GOVERNMENT UNDER LAW IN THE SHADOW OF A NUCLEAR WAR

13 April 1956

CONTENTS

Page

INTRODUCTION--Rear Admiral H. T. Deutermann, USN, Deputy Commandant, Industrial College of the Armed Forces 1

SPEAKER--Dr. Charles Fairman, Professor of Law, Harvard Law School 1

GENERAL DISCUSSION 18

Publication No. L56-127

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 has taught at Pomona College, Harvard University, Williams College, Stanford University and Washington University, and since 1955 has been in his present position. He 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 Office of the Judge Advocate General, 1942-43; as Legal Advisor, G-5 Section, Armed Forces Headquarters in the Mediterranean Theater, 1943-44; and as Chief, International Law Division, ETC, 1944-45. Other positions held by him are: Consultant, Commission on Organization of Executive Branch of 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 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 author of The Law of Martial Rule, 1930; 2d ed., 1943; Mr. Justice Miller and the Supreme Court, 1862-1890; 1939; American Constitutional Decisions, 1949, rev. ed. 1950; and many articles on judicial biography and on constitutional and international law.

GOVERNMENT UNDER LAW IN THE SHADOW OF A NUCLEAR WAR

13 April 1956

ADMIRAL DEUTERMANN: Good morning. Our subject this morning is "Government Under Law in the Shadow of a Nuclear War." We in the military sometimes are a little bit hazy on the matter of law. Things go into court and we have fixed opinions before they go in there. We think they are going to come out in such-and-such a way. Very often we are surprised.

Our speaker today is not only an eminent lawyer; he is on the faculty of the Harvard School of Law. He is also an experienced soldier. He is a veteran of both wars and was very active in Reserve affairs between the wars. He is an author. He has done a previous lecture here at the College. You have his biography. You have the scope of the lecture this morning.

I think one of the matters that is going to come up for questioning is last year's Operation Alert. As you know, as everybody knows, a very controversial question came up there of declaring limited martial law. I was left in a big hole in the ground in a mountain near Camp Davis when this operation took place. That is a good, sizable hole; and I know that the Judge Advocate General and even the Supreme Court would like to get into that one.

Dr. Fairman, it is a great pleasure to welcome you back to the College and introduce you to this class.

DR. FAIRMAN: Thank you, Admiral.

General Hollis and gentlemen: Much has happened in this field since I spoke to your predecessors here in May, 1954. The change has been toward confusion and a resulting impairment of national security. Your predecessors two years ago were concerned, as are you, with the problem, What should be the pattern for administering the country after a nuclear attack, and what is the responsibility of the Armed Forces in planning against that terrible day? Martial law had cropped up in their studies, and I was asked particularly to comment on that subject. I urged that a military administration would not be a sound mode of governing the stricken country; that the Armed Forces should

"act vigorously for the maintenance of an orderly civil government." The phrase comes from Duncan v. Kahanamoku, where the Supreme Court held invalid certain measures of "martial law" in Hawaii during World War II.

Being concerned to know that the advice I was going to give was in accord with official doctrine, I sent the manuscript to the Assistant for Civil Defense in the Office of the Secretary of Defense. Here is a part of his reply:

> "There is no conceivable nation-wide apprehension of 'martial rule' as many people believe whereunder 'the military' can or will 'take over' for 'Civil Defense', 'internal security' or 'military government' for the United States . . . . Absurd as it seems to you and me there are a startling number of people who vaguely believe that that will be the case."

What seemed inconceivable and absurd in May, 1954, is what was done in Operation Alert in June, 1955. Limited martial law was invoked and a suspension of the writ of habeas corpus as the solution to the problem. It was an on-the-spot decision--unstudied, uncoordinated, an improvisation of the moment. I think it was a terrible mistake. It produced dismay among those responsibly concerned with civil defense. That uncertainty persists today. To quote from a recent letter from the Office of Civil Defense in one of our more important states, the present situation is one of "confused thinking, stupid evaluation, inaccurate terminology, and totally unrealistic planning and operations."

Unlike my talk in 1954, today's presentation makes no claim to express the policy of our Government, for on this point the Government at present has no settled policy. I speak only for myself. I propose first to look the problem in the face, as rigorously and concretely as possible; then later I shall come to Operation Alert--how it took its strange course, and how its solution would have worked out in practice.

Suppose a nuclear attack struck fifty or sixty target areas, with the terrible consequences reasonably to be expected. What should be our plan for administering the country after such a blow? That is our topic today.

The Federal Civil Defense Act of 12 January 1951, placed the primary responsibility for civil defense in the states and their subdivisions. The Federal Civil Defense Administration was given no power to direct the operations of State and local governments. Its powers are weak, even after the emergency has arisen.

Virtually everyone who has studied the matter recently agrees that that must be changed. There must be authority in the National Government to direct the work of relief and rehabilitation of the entire country. The United States Government will have to assume primary responsibility.

There must be legislation to stake out the lines by which that central leadership would be exerted. The National Government must act upon and through the existing State governments. Normally the United States acts only through its own proper agents--the Post Office, the Army, the Treasury, the Department of Justice, and so on. It gets its work done by its own proper means. With this new concern for defense in a nuclear age, it must be otherwise. The National Government must be geared directly to the states, so that leadership at the top will be transmitted to and through the state and local administrative machinery.

This is almost without precedent. We have used the State governments to carry out selective service, and a few smaller illustrations may be found; but there has been virtually no experience in our history with gearing together the National and the State administrations. Don't worry about constitutional objections. I assure you that the Constitution, rightly understood, will sustain all that needs to be done in this respect. Our problem here is operational, not constitutional.

The adminstration of a Commonwealth within the American Union, with its subordinate units--the cities and counties--has become a tremendous affair. In addition to the traditional responsibilities of an earlier era, new protective and regulatory functions have been undertaken. This was inevitable in an industrial and interdependent society.

The existing system of administration, run by a host of public servants who know their respective tasks and the characteristics and vagaries of their fellow citizens, has a tremendous going-concern value. This administrative apparatus would be indispensable in carrying on after an attack. It would be fantastic to think of supplanting it. Rather, we must build it up and prepare it to absorb the weight of the blow. I will not go into detail here, for this is not a military problem.

The Federal Government must transmit a great current of unifying direction and influence down through this existing state and local machinery--civil direction and influence. Many of the concerns of civil defense involve merely the normal functions of State and local governments as carried on at a time of national disaster. Some of the concerns

of civil defense involve inducing state and local action on matters essential to national survival. To effectuate the national purpose, the many units of State and local government must be brought to adequate and similar arrangements for operating in an emergency. They must be prepared to move in response to national direction and leadership.

The mechanics of operation should, I believe, be somewhat as follows: In each region--now Federal Civil Defense regions, which were drawn to conform to Army areas--there would be a center of Federal authority. Here would be gathered competent representatives of all interested departments and agencies, under a regional chief. This would be a substation for the transmission of national direction. If the center of authority were knocked out, if the region were isolated for a time, this regional command post would carry on with the authority of the United States Government.

In transmitting national direction the region would in principle deal directly with the Governors of the several States. Certainly this should be the practice in all important matters. For routine operations no doubt there would come to be direct dealing along functional lines, as in the use of technical channels as distinguished from formal command channels in the military service.

No serious concern has yet been displayed within the National Administration to seek legislation to establish adequate national leadership and direction of civil defense. At present the only significant movement toward that end at the national level is in the hearings being held by the Subcommittee on Military Operations of the Committee on Government Operations of the House of Representatives, under the Chairmanship of Representative Holifield. That group promises to stick with the problem until something is accomplished. At the present moment this seems to be our best hope of sound action.

Of course, legislation is not enough. The statute could do no more than empower the Federal Government to assert its primary authority and leadership, to conduct practical tests, to establish standards and inspect for compliance, to withhold Federal grants where Federal standards were not met, and above all to practice and practice until working relationships had become familiar and all parts had learned to adapt themselves to the danger as it presented itself. Quite aside from a statute, there is need for energetic, wise, confidence-inspiring administration.

This would be like training troops. One should start with simple exercises, and take larger and more complex problems only as capabilities have been built up. Staff exercises should come first; the public generally should be drawn in only after plans had been tried in simulated exercises. The Armed Forces should be brought in, in a supporting role. But before the Armed Forces can usefully participate in support, there must first be developed the pattern of the civil administration that would be supported.

In the years since World War II, and especially since 1950, civil defense organizations have been built up in the states and in the counties and cities, especially in areas that appear likely targets. In each unit the function of the director and his staff is to organize all the elements of public administration, including therein the public utility companies, the carriers, the distributors of food, the doctors and the hospitals, the Red Cross, the agencies of welfare and of charity, the Clergy and the churches, and the undertakers.

These civil defense staffs are not great self-contained forces. They are simply the units prepared to be the centers of operations in event of an attack. They function also in time of natural disaster, thereby acquiring invaluable experience. A great many of the Directors of Civil Defense are retired officers from the armed services. As I have observed these organizations over recent years, I have come to have a sincere respect for the quality of the leadership. Considering the handicaps under which they work, they have made respectable achievements.

In sum, we need a system of effective national leadership, expressed in an adequate statute, administered with vigor, imagination, courage, and candor. No wonder there is public apathy when there is such a sense of bafflement. It is rather like the situation in a division where battalions and regiments are of uncertain capabilities and show want of self-confidence, yet where the command at the top has failed to infuse the whole with energizing purpose. It ill becomes the divisional headquarters to reproach lower units for inadequate performance when the greatest want of all is high competence and sustained, understanding leadership at the top.

The relevance of this remark will become apparent as I turn now to a critique of Operation Alert 1955.

The standards for Operation Alert were issued by the Federal Civil Defense Administration under date of 1 March 1955. The exercise

was set for 15-16 June--three and a half months later. Fifty-odd critical target cities would be struck. The size of bomb and type of burst was assigned, save that some cities were to be prepared for whatever was later disclosed. They were given assumptions as to the total killed and the total injured, supposing no evacuation. Local Civil Defense Directors were to work out plans for evacuating as many as would be possible with their respective assumed times of warning--around two to three hours. Damage reports were to be prepared in advance, to permit "immediate transmittal" upon the assumed moment of attack. Nine days of operations were to be condensed into 26 hours. Hence the writing of damage reports long in advance. All concerned at the local level would be busy getting on with the exercise. They would test in simulated operations whether things went as well, or better, or worse, than they had estimated.

Observe that it was foreordained that this would be a country-wide attack with exceedingly heavy casualties. That was only reasonable. Everyone, I suppose, expects that if such an attack were made, the dead would run away up in the millions. So this was all assumed in advance, and casualties were estimated and these dire reports of damage were written out long before 15 June dawned. It was foreordained.

June 15 came. All over the country, civil defense workers, including the representatives of all the public agencies involved, assembled at the various control centers, in secluded installations. "Lemon Juice" was signalled; two hours or more later came "Apple Jack"; then the moment of attack--and off went the damage reports.

Field agencies of the Federal Government sent representatives to the various Federal control centers. I was told, on very reliable authority, that initially some of the Federal agencies in the field had not taken very seriously the business of participating; and that when this situation was discovered, they were energized from Washington. I think it is fair to assume that these Federal field agencies were not better prepared than were the State and local Civil Defense organizations. I believe the contrary would be closer to the mark. The pertinence of this will appear in a moment.

The very top of the national executive went to an emergency capital outside Washington--the President, the Cabinet, the Joint Chiefs of Staff, the Board of Economic Advisers, and of course the Director of the Office of Defense Mobilization and the Administrator of the Federal

Civil Defense Administration. I am aware that there are present here some who were privileged to be up there in one of those camps. I was not, and I simply have to seek out my information as I can get it from what has been told me and, in particular, what appears in the testimony of Mr. Burgess. They were all up there, under canvas. There was a press office, with the reporters and commentators--all ready to tell the country how the exercise was going. The presence of the President made it certain that the event would have full coverage, and that whatever was done would be widely noted and would leave in the public consciousness a deep impression that what was done was what should be done thereafter.

The hour came, and then the prepared reports came in. Terrible carnage--as had been settled long in advance.

An on-the-spot decision was taken--to declare "limited martial law." I believe this had not been foreseen by anyone who went up to the emergency capital. This I believe. No draft had been prepared. The proclamation was put together after the event, which one can readily believe when one examines it critically.

At the President's news conference on 6 July the following colloquy took place. I quote from the transcript:

> "Anthony H. Leviero, of the New York Times: Mr. President, in Operation Alert you issued a test proclamation of martial law on a national scale. I wonder if you would discuss the application of it and where the governors and other civil authorities would fit into the picture.
>
> "The President: Well, Mr. Leviero, remember, this was an answer to a specific instance. The problem I was confronted with when I left my office, and which I hadn't known before--I refused to let them tell me the conditions under which this problem was to be operated, because I conceive it should be, you might say, the played (hypothetical) decisions should be made in the proper atmosphere of emergency.
>
> "And I was suddenly told that fifty-three of the major cities of the United States had either been destroyed or so badly damaged that the populations were fleeing; there were uncounted dead; there was great fall-out over the country; here there was, as I saw it, no recourse except to take charge instantly, because, even Congress dispersed from Washington because of a bomb, would take some hours to meet, to get together, to organize themselves.

"It was a terrible situation, one that--which you would hope to be terminated very quickly as soon as you get Congress together.

"Now, because of this unexpected development they handed me, I have asked the Attorney General to look through our entire record of precedence (sic) from the beginning of our government to see what would be the thing that would do the least violence to our form of government, which would protect the population, protect the national decision and the, let's say, that particular incident did at least have this benefit: to cause us to study more deeply and in a more analytical fashion our whole history to see what would be the best thing to do under such circumstances."

Once more I recall, the 53 cities damaged or destroyed, the uncounted dead, the survivors fleeing, the fallout--all of these things had been settled weeks in advance. It was not sudden to those out in the field. These were the very assumptions on which the exercise had been set up.

A group of 42 observers, drawn from the Bureau of the Budget and other Federal agencies, were sent to various control centers, to inspect and report. Here are their reports as recorded in a White House press release of 7 July:

	NO. AGENCIES REPORTED			
	Outstanding	Adequate	Need Improvement	Not Evaluated
Effectiveness of Operations	3	27	1	--
Staffing	4	22	5	1
Flexibility and Adaptability	4	26	1	--
Communications	5	21	5	--

They were doing adequately for the most part, and some outstanding.

To be sure, these were ratings of Federal agencies, not of State and local civil defense organizations. But, as I pointed out a moment

ago, it is fair to believe that the Federal field agencies were not any sharper--indeed, were probably not as sharp--on postattack operations as are the civil defense organizations. There was one of the Federal observers visiting the control center where I had gone--that for St. Louis--and it seems fair to suppose that the others were not so indifferent as to overlook the State and local organizations. So if civilian authority and control of essential functions had so far broken down as to require a sudden shift to Army rule--which the declaration of limited martial law asserted--why did not the Federal observers mention it?

I suggest that the breakdown was a sudden conclusion, at the top, by persons who had not studied in advance the assumptions on which the exercise had been set up.

I do not say that civil administration would not have broken down if what was assumed had actually happened. Indeed, I suppose that in our present state of inadequate preparedness that might well happen. We should work hard to brace the civil administration so that it would not break down. Operation Alert was a training exercise, to advance that preparation.

Certainly it will take more exercises, many more, before a satisfactory capability has been reached. There should be no marvel in this, not to officers of the armed services. When you start with troop training, you know that the units could not take the real thing. You keep training in more difficult conditions and with ever larger units, until finally they appear battle-worthy. You would take care not to discourage their slowly mounting self-confidence. And emphatically you realize that it would produce bewilderment and infirmity of purpose to condemn the lower units when the seat of the trouble lies in unpreparedness in the top headquarters.

Let me tell you about the reaction of State and city directors.

The Massachusetts Civil Defense Agency, when notified of the declaration of martial law, sent this message to Region 1, FCDA:

> "You informed us that the President has declared martial law throughout the country. What does this mean so far as Civil Defense functions and State governmental authority are concerned? From whom do we take orders? To whom are we responsible? Is FCDA Region 1 superseded by First Army? What channels of command and communications are established or will be established?

Has Massachusetts Military District been informed, and are they in authority in Massachusetts? Civil government still operating in all areas except inner target areas."

The Director for Baltimore, as quoted in the press, in reporting to the Maryland Civil Defense Agency especially criticized the martial law declaration, saying:

"We haven't the slightest idea of how we should operate in the event such a thing as martial law should be declared . . . . It was the first we had heard of such a thing."

From a very able state director, a retired officer:

"The declaration of Martial Law rested on two unfounded assumptions:

a) That the Army would be available.

b) That the Army has the capability for the task, in fact, could do it better and more efficiently than the civilian governmental agencies.

"Relative to the assumed situation, neither of the aforementioned assumptions appears valid.

"As a matter of morale, if not of principle, any suggestion of martial law or rule should be avoided.

"As a matter of operations the only machinery for the work of rescue, restoration, and rehabilitation is that within the framework of the existing civil governmental and social agencies exercising their civil defense emergency powers as required.

"This is not to say that in certain isolated instances where there is a complete absence of civil government that martial law should not be invoked, always assuming that military forces are available, which is open to doubt.

"Again assuming that military forces are available, they could be given the task of policing and guarding devastated areas, but that would not be martial law."

From the very experienced director of Civil Defense who heads an outstanding city organization:

"The declaration of martial law definitely threw a note of confusion into the entire operation because it was not possible to understand at that point how the military could or would assume control. We believe that if such a move is contemplated or even a remote possibility in the future that there must be a very careful plan worked out for cooperation between military and civil authorities. Otherwise the results of such a declaration could do far more harm than good."

A State director remarks on "the extreme degree of confusion that existed among our national leadership prior to and as a result of the act"--that is, the act of resorting to martial law--and continues:

"While the President undoubtedly made the declaration upon the advice of his immediate subordinates, and with the comfortable awareness of the simulative aspects of the test, it is not believed that he had any definite knowledge as to the methods or techniques of application or as to the irreparable psychological damage that would be effected on the future of volunteer, civilian civil defense.

"While martial law is briefly mentioned as a 'last-resort' measure in civil defense (United States Civil Defense, 1950, NSRB Doc. 128, p. 16), nevertheless most civil defense planning is based on the assumption that martial law will not be declared. Under this assumption, the general public is more logically approached and convinced as to the necessity for a volunteer civilian civil defense. Without this assumption, the general public naturally looks to and depends upon the military for civil and non-military defense.

"When the President declared martial law during Operation Alert 1955, this feeling of total national security being a function of the military was firmly imbedded in the minds of the American public. It was substantial proof of the lingering doubt held by the average layman that '. . . the military is going to take over civil defense anyhow . . . .'"

From the Civil Defense Director of a large city to the FCDA Administrator, shortly after Operation Alert:

"The press reports during the recent 'Operation Alert' concerning the declaration of martial law and an article in the July 1st issue of 'U. S. News & World Report,' are having a very adverse report on Civil Defense efforts locally. There has always

been a group of people--unfortunately some of our local city officials are included--who thought the civil defense effort useless because 'martial law will be declared and the Army will take over.' Press reports originating in Washington would seem to give substantial reasons for this belief.

"Where the Army would get the trained manpower for such an operation and what would happen pending the arrival of this manpower is not mentioned.

"I expect to go before my Board of Supervisors with a request for $89,000 for an intensive public information saturation campaign within a week or ten days. The question of martial law is bound to be raised. I therefore request that you reply by telegram or air mail, clarifying just what the Federal policy in this matter is and indicating whether or not continued local efforts in civil defense are essential."

One final quotation--this from a state director:

"Certainly, we of the local and State Civil Defense organizations should be able to depend upon the FCDA to visualize the impediment to the Civil Defense effort which is caused by even 'thinking' about plans for invoking Martial Law within the very first hours of the assumed attack on the Continental United States. If we don't have faith in our ability to build up the Civil Government to the point where it can accept its responsibilities in that time of emergency, we had better quit talking about it right now and definitely and firmly turn the problem over to the Military so that they can make the plans and take the necessary organizational steps now."

Let us get back under the big tent, at the emergency capital, when those damage reports first came in. Down at the operating level, directors were fighting their several battles; and, as is a characteristic of the heat of operations, people who are busy doing their best don't have much time to send back play-by-play accounts. At the emergency capital, however, the damage reports evidently produced consternation. Clearly the authority of the United States and the leadership of the President would have to be asserted in the event of a nuclear attack. But there was no statute providing the mechanics of national direction of state and local administration. The Act of 1951 had declared that civil defense is primarily a state concern. How could national leadership be made instantly effective?

I suggest that the moral authority of the Presidential office is so great that in such a moment of extremity no state or local officer would refuse to conform to the President's direction. On such an occasion, moral authority counts enormously, especially when, as in June, 1955, there was deep popular respect for both the office and the occupant.

A different line was pursued. To bridge the gap between the President and the Governors of the States, it was decided to throw in the channels of the United States Army. National direction would be routed through the Department of Defense, the Department of the Army, the Chief of Staff, Continental Army Command, and go down to the six Army headquarters. Understand, the Department of the Army had had no forewarning of this sudden mission.

I will speak first of how "martial law" was conceived by certain civilian leadership at the emergency capital. Then I will consider "martial law" in practical operation.

The Proclamation declared:

> "The Secretary of Defense and subordinate military commanders of the respective Army areas shall enforce law and order and shall carry out determinations and decisions of Federal agencies in the discharge of the regular and emergency authorities vested in them by law and the proclamations and Executive orders issued since the attack upon the United States including:
>
> "(a) Civil Defense proclamations;
>
> "(b) ODM and stabilization proclamations."

Evidently "martial law" was thought of as a device whereby measures of economic control--complicated measures, price control and all the rest, originating in the departments and agencies, notably ODM, could somehow be transmitted to state and local levels, and put into operation, through Army channels. By some legerdemain, paper proclamations at the top would be handed to the Army and, behold, it was as good as done! I cite a lyrical press report, quoted in the FCDA Daily News Digest No. 1064 of 22 June:

> "Meantime, . . . relocated government agencies poured out dummy decrees designed to pump money, manpower, food and medicine into the supposedly wounded civilian economy. By now--

with the exercise at a point representing the 20th to 30th day of the real thing--the economy was operating under a . . . proclamation of martial law and a tightening web of simulated Federal controls."

I am reminded of the people who went streaming out across the Potomac to witness the great triumph at Bull Run.

From FCDA News Digest No. 1063, of 21 June:

"(ODM Director) Flemming said that the President's decision to invoke martial law on a nationwide scale was the key development of the three-day exercise. He said that it would cut at least one and possibly two years off the work of preparation that ODM must do in planning to counter an attack. 'The President's decision was made on the spot,' Flemming said. 'It left no doubt that in case of an attack of the magnitude envisioned in our test, the President would call for martial law throughout the country. We know now what to expect and can make definite plans to handle the situation.' He added that, 'Martial law has never been declared upon a nation-wide basis in this country's history. It opens up a vast new field of legal and other problems which experts will have to study for some time to come.'"

How the news about "martial law" came to the Pentagon has been told in detail by Assistant Secretary Burgess, in a statement of 25 June 1955, to the Senate Subcommittee on Civil Defense. See Hearings on Civil Defense, Part 2, at p. 746. It was at 0040 hours Eastern Daylight Saving Time, on 16 June, that the Defense Department was advised that the President had declared martial law. It was not until 2222 hours--21 hours and 42 minutes later--that the text was received. According to the Alert timetable, whereby 9 days were condensed into 26 hours, the text of the declaration was signalled to the Defense Department more than 4 days after the declaration was made. Indeed, as Mr. Burgess concluded, by the time the proclamation was received, "the civil defense operation was ended."

Quoting further:

"Informally the full text of the message was given to the Operations Division of the Office of the Assistant Chief of Staff, G-3, for study but no further action. Nothing went down to continental Army commands or to the Army headquarters."

I repeat, the Army was not in any way called upon to perform under the declaration. A state director said to me, with a chuckle: "I was strongly tempted to send a signal to Army headquarters asking for instructions." He knew that the Army headquarters knew nothing at all about it.

The preliminary memorandum from the Secretary of Defense to the Secretary of the Army, prepared at the emergency capital, directed that the Chief of Staff would prepare to "carry out, with military authority, whatever actions are required (a) to restore and maintain law and order; (b) to initiate recovery and rehabilitation from the effects of enemy action."

I bear down on this directive. The Chief of Staff was to act with military authority. He was to initiate the tremendous endeavor of national recovery and rehabilitation. That means a military administration of the entire country. Of course, the mayors would be left in the city halls and the governors in the state houses, but it was to be a military administration. The Army Staff--no matter for the moment what part of the Staff--and the staff at lower echelons were to direct the tremendous endeavor. Mr. Flemming and other civilians had the idea that somehow the Army would carry out mechanically the directives of the various departments and agencies.

I suggest that the idea of the Army's part can be put in a jingle:

> "Theirs not to reason why--
> Theirs to see that men comply!"

But the draft directive to the Chief of Staff told him to get on with relief and rehabilitation with military authority.

I raise practical problems of how this could be done.

Washington was hit by a 10-MT bomb. How much of the Army Staff got away to set up in the field? If the bomb fell on D-Day, how do we know that the dwellers in the Pentagon got away? If this was D-Day, or indeed any day during the war, would the Army, in addition to its normal duties, be prepared to direct the relief and rehabilitation of America?

Doubtless most of you have participated in or at least observed civil affairs in overseas territories. You have some idea of the magnitude and varied competence of the G-5 staff section in a large-scale

military occupation. You know that the Army has no such staff section in being, and could not improvise such a staff section of the size and varied ability requisite for governing America, in less than many months. The Army is not prepared to administer the many functions--governmental, economic, and social--that would be involved in relief and rehabilitation.

New York City was hit by a 5-MT surface burst. How well did Headquarters First Army execute itself in Governors Island? Chicago was hit by a 5-MT surface burst. Did Headquarters Fifth Army get away from 1660 East Hyde Park Boulevard?

In thinking of shifting to martial law because 53 cities have been destroyed, we should indulge no more favorable presumptions about the continuity of Army organization than we do about the organization of civil government.

There are other and deeper objections to this conception of placing the work of national recovery under martial law--spiritual objections. The Army operates on the basis of authority and command. It must operate on that basis. Normally the authority is exercised with reason, and where there is inspired leadership, there will be an eager readiness to carry out commands. But the leadership of the military service is one thing and effective leadership of the civilian community is quite another. The mass of citizens will not respond to Army direction half so willingly or half so effectively as to the democratic leadership or mayors, governors, and the like. We must look to elected officials, public administrators, and men of civic virtue generally to be the natural leaders of American communities in the conduct of national relief and rehabilitation.

Yesterday I attended civil defense hearings by the Holifield Subcommittee. The Under Secretary of Agriculture and an Assistant Secretary of Labor testified as to what their respective departments were doing about civil defense, under delegations. The Department of Agriculture has made plans that concern the farmers. The Assistant Secretary of Labor was talking about the mobilization of labor in the event of nuclear attack--labor to move to points where needed, to perform new tasks requisite in an emergency. He was talking about ways of enlisting willing participation in preparatory training, and of incentives to make sure of reliable labor forces. How unsuited to the leadership of the American farmer and the mass of American workers is martial law carried out through Army channels! Certainly the Joint

Chiefs of Staff do not want the Armed Forces to have this strange business thrust upon them--not suddenly, not even with notice in advance. The Government of America is not an appropriate task for the Armed Forces. I cite to you the testimony of the Joint Chiefs of Staff before the Holifield Subcommittee on 23, 28, 29 February, and 1 March of this year. It's a very bulky thing, and when it comes out, I urge you to read it.

Within the ODM and the FCDA the present disposition seems to be to say that "martial law," as used in Operation Alert, does not mean what it really does mean to those who are acquainted with the subject. They stress that the proclamation said "limited martial law." I quote from a memorandum of 13 January 1956, by the General Counsel of the FCDA: "The purpose of the declaration was not to replace the civil administration, but to support it by overcoming the disorders which were in fact or threatening to obstruct the essential operations of government."

What civil disorders were in fact obstructing or threatening to obstruct the operations of government in the paper exercise of 15 June? This, I firmly believe, is pure invention, after the event. The citizens of America were going about their usual business on 15 June: --quaere, how many even knew of the test exercise? Where were the disorders, actual or threatened?

The General Counsel said further: "The declaration of martial law did not make the Commanding General in each area the supreme authority within those boundaries." The memorandum interprets martial law as a condition where Army commanders, the FCDA regional director, and local officials all pitch in and help one another, apparently with nobody really knowing who is directing whom. He even mentions the possibility that perhaps the FCDA regional director should have authority to order the movement of troops upon specific missions, but thinks it "doubtful that that would be advisable."

Mr. Flemming, Director of ODM, testified before the Subcommittee on 10 April--last Tuesday. I wish I had time to quote some of the passages. I urge you to read his testimony when it appears in print. It seems to me that his ideas about "martial law" are confused and confusing. He sticks to his story that "martial law" is a normal feature of postattack administration. But apparently his use of the term is not what it means, and rightly means, to the Army--namely, the actual government of the civil population through the military forces.

The "martial law" of ALERT 1955 has been watered down to merely "the maximum military aid to the civilian agencies" that would be practicable and consistent with the primary responsibilities of the Armed Forces.

There are, of course, many functions that troops can most usefully perform--particularly logistical support. The Armed Forces know how to set up reception centers, how to conduct mass feeding and shelter; they can direct road traffic. They can establish Red Ball Highways and move supplies to points where they are needed--assuming that transport is available. But this sort of logistical support is not a military administration of the country. It is confusing and mischievous to say "martial law" when only such military aid is meant.

Given an established system of national authority and leadership, running down to the States and their subdivisions, it would be practicable to transmit the directives of the Federal departments and agencies down that channel; and where military aid was to be rendered, a corresponding directive would be sent down military channels. Then the military commander would have instructions from his own superiors, setting forth the principles and measure of his supporting action. He would not and should not be subject to the orders of authorities other than his own superiors in the National Military Establishment.

The proclamation of "martial law" has put our thinking about civil defense in a false setting. It has led to a great preoccupation with compulsion and military authority--suspending the writ of habeas corpus and that sort of thing. The great need on the morrow of an attack, as I see it, would be for civic leadership, for maintaining the continuity of effective civil administration. Military units, where available, could render invaluable assistance by means of material support. It is most desirable that officers who, like yourselves, are concerned with logistics, should work out the methods for rendering such support. But the direction of relief and rehabilitation is essentially a task for civilians. A military administration of the country is not the solution of the problem.

Thank you very much.

MR. NIKLASON: Dr. Fairman is ready for your questions.

QUESTION: From what you have given us of the recent statement of a high government official it seems to me that the Government is

accepting the viewpoint that you have been expressing. How else would you arrive at such vast decisions in a democracy than by raising the question as it has been raised and now apparently settling it very quickly?

DR. FAIRMAN: I wondered about that very thing--whether out of this some good might come. Before it happened, I had made it my business to test, wherever I went, what people thought. I found what you will find in General Nelson's East River Report--the "unspoken major premise" that he found as he went around that somehow the Army is going to take over.

If out of Operation Alert there had come a determination to build up a better system of civil defense, it would have been productive of good. At the moment, however, the situation seems to be that much confusion was bred. You can't get the genie, "martial law," back into the bottle once you let it out. I think the thinking over in the Pentagon is completely straight on this, subject, as is always the case in the military service, to the fact that one must not speak out ahead of one's civil superiors.

Among the rank and file of civil defense directors over the country, confusion now prevails, and dismay. Among the people generally I think this has contributed somewhat to the bafflement; but if it has affected the sense of confusion, it is only for the worse, by making people think: "It's all being taken care of. The Army will take over." And, as was said by one of the civil defense directors I quoted, it is awfully hard to get civilians to work once you have this dramatic demonstration that the Army is really going to take over.

I would much prefer to have had the thing well thought out in advance, not to have gone at it unprepared. I would much prefer that top headquarters had talked it all out, every point of view being heard, and had settled on the wise course without making it a matter of public discussion, so that what the public learned would be the approved solution, not a bad solution to be undone. And it has done this further hurt: that a lot of people in high places have gone on record and it's hard for them to climb down.

QUESTION: It seems to me that we do have incidents of martial law on a smaller scale going on in this country all the time. In fact, in labor disputes we have precedents of martial law. If the President had not declared martial law, and the bombs actually fell, I wonder if

you would give your opinion as to how many of the forty-eight governors would actually have declared martial law under the press of time, on their own.

DR. FAIRMAN: I don't know. I was told that one of them had. But one startling thing about it is that this proclamation, as it was cooked up, is that it actually deplores and regrets that we didn't have the governors declaring martial law. One of the recitals--and I can quote it to you--is that the reason for a national declaration of martial law was that the governors weren't able to do it in all the forty-eight states. The proclamation seems to say: "It would be a lot better if we had forty-eight brands of martial law, but failing that, we must have one for the entire Nation."

Now, I invite your attention to this as a matter of operations. Just think. If we really are to have national direction, as I assume, national directive would go down at the state level; and then, instead of the Federal departments dealing with the corresponding agencies of State administration, all this stream of direction would be shunted to the state adjutant general, and would be administered through his subordinates. Now, that seems to me the worst of all ways to communicate national leadership down to the local level.

You are right in saying that we have now a number of incidents of State martial law. Happily, they are fewer of late. I made it my business years ago to study these things. In the main they were regrettable, in that typically they arose out of unhappy labor-management disputes before labor organization was recognized by management. It turned out often to be crude machinery for "busting" a labor dispute. I assure you that in some of the states, the expression "martial law" calls unfortunate history to mind.

QUESTION: I understand that the directive for Operation Alert 1956 is out now and that it contemplates the use of martial law. Do you feel that this is an advance notice, an advance finding, that it may be feasible to have limited martial law of some kind and to integrate it with Civil Defense and other agencies? Or is there any other comment you would like to make?

DR. FAIRMAN: My first comment is that I hope you are misinformed. I didn't know the plan was out yet. If it is, that is the worst news I have heard today.

So I would say that it would be deplorable if we have to go through this business of "martial law" again. If you do it twice, I fear that will really settle the pattern.

QUESTION: You stressed the necessity for gearing the state instrumentalities and operations into those of the Federal Government. I certainly agree with you that that is necessary. Would you propose that the Federal Civil Defense Administrator be given more authority to go down into the states? Would you propose that he have the overriding decision, let us say, over state officers in the control of facilities?

DR. FAIRMAN: That is a very good question. I understand the Holifield Subcommittee is going to cope with it.

I don't think we can foresee just how this would work out. I believe it is fair to start on the assumption that it is more important to establish the mechanism, the machinery, for the flow of authority than to worry too much about what you do if somebody proves recalcitrant. Your question is, what you would do in the event of recalcitrance? Let me just put that aside for the moment, because I don't think that is the first thing to think about. It's more reasonable to presume that people in the first instance are going to conform than that in the first instance they are going to obstruct. I am more concerned with getting the flow of power

Now, of course, eventually recalcitrance may arise. What if a governor says, "I won't." I have in mind the business of interning the Japanese-American citizens as well as the Japanese aliens. The original purpose was to remove them from the Pacific coast area but not to relocate them at any prescribed place. Immediately there was objection; and the relocation came out of Federal deference to state unwillingness to have those people running around in the interior.

I don't think the answer is to amend the Federal penal code to provide for prosecution of state governors. That is no way to do it. My own feeling is that the statute should have a provision covering that. My notion would be that the President should be authorized to put in a man to act in respect of all the state governor's functions that are material to the Federal war effort. So, if you were standing there as the Federal representative, in the place of Governor So-and-so of the State of So-and-so, you could not act in respect of his purely internal responsibility--you couldn't appoint judges or convene the state legislature--but in respect of all these things essential to the Federal Government's war effort, your signature would be in lieu of his. That would be my notion.

I hope that we wouldn't have to meet any problem of resistance of a state governor. But I am sure of this: That to send the Army Commander to deal with that recalcitrant governor is, I think, a very poor way of getting him to quit being recalcitrant. I think it would be a lot better if the President would pick up the phone and talk to that State governor.

QUESTION: I would like to correct what has been said about the use of military martial law--that they are going to use a mixed Operation Alert. I believe Mr. Flemming stated, and it was so announced in the papers, that it would be in the form of military aid to civil power. Now, if we accept this as military aid to civil power--

DR. FAIRMAN: That, I may say, is consistent with what he said on Tuesday.

QUESTION (continued): If we accept the fact that we are going to have military aid to civil power, then I think we should sell that idea to the people, and we should get the Governors and the military commanders and the FCDA people sitting down together now on the subject, where the military is not. Would you care to comment on that?

DR FAIRMAN: I am completely in agreement with you, with only this proviso: that before these gentlemen sit down together, it is essential to have a plan of operation, so that respectively each knows what his responsibility is. This isn't like a lot of children in the kindergarten playing Ring Around the Rosy--everybody acting on his own initiative. It makes a great difference whether the soldier goes to the conference as the bearer of primary responsibility, trying to get civilians lined up to make sure that they will do the things they ought to do, or whether you go there as the bearer of only limited responsibility to deliver logistic support, in aid of the civil government.

COMMENT: Which is apparently the way the British have foreseen it--selling their civil defense people the idea that they are going to be area commanders. In their exercises I understand that they are keeping their command channels purely nonmilitary.

DR. FAIRMAN: I am sure they would not get mixed up in this kind of uncertainty. It is perfectly true that a command paper came out early this year, wherein the British Government points out that they will give certain reserve units special training for civil defense operations. But emphatically the Government of England is not planning to institute "martial law."

QUESTION: You have expressed concern about the damage done in last year's Operation Alert by the declaration of martial law. It seems to me a lot can be salvaged, because in times in the past the Army has helped out in relief operations--

DR. FAIRMAN: That is logistic support.

QUESTION: --and you have a precedent there which can be useful.

DR. FAIRMAN: I agree with you, but don't call it martial law.

QUESTION: No, but that's the way it is supposed to be done now.

DR. FAIRMAN: That is fine. But I can assure you that the state civil defense directors don't understand that Operation Alert stands merely for military aid to the civil power. Take the response of the Massachusetts civil defense director: "Whom do we take orders from?"

QUESTION: Doctor, I understood you to say that because of our past experiences with martial law, particularly in labor disputes, people have a rather low opinion of it. I suspect that if you studied what came out of people who had been under martial law during time of disaster, you would find not a dissatisfaction with it but actually praise. Would you care to comment on that?

DR. FAIRMAN: Would you care to comment on which episode it was where they praised it? Were you ever under it yourself?

QUESTION: No, but I have a family that was under it during a bad flood.

DR. FAIRMAN: Did they call it martial law out there?

QUESTION: I don't know. I am not a lawyer, but perhaps it was that technically.

DR. FAIRMAN: I rather doubt that they did call it martial law. I very much doubt that.

Praise for the aid that had been brought, yes. I believe it is fair to say that the people of Hawaii would not now speak in praise of the regime under which they lived so long. Do you have any comment adverse to that?

QUESTION: I never lived in Hawaii.

DR. FAIRMAN: I never did either. I had a seat in the Munitions Building, where I was able to see that at a distance of six thousand miles. Indeed, I had written an article rather speaking in praise of it as it first appeared.

One reason I feel rather deeply about this is that I did speak in qualified praise of it in an article that went in the post box on 2 May just as I came on active duty; and I have been charged with being strongly militaristic about this. So--and this is a personal comment--it rests on my conscience heavily that I have been understood as speaking in praise of what went on in Hawaii. When once I got here in Washington and saw how it was going on and on, I regretted more and more the stand that was taken.

I think people may speak very favorably of the Army bringing them blankets, but I believe they will not speak favorably of the Army ruling them.

QUESTION: I certainly recognize that the problem is difficult enough as it is and I wouldn't like to seek to impose another problem--

DR. FAIRMAN: One more couldn't add any confusion.

QUESTION: --but under such an attack there are always the saboteurs and the fifth columnists in the various areas. It would certainly complicate the problem if there was any serious effort to carry on fifth column activities in a certain area. In that case wouldn't there have to be Federal directives, or how could we deal with them?

DR. FAIRMAN: If enemy forces land here, it is the business of the Army commander responsible here to get them. If that happens, you would have a situation where martial rule was indeed appropriate, if indeed it is a battle area, whether an old-fashioned battle or the fifth column kind of battle.

But it is not reasonably to be contemplated that throughout the length and breadth of the United States, foreign forces would actually descend on this country. There were only two places, I believe, during World War II where that happened. That was the case of the saboteurs, landing in two places, who were tried over here in the Justice Department--and the Army must admit that it was the FBI that caught them.

One of the difficulties of the case, from the legal point of view, in pointing out how they breached the lines of the United States was that the most visible lines were FBI and not Army lines, or Navy lines either for that matter.

MR. NIKLASON: Thank you, Dr. Fairman, for a very interesting and profitable lecture and discussion.

(7 May 1956--450)B/ljt

B68523