CONSTITUTIONAL LIMITATIONS ON TRIALS BY MILITARY COMMISSIONS

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In June, 1942, eight representatives of the German Reich surreptitiously landed on the shores of this country while the two nations were at war. The admitted purpose of coming, although the intention to carry out such purpose was denied,1 was to commit acts of sabotage against our war production facilities, our communications, and other means by which we were carrying on the war. These eight men were promptly captured and under Presidential Proclamation of July 2, 1942,2 held for trial by a military commission. The personnel of such Commission and the procedure for accomplishing the assignment were provided for by Order of the President 3 issued on the same day as the foregoing Proclamation.

Prior to announcement of the decision of the Military Commission, counsel for the defendants challenged in the United States Supreme Court, the constitutionality of the trial by military commission and the authority of the President to appoint it. For the first time in many years the military commission was used in a case of major importance, and for the first time since 18664 the United States Supreme Court had under consideration the constitutional limitations on such trials.  It is our present purpose to examine historically and judicially those constitutional limitations.

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4. Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 282 (1866).
I. HISTORY OF MILITARY COMMISSIONS

Although codified rules for discipline of soldiers, and enforcement thereof, date back to the days of the Roman Empire, in English history as early as 1190 in the reign of King Richard I, in the history of the Holy Roman Empire to 1532 with the Code of Charles V, the Articles of Gustavus Adolphus of Sweden of 1621, and 1775 with the Articles of War of the Provisional Congress of Massachusetts, no recognition is given the military commission.

The presently known military commission is the result of the Military Commissions and the Councils of War organized by General Winfield Scott during the Mexican War in 1847. But although known by different names, such military tribunals were in fact known long before 1847. They can be traced in early English history to the twelfth century during which time the Court of the Constable and the Marshal was established for control over the King’s Army, for appeals of death for murder committed out of the country, and for the determination of the rights of prisoners taken in war. This court later took jurisdiction over all persons; finally it was abolished in the Magna Carta of 1215, the Petition of Rights of 1628 and the Bill of Rights of 1689, since which time it has been established, despite violations by kings, that as a matter of law civilians are entitled to be tried in civil courts by their peers. However, by the time of the American Revolution, the military laws of England had been codified into articles of war, restricting the summary authority of the Sovereign to the members of the armed forces, while civilians were liable only to the civil law. In an early English case, it was determined that Perkin Warbeck, an alien, posed as a son of Edward IV and invaded England; he was taken in war, tried before the Court of the Constable and the Marshal who were specially commissioned “to hear and determine the

5. Rules promulgated, reproduced in WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed. 1920) 903.
6. Id. at 18.
7. Articles reproduced, id. at 907.
8. Articles reproduced, id. at 947.
9. Id. at 832.
11. STEPHENSON AND MARCHAM, SOURCES OF ENGLISH CONSTITUTIONAL HISTORY (1937) 121; text of Magna Carta in translation.
12. Id. at 452.
13. Id. at 601.
same according to martial law," 16 found guilty, and sentenced "to be
drawn, hanged and quartered."

In the early history of this country, jurisdiction of the military
authorities was defined and limited by enactment of the Continental
Congress in 1775 of articles of war modeled on those of England.17

But although military commissions were not legislatively recog-
nized until 1862, they were recognized in military practice and accepted
as proper military tribunals long before that date, authorized to try
certain types of offenders and offenses under certain conditions dis-
cussed later herein. Major Birkhimer, in his book on military law,
points out that although the military commission was not known
before the Mexican War, as a military commission, "The war court,
originally based on the common law of war, has always been recognized
in the service." 18 The earliest trial in the history of our country before
such war courts, as distinguished from courts-martial provided for in
codified articles of war, is that of Major Andre. This trial, held in
September, 1780, was pursuant to the charge that Major Andre, an
Adjutant General of the British Army, with whose country the United
States was then at war, had come within our lines, and in order to
avoid detection and to accomplish a meeting with General Arnold
of the American Army, changed from his British uniform. He was tried
by a Board of Officers which reported to the Commander-in-Chief of
the United States, General Washington, that Major Andre "ought to
be considered as a spy from the enemy, and that, agreeable to the law
and usage of nations, it is their opinion he ought suffer death." 19

There were other instances in early American history of trials by
military tribunals specially designated, as for example the trial of
Joshua Hett Smith in 1780, charged with being an accomplice of
General Arnold and Major Andre; the trials, under orders of General
Jackson, of Arbuthnot and Ambrister in Florida, in 1818, for inciting
the Indians to war against the United States. Though these trials
were heard by tribunals having no statutory authority, they were never-

16. "Calvin's Case"—Constitutional and Historical Basis of Military Jurisdiction
(1938) Special Text No. 173, ARMY EXTENSION COURSES 14.
17. For an historical survey of the various enactments of the Articles of War in
this country from 1775 to the present, see Taylor, Military Courts—Martial Pro-
cedure under the Revised Articles of War (1926) 12 VA. L. REV. 463, 464-465.
18. BIRKEMER, MILITARY GOVERNMENT AND MARTIAL LAW (3d ed. revised, 1914)
351.
19. Op. cit. supra note 16 at 57-59. In a note on page 59, it is stated: "Conse-
quently Andre was not tried by court-martial, but was accorded a hearing before a
Board. In a sense this Board may be regarded either as a Military Commission or as
a 'Court of Inquiry' under a different name." Also, DAVIS, A TREATISE ON THE MIL-
ITARY LAW OF THE UNITED STATES (3d ed. revised, 1913) 308, footnote 1. For a com-
parison of the offense of spying as charged against Major Andre, with spying under
the 29th Article of the Hague Regulations, see 2 OPPENHEIM, INTERNATIONAL LAW
theless justified and upheld according to the general usage of the military service or the common law of war.\textsuperscript{20}

Under the command of General Winfield Scott, the army of the United States occupied Mexico in 1847. Faced with the necessity of maintaining order among the civilian population, General Scott found no authorization in the Articles of War for dealing with civilians and those who had committed crimes peculiar to time of war. It, therefore, became necessary to set up such tribunals as could adequately deal with the conditions. By General Order No. 20 of General Scott, dated February 19, 1847, military commissions were established to punish the commission of enumerated crimes, when committed by any of the individuals specified in that Order. It was provided, however, "... that no military commission shall try any case clearly cognizable by any court-martial. . . ."\textsuperscript{21} This new military tribunal was thus recognized as supplementary to the Articles of War which limited the jurisdiction of the court-martial to members of the armed forces, and then only for specific offenses. The military commission has been distinguished from the court-martial in that the former, without defined powers, and not bound by rules of procedure as are courts-martial, is able to proceed more expeditiously.\textsuperscript{22}

Reference to section two of General Scott's Order will disclose that the list of crimes for which punishment was provided by military commissions did not include crimes against the law of war. For the trial of such cases, there were provided "Councils of War" which differed from military commissions only in the type of cases heard. Colonel Winthrop\textsuperscript{23} described the jurisdiction of the Councils of War: "The principal charges referred to and passed upon by these Courts were Guerilla warfare or Violation of the Laws of War by Guerillas, and Enticing or Attempting to entice soldiers to desert the United States service."\textsuperscript{24}

It would be well at this point to note what is meant by "Law of War." It has recently been defined, "The law of war is not to be found in any statute or series of statutes. It was referred to, not inaccurately in \textit{Ex parte Vallandigham}, as the 'common law of war' and, like the common law, does not consist of formal written code but

\textsuperscript{20} \textit{Ex parte Vallandigham}, 4 Wall. 243, 249, 17 L. Ed. 589, 592 (1863). For a collection of other cases tried before special military tribunals, see \textsc{Winthrop}, op. cit. supra note 5, at 832; \textsc{Birkholzer}, op. cit. supra note 18, at 351.

\textsuperscript{21} General Order No. 20, § 11.

\textsuperscript{22} Munson, \textit{The Arguments in the Saboteur Trial} (1942) 91 U. of Pa. L. Rev. 239, 241.

\textsuperscript{23} Op. cit. supra note 5, at 832-833.

\textsuperscript{24} Dr. Francis Lieber wrote an interesting pamphlet on the law of guerilla warfare: \textit{Guerilla Parties Considered With Reference to the Laws and Usages of War} (1862).
rules derived from international law, acts and orders of the military power, the pronouncements of recognized authorities, such as Grotius, Vattel and Lieber, and international agreements embodied in such form as the Hague Conventions and the like." 25 In Ex parte Quirin, 23 Chief Justice Stone wrote: "From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals." 27

It was the combined jurisdiction of the Military Commission and the Councils of War of General Scott, that gave us the military commission as it was known and used in the Civil War, and as it is known and used today. The limitations in the use of such commissions, constitutionally inherent in them, will be dealt with hereinafter. Suffice it to mention at this point the objection of one author that the term "military commission" is incorrectly used if it is intended to refer to any military tribunal that takes jurisdiction in any situation other than "where martial law (not military government) 28 is exerted domestically, supplanting law." 29 It is argued that it should not be used to describe the military tribunal where military government is established, for, under such circumstances, the military tribunals are the military government. 30 If Mr. Miller's point is sound, it does not appear how the jurisdiction of the military commission, as he defines it, is to be justified where it tries offenses which are contrary to the law of war, since such may not have been committed in territory which is under martial law, as for example, the recent case of Ex parte Quirin. 31

27. For further development of the subject "Law of War", see Lawrence, The Principles of International Law (7th ed. revised, Winfield, 1923); Barclay, Law and Usage of War (1914); Oppenheim, International Law (5th ed., Lauterpacht, 1935) §§ 150-161. Various violations of the laws of war have been codified in the Rules of Land Warfare, FM 27-10 (War Dept. 1940) rules 1-5; 247-251. These rules are substantially the same as the rules agreed upon for international guidance by the signatory nations to the Hague Convention in Chapters I and II of the Annex to the Convention IV of 1907, approved by the United States Senate, 36 Stat. 2295.
28. The classic definitions of martial law and military government are contained in the minority opinion written by Chief Justice Chase in Ex parte Milligan, 4 Wall. 2, 112, 18 L. Ed. 281, 302 (1866): "Martial law proper . . . 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 laws no longer adequately secure public safety and private rights." Military Government supersedes, " . . . as far as may be deemed expedient, the local law, and [is] exercised by the military commander under direction of the President, with the express or implied sanction of Congress; . . ."
29. Miller, Relation of Military to Civil and Administrative Tribunals in Time of War (1941) 7 Otto St. L. J. 188, No. 10 at 103.
30. Id. at 108; cf. Ex parte Ortiz, 100 Fed. 955 (C. C. D. Minn. 1900); King, The Legality of Martial Law in Hawaii (1942) 30 Calif. L. Rev. 599, 613.
The Military Commission was widely used during the period of the Civil War and as early as 1861, legislation having authorized such commissions. While more than two thousand cases were tried before military commissions during that period and the years of reconstruction thereafter, the two trials that stand out in importance and interest are United States v. Herold et al, tried in 1865, arising out of the assassination of President Lincoln, and Ex parte Milligan.

Generally, in the period of the Civil War, the military commission was employed for the trial of two types of cases, whether the defendants were civilians or individuals subject to military law: (1) Violations of the Law of War; (2) Non-military crimes in areas where the military had taken control and the functions of the ordinary courts had been suspended and superseded by the military.

From this period in the history of the military commission to July 2, 1942, when President Franklin D. Roosevelt promulgated his proclamation, little is heard of this form of military tribunal. The only instances in which they were used followed the Spanish-American War, on foreign soil. These were judicially upheld in their jurisdiction over civilians up to the time that the peace treaty entered into between the United States and Spain was ratified by the United States Senate.

At the conclusion of World War I, the military commissions were used in occupied Germany for trials of local persons under Military Government, and for offenses violating the Law of War.

In the Articles of War of 1916 additional jurisdiction was given military commissions. Article of War 80 provided for jurisdiction in military commissions over offenses by military personnel arising out of captured or abandoned property. Article of War 81 conferred on military commissions authority to try persons who deal with or aid the enemy. Both of these Articles as well as Article 82 wherein jurisdiction was given to try persons "found lurking or acting

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32. 12 STAT. 598 (1862) § 5; 12 STAT. 736 (1862) § 30.
33. WINTHROP, op. cit. supra note 5, at 834.
34. 4 Wall. 2, 18 L. Ed. 282 (1866).
35. Underhill, Jurisdiction of Military Tribunals in the United States over Civilians (1924) 12 CALIF. L. REV. 159, 163, 12 STAT. 736 § 30 (1863); later repealed by Revised Statutes of United States of June 22, 1874, insofar as it applied to military commissions. 12 STAT. 736 § 38 (1863); continued in present Articles of War (No. 82), 41 STAT. 804 (1920), 10 U. S. C. A. § 1554 (1934). 13 STAT. 397 § 6 (1864); not reenacted in Revised Statutes of 1874. 14 STAT. 428 (1866); not reenacted in Revised Statutes of 1874.
36. 7 FED. REG. 5101 (July 7, 1942).
37. Ex parte Ortiz, 100 Fed. 955 (C. C. D. Minn. 1900).
38. Cf. view of Mr. Miller referred to, note 29, supra. There appears to be one case of a spy tried by a military commission during World War I, that of Lathar Witcke, alias Pablo Waberski, discussed in the second installment of this article, to be published in the next issue of the REVIEW.
39. 39 STAT. 663 (1916).
as a spy, in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere . . . ;" are continued in the Articles of War now in effect. 40

Before passing to questions of constitutionality, jurisdiction and other problems attendant upon the use of military commissions, it should be observed that the propriety of the use of such military courts under proper circumstances, has been beyond question for many decades, and recognized by the three branches of our government, 41 including Attorneys-General of the United States. 42

In the most recent case dealing with military commissions, Ex parte Quirin, the Supreme Court of the United States apparently did not regard it necessary to question the validity of a trial by a military commission, for the opinion does not suggest a doubt; rather it discusses the legality of the particular trial by military commission that was the subject of litigation. Moreover, the petitioners in the proceeding did not raise the question, and the respondent, the United States of America, dismissed it with the statement: "Trial by military commission is firmly established as proper under the law and usage of war." 43

II. THE OUTSTANDING TRIALS BEFORE MILITARY COMMISSIONS SINCE THE ADOPTION OF THE CONSTITUTION.

In the first of the two important Civil War cases, United States v. Herold, 44 seven men and one woman were tried by a military commission for the assassination of President Lincoln. The trial was based on the charge of "maliciously, unlawfully, and traitorously, and in aid

41. Legislative: 12 Stat. 736 § 30 (1863), and continuing down to 1920 when the latest Articles of War became law, with the intervening legislation referred to, note 35, supra. Executive: Proclamation of President Johnson, dated May 1, 1865, for the trial of the Assassins of President Lincoln by military commission; set forth in DeWitt, THE JUDICIAL MURDER OF MARY E. Surratt (1895). See also, Proclamation of President Roosevelt, dated July 2, 1942, 7 Fed. Reg. 5101 (July 7, 1942) and his Order of the same date, 7 Fed. Reg. 5103 (July 7, 1942). Judicial: Federal—Ex parte Vallandigham, 1 Wall. 243, 17 L. Ed. 589 (1864); In re Murphy, 17 Fed. Cas. 1030, Fed. Cas. No. 9,947 (C. C. D. Mo. 1867); In re Egan, 5 Blatchford 319, Fed. Cas. No. 4,303 (C. C. D. N. Y. 1863); State—In re Martin, 45 Barb. 142 (N. Y. 1865); State v. Stillman, 7 Cold. 341, 348 (Tenn. 1870); "Long and uninterrupted usage has made these (military commissions) part and parcel of common military law." State ex rel. Mays v. Brown, 71 W. Va. 519, 77 S. E. 243 (1912); contra: Ex parte McDonald, 49 Mont. 434, 143 Pac. 947 (1914); Ex parte Moore, 64 N. C. 802 (1870).
42. 5 Ops. Atty. Gen. 55; 11 id. at 297; 13 id. at 59; 14 id. at 249; 31 id. at 356.
43. Respondent's Brief, p. 33.
44. An extract of the proceedings is set forth in op. cit. supra note 16, at III. There is no report of the case, but for a transcript of the proceedings compiled by the Recorder to the Commission, see FITZMA, THE ASSASSINATION OF PRESIDENT LINCOLN AND THE TRIAL OF THE CONSPIRATORS (1865).
of the existing armed rebellion against the United States of America, on or before the 6th day of March, A. D. 1865, . . . combining, confederating, and conspiring together . . . to kill and murder, within the Military Department of Washington, and within the fortified and intrenched lines thereof, Abraham Lincoln, late . . . President of the United States of America, and Commander-in-Chief of the Army and Navy thereof; . . . [names other high officials against whose lives attempts at assassination were made] and in pursuance of and in prosecuting said malicious, unlawful, and traitorous conspiracy aforesaid, and in aid of said rebellion, afterward, to wit, on the 14th day of April, A. D. 1865, within the Military Department of Washington aforesaid, and within the fortified and intrenched lines of said Military Department . . . maliciously, unlawfully and traitorously murdered the said Abraham Lincoln, who at that time was the President of the United States of America and Commander-in-Chief of the Army and Navy of the United States as aforesaid; . . . .”

The defendants contested the jurisdiction of the military commission but were overruled.

The determination to try these alleged assassinators by military commission was the result of an opinion by the Attorney General, James Speed, who held “. . . that if the persons who are charged with the assassination of the President committed the deed as public enemies, as I believe they did, . . . they not only can, but ought to be tried before a military tribunal.”

The opinion recites that “At the time of the assassination a civil war was flagrant, the city of Washington was defended by fortifications regularly and constantly manned, the principal police of the city was by federal soldiers, the public offices and property in the city were all guarded by soldiers, and the President's house and person were, or should have been under the guard of soldiers. Martial law had been declared in the District of Columbia, but the civil courts were open and held their regular sessions, and transacted business as in times of peace.”

The opinion continued that military tribunals exist under the Constitution, that Congress should prescribe how they should be constituted and if Congress fails to do so, they should be constituted “according to the laws and usages

45. Taken from Pitman, op. cit. supra note 44, at 18-19.
46. A bitter denunciation of the entire proceedings was written by DeWitt, The Judicial Murder of Mary E. Surratt (1895).
48. Id. at 297 (italics supplied). In a Note (1943) 56 Harv. L. Rev. 631, 634, footnotes 5 and 20, it is suggested, that in the Attorney General's opinion, "martial law" was confused with "martial rule", the latter being "a local, intrastate and peacetime measure, when soldiers, as a special type of police, aid the civil authorities in applying ordinary law to civilians. . . ." This distinction is not drawn by other authorities or in judicial opinions. The two terms seem to be used interchangeably.
of civilized warfare. They may take cognizance of such offenses as the laws of war permit; they must proceed according to the customary usages of such tribunals in time of war, and inflict such punishments as are sanctioned by the practice of civilized nations in time of war." He admits that under the Congressional authority granted in the clause of the Constitution "to make rules for the Government and Regulation of the land and naval Forces," the Congress cannot "in time of war or peace . . . create military tribunals for the adjudication of offenses committed by persons not engaged in, or belonging to, such forces. This is a proposition too plain for argument." But these defendants, the opinion continues, are "secret participants in hostilities, such as banditti, guerillas, spies, etc." and as such are subject to punishment under the laws of war, the latter being a concomitant of war. But it is difficult to agree that after actual hostilities had ceased, the assassination of the President could constitute an offense against the law of war.

The defendants were tried, found guilty and ultimately four were hanged, including the one female defendant, Mary E. Surratt. Of the remaining four, one was sentenced to six years imprisonment, and the remaining three to life imprisonment at hard labor. One of the defendants who received a life imprisonment, Dr. Samuel A. Mudd, challenged, in a federal court, the jurisdiction of the military commission on the ground that no offense with which he was charged was the proper basis of a trial by military commission. The court sustained the jurisdiction, holding that the military commission could try the defendant for "the crime of murdering the President of the United States in time of civil war . . . ." 50

While the trial of the assassinators was in progress, there was pending in the United States Supreme Court a petition for a writ of habeas corpus to determine the constitutionality of the trial of one Lambdin P. Milligan by a military commission. The decision in that case, rendered after the defendants in the Herold case had been executed, made it apparent that the military commission in the case of the assassinators was lacking in jurisdiction, and that the executions were virtually murder.51 *Ex parte Milligan* was the first opportunity that was afforded the Supreme Court of the United States to pass on the question of the extent to which military commissions may be used under our Constitution.

51. 2 Warren, History of the United States Supreme Court (1937) 418-454, wherein the cited case is discussed in its political and social backgrounds.
Lambdin P. Milligan, a civilian resident of Indiana, was arrested by order of the Commander of the Military District of Indiana. He was tried by a military commission in October, 1864, found guilty and ordered to be hanged on May 19, 1865.52

The facts reveal that the defendant, a citizen of the United States and a resident of Indiana for twenty years, had never been in the armed services of the United States. He was arrested in the State of Indiana charged with: (1) "Conspiracy against the Government of the United States"; (2) "Affording aid and comfort to rebels against the authority of the United States"; (3) "Inciting insurrection"; (4) "Disloyal practice"; (5) "Violations of the laws of war." 53

In his petition for a writ of habeas corpus, Milligan contended that the military commission had no authority to try him upon the charges mentioned because he was a citizen of the United States and of the State of Indiana; he had not been, since the commencement of the Rebellion, a resident of any State that had rebelled against the United States. The petition was filed under the provision of the Congressional enactment of March 3, 1863,54 which authorized the President to suspend the privilege of the writ of habeas corpus whenever, in his judgment, it was necessary for the public safety.55 The statute further provided that lists of persons in custody, other than prisoners of war, were to be furnished to the judges of the federal courts in the jurisdictions in which such persons were resident. Then, if the grand jury of the district did not indict one of such persons, he was entitled to be discharged, "... and it was the duty of the judge of the court to order him brought before him to be discharged. ... "56 If no list was furnished within twenty days after the termination of the session of the grand jury, any person in custody who was not indicted was entitled to his discharge; and a petition therefor could be filed by a credible person to obtain a judge's order for the purpose.

The court unanimously held that since no indictment had been returned against Milligan, his petition for discharge was proper and hence Milligan was entitled to his freedom, for in the statute, Con-

52. An action was subsequently instituted by Milligan against General Hovey, who had ordered that Milligan be taken into custody, for wrongful arrest and imprisonment. A verdict for nominal damages in favor of Milligan was returned by the jury. Milligan v. Hovey, 3 Biss. 13, Fed. Cas. No. 9,605 (C. C. D. Indiana, 1871).
53. Ex parte Milligan, 4 Wall. 2, 6, 18 L. Ed. 281 (1866).
54. 12 STAT. 755 (1863).
55. President Lincoln invoked the authority granted under the aforesaid statute by suspending the writ of habeas corpus in his Proclamation of Sept. 15, 1863. 13 STAT. 734 (1863).
56. Ex parte Milligan, 4 Wall. 2, 116, 18 L. Ed. 281, 204 (1866). POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES (10th ed. by Bennett, 1888) 593.
gress provided the circumstance under which the person detained could secure his release. But the majority opinion of the court continued: "The controlling question in the case is this: Upon the facts stated in Milligan's petition, and the exhibits filed, had the military commission mentioned in it jurisdiction, legally, to try and sentence him?" 57

In behalf of the government, it was sought to sustain the jurisdiction of the commission under the "laws and usages of war." But the court would have none of it. "It can serve no useful purpose," they wrote, "to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise." 58

The Government next sought to justify the use of the military commission as an instrument for enforcing martial law. The Court rejected this contention too. The majority held, in words that have become axiomatic, that "Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration." 59 Recognizing that martial law under certain circumstances is proper, the opinion continued: "It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. 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 law 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

57. Id. at 118, 295.
58. Id. at 121-122, 296.
59. Id. at 127, 297.
in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.”

But while the minority of four of the judges agreed with the majority of five in the final result insofar as it dealt with the interpretation of the statute already referred to, and the fact that the President had not the authority to order trials by military commissions, they would have stopped in the decision at that point. However, being in disagreement on the rule expounded by the majority that Congress too, was lacking such authority, they continued their opinion to discuss the power of the legislature, concluding that the Congress had the constitutional authority to order trials by military commissions, but that by the strongest implication in the statute involved in the case then before the Court, it had prohibited such trials.

The minority, however, asserted the proper restriction on Congress in its power to order the use of military tribunals: “We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists. Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or security of the army or against the public safety.”

In discussing the Milligan case during the argument in Ex parte Quirin, the Attorney General also took the position that the dispositive question was the interpretation and application of the Act of March 3, 1863. The rest was gratuitous and therefore dictum. But whether it is dictum technically, there can be no gainsaying the fact that the Milligan case has been regarded as a beacon light in constitutional law.

60. Ibid.
61. Id. at 140, 302.
62. Ibid. Pomeroy, op. cit. supra note 56, at 593-598, expressed disagreement with both the majority and minority opinions. He denies that Congress has the power to provide for martial law, military arrests, and military trials of civilians; he criticizes the majority opinion on the ground that it confuses martial law and military government, and overlooks the fact that martial law is not in any true sense a judicial proceeding, but rather is a method of waging war. The extent of the President's authority under his constitutional obligation to wage war, is said to be dependent upon the individual circumstances of each case, and not upon any general rule or principle.
63. Respondent's Brief, at 42.
64. GLENN, THE ARMY AND THE LAW (1918) 181; WtENER, A PRACTICAL MANUAL OF MARTIAL LAW (1940) 106; Birkhimer, op. cit. supra note 18, at 421; PomEROY, op. cit. supra note 56, at 593, refers to the application of the statute as "one branch of the great case Ex parte Milligan”. Cf. minority opinion of U. S. Circuit Court Judge Haney in Ex parte Zimmerman, 132 F. (2d) 442 (C. C. A. 9th, 1942), at 450, wherein he states that the argument that what was said in the Milligan case was dicta, is wholly unsound.
not on the interpretation of the statute referred to, which has long been
off the statute books, but rather on the use of martial law and its
attendant processes and tribunals. Up until the time of the Quirin case,
it was the only decision of the United States Supreme Court squarely
dealing with the jurisdiction of military commissions over non-military
defendants.

The Milligan case immediately created a furore through the coun-
try. It was the subject of vitriolic criticism in the leading newspapers
and periodicals, one of such newspapers stating "... that treason,
vanquished upon the battlefield and hunted from every other retreat,
has at last found a secure shelter in the bosom of the Supreme Court." 68
With almost complete unanimity, the outstanding writers have criti-
cized the case insofar as it interprets the constitution with reference
to the test for the use of martial law and military commissions.

The unlikelihood of the Milligan majority being upheld today is
suggested by a prominent contemporary law scholar: "When one con-
siders certain characteristics of modern war-mobility on land, surprise
from the air, sabotage, and the preparation of fifth columns—it must be
apparent that the dictum that 'martial rule cannot arise from a threat-
cened invasion' is not an adequate definition of the extent of the war
power of the United States. An army today has a dispersion in depth
quite unknown in our Civil War. If the problem were to arise
today it seems fair to assume that the Supreme Court would not hold
to the letter of Justice Davis' opinion." 68

65. Repealed by omission from the United States Statutes, Revision of 1874.
67. E. g., Willoughby, Principles of the Constitutional Law of the United States (1935) 672; Winthrop, op. cit. supra note 5, at 817-818 (Col. Winthrop's superior, Judge Advocate General Lieber, approved the majority opinion in the Milli-
same effect may be found in Glenn, op. cit. supra note 64, at 188; Wiener, op. cit. supra note 64, at 169-169; 2 Hare, American Constitutional Law (1889) 964-965: "Nothing short of necessity can justify a recourse to martial law; but such a neces-
sity may exist before the blow actually falls. An Army assembled in Canada might necessitate extraordinary measures of precaution on the northern frontier, although no hostile force had crossed the line." But see Cullen, The Decline of Personal Liberty in America (1914) 48 Amer. L. Rev. 345, 351. For a comparison between the rule of the Milligan case and the English rule that does not regard the closing of the courts as the test for the use of military tribunals, see Ex parte Marais (1902) A. C. 109, and the discussion of that case in Dodd, The Case of Marais (1902) 18 L. Q. Rev. 143, 146, 147; Richards, Martial Law (1902) 18 L. Q. Rev. 133; Pollack, What Is Martial Law? (1902) 18 L. Q. Rev. 153. Cf. U. S. ex rel. Wessels v. McDonald, 265 Fed. 754 (E. D. N. Y. 1920); certiorari denied on stipulation, 256 U. S. 705, 41 Sup. Ct. 535, 65 L. Ed. 1180 (1920).
68. Fairman, The Law of Martial Rule and the National Emergency (1942) 55 Harv. L. Rev. 1253, 1287; Fairman, Martial Rule and the Suppression of Insurrec-
tion (1929) 23 Ill. L. Rev. 766, 783.
But with all the clamor and criticism of the law of the *Milligan* case, it is still the law for those facts.\(^6\) It is, nevertheless, difficult to understand how with any degree of reason today, in the presence of swiftly moving forces, it could be controlling. Under the rule of the principal case, though an invasion threatens, the authorities that are charged with the constitutional responsibility of repelling invasion\(^7\) and of taking "care that the Laws be faithfully executed"\(^7\) must wait until the enemy is on our territory and our civil courts are completely closed before they can deal with the emergency effectively. The opposite but more reasonable view was expressed by Chief Justice Chase writing for the minority of the court in *Ex parte Milligan*: "We cannot doubt that, in such a time of public danger, Congress had power, under the Constitution, to provide for the organization of a military commission, and for trial by that commission of persons engaged in this conspiracy. The fact that the Federal courts were open was regarded by Congress as a sufficient reason for not exercising the power; but that fact could not deprive Congress of the right to exercise it. Those courts might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators."\(^7\)

It was said that "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."\(^7\) That was said in 1866, and while it is still good American law,\(^7\) it has been limited in subsequent decisions of the United States Supreme Court.

In 1909, in *Moyer v. Peabody* which dealt with the right of the head of a State to arrest and detain the leader of an insurrection, Mr. Justice Holmes wrote: "So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge. . . . It is not alleged that his judgment was not honest. . . . When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process."\(^7\)

\(^6\) *Ex parte Quirin*, 317 U. S. 1, 45, 63 Sup. Ct. 2, 19, 87 L. Ed. 1, 18 (1942).
\(^7\) U. S. Const. Art. I, § 8, cl. 15.
LIMITATIONS ON TRIALS BY MILITARY COMMISSIONS

In 1932, although the Court inquired into the “necessity” for the use of martial law by the Chief Executive of Texas, Chief Justice Hughes nevertheless wrote: “By virtue of his duty to ‘cause the laws to be faithfully executed’, the Executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen. His decision to that effect is conclusive.” (Citing Martin v. Mott, 12 Wheat. 19, Luther v. Borden, 7 How. 1, and Moyer v. Peabody, 212 U. S. 78). “The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for, without such liberty to make immediate decisions, the power itself would be useless. Such measures, conceived in good faith, in the face of emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace.”

True, both of these cases involved actions of Governors, but is it too much to assume that if such discretion is permitted the Governor of a State, at least the same discretion would be allowed the President of the United States? As a matter of fact, the Supreme Court has supported the honest exercise of executive discretion by the President in Martin v. Mott, where they reviewed the decision of a court-martial which had fined Mott for not entering the service of the United States as a militia-man, when required by the President pursuant to power granted him by Congress. The statute authorized the President to call into federal service the militia of the several states whenever the United States shall be invaded or be threatened with invasion. The court, through Mr. Justice Story, stated: “We are all of 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. We think that this con-

76. Sterling v. Constantin, 287 U. S. 378, 399-400, 53 Sup. Ct. 190, 196-197, 77 Law Ed. 375, 386-387 (1932). It is important to note that the Court expressed the fundamental question of the case before it, as “The Governor’s attempt to regulate by executive order the lawful use of complainant’s properties in the production of oil”. They were not dealing with the power of the Governor to proclaim martial law, nor the use of the military to meet an emergency; likewise they were not dealing with a situation wherein there was forcible resistance to authority for it was admitted that there had been no uprising in the State.

Issue has been taken with Justice Holmes’ statement in the Peabody case, “Public danger warrants the substitution of executive process for judicial process”. Wiener, op cit. supra note 90, at 110, points out that the pronouncement of Justice Holmes has been modified by Sterling v. Constantin. While the latter case establishes the right of the judiciary to review the necessity for the use of the military, it is to be noted that even with such review, the discretion of the executive is affirmed when exercised in the presence of insurrection or disorder.

77. Respondent’s Brief in Ex parte Quirin, at 52.

78. 12 Wheat. 19, 6 L. Ed. 537 (1827).

79. Act of Feb. 28, 1795, Ch. 101.
struction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress." 80

It is impossible, of course, to reconcile the views expressed above with the language of the Milligan case, repudiating the doctrine propounded by the Government, that when war exists, the commander, with the approval of the Executive and on the basis of necessity, can substitute military force for civil law. 81 "Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish." 82 Moreover, it was pointed out that there was no necessity for martial law since Indiana was not invaded and no hostile soldiers were on her soil.

It is probably safe to state that based on the language in Moyer v. Peabody and Sterling v. Constantin, a Supreme Court of today, if required to pass on a situation identical with that of Ex parte Milligan, would unhesitatingly refuse to adopt as law the obiter in the latter case. It is inconceivable that a court in 1943 would demand an actual invasion and completely closed courts before it would recognize the right to deal with an emergency, involving the safety and perhaps more accurately, the very life of the nation. Despite the fact that the Court in the Sterling case refused to approve the action of the Chief Executive and declared it beyond his constitutional powers, the decision must be distinguished on the facts from the Peabody case and from the other language in the opinion of Chief Justice Hughes. The latter expressed the conclusiveness of the determination by the Chief Executive of the necessity for using military authority in suppressing violence. In behalf of the Governor of Texas, it was admitted that there was no uprising. 83 Thus, it was held that merely because the Executive has the discretion to use military powers as "a necessary incident of his power to suppress disorder" it does not follow "that every sort of

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80. 12 Wheat. 19, 30, 6 L. Ed. 537, 540 (1827).
81. Fairman, Martial Law and Petroleum (1933) 19 Corn. L. Q. 20, 26, compares the ruling of the Supreme Court in The Prize Cases, 2 Black 635, 17 L. Ed. 459 (1862), with the Milligan case. In the former, it was decided that the President could meet force with force, to the point of establishing a blockade of American ports without authorization of Congress; in the Milligan case, the President was denied the right to invoke martial law and military processes, when, in his judgment, circumstances required such action. While the facts in the two cases were different, there is a seeming inconsistency in doctrines, with the law in the Milligan case being further weakened by the language of the Court, in Moyer v. Peabody and Sterling v. Constantin. In re Kalanianole, 10 Hawaii 29, 49-50 (1895), in quoting the Milligan opinion that "martial law cannot arise from a threatened invasion", the Court observed: "It is, however, opposed to the reasoning of the Court in Martin v. Mott, 12 Wheat. 19, and has been practically ignored in subsequent decisions of the same Court and is criticized as erroneous by those who uphold the greater portion of the much disputed opinion of the Court in Ex parte Milligan."
82. Ex parte Milligan, 4 Wall. 1, 124-125, 18 L. Ed. 281, 297 (1866).
action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat." 84

In the recent case of *Ex parte Zimmerman*, 85 the Court had before it an appeal from a refusal of District Court Judge Delbert E. Metzger, to issue a writ of habeas corpus. Dr. Hans Zimmerman was detained under direction of a Board of military officers, set up as a part of the military authority authorized by Governor Poindexter for the Territory of Hawaii. The petitioner challenged the necessity for such action by the Territorial Governor but the majority of the Court refused to review the Governor's determination. They held, "The petition did not assert that the actual cause of the detention was unrelated to such an inquiry, or that the inquiry was undertaken or the decision made in bad faith, or that the authority of the Board was used to bring about the detention of the petitioner as a means of furthering private interest or personal spite. Had a showing of such sinister nature been made it appears to us that the respondent ought to have been required to show cause for the detention in order that the Court might be in position to determine whether the action was purely arbitrary." 86 But a dissenting opinion was filed in which this question of the "necessity" for use of military power, was stated to be a question of fact, provable to a court which in turn could conclude from those facts, whether the necessity claimed actually existed. The petitioner indicated an intention to appeal the decision to the United States Supreme Court, but before same could be arranged, Dr. Zimmerman was released and the appeal discontinued.

The facts of the *Quirin* case may be briefly stated. The eight petitioners were of German birth, and all but Haupt were admittedly German citizens. The latter claimed that he had come to this country with his parents when he was five years old, and claimed derivative citizenship through his parents who were naturalized while he was a minor. After attending schools in Berlin, Germany, for instruction in the use of explosives and in methods of sabotage and secret writing, the petitioners came to this country by submarines, in two groups of four each. They carried with them explosives and other equipment for committing sabotage and had received instructions to destroy war industries and war facilities in the United States. One of the groups landed at night at Amagansett Beach on Long Island, N. Y., on or about June 13,

84. Id. 287 U. S. 378, 400, 53 Sup. Ct. 190, 196, 77 L. Ed. 375, 387 (1932).
86. Id. at 446.
1942; the other, during the night, at Ponte Vedra Beach, Florida, on or about June 17, 1942. Both of these areas were within the Eastern Defense Command of the United States Army at the time of such landings, the waters around Long Island being within the officially designated Eastern Sea Frontier, and the water around Ponte Vedra Beach, Florida, within the Gulf Sea Frontier as officially declared.

When landing, all wore the uniforms of soldiers of the German Army, which they promptly discarded and buried with other articles, clothing themselves in civilian dress. One of the groups was taken into custody by the Federal Bureau of Investigation in New York, and the other in Chicago. On July 2, 1942, President Roosevelt issued a Proclamation declaring that "subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States or any territory or possession thereof, through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals; . . . ." The Proclamation denied to such persons access to the courts of the United States except as the Attorney General with the approval of the Secretary of War, may prescribe. On the same date, the President, by Order, appointed a commission of seven high ranking army officers to try the eight men, designating the Attorney General and the Judge Advocate General as Prosecutors, and two Colonels of the United States Army as defense Counsel.

On July 3, 1942, the charges and specifications against the petitioners were lodged with the Commission. The charges were: (1) Violation of the Law of War; (2) Violation of Article of War 81; (3) Violation of Article of War 82; (4) Conspiracy to commit the offenses alleged in the three foregoing charges.

When all the evidence had been taken by the Commission, petitioners, through their Counsel, applied to the lower federal courts and finally to the United States Supreme Court for leave to file petitions for writs of habeas corpus. The applications were denied, the Supreme Court in a per curiam opinion holding: (1) that the charges preferred against the petitioners were properly triable by a military com-

89. 317 U. S. 1, 23, 63 Sup. Ct. 2, 8, 87 L. Ed. 1, 6 (1942).
90. Per curiam opinion delivered day following argument, reported in 317 U. S. 18, 63 Sup. Ct. 1 (1942). Full opinion of Court written by Chief Justice Stone, filed October 29, 1942, reported in 317 U. S. 1, 18, 63 Sup. Ct. 2, 6, 87 L. Ed. 1, 4 (1942).
mission; (2) that the commission was lawfully constituted; (3) that the petitioners were lawfully held and had shown no proper cause for the issuance of a writ of habeas corpus.

First, we should note that the Court based its decision on the single point that the petitioners, by crossing over our lines and remaining without their uniforms for the purpose of committing acts of destruction, are unlawful belligerents under the law of war, and as such are subjects to be dealt with under military jurisdiction. This was the allegation of the first specification of the first charge filed by the Government. The jurisdiction of the military commission to try the eight petitioners having been thus established, the Court did not consider the other specification of the first charge which alleged a violation of the law of war in that the petitioners "... appeared within zones of military operation or elsewhere behind one or more of the military or naval lines or defenses of the United States..." without being in their uniforms of the German Army, for the purpose of committing sabotage." Similarly they regarded decisions on the second, third and fourth charges as unnecessary.

The application of the petitioners challenged the proceedings before the military commission on a number of grounds. First, that a military commission had no jurisdiction over the offenses charged; second, it had no jurisdiction over the persons of the petitioners; third, the Proclamation of the President was invalid; fourth, the provisions of the Presidential Order conflicted with Congressional enactments; fifth, the rule-making power for the procedure of the Commission was improperly delegated to the Commission. It was further argued that the petitioners had the right to institute the actions before the Supreme Court despite the provision of the President's Proclamation: "... that such persons shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States, or of its States, ..."

The right of petitioners to institute the proceedings was upheld and declared not to be in conflict with the provision in the President's Proclamation. There was nothing in such language, said the Court,
that foreclosed the petitioners from obtaining a judicial determination of the applicability of the Proclamation to them, or of the constitutionality of their trial by a military commission. With that, the Court passed to a consideration of the main issue of the Constitutional authority of the Commission.

In the Constitution of the United States, the Congress is authorized “To define and punish Piracies and Felonies committed on the high seas, and Offenses against the Law of Nations.” The law of war is, and has been, recognized by the Supreme Court as included in the law of nations dealing with the conduct of war, and the rights of nations and their respective citizens. The law of war distinguishes between enemy belligerents and non-belligerents, lawful and unlawful belligerents, and the punishment for each group differs. This has been recognized as part of the law of war by international agreement to which the United States is a signatory nation. Whereas, under such rules, an enemy who is a lawful belligerent and who is captured is entitled to detention under regulated arrangements, an unlawful belligerent upon capture is subject not only to detention, but also trial by a military tribunal for the acts that render his belligerency unlawful. The Court adopts the rule that “The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or any enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.”

They base this on “Instructions for the Government of Armies of the United States in the Field, approved by the President, General Order No. 100, April 24, 1863, section IV and V.” These provisions have been continued in the Rules of Land Warfare.

100. The Prize Cases, 2 Black 635, 667, 687, 77 L. Ed. 459, 476, 483 (1862), and other cases collected in opinion Ex parte Quirin, 317 U. S. 1, in footnote 5 at 28, 63 Sup. Ct. 2, in footnote 5 at 10, 87 L. Ed. 1, in footnote 5 at 8 (1942).
102. Ex parte Quirin, 317 U. S. 1, 31, 63 Sup. Ct. 2, 12, 87 L. Ed. 1, 10 (1942).
103. Paragraphs 83 and 84, quoted in opinion of the Court, id. at 32-33, 63 Sup. Ct. at 13-14, 87 L. Ed. at 11-12.
104. Paragraph 88: “A spy is a person who secretly, in disguise or under false pretence, seeks information with the intention of communicating it to the enemy. The spy is punishable with death by hanging by the neck, whether or not he succeeds in obtaining the information or in conveying to the enemy.”
Thus, unlawful belligerents are recognized as offenders against the law of war, and under the Articles of War (Article 15), Congress has reserved to military commissions jurisdiction over offenses that by the law of war may be tried by such commissions. Furthermore, over a long period of time the military authorities in this country, as well as authorities on international law, have regarded an unlawful belligerent as one who discards his uniform and enters this country from enemy territory for the purpose of committing acts of destruction.\footnote{106}

Nor does the status of such persons change by virtue of the fact that they may be citizens, for citizens who associate themselves with the enemy become enemy belligerents under the Hague Convention and the law of war.\footnote{107}

Earlier in the opinion, the authority of the President was upheld under the Acts of Congress and under the Constitution;\footnote{108} also, it was stated that since offenses against the law of war were not triable at common law by jury, there is no violation of the Constitution in denying such jury trials to the petitioners. The remaining part of the opinion deals with the \textit{Milligan} case,\footnote{109} and the procedure laid down by the President for the Commission.

The petitioners argued that the rulings of the majority in the \textit{Milligan} case supported their contention of a lack of jurisdiction in the military commission. Chief Justice Stone, writing for a unanimous court, distinguished the two cases on the facts and upheld the trial of Quirin and his seven associates, under the law of war, saying "We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as—in circumstances found not there to be present and not involved here—martial law might be constitutionally established. The Court's opinion is inapplicable to the case presented by the present record." \footnote{110} It may be further noted, in distinguishing the \textit{Milligan} case on the facts, that the latter was neither an alien nor connected with the enemy; he had not crossed the Union lines with an intent to cause destruction of war facilities, and under the

\footnote{106. \textit{Ex parte} Quirin, note 1 supra, at footnote 12. See also, Hague Convention, \textit{op. cit.} supra note 101, § I, chs. I and II; Flory, \textit{American Council on Public Affairs} (1942); Vattel, \textit{The Law of Nations} (Chitty ed. 1834) 375; Wilson, \textit{Handbook of International Law} (3d ed. 1939) 292.}

\footnote{107. The Wm. Bagaley v. United States, 5 Wall. 377, 405, 18 L. Ed. 583, 588-9 (1867).}

\footnote{108. § III of this article, p. 142 et seq., infra.}

\footnote{109. 317 U. S. 1, 45-48, 63 Sup. Ct. 2, 19-20, 87 L. Ed. 1, 18-19 (1942).}

\footnote{110. Id. at 45, 63 Sup. Ct. at 19, 87 L. Ed. at 18.
conditions of warfare in 1863, he could not have been within a theatre of operations.

As to the procedure, petitioners contended that if they were to be tried by military commission, they were entitled to the protection of the procedure set forth by Congress in the Articles of War; the President's Order prescribing the procedure for their trial was contrary to the Articles of War, and hence unlawful. The Court ruled against the petitioners on this too, stating that while they had no occasion to inquire whether the Congress could restrict the President in dealing with enemy belligerents they were unanimously of the opinion that the Articles of War provided no basis for the issuance of the writ. It was mentioned, however, that a majority of the court could not agree upon the proper reason for such ruling. Some of the Justices felt that the Articles of War were not intended to apply to Presidential military commissions convened to try enemy belligerents; the remaining Justices were of the opinion that even though the trial was subject to the provisions of the Articles of War which relate to military commissions, the procedure described by the President and employed by the Commission was not prohibited or foreclosed by those Articles, in a trial of offenses against the law of war and the 81st and 82d Articles of War.

Briefly stating the holding of Ex parte Quirin, we would say that the case stands for the proposition that where a member of the enemy's armed forces secretly lands on our shores, crosses our lines, and discards his identification, in order to conceal his military status for the purpose of committing acts of destruction against our war efforts and facilities, he has committed an offense against the law of war for which

111. Petitioners' Brief, at 40 et seq.

112. This was suggested by Attorney General Biddle when he stated during oral argument before the Supreme Court: "I am not at all sure that the government in that case (i.e., the Milligan case) could not have argued with some force that in time of war an act which prevented the President of the United States and the Commander-in-Chief as a soldier and as a Commander from dealing with spies in his own way would have been unconstitutional." (Quoted in Munson, The Arguments in the Saboteur Trial (1942) 91 U. of Pa. L. Rev. 239.)

113. Ex parte Quirin, 317 U. S. 1, 47-48, 63 Sup. Ct. 2, 20, 87 L. Ed. 1, 19 (1942). One of the reviews of the Quirin case (Note in 29 Va. L. Rev. 317, 336, supra note 15, at 336) raises the question of the jurisdiction of the military commission on that case, because the offenses charged were not committed in territory wherein either martial law or military government were in effect, nor within a theatre or zone of military operations. While it may be said that under the Milligan case, the offenses charged in the Quirin case, were not committed in a theatre of operations, it is uncertain whether that would be so at the present time. While the Supreme Court in the principal case notes the fact that the places where the petitioners landed were within the military and naval lines as officially declared, they make no reference to whether such areas are within the zone or theatre of operations. (See colloquy between Justice Frankfurter and Col. Royall of Defense Counsel, quoted in Bernstein, The Saboteur Trial—A Case History (1943) 11 Geo. Wash. L. Rev. 131, 175.)
he may be constitutionally tried and punished by a military commission convened by the President of the United States.

But the opinion has left much unsaid; in some instances expressly withholding discussion as unnecessary to the decision; in other instances making no reference at all. Expressly reserved are the questions of the constitutional authority of the President as Commander-in-Chief to convene military commissions without the sanction of Congressional enactment; the extent of the jurisdiction of the military commission to try offenders against the law of war; the enumeration of offenses that constitute violations of the law of war; the constitutionality of Articles of War when applied to persons who are not members of our armed forces and therefore not subject to military law in accordance with the Articles of War; the limitation of Articles 81 and 82 to the offenses specified therein, only within the theatre of active military operations; the constitutional necessity of the President affording enemy belligerents any trial before subjecting them to disciplinary action; and the constitutional power of Congress to limit the authority of the President as Commander-in-Chief in dealing with enemy belligerents.

Professor Cushman directs attention in his review of the Quirin opinion, as to what the Supreme Court would do with the question of jurisdiction of the military commission if there were a dispute as to the jurisdictional facts; i.e. "defendants charged with acts of sabotage or other hostile acts, and the holding of these persons for trial by military commission in the face of their denial of misconduct and of confusing evidence as to what actually occurred." Reference is made to that part of the opinion which states, "... and the admitted facts affirmatively show that the charge is not merely colorable or without foundation." We submit that the only question with which the Court would be concerned is the jurisdiction of the military commission to try the petitioners on the charges and specifications presented. Its consideration must be directed to those questions in the presence of the factual allegations of the specifications based upon the charges. The Court stated: "We are not here concerned with any question of the

115. Id. at 45-46, 63 Sup. Ct. at 19-20, 87 L. Ed. at 17-18.
116. Id. at 46, 63 Sup. Ct. at 20, 87 L. Ed. at 18.
117. Ibid. See also second instalment of this article, to be published in the next issue of the Review.
118. Ibid.
119. Ibid.
120. Cushman, Ex parte Quirin et al.—The Nazi Saboteur Case (1942) 28 CORN. L. Q. 54, 64.
121. Ex parte Quirin, 317 U. S. 1, 36, 63 Sup. Ct. 2, 15, 87 L. Ed. 1, 13 (1942).
guilt or innocence of petitioners.” Thus, it is believed that in the event the facts were not admitted, the Supreme Court would not make inquiry but would have to determine the jurisdiction on the charges and specifications. The truth or falsehood of the facts charged would be a matter of weight of evidence to be determined by the military commission, as disputed facts are determined in any judicial proceedings by the Court in the absence of a jury.

The Quirin case, apparently, does change our law, expanding the jurisdiction of the military commission to a point that would seem to permit the use of the military commission in times of war against persons not members of our armed forces, be they citizens or non-citizens, for offenses against the law of war. The latter being undefined, there can be no certainty as to what offenses might be included. One writer suggests that at the present time an attack on the President by a citizen intended to assist the enemy would probably be held within the category of offenses against the law of war. But it should be noted that the Quirin case, decided on the particular facts before the Court, does not by its holding refer to all persons. It deals specifically with unlawful belligerents. Hence, whether a military commission could try, and punish, a civilian saboteur not connected with the enemy’s military forces, in the presence of all the other facts of the Quirin case, remains an open question.

III. PRESIDENTIAL AUTHORITY TO EMPLOY AND ORGANIZE MILITARY COMMISSIONS

The mere fact that our country is at war does not ipso facto give validity to trials before military commissions of persons who are not members of our armed forces. Our philosophy of government rejects a rigid interpretation of the doctrine, Inter arma leges silent, as law for the United States. The constitutional guarantees contained in the first ten amendments, the American Bill of Rights, do not provide that those guarantees shall obtain as long as the country is at peace. The Supreme Court of the United States has given expression to the protection of the constitution in times of war as well as in times of peace, “Thus, the war power of the federal government is not created...
by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties.”

If military commissions are to be used to try persons who are not members of the armed forces, the setting up of such commissions and the cases tried by them must be consistent with the law of the land. But situations have arisen, which we have seen the courts recognize as emergencies, and in which they refused to overrule the actions of the Executive or military authorities, notwithstanding the fact that Justice Davis in the *Milligan* case refused approval of “the theory of necessity.”

The jurisdiction of a military commission in this country is based either upon the common law of war or upon statutory provision, but neither of these can give greater legality to such commission than the Constitution will permit. Hence to determine the authority for the appointment of the commission, as well as the jurisdiction thereof, we must view in the first instance, not the statutes of the United States, nor custom under the common law of war; rather, we must first answer the question, does the Constitution, which is an instrument of powers granted to the federal government by the people, permit the trial of persons not connected with the armed services by military commission? If it does, what is the extent of its jurisdiction?

The answer to the first of these questions has now been settled beyond any doubt by the highest judicial authority of our country in the *Quirin* case. In an opinion delivered the day following the conclusion of argument based on the contention “... that the President had no authority to issue such Proclamation in the absence of a statute

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129. *Ex parte Quirin*, 317 U. S. 1, 27, 63 Sup. Ct. 2, 10, 87 L. Ed. 1, 8 (1942); *Ex parte Milligan*, 4 Wall. 2, 121, 18 L. Ed. 281, 293-6 (1866); also minority opinion, id. at 141, 18 L. Ed. at 302; Willoughby, op. cit. supra note 67, at 643: “Not even the order of the President himself, the constitutional Commander-in-Chief of the Army and Navy, if that order be without authority of law, is sufficient to justify the performance of the act commanded.”
giving him this authority. We know of no inherent or Constitutional
right of the President to issue Proclamations in matters affecting such
substantial rights as this Proclamation purports to affect," 131 the
United States Supreme Court in its per curiam opinion decided, "That
the charges preferred against petitioners on which they are being tried
by military commission appointed by order of the President of July 2,
1942, allege an offense or offenses which the President is authorized
to order tried before a military commission." 132 Even the view of
the majority in the Milligan case, considered by many legal scholars
to be extreme, does not deny that under enumerated circumstances,
such trials are constitutional. 133

The authority of the President is derived from the Constitution
itself as well as from Acts of Congress. 134 Under Art. II, Sec. 3, of
the Constitution, the President is charged with the obligation to "take
Care that the Laws be faithfully executed." By Art. II, Sec. 2, clause
1, he is designated Commander-in-Chief of the Army and Navy and
as such is invested with authority independent of that conferred by
Congress. 135

Hence, as the Constitutional Commander-in-Chief of the Army
and Navy, responsible for the prosecution of a war, he must do all
things necessary for the protection of the country and the successful
completion of such war. 136 "If a war be made by invasion of a foreign
country, the President is not only authorized but bound to resist force
by force." 137 Offenses committed during such time of war that would
interfere with the prosecution of the war, the operations of the armed
forces and the general welfare of the country, especially insofar as its
safety is concerned, would thus be a matter of concern to the President
under his responsibility to "take Care that the Laws be faithfully ex-
ecuted" 138 and also as the head of the armed forces.

With such responsibility, and with the correlative power in the
President, the danger of oppression and dictatorship that may well
result from Presidential action under the guise of necessity during war
time, becomes apparent. And a very real danger it is! One need

131. Petitioners' Brief, at 37.
132. Ex parte Quirin, 317 U. S. 1, footnote at 18-19, 63 Sup. Ct. 1, 2 (1942).
133. Ex parte Milligan, 4 Wall. 2, 127, 18 L. Ed. 281, 297-298 (1866).
134. BIRKIMER, op. cit. supra note 18, at 357; WINTHROP, op. cit. supra note 5,
at 831.
135. Ex parte Quirin, 317 U. S. 1, 26, 63 Sup. Ct. 2, 10, 87 L. Ed. 1, 8 (1942).
136. POMEROY, op. cit. supra note 56, at 597.
137. The Prize Cases, 2 Black 635, 668, 17 L. Ed. 459, 476 (1862); Brown v.
United States, 8 Cr. 119, 153, 3 L. Ed. 504, 519 (1814); see also Franklin, War
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merely examine the record of the trial of the alleged assassins of President Lincoln to understand why it is said the danger is real.\textsuperscript{139}

But it is equally dangerous to permit review of the determination of the Commander-in-Chief, that the emergency requires prompt, forceful action. Under such law, the executive could be sued after he had acted, and thus the country may be exposed to situations which the President could not meet with assurance of immunity from personal liability if other persons who later sit in judgment of him, disagree with his decision.

We have already indicated that the Supreme Court has upheld the right of the Chief Executive to determine when circumstances of violence and disorder require use of emergency measures.\textsuperscript{140} So long as the discretionary powers vested in the President are exercised in good faith and for the purpose of preventing the continuance of insurrection, violence or disorder, such judgment of the Executive was held to be conclusive.\textsuperscript{141}

What, then, becomes of Justice Davis' statement that "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."\textsuperscript{142} The answer is readily obtained from the opinion. This case does not hold that the President cannot pursue his responsibility as Commander-in-Chief and in so doing, among other things, order offenses punished by military commission. Though, as we have seen, there is considerable criticism and disagreement with the view of the majority in the\textit{Mili-gan case} as to when the President may declare martial law and as a concomitant thereof employ military commissions for the trial of non-military persons, Justice Davis recognizes that there are occasions when martial law can be properly employed, as for example, and as held by the majority, when there is actual invasion and the courts are actually closed.\textsuperscript{143}

But the more liberal language in such cases as\textit{Martin v. Mott},\textit{Moyer v. Peabody}, and\textit{Sterling v. Constantin}, are justified on the basis of probabilities. One law review writer justifies it, "The execu-

\textsuperscript{139} DeWitt, \textit{op. cit. supra} note 46. Also, an example of abuse of such power of determining when necessity exists, may be seen in the factual situation in\textit{Sterling v. Constantin}, 287 U. S. 378, 53 Sup. Ct. 190, 77 L. Ed. 375 (1932), wherein the Governor of Texas invoked martial law to restrict the use of oil lands.

\textsuperscript{140} Pp. 135-136, supra.


\textsuperscript{142} \textit{Ex parte Milligan}, 4 Wall. 2, 120-121, 18 L. Ed. 281, 205 (1866).

\textsuperscript{143} Note 81, supra.
tive must be left unhampered in time of war to deal with problems summarily and to take protective measures without waiting for the machinery of the courts. . . . It may be urged that this view gives too great power to the executive, and that it is likely to be abused. The reply would be that it is equally improbable that the ordinary executive would disregard the powerful restraints of public opinion. To carry on a war effectively, the executive must have power; and reliance must be placed on the ability of the people to restrain him in the use of it. Under the Constitution of the United States, there is no method by which the guaranties of the Bill of Rights can be suspended. The legal justification of martial law must rest on the theory that the doctrine salus populi lex suprema is understood as an implied modification of the Bill of Rights.” 144 The Supreme Court has likewise given recognition and approval to what may be termed “the doctrine of probabilities.” In Luther v. Borden, Chief Justice Taney wrote for the Court: “It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual. When citizens of the same State are in arms against each other, and the constituted authorities unable to execute the laws, the interposition of the United States must be prompt, or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis. And the elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a willful abuse of power as human prudence and foresight could well provide. At all events, it is conferred upon him by the Constitution and laws of the United States, and must therefore be respected and enforced in its judicial tribunals.” 145

It is not to be assumed that when the President appoints a military commission, he need rely on the implied constitutional powers in taking “Care that the Laws be faithfully executed,” 146 or his authority as Commander-in-Chief of the Army and Navy. 147 There is, indeed,

144. Note (1902) 15 HARV. L. REV. 850, 851.
145. 7 How. 1, 44, 12 L. Ed. 581, 600 (1849). While the cited case dealt with presidential action as a result of rebellion in Rhode Island, what is stated in the opinion is equally applicable to presidential action when the country is involved in war with other nations. See also, letter of Thomas Jefferson to J. B. Colvin, dated Sept. 20, 1810, in 12 THE WRITINGS OF THOMAS JEFFERSON (Library Ed. 1904) 418; letter of Abraham Lincoln to Birchard and others, dated June 29, 1863, in 9 COMPLETE WORKS OF ABRAHAM LINCOLN (New and Enlarged Edition, 1905) 3.
146. Art. II, §3.
authority vested in him in most instances by Congressional acts. But as pointed out earlier in this discussion, the authority conferred on the President by Congress is valid only to the extent that the Constitution permits.148

Under the first Article, eighth section of the Constitution, Congress is given the power to "provide for the common Defense"; 149 "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations"; 150 "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"; 151 "To raise and support Armies . . ."; 152 "To provide and maintain a Navy"; 153 "To make Rules for the Government and Regulation of the land and naval Forces"; 154 "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." 158

Under these constitutional authorizations, Congress has acted. From early times in the history of our country, codes have been enacted for the law of the armed forces.156 As those codes have been developed, recognition was ultimately given in them, to what is known as the "law of nations." The United States Supreme Court has "From the very beginning of its history . . . recognized and applied the law of war as including that part of the law of nations which prescribes for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals." 157

The present code of military law, the Articles of War,158 embraces several provisions for trials by military commissions.159

The broadest of all of these articles is, of course, the fifteenth, whereunder any violations of the law of war as a part of the law of nations, can be dealt with summarily by a trial before a military com-

148. P. 143, supra.
149. Cl. 1.
150. Cl. 10.
151. Cl. 11.
152. Cl. 12.
153. Cl. 13.
155. Cl. 18.
156. P. 120, supra.
157. Ex parte Quirin, 317 U. S. 1, 27-28, and footnote 5, at p. 28, 63 Sup. Ct. 2, 10, and cases collected in footnote 5, at p. 10, 87 L. Ed. 1, 8, and footnote 5, at pp. 8-9 (1942).
158. 41 Stat. 787 (1920); 10 U. S. C. A. §§ 1471-1593a (1927 and 1942 Cum.).
The famous trials before military commissions in United States history were, for the most part, under the charge of a violation of the law of war, even before Congress enacted any provision similar to the present fifteenth Article of War. The first and only reported case dealing with this fifteenth Article is the recent Ex parte Quirin.

In connection with the petitioners' denial of the President's authority to set up the commission under the fifteenth Article of War, they contended that inasmuch as that Article does not define and codify the law of war, and there are no common law crimes of the United States, no offense is charged. This argument the Court dismissed: "It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns." After comparing the absence of codification of the law of war with the similar situation of recognizing the definition of piracy by reference to international law as was done in several cases by the Supreme Court, the opinion continues, "Similarly by the reference in the 15th Article of War to 'offenders or offenses that . . . by the law of war may be triable by such military commissions,' Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war (Compare Dynes v. Hoover, 20 How. 65, 82, [15 L. Ed. 838]) and which may constitutionally be included within that jurisdiction. Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course." It is not to be assumed that the President is the only one who can appoint such military commissions. In the notable cases that have become the subject of Supreme Court consideration, the commissions were appointed by the President, but it will be recalled that during and after the Civil War, a total of more than two thousand trials were conducted by such commissions. These were designated by military commanders subordinate to the President, whose authority was derived

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160. King, note 30 supra, at 613.
161. Notwithstanding the Espionage Act, 40 Stat. 217 (1917), 50 U. S. C. A. §§ 31-42 (1941), jurisdiction in military commissions and other military tribunals is expressly reserved by § 38 of that Act, for the trials of offences as provided in the Articles of War.
162. Petitioners' Brief, at 29.
163. 317 U. S. 1, 29, 63 Sup. Ct. 2, 11, 87 L. Ed. 1, 9 (1942).
164. Ibid.
from the President as the Supreme Commander, and from the law and usage of war.\textsuperscript{165}

In connection with the authority of the President (including that of his subordinate commanders) the question remains open as to the validity of a military commission set up by the President under his constitutional powers, in direct contravention to Congressional prohibition.\textsuperscript{166} There is no rule of law or decision of any court to point the solution. In the argument before the United States Supreme Court in the \textit{Quirin} case, Attorney General Biddle expressed the doubt that Congress could constitutionally legislate in derogation of the President's duty as a Commander-in-Chief in dealing with spies in his own way.\textsuperscript{167} This question is not too likely to arise, but if it does, it may be found that whether Attorney General Biddle is right in his observation, will depend upon the Court's further interpretation and application of the law of war.

\textit{(To be Concluded.)}


\textsuperscript{166} "We need not inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents." \textit{Ex parte Quirin}, 317 U. S. 1, 47, 63 Sup. Ct. 2, 20, 87 L. Ed. 1, 19 (1942).

\textsuperscript{167} Note 112, \textit{supra}. 