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The Constitution and the Emergency Detention Act of 1950

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I. THE EMERGENCY DETENTION ACT OF 1950

Historical Background

The Emergency Detention Act of 1950[1] was passed on September 23, 1950 by a vote of 286-48 in the House and 57-10 in the Senate.[2] The House Committee on Un-American Activities had urged the Act's passage to meet the threat to internal security posed by the Communist Party both in the United States and abroad.[3] The Committee reported that:

> Over 10 years of investigation by the Committee . . . has established (1) that the Communist movement in the United States is foreign-controlled; (2) that its ultimate objective with respect to the United States is to overthrow our free American institutions in favor of a Communist totalitarian dictatorship to be controlled from abroad; (3) that its activities are carried on by secret and conspirational methods; and (4) that its activities, both because of the scope and nature of Communist activities here in the United States, constitute an immediate and powerful threat to the security of the United States and to the American way of life.[4]

The Bill of Rights Committee of the American Bar Association rendered the opinion that the House Committee's finding of a clear and present danger to national security was warranted and that the Act is constitutional in light thereof.[5]

General Statement of Provisions

The preamble to the Act[6] sets forth the legislative findings upon which the Act is based, among them:

> (1) There exists a world Communist movement which . . . is a world wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in all the countries of the World through the medium of a world wide Communist organization.
> . . . .
> (4) The direction and control of the world Communist movement is

1. 64 Stat. 1019-30 (1950), 50 U.S.C. §§ 811-26 (1951).
2. 96 Cong. Rec. 15632-33 (1950) (House of Representatives); *id.* at 15520-726 (Senate).
3. H.R. Rep. No. 2980, 81st Cong., 2d Sess. (1950), 1950 U.S. Code Congressional Service 3886 [subsequent volumes titled U.S. Code Cong. & Admin. News]; see Emergency Detention Act of 1950 [hereinafter cited as "Act"] § 101, 64 Stat. 1019-23, 50 U.S.C. § 811 (1951).
4. *Id.* at 3886.
5. *Id.* at 3890 (opinion rendered upon request to the House Un-American Activities Committee (HUAC)).
6. Act § 101, 64 Stat. 1019-21 (1950), 50 U.S.C. § 811 (1951).

vested in and exercised by the Communist dictatorship of a foreign country.

. . . .

(7) . . . [T]hose individuals who knowingly and willfully participate in the World Communist movement . . . in effect repudiate their allegiance to the United States . . . .

. . . .

(11) The security and safety of the territory and Constitution of the United States, and the successful prosecution of the common defense, especially in time of invasion, war, or insurrection in aid of a foreign enemy, require every reasonable and lawful protection against espionage, and against sabotage to national-defense material, premises, forces and utilities . . . and other activities essential to national defense.

(12) Due to the wide distribution and complex interrelation of facilities which are essential to national defense and due to the increased effectiveness and technical development in espionage and sabotage activities, the free and unrestrained movement in such emergencies of members or agents of such organizations . . . would made adequate surveillance to prevent espionage and sabotage impossible and would therefore constitute a clear and present danger to the peace and safety of the United States.

. . . .

(14) The detention of persons who there is reasonable ground to believe probably will commit or conspire with others to commit espionage or sabotage is, in a time of internal security emergency, essential to the common defense and to the safety and security of the . . . United States.[7]

The President is authorized to declare an "internal security emergency" when any of the following occur:

(1) Invasion of the territory of the United States or its possessions,

(2) Declaration of war by Congress, or

(3) Insurrection within the United States in aid of a foreign enemy . . . .[8]

During such emergency, the Attorney General may "apprehend and by order detain . . . each person as to whom there is reasonable ground to believe . . . will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage."[9] Release of detainees may be effected in one of four ways:

(1) by the termination of the internal security emergency by either presidential proclamation or congressional resolution;

(2) by order of the Attorney General;

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7. Act § 101(1), (4), (7), (11), (12), (14), 64 Stat. 1019-21 (1950), 50 U.S.C. § 811(1), (4), (7), (11), (12), (14) (1951).

8. Act § 102(a), 64 Stat. 1021 (1950), 50 U.S.C. § 812(a) (1951).

9. Act § 103(a), 64 Stat. 1021 (1950), 50 U.S.C. § 813(a) (1951).

(3) by final order after hearing before the Board of Detention Review; or

(4) by final order of a federal court either upon review of the Detention Board's action or upon a writ of habeas corpus.[10]

Within forty-eight hours following apprehension, the detainee is to be taken before a preliminary hearing officer.[11] There, the detainee shall be informed of the grounds for his detention; his right to retain counsel; his right to a preliminary examination; his right to withhold making any statements; and that should he make any statement, it may be used against him.[12] If the detainee does not waive his right to a preliminary examination, evidence shall be heard within a reasonable time.[13] He may offer evidence and cross-examine government witnesses except that the Attorney General "shall not be required to furnish information the revelation of which would disclose the identity or evidence of Government agents or officers which he believes it would be dangerous to national safety and security to divulge."[14]

An order of detention may be revoked or modified when the Attorney General receives, upon the request of the detainee, additional information which negates the reasonable ground for detention.[15] However, with respect to either court or Detention Board review of the detention order, again the Attorney General "shall not be required to offer or present evidence of any agents or officers of the Government the revelation of which in his judgment would be dangerous to the security and safety of the United States."[16] The Attorney General is authorized to prescribe regulations to effectuate the Act subject to the limitations that detainees are not to be required to perform forced labor or be confined with criminals.[17] The Detention Review Board is subject to the Administrative Procedure Act.[18] The Board is empowered to require the Attorney General to furnish the detainee with "as full particulars of the evidence as possible, including the identity of informants" except where the Attorney General "believes it would be dangerous to national safety and security to divulge."[19] The Board and its hearing examiners may secretly consider evidence which the Attorney General "in his discretion offers to present [but] which cannot be publicly revealed for reasons of national security."[20] Review of Detention Board determinations may be had to the United States Court of Appeals,[21] and review of Court of Appeals determinations may be had to the Supreme Court by writ

10. Act § 103(b), 64 Stat. 1021 (1950), 50 U.S.C. § 813(b) (1951).
11. Act § 104(d), 64 Stat. 1022 (1950), 50 U.S.C. § 814(d) (1951).
12. *Ibid.*
13. *Ibid.*
14. *Ibid.*
15. Act § 104(e), 64 Stat. 1023 (1950), 50 U.S.C. § 814(e) (1951).
16. Act § 104(f), 64 Stat. 1023 (1950), 50 U.S.C. § 814(f) (1951).
17. Act § 104(g), 64 Stat. 1023 (1950), 50 U.S.C. § 814(g) (1951).
18. Act § 108, 64 Stat. 1024-25 (1950), 50 U.S.C. § 818 (1951).
19. Act § 109(c), 64 Stat. 1025 (1950), 50 U.S.C. § 819(c) (1951).
20. Act § 109(g), 64 Stat. 1026 (1950), 50 U.S.C. § 819(g) (1951).
21. Act § 111(c), 64 Stat. 1028-29 (1950), 50 U.S.C. § 821(c) (1951).

of certiorari or by certification.[22] The privilege of the writ of habeas corpus is expressly preserved.[23]

The preamble further declares that the detention shall not interfere with the constitutional rights and privileges of anyone, but "at the same time shall be sufficiently effective to permit the performance by the Congress and the President of their Constitutional duties to provide for the common defense, to wage war, and to preserve and protect the Constitution, the Government and the people of the United States."[24]

The Historical Use of the War Power to Detain Persons Deemed Dangerous to National Security

The use of the war power to detain was initially employed with respect to aliens. In 1798, the Alien and Sedition Acts were passed.[25] The Enemy Alien Act[26] authorized the President to make provision for the apprehension, restraint, securement and removal as alien enemies, all subjects of enemy nations with which we were at war who were present within the United States. That Act provided:

> That it shall be lawful for the President . . . to order all such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof to depart out of the territory of the United States . . . .[27]

During the War of 1812, proclamations were made excluding male British subjects from residing within a forty mile distance from the eastern United States coastline,[28] and the proclamations were upheld.[29]

During the Civil War, President Lincoln suspended the privilege of the writ of habeas corpus and Congress later ratified.[30] It has been estimated that approximately 38,000 executive arrests were made during this period, and men known, or suspected to be dangerous to national security were detained indefinitely in military prisons without charges being lodged against them or trials being held.[31]

World War II presented a prominent example of restrictive measures taken in the name of the war power. By presidential proclamation in December of

22. Act § 111(d), 64 Stat. 1029 (1950), 50 U.S.C. § 821(d) (1951).
23. Act § 116, 64 Stat. 1030 (1950), 50 U.S.C. § 826 (1951).
24. Act § 101(15), 64 Stat. 1021 (1950), 50 U.S.C. § 811(15) (1951).
25. 1 Stat. 577-78 (1798); see Emerson & Haber, Political and Civil Rights in the United States 275-78 (2d ed. 1958).
26. *Ibid.* See generally Miller, Crisis in Freedom (1951) for an historical commentary on the Alien and Sedition Acts.
27. 1 Stat. 577 (1798).
28. See Freeman, *Genealogy, Evacuation, Law*, 28 Cornell L.Q. 414 (1943).
29. Lockington v. Smith, 15 Fed. Cas. 758 (No. 8488) (C.C.D. Pa. 1817); Lockington's Case, 1 Brightly 269 (Pa. Sup. Ct. 1813); Brown v. United States, 12 U.S. (8 Cranch) 110 (1814).
30. See Emerson & Haber, *op. cit. supra* note 25, at 281.
31. Hall, *Free Speech in Wartime*, 21 Colum. L. Rev. 528 (1921).

1941, President Roosevelt restrained German, Italian, and Japanese Aliens from endangering public safety.[32] The rights of such persons to travel, bear arms, possess photographic equipment, and to other activities was restricted, and members of those nationality groups who were considered to be dangerous were detained.[33] Subsequently, particular areas along the west coast were declared off limits to alien enemies and thereafter a curfew and other restrictions were imposed along the entire coast; consequently, some ten thousand Japanese, Italian, and German aliens were relocated.[34]

On March 21, 1942, Public Law No. 503 was passed, making it a misdemeanor to knowingly perform an act in a military zone contrary to the order of a military commander.[35] Three days later, Lieutenant General DeWitt, military commander for the west coast area, prohibited both Japanese aliens and citizens of Japanese ancestry from leaving a certain area; other Japanese aliens and citizens were evacuated from certain designated areas and detained.[36] The program with respect to these Japanese included the curfew; their exclusion from the west coast; their confinement pending loyalty investigations; and indefinite confinement of those found to be disloyal; all measures proposed and accepted as military necessities.[37]

In *Hirabayashi v. United States*,[38] Kiyoshi Hirabayashi, an American citizen of Japanese descent, was convicted in federal district court under Public Law No. 503 for failing to observe the imposed curfew. On appeal, Hirabayashi attacked the statute as an unconstitutional delegation of legislative power to the military and as discriminating against Japanese citizens as opposed to citizens of other ancestry in violation of the fifth amendment. The Court held that it was not faced with a question of the power of Congress to delegate: that the issue was whether the Legislative and the Executive together had constitutional authority to impose the curfew. Further in issue was whether the Legislative and Executive could together delegate to the military the power "to appraise the relevant conditions and on the basis of that appraisal to say whether, under the circumstances, the time and place were appropriate for the promulgation of the curfew order. . . ."[39] Answering both issues in the affirmative, the Court said the following of the war power:

> The power is not restricted as to the winning of victories in the field

32. Proclamation No. 2525, December 7, 1941, 6 Fed. Reg. 6321 (1941).
33. Freeman, *supra* note 28, at 416-17 (account of chronology of events leading up to the Japanese detentions); see generally tenBroek, Barnhart & Matson, *Prejudice, War and the Constitution* (1954) (history of and commentary upon Japanese-American evacuation and resettlement).
34. Freeman, *supra* note 33, at 418.
35. *Id.* at 418-19 n.28; see Alexandre, *Wartime Control of the Japanese-Americans*, 28 Cornell L.Q. 385, 410-13 (1943) (for argument that Public Law No. 503 was proper delegation of legislative authority). *But cf.*, tenBroek, Barnhart & Matson, *op. cit. supra* note 33, at 220-23.
36. Freeman, *supra* note 33, at 420.
37. Rostow, *The Japanese American Cases—A Disaster*, 54 Yale L.J. 489, 513 (1945).
38. 320 U.S. 81 (1943).
39. *Id.* at 92.

> and the repulse of enemy forces. It embraces every phase of the national defense. . . . Where, as they [Executive and Legislative branches] did here, the conditions call for the exercise of judgment and discretion and for the choice of means, by those branches . . . on which the Constitution has placed the responsibility of warmaking, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.[40]

The presence of the Japanese on the west coast and the threat of espionage and sabotage thus posed was held to be ample warrant for the judgment made. Infringement of individual liberty is a necessary concomitant to the exercise of the war powers, and to defendant's contention of discrimination the Court held that the fifth amendment contains no equal protection clause, and only "discriminatory legislation by Congress as amounts to a denial of due process"[41] is restrained. The Court applied a test of urgency: "Congress may hit at a particular danger where it is seen, without providing for others which are not so evident or urgent."[42]

Korematsu v. United States[43] involved another American citizen of Japanese ancestry. There the conviction was for violating an exclusion order by remaining within a military area. Appellant attacked the *Hirabayashi* assumption of a threat of espionage and sabotage and asserted that the danger of Japanese invasion had disappeared, thus nullifying the necessitating forces behind the statute under which he was convicted. These arguments were rejected, and the conviction was affirmed. The detention aspects of the exclusion program were upheld, Mr. Justice Black for the majority stating that, "the power to exclude includes the power to do it by force if necessary. And any forcible measure must necessarily entail some degree of detention or restraint whatever method of removal is selected."[44] Mr. Justice Jackson's dissent in *Korematsu* foresaw dangers in the decision: "The principle . . . lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[45]

Ex Parte Endo[46] involved another American citizen of Japanese ancestry who, after having been removed to a relocation center, filed petition for a writ of habeas corpus, which was denied. The Supreme Court reversed. In *Endo*, no question of loyalty was present and the petitioner was being detained as part of a quota plan of orderly relocation of detainees to inland areas. The Court held that where the power to detain derives from the war power to protect against espionage and sabotage, no lawful detention may be had of loyal citizens who cannot be classified as being within the ambit of that objective:

40. *Id.* at 93.
41. *Id.* at 100.
42. *Ibid.*
43. 323 U.S. 214 (1944).
44. *Id.* at 223.
45. *Id.* at 246. See Rostow, *supra* note 37, at 491 (asserting that *Korematsu* increased the power of the military over civil government by sanctioning an act of military power without a factual record upon which the justification therefor could be found).
46. 323 U.S. 214, 282 (1944).

> The authority to detain a citizen or to grant him a conditional release as protection against espionage or sabotage is exhausted at least when his loyalty is conceded. If we held that the authority to detain continued thereafter, we would transform an espionage or sabotage measure into something else.[47]

The implication from *Endo* is that, given a case of disloyalty, no constitutional barrier would be present to prevent such detention.[48]

Comparison of Japanese Evacuation Program with Emergency Detention Act

The constitutional basis for the Japanese evacuation program was stated by the Court in *Hirabayashi* to be the combined war powers of the Executive and Legislative branches. In *Hirabayashi*, the Court upheld the use of the war power as used in that program. The power underlying the Emergency Detention Act is also the combined war powers of the Executive and Legislative: the congressional authorization is the statute itself, and the Act becomes operative upon the presidential declaration of an internal security emergency.[49] The necessity of the Japanese-American detention program was determined by military judgment; the necessity of the Emergency Detention Act has been determined by the congressional findings embodied in the Act.[50] It has been advanced that greater respect ought to be and probably will be accorded by the courts to these congressional findings than the military judgment of the Japanese-American program, especially in light of the Court's reluctance to controvert the military estimates of danger in those cases.[51] The Japanese-American program was implemented by the military: the Emergency Detention Act is to be implemented by the civil authorities, although it is conceivable that the military might play a role in its implementation, *e.g.*, during wartime.

Article I, section 8 of the federal Constitution authorizes Congress to declare war, make rules for the governing of the armed forces, to provide for a militia to carry out federal laws and put down domestic insurrections and foreign invasions. Article I, section 9 provides for the suspension of the writ of habeas corpus "when in cases of Rebellion or Invasion the public safety may require it." In *Ex Parte Milligan*,[52] a habeas corpus proceeding was brought by a citizen, not a member of the military, who had been convicted and sentenced to death by a military commission. The Court held there that the war power rested on necessity, and that unless some great exigency existed, *e.g.*, invasion or rebellion

47. *Id.* at 302. See Dunbar, *Beyond Korematsu: The Emergency Detention Act of 1950*, 13 U. Pitt. L. Rev. 221, 226-27 (1952) (favorably comparing the Act with this statement from *Endo*, and asserting that the legislative findings contained in the Act are a more respectable basis for detention than Gen. De Witt's conclusions regarding the Japanese-Americans).

48. See Note, 51 Colum. L. Rev. 606, 654 n.448 (1951).

49. See Act § 102(a), 64 Stat. 1021 (1950), 50 U.S.C. § 812(a) (1951).

50. Act § 101, 64 Stat. 1019-21 (1950), 50 U.S.C. § 811 (1951).

51. Dunbar, *supra* note 47, at 223.

52. 71 U.S. (4 Wall.) 110 (1866).

that effectively nullified civil process, no citizen could be subjected to a military tribunal or martial law. Since the civil courts were not interrupted in their operation, the military commission was without jurisdiction to try the petitioner and his conviction was reversed. Whether the Japanese-American cases exceeded the *Milligan* Court's concept of the scope of the war power will not be discussed here. One writer has, however, criticized the *Endo* Court, viewing *Milligan* as deciding that it is "illegal to arrest and confine after an unwarranted military trial," and viewing the facts in *Endo* as arrest and confinement without any trial at all.[53] Regardless, the Japanese-American cases strongly indicate a judicial policy of non-interference with the legislative-executive judgment with respect to dangers to national security. If for no other reason, the Emergency Detention Act appears on firm ground.

II. The Constitutional Problems

The Act has never been passed upon by the courts. It will, most likely, be upheld as a valid exercise of the war power, at least in the sense of government's right of self-defense.[54] *Dennis v. United States*,[55] decided one year after the passage of the Act, impliedly supports the Act and the legislative findings from which it arose. In *Dennis*, convictions under the Smith Act were upheld, Chief Justice Vinson stating: "If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike . . . action by the Government is required."[56] This position was affirmed six years later in *Yates v. United States*.[57] But *Yates* emphasized that mere advocacy of overthrow of the government is not enough to warrant government action: in addition, there must be present an overt act or effort to effect the ends of such advocacy. Mr. Justice Frankfurter, concurring in *Dennis*, stated that with respect to Communist activities in the United States "there is ample justification for a legislative judgment that the conspiracy now before us is a substantial threat to national order and security."[58] The legislative findings and judgment behind the Act appear constitutionally acceptable, for the Court has indicated its approval of the closely parallel legislative findings[59] set forth in the Subversive Activities Control Act of 1950.[60] One of the most formidable constitutional issues that may be expected to be raised with respect to the Act will be the question of the Act's infringement upon the first amendment freedom of association.[61]

53. Rostow, *supra* note 37, at 527. See Report of Commission on Government Security 254 (1957).
54. *Cf.* notes 47, 48 *supra* and accompanying text.
55. 341 U.S. 494 (1951).
56. *Id.* at 509.
57. 354 U.S. 298 (1957).
58. 341 U.S. 494, 542 (1951).
59. See Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961) (dictum).
60. Subversive Activities Control Act of 1950 § 2, 64 Stat. 987-89, 50 U.S.C. § 781 (1951).
61. *Cf.* Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

Tocqueville observed: "There are no countries in which associations are more needed, to prevent the despotism of faction or the arbitrary power of a prince, than those which are democratically constituted."[62] The first amendment to the Constitution reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or of abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Although the right of association is not specifically mentioned in the Constitution, it is impliedly supported by the first amendment rights of assembly, petition and religion.[63] This freedom, like all others guaranteed by the Constitution, is not without restrictions, especially as pertains to the Communist Party.[64] More particularly:

> Although there is a fundamental general freedom of association, there is no constitutional freedom of subversive association. There is, however, a reflected right of subversive association which is of a subconstitutional order. This reflected right appears to exist only because the fundamental guarantees of liberty in the Constitution, especially due process and the freedom of speech and press and from self-incrimination, prevent the government from interfering arbitrarily with the members of subversive groups. The government may restrict or penalize the members of subversive associations, at least those which seek to overthrow the government, in any way it sees fit, subject only to the restrictions imposed on it by those fundamental constitutional guarantees. In dealing with subversive associations and their members, therefore, the government is not further restrained by the fundamental freedom of association. It must be remembered, however, that the fundamental guarantees of individual liberty which do inhibit the government in its dealings with subversive associations and their members work genuine and substantial restraints upon the exercise of official power. Often they are as effective in restricting the government as would be a fundamental freedom of subversive association.[65]

The preamble to the Emergency Detention Act does not regard the Communist Party as a political party in the sense as that term is understood in the United States.[66] It classifies the Party as a foreign controlled movement designed to overthrow the government of the United States, and its members as having repudiated their allegiance to the United States.[67] The mere advocacy of overthrow is protected by the Court's decision in *Yates*; but *Yates* and *Dennis* together clearly establish the right of the government to act in its own defense of the Communist objective.[68] The congressional findings of necessity for the

62. 1 De Tocqueville, Democracy in America 197 (Reeve transl. 1904).
63. Rice, Freedom of Association 36 (1962).
64. See generally *id.* at 137-75.
65. *Id.* at 177. (Footnotes omitted.)
66. Act § 101(6), 64 Stat. 1019-20, 50 U.S.C. § 811(6) (1951).
67. Act § 101, 64 Stat. 1019-1021, 50 U.S.C. § 811 (1951).
68. See notes 55-59 *supra* and accompanying text.

Emergency Detention Act seem to be sound in light of the factual and legal precedent of the Japanese-American cases, and the implications of the decision in *Communist Party v. Subversive Activities Control Board*,[69] indicating the Court's approval of the legislative findings behind the Subversive Activities Control Act of 1950.[70]

However, the situation is not without voices of objection. John Lord O'Brian, for example, while realizing the need for security measures, deplores a trend of government encroachment upon individual liberty, *e.g.*, the establishment of guilt by association; the conferring on administrative officials the right to investigate and pass upon the character of opinions of individuals and their rights under the first and fourteenth amendments; adjudging men untrustworthy because of their ideas and motives or because of suspicion with regard to future conduct; the use of the Attorney General's list in determining qualifications for employment; the use of secret information by anonymous accusers; the denial of the right of cross-examination to those accused; supervision and limitation of freedom of travel by citizens; the participation of military officials in decisions affecting the guarantees of the Bill of Rights; the interference with the right of citizens to work in defense plants or on American ships; and the establishment of security officers and of hearing panels in all governmental agencies drawn exclusively from governmental personnel and operating without any central supervision or determination of uniform procedures.[71]

In effect, the government permits participation in the Communist Party and other subversive organizations. But, at the same time, it takes the position that because of the legislatively-found Communist objective of overthrow of the government, such participation constitutes a real threat to national security. Therefore, the government will preclude such participants from governmental and related employment, etc., and given the proper circumstances, will cause them to be detained in the name of national security. The presumption is that such individuals are, or are likely to be, dangerous to the objective of national security. There can be no doubt that this situation imposes direct obstacles upon any freedom to associate in a subversively oriented organization, and *de facto* does establish guilt by association.[72] Yet, the freedom to associate remains. And, where an expressly-mentioned first amendment freedom, *e.g.*, free speech, can be restricted in the face of a clear and present danger,[73] it is not difficult to comprehend the implied first amendment freedom of association being restricted under similar circumstances.[74]

It has been advanced that no constitutional problems could arise under the Act if its provisions became operative during times when the writ of habeas

69. 367 U.S. 1 (1961).
70. See notes 59-60 *supra* and accompanying text.
71. O'Brian, National Security and Individual Freedom 46-48 (1955).
72. *Cf.* Adler v. Board of Educ., 342 U.S. 485 (1952).
73. See Schenck v. United States, 249 U.S. 47 (1919). *Cf.* American Communications Ass'n v. Douds, 339 U.S. 382 (1950); Abrams v. United States, 250 U.S. 616 (1919).
74. Act § 101(11), (12), 64 Stat. 1020 (1950), 50 U.S.C. § 811(11), (12) (1951).

corpus could be suspended, and if the Act provided for such suspension, for then both citizens and aliens could be detained.[75] This raises the underlying question of what is the nature of the internal security emergency whereby the Act takes effect. Three alternative situations will warrant the declaration of the emergency.[76] A declaration of war by Congress taken together with the congressionally found Communist threat to national security would seem to provide ample basis for the suspension of the writ. Any constitutional barriers which might obstruct the Act's effective operation could foreseeably be remedied by the mere suspension of the writ by Congress upon the declaration of war. The findings of danger to public safety embodied in the Act would provide the basis for the suspension. The procedures and administrative directions of the Act would provide the means whereby the danger could rapidly and effectively be coped with. In this situation, certainly the carefully considered provision of the Act coupled with the running files of the Attorney General with respect to security risks, compares favorably with a snap Executive judgment implemented by the military, as was the situation in the Japanese-American cases.

An invasion of the United States would again logically seem suited to suspension of the writ, for a greater incident of war cannot be conceived. However, the invasion would have to endanger public safety and be of such connection with the legislative purpose of the Act as to warrant suspension thereunder.[77] This same limitation would apply equally to the third alternative, "insurrection within the United States in aid of a foreign enemy."

The probable explanation for the retention of the privilege of the writ in these situations, which seemingly lend themselves to the writ's suspension is that the Act is designed to cover situations which are threatening to national security, but which fall short of the factual bases of situations in which the Court has refused to interfere with the writ's suspension, *e.g.*, the Japanese threat to the west coast during World War II. It must be observed that in the Japanese-American situation, the danger confronted a portion only of the United States, and the danger was readily ascertainable and susceptible of regulation. The present danger affects the whole of the United States, is more subtle and hidden in its machinations, and is thus not readily ascertainable and susceptible of reasonable regulation. The Communist threat, even in peacetime, poses a more complex problem from the standpoint of national security safeguards than did the resident Japanese threat during wartime. The problem, therefore, submits to a more complex solution, but the constitutional bases for the solution are not clearly ascertainable.[78]

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75. Note, 51 Colum. L. Rev. 606, 652-53 (1951) (raising query as to whether Emergency Detention Act can be constitutional in absence of martial law and without suspension of writ of habeas corpus).

76. See note 8 *supra* and accompanying text.

77. U.S. Const. art. 1, § 9 (writ of habeas corpus may be suspended when "the public safety may require it").

78. See Note, 51 Colum. L. Rev. 606, 654-55 (1951); Dunbar, *supra* note 47, at 222 (asserting that Japanese-American cases afford no clear precedent on the detention issue).

Should the detention aspects of the Emergency Detention Act be ruled unconstitutional by the Court as an unwarranted employment of the war power, *e.g.*, in the absence of martial law and the suspension of the writ of habeas corpus, the situations which give rise to the internal security emergency seemingly could be made the basis of a legislative-executive judgment suspending the writ, thus saving the effectiveness of the Act. As previously noted,[79] it is doubtful that the Court would interfere with that legislative judgment viewing past history, especially the reluctance of the Court to interfere with such judgments in *Hirabayashi*, *Korematsu* and *Endo*.

Procedural Considerations

Weak from the standpoint of both the fifth and sixth amendments is the fact that the detainee *de facto* has the burden of establishing his innocence. He is detained by virtue of the reasonably grounded belief of the Attorney General. He is subjected to an administrative proceeding which, with serious shortcomings, attempts to approximate standard criminal procedure.[80] He is allowed to present evidence in his behalf, but in many conceivable instances this will amount to no more than the opportunity to present self-testimony, since the Attorney General may withhold evidence. His ability to compel witnesses to testify in his behalf could well be impaired by the fact that his place of detention might be far removed from his place of residence. This would make attendance of witnesses costly and impracticable, considering the mass of cases that will necessarily arise at once upon the declaration of the internal security emergency.[81]

Since the Administrative Procedure Act governs the proceeding, presumably the test of substantial evidence rather than the test of reasonable doubt will be the measure.[82] The hearing officer is permitted to consider secret evidence. Even though the Act provides the detainee with the right to cross-examine witnesses against him, such right would necessarily be denied and limited by admitting such secret evidence. The discretion of the hearing officer with respect to the evidence he entertains is wide. He may consider:

> (1) Whether such person [detainee] has knowledge of or has received or given instructions or assignment in the espionage, counterespionage, or sabotage service or procedures of a government or political party of a foreign country, or in the espionage, counterespionage or sabotage service or procedures of the Communist Party of the United States . . . and whether such knowledge, instruction or assignment has been acquired or given by reason of civilian, military or police service with the United States Government, the governments of the several States

79. See note 51 *supra* and accompanying text.
80. See notes 9-16 *supra* and accompanying text.
81. See Note, 51 Colum. L. Rev. 606, 646 n.380 (1951) (fourteen thousand Communists earmarked by Attorney General for detention under the Act, and abandoned military camps being readied for detention centers).
82. *Cf.* Act § 104(d), 64 Stat. 1022-23 (1950), 50 U.S.C. § 814(d) (1951): "If from the evidence it appears to the preliminary hearing officer that there is probable cause . . . ."

> . . . or whether such knowledge has been acquired solely by reason of academic or personal interest not under the supervision of or in preparation for service with the government of a foreign country or a foreign political party, or whether, by reason of employment at any time by the Department of Justice or the Central Intelligence Agency, such person has made full written disclosure of such knowledge or instruction to officials within those agencies and such disclosure has been made a record in the files of the agency concerned;
>
> (2) Any past act or acts of espionage or sabotage committed by such person, or any past participation by such person in any attempt or conspiracy to commit an act of espionage or sabotage against the United States, any agency or instrumentality thereof, or any public or private national defense facility within the United States.
>
> (3) Activity in the espionage or sabotage operations of, or the holding at any time after January 1, 1949, of membership in the Communist Party of the United States or any other organization or political party which seeks to overthrow or destroy by force and violence the Government of the United States or any of its political subdivisions and the substitution therefore of a totalitarian dictatorship controlled by a foreign government.[83]

What is sought to be proved by these provisions is fleeting and elusive by criminal standards; it is not a fact of an act done but a fact of what might be done. The sought after conclusion is necessarily conjectural: it can only be proved by circumstantial evidence, some of which may be kept secret in the interest of national security.

Due process objections to the Act construed as a criminal statute are many. Because of the fact that the Attorney General can withhold evidence when he deems the same to be in the national interest, the detainee conceivably might be unable to present a defense. He might be unable to test his accusers by cross-examination, and consequently be unable to offer rebuttal evidence. He might stand accused by both hearsay and secret evidence—which enter into the hearing officer's determination.

Basic to a criminal statute is that it must be specific and precisely define the act which it prohibits so that the nature of the conduct proscribed can be ascertained.[84] The legislative intent here is plain: prevention of espionage and sabotage. However, the inarticulate proscription of conduct could well be argued to violate due process for vagueness, should the Act be construed as a criminal statute.

Akin to the essence of Public Law No. 503 in the Japanese cases, the Emergency Detention Act provides for a fine of not more than $10,000 or imprisonment for not more than ten years, or both, for persons who attempt to evade confinement under the Act.[85] Similar penalty is provided for persons who

83. Act § 109(h), 64 Stat. 1026-27 (1950), 50 U.S.C. § 819(h) (1951).

84. See United States v. Cohen Grocery Co., 255 U.S. 81, 89 (1921): "It leaves open . . . the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against."

85. Act § 112, 64 Stat. 1029-30 (1950), 50 U.S.C. § 822 (1951).

knowingly aid in such evasion.[86] Anyone who willfully resists or interferes with Detention Board members or agents in the performance of the Board's duties shall be subject to a fine of not more than $5,000 or imprisonment for not more than one year or both.[87] These provisions have been asserted as rendering the Act a criminal statute;[88] but this same commentator feels that, in light of the Japanese cases, the Act will be upheld not as a criminal statute but as an exercise of the war power:

> It is only as a law dealing with espionage and sabotage and not with free thought or speech that the Act is at all compatible with American conceptions of justice. Yet we must anticipate, with regret but probable certainty, that its enforcement will inevitably weaken that popular confidence in the inviolate character under law of individual rights which is the ground from which has grown the free, varied and rich expression of thought in America.[89]

The ultimate question is whether, without suspension of the writ of habeas corpus, or without a state of martial law, the Act is a valid exercise of the war power. An affirmative determination of that issue will apparently overcome any constitutional objections, for as the Court in *Hirabayashi* stated: "If it was an appropriate exercise of the war power its validity is not impaired because it has restricted the citizen's liberty."[90]

III. Conclusion

The Act provides a critically necessary reason for the measures it contains: a highly organized militant and subversive agency within the United States which threatens the very bulwarks of our national security. The Communist threat cannot be discounted as conjectural. Governmental investigation of that threat has caused the imposition of severe restrictions upon the Communist Party and its members. The threat has been judicially recognized and the courts have indicated a strong reluctance to interfere with restrictive legislative measures in the face of strong constitutional objections.

The right of the government to protect itself against subversive elements threatening its existence is basic. Detention of suspected security risks is an established method of governmental self-defense during wartime. The present state of world affairs in which the United States is so vitally engaged has been appropriately termed the "cold war." Billions of dollars are spent annually by this nation for national defense. Large standing armies are maintained. The brink of "hot war" has been dangerously approached several times in the last few years. The Emergency Detention Act of 1950 was enacted in the wake of the commencement of a "hot war" in Korea. It is submitted that the state of affairs as have historically developed the modern "cold war" is appropriate to

86. Act § 113, 64 Stat. 1030 (1950), 50 U.S.C. § 823 (1951).
87. Act § 114, 64 Stat. 1030 (1951), 50 U.S.C. § 824 (1951).
88. See Dunbar, *supra* note 47, at 221-22.
89. *Id.* at 231.
90. 320 U.S. 81, 89 (1943).

the imposition of detention measures when urgency demands. It is submitted further that in light of this "cold war" situation, the threat to national security posed by subversive organizations and the requirements of the Act which determine an internal security emergency (all aspects of a "hot war" situation), the detention proscribed by the Act will be judicially approved regardless of constitutional objection raised; this especially considering the many defensive steps the government has successfully taken in other pieces of legislation, *e.g.*, the Smith Act and the Subversive Activities Control Act.

The Act may well be shocking to the conscience of a democratically-oriented people. By the standards of a criminal statute, the Act would seem doomed to fall. But in light of the dangers of the times, and the precedent of the Japanese-American cases of the last world war, the Emergency Detention Act of 1950 seems a valid exercise of the war power, as a self-protective, national defense measure.

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