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It is worth remarking that as the Constitution is deemed to proceed from the People who enacted it, not from the Convention who drafted it, it is regarded for the purposes of interpretation as being the work not of a group of lawyers but of the people themselves.

—Bryce, The American Commonwealth.

INTRODUCTION

In the trial of the Lincoln conspirators, a most illustrative example of civilians being tried by a military commission, one of the counsel, referring to the matter of jurisdiction, said: "That question, in all courts, civil, criminal, military, must be considered and answered affirmatively before judgment can be pronounced."[1] The issue arises when a civilian is brought before a court-martial or military commission for trial without a jury, instead of before the ordinary civil courts, which are open at the time. The court-martial or military commission may be established by virtue of a statute, as exemplified in the Articles of War,[2] enacted by Congress; or it may arise as an incident of the common-law of war, as for example, the military commission convoked in 1847 by General Scott to try civilians in Mexico.

This article will consider the jurisdiction assumed by courts-martial or military commissions to try and to sentence civilians when the regular courts are open. As the trial of the Lincoln conspirators involved this question, special reference will be made to it.

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1 The Assassination of President Lincoln and the Trial of the Conspirators. Compiled and arranged by Benn Pitman, Recorder to the Commission. Publishers: Moore, Wilstach & Baldwin, Cincinnati and New York, 1865. Speech of Mr. Reverdy Johnson. See Myths After Lincoln by Lloyd Lewis, 1929, Harcourt, Brace & Co.

2 June 4, 1920, c. 227, subchapter 11, 1, 41 Stat. 787. 10 USCA, Ch. 36.

The civilian claims that the court-martial or military commission has no jurisdiction, as it is not a court within the meaning of Art. III, Sec. 1, of the Constitution; and he further contends that such tribunal deprives one of a right to a trial by jury as provided by Art. III, Sec. 2, Cl. 3, and ignores the safeguards surrounding it, which were established by the fifth and sixth amendments. The militarician claims that the military tribunal has jurisdiction over civilians by virtue of the "war power," even though the civil courts are open, as the right to a trial by jury and to other civil liberties guaranteed by the Bill of Rights is suspended in time of war. He cites the maxim, *"Inter arma silent leges."* In answer to that school of thought another maxim is cited, *"Sunt et belli sicut et pacis jura."* It is further shown that the basic principle of government under the Constitution is that the civil power is supreme at all times; and, in the language of ex-President John Adams, "Nothing is more essential than to hold the civil authorities decidedly superior to the military power." [3] It is then added that the exercise of the "war power" does not suspend the operation of the provision relating to trial by jury nor any of the provisions found in the Bill of Rights, as these were inserted to protect the fundamental liberties, which history had shown were endangered by an exercise of military power. As Justice Field said in the *Milligan* case, "Not one of these safeguards can the President, or Congress, or the Judiciary disturb except the one concerning the writ of *habeas corpus*." [4]

1066 — 1860

A brief examination will be made of the historical development as shown in the leading cases and opinions to afford a proper perspective for determining the line of demarcation between military and common law trials of civil-

[3] Works of John Adams, Vol. 10, p. 17.

[4] Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281 (1866). See "Military Law and War-Time Legislation," 1919, Preface by Colonel John H. Wigmore, and pp. 158, 681, 729, 820.

ians in time of war when the ordinary courts are open and functioning.

In Hale's History of the Common Law,[5] it is stated, in referring to the jurisdiction over civilians in time of martial law:

"That this indulged law is only to extend to members of the army, or to those of the opposed army, and never was so much indulged as intended to be executed or exercised upon others, for others who had not listed under the army had no color or reason to be bound by military constitutions applicable to the army whereof they were not parts, but they were to be ordered and governed according to the laws to which they were subject although it were a time of war."

Again, in his classic on criminal law, Hale states, "That regularly when the King's courts are open it is a time of peace in judgment of law." [6] These quotations indicate the tendency of the early common law to clearly define the limitations of military jurisdiction over civilians. Likewise Magna Charta and Petition of Right exemplify the same doctrine. In Forsyth's valuable collection of cases is found an opinion rendered by eminent Mr. Hargrave relating to an Irish trial in which a military commission tried a civilian and pronounced the sentence of death while the regular courts were open. Mr. Hargrave said:

"He saw the right of putting rebels to death in battle while the battle lasted. He also saw the right to arrest those found in actual rebellion or duly charged with being traitors, and to have them imprisoned for trial and punishment according to the law of treason. But he could not see that trying and punishing rebels according to martial law was, when Mr. Grogan was tried and put to death, part of the English law as it was administrable in England or even as it was administrable in Ireland. On the contrary he saw such recitals to be irreconcilable with the Petition of Right and the opinions of Coke . . . Noy . . . Rolle . . . Banks . . . Mason . . . and Hale." [7]

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5 Ed. 1820 by Runnington, p. 42. See Holdsworth, Martial Law Historically Considered, 18 L. Q. R. 117.

6 Hale, Pleas of the Crown, Vol. 1, Dogherty's Ed. 1800, p. 346.

7 Forsyth's Cases and Opinions on Constitutional Law, Stevens & Haynes, London, 1869, p. 189, 192. At p. 491, in this book, will be found one of the greatest arguments of Mr. David Dudley Field, on military jurisdiction over civilians: McCardle's case, 7 Wall. 506 (1868).

In Coke's words, "A rebel may be slain in rebellion but if he be taken he cannot be put to death by martial law." [8] Again, Rolle has said, "The common law is the highest for the subject. . . . If a subject be taken in rebellion and be not slain at the time of his rebellion, he is to be tried after by the common law." [9] In Maitland's Constitutional History are the following remarks on this subject: "But suppose one of the rebels captured, there is no court that can try him save the ordinary criminal courts of the country." [10] The preceding historical sources indicate that the spirit as well as the positive letter of the law upheld the doctrine that the civilian had a *prima facie* right to be tried by a civil court. England is adhering to this doctrine at the present time and with the exception of some anomalies in the sixteenth and seventeenth centuries it has strictly followed these principles.

In Ireland the famous case of *Wolfe Tone* involved the question of military jurisdiction over a civilian in time of war when the civil courts were open but Tone's rash act precluded a final decision by the Irish court. Tone left Ireland and became a French officer. Returning to Ireland on a French warship, he was arrested by the military authorities and tried by court martial and sentenced to be hanged. On the day set for his execution his father obtained counsel, who sued out a writ of *habeas corpus* and sought Tone's release on the ground that the great criminal court of the land was open and therefore the military court was without jurisdiction. Lord Chief Justice Kilwarden ordered the writ to issue and likewise ordered the sheriff to proceed to the barracks and acquaint the provost-marshal that a writ was being issued and to suspend Tone's execution. Upon refusal of the military officers to recognize the writ, the Lord Chief Justice said: "Mr. Sheriff, take the body of

8 Rushworth's Collection, iii, Appendix, 76 to 81.

9 *Ibid.* See Fairman, The Law of Martial Rule, Chicago, 1930, Callaghan and Company, p. 1, and p. 245 for extensive Bibliographical Note.

10 P. 492.

Tone into custody. Take the provost-marshal and Major Sandys into custody and show the order of the court to General Craig." [11] "Nothing better illustrates the noble energy with which judges have maintained the rule of regular law, even at period of revolutionary violence, than Wolfe Tone's case." [12]

During the Revolutionary War while the civil courts of New York were open and functioning the military authorities assumed jurisdiction in the following instance: In 1780, General Washington ordered a court martial to try Joshua Hett Smith, a civilian for aiding and assisting Benedict Arnold in his treasonable design with Major Andre. Smith accompanied Major Andre from the sloop of war *Vulture* and entertained him as a guest at his home. Upon the arrest of Major Andre it was found he was wearing a suit of Smith's clothes. "Smith objected to the legality or propriety of his being tried by a military tribunal. He conceived himself only amenable to the civil authority of the state to which he belonged, which had established the right of trial by jury in the constitution then recently established. "I was answered by the court," he says in his narrative, "that I was tried by a resolve of congress, passed in the year 1777, authorizing the commander-in-chief of the army, to hear and try by court martial, any of the citizens of the United States, who should harbor or secrete any of the subjects or soldiers of the king of Great Britain, knowing them to be such, or should be instrumental in conveying intelligence to the enemy, and, if found guilty, should be condemned and executed as a traitor, assassin and spy. To this I objected. . . . it made the military paramount to the civil authority, and would

11 27 State Trials (Howell's Ed., London 1820), 614 at 625. *Cf.* Ex parte McArdle, 7 Wall. 506 (1868), and see Field's argument in behalf of McArdle, *op. cit. supra* note 7.

12 Dicey's Law of the Constitution, 8th Ed., London 1915, p. 289. Dicey concluded, on p. 290, as follows: "When it is remembered that Wolfe Tone's substantial guilt was admitted, that the Court was made up of judges who detested the rebels, and that in 1798 Ireland was in the midst of a revoluntionary crisis, it will be admitted that no more splendid assertion of the supremacy of the law can be found than the protection of Wolfe Tone by the Irish Bench."

establish if the court were to proceed on my trial, a precedent dangerous to the liberties of the subject; that it would excite eventually the indignation of my fellow citizens, in destroying one of the established principles of liberty belonging to the subject, and the violation of the right to trial by jury, one of the principal reasons assigned by congress for their separation from Great Britain, in the Declaration of Independence, as well as allowing the military an extent of power incompatible with a free government." [13] The Court martial ignored Smith's argument. This is one of the earliest American precedents following the Declaration of Independence in which the military authorities ignored the demand of a jury trial in the civil courts and proceeded against a civilian with a court martial. In considering the value of its authority it must be noted that this proceeding occurred before the adoption of the constitution. Another important case which involved the right to try civilians without a jury arose in Rhode Island in 1786. A depression followed in the wake of the Revolutionary War and an idea became prevalent that paper money might be a way out; so the legislature of Rhode Island passed a law declaring paper money legal tender in lieu of gold or silver. Under the banking act it was declared a crime for any merchant to refuse to accept the paper money and one was subject to arrest and trial before a special court without a jury for violating the act. Wheeden, a butcher, refused to accept the paper money in payment of a bill of supplies and was arrested for violating the law; but much to the surprise of the executive and legislature, the Judges dismissed the complaint. The legislature thereupon sought to impeach the judges for attempting to interfere with the power of the legislature. *Trevett against Wheenden* [14] is one of the best contemporary expositions upholding the right to trial by jury

[13] 2 Chandler's Criminal Trials 185 at 187. New York sought to prosecute Smith as a result of these charges but he fled to England.

[14] 2 *ibid.*, 267. See Capital Traction Co. v. Hoff, 174 U. S. 1 (1898) (Aspects of Jury Trial).

and denying the right of jurisdiction in special courts to try summarily. The proceedings against the Rhode Island Judges [15] for dismissing the complaint in the above case contains an exhaustive contemporary analysis of the relation between the legislative, executive, and judicial departments, and sustains the right of judicial review. Although military jurisdiction was not involved in these early Rhode Island decisions there were questions akin to those arising in a conflict between the military and civil power. Did the legislative department in time of emergency have power to suspend the right to a trial by jury and create special tribunals for the trial of crimes although the ordinary courts were open at the time? As a military trial is merely one by a special court without a jury there is much argumentative material in this 1786 record, which can be used in 1933 for the purpose of comparative analysis.

The *Trials of the Western Insurgents* gives a sidelight on the relation between the civil and military powers that arose out of the Whiskey Rebellion in Western Pennsylvania. When General Washington decided to use the militia to curb the rebellion he had Alexander Hamilton, who was at Bedford with him, send a letter of instructions to Governor Lee under date of October 20th, 1794. The letter stated: "Of those persons in arms, if any, whom you may make prisoners; leaders, including all persons in command, are to be delivered to the civil magistrate. . . ." Further, it said: "You are to exert yourself by all possible means, to preserve discipline among the troops, particularly a scrupulous regard to the rights of persons and property, and a respect for the authority of the civil magistrates, taking especial care to inculcate, and cause to be observed this principle, that the duties of the army are confined to the attacking and subduing of armed opponents of the laws, and to the supporting and aiding of the civil officers in the execution

15 *Ibid.* See 12 Cal. Law Rev. 75, 85, as to the effect of Constitution on previous law.

of their functions." [16] General Washington in this instance had the Judge of the District, Richard Peters, and the Attorney of the District, William Rawle, accompany the army. Such practice made the civil power supreme. If the military commander claims jurisdiction the well known incident in which General Jackson was involved evidences the complications that may arise. After the battle of New Orleans, but before official knowledge that the treaty of peace had been signed, General Jackson exercised the military jurisdiction which he assumed upon the declaration of martial law at the outset. As the war was over, a Mr. Louiallier published a denunciatory newspaper article, and General Jackson arrested him. Mr. Morel, a lawyer, had United States Judge Hall issue a writ of habeas corpus in behalf of Mr. Louiallier. General Jackson arrested the lawyer and the judge. Mr. Hollander said, in effect, that such conduct was terrible, and General Jackson arrested him. When the marshal attempted to serve the writ of habeas corpus, General Jackson took it from him and he returned with a copy. When peace was restored, Judge Hall returned to his bench and fined General Jackson one thousand dollars; and the General paid it.[17]

In *Martin v. Mott* [18] a militia-man refused to obey the order of the President calling forth the militia, for which delinquency he was tried by a court-martial and fined $96.00. It was contended that Congress could not confide such power in the President by legislative act and that the President had no power to decide whether the exigency justified calling forth the militia; but Mr. Justice Story said in his opinion, "We are all of the opinion that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons." This leads into a consideration of

16 Wharton's State Trials, Philadelphia 1849, pp. 159, 160.

17 Thirty years later Congress passed an Act which refunded the amount paid with interest. Bassett's Life of Andrew Jackson.

18 12 Wheat. (U. S.) 19, 6 L. ed. 537 (1827).

the matter of political questions and the principle that political questions are for the executive department to decide and not the courts.[19] Whether the United States recognizes Russia or whether a state of war exists is said to be a matter for the political department of the government to decide. Usually the judicial department has been reluctant to interfere in political questions;[20] but in an Irish case it was stated: "A somewhat startling argument was addressed to us by Mr. Serjeant Hanna, that it was not competent for this court to decide whether a state of war existed or not, and that we were bound to accept the statement of Sir Nevil Macready in this respect as binding upon the court. This contention is absolutely opposed to our judgment in Allen's Case (1921) 2 I. R. 241, and is destitute of authority and we desire to state, in the clearest possible language, that this Court has the power and duty to decide whether a state of war exists which justifies the application of martial law." [21] A case that arose in Bombay in 1830 pointed out that as long as the military authorities were assuming jurisdiction the civil courts would not undertake to act. In that case [22] a military officer was sued for seizing treasure at Poonah while the civil courts were open, and the Bombay court held that the officer was liable. On appeal, that opinion was reversed. The court said it was a time of war and, even though the civil courts were open, the military authorities were not subject to its jurisdiction. The peculiar thing that must be remembered about that case of 1830 is that it

19 See Weston, "Political Questions," 38 Harv. L. Rev. 296 (1925); Field, "The Doctrine of Political Questions in the Federal Courts," 8 Minn. L. Rev. 485 (1924). In Sterling v. Constantin, 53 Sup. Ct. 116 (1932), the question was considered as to whether the facts justified Governor Sterling issuing a proclamation and declaring martial law in the oil fields of Eastern Texas. *Cf.* U. S. v. Wolters, 268 Fed. 69 (1920), and note in 34 Harv. L. Rev. 659, "Trial of Civilians by Military Courts."

20 Martin v. Mott, *op. cit. supra* note 18; Luther v. Borden, 48 U. S. 1, 12 L. ed. 581 (1849); Moyer v. Peabody, 212 U. S. 78, 29 Sup. Ct. 235, 53 L. ed. 410 (1909). See Fletcher, "The Civilian and War Power," 2 Minn. L. Rev. 110 (1918).

21 R. (Garde) v. Strickland, [1921] 2 I. R. 317, 329. See Bruce, "The Oil Situation and the Military," 17 A. B. A. Journal 643 (1931).

22 Elphinstone v. Bedreechund, 1 Knapp, P. C. 316 (1830).

involved an action for damages and not the question whether military authorities have exclusive jurisdiction over civilians in time of war when the civil courts are open. Yet, in 1902,[23] when a real issue arose as to military jurisdiction over civilians this 1830 damage case was used as controlling authority for the view that the military jurisdiction was supreme. There are other views, and this problem should also be considered in the light of the following opinion sent to the Governor of Canada in 1838 by the Attorney General and Solicitor General of England: "When the regular courts are open, so that criminals might be delivered over to them to be dealt with according to law, there is not, as we conceive, any right in the Crown to adopt *any other course of proceeding*." [24] In general that statement is likewise applicable to the United States and up until 1860 all doubt was resolved in favor of its soundness.

1860 — 1933

Until 1860 in the United States a balance had generally been struck between the essentials of a stable society and the civil liberties of the individual.[25] It always had been customary to recognize the constitutional guaranties of jury trial; and, as a matter of practice, civilians were immune

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23 Ex parte Marais, [1902] A. C. 109. Marais was arrested on August 15, 1901, by the chief constable of Paarl, about thirty-five miles from Cape Town, who acted under instructions from the military authorities. See Tilonko v. Atty. Gen. of Natal, [1907] A. C. 93.

24 Forsyth's Cases and Opinions on Constitutional Law, *op. cit. supra* note 7, at p. 198. Professor John Meehan, a fellow member of the faculty, called my attention to the following statement in The Constitutional Review, Vol. XIII, April 1929, p. 81, in an article by Professor Robert Rankin: ". . . The fact that the courts are open has great weight, but the real test is the method with which the civil courts exercise their jurisdiction." *Cf.* Dicey's Constitution, *op. cit. supra* note 12, at p. 544.

25 Whiting, "War Powers of the President," Boston, 1862, p. 124, states: "All judicial convictions must be in accordance with the laws establishing the judiciary and regulating its proceedings. Whenever a person accused of crime is held by the government, not as a belligerent or prisoner of war, but merely as a citizen of the United States, then he is amenable to, and must be tried under and by virtue of, standing laws; and all rights guaranteed to other citizens in his condition must be conceded to him." Stacy's case, in 10 John. 328 (1813), is one of the well-known cases illustrating an earlier contemporaneous view. One of the most eminent judges that ever graced the bench, Kent, Ch. J. said: "This is a case which concerns the personal liberty of the citizen. Stacy is now suffer-

from military trials if the ordinary courts were open. But amidst the hysteria of political and civil war the civil liberties of the individual were ignored; and wholesale arrests of citizens by military order and subsequent trials by military commissions were common. Sometimes there would be no trial, as in the case of *Madison Y. Johnson v. J. Russell Jones,*[26] which is typical of the times. Johnson, an eminent lawyer of Galena, Illinois, was suspected of not being in sympathy with the government and was arrested and brought to Chicago, where he was kept for a few days. He was then transferred to Fort Delaware and kept in prison for three months. Then he was set at liberty without trial or examination or any offense being charged against him. Johnson then sought to recover damages for false arrest and imprisonment, and won his case. In 1861 John Merryman [27] was aroused from his bed at two o'clock in the morning, arrested by military order, and taken to Fort McHenry near Baltimore. It was claimed Merryman was not support-

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ing the rigor of confinement in close custody, at this unhealthy season of the year, at a military camp, and under military power. He is a natural born citizen residing in this state. He has a numerous family depending upon him for their support. He is in bad health, and the danger of a protracted confinement to his health, if not to his life, must be serious. The pretended charge of treason (for upon the facts before us we must consider it as a pretext), without being founded upon oath, and without any specification of the matters of which it might consist, and without any color of authority in any military tribunal to try a citizen for that crime, is only aggravation of the oppression of the confinement. It is the indispensable duty of this court, and one to which every inferior consideration must be sacrificed, to act as a faithful guardian of the personal liberty of the citizen, and to give ready and effectual aid to the means provided by law for its security." A petition of *habeas corpus* had been ordered to issue in Stacy's behalf. The court ordered an attachment against General Lewis for a contempt in case he did not discharge the prisoner forthwith.

26 44 Ill. 142 (1867). In an important case, Smith v. Shaw, 12 Johns. 257 at 265, decided in 1815, a civilian sued a military officer for false imprisonment. The officer set up the defense that Shaw was a spy in the War of 1812, but the military arrest was not upheld. Ch. J. Johnson, who subsequently became a Justice of the Supreme Court of the United States, said in the opinion: "None of the offenses charged against Shaw were cognizable by a court-martial, except which related to his being a spy; and if he was an American citizen he could not be charged with such an offense. He might be amenable to the civil authority for treason, but could not be punished under martial law as a spy."

27 Ex parte Merryman, Taney 246, Fed. Cas. No. 9487 (1861). (Professors McCabe and Rapacz, of the De Paul Law College, furnished many helpful suggestions about the cases of the period between 1860 and 1870.)

ing the cause of the Union. Chief Justice Taney ordered a writ of *habeas corpus* to issue in Merryman's behalf but the military authorities refused to recognize the order of the Chief Justice as President Lincoln had given power to suspend the writ. The Chief Justice denied the power and ordered that an attachment issue against General Cadwalader because he acted in disobedience of the writ. When the attaching order was attempted to be served at Fort McHenry by the United States marshal he was ignored at the gate by the military authorities. Merryman was still in custody. In 1863 Clement L. Vallandingham, one of the leaders of the copperheads, was arrested by order of General Burnside; and President Lincoln said: "This arrest was made because he was laboring, with some effect, to prevent the raising of troops; to encourage desertions from the army; and to leave the rebellion without an adequate force to suppress it. . . . he was damaging the army upon the existence and vigor of which the life of the nation depends. He was warring upon the military and this gave the military constitutional jurisdiction to lay hands upon him." [28] A writ of *habeas corpus* sought by Vallandingham was refused by Judge Leavitt in the United States Circuit Court at Cincinnati because he said he was bound by a prior decision rendered in October, 1862, by Judge Swayne in which he concurred. This decision held that if the prisoner was under military jurisdiction the civil courts would not grant *habeas corpus*. Vallandingham, after his trial by the military commission, sought a writ of *certiorari* before the Supreme Court of the United States but it was denied on the ground that the court did not have original jurisdiction in such a case under the constitution.[29] Instead of seeking a writ of *cer-*

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28 President Lincoln's Views — An Important Letter on the Principles Involved in the Vallandingham Case. (Pamphlet) Philadelphia, 1863. King & Baird, Sansom Street, pp. 12, 13; Nicolay and Hay, VIII, p. 298.

29 Ex parte Vallandingham, 1 Wall. 243 (1864). In a volume by James G. Randall, "Constitutional Problems Under Lincoln," published by Appleton & Company, New York, 1926, at p. 46, referring to President Lincoln, it states: "In the case of Vallandingham, for instance, there is good evidence that he would

tiorari, Vallandingham should have appealed from the ruling of Judge Leavitt, who denied the petition for a writ of *habeas corpus*. The answer of the Supreme Court that it had no jurisdiction in this case still left the question of the military jurisdiction over civilians unsettled in 1864. In 1865 the trials of the Lincoln conspirators before a military commission ordered by President Johnson still left the question as much of a riddle as ever. But in 1866 the Supreme Court's decision in the *Milligan* case solved the question to some extent. "During the rebellion, one Milligan, a citizen of the United States and resident of Indiana, who was neither a prisoner of war nor in the military service of the United States, was arrested at his home by order of General Hovey, brought before a military commission, tried, and sentenced to be hanged. On petition for *habeas corpus,* the judges of the circuit court were divided in opinion but the Supreme Court held that inasmuch as the court knew judicially that the authority of the United States was unopposed, and its courts were open in Indiana, the military commission had no jurisdiction of the case." [30] This landmark decision would have alleviated much misunderstand-

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not have sanctioned the original order for the arrest had the matter been referred to him." Is Dr. Randall's statement correct? President Lincoln knew all about the military arrest of Vallandingham and in his letter of June 12, 1863, to the New York Democrats, said: "And yet, let me say that, in my own discretion, *I do not know whether* I would have ordered the arrest of Mr. Vallandingham. While I cannot shift the responsibility from myself, I hold that, as a general rule, the commander in the field is the better judge of the necessity in any particular case. Of course I must practice a general directory and revisory power in the matter.

"One of the resolutions expresses the opinion of the meeting that arbitrary arrests will have the effect to divide and distract those who should be united in suppressing the rebellion, and I am specifically called on to discharge Mr. Vallandingham. I regard this at least a fair appeal to me on the expediency of exercising a constitutional power which I think exists. In response to such appeal, I have to say it gave me pain when I learned that Mr. Vallandingham had been arrested that is, I was pained that there should have seemed to be a necessity for arresting him, and that it will afford me great pleasure to discharge him so soon as I can, by any means, believe the public safety will not suffer by it." This quotation is from the letter referred to in note 28 *supra,* at p. 16.

[30] Ex parte Milligan, 4 Wall. 2 (1866). The statement used is that of Justice Holmes, from the Holmes' edition (12th) of Kent's Commentaries, Vol. 1, p. 341, Boston, Little, Brown, and Company 1873. Glenn, "Army and the Law" (1918) attempts to explain away the value of the Milligan case on punitive theory.

ing of the extent of the military power to try civilians, if it had been handed down before the War of the Rebellion, instead of in 1866.[31] Up to the present time the law of this case has not been changed in the United States.

The decision of the Supreme Court in 1866 exposed the unsoundness of some of Attorney General Speed's views [32] in regard to the legality of trying civilians by military commission, and supported the statement of the law given to the Governor of Canada by the English Law Officer in 1838, that, "When the regular courts are open, so that criminals might be delivered over to them to be dealt with according to law, there is not, as we conceive, any right in the Crown to adopt *any other course of proceeding.*" [33] The 1838 opinion was a restatement of the law by representatives of the Crown and the 1866 decision was a restatement of the law by the highest judicial body in the United States, and in principle they accord. A reasonable view would demand recognition of the soundness of the doctrine enunciated. When you further consider the views of President Lincoln on this matter, as stated in his letter of June 12, 1863, to the Democrats at Albany, it is evident that his views were in some respects too broad in reference to military trials of civilians. President Lincoln said:

"But the meeting [at Albany], by their resolutions, assert and argue that certain military arrests, and proceedings following them, for which I am ultimately responsible, are unconstitutional. I think they are not. The resolutions quote from the Constitution the defini-

31 Burgess, "Civil War & Constitution," New York 1901, Chas. Scribner & Sons, Vol. 2, Ch. XXVIII, pp. 218-219, states: "There is no question that the practices of the Administration and the opinion of the Court were at variance, and there is little doubt that in spite of the opinion of the Court the practices of the Administration would be repeated under like circumstances." This pessimistic prediction has not been fulfilled and the experiences of the World War indicate that Espionage Acts provide ample means to cope with any grave situation even under circumstances similar to 1863. See "The Executive Power in the United States," by De Chambrun, 1874, Lancaster, Pa., p. 135, for a critical analysis of the Milligan case; p. 236 for an interpretation of what the executive power became under President Lincoln.

32 Trial of the Conspirators, *op. cit. supra* note 1, at p. 403. See Cushing, VIII, Opin. Atty. Gen'l, p. 369, as to domestic martial law, etc.

33 Forsyth, *op. cit. supra* note 24.

tion of treason, and also the limiting safeguards and guarantees therein provided for the citizen on trial for treason, and on his being held to answer for capital or otherwise infamous crimes, and, in criminal prosecutions, his rights to a speedy and public trial by an impartial jury . . . but these provisions of the Constitution have no application to the case we have in hand [Vallandingham case] because the arrests complained of were not made for treason—that is not for *the* treason defined in the Constitution, and upon conviction of which the punishment is death—nor yet were they made to hold persons to answer for capital or otherwise infamous crimes; nor were the proceedings following, in any constitutional or legal sense, 'criminal prosecutions.' The arrests were made on totally different grounds, and the proceedings following accorded with the grounds of the arrests. . . .[34]

"By the third resolution, the meeting indicates their opinion that military arrests may be constitutional in localities where rebellion actually exists, but that such arrests are unconstitutional in localities where rebellion or insurrection does not actually exist. They insist that such arrests shall not be made, 'outside the lines of necessary military occupation, and the scenes of insurrection.' Inasmuch, however, as the Constitution itself makes no such distinction, I am unable to believe that there is any such constitutional distinction." [35]

The *Milligan* case, however, held that there was such a distinction; and to that extent the views of President Lincoln were not recognized by the Supreme Court of the United States. Vallandingham in 1863 and Milligan in 1865 were both arrested for warring on the military or military crimes. The Lincoln conspirators were likewise arrested and tried in 1865 for military crimes and four of them were executed at the Arsenal in Washington, D. C.[36] Milligan was sentenced to be hanged,[37] but the decision of the Supreme Court in 1866 exposed the illegality of the military trial and resulted in his being set free. In *Ex parte Marais* [38] a civilian was arrested for contravening Martial Law Regulations in a district which showed no visible signs of disorder and where the civil courts were open. In petitioning for his re-

34 President Lincoln's Views, *op. cit. supra* note 28, at pp. 7, 8. See Chafee, "Freedom of Speech," 1920, p. 33, as to war power and First Amendment.

35 *Ibid.* p. 12.

36 The Assassination of Abraham Lincoln by Osborn Oldroyd, Washington, D. C., p. 205 (View of the scaffold after the trap was sprung).

37 Ex parte Milligan, *op. cit. supra* note 30, opening statement.

38 [1902] A. C. 109. See note in 15 Harv. Law. Rev. 850 supporting decision.

lease from the military authorities it was pointed out: "Even if a state of war did exist, still the application of martial law was limited by the necessity of preserving peace and order in the district, and did not oust the jurisdiction of those civil Courts which notwithstanding the pressure of military circumstances, were still administering the law of the land. There was no necessity alleged or shown for bringing the petitioner before a military tribunal whilst a civil Court was sitting. The right of the Crown to resort to such an extremity as the proclamation of martial law was limited by necessity, and, if a civil Court was open, the Crown had no power to try an offender by a military one." [39] The Privy Council upheld the refusal of the Cape Colony court to release the prisoner from the military authorities, and, upon this matter, which is accompanied with an abundance of doubt, said:

> "The truth is that no doubt has ever existed that where war actually prevails the ordinary Courts have no jurisdiction over the action of the military authorities." [40]

This decision in 1902 should be weighed with a realization that it was greatly influenced by *Elphinstone v. Bedreechund,* which arose in 1830,[41] and the following unsettled presumption about the meaning of the Petition of Right: "The framers of the Petition of Right knew well what they meant when they made a condition of peace the ground of the illegality of unconstitutional procedure." [42] In 1921 the Irish court was greatly influenced by *Ex parte Marais* and, citing it, said: "It is also clear on the *authorities* that when martial law is imposed, and the necessity for it exists, or, in other words, while war is still raging, this court has no jurisdiction to question any acts done by the military au-

39 *Ibid.* 110, 111.

40 *Ibid.* 115.

41 [1830] 1 Knapp P. C. 316.

42 Ex parte Marais, [1902] A. C. 109, at 115. See a very instructive note on the question of whether the Petition of Right referred to a "time of peace," in O'Sullivan, Military Law and the Supremacy of the Civil Courts, London, 1921, published by Stevens and Sons, Ltd., at page 29, footnote x.

thorities." [43] In the Irish case, John Allen, a civilian, was arrested by the military authorities and sentenced to death upon a finding of guilty by a military court.

In *Cooley's 1931 edition on Constitutional Law* the fact is apparent that this point about the jurisdiction of the military authorities over civilians is still unsettled. It states:

"But whether the Eighty-first Article of War, which provides that, 'whosoever relieves the enemy with arms, ammunition, supplies, money, or other thing, or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial or military commission may direct,' may be generally enforced against citizens of the United States is *another question*. These acts would constitute treason and in prosecution for treason an indictment by the grand jury and a trial by jury are held to have been provided for in the Constitution. If these acts, however, were committed in the 'theatre of war,' courts-martial *would probably* have jurisdiction." [44]

The foundation for the understanding of the issues involved in the Lincoln conspiracy trial, which will now be considered, has been laid in the examination of the opinions of jurists and contemporaneous cases mentioned above.

Civil War Dates

April 3, 1865, Richmond was taken.

April 9, 1865, General Lee surrendered.

April 14, 1865, President Lincoln was assassinated.

April 16, 1865, Andrew Johnson became President.

April 26, 1865, General Jackson surrendered.

April 27, 1865, Booth, the murderer of President Lincoln was shot and captured.

May 10, 1865, Jefferson Davis was captured at Irwinville.

May 24, 1865, Grand review of General Sherman's army at Washington.

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43 Rex v. Allen, [1921] 2 I. R. 241. The court in supporting its use of the word "authorities," cited only Ex parte Marais. See Egan v. Macready, [1921] 1 I. R. 265 for a statement to the effect that Ex parte Marais would not be applicable where a prisoner was sentenced to death by court-martial.

44 Cooley on Constitutional Law, (4th ed.), (Bruce), 1931, Little, Brown, and Company, § 18, p. 179.

May 24, 1865, Jefferson Davis indicted for treason.

May 31, 1865, General Hood and staff surrendered.

Trial of Lincoln Conspirators

May 1, 1865, President Johnson ordered a Military Commission.

May 9, 1865, First Session of the Commission.

June 30, 1865, Findings and sentences of the conspirators rendered by the Commission.

July 7, 1865, Application of Mary E. Surratt for *habeas corpus* filed.

July 7, 1865, Writ of *habeas corpus* suspended.

July 7, 1865, Execution of four conspirators Herold, Payne, Atzerodt, Mrs. Mary E. Surratt.

After the assassination of President Lincoln by John Wilkes Booth, an investigation to discover his accomplices resulted in the arrest of a number of suspects, including David E. Herold, Edward Spangler, Mrs. Mary E. Surratt, George A. Atzerodt, Lewis Payne, Dr. Samuel Mudd, Samuel Arnold and Michael O'Laughlin, by the military authorities. President Johnson [45] then asked Attorney General James Speed whether the person involved in the assassination could be tried by a military court or must he be tried before a civil court. The Attorney General rendered an opinion pointing out that under the laws of war arising from the law of nations the military authorities under the constitution had jurisdiction to try and execute secret enemies of the country according to the laws of war and that Booth and his associates were secret active public enemies. Mr. Speed also said:

"The fact that the civil courts are open does not affect the right of the military tribunal to hold as a prisoner and 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. . . . My conclusion, there-

[45] Trial of the Conspirators, *op. cit. supra* note 1, p. 17. A copy of President Johnson's letter of May 1, 1865, ordering a military commission.

fore, is that if the persons who are charged with the assassination of the President committed the deed as public enemies, as I believe they did, and whether they did or not is a question to be decided by the tribunal before which they are tried, they not only can, but ought to be tried before a military tribunal. If the persons charged have offended against the laws of war, it would be as palpably wrong for the military to hand them over to the civil courts, as it would be wrong in a civil court to convict a man of murder who had in time of war, killed another in battle." [46]

On May 1, 1865, President Johnson, relying on the opinion of the Attorney General, ordered a military commission to be convoked to try the persons implicated in the murder of President Lincoln, in the attempted assassination of the Honorable William H. Seward, Secretary of State, and in an alleged conspiracy to assassinate other officers of the Federal Government at Washington, D. C. At the outset the accused claimed that the military commission had no jurisdiction under the Constitution as the civil courts were open and functioning at the time and that they were entitled to a trial by jury. The Military Commission ignored that argument on the ground that a military crime was involved, that the jurisdiction of the military was supreme, and that the provision relating to jury trial had no application in time of war. After a trial of seven weeks, the Military Tribunal found the defendants guilty and sentenced four of them to Fort Jefferson (Dry Tortugas) in Florida and four of them to be hanged. On July 7th, 1865, the three men and one woman were executed in Washington, D. C.[47] Major Birkhimer, in discussing the jurisdiction of the civil and military authorities and upholding the view that the mili-

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46 Trial of the Conspirators, *op. cit. supra* note 1, p. 409. In De Hart's "Military Law," (edition of 1863), p. 143, is the following quotation from the opinion of the attorney general, in May, 1839, on the jurisdiction of a court-martial to proceed against an offender while a prosecution is pending aganist him before a court of criminal jurisdiction for the same offence: "I can feel no hesitation in saying, (says the attorney general) that until he shall be discharged from the prosecution pending before the civil tribunal, no court-martial can be held upon him. Any such interference would be to place the military above the civil authority, which is wholly *inadmissable in our government.*"

47 Trial of the Conspirators, *op. cit. supra* note 1, at pp. 248, 249, 250. See a detailed report of the trial by Ben Perley Poore, Boston, 1865, 3 Vols.

tary did not act in subordination to the civil power while aiding the civil magistracy of the District of Columbia to exercise their vocations as usual, states: "The latter branch of the subject was perhaps best illustrated by the hold the military retained of jurisdiction of military offences, without regard to the civil aspect of the case, as in the trial, conviction, and execution of the conspirators against the lives of the President and members of the cabinet in 1865, although at the time the war was over, and civil courts were open for the trial of causes properly presented." [48]

In passing it should be noticed that on July 7th, 1865, the morning of the day set for the executions a petition for writ of *habeas corpus* was filed in behalf of Mary E. Surratt by her counsel before Judge Andrew Wylie of the Supreme Court of the District of Columbia. Judge Wylie ordered the writ to issue as prayed, returnable before the Criminal Court of the District of Columbia at ten o'clock of the same day. At half-past eleven o'clock on the same morning Major-General Hancock, accompanied by Attorney-General Speed, appeared before Judge Wylie in obedience to the writ and explained that President Johnson had suspended the writ of *habeas corpus* and ordered the judgment of the Military Commission to be executed. The court ruled that it yielded to the suspension of the writ of *habeas corpus* by the President of the United States.[49] Such an impasse is virtually a judicial bankruptcy and pyramids the power of one department to a height incompatible with its normal stature. Mr. Justice Davis of the Supreme Court of the United States, referring in the *Milligan* case to the laws and usages of war, a year later stated: ". . . they can never be applied to citi-

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48 Birkhimer, Military Government and Martial Law, (3rd ed.), 1914, Franklin Hudson Company, Kansas City, Mo., p. 480. In the light of the decision of the United States Supreme Court in the Milligan case (*supra* note 30) such a conclusion is practically explained away. Davis' Military Law, (2nd ed.), 1904. p. 311, states that the civil courts were not seriously interrupted in the exercise of their judicial functions.

49 Trial of the Conspirators, *op. cit. supra* note 1, at p. 250. For a special study of the trial of Mary E. Surratt, see "The Judicial Murder of Mary E. Surratt" by DeWitt, Baltimore, 1895.

zens in States which have upheld the authority of the government, and where the courts are open and their process unobstructed." [50] Justice Davis, in discussing the jurisdiction of the military power, said:

"If, in foreign invasion or civil war, the Courts are actually closed, and it is impossible to administer criminal justice according to law, then on the theatre 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." [51]

John H. Surratt, the son of Mary E. Surratt, who was alleged to be one of Booth's accomplices fled from Washington to Canada and from there to Europe. He was brought back to the United States the following year and tried for the murder of President Lincoln by the criminal court for the District of Columbia. The jury disagreed and John H. Surratt was subsequently set free.[52] If John Surratt had been tried with the other defendants, by the military commission, undoubtedly his fate would have been similar to theirs. If the Supreme Court of the United States had ruled on the military trial of the Lincoln conspirators, it is interesting to speculate on what the court would have decided. As the trials of the Lincoln conspirators have been relegated to the museum of legal history, the most charitable view is to consider them the result of the hysteria of war.

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50 Ex parte Milligan, *op. cit supra* note 30.

51 *Ibid.* See 2 Boudin, Government by Judiciary, 45, Godwin, Inc., N. Y. 1932.

52 Trial of John H. Surratt, Washington, D. C., 1867, Government Printing Office, Washington, D. C., 2 Vols.

After the jury disagreed Surratt was returned to Old Capitol Prison, from which he was later released upon $25,000.00 bail. Upon arraignment for a new trial, Surratt was discharged by the court, as the United States failed to overcome the objection of defense counsel to proceeding on the indictment.

Conclusion

The rule that a civilian is entitled to be tried by the civil courts is as old as Magna Charta.[53] The Petition of Right in 1628 and the Bill of Rights in 1688 likewise confirm the guaranties of civil liberties. The Declaration of Independence in 1776 submitted to a candid world that the King, amongst other things, had affected to render the military independent of, and superior to, the civil power; and deprived the colonists, in many cases, of the benefits of a trial by jury. It is evident that if the Constitutional Convention had not agreed to add a Bill of Rights to the Constitution, it would not have been ratified. The guaranty of a jury trial was provided for in the original document and further safeguarded by the fifth and sixth amendments. In a recent study of the making of the Constitution the development of Art. III, section 2, clause 3, is shown by Mr. Charles Warren, who concludes: ". . . and in this manner the principle of jury trial in criminal cases was imbedded and guaranteed forever." [54]

The early common law recognized the right of trial by the civil courts, even in time of war. In 1322 the rebel Earl of Lancaster rebelled against King Edward II and amidst the noise of battle the King convoked a court-martial and tried him. The Earl was sentenced to death and executed. Eight years later on petition of the Earl's brother to the new monarch, King Edward III, the attainder of the Earl of Lancaster was reversed on the ground that at the time of his trial and sentence the civil courts were open.[55] There is an abundance of authority supporting the view that as long as the civil courts are open a person is not to be tried by the military authorities even though it is a time of war, as in judgment of law it was said to be a time of peace. As

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53 McKechnie, Magna Carta, Ch. 39, p. 375.

54 Warren, The Making of the Constitution, Boston 1928, Little, Brown, and Company, p. 547. See Cooley's Constitutional Limitations, (8th Ed.), 1927, Vol. 1, pp. 668, 671.

55 Hale, Pleas of the Crown, *op. cit. supra* note 6, at pp. 344, 499.

a consequence of this doctrine the only time a civilian could be legally tried by the military authorities, was when the regular courts were closed or, as Coke said, "shut up." [56] The state trials record some instances of a disregard for the forms of law and the irregular trials of civilians by other than the regular courts. Such trials were denounced by the people as a violation of their fundamental rights and history indicates the Bill of Rights in 1688 resulted in part from the people demanding a restatement of the law with specific emphasis on outlawing military trials. In England civilians have not been subject to military trial while the ordinary courts are open, even in time of war. In Ireland and South Africa there are cases repudiating the English rule. In the United States, since the adoption of the Constitution, the principle has been recognized generally that a civilian is not subject to military trial. During the War of the Rebellion this rule was ignored but the decision in Ex parte Milligan in 1866 restored the ancient landmarks.

One of the things that brought about the adoption of the present Constitution was the assurance to the States that a Bill of Rights would be added to it.[57] The provision relating to jury trial in the original document was thereupon safeguarded by the fifth and sixth amendments. According to the understanding of the people at that time, the Constitution thereby assured one of a regular trial in the civil courts and excluded military trials. In other words, the military jurisdiction was made subservient to the civil power. What the people understood at that time is a pretty good idea of what was intended to be protected. If they properly understood the Constitution and the Bill of Rights, the

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56 Coke's First Institute, (3rd Ed.), 1633, p. 249, § 412. "And therefore when the Courts of Justice be open, and the Judges and Ministers of the same may by law protect men from wrong and violence, and distribute justice to all, it is said to be a time of peace. . . ."

57 Elliot's Debates in the several State Conventions on the adoption of the Federal Constitution, Second edition, in five volumes, Philadelphia, 1861.

present Articles of War,[58] would be unconstitutional in so far as courts-marshal and military commissions are given jurisdiction over civilians when the civil courts are open. Such a result rests upon the doctrine announced by Chief Justice Marshall in the case of *Marbury v. Madison,*[59] that acts of Congress in conflict with the Constitution are void. The fundamental liberties guaranteed by the Constitution apply to civilians at all times (war and peace) if the civil courts are open.[60]

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58 Federal Statutes, *op. cit. supra* note 2. In a recent case, Terry v. United States, 2 Fed. Supp. 962 (1933), a citizen was tried before a general court-martial established by virtue of the Articles of War. He had embezzled moneys of the United States intended for military service and had presented a false claim against the United States for payment. The military jurisdiction was assumed because the citizen had committed an offense contrary to Article of War during army service, but as he had received an honorable discharge before the military authorities preferred charges, it was contended that the case was not within the Articles of War. It was also contended that the accused would be deprived of a jury trial. Cushman, District Judge, ruled otherwise. In the light of previous analysis such a decision seems unwarranted. Long ago, De Hart in his work on Military Law, (New York, 1863), at page 35, said: "It must be borne in mind, however, that in all such cases which may occur, the decision quoted goes only to maintain the prosecution, if commenced before the time at which the prisoner is entitled to claim his discharge. If once lawfully discharged from the service, he could not afterwards be arrested, or held amenable to trial by a military court, for a military offense committed during the period of his military service." In other words, the prosecution should be in the civil courts. See 4 Minn. L. Rev. 79.

59 1 Cranch, 137 (1803).

60 United States v. Cohen Grocery Co., 255 U. S. 81 (1921). See 3 Willoughby on Const. Law 1591 (2nd Ed. 1930), Baker, Voorhis & Co.; Burdick on Law of Am. Constitution, p. 261, G. P. Putnam's Sons, New York.