

RELATION BETWEEN ARMED FORCES AND CIVIL AUTHORITY IN  
A POSTATOMIC ATTACK SITUATION

6 May 1954

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INDUSTRIAL COLLEGE OF THE ARMED FORCES

Washington, D. C.

Dr. Charles Fairman, Nagel Professor of Constitutional Law, Washington University, St. Louis, Missouri, was born in Alton, Illinois, 27 July 1897. He received the following degrees: A. B., University of Illinois, 1918 and M. A., 1920; Ph. D., Harvard, 1926; graduate work, University of Paris, 1925-26; LL. B., University of London, 1934; S. J. D., Harvard Law School, 1938. He has taught at Pomona College, Harvard University, Williams College, Stanford University, and since 1953 has been in his present position. Dr. Fairman served during World Wars I and II and was active in the Reserve Corps between the wars. In this service he rose from the ranks through all grades to Colonel. His World War II service was in the Judge Advocate General's Office, 1943-44, and as Chief International Law Division, ETO, 1944-45. Other positions held by him are: consultant, Commission on Organization of Executive Branch of the Government, 1948, consultant to Provost Marshal General's Office, 1950; and chairman, Committee on 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 and in Missouri, and is a member of the Board of Editors of the American Journal of International Law and Social Science Research Council. He is author of "The Law of Martial Rule," 1930, 2d ed. 1943; "Mr. Justice Miller and the Supreme Court, 1862-1890," 1939; "American Constitutional Decisions," 1948, rev. ed. 1950; and many articles on judicial biography and on constitutional and international law including: "The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii, and the Yamashita Case," 59 Harvard Law Review 833-82, July 1946; "Some Observations on Military Occupation," 32 Minn. Law Review 319-48, March 1948; and "Some New Problems of the Constitution Following the Flag," 1 Stanford Law Review 587-645, June 1949. This is his first lecture at the Industrial College.

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COLONEL BARTLETT: General Greeley, visitors, gentlemen: When the Mobilization Branch devised the final problem on which you are working, we considered the possibility that one or more committees would visualize a condition of riot, pillage, and mass panic after the bombs fell. It seemed possible that without any guidance your proposed solution might be to declare martial law and go on to other problems. Consequently, we sought a lecturer on this topic.

Through the Judge Advocate General (JAG) of the Army and the JAG School at Charlottesville, Virginia, we secured the name of today's speaker. As you have noted from his biography he is Nagel Professor of Constitutional Law at Washington University in St. Louis. However, he has been engaged for several years on a study of all aspects of martial law. "Who's Who in America" needs 27 lines to recite all his accomplishments and we were delighted when he accepted today's assignment.

Professor Fairman, it is a pleasure to present you to the Industrial College of the Armed Forces.

DR. FAIRMAN: Thank you, Colonel Bartlett. General Greeley, gentlemen:

I have written out what I am going to say to you in 60 minutes because this is a thorny subject. If one speaks extemporaneously, there is considerable danger of misstating one's thought or inadvertently giving undue emphasis to one aspect and overlooking something else.

I do not suppose that the outcome of any battle will turn on the matter I am to discuss with you today. I do apprehend that how we win and, indeed, whether we win, a war would be profoundly influenced by our skill--or ineptitude--in civil-military relationships in the area affected by military operations. I do believe that this is a matter where we are in desperate need of a sound basic philosophy, and of the assurance that comes from practice under a variety of simulated situations. This is not a matter that can safely be left to the improvisation

of the moment. A few days of bungling uncertainty, after an attack, would get us off to a very bad start.

We are a people inexperienced in sustaining a war within the body of the country. "Hardly a man is now alive" who remembers the four years prior to Appomattox. We have accumulated experience in the forging of armed forces at home while friends and eventual allies engaged the enemy far from our shores. We have learned a good deal about converting our economy to the ends of war. We have recently attained some proficiency in the conduct of civil affairs in foreign places. But how the Armed Forces and the agencies of civil government would get along together in the event that enemy action struck home--that is a matter of great importance on which we are woefully unprepared.

Think, for a moment, of actual situations.

In the event of enemy action within domestic territory, disorganized civilians and organized evacuations would crowd the highways. The Armed Forces would be using the highways too. How should these movements be coordinated and controlled? It is no solution simply to say, shove the civilians into the ditch and let the troops go by. We must work out something much better than that. Blackouts and dimouts would be imposed. Telecommunications must be controlled. Sabotage must be watched for and prevented. How would all these local incidents of war be policed--by soldiers, scurrying all over the place?--or by the civilian block wardens? How should an apparent offender be dealt with--by petty provost courts sitting in every town?--by an indictment in one of the 80-odd Federal district courts? How? Local supplies must be conserved and rationed; feeding centers and welfare services must be provided. Gasoline is the key to movement; but who is to keep the key?

Suppose the military authority orders the evacuation of an area. Who will see to it that the inhabitants get off? Who will supply the transport? Who will conduct the movement, provide food and shelter, administer the relocation? Evidently combat forces could not perform all these functions--yet the functions must be performed. There must be working arrangements between the Armed Forces and the local civil authorities. These working arrangements must be flexible, responsive to the situation as it presents itself--like the quick interaction of trained players on a basketball team.

Plant security, I need hardly remind the Industrial College, would be a major concern in war production. It is a responsibility definitely fixed upon management. But the civil authorities and the military authorities are vitally concerned in seeing to it that that responsibility is discharged.

Again, there may be present in the country people who are reasonably suspected of a disposition to commit acts in aid of the enemy. I say "reasonably suspected," for I raise the problem of "preventive" measures, before any "act" has been committed. Enemy aliens produce no "major" problem; certainly they may be taken into safe keeping, although they must be given reasonable care. But the detention of American citizens merely because they are "reasonably suspected" of hostile purposes--that bristles with difficulties of constitutional law, of policy, of practical administration. Such action is, I shall point out, not a responsibility of the Armed Forces. We may be thankful that it is not, since it is a touchy and unwelcome business for which men in uniform are ill-suited. But it is a matter in which the Armed Forces have a proper interest. Here then is another field where a sound relationship between civil authorities and the fighting forces is vital to the national defense.

I might go on firing these questions. They are novel, difficult, and in the highest degree important. They would arise the moment operations began. Their solution requires careful analysis of duties and capacities--a sound philosophy of functions and working relationships. Thinking should come before action--we should force ourselves to think things out, and then test, and revise and test again and again, before any emergency is upon us.

Let us start with the largest strand in this tangled mass--Civil Defense. During World War II there was, you will recall, an Office of Civilian Defense, which sponsored a variety of national programs--air-raid drills, victory gardens, bond drives, and other extraneous activities. In 1948 the War Department Civil Defense Board--of which I shall speak in a moment--expressed this conclusion: "It is apparent, in retrospect, that the civil defense organization, in spite of the noteworthy patriotic response of the civilian volunteers, was inadequate to cope with a heavy attack."<sup>1/</sup>

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<sup>1/</sup> A Study of Civil Defense. Report of the War Department Civil Defense Board (the Bull Board), released by the Office of the Secretary of Defense on 15 Feb 1948, p. 8.

The War Department Civil Defense Board was set up by a memorandum of 25 November 1946, to formulate the Department's views and policies as to civil defense. Its president was General Harold R. Bull--later Commandant of the National War College. The report was released by Mr. Forrestal, Secretary of Defense, on 15 February 1948. I quote a few passages material to our present inquiry.

"The major civil defense problems are not appropriately military responsibilities. Such problems are civilian in nature and should be solved by civilian organization." (p. 20)

"The state government must accept the responsibility of civil defense for its people and communities. . . . Federal civil defense agencies advise, assist and secure necessary uniformity, and must have the power to direct state action when the emergency is interstate or vitally affects Federal interests." (p. 12)

There must be "maximum responsibility on civilian organizations from the Federal to local levels consistent with necessary coordination with the armed forces." The Armed Forces must be free "for their primary mission of operations against the enemy." (p.16)

Scarcely a fortnight thereafter, by directive of 27 March 1948, Mr. Forrestal set up the Office of Civil Defense Planning--an office to plan a system. It was ably directed by the late Russel J. Hopley, an executive of the Bell Telephone system. The executive assistant was Colonel Barnet W. Beers, who had worked for the Bull Board, has ever since been involved in this business, and is today Assistant for Civil Defense in the Office of the Secretary of Defense. From the elaborate report of 1 October 1948, I quote one remark:

"It would be most disastrous and confusing during an emergency to find both the Army and the Civil Defense organization depending upon the same routes of communication, the same supply lines or the same transportation facilities. This tactical coordination must be carried out in the field and with Army Headquarters." (p. 177)

The Hopley Report advised that, on balance, it seemed better to put the Office of Civil Defense under the Secretary of Defense, on the

same line with Army, Navy, and Air Force, rather than to make it an independent agency. But, as will be seen in a moment, the Executive and the Congress were in accord in rejecting that suggestion.

Moving rapidly over the ground, 2/ I draw your attention to NSRB Document 128, "United States Civil Defense," transmitted to the President by Mr. Symington, then Chairman of the National Security Resources Board, on 8 September 1950. It was, and remains, the national plan for civil defense. The State and local organizations have been brought into line with this document; the State Civil Defense Acts, in the main, follow the suggested Model Statute on page 135 of the plan.

On September 18 the President laid the plan before Congress. Bills were at once introduced, hearings were held, and on 12 January 1951 the Federal Civil Defense Act became law. You should acquaint yourselves with that statute. The FCDA, as you know, was made an independent agency--not placed under the roof of the Department of Defense. On the making of this decision I quote from the hearings before a subcommittee of the Senate Armed Services Committee:

"Mr. Chambers (Colonel Chambers of the Committee Staff): Colonel Beers, was this matter--(that is, the question of putting Civil Defense in the Department of Defense)--considered by the Joint Chiefs of Staff and did they advise on the final disposition?"

"Colonel Beers: Quite thoroughly.

"Mr. Chambers: And the Joint Chiefs of Staff do agree that the administration of civil defense should not be a part of the military structure?"

"Colonel Beers: Yes, sir.

"Senator Kefauver: Why is it they don't want it a part of the military structure, Colonel Beers?"

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2/ An enumeration of the major steps in the history of civil defense is set out in House Report No. 3209, of 19 Dec 1950, 81st Cong., 2d sess.

"Colonel Beers: The feeling in military circles, the military thinking, even below the level of the administrative office of the Secretary of Defense, is that they have got enough to do as it is . . . "3/

Now consider the statute, and glance at the Declaration of Policy, section 2.

"It is . . . the policy and intent of Congress that this responsibility for civil defense shall be vested primarily in the several states and their political subdivisions. The Federal Government shall provide necessary coordination and guidance . . ."

Glance at the Powers and Duties of the Administrator, in section 201:

1. To prepare national plans and programs.
2. To study and develop measures.
3. To conduct or arrange training programs.
4. To assist and encourage the States to enter into mutual aid compacts.
5. To assist and coordinate activities of the States.
6. To procure and distribute materials and facilities.
7. To make financial contributions, and so on.

These are not strong powers--they fall far short of authority to direct. Perhaps experience would show that they should be strengthened; that is my own belief.

We start, then, with a national policy, expressing the views of the civilian heads and of the professional military leadership of the Executive, the views of Congress, and the views of the State Governors.

3/ Hearings on S. 4217 and S. 4219, p. 80.

The actual operation of Civil Defense is a responsibility vested primarily in the States and their subdivisions. Each state has its plan. Recently I have been examining them. Here (showing the document) is a typical one, for Oregon--a basic plan, resting upon the State's Civil Defense Act and NSRB Document 128. There is a functional organization in the central office, and lines of command running down to the local level. There are annexes--on security and police; on fire services; on medical services--radiological monitoring, medical evacuation, etc.; on aid and welfare--assembly areas, reception centers, conduct of evacuations, relation with the Red Cross; on engineering and heavy rescue; on communications, on transportation, and so forth. These are loose-leaf books, for you see they need constant revision. Mutual aid, backed up by mobile support, are basic conceptions--just as they are in the tactical employment of an infantry battalion. City A helps city B if the latter is hit, and mobile support comes up from the rear to the point where it is most needed. There is now a pretty highly developed system of interstate compacts, and even compacts running over the borders. Mutual support is, in some cases, a one-way undertaking; there may be little reciprocity. For example, Arizona's plan is concerned very largely with how to handle 250,000 tourists caught in California, 500,000 migratory workers, and perhaps some panic-struck Californians--to route them along Arizona's few highways, to allocate gasoline, and to provide food in a state most of whose groceries come from afar.

Down at the ground level are the block wardens--the doughboys of Civil Defense--supported by specialists such as first-aid teams, police, rescue workers, and the like.

The FCDA is responsible for guidance and coordination of State and local training. To that end it has prepared--with elaborate consultation--administrative guides, such as that on Principles of Civil Defense Operations, and the one on Emergency Welfare Services--and Technical Manuals, such as that on Utilization and Control of Streets and Highways, and one on Organization and Operation of Casualty Services. These are the drill and service regulations for the volunteer army of Civil Defense.

The Federal Civil Defense Administration (FCDA) maintains eight regional offices. Think of them as facilitating agencies, field offices whereby the FCDA moves closer to the State and local authorities and thus makes its assistance and coordination more

readily effective. Regional offices arrange for the effective use of Federal personnel and resources in a civil defense emergency.

While the regional office thus acts as a go-between and facilitator, it is not a required channel between the Armed Forces and the local authorities in the matter of that infinite variety of daily contacts that would be necessary in the course of active operations.

You know, of course, that the several States, with varying success, have endeavored to recruit skeleton organizations. There are a few permanent employees in key positions; retired officers are prominent in these groups. As to the strength of the Civil Defense organizations, I have only impressions, as have you. Perhaps the greatest trouble is that people, thus far, just don't get scared about a war and won't play at being wardens and nurses. A year ago, at San Francisco, I witnessed a drill of Admiral Cook's organization for that city, and of the California regional Civil Defense, and it all looked very substantial and very serious. There was a captain there from the Presidio. He represented, however, not Sixth Army Headquarters, but only the Presidio as a part of San Francisco. The exercise made no attempt to develop the matter on which I am speaking--the day-to-day working relations between the Armed Forces and Civil Defense after an attack.

Some months ago, I addressed to the Director of Civil Defense in each State some questions about legislation, plans, and practices, and then added this remark:

"Any comments or reflections on your experience in Civil Defense exercises, in the matter of the relationships between Civil Defense activities and the operations of the Armed Forces, will be most gratefully received."

Some evidently did not realize that there was any problem of working relationships--they had not gotten that far. Some said they had been given everything they sought from the Army. Some had at least faced up to their side of the problem. Here is the experience of one State director:

"In 1952 we engaged in a CPX alert supervised by the JOC at Army Headquarters, which showed up a considerable problem in Civil Defense and Military coordination. Early in 1953, we

directors were called to Army Headquarters for a briefing on another combined Alert to be held in the Spring.

"At this time there had been a change in personnel at Headquarters, and it was obvious at this meeting that Civil Defense was less than a 'step-child' in this Alert. So we declined to participate, and set up our own Operation--the military to observe. Actually, it was our feeling that Civil Defense would have to operate on its own, anyway, so let's get some practice.

"The Alert operated well within most state areas, but from an inter-state standpoint was far from satisfactory . . . . This year we will again attempt an inter-state approach, but this time a blackboard drill. We will again need military cooperation."

Here is the experience of another director:

"Members of the staff have participated in Command Post Exercises with the (nearest) military District staff. While these exercises have been of some instructional value to Civil Defense staff people, they have not been too practical, mainly because of the vast difference in staff training and experience between Military and Civil Defense. . . . We have a great deal of work to do in this particular field so that lines of responsibility and actual operating procedures can be more clearly defined in advance."

I am not urging that the armed services be a big brother to Civil Defense just out of kindness to Civil Defense, although to do so would greatly strengthen the country we are all sworn to protect and defend. I am saying, rather, that an effective Civil Defense organization is essential to the success of the Armed Forces. Suppose this atomic attack that has been given as our hypothesis: The Armed Forces will need certain highways for their own operations. Who will prevent ingress and reroute traffic? The Armed Forces may have to evacuate certain areas. Who will conduct the movement, with all its logistical support? The Armed Forces will want unauthorized signaling to be prevented, sabotage to be guarded against, suspicious characters to be checked. Who will do all that? Not G-1, G-2, G-3, G-4, the Signal Officer, the Quartermaster, nor the Engineer. A unit that turned from its combat mission to do by its own means all the things it would require to be done, would be hopelessly dissipated. I suppose

the commanding general would employ his G-5 Section to see to it that the civil authorities did the things essential to aid the military mission, but it would be the civil authorities, which means the local Civil Defense organization, that must themselves contrive to do their part in meeting the crisis.

The relationship would not be one of command, but of coordination and cooperation. The commanding general does not take command of the Governors or the mayors or the directors of Civil Defense in this area. If he and his staff are skillful in handling civil affairs, a high degree of mutual support can be attained--more, certainly, could be attained in this manner than by any attempt to order them around.

Mr. Daniel K. Edwards, then Assistant Secretary of Defense, speaking on behalf of the Defense Department at the National Civil Defense Conference in 1951, had this to say:

"Civil defense is a program that should be carried on by civilians. In the first place, it will require the maximum effort of our Armed Forces to ready themselves and to conduct operations in defense of our country. They should not be burdened with a program that can be effectively carried out by the civilian population.

"But perhaps even more important than that, it is highly desirable that the program derive its great vitality from energies inherent in local initiative and in broad popular support."<sup>4/</sup>

He was speaking, not only of preparation before war broke out, but also of operations during hostilities. For it would be the height of folly to prepare in time of peace on the theory that Civil Defense was a civil and State responsibility, and then in the heat of action suddenly shift to a different theory. The Armed Forces and civil government, especially Civil Defense, must learn to work together.

Learning to work together is a major element in modern warfare. The three services are learning to work together. This college is an example of joint action. Defense must work with the Department of State, the Treasury, and other Departments. That is recognized by the presence in this college of representatives of other Departments. The political adviser from the State Department is now a familiar

<sup>4/</sup> Conference Report of meeting in Washington, 7-8 May 1951, p. 15.

figure at a theater headquarters. The United States and its allies must concert and coordinate their action. We have progressed from the Combined Chiefs of Staff of World War II to such elaborate and delicate arrangements as the NATO system. This has involved the development of staff practices, to which this college and the National War College make a major contribution. Defense today involves many relations other than command. I venture to say that mere command is not a major element in the operations of General Gruenther's headquarters at SHAPE. One must use other means to get things done. Here at the Industrial College, with your great concern in the logistical support of military operations, it must be evident that mere command will not avail to keep all the elements of production lined up. One must develop other techniques.

I urge that the Armed Forces must learn ways for getting on with the civil authorities--must develop staff techniques and standard procedures for cooperating with Civil Defense. The Assistant Secretary, in the language I just quoted, spoke of the "energies inherent in local initiative and in broad popular support." In planning for an atomic attack, one should count upon that initiative and support. The great fear, it seems to me, is that an atomic attack would catch Civil Defense so unprepared to sustain and rise from a blow, that it might go to pieces--that cries would go up, "Nobody knows what the score is"; "nobody knows what to do"; with a heedless demand that "the Army take over." This, I urge, should be resisted and warded off--both because the Army would be very busy about its own proper responsibilities, and because of other weighty considerations drawn from experience, to which I shall come presently.

So I venture to urge that these relationships be practiced and strengthened and war-gamed, that staff practices be established and confirmed by trial, that hitches and kinks be spotted and corrected, to the end that, come an attack, the Armed Forces and Civil Defense could discharge their respective responsibilities with mutual understanding and confidence.

This may be viewed as a special and difficult problem of federalism. The reconciliation of national authority with local autonomy daily calls for delicate adjustments--as in the regulation of interstate transportation, for example, or in Federal judicial control of State criminal proceedings. Here we have a problem, however, of adjusting Federal military action with the action of State civil authorities. Civil-military

relations are always somewhat delicate, and here we have Federal military and State civil authorities. Moreover, the two must learn to act together in moments of emergency, when there is little time for deliberation. So I repeat, here is a need for patient, thoughtful, resourceful staff work--a task for your very best endeavors.

Now a brief discussion of the preventive detention of suspected civilians in time of war. I will not take long, for this is not a military responsibility. It is important that you know that we have a statutory scheme, and that the responsibility has been placed in other hands.

I assume, for present purposes, that some preventive detention would be reasonable and necessary. The British--certainly as liberty-loving and democratic as we--resorted to such measures in both World Wars.<sup>5/</sup> I have studied that history at some length. It is significant, very instructive, and I believe prophetic. We should, and I hope would, profit from their experience.

The act of Congress of 23 September 1950, Public Law 831, in its Title II--the Emergency Detention Act--in the event of war or certain other emergencies, authorizes the detention of any "person as to whom there is reasonable ground to believe that such person probably will engage in . . . acts of espionage or of sabotage." Power to initiate action lies with the Attorney General. There must be a preliminary hearing--with disclosure of the grounds and the right to counsel. If probable cause is found, the detainee may appeal to the Detention Review Board, whereupon a hearing is held, with a cross examination of witnesses. The Board maintains or terminates the detention. If the Board finds that the detention was without reasonable grounds, it awards an indemnity. Judicial review of these actions is maintained. The Attorney General must render a report to the President and the Congress every two months.

I see some serious constitutional difficulties with the statute, but I will not bother you with that, or with the grave problems of procedure. This has always been a very unhappy business in Great Britain, and it would be so with us. There are tremendous possibilities

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<sup>5/</sup> Cornelius P. Cotter, "Emergency Detention in Wartime; The British Experience," 6 Stanford Law Review 238-86, Mar 1954.

of injustice, through mistake or excess of zeal. It would be a marvel if it did not run beyond all reason. I have mentioned this statutory scheme because of its interest to the Armed Forces, and because in times past some commanders have reached out to take this sort of concern into their own hands. This was a source of a notorious and lamentable conflict between the commanding general and a Federal judge in Hawaii in World War II. Now Congress has made its own provision for detention on suspicion; it has established procedural safeguards; and it has lodged the entire matter in the civil side of the Government.

Now I have gotten thus far in my talk without once using the expression "martial law,"<sup>6/</sup> or more accurately, "martial rule."

Uninformed people, even people who should be informed, are apt to suppose that, by saying "martial law," the Executive can shift gears, throwing out the normal legal system of powers and restraints, and throwing in an extraordinary system with far more power and far less restraint. This, I assure you, is a gross misconception. Put no more trust in it than in the incantation "presto," or "abracadabra." By declaring "martial law" one gains no lawful power that one would not have had without it. That last sentence may be subject to some qualification in cases where a statute or a State constitution has made some express reference to "martial law." There is, for instance, such a provision in the Organic Act of Hawaii. But for our present purposes--action by the Federal Armed Forces within the body of the country--the proposition remains true: declaring "martial law" does not make lawful one single thing that would otherwise have been unlawful. To quote Chief Justice Hughes in a great opinion, a declaration of "martial law" affords no "avenue of escape from the paramount authority of the Federal Constitution."<sup>7/</sup>

In the law of the American Constitution, the questions are, first, Was the action taken--exclusion, restriction, seizure, removal, or whatever it may be--directed toward a legitimate end, an end that the law commands, for example, that the invader be repelled? Second, were the means used appropriate to that legitimate end? There, in a nutshell, is the entire law of the matter.

<sup>6/</sup> The expression "martial law" has at various times had various meanings. I have discussed the historical background in the law of "Martial Rule," 2d ed., 1943. As here used, it refers to the assumption by a military commander of authority for some or all of the functions of civil government.

<sup>7/</sup> Sterling v. Constantin, 287 and 398, 1932.

Going over the ground once more, first, the end. It must be an end that the Constitution and the law have established--not merely some end that some commander conceives it would be good to pursue. The ends of which I speak are appointed by the Constitution--that the invader be repelled, that insurrection be suppressed, that the system of constitutional government be maintained. The commander has nothing to do with naming those ends. They are established by the Constitution, which he and we are in duty bound to preserve, protect, and defend. So much for the end.

Now, "let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."<sup>8/</sup> I have appropriated the language of John Marshall, the greatest of all the Justices, in *McCulloch v. Maryland*, just 135 years ago. "We must never forget," he said in that same opinion, "that it is a constitution we are expounding . . . a constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." Marshall had been a soldier in Washington's army--a lieutenant at 19; later he had taken a major part in securing the ratification of the Constitution. He was a man of faith, of confidence in the American system of government, wherein public power is measured by a Constitution, adapted even to crises, and finally interpreted by an independent judiciary.

Chief Justice Hughes--one of Marshall's most worthy successors--once observed from the Court that, under the Constitution, "the power to wage war is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation."<sup>9/</sup> The power is adequate to any emergency. But the war power is not entirely Executive power; there are some things that remain for Congress. Still less is the war power entirely confided to military commanders; it does not follow that, because a certain result is needed, the military commander must himself assume authority to take action. Maybe it belongs to somebody else

<sup>8/</sup> *McCulloch v. Maryland*, 4 Wheat., 316 and 421, 1819.

<sup>9/</sup> *Home Building and Loan Assn. v. Blaisdell*, 290 U. S., 398 and 426, 1934.

to judge on that. Chief Justice Hughes spoke, advisedly, of "a supreme cooperative effort to preserve the nation"; a prudent commander does not claim a monopoly on the business of saving the Nations; he will seek and promote a supreme cooperative effort.

I am going to speak of a number of instances of military action, to extract from each its lesson on what to do--or, more often, what not to do. 10/

Ex parte Merryman, Federal Case No. 9487, 1861.

This case arose in Baltimore, in May 1861. Militia being rushed to the defense of Washington had been fallen upon and beaten up by hostile mobs at Baltimore. Communications were being cut off. Presently President Lincoln instructed the commanding general that, if at any point on the line from Philadelphia to Washington he found resistance which rendered it necessary to suspend the writ of habeas corpus for the public safety, the commanding general was authorized to take that action.

Merryman, lieutenant in a secessionist militia company at Baltimore, was arrested and held at Fort McHenry. His lawyer promptly obtained a writ of habeas corpus from Chief Justice Taney, returnable at the Federal Circuit Court room in Baltimore. The general in command replied that he was authorized by the President to suspend the writ; he respectfully declined to produce the prisoner; he requested time to receive instructions from the President.

The writ of habeas corpus, I should explain, is the great writ of liberty; it is the action one brings to cause the person detained to be brought into court, in order that the legality of his detention may be determined. If the respondent does not show lawful grounds, the

10 For the benefit of anyone who may be interested, I cite the following where I have discussed more fully the instances mentioned in the lecture: Mr. Justice Miller and the Supreme Court, 1862-1890, 1939, ch. IV, The Court and the Civil War; The Law of Martial Rule, 2d ed., 1943; "The Law of Martial Rule and the National Emergency," 55 Harvard Law Review 1253-1302, June 1942; "The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the Yamashita Case," 59 Harvard Law Review 833-82, June 1946.

prisoner is set free. The Constitution provides: "The Privilege of the Writ of Habeas corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

Who shall decide, within the meaning of this language, whether the public safety so requires--the President, or the Congress? Certainly it is the latter--the Congress. I will not stop to give the reasons why this is so.

President Lincoln was, I think, ill-advised when he authorized the suspension of the writ. This action seemed to put him in the wrong. The Chief Justice promptly wrote a forceful opinion to the effect that the President had usurped power that belonged to Congress alone. On this point, doubtless he was right. But more broadly, surely under the circumstances it was lawful to detain one who was engaging in acts hostile to the United States. It was lawful to hold him temporarily to keep him from hurting the Government. This would be true without any formal suspending of the writ.

President Lincoln's measures were often, I think, far better in constitutional law than the reasons that were assigned. I regret that he did not have the benefit of better legal counsel; at times he was put in the wrong--as by Taney's opinion in Merryman's Case--when basically he was on firm ground.

Why do I tell you of this case? Chiefly to make this point: It is ordinarily unnecessary, and undesirable, even for Congress to suspend the writ of habeas corpus. Suspension of the writ merely puts off the day of legal reckoning. It takes from the prisoner his normal right to have the validity of his detention determined, here and now. But if there is good reason for holding him, the Government will do well to seek an early decision--not to stall for time. Then we will know where we are. Further, I would tell you, as officers of the armed services, that your prospects for being upheld are far better while the danger is present, than they will be after the war is won. I shall have other occasions to make that point.

If you must hold a man to prevent him from doing actual damage to the United States--not to prevent big talk, but actual damage--then grab him and hold him, and if he sues for habeas corpus, go into court and tell the judge exactly why it was necessary to do what you did. If you have acted on reasonable grounds and have done no more

than appeared necessary, you may count upon the Federal judiciary to sustain your action.

Ex parte Vallandigham, Fed. Case No. 16,816, 1863; 1 Wallace 243, 1864.

General Burnside had been relieved of the command of the Army of the Potomac and assigned to the command of the Department of the Ohio, with headquarters at Cincinnati. The area was infested with disloyal persons. Burnside issued G. O. No. 38, in part as follows:

"The habit of declaring sympathies for the enemy will no longer be tolerated in this department. Persons committing such offenses will be at once arrested with a view to being tried . . . or sent beyond our lines into the lines of their friends."

Thereafter Burnside reached out and grabbed Clement L. Vallandigham, the most notorious of the Copperheads. Vallandigham had until 1863 been a Member of Congress, and a vigorous opponent of the war. In a speech in Ohio in 1863 he had called President Lincoln a tyrant and said that "resistance to tyrants is obedience to God." Vallandigham was arrested at Dayton and brought before a military commission at Cincinnati, charged with having publicly uttered disloyal sentiments. He was convicted, and sentenced to confinement for the duration of the war.

Why did Burnside initiate all this controversy? Did the Administration in Washington want him to silence and punish this noisy critic? Why did he suppress the "Chicago Times" and forbid the circulation in his department of the "New York World," as he did at this juncture? There was telegraphic communication with the capital. Why did Burnside rush into this thicket of brambles all on his own? It put the President in a most unhappy position. If he sustained his ill-advised and impetuous subordinate, many citizens, even perfectly loyal citizens, would resent this needless attack upon civil liberties. If he repudiated him, many ardent loyalists would say the President lacked nerve and--to borrow a modern word--was an appeaser. Burnside, a general who had failed in great things, might well have sought at least to be prudent in the smaller things that were his responsibility at Cincinnati. But no, he rushed to take on the Administration's greatest critic, and to attack the press, by measures that were needless, in excess of the occasion, and unconstitutional.

Lincoln overruled him as to the newspapers. As to Vallandigham, the President ordered that he be released from confinement and sent over to the Confederates he loved so well. That was a resourceful way out of the mess Burnside had created. Vallandigham being no longer in confinement, that ended the habeas corpus action he had brought. Then Vallandigham's lawyer--seeking to gain a quick decision by the Supreme Court adverse to the Administration--asked the Court to review the proceedings of the military commission. The Court held, quite rightly, that it is not a part of the chain of military authority for the review of records of trial by a military tribunal.

I do not wish to discuss here the precise legal points involved. Vallandigham's case is of interest for us here today as a notable instance of what a great lot of trouble can be caused by one fidgety general who leaves his path of duty, which is winning the war, to engage in wrong-headed attacks upon the liberties of the citizens. Here, as in so many instances during the Civil War, President Lincoln could have cried, Save me from my friends!

Ex parte Milligan, 4 Wallace 2, 1866.

Lamdin P. Milligan of Indiana was a major general in the Order of the Sons of Liberty, a Copperhead organization that had enrolled many members in Ohio, Indiana, and Illinois. There was a plot, financed by Confederate money sent in from Canada, to overpower the guards at POW camps at Chicago, Springfield, Rock Island, Indianapolis, and Cincinnati, to arm these Confederates and to overthrow the State Governments. <sup>11/</sup> This was in the summer of 1864--when the election campaign was getting under way. The Government was aware of the plan, and took measures that completely disheartened the conspirators. On 8 October the Judge Advocate General made a report to the Secretary of War, disclosing the ramifications of the plot. All this was injected into the election canvass.

What measures should be taken against Milligan and the others implicated? It seems that General Henry B. Carrington, who had

11/ This plot is the theme of an interesting new book, James D. Horan's, Confederate Agent, 1954.

collected the evidence, wanted to have the trial in a Federal court; but Governor Morton of Indiana and the Secretary of War, Stanton, thought that a trial by military commission would have a more salutary effect in discouraging further plots.<sup>12/</sup> On orders from Washington, the Commanding General of the District of Indiana convened a military commission at Indianapolis and brought Milligan and others to trial for giving aid to the rebels, and on other charges. He was convicted and sentenced to be hanged. Indiana was then remote from hostilities. Morgan's raid in July 1863 had been the last time it was seriously threatened. The Federal Court was sitting regularly at Indianapolis. A trial there would presumably have resulted in the conviction of all whose treason could be proved.

This trial by military commission was needless, unconstitutional, and politically erroneous. Justice David Davis, Lincoln's close friend and a judge of the utmost fidelity to the Union, advised the President "that the various military trials in the Northern and Border States where the courts were free and untrammelled, were unconstitutional and wrong." Lincoln put off acting upon the record of conviction, hoping that the war would soon be won and then, as he said, "We shall none of us want any more killing done." But when the record finally came to the White House, Lincoln had been assassinated, and President Johnson approved the sentence--later it was commuted to life imprisonment.

Thereupon habeas corpus proceedings were brought, and the case came up to the Supreme Court, which on 3 April 1866--a year after Appomattox--held that the trial by military commission had been unconstitutional. Milligan went free; if he had had a proper civil trial presumably he would have been convicted and punished.

Mr. Justice Davis spoke for the Court:

"If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theater of actual military operations, where war really prevails, . . . (the military power) is allowed to govern by martial rule until the laws can have their free course.

<sup>12/</sup> W. D. Foulke, Life of Oliver P. Morton, I, 419.

As necessity creates the rule, so it limits its duration . . . .  
 Martial rule can never exist where the courts are open, and  
 in the proper and unobstructed exercise of their jurisdiction.  
 It is also limited to the locality of actual war."

The language may have been somewhat too strict, but the decision remains above question.

So the Civil War ended on a note of constitutional restraint. The military authority had been placed, undeservedly, in a very unfavorable light as an enemy of civil liberty.

In the decades that followed, down to World War II, the Court had no occasion to make any further pronouncement about martial rule. But in the latter part of the nineteenth century, and down to the 1930's, governors in a number of States became more and more prone to declare "martial law" on slight provocation--on the occasion of some labor dispute, or even for the most trivial incidents. The national guard would be called out and employed--usually, though not always, on the side of management and against organized labor--and a good many high-handed and rather outrageous things were done. Usually the matter was of brief duration, and only once did a case reach the Supreme Court until *Sterling v. Constantin*, 287 U. S. 378, in 1932.

*Sterling v. Constantin* was a part of the struggle over limiting production in the oil fields of Texas. Earlier prorationing statutes had been held invalid. Then the Governor declared "martial law" and instructed the adjutant general to do that which the courts had held unconstitutional. It was an attempt to bypass the Constitution by saying the words "martial law." Chief Justice Hughes, for a unanimous Court, held "No." That was the opinion where he said there was no "avenue of escape from the paramount authority of the Federal Constitution." The military authority, in the face of an actual emergency, has "a permitted range of honest judgment as to the measures to be taken in meeting force with force. . . . Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of disorder or the prevention of its continuance," are within the range of permissible discretion. But "what are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, and judicial questions." It was a great opinion, and every word of it rings true today.

Now I come to World War II. First, the exclusion of United States citizens of Japanese parentage from the Pacific Coast was sustained in *Korematsu v. United States*, 323 U. S. 214, decided in December 1944. Justices Roberts, Murphy, and Jackson dissented. So far as alien Japanese were concerned, there could be no serious question of the power to intern enemies. But to exclude American citizens on account of their ancestry--that went very far. It is fair to say that the country has had a bad conscience about the whole matter; the measures that were involved in the *Korematsu* case--based upon a racial classification--are not to be regarded as having solid judicial support today.

I come to the second great episode of World War II, the military government of Hawaii. In *Duncan v. Kahanamoku*, 327 U. S. 304, decided in February 1946, when the fighting was over, the Court held that the military regime that had been maintained in Hawaii was beyond anything that the law could sustain. This is a case that teaches us what not to do.

Go back to the autumn of 1941, before Pearl Harbor. The Hawaiian Legislature was in session, considering the so-called M-day bill, which became the Hawaii Defense Act.<sup>13</sup> This statute gave the Governor perhaps the most sweeping authority ever conferred upon an American governor. In the event of war, he was clothed with power to make regulations upon virtually every material concern, to requisition labor and services, to control the economy, to require inhabitants to take measures of defense etc. He could even suspend the operation of statutes. Any violation of one of the Governor's regulations was a misdemeanor punishable in the courts.

General Short appeared before the territorial Senate on September 18 to speak in favor of the M-day bill. He concluded:

"I believe it is absolutely essential in any bill passed by the legislature to give the governor the broadest possible powers and depend on his discretion not to use such powers unless a real emergency arises. This in all probability will do away with the necessity for the declaration of martial law. This is most essential.

<sup>13</sup>/ Ch. 324, Revised Laws of Hawaii, 1945; the statute was enacted as L. Sp. 1941, ch. 24.

"I would very much rather see the necessary action taken by the civilian population in the present emergency and have them handle the emergency . . . ." 14/

You know, of course, that is not what happened. On the afternoon of 7 December 1941, the Governor was induced to declare "martial law" and to call upon the Commanding General "to exercise all the powers normally exercised by me as Governor," and to exercise the powers normally exercised by judicial officers and employees of this territory . . . and such other and further powers as the emergency may require." All this was done suddenly, on the Island. The President knew nothing of it until somewhat later. The Army authorities established what was styled a "Military Government." The courts of law were closed. Military commissions and provost courts were created, to try "any case involving an offense committed against the laws of the United States, the laws of the Territory of Hawaii, or the rules, regulations, orders or policies of the military authorities." 15/

Late in January 1942, the courts were permitted, "as agents of the Military Governor," to resume their normal functions, subject to considerable exceptions. 16/ Of course the Federal and Territorial courts created by Congress could never be "agents" of a "Military Governor." The phrase showed the erroneous theory upon which the entire regime was conducted, that the commanding general had supreme power, supreme over the courts and the law. This was wrong; it must always be wrong so long as the American constitution endures; and when the validity of this regime came before the Supreme Court in 1946, the whole thing was struck down. *Duncan v. Kahanamoku* was the case of a drunken civilian at the Navy Yard who had punched a Marine sentry. The companion case of *White v. Steer* concerned a stockbroker charged with embezzling the stock of his client. Both were tried before military tribunals. Why was it necessary two years after Pearl Harbor in one case and eight months after in the other to bring these civilians before a military tribunal rather than the civil court appointed by law?

The counsel for one of the petitioners put that question to the Commanding General, in habeas corpus proceedings. Here is a part of the testimony:

14/ Minutes of the Committee of the Whole.

15/ G. O. No. 4, 9 Dec 1941.

16/ G. O. No. 57, 27 Jan 1942.

Q. What I am trying to get from you is, why do you think we have got to have the provost courts? You first said that on account of the delays of the civil courts. Is that one of your reasons?

A. That is one reason, yes.

Q. You know that to be a fact, that there are delays in the civil courts of this Territory?

A. I would not say in the civil courts of this Territory because I am not familiar with them.

Q. Well, that is what we are talking about.

A. But I say this: I draw on my general experience.

Q. Well, is there anything else besides the delays of the civil courts?

A. Oh, yes, there are many reasons why we should have control under the provost court system. I thought I outlined that very elaborately in my direct testimony.

Q. One of the things you said was that you had to have some instrumentality to enforce your orders?

A. Yes, which are not offenses against the Territorial Courts or the Federal Courts.

Q. You are familiar with the fact that they could be made such?

A. But, as I said, even though they were made offenses, I would still have to go before the courts, the civil courts, which is objectionable when the offenses are of this character that rest upon security. And you place the Commander, then, of the area under the control of other agents for enforcement of his regulations when he has the responsibility of security. Are you going to take the responsibility for the security of these islands? Is the Court going to take the responsibility for the security of the fleet? Is Governor Stainback going to take the responsibility for the security of the fleet? No. I have it. And, nor my conscience and nor my duty will ever make me say that I don't need the authority that goes hand in hand with my authority (sic). 17/

17/ Transcript of Record in Duncan v. Kahanamoku, p. 1051 ff.

The Supreme Court was unimpressed. Law Chief Justice Stone:

"I find nothing in the entire record which would fairly suggest that the civil courts were unable to function with their usual efficiency at the time these petitioners were tried, or that their trial by jury in a civil court would have endangered good order or public safety . . . the military authorities themselves testified and advanced no reason which has any bearing on public safety or good order for closing the civil courts . . . I can only conclude that the trials and convictions . . . were . . . without lawful authority."

Mr. Justice Black, in his opinion for the Court, said the military authorities were authorized "to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion"--but there was no need and they were not authorized to supplant the civil government.

In preparing this lecture I went back to my old file on martial rule in Hawaii, and I came upon this office memorandum dated 17 August 1942--a moment when the Hawaiian situation was at a critical state in Washington. The memorandum closes with this sentiment, to which I still subscribe:

"If no commander imposes any control over the civil population which cannot be justified in court, the judiciary will acquire some confidence in the sobriety and self-restraint of military commanders. It would be a splendid thing if at the close of the present war it could be said that the Army had imposed no control . . . that had not survived the test of judicial scrutiny."

Now, in conclusion, to pull all this together.

1. We live under and are bound to support a Constitution that is adequate to the various crises of the Nation. The power to wage war is a power to wage war successfully. It is needless, it is folly, it is a blunder, for any officer to go on the theory that he has to breach the law of the Constitution in order to save the country. Don't cross the Rubicon--don't assume arbitrary authority on the theory that only so can you save the Nation.

2. The war power contemplates "the harnessing of the entire energies of the people in a supreme cooperative effort to

preserve the nation." Seek to maximize that cooperative effort. Cultivate good relations, mutual understanding. We will all be seeking to win the war; we can do it best by working together.

3. Whatever appears reasonably necessary to that end, let it be done. Done by whom? If it is the sort of action that pertains to the Armed Forces, let them do it. If it is the sort of action that pertains to the civil government, look to the civil government to do it. Let the civil authorities close the saloons and enforce the curfews. If the civil government will not or cannot at the moment perform its proper functions, and action then and there is really necessary, then take it. But seek to anticipate and avert any such situation. As the Supreme Court said in *Duncan v. Kahanamoku*, the military authority should "act vigorously for the maintenance of an orderly civil government."

4. A declaration of "martial law" does not make lawful anything that would not be lawful without it.

5. The Armed Forces should not assume the functions of the State and Federal courts. That was the particular feature of the regime in Hawaii that the Supreme Court found utterly needless and unlawful. Violations of Civil Defense regulations, of traffic controls, and the like, will be punishable in the State courts. The act of Congress of 21 March 1942--now 18 U.S.C. sec. 1383, 1948--makes it a Federal offense--an offense punishable in the Federal courts--to violate regulations imposed in military areas and zones. I do not doubt that in the event of enemy action within the body of the country, that statute would need to be expanded. Perhaps relatively petty violations of local military controls would be made punishable before a United States Commissioner, as is now provided for petty offenses in places under exclusive Federal jurisdiction.<sup>18/</sup> But I urge upon you, the Armed Forces should not rush into the business of trying civilians by military commission or provost court for offenses that are cognizable in civil courts. For actual offenses against the laws of war--as in the case of the German saboteurs who came into the country in 1942--of course the military commission is the appropriate tribunal.

6. Establish channels for mutual consultation and for supporting action. This means continuous, intelligent, understanding staff practices. These arrangements should be tested in joint exercises, in war games, until they become smooth and habitual. Treat the civil authorities with respect. Don't tell the Federal judge

<sup>18/</sup> 18 U.S.C. secs. 3401 and 3402, 1948.

or the State governor that you are making him your "agent." That is wrong in principle, and only gets us to fighting among ourselves.

7. Don't evade a challenge in the Federal courts to the measures you are taking. If you have done only what was 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.

To work out wise patterns for civil-military relations in the event of an attack upon this country is a tremendous challenge to you, the future commanders and senior staff of the Armed Forces. I urge you to give it your best thought.

QUESTION: I have two questions: The first one is about the Civil Defense Act of 1950. Isn't that divided into two parts, the one delegating the planning, guidance, and coordinating activities to the Administrator prior to the attack and then subsequent to the attack, doesn't he have much broader powers as an operator which he uses through the regional director?

DR. FAIRMAN: The Administrator has more power but he still doesn't have power to command. Here are the emergency powers:

"to sell, lease, lend, transfer, or deliver materials or perform services for civil defense purposes . . . reimburse any State, including any political subdivisions thereof, for the compensation paid to and the transportation, subsistence, and maintenance expenses . . . provide financial assistance for the temporary relief . . . employ temporarily additional personnel . . . ."

Those are things he needs--but they do not give the power to direct.

QUESTION: Why don't they grant him those same powers prior to attack as he has subsequent to the attack? It would seem to me a more actual situation.

DR. FAIRMAN: That is for the FCDA to worry about. If it feels the need of a little more elbow room now, I should think it would seek an amendment of statute. These are largely matters of procurement and spending, which are tied down by procedures. Congress is unwilling to turn the Administrator loose before an emergency.

QUESTION: I can see that in an emergency the Armed Forces would necessarily have to cooperate with the civilian authorities and I can see that it would be under the authority of the civilians. I don't see how we reconcile the doctrine of "posse comitatus" with this use of troops.

DR. FAIRMAN: I don't think they are operating under civilians. It is not a matter of the Armed Forces being under State or local civilian authority or the civil authority being under the Armed Forces. You do your job and you try to get the mayor to do his job. You certainly don't go over and report to the mayor and say, whom do you want shot.

DR. FAIRMAN: Posse Comitatus goes back to Reconstruction, like so much else. <sup>19/</sup> This was a statute to the effect that the Armed Forces should not except as expressly authorized by the Constitution or by act of Congress, be used as a posse comitatus. It goes back to Reconstruction when the Federal forces were stationed down there and were called out to arrest a magistrate in the execution of the law.

There is an unfortunate case which occurred in Idaho in 1899. The National Guard was still out, having gone to the Spanish War, and the Governor had a labor dispute in the Coeur d' Alene mines on his hands. Federal troops were sent there and they got themselves or were allowed to get themselves into a situation where General Merriam leading the force of the Federal troops to make effective the things the Governor wanted to do--and some of them were, I think, rather unwise things. That has stood out ever since as an example of what you should not do--send Federal troops in and tell them to report to the Governor and do whatever he asks. When Elihu Root became Secretary of War, that whole thing was stopped.

QUESTION: The thing I visualized, doctor, is such great confusion in an atomic attack that somebody is going to have to stand up there and say, "You are going to do it this way." Is it going to be the governor or the military?

DR. FAIRMAN: What is "this?" Is it taking bodies out of the debris? I think that is the governor's business. Is it shooting artillery? That is your business. I know there is a feeling that there has to be one fellow over every other fellow. The British had a good deal

<sup>19/</sup> Sec. 15 of the Act of Cong., 18 June 1878, 20 Stat. 152.

of experience with blitzes, but the generals have never taken over. Somehow local civil defense people get out the survivors and bury the dead. They have, I think--I have served with them as many of you have--a better conception of these working relationships than we have, partly because here there are Federal, military, and State officers, which always make it harder than as it is in England, where it is the War Office and the Home Office, working under the same government.

That may not be as clear as you would like it to be. I think if we had war-gamed this thing, did it over and over again, the situations would tend to clarify themselves a lot more than by just sitting here in chairs and speculating.

QUESTION: I learned quite a while ago that you can't command by cooperation, and, since doing two terms in Washington, I have been very much confused by the word "coordination." It seems to end up in some directive wherein if your established agency of Government decides to undertake a project it attempts to spend the funds of another agency.

We in the military services bumped up against this problem when we unified. We established plans for joint action; they are quite lengthy. We have sweated considerably over them, but we have them. You can move your organization. You can preserve your organization integrity while functioning under a direct-command-appointed officer whether Army, Navy, Coast Guard, or a foreigner. What we need is some sort of plans for joint action involving military and duly authorized civilian agencies. The pattern of groundwork is there. I wonder whether you have considered that possibility?

DR. FAIRMAN: Is it that in the end there will be one fellow?

QUESTION: Command is what you are after.

DR. FAIRMAN: I think the answer then is the man in the White House. He is the only man far enough back to tell everyone what to do.

QUESTION: No, I disagree, sir. You must have your authority delegated to the scene of action. If you are going to undertake tactical operations, you must have command on the spot.

DR. FAIRMAN: Let us take five paces forward. Should I be at Denver or what about somewhere further toward the coast? All right;

I am at Sacramento. And you want either the Governor of California or the Commanding General Sixth Army to have operational direction of everything that is done. I think your theory Captain, is that it has to be one or the other of those two gentlemen. It certainly isn't going to be the Governor that assumes command of the Armed Forces. So in your theory the Army commander must have ultimate direction of everything in California.

As soon as you have done that, every complaint--and they may be, not unreasonable and ill-mannered, but constructive and patriotic criticism--about how the General is exercising this total authority can be carried back only to the General's boss, who is the Secretary of the Army. This would dam up all local civilian energy and dissatisfaction, too, because you put the civilian inhabitants and the mayors and even the Governor in the position of a private in the Army, who can make his representation only through channels. I don't think that this is a practicable way of winning a war in this country. I think the experience in Hawaii shows that.

I saw that episode, not quite as a participant, but from a ringside seat at one phase, here in Washington. The Army came back to Mr. McCloy, the Assistant Secretary of War, and the civil authorities came back to Mr. Ickes, Secretary of the Interior. There were protracted conferences, in the office of the Solicitor of the Interior, over who was going to do this and who was going to do that. I believe that it should have been possible, on the ground, out there in Hawaii, to effect common action--rather than to have to bring these local matters way back to Washington. And that was a relatively simple situation, because it was all Federal authority anyway. All parties were subject to the President's direction. How much more theory it would be if it were a Federal military commander and a State governor.

I don't think you can hand over to Army commanders, with good prospects for successful action, command over State and local civil authorities. Don't misunderstand me. What is it you want to have done? If it is something really necessary to the national defense, get it done. I thought I made that clear. But if the governor will do it, you are willing that he should do it, aren't you?

QUESTION: I want to make it clear that I have no intention of disturbing the organizational integrity of the State and municipal forces, but there must be overall command.

DR. FAIRMAN: What is that overall command?

QUESTION: The what must be done, not the how but the what.

DR. FAIRMAN: Perhaps I am with you, in the ultimate. Before this thing began, you should have your war games. You wouldn't take doughboys, and for that matter the Air Force and Navy, who hadn't worked together, you would never send them out there with a book about what they had to do and let them learn how to do it. The key is in working them out. In the working out, you will find out how. None of us know all about that. If the governor will see to it that they do get the bodies out, and so on, you are content, aren't you? If it is done?

QUESTION: Yes.

MR. FAIRMAN: That is his responsibility. As long as he is doing his job, and you are sticking to yours, I don't think you need to say, "Look here, Governor, you are working for me. I am your boss." I don't think that is going to make him work more eagerly.

QUESTION: I still don't think we are organized right; however, I can't put my finger on it.

DR. FAIRMAN: I don't think we are either. I think we have to learn to do it.

QUESTION: I merely suggested the pattern is there.

DR. FAIRMAN: I am with you that we need a careful analysis. If in the end the governor says, "Look, I am not going to do it," and you say, "It is really necessary, it has to be done," and still he says, "I won't do it"--doubtless then you would see to it that the necessary thing was done. But I think it would be silly to divert your troops to do those things unless there was no other means of doing what was necessary.

QUESTION: That is the point. We can't.

DR. FAIRMAN: Since you can't divert your troops, and these things, if they are done, must be done by the governor's people, the next question is, Are they going to be done more willingly by telling him he is your agent or by telling him, "I know you have a hard time

running your State but this must be done." I think Civil Defense is pretty topplly. I don't think the conclusion is for the Army to rush in and take over. The conclusion is, endeavor, very diligently, to get on together, and see how it works.

QUESTION: You have led me into a discussion I didn't intend to get into. I wouldn't insist that the commander of the overall structure be military necessarily, if, in the development of this pattern, you end up with a civilian, with the military responsive to that directive. Somebody has to command the operation. That is what I am trying to say in a nutshell, and now they don't seem to have it. It is cooperation and coordination and it doesn't mean a d-- thing.

DR. FAIRMAN: These problems of civil-military relationships are too difficult and elusive, I think, to yield to a simple formula. Unified operational direction is a splendid conception as it applies to Army, Navy, and Air Force commanders, all of whom are subject to a single alternate authority, the President through the Secretary of Defense to the Joint Chiefs of Staff. But the commanding general and the State governor do not work for a single ultimate chief; one works for the President and the other himself is the highest magistrate of one of the States. The President does not have command over governors--much less does the commanding general. I do not doubt that the United States Government may, in all that is requisite to effective national defense, establish such a system of national direction of State activities, such as civil defense, as may appear necessary and appropriate. It was a good phrase when you spoke of an effective overall structure. But however that may be, I believe that our greatest need at present is for commanders and staff officers of the Armed Forces on the one hand and governors, mayors, and other agents of civil government on the other to learn to carry on their respective functions with mutual understanding. They would still have to do that, in day-to-day activities, even if Congress should establish some ultimate overall direction. Practive at doing their best is the best way to develop what more may be needed.

COLONEL BARTLETT: Professor, there are many hands that haven't been recognized, but we have a policy that the lunch hour comes along about now. You will recall when I telephoned, professor, I asked you to talk to us on Martial Law. I know the topic you chose is much more comprehensive and much more beneficial to us in our final problem. So on behalf of the Commandant and the students, may I express to you our deep appreciation.

(7 June 1954--350)S/en