THE SUSPENSION OF THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS: ITS JUSTIFICATION AND DURATION

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I. THE FACTS

When the Filipino people woke up one morning [1] to find the headlines of the papers carry the sensational news of a MIS [2] raid in the city of Manila the day before, in which 105 alleged Communists were rounded up, including 9 members of the National Secretariat of the local Communist Party,[3] a wave of alarm mingled with near-unbelief swept the country. The gravity of the Communist threat to national security was never fully realized until that time. Some of the Politburo men were known figures in Philippine society; one was a prominent lawyer,[4] and one, at least, was a high official in the government.[5]

Other events followed in quick succession. Four days after the MIS raid, before the alarm of the people could subside, President Elpidio Quirino suspended the privilege of the writ of habeas corpus.[6]

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[1] October 18, 1950.

[2] Military Intelligence Service. This is the most active branch of the Intelligence Section of the Armed Forces of the Philippines. This organization has figured in many Communist-busting activities in the Philippines.

[3] Federico R. Maclang, member of the secretariat, general supervisor of the courier division and top man among the suspects; Ramon Espiritu, member of the Communist Politburo and chairman of the party's national finance committee; Magno Bueno, member of the communist provincial committee in Nueva Ecija and in charge of the communist expansion program in Pangasinan; Honofre Mangila, member of the Communist central committee and the chairman of the organizational department in Manila; Iluminada Calonje, chairman of the communist central committee cadres in Manila; acting chief of the central post of the communist central committee cadres in Manila; Federico M. Bautista, member of the communist national finance committee; Simeon Rodriguez, also member of the communist national finance committee; Atty. Jose Lava, general secretary of the Communist Party and member of the secretariat; Angel Baking, supervisor of the communist technological group.

[4] Atty. Jose Lava belongs to a prominent family of intellectuals, most of the members being connected in one way or another with the Communist movement in the Philippines.

[5] Angel Baking was a former professor of engineering at the University of the Philippines and was a technical assistant in the Division of Economics, Department of Foreign Affairs at the time of his arrest.

[6] Proclamation No. 210, October 22, 1950.

The Politburo men were held incommunicado in Muntinlupa. Three months after,[7] in a second mass raid in the city, MIS agents "picked up" a city councilor [8] and 5 newspapermen [9] without warrants of arrest; searched the home of a counsellor in the Department of Foreign Affairs [10] for subversive literature, without a search warrant. The Communist suspects were taken to army headquarters at Camp Murphy and detained in a stockade. One of the newspapermen was manhandled.[11]

Fear gripped the hearts of the people. Surely, there is cause for alarm if the liberties of the citizens could be rendered insecure by the military on suspicions of dissidence and subversive activities. Certainly, being suspected of Communist activities on mere possession of Communist literature is totally unjustifiable. And certainly, a militant stand on basic national issues,[12] a searching criticism of the government and constituted authorities,[13] an outspoken championing of the rights of the laboring elements of the country[14] are the very ingredients of the thing called democracy, without which it would not be worth its name.

These rights of the people were in danger. And indignation rose high with this second raid. Civil libertarians,[15] civic-minded citizens,[16] even the Congress of the Philippines, which, when the writ was first suspended, had impliedly sanctioned the action of the President, clamored for the restoration of the writ.[17]

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[7] January 27, 1951.

[8] Councilor Amado Hernandez, Nacionalista, National President of the Congress of Labor Organizations.

[9] One *Herald* editor, one *Herald* reporter, one *Times* reporter, one *Evening News* reporter, and one *Chronicle* reporter.

[10] Counsellor Renato Constantino of the Department of Foreign Affairs.

[11] Macario Vicencio, *Times* reporter, was manhandled at Camp Murphy by one Lt. Irlanda. *Manila Times,* January 30, 1951.

[12] Many of those apprehended had spoken on national issues, like the Parity Amendment.

[13] Some of the newspapermen have been critical of the government in many of their writings.

[14] Amado Hernandez has been leading labor groups in the country for a number of years and openly denouncing many government acts and practices.

[15] The Civil Liberties Union was first among those who raised their voices in apprehension of the abuses likely to happen with the suspension of the privilege of the writ of habeas corpus.

[16] Students and university professors joined the ranks of those who protested against the acts of the MIS, foreseeing dark prospects for civil liberties in the country.

[17] The House of Representatives was all set to ask the President for the restoration of the writ of habeas corpus. In the Senate, Senator Cuenco readied a bill for extending the period of legal detention of persons to 72 hours instead of 6 hours as provided in the Revised Penal Code; Senator Paredes readied a bill re-

Recognizing that popular sentiment was rising against the suspension of the privilege of the writ of habeas corpus, President Quirino, in an effort to allay the suspicions of the people and placate the rising temper of public opinion, restored the writ of habeas corpus in fifteen provinces in the Visayas and Mindanao.[18]

Seventeen months have passed since the writ of habeas corpus was suspended. Conditions have changed since then.[19] The rounding up of the Politburo men and their subsequent conviction in the Court of First Instance of Manila [20] was a great blow to the group of men plotting to overthrow the existing government. Lawlessness, criminality, and violence have been reduced to a minimum during the last 15 months; the orderly processes of government continue; there is relative peace and order in the former Huk-infested regions of Luzon.[21]

How long further need the suspension of the writ of habeas corpus continue? Was it proper, in the first place, to suspend it? These are questions that are proposed to be discussed in this article.

II. THE HISTORY OF THE WRIT

The writ of habeas corpus,[22] characterized by Justice Malcolm as "the best and only sufficient defense of personal freedom," [23] is one of those rights of the individual cherished in the Constitution as a defense against tyranny.

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commending the restoration of the writ. Cuenco said: "Suspension has not vested the army with authority to make arbitrary arrests or detentions." Senator Francisco said: "The suspension does not either legalize such illegal arrest or protect the officer of the law from the consequences of his act." *Manila Chronicle*, January 28, 1951.

[18] February 3, 1951. The provinces in the Visayas that regained the writ of habeas corpus were Palawan, Bohol, Romblon, Masbate, Cebu, Leyte, and Samar. In Mindanao and Sulu, Zamboanga, Misamis Oriental, Misamis Occidental, Lanao, Bukidnon, Agusan, Surigao and the Sulu Archipelago.

[19] The Communist Party of the Philippines has been crippled since. The chronic raids by HMB's in different provinces throughout Luzon have been greatly minimized.

[20] Decision rendered by Judge Oscar Castelo of the Manila Court of First Instance in Criminal Cases Nos. 14071, 14082, 14270, 14315, 14344.

[21] Nueva Ecija, Pampanga, Tarlac, Bulacan, Laguna, Batangas. Quezon, Bataan, Pangasinan, Rizal.

[22] Found in Article III, Section 1 (14) of our Constitution: "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." Almost of the same words is the guarantee found in the American Constitution: "The privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion, the public safety may require it." Art. I, Section 9).

[23] *Villavicencio* v. *Lukban*, 39 Phil. 778, 788.

By such writ of habeas corpus,[24] an English court commanded the jailor or other officer having a prisoner in charge to bring him before the bar for inquiry as to the legality of his restraint from liberty.[25] After the use of the writ became more common, abuses crept into the practice, which in some measure impaired the usefulness of the writ.[26] From 1668 to 1678, four different measures partially covering the ground included in the final Habeas Corpus Act were introduced in the English Parliament.[27]

The Habeas Corpus Act was passed in 1678, mainly to prevent abuses and evasions of duty by judges and ministerial officers, and to compel prompt action in any case in which illegal imprisonment was alleged.[28] That act gave no new right to the subject, but it

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[24] (Lat., the you have the body). BOUVIER'S LAW DICTIONARY, p. 1400.

This is habeas corpus *ad subjiciendum* or *cum causa,* called so from the requirement contained that the alleged prisoner and the person restraining him should "submit themselves to the order of the court." *The American Cyclopedia,* Vol. 8, p. 364.

[25] NORTON, THE CONSTITUTION OF THE UNITED STATES, ITS SOURCES AND APPLICATIONS, p. 83.

[26] At times, the party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and third were issued before he produced the party; and many other vexatious practices were resorted to in order to detain state prisoners in custody. 3 BLA. COM. 135, cited in BOUVIER'S LAW DICTIONARY, *op. cit.*, 1400. Greater promptitude in its execution was required to render the writ efficacious. Although the right was theoretically recognized, it was ignored in practice by the Stuart Kings on the principle that "the king can do no wrong." Grant, "Suspension of Habeas Corpus in Strikes," 3 *V. Law Review,* p. 250. To define with clarity and precision the rights of Englishmen, the subject was brought forth in Parliament in 1668. The immediate occasion of the passage of the writ was attributed to the illegal imprisonment of one Jenkes in 1666 on the order of King Charles II for publicly urging that the King be petitioned to call a Parliament. However, it is more reasonable to believe that Lord Shaftesbury was impelled to work on behalf of the writ as a result of his own experiences, having been imprisoned without legal cause a number of times, *Lot. cit.*

[27] On each of these occasions, the bill never progressed further than the first stage—passage in the House of Commons. "According to Bishop Burnet, Lords Grey and Norris were named to be tellers. Lord Norris, being a man subject to vapours, was not at all times attentive to what he was doing. So a very fat lord coming in, Lord Grey counted him for ten, as a jest at first; but seeing Lord Norris had not observed it, he went on with his misreckoning of ten, so it was reported to the House, and declared that they who were for the bill were the majority, although it indeed went on the other side.

The majority being declared from the Woolsack in favor of the bill, Shaftesbury perceived a great commotion among the courtiers at a result so little expected on either side. With much presence of mind, he instantly started on his legs, and after speaking near an hour, during which many members entered and left the House, concluded with a motion on some indifferent subject. It was now impossible that the House could be retold, and no further question could be made upon the bill in the Lords." For a long time, the bill was identified as Lord Shaftesbury's Act. *Loc. cit.*

[28] COOLEY'S CONSTITUTIONAL LIMITATIONS, Vol. I, p. 717.

furnished the means of enforcing those which existed before.[29] The preamble recited that "whereas great delays have been used by sheriffs, jailors, and other officers to whose custody any of the king's subjects have been committed for criminal or supposed criminal matters, in making returns of writs of *habeas corpus,* to them directed, by standing out on *alias* or *pluries habeas corpus,* and sometimes more, and by other shifts to avoid their yielding obedience to such writs, contrary to their duty and the known laws of the land, whereby many of the king's subjects have been and hereafter may be long detained in prison in such cases, where by law they are bailable, to their great charge and vexation. For the prevention whereof, and the more speedy relief of all persons imprisoned for any such criminal or supposed criminal matters," the act proceeded to make elaborate and careful provisions for the future.[30]

There were occasions in England where a habeas corpus Suspension Act would be passed in Parliament partially annulling the operation of the Habeas Corpus Act.[31] In the main, however, the writ became an effective check on governmental abuse and an important safeguard to personal liberty.

The great writ of habeas corpus was thus a traditional means of defense of personal freedom which the Founding Fathers brought with them into the New World and transplanted on American soil and which, finally found expression in the Constitution of the United States: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public

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[29] HALLAM, CONSTITUTIONAL HISTORY, c. 13, cited in COOLEY, *loc. cit.*

[30] The important provisions of the act may be summed up as follows: That the writ of *habeas corpus* might be issued by any court of record or judge thereof, either in term-time or vacation, on the application of any person confined, or of any person for him; the application to be in writing and on oath, and with a copy of the warrant of commitment attached, if procurable; the writ to be returnable either in court or at chambers; the person detaining the applicant to make return to the writ by bringing up the prisoner with the cause of the detention, and the court or judge to discharge him unless the imprisonment appeared to be legal, and in that case to take bail if the case was bailable; and performance of all these duties was made compulsory, under heavy penalties. Thus the duty which the judge or other officer might evade with impunity before, he must now perform or suffer punishment. The act also provided for punishing severely a second commitment for the same cause, after a party had once been discharged on habeas corpus, and also made the sending of inhabitants of England, Wales, and Berwick-upon-Tweed abroad for imprisonment illegal, and subject to penalty. *Loc cit.*

[31] A Suspension Act made it hopeless for any person imprisoned under a warrant signed by the Secretary of State on a charge of high treason, or on suspicion of treason, to insist upon being either discharged or put on trial. The Government then deferred indefinitely the formal accusation and public trial of persons imprisoned on suspicion of treasonable practices. NORTON, *op. cit.,* pp. 83-84.

safety may require it.[32] This same tradition was in turn brought by the American people into the Philippines, incorporated in the Philippine Bill of 1902,[33] and in the Jones Law of 1916 [34] and finally was included among the rights of the individual enumerated in the Bill of Rights of the Constitution of the Philippines.[35]

The Bill of Rights provides that 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." [36] Among the powers granted the President by the Constitution is the suspension of the privilege of the writ of habeas corpus "in cases of invasion, insurrection, or rebellion, or imminent danger thereof, when the public safety requires it." [37] It is to be noted that the phrase "imminent danger thereof" appearing in the power granted to the President to suspend the writ does not appear in the provision on habeas corpus in the Bill of Rights. Authoritative opinion has been advanced that this phrase ought to be deemed included in the latter provision because of the explicit provision empowering the President of the Philippines to suspend the writ of habeas corpus not only in cases of invasion, insurrection, or rebellion, but also in case of imminent danger thereof, when the public safety requires it.[38] At any rate, since under the settled doctrine of the Supreme Court that upon the President rests the exclusive competency of determining whether or not a state of invasion, insurrection, or rebel-

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[32] Article I, sec. 9, United States Constitution. In some state constitutions, the prohibition is even broader prohibiting absolutely, without exception or qualification, the suspencion of the writ. In no case can be the power exercised under either the Federal Constitution or the constitution of a state unless the conditions specified therein exist. And under the Federal Constitution, it is not enough that rebellion or invasion exists. The public safety must require the suspension of said writ.

Under a constitutional provision absolutely prohibiting the suspension of the writ, the governor cannot suspend it even in a county which he has declared to be in a state of insurrection and in which he has proclaimed martial law. *Ex parte Moore,* 164 N.C. 802. On the other hand, the statutes of Idaho make it the duty of the governor, whenever a state of insurrection or rebellion exists, for the purpose of suppressing the same to suspend the writ of habeas corpus or disregard such writ, if issued. "The proclamation of the governor declaring Soshene county to be in a state of rebellion, and his action in calling to his aid the military forces of the United States for the purpose of restoring good order and the supremacy of the law, had the effect to put into force, to a limited extent, martial law in said county, and such action is not in violation of the Constitution but in harmony with it, being necessary for the preservation of the government and in its necessary self-defense." *In re Boyle,* 57 P. 706.

[33] Section 5, Act of Congress of July 1, 1902.

[34] Section 3, Act of Congress of August 29, 1916.

[35] Article III, Section 1 (14).

[36] *Loc. cit.*

[37] Article VII, Section 10 (2).

[38] TAÑADA and FERNANDO, CONSTITUTION OF THE PHILIPPINES, pp. 403-404.

lion exists,[39] it would be merely academic to make such a distinction, for the President may certify to what he deems to be cases of invasion, insurrection, or rebellion, even if to others what exists is only an imminent danger thereof.[40]

III. THE SUSPENSION [41]

There was a time in the political history of the Philippines before the Republic when the writ of habeas corpus was suspended.

[39] *Barcelon vs. Baker,* 5 Phil. 87.

[40] TAÑADA and FERNANDO, *op. cit.,* p. 404.

[41] In the United States, only the legislative branch of the government can suspend or authorize the suspension of the writ. This is manifest in the placement of the provision on habeas corpus in Article I, Legislative Department. "Looking only at the form of expression, it would be regarded as a limitation. Regarding it according to its place in the Constitution, it should be deemed a limitation for it is placed with six other subdivisions in the same section, every one of which is a limitation. It implies that the power has been already granted, just as in the 4th and 6th subdivision a power is implied.

If the sentence respecting the habeas corpus be a limitation and not a grant of power, we must look into other parts of the Constitution to find the grant; and if we find none making the grant to the President beyond his appointment as Commander-in-Chief, and it has been shown that there is none in that, it follows that the power is in the legislature or the judicial department.

If however the provisions were deemed a grant of power, the question would occur, to whom is the grant made? The following considerations go to show that it is to be deemed as made to Congress:

First, the debates in the convention which framed the Constitution seem at least to suppose that the power was given to Congress, and to Congress alone.

Second, the debates in the various state conventions do most certainly proceed upon that supposition.

Third, the place in which the provision is left, indicates, if it does not absolutely decide, that it relates only to the powers of Congress. It is not in the 2nd article, which treats of the Executive Department. It is not in the 3rd which treats of the Judicial Department. It is in the 1st article, which treats of the Legislative Department. There is not another subdivision in all the seven subdivisions which does not relate to Congress, in part at least, and most of them relate to Congress alone.

Fourth, the constitutional law of the mother country had been long settled that the power to suspend the privilege of the writ, or as it was sometimes called, suspend the writ itself, belonged only to Parliament. With this principle fairly seated in the minds of lawyers, it seems incredible that so vast a change as conferring the grant upon the Executive should have been so loosely and carelessly expressed.

Fifth, the prevailing sentiment of the time when the Constitution was framed was a dislike and dread of executive power. It is hardly to be believed that so vast and dangerous a power would have been conferred upon the President without providing some safeguards against its abuse.

Sixth, every judicial opinion and every commentary on the Constitution up to the period of the Rebellion treated the power as belonging to the Congress and to that department alone. *Ex parte Milligan,* 4 Wall. 2.

Governor-General Luke E. Wright, on January 31, 1905,[42] pursuant to a resolution and request of the Philippine Commission, suspended said writ in the provinces of Cavite and Batangas in accordance with the provisions of the Philippine Bill.[43] The suspension was based on the fact of general knowledge that certain organized bands of ladrones in the Philippines were in open insurrection against the constituted authorities and performed illegal acts. A case arose [44] putting in issue not the authority of the Governor-General to suspend but the collateral question as to the proper person who shall determine the existence of a state of rebellion, insurrection, or invasion. The court held that the act of Congress gave to the Governor-General, with the approval of the Philippine Commission, the sole power to decide whether a state of rebellion, insurrection or invasion existed in the Philippine Archipelago, and whether or not the public safety required the suspension of the privilege of the writ, which decision is conclusive against the judicial department. Congress had the authority so to empower the President. The court upheld the authority of the Philippine Commission to pass the resolution of January 31, 1905 after an investigation of facts and the power of the Governor-General to issue Executive Order No. 6 of January 31, 1905.

On October 22, 1950, President Elpidio Quirino issued Proclamation No. 210 [45] suspending the privilege of the writ of habeas corpus throughout the country, the first time that the writ has been suspended since the institution of civil government. His grounds for suspending the writ in the face of "actual danger of rebellion" were that lawless elements of the country have committed overt acts of sedition, insurrection, and rebellion for the purpose of overthrowing the duly constituted authorities, said acts consisting of armed raids, ambushes, wanton acts of murder, rape, spoilage, looting, arson, planned destruction of private and public buildings and attacks against civilian lives and properties; and that these various groups were well-armed.[46]

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[42] Resolution of the Philippine Commission dated January 31, 1905.

[43] Executive Order No. 6, January 31, 1905.

Section 5 of the Act of Congress of July 1, 1902, provides: "That the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion, insurrection, or invasion the public safety may require it, in either of which events the same may be suspended by the President or by the Governor-General with the approval of the Philippine Commission whenever during such period the necessity for such suspension shall exist."

[44] *Barcelon v. Baker*, 5 Phil. 87.

[45] 46 O.G. No. 10, p. 4682.

[46] Proclamation No. 210, October 22, 1950.

Since 1946, a long list of rebellious activities has been engineered by the Hukba-

The proclamation was, in a sense, the culmination of a series of events harking back to the thirties when the Communist Party of the Philippines was declared an illegal association by the Supreme

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lahaps, led by Communist leaders, consisting of ambushes of Philippine Constabulary soldiers, robberies, raids on towns, lootings and plunder, massacres and rape.

In 1946, in barrio Tuclung, Sta. Ana, Pampanga, a band of 300 Huks entered the barrio, raided the homes of the people, gathered the men, and massacred fifty of them for refusal to join the Hukbalahaps.

In 1949, five hundred dissidents, under the command of Huk Chieftain "Linda Bie" went on a rampage in Orani, Bataan, killing 25 soldiers and inhabitants, wounding 13 others, kidnapping women, razing 69 houses in the commercial and residential districts of the town, burning trucks, and committing all sorts of depredations on the helpless townspeople.

The supreme tragedy was the murder of Mrs. Aurora Aragon Quezon and her party who were on their way to Baler, Tayabas to inaugurate a hospital in April 1949. Included among the victims were Baby Quezon, Philip Buencamino III, Mayor Ponciano Bernardo of Quezon City, Col. Primitivo San Agustin, Col. Antonio San Agustin, and some other armed forces, officers and enlisted men. It was done in broad daylight. It was done with unquestionable premeditation and treachery. It was the acme of wanton and pointless tragedy. It was an outrage without parallel. The nation cowered in grief.

On March 29, 1950, the HMB celebrated its eighth anniversary by staging widespread sorties against several towns and barrios in Rizal, Laguna, Batangas, Pampanga, and Nueva Ecija. Main objectives were PC garrisons and municipal buildings. More than 30 persons were killed, many of them civilians, and more than 50 more were wounded.

To celebrate the "Cry of Balintawak" Day, the Huks made violent and bloody assaults in August, 1950, in 11 different places scattered from Santiago, Isabela, in the north, to Sta. Cruz, Laguna, and Casiguran, Quezon, in the south. When the smoke was cleared, the government counted among its losses, 52 officers and men killed with 13 civilians, 20 Constabularymen and 9 civilians wounded, and 3 Constabulary troopers missing in action. The pattern was the same everywhere the Huks struck. It was an orgy of murder, pillage and burning. In Makabulos, it was a story of helpless patients in a hospital butchered, even as they lifted weakening arms in pitiful appeals for mercy; of nurses raped and murdered and doctors ruthlessly slain; treasuries looted; of civilian homes destroyed. In all the raids, the attacks were premeditated, dictated by a higher source, accompanied with treachery, cruelty and ignominy. "Whatever power may have been behind this crime," the President of the Philippines decried, "the criminal, blood-stained hands were hands which we should have loved to grip in brotherhood, but could not." In a ringing call to the people to unite and fight the Red Hand of murder, the President of the Philippines declared that the survival of the country is at stake, and that the fight is to preserve our Philippines.

An indignant and terrified nation had hardly recovered from the news of the barbarous Makabulos and Sta. Cruz raids when the Huks again swooped down and went on a rampage in a barrio in San Marcelino, Zambales, in November, killing twenty-three townspeople, including eight children, wounding four, and kidnapping others. The Huks, numbering about 150, believed to be under Huk Commander Sumulong, terrorized the barrio people for more than six hours, committing rape, murder, arson. Not content with these, the Huks gouged out the eyes of children,

Court [47] because aiming at the downfall of the government by the use of force and establishing in its stead one patterned after the Soviet Government of Russia. In the same year, several persons, most of them top members of the party were convicted under Section 8 of Act 292, now embodied in Article 142 of the Revised Penal Code, for inciting to sedition.[48] In 1928, the party was reconstituted

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four of them under three years, before bayoneting them to death, excelling in cruelty the Japanese soldiers who had massacred and pillaged in the country during the Occupation.

Two years after the Orani sack (*supra*), in the same first month of the year, the Huks visited Bataan again, and other communities in Nueva Ecija, Batangas and Tarlac. In the Hermosa raid, twelve civilians and two army soldiers were killed. The long list of those killed, wounded, and brutally beaten included Chinese and Filipino civilians. An attempt was made to assault a school teacher in a barrio school, whose face was beaten to a pulp by the attackers' rifle butts when she resisted them. In Culis, a civilian was picked up in his house and thrown out of the window, and while he lay on the ground, big stones were thrown at his head, battering it to pieces. As evidence of all the senseless killings, the bodies of some victims were left on the road, presenting a gory sight. The marauders, numbering about 200, were under Commanders Roger and Alexander.

These were only some of the atrocities committed by the Huks during the last five years. Their bloody record, during that time, is totally shocking to the conscience. Public indignation, so long repressed, was rising to a pitch point. The suspension of the writ of habeas corpus was a reaction, a logical reaction, to the wave of violence mounting with the years.

[47] *People v. Evangelista,* 57 Phil. 375.

[48] *People v. Evangelista,* 57 Phil. 354, where the basis for conviction was the circulation of pamphlets containing the constitution and by-laws of the Communist Party and the advocacy through speeches of its ideas and doctrines.

People v. Feleo, 57 Phil. 451, where words inciting the hearers to imitate French soldiers in battle, who, instead of pointing their guns at their enemies directed their weapons towards their own chiefs were considered seditious as tending to incite the people to take up arms against the constitutional authorities.

People v. Nabong, 57 Phil. 455, where at a necrological service the defendant criticized the Constabulary for having seized the flag and shot at innocent women, urging at the same time the overthrow of the Government by violence and the use of the whip designed to leave marks on the sides of the adversaries.

People v. Capadocia, 57 Phil. 364, substantially similar to *People v. Evangelista,* with the exception that defendant did not take part in the inauguration of the Communist Party but only supported it subsequently by acts and speeches declared seditious by the Supreme Court.

All these decisions adopted the "dangerous tendency" rule as enunciated in *Gitlow v. New York,* 268 U.S. 682. The validity of the doctrines enunciated in these cases would appear doubtful at present, as the Supreme Court had shown preference for the "clear and present danger" rule announced by Justice Holmes in *Schenck v. U.S.* and followed in a long line of cases in the United States, by embodying the same in effect in the cases of *Lino v. Fugoso,* 43 O.G. 1214 and *Primicias v. Fugoso,* 45 O.G. 3280. The validity of the "clear and present danger test" appears again doubtful with the latest decision of the United States Supreme Court convicting the 11 top Communists in the United States under Secs. 2(a) and (c) and 3 of the Smith Act (Den-

with the merger of the former Communist Party and the Socialist Party headed by Pedro Abad Santos, eliminating subversive provisions in the Constitution of the party and putting up candidates for the elections of the same year through the Popular Front Party.[49] The Communist Party went underground during the Japanese Occupation, and after liberation openly and actively participated in the national elections.[50]

IV. THE HMB [51] AND THE COMMUNIST PARTY

In the beginning, the Hukbalahap (or HMB) had its own platform, and the Communist Party, another. On the part of the people, while there has never been much sympathy for the Communist Party, there had been some measure of understanding and charity for the Huks.

Events that were to come, however, revealed that the Hukbalahap organization was far from being solely a social movement of peasants fighting age-long oppressions. Subsequent events showed clearly that the Hukbalahap, completely dominated by the Communists during the last few years, was being utilized as the armed force of the Communist Party.

If there was any doubt before that such a tie-up between the Hukbalahap and the Communist Party exists, such doubt was totally removed with the recent decision of Judge Oscar Castelo of the Manila Court of First Instance convicting the 9 members of the local Politburo.[52] Said the decision:

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nis et al. v. U.S., 71 S. Ct. 857, No. 336, decided June 4, 1951). The latest decision in the Philippines (*Espuelas vs. People*, G.R. No. L-2990), is a repudiation of the "clear and present danger" test.

[49] From that time, the Communist Party enjoyed, more or less, a legal status, and openly represented itself as a political party.

[50] The Communists and Hukbalahap leaders were active organizers of the Democratic Alliance, a political party which put up candidates for congressmen in several provinces in Central Luzon, and coalesced with the Nacionalista Party (Conservative Wing), supporting President Osmeña in the presidential elections of 1946.

[51] The HMB's formerly called themselves HUKBALAHAP (Hukbong Bayan Laban sa Hapon, or People's Anti-Japanese Army). After liberation, they changed the name HUKBALAHAP to simply HUK. Still later, they adopted the name HMB (Hukbong Magpapalaya ng Bayan or People's Liberation Army.)

[52] Sentenced to die in the electric chair were: Federico R. Maclang, member of the secretariat, general supervisor of the courier division and top man among the defendants in the party organization; Ramon Espiritu, member of the Communist politburo and chairman of the party's national finance committee; Magno Bueno, member of the Communist provincial committee in Nueva Ecija and in charge of the communist expansion program in Pangasinan; Honofre Mangila, member of the communist central committee and chairman of the organizational department in Manila; Cenon Bungay, Huk commander who led a raid on San Pablo City and took part in another encounter

> Based on the documentary evidence alone, this tie-up is conclusively established by excerpts from documents and official publication of the CP and/or the HMB; by the press interview of Luis Taruc, which was planned, approved and supervised by the Secretariat (SEC); by the numerous HMB raids, ambushes, attacks, etc., which were committed with the authorization, approval and/or direction of the CPP; by the exchange of voluminous communications among the accused and/or with top leaders of the HMB in the field; and by the actual tallying of the serial numbers of 65 ₱100-bills and 60 ₱50-bills taken from Sta. Cruz, Laguna, during the HMB raid on August 26, 1950, and the amount of ₱145 in PNB circulating notes and ₱312 received by Lakindanum (Simeon G. Rodriguez) from Comrade Torres of Regional Command (RECO) No. 4, with the money found in the possession of said Simeon Rodriguez during the raid conducted by the agents of the Military Intelligence Service of the Army of the Philippines at 2683 Pasaje Rosario, Paco, Manila, on October 18, 1950.[53]

After going over the voluminous documentary evidence introduced during the Politburo trial, the trial court came across documents showing that the purpose of the Communist Party of the Philippines is to overthrow the government of the Philippines by armed struggle, and that the HMB is to effect his overthrow. Quoted below are excerpts from some of the documents in evidence:

> "What should be our attitude towards these new developments? Hasten the downfall of Quirino, while at the same time projecting the fact through mass action (armed or otherwise) and through propaganda, that the new leadership cannot solve the people's problems, and the only solution is the armed struggle for national liberation and establishment of the new democracy. Expose Christian and Social Democracy, the third party force theory, bourgeoisie reforms."
>
> "Quickly seizing up the existence of a revolutionary situation, arising from the merger of the crisis of production due to the imperialist-feudal domination of our economy, and the parliamentary crisis due to fraud and terrorism in the 1949 elections, the CPP openly called on the people to overthrow the Liberal Party puppets of the American imperialists."
>
> "The Communist Party marks the 54th anniversary of the Cry of Balintawak, calling on the people to join the HMB in annihilating the enemy today, no different from the enemy denounced by Bonifacio. . . "

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with government forces in Plaridel, Bulacan; Iluminada Calonje, chairman of the communist national communications division, acting chief of the central post of the communist central committee cadres in Manila. Sentenced to life imprisonment were: Federico M. Bautista, member of the communist national finance committee; Simeon Rodriguez, also member of the communist national finance committee; Atty. Jose Lava, general secretary of the Communist Party and member of the secretariat; Angel Baking, supervisor of the communist technological group; Rosario C. de Santos; Julita Rodriguez, Pedro Vicencio, Felipe Engreso, Josefina Adelan, Elpidio Acuña Adime, Naty Cruz, were sentenced to different periods of deprivation of liberty with the exception of the last two, who were committed to the reformatory for being minors.

[53] Decision rendered by Judge Oscar Castelo of the Manila Court of First Instance in Criminal Cases Nos. 14071, 14082, 14270, 14315, 14344.

> "In the Philippines, the HMB, following communist leadership, shows the way. The communist party of the Philippines calls on the Filipino people everywhere to organize new guerrilla and partisan groups and coordinate with the HMB in the decisive struggle toward the inevitable and final armed overthrow of the imperialist and puppet war-mongers." [54]

In the Communist Party document entitled "Over-all Plan of Expansion and Development of the Party, HMB and Mass Organizations," the following objectives were envisioned: Expansion of the Cadres from 3,600 in July, 1950 to 56,000 in September, 1951; Party Members from 10,800 in July, 1950 to 172,800 in September, 1951; and Organized Masses from 30,000 in July, 1950 to 2,430,000 in September, 1951.[55]

V. THE COMMUNIST STRATEGY IN SOUTHEAST ASIA

The communist threat in the Philippines is, in fact, related to the great social and political upheavals that have been unfolding throughout the continent of Asia in recent years. A keen student of Communism in the Philippines,[56] reports that top Communist brass

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[54] The article, "Establish Underground Local Government as Organs of Power and Struggle to Overthrow Imperialist Puppet Rule," calls on the people to:

"1. Arm yourselves to defend your lives, liberties and properties against the abuses of the puppet forces, profiteers and hoarders.

"2. Enforce equitable crop sharing between the peasants and friendly landlords. Confiscate the harvest and other properties of enemy landlords and other traitors. Enforce living wages of workers in business establishments owned by friendly capitalists but destroy and sabotage the business of imperialists and enemy capitalists.

"3. Refuse or delay payment of taxes to the puppet government, and campaign among neighbors to do likewise.

"4. Refuse to sell your harvest to enemy agents.

"5. Establish connections between the underground local governments and the puppet local governments in the interest of coordination in the armed struggle for national liberation.

"6. Cooperate with the local HMB unit or CP nucleus in the holding of mass school to educate local barrio leaders of the aims and methods of struggle of the HMB and the Communist Party leading it...

"7. Establish local people's courts of justices...

"8. Gather all information and statistical data about the enemies of the people and other important information and data useful in the conduct of the struggle, and report the same to the local HMB unit or CP nucleus.

"9. Maintain intact your connections with the local HMB unit or CP nucleus. Shelter and feed HMB forces and CP cadres who seek shelter with you and facilitate their transit from one place to another to enable them to perform their duties.

"10. Arrest yellow labor leaders... liquidate those who do not show readiness to change their anti-social and unpatriotic ways, as well as enemy landlords, traitors and spies.

[55] *Loc. cit.*

[56] Samuel W. Stagg.

in Asia have decided that the Philippines must first be taken into Communist ranks, for these Islands offer the whole of Asia an example of the progress and freedom that people can enjoy under a democracy.[57]

In Southeast Asia, the Communists have been active for some years now. They have been largely responsible for the civil war which has reduced Burma to a condition bordering upon anarchy. Ho Chi Minh and other Communist leaders dominate the Viet Nam revolt in French Indo-China. In Malaya, some 6,000 Communists have been carrying on a guerilla war for nearly 2 years. The Communist revolt in the Indonesian Republic was suppressed in 1948, but Communism has been gathering strength in that new Republic since. There is a Chinese Communist Party in Siam, and most of the leaders of the Hukbalahaps (HMB) in the Philippines are Communists. The Indian Government, greatly perturbed by Communist agitation, has recently made wholesale arrests and passed a law giving it drastic powers of arrest and imprisonment without trial. Tibet seems about the least likely country in the world to go Communist; but even there, the Chinese Communists have grown too strong for the Dalai Lama, who is now virtually under Communist dictation.

The fall of Chiang Kai-Shek has been an immense encouragement to the Communists throughout Southeast Asia. Apparently, the plans were drawn up at a meeting in Peking in 1950. The Cominform, in its official publication, stated that "imperialism" is to be crushed in the countries of Southern Asia. It is significant that President Sukarno and Premier Hatta are now coupled with Premiers Nehru of India and Thakin Nu of Burma and our President Elpidio Quirino as "reactionary" agents of the "capitalist imperialist exploiters" of America and Western Europe.[58]

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[57] "Communist Master Plan for the Conquest of the Philippines," *Philippines Free Press*, June 24, 1950.

[58] The Cominform publication gives one valuable hint of how Moscow proposes to act: It declares that the decisive condition for success is the formation of people's liberation armies under Communist Party leadership. This means that the Communists will try to extend the present revolts under the cloak of a nationalist struggle for freedom from foreign imperialists. Noteworthy is the similarity of pattern for Communist domination in the Philippines to that of all the rest of Southeast Asia.

Viet Nam, which forms the bulk of French Indo-China, is in a peculiarly dangerous position. The French are willing to grant a very wide measure of self-government, provided that they retain control of foreign policy, and in part of defense. These terms have been accepted by Bao Dai, who seems to have had some success in gaining a following, but Ho Chi Minh refused them and an indecisive guerrilla war has been going on for the last five years. The Chinese Communists are now in direct, physical contact with Ho Chi Minh. So far the rumors are not confirmed that they have sent him equipment, but this development is very likely seen. The

With the aid particularly of Communist China, communist conspiracy has been going on in the Philippines for the last few years. This is part of the master plan for the conquest of the Philippines.

Soviet and Chinese recognition of Ho Chi Minh as the legal government of Viet Nam is as significant as the German-Italian recognition of France in 1936.

The capture of French Indo-China would give the Communists a common frontier with Siam as well as Burma. In the latter country, no less than four rival factions, two of them Communist, are at war with the Socialist government of Thakin Nu.

Premier Field Marshal Phibun Songgram of Siam is anti-Communist, but too much confidence may be placed in his steadfastness. About 16 per cent of the population are Chinese, there is a Chinese Communist Party, and one Siamese faction is anxious to overthrow Phibun's government. In fact, but recently, a bloodless coup d'etat was effected in Siam by the military. Control of Siam would bring the Communists to the border of Malaya.

Malaya may well become the Palestine of Southeast Asia: of the population of 5,800,000 the Malays are 43 per cent, the Chinese 45 per cent, and the Indians 10 per cent. Each race dislikes the other two, and British efforts to persuade them to cooperate in setting up a democracy have not had much success in the face of three antagonistic and growing nationalism. At the moment, however, the problem is the Chinese Communist guerrillas. About 6000 Communists and 50,000 British and Malay troops and armed police are playing a game of hide-and-seek in the jungles of Malaya. The end of the war is not in sight, and if the Communists controlled Siam, they could easily infiltrate arms and reinforcements to the guerrillas. Siam could be to Malaya what Yugoslavia was to Greece during the years of the Communist civil war.

At the moment, French Indo-China is the key to the situation. It is essential that Ho Chi Minh should not win, for if he does the Communists will gain control of a great deal more besides. The real problem is not the survival of the French empire in a modified form, but the necessity of halting the southward advance of Chinese Communist imperialism. Lenox A. Mills, "Cold War in Southeast Asia," *Virginia Quarterly Review,* Summer, 1950, pp. 368-378.

A potential source of weakness is the Chinese minority that exists in every country of Southeast Asia except Burma. The Chinese have an economic power that is out of all proportion to their numbers, since they are the retail shopkeepers, the buyers of the peasant's rubber and other produce, and the principal moneylenders, at usurious rates of interest. This triple monopoly gives them an economic stranglehold over the native population. The great bulk of retail trade in the Philippines is in Chinese hands. The Chinese occupy every important commercial district in every city in the Philippines.

The Chinese, by nature, are clannish. They do not easily become assimilated, and even after several generations abroad, their loyalty is given to China and not to their country of domicile. They have attracted the unpopularity which always descends upon an alien group that seems to have acquired too large a share of the wealth of the country. Growing nationalism is widening the gulf, and there are clear signs that the governments of Southeast Asia intend to curb the power of the Chinese.

This will compel them to look for China for the protection of their vested interests, and the only question is whether Mao Tse-Tung is prepared to fill this role. Judging by events in China, it would appear that he is, for he and the Chinese businessman have come to terms with one another. There is nothing to prevent the same thing happening overseas when it is to the advantage of all concerned. The large majority of the Chinese in Southeast are anti-Communist. Formerly, they were strong supporters of Chiang Kai-Shek, and it is significant that they have now dropped him and

Chinese Communist agents are reportedly now scouring the country secretly enrolling Chinese as "Cooperators." [59] Every conceivable form of pressure is being brought to bear "to persuade" local Chinese to join—arguments, hints as to possible harm to relatives who are now in the hands of Communists in China, the threat of arson, bodily harm, and even death. Information is that 40,000 Chinese in the Philippines have signed up and Communist leaders have set up a goal of 100,000 Chinese "Cooperators" within 1951-52.[59] The discovery of a huge smuggling syndicate in operation in the Philippines which presently is under investigation, the revelation of Huk funds secured from Chinese Communists in the Philippines, notably the multimillionaire Co Pak, who, until his deportation, handled "the financial end of the revolution," these are evidences of a large Chinese fifth column in the Philippines, "waiting," says an American correspondent [60] "to capture full control of the Filipino revolt."

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taken up an attitude of watchful waiting. Mao Tse-Tung stands to gain the support of a very astute, well-organized powerful group which could become a most useful fifth-column.

[59] One of the most effective arguments used is "Why oppose the inevitable? China is now a Communist nation, the Communist movement is beginning to sweep over Asia. Why not play safe by playing with a sure winner?"

The next move will be to organize these "Cooperators" into small cells, one in each larger town in all parts of the Philippines. Each cell will be under the leadership of the proved Chinese Communist "enforcer," whose word will be law, and who will literally hold the power of life and death over the cell members. In each province, there will be a "provincial commissar" who will have direct authority over all cell leaders in that province.

"Provincial commissars" and local cell leaders have been ordered to assemble hidden arsenals for later use.

Chinese "Cooperators" will be carefully screened and those possessing military experience and fitness will be given special training and indoctrination with a view to their being used as shock troops later. As needed, these specially selected Chinese will be ordered to the Huk front.

A parallel program is being followed by Filipino Communists. The two parallel systems of cells are perfectly coordinated and in time will be fused with the Filipinos relegated to inferior places in the Party.

According to a Communist source, there are in and near Manila more than 12,000 able-bodied Chinese who possess some military experience. This source also declares that the Communists will have not less than 20,000 fighting men available when needed in and near Manila.

The attack of Manila is to come as a complete surprise. The people of Manila will wake up one morning to find all the markets, water and electricity supply of the City, all transportation facilities of the City, in the hands of the Communists. Road blocks with machine guns will control the important streets within the City and leading to the provinces. Stagg, "Communist Master Plan for the Conquest of the Philippines," *op. cit.*

[60] Robert Shaplen in "The Huks: Foe in the Philippines," lead article in the April 7, 1951 issue of *Collier's* magazine.

VI. NECESSITY FOR THE SUSPENSION

The United States Supreme Court has summed up the justification for the suspension of the privilege of the writ of habeas corpus in the following words:

> In every war, there are men of previously good character, wicked enough to counsel their fellow citizens to resist the measures deemed necessary by a good government to sustain its just authority and overthrow its enemies; and their influence may lead to dangerous combinations. In the emergency of the times, an immediate public investigation according to law may not be possible; and yet, the peril to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit, in the exercise of a proper discretion, to make arrests, should not be required to produce the person arrested in answer to a writ of habeas corpus.[61]

Against a background of Communist aggressions all over Southeast Asia; against a record of criminality and violence almost without parallel in the country, and the pressing and immediate threat to national security poised by the communist conspiracy to overthrow the existing government, President Quirino threw down the gauntlet. Nine heads of the divisions composing the National Secretariat of the Communist Party in the Philippines, in whose possession were found "strong and convincing" evidence showing their participation in rebellious and seditious activities received the full impact of the suspension. For them there was to be no liberty before trial; for them there was to be no opportunity to escape to the hills. The writ of habeas corpus was now suspended.

The action of the President evoked much protest from many quarters.[62] In the first place, the suspension had an immediate,

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[61] *Ex parte Milligan*, 4 Wall. 2, 125.

[62] Many were of the belief that remedial legislation would achieve the purpose sought by the proclamation without having to resort drastically to suspension of the writ of habeas corpus which is a restriction of a basic right. Among the remedial bills suggested were:

1. Amending Article 125 of the Revised Penal Code which limits to six hours the detention of persons by the authorities before delivery to the courts in connection with crimes against national security.

2. Outlawing the Communist Party of the Philippines, the HMB organization, the PKM and other similar associations.

3. Giving more teeth to existing laws on crimes against national security by providing for the death penalty on persons convicted of rebellion, sedition, or insurrection.

The privilege of the writ of habeas corpus had to be suspended not only because it was desirable for the prosecuting officials to have sufficient time to investigate and file the necessary charges in court but also because a public officer or employee who shall detain any person for some legal ground and shall fail to deliver such person to the proper judicial authorities within the period of six hours, shall suffer the penalties

palpably pernicious effect. Fear clutched the hearts of the citizens. They were cowed into silence by the threat of arrest at the slip of the tongue. Those who were wont to speak freely against the abusive actions of government officials kept still. Criticism of the Government became *anathema* to many. And the defense of individual liberties became a subject that must be touched not, lest one be invited by the military into their secret stockades.

The wisdom of such action was manifestly doubtful in the beginning. The danger was clear: in any government where criticism is repressed or suppressed in any manner, there tyranny may find a fertile soil for its roots to grow deep into. The suspension was attacked, and in a sense, rightly, as a dangerous invasion of the rights of an individual under our constitutional government.

Moreover, the President suspended the privilege of the writ of habeas corpus throughout the Philippines. This made his action harder to justify on constitutional grounds. For the mandate of the constitution is clear: the privilege of the writ of habeas corpus may be suspended only in cases of invasion, insurrection or rebellion [63] or imminent danger thereof [64] 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.[65] There is thus a clear limitation on the right to suspend the privilege of the writ of habeas corpus: it must be in places only where the necessity for such suspension exists and only for such period as may be necessary.

From a long view, however, especially considering that the top Communist suspects apprehended for which the suspension of the

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provided in article 125 of the Revised Penal Code. Said provision shortened to six hours the period of twenty-four hours formerly provided by the old Penal Code. After liberation, the legal detention period was extended to not more than thirty days by Executive Order No. 65 under the President's emergency powers insofar as it affected those accused of treasonable collaboration. The People's Court Bill further suspended Article 125 of the Revised Penal Code by extending the period to six (6) months with regard to political detainees. (Com. Act No. 682, section 19 provided that in the interest of public security, the provisions of Article 125 should be suspended insofar as political detainees are concerned until the filing of the corresponding information in the People's Court, but the period of suspension shall not be more than six months from the date of formal delivery of the political prisoners by the Commander-in-Chief of the Armed Forces in the Philippines to the Commonwealth Government.) The case of *Laurel v. Misa,* 42 O.G. No. 11, upheld the validity of both Executive Ordinance No. 65 and Commonwealth Act No. 682.

[63] Only on these three occasions may the privilege of the writ of habeas corpus be suspended under the Bill of Rights.

[64] This occasion to suspend the privilege of the writ of habeas corpus is granted the President in Article VII, Section 10(2) of the Constitution.

[65] This under the Bill of Rights (Article III, Section 1[14]).

privilege of the writ of habeas corpus was especially intended were subsequently convicted, thus rendering almost impotent since the suspension Communist aggressive conspiracies in the Philippines, the suspension might be justified. Thus, echoing the view of those who had from the beginning supported the suspension of the writ, Presiding Justice Alejo Labrador of the Court of Appeals points out "that dissidence aims to destroy the very existence and security of a democratic state, while abuse of the writ provides only an occasion to destroy one of the democratic processes . . . Dissident threat is not merely potential; it is actual and real; while abuse of authority and intimidation at the polls is only a mere possibility, and not even a probability." [66]

Civil libertarians have been zealous in their denunciation of the action. But yet, in these perilous times, there seems to be some need to recognize that our most important obligation is to preserve the *whole* Constitution and to realize that in our zeal to defend the Bill of Rights from encroachment by authorities, we may allow the very people for whom we invoke the Bill of Rights to destroy the whole Constitution in which the Bill of Rights is but an important part. However much we might guard with zealous care individual rights in a democratic scheme of government, it is sometimes necessary and reasonable to limit the exaggerated application of civil rights to a field which threatens our national survival.

VII. SUSPENSION DURING MARTIAL LAW

In connection with the suspension of the privilege of the writ of habeas corpus, a pertinent inquiry would be the effect of a declaration of martial law on habeas corpus. The suspension of the writ of habeas corpus is not, of course, in itself a declaration of martial law; it is simply an incident, though a very important incident, to such declaration. But practically, in England and the United States, the essence of martial law is the suspension of the privilege of the writ of habeas corpus, and a declaration of martial law would be utterly useless unless accompanied by the suspension of the privilege of such writ. Hence, in the United States, the two, martial law and the suspension of the writ, is almost regarded as one and the same thing.[67]

There seems to be some divergent views on the nature of martial law on the part of the authorities, both civil and military, but it would seem that in the main, martial law is that law which, of necessity, obtains and governs a tract of country in which there are

[66] *Manila Times,* September 17, 1951.
[67] *Martin v. Mott,* 12 Wheat. 19.

active military operations, or a tract, province, or country after it has been subjugated by military power and before civil authority has been formed and been enabled to exert itself.[68]

In the very nature of things, martial law must be permitted to prevail on the actual theater of military operations in time of war. There seems to be little doubt on this. War, according to the Supreme Court of Illinois is simply an appeal to force; and where it is being waged, it necessarily suspends and displaces the ordinary laws of the land by those usages which are known as the laws of war, and a commanding officer, if he finds within his lines a person, whether citizen or alien, giving aid or information to the enemy, can arrest and detain him so long as may be necessary for the security or success of his army.[69]

In extreme cases, courts go further and admit that if, in a district remote from the theater of military operations, the popular sentiment is so disloyal to the government and that one who aids and abets the public enemy cannot be rendered powerless for mischief and brought to justice by the arm of the civil law, that fact would justify the government in treating such district as virtually attached to the theater of military operations, and in enforcing therein martial law or the laws of war, so far as might be necessary to the public safety.[70]

Thus, declared the Supreme Court of West Virginia,[71] the guaranties of the Constitution as well as the common law and statutes, and the functions and powers of the courts and officers, become inoperative by virtue of the disturbance, and the proclamation of martial law simply recognizes the status or condition of things resulting from the invasion or insurrection, and declares it. In sending the army into such territory to occupy it and execute the will

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[68] *In re Egan,* Fed. Cas. No. 4,303, the Supreme Court of the United States, in defining martial law, said: "All respectable writers and publicists agree in the definition of martial law,—that it is neither more nor less than the will of the general who commands the Army. It overrides and suppresses all existing civil law, civil officers, and civil authorities, by the arbitrary exercise of military power; and every citizen or subject—in other words, the entire population of the country within the confines of its power—is subjected to the mere will or caprice of the commander...

"As observed by Sir Matthew Hale, martial law is not law, but something indulged rather than allowed as law, all authorities agree that it can be indulged in only in case of necessity, and that when the necessity ceases, martial law ceases. Hence, the President of the United States has a right to govern, through his military officers, by martial law, when and where the civil power is suspended by force; in all other times and places the civil excludes martial law—excludes government by the war power.

[69] *Johnson v. Jones,* 44 Ill. 143, 154.

[70] *Loc. cit.*

[71] *State v. Brown,* 77 SE Rep. 243, 245.

of the military chief for the time being, as a means of restoring peace and order, the executive merely adopts a method of restoring and making effective the Constitution and laws within that territory, in obedience to the sworn duty to support the Constitution and execute the laws. "The provisions against the suspension of the writ of habeas corpus and trial of citizens, by military courts, for offenses cognizable by the civil courts, cannot, in the nature of things, be actually operative in any section in which the Constitution itself and the functions of the courts have been ousted, set aside, or obstructed in their operation by an invasion, insurrection, rebellion or riot." [72]

There has only been one instance when the Congress of the United States authorized the suspension of the writ of habeas corpus. President Lincoln, in the beginning of the Civil War, before issuing a formal proclamation, authorized officers in the military service to suspend the privilege of the writ in several cases where former officers of the army or the government had gone over to the Confederacy and were active in the North against the Union. Such persons were put in prison and held without trial.[73] Previously, in 1862, before the Act of Congress authorizing him to suspend the privilege of the writ, he issued a formal proclamation declaring martial law and suspending the writ in respect of all persons arrested or who "are now or hereafter during the rebellion, shall be imprisoned in any fort, by any military authority or by the sentence of any court martial or military commission." [74]

Thus, the climax on the impairment of civil rights during the Civil War was this institution of martial law and the limited use of military tribunals for the trial of civilians in both border and free states. Since portions of all the border states were at various times during the war occupied by Confederate troops or hostile guerrillas, martial law was employed there as an essential means of military security. Moreover, disloyalty to the Union in these areas was so widespread and so violent that the President considered martial law necessary for the preservation of peace and order. Usually martial law was applied in specified limited districts where the situation seemed most serious, but in July 1864 Lincoln put the whole state of Kentucky under martial law. And at the time of Lee's invasion of Pennsylvania in 1863, the President, in response to the petitions of many citizens, proceeded to put that area under martial law.

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[72] *Loc. cit.*

[73] NORTON, *op. cit.*, p. 83.

[74] 45 L.R.A. 832.

There was hardly any legal controversy with respect to the trial of civilians who had committed offenses of a military character, such as sniping or spying in regions under martial law where military commissions were set up. A great controversy however, arose when citizens were subjected to military tribunals in regions remote from the military operations and where the civil courts were unimpeded by the course of the war. Two of these cases, which attracted nation-wide attention, strikingly reveal the effect war may have upon decisions of the Supreme Court. The first case involved Vallandigham, a former Democratic congressman of Ohio, who made public speeches bitterly denouncing the Lincoln administration for needlessly prolonging the war. For this offense he was placed under military arrest and promptly tried by a military commission in Cincinnati, although he strongly denied its jurisdiction. The commission found him guilty of disloyal sentiments and sentenced him to close confinement during the war. Before the Supreme Court, Vallandigham argued that the jurisdiction of a military commission did not extend to a citizen who was not a member of the military forces, that the prisoner had been tried on a charge unknown to the law, and that the Supreme Court had the power to review the proceedings of the Commission, but the high tribunal refused to review the case, declaring that its authority, derived from the Constitution and the Judiciary Act of 1789, did not extend to the proceedings of a military commission because the latter was not a court.

A very similar case but one destined to result in quite a different decision was that of Milligan, who, with certain associates was arrested in Indiana in 1864, by the military commander of the district. Tried before a military commission and convicted of conspiracy to release and arm rebel prisoners and to march with these men into Kentucky and Missouri in order to cooperate with rebel forces there for an invasion of Indiana, Milligan petitioned the circuit court for a writ of habeas corpus, and the judges, disagreeing, certified the question of law to the Supreme Court. The Supreme Court rendered its now famous decision in *Ex Parte Milligan,* holding the military commission authorized by the President to have been unlawful. Contrary to the Vallandigham decision, the Supreme Court asserted its right to review the action of a military commission and to nullify it if the action was without legal foundation. Since Milligan had not been indicted by a grand jury at the next session of the federal court, the Court held that according to the Habeas Corpus Act of March 1863, the government had no legal right to hold him and that he must be released.[75]

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[75] KELLY & HARRISON, THE AMERICAN CONSTITUTION, ITS ORIGINS AND DEVELOPMENT, pp. 443-446.

The best known episodes of martial rule have been chiefly the result of chronic lawlessness in the mining industry. The depression brought the problem of dealing with demonstrations of hungry men, and then the increased militancy of organized labor. In some states, the martial law was invoked to cover the imposition of executive moratoria. In 1934, 27 states mobilized the guard for emergency duty; in 1935, 32 states. Troops have been mobilized not only to prevent whites from lynching Negroes but also to prevent Negroes from exercising their legal right to reside among whites; to protect the community from bandits, and to protect the bandits alive or dead, from the community; to guard the life of the governor of Kentucky and to keep peace at the derby. In some states, the proclamation has become a familiar, even whimsical act. Texas had seen such episodes in the twelve years following the first World War. Gov. Murray of Oklahoma restricted the production of oil at the same time and in the same way as Governor Sterling of Texas; he declared martial rule within fifty feet around each well, reciting that some producers could not "secure justice or equity from the courts of the land, so they must needs rely upon the chief magistrate of the state to exercise the supreme executive power . . ." Gov. Murray called the militia a score of times during his term to prevent the foreclosure of farm mortgages, to enforce a bank holiday, to deliver from jail one committed for nonpayment of alimony, to take charge of ticket sales at the football game between the state's two institutions of higher learning.[76]

In Sterling v. Constantin,[77] where Governor Sterling of Texas declared there was an insurrection in the oil countries which he directed Gen. Wolters to suppress by measures of "martial law," the Supreme Court held that there was no violence to suppress.

Sometimes governors declare "martial law" as a trump card in some contest with political rivals. In 1935, Governor Johnson of South Carolina tried to get rid of the highway commissioners by declaring them to be insurgents—only to be restrained by the state supreme court. Governor Quinn of Rhode Island, seeking to tap the strength of an opponent who was also proprietor of the Narragansett Race Track established martial law over the track. When Senator Huey Long was at war with Mayor Walmsley for control of the New Orleans police board, Governor Allen, acting from the Senator's hotel suite obligingly called the troops and instituted an extraordinary regime which he described by the alliterative title of "partial martial law." In 1939 Governor Rivers of Georgia proclaimed martial law

[76] Fairman, "The Law of Martial Rule and the National Emergency," 55 *Harvard Law Review*, p. 1253, 1275.

[77] 287 U.S. 190.

around the highway department's building as a device for excluding the chairman whom he had already been enjoined from removing, and later expanded the proclamation to protect his military agents from punishment for their contempt—all of which was brought to naught by the state supreme and federal district courts. Military control by state authorities during labor disputes has seldom been administered with an even hand. Generally the strikers are branded as insurgents, and the open shop is enforced.[78]

It follows, from what have been said, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theater of actual military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for if this government is continued after the courts are reinstated, it is a gross usurpation of power.[79]

Thus, in the Milligan case,[80] the majority held the imprisonment of Milligan illegal, and discharged him, on the ground that in a state where no war prevailed, and the jurisdiction of the civil courts was undisturbed, neither Congress nor the President, nor both united, could constitutionally create a military tribunal or enforce martial law. And in the Mclaughlin case,[81] where the commanding general of the district ordered the destruction of plaintiff's whiskey occurring just at the close of the active hostilities of the Civil War, it was held that the order from the general was no justification. In defining where martial law may rightfully obtain, it declared that it is limited to the theater of active military operations, where no civil authority remains, and there is a necessity to furnish a substitute to preserve the safety of the Army and society; and martial rule can only prevail until the laws can have their free course.

The Hawaiian Organic Act of 1900 gives the governor the power to suspend the privilege of the writ of habeas corpus or place the territory or any part thereof, under martial law until communication can be had with the President and his decision thereon known. Congress has twice copied the language quoted in the organic law of 1917 for Porto Rico and in the Philippine Act of 1916. On Decem-

[78] Fairman, *op. cit.*, p. 1276.
[79] *Ex parte Milligan*, 4 Wall. 2.
[80] *Loc. cit.*
[81] 50 Miss. 453.

ber 7, Governor Poindexter, after the bombing of Pearl Harbor, issued a proclamation declaring that pursuant to Sec. 67 of the Organic Act, the privilege of the writ was suspended and the Territory was placed under martial law. The most striking aspect of martial rule are the limitations placed on the jurisdiction of civil as well as criminal of the ordinary courts.[82]

Federal Judge Delbert Metzger handed down an opinion on a petition for habeas corpus by Dr. Hans Zimmerman, American citizen, interned, and removed from the territory because of alleged subversive activities. In denying the petition the court held: "The court... believes that a writ should issue as a matter of law. But it would be in clear defiance of an order of the military governor to issue the writ. I feel the court is under duress and is not able to carry out the function of the court as is its duty. For that reason alone, the court declines to issue the writ." [83]

However, in the more recent case of Duncan v. Kahanamoku,[84] the Supreme Court of the United States held that the provision of the Hawaiian Organic Act authorizing the territorial Governor with approval of the President to declare martial law in the interest of public safety, did not authorize the military after the Governor's proclamation of December 7, 1941, to try and punish civilians not connected with the armed forces for embezzlement and assault in area which the military had not required civilians to evacuate and in which the civil courts were open and functioning. "Our system of government," said the Supreme Court, speaking through Mr. Justice Black, "clearly is the antithesis of total military rule and the founders of this country are not likely to have contemplated complete military dominance within the limits of a Territory made part of this country and not recently taken from the enemy. They were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws. Their philosophy has been the people's throughout our history. For that reason we have maintained legislatures chosen by citizens or their representatives and courts and juries to try those who violate legislative enactments. We have always been especially concerned about the potential evils of summary criminal trials and have guarded against them by provisions embodied in the constitution itself . . . Legislatures and courts are not merely cherished American institutions; they are indispensable to our government . . . Military tribunals have no such standing. For as this Court has said before . . . the military should always be kept in subjection to the laws of the country to

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[82] Fairman, *op. cit.*, p. 1289.

[83] 132 F (2nd) 442.

[84] 327 U.S. 304, decided in 1946.

which it belongs, and that he is no friend of the Republic who advocates the contrary. The established principle of every free people is that the law shall alone govern; and to it the military must always yield."

This very recent ruling of the United States Supreme Court seems to reflect the prevailing attitude of the high tribunal with regard to the conflicting jurisdictions asserted by military tribunals and civil courts during martial law. This ruling of the Supreme Court gives vitality to the classical statement in the Milligan case: [85] "The Constitution of the United States is a law for rulers and 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."

VIII. DURATION OF THE SUSPENSION

Church, analyzing the suspension of the privilege of the writ of habeas corpus in the United States in 1863, asserts that the suspension was only to continue during the rebellion. When that ceased, the right of the president to continue the suspension also ceased, and the courts were bound to give to the citizen his rights under the privilege.[86] Since there was nothing prescribed as to what should be the evidence of it, the same was to be ascertained, like any other fact, by evidence appropriate to such a fact. In the case of the Civil War, the abundant evidence that the rebellion no longer continued; that its organization was destroyed, its armies captured or surrendered, and its officers imprisoned or paroled; that the Union armies being rapidly mustered out, the returning soldiers daily crowding the streets; that there were no battles, no single known body of men in arms anywhere under the once well-known organization called the "Confederate States of America," etc.—all were received as sufficient evidence that war had ceased everywhere in the land. This being so, the authority of the President under the act of March 3, 1863, section 1, to suspend the privilege of the writ of habeas corpus had expired.[87]

Thus, by July, 1865, barely two years after the Act of Congress authorizing the President of the United States to suspend the privilege of the writ of habeas corpus,[88] the Supreme Court of Pennsylvania discharged the relator under arrest who sued out a habeas corpus.[89]

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[85] 4 Wall. 2.

[86] CHURCH, HABEAS CORPUS, p. 46.

[87] *Loc. cit.*

[88] March, 1863.

[89] *Com. v. Frink*, 4 Am. Law Reg. N.S. 700, cited in CHURCH, *op. cit.*, 47.

And in November, 1865, where a person was tried by a military commission in South Carolina for a murder committed in September, 1865, the Supreme Court held that hostilities had terminated and the rebel army had surrendered to the authorities of the United States some seven months before the trial, and hence the prisoner was entitled to be discharged on habeas corpus, on the ground that the conviction was illegal, for want of jurisdiction in the tribunal.[90]

And when in July, 1865, the governor of Alabama declared the laws as they stood in 1861 to be in full force, it was an indication that martial law had ceased and all laws passed subsequent to 1861 and prior to September, 1861 had been replaced or suspended by implication.[91]

Thus, it is incontrovertible that the only object in the suspension of the privilege of the writ of habeas corpus is the necessity for making effective measures designed to maintain law and order and defend the existing government against subversion and destruction. In other words, the real consideration is the necessity of the case. If the requisite effectiveness can be secured, as certainly it can now be secured, without doing violence to a constitutional provision whose meaning is plain, the reason for the suspension of the writ vanishes.

In the United States, martial law, which is a more drastic measure curtailing individual liberties, has been limited to only such periods as are demanded by the most imperious necessity to save the nation. Seldom has martial law, when properly declared to meet extraordinary situations calling for individual and collective sacrifice, been extended for more than two years. And specifically, the situation that has properly called for martial law and the suspension of the privilege of the writ of habeas corpus in the United States is the great Civil War in whose outcome depended whether or not the American people were to form a "more perfect union."

In the Philippines, the writ of habeas corpus has been suspended "in the face of actual danger of rebellion."[92] Grave as the danger might be, it could not have possibly been as grave as when the Confederacy rose to secede from the Union. For then the Union Government was faced not with actual danger of rebellion but with rebellion itself.

Where martial law was declared for flimsy reasons, the state and federal courts of the United States were quick to protect the liberties

[90] *In re Egan*, 8 Fed. Cas. 367.
[91] *Jeffries v. State*, 39 Ala. 655.
[92] Proclamation No. 210, October 22, 1950.

of the citizens and grant them habeas corpus. In the Philippines, seventeen months have passed since the suspension of the privilege of the writ of habeas corpus. The writ has since been restored in fifteen provinces.[93] True, there has not been much abuse in the last seventeen months,[94] and the peace and order situation has practically gone back to normal since. But precisely because the situation is already normal, and the susceptibility to abuse remains and shall remain while the writ is suspended, there seems to be now an imperative need for lifting the suspension.

IX. CONCLUSION

Our democracy then must meet the faith and creed of Communism on the merits; and it will be able to do so only as there is enough vitality in it, enough faith engendered from a people ready to spend themselves without measure for it, enough creed to command their absolute loyalty and unswerving allegiance to it. Indeed, the strength of our democracy lies not so much in those measures designed to combat the forces that would subvert and destroy it as in keeping unfettered the liberties that give life to it. There is a quality for which we have no specific word which is embodied in the expression that a man or a people in any crisis will react consistently with his or their training and traditions. Loyalty to our ideals and traditions requires that there should always be a method at hand whereby in no particular case can a citizen be deprived of his liberty without just cause or except upon the demands of the most imperious necessity.[95] The preservation of our democratic tra-

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[93] In the Visayas: Palawan, Bohol, Romblon, Masbate, Cebu, Leyte and Samar. In Mindanao and Sulu: Zamboanga, Misamis Oriental, Misamis Occidental, Lanao, Bukidnon, Agusan, Surigao, and the Sulu Archipelago.

[94] It was reported that during the second MIS raid in Manila on January 27, 1951, Renato Constantino, counsellor in the Department of Foreign Affairs, was suspected of being a Communist and his library was searched for having Communist books therein; the same time that several newspapermen were arrested without warrant; the same time also that one of them was manhandled at Camp Murphy by army authorities. See footnote 11.

[95] It is generally recognized that the suspension of the writ of habeas corpus is a most stringent measure infringing on a cherished right of a person under detention that in the words of Burwell, "nothing but the most imperious necessity" would warrant the suspension of the great writ. (Uttered by Mr. Burwell of Virginia in a public debate precipitated by the request of President Jefferson in 1807 to Congress to confer the power upon him on the occasion of the Burr Conspiracy. He said that there had already been two insurrections so far in the United States, the Shay and the Whiskey Rebellion, both of which had defied the authority of Congress and menaced the Union with dissolution; in one of them, 15,000 men had been called out. Nevertheless, he never heard of a proposition to suspend the writ of habeas corpus. "Nothing but the most imperious necessity would excuse us in confiding to the execu-

ditions—and preserve them we must—lies not in rendering impotent and anemic the liberties that have given growth to such traditions but in keeping alive the flame of liberty which has illumined the pages of our political history during the last half-century.

The suspension of the privilege of the writ of habeas corpus must be lifted and now. Otherwise, by prolonging such suspension, the government may find it increasingly difficult to capture the full loyalty of a people whose dwindling faith in their government, already shaken by so many sins of commission and omission, may yet turn into gross apathy, even active hostility.

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tive or to any other person under him, the power of seizing and confining a citizen, upon bare suspicion, for three months, without responsibility for abuse of unlimited discretion.) Wm. Grant, "Suspension of the Habeas Corpus in Strikes," *op. cit.*, 257.

The "imperious necessity" alluded to is recognized, however, and furnishes its own excuse for the suspension of the writ. *Loc. cit.* If, as is admitted, occasions arise when necessary action is such that its legitimate purpose would be foiled by awaiting legislation, then let necessity be the sole excuse, and the rights of the individual will at least be untrammeled by judicial decision. Necessity in the eyes of all authorities is the *only reason* for the suspension of the writ. 2 HARE, AMERICAN CONSTITUTIONAL LAW, 965, quoted by Grant, "Suspension of the Habeas Corpus in Strikes," *loc. cit.*