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Jurisdiction of Military Tribunals in the United States Over Civilians

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II.—MILITARY GOVERNMENT.

Returning to the opinion of Mr. Chief Justice Chase in *Ex parte Milligan*, there is, under the Constitution, a second kind of military jurisdiction, "to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion or civil war within states or districts occupied by rebels treated as belligerents; . . . distinguished as military government, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress."¹⁴⁵ Ordinarily in our history this jurisdiction has been exercised on foreign soil, during a formally declared war; but "when the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts of Justice cannot be kept open, *civil war exists* and hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land."¹⁴⁶ The courts are bound by the determination of the President that civil war exists.¹⁴⁷

"Territory is considered occupied when it is actually placed under the authority of the hostile army."¹⁴⁸ "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore, and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."¹⁴⁹ Accordingly, where possible, the occupant maintains the local courts in

¹⁴⁵ *Ex parte Milligan* (1866) 71 U. S. (4 Wall.) 2, 141.

¹⁴⁶ *The Prize Cases* (1862) 67 U. S. (2 Black) 635, 667.

¹⁴⁷ *The Prize Cases*, *supra*, n. 146.

¹⁴⁸ Art. 42, Annex to Hague Convention No. IV of Oct. 18, 1907.

¹⁴⁹ *Id.*, Art. 43.

their operation.¹⁵⁰ But where this is impracticable, the occupant may establish a government of his own, not only on foreign soil but in the occupied territory of a belligerent rebel.¹⁵¹ The government as instituted does not depend on the Constitution of the invader, but on the laws of war,¹⁵² and the jurisdiction and authority of tribunals created by the conqueror depends upon his discretion.¹⁵³ During the Civil War, the President or military commander appointed, under authority of the laws of war, courts variously designated. The so-called Provost Courts, which ordinarily exercised the functions of Police Courts, when so empowered by the commander in the field, took cognizance of important civil actions.¹⁵⁴ In *The Grapeshot*¹⁵⁵ and in *Burke v. Miltonberger*¹⁵⁶ the authority of the Provisional Court to entertain a case in admiralty, and a civil action, respectively, was upheld by the Supreme Court of the United States, while *United States v. Reiter*¹⁵⁷ was a trial for murder. In *Leitensdorfer v. Webb*¹⁵⁸ the authority of a Circuit Court established by military power on Mexican soil to continue its functions after the cession of the territory, but before organization of a civil government, was upheld. Here it may be noted that though we acquired the island of Guam in 1899, Congress has never seen fit to abolish the military government thereof.

While these courts are civil in appearance, they are nevertheless established by military authority and are in reality military tribunals.¹⁵⁹ Usually they have dealt with matters normally under the jurisdiction of the local courts. But the fact of the occupation brings into existence a class of offenses against the safety of the invading army, which cannot arise in time of peace. These are generally denominated offenses against the laws of war. One expressly recognized by the Hagne Convention is espionage.¹⁶⁰ Among those recognized by our Rules of Land Warfare are: using forbidden weapons, killing wounded, refusal of quarter, ill-treatment of prisoners, breach of parole, abuse of flag of truce or of the Red

¹⁵⁰ Rules of Land Warfare, U. S. War Dept., par. 299.

¹⁵¹ *Texas v. White* (1868) 74 U. S. (7 Wall.) 700; *U. S. v. Reiter* (1865) Fed. Cas. No. 16,146, 4 American Law Register (N.S.) 534.

¹⁵² *Rutledge v. Fogg* (1866) 43 Tenn. 554, 91 Am. Dec. 299.

¹⁵³ *Heffernan v. Porter* (1869) 46 Tenn. 391, 98 Am. Dec. 459.

¹⁵⁴ *Mechanics and Traders Bank v. Union Bank* (1874) 89 U. S. (22 Wall.) 276.

¹⁵⁵ (1869) 76 U. S. (9 Wall.) 129.

¹⁵⁶ (1873) 86 U. S. (19 Wall.) 519.

¹⁵⁷ *Supra*, n. 151.

¹⁵⁸ (1857) 61 U. S. (20 How.) 176.

¹⁵⁹ *Handlin v. Wickdiffe* (1873) 79 U. S. (12 Wall.) 173.

¹⁶⁰ Art. 29, Annex to Hague Convention No. IV of Oct. 18, 1907.

Cross flag, use of civilian clothing on the battlefield, poisoning wells, and pillage. The foregoing may be committed by members of the enemy's armed forces.¹⁶¹ Others peculiar to civilians are: committing hostilities without having acquired the belligerent character,¹⁶² war treason,¹⁶³ war rebellion,¹⁶⁴ highway robbery and war piracy,¹⁶⁵ acting as armed prowlers or marauders,¹⁶⁶ and miscellaneous offenses against regulations promulgated by the occupant.¹⁶⁷ In some cases jurisdiction over the less serious of these offenses has been granted to Provost Courts, as in the area occupied by the American Forces in Germany during the World War.¹⁶⁸ In general, however, we have not conferred this jurisdiction on these courts, but on the military commission.

On the continent of Europe these offenses appear to be handled by the court-martial. This has also been true in the British service. But though our system of courts-martial was derived from the British, there is a fundamental difference in the systems; the British courts were established by royal commission to supplement, and later to supersede, the *Curia Militaris*, or Court of the Constable and Marshal.¹⁶⁹

Though Parliamentary sanction for courts-martial was granted by the statute 1 Wm. & M. s. 1 c. 5, and by more comprehensive later enactments, nevertheless the war-time authority of British courts-martial abroad may still depend in part on royal order.¹⁷⁰ In our service the jurisdiction of our earliest courts-martial was derived from Resolves of the Continental Congress. That body promulgated Articles of War in 1775 and again in 1776. The latter Articles¹⁷¹ are almost an exact copy of the British royal Articles of 1774;¹⁷² where the name of Congress appears it is substituted in ten places for the British Crown or its ministers and only once for Parliament; and as Congress in the Declaration of Independence contended that the jurisdiction of Parliament was "foreign to our Constitution and unacknowledged by our laws," and indicted the

¹⁶¹ Rules of Land Warfare, par. 366.

¹⁶² *Id.*, par. 369.

¹⁶³ *Id.*, par. 372.

¹⁶⁴ *Id.*, par. 370.

¹⁶⁵ *Id.*, par. 371.

¹⁶⁶ *Id.*, pars. 373, 374.

¹⁶⁷ *Id.*, par. 375.

¹⁶⁸ Smith, *Military Government*, 36.

¹⁶⁹ 2 Grose, *Military Antiquities*, 54, 86 et seq.

¹⁷⁰ 18 *Law Quarterly Review*, 153.

¹⁷¹ (Sept. 20, 1776) 5 *Journal of the Continental Congress*, 788; Davis, *Military Law of the United States*, Appendix B.

¹⁷² Davis, *Military Law of the United States*, Appendix B.

British king for giving assent to Parliamentary acts of "pretended legislation," it is safe to assume that the Continental Congress deemed itself the successor of the British Crown in a purely executive union of thirteen legislatively independent states, and that the American Articles of 1776 were therefore an executive and not a legislative act. When the Articles of Confederation were adopted July 9, 1778, the United States in Congress assembled found itself vested with mixed executive and legislative powers; among these was the power to make "rules for the government of the land and naval forces".¹⁷³ When the Constitution was adopted, however, there was a sharp segregation of executive and legislative powers; the President became commander-in-chief of the Army and Navy,¹⁷⁴ while the power to "make rules for the government and regulation of the land and naval forces" was definitely placed in the legislative powers of Congress.¹⁷⁵ One of the earliest acts of Congress was to continue in force the then existing Articles of War.¹⁷⁶

So while before the Confederation our courts-martial may have exercised a customary jurisdiction under the laws of war, since no such jurisdiction was granted them by the Articles in force under the Confederation or Constitution, they early ceased to exercise such jurisdiction. Further, under the Constitution they were creatures of statute, and no President or military commander could grant them such jurisdiction. In 1818, General Jackson, invading Florida to punish the depredations of certain Indians, tried two British subjects by court-martial and carried the sentence of death into execution. This extension of jurisdiction was the subject of a debate in Congress, and was generally held to be illegal. In 1847, General Scott found himself unable adequately to punish soldiers of his command in Mexico for crimes ordinarily cognizable by the civil courts, as they were not covered by any Articles of War; and at the same time he found himself unable to punish natives for such offenses against his forces. He therefore enumerated certain offenses, and established what he called "martial law" as a "supplemental code in, and about, all cities, towns, camps, posts, hospitals, and other places which may be occupied by any part of the forces of the United States, in Mexico, and in, and about, all columns,

¹⁷³ Articles of Confederation, Art. IX.

¹⁷⁴ U. S. Const., Art. II, § 2.

¹⁷⁵ *Id.*, Art. I, § 2.

¹⁷⁶ Act of Sept. 29, 1789, 1 U. S. Stats. at L. 96.

escorts, convoys, guards and detachments, of said forces, while engaged in prosecuting the existing war in, and against the said republic and while remaining within the same". He then provided that the enumerated crimes

"... whether committed: 1. By any inhabitant of Mexico, sojourner or traveler therein, upon the person or property of any individual of the United States forces, retainer or follower of the same; 2. By any individual of the said forces, retainer or follower of the same, upon the person or property of any inhabitant of Mexico, sojourner or traveler therein; or 3. By any individual of the said forces, retainer or follower of the same upon the person or property of any other individual of the said forces, retainer or follower of the same—shall be duly tried under the said supplemental code.

"10. For this purpose it is ordered, that all offenders, in the matters aforesaid, shall be promptly seized, confined and reported for trial, before *military commissions*."¹⁷⁷

This was the genesis of the military commission. In the Civil War it was used for the trial of two classes of offenses, committed whether by civilians or by military persons, viz., I. Violation of the laws of war. II. Civil crimes, which, because the civil authority is superseded by the military and the civil courts are suspended, cannot be taken cognizance of by the ordinary tribunals.¹⁷⁸ It might take cognizance of offenses, committed during the war before the initiation of military government but not then brought to trial.¹⁷⁹ The jurisdiction might be exercised up to the declaration by competent authority of the termination of the war status.¹⁸⁰ During the Civil War, some jurisdiction was conferred by statute on these tribunals, but with the exception of the provision relating to spies these statutes are not now in force.¹⁸¹ During the Spanish War the military commission was used on foreign soil, and its jurisdiction over civilians between the time of the signature of the peace treaty and the ratification was upheld in *Ex parte Ortiz*.¹⁸² This tribunal was again established in Germany by Orders No. 1, Officer in Charge of Civil Affairs in Occupied Territory, A. E. F., December 18, 1918, for the trial of inhabitants offending against the laws of war or the military government.

¹⁷⁷ General Orders, 267, Headquarters of the Army, Sept. 17, 1847.

¹⁷⁸ Dig. Ops. J. A. G. (1912) p. 1067.

¹⁷⁹ Loc. cit.

¹⁸⁰ Id., p. 1068.

¹⁸¹ Loc. cit.

¹⁸² (1900) 100 Fed. 955.

Meanwhile, by Act of March 3, 1863 (later incorporated as Article of War 58 of the Code of 1874),¹⁸³ jurisdiction over soldiers in time of war for the more-serious common-law crimes was conferred on courts-martial; and this jurisdiction has been amplified and incorporated in the later codes.¹⁸⁴ In addition, by Act of March 2, 1913¹⁸⁵ and again by Act of August 29, 1916¹⁸⁶ and Act of June 4, 1920¹⁸⁷ general courts-martial were given jurisdiction over persons who by the laws of war were subject to trial by military tribunals, and by the two latter acts military commissions were specifically given jurisdiction over the offenses of dealing in captured or abandoned property, by any person subject to military law,¹⁸⁸ of relieving, corresponding with, or aiding the enemy,¹⁸⁹ and of being found lurking or acting as a spy.¹⁹⁰ In both statutes it was also provided (words italicized appearing in the Act of June 4, 1920 only, bracketed words in the Act of August 29, 1916 only):

"Article 15. *Jurisdiction* not exclusive.—The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that *by statute or by the law of war* may be [lawfully] triable by such military commissions, provost courts, or other military tribunals."

Jurisdiction of military tribunals of one sort or another in hostile occupied territory of a belligerent, whether foreign enemy or insurgent or hostile Indian tribe¹⁹¹ is therefore undoubted. The jurisdiction extends over civilians, whether hostile or neutral,¹⁹² and "the law of war, like the criminal law regarding other offenses, makes no difference on account of the difference of sexes concerning the spy, the war traitor, or the war rebel."¹⁹³

¹⁸³ 12 U. S. Stats. at L. 257, 284, 736, incorporated in U. S. Rev. Stats. § 1342.

¹⁸⁴ Act of Aug. 29, 1916, ch. 418, § 3, 39 U. S. Stats. at L. 650, U. S. Comp. Stats. (1918 ed.) §§ 2308a, 2308a (1)-(121), 9 Fed. Stats. Ann. (2d ed.) 1243. Act of June 4, 1920, ch. 2, supra, n. 19.

¹⁸⁵ 37 U. S. Stats. at L. 722, U. S. Comp. Stats. (1918 ed.) § 2308a (8)-(41), 9 Fed. Stats. Ann. (2d ed.) 1256.

¹⁸⁶ Supra, n. 184.

¹⁸⁷ 41 U. S. Stats. at L. 787, U. S. Comp. Stats. (1923 Supp.) § 2308a, Fed. Stats. Ann. (1920 Supp.) 330.

¹⁸⁸ Art. War 80.

¹⁸⁹ Art. War 81.

¹⁹⁰ Art. War 82.

¹⁹¹ Holmes v. Sheridan (1870) Fed. Cas. No. 6644, 1 Dill, 351.

¹⁹² Rules of Land Warfare, par. 428.

¹⁹³ Gen. Orders, 100, Headquarters of the Army, 1863, Art. 102.

III. MARTIAL LAW.

We are now ready to consider the third kind of military jurisdiction described by Mr. Chief Justice Chase. He says that this "is to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise. . . . [it] may be denominated *martial law proper*, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures safety and private rights."¹⁹⁴

While the above classification is generally accepted, the statement as to the manner in which martial law can be called into action, and as to the jurisdiction of military tribunals thereunder was dictum in a dissenting opinion, and has not established the law.

Some confusion results from a study of the authorities, by reason of the fact that the term "martial law" is not always used in the same sense. In the British usage it includes both military government and martial law as defined by Mr. Chief Justice Chase. In some cases it is confused with military law. Sir Matthew Hale says:

"First, that in truth and reality it is not a law, but something indulged, rather than allowed as a law. The necessity of government, order, and discipline in an army, is that only which can give these laws a countenance; *quod enim necessitas cogit defendi*.

"Secondly, this indulged law, was only to extend to the members of the Army, or those of the opposite army, and never was so much indulged as intended to be exercised upon others . . .

"Thirdly, that the exercise of martial law, whereby any person should lose his life, or member, or liberty, may not be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land."¹⁹⁵

And again he says, "that regularly, when the king's courts are open, it is a time of peace in judgment of law."¹⁹⁶ These passages are cited with approval by Blackstone,¹⁹⁷ who further regrets that, though express legislative sanction had been given for the exercise

¹⁹⁴ Ex parte Milligan (1866) 71 U. S. (4 Wall.) 2, 142, 18 L. Ed. 281.

¹⁹⁵ Hale, Common Law, 42.

¹⁹⁶ 1 Hale, Pl. Cr. 347.

¹⁹⁷ 1 Bl. Comm. 413.

of "martial law" in capital cases, nevertheless Parliament still permitted the king to denounce and fix the penalties for less serious offenses committed by soldiers. Blackstone admitted that in view of 1 Wm. & M. s. 2 c. 2, "martial law" could extend to soldiers in time of peace. Both Hale and Blackstone were, then speaking of "military law"¹⁹⁸—a military law which was "indulged, rather than allowed as a law," but which was embodied in executive articles of war dating back at least to the reign of Richard I (see the Articles of various monarchs in 2 Grose, *Military Antiquities*); and which was first administered by the Court of the Constable and Marshal¹⁹⁹ under customary authority as restricted by 8 Ric. 2, c. 5; 13 Id., c. 2; and 1 Hen. 4, c. 14,²⁰⁰ later by the Court of the Marshal,²⁰¹ and later by the court of war or court-martial under royal commission.²⁰²

It appears, however, that from time to time attempts were made to extend this jurisdiction beyond the army. Hale informs us that Edmund of Kent²⁰³ and Thomas of Lancaster²⁰⁴ were taken in arms against the king and condemned by a sort of military court, but that their attainders were reversed by Parliament in 1 Edw. III, "for the reason that no man ought to be adjudged to death for treason or for any other offense without being arraigned and put to answer." Again we find the term in its proper sense used in the Petition of Right of 3 Car. I, wherein it was prayed that no commission should issue in England to proceed according to martial law. In *Grant v. Gould*,²⁰⁵ however, the term is used in the sense of "military government" or "martial law," as distinguished from "military law," and it was so used in *Marais v. General Officer*.²⁰⁶

Early cases in the United States exhibit similar confusion. The case of *Smith v. Shaw*²⁰⁷ uses the term in the sense of military authority exercised in the immediate vicinity of the military forces, in time of war, over spies; in other words, probably in the sense of "military law". In a number of cases it is used in the sense of

¹⁹⁸ 8 Ops. Atty. Gen. 366.

¹⁹⁹ 1 Grose, *Military Antiquities*, 216, 227; 2 Id., 53.

²⁰⁰ 2 Hawkins, Pl. Cr. 12.

²⁰¹ 2 Grose, *Military Antiquities*, 54, 86 et seq.; contra, 3 Bl. Comm. 103; Hale, *Common Law*, 40; 7 Mod. 127.

²⁰² 2 Grose, *Military Antiquities*, 86 et seq., 124, 126, 137, 152.

²⁰³ Hale, *Common Law*, 42.

²⁰⁴ 1 Hale, Pl. Cr. 347.

²⁰⁵ (1792) 2 Hen. Blackst. 99.

²⁰⁶ [1902] A. C. 109, 71 L. J. P. C. 42, 85 L. T. 734, 50 W. R. 273, 18 T. L. R. 185.

²⁰⁷ (1815) 12 Johns. 257, 5 N. Y. Com. Law. Rep. 383.

“military government,” e.g., *United States v. Diekelman*,²⁰⁸ *Winter v. Dickman*,²⁰⁹ *Jeffries v. State*,²¹⁰ *Kimball v. Taylor*.²¹¹ In many cases, however, it is used conformably to the classification of Mr. Chief Justice Chase.

The cases are not in accord, however, as to just what authority exercised in the home territory constitutes martial law. Some consider that it exists when the privilege of the writ of habeas corpus is suspended, or when the militia is called forth to enforce the laws of the Union, or when the governor, pursuant to the provisions of the State Constitution, declares that a state of insurrection exists and sends in the militia to suppress the same. In *Luther v. Borden*²¹² the court, in upholding the power of the State of Rhode Island to declare martial law, referred only to a resort to the laws and usages of war, no more force being used than might be necessary, the parties being answerable for excesses. On the other hand, the courts in some cases have used the term to describe a condition of affairs in which military forces either lawfully or unlawfully exercise jurisdiction over matters usually confided to the judiciary. As the object of this inquiry is to discover the extent of the jurisdiction of military tribunals over civilians, we shall therefore omit from consideration those cases which uphold the legality of “martial law,” but which do not decide anything bearing on the jurisdiction of military tribunals.

We have already noted that military tribunals may function practically without restriction in hostile occupied territory—whether that territory be that of a foreign foe or of a rebel treated as a belligerent. May they function similarly in parts of the United States not in belligerent rebellion? This question involves the following considerations: What is the difference between a mere insurrection and a belligerent rebellion? How is the existence of one or the other condition determined? Under what conditions may the guarantees of the Constitution against military trials be set aside in parts of the home soil which are not in belligerent rebellion?

There are various decisions describing the difference between a belligerent rebellion and a mere insurrection. Perhaps the following quotations will serve to give an adequate idea :

“Several of these states have combined to form a new confederacy, claiming to be recognized by the world as a sovereign

²⁰⁸ (1875) 92 U. S. 520, 23 L. Ed. 742.

²⁰⁹ (1868) 42 Ala. 92.

²¹⁰ (1866) 39 Ala. 655.

²¹¹ (1874) Fed. Cas. No. 7775, 2 Woods, 37.

²¹² (1849) 48 U. S. (7 How.) 1, 12 L. Ed. 581.

state. . . . It is no loose, unorganized insurrection, having no defined boundaries or possessions. It has a boundary marked by lines of bayonets and which can be crossed only by force; south of this line is enemies' territory, because it is claimed and held in possession by an organized, hostile, and belligerent power."²¹³

"When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts of Justice cannot be kept open, *civil war exists* and hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land."²¹⁴

"There is a very great distinction between insurrection and war. It is this: war is an act of sovereignty, real or assumed; insurrection is not; war makes enemies of the inhabitants of the contending states; but insurrection does not put beyond the pale of friendship the innocent in the affected district. War creates the rights and duties of belligerency, which to a mere insurrection are unknown. Doubtless an insurrection may become war, as was the case with the Great Rebellion; but it does not become so in the legal sense until the rebellious party assumes legal form."²¹⁵

If, then, a state of war is different from a state of insurrection, by whom may a state of civil war be recognized? The courts follow the decisions of the political branches of the Federal government on this question.²¹⁶ Whether or not the political branches of a State government can recognize a condition of civil war, so as to accord to the insurrectionary party belligerent rights, and so as to itself acquire the power to set aside the guarantees of the State Constitution in the affected region, is a disputed question. The Federal Constitution provides:

"No state shall, without the consent of Congress, . . . engage in war, unless actually invaded or in such imminent danger as will not admit of delay."²¹⁷

That the term "invaded" does not include insurrection or other domestic violence is indicated by the use of the terms, "insurrections" and "invasions" side by side in Article I, section 8, of "rebellion" and "invasion" in section 9, and of "invasion" and "domestic violence" in Article IV, section 4. The "imminent danger" under which a State may engage in war is not defined, but some help

²¹³ The Prize Cases (1862) 67 U. S. (2 Black) 635, 673.

²¹⁴ The Prize Cases (1862) 67 U. S. (2 Black) 635, 667.

²¹⁵ *Ex parte McDonald* (1914) 49 Mont. 454, 474, 143 Pac. 947, L. R. A. 1915B 988, Ann. Cas. 1916A 1166.

²¹⁶ *Sutton v. Tiller* (1869) 6 Cold. (Tenn.) 593, 98 Am. Dec. 471; U. S. v. One Hundred and Twenty-nine Packages (1862) Fed. Cas. No. 15,941; The Prize Cases (1862) 67 U. S. (2 Black) 635.

²¹⁷ U. S. Const., Art. I, § 10.

may be obtained from the history of the section above quoted. It first appeared in the Articles of Confederation, where it read :

“No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted; . . .”²¹⁸

Unless, then, it be held that the Constitution has materially amplified the war-making powers of the states over what they were under the Confederation, it would appear that no state may transmute a domestic disturbance or insurrection into a war, so as to acquire for itself belligerent powers in the disturbed area.²¹⁹ The statement in *Luther v. Borden*²²⁰ that the State of Rhode Island resorted to the rights and usages of war during Dorr’s Rebellion does not seem to have been necessary to the decision in the case. In Kentucky it has been held that the Federal government is the only sovereign in this country for recognizing belligerent rights.²²¹ In West Virginia, however, it has been held that the governor may declare that a state of war exists; that such declaration is reviewable only by the legislature under impeachment proceedings; and that during such a state of war the military forces of the state may, under the governor’s orders, exercise belligerent powers in the affected area, including the right to try civilians by military commission, for offenses committed in an interim of peace between two periods of “war”.²²² The court arrived at this decision in spite of the following provisions of the State Constitution.

“The privilege of the writ of habeas corpus shall not be suspended.”²²³

“. . . no citizen, unless engaged in the military service of the State, shall be tried or punished by any military court, for any offense that is cognizable by the civil courts of the State.”²²⁴

“The provisions of the Constitution of the United States, and of this State, are operative alike in a period of war as in time

²¹⁸ Articles of Confederation, Art. VI.

²¹⁹ See Ballantine, *Military Dictatorship in California and West Virginia*, 1 *California Law Review*, 413, 424.

²²⁰ *Supra*, n. 212.

²²¹ *Price v. Poynter* (1866) 1 *Bush* (Ky.) 387; *Bell v. L. & N. R. R. Co.* (1866) 1 *Bush* (Ky.) 404.

²²² *State ex rel. Mays v. Brown* (1912) 71 *W. Va.* 519, 77 *S. E.* 243, 45 *L. R. A.* (N. S.) 996, *Ann. Cas.* 1914C 1; *Ex parte Jones* (1913) 71 *W. Va.* 567, 77 *S. E.* 1029, 45 *L. R. A.* (N. S.) 1030, *Ann. Cas.* 1914C 31.

²²³ *W. Va. Const.*, Art. 3, § 4.

²²⁴ *Id.*, Art. 3, § 12.

of peace, and any departure therefrom, or violation thereof, under the plea of necessity, or any other plea, is subversive of good government, and tends to anarchy and despotism."²²⁵

This disregard of the Constitution appears to be logical, if we grant the premise that the state may engage in civil war, as does also the decision that this jurisdiction is dependent on military occupation in actual war;²²⁶ but the disregard in the Mays case of the fact that civil courts were open in unaffected parts of the same county, and in the Jones case of the fact that petitioner was brought from an unaffected district into the military zone for trial, can not be so easily reconciled with our theory of government.

It appears settled, then, that the Federal government, through its political branches, may recognize the existence of civil war in a legal sense in a defined area, and may conduct military government therein. We must leave it as an unsettled question whether the political branches of a state government may do the same thing. We have now to consider under what conditions military trials of civilians may be held in parts of the country retaining their allegiance, or, in other words, whether or not such trials may be held under "martial law".

The Constitution of the United States gives little help on this question. The term "martial law" is not mentioned, nor is any exception made to the prohibitions of the Fifth and Sixth amendments other than the one discussed under the head of "military law". Power is granted to suspend the writ of habeas corpus "when in cases of rebellion or invasion the public safety may require it."²²⁷ This suspension is a legislative function.²²⁸ The President can not suspend the privilege of the writ without the authority of Congress.²²⁹ The writ itself is not suspended, but issues as a matter of course, and the court determines whether the petitioner comes within the terms of the suspension.²³⁰ But this power of suspension does not legalize an unlawful arrest or imprisonment,²³¹ nor can Congress deprive anyone of other remedies therefor.²³²

Congress cannot suspend the issuing of the writ by a state

²²⁵ W. Va. Const., Art. I, § 3.

²²⁶ *Ex parte Lavinder* (1921) 88 W. Va. 713, 108 S. E. 428.

²²⁷ U. S. Const., Art. I, § 9.

²²⁸ *Ex parte Merryman* (1861) Fed. Cas. No. 9487, Taney, 246.

²²⁹ *Ex parte Benedict* (1862) Fed. Cas. No. 1292; *In re Kemp* (1863) 16 Wis. 382; 8 Ops. Atty. Gen. 372.

²³⁰ *Ex parte Milligan* (1866) 71 U. S. (4 Wall.) 2, 18 L. Ed. 281.

²³¹ *Griffin v. Wilcox* (1863) 21 Ind. 383.

²³² *Johnson v. Jones* (1867) 44 Ill. 142.

court,²³³ nor does the restriction of Article I, section 9 of the Federal Constitution, apply to the states.²³⁴ The constitutions of various states, however, contain similar provisions.²³⁵

In some few cases state constitutions authorize the governor to declare martial law. For example, in New Hampshire, "No person can in any case be subjected to law martial or to any pains or penalties by virtue of that law, except those employed in the army or navy, and except the militia in actual service, but by authority of the legislature."²³⁶ Again, ". . . the governor shall not at any time hereafter . . . grant commissions for exercising the law martial in any case without the advice and consent of the council."²³⁷ Provisions similar to the former appear in the constitutions of Massachusetts²³⁸ and of South Carolina.²³⁹ The Constitution of Rhode Island provides, ". . . and the law martial shall be used and exercised in such cases only as occasion shall necessarily require."²⁴⁰ The Organic Act of the Territory of Hawaii provides, "That the governor . . . may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known."²⁴¹ The constitutions of the other states and territories appear to be silent on the subject. A declaration of martial law in conformity with state law does not conflict with the Federal Constitution.²⁴²

Martial law may, then, exist under the Constitution in New Hampshire, Massachusetts, South Carolina, Rhode Island, and Hawaii, though in only one of them is there an adjudication to the effect that the declaration warrants trial of civilians by military tribunals. In the old Republic of Hawaii, whose Constitution contained a provision similar to the one above quoted, it was held that

²³³ Griffin v. Wilcox, *supra*, n. 231.

²³⁴ Gasquet v. Lapeyre (1916) 242 U. S. 367, 61 L. Ed. 367, 37 Sup. Ct. Rep. 165.

²³⁵ E. g., Cal. Const., Art. I, § 5.

²³⁶ N. H. Const., Art. 34.

²³⁷ N. H. Const., Art. 50.

²³⁸ Mass. Const., Pt. I, Art. XXVIII.

²³⁹ S. C. Const., Art. I, § 25.

²⁴⁰ R. I. Const., Art. I, § 18.

²⁴¹ T. H. Organic Act, § 67, Act of Apr. 30, 1900, ch. 339, § 68, 31 U. S. Stats. at L. 153, U. S. Comp. Stats. (1918 ed.) § 3708, 3 Fed. Stats. Ann. (2d ed.) 510.

²⁴² Luther v. Burden, *supra*, n. 212; Despan v. Olney (1852) Fed. Cas. No. 3, 822, 1 Curt. 306; U. S. ex rel. Seymour v. Fischer (1922) 280 Fed. 208; U. S. ex rel. McMaster v. Wolters (1920) 268 Fed. 69.

when the President of the Republic in his discretion declared martial law he might authorize trials by military commission, and that such trials might continue even after the courts were open if the state of war still continued.²⁴³ Such trials do not contravene the Federal Constitution if in conformity with State law.²⁴⁴

The Hawaiian case, however, is not decisive as to trials under the authority of the United States, nor under the authority of states whose constitutions do not provide for any suspension of ordinary law or of the ordinary civil rights. In these jurisdictions, if such a power exists, it must be because of a law superior to the Constitution. Is there such a law?

Little help can be secured from English cases. In *Grant v. Gould*²⁴⁵ a dictum of the court stated that martial law had been exploded in England for over a century. Yet in *Marais v. General Officer*,²⁴⁶ martial law was allowed to exist in time of foreign war in a colony where the courts were open. Further, as Parliament is not subject to the inhibitions of a written constitution, it could doubtless establish trial by martial law if it so pleased. It appears to have done so in the recent *Defense of the Realm Act*.²⁴⁷

In considering the American cases on this subject we are at once struck by the large number of decisions in which the court, by way of dictum, asserted that martial law might exist, and military trials be held, under circumstances other than those before the court, and the small number of decisions on the precise point. This discussion will, as far as possible, avoid reference to the dicta.

At the outset, we find it clearly established by the leading case of *Ex parte Milligan*²⁴⁸ that even during civil war, and under threatened invasion, in loyal territory where the courts are open martial law cannot prevail, and persons not subject to military law are not subject to trial by military tribunals. Not even a declaration of martial law can abrogate the Constitution.²⁴⁹ The governor of a territory cannot suspend the law and substitute military for civil authority.²⁵⁰ The only cases directly to the contrary seem to be in

²⁴³ *In re Kalanianole* (1895) 10 Hawaii, 29.

²⁴⁴ *U. S. ex rel. Seymour v. Fischer*, *supra*, n. 242; *U. S. ex rel. McMasters v. Wolters*, *supra*, n. 242.

²⁴⁵ (1792) 2 Hen. Blackst. 99.

²⁴⁶ *Supra*, n. 206.

²⁴⁷ 4 and 5 Geo. V, c. 29.

²⁴⁸ *Supra*, n. 230.

²⁴⁹ *Johnson v. Duncan* (1815) 3 Mart. O. S. (La.) 530; *Com. v. Palmer* (1866) 65 Ky. 570; *Corbin v. Marsh* (1865) 63 Ky. 193.

²⁵⁰ 8 Ops. Atty. Gen. 374.

In *re* Kalanianole,²⁵¹ and *Ex parte* Vallandigham.²⁵² The former, however, turned on a provision in the Constitution of the Republic of Hawaii, and the latter turned on a question of the jurisdiction of the Supreme Court of the United States to issue a certiorari to a military commission. The majority decision in the Milligan case may be taken as settled law. In accord therewith are: *In re* Egan,²⁵³ in which it was held that a military commission could not try a civilian for homicide in a rebellious state after the reestablishment of civil government; *Griffin v. Wilcox*,²⁵⁴ where it was held that military authorities could not establish regulations where the courts were open, and arrest civilians for violation thereof; *Smith v. Shaw*,²⁵⁵ where it was held that a military court could not try civilians for treason; and *Matter of Martin*,²⁵⁶ where it was held that crimes could not be tried by military tribunals outside the theater of war.

But these cases are not decisive as to circumstances in which the courts are closed, by an uprising not amounting to belligerency. Can military courts assume jurisdiction of civilians in such cases?

The following cases appear at first glance to uphold the affirmative of this proposition: *In re* Ezeta,²⁵⁷ *Ex parte* Mudd,²⁵⁸ *United States ex rel. Seymour v. Fischer*,²⁵⁹ *United States ex rel. McMaster v. Wolters*,²⁶⁰ and *State ex rel. Mays v. Brown*.²⁶¹ In the *Ezeta* case, however, the court had before it the question of the jurisdiction of military courts during a "state of siege" in the Republic of Salvador, and the decision turned on the law of that Republic which specifically authorized such jurisdiction. In the *Seymour* and *McMaster* cases the military court was appointed by State authority; the Federal court in each case said that the governor had power by virtue of his power to declare and suppress a state of insurrection, to declare martial law and to order that civilians be tried by military tribunals; the court in the *Seymour* case said that the sentence of a military court did not expire with the termination of the condition of martial law; but the reasoning confused military government with martial

²⁵¹ *Supra*, n. 243.

²⁵² (1863) 68 U. S. (1 Wall.) 243.

²⁵³ (1866) Fed. Cas. No. 4303, 5 Blatchf. 319.

²⁵⁴ (1863) 21 Ind. 383.

²⁵⁵ (1815) 12 Johns. (N. Y.) 257.

²⁵⁶ (1865) 45 Barb. (N. Y.) 142.

²⁵⁷ (1894) 62 Fed. 972.

²⁵⁸ (1868) Fed. Cas. No. 9,899.

²⁵⁹ *Supra*, n. 242.

²⁶⁰ *Supra*, n. 242.

²⁶¹ *Supra*, n. 222.

law, and the actual decision of each case was something very different from that indicated by the reasoning; the McMaster case merely decided that a military trial under State authority did not contravene the due process clause or the trial by jury clause of the Federal Constitution, and the Seymour case decided that such a trial under such circumstances did not contravene the due process clause of the Federal Constitution provided it did not violate state law. In the Mudd case, the court appears, from the reporter's syllabus, to have held that murder of the President in time of civil war is triable by military commission. Unfortunately the case is not reported at length, and it does not appear what question was before the court, what was the status of the petitioner, whether he was a principal or an accessory, or whether his act connecting him with the murder was committed in hostile occupied territory. The Mays case, as above noted, was decided on the theory that the State can engage in civil war and can exercise belligerent powers on the soil of the enemy; though the term "martial law" was used in the decision, the case is not authority on the question now under discussion.

On the other hand, In *Ex parte McDonald*²⁶² the Supreme Court of Montana held that, while the military forces of the State might, in a state of insurrection, detain prisoners until it should be judged safe to hand them over to the civil authorities, nevertheless the power of the governor to suppress insurrection did not include the power to abrogate the right of trial by jury, nor to authorize the trial of civilians by military commission. In accord is *Ex parte Moore*.²⁶³

Of course, the *McDonald* case does not establish the law for the whole United States. It may be that future decisions will clearly uphold the power of a state to engage in civil war, and exercise belligerent powers within affected districts; if so, a sea-coast state should have the right to establish a blockade of its ports which may be in rebel control; contracts between inhabitants of loyal districts and of disloyal districts might be suspended; all the inhabitants of the former might be enemies of inhabitants of the latter; and neutrals as well as citizens in the rebellious soil might be subject to trial by military tribunals under the law of war. It may be that this doctrine will be repudiated. If it is repudiated, and if a state may exercise only sovereign, and not belligerent, rights, in a district in insurrec-

²⁶² *Supra*, n. 215.

²⁶³ (1870) 64 N. C. 802.

tion, even then it may be held that constitutional authority for martial law is unnecessary; that *salus populi* is *suprema lex*, and hence superior to the Constitution; that with or without a formal declaration of martial law the Executive authority may, where insurrection in fact exists, dispense with trial by jury before the duly constituted courts; and that the otherwise unconstitutional acts of the agents of the government may not subsequently be reviewed by the courts. Hitherto, however, the decisions have not gone that far. It may well be questioned whether on principle they should go that far.

It is undoubtedly true that all the powers of sovereignty reside somewhere in the state, except such as have been granted to the Federal government or prohibited to the state in the Federal Constitution. The power to suspend the Bill of Rights does not appear (except as heretofore noted) to have been granted to any agency of the Federal government or to any agency of any state. **May not the power to establish martial law remain dormant in the people, to be resumed by them at will by a constitutional amendment? May not the people determine in advance what shall be their *suprema lex*? Can it be maintained that the Executive of a state may govern on the assumption that the Constitution has been set aside, when, but for the Constitution, he himself has no official existence? "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances."²⁶⁴ "If a subject be taken in rebellion, he is to be tried afterwards and by the common law."²⁶⁵ "What the Constitution prohibits, war cannot legalize."²⁶⁶**

If it be agreed that jurisdiction under martial law cannot be established as a matter of law on the soil of any sovereignty with whose constitution it is in conflict, it does not necessarily follow that every act done by officers of such government in suppression of insurrection which fails to conform to the provisions of law relating to personal liberty is criminal or actionable. In Kentucky, it is true, it is held that members of the militia when lawfully called into service by the governor have only the powers of peace officers.²⁶⁷ This appears to be the view of Professor H. W. Ballantine, who says: "As a matter of common law, therefore, the powers

²⁶⁴ Ex parte Milligan (1866) 71 U. S. (4 Wall.) 2, 120, 18 L. Ed. 281.

²⁶⁵ Ex parte McDonald, 49 Mont. 454, 468, supra n. 215, quoting from a debate in Parliament on the Petition of Right.

²⁶⁶ Corbin v. Marsh (1865) 63 Ky. 193, 195.

²⁶⁷ Franks v. Smith (1911) 142 Ky. 232, 134 S. W. 484.

of the military would seem to be preventive, defensive, and ministerial, with no authority to issue orders to citizens generally, or to punish those who disobey commands or commit offenses.²⁶⁸ Except for the last clause, however, this does not seem to be in accord with the general trend of decisions. In the Federal, and in perhaps all of the state Constitutions, there are provisions which either expressly or impliedly authorize the Executive to use the military forces to enforce the law. These forces may at times have to take drastic action. Aside from those cases in which state laws provide immunity from prosecution or action for acts done in pursuance of militia duty, there are numerous cases in which the courts have refused redress to the party complaining of such acts. In *Ex parte Field*²⁶⁹ a marshal who, by direction of the President, disobeyed a writ of habeas corpus issued in a state which was not in the theater of war was fined for contempt. In *McCall v. McDowell*²⁷⁰ a subordinate officer obeying the order of his superior to execute an unwarranted arrest in a state not in insurrection was exonerated, while the superior was held liable in damages to the party arrested. But in *In re Boyle*,²⁷¹ and *In re Moyer*²⁷² and *Ex parte McDonald*,²⁷³ the court refused to release on habeas corpus a petitioner who was held by the military while engaged in suppressing an insurrection. It appeared that the detention of the petitioner was a necessary means of restoring order, and the order of the governor that the writ be disregarded was held justified. In *Ex parte Moore*²⁷⁴ while the court declined to express itself as to whether the governor's order was justified, it exonerated the military officer who obeyed the governor and disobeyed the writ. In *Moyer v. Peabody*²⁷⁵ the court held that detention of a prisoner arrested during a state of insurrection without a warrant, by state authority, did not violate the Fourteenth Amendment to the Federal Constitution, there being no abuse of power. In the *Boyle* and *Moyer* cases it appeared that the governor had declared a state of insurrection. The state courts held that they could not inquire into the existence

²⁶⁸ 5 *Journal American Institute Criminal Law and Criminology*, 740; 24 *Yale Law Journal*, 189, 212.

²⁶⁹ (1862) *Fed. Cas. No. 4,761*, 5 *Blatchf.* 63.

²⁷⁰ (1867) *Fed. Cas. No. 8,673*, *Deady*, 233, 1 *Abb. (U. S.)* 212.

²⁷¹ (1899) 61 *Idaho*, 609, 57 *Pac.* 706.

²⁷² (1904) 35 *Colo.* 159, 85 *Pac.* 190.

²⁷³ *Supra*, n. 215.

²⁷⁴ *Supra*, n. 263.

²⁷⁵ (1906) 148 *Fed. Ed.* 870, affirmed in (1909) 212 *U. S.* 78, 53 *L. Ed.* 410, 29 *Sup. Ct. Rep.* 235.

of an insurrection, since in those states the constitution authorized such a declaration by the governor, and made it a prerequisite to the calling forth of the militia. They did, however, inquire into the necessity of the detention, and decided the cases on the grounds of necessity and not on the grounds of the governor's declaration. In *Commonwealth ex rel. Wadsworth v. Shortall*,²⁷⁶ where it did not appear that a similar declaration was required, relator was held entitled to release on habeas corpus when charged with a homicide committed under military orders while on duty as a militiaman in suppressing an insurrection, the order being apparently lawful and its issuance being apparently necessary. In *re Fair*,²⁷⁷ a homicide committed by a Federal soldier without malice under orders which were not plainly illegal was held to be not an offense against the state (whatever may have been the responsibility of the officer issuing the order). In *Luther v. Borden*²⁷⁸ a militiaman engaged in suppressing insurrection was not liable for trespass in breaking and entering plaintiff's house and effecting an arrest. The rule in these cases seems to be this: neither a military subordinate nor the executive nor the legislature can assume to disregard the writ of habeas corpus except as authorized by the Constitution, nor can the executive or any military subordinate authorize arrests, searches, or seizures by a mere declaration of a condition of affairs or of a type of law paramount to the Constitution. But just as the individual may justify trespass, or even homicide, in self defense on the ground of necessity, so the agents of the state may justify what would otherwise be tort or even crime on the ground of necessity in defense of the state. The justification is not proclaimed as a matter of law, but is a matter of fact in each case.²⁷⁹ It was in accord with this doctrine that the Supreme Court of Montana held detention by the military, in a given case, necessary and military trials unnecessary.²⁸⁰

With reference to the right and duty of defending the commonwealth against its enemies, when there is war within the realm, Sir Frederick Pollock says:

"First, it is not a matter of prerogative, but appertains to all lawful men. Secondly, it is not specially vested in military officers, though they may often be the most proper persons to

²⁷⁶ (1903) 206 Pa. 165, 55 Atl. 952.

²⁷⁷ (1900) 100 Fed. 149.

²⁷⁸ *Supra*, n. 212.

²⁷⁹ *McLaughlin v. Green* (1874) 150 Miss. 453.

²⁸⁰ *Ex parte McDonald*, *supra*, n. 215.

exercise it. Thirdly, its exercise requires to be justified on every occasion by the necessity of the case."²⁸¹

If by "war" he means "insurrection," he is fully in accord with what appears to be the American doctrine. He further says:

"So-called martial law . . . is an unlucky name for the justification by the common law of acts done by necessity for the defense of the Commonwealth when there is war within the realm."²⁸²

Tested in this light, it is difficult to see how trial of civilians in the home territory by military commission under "martial law," can, as a matter of fact be justified. The military forces, like peace officers, may, to accomplish their lawful errand, find it necessary to trespass upon property, to seize weapons, or to detain, or even to commit homicide upon an insurgent *in flagrante delicto*; they may have to go farther than peace officers may do, and refuse, for the time being, to obey the order of a court to vacate the property, to restore the weapons, or to free the prisoner; but it is difficult to see how they can justify, on the grounds of necessity, an unlawful trial and sentence of a prisoner already taken. If the prisoner is innocent, he is not deserving of punishment; and he is entitled to have his guilt or innocence determined in the forms prescribed by law. It is the function of the military forces to hold the prisoner until order is restored and he can be safely turned over to the civil authorities for trial. Martial law prevents, but it does not punish.²⁸³

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²⁸¹ 18 Law Quarterly Review, 152, 153.

²⁸² Id. 156.

²⁸³ Contra, Birkhimer, Military Government and Martial Law, 525 et seq.