

St. John's Law Review

Volume 26
Number 1 *Volume 26, December 1951, Number*
1

Article 19

May 2013

New York State Defense Emergency Act of 1951

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

CURRENT LEGISLATION

NEW YORK STATE DEFENSE EMERGENCY ACT OF 1951¹

The framers of our Constitution were unaware that in a relatively short period of time that instrument would have to accommodate measures designed to perpetuate this nation through an era in which atomic annihilation could, in a matter of hours, be a reality.² Not only the manner of conducting, but indeed the manner of commencing war has been greatly altered with the years.³ Wars no longer follow a formal declaration; a nation may be plunged into war without forewarning.⁴ Because a sudden attack might come with devastating effect on the civilian population, Congress initiated a preparedness program by passing the "Federal Civil Defense Act of 1950."⁵ This Act declared that the "... responsibility for civil defense shall be vested primarily in the several States and their political subdivisions. . . ." ⁶ Pursuant to this declaration, New York State undertook a reconsideration of its Civil Defense Law of 1950.⁷ Governor Dewey, in his legislative message, pointed out the need for legislation: "The one thing of which we can be sure is that the devastation caused by any modern atomic bomb will require advance preparation of a kind never before undertaken any place in the world . . . only by spelling out in advance the things which would have to be done and the powers and duties of your State Government, could martial law be avoided in the terrible event of such destruction of life and property. . . ." The legislature passed the "New York State Defense Emergency Act of 1951"⁸ amidst a storm of protest.⁹

¹ Laws of N. Y. 1951, c. 784, as amended, Laws of N. Y. 1951, c. 785, 786, repealing N. Y. EXEC. LAW Art. XVI.

² N. Y. Times, Oct. 4, 1951, p. 1, col. 8 (second atomic blast by Soviet revealed); see *Toyosaburo Korematsu v. United States*, 140 F. 2d 289, 296 (9th Cir. 1943).

³ See N. Y. Times, Aug. 7, 1945, p. 1, col. 8 (first atomic bomb dropped on Japan); N. Y. Times, Feb. 1, 1950, p. 1, col. 8 (President orders hydrogen bomb built).

⁴ N. Y. Times, Dec. 8, 1941, p. 1, col. 8. See also Wright, *When Does War Exist?*, 26 AM. J. INT'L L. 362 (1932); cf. *United States v. Rappoport*, 36 F. Supp. 915 (S. D. N. Y.), *aff'd*, 120 F. 2d 236 (2d Cir. 1941) (by implication); *United States v. Cornell*, 36 F. Supp. 81 (D. Idaho 1940) (by implication); Freeman, *Constitutionality of Peacetime Conscription*, 31 VA. L. REV. 40 (1944).

⁵ 64 STAT. 1245, 50 U. S. C. APP. §§ 2251-2297 (Supp. 1951).

⁶ *Id.* § 2251.

⁷ Laws of N. Y. 1950, c. 690.

⁸ See note 1 *supra*. Hereafter referred to as the Act.

⁹ See N. Y. Times, Feb. 22, 1951, p. 25, col. 4; March 1, 1951, p. 17, col. 1; March 7, 1951, p. 30, col. 3; March 22, 1951, p. 30, col. 6.

In time of dire need it may be the inherent right of a sovereign to do all that is necessary to protect itself;¹⁰ yet an emergency does not permit the suspension of certain basic rights.¹¹ The purpose of this note is to outline the present Act and determine to what extent it infringes on basic individual rights.

Scope of the Act

The term "civil defense" is defined to encompass "[a]ll those activities and measures designed or undertaken (1) to minimize the effects upon the civilian population caused or which would be caused by an attack, (2) to deal with the immediate emergency conditions which would be created by any such attack, and (3) to effectuate emergency repairs to, or the emergency restoration of, vital utilities and facilities destroyed or damaged by any such attack."¹² Execution and implementation of these "activities and measures" has been assigned to the political subdivisions of the state on a county and city level.

To coordinate and effectuate the civil defense programs of the local authorities, the Act creates in the executive department a Civil Defense Commission,¹³ the functions of which are to adopt a comprehensive plan for the civil defense of the state; enter into mutual defense pacts with other states; and to guide and direct local authorities in carrying out such programs.¹⁴

The directives of the Act do not cease with preparations to obviate the effect of enemy attack, but integrate the production and resources of the state with "[t]he preparation of the United States and

¹⁰ See *Saltpetre Case*, 12 Coke 13, 77 Eng. Rep. 1294 (1606); *The Mayor of N. Y. v. Lord*, 18 Wend. 126 (N. Y. 1837); *Russell v. The Mayor of N. Y.*, 2 Denio 461 (N. Y. 1845); *THE FEDERALIST*, No. 23 (Hamilton). See Fairman, *The Law of Martial Rule and the National Emergency*, 55 HARV. L. REV. 1253 (1942); Schwartz, *The War Power in Britain and America*, 20 N. Y. U. L. Q. REV. 325, 465 (1945).

¹¹ *Ex parte Quirin*, 317 U. S. 1 (1942); *Schechter v. United States*, 295 U. S. 495 (1935); *Home Building and Loan Association v. Blaisdell*, 290 U. S. 398 (1934); see *United States v. Cohen Grocery Co.*, 255 U. S. 81, 88 (1921); *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 155 (1919).

¹² N. Y. STATE DEFENSE EMERGENCY ACT § 3(3).

¹³ Hereafter referred to as the Commission. The Commission consists of: ". . . the superintendent of public works, the chairman of the public service commission, the commissioners of health, education, social welfare, commerce, agriculture and markets, housing, standards and purchase, the industrial commissioner, the chairman of the workmen's compensation board, the director of the division of veterans affairs, the director of the division of safety, the superintendent of state police, the chief of staff to the governor, two local directors to be selected by the governor and one additional member, to be appointed by the governor. . . ." N. Y. STATE DEFENSE EMERGENCY ACT § 20(1). See N. Y. CONST. Art. V, § 3, "No new departments shall be created . . . but this shall not prevent the legislature from creating temporary commissions for special purposes. . . ."

¹⁴ N. Y. STATE DEFENSE EMERGENCY ACT § 21.

other nations cooperating with it for defense against attack and for the conduct of war."¹⁵ The State Defense Council¹⁶ was created to formulate policy for carrying out these broader purposes of the bill. The Council acts as a liaison to cooperate with established federal and sister state agencies, and to incorporate all other agencies of New York State in the defense effort.¹⁷ In pursuance of these objectives, the Council is empowered to control all other agencies of the state and require them to act as agencies of the Council.¹⁸

The Act vests broad and sweeping powers in the governor; he ". . . may execute or require or provide for the execution of any of the powers, granted by this act, to any agency or officer, in such manner as he deems necessary or proper."¹⁹ Furthermore, no provision of this Act is to be construed as limiting the exercise of powers otherwise vested in him.²⁰

Powers of the Agencies

The Act's grant of powers, designed ". . . to meet the extraordinary efforts and dangers of defense and yet to protect until the last safe instant the freedom of every citizen. . . ." ²¹ is broadly achieved by a division of its provisions into "attack" and "pre-attack" categories.²²

In order to expedite the work of the state defense agencies, sweeping powers over rights in private property have been granted to the Council, Commission and local defense organizations. The Council in the event of attack, is to ". . . provide for the protection and preservation of property . . . by the owner or person in control thereof or otherwise."²³ Rights in private property are, in addition, subjected to the power of eminent domain delegated to the Commission.²⁴ In the event of an attack, the Commission may ". . . take,

¹⁵ *Id.* §§ 3(6), 2.

¹⁶ *Id.* § 10. Hereafter referred to as the Council. The Council consists of: ". . . the governor, the lieutenant-governor and the attorney-general; the temporary president of the senate, the minority leader of the senate and the chairman of the senate finance committee; the speaker of the assembly, the majority leader of the assembly, the minority leader of the assembly and the chairman of the assembly ways and means committee; the chairman of the state civil defense commission; and twelve persons to be appointed by the governor. . . ." N. Y. STATE DEFENSE EMERGENCY ACT § 11(1).

¹⁷ ". . . [T]he legislature may from time to time assign by law new powers and functions to departments, officers, boards or commissions, and increase, modify or diminish their powers and functions." N. Y. CONST. Art. V, § 3.

¹⁸ N. Y. STATE DEFENSE EMERGENCY ACT § 12.

¹⁹ *Id.* § 111.

²⁰ *Ibid.*

²¹ Governor Dewey's message recommending enactment, Jan. 8, 1951.

²² However, "attack" being defined by the Act to mean "actual or imminent" attack, it is difficult to perceive the line of demarcation between "attack" and "pre-attack" powers in the light of current international instability and modern concepts of warfare.

²³ N. Y. STATE DEFENSE EMERGENCY ACT § 12(15).

²⁴ *Id.* § 25. That courts will not interfere with a reasonable determination

use, or destroy any and all real or personal property, or any interest therein, necessary or proper for the purposes of civil defense . . ." ²⁵ and may authorize county or city agencies to do the same.²⁶ Adequate compensation is provided for in the case of such a taking.²⁷ In the event of attack, all ". . . transportation and communication facilities and public utilities . . ." shall come under the direct control of the county and city organizations.²⁸

To insure that the people of the state receive an adequate supply of food, clothing, fuel and other essential materials during the emergency, the Council is directed to "[a]dopt and make effective rationing, freezing, price-fixing, allocation or other orders or regulations imposed by the authority of the federal government in aid of the defense effort. . ." ²⁹ A similar provision was in effect during the last war.³⁰ However, this Act goes further than its predecessor in that it allows the Council to prescribe such measures of its own, effective for a ninety-day period, without regard to federal action.³¹

Production and labor are brought within the scope of the Act in an attempt to enlist all of the state's potential in the defense effort. The Council is to establish programs encouraging maximum and efficient production,³² and in such vein can authorize the conduct of business or manufacture of goods on Sundays or legal holidays when requested by federal authorities or when such action *would be in the interests of public welfare*.³³ The Secretary of State can extend or restrict the hours of public business and public employees.³⁴

The greatest concession to the expediency of maximum production is evidenced in a grant of authority to the Industrial Commissioner. He is authorized during the defense emergency, to grant employers engaged in defense work dispensations from state labor laws,³⁵

of a board, officer, or corporation vested with the power of eminent domain that an appropriation is necessary, see *People v. Fisher*, 190 N. Y. 468, 83 N. E. 482 (1908).

²⁵ N. Y. STATE DEFENSE EMERGENCY ACT § 25(1).

²⁶ *Id.* § 25(2).

²⁷ *Id.* § 25(3).

²⁸ *Id.* § 25(2)(b).

²⁹ *Id.* § 12(13). "No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or part thereof, shall be applicable, except by inserting it in such act." N. Y. CONST. Art. III, § 16. See *Matter of Mosner v. Haddock*, 181 Misc. 486, 46 N. Y. S. 2d 343 (Sup. Ct.), *aff'd mem.*, 268 App. Div. 752, 48 N. Y. S. 2d 802 (1st Dep't 1944); *Butter & Egg Merchants Ass'n v. LaGuardia*, 181 Misc. 889, 47 N. Y. S. 2d 913 (Sup. Ct. 1944) (holding that legislation similar to Section 12(13) of the N. Y. STATE DEFENSE EMERGENCY ACT is not in violation of the State Constitution).

³⁰ Laws of N. Y. 1942, c. 445, as amended, Laws of N. Y. 1942, c. 544, Laws of N. Y. 1943, c. 196, § 1, Laws of N. Y. 1944, c. 412, § 2; repealed by Laws of N. Y. 1946, c. 445, § 1.

³¹ N. Y. STATE DEFENSE EMERGENCY ACT § 12(14).

³² *Id.* § 12(8).

³³ *Id.* § 12(9).

³⁴ *Id.* § 40(5).

³⁵ *Id.* § 71.

where the employer alleges and proves that under the existing labor conditions he cannot maintain efficient maximum production.³⁶ Such dispensations are effective for six months and can be extended only after another hearing.³⁷ No dispensation can be granted affecting minors under sixteen years of age.³⁸ Parties aggrieved by any ruling of the Commissioner may appeal.³⁹ The Board of Standards and Appeals is granted a dispensing power with regard to public works related to the defense effort.⁴⁰ It is to be noted that a subsequent section assures that no dispensation shall be deemed to impair or prevent the right of labor to carry on lawful collective bargaining.⁴¹

Financial institutions were not left beyond the pale of this seemingly all-inclusive act. In the event of attack, the Council is to protect and maintain banking deposits, the banking structure, the business of insurance and the interest of policy holders and beneficiaries.⁴² The legislation does not specify the manner in which this is to be accomplished.

Personal liberty has been limited by these emergency measures in an unprecedented exercise of sovereign power. The local authorities in the event of, *or in anticipation of*, attack, may compel the evacuation of any person from his home if his remaining therein would endanger his safety or that of others.⁴³ They may also impress into service any person who may be necessary to carry out any and all of the duties of the localities in counteracting the immediate effects of an attack.⁴⁴

This form of enforced service is only to be exercised in the instance of immediate emergency.⁴⁵ The authorization for temporary impressment would not adequately provide sufficient defense personnel should voluntary enlistments fail to fill approved quotas. Neither could the authority of the Council and Commission to reassign any state employee to civil defense work effectively meet manpower deficiencies without seriously hampering governmental processes.⁴⁶ Noting these limitations, and confronted with a general public apathy to the exigencies of civil defense, the legislature deemed itself obligated to include a conscription provision in the Act. Under this section, each county or city, when authorized by the Council may conscript persons to perform the duties imposed upon the counties and

³⁶ *Id.* § 73(d).

³⁷ *Id.* § 73(b).

³⁸ *Id.* § 73(a).

³⁹ *Id.* § 75.

⁴⁰ *Id.* § 72. See N. Y. CONST. Art. I, § 17, "No laborer, workman or mechanic, in the employ of a contractor or subcontractor engaged in the performance of any public work, shall be permitted to work more than five days in any week, except in cases of extraordinary emergency. . . ."

⁴¹ N. Y. STATE DEFENSE EMERGENCY ACT § 86.

⁴² *Id.* § 12(16).

⁴³ *Id.* § 25(2)(a).

⁴⁴ *Id.* § 25(2)(c).

⁴⁵ *Ibid.*

⁴⁶ *Id.* §§ 12(6), 25(1)(b).

cities by the Act.⁴⁷ The regulations of the Council pursuant to this section are to be on a “. . . fair and impartial basis by age, training, occupation, ability or such other classification as *the council finds appropriate* and shall specify any exceptions to such classifications in connection with physical condition, family needs, callings, vocations or professions which must be followed or performed during or after attack, unusual occupational demands, or similar matters.”⁴⁸

Constitutionality

Many serious constitutional problems have arisen with the enactment of this legislation for which no exact precedent can be found. The problem of survival under the existing potential danger is new to the citizenry of the state.

A review of the constitutional questions that may arise under the Act will be made with particular reference to the conscription provision. The power of the Council to authorize conscription is exercisable *today* under the enabling provision of the Act.⁴⁹ Since this power to restrain the right of liberty of person may be exercised *now* as distinguished from the exercise of other drastic powers only in the event of attack, it is deemed that a determination of its validity would virtually validate the entire Act.

Procedural Due Process

The conscription section of the Act omits provisions for, or mention of, any notice and hearing. Although the state government possesses certain residual sovereign powers, it is limited in the exercise thereof by both the Federal and State Constitutions.⁵⁰ Both instruments prohibit denial of liberty “. . . without due process of law.”⁵¹

The concept of procedural due process may vary with the circumstances; however, certain requirements are deemed fundamental. Certain accepted concepts of due process, such as the right to appeal, have been held not to be essential, provided that due process has al-

⁴⁷ *Id.* § 26.

⁴⁸ *Ibid.* (Emphasis added.)

⁴⁹ N. Y. STATE DEFENSE EMERGENCY ACT § 26(2). For quotas established and met in New York City, see First Year Report of the Director of Civil Defense, City of New York (1951).

⁵⁰ That a state constitution is not a grant, but a limitation on legislative power, so that the legislature may enact any law not expressly or inferentially prohibited in the constitution of the state or nation, see *Racine v. Morris*, 201 N. Y. 240, 94 N. E. 864 (1911); *Matter of Ahern v. Elder*, 195 N. Y. 493, 88 N. E. 1059 (1909).

⁵¹ U. S. CONST. AMENDS. V, XIV; N. Y. CONST. Art. I, § 6. As to the influence of the Supreme Court's interpretation of due process on state courts, see *Bourjois Sales Corp. v. Dorfman*, 273 N. Y. 167, 7 N. E. 2d 30 (1937); *Franklin v. State*, 232 Ala. 637, 169 So. 295 (1936).

ready been accorded in the tribunal of first instance.⁵² In the words of Justice Brandeis, "The first distinction is between issues of law and issues of fact. When dealing with constitutional rights (as distinguished from privileges accorded by the Government) there must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claims it. The second distinction is between the right to liberty of person and other constitutional rights. . . . A citizen who claims that his liberty is being infringed is entitled, upon habeas corpus to the opportunity of a judicial determination of the facts. And, so highly is this liberty prized, that the opportunity must be accorded to any resident of the United States who claims to be a citizen. . . . But a multitude of decisions tells us that when dealing with property a much more liberal rule applies."⁵³

The notice and opportunity to be heard must be provided for as a matter of right, not of grace.⁵⁴ In any proceeding which is to be accorded finality, the required notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the action and afford them an opportunity to present their objections.⁵⁵ With special reference to administrative tribunals, the right to oral argument is generally accorded; however, such right is not absolute, but varies with the circumstances as presented by the record.⁵⁶

A strong position was taken in the case of *Stuart v. Palmer*⁵⁷ regarding the requirement of a statute to provide for notice and hearing. A statute was enacted in New York authorizing officials to take, assess and improve certain lands by construction of a highway. Concededly, the assessment was fairly apportioned. However, the statute omitted mention of notice and hearing. The Court of Appeals said that, regardless of whether notice was actually given, the statute itself must provide for such notice and hearing. The omission of such provision, therefore, was fatal—the statute was held unconstitutional. In the language of the court, "The legislature may prescribe the kind of notice and the mode in which it may be given, but it cannot dispense with all notice."⁵⁸

The sole object of construction is to determine the legislative intent which must be found primarily in the language of the statute

⁵² Ohio *ex rel.* Bryant v. Akron Park District, 281 U. S. 74 (1930).

⁵³ St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 77 (1936) (concurring opinion) (cases omitted).

⁵⁴ Coe v. Armour Fertilizer Works, 237 U. S. 413 (1915).

⁵⁵ Milliken v. Meyer, Administratrix, 311 U. S. 457 (1940); Grannis v. Ordean, 234 U. S. 385, 394 (1914); Priest v. Las Vegas, 232 U. S. 604 (1914); Roller v. Holly, 176 U. S. 398 (1900).

⁵⁶ Federal Communications Commission v. Station WJR, 337 U. S. 265 (1949); Morgan v. United States, 298 U. S. 468, 481 (1936); Londoner v. Denver, 210 U. S. 373 (1908).

⁵⁷ 74 N. Y. 183 (1878).

⁵⁸ *Id.* at 188.

itself.⁵⁹ Adequate provision has been made to preserve the rudimentary requirements of procedural due process in other sections of the Act, such as those pertaining to dispensations from the labor laws.⁶⁰ The conscription section of the Act omits specific provision for, or indeed, *mention of*, any notice and hearing. Although courts have at times implied such provision where the language of the statute permitted,⁶¹ the language of the conscription section does not give rise to such implication.

It would seem that so basic a right as liberty of person has been treated in all too cursory a manner by the legislature in omitting adequate provision for notice and hearing. Should the establishment of proper safeguards be left to a promulgation of the Council in light of *Stuart v. Palmer*?⁶²

Involuntary Servitude and Eminent Domain

When a sovereign is faced with an emergency it may call upon its citizenry to obviate the danger. It may be stated generally that the duty owed to the sovereign will vary with the degree, proximity and duration of the danger.⁶³ It would appear that government may, in addition, compel its citizens to train in preparation for performance of a potential duty. The power of the state to conscript persons into the civil defense forces, a statutory product of this century, may be considered in *pari materia* with other statutory duties possessing a wealth of historical background.

A New York statute enables a law officer to command the aid of any person (without distinction being made for sex) in executing a legal process, making arrest or retaking a person escaped from legal custody.⁶⁴ Refusal or willful neglect to obey such command is punishable as a misdemeanor.⁶⁵ Provision is made for compensa-

⁵⁹ *Caminetti v. United States*, 242 U. S. 470 (1916); *Church of the Holy Trinity v. United States*, 143 U. S. 457 (1892).

⁶⁰ N. Y. STATE DEFENSE EMERGENCY ACT §§ 74, 75.

⁶¹ See *People ex rel. Morriale v. Branham*, 219 N. Y. 312, 52 N. E. 2d 881 (1943) (statute authorizing detention of "mental defectives" after expiration of their penal sentence upon order of a judge of a court of record, although not containing provision for notice, was held valid because need for a judicial determination of the facts implied the necessity for notice). See also *Troutman v. State*, 273 App. Div. 619, 79 N. Y. S. 2d 709 (3d Dep't 1948).

⁶² 74 N. Y. 183 (1878). This case which deals with mere (by comparison) property rights has been cited consistently and has never been overruled.

⁶³ "When the Italians invaded Abyssinia the following mobilization order was promulgated by Emperor Haile Selassie: "When this order is received, all men and all boys able to carry a spear will go to Addis Ababa. Every married man will bring his wife to cook and wash for him. Every unmarried man will bring any unmarried woman he can find to wash and cook for him. Women with babies, the blind, and those too aged to carry a spear are excused. Anyone found at home after receiving this order will be hanged." From an address by Admiral Harold R. Stark before the U. S. Chamber of Commerce, *THE READER'S DIGEST*, p. 97 (June 1944).

⁶⁴ N. Y. CODE CRIM. PROC. § 169.

⁶⁵ N. Y. PENAL LAW § 1848.

tion to the assisting civilian in the event of injury. The historical antecedent of this duty dates to the year 1285 and the Statute of Winchester.⁶⁶ Not only did that statute compel a citizen's assistance in making arrests, but imposed a duty to maintain and provide "... an Hauberke, a Breastplate of Iron, a Sword, a Knife, and a Horse."

In like manner, the militia concept may be considered in relation to the conscription provision. Inquiry as to the origin of the duty of "soldier in time of war—civilian in time of peace"—is answered in the annals of early English history.⁶⁷ This concept at one time was considered a firmly established obligation of the people to band themselves in groups, drill, and keep arms. With the passage of time it was transformed so that the king could exact such duty from his subjects.

Debates at the drafting of our Constitution indicated the fear colonists had in regard to a large standing army.⁶⁸ This fear was a motivating factor in securing to the several states a continuation of the militia system.⁶⁹ As a consequence, the Constitution of the State of New York⁷⁰ specifically provides that all able-bodied men within a certain age group should constitute the militia of the state.⁷¹ Legislation in pursuance of this article details the entire militia system of the state, from the available pool of manpower to the training of organized units. Provision is made that under certain conditions⁷² personnel may be drafted into the organized drill units when the ranks are undermanned, although the militia had not been called into actual service. The refusal of a person to submit to such draft is punishable as a misdemeanor.⁷³ Militiamen are compensated when their services are required to continue for a period exceeding one day.⁷⁴

Other duties owed to the state of a similar sporadic nature in regard to the occasion and duration of service, have been contested in the courts unsuccessfully under the Thirteenth Amendment's prohibition against involuntary servitude.⁷⁵ In the *Selective Draft Law Cases*,⁷⁶ the Supreme Court dismissed the assertion of involuntary servitude, refusing to dignify it with a reply by saying, "... we are constrained to the conclusion that the contention to that effect is

⁶⁶ 13 EDW. I.

⁶⁷ 1 BL. COMM. 409-414 (Jones' ed. 1916); Ansell, *Legal and Historical Aspects of the Militia*, 26 YALE L. J. 471 (1917).

⁶⁸ See Ansell, *supra* note 67.

⁶⁹ ARTICLES OF CONFEDERATION Art. VI, § 4; U. S. CONST. AMEND. II.

⁷⁰ Art. XII; see Conway, *A State's Power of Defense Under the Constitution*, 11 FORD. L. REV. 169 (1942).

⁷¹ Laws of N. Y. 1950, c. 825, § 2, as amended, Laws of N. Y. 1951, c. 16, § 2.

⁷² Laws of N. Y. 1950, c. 825, § 2; Laws of N. Y. 1951, c. 16, § 4.

⁷³ Laws of N. Y. 1950, c. 825, § 2.

⁷⁴ N. Y. MILITARY LAW § 210.

⁷⁵ See Note, 47 COL. L. REV. 299 (1947).

⁷⁶ 245 U. S. 366 (1918).

refuted by its mere statement."⁷⁷ The state may exact the labor of its citizens to maintain public roads for specified periods each year without compensation.⁷⁸ "Jury service is not a matter of choice or right, but is a duty, imposed by the state. . . . in the absence of statute, compensation cannot be recovered."⁷⁹ The Supreme Court, early in the history of the Thirteenth Amendment delimited its prohibition to factual circumstances approaching African slavery and forms of peonage.⁸⁰

The duty imposed upon persons in this state under the conscription provision of the Act, if viewed in the light of what is possible under the statute,⁸¹ is one of paramount degree. Unlike the aforementioned duties, it is one that has to be evaluated in terms of its duration and the proximity of public danger.

Under such a maximum approach to this legislation, any person (no qualifying provision is made in the statute for sex or age) can be compelled to work an unlimited period of time each day for the foreseeable future without compensation. Certainly the imposition of this duty merits close inspection. It is entirely possible in a hypothetical situation to deprive a person of the right to pursue his calling, to restrain his liberty, and to detail him to service for an indeterminate period of time without payment or sustenance. Indeed, the contention has been advanced in a recent case⁸² by a disabled war veteran that his body was private property owned by him and such being true, it fell within the purview of that portion of the Fifth Amendment to the Constitution which provides, ". . . nor shall private property be taken for public use, without just compensation." It is submitted that the petitioner's novel theory did not receive adequate consideration by the court. That case is distinguishable from any action that may arise under the hypothetical problem in a maximum approach to this statute. A soldier receives food, clothing and shelter. No provision is made in this Act to provide a civil defense draftee with mere sustenance. There is much *dicta* to the effect that a soldier need not be reimbursed for his service.⁸³ The practice has been otherwise. Perhaps, the power of eminent domain is not applicable to the taking of a person's body. But can the legislature, under our form of government, extend the period of compelled service to be rendered without compensation or sustenance, to a point

⁷⁷ *Id.* at 390.

⁷⁸ *Butler v. Perry*, 240 U. S. 328 (1916).

⁷⁹ *Maricopa County v. Corp.*, 44 Ariz. 506, 39 P. 2d 351, 352 (1934).

⁸⁰ *See Butler v. Perry*, 240 U. S. 328, 332 (1916).

⁸¹ *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N. Y. 48, 129 N. E. 202 (1920), *reargument denied*, 231 N. Y. 516, 132 N. E. 870, *cert. denied*, 256 U. S. 702 (1921).

⁸² *Commerz v. United States*, 66 F. Supp. 943 (D. Mont.), *aff'd*, 159 F. 2d 248 (9th Cir.), *aff'd*, 331 U. S. 807 (1947).

⁸³ *See Jacobson v. Massachusetts*, 197 U. S. 11, 29 (1905); *United States ex rel. Zucker v. Osborne*, 54 F. Supp. 984, 987 (W. D. N. Y. 1944), *aff'd*, 147 F. 2d 135 (2d Cir.), *cert. denied*, 325 U. S. 881 (1945).

where a person's livelihood is endangered? Mere statement of this possibility seems to refute its validity. In the failure of the conscription provision to delimit the service that may be exacted of its citizens without compensation, it is more drastic than any other duty that has been previously imposed by a state on its citizens.

The economic repercussions resulting from the denial to a wage earner of the opportunity to seek remunerative employment cannot be estimated. No provision having been made in the Act to compensate these civil defense workers, it is no answer that they may be subsequently reimbursed. The State Constitution specifically prohibits the expenditure of funds when no contractual obligation is entered into for goods or services.⁸⁴

Delegation of Legislative Authority

It may be doubted whether the legislature was competent to grant such broad discretionary powers to the Council. An objection of this nature may be founded on the theory that the legislative power is vested solely in the legislative branch of government and cannot be effectively delegated by that body.⁸⁵ In *Wayman v. Southard*,⁸⁶ Chief Justice Marshall pointed out the first exception to this universal rule, which exception was followed by a series of "disintegrating erosions" almost obliterating the original principle. Justice Cardozo's dissent in *Panama Refining Co. v. Ryan*,⁸⁷ calling for "elasticity of adjustment" in the separation of powers between the executive and the legislative, has become today's majority opinion. In upholding the Congressional grant of authority to the Office of Price Administration, the Court said, "Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for its declared purpose. . . ." ⁸⁸ Whether or not the authority given to the Council to conscript persons on a "fair and impartial basis" contains the standard of guidance ⁸⁹ essential to its validity is to be determined by a reading

⁸⁴ N. Y. CONST. Art. VII, § 8.

⁸⁵ LOCKE, OF CIVIL GOVERNMENT 141.

⁸⁶ 10 Wheat. 1, 43 (U. S. 1825).

⁸⁷ 293 U. S. 388, 440 (1935).

⁸⁸ *Yakus v. United States*, 321 U. S. 414, 426 (1944).

⁸⁹ "The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant. . . . Here in effect is a roving commission to inquire into evils and upon discovery, correct them. . . . This is delegation running riot. No such plentitude of power is susceptible of transfer." Justice Cardozo, concurring in *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 551-553 (1935). Speculation as to what language will satisfy the court is beyond the scope of the writer. "Unreasonable restraint of trade" is definite, *Nash v. United States*, 229 U. S. 373, 376, 377 (1913); while "unreasonable rate or charge" is indefinite, *United States v. L. Cohen Grocery Co.*, 255 U. S. 81, 89

of the entire provision with reference to the circumstances under which it was enacted. Notice should be taken of the words qualifying "fair and impartial" and the necessity of submitting a report of all action taken under the provision to the legislature.⁹⁰

Substantive Due Process

The Supreme Court has viewed constitutionality of state action in different lights dependent upon the subject of the legislation and the resultant effect of such legislation upon guaranteed rights of its citizens. State statutes presented for review to the Court are accompanied by a presumption of constitutionality.⁹¹ It will suffice to say that this presumption may be a gesture by the Court—a device to enable the Court to sustain the validity of the statute on any conceivable set of facts, where the case comes up on demurrer—or is possibly used as a procedural device to direct the burden of proof.⁹² In the field of economic affairs this presumption is very broad with regard to substantive due process and state regulation. It may be stated that if reasonable men will differ as to the wisdom of the legislation, yet the position taken by the legislature is arguable, the Court will not then interfere.⁹³ The breadth of such presumption diminishes, however, when state action enters the sanctuary of civil liberties⁹⁴ and may possibly vanish.⁹⁵ Having particular regard to freedom of speech, notwithstanding the reasonableness of the legislation, the Court has disregarded the particular factual circumstances, determined what may possibly be done to infringe this freedom under the statute and applied the "clear and present danger" test.⁹⁶ There has been indicated of late a tendency of the Court to retreat from its previous policy of upholding state statutes dealing with civil liberties.⁹⁷

(1921); but "reasonable allowance for salaries" is sufficiently informative, *United States v. Ragen*, 314 U. S. 513, 522, 523 (1941). General terms have been found sufficient, *Omaechevarria v. Idaho*, 246 U. S. 343, 348 (1918); while detailed language has been considered indefinite, *Lanzetta v. New Jersey*, 306 U. S. 451, 457, 458 (1939); *Connally, Comm'r v. General Construction Co.*, 269 U. S. 385, 393, 394 (1926). The standard, it would seem, varies considerably with the area of conduct regulated, *see United States v. Petrillo*, 332 U. S. 1, 6, 7 (1947).

⁹⁰ N. Y. STATE DEFENSE EMERGENCY ACT § 26.

⁹¹ *Ogden v. Sanders*, 12 Wheat. 213 (U. S. 1827).

⁹² *Fay v. New York*, 332 U. S. 261, 285 (1947).

⁹³ *Daniel, Att'y Gen'l v. Family Security Life Ins. Co.*, 336 U. S. 220, 224, 225 (1949); *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U. S. 525, 536, 537 (1949); *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 400 (1937); *Nebbia v. New York*, 291 U. S. 502, 537 (1934).

⁹⁴ *Thomas v. Collins*, 323 U. S. 516, 530 (1945); *Schneider v. State*, 308 U. S. 147 (1939).

⁹⁵ *See United States v. C.I.O.*, 335 U. S. 106, 140 (1948) (concurring opinion); *Bridges v. Wixon*, 326 U. S. 135, 165 (1945) (concurring opinion).

⁹⁶ *Kunz v. New York*, 340 U. S. 290 (1951); *see Note*, 25 ST. JOHN'S L. REV. 295 (1951).

⁹⁷ *Compare Gilbert v. Minnesota*, 254 U. S. 325 (1920), *with Taylor v. Mississippi*, 319 U. S. 583 (1943); *compare Minersville School District v.*

On this question, Justice Stone has said:⁹⁸ "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth . . ." than when it involves regulatory legislation affecting commercial transactions.

Assuming that the conscription provision is to be considered under the broad scope of the presumption in favor of constitutionality afforded state action in the field of economic affairs, can the reasonableness of the restriction imposed upon persons under the hypothetical presented be considered as arguable?

Assuming that the provision is to be considered under a presumption which has been narrowed in scope, in that the state action ". . . appears on its face to be within a specific prohibition of the Constitution . . ." ⁹⁹ and a maximum of the statute approach is used, can its validity be upheld?

It is submitted that the conscription provision as it now stands, considered from all its facets—the possibility that it may be exercised today; its omission of provision for notice and hearing; the broad and sweeping delegation of legislative authority without sufficient criteria as to length of service, distinction between sexes, and duties which may be imposed; its omission of provision for compensation or sustenance when the duty to serve may prevent the right to earn a living—raises grave questions of constitutionality.¹⁰⁰

Recommendations and Conclusions

Constitutionality is not the sole criterion of worthy legislation: it may conclude the judiciary but it does not necessarily attest to the wisdom of the law. It is submitted that there is much to improve in this hastily enacted statute, both in removing doubts as to its constitutionality and contributing to its feasibility. The Federal Government should assume some role in this process. Indeed, the Constitution commands that "[t]he United States . . . shall protect each of them [the States] against invasion. . . ." ¹⁰¹ Valid objection may be raised against the action of Congress in almost abdicating that duty in favor of the less equipped states.¹⁰² Imminency of the threat to our vital security, however, prevents a wait-for-Congress-to-act

Gobotis, 310 U. S. 586 (1940), *with* West Virginia State Bd. of Education v. Barnette, 319 U. S. 624 (1943).

⁹⁸ United States v. Carolene Products Co., 304 U. S. 144, 152, n. 4 (1938).

⁹⁹ *Ibid.*

¹⁰⁰ "Concededly the Legislature cannot decide the question of emergency and regulation, free from judicial review. . ." People v. Nebbia, 262 N. Y. 259, 268, 186 N. E. 694, 698, *aff'd*, 291 U. S. 502 (1934).

¹⁰¹ U. S. CONST. Art. IV, § 4.

¹⁰² 64 STAT. 1245 (1950), 50 U. S. C. APP. §§ 2251-2297 (Supp. 1951).

policy. Nor is it any solution to criticize the present Act and advocate its repeal. Immediate protective legislation is of paramount importance. Therefore, instead of merely taking issue with such portions of the Act as are deemed improper, the following recommendations are advanced in an attempt to avoid the harsher results of the statute and yet to preserve it as an effective emergency instrument:

(1) Make the existence of an "imminent attack" dependent upon a declaration of the President of the United States, an official better informed about the temper of foreign relations than state authorities. Failing an objective definition of "attack," the very purpose of relegating the more drastic powers of the Act to the "attack" period might prove meaningless in effect.

(2) Declare that the powers operative in the event of an attack are to cease at a *reasonable* time after the termination of such attack or threat of imminent attack.

(3) Render the power of the Council to authorize business or labor on Sundays or legal holidays, ". . . when necessary for the safety and health of the people of the state . . ." available only in the event of an attack. The federal authorities are competent to cope with the problem until then.

(4) Restrict the Council's power of rationing, freezing, price-fixing and allocation to the "attack" period, allowing the federal regulations to handle the problem until then.¹⁰³

(5) Define more adequately the authority of the Council to ". . . provide for the protection and preservation of property . . . by the owner or person in control thereof or otherwise. . . ." and the duty to protect and maintain the banking and insurance structure, interests and deposits. A more concrete recommendation cannot be made in this instance for it is difficult to determine what the legislature intended by these provisions and only speculation is possible concerning the regulations that may be promulgated under them. It may be stated that there are sufficient penal laws to protect against looting if that is the activity feared.

(6) Provide for adequate compensation to be paid *by the state* whenever property is taken or used for defense purposes.¹⁰⁴ The

¹⁰³ As to whether the state may regulate an area in which Congress has acted, see *Hines v. Davidowitz*, 312 U. S. 52 (1941). *Contra*: *Matter of Mosner v. Haddock*, 181 Misc. 486, 46 N. Y. S. 2d 343 (Sup. Ct.), *aff'd mem.*, 268 App. Div. 752, 48 N. Y. S. 2d 802 (1st Dep't 1944) (dependent upon intent of Congress to occupy entire field). See also Grant, *The Scope and Nature of Concurrent Power*, 34 Col. L. Rev. 995 (1934).

¹⁰⁴ "Where, in the exercise of emergency powers . . . (a) possession of any land has been taken on behalf of His Majesty, or (b) any property other than land has been requisitioned or acquired on behalf of His Majesty, or (c) any work has been done on any land on behalf of His Majesty, otherwise than by

injured property owner should not be compelled to discover whether the property was taken under the authority of the state or his local government agency and then press his remedy against the acting party only.¹⁰⁵ This may be impossible under attack conditions. Nor should compensation be predicated upon the taking being made under authorization of the Council or Commission as is required by the present law. If the property is taken, the owner should have an immediate right against the state; if it has been taken without authority, the state should have a remedy against the party acting without the scope of his authority.

(7) The conscription provision should be amended in several respects. Proper notice (at least thirty days) and a hearing with right of appeal should be granted to a conscripted party.¹⁰⁶ Definite classifications as to persons to be conscripted should be made by the legislature, not the Council. Authorization by the Council to draft should provide which classifications should be called up.¹⁰⁷ Particular classes of persons should be assigned to appropriate duties (women should not be firemen). A maximum number of hours of service per week should be prescribed, with compensation to be paid for any service beyond that limit. Defense personnel should be included within the protection of workmen's compensation laws not only if they are injured while performing their duties during attack as at present,¹⁰⁸ but also while undergoing training.¹⁰⁹ Conscripted personnel should be discharged as soon as volunteers fill the established quotas or when the emergency terminates. Most pressing is the need to remedy what must have been the neglect of the legislature in failing to impose a specific penalty for violation of the conscription section. At present such violation is an infraction.¹¹⁰ In order to make this basic provision effective, evasion of directives

way of measures taken to avoid the spreading of the consequences of damage caused by war operations, then, . . . compensation assessed . . . shall be paid. . . ." 2 & 3 GEO. VI, c. 75, § 1(1) (1939). See also 2 & 3 GEO. VI, c. 31, §§ 2-6 (1939), requiring local authorities to pay compensation to the owner of property for any damage to the property ensuing from the diminution of property value or interference with his use of the premises by the construction and maintenance of air raid shelters thereon. Furthermore, the premises are to be restored to their original state, so far as possible, when its use as a shelter is no longer required.

¹⁰⁵ N. Y. STATE DEFENSE EMERGENCY ACT § 25.

¹⁰⁶ See 62 STAT. 618 (1948), as amended, 50 U. S. C. APP. § 460 (Supp. 1951) (Federal Selective Service Act) for adequate provisions contained therein.

¹⁰⁷ See 62 STAT. 609 (1948), as amended, 50 U. S. C. APP. §§ 455, 456 (Supp. 1951) (Federal Selective Service Act).

¹⁰⁸ Laws of N. Y. 1951, c. 788, §§ 302, 303.

¹⁰⁹ See 2 & 3 GEO. VI, c. 31, § 71 (1939), which provides for compensation to English civil defense workers injured while in training.

¹¹⁰ N. Y. STATE DEFENSE EMERGENCY ACT § 101(5). Consider the possibility of extradition proceedings against an evader who leaves the state, when he is only guilty of an infraction.

promulgated thereunder should be deemed a misdemeanor. Willful refusal to serve when conscripted should be made a felony.

(8) The governor should be allowed to assume all of the duties and powers of all of the agencies under this Act *only* when an attack occurs or is imminent.¹¹¹

These specific proposals suggest themselves upon the face of the Act. They are not exclusive. Legislation of this nature, which gives the power to override all other laws save the Federal Constitution, statutes and regulations and the State Constitution deserves much more consideration than has been given to it. The problems which this bill attempts to solve are the most pressing questions ever presented in the state's history. There is need for a standing legislative committee to conduct extensive hearings on the situation to: secure the advice of recognized technological experts; study the action taken by other states and by Great Britain during the last war; invite remedial proposals from military and police officials, firemen, labor leaders, production heads, bar associations and other strata of our society who could presumably aid it in formulating improvements in the present Act. In this manner a deeper understanding of the absolute requisites to an effective defense mobilization could be obtained. As these requirements become properly defined, the legislature should use them as a basis for imposing limitations on the current broad powers of the defense agencies, which would allow them to carry out their duties effectively, but would at the same time provide the best protection possible for acknowledged civil liberties.¹¹²



PURCHASER AT MORTGAGE FORECLOSURE SALE—THE TITLE HE
ACQUIRES—EFFECT OF NEW SECTIONS 500-A, 506-A AND 506-B
OF THE NEW YORK REAL PROPERTY LAW

Introduction

A new amendment to the New York Real Property Law,¹ which has become effective September 1 of this year, has affected the mortgage foreclosure law of this state to a limited but noteworthy extent.

¹¹¹ See *Ex parte Merryman*, 17 Fed. Cas. No. 9487 (1861), and surrounding history as an illustration of the terrifying results possible from the residence of so much power in a single official, in that case: President Lincoln.

¹¹² During the last war, England's civil defense regulations were promulgated by the King in Council. However, it was mandatory to place all such regulations before Parliament, which body could void them within forty days. 2 & 3 GEO. VI, c. 31, § 88 (1939).

¹ N. Y. REAL PROP. LAW §§ 500-a, 506-a, 506-b. Added by Laws of N. Y. 1951, c. 610.