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MARTIAL LAW AND HABEAS CORPUS*

JOHN H. HATCHER**

An investigator is astonished at the confusion enveloping this subject. The literature thereon abounds with divergent statements and is not even free from inaccurate quotations. Much of the confusion of English precedents on martial law is due to their failure to distinguish between its use in time of peace and time of war. Some of the confusion is due to the several definitions of the term. For example, Sir Thomas Smith, an early writer on the government of England, said martial law was the arbitrary will of the king in war; while a century later, Sir Mathew Hale, the legal commentator, said martial law was the law imposed by the King's Marshall for "the government, order and discipline in an army." Some of the modern confusion has arisen from failure to distinguish between the terms *military law*, *military government* and *martial law*. Military law, technically, is a legislative code of rules and articles of war. Military government, technically, is the control imposed by the military command over conquered or disorganized territory. Infractions of military law and of military government may be tried by military commissions, sometimes called courts-martial; but neither military law nor military government is martial law, as technically defined. The latter has no code of laws, but is simply the exercise of military discretion in time of war.

The essence of martial law is said to be suspension of the writ of *habeas corpus*. The confusion on the latter is but little less than that on martial law. This writ did not issue from the mists of primitive common law fully panoplied as many writers have as-

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sumed. On the contrary, the writ passed through a long transition period just as did other legal writs. The learned Edward Jenks has a clear conviction that the original use of this writ was "not to get people out of prison, but to put them in it."¹ Even after the writ was molded to test only the legality of a commitment, several centuries passed before the writ was granted to persons committed by the Royal order. And this was finally accomplished, not by expansion of the common law (as some controversialists have asserted), but by specific acts of parliament in the seventeenth century. In this country, further confusion regarding the writ has arisen from the provision of the national Constitution, that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."² Some writers of national prominence have construed this provision to be a delegation of power to Congress.³ Other writers equally prominent have construed the provision to be a limitation of congressional power.⁴ The division of comment on martial law and *habeas corpus* caused Attorney General Cushing, in 1857, to complain that the commentators *were all at sea*. The interim decisions have left commentation still at sea, particularly the leading federal decisions of *Ex parte Merryman*,⁵ and *Ex parte Milligan*.⁶

Ex parte Merryman. Merryman, a resident of Maryland, was arrested May 25, 1861, under a military order and taken to Fort McHenry. Upon his petition, Chief Justice Taney issued a writ of *habeas corpus* on May 26th, directed to General Cadwalader, the commander of the fort, and returnable at eleven o'clock the next day. At that hour, the General's return was filed, stating, in effect, that Merryman had been arrested under order of Major General Keim of the United States Army, and brought to Fort McHenry charged with "various acts of treason, and with being publicly associated with and holding a commission as lieutenant in a company having in their possession arms belonging to the United States and avowing his purpose of armed hostility against the government." The return further stated that General Cadwalader was informed the charges could be "clearly established"; that he was authorized by the President in such cases to suspend the writ of *habeas corpus*

¹ Jenks, *The Story of the Habeas Corpus* (1902) 18 L. Q. REV. 65.

² U. S. CONST. Art. I, § 9.

³ See POMEROY, CONSTITUTIONAL LAW (10th ed. 1888) § 707.

⁴ See HALLECK, INTERNATIONAL LAW (1861) 503.

⁵ Taney's C. C. Dec. 246, Fed. Cas. No. 9,487 (C. C. D. Md. 1861).

⁶ 4 Wall. 2, 18 L. Ed. 281 (U. S. 1866).

for the public safety; that he realized this power was "a high and delicate trust" which he had been enjoined to exercise "with judgment and discretion", and suggested that he be not embarrassed by any "unnecessary want of confidence." The return then requested that further action be postponed until the General could receive instructions from the President, when a further return would be made. This request was disregarded by the Chief Justice, who forthwith issued an attachment for contempt against General Cadwalader because he had not produced Merryman. The marshal was unable to execute the attachment. Whereupon the Chief Justice filed an opinion which was promptly pronounced "unanswerable" by the supreme court of Wisconsin,⁷ and which has been approved by a number of other courts.

An initial impression of Justice Taney's course in the Merryman case is that he was precipitate. There is a presumption, honored in all courts, that official conduct is in line of official duty.⁸ It would seem that this presumption should have been accorded the military officers responsible for Merryman's detention until General Cadwalader could have communicated with the President, and made the further return promised.

One's attention is next arrested by the variance of the facts stated in the opinion from the facts in the record. And one is surprised that, despite General Cadwalader's declared realization that his authority was "a high and delicate trust" to be executed with "judgment and discretion" the opinion treats the case as one in which the military power proposed to *usurp judicial authority at will* "upon any pretext or under any circumstances." That unwarranted approach to the case forecasts the extreme legal propositions advanced by the opinion. Its chief pronouncement is that under the Constitution,⁹ no suspension (or disregard) whatever of *habeas corpus* is lawful unless authorized by Congress. This holding is based on the theory that the right of suspension is an exclusive grant of congressional power. The opinion quotes two American authorities, Story and Marshall. The quotation from Story postulates merely that Congress is the sole judge of the exigency warranting the suspension referred to in the Constitution, but makes no attempt to define that suspension. The quotation from Marshall¹⁰ relates specifically to the Congressional Judiciary

⁷ *In re Kemp*, 16 Wis. 382, 391 (1863).

⁸ *Martin v. Mott*, 12 Wheat. 19, 33, 6 L. Ed. 537 (U. S. 1827).

⁹ U. S. CONST. Art. I, § 9.

¹⁰ *Ex parte Bollman*, 4 Cranch 75, 101, 2 L. Ed. 554 (U. S. 1807).

Act of 1789, and not to the Constitution. The opinion does not discuss the colonial background of the section, does not regard the plain language of the section, and does not consider the comments thereon of the Constitution-makers. These omissions are due perhaps to the stated assumption that the construction adopted in the opinion had been theretofore given by everyone, particularly (as the opinion states), by "every jurist and statesman" in the Congress which considered suspending the writ in connection with the Burr conspiracy. My research does not find substance for the assumption.

The colonists demanded the privilege of *habeas corpus* as Englishmen, and it was usually accorded them, though in some instances the colonial governors were recalcitrant. "Now and then" upon complaint by a governor that the Americans were becoming "a factious and turbulent people, with heads turned by queer political crotchets", the King's Privy Council would instruct the governors to suspend the writ.¹¹ That was done in times of peace, was solely for purposes of discipline and was without legal justification. Wherefore, those suspensions were resented by the colonists. But the annals show that they acquiesced in violations of the writ in times of war. During the Revolutionary War, the American officers disregarded the writ at will and the records of the Continental Congress, to which several personal protests were made, disclose no congressional action against the practice. On the contrary, in 1778, that body specifically approved the refusal of General Smallwood to honor a writ issued by the Chief Justice of Delaware.

Madison's notes on the Constitutional Convention contain only two comments on this section, one by Judge John Rutledge, of South Carolina, and one by James Wilson, of Pennsylvania, both outstanding delegates. Rutledge was for declaring the writ inviolate on the ground that a suspension would never be necessary "at the same time through all the states." This remark is not comprehensible except upon the one hypothesis, that Rutledge understood the proposed suspension to be nation-wide. Wilson merely "doubted whether in any case a suspension could be necessary, as the discretion now exists with judges, in most important cases, to keep in gaol or admit to bail." Prisoners gaoled and subject to bail at judicial discretion were civil, not military, prisoners. The latter were ordinarily detained in prison camps, not subject to bail at all, and held or released at the discretion of the commanding

¹¹ 1 FISKE, AMERICAN REVOLUTION (1899) 2.

officer. So it is apparent that Wilson understood the section to apply to civil arrests. This understanding was in no wise strained, because, on occasion, civil officials had been given legislative authority to disregard the writ. For example, in May, 1781, the Virginia Assembly empowered the governor to have arrested and confined, without benefit of *habeas corpus*, any person he had good cause to suspect of disloyalty. Thus the only recorded construction of this section within the convention itself is that it related to a nation-wide suspension of the writ as to civil arrests. Governor Randolph, of Virginia, himself a framer of the Constitution, in a speech to the Virginia Convention which ratified the Constitution, associated the section with civil arrests, saying: "I contend that, by virtue of the power given to Congress to regulate courts, they could suspend the writ of *habeas corpus*. This is therefore an exception to that power."¹² Before the same convention, Mr. Nicholas, Mr. Grayson and Mr. Henry, and before a like convention in Massachusetts, Judge Sumner also construed the section to be a restraint on congressional power, and that construction was questioned by none.¹³ The Merryman opinion does not name the jurists and statesmen in Congress who discussed the Burr conspiracy, but in the *Annals of Congress* 1807, wherein it was discussed, I find only three constructions of the provision, to wit, those by Representatives Broom, Holland and Campbell, all of whom said that the provision was a restriction of Congressional power.¹⁴ The phrasing of the Constitution was done by masters of the English language. It is not consistent with their skill that an exclusive grant of power should have been expressed in negative words alone. If the sententious language of the section be given its ordinary meaning, then the construction of Randolph and his contemporaries is patently correct. The "shall not" of the section

¹² 3 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION (1836) 464. Senator Wall of New Jersey quoted Governor Randolph as saying to the Convention, June 10, 1788, that the writ could be suspended here only by "The Legislature . . . never by the Executive." CONGRESSIONAL GLOBE (1862-3) 1462. That quotation is not sustained by the official record of the Governor's remarks. See 3 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 203.

¹³ 3 *id.* at 102, 449, 461, and 2 *id.* 108-9.

¹⁴ 9 ANNALS OF CONG. 2d Sess. 503, 540 (1807). Representative Campbell said: "This provision evidently relates to Congress, and was intended to prevent that body from suspending by law the writ of *habeas corpus* except in cases stated, and has no relation whatever to the act of an individual in refusing to obey the writ. Such refusal or disobedience would not certainly suspend the privilege of the writ, and must be considered in the same point of view as the violation of any other public law made to protect the liberty of the citizen." Specifically accordant with the second sentence: Representatives Holland and Masters.

can mean naught but prohibition, and standing alone would be absolute; but to the "shall not" the public emergency is an exception. That the section was thought necessary at all implies the conception of the framers, that Congress, through another provision of the Constitution, had been given a power over *habeas corpus*. I see no reason to controvert Governor Randolph's position that such power was an incident of the congressional power to regulate the federal courts. The framers knew that in wartime Congress could not foresee the necessity of most military arrests, and that the imperative need of quick and sometimes secret military action in such cases could not await congressional investigation. Unless it be taken that the framers were unmindful of this knowledge; unless it can be demonstrated that Rutledge, Wilson and Randolph did not speak the understanding of their fellows, then the section was designed to be not an exclusive grant of all power over *habeas corpus* to Congress, as the Merryman opinion holds, but a specific restriction on congressional power to have the courts suspend the writ; and the section has no bearing on the occasional or local disregard of the writ by a military commander. I submit with deference, that no opinion on this subject is "unanswerable" which does not answer Rutledge, Wilson and Randolph.

The Merryman opinion attempts to correlate the status of the writ under the Federal Government with that of the writ under the common and the statutory laws of England. This attempt overlooks the fact that such laws were not adopted by the Constitution and could not bind the Federal Government in any manner. The opinion deduces from commentaries on the English government that only Parliament could suspend the writ of *habeas corpus* in England, and reasons accordingly that only Congress could suspend it in the United States. The opinion overlooks the repeated declarations of the Constitution-makers that our situation was entirely different from that in England and that "the British government cannot be our model."¹⁵ A power may not be accredited to Congress because Parliament has it, but only if the Constitution delegates it. Neither is congressional power expanded by the common law, for ". . . the United States, as a Federal Government,

¹⁵ 5 ELLIOT, *op. cit. supra* n. 12, at 137, 141, 153, 165, 168, 188, 234. "We are constantly running away with the idea of the excellence of the British Parliament, and, with or without reason, copying from them; when, in fact, there is no similitude in our situations." Delegate Pierce Butler of South Carolina to the Convention on June 13, 1787. 1 *id.* at 409.

has no common law. . . ."¹⁶ Pursuing the unwarranted analogy to the English government, the Merryman opinion charges that if the President may suspend the writ, then the Constitution has conferred on him more regal and absolute powers than England had entrusted to its Crown. That charge also fails, because at the time our Constitution was formed and prior thereto even to the days of the Conqueror, the right of the Crown, as the supreme military commander, to administer martial law in time of national danger, if necessary, had been consistently recognized. In 1565, Sir Thomas Smith, in his Commonwealth of England, wrote: "In war time and in the field, the Prince hath also absolute power, so that his word is a law." This same power was recognized in the celebrated *Ship Money* case in 1637 by judges and lawyers alike, the able St. John, though opposing the Crown, saying: ". . . it must needs be granted that in this business of Defence, the *suprema potestas* is inherent in his majesty, as part of his crown and kingly dignity." Furthermore, Parliament, which alone speaks with finality for England, in three separate acts near the date of the Constitution¹⁷ referred to this power as the "acknowledged prerogative" and as the "undoubted prerogative" of the Crown.

The Merryman opinion brushes aside any possible argument in favor of the government's right to suspend the writ even "for self-defense in time of tumult and danger", on the ground that the government is one of delegated powers only, and such a power is not granted. The opinion treats the President as commander-in-chief of our military forces merely "from necessity and the nature of his duties," and concedes no military right to arrest a civilian "except in aid of the judicial authority and subject to its control." And the opinion would exalt constitutional guarantees of personal rights and property, including trial by jury, above the necessities of war. The opinion thus ignores the express constitutional provisions which authorize the government to wage war and which make the President the commander-in-chief of the army and the navy of the United States. The opinion takes no account of the common thought among all nations from the dawn of history that in times of peril the conservation of the nation may demand "the sacrifice of the legal rights of a few" and may not only justify, but compel, the temporary abandonment of civil procedure.¹⁸ This

¹⁶ *United States v. Worrall*, 2 Dall. 384, 394, 1 L. Ed. 426 (U. S. 1798).
Accord: Ex parte Bollman, 4 Cranch 75, 93-4, 2 L. Ed. 554 (U. S. 1807).

¹⁷ 39 GEO. III, c. 11; 43 GEO. III, c. 117; 3 & 4 WM. IV, c. 4.

¹⁸ HALLAM, CONSTITUTIONAL HISTORY OF ENGLAND (1876) 240.

thought is based on the first law of nature, the right of self preservation. Whatever is necessary to preserve that right is lawful. A conflict between hostile nations is a struggle for self-preservation, wherein civil rights may lawfully be disregarded. "*Inter arma, silent leges*", said Cicero. Whatever else their disagreement, those two great antagonists, Jefferson and Hamilton, concurred in this: that the impulse of self-preservation, whether individual or national, surmounted all civil laws, and that the duty to save the country when in danger was a greater duty than that to respect property or personal rights.¹⁹ Unnoticed by the Merryman opinion is "an unbroken sequence" of English decisions from the earliest year books down to the formation of our Constitution, upholding the right of the Crown in time of war forthwith to occupy fields, raze houses, impress civilians, make precautionary arrests, sequester noncombatants and even execute hostile subjects if the exigency admitted no delay.²⁰ "*Flagrante bello*", said the court of the King's Bench in 1776, "the common law has never interfered with the army."²¹

The framers of our Constitution were familiar with ancient history, and with the English decisions. Most of the framers, including their presiding officer, General Washington, had taken an active part in the recent war with England. In that war, they had seen their armies, following the English custom, occupy, use or destroy private property as the apparent necessity demanded; they had seen loyal civilian population subjected to military control; some had seen their officers disregard civil process, including writs of *habeas corpus*; and some had been with General Washington at Tarrytown where he asserted authority to hang the civilian, Joshua Hett Smith, immediately, as a traitor, and stated that nothing could save him but a candid confession of his connection with the Andre affair. The lawfulness of those means was not questioned, and since the framers placed no specific limitation on the war power, they must have expected it to employ those same means in defending the government of the United States. If those means override the other constitutional provisions, the framers must have so intended; and those means themselves become the law of

¹⁹ 5 JEFFERSON'S COMPILED WORKS (1899) 542; THE FEDERALIST, No. XXIII.

²⁰ Richards, *Martial Law* (1902) 18 L. Q. REV. 133, 136.

²¹ *Barwis v. Keppel*, 2 Wils. K. B. 314, 318, 95 Eng. Rep. R. 831 (1766). Accordant pronouncements were later made by English lord chancellors in *Ex parte Marais*, [1901] A. C. 109, 115; *Tilonko v. Attorney General*, [1907] A. C. 93, 95.

the land, and are due process under the Constitution. This doctrine is neither original nor novel. It was stated without controversion in 1628 by Serjeant Ashley in the great English Parliamentary debates which preceded the preparation of the Petition of Right, as follows: "The Martial Law . . . though not to be used in times of peace . . . yet in times of invasion, or other times of hostility, when an army-royal is in the field, and offences are committed, which require speedy reformation, and cannot expect the solemnity of legal trials; then such imprisonment, execution, or other justice done by the law-martial is warrantable, for it is then the law of the land, and is *jus gentium* [the law of the nations] . . ." ²² This doctrine was specifically applied to our Constitution in *McCulloch v. Maryland*, wherein the court said "the government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; . . . That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional." ²³

The bane of inaccuracy did not escape several commentators on the *Merryman* case. Mr. Tucker in his work on the Constitution says: "The President never acted in the matter so as to release Merryman." ²⁴ Mr. Bailey in his work on *habeas corpus*, ²⁵ follows Tucker. According to these authors, Merryman, unreleased, still is waiting, still is waiting. *War of the Rebellion* shows that Merryman was "transferred to civil authority" sometime (date not given) prior to February 17, 1862. ²⁶ The usually reliable Warren in his work on the Supreme Court, after referring to the storm of public criticism which met the Merryman opinion, says that four years later it was "strongly upheld" in the majority opinion of the *Milligan* case. "Never", says Mr. Warren, "did a fearless Judge receive a more swift or more complete vindication." ²⁷ The unvarnished truth is, the facts in the two cases are dissimilar; the principles necessarily involved in the two cases are not the same; the Milligan opinion does not mention the *Merryman* case at all, and is so inconsistent and inaccurate that what vindication, if any, the opinion affords Chief Justice Taney is tenuous indeed.

²² 3 State Tr. 149 (1809).

²³ 4 Wheat. 316, 409, 419, 4 L. Ed. 579 (U. S. 1819).

²⁴ TUCKER, CONSTITUTION OF UNITED STATES (1899) § 318.

²⁵ BAILEY ON HABEAS CORPUS (1913) § 110.

²⁶ 2 WAR OF THE REBELLION, Official Records (2d series) 226.

²⁷ 3 WARREN, SUPREME COURT IN UNITED STATES HISTORY (1922) 96.

Ex parte Milligan. Milligan, a citizen of Indiana, charged with conspiracy and insurrection against the government of the United States, was tried and sentenced in 1864 by a military commission appointed by the President under express congressional authority. The Supreme Court, upon *habeas corpus*, held unanimously that the commission had no jurisdiction over Milligan. The holding itself is not here questioned; but the opinion of the court, written by Associate Justice Davis, made some majority pronouncements on martial law which (only) are seriously questioned.²⁹ The Davis opinion says: "No doctrine, involving more pernicious consequences was ever invented by the wit of man than that any of its [the Constitution's] provisions can be suspended during any of the great exigencies of government."²⁹ Standing alone, that declaration would support Taney, but later the Davis opinion, after referring to the fact that in every war, certain measures deemed necessary by the government, would be opposed by some citizens, makes this entirely inconsistent admission: "In the emergency of the times, an immediate public investigation according to law may not be possible; and yet, the peril to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit in the exercise of a proper discretion to make arrests, should not be required to produce the persons arrested in answer to a writ of *habeas corpus*."³⁰ The Davis opinion, calmly ignoring this admission, then says: "Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction."³¹ This test of martial law is patently incomplete, since it does not provide further that the courts should be competent "to avert threatened danger" and "to punish, with adequate promptitude and certainty, the guilty conspirators."³² (Opinion of Chief Justice Chase.) Indubitably, the acid test must

²⁸ Warren, *Spies, and the Power of Congress to Subject Certain Classes of Civilians to Trial by Military Tribunal* (1919) 53 AM. L. REV. 195, 209: "... it is evident that some of the expressions of Davis, J., in *Ex Parte Milligan* . . . [Mr. Warren's "complete vindication" of Taney, C. J.] were loosely and probably inaccurately used. . . ." And how!

The celebrated phrase of the Davis opinion, "The Constitution of the United States is a law for rulers and people, equally in war and in peace", 4 Wall. 2, at 120, was preceded by that of Senator Saulsbury before the Senate, January 8, 1863, "... that Constitution which was made for all times, for peace as well as war."

²⁹ 4 Wall. 2, 121, 18 L. Ed. 281 (U. S. 1866).

³⁰ *Id.* at 125.

³¹ *Id.* at 127.

³² *Id.* at 141.

be, *can the courts handle the emergency?* The Davis opinion also states that "Martial law cannot arise from a *threatened* invasion. . . . It is also confined to the locality of actual war."³³ These prescriptions are myopic. A hostile army on our border "might necessitate extraordinary measures . . . although no hostile force had crossed the line."³⁴ Excepting military defeat, few acts impair military morale more than persistent civilian attempts to prevent enlistments, procure desertions, weaken confidence and inform the enemy. These treasonous acts may be in places far from and unaffected outwardly by actual warfare. But since civil procedure is not suited to deal effectively with such acts, the military commander must have and must exercise the power to suppress them no matter where occurring. "There may be a state of war at any place where aid and comfort can be effectually given to the enemy, having regard to the modern conditions of warfare and means of communication."³⁵

The Constitution should be construed as a whole, and all provisions harmonized if possible. But where a general power is plainly conferred for a vital purpose, such as the power to wage war, any provision which would limit the power must be equally vital. The occasional preservation of personal or property rights is not comparable to the preservation of the nation. This statement bears not the faintest implication that the military power may act wantonly. Martial rule is justified as well as limited by the emergency. Justification may be absolute today and wanting tomorrow, if the exigency has terminated. Every military act in violation of civil rights may later be judged civilly by the apparent necessity for it, and the actor held accountable by the civil law for any unwarranted invasion of personal or property rights. Even after twenty years, the English Colonial Governor Wall was not only brought to judgment, but was hanged for his ruthless administration of martial law following an insurrection.³⁶

³³ *Id.* at 127.

³⁴ 2 HARE, AMERICAN CONSTITUTIONAL LAW (1889) 965. *Accord*: 3 WILLOUGHBY, CONSTITUTION OF THE UNITED STATES (2d ed. 1929) § 1051.

³⁵ Pollock, *What Is Martial Law* (1902) 18 L. Q. REV. 152, 157.

³⁶ The attorney general (later, Lord Ellenborough) said to the jury concerning Wall, that if the circumstances disclosed a reasonable degree of necessity for his conduct, "God forbid that a hair of his head should be touched."

During the War of 1812, General Jackson placed New Orleans under martial law, and banished Dominick A. Hall, a federal judge who issued a writ of *habeas corpus* for a military prisoner. When civil authority was restored, Hall imposed a fine on Jackson of \$1,000.00 for alleged contempt, which the latter paid. (Money to reimburse Jackson for the fine was immediately raised in New Orleans by popular subscription; but he, with princely gesture, had the

The Davis opinion is surprisingly inadvertent in its precedential quotations. The opinion states that in reversing the attainder of Thomas, Earl of Lancaster, 1327, the English Parliament adjudged that in time of peace no man should be tried for any offense except by the king's courts, and " 'that regularly when the king's courts are open it is a time of peace in judgment of law.' " ³⁷ Neither the Latin copy of that judgment, ³⁸ nor its English translation ³⁹ contains the quotation, in form or substance. It is true that in later years a legal saying arose in England that a place where the courts were open should be regarded as a place of peace. But in medieval times the military disturbances were usually limited to the localities occupied by armed forces, and elsewhere orderly civil procedure was not interrupted. The yardstick of peace in those times is too short for measurement now, since increased facilities of communication and locomotion now extend the disturbances of war to places remote from armed camps. ⁴⁰

The Davis opinion is equally inattentive in stating that during the celebrated parliamentary debate concerning the trial of the missionary, John Smith, by a military tribunal in British Guiana, Lord Brougham and Sir James Mackintosh said: "When the laws can act, every other mode of punishing supposed crimes is itself an enormous crime." ⁴¹ This quotation is attempted from a speech of Sir James but is not correct. He unequivocally defended martial rule in case of necessity, and, following that defense, said, not "when the laws can act", but "As soon as the laws can act," *etc.* ⁴² Lord Brougham also conceded that in case of invasion or rebellion, "when there is no time for the slow and cumbrous proceedings of the civil law," ⁴³ martial law was justifiable. And while both of those statesmen did denounce the trial, they did not speak for England, as the House of Commons, which did so speak, confirmed the trial. ⁴⁴

The Davis opinion continues remiss in declaring that our Revolutionary fathers characterized the proclamation of martial law at Boston by General Gage as an "attempt to supersede the course

money given to the families of soldiers, who had fallen in defense of the city. In 1844, Congress repaid him the fine, with interest.)

³⁷ 4 Wall. 2, 128.

³⁸ In 1 HALE'S PLEAS OF THE CROWN (1778) c. 26.

³⁹ 1 HOWELL'S STATE TRIALS (1809) 39 *et seq.*

⁴⁰ Dodd, *The Case of Marais* (1902) 18 L. Q. REV. 147.

⁴¹ 4 Wall. 2, 128.

⁴² *Id.* at 54-55.

⁴³ *Id.* at 54.

⁴⁴ *Id.* at 99.

of the common law, and instead thereof to publish and order the use of martial law."⁴⁵ The quotation was evidently attempted from a declaration of the Continental Congress. Here is what the records show. On June 12, 1775, General Gage, claiming authority from the Royal Charter of Massachusetts, and stating that "justice cannot be administered by the common law of the land, the course whereof has for a long time past been violently impeded, and wholly interrupted," proclaimed martial law "for so long time as the present unhappy occasion shall necessarily require. . . ." ⁴⁶ A committee was at once appointed by the Massachusetts Provincial Congress to consider "the late extraordinary proclamation" of General Gage. The report of the committee was filed June 16, 1775, and denied neither his claim of authority nor his statement that the common law was not being administered. The matter was taken up then by the Continental Congress, which on July 6, 1775, issued a declaration, reciting merely that General Gage by proclamation, "proceeds [not *attempts*] to supersede the course of the common law", *etc.*, but not controverting his statement that the course of the common law had been impeded and interrupted. Assuming that his statement was correct, because not challenged by those representative bodies, there should be no serious doubt of his lawful right to impose martial law.⁴⁷

The Davis opinion is finally inexact in saying: "The Virginia Assembly, also, denounced a similar measure on the part of Governor Dunmore 'as an assumed power, which the king himself cannot exercise; because it annuls the law of the land and introduces the most execrable of all systems, martial law.'" ⁴⁸ Henning's Statutes at Large of the Virginia Assembly contain no such denouncement. What the opinion evidently referred to is a "declaration" by a convention of Virginia delegates on December 13, 1775, since the declaration does contain the phrases quoted, though widely separated and in no sense connected by the word "because" or any other word. The declaration did execrate martial law, but did so hypothetically. In a different connection, entirely, the declaration did reprobate Lord Dunmore's attempt,

⁴⁵ *Id.* at 128.

⁴⁶ 2 AMERICAN ARCHIVES (4th series, 1839) 970. General Gage was regularly appointed governor of Massachusetts, and he referred to this provision in the charter: "And Wee Doe by these presents . . . Ordaine that the Governor shall have full power . . . to use and exercise the Law Martial in time of actual . . . Rebellion as occasion shall necessarily require . . ."

⁴⁷ See *id.* at 1416, 1868.

⁴⁸ 4 Wall. 2, 128.

as the declaration charged, to employ martial law in violation of the "constitution" (charter) of Virginia, and against loyal subjects of the King of England, in order "to intimidate the good people of this Colony into a compliance with his [Dunmore's] arbitrary will."⁴⁹ And this it was—the use of martial law arbitrarily—that the declaration said the king himself could not do. Upon the allegations of the declaration, the Dunmore proclamation was clearly unjustified; but the sentiments of the declaration do not warrant the realignment of its phrases as was done in the Davis quotation.

In conclusion, I submit deferentially: In this world of arms, constitutional civil rights will endure only if protected by arms. The constitutional authority of the United States government to wage war, being unrestricted, implies the full use of the war power. That power is the power of necessity, than which none is greater. What necessity requires, it justifies. Wherefore, not only upon the actual theater of war, but wherever an emergency of war arises, the violation of every civil constitutional right impeding the war power is justified, if necessary. At peace, civil law should be absolute; at war, martial rule, wherever necessary, must be absolute.

⁴⁹ 4 AMERICAN ARCHIVES 81.