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THE PRESIDENT AND MILITARY POWER IN EMERGENCIES

CHARLES McCAMIC*

Military law, as the term is usually understood and applied, is the code of the soldier, which law is ordinarily found in the Articles of War. Concomitant with this are the means by which such military law is enforced, the courts martial. There is another meaning in which the term "military law" is used: the military rule exercised by the militia in emergencies. This latter use may occur in war time, when, of course, the right to do so is plain. A situation may also arise in peace time in a state or territory calling for the use of the militia or the army of the United States. It is in this latter meaning that the term is used here. May the President proclaim martial law in the area of the disturbance with the same legality that he could do if war was an actual fact? And especially may he do so if the civil courts are open in such disturbed areas? It is not to be doubted that he may do so in war time in the zone of actual disturbance. The military rule in such situation is not confined to the courts martial nor to the Articles of War.

There have been occasions in times of peace when difficulties have arisen so serious that the very existence of governments seemed to be threatened. In such emergencies, the doctrine of necessity has been invoked to support the power in the government. If the power to defend and protect itself is deferred, it may be too late.

The problem is not new, of course. In 1637 it arose in Great Britain in the Case of Ship Money. One John Hampden refused to pay an extraordinary tax levied for the purchase of war ships. The power to tax was upheld. The argument of the Lord Chief Justice, Sir John Finch, is set forth in part in the note. The

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*Member of the Bar, Wheeling, West Virginia, and Lieutenant Colonel, J. A. G. Reserve.
1 3 How. St. Tr. 825.
2 "Now, whether a danger be to all the kingdom, or to a part, they are alike perilous, and all ought to be charged . . . . The king may charge the subjects for the defence of the land. Now the land and the sea make but one intire kingdom, and there is but one lord of both, and the king is bound to defend both . . . . Expectancy of danger, I hold, is sufficient ground for the king to charge his subjects; for if we stay till the danger comes, it will be then too late, it may be . . . . His (the king's) averment of the danger is not traversable, it must be binding when he perceives and says there is a
The doctrine of this case was later set aside by an act of Parliament. The Ship Money Case is known to every student of English history. (Thus, early arose this present-day mooted question — the power of the government in times of emergencies, and when the court then decided in favor of the existence of the power, we have present the legislative remedy of attempted repeal.)

In 1794 when England was at war with France, a British subject, one Theobald Wolf Tone, a member of the Irish bar in Dublin, interested himself favorably in the project of a French invasion of Ireland. Tone had had a colorful career. He had taken part in the French revolution. In 1795, he and his family transported to America. When in sight of Boston, the vessel in which they had sailed was boarded by a British man-of-war, and Tone was impressed as a sailor in the British navy. Upon securing his release, he tendered his services to the French Directory, and he was commissioned in the French army. This commission he accepted. Tone was later captured while attempting to land troops in Ireland. On November 10, 1798, he was brought to trial before a court martial in Dublin. He was found guilty and sentenced to be hanged. The execution was set for November 12, 1798. In the interval before the date set for the execution arrived, Tone’s father applied for a habeas corpus to the Court of the King’s Bench sitting in Dublin. The ground of the application was that war not raging, and the Court of King’s Bench being open, a court martial had no jurisdiction to try; “that martial law and civil law are incompatible; and that the former must cease with the existence of the latter.”

A writ of habeas corpus was ordered to issue “instantly”, but because Tone might be executed before the writ could be prepared, the sheriff was directed to proceed to the barracks where Tone was confined “and acquaint the provost-marshal that a writ is preparing to suspend Mr. Tone’s execution; and see that he be not executed”. The sheriff was refused admission to the barracks where Tone was confined, the provost-marshal saying, “he must obey lord Cornwallis”. The sheriff so reported to the King’s Bench, and he was ordered to arrest the provost-marshal, and to “take the body of Tone into your custody”. The sheriff made a second trip to the barracks, and was there informed that

danger; as in 1588, the enemy had been upon us, if it had not been foreseen, and provided for, before it came.”

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*16 Chas. I, c. 14 (1641).
*27 State Trials 614,
Tone had cut his throat and was not in a condition to be removed. He died a few days later from the self-inflicted wound.

This case of Tone was never decided on the merits, but nevertheless it remains as a landmark in the history of jurisprudence of a time probably when narrow liberalism ruled the English legal opinion of the day. The prevailing legal view of that day was that of the Tone case. It is so expressed by Blackstone, who grounds his views upon Littleton.⁶

The next period to note is the year 1867 which is unusual because there arose both in the English courts and in the Supreme Court of the United States substantially the question presented in the case of Tone, — whether or not when the civil courts are open, courts martial have power to try and sentence. The English courts refused to follow the doctrine of the Tone case, but the Supreme Court of the United States without citing it, by a five to four decision followed the Tone doctrine. The English case arose out of the Jamaica rebellion, where a grand jury refused to indict army officers for murder, who had carried out orders of a superior military authority.⁷

The American case was that of ex parte Milligan.⁸

Milligan, a citizen of Indiana, who had never been in the military service of the United States, was arrested in Indiana by order of the Commanding General of that military district, charged with conspiracy against the government of the United States, affording aid and comfort to the rebellion, inciting an insurrection, etc. The specifications set forth inter alia that Milligan with others in time of actual war had set on foot a secret military organization for the purpose of overthrowing the government, and that he had become an officer therein; also that he had, with others, conspired to seize the United States and State Arsenals and to release the prisoners of war confined therein and to arm the prisoners. A trial before a military commission resulted in a finding of guilty with a sentence of death. An application for a writ of habeas corpus was made in the Circuit Court of the United States for the District of Indiana, which was, on a division of opinion between the judges, certified to the Supreme Court. It is a cause célèbre. Among the eminent counsel appearing on both sides was James A. Garfield for the petitioner. Milligan insisted that the military commission had no jurisdiction.

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⁶I Commentaries (1768) 413.
⁸4 Wall. 2, 18 L. ed. 281 (1866).
to try him upon the charges, because he was a United States citizen residing in Indiana, who had not been a citizen of any other state since the commencement of the Rebellion, and that he was guaranteed the right of trial by jury by the Constitution of the United States.

The court divided five to four, the majority opinion being written by Mr. Justice Davis and the minority by Chief Justice Chase. Both these Justices were appointees of President Lincoln. In the majority opinion the question was stated "had the military commission . . . . jurisdiction, legally, to try and sentence him? Milligan, not a resident of one of the rebellious states, or a prisoner-of-war, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at his home, arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission, organized under the direction of the military commander of the military district of Indiana. Had this tribunal the legal power and authority to try and punish this man?"

The majority held that "martial rule" is "confined to the locality of actual war" and that it "can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction." Milligan therefore, being a civilian, acting wholly in civilian territory, over which the jurisdiction of the militia had not attached was not subject to trial by a military commission. "If armies were collected in Indiana, they were to be employed in another locality, where the laws were unobstructed and the national authority disputed. On her soil there was no hostile foot."

In the able and vigorous dissent, martial law was clearly defined as: "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 . . . . 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 public safety and private rights."

The fact that the civil courts were open, he thought, was not
controlling because they "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".

The decision of the court in the Milligan case has been the subject of extensive comment. Winthrop in his Military Law and Precedents* believes the view of minority of the court "is the sounder and more reasonable one."

The present Chief Justice, Mr. Hughes, in a paper, War Powers under the Constitution, published as a Senate Document, has very cautiously suggested that "outside the actual theatre of war, and if, in a true sense, the administration of justice remains unobstructed, the right of the citizen to normal judicial procedure is secure." In the same paper, Mr. Hughes also comments on the view of the majority opinion in the Milligan case that martial law cannot arise except where confined to the locality of actual war, that "certainly, the test should not be a mere physical one, nor should substance be sacrificed to form. The majority recognized 'a necessity to furnish a substitute for the civil authority', when overthrown, in order 'to preserve the safety of the army and society'. If this necessity actually exists it cannot be doubted that the power of the Nation is adequate to meet it, but the rights of the citizen may not be impaired by an arbitrary legislative declaration."

Charles Fairman, of Williams College, in his recent book, The Law of Martial Rule,* says: "There is general agreement that Justice Davis went too far when he said that martial law cannot arise from a threatened danger, that the courts and civil administration must already have been deposed."

Are the expressions of Messrs. Winthrop, Hughes and Fairman justified? In arriving at a conclusion, it is submitted that a careful study should be made, not only of the use of martial law in the United States, both by authority of the federal government and by that of the States, but also of the cases arising out of the Boer War, the World War and of the Irish Rebellion of 1920.

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* (2d ed. 1896), at 817.
* (1930), at 145.
Martial Law in the United States

In times of public danger and in emergencies, martial law, as here understood, has been declared by the President and has been exercised in the United States. Historical exercises of the power were made in New Orleans by General Jackson on December 16, 1814; by General Scott in Mexico in 1847; in the Kansas disturbances of 1854-1858; and in the labor strikes of 1877 when Federal troops were sent into the Eastern Panhandle of West Virginia.

It may not be amiss to refer to some of the other occasions of the declaration of military law. On July 30, 1866, when a riot occurred in New Orleans, martial law was declared by the Department Commander in this language: "in consequence of the riotous and unlawful proceedings of today, Martial Law is proclaimed in the City of New Orleans. Brevet Major General A. U. Kautz is appointed Military Governor of the City. He will make his Headquarters in the City Hall, and his orders will be minutely obeyed in every particular. All civil functionaries will report at once to General Kautz and will be instructed by him with regard to such duties as they may be hereafter required to perform."

In March, 1867, during a flood in the Tennessee River at Chattanooga, life and property were imperilled, and at the request of the civil authorities, Captain J. Kline, 25th Infantry, commanding the post, placed the city under martial law, and boats were ordered seized by the military for the purpose of moving household goods. The Mayor subsequently thanked the post commander for his services.

The Jackson proclamation was as follows:
"Major General Andrew Jackson, commanding the seventh United States military district, declares the city and environs of New Orleans under strict Martial Law, and orders that in future the following rules be rigidly enforced, viz: Every individual entering the city will report to the adjutant general's office, and on failure, to be arrested and held for examination. No person will be permitted to leave the city without permission in writing signed by the General or one of his staff. No vessels, boats, or other craft will be permitted to leave New Orleans or Bayou St. John without a passport in writing from the General or one of his staff, or the commander of the naval forces of the United States on this station. The street lamps will be extinguished at the hour of nine at night, after which time persons of every description found in the streets, or not at their respective homes, without permission in writing as aforesaid and not having the countersign, shall be apprehended as spies and held for examination."

Gen. Order No. 60, Dept. of La. (1866).
Gen. Order No. 12, Post of Chattanooga, Tenn. (March 11, 1867).
During the Ku Klux disturbances, the President, in October, 1871, suspended the writ of habeas corpus in certain counties in South Carolina.

Brigadier General Wilkinson in 1806 commanding in Louisiana, suspended the writ of habeas corpus during the Burr conspiracy. The Supreme Court, in passing on the question, expressed the dictum that the writ could be suspended only by the legislature, but President Lincoln in Civil War time acted on the theory that the President had such power.

The Federal authorities acting under the Articles of Confederation exercised armed force to put down Shays' levellers in Massachusetts in 1787; and under the present Constitution, the Whiskey Rebellion in Pennsylvania in 1794-5.

In 1842 Dorr's rebellion occurred in Rhode Island.

In Luther v. Borden, the defendants, acting under the authority of the Rhode Island government, broke into the plaintiff's home. This government was operating under a charter granted by Charles II in 1663, under which Rhode Island was admitted to the Union. An unauthorized election adopted a new constitution and Thomas W. Dorr was elected Governor. When Dorr attempted to act as Governor, the regular government of Rhode Island resisted; the legislature passed an act declaring the state under martial law; the militia was called out, and plaintiff, supporting Dorr, had his home broken into and himself arrested. In a suit for damages the defendants were justified upon the ground that actual war was being levied on the state; the state had declared martial law, and they, being in the military service of the state, broke the house by command of their superior military officer, doing as little damage as possible. Dorr's attempt was a failure.

This brief review brings us to the later situations growing out of internal affairs.

Cases in Some of the States

In 1871 the Governors of North Carolina and Tennessee suspended the writ of habeas corpus during the Ku Klux trouble.

In 1892, and subsequently, riots occurred in Coeur d'Alene mines in Shoshone County, Idaho. The disturbances continued
for some years. Finally in 1899, the Governor of the State declared the county to be in a state of insurrection and rebellion and called on the President to send in troops, which were furnished. William Boyle was arrested and he applied to the State Supreme Court for a writ of habeas corpus, which was denied."

Among other things the court said: "We are of the opinion that whenever, for the purpose of putting down insurrection or rebellion, the exigencies of the case demanded for the successful accomplishment of this end in view, it is entirely competent for the executive or for the military officer in command, if there be such, either to suspend the writ (of habeas corpus) or disregard it, if issued." (Italics the author's).

During the protracted struggles in Colorado in 1903 and 1904 between the operators and the Western Federation of Miners, Governor Peabody on several occasions declared martial rule in certain counties. Charles H. Moyer, President of the Western Federation, on March 30, 1904, was arrested by the troops, and imprisoned until June 15, 1904. He applied for a writ of habeas corpus to be released on bail, which the Supreme Court of Colorado declined, and later the petition was dismissed."

After the Governor's term of office had expired, Moyer sued him in the Federal Court for damages for false imprisonment, alleging that the imprisonment was without probable cause; that no complaint was filed against him and that the Colorado courts were open all the time. The Circuit Court dismissed the suit on demurrer, and certified the question of jurisdiction to the Supreme Court."

That Court, in an opinion by Mr. Justice Holmes, unanimously affirmed the Circuit Court and used language so clear that he who runs may read:"...

"... It is admitted, as it must be, that the Governor's declaration that a state of insurrection existed is conclusive of that fact...

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26 Ex parte Boyle, 6 Idaho 609, 57 Pac. 706 (1899).
27 Ex parte Moyer, 35 Colo. 154, 91 Pac. 738 (1905). As recently as 1927 a Colorado case arose in the federal courts, U. S. ex rel. Palmer v. Adams, 26 Fed. (2d) 141 (D. Colo. 1927). Governor Adams declared an insurrection in two counties and the adjutant general was directed to use such means to suppress it as he saw fit. Palmer was arrested and held without charges. On an application for a habeas corpus, the demurrer was sustained. There was no denial of due process under the 14th Amendment. An appeal was taken to the Circuit Court of Appeals but the question had become moot, it being conceded that violence and tumult had ceased. The court gave no indication of its views. 29 Fed. (2d) 541 (C. A. A. 8th, 1928).
"The facts that we are to assume are that a state of insurrection existed and that the Governor, without sufficient reason but in good faith, in the course of putting the insurrection down held the plaintiff until he thought that he safely could release him . . . .

"In such a situation we must assume that he had a right under the state constitution and laws to call out troops, as was held by the Supreme Court of the State . . . . That means that he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power. 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 and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief." (Italics the author's).

This principle had been declared in Martin v. Mott by Mr. Justice Story; the same principle has been in effect since Luther v. Borden.

During the martial rule in Montana in 1914, sentences imposing punishment upon civilians were reversed by the state supreme court.

In 1902 the Governor of Pennsylvania called on the militia to put an end to alleged violence in Schuylkill county. A private soldier, posted as a sentinel, was prosecuted for murder, in killing a person while carrying out orders of his superior officer. He was held blameless by the Supreme Court of Pennsylvania.

In West Virginia, beginning in 1912, four "wars" have been declared by proclamations of the Governors. Governor Glasscock declared a state of war to exist in Paint Creek magisterial district of Kanawha County, and he also appointed a military commission to sit in a territory corresponding in area to the district. The commission convicted certain persons of offenses and confined them in the State penitentiary. On habeas corpus proceed-

\[\text{\textsuperscript{12} Wheat. 19, 6 L. ed. 537 (1827).}\]
\[\text{\textsuperscript{21} Supra n. 15.}\]
\[\text{\textsuperscript{22} Ex parte McDonald, 49 Mont. 454, 143 Pac. 947 (1914); Herlihy v. Donohue, 52 Mont. 601, 161 Pac. 164 (1916).}\]
\[\text{\textsuperscript{23} Commonwealth v. Shortall, 206 Pa. St. 165, 55 Atl. 952 (1903).}\]
ings in the Supreme Court of Appeals, the writs were denied, one judge dissenting."

The Constitution of West Virginia provides:

Article I, Section 3:

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

Article III, Section 4:

"The privilege of the writ of habeas corpus shall not be suspended . . . .

Article III, Section 12:

. . . . "The military shall be subordinate to the civil power; and no citizen, unless engaged in the military service of the State, shall be tried or punished by any military court, for any offence that is cognizable by the civil courts of the State . . . .

Article VII, Section 12:

"The Governor shall be commander-in-chief of the military forces of the State (except when they shall be called into the service of the United States), and may call out the same to execute the laws, suppress insurrection and repel invasion".

The Code provides inter alia:

. . . . "In the event of invasion, insurrection, rebellion or riot, the commander-in-chief may in his discretion declare a state of war in the towns, cities, districts or counties where such disturbances exist."

The reasoning of the court may be gathered from some excerpts from the opinion written by Judge Poffenbarger:

"It seems to be conceded that if the governor has the power to declare a state of war, his action in doing so is not

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25 W. VA. REV. CODE (1931) c. 15, art. 1, § 83.
reviewable by the courts. Of the correctness of this view, we have no doubt . . . .

"Subject to the jurisdiction and powers of the federal government, as delegated or surrendered up by the provisions of the federal Constitution, this state is sovereign and has the powers of a sovereign state. Like all others, it must have the power to preserve itself . . . ."

As to the suspension of the writ of *habeas corpus* the court said:

"There is no court with power to grant or enforce the writ of *habeas corpus* within the limits of such territory . . . . In these disturbed areas, the paralyzed civil authority can neither enforce nor suspend the writ of *habeas corpus*, nor try citizens for offenses nor sustain a relation of either supremacy or subordination to the military power, for in a practical sense it has ceased . . . ."

The court declined to review the sentences complained of, contenting itself with deciding solely the question of legality and leaving open the question of right to imprison after the restoration of the civil status. Judge Robinson filed a rather vehement dissent. This decision is adverted to at length because a recent writer, Charles Fairman, says: "It is a far cry from the spirit of the *Milligan* opinion to the views entertained by the Supreme Court of West Virginia in 1912-1914, when an exercise of martial rule was challenged before that tribunal."28 Is this criticism sound? Since the *Milligan* opinion and before the *Nance* case, the Supreme Court of the United States had decided *Moyer v. Peabody*27 in which case it was held that it was the right of the Governor to declare that a state of insurrection existed and that his judgment could not be reviewed by the courts. In the *Moyer* case Moyer had been arrested and confined, yet the Supreme Court said that when the state of insurrection had been declared, the Governor could call out the troops and, said Mr. Justice Holmes: "That means that he shall make the ordinary use of soldiers to that end; that he may kill persons who resist and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace."

In the *Nance* case the bodies were seized, and instead of be-

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28 *The Law of Martial Rule* (1930) 152,
27 *Supra* n. 19,
ing merely held in confinement without trial, as in the Moyer case, the persons were tried, convicted and sent to the penitentiary. It is submitted the Nance procedure was legal under the Moyer opinion. With the restoration of peace Nance et al., were pardoned.

In Galveston, Texas, a citizen had been tried and convicted by a provost judge, during a period of martial law, in which the military commander had displaced the city commission and the local judges. A petition for a habeas corpus was denied. In Nebraska terms of imprisonment in the county jail had been imposed on persons by the military, which had been called for by the Governor during a state of lawlessness and disorder beyond the control of the civil authorities. Habeas corpus was denied.

The recent case of Constantin v. Smith decided by a Federal Court in Texas was a suit brought about because the Governor of Texas had attempted to take over the oil industry, in furtherance of which policy he by fiat had declared martial war because the owner of the wells might become enraged and commit acts of violence, thereby depriving plaintiffs of their property without due process. A federal statutory three-judge court had an application for an injunction against the Railroad Commission of Texas, to which Governor Sterling and others were also parties. Said the court: "It was conceded that at no time has there been any actual uprising in the territory. At no time had any military force been exerted to put riots or mobs down." "The only insurrection or riot in the territory was, not one of fact, but by fiat." The case involved the right of a citizen to relief against the acts depriving him of his property, and the question of martial law was merely incidental.

The Boer War Cases, the South African Cases During the World War and the Cases of the Irish Rebellion of 1920

To examine these cases here at length would unduly prolong this paper.

The Boer War cases, which are collected in the footnote, be-

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30 57 Fed. (2d) 227 (E. D. Tex. 1932).
They are positive that even though the courts are open, martial law may then exist in the event of necessity. Fourie was arrested and tried during an actual state of war, but in a district from which the civil magistrate had been expelled. Bekker was arrested and tried where the magistrates were sitting, after comparative calm had been restored to that district. Smith, a soldier, was acquitted because he had carried out the military order of his superior officer. In the Marais case the court said: "... Martial law had been proclaimed over the district in which the petitioner was arrested and the district to which he was removed. The fact that for some purposes some tribunals had been permitted to pursue their ordinary course is not conclusive that war was not raging."

The Krohn case arose during the World War. Martial law had been proclaimed on October 12, 1914, throughout the country. Krohn, a builder and contractor, residing in Pretoria, had been arrested and detained under the proclamation. He was indicted for using seditious language. Jurisdiction to try was in the military court. All the civil courts being open, Krohn applied to the Transvaal Provincial Division for an interdict restraining any form of trial proceeding by this special court, on the ground that it had no authority to exercise judicial functions, or to try him, or any other person. His application was dismissed. He appealed against that judgment. The reasoning of the court may be gathered by the following from the opinion:

"... there is an inherent right in every State, as in every individual to use all means at its disposal to defend itself when its existence is at stake; when the force upon which the courts depend and upon which the constitution is based is itself challenged. Under such circumstances, the State may be compelled by necessity to disregard for a time the ordinary safeguards of liberty in defense of liberty itself, and to substitute for the careful and deliberate procedure of the law a machinery more drastic and speedy in order to cope with an urgent danger. Such a condition of things may be brought about by war, rebellion or civil commotion; and the deter-

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mination of the State to defend itself is announced by the proclamation of martial law. But, in the absence of statutory provision upon the subject, — and none exists here — such a proclamation clothes the government with no authority, and invests it with no power which it did not possess before. The right to use all force necessary to protect itself, whether against external or internal attack, is an inherent right. The proclamation is merely a notification to all concerned, that the right in question is about to be exercised and upon certain lines."

War was actually raging in the district when and where Krohn was arrested. That was sufficient.

The Marais case is perhaps the most important of the Boer War cases, and it flatly states that the fact that for some purposes some courts are permitted to sit, is not conclusive that war is not raging. To put the proposition in other language: the mere fact that the law courts were sitting did not preclude martial law. This was applied in the case in the Natal Rebellion of 1906. In Krohn v. Minister for Defense all the courts were open. Martial law was declared, however, throughout the Union of South Africa because of the German invasion and the October, 1914, rebellion. Krohn was arrested and confined, charged with seditious utterances. He attempted to secure an interdict restraining the authorities from proceeding with the trial. He lost, and on appeal, lost again. The fact that all the courts were open made no difference. War was actually raging in the district when and where Krohn was arrested. That was sufficient.

The Irish cases are as positive as the South African cases. The declaration of martial law in Ireland, however, had been made by legislative sanction.

The Powers of the President

With this brief review, let us come to the powers of the President of the United States.

From the foregoing cases arising in the states, it would seem plain that when the governor of a state in time of disturbance declares a state or district therein to be in a state of insurrection,

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30 THE PRESIDENT AND MILITARY POWER

[Supra n. 31.]

[Supra n. 31.]

the power to review such declaration is denied to the courts and
that if the militia be called out under such circumstances, military
law with all of its consequences follows. But let us go a step
farther. Suppose the Governor does not take action and an
emergency arises? What powers has the President of the United
States in such cases?

Article IV, Section 4, of the Constitution of the United
States provides:

"The United States shall guarantee to every State in
this Union a republican form of government, and shall pro-
tect each of them against invasion; and on application of the
Legislature, or of the executive (when the Legislature can-
not be convened) against domestic violence."

The President is Commander-in-Chief of the Army and Navy
and of the Militia when in the actual service of the United
States. Congress is empowered to provide for calling out the
militia to execute the laws of the United States, suppress insur-
rection and repel invasions. The provisions of the writ of habeas
corpus shall not be suspended unless, when in cases of rebellion
or invasion, the public safety may require it. He is enjoined to
take care that the laws be faithfully executed.

The President is authorized in case of insurrection in any
State, against the government thereof,

"... on application of the legislature of such State, or of
the executive, when the legislature cannot be convened, to
call forth such number of the militia of any other State or
States, which may be applied for, as he deems sufficient to
suppress such insurrection; or, on like application, to em-
ploy, for the same purposes, such part of the land or naval
forces of the United States as he deems necessary."

"Whenever, by reason of unlawful obstructions, combi-
nations, or assemblages of persons, or rebellion against the
authority of the Government of the United States, it shall
become impracticable, in the judgment of the President, to
enforce, by the ordinary course of judicial proceedings, the
laws of the United States within any State or Territory, it
shall be lawful for the President to call forth the militia of
any or all the States, and to employ such parts of the land
and naval forces of the United States as he may deem neces-

32 U. S. Const., art. 2, § 2, cl. 1.
33 Ibid., art. 1, § 8, cl. 15.
34 Ibid., art. 1, § 9, cl. 2.
35 Ibid., art. 2, § 3.
sary to enforce the faithful execution of the laws of the United States, or to suppress such rebellion, in whatever State or Territory thereof the laws of the United States may be forcibly opposed, or the execution thereof forcibly obstructed."

"Whenever insurrection, domestic violence, unlawful combinations, or conspiracies in any State so obstructs or hinders the execution of the laws thereof, and of the United States, as to deprive any portion or class of the people of such State of any of the rights, privileges, or immunities, or protection, named in the Constitution and secured by the laws for the protection of such rights, privileges, or immunities, and the constituted authorities of such State are unable to protect, or, from any cause, fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the Constitution of the United States; and in all such cases, or whenever any such insurrection, violence, unlawful combination or conspiracy, opposes or obstructs the laws of the United States, or the due execution thereof or impedes or obstructs the due course of justice under the same, it shall be lawful for the President, and it shall be his duty, to take such measures, by the employment of the militia, or the land and naval forces of the United States, or of either, or by other means, as he may deem necessary, for the suppression of such insurrection, domestic violence, or combinations."

"Whenever, in the judgment of the President, it becomes necessary to use the military forces under this chapter, the President shall forthwith, by proclamation, command the insurgents to disperse and retire peaceably to their respective abodes, within a limited time."

The President is also authorized to suspend commercial intercourse with the State in insurrection, and to provide prohibitions and conditions of commercial intercourse on the part of the State not declared to be in a state of insurrection, which may take the form of a license or permit. The Secretary of the Treasury may appoint officers to carry into effect such licenses, rules and regulations. Heavy penalties are provided, including confiscation of property employed to aid insurrection.

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40 Ibid. § 205.
41 Ibid. § 206.
42 Ibid. §§ 207, 208.
43 Ibid. § 209.
44 Ibid. § 210.
45 Ibid. § 212. 8 U. S. C. A. § 51, 52 (1926) authorize the use of military power in aid of the execution of warrants and other judicial process. Army
The above does not constitute a complete enumeration of the powers of the President. Enough has been given to indicate that without the request of the state through its governor or its legislature, or even over the protest of the state authorities, in time of insurrection or domestic trouble, the President, to protect federal rights and to accomplish federal duties, is clothed with ample power to send the military forces into sections of the United States to put down insurrection and to reestablish order, peace and concord.

Again, it seems necessary to repeat here what has been said about the power and discretion of the governors. The decision whether or not the situation requires such steps is solely with the President. "He first makes the proclamation required by statute." After that is done, the National Government has the right to use physical force in any part of the United States to compel obedience to its laws, and to carry into execution the powers conferred upon it by the Constitution.

In the Debs case, Mr. Justice Brewer used this language: "We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent." (Author’s italics).

It is unthinkable that such a declaration will ever be modified, especially in view of the provisions of the United States Constitution that "This Constitution, and the laws of the United

Regulations, Paragraph 487 provides:
"If time will admit, application for the use of troops for such purposes must be forwarded, with statements of all material facts, for the consideration and action of the President; but in case of sudden and unexpected invasion, insurrection or riot, endangering the public property of the United States, or in case of attempted or threatened robbery or interruption of the United States mails, or any other equivalent emergency so imminent as to render it dangerous to await instructions requested through the speediest means of communication, an officer of the Army may take such action before the receipt of instructions as the circumstances of the case and the law under which he is acting may justify, and will promptly report his action and the circumstances requiring it to The Adjutant General of the Army, by telegraph, if possible, for the information of the President."

The militia or national guard of a State has never yet been called into service by the President as authorized by 50 U. S. C. A. § 201 (1926).

"Martin v. Matt, supra n. 20.
"In re Debs, 158 U. S. 564, 15 S. Ct. 900 (1893)."
States which shall be made in pursuance thereof and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding." The Judges of the State courts take oath of office to support the Constitution of the United States.

The problem, then, seems to be solved, and in the light of unimpeachable authority. When a district is declared by the President in the Proclamation to be in a state of insurrection, the militia can be sent in — and actual martial law put in force and effect in the zone of the declaration. A condition termed in this paper martial rule, as contra-distinguished from martial law, can probably be put in force and effect in such zones near the zones of declaration as are, in the judgment of the President or the military commander, necessary to render fully effective the zones of declaration. In these zones of martial rule, which may roughly be compared to what is known as a "state of seige" in Europe, we would probably have a mixed situation in which the commander could either try by military commission, or avail himself of the existing courts and judges as a means of trial. The federal law recognizes courts-martial and military commissions. Courts-martial are concomitant with the Army and its rule under the Articles of War. Military commissions are distinct tribunals from courts-martial. The jurisdiction of a military commission extends to civilians, especially with respect to the trial of crimes peculiar in time of war.

In the Nance case Judge Poffenbarger used this language: "Power to establish a military commission for the punishment of offenses committed within the military zone is challenged in argument; but we think such a commission is a recognized and necessary incident and instrumentality of martial government."

He might have added that the means necessary in one zone might be harsh or wholly inadequate in another zone. Circumstances easily can be imagined where it would be entirely proper in a zone to supersede the governor of a state; to levy, collect and expend the taxes; to take charge of the finances of the state, including the supervision of the banks; to try and punish for of-

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49 Art. 6, par. 2.
50 Winthrop on Military Law (2d ed. 1896) 831.
51 Supra n. 2d.
fenses; to put an embargo upon communications, and to resort to other measures that to a free people in a free state would be more than abhorrent. But the answer is: the government is supreme in its rights to preserve itself.

During the Civil War, it is said in Winthrop's Military Law, the military commissions acting under the authority of the United States entered judgment in several thousand cases. Such a commission tried the Lincoln conspirators, as well as Milligan.

A military commission is not part of the judicial system. Its judgments are not reviewable by certiorari. It has no civil jurisdiction.

A trial by martial law is purely an executive act and for matters within its jurisdiction it is not even necessary that a written record of its proceedings be kept, "the record being itself the official and operative order which the judgment demands."

The matters within the jurisdiction of military commissions are ordinarily offenses against the laws of war and the safety of the army and of the state, and civil crimes which, where the ordinary courts have ceased to function, cannot be tried normally. If the civil courts can function, the proclamation of martial law does not suspend them. In the Nance case it was said: "In these

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102 (2d ed. 1896) 1302.
103 Ex parte Vallandigham, 1 Wall. 742, 17 L. ed. 589 (1883).
104 40 Cyc. 391, n. 41.
106 Att'y General v. Van Reenen, 89 The Law Times Reports 591 (1903) (appeal from the Supreme Court of Cape Colony). Van Reenen had been convicted of moving himself and certain property to and fro in Malmesbury district without proper authority. The charges were heard before a magistrate where the accused pleaded guilty and was fined and imprisoned. The magistrate made no record of the trial. He did note the charges, judgment and sentence "upon a piece of paper purporting to be the form generally used in the hearing of charges under the ordinary jurisdiction of a resident magistrate." The Supreme Court of the Colony of Good Hope reversed because of the defective form of the record. On appeal Lord Chancellor Halsbury in reversing the Supreme Court of the Colony said: "The truth is that the whole matter rests upon the initial mistake of calling the memorandum a "record", and treating it as if it were a record of a court of justice. There would be no necessity, certainly in point of law, and probably not in practice, to have a written memorandum of each sentence, or judgment, of the martial law court; certainly no such principle applies as is known to the courts of ordinary criminal jurisdiction in respect of records, the record being itself the official and operative order which the judgment demands."

107 Fairman, Law of Martial Rule (1930) 201.
disturbed areas, the paralyzed civil authority can neither enforce nor suspend the writ of habeas corpus, nor try citizens for offenses, nor sustain a relation of either supremacy or subordination to the military power, for in a practical sense it has ceased.\(^{25}\) That this view is by no means new is shown by the decisions during The Boer War. In Queen v. Bekker\(^{26}\) Justice Maasdorp said: "There is abundant authority for saying that there is nothing to prevent the military, while administering martial law, from allowing the Courts of law to take cognizance of matters which do not clash or conflict with the proceedings of court-martial. The existence of such civil courts is no proof that martial law has become unnecessary."

The Milligan case\(^{27}\) simply adopted what had been the pronounced law in the British Empire. Since then, the Supreme Court of the United States had had no occasion directly to review that decision. It may be arguable that the Moyer case\(^{28}\) has placed limitations upon the doctrine of the Milligan case. In the British Empire since the Milligan case, the question has arisen in numerous cases, and many modifications have been made. Especially is this true in the Boer War cases. A quotation from the opinion of Buchanan J. in Queen v. Bekker\(^{29}\) will suffice: "... I do not concur in the contention of counsel that because certain of the courts are open therefore martial law cannot exist. As we know in one part of this Colony a court was recently actually engaged in criminal trials by jury to the accompaniment of a bombardment, and yet it was admitted that martial law was necessary and was in fact in force at the time at the same place. The courts must not only be open, but also to the full, proper and unobstructed exercise of their jurisdiction."

**Conclusion**

The cases here referred to mark a long advance from the holdings in effect at the time of the Milligan case that if the courts are open, there is a state of peace, which denies jurisdiction to the military commissions. It is very cautiously believed that some modification of the doctrine of the Milligan case would be

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\(^{25}\) Supra n. 24.
\(^{26}\) Supra n. 25.
\(^{27}\) Supra n. 7.
\(^{28}\) Supra n. 19.
\(^{29}\) Supra n. 31.
made were the question again to be passed upon by the Supreme Court.

A probable solution would be for Congress to pass a statute giving special powers to the militia, but imposing conditions on its exercise as was done in Ireland in *Egan v. Gen'l Macready*. The extent of the powers would, no doubt, be matter for serious differences of opinion save in time of war. In the last analysis, in time of war, military law is the will of the executive — the executive is the commander-in-chief. With respect to times of insurrection, at least two points are clear. The Colorado, Idaho and West Virginia cases agree that the proclamation of the Governor that an insurrection exists is conclusive. The United States Supreme Court in the case of *Moyer v. Peabody* also holds this. So do the Irish and the South African cases. It is conceded, moreover, that insurrections can be met with military force. In fact all the cases sustain this view. The United States Supreme Court in the *Moyer* case said that all the ordinary means of soldiers could be adopted, even to the extent of taking life. In Idaho and Colorado, the ones arrested were not tried but were placed in detention camps. In West Virginia, they were tried by the military courts and imprisoned. The difference is only one of degree, not of method. The military will be upheld in such cases. But the degree to which they are upheld is a debatable point. It is manifest that the soldiers must have greater powers than the police — and must be protected in obedience to lawful orders of a superior. Whether it is necessary to have actual war powers in such cases of insurrection, at present remains a debatable point.

The usual *habeas corpus* provision in state constitutions prohibiting its suspension will avail little, for if the courts cannot function or do so imperfectly — the right to the writ is bootless — it cannot be enforced. Insurrection may be synonymous with war; it may not be. In West Virginia, a war was declared. The difference, if any, may be entirely visionary and if any difference exists, the lesser degree may in a few moments be changed by the actual conditions on the ground.

The Government has the right to live and, it is submitted, if it has the power, such power may be exercised. The dangers arising from domestic disorder are not those that arise from war,

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64 *Supra* n. 34.
65 *Supra* n. 19.
but such dangers are more constant. Legislatures could provide in a large measure for protection therefrom. In this way, a means could probably be worked out that would preserve the fundamentals of government, and the basic law and its administration even in times of domestic disorder. "'Tis a consummation devoutly to be wished." The accused is always entitled to a fair trial.

Upon the termination of the emergency it would seem to be reasonable that the sentences imposed by the military commissions should cease. But there is authority that the "establishment of peace" does not terminate them. The sentences were valid when imposed, and the argument is that they do not cease to be valid because the emergency has ceased to exist. In West Virginia pardons were given to those sent to the penitentiary by the military commission. Whether sentences expire with the emergency has not been adjudicated in the state.

In obeying a superior officer, the inferior may be faced with a number of situations. He may in carrying out the order do an act that any person of ordinary intelligence should know was illegal. In such circumstances he has been held liable, as in Manley v. State, where the soldier in carrying out his orders to keep back a crowd, when the President was visiting, bayonetted a man who endeavored to cross his path. Again, as in the Shortall case in Pennsylvania, his act may be lawful and not needlessly severe, or he might be in the situation of participating when he could not have known of any illegal end in view. In Riggs v. State the accused soldier was summoned by his captain for scouting duty. They went to a house and when the individual who lived there was found, he was killed, apparently without any justification or excuse. As it was not shown that the soldier aided or abetted in the killing, his conviction was reversed.

If the soldier acts with good motives in obeying the orders of his military superior, the plaintiff is usually left without a civil remedy. Thus in West Virginia the court has held that suppressing a newspaper outside the zone or theatre of war, but circulating in the zone, papers carrying articles opposed to the

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"Supra n. 29.
62 Texas Crim. 392, 137 S. W. 1137 (1911); 69 Tex. Crim. 502, 154 S. W. 1008 (1913).
"Commonwealth v. Shortall, supra n. 23.
3 Cold. 85 (Tenn. 1866)."
Governor's policy, is so protected. If as in some cases, damages are recovered, they may be reimbursed out of the public treasury, as was done in *Mitchell v. Harmony*.

The situation, however, must be judged by the facts as they appeared at the moment to the man on the spot, and not in the light of subsequent events.

It is believed that authority sufficient has been shown in this paper to convince one that the Federal government is full handed in cases of domestic disturbance. Certain it seems that if such occasion arise, the Government would not ponder as in the familiar fourteenth century story of the philosophical donkey owned by a Frenchman, one Jean Buridan. The donkey being equally hungry and thirsty, was placed half way between a bag of oats and a bucket of water. It contemplated both without being able to decide for the water or the oats, and it is said it wasted away and died.

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71 13 How. 115, 14 L. ed. 75 (1851).
72 The research for this paper was done in the law library of the Supreme Court of Ohio in Columbus; the South African, the Irish and the English cases were studied in the law library of Ohio State University in Columbus, Ohio.