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THE WAR POWER AND THE GOVERNMENT OF MILITARY FORCES.

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Many questions, prompted by existing military activities in this country and abroad, are now the subject of general discussion, concerning the respective powers of the President and the Congress of the United States, the government of conquered territory, the trial of civilians by military courts, status of the militia, and so forth.

While in these discussions the question involved is frequently treated as new, in most instances the precise point has been repeatedly decided by the courts of our own country. Thus, for example, the power of the President to use the military forces of the United States against a foreign country prior to declaration of war by Congress, the right of a successful enemy to govern inhabitants of conquered territory during war, his right to their allegiance, his right to try them by military courts for any offenses, however serious, the status of the militia, and the extent to which it is subject to the call of the President—these and numerous other questions of present day interest were long ago argued and decided by the foremost lawyers and jurists in this country.

It has accordingly been deemed timely to publish in the military law section of this Journal a digest of the authorities relating to the various subjects indicated. This digest consists of extracts from a publication entitled "Laws Relating to the Navy, Annotated," which the writer has in course of preparation, pursuant to a resolution of the United States Senate.

The abbreviation "C. M. O." refers to Court-Martial Orders published by the Navy Department, and the file numbers cited refer to cases which form part of the records of the same department.

POWERS OF CONGRESS UNDER ART. 1, SEC. 8, OF THE CONSTITUTION

"Section 8. The Congress shall have power . . . to declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."

Decisions under this section of the Constitution naturally fall under the following headings:

- I. THE WAR POWER.
- II. PROPERTY OF BELLIGERENTS.
- III. ACQUISITION AND GOVERNMENT OF TERRITORY.
- IV. DISCIPLINE OF ARMY.
- V. MARTIAL LAW.

I. THE WAR POWER.

Power of Congress to declare war and President's power as Commander-in-Chief.—“Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of forces and the conduct of campaigns. That power and duty belong to the President as Commander in Chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature and by the principles of our institutions. The power to make the necessary laws is in Congress, the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authority essential to its due exercise. But neither can the President in war more than in peace intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. Congress cannot direct the conduct of campaigns, nor can the President or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment for offenses, either of soldiers or civilians, unless in cases of a controlling necessity which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.” (Ex. parte Milligan, 4 Wall. 2, 139, dissenting opinion of four justices; see also *Swain v. U. S.*, 28 Ct. Cls., 173, 221, *affirmed*, 165 U. S., 553; and see note to Art. II, sec. 2, clause 1.)

Power of President in advance of congressional action.—“If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.” (Prize Cases, 2 Black, 635.)

“Whether the President in fulfilling his duties as Commander in Chief in suppressing an insurrection has met with such armed hostile resistance and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents is a question to be decided by him, and this court must be governed by the decisions and acts of the political department of the Government to which this power was intrusted. He must determine what degree of force the crisis demands. The proclamation of blockade is itself official and conclusive evidence to the court that a state of war existed which

demanding and authorized a recourse to such a measure, under the circumstances peculiar to the case." (Prize Cases, 2 Black, 635.)

"A state of actual war may exist without any formal declaration of it by either party; and this is true of both a civil and a foreign war." (Prize Cases, 2 Black, 635.)

"That a foreign nation, or insurrectionary body of citizens, may by invasion of the United States or by other acts bring about a condition of affairs which will warrant the President in declaring, in advance of congressional legislation, that a state of war exists, was asserted by the Supreme Court in the Prize Cases." (2 Willoughby Const., 796.) [That power of declaring war is exclusive with Congress, see *Perkins v. Rogers*, 35 Ind., 167. See also 14 Mich. Law Review, 473.]

"The question in the present case is, When did the Rebellion begin and end? * * * The proclamation of intended blockade by the President may, therefore, be assumed as marking the first of these dates, and the proclamation that the war had closed as marking the second." (The Protector, 12 Wall., 700.) [The President's proclamations of intended blockade were issued on April 19 and 27, 1861; Congress formally declared war to exist on July 13, 1861, proclamations that the war had closed were issued on April 2 and August 20, 1866.]

Extent of war power.—"The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution. In the latter case the power is not limited to victories in the field and to the dispersion of the insurrectionary forces. It carries with it inherently the power to guard against the immediate renewal of the conflict and to remedy the evils which have arisen from its rise and progress." (*Stewart v. Kahn*, 11 Wall., 493.)

II. PROPERTY OF BELLIGERENTS.

Effect of declaration of war.—"The people of the two countries become immediately the enemies of each other—all intercourse, commercial or otherwise, between them unlawful—all contracts existing at the commencement of the war suspended, and all made during its existence utterly void. The insurance of enemies' property, the drawing of bills of exchange or purchase on the enemies' country, the remission of bills or money to it are illegal and void. Existing partnerships between citizens or subjects of the two countries are dissolved and, in fine, interdiction of trade and intercourse, direct or indirect, is

absolute and complete by the mere force and effect of war itself. All the property of the people of the two countries on land or sea is subject to capture and confiscation by the adverse party as enemies' property, with certain qualifications as it respects property on land (*Brown v. U. S.*, 8 Cranch, 110). All treaties between the belligerent parties are annulled. The ports of the respective countries may be blockaded, and letters of marque and reprisal granted as rights of war, and the law of prizes as defined by the law of nations comes into full and complete operation, resulting from maritime captures, *jure belli*. War also effects a change in the mutual relations of all States or countries, not directly, as in the case of belligerents, but immediately and indirectly, though they have no part in the contest, but remain neutral." (Prize Cases, 2 Black, 635, 682, dissenting opinion Justice Nelson; see also *McCormick v. Humphrey*, 27 Ind., 154; *Perkins v. Rogers*, 35 Ind., 167.)

Confiscation of enemy property.—"War gives the right to confiscate but does not of itself confiscate the property of the enemy." (*Brown v. U. S.*, 8 Cranch, 110; see also *Britton v. Butler*, 4 Fed. Cas. No. 1903; *Wagner v. Schooner Juanita*, 28 Fed. Cas. No. 17039; *Miller v. U. S.*, 11 Wall. 304; *Brown v. Hiatt*, 4 Fed. Cas. No. 2011.)

"When war breaks out the question what shall be done with enemy property in our country is a question rather of policy than of law. The rule which we apply to the property of our enemy will be applied by him to the property of our citizens. Like all other questions of policy it is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature not of the executive or judiciary." (*Brown v. U. S.*, 8 Cranch, 110.)

Authority of military commander to seize private property in domestic territory.—"Private property may be taken by a military commander to prevent it from falling into the hands of the enemy or for the purpose of converting it to the use of the public; but the danger must be immediate and impending, or the necessity urgent for the public service such as will not admit of delay and where the action of the civil authority would be too late in providing the means which the occasion calls for. The facts as they appeared to the officer must furnish the rule for the application of these principles. But the officer cannot take possession of private property for the purpose of insuring the success of a distant expedition upon which he is about to march." (*Mitchell v. Harmony*, 13 How., 115.)

Enemy Territory.—“If private property there [in conquered territory] was taken by an officer or a soldier of the occupying army, acting in his military character, when by the laws of war or the proclamation of the commanding general it should have been exempt from seizure, the owner could have complained to that commander, who might have ordered restitution or sent the offending party before a military tribunal as circumstances might have required, or he could have had recourse to the Government for redress. But there can be no doubt of the right of the Army to appropriate any property there, although belonging to private individuals, which was necessary for its support or convenient for its use. This was a belligerent right which was not extinguished by the occupation of the country, although the necessity for its exercise was thereby lessened. However exempt from seizure on other grounds private property there may have been, it was always subject to be appropriated when required by the necessities or convenience of the Army, though the owner of property taken in such case may have had a just claim against the Government for indemnity.” (Dow *v.* Johnson, 100 U. S., 158, 167; compare, Hefebower *v.* U. S., 21 Ct. Cls., 237; U. S. *v.* Pacific R. Co., 120 U. S., 239; Alexander *v.* U. S. 39 Ct. Cls., 383; 13 Op. Atty. Gen. III; Wiggin’s Case, 3 Ct. Cls., 413.)

“Extraordinary and unforeseen occasions arise, however, beyond a doubt, in cases of extreme necessity in time of war or of immediate or impending danger in which private property may be impressed into the public service or may be seized and appropriated to the public use or may even be destroyed without the consent of the owner. * * * The rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser and that the Government is bound to make full compensation to the owner.” (U. S. *v.* Russell, 13 Wall., 623.)

Status of inhabitants in enemy country.—“The district of country declared by the constituted authorities during the late Civil War to be in insurrection against the Government of the United States was enemy territory, and all the people residing within such district were, according to public law and for all purposes connected with the prosecution of the war, liable to be treated by the United States, pending the war and while they remained within the lines of insurrection, as enemies, without reference to their personal sentiments and dispositions.” (Ford *v.* Surget, 97 U. S., 594.)

“It is said that, though remaining in rebel territory, Mrs. Alexander has no personal sympathy with the rebel cause and that her prop-

erty therefore can not be regarded as enemy property; but the court can not inquire into the personal character and dispositions of individual inhabitants of enemy territory. We must be governed by the principle of public law so often announced by this bench as applicable alike to civil and international wars, that all the people of each State or district in insurrection against the United States must be regarded as enemies until, by action of the Legislature and the executive, or otherwise, that relation is thoroughly and permanently changed." (Mrs. Alexander's Cotton, 2 Wall., 404; see also, *Miller v. U. S.*, 11 Wall, 268, sustaining laws providing for confiscation of private property owned by friendly as well as hostile inhabitants of the Confederate States.)

III. ACQUISITION AND GOVERNMENT OF TERRITORY.

Power to acquire territory.—"The genius and character of our institutions are peaceful, and the power to declare war was not conferred upon Congress for the purposes of aggression or aggrandizement, but to enable the General Government to vindicate by arms if it should become necessary its own rights and the rights of its citizens. A war, therefore, declared by Congress can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's territory. The United States, it is true, may enlarge its boundaries by conquest or treaty and may demand the cession of territory as a condition of peace in order to indemnify its citizens for the injuries they have suffered, or to reimburse the Government for the expense of the war; but this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. His duty and power are purely military. . . . He may invade the hostile country and subject it to the sovereignty and authority of the United States; but his conquests do not enlarge the boundaries of this Union nor extend the operations of our institutions and laws beyond the limits before assigned to them by the legislative power." (*Fleming v. Page*, 9 How., 603.)

"The Constitution confers absolutely upon the Government of the Union the power of making war and of making treaties; consequently that Government possesses the power of acquiring territory, either by conquest or treaty." (*American Insurance Co. v. Canter*, 1 Pet., 511.)

"The war power and the treaty-making power each carries with it

authority to acquire new territory." (*Stewart v. Kahn*, 11 Wall., 493.)

"The power to acquire territory, either by conquest or treaty, is vested by the Constitution in the United States." (*U. S. v. Huckabee*, 16 Wall., 414.)

The port of Tampico, Mexico, while in the military possession of the United States and governed by its military authorities acting under the orders of the President, was not a part of the United States and did not cease to be a foreign country in the sense in which these words are used in the acts of Congress. "It is true that when Tampico had been captured and the state of Tamanlipas subjugated, other nations were bound to regard the country while our possession continued as the territory of the United States and to respect it as such. * * * As regards all other nations, it was a part of the United States and belonged to them as exclusively as the territory included in our established boundaries. But yet it was not a part of this Union. For every nation which acquires territory by treaty or conquest holds it according to its own institutions and laws. * * * The power of the President under which Tampico and the state of Tamanlipas were conquered and held in subjection was simply that of a military commander prosecuting a war waged against a public enemy by the authority of his Government." Tampico therefore continued to be a foreign port, "nor did our laws extend over it." (*Fleming v. Page*, 9 How., 603.)

Status of Porto Rico while under military government previous to ratification of treaty of peace ceding the island to the United States: "During this period the United States and Porto Rico were still foreign countries with respect to each other. * * * The fact that notwithstanding the military occupation of the United States, Porto Rico remained a foreign country within the revenue laws is established by the case of *Fleming v. Page*." (*Dooley v. U. S.*, 182 U. S., 222.)

"Cuba is none the less foreign territory, within the meaning of the act of Congress because it is under a military government appointed by and representing the President in the work of assisting the inhabitants of the island to establish a government of their own under which as a free and independent people they may control their own affairs without interference by other nations." As between the United States and all foreign nations, Cuba was to be treated as if it were conquered territory. "But as between the United States and Cuba,

that island is territory held in trust for the inhabitants of Cuba, to whom it rightfully belongs." (*Neely v. Henkel*, 180 U. S., 109.)

Government of conquered territory during war.—By the conquest and military occupation of the port of Castine, Me., by the British during the War of 1812, "the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended and the laws of the United States could no longer be rightfully enforced there or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British Government and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case no other laws could be obligatory upon them; for where there is no protection or allegiance or sovereignty there can be no claim to obedience." (*U. S. v. Rice*, 4 Wheat, 246.)

"Although the city of New Orleans was conquered and taken possession of in a civil war waged on the part of the United States to put down an insurrection and restore the supremacy of the National Government in the Confederate States, that Government had the same power and rights in territory held by conquest as if the territory had belonged to a foreign country and had been subjugated in a foreign war. . . . In such cases the conquering power has a right to displace the pre-existing authority and to assume to such an extent as it may deem proper the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases save those which are found in the laws and usages of war. * * * In such cases the laws of war take the place of the Constitution and laws of the United States as applied in time of peace." (*New Orleans v. New York Mail S. S. Co.*, 20 Wall., 387; *Dooley v. U. S.*, 182 U. S., 222.)

"While his [military commander's] power is necessarily despotic, this must be understood rather in an administrative than in a legislative sense. While in legislating for a conquered country he may disregard the laws of that country, he is not wholly above the laws of his own. * * * His power to administer would be absolute, but his power to legislate would not be without certain restrictions—in other

words, they would not extend beyond the necessities of the case. * * * It was said that the courts established in Mexico during the war 'were nothing more than the agents of the military power to assist it in preserving order in the conquered territory and to protect the inhabitants in their persons and property while it was occupied by the American arms. They were subject to the military power and their decisions under its control whenever the commanding officer thought proper to interfere. They were not courts of the United States and had no right to adjudicate upon a question of 'prize or no prize,' although Congress in the exercise of its general authority in relation to the national courts would have power to validate their action." (*Dooley v. U. S.*, 182 U. S., 222.)

"So long as the war continued it can not be denied that he [the President] might institute temporary governments in insurgent districts occupied by the national forces or take measures in any States for the restoration of State governments faithful to the Union, employing, however, in such efforts only such means and agents as were authorized by constitutional laws." (*Texas v. White*, 7. Wall, 700.)

"The municipal laws—that is, such as affect private rights of persons and property and provide for the punishment of crime—are generally allowed to remain in force and to be administered by the ordinary tribunals as they were administered before the occupation. They are considered as continuing unless suspended or superseded by the occupying belligerent." (*Dow v. Johnson*, 100 U. S., 158.)

"While we see no reason to doubt the conclusion of the court that the port of Tampico [during its occupation by the United States in the Mexican War] was still a foreign port, it is not perceived why the fact that there was no act of Congress establishing a customhouse there or authorizing the appointment of a collector should have prevented the collector appointed by the military commander from granting the usual documents required to be issued to a vessel engaged in the coasting trade. A collector, though appointed by a military commander, may be presumed to have the ordinary power of a collector under an act of Congress, with authority to grant clearances to ports within the United States, though, of course, he would have no power to make a domestic port of what was in reality a foreign port." (*De Lima v. Bidwell*, 182 U. S., 1.)

Government of conquered and ceded territory after war.—See note to Art. IV, sec. 3, clause 2.

IV. DISCIPLINE OF ARMY.

Jurisdiction over persons in military service during war.—

“The question here is, What is the law which governs an army invading an enemy’s country? It is not the civil law of the invaded country. It is not the civil law of the conquering country. It is military law—the law of war—and its supremacy for the protection of the officers and soldiers of the Army when in service in the field in the enemy’s country is as essential to the efficiency of the Army as the supremacy of the civil law at home and in time of peace is essential to the preservation of liberty.” (Dow v. Johnson, 100 U. S., 158, 170.)

“This doctrine of nonliability to the tribunals of the invaded country for acts of warfare is as applicable to members of the Confederate Army when in Pennsylvania as to members of the National Army when in the insurgent States. The officers or soldiers of neither Army could be called to account civilly or criminally in those tribunals for such acts, whether those acts resulted in the destruction of property or the destruction of life. Nor could they be required by those tribunals to explain or justify their conduct upon any averment of the injured party that the acts complained of were unauthorized by the necessities of war.” (Dow v. Johnson, 100 U. S., 158, 169.)

Courts-martial did not have exclusive jurisdiction to try persons in the Army for offenses punishable by State laws during the Civil War while they were in States “occupying as members of the Union their normal and constitutional relation to the Federal Government, in which the supremacy of that Government was recognized and the civil courts were open and in the undisturbed exercise of their jurisdiction. When the armies of the United States were in the territory of insurgent States, banded together in hostility to the National Government, and making war against it—in other words, when the armies of the United States were in the enemy’s country—the military tribunals mentioned had under the laws of war and the authority conferred by the section named exclusive jurisdiction to try and punish offenses of every grade committed by persons in the military service. Officers and soldiers of the armies of the Union were not subject during the war to the laws of the enemy or amenable to his tribunals for offenses committed by them. They were answerable only to their own Government and only by its laws as enforced by its armies could they be punished. * * * The fact that when the offense was committed for which the defendant was indicted the State of Tennessee was in the military occupation of the United States with a military governor

at its head appointed by the President cannot alter this conclusion. Tennessee was one of the insurgent States forming the organization known as the Confederate States, against which the war was waged. Her territory was enemy's country, and its character in this respect was not changed until long afterward. * * * The laws of the State for the punishment of crime were continued in force only for the protection and benefit of its own people." (Coleman v. Tennessee, 97 U. S., 513, 515; see also Tennessee v. Hibdon, 23 Fed. Rep., 795; 24 Op. Atty. Gen., 570.)

When the armies of the United States are in the enemy's country the established military tribunals of the United States have under the laws of war and statutory authority exclusive jurisdiction to try and punish offenses of every grade committed by persons in the military service. (24 Op. Atty. Gen., 570, citing Coleman v. Tennessee, 97 U. S., 509.)

"While it is true that the jurisdiction of military tribunals is not exclusive *in time of peace* and in territory where the supremacy of the United States is recognized and the relations between the local government and the National Government normal, and where also the exercise of jurisdiction of the local civil courts is not disturbed, it is equally true that when the armies of the United States are in hostile territory, and as in the present case engaged in actual warfare, the jurisdiction of such tribunals over such offenses *is* exclusive; and it is evident from the decisions cited that in reference to the present question [Philippine insurrection] the country was none the less 'enemy's country' and the territory hostile because it was harassed by insurrection against a sovereignty perfect in law rather than attacked or defended by a recognized belligerent." (24 Op. Atty. Gen., 570.)

"It is well settled that a foreign army permitted to march through a friendly country or to be stationed in it by authority of its sovereign or government is exempt from its civil and criminal jurisdiction. * * * Much more must this exemption prevail where a hostile army invades an enemy's country. There would be something singularly absurd in permitting an officer or soldier of an invading army to be tried by his enemy whose country it had invaded. The same reasons for his exemption from criminal prosecution apply to civil proceedings. There would be as much incongruity and as little likelihood of freedom from the irritations of the war in civil as in criminal proceedings prosecuted during its continuance. In both instances, from the very nature of war the tribunals of the enemy must be without jurisdiction to sit in judgment upon the military conduct of the

officers and soldiers of the invading army * * *. It is manifest that if officers or soldiers of the army could be required to leave their posts and troops upon the summons of every local tribunal on pain of a judgment by default against them which at the termination of hostilities could be enforced by suit in their own States, the efficiency of the army as a hostile force would be utterly destroyed." (*Dow v. Johnson*, 100 U. S., 158, 165.)

"Nor is the position of the invading belligerent affected or his relation to the local tribunals changed by his temporary occupation and domination of any portion of the enemy's country * * *. The municipal laws—that is, such as affect private rights of persons and property and provide for the punishment of crime—are generally allowed to remain in force and to be administered by the ordinary tribunals as they were administered before the occupation. They are considered as continuing unless suspended or superseded by the occupying belligerent. But their continued enforcement is not for the protection or control of the army or its officers or soldiers. These remain subject to the laws of war and are responsible for their conduct only to their own government and the tribunals by which those laws are administered. If guilty of wanton cruelty to persons or of unnecessary spoliation of property or of other acts not authorized by the laws of war they may be tried and punished by the military tribunals. They are amenable to no other tribunal except that of public opinion, which it is to be hoped will always brand with infamy all who authorize or sanction acts of cruelty and oppression." (*Dow v. Johnson*, 100 U. S., 158; see also 24 Op. Atty. Gen., 570.)

An officer of the Army may be sued in the courts of the United States for unauthorized seizure of the property of a citizen traveling with the Army as a trader during the war with Mexico. "The trespass was committed out of the limits of the United States. But an action may be maintained in the circuit court for any district in which the defendant may be found upon process against him where the citizenship of the respective parties gives jurisdiction to a court of the United States." (*Mitchell v. Harmony*, 13 How., 115.)

The validity of a seizure by a United States officer in command of troops while in an insurgent State could not be tried in a municipal court in a common-law proceeding, where the property seized belonged to an enemy, as such seizure was an act of war and no action can be maintained in such court against the captor of booty. This conclusion does not conflict with the ruling of the Supreme Court in *Mitchell v. Harmony*, as there the property in question belonged to a citizen and not to an enemy. (*Coolidge v. Guthrie*, 6 Fed. Cas., No. 3185.)

An officer of the Federal Army was sued in New Orleans for seizure of private property by a subordinate officer under his authority, alleged to be a wanton abuse of power. Judgment was entered against defendant, with interest and costs. Suit was brought on this judgment in the Federal Court for the District of Maine and judgment entered by that court for \$2,659.67 and costs. This was reversed by the Supreme Court on ground that lower courts were without jurisdiction. (*Dow v. Johnson*, 100 U. S., 158.)

An officer in the Army of the United States who, while operating in the Philippines during the insurrection in those islands and while the government of military occupation was in force therein, committed homicide against a native of those islands, was amenable only to the laws of war and could not be tried by the civil courts of those islands or of the United States; and having left the military service, he could not be tried for the offense by a military court. A court-martial has no jurisdiction over an officer after he has left the service, and a military commission has no jurisdiction to try such officer after peace has been proclaimed. (24 Op. Atty. Gen., 570.) [While the United States was not at war with any recognized power during the Philippine insurrection, nevertheless a state of war existed for certain purposes as to all the military forces of the United States directly engaged in the suppression of said insurrection (7 Comp. Dec., 345); see note to sec. 290, Revised Statutes.]

An officer of United States Volunteers was charged with having deliberately murdered a brother officer during the Mexican War at a place in Mexico occupied by the United States troops and under the jurisdiction of the United States. He escaped to the United States during the progress of his trial by a military commission. Held, that he could not be tried by any civil court of the United States; and the volunteer forces to which he belonged having been disbanded and mustered out of the service, he could not be brought to trial by a military court as for a military offense. "However much it is to be regretted that the extraordinary case of Captain Foster should escape a judicial or military investigation, it is of infinitely higher moment that the constitutional principles of the Government as wisely expounded by the judiciary should be upheld and enforced. If the country hereafter should be likely to be placed in circumstances under which a similar case might arise, Congress can easily provide against a recurrence of the difficulties of the present case." (5 Op. Atty. Gen., 55.)

V. MARTIAL LAW.

Military jurisdiction over civilians in time of war.—"There are under the Constitution three kinds of military jurisdiction: One to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within the States or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of States maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under the military law, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as military government, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander, under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated martial law proper, and is called into action by Congress or temporarily when the action of Congress can not be invited, in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities whose ordinary law no longer adequately secures public safety and private rights." (Ex parts *Milligan*, 4 Wall., 2, dissenting opinion of four justices.)

Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the Army, and is in fact his will." (*U. S. v. Dieckelman*, 92 U. S., 520. For other definitions, see 8 Op. Atty. Gen., 365; *In re Egan*, 8 Fed. Cas. No. 4, 303; *In re Ezeta*, 62 Fed. Rep., 972.)

"What has been called the paramount law of self-defense, common to all countries, has established the rule that whatever force is necessary is also lawful. 'Whatever force is necessary for self-defense is also lawful. This law, applied nationally, is the martial law, which is an offshoot of the common law, and although ordinarily dormant in peace, may be called forth by insurrection or invasion.'" (*Commonwealth v. Shortall*, 206 Pa. St., 165; 65 L. R. A., 193.)

"The right in the military officer to govern by martial law, as we have said, arises upon the fact of existing or immediately impending force at a given place and time, against legal authority, which the civil authority is incompetent to overcome; and it is exercised precisely upon the principle on which self-defense justifies the use of force by

individuals. * * * That is, there are cases where force must be resisted by force, instead of waiting for the civil authorities. * * * This is the doctrine expressed by the maxim, *inter arma silent leges*; * * * that is, that in the midst of actual force, for *arma* is used as meaning force, the law is silent." (Griffin v. Wilcox, 21 Ind., 370.)

"As has been said by a distinguished civilian, 'when foreign invasion or civil war renders it impossible for courts of law to sit, or to enforce the execution of their judgments, it becomes necessary to find some rude substitute for them and to employ for that purpose the military, which is the only remaining force in the community; and, while the laws are silenced by the noise of arms, the rulers of the armed force must punish, as equitably as they can, those crimes which threaten their own safety and that of society; but no longer.' This necessity must be shown affirmatively by the party assuming to exercise this extraordinary and irregular power over the life, liberty and property of the citizen, whenever it is called in question." (In re Egan, 8 Fed. Cas. No. 4303.)

"Public danger warrants the substitution of executive process for judicial process." (Moyer v. Peabody, 212 U. S., 78.)

"Unquestionably a State may use its military power to put down an armed insurrection too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government. The State itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable and so ramified throughout the State as to require the use of the military force and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war, and the established government resorted to the rights and usages of war to maintain itself and to overcome the unlawful opposition." (Luther v. Borden, 7 How., 1.)

"It is not unfrequently said that the community must be either in a state of peace or war, as there is no intermediate state. But from the point of view now under consideration this is an error. There may be peace for all the ordinary purposes of life, and yet a state of disorder, violence and danger in special directions, which, though not technically war, has in its limited field the same effect, and if important enough to call for martial law for suppression is not distinguishable, so far as the powers of the commanding officer are concerned, from actual war. The condition in fact exists, and the law

must recognize it, no matter how opinions may differ as to what it should be more correctly called." (*Commonwealth v. Shortall*, 206 Pa. St., 165; 65 L. R. A., 193.)

Martial law "is called into action by Congress, or temporarily, when the action of Congress can not be invited, in the case of justifying or excusing peril, by the President." (*Ex parte Milligan*, 4 Wall, 2; see also *Despan v. Olney*, 7 Fed. Cas. No. 3822.)

"It is to be borne in mind that this power is not one to be exercised only by the highest officers of the Government, in whose hands it might be exercised with moderation. It is claimed for the President as Commander-in-Chief and as incident to a state of war. But if it exists at all it exists as the law of war or martial law, and may be exercised by the military officer in command of any district without reference to his rank, as rightfully as by the President himself. He might be afraid to exercise it without orders from his superior, but if it exists at all it belongs to him as well as to the President." (*Johnson v. Jones*, 44 Ill., 143; 92 Am. Dec., 159.)

Limitations upon exercise of martial law.—"Martial law can not arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration. * * * There are occasions when martial rule can be properly applied. If in foreign invasions or civil war the courts are actually closed and it is impossible to administer criminal justice according to law, then on the theater of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority thus overthrown, to preserve the safety of the Army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration, for if this government is continued after the courts are reinstated it is a gross usurpation of power. Martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war." (*Ex parte Milligan*, 4 Wall., 2.)

"A citizen not connected with the military service and resident in a State where the courts are open and in the proper exercise of their jurisdiction can not, even when the privilege of the writ of habeas corpus is suspended, be tried, convicted, or sentenced otherwise than by the ordinary courts of law." (*Ex parte Milligan*, 4 Wall., 3.)

The Federal authority having been unopposed in the State of Indiana and the Federal courts open for the trial of offenses and the

redress of grievances, the usages of war could not, under the Constitution, afford any sanctum for the trial there of a citizen in civil life not connected with the military or naval service by a military tribunal for any offense whatever. "It is claimed that martial law covers, with its broad mantle, the proceedings of this military commission. The proposition is this: That in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it and of which he is the judge) has the power, within the lines of his military district, to suspend all civil rights and their remedies and subject citizens, as well as soldiers, to the rule of *his will*; and in the exercise of his lawful authority can not be restrained except by his superior officer or the President of the United States. * * * Martial law established on such a basis destroys every guaranty of the Constitution and effectually renders the 'military independent of and superior to the civil power.' * * * Civil liberty and this kind of martial law can not endure together. * * * It will be borne in mind that this is not a question of the power to proclaim martial law when war exists in a community and the courts and civil authorities are overthrown." (*Ex parte Milligan*, 4 Wall., 3, 124-127.)

Martial law is exercised in our country, the military being on the spot to execute it where no civil authority exists; but where the civil authority exists, the Constitution is imperative that it shall be paramount to the military." (*Griffin v. Wilcox*, 21 Ind., 370.)

"Martial law is restricted to those places which are the theater of war and to their immediate vicinity. Modified by the necessities of war, it is obvious it can not operate beyond these bounds." (In re Kemp, 16 Wis., 359.)

"Neither can even the Commander-in-Chief of the Army extend martial law beyond the sphere of military operations. If he possessed this power, in time of war or insurrection, over the whole extent of the Nation, whether within the theater of military operations or not, the political institutions and laws of the land would be entirely at his mercy." (*Jones v. Seward*, 40 Barb. (N. Y.), 563.)

"But when the civil courts, in the midst of loyal communities, are exercising their ordinary jurisdiction, the appeal to the military arm or to martial law is needless." (*Johnson v. Jones*, 44 Ill., 143; 93 Am. Dec., 159.)

See note to Article I, Section 8, Clause 13, "Civil responsibility of persons in military service."

Effect of martial law.—When martial law is declared by a State during a local insurrection, "the officers engaged in its military

sevice might lawfully arrest anyone who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection, and might order a house to be forcibly entered and searched when there were reasonable grounds for supposing he might be there concealed. Without the power to do this, martial law and the military array of the Government would be mere parade and rather encourage attack than repel it." (*Luther v. Borden*, 7 How., 1.)

"The effect of martial law is to put into operation the powers and methods vested in the commanding officer by military law. So far as his powers for the preservation of order and security of life and property are concerned, there is no limit but the necessities and exigency of the situation; and in this respect there is no difference between a public war and domestic insurrection." (*Commonwealth v. Shortall*, 206 Pa. St., 165; 65 L. R. A., 193.)

Martial law "overrides and suppresses all existing civil laws, civil officers, and civil authorities by the arbitrary exercise of military power; and every citizen or subject, in other words, the entire population of the country, within the confines of its power, is subjected to the mere will or caprice of the commander. He holds the lives, liberty, and property of all in the palm of his hand. Martial law is regulated by no known or established system or code of laws, as it is over and above all of them. The commander is the legislator, judge and executioner. His order to the provost marshal is the beginning and the end of the trial and condemnation of the accused. There may be a hearing, or not, at his will. If permitted, it may be before a drum-head court martial or the more formal board of a military commission, or both forms may be dispensed with and the trial and condemnation be equally legal, though not equally humane and judicious." (*In re Egan*, 8 Fed. Cas. No. 4303.)

"The will of the military chief * * * is, subject to slight limitations, the law of the military zone or theater of war. It is sometimes spoken of as a substitute for the civil law. It is said also that the proclamation of martial law ousts or suspends the civil jurisdiction. These expressions are hardly accurate. The invasion or insurrection sets aside, suspends, and nullifies the actual operation of the Constitution and laws. The guaranties of the Constitution as well as the common law and statutes, and the functions and powers of the courts and officers, become inoperative by virtue of the disturbance. The proclamation of martial law simply recognizes the status or condition of things resulting from the invasion or insurrection and declares it. In sending the army into such territory to occupy it and

execute the will of the military chief for the time being, as a means of restoring peace and order, the executive merely adopts a method of restoring and making effective the Constitution and laws within that territory, in obedience to his sworn duty to support the Constitution and execute the laws." (State v. Brown, 71 W. Va., 519, 521; 33 Ann. Cas., 2.)

"In most, if not all, of the instances in which the civil courts have treated sentences of the military commissions as void, the commissions acted and the sentences were pronounced in tranquil territory, not covered by any proclamation of martial law, in which there was no actual war, in which the Constitution and laws were in full and unobstructed operation." (State v. Brown, 71 W. Va., 519, 524; 33 Ann. Cas., 3.) ["In some parts of the country, during the War of 1812, our officers made arbitrary arrests and by military tribunals tried citizens who were not in the military service. These arrests and trials, when brought to the notice of the courts, were uniformly condemned as illegal." (*Ex parte Milligan*, 4 Wall., 128.)]

"Power to establish a military commission for the punishment of offenses committed within the military zone is challenged in argument; but we think such a commission is a recognized and necessary incident and instrumentality of martial government. A mere power of detention of offenders may be wholly inadequate to the exigencies and effectiveness of such government. How long an insurrection or a war may last depends upon its character." (State v. Brown, 71 W. Va., 519, 525; 33 Ann. Cas., 4.)

"So long as such arrests [without judicial process] are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief. * * * When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment." (*Moyer v. Peabody*, 212 U. S., 78.)

"No more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for the purposes of oppression and any injury willfully done to person or property, the party by whom or by whose order it is committed will undoubtedly be answerable." (*Luther v. Borden*, 7 How., 1.)

"It is an unbending rule of law that the exercise of military power when the rights of the citizen are concerned shall never be pushed

beyond what the exigency requires." (*Raymond v. Thomas*, 91 U. S., 712.)

During the war of 1812 General Jackson declared martial law in New Orleans. By his order some of the citizens were arrested for seditious publications. A writ of habeas corpus was issued and served on General Jackson, who tore up the writ and sent the judge by force beyond his lines. Later news was received of the treaty of peace and martial law revoked. The court issued a process against Jackson for contempt of court. He came into court personally, submitted to its jurisdiction, and paid a fine of \$1,000. "I have always been taught to believe that Judge Hall was right in imposing the fine, and that General Jackson earned the brightest page in his history by paying it and gracefully submitting to the judicial power. Such I believe is the judgment of history and of thoughtful judicial inquirers, though a grateful country very properly refunded to her favorite general the sum he paid for a necessary but unauthorized exercise of military power." (Opinion of Mr. Justice Miller, *Dow v. Johnson*, 100 U. S., 158, 194.)

Military commissions.—"The laws of war constitute much the greater part of the laws of nations. Like the other laws of nations, they exist and are of binding force upon the departments and citizens of the Government, though not defined by any law of Congress * * * It is manifest from what has been said, that military tribunals exist under and according to the laws and usages of war in the interest of justice and mercy. They are established to save human life, and to prevent cruelty as far as possible. The commander of an army in time of war has the same power to organize military tribunals and execute their judgments that he has to set his squadrons in the field and fight battles. His authority in each case is from the law and usage of war * * * That the laws of war authorized commanders to create and establish military commissions, courts, or tribunals, for the trial of offenders against the laws of war, whether they be active or secret participants in the hostilities, can not be denied. * * * It must be constantly borne in mind that such tribunals * * * can not exist except in time of war, and can not then take cognizance of offenders or offences where the civil courts are open, except offenders and offences against the laws of war * * * The fact that the civil courts are open does not affect the right of the military tribunal to hold as a prisoner and to try. The civil courts have no more right to prevent the military, in time of war, from trying an offender against the laws of war than they have a right to interfere with and prevent a

battle." (11 Op. Atty. Gen. 297, holding that "the persons charged with the assassination of the President in the city of Washington, on the 14th of April, 1865, may be lawfully tried before a military tribunal." See also, *Carver v. U. S.*, 16 Ct. Cls., 361; 111 U. S., 609.)

See "Unconstitutional Claims of Military Authority," published in *Journal of the American Institute of Criminal Law and Criminology*, vol. 5, page 718, for criticism of decisions of the United States Supreme Court and other authorities above cited; see also, *Johnson v. Duncan*, 3 Martin (La.) 530, 6 Am. Dec. 675, cited in dissenting opinion in *Luther v. Borden*, 7 How. 83, in dissenting opinion in *Re Moyer*, 12 L. R. A. (N. S.) 979, 35 Colo. 159, etc. See also XIV Mich. Law Rev. 197.

(To be continued.)