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THE DETENTION OF INSURRECTIONISTS: A TIME TO RECONSIDER

by

William J. Flittie

This Article cannot be more than a preliminary statement. It is hoped it will provoke investigation into the possibilities for containing revolutionary insurrections aimed at overthrowing the Government.\(^1\)

The threat of revolution, while in no sense immediately impending in the United States, is a problem that is current and serious. The hard truth is that it can happen here, and the conditions which would cause it could develop quite suddenly. Consider the implications of the riots, gunfights, bombings, political kidnappings, and even murders which are daily fare in our newspapers. Are we equipped to deal with the next escalation, active insurrection, if it is in our future? Much is at stake. If we are not ready, how do those of us who mean to preserve this Government best prepare ourselves to do it? It will not be done by the wringing of hands and hoping for the best, of that one can be sure.

From my reading of history I conclude that, were one a plotter of insurrection he could have no fonder hope than that his intended victims had not prepared themselves in advance with carefully thought through means to deal with his ilk. Such a posture necessitates hasty improvisations. These responses may be inadequate to contain a revolution. More likely they will be grossly excessive repressions that will so shame and discredit their authors that the revolutionary cause is advanced even as it is defeated for the moment. That result is not necessary. Preventive detention measures, coolly and deliberately thought through, can be constructed to prevent either eventuality. But we do not have them now. The Emergency Detention Act of 1950, our only statute designed to deal with detention on a non-criminal basis, was a most inadequate law, and it has now been repealed.\(^2\)

\(^1\) The idea of citizen detentions is apt to arouse emotional response in many people as being incompatible with constitutional liberties. This happens not to be the case, a matter hereafter discussed in terms of the Japanese-American detentions of World War II. Beyond these, consider that contempt-of-court detentions are accepted means for enforcing legal obligations such as alimony and child support. Even more stringent, to ensure their presence to testify at criminal trials virtually all American jurisdictions permit jailing of material witnesses if they cannot make bond to guarantee attendance. 58 AM. JUR. WITNESSES § 10 (1948). A recent case from a liberal jurisdiction upholding witness detention is People ex rel. Van Der Beek v. McCloskey, 18 App. Div. 2d 205, 238 N.Y.S.2d 676 (1963). Finally, people who are violently insane are detained, in good part for the protection of the rest of us. The parallel here with supporters of insurrection who would overthrow the Government supported by their fellow citizens is rather plain.

Without an adequate law the treatment accorded our Japanese-American fellow citizens in World War II suggests the callousness to be anticipated from essentially decent men when, suddenly and unprepared, they are confronted with what they believe is a threat to their very existences.

I. THE EMERGENCY DETENTION ACT OF 1950

This statute, adopted contemporaneously with American involvement in the Korean War, contained a fundamental defect which rendered it useless, or required a false application for it to be available in the type of insurrectionary situations presently most likely to occur. It could be implemented by the President only in the event of invasion, declaration of war, or domestic insurrection in aid of a foreign enemy. The limitation was made all the more positive by concentrating the congressionally declared statutory purpose upon the threat posed by traitorous allegiances to foreign communist dictatorships. Not for a moment to deny the very real and perennial threat of international communism, and recognizing, too, that communists rarely miss any opportunity to fish troubled waters, a realistic observer of the contemporary scene still is compelled to the view that the most serious current threat is from the so-called New Left, an indigenous phenomenon now apparently bent on adopting the tactics of the Middle Eastern and Latin American terrorist organizations, and the reactions to it which can be triggered if its actions become aggressive enough to draw them. The same might be true of the violence prone elements which, by persuasion and coercion, seek to assume leadership of the large Negro and Latin racial minorities and league with the New Left, though these presently are quiescent.

Another serious defect of this Act was that it lacked subtlety. In current and foreseeable contexts it seems unlikely that the “crazies” of the several extant revolutionary organizations have the power to accomplish their ends. But they can, and well may in a rising tide of frustration and violence, trigger a reaction which could end American democracy. Though the pattern would be considerably different (one does not learn from history by seeking perfect identity), it still would in essence be a repetition of what happened to the between-the-wars Weimar Republic of Germany. When the middle ground erodes away, ordinary and decent people can be forced to choose between dictatorships of the right and left. The Germans chose to the Japanese-American detentions of World War II, hereafter considered. If the emergency need arises, one may expect again ad hoc executive responses, without guidelines to follow and thus the constant danger of unnecessarily forceful repression.


Id. §§ 101, 109(h), 64 Stat. 1019, 1026.

While the New Left extremists seem to have adopted a low profile recently, it is much too soon to forget their dedication to violence as exhibited in various bombings and militant demonstrations on college campuses in recent years. Newly appointed Attorney General Saxbe discussed this subject in an interview reported verbatim in U.S. News & World Report, Feb. 4, 1974, at 25.

For those who insist on indulging an assumption “it can't happen here” because America somehow is different, please recall that as recently as 1964 most Americans applauded the military dictatorship that seized power in Brazil as an alternative to the communist dictatorship that threatened. In so doing they were making a
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Hitler over communism with tragic consequences—though this is not to suggest that the world necessarily suffered more thereby than it would have suffered had the decision gone the other way. It was a horrible alternative that events forced upon the German people.

Thus, it would be well to have a statute that could be used to quell serious insurrectionary activities, even though themselves unlikely to succeed, when it becomes evident their consequences are recruiting a reaction of even more dangerous proportions. Certainly no special regard is owed revolutionists whose only virtue is that they lack power. The test for our society lies in weighing the impact of suppressing them upon the maintenance of our democratic institutions. In effect, this means weighing the beneficial and destructive aspects of suppression at particular points of time, a test that is by no means constant but shifts according to how badly deteriorated the political situation has become.

The structure of the Act itself merits these additional criticisms:

1. Apprehensions for detention were pursuant to the issuance of individual warrants. Such a cumbersome procedure is wholly inadequate for dealing with insurrectionary activities verging on warfare unless sets of warrants are maintained and updated in about the same manner as the military forces maintain war contingency plans. This, I am reasonably confident, no friend of a free society would wish.

2. The standards for sheltering detainees from mistreatment and economic loss were very inadequate.

3. The hearing procedure lacked expedition. It consisted, after apprehension, of an initial formal hearing before a hearing officer. If detention was ordered, review by a panel of the Detention Review Board (created by the Act for the purpose) was had after a petition seeking review was filed, the review to be, in effect, a de novo hearing.

4. The standard for decision was reasonable grounds to believe a person will engage in espionage or sabotage. This patently fails to cover many types of dangerous insurrectionary activity.

5. Court review by the courts of appeal was provided, with the review standard the administrative law's substantial evidence rule. Both in terms of the speed of dispositions and levels of certainty of involve-

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8 The Canadian procedure dispenses with warrants. See note 43 infra.
9 Act of Sept. 23, 1950, ch. 1024, § 104(c), 64 Stat. 1022, provides for physical care as determined necessary by the Attorney General. Id. § 104(g), 64 Stat. 1023, provides that detainees cannot be forced to do labor or be confined as criminals. Bi-monthly reports of actions taken to the President and Congress are required by id. § 104(h), 64 Stat. 1023, and id. § 109(a)(4), 64 Stat. 1025, permits indemnity for loss of income, but only if a detention has been ordered without reasonable grounds.
10 Id. § 104(d), 64 Stat. 1022.
11 Id. § 109(b), 64 Stat. 1025.
12 Id. §§ 105-09, 64 Stat. 1023.
13 Id. § 109(1), 64 Stat. 1027.
14 Id. § 111, 64 Stat. 1028.
ment, better standards than those of the administrative law might have been established.

6. The penalty for knowingly evading detention was set as high as a fine of ten thousand dollars or ten years imprisonment, or both.\textsuperscript{15} This misapprehends the reasons underlying the statute. Detainees are not criminals. (Presumably those against whom criminal charges could be brought would be prosecuted rather than merely detained.) Much lesser penalties, such as a sentence of one year, would seem entirely adequate, and far more likely to enlist the aid of the general citizenry in effecting apprehensions. The only real justification for detentions is to get dangerous individuals out of circulation during a critical period.

7. The writ of habeas corpus was not suspended.\textsuperscript{16} The United States Constitution expressly provides for suspension of the great writ in the face of insurrection.\textsuperscript{17} The ancient wisdom of the founders of this nation seems preferable to any present day sentimentality concerning habeas corpus when the matter is so serious a one as choking off revolution.

II. LEGAL BASES FOR SUPPRESSING INSURRECTIONISTS

A. Criminal Process

Apart from a few intellectual leaders of the Marcuse stamp, it is not often possible to be an active insurrectionist without violating some criminal laws. When, within the proof requirements that must be met for convictions, such activities can be proved, the perpetrators can and should be held to answer as criminals. In this vein it is to be noted that the Civil Disobedience Act of 1968\textsuperscript{18} provides rather severe punishments for persons who teach the use of, or use firearms and explosives in violent activities, crossing state lines to do so.

But there are grave defects in relying on the conventional criminal law to control emergency situations. First, unless the criminal statutes are abused by implementing their processes despite the fact that it is known the charges cannot be proved, the most sophisticated and dangerous plotters will go unreached for about the same reason the leadership of that criminal government within a government, the Mafia, has proved usually unreachable. It

\textsuperscript{15} Id. \S 112, 64 Stat. 1029.

\textsuperscript{16} Id. \S 116, 64 Stat. 1030.

\textsuperscript{17} "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, \S 9. Whether the President may himself suspend the writ is unclear. \textit{Ex parte Merryman}, 17 F. Cas. 144 (No. 9,487) (C.C. Md. 1861). The clash between President Lincoln and Chief Justice Taney over this issue is described in Martin, \textit{When Lincoln Suspended Habeas Corpus}, 60 A.B.A.J. 99 (1974). In any event, it seems clear that Congress may delegate authority to the President to make suspensions, which need not be general but may be directed at defined groups of persons. \textit{Ex parte Milligan}, 71 U.S. (4 Wall.) 2 (1866). Also, suspension of the writ does not prevent judicial testing of the legality of particular actions by other remedial devices of the law. Griffin v. Wilcox, 21 Ind. 370 (1863).

\textsuperscript{18} 18 U.S.C. \S\S 231-33 (1971).
simply is exceedingly difficult to prove cases against men who provide the brains while other men, often several times removed, provide the hands. This is particularly true when the security of the chain of command is reinforced by what amounts to sacred oaths not to inform.

Secondly, and of even greater import, is the slowness of criminal enforcement. This, coupled with the liberality of bail bond procedures, is a matter which Chief Justice Burger considers the great barrier to efficient criminal law enforcement. In insurrectionary situations the time element is even more pressing. Criminal prosecutions should be had in addition to detentions where crimes can be proved, but it should be recognized that these are inadequate to control determined insurrectionists when their movements attain power and momentum beyond the stage of a police problem, yet still are in an incipient stage.

B. Martial Law

Martial law, where it can be applied, will permit severe mass population controls such as curfews, area restrictions and the like, although in proceedings against particular individuals the necessity of proving charges remains. Martial law would be operative in situations of large scale civil war. To what extent is it available in situations of incipient insurrection?

The ruling case comes from our Civil War, one of history's greatest insurrections. Styled Ex parte Milligan, it involved an attempt to execute, after conviction by martial law, a civilian "copperhead" residing in Indiana, at a distance from any actual military conflicts. A minority of four justices contended for a larger scope of martial law jurisdiction in times of insurrection and public danger, but the five-justice majority strictly limited domestic martial law applications to situations of invasion or insurrection, where the courts are actually closed and incapable of administering the criminal laws. (With considerable delicacy the tenor of the opinion also hints there could have been no purpose in setting aside the usual criminal processes in the particular case except to accomplish results different from what would have been attained in the civilian court system.) The clash of viewpoints in this close decision has not been squarely tested since, but dicta in the World War II case of Duncan v. Kahanamoku makes it quite evident the more restrictive majority view enjoys overwhelming favor, making it most unlikely that the precedent of Milligan could be overturned.

Often overlooked in Milligan is a statement that, on analysis, very clearly would have been supported by all nine justices, to the effect that the military can aid in an emergency by apprehending insurrectionists even though un-

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20 71 U.S. (4 Wall.) 2 (1866).
21 Id. at 142.
22 Id. at 127.
23 327 U.S. 304 (1946). This case involved an attempt to supersede with martial law normal criminal functions of the federal district courts. There was no combat near the Hawaiian area at the time though Hawaii was a most important base for operations against the Japanese forces. The square issue was avoided by interpreting a pertinent statute as not intended to authorize martial law jurisdiction in the manner asserted.
able to try them under less than near-battlefield conditions. In short, Milligan's apprehension by the Army was legal. But the main purpose of the military is war, or the preparation for it. It will be well to hold military men rather closely to their service. The soldier is not law trained except by happenstance. When he is, he surely will be outranked by superiors who are not. His tendency, consistent with his function, is to subordinate all he can subject to his control to the goal of military victory. This is not mere surmise. The dominant role played by the military in the Japanese-American detentions of World War II, next considered, is a recent object lesson for keeping the military as far as possible from citizen civilians. Also, this miserable record is a lesson that elected officials, particularly presidents, must not be allowed to shirk distasteful obligations by the expedient of delegating the dirty work to others, such as military officers, who are not vulnerable to the restraints of the elective political processes.

C. The Japanese-Americans in World War II

If the reader to this point has wondered if there are strong precedents on which to rest detention procedures, the answer, stemming from the Japanese-American experiences in World War II, must be an emphatic yes.

The treatment during World War II accorded approximately 70,000 fellow Americans who happened to be of Japanese ancestry has been elaborately researched and reported in a trilogy of books published under the auspices of the University of California. In these three volumes can be examined in great detail one of the least attractive episodes of our national history. It should be an example of how not to do it if ever again it becomes necessary to detain citizens deemed dangerous to the existence of the rest of us. At the same time, because the operative facts underlying the court tests generated were so distasteful, and were so recognized by the Supreme Court Justices, there resulted a "hard case" test which should be of unusual reliability in measuring the extent of power to deal on a non-criminal basis with population elements reasonable men could evaluate as infested with state enemies.

Just how harsh was this treatment may be gathered from the following brief statement: On the day of the Pearl Harbor attack, December 7, 1941, our Japanese-American fellow citizens were an unknown quantity. Possessed of dual citizenship, many engaged in religious observances which contained elements of worship of the emperor—ruler of the Japanese enemy which had treacherously attacked our forces. It is quite understandable they were viewed with apprehension. Yet, in the days and weeks which followed hard upon the initial attack, surely most critical of all, no acts of sabotage or espionage occurred. A Justice Department roundup of suspect Japanese aliens, conducted from December 7, 1941, into February 1942, produced no hard evidence any sabotage or espionage was planned by mem-

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24 71 U.S. (4 Wall.) at 125.
bers of the Japanese racial community. Neither on the West Coast nor in Hawaii (where persons of Japanese ancestry, the dominant population element, never were placed in detainee status) did hazards of substance beyond men's imaginings develop. Despite this, in a Kafka-like sequence when the real danger was past, beginning with February 19, 1942, governmental machinery was set in motion which resulted in virtually all West Coast residents of Japanese blood—citizen and alien alike—men, women, and smallest children—being placed behind wire under military guard in bleak desert detention camps. There most remained until the war was nearly over.\textsuperscript{26}

Three important cases dealt with these events: the 1943 decision of \textit{Hirabayashi v. United States},\textsuperscript{27} and the two 1944 decisions of \textit{Korematsu v. United States}\textsuperscript{28} and \textit{Ex parte Endo},\textsuperscript{29} these latter being decided the same day. All of these cases involved American citizens. The factual context was as follows. On February 19, 1942, seventy-four days after Pearl Harbor, President Roosevelt promulgated Executive Order No. 9066\textsuperscript{30} authorizing the Secretary of War, or military commanders designated by him, to prescribe military areas and restrict the right of persons to enter, remain in, or leave such areas. To perform these functions for the western United States, the Secretary designated the general commanding the Western Defense Command. That general, by March 16, had designated the whole Pacific coastal region (in which lived most persons of Japanese race who resided in the continental United States) as Military Area No. 1, a zone for maximum precautions. On March 18 the President, by another executive order, established a civilian relocation board to handle population relocations contemplated. With this background before it, along with abundant other information that the target population was persons of Japanese ancestry, the Congress then enacted Public Law 503\textsuperscript{31} providing criminal penalties for violations of orders issued pursuant to the authority of Executive Order No. 9066. Three days later the general commanding imposed a curfew in Military Area No. 1 on German and Italian aliens, and on all persons of Japanese ancestry including American citizens. Then commenced the issuance of a series of exclusion orders, each affecting a part of Military Area No. 1, applicable only to citizens and aliens of Japanese ancestry. These orders were intended progressively to accomplish their removal from Military Area No. 1. Actual physical departure was forbidden, however, until it could be accomplished in a systematic and orderly manner. In the meantime periodic reporting of whereabouts was required.\textsuperscript{32} Actual removals involved reporting to designated assembly points, from whence these persons were transported under military guard to central camps, there to be held under guard indefinitely, until and unless released conditionally or un-

\begin{itemize}
\item \textsuperscript{26} TENBROEK 99-184.
\item \textsuperscript{27} 320 U.S. 81 (1943).
\item \textsuperscript{28} 323 U.S. 214 (1944).
\item \textsuperscript{29} 323 U.S. 283 (1944).
\item \textsuperscript{30} 3 C.F.R. 1092 (1942).
\item \textsuperscript{32} 320 U.S. at 83-91.
\end{itemize}
conditionally. Five days notice to put their business affairs in order was all that was given prior to actual removals and only the most Spartan personal effects were allowed to be taken. No significant custodial role for property left behind was undertaken by the Government. Assembly was completed by June 6, 1942, and lodgement in the camps by November 1, 1942. Most persons affected remained in the camps until December 1944, when the order pursuant to which they were held was revoked.

Hirabayashi, the first case, involved a willful curfew violation. Korematsu involved the defiance of an exclusion order by deliberately remaining in Military Area No. 1 after actual removal had been ordered and, for all but recalcitrants, effected. Endo was a habeas corpus proceeding testing detention in the camps despite the fact that Endo's personal loyalty to the United States was conceded by the Government. The United States lost only the last case, prevailing without dissent in Hirabayashi and by a 5-3 court division in Korematsu. In this division, however, only the dissent of Justice Murphy questions the fundamental authority of the United States severely to restrain citizens in circumstances of emergency such as were there involved. The net effect is that there exists no discernible cleavage in these cases between the liberal activist faction of the Court and the Justices of a more conservative and traditional bent. These varying attitudes thus are a neutral factor in predicting future Court treatment of detentions where reasonable grounds exist.

Hirabayashi, authored by Chief Justice Stone, exhibits some preliminary difficulty with the fact the presidential proclamation preceded the congressional enactment setting penalties for its violation, but reached the conclusion Congress had "ratified and affirmed" the President's action, thereby avoiding problems as to where the basic constitutional power to detain resides.

Then, going to the very heart of the problem, Chief Justice Stone stated:

Whatever views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry, we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with . . . .
Concurring, Justice Douglas, a leading Court civil libertarian activist, took a position which seems even stronger:

We cannot possibly know all the facts which lay behind the decision. Some of them may have been as intangible and as imponderable as the factors which influence personal or business decisions in daily life . . . .

. . . Nor are we warranted where national survival is at stake in insisting that these orders should not have been applied to anyone without some evidence of his disloyalty. . . . [W]here the peril is great and the time is short, temporary treatment on a group basis may be the only practicable expedient whatever the ultimate percentage of those who are detained for cause.\(^{38}\)

Justice Black, another Court liberal, authored the majority opinion in Korematsu. He engaged in a preliminary quibble as to whether he was dealing with exclusion or detention, but this quibble surely evaporates in the face of language as strong as "the power to protect must be commensurate with the threatened danger,"\(^{39}\) and

[Korematsu] was excluded because we are at war . . . , because the . . . military authorities feared an invasion . . . and felt constrained to take proper security measures . . . . [T]he need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.\(^{40}\)

Justice Douglas, writer of the opinion in Ex parte Endo, avoided the constitutional issues of detention by interpreting the combination of Executive Order No. 9066 with Public Law 503 to mean that detention of an admittedly loyal citizen never was authorized. In order that there could be no misunderstanding of the Court's position, however, his opinion pointedly declares:

We do not mean to imply that detention in connection with no phase of the evacuation program would be lawful . . . . Some such power might indeed be necessary to the successful operation of the evacuation program. At least we may so assume. Moreover, we may assume for the purposes of this case that initial detention in Relocation centers was authorized.\(^{41}\)

It can only be concluded that unless and until these opinions are overturned (and this seems most unlikely, particularly when it is reflected that the test can come only with the arrival of the emergency), detention of citizens is permissible as part of a reasonable program designed to control and cope with a grave national emergency. This being the case, it follows that a solemn personal determination by the President pursuant to an au-
theorizing act of Congress to the effect that insurrectionary activities in actual progress threaten the established national government, if supported by facts which would permit reasonable men to reach that conclusion even though others might differ, is an exercise of power the Supreme Court very plainly has found to reside in the national government.

At this point, too, a little common sense is in order. If the crisis of insurrection ever is allowed to descend upon us in circumstances where there is not a carefully developed plan for dealing with it, it is certainty that suppression will follow, and it will be attended by considerable mistreatment of those swept up as suspected insurrectionists. The behavior of some of our most prominent political liberals in the Japanese-American debacle makes this very predictable. Moreover, domestic insurrection looses the worst passions of all. Thus, in addition to being prudent, it very much reconciles with civilized behavior to chart the way now, before passions are aroused and while we are capable of dealing with it in cool blood. The failings of the common clay are more common in all of us than it is fashionable to admit.

III. SOME CONSIDERATIONS UNDERLYING THE DETENTION OF INSURRECTIONISTS

Any satisfactory legislation designed to curb insurrection must in great part be the product of original thought. Most of the experience of the past is ad hoc experience that was practically certain to, and did, produce deplorable results. But there are some areas profitably to be investigated. Here it is not possible to go beyond suggestion, for at this point a funded project becomes necessary.

1. Basic to the whole matter of detentions are the abilities of our police and security forces, on short notice, to identify and apprehend substantially all activists in any defined insurrectionary movement; then provide information which will make it possible to segregate out the really dangerous ones in order that the balance of those apprehended may be freed in a matter of a few days. It is pure surmise on my part, but as a matter of judgment I believe there is no insurrectionary movement now existing, or likely to exist, which cannot be broken if deprived of the presence of no more than a thousand persons—provided, of course, these are the right ones, and provided further the insurrection is caught at inception.

42 TENBROEK at 111-12, 172, 331, deals with President Franklin Roosevelt; at 83-84, 93, 203, 267-68 with Earl Warren, then Attorney General of California, later Governor of California and Chief Justice of the United States; at 85 with the comments of columnist Walter Lippman. It is not intended hereby to suggest that the performance on the conservative side was any better. It was not. What is intended is to demonstrate that no man, regardless of political bent, should be placed in a position of having to deal with people in time of crisis on an ad hoc basis if it can reasonably be avoided.

43 Perusal of 1970 FBI ANN. REP. 33-36 and 1971 FBI ANN. REP. 31-35, although they contain no figures, permits a common-sense evaluation. Consider, too, that in Canada the suppressed FLQ (Le Front de Liberation du Quebec) which, in October 1970, kidnapped as hostages British Trade Commissioner Cross and Quebec Labor
2. An extensive survey should be made to establish the existence and contents of foreign statutes and regulations for the detention of insurrectionists. Particular attention should be paid the existence of such laws in nations adhering to the Western political tradition which we share. There are such laws. Some have been implemented quite recently. Beyond this, where detentions actually have been made, the success or lack of success attained should be closely studied. It is as important to know why actions, in a degree, fail as why they succeed.

3. An effective program of initial apprehensions is certain to capture Minister LaPorte, murdering the latter, is estimated to have had only 130 active members organized in 22 cells plus 2,000 "conspiratorial sympathizers." N.Y. Times, Oct. 17, 1970, at 12, col. 1. Of course, hidden among the "conspiratorial sympathizers" may well have been some of the most dangerous leadership elements, while some of the active members may have been relatively harmless if shorn of leadership. This type of breakdown would be more meaningful, and probably could be developed if the situation were investigated at length.

4. To suppress the FLQ in Canada the Canadian Federal Government on October 16, 1970, implemented its War Measures Act, CAN. REV. STAT. c. W-2 (1970). This short and very broadly drawn statute authorizes arrest, detention, exclusion, and deportation in the event of proclaimed insurrection, real or apprehended. The implementation was accomplished through issued regulations which, in effect, made membership or acts in support of the FLQ into crimes punishable by up to five years imprisonment. This was done on what appears to be an ex post facto basis that would be constitutionally objectionable in this country, and no reason is apparent in the War Measures Act itself why the criminal structure needed to be followed. Arrest and search without warrant were authorized, with detentions of up to 21 days without filing of criminal charges permitted. N.Y. Times, Oct. 17, 1970, at 12, col. 1. The Canadian Government sustained severe criticism from its opposition for acting so harshly to deal with so small an insurrectionary movement. N.Y. Times, Nov. 1, 1970, at 15, col. 1. The War Measures Act thereupon was superseded by the Public Order (Temporary Measures) Act, 1970, 19 Eliz. 2, c. 2 (Can.), to be in effect until not later than April 30, 1971. This statute is structurally the enactment of the prior regulations, except that it is more narrowly aimed at the FLQ, and the maximum interval a person can be held without filing criminal charges is reduced to seven days. N.Y. Times, Nov. 3, 1970, at 1, col. 3.

By far the most pervasive recent law dealing with insurrection is the Northern Ireland (Emergency Provisions) Act 1973, c. 53, superseding the Civil Authorities (Special Powers) Act (Northern Ireland) 1922, 12 & 13 Geo. 5, c. 5. Addressed specifically to the recurring civil strife in Northern Ireland, the statute confers upon Her Majesty's forces on duty and local enforcement officials broad powers of arrest and detention. Upon suspicion of commission of acts of terrorism or other acts proscribed by the statute and without warrant or other authorization, any person may be stopped, questioned, searched, arrested and detained, all by whatever means necessary. Search of dwellings must be authorized by higher officials. Detention by British military forces is limited to four hours, but detention by local officials may be for as much as 72 hours, after which time detainees must be brought before a commissioner appointed by the Secretary of State for the purpose of reviewing the need for continued detention. Detention can thereafter continue indefinitely, subject to timely and proper review of the entire case. Appeal may be had to a specially created tribunal. As of October 21, 1973, 649 persons were detained pursuant to the Act. Letter from J.F.W. Judge of the British Attorney General's office to William J. Flittie, Oct. 31, 1973. Although this Act may well be offensive to the United States Constitution in its search and seizure provisions and its criminal as opposed to detention aspects, it nevertheless deserves study as an organized and rational response to a serious insurrection in a Western nation, the legal traditions of which are the very stem whence comes our American law.
some persons innocent of involvement, or at least it must be so assumed. It further must be assumed that some of these persons will continue in custody after initial processing by reason of human error, and the caution an emergency such as insurrection will arouse in many men. The prospect of apprehended persons voluntarily submitting themselves to polygraph testing and perhaps other scientific means of lie detection as a final step in the rapid processing procedures should be investigated. Detainees, of course, finally should be afforded regular hearing procedures, but these take time. If it is possible to winnow out a significant portion of those whose apprehension is erroneous prior to reaching this stage through use of scientific tests, this should be done.

In summary, careful inquiries are needed into the capabilities of the police and security forces to identify and classify insurrectionists, into the laws, regulations, and experiences of nations that have detention statutes, and into possible means for expediting the processing of apprehended persons so that the need to hold people for the intervals that will be required to complete formal hearing procedures will be reduced to the greatest extent possible.

IV. Points To Be Considered in Framing a Statute

At this stage only tentative conclusions are in order. With that admonition, these points are advanced as matters to be considered in framing a detention statute designed to reach domestic insurrectionists.

1. All types of insurrectionary activity should be covered.

2. The President should have the sole responsibility for defining the class

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45 In essence this problem reduces to whether the polygraph yields results of equal or better accuracy than the judgment of human fact finders. Its chief proponents, basing their conclusion on over 35,000 tests, say the percentage of known error is less than one percent, with about five percent of the tests rejected as too untrustworthy to analyze due to psychological or physiological impairment of the examinees. J. Reid & F. Inbau, Truth and Deception 234 (1966). A collection of papers presented at the University of Tennessee Symposium on the Polygraph also deals with the accuracy problem. 22 Tenn. L. Rev. 711-74 (1953). A leading commentator on the law of evidence has stated that the exclusion of the lie detector test results from trials is not justified. C. McCormick, Evidence § 207 (2d ed. E. Cleary 1972). Typical of polygraph criticisms is Skolnick, Scientific Theory and Scientific Evidence: An Analysis of Lie Detection, 70 Yale L.J. 694 (1961), which plays with statistics by varying assumptions of how many “guilty” are in the base of examinees to be tested to produce widely fluctuating results. This type of criticism does not fare well in the face of the real situation to be anticipated. Assume a group already processed by police file evidence contains 90 insurrectionists and 10 innocent persons. If all elect to be tested, and there is as much as a five percent error, it means that about five insurrectionists will be freed erroneously and one person innocent of involvement will be held erroneously. Such results are certainly tolerable from the standpoint of reducing inevitable error against the innocent to a minimum while at the same time so decimating the insurrectionist organization as to break its effectiveness. Most objection to the use of polygraph evidence arises in the context of proving criminal guilt, or establishing innocence. It must be conceded that were its use to become general, there would result a situation where defendants refusing the test would, in effect, be compelled by indirection to testify against themselves. Juries are not stupid. But in a noncriminal context this test (which can be given only to cooperative subjects) seems unobjectionable except from the standpoints of insurrectionists who do not wish their organizations broken, the sympathizers with insurrectionary ends, and that element among us which believes society must hope for the best but never take stringent action to suppress its would-be destroyers.
or classes of persons to be detained, and for ordering their apprehensions.

3. The President should be authorized to act only when (a) actual overt acts of violence have occurred and (b) in his judgment, a substantial direct or indirect threat to the security of the national government exists. His judgment also should be subject to reasonable and responsible checks by the legislative branch.

4. The administration of detentions should be in the hands of a commission, the membership of which is drawn from state governments, not the federal government, and the quality of which makes its actions certain to command the highest public confidence. The commission should not exist as an operating entity except when an emergency has been declared under which actual detentions are in progress. If there is any area where a continuing bureaucracy is not desired, this is it.

5. As is permitted by the Constitution, the writ of habeas corpus should be suspended in the case of suspected insurrectionists held for detention or detained. However, full legal testing of all issues arising out of these detentions through procedures such as declaratory judgment should be allowed to proceed in the courts.

6. Persons apprehended should be given every reasonable opportunity to establish non-involvement, including voluntary polygraph testing, in order that they not be held for and subjected to lengthy formal hearings where these can be avoided.

7. To be effective, apprehensions without warrants must be permitted. These are not criminal proceedings. They are emergency detentions. Not warrants, but reliable means for very rapidly processing persons apprehended are what are wanted.

8. Detainees must be made secure from physical mistreatment and economic loss arising from their detentions.

9. Detainees should be offered the options of detention under close control in the general areas of their residences, or detention with considerably more relaxed controls in distant parts of the country of their own choosing. In all detentions continued engagement in normal legitimate business and study activities should be permitted to the degree feasible.

10. Detainees and their dependents should not be subjected to reduced living standards, except possibly in the case of insurrectionists who happen to be persons of wealth.

11. Criminal penalties should be light, and limited to the offenses of escaping or willfully avoiding detention. The general public, and the family and friends of insurrectionists, will be far more cooperative in helping with apprehensions if the penalties are light. Again, remember that detainees are not criminals per se. The big objective is not to punish, but to get them out of circulation in a critical period. At the same time, it must be recognized we deal here with powerful political
motivations. This could result in very great force being required to apprehend some detainees. The actions of the police charged with effecting these apprehensions should be measured accordingly when issues of excessive use of force are raised.

V. CONCLUSION

Every rational man knows that serious insurrection is going to be strenuously resisted. If that resistance is ad hoc and unplanned, much avoidable mistreatment of fellow human beings will result. Some persons, including members of Congress, seem to prefer it that way. I do not. I do not think a majority of Americans who will consider the implications of being without a statutory plan of control will prefer unreadiness. If this be true, let us address ourselves to the preparation of a statute. One thing is very certain as this is written. As of now we are not ready.

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46 The repeal of the Emergency Detention Act of 1950 was effected, not for the purpose of substituting a better statute, but to wipe detention procedures from the national statutes. This effort was primarily led by Japanese-American members of Congress from Hawaii, and it is said to be rested in good part on their resentment against the Japanese-American detentions of World War II. N.Y. Times, March 19, 1971, at 32, col. 1. This was a tragically misguided effort. The Japanese-American debacle occurred because we did not have a statutory blueprint for dealing with the problem, for it is unthinkable that a statute, written without the press of crisis, would authorize anything like what was done then.