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Emergency Detention Acts: Peacetime Suspension of Civil Rights—with a Postscript on the Recent Canadian Crisis*

John J. McGonagle, Jr.**

America today is beset with crises which all too often erupt in violence.

* At the time that this article was prepared, only one of what could be called the common-law nations, the Republic of South Africa, had ever utilized statutory emergency powers in peacetime to detain persons deemed to be a danger to the state. The occasion for invoking those powers was the danger of a racial uprising in South Africa in 1960. The South African experience was thus unique.

Like South Africa, the United States is armed with statutory power in the Emergency Detention Act to suspend individual rights in the event of certain civil emergencies. Until recently, however, most people believed that the possibility was remote that the federal government would ever exercise such emergency powers in peacetime.

On October 16, 1970, Canada invoked the emergency powers granted in its War Measures Act to deal with terrorists allegedly responsible for the murder of one governmental official and the kidnapping of yet another. To date, the validity of the War Measures Act has not been tested in the Canadian courts by those opposed to its application in peacetime. That it has been invoked by a democratic neighbor has sensitized Americans to the possibility that such measures might be required here and that they might be invoked by our government.

With the announcement that Canada had invoked its War Measures Act, Americans were asking whether this "could happen here." In answer to questions from college students in a Mount Holyoke College auditorium, Assistant Attorney General William Ruckelshaus is reported to have said that the President could not declare martial law nationally, as had been done in Canada, "because of constitutional protections." The Washington Post, Oct. 21, 1970, at A3, col. 1.

The body of this article is devoted to ascertaining whether Mr. Ruckelshaus' evaluation of our constitutional protections (and the power and ability of our courts to intervene when needed) really could keep the President of the United States from detaining American citizens under the provisions of the Emergency Detention Act in time of peace. An epilogue to this article presents a brief summary of the Canadian War Measures Act and some comments on its recent invocation.

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Tragically, the authorities have often been forced to utilize armed force to put down disorders. The consequence of this use of force has been a reconsideration of the causes of these violent eruptions and of the means available to governmental authorities for containing and suppressing the immediate violence. The nation has shown increasing concern as well over the degree of control which the courts and society should have over this official "counter-violence."

While many tactics have been employed in an attempt to control domestic violence, one means available to the federal government has never been utilized—the Emergency Detention Act of 1950 (EDA).¹ Fortunately, the President has never invoked Section 812(a)(3) of the Act to round up large numbers of persons in non-war situations to maintain our internal peace. That the potential for such action exists, however, is indicated by two events of recent importance. First, in 1968 the House Committee on Un-American Activities contemplated using this Act against "guerilla warfare advocates."² Again in 1969 rumors circulated that the federal government was readying "concentration camps," for use against residents of urban ghettos and political dissidents.³ In light of these developments, a study of the applicability of this Act in a non-war situation is particularly appropriate.

In order to appreciate the potential scope of the EDA it is necessary to look to the experience of another nation, the Republic of South Africa, which has a similar statute, the Public Safety Act of 1953 (PSA).⁴ While the relationship among the legislative,⁵ executive⁶ and judicial⁷ branches in the Re-

1. 64 Stat. 1019, as amended, 72 Stat. 950, 50 U.S.C. § 811 (1964) [hereinafter cited as EDA].

2. HOUSE COMM. ON UN-AMERICAN ACTIVITIES, GUERILLA WARFARE ADVOCATES IN THE UNITED STATES, H.R. REP. NO. 1351, 90th Cong., 2d Sess. 59 (1968). See also *American Concentration Camps: Prospective Challenge of Title II of the McCarran Act*, 48 B.U.L. REV. 647 (1968).

3. Letter from Senator Inouye to Senator Eastland in SENATE COMM. ON THE JUDICIARY, EMERGENCY DETENTION ACT, S. REP. NO. 632, 91st Cong., 1st Sess. 3 (1969). A bill to repeal the EDA, S. 1872, passed the Senate on Dec. 22, 1969, and was referred to the House Committee on Internal Security, formerly named the House Un-American Activities Committee.

4. Public Safety Act, No. 3 of 1953 (S. Afr.) [hereinafter cited as PSA].

5. The Parliament of the Republic of South Africa is a bicameral body, elected by the White populace. See Hahlo & Maisels, *The Rule of Law in South Africa*, 52 VA. L. REV. 1, 5-6 (1966) [hereinafter cited as Halo & Maisels]; Landis, *South African Apartheid Legislation II: Extension, Enforcement and Perpetuation*, 71 YALE L.J. 437, 466-99 (1962) [hereinafter cited as Landis II]. The non-whites are represented only in an indirect sense, if at all. E. BROOKES & J. MACAULAY, *CIVIL LIBERTY IN SOUTH AFRICA* 139-53 (1958).

As the South African Constitution has, with but two exceptions, no "entrenched" clauses, the Parliament is the supreme body in the nation, able to amend the Constitution. See Douthwaite, *South Africa and the Law*, 1960 ACTA JURIDICA 45-46 (1961); O. SCHREINER, *THE CONTRIBUTION OF ENGLISH LAW TO SOUTH AFRICAN*

public of South Africa is substantially dissimilar to that of the United States,

LAW; AND THE RULE OF LAW IN SOUTH AFRICA 28-29 (1967); D. MOLTENO, *THE ASSAULT ON OUR LIBERTIES* 25 (1959). It may thus act in any manner it chooses, even to the extent of derogating rights that are generally regarded as fundamental. In an extrajudicial essay, Chief Justice Centlivres of South Africa's highest court declared, after noting the United States Constitution's safeguards for individual liberties, "There are no such safeguards in the [South African] Constitution Theoretically there are none, for the simple reason that Parliament is omnipotent. Our Parliament has as regards the matter I am now considering exactly the same powers as the British Parliament." Centlivres, *The Constitution of the Union of South Africa and the Rule of Law*, GOVERNMENT UNDER LAW 423, 436 (A. Sutherland ed. 1956) [hereinafter cited as Centlivres]. The Parliament may apply its acts retroactively, may discriminate on racial or other bases in its legislation, and may suspend or eliminate all rights. See *Sachs v. Minister of Justice*, 1934 S. Afr. L.R. 11, 37 (A.D. 1933) and CENTLIVRES, *supra* at 442-44.

In justifying its possession and exercise of such absolute powers, one author argued that the South African Parliament merely succeeded to the full powers of the English Parliament. T. KARIS, *FIVE AFRICAN STATES* 517 (G. Carter ed. 1963); see Davenport, *Civil Rights in South Africa, 1910-1960*, 1960 ACTA JURIDICA 11, 13 (1961). Other commentators contend, however, that the "absolute power" possessed by the English Parliament is absolute in form only. E. BROOKES & J. MACAULAY, *supra* at 3. A pair of like-minded authors have declared that, as the English Parliament would never suspend fundamental rights except in times of the most extreme emergency, such rights are in effect guaranteed. N. CHATTERJEE & P. RAO, *EMERGENCY AND LAW* 11-28 (1966). The British Parliament therefore is "supreme" only because it can be "trusted" with such authority. Davenport, *supra* at 13. Because it is a minority government, it may be argued that the South African Parliament does not derive its supremacy from the English tradition, which is characterized by a majoritarian government respecting the rights of the minority. *Id.* However, the entrusting of such powers to a majority is no guarantee that the rights of a minority will not be restricted or eliminated; it is merely less repulsive to entrust such powers to a majoritarian government. Whether the South African Parliament is truly the successor to the British Parliament is, however, not determinative of the scope of its powers. The South African Parliament regards itself as governed, in large measure, by the laws and customs of England and is recognized as the repository of the sovereign power over the populace, whatever its historical legitimacy. See, e.g., Centlivres, *supra* at 438.

There seems to be no question that the Parliament can delegate powers to the executive and the American legal concept of "impermissible delegation" of legislative power has no place in the South African legal system. See H. HAHLO & E. KAHN, *THE SOUTH AFRICAN LEGAL SYSTEM AND ITS BACKGROUND* 163-67 (1968) [hereinafter cited as HAHLO—1968]; Douthwaite, *supra* at 47; cf. N. GRUNDSTEIN, *PRESIDENTIAL DELEGATION OF AUTHORITY IN WARTIME* (1961). The Parliament, in the Public Safety Act, as will be seen, appears to have completely delegated its legislative competence and made it exercisable at the will of the Executive.

6. The State-President of the Republic of South Africa is the direct successor to the Governor-General of the Union of South Africa. He is basically a figurehead, possessed of few powers. The ruling figure and repository of executive power is the holder of the non-constitutional office of Prime Minister, acting through his cabinet. See generally O. SCHREINER, *supra* note 5, at 27-28. For purposes of discussing the PSA, this triumvirate, the State-President, the Prime Minister, and the cabinet, will be collectively referred to as "the Executive." Cf. PSA § 4(1). It should be noted that each member of this group possesses distinctive powers and duties in other contexts which are not relevant to this article.

7. The South African judiciary is, under its Constitution, structurally independent. Judges are appointed for life, retire at age 70, and can be removed only for cause. Supreme Court Act, No. 59 of 1959, § 10(7) (S. Afr.). This removal power has never been exercised. Hahlo & Maisels at 10. Some observers contend that the

it does possess an English common law heritage.⁸ As such, the PSA is a contemporary example of a non-war detention statute within the common-law nations.

The PSA has been invoked but once, in 1960, and was withdrawn shortly thereafter. However, the experience of the South African judiciary in reviewing the actions of the executive under the PSA is a fertile source of material for the analysis of our Act. The ability and willingness of the South African judiciary to review and check the executive's detention of persons deemed threats to national security, argue the necessity for some formalized review. When coupled with an appraisal of our judiciary's probable reaction to executive detentions under the EDA, the danger of removing the Emergency Detention Act from the books will be made clear.

judiciary's traditional independence has been undermined in recent years by the appointment of political "regulars" who, while nominally meeting the traditional requirements, are considerably less qualified than the many others available. T. KARIS, *supra* note 5, at 583-84; Landis II at 464.

Unlike the American federal judiciary, whose independence is protected by art. II, § 1 of the Constitution, the South African judiciary's status is determined by statute. *E.g.*, Supreme Court Act, No. 59 of 1959, § 10(1)(a) (S. Afr.). Therefore, it is possible, although unlikely, that the Parliament could pass an act removing the present judges. *See* Centlivres at 438. It has been argued that the tenure of judges is, in its own way, "entrenched" by tradition, and that it would require an extreme political effort by the Parliament to remove the judges. The fate of the "entrenched" protection of the voting rights of the "Coloured" in Cape Province demonstrates, however, that the executive, with sufficient parliamentary support, can accomplish even this. Davenport, *supra* note 5, at 16. Thus, the South African judiciary is constitutionally less secure, and therefore less able to be independent than its American counterpart. *But see* Hahlo & Maisels at 10.

In spite of the supremacy of the Parliament, the South African courts have been unwilling to construe parliamentary legislation in a manner that would conflict with fundamental rights. If there is a rational construction which can be given such legislation which will preserve the freedoms of the individual, the courts presume that this is the interpretation intended by the Parliament. The Parliament, if it so desires, however, can override such interpretations and impose its will by amending the statute in question to eliminate such an alternative construction.

In spite of what the American bench might regard as a precarious position, the South African judiciary has demonstrated remarkable independence. Hahlo & Maisels at 30-31; Landis II at 464; *South Africa*, TIME, Nov. 15, 1968, at 46. It has, for example, created or at least exercised a right to review the acts of the Parliament for inconsistency with the "entrenched" provisions of the Constitution. Centlivres at 427. Further, as one commentator has said, "the [South African] courts had shown a predilection, indeed nearly a genius, for reading a 'separate but equal' requirement into measures which on their face authorized separate and unequal facilities." Landis II at 450. The courts have also attempted to construe the criminal laws, penal provisions of statutes, and the laws affecting marriage in a way most favorable to the liberty and sanctity of the individual. 1 F. GARDINER & A. LANSDOWN, *SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE* 19-20 (6th ed. 1957). *See also* Landis II at 487.

8. *See generally* SCHREINER, *supra* note 5. *See also* 1 F. GARDINER & A. LANSDOWN, *supra* note 7, at 6, 15, 18; Spitz, *The Lawless Case—An Essay on the International Protection of Human Rights*, 79 S. AFR. L.J. 390, 391 (1962). *But see* HAHLO—1968 at 578-96.

This article will first present the structure and background of both the PSA and EDA. It will then study the judicial review of the executive's proclamation of an emergency, and promulgation and application of regulations directing detention of persons deemed a danger to the nation. The ability of the judiciary to declare an emergency at an end in the absence of action by the Executive and the effect of such a declaration will next be considered. In conclusion, a suggested modification of the EDA will be advanced.

Background of the United States Emergency Detention Act

Americans have commented critically on the Republic of South Africa for its repressive legislation, including acts like the Public Safety Act which grants virtually unlimited power to the executive in emergencies. It is not commonly known, however, that the executive branch in the United States possesses similar statutory authority, under the Emergency Detention Act of 1950, to create "concentration camps" to be used in time of a presidentially declared "internal security emergency." This power has not been exercised to date.⁹

Since the EDA was added to the Internal Security (McCarran) Act of 1950 during the last days of the second session of the 81st Congress, without having been considered by any committee, the legislative history of EDA is very limited.

As a separate title of the Internal Security Act, the Emergency Detention Act has been an anomaly from the beginning, since it was opposed, during the earlier stages of the legislative process, by virtually all of the sponsors of Title I . . . and sponsored by virtually all of those who were opposed to the McCarran-Walter Act [Title I].

. . . [T]he late Senator Pat McCarran of Nevada, floor manager of the Internal Security Act and author of the legislation which became Title I of that act, rewrote the Emergency Detention Act on the floor of the Senate¹⁰

9. With funds provided in its 1951-52 appropriations the Department of Justice rehabilitated six World War II installations to serve as detention camps in the event the EDA came into effect. In 1952, Senator Eastland called upon Congress to use the camps to jail 50,000 alleged communists. The camps were maintained on a stand-by basis by the Federal Bureau of Prisons. In 1963, the Department of Justice stated that the camps had been abandoned or turned to other uses in 1958. In a 1969 television interview, the Director of the U.S. Bureau of Prisons, Myrl Alexander, stated: "We have no concentration camps in our system that are designed or planned for the detention of persons other than those who are normally convicted of violation of federal crime." 1 T. EMERSON, D. HABER & N. DORSEN, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 186 (student ed. 1967); *Concentration Camps in America?* 60 MINUTES, Vol. I, No. 18 (CBS Television Network, June 24, 1969) [hereinafter cited as 60 MINUTES].

10. SENATE COMM. ON THE JUDICIARY, *EMERGENCY DETENTION ACT*, S. REP. NO. 632, 91st Cong., 1st Sess. 2 (1969).

Although there were no hearings and only very limited debate on the measure, the historical factors which motivated the Congress to consider and pass such legislation are substantial.

America, by the time the Congress was considering the EDA, had witnessed many instances of executive or legislative action taken to forestall internal strife. Challenges to such actions had generally been dismissed by the courts,¹¹ thus encouraging resort to such measures.

During World War II, for example, the United States, without express statutory authorization, detained large numbers of Japanese-American citizens who resided on the west coast. Although this action was criticized by a few commentators at the time of its exercise, it was generally regarded as a reasonable measure to forestall internal sabotage and espionage. The wide acceptance of the necessity for and constitutional validity of these actions was a major factor in the passage of the Emergency Detention Act.¹²

In 1950, the United States was quite sensitive to the threat of a "Communist Conspiracy."¹³ Only five years after the termination of active hostilities in World War II, the United States witnessed the growth of Soviet domination over Eastern Europe, the fall of the Republic of China, and a Communist attempt to take control of Greece by force. As the congressional findings of fact in the Act noted:

[T]he most powerful existing Communist dictatorship has . . . already caused the establishment in numerous foreign countries of Communist totalitarian dictatorships, and threatens to establish similar dictatorships in still other countries.¹⁴

In each instance, "so-called 'fifth columns' which employed espionage and sabotage to weaken the internal security and defense"¹⁵ of these nations, were operative and singularly effective. In the United States, the Communist Party (CPUSA) had emerged from the war as a legitimate political organization. However, as a result of the post-war experience in other countries, the Congress found that, "although purportedly a political party, (CPUSA) is in fact an instrumentality of a conspiracy to overthrow the Government of the United States."¹⁶ The CPUSA was a potential fifth

11. See generally U.S. LIBRARY OF CONGRESS, LEGISLATIVE REFERENCE SERVICE, POWERS OF THE PRESIDENT AS COMMANDER IN CHIEF OF ARMY AND NAVY OF THE UNITED STATES 1-15 (1956).

12. Internal Security Act of 1950, ch. 1024, Tit. I, 64 Stat. 987 (codified in scattered sections of 18, 42, 50, U.S.C.).

13. See EDA § 811(1).

14. *Id.* § 811(8).

15. *Id.* § 811(10).

16. Communist Control Act of 1954, 68 Stat. 775, 50 U.S.C. § 841 (1964). See Section 343 which ties this Act to the EDA.

column, willing and able to operate as the vanguard of a revolution. It was to this specific threat that the Emergency Detention Act was directed.

The concept of enacting legislation which would become effective only upon a presidential or congressional declaration was not alien to the Congress. Although such legislation had earlier been challenged, the Supreme Court, as early as the 1890's, had ruled that legislation which took effect upon an executive finding and declaration of fact was valid and not an unconstitutional delegation of power.¹⁷ By 1950 "emergency" legislation of varying sorts was widely employed.¹⁸ Thus the Congress, faced with a felt need for legislation to combat potential internal subversion,¹⁹ could look to a history of judicially validated "emergency" actions of like nature, and past congressional recognition of the utility of legislation implemented by an executive declaration.

In spite of this background, the EDA and the remainder of the McCarran Act were vetoed by President Truman as unconstitutional. The President's veto message discussed the Emergency Detention Act only briefly.

It may be that legislation of this type should be on the statute books. But the provisions . . . would very probably prove ineffective to achieve the objective sought, since they would not suspend the writ of habeas corpus, and under our legal system to detain a man not charged with a crime would raise serious constitutional questions unless the writ of habeas corpus were suspended. Furthermore, it may be that persons other than those covered by these provisions would be more important to detain in the event of emergency. This whole problem, therefore, should clearly be studied more thoroughly. . . .²⁰

After very little debate, the Congress passed the bill over the veto of the President.

Viewing the Emergency Detention Act as a whole, it appears to have been designed for use in time of war or threat of war. This interpretation is supported by the report of the House managers of the bill.²¹ However, the

17. *Field v. Clark*, 143 U.S. 649, 692-93 (1891). See, C. ROSSITER, CONSTITUTIONAL DICTATORSHIP 299 (1948).

18. See, e.g., U.S. LIBRARY OF CONGRESS, LEGISLATIVE REFERENCE SERVICE, PROVISIONS OF FEDERAL LAWS IN EFFECT IN TIME OF NATIONAL EMERGENCY (1962). See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 652-53 (1952) (Jackson, J., concurring).

19. See generally Brecht, *The Concentration Camp*, 50 COLUM. L. REV. 761 (1950).

20. *Internal Security Act, 1950—Veto Message from the President of the United States*, 96 CONG. REC. 15629, 15630 (1950). Congressman Rankin noted "The rumor is that Felix Frankfurter wrote [the message]." 96 CONG. REC. 15632 (1950).

21. *Statement of House Managers on Internal Security Act of 1950*, H.R. REP. NO. 2980, 81st Cong., 2d Sess. (1950). See also 96 CONG. REC. 15287 (1950) (remarks of Representative Wood, House Manager of the bill). In Dunbar, *Beyond Korematsu: The Emergency Detention Act of 1950*, 13 U. PITT. L. REV. 221, 222 (1952), the author

third ground for invoking the provisions of the Act, "insurrection within the United States in aid of a foreign enemy,"²² is rather curious in this regard, for it contemplates operation of the Act in a non-war situation.²³ This interpretation is supported by the fact that the Congress noted that CPUSA was an "agency of a hostile foreign power,"²⁴ which could mean that an insurrection fomented by CPUSA would be in "aid of a foreign enemy," even though a state of war was neither in existence nor imminent. Thus, the Act does not necessarily reflect a mere codification of the war power,²⁵ but rather may be a statutization of other governmental powers as well. It is quite possible that the power sought to be exercised by this clause is an "emergency" power possessed by the President or the Congress or both,²⁶ about which there has been substantial controversy as to its existence and its locus.²⁷ This Act may be designed, in part, to validate past exercise of such powers and to restrict any future exercise of such power to a statutory context with its attendant administrative and judicial review.²⁸

In spite of the presidential veto message, it seems generally conceded that the EDA is a valid exercise of some federal power, whether it be the war power or an inherent executive "emergency" power. As Professor Sutherland has noted:

The detention provisions, despite their drastic sound, are probably nothing more than would be carried out in any event in case of invasion, insurrection, or declaration of war. . . . In the serious emergencies contemplated by the statute, there is surely power in the United States to detain anyone reasonably supposed to be a likely saboteur or spy even if detention is tested by habeas corpus.²⁹

seems to consider that the EDA will be applied only in time of war.

It has been suggested that the EDA is modeled on a British wartime act. Emerson et al., *supra* note 9, at 186. This act was clearly a wartime measure, a fact stressed by the House of Lords in validating its application. N. CHATTERJEE & P. RAO, *supra* note 5, at 21-25. See also Cotter, *Emergency Detention in Wartime: The British Experience*, 6 STAN. L. REV. 238 (1954); Cohn, *Legal Aspects of Internment*, 4 MOD. L. REV. 200 (1941); C. ROSSITER, *supra* note 17, at 184-205. It is not clear where the notion developed that the EDA was modeled on the British act as there is no hint of this in the legislative history.

22. EDA § 812(3).

23. Dunbar, *supra* note 21, at 230 seems to recognize this.

24. See Communist Control Act of 1954, *supra* note 16.

25. See *The Internal Security Act of 1950*, 51 COLUM. L. REV. 606 (1951); *The Constitution and the Emergency Detention Act of 1950*, 13 BUFF. L. REV. 477, 480-83, 490 (1963). See also Groves, *Emergency Powers*, 3 J. INT'L COMM'N OF JURISTS (No. 2) at 1, 2, 8 (1961).

26. See O'Brian, *Changing Attitudes Toward Freedom*, 9 WASH. & LEE L. REV. 157, 158 (1952).

27. See, e.g., *Request of the Senate for an Opinion as to the Powers of the President "In Emergency or State of War"*, 39 OP. ATT'Y GEN. 343, 347-48 (1939). See also *Myers v. United States*, 272 U.S. 52, 151, 163-64 (1926).

28. But see C. ROSSITER, *supra* note 17, at 308 n.19.

29. Sutherland, *Freedom and Internal Security*, 64 HARV. L. REV. 383, 410 (1951).

Further, as another commentator noted, the substantial legislative findings of the Congress create a strong presumption in favor of the "necessity" for such a law.³⁰ With such apparent support, the exercise of the detention power in an emergency declared pursuant to section 812(a)(3) presents a substantial possibility for abuse, for it could be invoked by the President in a non-war situation to deal with civil disorders which he has labeled an "insurrection."³¹

Judicial Review of Executive Action

Since the provisions of America's EDA have never been invoked by the President, other actions of the state and federal executive must be studied in order to determine what role courts would play in reviewing the declaration of an "internal security emergency." Historically, there are several situations which provide viable comparisons for the analysis of judicial supervision of a presidential declaration. The first cases involve attempts by state governors to put down "insurrections" during the first half of this century. The second are the cases involving the review of federal actions taken in the name of military necessity, in particular the Japanese exclusion cases in World War II. A final point of study would be the cases arising after President Lincoln's suspension of habeas corpus at the beginning of the Civil War.

In the cases of state governors declaring that an "emergency" or an "insurrection" existed, followed by the use of forces such as the national guard, the courts adopted a policy of non-interference, presuming the state executive's decision to be valid.³² As the United States Supreme Court said in *Sterling v. Constantin*: "By virtue of his duty to 'cause the laws to be faithfully executed,' the [state] Executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen. His decision to that effect is conclusive."³³

See also *Moyer v. Peabody*, 212 U.S. 78, 85 (1909).

Commenting on the British wartime Regulation 18B (discussed *supra* note 21), Professor Rossiter noted that this "would have probably been declared unconstitutional in the United States even at the height of the war effort." C. ROSSITER, *supra* note 17, at 199.

30. *The Constitution and the Emergency Detention Act of 1950*, 13 BUFF. L. REV. 477, 483 (1963); cf. *American Concentration Camps: Prospective Challenge of Title II of the McCarran Act*, 48 B.U.L. REV. 647, 649-50 (1968), listing nine possible constitutional objections to the EDA.

31. But see statements of Jerris Leonard, head of the Civil Rights Division of the Department of Justice to CBS reporter Mike Wallace: "*Wallace*: Are you saying that the Justice Department would never use Title II . . . for purely domestic subversion? . . . *Leonard*: . . . [T]hat's correct. I would say it's correct because there is no need to use this kind of law; there is adequate other criminal law on the books which could be used in lieu of this kind of proposition." 60 MINUTES, *supra* note 9.

32. *Moyer v. Peabody*, 212 U.S. 78, 84-85 (1909) (Holmes, J.); *Hearon v. Calus*, 178 S.C. 381, 397, 183 S.E. 13, 19 (1935) (*per curiam*); *United States ex rel. Seymour v. Fisher*, 280 F. 208, 210 (D. Neb. 1922).

33. 287 U.S. 378, 398 (1932).

In cases involving actions by the federal executive taken in the name of military necessity, a similar attitude exists. According to former Chief Justice Warren, the Japanese exclusion cases³⁴

[demonstrate] dramatically that there are some circumstances in which the Court will, in effect, conclude that it is simply not in a position to reject descriptions by the Executive of the degree of military necessity. Thus, in a case like *Hirabayshi*, only the Executive is qualified to determine whether, for example, an invasion is imminent. In such a situation, where time is of the essence, if the Court is to deny the asserted right of the military authorities, it must be on the theory that the claimed justification, though factually unassailable, is insufficient.³⁵

Such an attitude effectively bars judicial review of any executive proclamation of an internal security emergency. The former Chief Justice also noted, however, that "if judicial review is to constitute a meaningful restraint upon unwarranted encroachments upon freedom in the name of military necessity, situations in which the judiciary refrains from examining the merit of the claim of necessity must be kept to an absolute minimum."³⁶ Thus, it may be argued that the declaration of an internal security emergency under the EDA on the grounds of an insurrection within the United States in aid of a foreign enemy should be subject to judicial review on the grounds that time is not of the essence as it is in the context of a threatened invasion. If the power statuted by the EDA is not the war power, then it seems clear that the existence of the emergency is reviewable by the courts.³⁷ In the case of a declaration under this Act, there is an added factor favoring judicial non-interference—the congressional finding of need for such action in the case of an insurrection in aid of a foreign enemy.³⁸ In spite of this, such an execu-

34. *Hirabayshi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944).

35. Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 192 (1962). See also *Duncan v. Kahanamoku*, 327 U.S. 304, 336 (1946) (Stone, C.J., concurring); *Luther v. Borden*, 48 U.S. (7 How.) 1, 43 (1849); and *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 28-30 (1827).

36. Warren, *supra* note 35, at 193; cf. *Korematsu v. United States*, 323 U.S. 214, 225 (1944) (Roberts, J., dissenting).

37. See *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 444 (1934). See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 629, 678 (1952) (Douglas, J., concurring; Vinson, C.J., with whom Reed, J., and Minton, J., join, dissenting); C. ROSSITER, *supra* note 17, at 283.

38. One author has commented that the EDA seems to rely on its extensive findings of fact to support it in any later court test. He argues that this finding is deserving of at least as much respect as those involved in the case of *Hirabayshi v. United States*, 320 U.S. 81 (1943), where no presidential order or congressional act directly authorized the relocation program. It was initiated after a military commander's interpretation of what was necessary in light of security requirements. Dunbar, *supra* note 21, at 223.

See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643 (1952) (Jackson,

tive decision is not beyond judicial review.³⁹

If the courts do review the executive's decision to declare an emergency, the matters which they should consider, and the manner in which they should view these facts, were enunciated by the United States Supreme Court in *Mitchell v. Harmony*:

In deciding upon this necessity, however, the state of the facts, as they appeared to the officer at the time he acted, must govern the decision; for he must necessarily act upon the information of others as well as his own observation. And if, with such information as he had a right to rely upon, there is a reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it; and the discovery afterwards that it was false or erroneous, will not [invalidate his decision].⁴⁰

Accepting the facts as viewed by the executive will not prevent the courts from taking judicial notice of other facts.⁴¹ In analyzing the situation which the executive faced, the courts are free to look to independent studies of the relevance of the factual situation at the time the decision was made as bearing on the reasonableness of the executive's decision.⁴²

There is, however, a problem facing a court attempting to assess the reasonableness of the executive's decision to declare an emergency—the privilege of the executive to refuse to divulge certain information, “the revelation of which would disclose the identity or evidence of Government agents or officers,” which the executive believes “would be dangerous to national safety and security to divulge.”⁴³ Even if such information is not “confidential information the President may possess as ‘the Nation’s organ for foreign affairs,’ ”⁴⁴ it might be such “that often would not be admissible,”⁴⁵ or of a nature “not constituting strict technical proof,”⁴⁶ or merely based on “assumptions that could not be proved,”⁴⁷ thus presenting substantial problems in

J., concurring in the judgment and opinion of the court); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934). See also Warren, *supra* note 35, at 199.

39. Cf. *The McCarran Act—Detection or Defection?*, 46 ILL. L. REV. 274, 290-91 (1951).

40. 54 U.S. (13 How.) 115, 135 (1851).

41. Cf. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 444 (1934).

42. Cf. *Korematsu v. United States*, 323 U.S. 214, 239-40 (1944) (Murphy, J., dissenting).

43. EDA § 814(d). See also 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE (Criminal) §§ 254, 258 (1969); J. WIGMORE, EVIDENCE § 2378-79 (J. McNaughton rev. 1961); Hardin, *Executive Privilege in the Federal Courts*, 71 YALE L.J. 879 (1962); McKay, *The Right of Confrontation*, 1959 WASH. U.L.Q. 122, 145-55; Street, *State Secrets—A Comparative Study*, 14 MOD. L. REV. 121, 124-27 (1951).

44. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 679 (1952).

45. *Korematsu v. United States*, 323 U.S. 214, 245 (1944).

46. *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 31 (1827).

47. *Korematsu v. United States*, 323 U.S. 214, 245 (1944).

evaluating it.

Thus, even if the courts are willing to review the validity of the executive's decision to declare an internal security emergency, they are severely handicapped. First, in order to protect national security, the courts may be barred from access to certain information upon which the decision was based. Second, some of the bases of the decision may be no more than experience, intuition, or a "feel" for the situation—material which the court is incapable of evaluating. The court, in the absence of "hard" information, will defer to the judgment of the executive as to the facts and the necessity for the declaration.

The experience of the federal courts in dealing with the suspension of the writ of habeas corpus also provides a guide as to what the courts would and would not review under the EDA. In discussing this review, Professor Corwin has stated:

The question arises, lastly, whether a suspension of the writ is subject to judicial review on the complaint that disorders pleaded in its justification did not amount to "rebellion" and that "the public safety" did not "require" it. . . . [The] first part of the question is subject to judicial review, the second part is not, being essentially "political;" and in fact judicial intervention will not take place at all until the emergency is safely past. The Court will see to that.⁴⁸

The same attitude will undoubtedly be manifested in the case of the declaration of an internal security emergency. The courts may well be able to review the "facts" of the emergency, but not the "need" for a declaration. In the unlikely event that the courts are willing to intervene, such a decision could not easily be made, for the "facts" which governed the decision would either be unavailable or of such a nature that a court, in attempting to pass on them, would actually be passing upon the exercise of executive discretion. It is clear that once the question becomes one of the discretion of the executive, an attempt by the judiciary to enforce or restrain the performance of executive and political duties by the President "might be justly characterized, in the language of Chief Justice Marshall, as 'an absurd and excessive extravagance.'"⁴⁹ However, "the paucity of judicial restraints on presiden-

48. E. CORWIN, *THE PRESIDENT—OFFICE AND POWERS 1787-1957* at 146-47 (4th ed. 1957).

49. *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499 (1866). At one point, the Senate was considering the following addition to what is now EDA § 812(a): "In the event of any one of the following: . . . (4) *Declaration of an 'internal security emergency' by concurrent resolution of the Congress. . . .*" S. 4037, 81st Cong., 2d Sess. (1950) (emphasis added). Senatorial comments against this were quite pointed. See, e.g., Senator Ferguson, 96 CONG. REC. 14591 (1950); Senator Holland, *id.* at 14592; Senator McCarran, *id.* at 14623. The bill was passed without this clause.

tial action based on the plea of necessity does not mean that such action is subject to *no* restraint. . . . [T]he final evaluation of such a plea would seem theoretically to rest with the national *legislative* authority. . . ."⁵⁰

Structure and Background of the Public Safety Act

The Republic of South Africa's Public Safety Act was passed shortly after the enactment of the Suppression of Communism Act of 1950.⁵¹ The Suppression Act, severely criticized by both South African and American observers, is not an emergency measure per se, although the enactment of this and related acts is justified by the existence of a "continuing state of tension" in South Africa.⁵² This continuing state of tension in turn is attributed by several writers to the maintenance of apartheid.⁵³ As a part of this policy, the non-whites, previously possessed of a limited voice in government, have been effectively removed from the electoral process,⁵⁴ and find themselves unable to achieve their political objectives through normal legal channels, a situation generating substantial racial unrest.⁵⁵ Even critics of the present South African government and its policy of "separate development" have acknowledged that apartheid has produced tensions which have encouraged the growth of communism in the presently non-communist opposition parties.⁵⁶ As one commentator has stated:

The effect of the Suppression of Communism, Public Safety, and Criminal Law Amendment Acts read together certainly will be to make it more difficult than before for non-White organizers to launch any concerted campaign of resistance against the laws, and even to prevent non-European leaders from stating their opposition to a bill introduced by the Government or criticizing it.⁵⁷

The Public Safety Act, by its terms, grants to the executive virtually unlimited power to make regulations for all or a part of the nation after a declaration by the executive that an emergency exists.⁵⁸ It prescribes minimal

50. E. CORWIN, *supra* note 48, at 147.

51. No. 44 of 1950 (S. Afr.). This Act is briefly discussed in BROOKES & MACAULAY, *supra* note 5, at 22-24; 2 F. GARDINER & A. LANSDOWN, *supra* note 7, at 1026-28; Landis II, *supra* note 5, at 470-75; Baker, *Human Rights in South Africa*, 11 *How. L.J.* 549, 558 (1965).

52. Hahlo & Maisels at 26-27; O. SCHREINER, *supra* note 5, at 100.

53. For an extensive summary of the legislative aspects of apartheid, see Landis, *South African Apartheid Legislation I: Fundamental Structure*, 71 *YALE L.J.* 1(1961) [hereinafter cited as Landis I]; Landis II.

54. T. KARIS, *supra* note 5, at 491-494.

55. See A. HEPPLER, *SOUTH AFRICA* 152-55 (1966), where the author argues that this situation led to the passage of the PSA.

56. A. PATON, *SOUTH AFRICA TODAY* 25 (1951); Hahlo & Maisels at 28. See also HEPPLER, *supra* note 55.

57. Landis II at 483.

58. PSA § 2 (declaration), § 3 (emergency regulations); *R. v. Maphumulo*,

procedural standards for the publication of the proclamation and the regulations⁵⁹ to assure notice of their content and effect, although the Act allows the regulations to have a limited retrospective effect.⁶⁰ The proclamation may be withdrawn by the executive⁶¹ and will, in the absence of the withdrawal, lapse after twelve months.⁶² The executive, however, may extend the state of emergency and the regulations, if it deems such an extension necessary.⁶³

The only review provided in the Act for the actions of the executive is mandatory disclosure to the Parliament of regulations and detentions made under the authority of the Act.⁶⁴ Disclosure of this sort is not necessarily an effective protection if the Parliament is not in session, for there is then no one to exercise immediate review of the executive's actions. A further check will occur if the executive has "gone too far." The Parliament could immediately terminate the regulations or repeal the Act.⁶⁵

There is, however, a long-run indirect check on the executive's discretion—the pressure that the electorate can exert through the Parliament. This alternative is a less substantial check than it might appear to be. Although South Africa's constitution contains a limited guarantee of electoral power for some of the non-white voters, the vast native, "coloured," and Asian segments of the population have no direct voice in selecting the members of Parliament.⁶⁶ Thus, the power to throw out the government rests almost entirely with the white minority. If an emergency has been declared in order to combat the danger of a black uprising, as apparently was the case in 1960,⁶⁷ the probability of immediate parliamentary reaction or of eventual voter rejection is remote, if not non-existent. Thus, any effective control of the executive's activities must be found in the judiciary, or nowhere at all.⁶⁸

1960(3) S. Afr. L.R. 793 (N.P.D. 1960); E. BROOKES & J. MACAULAY, *CIVIL LIBERTY IN SOUTH AFRICA* 25 (1958).

59. PSA § 2(1) (proclamation), § 3(1) (regulations).

60. *Id.* § 3(2)(b). See also *R. v. Manthutle*, 1960(4) S. Afr. L.R. 827 (C.P.D. 1960).

61. PSA § 2(3).

62. *Id.* § 2(2).

63. *Id.*

64. *Id.* § 3(4), (5).

65. *Id.* § 3(6).

66. The Separate Representation of Voters Act, No. 46 of 1951 (S. Afr.). See also South Africa Act Amendments Act, No. 9 of 1956 (S. Afr.) and Note 5 *supra*.

67. T. KARIS, *FIVE AFRICAN STATES* 493 (G. Carter ed. 1963). See also A. HEPPLER, *supra* note 55, at 164-65; INT'L COMM'N OF JURISTS, *SOUTH AFRICAN INCIDENT—THE GANYILE CASE* 1 (1962).

68. Cf. Davenport, *Civil Rights in South Africa, 1910-1960*, 1960 ACTA JURIDICA 16 (1961).

Proclamation of an Emergency Under PSA

The reviewability of both the declaration and termination of an emergency under the Public Safety Act, and the validity and effect of the regulations and acts of the executive during an emergency, may depend on the source or sources of power upon which the PSA is based. The first possible source of such power is a direct delegation of authority from the Parliament to the executive to exercise the powers of Parliament. A second possible source is an auxiliary power, that of the executive to declare martial law,⁶⁹ although one commentary has stated that recourse to martial law may now be "outmoded" as a result of the passage of the PSA and other laws.⁷⁰ A third possible source is the "prerogatives of the crown," preserved for the executive⁷¹ by section 7(4) of the South African Constitution, which may include a power to issue proclamations having the force of law.⁷²

The Public Safety Act clearly provides that the proclamation of an emergency depends solely upon the judgment of the executive.⁷³ The first question which arises is whether the courts can review this decision. Under the theory that the executive is merely acting within the powers of the Parliament, it seems that review may be possible.⁷⁴ The standard which the courts would use is the subjective belief of the executive.⁷⁵ The case law on this subjective standard of thought in related areas indicates that the burden of proof is on the party challenging the declaration.⁷⁶

This obviously heavy burden of proof may be further increased by the invocation of the "State Privilege,"⁷⁷ a right of the executive to refuse to dis-

69. See Welsh, *Martial Law*, 58 S. Afr. L.J. 111 (1941). See also *Martial Law*, 32 S. Afr. L.J. 58 (1915); *Martial Law*, 19 S. Afr. L.J. 142 (1902); King, *Martial Law*, 17 CAPE L.J. 30, 132 (1900).

70. H. HAHLO & E. KAHN, *THE UNION OF SOUTH AFRICA, 5 THE BRITISH COMMONWEALTH—THE DEVELOPMENT OF ITS LAWS AND CONSTITUTIONS* 134, 145 (1960) [hereinafter cited as HAHLO—1960].

71. E. KAHN, *THE NEW CONSTITUTION* 25 (1962); O. SCHREINER, *THE CONTRIBUTION OF ENGLISH LAW TO SOUTH AFRICAN LAW; AND THE RULE OF LAW IN SOUTH AFRICA* 30 (1967).

72. The power to declare martial law may also be considered as falling within the ambit of this power.

73. PSA § 2(1).

74. See *Stanton v. Minister of Justice*, 1960(3) S. Afr. L.R. 353, 357 (T.P.D. 1960); *West Rand Union Club v. Minister of Justice*, 1924 T.P.D. 181 (1923); Mathews & Albino, *The Permanence of the Temporary—An Examination of the 90- and 180-day Detention Laws*, 83 S. Afr. L.J. 16, 28 (1966). Compare *Sachs v. Minister of Justice*, 1934 S. Afr. L.R. 11, 36 (A.D. 1933), with *Landis II supra* note 5, at 479.

75. See *Sachs v. Minister of Justice*, 1934 S. Afr. L.R. 11, 38 (A.D. 1933). The challenge may also be one as to the good faith of the executive in declaring the emergency. Cf. *R. v. Maphumulo*, 1960(3) S. Afr. L.R. 793 (N.P.D. 1960); D. MOLTENO, *THE ASSAULT ON OUR LIBERTIES* 17 (1959).

76. See text accompanying note 112, *infra*.

77. *Brown v. Deputy Commissioner of Police*, 1960(2) S. Afr. L.R. 809 (N.P.D. 1960).

close information on the ground that it would be detrimental to the public welfare.⁷⁸

If the PSA is viewed as the codification of the executive's power to declare martial law,⁷⁹ then the scope of judicial review is radically different. The courts may judge for themselves whether, in fact, a situation exists which is sufficient to allow the executive to institute martial law⁸⁰ and act to protect the interests of the state even at the expense of individual rights. The actual practice of the courts, however, in dealing with cases under the PSA militates strongly against this interpretation. The courts have apparently refused to look beyond the executive's declaration that an emergency exists.⁸¹ In fact, in one case, a court distinguished an earlier precedent as one which applied in the event of martial law, which, the opinion indicated, was not the situation then before the court.⁸²

A third analysis of the PSA is that it is merely the codification of the sovereign's prerogative powers.⁸³ One member of the South African Parliament observed:

The powers that the Public Safety Act gives to the Government are virtually limitless powers. Only once in British history have powers been comparable with those given by the Public Safety Act . . . [and that was] in 1539 . . . [under] the Statute of Proclamations [T]he Public Safety Act of 1953 . . . is an exact equivalent of the Statute of Proclamations of the reign of Henry VIII. In precisely the same way, under the Public Safety Act, there is a "virtual resignation of the essential character of Parliament as a legislative body."⁸⁴

The text of the Statute of Proclamations, however, indicates that the powers

78. The doctrine of "state privilege" is still evolving. Much of the judicial commentary on the subject is in dicta or in lower court opinions when the matter was not considered by the reviewing court, adding further to the uncertainty of any analysis. See *gen. Van der Linde v. Calitz*, 1967(2) S. Afr. L.R. 239 (A.D. 1967); *Sachs v. Minister of Justice*, 1934 S. Afr. L.R. 11 (A.D. 1933); *State v. Naicker*, 1965(2) S. Afr. L.R. 919 (N.P.D. 1965); *Kloppenburger v. Minister of Justice*, 1964(4) S. Afr. L.R. 31 (N.P.D. 1964); *Real Printing & Publishing Co. (Pty.) Ltd. v. Minister of Justice*, 1965(2) S. Afr. L.R. 782 (C.P.D. 1963); *Redelinghuys v. Geidel*, 1963(2) S. Afr. L.R. 274 (W.L.D. 1962); *Mawo v. Pepler*, N.O. 1961(4) S. Afr. L.R. 806 (C.P.D. 1960); *Stanton v. Minister of Justice*, 1960(3) S. Afr. L.R. 353 (T.P.D. 1960).

79. There is commentary to suggest that the PSA has made martial law obsolete. See note 70, *supra*.

80. HAHLO—1960 *supra* note 70, at 145-46; Welsh, *supra* note 69, at 113.

81. It seems reasonable that the courts can review the declaration to see if it has been issued in conformity with PSA § 2(1), as it does with the regulations. See text accompanying note 107 *infra*.

82. *Stanton v. Minister of Justice*, 1960(3) S. Afr. L.R. 353 (T.P.D. 1960).

83. See HAHLO—1960 at 145.

84. 12 PARL. DEB., *Sen.* col. 1809-10 (S. Afr. 1960). It is suggested, however, that the courts, in interpreting legislation, will not look to Parliamentary debates. HAHLO—1968 at 184.

to be exercised under it were severely restricted:

[T]he words, meaning and intent of this act [shall] be not understood . . . that by virtue of it any of the King's liege people . . . should have any of his . . . liberties [or] privileges . . . taken from them or any of them . . . nor that by any proclamation . . . any acts, common laws, standing at this present time in strength and force, nor yet any lawful or laudable customs of this realm . . . shall be infringed, broken, or subverted . . .⁸⁵

The most widely accepted interpretation of the Statute of Proclamations is that it enabled the King to make regulations to "fill out" the acts of the Parliament, in order to assure their enforcement and to have violations of both the acts and regulations tried before a special court.⁸⁶ Since the South African Parliament has not explicitly limited the exercise of power under the PSA as did the English Parliament in 1539, the South African executive is free, arguably, to issue regulations in derogation of the common and statutory law.⁸⁷ The King's Bench, however, in the *Proclamations Case* held that even in the absence of a limitation on the exercise of the prerogative powers, "the King cannot change any part of the common law, nor create any offense by his proclamation, which was not an offense before without Parliament."⁸⁸ If the South African executive does claim to act by virtue of the prerogative power, it is clear that under the authority of the *Proclamations Case* such a proclamation is reviewable⁸⁹ at least to the extent of its legality. However, like a declaration under the PSA, the judgment of the executive as to the need for such a declaration would not be reviewable.

Promulgation of Regulations Under EDA and PSA

The United States' Emergency Detention Act, like South Africa's Public Safety Act, specifically provides that the President may promulgate regulations during the period of the internal security emergency. Under the terms of a related act, however, the federal government is specifically barred from promulgating regulations which would result in forced military induction.⁹⁰ The reason for this provision is not clear. If the nation is "at war," it would seem reasonable for the government to issue regulations insuring an immediate mobilization to counteract the anticipated invasion or insurrection. This provision is in marked contrast to the British experience during World War

85. Lex Regia, 31 Hen. VIII, c. 8 (1539).

86. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 45-46 (5th ed. 1956).

87. Cf. Bantu Administration Act, No. 38 of 1927, § 25(1) (S. Afr.).

88. 77 Eng. Rep. 1352, 1353 (K.B. 1611). Compare regulation 26 with regulation 29. The 1960 regulations are reprinted in INTERNATIONAL COMM'N OF JURISTS, SOUTH AFRICA AND THE RULE OF LAW, App. F (1960).

89. Proclamations Case, 77 Eng. Rep. 1352, 1353 (K.B. 1611).

90. Communist Control Act, 68 Stat. 775, 50 U.S.C. § 798 (1964).

II when the entire populace could have been mobilized for both military and nonmilitary service as a part of the British Government's emergency powers.⁹¹ Presumably in the American context, the laws affecting the call-up of the reserves and militia coupled with the presence of a standing army made a similar provision unnecessary, and possibly politically undesirable.

The Congress, in the EDA, attempted to soothe any constitutional critics of the Act by providing in the Act that "such detention . . . shall be so authorized, executed, restricted and reviewed as to prevent any interference with the constitutional rights and privileges of any person."⁹² Such a clause is a nice legislative flourish, but hardly necessary, for United States courts have made it quite clear that they will review the regulations promulgated during the exercise of emergency or similar powers to determine their reasonableness.⁹³ As the Supreme Court said in *Sterling v. Constantin*, in dealing with a governor's declaration of martial law:

It does not follow from the fact that the Executive has this range of discretion, deemed to be necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established.⁹⁴

The experience of all levels of government during the past few years in dealing with civil disorder indicates that if any regulations are promulgated under the EDA other than those that would authorize detentions, they will probably be general curfews designed to quiet an area in insurrection. The standard against which such regulations will be tested has been thoroughly discussed in recent legal literature⁹⁵ and is beyond the scope of this article.

Another level of attack on the action of the executive in an "emergency" situation would be to challenge the validity of regulations issued to implement a declaration of emergency. In South Africa, the executive must meet the procedural standards of the Public Safety Act in both the proclamation of the emergency and the promulgation of the regulations under it.⁹⁶ The courts can thus determine on review whether the regulations were issued and pub-

91. See generally N. CHATTERJEE & P. RAO, EMERGENCY AND LAW 11-28 (1966).

92. EDA § 311(15). See also *id.* § 826 (preservation of habeas corpus).

93. See *Hirabayshi v. United States*, 320 U.S. 81, 101 (1943). See also Jacob Rupert v. Caffey, 251 U.S. 264, 309 (1919); *Constitutional and Statutory Bases of Governors' Emergency Powers*, 64 MICH. L. REV. 290, 300 (1965).

94. 287 U.S. 378, 399-400 (1932). See also *Hearnon v. Calus*, 178 S.C. 381, 406, 183 S.E. 13 (1935) (*per curiam*).

95. See, e.g., *Judicial Control of the Riot Curfew*, 77 YALE L.J. 1560 (1968).

96. PSA § 2(1) (declaration of emergency); *Id.* § 3(1)(a) (regulations); *Id.* § 3(1)(b) (making regulations effective outside area of emergency).

lished in the proper manner,⁹⁷ a review which they do not possess in respect to parliamentary legislation.⁹⁸ If there is no showing that an emergency has been declared and regulations promulgated in accord with the Act, the authorities must bear the burden of justifying any challenged detentions.⁹⁹

Second, although the regulations are presumed to be issued in good faith, and thus valid when properly proclaimed, they are nonetheless open to challenge¹⁰⁰ unless they are issued as an exercise of the power to declare martial law. If the declaration of martial law is proper, no challenge is open to the regulations for during such a period the jurisdiction of the civil courts is ousted.¹⁰¹ Thus the first ground of challenge to the regulations is that they were issued in bad faith. The burden of proving this is substantial.¹⁰² A potential challenger is further hampered by the state privilege,¹⁰³ if it is applicable to the PSA. It is quite probable that the executive, during an emergency, will feel obliged to protect its agents by invoking the privilege to hinder any challenge.

Another ground for challenge is that the regulations were ultra vires the Act.¹⁰⁴ This too is a difficult test to meet, particularly given the wide scope of the PSA. In the absence of any suggestion that the Executive exercised its powers other than in good faith, properly published regulations are intra vires the Act.¹⁰⁵ Since the regulations are presumed to be valid, the courts will not, if the regulations are not directly challenged, inquire into their validity on their own initiative.¹⁰⁶

One type of regulation which might be overturned is No. 29, which observers believe eliminates habeas corpus.¹⁰⁷ Although the courts are willing to intervene by a writ of habeas corpus and release a detainee if the regu-

97. *Ex parte Lang* (W. 1960) (unreported—discussed in Kentridge, *Habeas Corpus Procedure in South Africa*, 79 S. Afr. L.J. 283, 286) holds that when the regulations have not been duly promulgated at the time of the arrest, the detained persons will be released.

98. HAHLO—1968 at 156.

99. *Brown v. Deputy Police Commissioner*, 1960(2) S. Afr. L.R. 809 (N.P.D. 1960).

100. *Slovo v. Superintendent, Johannesburg Gaol*, 1960(4) S. Afr. L.R. 230 (W.L.D. 1960).

101. *Krohn v. Minister of Justice*, 1915 S. Afr. L.R. 191 (A.D. 1915).

102. *See Sachs v. Minister of Justice*, 1934 S. Afr. L.R. 11 (A.D. 1933).

103. *See note 78, supra*.

104. *See Slovo v. Superintendent, Johannesburg Gaol*, 1960(4) S. Afr. L.R. 230, 231 (W.L.D. 1960).

105. *R. v. Maphumulo*, 1960(3) S. Afr. L.R. 793 (N.P.D. 1960).

106. *Id.*; *see Stanton v. Minister of Justice*, 1960(3) S. Afr. L.R. 353, 355 (T.P.D. 1960).

107. HAHLO—1960 at 137; Hahlo & Maisels at 14. The Roman-Dutch writ *de homine libero exhibendo* is, for all practical purposes, the same as habeas corpus. Centlivres at 442. Except for the discussion in the text accompanying notes 117-20 *infra*, it will be referred to as *habeas corpus*.

lations are suspended, their willingness to grant the writ in other cases is not so clear.¹⁰⁸ Whether a regulation such as No. 29 is ultra vires the Act may depend on the historic origin of the power to issue such regulations. If the PSA is a grant of full legislative powers to the executive, then no regulation, except one expressly forbidden by the Act itself, can be ultra vires.¹⁰⁹ The regulations would be virtually identical to an act of Parliament, and thus could not be held ultra vires.

It is possible, however, that the PSA grants the executive the power to suspend only statutory rights of the citizens and does not extend to rights secured by the common law.¹¹⁰ If that is so, the courts could review the regulations and refuse to enforce those which infringe common-law rights.¹¹¹ Thus, the grant of power to make regulations might not be a plenary grant of legislative power to the executive.

If the Act is considered a codification of the sovereign prerogative, or if this prerogative is considered as supplementing the Act, the result again would be that the executive could not suspend the common-law writ of habeas corpus. Any regulation which attempted to do this, as regulation No. 29 apparently does, would be ultra vires the Act and thus open to challenge.

Since the question of ultra vires is one of law and not of fact, like that of the subjective intent of the executive in making the regulations, this issue can easily be decided by a court. The assertion of the state privilege, moreover, would not hinder the court in such a determination, as it would in the case of regulations alleged to be issued in bad faith. If in the latter situation the state privilege is invoked as well, a virtually impregnable position is created for the executive.

Application of the Regulations

In applying the regulations promulgated under any emergency detention legislation, problems of judicial review similar to those discussed above arise. For example, under the Public Safety Act, the decision to detain an individual rests on the subjective judgment of the officer or magistrate who issued the order.¹¹² If the person challenging this decision, by means of habeas corpus

108. See *Stanton v. Minister of Justice*, 1960(3) S. Afr. L.R. 353, 360 (T.P.D. 1960).

109. *Id.* at 359. The validity of the regulations, however, was not attacked in any way. *Id.* at 355.

110. As Professors Mathews and Albino argued in connection with the 90-day and 180-day detention laws, the PSA may be interpreted as giving the Executive the power to suspend statutory law, but not to suspend a common-law right such as habeas corpus. See Mathews & Albino, *supra* note 74, at 41.

111. See *Brink v. Comm'r of Police*, 1960(3) S. Afr. L.R. 65 (T. 1960); see also 1 F. GARDINER & A. LANSDOWN, *SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE* 11 (6th ed. 1957).

112. Regulation 4(1); *Stanton v. Minister of Justice*, 1960(3) S. Afr. L.R. 353,

or other writs,¹¹³ must show that the officer had not thought about what he was doing, he faces an impossible task,¹¹⁴ since the officer is apparently not obliged to give his reasons for forming the opinion which he alleges he formed "honestly." The officer's decision, therefore, can be effectively challenged only on the ground that he acted ultra vires the regulations¹¹⁵ or was motivated by bad faith.¹¹⁶ The result is that even a good faith error on the part of the officer will not open his actions to challenge. The officer can employ the sweeping defense of state privilege and refuse to make anything but conclusory statements about his decision,¹¹⁷ thus further hindering a challenge to the detention.

The standard applied in reviewing the officer's conduct is similar to that used in cases involving the Roman-Dutch writ *de homine libero exhibendo*,¹¹⁸ where the party seeking release must show *dolo malo* on the part of the detaining officer. The standard applied in cases arising under the English writ of habeas corpus does not require such intent, but provides for release even in the case of good-faith mistake. The law surrounding habeas corpus has so permeated that of *de homine libero exhibendo* that the Roman-Dutch writ is, for all intents and purposes, now identical to habeas corpus.¹¹⁹ It may be argued that such a change in standards should enter into the review of the actions of officers acting under the emergency regulations.¹²⁰

The interpretation of what acts are permitted under the regulations and of what sub-regulations may be promulgated by the executive is properly a function of the courts. In such cases, the courts will look, sub silentio at the actual state of the emergency to determine if encroachments on fundamental rights are to be tolerated. Thus, in *Brink v. Commissioner of Police*,¹²¹ the Trans-

355 (T.P.D. 1960); *Ex parte Hathorn*, 1960(2) S. Afr. L.R. 767 (D. & C. L.D. 1960). See note 75 *supra*.

113. Kentridge, *supra* note 97 at 286. See INT'L COMM'N OF JURISTS, *supra* note 67, at 12, 19-20.

114. *Mawo v. Pepler*, N.O., 1961(4) S. Afr. L.R. 806, 814-15 (C.P.D. 1960).

115. Given the wide scope of the regulations, this is virtually impossible. *Id.* at 814.

116. *Stanton v. Minister of Justice*, 1960(3) S. Afr. L.R. 353, 356 (T.P.D. 1960). The burden of showing that the opinion was not in good faith is on the applicants. *Mawo v. Pepler*, N.O., 1961(4) S. Afr. L.R. 806, 815 (C.P.D. 1960).

117. See *Stanton v. Minister of Justice*, 1960(3) S. Afr. L.R. 353, 358 (T.P.D. 1960); cf. *Real Printing & Publishing Co. (Pty.) Ltd. v. Minister of Justice*, 1965(2) S. Afr. L.R. 782, 786 (C.P.D. 1963).

118. See note 107, *supra*.

119. Centlivres at 442; Hahlo & Maisels at 14.

120. The tendency of the judiciary to free itself from strict reliance on English common law and to look to continental systems, particularly the historical Dutch law, may militate against this trend. See HAHLO—1968 at 578-96; Douthwaite, *South Africa and the Law*, 1960 ACTA JURIDICA 47, 54; cf. *Joyi v. Minister of Bantu Admin. & Dev.*, 1961(1) S. Afr. L.R. 210, 216 (C.P.D. 1960). But see 1 F. GARDINER & A. LANSDOWN, *supra* note 111, at 7.

121. 1960(3) S. Afr. L.R. 65 (T. 1960). See also Centlivres at 442-44.

vaal court pointed out that the emergency was geographically limited in area, and that the executive did not indicate that the state was in any way endangered. Therefore, the court concluded, it would follow the standard rule of interpretation and construe the regulations so as to protect individual liberties, even at the expense of the legitimate interests of the state. If the emergency is sufficiently widespread, or in the case of martial law, if the emergency exists at all, the courts may shift to the rule of interpretation favoring the security of the state, even to the detriment of the liberties of the individual.¹²² It appears that the duration of the emergency,¹²³ as well as its scope, and the effectiveness of the protections for the individual detainee provided by the Act¹²⁴ and the regulations will also influence the rule of interpretation applied to the regulations. For example, in *Mawo v. Pepler, N.O.*, the court noted the built-in protections of the PSA "which operate against the theoretical possibility advanced . . . that there could be an indefinite detention of a person under regulation 4(1) without anyone knowing of his fate."¹²⁵

Thus, if the declaration of a state of emergency is repeatedly extended, the courts may tend to construe the regulations in favor of the individual; and if the Act and regulations do not provide proper protection for the rights of the individual, the courts might look with disfavor on restrictions of fundamental rights. Therefore, while the regulations and actions taken under them appear to be virtually impervious to a direct attack on their validity,¹²⁶ the judicial review of the question of whether an emergency in fact existed, and of the number of safeguards provided in the entire statutory and regulatory scheme would enable the court to intervene and protect fundamental rights through proper rules of interpretation.

American courts, like their South African counterparts, while reluctant to review the declaration of an internal security emergency under the EDA, should feel free to review the actions of the President and of his agents during any emergency. As the South African experience illustrates, the major item which they will be asked to review will be the reasonableness of detentions made under the Act.

The EDA, while specifically preserving the privilege of the writ of ha-

122. *Ex parte Hathorn*, 1960(2) S. Afr. L.R. 767, 771 (D. & C.L.D. 1960). See HAHLO—1968 at 208-10. See also Mathews & Albino, *supra* note 74, at 29.

123. O. SCHREINER, *supra* note 71, at 101. See also *Ex parte Hathorn*, 1960(2) S. Afr. 767, 777 (D. & C.L.D. 1960); Mathews & Albino, *supra* note 74, at 42.

124. See text accompanying notes 64-68, *supra*.

125. 1961(4) S. Afr. L.R. 806, 811 (C.P.D. 1960).

126. See *Sachs v. Minister of Justice*, 1934 S. Afr. L.R. 11 (A.D. 1933). An attack on the regulations is theoretically possible. Cf. *Seedat v. Rex*, 1942 T.P.D. 189 (1942).

beas corpus,¹²⁷ provides a complete administrative procedure for the review of detentions, culminating in a right of appeal to the federal courts.¹²⁸ Realistically, if an emergency does not result in the closing of the courts, the most frequent challenge will be by habeas corpus. But by the time a detainee's case reaches the courts, the reason for his detention may have passed, and it is likely that he will have already been released or that he will be retained for trial for violation of regulations or of the laws relating to sedition, insurrection, or sabotage. In either event, the case will probably be moot, and the government will have accomplished its desired objective, detention without judicial intervention.

The Japanese exclusion cases during World War II seem to indicate that an entire group may be detained, if the classification of that group as potentially dangerous is a reasonable one.¹²⁹ If a group other than the CPUSA is detained, of course, the burden of proving the reasonableness of the detention will be quite severe, for the government will not have the benefit of the Congressional findings of necessity which bolster any detention of members of the CPUSA.¹³⁰

In determining if the detention of an individual is reasonable, the courts will consider a number of factors. The first is the loyalty or lack of "subversiveness" of the detainee. The proven or acknowledged presence of either should entitle the detainee to immediate release.¹³¹ The courts will also consider the geographic scope of the "round-up"—has the government detained persons in areas where there is no danger of an insurrection? Presumably the government may range quite far in its "prevention," but there must be limits.¹³² Such a delimitation will be difficult, in part because of the effects of executive secrecy. The courts will be free, of course, to consider matters not presented by either party, and in some cases such information may be determinative. As Justice Murphy suggested in his dissent in *Korematsu v. United States*, the fact that there have been no subsequent indictments of detained persons for crimes related to the reasons for detention may cast doubt on the validity of the detention.¹³³ However, here too, there is a vast area of executive discretion into which the courts will not inquire.

127. EDA § 826.

128. *Id.* §§ 814, 819-21.

129. See cases cited in note 34, *supra*.

130. Although Congress seems to have intended the EDA to apply to other than merely Communist groups, it has not achieved that broader coverage because of the limited findings of fact. Dunbar, *Beyond Korematsu: The Emergency Detention Act of 1950*, 13 U. PITT. L. REV. 221, 225 (1952). See also veto message of President Truman set out in the text at note 20, *supra*.

131. *Ex parte Endo*, 323 U.S. 283 (1944).

132. See *Sterling v. Constantin*, 287 U.S. 378, 403-4 (1932).

133. 323 U.S. 214, 241 (1944).

It has been suggested that the fact that the EDA specifically retains the right to the writ of habeas corpus may raise some problems.¹³⁴ One commentator, for example, has observed that the Act might be ineffective unless the writ is suspended.¹³⁵ Presumably, this is because the government would not be able to detain persons on mere "suspicion" for a prolonged period by exploiting the delays built into the Act's administrative review. Even if the right to the writ were not suspended, however, the courts might be reluctant to intervene quickly in the case of a politically sensitive situation and this would effectively postpone, although not officially suspend, the writ. One commentator has suggested that such a situation occurred in Recorder's Court during the Detroit civil disorders of July 1967.¹³⁶ Another commentator believes that in spite of the availability of the writ, the courts will not be able to intervene effectively to protect detainees:

[A]lthough this statute provides that it shall not be considered to suspend or authorize the suspension of the privilege of the Writ of Habeas Corpus, it would seem that the court, in considering such a case, might be hampered by the pendency of administrative hearings. It would also seem questionable whether under the privilege conferred on the Attorney General to withhold evidence, the court would have before it an adequate record.¹³⁷

Although it is not settled whether the Congress alone,¹³⁸ or the President alone,¹³⁹ or both¹⁴⁰ may order the right to the writ suspended during an internal security emergency, a suspension could well occur. As Senator McCarran remarked during debate on the EDA:

[The Act] would permit the state of "internal security emergency" to be declared only in case of invasion, declaration of war, or insurrection within the United States in aid of a foreign enemy. Those are contingencies which would justify suspension of the writ of habeas corpus¹⁴¹

If the Congress were not in session, it is possible that the President, emulating

134. See text accompanying note 20, *supra*.

135. *The Internal Security Act of 1950*, 51 COLUM. L. REV. 606, 652-53 (1951).

136. *The Administration of Justice in the Wake of the Detroit Civil Disorder of July 1967*, 66 MICH. L. REV. 1542, 1577-79 (1968).

137. O'Brien, *Changing Attitudes Toward Freedom*, 9 WASH. & LEE L. REV. 157, 168 (1952). See also *The Internal Security Act of 1950*, 51 COLUM. L. REV. 606, 649-50 (1951).

138. J. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN*, 135-36 (rev. ed. 1951); *Ex parte Merryman*, 17 F. Cas. 144 (No. 9,487) (C.C.D. Md. 1861). See also E. CORWIN, *THE PRESIDENT—OFFICE AND POWERS 1787-1957* at 146 (4th ed. 1957).

139. Remarks of Senator McCarran, 96 CONG. REC. 14623 (1950). See also *Suspension of the Privilege of the Writ of Habeas Corpus*, 10 OP. ATT'Y GEN. 74 (1861).

140. Halbert, *The Suspension of the Writ of Habeas Corpus by President Lincoln*, 2 AM. J. LEGAL HIST. 95 (1958).

141. 96 CONG. REC. 14623 (1950). See also *The Constitution and the Emergency Detention Act of 1950*, 13 BUFF. L. REV. 477, 486-87 (1964).

the actions of President Lincoln at the beginning of the Civil War,¹⁴² might order the right to the writ suspended. The Congress might suspend habeas corpus itself, or if the President had acted first, it might follow the Civil War precedent, and ratify the President's action.¹⁴³ In any event, such an action would not suspend the writ itself, but merely the right to the writ. The courts could still order the presentation of the detainee for a hearing in order to determine if he is entitled to the writ.¹⁴⁴ The fact that the government could, even while the writ is suspended, be required to present the person to a court might cause the executive to exercise a degree of restraint. Thus, it appears that judicial intervention of some sort would not be foreclosed, unless the courts were closed.¹⁴⁵

*Termination of the Emergency—Effect on Regulations
and Prosecutions*

A further question arises in dealing with emergency detention—what is the legal effect of the termination of the state of "emergency." The South African courts have indicated that the withdrawal of the declaration of an emergency under the PSA renders any regulations then in force null and void from that moment on.¹⁴⁶ The South African executive may, nevertheless, prosecute persons for violations of the regulations which were committed while the regulations were in force,¹⁴⁷ subject of course to the conditions that the regulations did not make criminal that which was legal when it was committed, and possibly that the regulations did not eliminate common-law rights. The same would be true if the regulations were withdrawn while the declaration of emergency remained in effect. It is not clear, however, what would be the status of persons tried for violations of regulations if the power of the executive to issue regulations were terminated by the Parliament. Arguably, such prosecutions could continue, since the regulations were valid when the violations occurred. It might be argued, however, that such an action by the Parliament would indicate that the executive's actions under the regulations were considered invalid by the Parliament, thus necessitating a bar to prosecutions for violations of the regulations.

A critical question is whether the courts can declare that the conditions

142. On this period, *see generally* Halbert, *supra* note 140; RANDALL, *supra* note 138; C. ROSSITER, *THE AMERICAN PRESIDENCY* (1956).

143. *See* CORWIN, *supra* note 48, at 146.

144. *But see Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 125-26 (1866).

145. *But see The Internal Security Act of 1950*, 51 COLUM. L. REV. 606, 653 (1951).

146. *R. v. Sutherland*, 1961(2) S. Afr. L.R. 806, 815 (A.D. 1961). *Cf. Brown v. Deputy Comm'r of Police*, 1960(2) S. Afr. L.R. 809 (N.P.D. 1960); *Ex parte Lang* (cited in Kentridge, *supra* note 97).

147. *R. v. Sutherland*, 1961(2) S. Afr. L.R. 806 (A.D. 1961).

justifying a declaration of an emergency under the PSA no longer exist,¹⁴⁸ and that therefore the regulations have no further force. A lower South African tribunal, in *Stanton v. Minister of Justice*, indicated that there was no need for the existence of a "factual" emergency for the executive to exercise its powers under the PSA.¹⁴⁹ Presumably then, the end of an emergency would not automatically end the life of the regulations. As the highest court of South Africa said in *Regina v. Sutherland*:

There is nothing in the Public Safety Act which requires the Governor-General to withdraw a Proclamation . . . as soon as the state of emergency ceases; it may indeed be expedient to keep in force such a Proclamation for some time after the state of emergency has ceased, in order to prevent a recurrence thereof. It certainly could be necessary for the Governor-General to keep alive such a proclamation after the *de facto* cessation of the state of emergency for the purpose of making regulations 'for dealing with any circumstances which in his opinion have arisen or are likely to arise as a result of such emergency' in terms of the concluding words of section 3(1) of the Act.¹⁵⁰

This opinion implied that the South African courts are not competent to review the factual situation—perhaps on the ground that the existence of an emergency is a "political question"—and to declare that the regulations are no longer in force. But the fact that the court in *Regina v. Sutherland* actually did review the state of the nation might imply that the courts will permit the executive to continue to exercise its powers after the end of a "factual" emergency, but only until the nation is "factually" calm enough for the normal legal process to take over again.¹⁵¹

America's EDA, unlike South Africa's PSA, provides for no automatic termination of an internal security emergency after a fixed time. Rather, the mechanism for its termination is similar to that for its declaration—a presidential or congressional proclamation.¹⁵² The question then arises whether the United States courts may determine, once the need for detentions has passed, that there is no further internal security emergency.

In cases involving the declaration of a state of emergency or insurrection the courts have been willing to look at the situation and to determine whether the emergency is, in fact, over. The factors considered are similar to those

148. It appears that this can be done when the nation is under martial law, if the courts are still open. See authorities cited in note 80 *supra*.

149. 1960(3) S. Afr. L.R. 353, 355 (T.P.D. 1960).

150. 1961(2) S. Afr. L.R. 806, 814 (A.D. 1961).

151. What constitutes such a situation is not clear. See, e.g., Mathews & Albino, *The Permanence of the Temporary—An Examination of the 90- and 180-day Detention Laws*, 83 S. Afr. L.J. 16, 42 n.80 (1966).

152. EDA § 812(b).

considered when a court reviews the declaration of the emergency and the reasonableness of regulations made and actions taken during the emergency.¹⁵³

In cases when the war power was employed by the executive to correct the after-effects of hostilities,¹⁵⁴ as it was in sustaining rent controls in the context of an excessive post-war demand for scarce housing, the Court has been willing to investigate the present situation and to determine "whether conditions had so far changed [since the enactment of the challenged legislation] as to affect the constitutional applicability of the law."¹⁵⁵ Until recently, cases involving the validity of acts more directly related to the carrying on of a war were not similarly reviewed.¹⁵⁶ In 1959, the Court, in *Lee v. Madigan*,¹⁵⁷ changed this. Federal courts are now free to determine when the nation is "at war" or "at peace" in order to decide whether a particular statute is in operation; but "[i]n determining what a statute means when it speaks of war or peace, the purpose of the particular provision must be analyzed."¹⁵⁸ Thus the actual existence of war or peace is not subject to judicial determination, even though the state of war or peace has traditionally been marked by an executive or congressional declaration. Even if the judiciary cannot review the validity of the executive's declaration of an internal security emergency, it can review the continuing status of such an emergency and determine when there is no longer an internal security emergency, even if the Congress or the President has not terminated it.¹⁵⁹

153. See *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 447 (1934).

154. See *gen. The War Power Extended*, 17 GEO. WASH. L. REV. 461 (1949).

155. *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 546 (1924). See also *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948); *Jacob Rupert v. Caffey*, 251 U.S. 264 (1920); *Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146 (1919).

156. *Lee v. Madigan*, 358 U.S. 228, 237 (1959) (Harlan, J. and Clark, J., dissenting).

157. 358 U.S. 228 (1959).

158. *United States v. Sobell*, 314 F.2d 314, 328 (2d Cir. 1963), *cert. denied* 374 U.S. 857 (1963). See also *United States v. Elliot*, 266 F. Supp. 318, 322 (S.D.N.Y. 1967).

159. EDA § 812(b). The Supreme Court, however, in *Lee v. Madigan*, 358 U.S. 228 (1959), noted that the statute in question made no provision for its inapplicability by reference to a specific act. Arguably, therefore, the Court would not intervene in a case under the EDA since that act specifically provides for its termination by reference to a specific action of the Congress or the executive. This attitude is reflected in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 546 (1950), where the Court noted that the emergency in question had never been terminated. Even if the Court's rejection of the resolutions terminating the war is to be taken as indicative of the time of "peace," it is not at all clear that the Court would consider itself to be bound by such a resolution. In this regard, see the discussion in *United States v. Sobell*, 314 F.2d 314, 328 (2d Cir. 1963), *cert. denied* 374 U.S. 857. Compare *Korematsu v. United States*, 323 U.S. 214, 234 (1944) (Murphy, J., dissenting) and *Duncan v. Kahanamoku*, 327 U.S. 304, 337, 351 (1946) (Stone, J., concurring, Burton, J. and Frankfurter, J., dissenting).

In the case of the war powers, the government may continue to exercise power un-

If the internal security emergency is at an end, then all detainees must be immediately released.¹⁶⁰ If there are any prosecutions pending for violations of the EDA, however, the South African experience suggests that such prosecutions be allowed to continue. Of course, defendants to such actions should be able to raise as a defense the invalidity of the regulations or detention. In order to evaluate this defense, a court must proceed with the analysis of the validity of the regulations and detentions outlined above, viewing the regulations or detention as of the time of the violations, not in retrospect utilizing information not reasonably available to the executive when it acted.

*Suggested Modification of the Emergency Detention
Act of 1950*

The experience of the South African courts in reviewing cases arising under the PSA when coupled with that which would probably occur in the United States under the EDA, raises questions about the effectiveness of judicial review of the executive in the context of an emergency. In South Africa, an independent, although relatively powerless, judiciary has attempted to exercise some degree of control over an executive which, through the Parliament, can insulate itself from such interference. The South African courts, while preserving an option to intervene if the situation so warrants, have been careful not to oppose the executive too directly too often. Failure to utilize these rights to intervene, however, may render them as meaningless as if they did not exist at all.

In the United States, the courts have also asserted a right to review the executive's actions during an emergency. When the acts challenged relate to areas like economic regulation after a war, the courts have been willing to intervene immediately. As the power exercised by the executive becomes more clearly a war power and as its exercise relates more closely to vested interests of the executive and the protection of the nation, the courts have been less willing to confront the executive.¹⁶¹ Although they claim to be willing to review executive actions clearly related to national security, this review has been notably timid.¹⁶² During actual hostilities, the Supreme Court has

der acts in effect for a war even after the war is "over," if the act is reasonably related to controlling or correcting effects of the war. *The War Power Extended*, 17 GEO. WASH. L. REV. 461 (1949). This is not, however, so clear in the other "emergency" cases.

See also *Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146 (1919); *Jacob Rupert v. Caffey*, 251 U.S. 264, 304 (1920) (Reynolds, J., Day, J. and Van Devanter, J., dissenting).

160. Cf. *Ex parte Endo*, 323 U.S. 283 (1944).

161. See, e.g., C. ROSSITER, *CONSTITUTIONAL DICTATORSHIP* 283 (1948); *The War Power Extended*, 17 GEO. WASH. L. REV. 461, 469 (1949).

162. See, e.g., *Ex parte Endo*, 323 U.S. 283 (1944).

been unwilling to challenge the executive directly and will not decide key questions about the actual scope of the executive's authority.¹⁶³ As one commentator put it:

It is understandable that the Court should be reluctant to act during a crisis. The prestige of the Court would suffer if the other branches of government paid it no respect, as happened after the decision in *Ex Parte Merryman*.¹⁶⁴ The Court might also feel that it would be acting irresponsibly if it were to declare legislation invalid during a crisis because the legislature and the executive would not have time to fashion alternative legislation acceptable to the Court.¹⁶⁵

Admittedly, in the past the United States has not had to worry about the abuse of such powers. Reflecting on the acts of President Lincoln during the Civil War, it might be said that, given a crisis and a President with reasonable domestic support, the executive will take any measures it deems necessary. If this action by the executive results in the derogation of fundamental rights, a change in one law will not be able to prevent it.

If America's Emergency Detention Act is changed, it should not be on the grounds that judicial review is not possible. Rather, it should be on the grounds that the judiciary is reluctant to oppose directly the executive in the midst of crisis.¹⁶⁶ There must instead be other protections. One might be, of course, an automatic termination of the state of emergency after a short, fixed period. Emergencies, however, do not typically end on schedule and the executive might reasonably desire the ability to extend any declaration of emergency beyond a fixed time, thereby bringing the EDA closer to the present terms of the Public Safety Act.

Another solution was suggested by Professor Rossiter in his analysis of "constitutional dictatorships":

[T]he President should have a provisional power of declaring national emergencies; Congress, however, should have the final decision; and the rules of Congress should be so amended that a Presidential demand for confirmation of his declaration of a national emergency would be put to an immediate vote. The termination of an emergency should be entirely in the hands of Congress.¹⁶⁷

163. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943). But see *Ex parte Merryman*, 17 F. Cas. 144 (No. 9,487) (C.C.D. Md. 1861).

164. 17 F. Cas. 144 (No. 9,487) (C.C.D. Md. 1861).

165. *American Concentration Camps: Prospective Challenge of Title II of the McCarran Act*, 48 B.U.L. REV. 647, 666 (1968).

166. See, e.g., *id.* Cf. Groves, *Emergency Powers*, 3 J. INT'L COMM'N OF JURISTS (No. 2) at 15 (1961).

167. C. ROSSITER, *supra* note 161, at 310-11. See discussion *supra* note 49.

A provision of this type is present in the Emergency Detention Act to a limited degree—an “internal Security Emergency” continues “in existence until terminated by proclamation of the President or by concurrent resolution of the Congress.”¹⁶⁸ Only the President, however, is “authorized to make public proclamation of the existence of an ‘Internal Security Emergency.’”¹⁶⁹ It would be wise to put the power to declare and terminate an emergency wholly in the hands of Congress. As Justice Jackson said in *Youngstown Sheet & Tube Co. v. Sawyer*:

[C]ontemporary foreign experience may be inconclusive as to the wisdom of lodging emergency powers somewhere in a modern government. But it suggests that emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them.¹⁷⁰

This sentiment is echoed by Professor Corwin who noted that “just as nature abhors a vacuum, so does an age of emergency. Let Congress see to it, then, that no such vacuum occurs. The best escape from presidential autocracy in the age we inhabit is not, in short, judicial review, which can supply only a vacuum, but timely legislation.”¹⁷¹

If nothing else, a legislative change of the type suggested by Justice Jackson and Professor Rossiter would allow for a more direct response to citizen pressures to terminate an emergency; since the Congress has the power of the purse it would also assure that the body challenging the executive was more equal to the task than the judiciary. This procedure, as the South African experience illustrates, does not by itself guarantee that the Congress will not accede to the executive. This danger is inherent in any republican system—and in the last analysis, one must trust to the character of the men comprising the government.

Although we have, in the past, trusted the President not to set himself up as a constitutional dictator,¹⁷² inserting the Congress into the process of invoking emergency powers reduces the probability that a “temporary” constitutional dictatorship will become entrenched.

168. EDA § 812(b).

169. *Id.* § 812(a).

170. 343 U.S. 579, 652 (1952) (concurring opinion).

171. E. CORWIN, *supra* note 138, at 157. See also 60 MINUTES: “Wallace: . . . The California Attorney General who urged the evacuation and detention [of the Japanese-Americans on the West Coast during World War II] was Earl Warren who would later become the most liberal Supreme Court Chief Justice in history. The evacuation was ordered by a liberal President of the United States, Franklin Roosevelt, and was supported by the mass of public opinion. In 1944, the evacuation was upheld by the Supreme Court. The decision was written by one of the Court’s great liberals, Justice Hugo Black, and concurred in by another Court liberal, William Douglas.”

172. Halbert, *supra* note 140; J. RANDALL, *supra* note 138. See also C. ROSSITER, *supra* note 142.

If Congress is thus involved, then a constitutional dictatorship could replace the present republican system only if the Congress succumbed to the notions that discretionary power over individual liberty should be centralized and that the executive should be the locus of such vast powers.

Epilogue

The Canadian War Measures Act and the Crisis of October 1970

In 1914, responding to the demands of a wartime state, Canada passed the War Measures Act,¹⁷³ which, with only a minor change, is still on the books. The War Measures Act broadly provides:

The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion, or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada * * *.¹⁷⁴

The right to exercise these powers comes into being "only upon the issue of a proclamation of the Governor in Council declaring that war, invasion or insurrection, real or apprehended, exists."¹⁷⁵ However, the statute effectively bars any judicial review of the *actual* existence of an insurrection by stating:

The issue of a proclamation . . . shall be conclusive evidence that war, invasion, or insurrection, real or apprehended, exists and has existed for any period of time therein stated, and of its continuance, until by the issue of a further proclamation it is declared that the war, invasion or insurrection no longer exists.¹⁷⁶

On Thursday, October 15, 1970, Canadian Prime Minister Pierre Trudeau met with his cabinet during the search for two kidnapped officials, Quebec Labor Minister Pierre Laporte and British Trade minister James R. Cross. At that time, the Prime Minister indicated that his cabinet was considering "the possibility of imposing emergency powers" to deal with the kidnappings, believed to have been perpetrated by the Quebec Liberation Front (FLQ).¹⁷⁷ Friday, October 16, 1970, the Prime Minister invoked the provisions of the War Measures Act at the request of Quebec provincial authorities who told him they were necessary to control a possible insurrection and violence. In so doing, he declared that the FLQ posed a threat of insurrec-

173. R.S.C. 1952, c. 288, amended 1960, c. 44 [hereinafter cited as WMA].

174. WMA § 3(1).

175. *Id.* § 6(1). Prior to the 1960 amendment of this section, the statute provided that these provisions would "only be in force during war, invasion, or insurrection, real or apprehended."

176. *Id.* § 2. *Compare* Co-operative Comm. on Japanese Canadians v. Attorney-General of Canada, [1947] 1 D.L.R. 577, 585-86 (Jud. Comm., Privy Council, 1946) (dictum).

177. N.Y. Times, Oct. 16, 1970, at 1, col. 8.

tion and was trying clandestinely to destroy the social structure of the nation.¹⁷⁸ As a result, the FLQ was declared to be "illegal,"¹⁷⁹ and any person "even assisting a member of the Front was liable to five years in jail."¹⁸⁰ At that time, the Prime Minister expressed "the clear understanding that the provisions of the act would be revoked on or before April 30, 1971,"¹⁸¹ although the Act did not require him to set a date for the return of civil rights.¹⁸²

The powers which the government now has are wide-ranging. For example, the Act specifically provides that the government's power will extend to *all* matters within the ambit of "arrest, detention, exclusion and deportation."¹⁸³ Operating under this grant of authority, the Prime Minister has suspended a broad range of individual civil liberties¹⁸⁴ and ordered the local police and Canadian soldiers to round-up both members of the FLQ and suspected FLQ sympathizers.¹⁸⁵ The individuals arrested in this sweep can be held for up to 90 days before they even have to be charged with a crime.¹⁸⁶ This type of detention is possible since the Canadian courts have held, at least during wartime, that the writ of habeas corpus is effectively "superseded" by valid detention orders issued under the authority of this Act.¹⁸⁷

Initially, there was some political opposition to Prime Minister Trudeau's invocation of this Act, but that resistance collapsed when it was discovered that Quebec Labor Minister Laporte had been murdered by the FLQ.¹⁸⁸

As required by the terms of a 1960 amendment to the War Measures Act,¹⁸⁹ the Prime Minister submitted the proclamation of the insurrection to the Canadian Parliament for debate and a vote on its possible withdrawal.¹⁹⁰

178. Washington Post, Oct. 17, 1970, at A1, col. 5; p. A12, col. 7. Quebec Premier Robert Bourassa said that police information that the FLQ had planned one assassination every 48 hours was one of the reasons why the federal government decided to invoke the WMA. *Id.*, Oct. 30, 1970, at A18, col. 1.

179. *Id.*, Oct. 18, 1970, at A5, col. 8.

180. *Id.*, Oct. 17, 1970, at A1, col. 5. WMA § 4 limits the penalties which can be imposed for violations of the orders and regulations made under the Act to a fine of five thousand dollars or imprisonment for a term not to exceed five years or both.

181. Washington Post, Oct. 17, 1970, at A12, col. 7.

182. See WMA §§ 2, 6(4).

183. *Id.*, § 3(1)(b). See generally Co-operative Comm. on Japanese Canadians v. Attorney-General of Canada, [1947] 1 D.L.R. 577 (Jud. Comm., Privy Council, 1946) (deportation).

184. Washington Post, Oct. 17, 1970, at A1, col. 5.

185. *Id.*, Oct. 18, 1970, at A1, col. 8.

186. *Id.*, Oct. 21, 1970, at A1, col. 1.

187. *Re Carriere*, [1943] 3 D.L.R. 181 (Quebec Super. Ct., 1942). The 1960 Amendment to the WMA, § 6(5), casts doubt on the continuing validity of this interpretation: "Any act or thing done or authorized or any order or regulation made under the authority of this Act, shall be deemed not to be an abrogation, abridgment or infringement of any right or freedom recognized by the *Canadian Bill of Rights*."

188. N.Y. Times, Oct. 20, 1970, at 2, col. 4.

189. WMA § 6(2).

190. *Id.* §§ 6(3), 6(4). N.Y. Times, Oct. 20, 1970, at 1, col. 1.

The Parliament debated this question. The government, during these debates, promised that it would introduce legislation within 30 days providing more limited and specific authority to the police to cover the present crisis and similar crises in the future.¹⁹¹ As a result, the Commons voted 190-16 to support the government.¹⁹²

During the emergency to date, the government has been careful to limit its activities under the authority of this Act to Quebec and to the FLQ.¹⁹³ Although it has arrested at least 429 persons¹⁹⁴ in over 2,000 raids,¹⁹⁵ at least 21 and possibly as many as 53 of these were released almost immediately and only 57 are still being held.¹⁹⁶ While those in custody have not been permitted to contact anyone,¹⁹⁷ there is some confusion as to whether the families of those still being detained have been told of the whereabouts of their relatives.¹⁹⁸ In any case, local civil liberties groups are evidently attempting to monitor the actions of the government of Prime Minister Trudeau while the Act is in effect.¹⁹⁹

After the emergency had been in effect for about a week, public opposition to the detentions began to appear. The Quebec Bar Association condemned the refusal of the authorities to permit detainees to consult with lawyers immediately.²⁰⁰ Three of Quebec's major labor organizations denounced the emergency powers as "threatening democracy and the exercise of civil rights."²⁰¹

On November 6, 39 Canadians and one American were arraigned by Quebec provincial authorities on charges ranging from seditious conspiracy to simple assault in connection with the government's crackdown on the FLQ.²⁰²

When the crisis will end is not clear. Prime Minister Trudeau has pub-

191. NEWSWEEK, Nov. 2, 1970, at 49; N.Y. Times, Oct. 20, 1970, at 1, col. 1; The Evening Star (Wash., D.C.), Oct. 20, 1970, at A-1, col. 2.

192. N.Y. Times, Oct. 20, 1970, at 1, col. 1; The Evening Star, Oct. 20, 1970, at A-1, col. 2.

193. See Washington Post, Oct. 22, 1970, at A6, col. 7.

194. *Id.*, Nov. 7, 1970, at A11, col. 1.

195. NEWSWEEK, Nov. 2, 1970, at 42.

196. N.Y. Times, Oct. 21, 1970, at 3, col. 1; Washington Post, Nov. 7, 1970, at A11, col. 1; *id.*, Oct. 22, 1970, at A6, col. 7.

197. N.Y. Times, Oct. 21, 1970, at 3, col. 1.

198. Compare N.Y. Times, Oct. 21, 1970, at 3, col. 1 (no information) with Washington Post, Oct. 22, 1970, at A6, col. 7 (most families have been informed about their whereabouts).

199. See Washington Post, Oct. 21, 1970, at A1, col. 1; *id.*, Oct. 22, 1970, at A6, col. 7.

200. *Id.*, Oct. 30, 1970, at A18, col. 1.

201. NEWSWEEK, Nov. 2, 1970, at 44.

202. Washington Post, Nov. 7, 1970, at A11, col. 1.

licly pledged that the emergency will last no longer than six months, and that he intends to replace the Act with more specific legislation as soon as possible. However, until the Governor in Council²⁰³ or perhaps the Parliament²⁰⁴ repeals the proclamation of an insurrection, Canada will continue to suspend civil liberties in order to deal with a crisis of terrorism.

203. WMA §§ 2, 6(1).

204. *See id.*, § 6(4). *But see id.*, § 2.