THE ROLE OF THE SUPREME COURT AS PROTECTOR OF CIVIL LIBERTIES IN TIMES OF EMERGENCY

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The privilege of the writ of habeas corpus was suspended by the President of the Philippines, in a proclamation issued on October 22, 1950.[1] The suspension applied to the persons then detained as well as others who might thereafter be similarly detained:

> "for the crimes of sedition, insurrection or rebellion, and all other crimes and offenses committed by them in furtherance or on the occasion thereof, or incident thereto, or in connection therewith." [2]

The action taken by the President attested to an executive determination that a state of emergency then existed in the Philippines.[3] For one of the mandatory provisions of the Bill of Rights is that the privilege of habeas corpus shall not be suspended, except in case of invasion, insurrection or rebellion, when the public safety requires it, the suspension being limited wherever during such period the

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[1] Proclamation No. 210, 46 O.G. 4682.

[2] 46 O.G. 4683.

[3] Two constitutional provisions bear directly on the question of emergency. One provides: "In times of war or other national emergency, the Congress may by law authorize the President, for a limited period and subject to such restrictions as it may prescribe, to promulgate rules and regulations to carry out a declared national policy." Art. VI, sec. 26. The other provision reads: "The privilege of the writ of habeas corpus shall not be suspended except in cases of invasion, insurrection, or rebellion, when the public safety requires it, in any of which events the same may be suspended wherever during such period the necessity for such suspension shall exist." Art. III, sec. 1, par. 14.

It may be stated that in general there are three types of crisis in the life of any nation, three well-defined threats to its existence which can justify a governmental resort to far-reaching authority not allowable perhaps during normal times. The first of these is war, particularly a war to repel invasion. The second is rebellion, when the authority of a constitutional government is resisted openly by large numbers of its citizens who are engaged in violent insurrection against the enforcement of its laws or even destroying it altogether. The third crisis is economic depression with the direct threat to a nation's continued existence that it implies and with a gravity at times amounting to a war or a rebellion. On this point, see ROSSITER, CONSTITUTIONAL DICTATORSHIP, pp. 5-6.

necessity for it shall exist.[4] In vesting the President of the Philippines with the authority to suspend the privilege of the writ of habeas corpus, not the actual existence of a state of invasion, insurrection or rebellion as contemplated by the above provision of the Bill of Rights but the imminent danger thereof justices the exercise of this power.[5] Up to the moment of writing the suspension of the privilege of the writ of habeas corpus has not been lifted. Insofar as the Executive Department of the Government is concerned then, the state of emergency continues. The question that thus arises is the weight to be accorded such an executive pronouncement in the determination by the Supreme Court of civil liberties cases before it.[6]

I. SUSPENSION OF RIGHT TO BAIL DURING EMERGENCY: MINORITY VIEW

The question possesses more than a mere academic significance. In the opinions rendered in the cases of *Nava v. Gatmaitan,*[7] *Hernandez v. Montesa* [8] and *Angeles v. Abaya,*[9] three justices, Padilla, Bautista Angelo and Pablo, premised their inability to accord petitioners Nava and Hernandez their constitutional right to bail on the ground that the emergency now existing suspended such right as to them, they being detained by virtue of the proclamation suspending

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[4] Art. III, sec. 1, par. 14.

[5] Art. VII, sec. 10, par. 2.

[6] The phrase *civil liberties* may embrace all constitutional rights, whether civil, political, or social and economic. Political rights imply the right to participate in the government, under democratic theory the right to oppose the government in power. Civil rights emphasize the liberty the citizens enjoy to protect themselves against the politically organized community. Social and economic rights on the other hand emphasize the protection that the welfare and well-being of the citizens receive from the government. The phrase *civil liberties* is here used to refer to civil rights.

Cf. "The essence of liberty is the rule of law. Only when impersonal forces which we know as law are strong enough to restrain both official action and action by private groups is there real personal liberty. Liberty is not mere absence of restraint, it is not a spontaneous product of majority rule, it is not achieved merely by lifting formerly depressed classes to power, it is not the inevitable by-product of technological advancement. Freedom is achieved only by a complex but just structure of rules of law, impersonally and dispassionately enforced against both ruler and the governed. Because liberty cannot exist apart from the impartial rule of law, it is vulnerable to wartime stresses, for then the rule of law breaks down. The same passions and anxieties may result from a long period of tension which may be almost as demoralizing as actual war." Jackson, Wartime Security and Liberty Under Law, 1 Buffalo Law Review 103, 104.

For a comprehensive and readable discussion of the effect of crisis conditions on civil liberties, see LASSWELL, NATIONAL SECURITY AND INDIVIDUAL FREEDOM.

[7] G.R. No. L-4855 Resolution prom. Oct. 11, 1951.

[8] G.R. No. L-4964 Resolution prom. Oct. 11, 1951.

[9] G.R. No. L-5102 Resolution prom. Oct. 11, 1951.

the privilege of the writ of habeas corpus. Five of their colleagues would respect such constitutional right to bail, as in their opinion it was not affected at all by the suspension of the privilege of the writ of habeas corpus.[10] No decision was rendered by the Supreme Court as under the Judiciary Act a majority vote of six of the eleven justices is necessary for a judgment to be validly promulgated by the Supreme Court of the Philippines.[11]

Justice Padilla explains his vote thus—

> "I am of the opinion that paragraph 14, section 1, Article III, of the Constitution, which prohibits the suspension of the privilege of the writ of *habeas corpus,* and paragraph 16 of the same section and article, which grants to all persons before conviction the right to be released on bail by sufficient sureties, except to those charged with capital offenses when the evidence of guilt is strong, and enjoins that excessive bail be not required, may be invoked and applied in normal times or during periods of normalcy in the life of the nation, for such is the import of paragraph 14 if the exception is to be taken into account. The exception has reference to the suspension of the privilege during such period as the necessity for it shall exist, which may be decreed by the President in cases of invasion, insurrection, or rebellion, or imminent danger thereof, when public safety requires it (Article VII, section 10, paragraph 2, of the Constitution). It envisages and is intended to confront an abnormal situation pregnant with perils and dangers to the existence of the State. The exception in paragraph 16, unlike the one in paragraph 14, refers to the denial of bail during a period of normalcy." [12]

Justice Bautista Angelo goes even further—

> "The cases before us involve a fundamental issue which vitally concerns the security of the State and the welfare of our people. They involve a conflict between the State and the individual. When the right of the individual conflicts with the security of the State, the latter should be held paramount. This is a self-evident political shibboleth. The State is the political body that stands for society and for the people to secure which individual rights must give way and yield. For as Justice Holmes well said, 'when it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment.' (Moyer vs. Peabody, 55 L. ed. 410). Only having in mind this fundamental point of view can we determine in its true light the important case before us which has no precedent in the annals of our jurisprudence." [13]

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[10] Paras, C.J., and Bengzon, Tuason, Jugo, and Reyes, JJ.

[11] Section 9, Judiciary Act.

[12] Separate opinion of Justice Padilla, pp. 1-2.

[13] Separate opinion of Justice Bautista Angelo, p. 1. The invocation by Justice Bautista Angelo of Holmes, concededly one of the greatest civil libertarians in the annals of the American judiciary, bears looking into. The quotation by Justice Bautista Angelo comes from the opinion of Holmes in the case of *Moyer v. Peabody,* 212 U.S. 78. The question before the court is set forth in the opening paragraph of

Justice Pablo has a similar belief—

> "En tiempos normales la Constitucion de Filipinas rige en su totalidad. Algunos de los derechos individuales, como el derecho del acusado a la libertad provisional bajo fianza, se hace efectivo por los juzgados por orden perentoria.[14]

The above view while extreme is not entirely lacking in plausibility. In terms of Lincoln's dilemma: "must a government be too strong for the liberties of its people or too weak to maintain its own existence?" [15] the preference of the above three justices is for strength. That is understandable. As the American Supreme Court had stated in a leading case, "civil liberties as guaranteed by the Constitution imply the existence of an organized system maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses * * *." [16] Concede the gravity of the situation as it must have appeared to the President of the Philippines, a view accepted by the three justices aforementioned, and the conclusion arrived at by them, does not seem to be too far-fetched. To accord unrestricted scope to the claims of liberty then might conceivably, to quote Justice Jackson, "result in converting the constitutional Bill of Rights into a suicide pact." [17]

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the opinion thus: "This is an action brought by the plaintiff in error against the former governor of the state of Colorado, the former adjutant general of the national guard of the same state, and a captain of a company of the national guard, for an imprisonment of the plaintiff by them while in office. The complaint was dismissed on demurrer, and the case comes here on a certificate that the demurrer was sustained solely on the ground that there was no jurisdiction in the circuit court. 148 Fed. 870." The alleged imprisonment of Moyer was asserted to have continued for about two months and a half on the order of the former governor who, previously had proclaimed the existence of a state of insurrection. Accordingly, as Justice Holmes stated: "The facts that we are to assume are that a state of insurrection existed and that the governor, without sufficient reason, but in good faith, in the course of putting the insurrection down, held the plaintiff until he thought that he safely could release him." With the good faith of the Governor being assumed, the judgment by the circuit court dismissing the complaint against him had to be affirmed. For as Justice Holmes reasoned out: "Such arrests are not necessarily for punishment but are by way of precaution, to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the governor is the final judge and cannot be subjected to an action after he is out of office, on the ground that he had not reasonable ground for his belief." Judged in the light of the facts and the question at issue in the above Moyer case, it would seem that Justice Bautista Angelo's invocation of Holmes for the broad proposition that individual rights must indubitably give way to the security of the state may do less than justice to that great jurist.

[14] Separate opinion of Justice Pablo, p. 1.

[15] Quoted in *Minersville School District v. Gobitis,* 310 U.S. 586.

[16] *Cox v. New Hampshire,* 312 U.S. 569.

[17] Jackson, diss., *Terminiello v. Chicago,* 337 U.S. 1.

II. EMERGENCY NOT SUFFICIENT FOR SUSPENDING CONSTITUTIONAL RIGHTS

It would seem that the case for those who maintain that an emergency justifies the refusal of the Supreme Court to apply the Bill of Rights cannot be more strongly put than that. As thus set forth, it is not too entirely persuasive. The view does seem to contain elements of permissible exaggeration, permissible it is true, but exaggeration nonetheless. To paraphrase Justice Jackson in his famous opinion in the case of *West Education Board of Virginia v. Barnette,*[18] such over-simplification may be handy in political debates but may lack the precision necessary as a postulate of judicial reasoning. Nor is the deficiency of the doctrine limited to its violation of certain canons of judicial thought.

The error is much more substantial than that. It presupposes that an emergency of itself calls for the suspension of the applicable constitutional guarantees. It implies that the Constitution is no longer a workable instrument in moments of danger to national safety and security. The Constitution certainly cannot be susceptible to that reproach. Well has the American Supreme Court said in the leading case of *Ex-Parte Milligan,*[19] "the Constitution is a law for rulers and for people equally in war and in peace and covers with the shield of its protection all classes of men at all times and under all circumstances." This affirmation should be enough to give pause to those who would premise the suspension of constitutional rights because of emergency condition. The fact that the Constitution provides for only one situation where a provision of the Bill of Rights may be suspended, emphasizes the holding in the above cited *Milligan* case that the framers of the Constitution—

> "limited the suspension to one great right and left the rest to remain forever inviolable."

Any other view would result in reducing the Bill of Rights to a barren form of words. Allow the exception to the enforcement of constitutional rights in times of emergency and the point will soon be reached where so sweeping an exception will leave nothing of these rights.

III. CONDITIONS FAVORABLE FOR CONTINUED EXISTENCE OF EMERGENCY

It is bad enough if emergency periods are of limited duration. It is infinitely worse if as recent tendencies seem to indicate periods

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[18] 319 U.S. 624.
[19] 4 Wall 123.

of crisis may have to be accepted as normal. This is a bipolar world in which we live.[20] The two centers of power are the United States on the one hand and Soviet Russia on the other. Their struggle for world domination is bitter and likely to be protracted.[21] The Philippines as an adherent of the democratic creed is definitely on the side of the United States. This is not a matter of imposition from a country that up to now has been generous in its financial support to the Philippines. It is not entirely the result either of the natural feeling of gratitude for such tokens of generosity. The Christian heritage from Spain as well as the education in democracy under American tutelage make acceptance of Communism unthinkable to the overwhelming majority of the Filipinos.[22]

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[20] See Lasswell, Interrelations of World Organization and Society, 55 Yale Law Journal 889.

[21] Cf. "A good crop in Western Germany is chiefly evaluated, not in economic or humanitarian terms, but according to its effect upon Soviet-American power. The question whether Italy is to receive economic assistance is entangled with estimates of how the economic recuperation of the Italian peoples will affect the spread of communism. Whether Koreans or Chinese are to have medical aid becomes subordinated to the Russo-American balance of power in Asia. Every expansion of population, every decline in the death rate, every upswing in production, every drop or rise in the standard of living, every amelioration in the respect position of the colored peoples, every advance in scientific knowledge, every radio broadcast, every movement of students or traders or tourists or displaced persons across frontier lines, every addition to transportation facilities (by air, sea, or land), every movement of raw materials, foodstuffs, semi-processed products, machine tools or consumer goods: In a word every social change is promptly weighed in the scale pans of power and responded to accordingly." Lasswell, "The Prospects of Cooperation in a Bipolar World," 15 The University of Chicago Law Review 877-901 (1948).

[22] Regarding American advantage in the war of ideas between her and Soviet Russia, Lasswell has the following to say: "The relative failure of Russian communism in the United States and elsewhere suggests that the United States has powerful assets in the war of ideas. Whatever the blemishes, America is still the 'miracle' of our age. It is possible to assert categorically that for at least a century the U.S. has maintained the longest sustained rise in the standard of living in the history of mankind. Thus the Marxist thesis of the inevitable and progressive impoverishment of the masses is emphatically contradicted by the facts. Millions of human beings have found a new birth of personal dignity in the freedom of this country. Any exceptions to the ideal of respect for human personality are under vehement attack among ourselves and are steadily giving ground in the fact of unceasing pressure to narrow the gap between ideals and practice. America has fostered the release of the energies of man on a scale without parallel.

It is safe to say that chronic mass unemployment will no longer be tolerated in this country. No qualified observer believes that it will be morally or politically possible for the government to refrain from adopting whatever measures are necessary to restore high job levels in case a substantial recession occurs.

The powerful program of economic assistance to European and other nations is a vital demonstration of the capacity of the United States to adjust to new emergencies and to rise to the responsibilities of the leadership so unexpectedly thrust upon us.

This is not to gainsay the fact, however, that in this country and for some time now there is a band of devoted and fanatical followers of Communism.[23] Since liberation with the aid of non-Communist groups who fought with them against the Japanese during the occupation, they have been in a stage of open rebellion in not a few places in the Philippines. As a matter of fact it was the mounting intensity of such subversive activities that called, in the presidential opinion, for the suspension of the privilege of the writ of habeas corpus. While the measures taken by the Government to put an end to this armed uprising have been on the whole successful, especially of late, the end of the Communist conspiracy is by no means in sight.

Nor is it likely that in the immediate future the forces of Communism would be entirely wiped out. As long as Russia remains a great power and while the struggle for world supremacy continues, Communism may be a spent but not a moribund force in the Philippines.[24] The small but fiercely determined group of local Commu-

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Although a victor in two world wars against aggressive powers, the United States has not engaged in imperial aggrandizement. In 1918 and in 1945 the leadership of the nation gave substantial support to the growth of international institutions." LASWELL, *op. cit.*, pp. 19-20.

[23] Cf. "The only probable future enemy is now supported by fanatical partisans within our midst. In strategic places, in communications, government, labor or industry, they could give valuable aid and comfort to the enemy. Probably much greater than their capacity for actual harm is their capacity to arouse fears and hatreds among us. A secret conspiratorial group, even if not very potent itself, can goad the Government into striking blindly and fiercely at all suspects in a manner inconsistent with our normal ideas of civil liberties." Jackson, Wartime Security and Liberty Under Law, 1 Buffalo Law Review 103-105.

[24] Of the ideological vulnerability of Soviet Russia, Lasswell writes thus: "Through the years it has been slowly dawning upon the observers of Russia that the most important thing to be discovered about Soviet Russia is that it is not what it purports to be. This discovery has been made, often at great personal and social cost, by ever-enlarging circles of laymen, writers, scholars and politicians. The spokesmen for Russia have done everything in their power over the year to induce or compel the Russian people and the rest of the world to take the Russian leadership at its own evaluation. There is ample reason to believe that this self-evaluation is false, and that in this falseness lies the ideological weakness of the Russian regime.

"The official myth spread at home and abroad by the ruling class of Russia is that they, the leaders of the Soviet Union, are the infallible interpreters of Marx, and that they are installing democracy, socialism, and communism in successive stages throughout Russia and the Russia-centered world. The evidence accumulates that the regime is neither communist nor socialist nor democratic.

"The noncommunist character of the present regime has already opened a running sore adjacent to the Soviet sphere of control in Europe. The revolt led by Tito in Yugoslavia is more than a routine border incident. It has profound ideological importance. Titoism is opposed to the subordination of every nation to the political convenience of the Moscow machine. Instead of permitting each nation to evolve its communist institutions in a genuine federation of communist states, the Moscow regime

nists who may still be at large can be expected to continue unabated their efforts at winning converts. Their arguments may not fall on deaf ears as long as the conditions of misery under which a great portion of the tenant and laboring classes live continue unremedied. The social justice measures undertaken by the Government must be expanded in its scope and accelerated in time to cut the ground from under the deceptive but plausible appeals of Communist leaders. As long as the phrase "total economic mobilization" remains a slogan rather than a plan for action, so long will Communist agitation find acceptance in the ranks of the dispossessed and discontented. It is a hopeful sign that the defense forces are concentrating not solely on military victories in the field but likewise on attempts at rehabilitating captured and surrendered Huks in resettlement projects in Mindanao.[25]

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appears to be substituting a new form of Russian imperialism—this time speaking the language of Marx—for czarist imperialism.

"It has long been denied by the liberal left of other countries that the Russian regime can properly call itself socialistic or democratic. The evolution of the perpetual dictatorship in Moscow has brilliantly confirmed the forecasts of Rosa Luxembourg and Karl Kautsky, for example, in the protests which they made against the autocratic centralization inaugurated and defended by Lenin and Trotsky. Trotsky himself fell victim at a later stage to the process which he had done so much to start.

"What, then, is the true nature of the regime in Moscow? The answer is not too difficult. Soviet Russia is a garrison-police state, in which the political police are exercising a dominant role. It has been characterized as an oriental despotism in modern clothes, speaking a language borrowed from European political philosophy and applying the gadgets of Western science and industry to the problem of power. The Kremlin is the headquarters of a vast system of forced labor camps; and it is only some exaggeration to say that the whole Soviet area is a concentration camp operated by the Political Bureau of the Communist Party at the head of a huge bureaucratic apparatus.

"Already the moral foundations of the Russian regime are cracking at the seams as its falseness is discovered and exposed by free or disillusioned minds. It is the Kremlin elite that fears what can happen to its power once the masses of the Russian people can receive honest news of the outside world. It is the Kremlin clique that keeps the globe divided into two great garrisons, while it searches for weapons strong enough to give them the power of enlarging the Russian prison until it admits the world. It is the Kremlin machine that must take principal responsibility for rejecting overtures for peace through understanding and for blocking inspection as a means of weapon control.

"There are many hateful and dangerous philosophies and modes of conduct in the world. But in this period of crisis, the principal enemy of national security and individual freedom is the ruling class of Soviet Russia. Kremlinism exploits the nations under Russian dominion. Kremlinism threatens the security and even the physical existence of mankind by keeping alive the global anarchy." LASSWELL, *op. cit.*, pp. 20-22.

[25] For a discussion of social and economic rights under the Constitution of the Philippines, see Fernando, Social and Economic Rights, XXV *Philippine Law Journal*, 575, 681.

IV. CONSTITUTIONAL RIGHTS UNIMPAIRED EVEN DURING EMERGENCY: MAJORITY VIEW

Unless the country is prepared then to see constitutional rights definitely discarded in these times of trouble and distress, the view that emergency can dispense with their application is not likely to recommend itself for approval.[26] For it carries within itself the

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As to other causes for communism taking root in a country, cf.: "Communism will not go to jail with these Communists. No decision by this Court can forestall revolution whenever the existing government fails to command the respect and loyalty of the people and sufficient distress and discontent is allowed to grow up among the masses. Many failures by fallen governments attest that no government can long prevent revolution by outlawry. Corruption, ineptitude, inflation, oppressive taxation, militarization, injustice, and loss of leadership capable of intellectual initiative in domestic or foreign affairs are allies on which the Communists count to bring opportunity knocking at their door. Sometimes I think they may be mistaken. But the Communists are not building just for today—the rest of us might profit by their example." Jackson, J., con., *Dennis v. United States*, 341 U.S. 494.

[26] For the bitter experience of Germany and France and a brief summary of what happened in Great Britain, Cf.: "Some modern nations have forthrightly recognized that wars or external dangers do upset the normal balance between liberty and authority. They have recognized, too, that fear and anxiety create public demands for greater assurance which may not be justified by necessity but which any popular government finds irresistible. They have met this by providing for some emergency powers or temporary crisis government. Their experiments are well worth studying though time today permits only most general reference.

"After the First World War, the Weimar Constitution guaranteed freedom of opinion and expression, of assembly and association, and inviolability of the person and of domicile, to the Germans. For its time and place, it constituted a rather advanced bill of rights in the Western tradition. However, the President of the Republic was empowered temporarily to suspend any or all of these individual rights if the public safety and order were seriously disturbed or endangered. This proved a temptation to every government, of whatever shade of opinion, and in thirteen years it was invoked on more than 250 occasions. Upon the burning of the Reichstag, Hitler attributed it to the Communists, although there was substantial evidence at the Nurnberg trial that the Nazis burned it themselves. In the excitement, he persuaded President von Hindenburg to suspend all such rights. They were never restored.

"The French, taught by their history, provided for a very different kind of emergency government, known as the "state of siege." Unlike the German emergency dictatorship, it can be invoked, not by action of the Executive, but as a parliamentary measure. And, unlike the German, it is not regarded as a suspension or abrogation of law, but, with characteristic French logic, is made a legal institution, governed by legal principles and terminable by parliamentary authority.

"Great Britain also has fought both World Wars under a temporary dictatorship of sorts. As there are no written constitutional limitations upon the power of the British Parliament, it simply provides a crisis government by delegating a larger measure than usual of its own absolute power to the Ministers, but always subject to recall at its will and subject to its scrutiny and supervision in administration. In each World War, Parliament, by its Defense of the Realm Act, has delegated to its ministers powers beyond those which Congress could delegate consistently with our Bill of Rights.

seeds of its own refutation. It implies the weakness of a democracy to defend itself democratically. Under such a system the Government might be saved from internal subversion, but what is saved is no longer the Government contemplated by the framers and the people who adopted the Constitution.[27]

"It may be significant that the short-lived German system, which resulted in dictatorship, allowed the Executive to enhance its own power by suspending civil rights. Both France and England retain that power in the Legislative branch, though in England the separation of power is rather nominal. But all three countries invoked emergency government as a political decision with which the Judiciary had nothing to do. Neither in Germany, France nor England could any court set aside the government's exercises of emergency power or review its fundamental legality." Jackson, Wartime Security and Liberty Under Law, 1 Buffalo Law Rev., 103, 107-108.

[27] Cf.: "National security involves individual freedom appraised in terms of all the civil liberties. At every level of review of defense policies, therefore, a third basic question is: Is there danger to the civil liberties of the individual?

"The concern of the Founding Fathers for the protection of the individual against arbitrary official action is fully reflected in the Bill of Rights. Those who argued against incorporating these safeguards in the original Constitution declared that they were entirely in favor of the principles and procedures at stake. Their argument was that the rights of the individual were so firmly embedded in the law that further provisions were not necessary, and might indeed narrow the scope of freedom by specific enumerations. The Bill of Rights amendments were, however, added to the Constitution at an early date and spelled out many of the barriers which English and American experience had learned to interpose between the private individual and official power.

"We shall not attempt a technical review of the specific practices which, taken together, constitute the civil liberties so essential to the practical expression of the valuation we put upon respect for the individual. It is, however, essential to keep in mind some procedural details as a reminder of what is at stake.

"We take it for granted that no one is to be punished unless his conduct is contrary to a law in force at the time his acts are committed. In short, no ex post facto laws are compatible with civil liberty.

"We forbid officials to hold anyone in custody unless authorized by a court of law. The writ of habeas corpus is the technical means by which the individual brings his plight to the notice of a court.

"We protect the privacy of the individual from intrusion on the part of investigators unless specific authority has been granted by a court. The purpose is to defend the home and workplace from arbitrary search and seizure of records and other objects.

"Public officials are to refrain from using coercion to force confessions from individuals whom they suspect of crime. They are not to subject individuals to harassment, such as chronic interference without proper cause.

"Public officials are also forbidden from inducing anyone to commit an offense. This rule is the result of the experience that crime may be increased by the zeal of police agents to entrap victims.

"If an individual is charged with crime or arrested, he is to have notice that his admissions may be used against him. Experience shows that innocent persons make self-accusing statements for such reasons as the desire to shield a beloved person or as the result of blackmail. Hence we put the burden of finding proof upon the official.

"The accused is entitled to receive the aid of a qualified adviser in preparing his defense.

Well has Justice Bengzon observed in his separate opinion in the above cases of *Nava v. Gatmaitan, Hernandez v. Montesa,* and *Angeles v. Abaya:*

> "And in my opinion, one of the surest means to ease the uprising is a sincere demonstration of this Government's adherence to the principles of the Constitution together with an impartial application thereof to all citizens, whether dissidents or not. Let the rebels have no reason to apprehend that their comrades now under custody are being railroaded into Mutinglupa, without benefit of those fundamental privileges which the experience of the ages has deemed essential for the protection of all persons accused of crime before the tribunals of justice. Give them the assurance that the judiciary, ever mindful of its sacred mission will not, thru faulty cogitation or misplaced devotion, uphold any doubtful claims of Governmental power in diminution of individual rights, but will always cling to the principles uttered long ago by Chief Justice Marshall that when in doubt as to the construction of the Constitution, 'the Courts will

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"It is of basic importance that the accused be informed not only of the nature of the charge made against him but of the identity of the accuser. It is possible to prepare a proper defense only when one knows who is alleging what.

"We permit the accused to confront his accuser in open court and to examine the accuser, witnesses, and materials used against him.

"Further, the authority of the court is used if necessary, at the request of the defense, to bring in reluctant witnesses.

"We are also accustomed to take for granted the presumption of innocence until proof of guilt is established by an authoritative process.

"We also believe that what is called a court should be constituted in a regular manner and safeguarded from biases that operate nonrationally to the disadvantage of the individual. For example, we expect judges to disqualify themselves if they have a personal grudge against the defendant. We expect jurors to have an open mind. We expect the rules of evidence to be applied to exclude irrelevant and merely derogatory references to the accused.

"When serious deprivations are possible, we believe in providing means of access to a high court of appeal. We expect such a tribunal to be free of most of the local and personal factors which may affect the administration of justice at a lower level.

"We insist that whatever punishments are inflicted shall apply as far as possible to the criminal and not to other persons. Hence no disqualifications for office apply to the children of a convicted person.

"We are opposed to cruel and unusual punishment as an unjustifiable infringement upon human dignity. Hence the restrictions on forced labor, chastisement, mutilation, and similar practices.

"We recognize that special care must be taken to see that individuals who have not attained full maturity, or who suffer from some disability which prevents maturity, shall not be discriminated against. This applies to the young or the mentally deficient and diseased.

"We also recognize that some questions are matters of conscience over which men of goodwill can profoundly disagree. Respect for the individual implies that under such circumstances the dissenter from majority view shall be exempted from the full weight of the deprivations which would otherwise be inflicted upon him by the community. This is part of the justification for treating 'political crime' with leniency." LASSWELL, *op. cit.*, pp. 65-68.

favor personal liberty.' (Ex parte Burford 3 Cranch [7 U.S.], Law Ed., Book 2 at p. 495)." [28]

Justice Tuason would apply the constitutional rights with undeviating rigidity:

"To the plea that the security of the State would be jeopardized by the release of the defendants on bail, the answer is that the existence of danger is never a justification for courts to tamper with the fundamental rights expressly granted by the Constitution. These rights are immutable, inflexible, yielding to no pressure of convenience, expediency, or the so-called 'judicial statesmanship.' The Legislature itself can not infringe them, and no court conscious of its responsibilities and limitations would do so. If the Bill of Rights are incompatible with stable government and a menace to the Nation, let the Constitution be amended, or abolished. It is trite to say that, while the Constitution stands, the courts of justice as the repository of civil liberty are bound to protect and maintain undiluted individual rights." [29]

As applied then to the question of bail the reasoning by Chief Justice Paras carries conviction:

". . . The privilege of the writ of habeas corpus and the right to bail guaranteed under the Bill of Rights are separate and co-equal. If the intention of the framers of the Constitution was that the suspension of the privilege of the writ of habeas corpus carries or implies the suspension of the right to bail, they would have very easily provided that all persons shall before conviction be bailable by sufficient sureties, except those charged with capital offenses when evidence of guilt is strong and except when the privilege of the writ of habeas corpus is suspended. As stated in the case of Ex parte Milligan, 4 Wall. 2, 18 L. ed. 297, the Constitution limited the suspension to only one great right, leaving the rest to remain forever inviolable." [30]

V. SUPREMACY OF THE CONSTITUTION EVEN IN TIMES OF EMERGENCY

It is extremely difficult to find cause for disagreement with the above views for they accord with the fundamental postulate of this Government, namely, that the Constitution is supreme and the Supreme Court as its guardian is called upon to apply its provisions in the determination of actual cases and controversies before it.[31] Well has it been observed that the protection of the citizen and the maintenance of his constitutional rights is one of the highest duties and privileges of the judiciary.[32] The exercise of this official duty, ac-

[28] Separate opinion of Justice Bengzon, p. 4.
[29] Separate opinion of Justice Tuason, p.4.
[30] Separate opinion of Justice Paras, p. 4.
[31] STORY ON THE CONSTITUTION, 275-276; WILLOUGHBY ON THE CONSTITUTION, 3.
[32] *Alvarez v. Court*, 64 Phil. 33.

cording to Justice Laurel requires that it gives effect to the supreme law even to the extent in clear cases of setting aside legislative and executive action.[33] The supreme mandates of the Constitution are not to be loosely disregarded.[34] Otherwise, the Bill of Rights might degenerate into mere expressions of sentiment.[35] Speaking of the Supreme Court, the late Justice Abad Santos once pertinently observed:

> "This court owes its own existence to that great instrument and derives all its powers therefrom. In the exercise of its powers and jurisdiction, this court is bound by the provisions of the Constitution." [36]

In the light of the above categorical views, the theory that an emergency may be relied upon for the suspension of the constitutional rights loses much of its persuasive force. It may be unfair though to ascribe to Justices Padilla, Bautista Angelo and Pablo the unqualified doctrine that in times of emergency when the writ of habeas corpus is suspended the other constitutional rights likewise are suspended. Their opinions were given in connection with an application for bail on the part of persons who previously were detained by virtue of the suspension of the writ of habeas corpus and thereafter proceeded against in the courts. They must have entertained the fear that the release on bail of such detained persons might endanger the campaign for peace and order by the petitioners joining and possibly leading the ranks of the rebels in the field.

It could be then that these justices did not have in mind such other constitutional rights of an accused person, namely, the observance of due process requirements,[37] the presumption of innocence accorded him, the right to be heard by himself and counsel, the right to a speedy and public trial, the right to confront witnesses and to have compulsory process to secure the attendance of his own witnesses,[38] the right not to be compelled to be a witness against himself,[39] his freedom from excessive fines and from cruel and unusual punishment,[40] as well as his freedom from being put twice in jeopardy or punishment for the same offense.[41] Respecting such rights of the accused certainly would not endanger national safety or security, or imperil the efforts to restore peace and order.

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[33] *People v. Vera*, 65 Phil. 56, 94-95.
[34] *Pampanga Bus Co. v. Pambusco Employees Union*, 68 Phil. 541.
[35] *Angara v. Electoral Tribunal*, 63 Phil. 139, 157.
[36] *Schneckburger v. Moran*, 63 Phil. 249, 251-252.
[37] Art. III, section 1, par. 15.
[38] Art. III, section 1, par. 17.
[39] Art. III, section 1, par. 18.
[40] Art. III, section 1, par. 19.
[41] Art. III, section 1, par. 20.

Likewise in connection with the freedom of belief, of expression, of assembly and of association, no claim is made even during normal times for their unfettered and unrestricted exercise.[42] The above rights are not to be abridged. But no abridgment exists in the constitutional sense if their exercise is subject to previous restraint or thereafter to subsequent liability where it may create a clear and present danger of the substantive evil that the state has a right to prevent.[43] The modification of the above standard of restraint into one of clear and probable danger in *Dennis v. United States*,[44] may find justification in the emergency conditions occasioned by the Communist threat even in the United States.

With reference to such other constitutional rights consisting in protection from ex-post facto law or bill of attainder,[45] for non-imprisonment for debt or for non-payment of a poll tax [46] and freedom from involuntary servitude,[47] it is difficult to see how an emergency could be a sufficient justification for the denial of such rights. Then there are those rights of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizure,[48] to the privacy of their communication,[49] and to liberty of abode and of changing the same.[50] Emergency may possibly affect the first two only in the sense that searches or invasion of privacy of communication that might otherwise be unreasonable could be justified under conditions of extreme gravity and urgency, without dispensing however with the requirement of search warrants except in those cases where a search may be valid without them. And with respect to freedom of domicile and of changing the same, this right may be circumscribed by a valid law finding justification in conditions of imminent and impending peril.

In addition to the above specific constitutional freedoms, liberty in general is protected by the due process clause.[51] Literally a person may be deprived of liberty under normal conditions as long as

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[42] See TAÑADA and FERNANDO, CONSTITUTION OF THE PHILIPPINES ANNOTATED, 1949 ed., pp. 243-244; CHAFEE, FREE SPEECH IN THE UNITED STATES, p. 8. But cf. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT.

[43] See Fernando and Quisumbing-Fernando, "Freedom of Expression in the Philippines and American Constitutions," XXIII *Philippine Law Journal*, 801.

[44] 341 U.S. 494.

[45] Art. III, section 1, par. 11.

[46] Art. III, section 1, par. 12.

[47] Art. III, section 1, par. 13.

[48] Art. III, section 1, par. 3.

[49] Art. III, section 1, par. 5.

[50] Art. III, section 1, par. 4.

[51] Cf. Fernando, "An Inquiry into the Constitutional Right to Liberty," XXVI *Philippine Law Journal*, 178.

due process is observed. Due process has been identified with that standard of fairness, reasonableness and freedom from arbitrariness.[52] It can readily be seen then that in times of emergency, certain restrictions on personal freedom as the imposition of a curfew,[53] the requirement of patrol duty,[54] the limitations on freedom to travel, and the submission to search at check points, would be unobjectionable. Such police power measures could not under the circumstances be considered as outrunning the bounds of reason or resulting in sheer oppression.[55]

VI. IMPORTANCE OF ROLE OF COURT IN PROTECTING RIGHTS DURING EMERGENCY

It is clear then that the judicial process does not take place in a social void.[56] The proclamation of an existence of an emergency is not a factor to be reckoned with lightly. The task of the Supreme Court in adjusting or harmonizing individual rights with the safety of the state, ordinarily one of utmost delicacy, then becomes even more formidable. And it is readily understandable for the members of the highest tribunal, whose responsibility for the safety of the

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[52] See TAÑADA and FERNANDO, THE CONSTITUTION OF THE PHILIPPINES ANNOTATED, pp. 50-52.

[53] Cf. *Hirabayashi v. United States,* 320 U.S. 81.

[54] Cf. *United States v. Pompeya,* 31 Phil. 245.

[55] Cf. Cardozo, diss. in *Liggett Co. v. Lee,* 288 U.S. 517, 585 "If the motive and the end attained are the advancement of the public good, the result may be quite another, unless preference and repression go so far as to outrun the bounds of reason."

[56] Cf. CARDOZO, NATURE OF JUDICIAL PROCESS, pp. 135, 136. "It is true, I think, today in every department of the law that the social value of a rule has become a test of growing power and importance. This truth is powerfully driven home to the lawyers of this country in the writings of Dean Pound. 'Perhaps the most significant advance in the modern science of law is the change from the analytical to the functional attitude.' 'The emphasis has changed from the content of the precept and the existence of the remedy to the effect of the precept in action and the availability and efficiency of the remedy to attain the ends for which the precept was devised.' Foreign jurists have the same thought: 'The whole of judicial function,' says Gmelin, 'has... been shifted. The will of the State, expressed in decision and judgment is to bring about a just determination by means of the subjective sense of justice inherent in the judge, guided by an effective weighing of the interests of the parties in the light of the opinions generally prevailing among the community regarding transactions like those in question. The determination should under all circumstances be in harmony with the requirements of good faith in business intercourse and the needs of practical life, unless a positive statute prevents it; and in weighing conflicting interests, the interest that is better founded in reason and more worthy of protection should be helped to achieve victory.' 'On the other hand,' says Geny, 'we are to interrogate reason and conscience, to discover in our inmost nature, the very basis of justice; on the other, we are to address ourselves to social phenomena, to ascertain the laws of their harmony and the principles of order which they exact.' And again: 'Justice and general utility, such will be the two objectives that will direct our course.'"

nation, while not so direct as in the case of the President is equally unavoidable, to fall short of the ideal sense of detachment in dealing with situations of such complexity. The fact remains however that the regime established here is one of liberty, of justice and of democracy. Belief in the theory of liberty is not merely an echo of a discredited past. It remains a fighting faith. It is a proclamation of the vitality of the democratic process. It rests on the conviction deeply and profoundly held that given the choice, a free people will prefer to remain free.

This is not to deny that force has to be met with force. This is not to deny that the courts are not to hamper the efforts of the executive agencies to put down subversion in whatever form it may manifest itself and wherever it may make its appearance. This is not to deny that on the executive and its agents is conferred the authority to cope with rebellious activities. Such authority must be equal to the occasion with which it is faced. It is on that ground alone that the suspension of the writ of habeas corpus may be justified. The courts can not go behind the facts which call for such suspension. That is a matter resting solely within the executive discretion. That is a decision which he makes being accountable solely to his conscience and the electorate who may judge him and his policies in the next national election. The proclamation suspending the writ of habeas corpus does not however free the judiciary from its solemn prerogative of judging controversies before it. The validity of the proclamation itself may be challenged in an appropriate case. If shown to be contrary to the precise terms of the Constitution, the Supreme Court has no alternative but to declare it null and void.[57] Even if adjudged valid, the judiciary still has the solemn task of interpreting its scope.

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[57] The heroic figure of Chief Justice Taney comes to mind. In the words of Justice Jackson: "I yield to the lawyer's impulse to prove my point by citing a precedent. The lowest point in the history of the federal judiciary was May 1861. Roger B. Taney, the aged Chief Justice of the United States, was sitting in Masonic Hall in Baltimore to hear the return to a writ of habeas corpus, 'that traditional bulwark of individual liberty,' which he had issued. An aide-de-camp in full military uniform and appropriately wearing a sword, appeared and declined obedience to the ancient writ of freedom, upon the ground that it had been 'suspended.'" Let the Chief Justice state the case:

"'The case, then, is simply this: a military officer, residing in Pennsylvania, issues an order to arrest a citizen of Maryland, upon vague and indefinite charges, without any proof, so far as appears; under this order, his house is entered in the night, he is seized as a prisoner, and conveyed to Fort McHenry, and there kept in close confinement; and when a habeas corpus is served on the commanding officer, requiring him to produce the prisoner before a justice of the supreme court, in order that he may examine into the legality of the imprisonment, the answer of the officer, is that he is authorized by the president to suspend the writ of habeas corpus at his discretion,

Only in that way can persons who do not fall within its terms but who are unfortunate enough to be caught in the meshes of executive action by zealous, well-meaning but mistaken officials find protection. The charge of abdication of its constitutional function if the judiciary would sanction each and every case of executive action on the ground that an emergency exists would be hard to meet. What is worse such judicial hands-off policy would lend comfort to the very forces seeking to undermine the Government. They can assert, and with plausibility, that the Constitution no longer obtains. It is precisely in time of emergency that the role of the Supreme Court as guardian of constitutional rights becomes more pressing

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and in the exercise of that discretion, suspends it in this case, and on that ground refuses obedience to the writ.

" 'As the case comes before me, therefore, I understand that the president not only claims the right to suspend the writ of habeas corpus himself, at his discretion, but to delegate that discretionary power to a military officer and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him.' "

"And he further recites:

" 'But the document before me shows that the military authority in this case has gone far beyond the mere suspension of the privilege of the writ of habeas corpus. It has, by force of arms, thrust aside the judicial authorities and officers to whom the constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers.

" 'Yet, under these circumstances, a military officer, stationed in Pennsylvania, without giving any information to the district attorney, and without any application to the judicial authorities, assumes to himself the judicial power in the district of Maryland; undertakes to decide what constitutes the crime of treason or rebellion; what evidence (if indeed he required any) is sufficient to support the accusation and justify the commitment; and commits the party, without a hearing, even before himself, to close custody, in a strongly garrisoned fort, to be there held, it would seem, during the pleasure of those who committed him.'

"Shorn of power, but not of courage, Taney, 'a great Chief Justice,' in full expectation that he, too, would be imprisoned, thundered forth the fundamental and eternal principles of civilian freedom from military usurpation. But with a confession of helplessness and despair, he closed an opinion which must rank as one of the most admirable and pathetic documents in American judicial annals:

" 'In such a case, my duty was too plain to be mistaken. I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome.'

"And so he sent his opinion to President Lincoln in the hope that 'that high officer' would 'determine what measures he will take to cause the civil process of the United States to be respected and enforced.' " JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY, pp. 324-326.

and inescapable, if the faith and confidence of the people in democracy in action are to be preserved unimpaired.[58]

[58] Cf. "These are times of the most ridiculous hysteria. America has become confused in its hurried effort to develop a foreign policy of containment of a resurgent imperialist power, Russia, which uses a novel technique, ideology, to further its program. By accident or design, many Americans have mixed up ideologies, domestic policies, espionage, and foreign policies until we seem hell-bent to destroy ourselves. From the reputedly sane, intelligent, and respectable American Bar Association comes a hasty and unconsidered endorsement of the McCarran Anti-Subversive bill. From California comes an incredible battle over loyalty oaths. From the hustings comes an almost universal attempt, usually successful, to place all political issues in a context of red-mongering. From the entertainment world comes the spectacle of large advertisers quailing before self-appointed censors of the political views of all entertainers. From legislatures and municipal councils all over the country comes a scramble to see which can enact the most outrageous anti-Communist legislation. Repression and restraint have grown to alarming proportions.

"Our crying need is for some institution to stand as a bulwark against current unreasoning excesses. The United States Supreme Court is well suited to do this. It has great prestige; it is aloof from short-run expediency; it has 'tenure' of sorts; it has an armory of arguments to back up its pronouncements. The Constitution, the American heritage, and the past decisions of the Court are all at hand to support an effort by the Court to stop the trend of events." Braden, Mr. Justice Minton and the Truman Bloc, 26 Ind. Law Rev., 153, 162-163.

"Civil liberties meant nothing, however, if they were only a 'fair weather concept.' Fortunately the federal courts could be relied upon to protect the freedoms of the First Amendment from assaults of transient legislative majorities and administrative officials in periods of crisis. That was perhaps their most vital function." Man, Mr. Justice Murphy and the Supreme Court, 36 Virginia Law Rev., 889, 905.