

MAINTAINING PUBLIC AUTHORITY IN THE EVENT  
OF NUCLEAR ATTACK

3 April 1959

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NOTICE

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INDUSTRIAL COLLEGE OF THE ARMED FORCES

Washington, D. C.

Dr. Charles Fairman, Professor of Law, Harvard Law School, was born in Alton, Illinois, 27 July 1897. He received the following degrees: A. B., University of Illinois, 1918; M. A., 1920; Ph. D., Harvard, 1927; graduate work, University of Paris, 1925-26; LL. B., University of London, 1934; S. J. D., Harvard Law School, 1938. He taught at Pomona College, Harvard University, Williams College, Stanford University, Washington University, and since 1955 has been in his present position. Dr. Fairman served in the Army during World Wars I and II and was active in the Reserve Corps between the wars. He has been consultant to Commission on Organization of Executive Branch of Government; consultant to Provost Marshal General's Office; and chairman, Committee of the Law of Occupied Areas in the American Bar Association's Section of International and Comparative Law. He was admitted to the bar in the District of Columbia, Missouri, and Massachusetts and is a vice president of the American Society of International Law, and a member of the Board of Editors of the American Journal of International Law. He is the author of "The Law of Martial Rule," "Mr. Justice Miller and the Supreme Court, 1862-1890," "American Constitutional Decisions," and many articles on judicial biography and on constitutional and international law. This is his fifth lecture at the Industrial College.

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COLONEL PORTER: Gentlemen: This morning we have another of our vertical series of lectures, which, as you know, do not relate directly to the current course of instruction.

This morning's talk on "Maintaining Public Authority in the Event of Nuclear Attack" is related rather closely to our final problem in the final unit of instruction which begins later this month. We know from your comments during the year that you are concerned about this final problem.

This morning's lecturer, Dr. Charles Fairman, is one of the country's outstanding authorities in this field. You have seen his biography and you know that he is a man of broad interest and that currently he is a Professor of Law at Harvard Law School.

Dr. Fairman, it is a pleasure to welcome you back for the fifth time and to introduce you to the current class. Dr. Fairman.

DR. FAIRMAN: Thank you, Colonel Porter.

General Mundy, Gentlemen: We start with a clear recognition of the prospect before us, the danger of a nuclear attack upon this country. The contingent possibility of war will be brandished by our opponents in their endeavor to shake us. Insofar as we develop an assured capacity to survive, the chance of gain to our enemies is reduced. We badly need to attain for ourselves a well-founded confidence that, however severe the blow, we would not be destroyed or broken in spirit.

We start, too, with a clear recognition that, if the nuclear attack did befall, our objective would be to restore our normal administration of government under the Constitution of the United States. We have an unshakable attachment to that system as the means to our common defense and welfare.

These are platitudes, I know. Yet it is well, as we face up to a danger whose magnitude surpasses anything in our experience, to draw strength from the values we know to be true and enduring.

The American Government must be the framework within which the Nation would carry on after an attack. Our history and our loyalty make that the great association within which our search for survival must be pursued. Our Government, Federal in form, was not designed to provide a general concentration of power at the center. It is a government of enumerated powers. Yet one great power and duty is to provide for common defense. Under the circumstances of a nuclear attack, the effective discharge of that national responsibility will require the gearing of National and State governments together for a single effort. There must be a direct line of authority running from the President to the Governor of the State and on down to the local units.

This should not be thought of as a violent supplanting of State by Federal authority. Rather, it would be the exercise of leadership and guidance where all the elements of the Nation's strength must be gathered together.

The State and their subdivisions must be maintained in the performance of their respective tasks as a part of the unified action of civil government at all levels. I will discuss in a moment what seems to me to be the method and the mechanics we must use. It is expected, however, in speaking to officers of the armed services, that I consider particularly the role of the Defense Establishment and the maintenance of public authority in the event of nuclear attack.

It occurred to me that it would be useful to that end if I set out what, as I conceive, would be a suitable directive to the Defense Department in this matter. This will express what, it seems to me, is sound doctrine in the light of our historical experience and of the danger for which we must prepare. After I have talked doctrine I will come to graphic representations to illustrate how things should, and how they should not, be done. Here is my conception of a proper directive:

So far as military forces are employed in civil defense operations, their role will be to aid the civil government to perform its own proper functions. That there be continuity of effective civil government is the objective always to be held in view; the part of the military forces in this regard is to render support, in response to need, to such extent as may be practicable. Assistance may be in the form of supplies, where available. It may be in services, of such a nature as the civil government finds needful and as the military forces are prepared to render. Provision of temporary feeding and shelter, treatment of the injured, movement by military transport, and improvisation of communications are examples of such support. Military aid to civil defense involves a diversion from the primary mission of the military

forces; civil-defense planning must take account of the limitations on such aid.

Military forces will not be placed under any command other than the chain established by law, coming down through the Department of Defense. When directed to lend assistance to some part of the civil government, the forces will receive through the military channels a directive fixing the scope within which they are authorized to act. Within the limitations of that directive, their role will be to aid that unit of the civil government to which they are sent in performing its functions in the face of the disaster.

The military forces will not be under the command of the unit of civil government, nor, on the other hand, will they supplant or control it. Success in such a situation involves good sense and mutual respect, and a clear recognition on both sides that the objective is the effective discharge by the units of civil government of their own responsibilities.

It must be recongnized as a possibility that in some areas enemy action may, for the moment, destroy the civil administration. This would call for the prompt repair of the lawful structure according to plans for the continuity of civil government.

Military forces sent to cope with such a condition should at once make contact with competent civil authorities and from the outset should promote the prompt restoration of the civil administration. The civil government operates only through units and agencies created by the law and through officers competent to act for such units and agencies. A resumption of effective action by those lawful entities--not the military creation of new entities--would be the proper course. Offices should be filled by civilian replacements, not by the installation of military personnel.

The military force must resist any tendency, whether from within the force, from civil functionaries, or from the mass of citizens, to draw the military force into any protracted involvement. The role of the military force is to support; if need be, to restore; but not to relieve the units of civil government of their proper responsibility. There must be a candid mutual understanding between

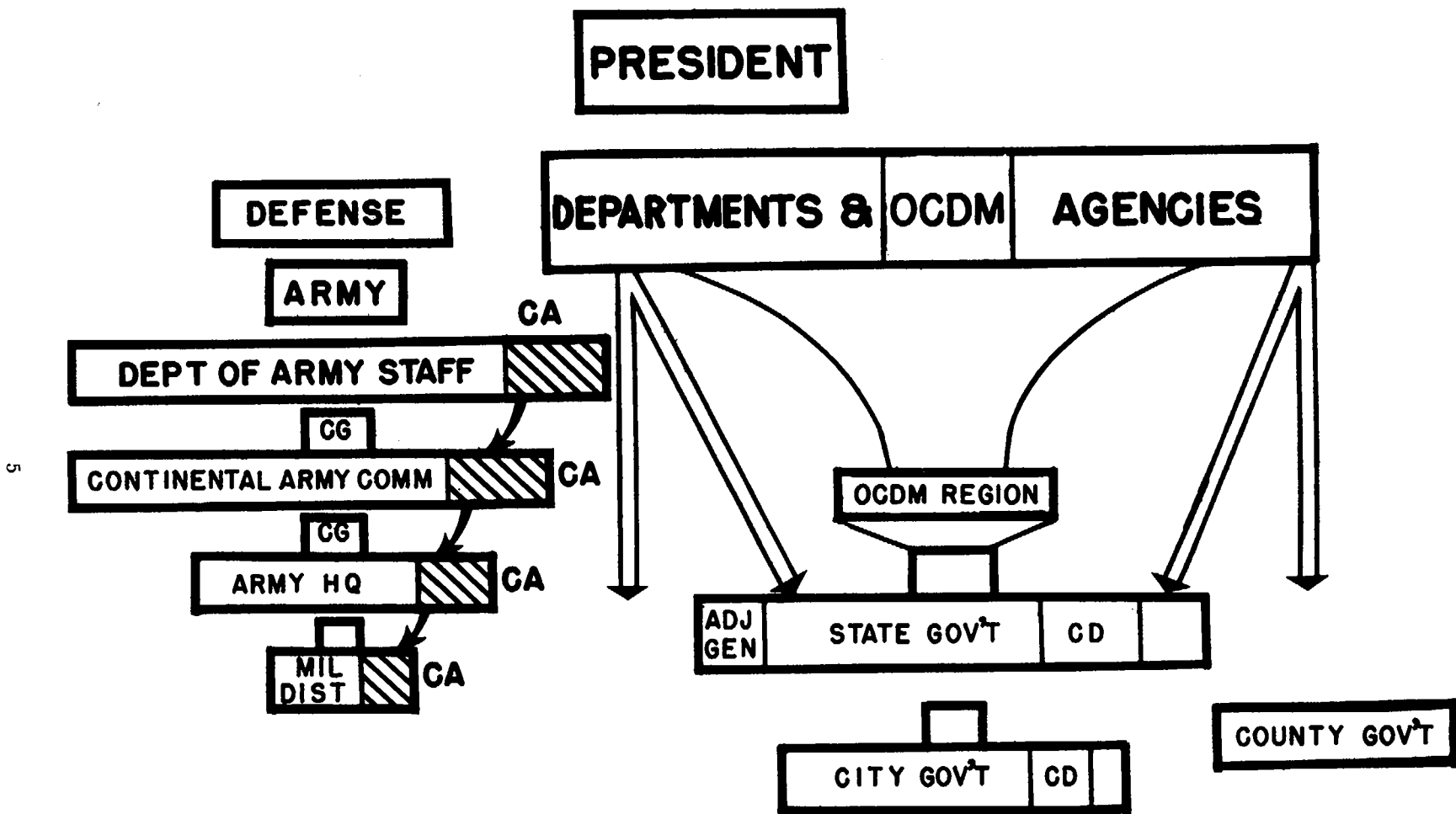
military authorities and civil authorities wherever the planning or conduct of civil-defense operations brings them into proximity. To this end, personal acquaintance and confidence are important. In the event of an enemy-created disaster, it would be too late to work out a concert of action. Gaps, collisions, uncertainties, and disagreements might prove fatal. It is essential that there be attained, in advance, a common understanding on needs, capabilities, objectives, methods, and principles of action. This understanding must be confirmed by testing in joint exercises, so that smooth-working relationships are achieved and at all times maintained.

It is the responsibility of the Department of Defense and of the service departments to give instruction, in accordance with the principles thus expressed, to military personnel so far as there is reason to expect that they may be concerned with civil-defense operations. This is particularly a responsibility of the Department of the Army, as the service department principally involved. Civil-military relations, in the event of an enemy-created disaster, would be concerned with an eventuality of many variables. Reaction must be unfaltering, responsive to the situation as it presents itself, and pointed always toward the preservation of effective civil government. Training within the military forces will be directed toward an understanding support of that purpose.

So much for what, as I see it, are the proper relations between the military and the civil authorities in the matter of civil defense. We come to graphic representations.

Chart 1, page 5. --First, a chart suggesting the magnitude of government at its various levels. Each State has its own administrative organization and its own system of local authorities--counties, and cities. What is set out here is merely typical and greatly simplified. A brash newcomer might suppose that in time of war many of these agencies might be abandoned as unnecessary. In truth, the civil administration is in the main performing functions that have become essential to our well-being.

CHART 1



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Consider the social services, whose growth over the past half-century has been a pronounced aspect of our development. I have no doubt that in time of national disaster these agencies, ministering to human wants, would prove among the most vital of all our institutions.

So I urge on you a healthy respect for the structure of American Government. Refrain from any hasty supposition that in time of real need much of it could be abandoned or replaced by some improvisation.

An uninformed citizen, looking at a chart of the Department of Defense, or one of the component services, might be inclined to suppose that it could be simplified in the interest of economy, and a pilgrimage through the Pentagon might even magnify that preconception. Of course we all know that that would be quite shortsighted. We remember that "each thing in its place is best, and what seems but idle show strengthens and supports the rest." With the civil government as with the military administration, the outsider is prone to oversimplify what he does not understand.

Ours is a popular representative Government. At each level authority is derived from the consent of the governed. Statutes and ordinances go forth from the capital, but the power to make and enforce them flows up from the people. Therein lies the moral authority, the true strength, of those in public office. That source of strength would be indispensable in time of nuclear war.

Sound planning for wartime administration must provide an unobstructed outlet for the expression of public sentiment. This means that legislative bodies--the Congress and the State legislatures--must be kept actively in being. Vacant places must be filled by some method of designation established by law in advance of the emergency. We would need these lawmaking bodies to give validity to the extraordinary measures that would have to be taken. We would need them to give expression of popular consent to the imposition and allocation of burdens the survivors must bear.



The executive officers, themselves, would need these representative bodies to give that criticism, guidance, and support without which they lose the common touch.

The courts of law must be kept in being. They, too, would be indispensable. In our scheme of government power is limited by law, and the courts apply what long ago was called the "golden Met-wand," the measure for testing the validity of executive action. Of course the law measures by reason: action that would be excessive in normal times may be justifiable and valid because reasonably necessary to meeting an emergency. Judges are familiar with the discretion, the wide range of honest judgment, that may be vested in executive officers; but official discretion is not held for the officer's personal satisfaction or willfulness. To be lawful, measures must be conceived in good faith and directly related to some end the law has fixed. I am paraphrasing some language of Chief Justice Hughes.

The courts in time of war would have essential functions quite aside from that of testing the validity of executive measures. They would be needed for making a host of adjudications in private matters, to enable business to go on. Men are dead: who have succeeded to their property? In particular, who may now vote their corporate shares? Business corporations seek to act in ways and for ends that normally would not have been attempted: will the action be valid? Could other parties rely upon it? Trusts must be administered under circumstances not foreseen by the trustor. The acts of agents are of uncertain validity where their principals have disappeared. And yet it would be important, as rapidly as possible after a nuclear attack, to restore production and stimulate the flow of essentials.

The courts would have a vital function to perform in establishing by their adjudication the foundation of validity on which alone men of affairs could act. The British Parliament, on the eve of World War II, passed statutes to insure the continuity of the courts and to enable them to meet the needs of the civil community. We need legislation, Federal and State, to insure that our own courts could perform their essential role.

I have not yet mentioned the need for the continued exercise of criminal jurisdiction in time of war. That, too, is important, though I think the matter is generally exaggerated. I believe it to be a gross misconception to suppose that the great need on the morrow of an attack would be to cope with looters. The malefactors who poke about a radioactive city may be left to their fate. I think the concern about what is called "law and order" is largely misconceived. I would expect that

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fleeing people would, where they could, appropriate what they needed to survive. You and I would take the same sensible action. I would not treat such people as criminals.

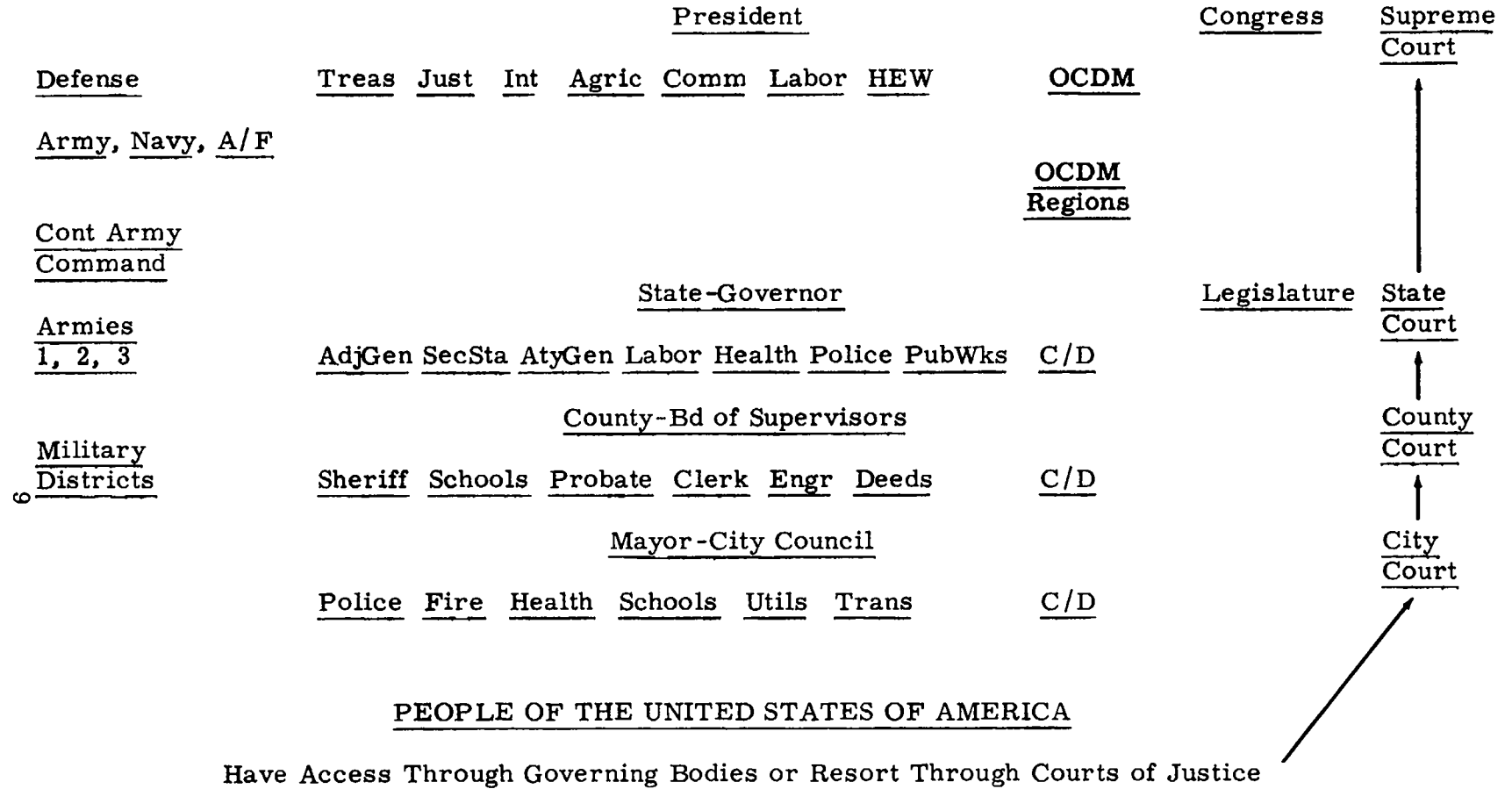
Such appropriations as necessary would, in the great waste of life, seem a very little thing. There would be major problems of policing, which, as I see it, would be more a matter of guiding stricken men to safety than of repressing evil conduct. It is a dangerous misconception to dwell on repression and punishment when intelligent affirmative action will be the great need.

The central core of government is administration--the bureaus and the departments that carry on the myriad public functions. This structure is made up of civil service servants and on top the politically responsible heads. This is as it should be. Politics is not a bad word. Politics is the art of the possible. Politicians perform an essential function in our free society. I am well aware that many now employed in this administrative structure are of limited capacity, and some are mere time-servers. The same is true of private industry--and possibly, in a measure, even of other large organizations. In time of disaster natural leaders would appear and somehow make themselves useful at points of real responsibility in the fabric of the community. This, too, is as it should be. I am concerned with the offices rather than with their momentary occupants. I would impress upon you the value of the structure, with its allocations of competence fixed by law. Here is the legal power--to tax, to regulate, to license, and so on. Here is experience. Here are the vital records and acquaintance with their use. No informed person would think of supplanting or disrupting the structure of civil administration.

I called for a direct line of authority from the President to the Governors and so on down, and said that I would come to the method and the mechanics.

Chart 2, page 9.--Normally, of course, there is no such gearing of Federal to State authority. In principle, the Federal Government carries out its functions by its own agents. In actual practice, there is a considerable amount of cooperation in technical fields. In time of disaster these informal practices must be enormously magnified. Relief must be brought, displaced persons must be moved about, manpower must be mobilized, and no government inferior to that of the Nation would have the stature to direct it.

CHART 2



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I think we need not worry much about State-rights sensibilities. I think no State authority is going to take umbrage when the President rises to the full height of his office. Presidential leadership would seem so indispensable, so patently in accord with the necessities of the occasion, that there would, I feel confident, be an eager acquiescence. The cry would be, "Tell us what to do. Show us the way to safety." I don't suggest that things would go smoothly. Of course there would be confusion and ragged performance. But I believe there would be no trouble about Federal usurpation or State rights.

In any event, the power to withhold Federal benefits should suffice to maintain conformity.

The Office of Civil and Defense Mobilization has regional offices. The regions correspond to the Army areas. Each has a Director, with a staff. Each has a Regional Operations Board, bringing together the field representatives of the various Federal departments and agencies. The regional office maintains constant touch with the civil-defense agencies of the State. This is, so to speak, the command channel for civil-defense activities. If a portion of the country were cut off, the regional office would assume leadership in carrying on.

Of course Federal guidance and direction would be much more pervasive than the mere responsibility for civil defense. Many Federal agencies would be sending directives on matters within their respective fields. We must think of activities far more varied than those carried on by personnel wearing a CD brassard. The channel of civil-defense authority is, however, comparable to the command channel in military administration. Other contacts up and down may be likened to the technical channels.

Of course there would be great confusion while ways for getting things done were worked out. A nuclear attack would inevitably produce great confusion. But the better prepared we are to set up appropriate ways for restoring essential services, the quicker will be our recovery and the more certain our survival. A well-contrived plan, frequent practice, and readiness to make a quick hitch where something has been broken, should see us through.

Now and then someone has the idea that the easy solution is for the Army to take over. One hears this much less than one did a few years ago. We should, however, take a good look at the idea.

Imagine an attempt at a nationwide military administration. Down the Army channels, designed for the administration of the military establishment, would be poured the directives from the various departments and agencies of the National Government--completely unfamiliar business, you will agree. The channel of civil authority that I described, running down through the Federal regional offices, would be supplanted or absorbed by the military channels--Department of the Army, Continental Army Command, Army Headquarters.

The Army is not experienced in dealing with civil administration--or with civil administrators--in the nonmilitary aspects of government. Not only is the subject matter unfamiliar--the mood of military administration and that in civil administration are rather markedly different. There is, quite properly, a certain preemptoriness in the one that would produce resentment in the other.

Remember, civil defense must be carried out largely through the personnel of State municipal offices. If Federal military authorities were imposed upon State civil authorities on matters that are the normal concern of the latter, the prospects for quick understanding and effective results would be very poor.

Again, civil administrators in a democracy are prepared to take account of public reactions. They learn to absorb criticism without resentment and to seek to remove causes of discontent. This is not called insubordination. In contrast, even in our rather democratic service, the channels that carry orders down develop a certain resistance to the transmission of complaints up from the field. The gripe column of the "Stars and Stripes" comes closest to performing that function. A military administration finds it very difficult to take proper account of popular criticism or to avail itself of popular initiative.

I have spoken of moods and modes of thought. Look at the actual mechanics. If the Army were made the channel for administering the country, it would have to install at every level a new staff section to deal with this utterly new business. Such sections vary in composition, according to the local situation.

Chart 3, page 13.--Such a section will have officers to deal with the various types of civil administration that flow through the headquarters--finance, rationing, labor, education, agriculture, and all the rest. The Army does not have that kind of specialists on tap. When, in World War II, it was seen that we would get into the work of administering

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occupied territories, civilians of the requisite experience were recruited. To a large extent they were on leave from their normal offices. Many of these officers were men of great distinction. It took months to select them, to give them general training, and then to draw them into the special work in planning for the particular operation before they were ready to function. The more one knows about that memorable experience the more clearly one sees that such a solution would not be appropriate for the period following a nuclear attack.

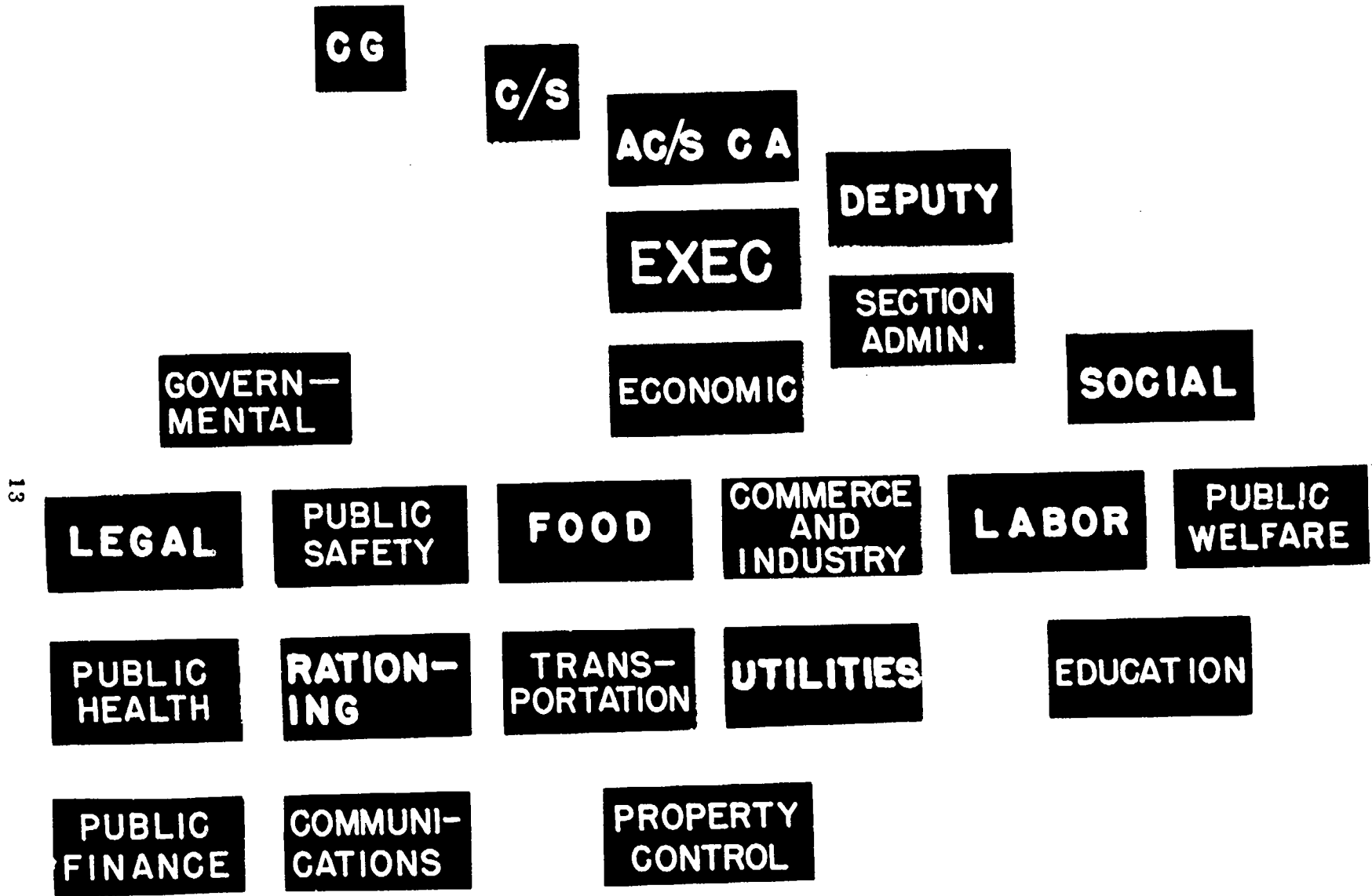
People experienced in civil administration would be needed right in their own communities. It would be utterly unrealistic to draw them from the civil community and bring them into the military service with the view to employing them in a military administration of our own country.

I do not overlook that we have military government units in the Army Reserve. They might perform useful functions at points of civil-military contact and in aid of the civil administration in the event of a nuclear attack. How useful they would be would depend upon the tact, the sophistication, the elasticity, and the good sense of the individual officers. It would, I feel certain, not be proper to make the Army's military government reserve the key to our system of postattack administration.

In this talk about the Army taking over it is always assumed that the Army has a present capability of doing the job, which it has not, and that somehow Army Headquarters are going to remain effective in the midst of the desolation. It is quite unwarranted to suppose that Army Headquarters at Governor's Island, Chicago, San Francisco, and the rest would not be the subject of the fate that befell civil communities all about them. A military administration on a nationwide scale must be rejected by any serious student of the problem.

There is, however, a line of thought that runs like this: After a nuclear attack there would be many isolated communities. Life would be reduced to its lowest terms. Each locality must be pulled together with little immediate aid or direction from the outside. Wouldn't it be our best hope to count upon units of the Armed Forces stationed nearby to take the initiative in resuscitating the civil community? This notion calls for rigorous analysis.

CHART 3



13

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Maybe there would be some military installation in the locality; maybe there would not. If there were, maybe it would remain in operation after the nuclear attack; maybe it would not. Maybe it could stay in place and become engaged in local relief; maybe that would not be consistent with its primary mission. Very certainly, as I suggested in the proposed directive, if a unit of the Armed Forces could relieve human want, lend transport, or restore communication with the outside, certainly that would be most useful. It is one thing to improvise lines of communication; it is quite a different thing to grab the instrument and start sending commands along the lines. At times when I have heard eager talk about putting the Armed Forces' communication equipment into service after a nuclear attack, I have wondered whether there has been a clear recognition of the difference between setting up the equipment and issuing the messages. I repeat-- if the Armed Forces can lend aid, it should be done. Note, however, that the respective Chiefs of Staff have not been willing to give any firm commitment on that score. No governor, no mayor, no responsible officer of civil administration has any assurance on which he may count for planning. The prospect of military supplies and facilities is no more than contingent, speculative, precarious. It won't do to write a scenario to give the Army the heroic lead if, but only if, it happens to be in town with nothing more pressing to do when the show comes off. Better let it seek recognition as the best player in a supporting role.

Another line of thought that to me seems erroneous: Count on military administration for the first little while, until the civil authorities get on their feet. Again this presupposes that there are Army units on the spot, all ready to take the job. But there is something more fundamentally erroneous. The entire conception of two distinct phases seems to me wholly unrealistic. Day would run into day, imperceptibly, as when one is recovering from some tragic affliction: one lives as best one can, for the moment. There is no awareness of stages. This will be true after an attack. Those in want will seek to get in touch with those who can render aid. Higher units of government will seek to convey their messages of guidance. Corporations will be calling for reports from their branches. There will be a bidding for supplies and for manpower. In a word, paths of administrative action will develop, and, day by day, will be worn deeper as men learn where to go to get what they want. The entire pattern of our workaday life is simply an elaborate network of paths worn by habit. From the moment the survivors emerge from their shelters and look around, paths are going to be established, and presently will become habitual.



If we were to go on the theory that we start with the military administration for a supposed first phase, don't you see that men would quickly become dependent upon it however inappropriate and inconvenient? The more the business that flowed through its hands, the deeper the Army would be committed to the enterprise. As with any other habit, it would be more and more difficult to make a break.

The truth is, we must have, before the event, a clear conception of the goal toward which we would be working, and the method to be followed in working toward it. Then, from the earliest days of disaster, we should be exerting our initiative and enterprise toward that established goal. The idea of two phases, first military administration and then a throwing of the switch, seems to me to be mischievous.

Now what is being done to ready the civil government for the tasks it would have to perform? On the subject of our particular concern today, continuity of government, the OCDM has made good progress in the year and more since Mr. Hoegh took the helm. It has developed a draft constitutional amendment and draft statutes for the States. It has done as much as it can to induce the several States to adopt these measures. The Conference of Governors has gone on record as favoring adoption. This necessarily takes time. In Massachusetts, for instance, it takes four years to amend the Constitution. California has taken the lead. Last November it was one of three States that adopted a constitutional amendment empowering the legislature to enact laws for the preservation of government. The California Legislature had already enacted such laws to become effective upon the adoption of the amendment. In most of the States the legislatures met last January and generally over the country measures have been adopted or are in the course of adoption.

So the tide is coming in, however slowly. Of course this is only putting laws on the books. Much must yet be done to make viable arrangements. But much has been accomplished in the past year. How much, how very much, must yet be done!

Let me suggest some of the stubborn problems with which the Government is only beginning to cope. Let me start with the banks, the agencies for dispensing credit, the places where men go to get the stuff with which to make purchases. On the morrow of an attack, many, perhaps most, of the banks would in fact be insolvent. Let us suppose that they have preserved in a safe place the evidence of their assets. Let us suppose that the bank can prove that it held such and such stocks and bonds and such and such notes, secured by mortgages upon such

and such property. The securities were merely pieces of paper evidencing that the holder had a certain equity in some enterprise, usually corporations, and the corporation's plant and inventory may have been destroyed. The bank had loaned credit on the security of certain property, but the substantial thing may now be dust floating in the ethereal void. The banks may in fact be insolvent; at least it would take a long time to discover what remained of the essential values underlying any bank's paper assets.

And yet, necessitous men would instantly seek money for elementary needs: they would want to draw upon their accounts. As soon as we go beyond relief in kind, as soon as we seek to do more than feed survivors in mess lines and bed them down in temporary shelters, we must provide them with means for drawing upon their bank balances. The Government could not simply give the survivors paper script to serve as money: that would be the crudest sort of fiat finance. Some way must be found to enable banks rather promptly to make limited payments to their depositors. To make that possible, the Government, it seems to me, would have to purchase bank assets of uncertain liquidity in exchange for some form of government obligation that would, over a period of years, be self-liquidating. So the Government, probably by the agency of some new credit corporation within the Federal Reserve System, would provide the banks with money to pay out, and in return would acquire bank assets whose ultimate liquidity would depend upon what physical property had not been destroyed.

Banks could now make payments in limited amounts to their depositors. Moreover, banks could now give credit to would-be producers who were seeking to carry on essential operations. I will return to these would-be producers in a moment. The Government, through some credit agency, would now be issuing paper money against securities of uncertain value. How would the Government go about recouping itself? What would give substance to the currency it had been handing out to the banks? We must, I think, accept the proposition that those whose property was destroyed by the nuclear attack would be compensated out of property that remained. The attack was aimed at us all. In the enjoyment of what remains after the holocaust, we must share and share alike. Government must effect a colossal redistribution of property, taking a part of that which remains and giving it to survivors whose property was lost.

How could this be done? One possibility, of course, is a scheme of war-risk insurance. Establish the premiums that must be paid, in advance, in order to be entitled to reimbursement when the loss

occurred. The property owner who did not now insure would then have only himself to blame. On various grounds I think this must be rejected. How could the premium be computed on so utterly unpredictable an event? How great a fund must be built up? Over how many years would the payment of premiums extend? These questions are unanswerable. The casualty to be insured against is not such a risk as actuaries can compute in terms of experience. Further, any corporation that sought to purchase insurance must pay so heavily that it would put itself out of business as against competitors who elected not to insure. Still further: Who can suppose that the American Nation, after a nuclear attack had occurred, would ever stand by the unforgiving proposition that he who had not taken insurance had chosen his bed and must lie in it. As a matter of justice and as a matter of practical politics, no such discrimination could be maintained. Inevitably, those who suffered major loss would have a strong moral claim against the Nation. And that claim must be met out of the mass of property that remained.

Congress, the political body that must consider and give effect to such claims, would certainly afford relief. The method for affording such relief is a matter that should be studied and prepared now. Let us suppose that of the total national wealth at the moment of the attack say one-fifth has been destroyed. The Government must levy upon the owners of the property that remains a contribution of something like 20 or 25 percent. You may think of government as the sovereign laying one mammoth tax, or you may think of government as the great insurer collecting the premium for this universal coverage. Whatever the rationalization, government must levy and collect a sizable fraction of the total remaining national wealth.

Of course this could not be done within any short period. It would have to extend over, say, five years. The taxpayers, or the premium-payers, would have to have considerable time to raise the levy out of income or by liquidation of capital. Moreover, it would be impracticable for the beneficiaries to employ their compensation at once. Government, on the morrow of an attack, would have concerns of a much more instant order: What has been knocked out by the attack? What remains? What repairs should at once be made? What production should be expedited? Whatever the work that must have first priority, three elements must be brought together--raw materials, manpower, and credit.

You will recall that I said I would return to producers seeking to carry on essential operations. They obtain credit from the banks, which make loans for those enterprises to which the Government has given

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priority. They seek workers and look to the employment offices of government to find among the displaced persons and others the manpower they need. Government on one hand would be seeking to resettle the families that had been bombed out and on the other hand would be seeking to find the types of manpower needed in production. Government on the one hand has supplied banks with currency and on the other has a lien upon all property that remains after the attack. Gradually it enforces that lien, redeems the currency it was obliged to issue, and begins the paying-off of benefits to those whose property was destroyed.

This is an exceedingly rough sketch of what, I suppose, must be done. I, myself, am no economist. I have drawn upon a very excellent paper, prepared in the seminar I conduct each year, by Mr. Charles F. G. Raikes, now of the New York bar, who had had the benefit of very adequate training in economics before he came to law school.

I have presented it to make these points: First, the transcendent importance of the National Government in respect to credit, production, rationing, and manpower. Next, the complexity and interdependence of the measures of relief and restoration. How difficult it would be to bring into accord the many interrelated programs that must be carried out concurrently. Even while millions of affected persons were still taking cover against fallout, in areas far away measures of control and relief must instantly be put into operation. How utterly unsuited to such a complex plan for relief would be any crude prescription of mere "law and order," "Shoot the looters." Our great need is, first, to work out these measures of economic, industrial, and administrative action; second, to acquaint the people with the grand design and with the part each individual and each family must play. This would call for a high form of political leadership--comparable to that which Churchill gave to England-- in World War II. This was the theme of a very excellent letter to the Editor of the "Washington Post" last Tuesday 31 March, by a Mrs. Meigs. I know nothing of her, but she compressed in that letter about as much sense as I have heard from anybody, high or low, in government.

Until we have worked out such a far-flung plan, it is unreasonable to reproach the mass of citizens for alleged lethargy or indifference. Responsibility lies first with the national leadership, and next with responsible administrators. Until adequate plans have been worked out, it is premature to call for public response. In the long view, our history gives reason to believe that, adequately prepared in mind and spirit, our people would be staunch enough to endure, sustained by those sources of strength that have not failed us in the past.

CAPTAIN THOMPSON: Gentlemen, Dr. Fairman is ready for your questions now.

QUESTION: Sir, I am a little more concerned about the maintenance of law and order than you have expressed, Dr. Fairman--not particularly the shooting of the looters. But, when we say this mass of people may be evacuated and we want to guide them to a place of safety, and as reasonable men they will take what they need for survival, this might be fine so long as someone else doesn't need it worse and it belongs to someone else. I am thinking of the undamaged areas, which would be primarily rural and which would not be well policed, and where, further, civil police are inadequate and not mobile enough to take care of the population, if there were such a group that could be put in these areas.

Would it not be well to have a mobile military force to assist, again, civilians in policing the maintenance of law and order in some of these evacuation areas?

DR. FAIRMAN: I think doubtless the answer is yes. It is a question of degree. I can't imagine that people would just be streaming across the country indefinitely. Certainly you would set up collection centers, and in just ordinary police operations you would guide the survivors into places, and then you would transport them in some orderly way over to where they ought to be. Very likely a military police force could be helpful.

My great concern is that, once you start writing this into the scenario on the theory that you want it there no matter what, like writing a play where you've got the leading actor and you write the play to suit the actor, I am very mistrustful. All our traditions of military action in the event of domestic disorder have tended to give emphasis to the take-over business, and because I am so mistrustful of that I tend to minimize these other things.

QUESTION: Sir, my question concerns the adequacy of the President's legal authorities in time of emergency. You wrote a little pamphlet back in 1955, I believe, in which you suggested that we should have some standby legislation to strengthen this line of authority from the President down to the States and the cities. I wonder if you still feel that way about it. I note that we have had an amendment to the Civil Defense Act since this was written. I also note that in your pamphlet you called quite a little attention to the actions of Lincoln during the Civil War and his feeling about the President's authority. I was just

wondering how you feel about this. What kind of legislation do we need, if any, taking into account the President's talk.

DR. FAIRMAN: That pamphlet to which you refer is one that was prepared for the lawyers who met at the Harvard Law School's Marshall Bicentennial Conference, the paper on "Government Under Law in Time of Crisis," and it was directed primarily at a lawyers' audience. I stressed the legal aspects. I stand by all I said there. I was very hopeful that the present Administration would support H. R. 2125 and companion bills that were evolved by Mr. Holifield's subcommittee. It was very significant that Republicans and Democrats alike supported one measure with no politics in it. I felt great comfort when, after Mr. Hoegh came to the Civil Defense organization, a new national plan was written and, without awaiting further legislation, said, very properly, what is as true as anything can be: "This is primarily a national responsibility." Now, I'd be happy to have legislation that said that, which is so true, so obvious, and so essential. I'd not worry much about absence of the statute if you really had the effective preparation on the administrative side to do the things that would be necessary. I think there would be no excuse for sitting and twiddling your thumbs because you didn't have a statute that told you what would be inevitable.

I am very happy to know that there are some members from OCDM in the room, and I think the finest thing that has happened to the organization is Governor Hoegh's coming to it.

STUDENT: Thank you. I agree with you entirely.

DR. FAIRMAN: I would be happy to have that conveyed to him. I'd be happy if Congress passed the right kind of legislation, but I hope you gentlemen in OCDM won't wait until it does.

QUESTION: Dr. Fairman, in your plan I notice that there was omission of any reference to the Executive Reserve Plan. I am just wondering whether you have overlooked that or found it to be inadequate, or just what your comments would be on it.

DR. FAIRMAN: I was not acquainted with it except in a very vague way. One of your brethren just spoke to me now. As I understand it--and you correct me if I am wrong--the idea is that you have a group of elite business administrators, people of the trouble-shooting sort, who could be plumped down wherever they were needed to get things going.

I don't know whether they operate primarily in the field of business administration or whether they are available in the structure of government. Perhaps you could tell me right now what the answer is to that.

STUDENT: I think basically it is to perform this function of continuity of government, more or less as it pertains to rehabilitation and reconstruction. But the purpose is really to perform a Federal function with the OCDM regional offices.

DR. FAIRMAN: Well, I would think first of all that it was important that that was coordinated with OCDM.

However able a business executive might be in his own line of work, that doesn't mean at all that he would be specially qualified to play a responsible part in the continuity of government. I am not acquainted with the program, but I trust that it has been cleared with Governor Hoegh.

QUESTION: Dr. Fairman, I think, speaking for the military, we thoroughly share your enthusiasm for your plan which keeps the military out of the civilian government business. However, due to the certain virtues of mobility, self-containment, organic equipment, and so on, the military is almost invariably called in to assist where local natural emergencies take place. I cannot help thinking that under attack conditions in some areas where the military is available complete voids of civil government must exist, and history will repeat itself. I am most interested in your comments now as to how the Government or the military extracts itself from this position, because it must inevitably run a military-type election, or it must select a civilian, or it must violate practically all of the prohibitions which you wrote into your plan.

DR. FAIRMAN: Well, if it must, then I think it had better stay away and not mess the situation up. One of the most discouraging things that has happened in the sound development of plans within the last year, I think--I wasn't going to say it, but, since you raised the question, I will--was a pronouncement by the then Commanding General, Continental Army Command, who was invited to speak to the Association of State Civil Defense Directors. I don't know who wrote the speech for him, but it had a very alarming air. The newspapers reported it under such headlines as "Army Would Rule U. S. Cities." There was a discussion of "Case A," where the Army would merely support, but the emphasis was on "Case B," where the military authorities would assume full responsibility. The Commanding General in the area would conscript, commandeer, punish. State and local boundaries would be disregarded: New military zones would be created.

Now, the moment you scrap those jurisdictional lines, you create a thing that is utterly unknown to the law. It is known only to the order that set it up. It can't lay a valid tax; it hasn't any records; it exists only while you are there. And presently you'll find that you'll have to stay there, because you have set something up that will fall the moment you go. If you are drawn into civil defense operations, why do you have to set up your own election machinery? I would suggest that, if there is a void in the structure of civil government, you get in touch with the next element up above and the elements down below that still exist, and say, "Here we are. What can we do?"

The plans now being carried forward by OCDM look for State legislation that will provide continuity--somebody to step into the Governor's office, somebody to step into the Mayor's office, somebody that doubles. Arrangements will be made to have substitutes backed up, five, six, seven deep. I don't know why those substitutions wouldn't be carried out effectively, as effectively, that is, as anything can be done in wartime. I am most mistrustful of the whole notion of the Army taking over, because I think it inevitably would be heavy-footed.

One aspect I have observed in Civil Affairs is this: the Civil Affairs Staff Section, however able and well-directed it may be, has to obtain the concurrence of other staff sections--G-1, G-4, and the rest--for virtually every important action. And the officers of those sections are constantly inclined to withhold concurrence until they can impose their own notions of what the Civil Affairs Section does about strictly Civil Affairs business. This makes for delay, and often complete frustration.

It is out of some experience with Civil Affairs in wartime that I say what I think on balance that the Army does not have a capability superior to the inherent ability of our own mass of civilian people. And I would hope that the Army would stay out, except for things that I mentioned, like bringing the blankets.

QUESTION: Sir, that seems to me like a pretty big jump. On one of your charts you had the OCDM regional offices. Then all at once there are the regional officers right in here above a bunch of State Governors. That doesn't appear to be realistic to me, without this legal authority, that four, five, or maybe six of our strong State Governors are all at once going to turn to these fellows and say, "Take all our assets, all our people. We surrender to you." That has not been quite the recognition of Federal authority that has been evident in the last couple of years.



DR. FAIRMAN: I am aware of the problem. I think that under the circumstances that we should envisage, the leadership of the Federal Government would be accepted by the State authorities. To begin with, there would not be a great adversity of interest; there would be a high degree of community of interest. Further, many of the most essential concerns are matters that really do not lie in the power of the Governor, anyway. The State executive doesn't control banking. Banking is largely a Federal concern. Manpower isn't going to be a matter controlled by the Governor. The allocation of raw materials, priorities, rationing--those things were never, in World War II, when we had such controls, State functions. So that the great essential things, the material things, are under the control of the Federal Government, with its powers to regulate commerce, other powers.

So that no Governor could take the banks, or the control of commerce, and say, "I won't play with you." I would be happy to see a statute that spelled out adequate Federal authority, as I said to the gentleman from OCDM. But I think this is far more a matter of moral authority than it is of statutory authority. I don't think we would get hung upon State resistance to national leadership. You may be more mistrustful than I. I think it depends on how you go at it.

I think it is true that if you send a general officer in there to the Governor, who says "I have been sent down here to take over," that isn't going to work at all well. I wouldn't go at this as a great exercise of throwing weight around and asserting authority and taking over. I think that once bombs have fallen on certain parts of the country no Governor is going to start fighting the battle of 1833 or of 1861. You shake your head?

STUDENT: Sir, it is hard for me to see Mr. Rockefeller, with his responsibilities as Governor of New York, going to an OCDM regional office and saying, "Here. You run it for us," and all the rest of it.

DR. FAIRMAN: He is not going to say, "You run it for us," but I think he will certainly need to know toward what great end the facilities of the Empire State are to be directed. I think if you had General Huebner here, who is the Civil Defense director for New York, and a very sensible one, and Mr. O'Connor, who is the very able and sensible Director of OCDM Region 1, you would find they aren't separated by any adversity of interest. Quite the contrary, I believe there is excellent understanding.

QUESTION: Doctor, I have been reading Dean Smith's book, "Chicago" with reference to the American Society of Military Power, and also some writings of the gentleman from Princeton, Dr. Corwin I think it is, and I get the impression that they feel that the thing we face over the long pull is not so much some general officer's moving in and fighting the old wars as it is the inevitable turning of a society that is not particularly well organized for this kind of thing inherently instinctively to the strongest hierarchy it can find in time of trouble, the kind of thing the colonel mentioned a few minutes ago: Do you think, sir, that, particularly if we give life to these bureaucratic structures as a preparation for what may come, this sort of thing may happen to us over a generation or maybe two?

DR. FAIRMAN: I fail to perceive what "this sort of thing" is.

STUDENT: I beg your pardon, sir--not the coup d'etat by military force but the coup d'etat by plebiscite. The people will simply turn to the military and say, "Take it, because we can't do it." Do you think this may happen?

DR. FAIRMAN: I don't think so. My reading of American history is not that that is the kind of thing we would want to do. I can't believe that that would happen. Let me say right now, this is not a civil libertarian talk that I am giving you. I haven't any fear that we are going to have a Napoleon on top when the thing is over. It is not one bit that, not one bit that. My great concern is that we pull through a nuclear attack by the most apt method.

The most pertinent experience we have had in domestic territory is what happened in Hawaii. General Short had gone to the Territorial Legislature and had said, in effect, "If we are attacked, I am going to be awfully busy fighting the Japanese and I don't want to have to police the streets and that kind of business." The legislature passed the so-called M-day Bill which I believe was the most sweeping delegation of authority that has ever been put on any American statute book. The whole theory was that Governor Poindexter was going to take care of civil matters in the war, and General Short would be looking out toward the Japanese. Well, of course it didn't happen that way. On the evening of that Sunday of the attack, a proclamation was issued, assuming military control of the territory, in complete disregard of the M-day statute.

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Presently this regime went bad, and from bad to worse. Secretary Ickes, whose territorial Governor had been displaced, became the center of one faction here in Washington, seeking to recover as much as possible of the powers taken by the Army. On the other side was the War Department.

This went on until there was finally a tremendous fiasco. General Richardson, an officer doubtless of high attainments in many ways, but with a very rigid philosophy about all this, said, in effect "If I am responsible, I've got to run everything." The test case came with an insistence on military trials long after the danger of invasion of Hawaii was over. One was a military trial of a stock broker charged with embezzling the funds of his client. Now, on no tenable theory did that have anything to do with the effective exercise of fighting power. It was struck down by the Supreme Court, and it deserved to go down.

It happened that, as the war ran on, it didn't make a lot of difference in the outcome. But we can't afford to get into that kind of shenanigans, in the event of a nuclear strike at the body of the country. We just couldn't afford to get into mere silly tangles where we would be at war with one another.

QUESTION: Sir, following an attack, what would be your idea as to the best way to control the health personnel, many of whom have been working for themselves as private practitioners and private nurses, and so forth. If Governor Hoegh is going to have control over those people and send them where he needs them, and not leave them back where they are practicing, what would be your thought as to the best way to control them?

DR. FAIRMAN: I should have said at the beginning of my talk that I am not the man who knows the answers to all things. I utterly disclaim any such pretension. I would think, however, that you had hold of one of the relatively easy things; I suggest it is easy because there are not rival political schools about treating wounded people. In many matters of military government, it becomes evident that you are a New Dealer or a conservative just by the way you do the elementary things in a community. But I would think that doctoring people, public health, and that kind of business was one that could be run without politics.

In our military government in World War II, I observed how rapidly Public Health officers could be brought into the operation, Major Scheele, later Surgeon General of the Public Health Service, was early drawn into that work.

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I think that mobilizing the doctors would be a lot easier than mobilizing most other parts of the community.

STUDENT: The Public Health Service is a semimilitary organization. I was thinking about the private practitioner. How do you tell him to go to Buffalo? He may say, "My office is in Alexandria. I want to stay down here."

DR. FAIRMAN: Well, let's think what we could do to apply some control on him. The most obvious thing that comes to my mind is that he gets his medical supplies through interstate commerce. We could say he can't have any iodine if he won't go where he is needed. One thing I will point out: there is a problem as to the doctor's license. He is licensed to practice medicine in one State and he may not have been licensed by the National Board. I think we've got to have some way to waive requirements so that doctors licensed in one jurisdiction can function all over the country.

I think that doctors would respond to human need far better than many other elements of the population.

QUESTION: I am interested, sir in your ideas on staffing the OCDM regional offices. You pointed out the important role they will play, and I, and I believe quite a few others in the class, have wondered quite often in hearing of this role how we can expect the caliber of people who take on this really vital role in wartime to be content with sitting back waiting for the button to be pushed when they will take on this role.

DR. FAIRMAN: I think it is a very good comment, but I think the difficulty is not an insoluble one. I made the point that I am more concerned with offices than with officers, but I can readily understand the necessity of putting strong people in the Regional Headquarters. I have a good deal of confidence in the ability to evoke that kind of leadership in time of war. I think in the Defense Establishment you don't have any trouble getting first-rate men in the civilian offices at the top in wartime. They will stay for the duration. There seems to be a good deal of difficulty in keeping those places filled for much longer than a year or two at a time right now. Everybody seems to have given a commitment to go back to the management from which he came after about a year or two years.

I don't think that is too great a problem. There are many able people you could recruit, if you've got the system already established so that they can fit in.

STUDENT: Shouldn't they be fitted in ahead of time?

DR. FAIRMAN: I think it would be well to have people if you can get the right kind. I think this is nothing more than an aspect of the problem you meet in the National Guard and in the Reserves. The most able people are busy practicing their professions, and things like that.

COMMENT: Dr. Fairman, I only happen to have an LL.B That's why they laughed.

DR. FAIRMAN: This is a very high degree, difficult to attain. All who have it should be entitled to the respect of their fellow countrymen. I greet you as a friend and a brother.

STUDENT: Thank you, Doctor. The judge says, "Don't argue when you have won the case." This isn't an argument or a test point. It is further in regard to the colonel's point on how authority will be exercised by the OCDM when they are in the hierarchy of authority. Assuming that the Governor of the State of New York gets along very fine with the OCDM man, we have no problem. Assuming, however, that one of the other 49 Governors does not. As I gather that, some one of the two would have to have the authority to make a decision to solve the local exigent condition. From the chart I gather it would be the OCDM. I don't argue the point, but, as you said earlier that this is a government of delegated authority, I wonder where the Congress would get the authority, and it would seem to me that perhaps the war power authority, one of the 13, and perhaps the least used--I don't think we have used it much at all--would be the basis for the authority. This has come up a few times in forums. That is the reason I mentioned it.

DR. FAIRMAN: Let me make a response which is not exactly responsive. Speaking to this audience, many of whom have not attained the law degree that you have, I have never thought it was pertinent to discuss this as a problem of constitutional law. On a previous occasion I said, "Don't worry about the constitutional difficulties," and was misrepresented in an unfriendly newspaper as saying "Don't pay attention to the Constitution." That was not what I said. I said that this audience doesn't need to worry about it, because it is not your problem. It is a law problem. It has to do with a need that is quite unprecedented. I haven't any doubt that we have a Constitution that is adequate to all the exigencies that may arise, as John Marshall said long ago. I am not worried about that. We have a constitutional system intended to endure for ages to come. I am anxious to make sure that it does.

You said there must be somebody who must make a decision. A decision about what? There are so many decisions to be made about so many things. All through this business you are going to have people making decisions about what to do with displaced people, what to do about credit, what to do about all kinds of matters. I think that you observe in military administration that there are ever and ever so many people making decisions. These decisions are all in the name of the commanding general, but the commanding general doesn't know the fiftieth part of them. There are officers in many difficult posts, each competent in some respect.

STUDENT: Of course I was concerned about whether there was a conflict between the two tops. There would be no problem of decision in the lower echelons. I was concerned with only when the two did not agree, who would have the authority--which one?

DR. FAIRMAN: My reaction would be this. In your own experience in military administration, when one headquarters has to deal with another headquarters, or one staff section with another, in theory one can always go to the top and have a conflict resolved. I have a feeling that ordinarily one doesn't go up for a command decision; the two subordinates go back and forth, talking it over, until finally--unless time solves the whole thing by making it moot--they arrive at an agreement. My observation of military administration is that it is very like civil administration here in Washington. One man with his briefcase goes to see those in other offices that are concerned, until finally the concurrence of all is obtained. Very little is done by command.

In getting on after a nuclear attack, there would be a tremendous process of working out concurrence between the many responsible parties. Most arrangements would result, I believe, from the initiation of the parties immediately responsible, rather than by any authoritative command from the top. I think the talk about top command is generally exaggerated.

CAPTAIN THOMPSON: Dr. Fairman, we have also run out of time here. I wish to thank you on behalf of the College.

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