad way on the morrow of a surprise nuclear attack. (The Armed Forces probably would be in rather a bad way too, so let's not be patronizing when we think of the disorganization of civil government. How well did the denizens of the Pentagon emerge? How well did Headquarters, First Army extricate itself from Governor's Island--Headquarters, Fifth Army from East Hyde Park Boulevard, Chicago--and Headquarters, Sixth Army from the Presidio of San Francisco?) The whole country would be in quite a mess. I hope supremely that a sturdy channel of civil authority will have been established, running down from the President through the State Governments to the country--a channel of legal and moral authority whereby the American people could be steadied and directed by the President's familiar and respected voice. That is the only adequate channel for national leadership, and the moral aspect of authority would be far more important than the legal on the morrow of an attack.

The function of the Armed Forces, then, would be, not to act as the great conduit between the national administration and the country, but rather to come in at weak points in the governmental structure, as needed and as available. In every locality affected--localities where people had been afflicted, localities into which people were being evacuated--there would be need for logistical support--food kitchens, blankets, tents, transport, medicine, and the like. In so far as such service could be rendered, it should be. It is not surprising that the Joint Chiefs are not prepared to make firm commitments: they do not know what would be left over from their own requirements.

Consider specific situations. Blankets are needed and the Quartermaster can spare some; a truck drives up, dumps them, and goes away. This is the simplest form of military aid, and it produces no serious problem. The State Highway Patrol must set up control points for sorting out refugees and directing them to concentration areas; an MP company is available and goes in; it conforms to the scheme established by the State patrol and merely aids in carrying out the arrangements. A community's water, gas, and electric services have been disrupted; military aid is requested, and Engineer and Signal units are directed to make repairs and to remain on the job until the community is able to take care of itself. A city has been hit and its administrative staff has suffered heavy casualties; a military government unit of the reserve is called to active duty and directed to aid the mayor. Another city has been so badly hit that its government is virtually nonexistent; another military government unit is directed to go in and organize a new city administration. You will see that in my progression of examples the military units become more and more deeply involved in civil business, until we come to the case where at the moment there is no one in charge on the spot and the unit finds itself on its own. The tendency to take over and dig in would be strong. Some stunned city fathers would only too eagerly leave it to the Army to do what they should do themselves. Men of property would insist that the troops remain to enforce law and order. ("Law and order" is a big unanalyzed catchall conception that always crops up in these discussions of civil-military relations.) Overzealous officers would respond to the flattering invitation to stay and help; they would feel a challenge to give the citizens better government than they ever gave themselves. Underzealous officers would find cozy spots and settle down for the duration. It might be another case of The Man Who Came to Dinner.

In testimony before the Holifield Subcommittee, urging the utter unsuitability of a military administration after a nuclear attack, I made certain remarks, which I am going to repeat because of Admiral Radford's comment upon them. Actually we were not in disagreement. I said, in part:

"I concede, candidly, that in the first despair after a nuclear attack it might sound reassuring to many for the President to announce, 'I have declared martial law; the Army has taken over.' But in a few days the inevitable inelasticity of Army rule would surely arouse resentment. It will not do to, say, have martial

rule for the first few days and then switch back to civil administration. Any postattack administration, civil or military, would at once begin to work out ways to establish channels for getting things done. And once those patterns were formed, it would be exceedingly difficult to shift to a different system. Once martial rule had gotten into operation, there would be enormous practical difficulties in getting it out of business."15/

This passage was read to Admiral Radford, with a question on, "how the Chairman of the Joint Chiefs of Staff feels about the military getting into the martial law business and holding on to it?" He replied:

"I can only speak for myself, I would hope that we did not have to do it, although I would imagine that Professor Fairman was correct in his estimate of the situation if it did happen."16/

Further question to Admiral Radford:

"I hope I am not misunderstood in this question. Is there a danger that once you have martial law . . . the Army is likely to hang onto this and extend it beyond the time necessary?"

Admiral Radford replied:

"No; I don't think there is a danger that the Army will want to hang onto it, I think they would be very anxious to get rid of it as soon as they could.

"If the inference made by Professor Fairman was to the effect that the Army would enjoy it, I don't think that is correct."17/

I quite agree in the belief that the top side of the Army would not want to stay in the business of public administration, whether under "martial law" or otherwise. I do greatly fear that, for one motive or another, the personnel actually committed would tend to increase their involvement; and I would emphasize the consideration that, once a pattern of postattack administration had been formed, it would be extremely difficult to break it.

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15/ Hearings, p. 297-98.

16/ Ibid., p. 372.

17/ Ibid.

So I urge that, whatever the original commitment, from delivering some blankets to a temporary military administration of a ghost city, on even to what might amount to martial rule in an area--whatever the commitment--I urge that you always keep in view that the mission is only temporary, that the objective is to render the service immediately needed, that the action should be kept as nearly as possible within the fabric of civil government, and that when that fabric has been shattered the effort should be to restore it as soon as possible. Restrain the do-it-yourself inclination; don't shove civilians out of their offices, figuratively or physically; seek to get civil administrators back into every vacant job. Restore any broken strands of civil authority; don't supplant the civil with the Army's system of administration. Don't let your military action become an end in itself.

I remarked that military support to civil government is a somewhat refined conception, at which we should now look.

Military units and personnel should receive orders and instructions relating to civil relief and control through the established chain of command; military support of civil authorities does not involve subjection to the command of such authorities. It was evident, on the occasion of Operation Alert 1955, that some civil administrators at the national level supposed that their directives could simply be dumped into the military channel and, running down the spout, would be carried into execution by the Army. There was even some thought that Army units could be ordered to report to civil officials and do their bidding. Such conceptions are, of course, all wrong.

Whenever the Army acts, it is directed through the responsible channel established by law: the President, the Secretary of Defense, the Secretary of the Army, the Chief of Staff, and so on down the chain of command. (I speak of the Army, since it is the service most concerned; of course the same principle applies to the Navy and the Air Force.) Army units are not to be loaned out like power saws and bulldozers, put into the hands of any civil authority that has some sawing or shoving to be done.

The appropriate mode of action, it seems clear to me, would be as follows. First, we must establish a channel of civil authority, from the President down, through the Federal Civil Defense agency (whatever its title may become) to the governors of the States, and so on down. That channel has not been established by statute. If a nuclear attack occurred before it had been created, the President should initiate it,

acting upon his constitutional and moral authority as the Nation's Chief Executive. Down that civil channel should be transmitted the instructions to the stricken country. Up that line would come requests for assistance. The Federal Civil Defense Administration has divided the country into civil defense regions, corresponding to Army areas. The office of the regional director is a center of Federal authority and service. In time of an Alert--and it would be so in time of war--field representatives of the various Federal Departments and Agencies-- Treasury, Agriculture, HEW, Bureau of the Budget, Federal Reserve System, etc. --gather around the FCDA regional office in the field. This regional command post thus becomes a substation for transmitting the power and leadership of the Federal Government. Thus we would have what, in military analogy, may be called the "command channel" for civil authority. In addition there would be, as at present, the "technical channels" of the various Federal Departments, running down to their field offices.

If units of the Army are to be employed for civil relief and control, they should act in accord with directives sent down through Army channels. Thus, if the Federal Civil Defense agency desired certain supporting action by the Army, it would arrange for the Department of the Army to transmit a directive to lower military levels, corresponding to the directive being sent down the channel of civil authority. I interject the observation that the conduct of civil relief would involve a tremendous new staff activity at the several levels of Army administration. Suppose the governor of a State desired the support of military units, and suppose that such units were made available: their directive would come to them by the military channel, and would in substance tell them to render specified aid to the governor. The directive, doubtless, would set forth the objective, the method, and the limitations that would govern the commander. He would not be told simply to report to the governor and do the governor's bidding. His directive might be rather general in terms, but it would be for him, not for the governor or the mayor he was supporting, to determine what it meant and what he was to do under it.

To a considerable extent, doubtless, the Department of the Army would authorize subordinate headquarters to receive and comply with State and local requests.

To anyone unacquainted with this sort of work, my description might sound rather stiff and even bureaucratic; one might think, there's

no time for turning square corners when bringing aid to the spot hit by a nuclear bomb. Of course military aid should not be strained and rigid; it should flow quickly in response to the call for help. Insistence upon a clear analysis of channels, however, really serves to keep things from becoming tangled--whereas loose notions of Army personnel • running around all on their own or taking on whatever anybody wanted done would add to the inevitable confusion. Your own experience in the service has taught you the importance of observing channels; surely it has also taught you the propriety of dealing informally, of going outside the grooves, where that is the sensible way to attain some substantial good. It is not in the spirit of our military service to stickle over mere formality where something of real value is in peril. Once the basic conception of military support to civil authority is made clear, your good sense and zeal should lead to a ready and helpful response. In the military service, as in the law, procedural regularity is important, not at all as an end in itself, but only as the means for keeping things straight.

If at the place where you are employed there is a void--a total absence of civil government to support--then, I repeat, the objective should be to recreate the civil system and hasten the day when the military force can be withdrawn.

A point of special importance: Don't rush into the business of administering justice. I see no reason to suppose that the Federal and State courts would be destroyed, although doubtless new judges would have to be appointed, by civil authority, to replace casualties. I wish that much more had been done to assure continuity in judicial administration; I am happy to see that the Attorney General has recently brought this matter to the attention of the Judicial Conference--that is the Chief Justice of the United States and the chief judges of the eleven circuits.<sup>18/</sup> There is need for legislation, Federal and State, penalizing a refusal to comply with competent directions in a civil defense emergency. A starting point would be found in the act of 21 March 1942--now 18 U. S. C. §1383 (1948)--providing for the punishment in the courts of violations of restrictions and orders in military areas. The initiative in this matter, however, lies outside the Department of Defense. The point for you in the Armed Forces is that resort to military tribunals will almost surely be avoidable, and should be avoided unless absolutely necessary. Nothing else is so likely to land you on the rocks, in military action to meet a domestic emergency, as the trial of civilians by military commissions and provost courts.

18/ New York Times, 15 Mar 1957, p. 23, col.5.



Preventive detention--that is, detention to prevent future wrongdoings by one as to whom reasonable apprehensions are entertained--belongs to the Department of Justice and not to the Department of Defense. See the Emergency Detention Act of 23 September 1950, 50 U.S.C. §§ 811 et seq. Detaining on suspicion is a touchy business at best; it is a function to which military officers are ill-suited; Congress has provided that, so far as it is necessary, the Department of Justice will attend to it. That, I think, will dispose of whatever need there might otherwise have been to suspend the privilege of the writ of habeas corpus. Suspending the writ is a remedy that stimulates men to the point where they may run around doing quite unreasonable things.

If in some emergency you found that a man must be detained, then and there--for instance, to prevent him from spreading dismay throughout a camp of refugees--then hold him for the moment, and, if perchance a Federal court issues a writ of habeas corpus, comply with it and explain why your action appeared necessary. There is very adequate authority for sustaining temporary measures, conceived in good faith, in the face of the emergency, and directly related to preventing a serious public evil.<sup>19/</sup> Those are words from an opinion of the Supreme Court by Chief Justice Hughes. Don't evade a challenge in the Federal courts to the measures you are taking. If you have done only what reasonably appeared necessary, you are on firm ground. Experience shows that it is safer for the commander to have that settled during the war than to wait until the danger is past. If you found yourself dealing with a rare sort of Federal judge who felt that his best contribution to the national salvation lay in frustrating military efforts, you might confidently count upon a wiser view being taken on appeal. In the history of those unseemly clashes between soldiers and judges, one finds fault sometimes on one

<sup>19/</sup> Moyer v. Peabody, 212 U.S. 78 (1909); Sterling v. Constantin, 287 U.S. 378 (1932); Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944).

"Nor need we here consider the power of the military simply to arrest and detain civilians interfering with a necessary military function at a time of turbulence and danger from insurrection or war," said the Court in Duncan v. Kahanamoku, 327 U.S. 304, 314 (1946), while holding invalid the trials by military tribunal during the protracted military government in Hawaii during World War II.

side and sometimes on the other; more often, I think, it lies on the side of some officer of inelastic mind who did not realize that, even in time of war, military action against our own people must be measured by the reason of the law.

Our thinking tends to place too much emphasis upon compulsion, sanctions, locking people up. The transcendent need in event of a nuclear attack will be for leadership, for guidance that inspires confidence, for well directed measures toward reducing confusion. It will take calm skill and resourcefulness--not vigilantism--to restore public administration.

I was very favorably impressed with the testimony of the responsible representatives of the AFL-CIO at the hearings on the Holifield bill, where--repeating the conclusion of a National Labor-Management Manpower Policy Committee--they stressed the view that:

" . . . the individual citizen will respond actively and conscientiously to perform the special tasks for which he will be needed provided he is given the proper leadership and direction.

"He will not have to be made subject to military control in order to obtain his fullest cooperation."

And further,

"The thing that has concerned us somewhat when we talked about this problem with some Government people is that this emphasis on utilizing compulsion seems to make them feel that this is an easy answer to everything. . . . But in our minds what you have really done is to cover up some of the real preplanning that is absolutely essential. . . ."20/

Our need is, indeed, for devising the ways whereby our national community could be sustained and restored in event this unprecedented blow fell upon us. The challenge is for fresh, imaginative, constructive thought. I venture to urge that, as you go to your new stations, you seek, each in his own corner, in the spot where he finds himself, to work out answers to some of these new problems of civil-military relations.

Thank you.

20/ Testimony on 8 Feb 1957. I quote from galley-proof.

QUESTION: I wonder if you would say a few words as to the distinction that may exist in law and practice between different kinds of martial law. I have in mind that we have Federal troops; we have the National Guard, which is sort of half-and-half on occasion; some States have had purely State troops which never were to be federalized. I visualize that the President might order a Federal martial law, the governor might order a State martial law, and perhaps someone else could do this, too.

DR. FAIRMAN: The first two of the suggestions might happen. I think it would follow that we would have confusion compounded if we had two sets of people in uniform running around in the same place at the same time. I can't think of a much more complete confusion than that.

This business of State martial law has a rather unhappy history. It has been invoked for too many light and transient causes. It is a pretty strong remedy that has been taken much too often.

I think that, if we have any nuclear bombs falling on this country, the emergency will be far too serious to treat it like those local episodes. It seems to me inevitable that there must be one central chain of authority to give direction to the whole country. And I would hope that down at the State level it would work itself out through the regular State civil institutions.

QUESTION: Sir, one of your premises was that once we got into martial law we would have a great deal of difficulty getting rid of it. Could you support that by specific or historic examples?

DR. FAIRMAN: Well, my most striking example would be Hawaii in World War II. That all happened, you remember, on the afternoon of the 7th of December. I thought at the moment that it was rightly done, and said so in an article in Harvard Law Review. I was not aware then of the scope of the M-day bill that, at the request of General Short, the Hawaiian Legislature had passed. At the time I wrote, that bill was not available on the continent, where I was writing. When the war was over and I had an opportunity to see it, I saw that the Hawaiian Legislature had set up a tremendous unprecedented civil authority which the Governor was to use. General Short's conception of his relations with the Governor was that he would be fighting and that the civil governor would work in liaison with him and would do all those things that needed to be done--keeping the streets cleared of traffic, putting out lights at night, and that kind of business. That was the theory of the statute. The statute was exactly in response to what the military people wanted.

Then, suddenly, for some reason which I don't know, it was all swept away that afternoon, that Sunday. From then on the thing began building up as a bigger and bigger empire. In the end, when it came to grief in the Supreme Court, the conclusion seemed very clear that it would not have been invalidated if it hadn't been carried on and on. It became an end in itself.

STUDENT: How long did it take to get rid of that martial law?

DR. FAIRMAN: It was finally closed down after one of these terrible impasses where the district judge, who I thought acted unwisely, had imposed a fine on General Richardson for contempt of court--and General Richardson I may say acted with equal unwisdom--and General Richardson was prepared to lock up the judge. Finally it got to the President's desk. Now, it seems to me that the President, who would be fighting a war, ought never to be distracted by having to settle this kind of thing. I was never over there and I never had any operational connection with the regime, except writing an opinion or two in the Judge Advocate General's Office early in the history of it. I felt then very clearly that it ought to have been closed down, instead of which it was built up.

I mention another episode, to show the difficulty of shifting from a military to a civil administration, even when one is striving very hard to bring that about. In the unfolding of the plan of Allied Military Government in Italy, one of our guiding purposes was to develop a sound Italian Government and to hand over to it, as soon as it was ready, responsibility for administration of the rear areas. Yet in spite of our best endeavors, it was months and months before the Italian ministers were strong enough for the transfer of responsibility to be made. Once a pattern of administration has been established, it is very difficult to shift to another.

QUESTION: Sir, we have heard some discussion about the necessity of putting the economy back in operation. Traditionally, of course, this is a private function in this country. You haven't touched on that particularly in your discussion. Would you comment on that phase of it?

DR. FAIRMAN: I didn't touch on it because that is not a thing in which I specialize. My colleague, Dean Cavers, who has been down here, does specialize in that. His wartime experience was in that kind of business.

Initiative should, I think, now be taken by management itself. Now and then I have correspondence with leaders in corporate management who are taking measures to assure that their organization would be able to function after an attack--that there would be an enduring chain of command legally competent to do whatever would be necessary. I think in particular of correspondence and conversations with the general counsel of the Hercules Powder Company of Wilmington, Delaware.

But we can't afford to leave it there, to the initiative of each corporation. One of the major tasks of a Federal Civil Defense Department would be to effect such relations between civil government and corporate management as would make sure that such things were taken care of.

Just 2 or 3 days ago, while I was writing the last paragraph, I think, for this talk, my colleague, Vice Dean Hall, came into my office. He was interested in a bill which is about to be introduced in the Massachusetts Legislature for maintaining the powers of an agent, notwithstanding the death or the possible death of the principal. If the principal is dead, that ends the agency. And if the principal may be dead, the agent is not confident in going ahead, and other parties are not confident in dealing with him. This is a bill which I think will soon be introduced up there. This is an agency problem. It is to assure the perpetuation of the agency for lawful purposes for a considerable period after the death or after the possible death of the principal.

That's the kind of thing I had in mind. I have that as a footnote to my paper.

QUESTION: Sir, I think I draw an inference from your discussion. I would like to check and see if it is correct.

DR. FAIRMAN: Yes, sir.

STUDENT: With the line of authority in the Federal Civil Defense Administration, as you pointed out, would this imply that the secretary of this Federal agency would supplant or displace the Secretary of State in the succession to the presidency?

DR. FAIRMAN: I don't think so. That's a statutory matter. It is for Congress to provide for succession after the President and Vice President. What you mean, I take it, is that the inference is that he would be, for internal civil matters, so much the man immediately under

the President that he would succeed after the Vice President. I don't think that follows at all.

Since you have raised the question of the matter of presidential succession, let me say that, while I think that subject is important, I am sorry that it is being discussed so largely in terms of heart failure, and the like, which doesn't worry me much. We can always carry on, in time of peace, somehow, even in an unfortunate event like what happened to President Garfield.

What concerns me is what we do if the President, say, on his way back from the Casablanca Conference, gets drowned, or we don't know where he is--that kind of thing. Maybe he gets buried in the rubble. I think this discussion of succession to the presidency ought to envisage the real, serious problem of maintaining the Government in event of war. Also I would like to see legislation about maintaining the Congress. I think governors should in time of war be able to appoint Representatives in place of those who have been killed, just as they may fill a vacancy in the Senate. There would be a lot of dead Congressmen, and it is not at all a time for having a congressional election.

QUESTION: The ODM orders that cover an emergency mention the highest powers of the President. Now, when I first became aware of that after the 1955 Operation Alert, I thought that was perhaps the semantics to cover martial law. I still haven't clear distinction in my mind of what they are talking about. Is it martial law or is it not?

DR. FAIRMAN: I wouldn't be the one to tell what ODM meant when they wrote something. I can be somewhat helpful, I hope. There is the presidential office. Some of its powers are definite, because they have been tried; they have been sustained in litigation. There are some that have been tried and found wanting, as in the steel seizure case. But in our discussion here today we are out in an uncharted area. I don't think that this is a problem where we need to worry too much about the law being adequate. I think it is the practice that we need to worry about. That may sound like an ill-turned sentence, when I say we don't need to worry too much about the law. I am not saying to forget about it--not at all. I am just saying that, in discussing the matter before officers of the Armed Forces, the most useful aspect to discuss is not that of the constitutional law involved. We may go on the view that the Constitution provides the strength essential to national survival.

I am impressed with the thought that in fact the President will have such powers as he effectively exerts. The country is going to go along. People aren't going to litigate whether this is ultra or intra vires for the President after the bombs fall--what his powers are. No President worthy of the office would hesitate, in doubt as to whether the Constitution authorizes all that may be necessary to the preservation of the Union. One of the most ill-starred of all the opinions of the Attorney General is one given by Jeremiah Sullivan Black in 1860 to President Buchanan, after Sumter had been fired on. His counsel was that the States have no right to secede--but that if they do, there is nothing the President can do to stop them.

Now, as it turned out, you know, a President did come to office who didn't doubt that the President does have authority. He acted, and history has sustained him. My feeling is that it is a matter of the President's rising to the responsibilities. I kept saying, you will notice, "constitutional" and "moral," because the moral authority in these things is as great as the constitutional. I wish, however, we had effective legislation to spell these things out--not so much in creating power as in informing the country what the mode of operation should be.

QUESTION: Sir, on this civil-military relationship, it seems to me, your assumptions are based on the fact that there is going to be a nuclear attack. Then in the postattack period there may be the possibility, not existing in your assumptions, for example, of an attack on this country by troops coming in, which would upset this relationship. Did you take that into consideration?

DR. FAIRMAN: Well, if that's what the situation is, it is quite a different one. I came down here on an invitation to talk about what happened after a nuclear attack and that's what I talked about. There won't be a separate fee for what I am going to say now, General Hollis, I'll just go ahead and do this gratis.

If indeed troops landed and moved into New England or California, or into some other part of the national domain, we would have a situation such as we have not had since the Civil War. And that produces very different problems, because there the military must effectively be in control of an area of operations. That becomes the great consideration. You must direct people as necessary to achieve that mission. All that is requisite you go ahead and do. But don't do more than is requisite.

The old Milligan Case, which still is, I take it, good authority-- the only question is what it is authority for--says, don't do more than appears really necessary; don't take over the administration of justice where the civil courts are able to function. As a matter of fact, in that case, it was the civilians, notably, the Governor of Indiana, who wanted Milligan to be tried by military commission. General Carrington, who was out there, was prepared to let Milligan be tried by the civil authorities. As the affair turned out, it was a great boon to Milligan; it undoubtedly saved him what otherwise would have been, I suppose, a capital sentence in a civil court. Because in the end he got off. I am interested if anybody in the Armed Forces thinks we need now to concern ourselves about a land attack upon the country without a preliminary nuclear softening up.

QUESTION: Sir, I am curious to know what the bill might say, or what you might say about the relationship of FCDA to ODM.

DR. FAIRMAN: Let me in considerable measure disqualify myself right now. I have never worked in that kind of business. It is off on the periphery, and I speak with a good deal of hesitation.

I have not been favorably impressed by what we have achieved to date. I was not favorably impressed when, shortly after Operation Alert 1955, the Director of ODM was exuberant in applauding the resort to martial law as a great aid to sound planning. He was quoted as saying that it would cut at least one and possibly two years off the work of preparation that ODM must do. Talk like that made me completely mistrustful of what was being done in his organization.

The predecessor of the ODM was the National Security Resources Board, created by the National Security Act of 1947. I was trying the other day to recall who was the Chairman of the NSRB; I did think it up, after a while. I don't have such trouble in remembering who was a Cabinet officer at a given time. My point is, I believe public consciousness is never going to fix upon the head of an agency known only by some letters, whose duties people don't understand, which agency seems constantly to be undergoing some governmental reorganization. A Cabinet officer is likely, I think, to lie awake at night, worried by the thought that, if something eventually goes wrong that was chargeable to him, his countrymen and history will hold him responsible. With the director of a little-understood agency, I believe the responsibility is not so keenly felt.



Moreover, when it comes to arranging common action where several parts of the Government are involved, one who speaks as the representative of a responsible permanent Department is in a much stronger position than one who speaks only for a coordinating agency.

So my feeling has come around to the idea that we would better get the responsibility for planning all aspects of nonmilitary defense fixed upon one department. I am exceedingly mistrustful of facile explanations that one matter has been delegated to this department and another matter has been delegated to that department, and that presumably they are all pursuing these delegated tasks. It is a lot easier to hand out these chits than to make certain that they will be honored on demand. I feel very fearful that, on demand, these delegations might prove to be only worthless paper.

DR. HUNTER: Dr. Fairman, I want to express to you our appreciation for your very effective and authoritative presentation of this matter. You have made an important contribution, not only to our course, but to national thinking in this field. Thank you again.

DR. FAIRMAN: Thank you, Dr. Hunter.

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