WAR POWERS AND MILITARY JURISDICTION

J. A. G. S. TEXT No. 4

The Judge Advocate General's School
ANN ARBOR, MICHIGAN

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AND
MILITARY JURISDICTION

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FOREWORD

"War Powers and Military Jurisdiction" is one of a series of texts prepared by the Staff and Faculty of The Judge Advocate General's School for use at the School. The subject matter of the text constitutes the introductory course in the curriculum, including the history and sources of military law, its scope and jurisdiction, and the general principles applicable to the exercise of military control.

A substantial portion of the textual material first appeared in an earlier work by Major Edward H. Young, J.A.G.D., "Constitutional Powers and Limitations", published with War Department approval in 1941 by the Department of Law, United States Military Academy.

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MILITARY LAW

DEFINITION AND SCOPE.--In a restricted sense military law is the specific body of law governing the army as a separate community. In a wider sense it includes, in addition, that law which, operating in time of war or like emergency, regulates the relations between enemies, authorizes the establishment and use of military government in occupied foreign territory, and in particular situations justifies the exercise of martial law in domestic territory.

This text is not designed to cover every legal question which arises as the result of the maintenance and operations of a military force. Rather it is intended to set forth the background and fundamental concepts of military law and jurisdiction. What are the sources of military law? How is military jurisdiction exercised? What are its tribunals? These are some of the questions which are discussed.

SOURCES.--Historically, some of our military law existed before the adoption of the Constitution or the formation of the United States. With the Constitution, however, all our public law began either to exist or to operate anew, and this instrument therefore is, in general, referred to as the source of the military law of the United States.[1]

Under the Articles of Confederation Congress had the power "to build and equip a navy". No such broad power, however, was granted with respect to an army. Congress was authorized only "to

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1 P. 15, Winthrop's "Military Law and Precedents" (2nd ed., 1920 Reprint).

Agree upon the number of land forces and to make requisition from each state for its quota". All officers of the army, including general officers, were appointed by the States, and the Federal Government was given no control over the States' militia.[2] The framers of the Constitution, seeking to eliminate the weaknesses of such a system, gave to the Federal Government full power to organize and maintain both an army and a navy, and, in addition, gave it substantial control over the militia of the States.

Many of the powers of the Federal Government relating to the military forces are found in express terms in the Constitution; others are implied from a construction of its language. Nowhere does the Constitution expressly state that there shall be a War Power, although such a power is in fact granted in general terms as indicated below.

Express Constitutional Powers.--One of the objects of the formation of the United States as set forth in the Preamble to the Constitution was to "provide for the common defense". Another was "to secure the Blessings of Liberty to ourselves and our Posterity".[3] A nation which could not wage war could not accomplish these purposes. Self-preservation is the first law of national life and

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2 Sec. 679, Willoughby "Constitutional Law of the United States" (2nd Student's ed., 1930).

3 Const. Preamble.

the necessary powers to preserve and defend the United States are provided in the Constitution itself.

The pertinent provisions of the Constitution relating to war and military matters are as follows:

Const., art. I, sec. 8.

The Congress shall have power:

To pay the debts and provide for the common defense and general welfare of the United States. (Cl. 1)

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water. (Cl. 11)

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years. (Cl. 12)

To provide and maintain a navy. (Cl. 13)

To make rules for the government and regulation of the land and naval forces. (Cl. 14)

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions. (Cl. 15)

To provide for organizing, arming, and disciplining militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress. (Cl. 16)

To exercise exclusive legislation in all cases whatsoever . . . over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings. (Cl. 17)

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. (Cl. 18)

Const., art. II, sec. 2.

The President shall be commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States. (Cl. 1)

He shall have power, by and with the advice and consent of the Senate to make treaties. (Cl. 2)

Const., art. II, sec. 3.

He shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

Const., art. III, sec. 3.

Congress shall have the power to declare the punishment of treason. (Cl. 2)

Const., art. IV, sec. 4.

The United States shall guarantee to every State in this Union a republican form of government and shall protect each of them against invasion.

Const., amend. II.

A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

Const., amend. III.

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Const., amend. V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger.

Implied Constitutional Powers.--Of the eighteen enumerated powers of Congress contained in Article I, Section 8, of the Constitution, it is observed that there are eight of them (as listed above) that relate to war and military matters. Of equal importance to the War Power of the Federal Government is the "necessary and proper" clause found in the same article. Here is the authority for the implied powers; here is the enabling section which permits Congress to make all laws necessary to protect the Union, or in the event of war, to prosecute it with vigor and success. As Commander in Chief, the power to command the forces and conduct the military campaigns belongs to the President. The power to make the necessary laws is in Congress; the power to execute them is in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authority essential to its due exercise.[4]

The Constitution in Time of War.--The Constitution is not set aside in time of war. Then, as in time of peace, exercise of the

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4 Ex parte Milligan, 71 U.S. 2, 139 (1866) See digest and abstract, p. 152, infra.

War Powers must conform to constitutional limitations. Nevertheless, such limitations are regarded as far less restrictive during war. There is authority for the statement that under the Constitution the War Power in time of war is co-extensive with necessity; and that all acts tending to increase the strength of this nation or weaken the enemy are lawful.[5]

The extent of governmental authority under the War Power as limited by the Constitution in normal time of peace may be distinguished from such extent or scope in time of war by the following illustration. Consider a motor truck capable of a maximum speed of ninety miles per hour, but the driver thereof unable to operate it over thirty miles per hour due to the fact that a governor has been installed to so limit its speed. This pictures the War Power as limited by the Constitution in normal times. If the governor is removed, the truck may be driven as fast as the driver believes necessary and safe; but even so, its speed cannot surpass its capabilities. This latter illustration pictures the War Power as limited by the Constitution in time of war.

The constitutional authority for the broader exercise of the War Power in time of war is not lost by the cessation of active hostilities. The Supreme Court has held that adequate measures may be employed under the War Power to remedy evils which have arisen

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5 New Orleans v. The Steamship Co., 87 U.S. 387, 394 (1874); Dow v. Johnson, 100 U.S. 158, 168 (1879). "The power to wage war is the power to wage war successfully." United States v. Hirabayashi, 46 F. Supp. 657 (1942).

from hostilities, and to guard against renewals of conflict.[6] Manifestly, during extraordinary times of peace, as in the period of our proclaimed emergency which preceded the outbreak of the present war, a similar rule is justifiable. The "blitzkrieg" methods of modern warfare which permit actual invasion to take place without warning require that such a principle exist in order to provide for the common defense.

Inherent Power.--Congress has no inherent sovereign powers in the realm of domestic legislation.[7] But different principles determine the extent of legislative powers in domestic affairs and their extent in international affairs.

> "* * * The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers then possessed by the states such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. Carter v. Carter Coal Co., 298 U.S. 238, 294. That this doctrine applies only to powers which the states had, is self-evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. During the colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown. * * *

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6 Stewart v. Kahn, 78 U.S. 493, 507 (1870).

7 Kansas v. Colorado, 206 U.S. 46, 81 (1907).

> "As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. * * *"[8]

The external sovereignty possessed by the Union of colonies continued to exist in the United States after the adoption of the Constitution except insofar as the Constitution in express terms qualified its exercise.

The power to declare and wage war, to conclude peace, to make treaties, and to maintain diplomatic relations with other sovereignties, even had they not been mentioned in the Constitution, would have been vested in the Federal Government as necessary concomitants of nationality. The United States would not be completely sovereign were its rights and powers in the international field not equal to those of other nations.[9]

Power to Declare War.--The Supreme Court has declared that "every contention by force, between two nations, in external matters, under the authority of their respective governments, is not only war, but public war".[10] It is not necessary to constitute war that the parties thereto be acknowledged as independent nations or sovereign states. A state of war may exist where one of the

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8 United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-316 (1936).

9 Ibid.

10 Bas v. Tingy (The Eliza), 4 U.S. 32, 35 (1800).

belligerents claims sovereign rights against another.[11]

The scope of the constitutional War Powers has been outlined. Naturally jurisdictional conflicts between the separate branches of the Government arise over the exercise of many of such powers. For example, the controversial question of the power to initiate war presents the issue as to who has such authority.

Under the Constitution, Congress and not the President is vested with the power to declare war. Therefore, Congress alone has the right to initiate a war as a voluntary act of sovereignty.[12] Without its consent, the several States are forbidden to engage in war unless actually invaded or in such imminent danger as will not admit of delay.[13] But war is a state of affairs not an act of legislative will and there must be at least two parties to it. When a foreign power creates a state of war by hostile acts against the United States, conventionally the President makes recommendation that Congress recognize the situation and declare war.[14] Where the exigency of such an occasion demands immediate action, whether caused by a foreign power or a belligerent claiming sovereign rights against the United States (as in the case of a state

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11 Prize Cases, 67 U.S. 635, 666 (1863); see also United States v. Mrs. Alexander's Cotton, 69 U.S. 404, 419 (1865).

12 P. 668, Prize Cases, note 11, supra.

13 Const., art. I, sec. 10, cl. 3.

14 See secs. 696-697, Willoughby, note 2, supra.

of civil war), the President is not only authorized but bound to resist force by force without waiting for any special legislative authority.[15]

Nations may deal with each other in such a way as to offend other nations, even though such dealings do not transcend the limits of the international law as generally comprehended at the time. Other nations, not parties to such transaction, nevertheless, might regard it as an unfriendly act aimed at them. This in turn could motivate acts in retaliation on their part which would lead to actual war. The President does not have the power to declare war, but, under his constitutional power to control the foreign relations of the United States, it is possible for him to influence the course of events in such a way as to make war inevitable. As chief executive of the nation, he has exclusive control of directing relations with foreign nations (which ordinarily are carried on through the Secretary of State), and, as commander in chief of the nation's armed forces, he necessarily has power to deal with foreign governments regarding military and naval affairs.[16]

In the past, under his military powers as commander in chief, the President has entered into a number of agreements of an international character which were regarded as justified on grounds of

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15 Prize Cases, note 11, supra.

16 Note 11, supra. See also secs. 35, 96, Burdick, "The Law of the American Constitution" (1922).

convenience or of necessity. For instance, in 1817, without the advice and consent of the Senate, the President made an arrangement with Great Britain regarding the number of war vessels to be kept by that power and the United States upon the Great Lakes. Also, it has been common practice for the President to make necessary arrangements to send American ships of war to foreign ports for either friendly visits or to protect its own citizens and their property.[17]

An exercise of these executive powers by the President was his negotiation of an agreement with England in 1940[18] without reference to the Senate, whereby fifty United States naval destroyers were transferred from our navy to England in exchange for the joint use with that nation of several of her military and naval bases located in the near Atlantic. The transfer of those destroyers was a fait accompli and nothing that Congress could do could alter the fact that these ships were available to England in the struggle she was then engaged in.

Written Military Law.--In addition to the basic general War Powers provided in the Constitution, there is a large body of written and unwritten military law. The written law is composed of statutory enactments, orders, and regulations, the principal

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17 Note 5, supra.

18 New York World-Telegram, 3 Sept. 1940; Evening Sun, New York, 5 Sept. 1940; New York Times, 3 Sept. 1940.

statutory portions of which are the Articles of War, enacted by Congress under its constitutional power to make rules for the government and the regulation of the land forces. The Articles of War have their basis and roots in the British Code. The first enactment of Articles of War of this country was contained in the Code of 1775 enacted by the Second Continental Congress. These were superseded the following year by what has been called the Code of 1776. The Code of 1806 was, in effect, a re-enactment of the Articles in force during the period of the Revolutionary War. It was amended from time to time until the Code of 1874 which was a restatement and rearrangement of all prior codes. By 1916 it was necessary to have a complete revision. The revision was contained in the Code of 1916.[19] The present Articles of War were enacted in 1920.[20]

The President, without need for congressional authorization, as commander in chief, is empowered to issue, personally or through his military subordinates, such rules and regulations as are necessary and proper to insure order and discipline in the army. Whether resting upon statutory authority or not, such regulations are said to have "the force and effect of law and be binding upon all parties subject thereto".[21] In keeping with such consequence, the Supreme Court has held that a War Department General Order issued by order

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19 39 Stat. 650.

20 41 Stat. 787.

21 United States v. Eliason, 41 U.S. 184, 190 (1842).

of the Secretary of War under the authority of Article of War "was a part of the law of the land which we judicially notice without averment or proof".[22] Of course, if a statute and a regulation are in conflict, the statute controls.[23]

Unwritten Military Law.--Winthrop states that unwritten military law consists of "1. The 'customs of the service,' so-called; 2. The unwritten laws and customs of war".[24] Taking account of this,--the United States Supreme Court holds the view that military or naval officers, as a result of their training and experience in the service, are more competent judges than the common law courts of questions within court-martial jurisdiction which depend upon unwritten military law or usage and not upon the construction of statutes.[25] Today many usages and customs of the service which originated in tradition have changed their form by becoming merged in written regulations for the army. The present Articles of War, 121 in number, and Army Regulations cover to a large extent regulations on subjects of discipline, precedence, command, and court-martial procedure which originated as usage or customs and came to the United States from the British Army.[26]

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22 Givens v. Zerbst, 255 U.S. 11, 18 (1921).

23 United States v. Symonds, 120 U.S. 46, 49 (1887).

24 P. 41, note 1, supra.

25 Smith v. Whitney, 116 U.S. 167, 178 (1886).

26 P. 41, note 1, supra.

Usage and custom, however, still govern in many important particulars under our military law. Thus, in court-martial procedure, many matters not covered by the Articles of War are governed by precedent as is illustrated by the rule that sentences of courts-martial are cumulative.[27] Similarly, the question of what constitutes conduct prejudicial to good order and military discipline under the 96th Article of War is determined by custom and usage. Nowhere in the Articles of War is such conduct defined in terms. An even more striking example is afforded by the wide range of service precedent, custom, and usage made effective by the 95th Article of War which denounces, without defining, conduct unbecoming an officer and a gentleman on the part of any officer.[28]

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27 Kirkman v. McClaughry, 160 F. 436 (1908).

28 Par. 151, M.C.M. (1928).

MILITARY TRIBUNALS.

COURTS-MARTIAL.--The Articles of War provide for the institution of courts-martial (General, Special and Summary). Jurisdiction is thereby conferred upon such tribunals for the trial of offenders against military law and the law of war. A Manual for Courts-Martial (1928) issued pursuant to an executive order of the President[1] contains the Articles of War, their explanation and the procedure governing these trials.

Jurisdiction As To Persons.--Generally the Articles of War apply only to those who can be considered part of the army's personnel. In times of peace, when the army is abroad, outside the territorial jurisdiction of the United States, they apply as well to all camp retainers and other persons accompanying or serving with the army. In time of war this latter class is subject to the Articles whenever with the army in the field, within or without the country.[2] The authority of Congress to make such civilians subject to military law is implied from the broad War Powers set forth in the Constitution. There is no violation of the guarantee of the Fifth Amendment inasmuch as that Amendment itself excepts cases arising in the land and naval forces.[3] It has been held that the meaning of the phrase "persons accompanying or serving with the Army" which is used in Article of War 2 covers cases of those present

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1 See ix, M.C.M., 1928.

2 Article of War 2.

3 Ex parte Falls, 251 F. 415 (1918).

with the military commander's permission.[4] It also has been ruled that war correspondents, members of the Red Cross, Y.M.C.A. workers, civilian members of a crew of a United States Army transport anchored in a foreign harbor, civilian employees of a contractor at a leased base in a British possession, are persons serving with the armies in the field and are subject to trial by courts-martial.[5] Civilian internees and prisoners of war are by virtue of the Hague Convention subject to the Articles of War and to trial by courts-martial.[6]

While courts-martial have jurisdiction to try offenders against the laws of war,[7] under ordinary circumstances such persons (unless they are members of the armed forces) are tried by military commissions or provost courts (see Military Commissions, page 29). In addition, any person charged with aiding the enemy or spying under Articles of War 81 and 82 may be tried by court-martial whether he is otherwise subject to military law or not.

Their Nature.--A court-martial has no common law powers whatever to adjudge the payment of damages or to collect private debts. Its jurisdiction is entirely penal or disciplinary. It has only

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4 Ex parte Gerlach, 247 F. 616 (1917).

5 Bull. JAG, Dec. 1942, p. 357.

6 Bull. JAG, Feb. 1943, p. 51.

7 Article of War 12.

such powers as are vested in it by express statute, or may be derived from military usage.

Strictly speaking, a court-martial is not a court at all in the full sense of the term but is simply an instrumentality of the executive power of the President for the enforcement of discipline in the armed forces. In this regard, a court-martial merely acts in the nature of an advisory board for the President or military commander who under the Articles of War is empowered to convene it and refer cases to it. Such officer is called the convening or reviewing authority and generally is the commanding officer of the accused whose case he has referred for trial. Normally, after reference, he retains the discretion to quash the charges, or after the court-martial has reached a finding and sentence (except in the case of an acquittal), disapprove either the finding or sentence or both, in whole or in part. If he doesn't disapprove, he may commute, remit or suspend a sentence. In other words, the reviewing authority is not bound (except in the case of an acquittal) by the decision of the court-martial he appoints. He is authorized to take the type of action which he believes will promote discipline, and therefore, military efficiency in his command. Thus the general rule is stated that the finding and sentence of a court-martial is never final until approved by the proper reviewing or confirming authority except in the case of an acquittal.

Statutory Basis.--Courts-martial, although sanctioned by the Constitution, are not a part of the judiciary of the United States. They are not the "inferior courts" which Congress "may from time to time ordain and establish" under the authority of Article III of the Constitution.

The Supreme Court, in discussing this matter, said:

> "These provisions show that Congress had the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d Article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other."[8]

An analogy may be drawn between our courts-martial established under the power of Congress to make rules and regulations for the government of the land and naval forces and the so-called legislative courts. Some of the more important of the latter class are: The Court of Claims established under the power to pay the debts of the United States;[9] the Court of Customs and Patent Appeals created under the power to lay and collect taxes on imports and the power to regulate patents;[10] Territorial Courts established under the power of Congress to govern the Territories.[11] Similar to

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8 Dynes v. Hoover, 61 U.S. 65, 79 (1857). See digest and abstract, p. 148, infra.

9 Williams v. United States, 289 U.S. 553 (1933).

10 Ex parte Bakelite Corp., 279 U.S. 438 (1929).

11 American Ins. Co. v. Canter, 26 U.S. 388, 415 (1828).

these are the various consular courts established under the treaty-making power and the numerous administrative courts (such as The Tax Court of the United States) created to aid the executive branch of the Federal Government in executing the laws.

Not all the judicial safeguards found in the Bill of Rights such as trial by jury, double jeopardy, the necessity that a person on trial for a crime be confronted with the witnesses against him, the requirement for a charge by indictment or presentment, etc., are rights given by the Constitution to persons triable by these legislative courts or military tribunals. Only individuals on trials before Federal courts established under the judiciary power, the so-called constitutional courts, must be accorded such rights. Even though not required to do so, however, Congress has extended to defendants triable in the legislative courts and military tribunals many of the judicial safeguards that the Constitution expressly required for defendants triable in the constitutional courts. Rights thus extended to defendants in legislative courts and military tribunals by statute must be observed and failure so to do is considered to be a denial of due process of law guaranteed by the Fifth Amendment to the Constitution.

Congress has not enacted all the constitutional safeguards for legislative courts, and some that have been enacted are different from those required by due process in constitutional courts. The safeguards enacted vary depending on the type of court and some of

those required in a military tribunal are not found in any other court.

On entering the military service a person changes his legal status. In effect, he becomes subject to a different legal system. The courts are different, the method of trial is different, the law which governs him is different. He loses certain constitutional rights but gains others. For instance, if a person who is not in the military forces commits a Federal crime, the Fifth Amendment gives the constitutional right to a "speedy and public trial by an impartial jury" in a Federal civil (constitutional) court. If such an offender be a member of the armed forces, however, and the proper governmental agency wishes to deny him such a trial and instead try him secretly by a court-martial, he could not successfully demand the jury trial guaranteed by the Fifth Amendment. In the latter case Congress prescribes the safeguards and procedure of a fair trial before a military tribunal. Such a procedure constitutes due process of law as to that military defendant although it may differ from the due process which must be afforded to one in a civilian status.

Effect of Court-Martial Decisions.--Even though a court-martial in a certain phase is merely an instrumentality of the executive power and in another aspect is analogous to a legislative court, it is a lawful tribunal, with authority to determine any case over which it has jurisdiction and is the only and highest court by which

a military offense may be punished. Its proceedings are open to review by only one civil tribunal, the Federal civil court, and then only for the purpose of determining whether the military court was properly appointed and constituted, whether it had jurisdiction of the person and subject matter, and whether, though having such jurisdiction, it had exceeded its power in the sentence pronounced.[12] So far as it is a court at all, it is bound, like any court, by the fundamental principles of law and established rules of evidence. As a court of justice it is required by the terms of its statutory oath to adjudicate in accordance with the evidence, between the United States and an accused "without partiality, favor or affection", and administer justice according -- not merely to the laws and customs of the service -- but according to its "conscience", i.e., its sense of substantial right and justice unaffected by technicalities.[13]

Double Jeopardy.--One of the well-known judicial safeguards expressly guaranteed by the Constitution to an accused is that he shall not twice be put in jeopardy for the same offense. Prior to Grafton v. United States[14] it was commonly believed that military jurisdiction of military tribunals being separate and apart from

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12 Carter v. McClaughry, 183 U.S. 365 (1902).

13 Article of War 19.

14 206 U.S. 333 (1907). See digest and abstract, p. 142, infra. Cf. Adams v. United States, 63 S. Ct. 1122 (1943) where trial by court-martial, after trial by a Federal court which had no jurisdiction, did not constitute double jeopardy.

the criminal jurisdiction of Federal courts, trial of an accused person by one tribunal would not bar trial by the other, and that the problem of double jeopardy was not involved. In the Grafton case where accused was tried by a Federal court of the Philippine Islands after an acquittal by court-martial, the court said:

> "If, therefore, a person be tried for an offense in a tribunal deriving its jurisdiction and authority from the United States and is acquitted or convicted, he cannot again be tried for the same offense in another tribunal deriving its jurisdiction and authority from the United States."

The court rested its decision on the constitutional provision against double jeopardy rather than on the provision of the Articles of War[15] that "No person shall, without his consent, be tried a second time for the same offense..." This latter provision is regarded only as a prohibition against two trials by military tribunals for the same offense.

Double Amenability.--When the same act constitutes two offenses, i.e., one offense against the sovereignty of a State and another against that of the Federal Government, prosecution and punishment by the Federal Government after prosecution and punishment by the State, or vice versa, does not amount to double jeopardy. Thus, if one feloniously kills a United States Marshal, an acquittal in the State court of a charge of murder under the State law cannot be pleaded in bar of trial in a Federal court for a charge of murder

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15 Article of War 40.

under the Federal law, even though the same evidence supports both charges. In such a case the laws of two sovereigns have been violated by a single act and the offender is therefore amenable to trial by the tribunals of both. Similarly, if a soldier by one criminal act offends against the Articles of War and also against the criminal laws of a State, he is amenable to trial by a Federal tribunal (a court-martial) and by a State tribunal.[16] When one does thus become amenable to trial by two jurisdictions, as a matter of fairness and because of military policy, ordinarily he is not tried twice.

It sometimes happens that a person subject to military law becomes amenable to trial in both a Federal civil court and before a United States military tribunal for two separate offenses arising out of different circumstances connected with the same act. In such case, there is no double jeopardy and the Grafton case is not in point. Even though the two different tribunals derive their jurisdiction from the same sovereign, they may both try the offender. For instance, if a soldier while in uniform becomes intoxicated and engages in an affray or brawl in the City of Washington, D.C., he may be tried in the Federal court for assault and battery. Since by the same act he has committed a different offense under the Articles of War (being drunk in uniform to the prejudice of good order and military discipline in violation of AW 96), he would also

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16 Article of War 74.

be amenable to trial by court-martial. Note, however, that he could not be tried by court-martial for committing an assault and battery after trial for the same offense by the Federal court. The test laid down by the Supreme Court in Gavieres v. United States[17] is whether each statute violated requires proof of an element not required by the other.

Federal Immunity.--Where an agent, civil or military, of the Federal Government is held by a State to answer for an act done pursuant to the actual or apparent authority of his office, he is immune to State prosecution. It is an established doctrine that one cannot be tried for an offense committed against a State in performance of a Federal duty.

The government of the United States and the government of a State are distinct and independent of each other within their respective spheres of action, although existing and exercising their powers within the same territorial limits.[18] Whenever any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the Federal Government have supremacy[19] until the conflict is resolved by the tribunals of the United States.[20]

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17 220 U.S. 338 (1911).

18 Ableman v. Booth, 62 U.S. 506 (1858).

19 The Constitution and laws of the United States made in pursuance thereof declared to be the supreme law of the land. Const., art. VI, cl. 2.

20 Cooley's Constitutional Limitations (8th ed.), Vol. 1, p. 27, 31.

To illustrate, if a person is held by an officer of the United States under the claim of authority of the United States, a State court cannot entertain a writ of habeas corpus to determine the validity of the claim of the United States. Only the United States itself can determine the validity of its claim.[21]

Further evidence of the supremacy of the Federal law is found in an act[22] which authorizes Federal judges to issue a writ of habeas corpus for any prisoner confined by a State for any act done or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof.

In the case of In re Neagle,[23] a deputy marshal appointed by the President to protect a Federal judge whose life was threatened, was held by a State court for alleged murder committed while acting within the line of duty assigned him. The Supreme Court held that because the defendant was performing a Federal duty, he was entitled to be released from custody of the State on habeas corpus issued by a Federal judge.

A similar result was reached in a case where a soldier placed on guard over prisoners fired at one attempting to escape. The bullet missed the prisoner and killed a woman who could not have been

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21 Tarble's Case, 80 U.S. 397, 412 (1871).

22 4 Stat. 634.

23 135 U.S. 1 (1890).

seen by the guard. It was held by the Federal District Court[24] that the guard was acting in the performance of his duty as a soldier and was not subject to arrest and trial for manslaughter by the State.

The Articles of War[25] give an express right to any person in the military service to remove any State civil or criminal prosecution to a Federal court if the prosecution is on account of an act done under color of office or law or war.

Power of Civil Authorities over Soldiers.--Except for the immunity arising for acts done by virtue of his office, in time of peace the soldier is answerable to civil authorities for any offense which he commits. If the civil authorities are the first to obtain jurisdiction over him, they may proceed to try him. If the military authorities are the first to obtain jurisdiction then his commanding officer is enjoined under threat of dismissal to use his utmost endeavor to deliver over to the civil authorities the soldier accused of the crime or offense unless he is already being held for trial or undergoing sentence.[26]

In war, as in peace, civil courts have jurisdiction to punish military personnel for offenses against civil laws.

If the act performed is an offense against both the military and civil law then if the army is the first to obtain jurisdiction

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24 United States v. Lipsett, 156 F. 65 (1907).

25 Article of War 117.

26 Article of War 74.

over the offender it may bring him to trial.

The injunction of the 74th Article of War requiring a commanding officer to deliver a soldier to civil authorities is not applicable in time of war. Civil authorities cannot effectively require the delivery of a soldier to them in time of war and it is the policy of the War Department to decline to turn over to such authorities a soldier charged with a civil offense unless the offense is "a most serious one, such as a felony recognized as an offense which would serve to disqualify the offender for military service and association with upright and honorable men", and unless "the commanding officer believes that the available evidence is sufficient to establish a prima facie case".[27]

There is nothing inherent in war that deprives the civil courts of jurisdiction over military personnel, but expediency and necessity dictate that in time of war the military forces shall have the right to withhold a soldier from civil authorities. The military forces have, upon a proper showing, been given the further right to demand and obtain custody of a soldier already held by the civil authorities for a civil offense.[28]

In Ex parte King[29] the court had before it a writ of habeas corpus issued upon the petition of the father of a soldier who was in custody of a State on a charge of murder. The soldier's commanding

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27 Par. 5, AR 600-355, 17 July 1942.

28 In re Wegener, 41 N.Y.S. (2nd) 413 (1943); Ex parte King, 246 F. 868 (1917).

29 246 F. 868 (1917).

officer filed an intervening petition demanding his restoration to military custody. The concurrent jurisdiction of civil and military courts was admitted. The question was whether the military court was entitled to preferential jurisdiction. The decision was predicated on the Articles of War and emphasis placed on the difference in application of these articles in time of peace and war. The court said at page 872:

> "* * * it is an unescapable implication from the exception in Article 59 of time of war * * * not only that the military authorities have the prior right to try him for the offense of which he is accused, but that they have the right to withhold him from the civil authorities and keep him in the Army under all circumstances during the pendency of the war. It is clear, therefore, that under the Articles of War as contained in section 1342, U.S. Rev. Stat. the civil authorities in time of war have no right to withhold a soldier accused of a crime from the military authorities or to demand him from them in order to try him for an offense against the criminal laws of the land."

The court then noted that Article of War 74 had superseded Article of War 59 and although there was a change in verbiage, the statutes were substantially the same. The present day State courts recognize Ex parte King as setting forth the governing law.[30]

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30 Civil law enforcement authorities are required during wartime to release to military authorities, soldier held on charge of felonious assault committed on civilian, when demand for such release is made by such military authorities. In re Wegener, 41 N.Y.S. (2nd) 413 (1943). But see United States v. Matthews, 49 F. Supp. 203 (1943), where writ of habeas corpus was sought by a military commander to gain custody of a soldier held by the State of Alabama charged with rape. In denying the writ the court said, "No facts are averred in the petition that if proven would show any material interference with or impairment of the military service of the country by the State, who now has custody of the accused soldier, bringing the soldier to trial in the State Courts."

The Judge Advocate General has ruled in numerous opinions[31] that during war military jurisdiction is paramount. A concise statement of the applicable law is found in SPJGA, 1942/5216, 014.13, where it was stated:

> "In time of war, under Article of War 74 (41 Stat. 803; 10 U.S.C. 1546), the military authorities have the paramount right to the custody of a person subject to military jurisdiction (Ex parte King, 246 Fed. 868; JAG 000.51, Jan. 27, 1942, SPJG 680.2, Mar. 16, 1942; SPJGA 014.13, July 30, 1942). However, this right is not exclusive and does not divest the civil courts of the jurisdiction of offenses which might properly be punished by such courts in time of peace. The civil authorities may therefore retain custody of and prosecute persons subject to military jurisdiction in the absence of a demand for custody by the military authorities, and no release or consent by them is necessary (SPJGA 014.13; July 30, 1942; id. 014.13, June 2, 1942)."

MILITARY COMMISSIONS.--A military commission is a criminal war court used as an instrumentality for the more efficient execution of the war powers vested in Congress and the President. It is used primarily for the trial of civilians for offenses against the laws of war.

The occasion for the military commission arises principally from the fact that the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the military forces, certain individuals who accompany them in the field, and others charged with certain specific offenses defined in a written code. Court-martial does not extend to many criminal acts

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31 JAG 014.1, Nov. 1, 1918; Dig. Op. JAG, 1912-40, Sec. 432 (5).

of civilians, peculiar to time of war; and for the trial of these a different tribunal is required.[32]

Historical Background.--One of the first instances of a trial by military tribunal (not a court-martial) for an offense against the laws of war was in the celebrated case of Major John Andre in 1780. The tribunal by which Andre was tried and convicted for conspiring with Benedict Arnold was convened as a "Board" and directed "to report a precise state of the case". The board reported their conclusion that "Major Andre * * * ought to be considered as a spy from the enemy and that agreeably to the law and usage of nations * * * he ought to suffer death".

Again in 1847, General Scott set up as part of the military government of Mexico a "Military Commission" in addition to courts-martial for the trial of serious offenses charged to have been committed by civilians.

It was not until 1863 that Congress, pursuant to its power "to define and punish offenses against the law of nations" recognized "military commissions".

Jurisdiction.--Although military commissions have frequently been referred to in statutes since that time, and although they are mentioned a number of times in our present Articles of War, there has been little attempt to define their jurisdiction or outline their procedure. In only three instances is jurisdiction of

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32 P. 831, Winthrop's "Military Law and Precedents" (2nd ed., 1920 Reprint).

specific offenses directly conferred on military commissions by statute. These are the offenses of dealing in captured or abandoned property, relieving the enemy, and spying, found in Articles of War 80, 81 and 82, respectively. All three of these are war offenses and the last two confer jurisdiction by general court-martial as well, to try any person, whether or not he is a member of our armed forces.

In addition to those cases in which jurisdiction is directly conferred, legislative recognition of the jurisdiction to try all offenses against the law of war is found in Article of War 15, which provides, among other things, that the Articles of War shall not be construed as depriving military commissions of jurisdiction over offenders or offenses that, by the law of war, are triable by such tribunals. Congress, by these enactments, has made provision for the trial of offenders against the law of war, but has left to the discretion of the President, as commander in chief of the army, the authority to convene such tribunals under such orders and regulations as will best serve the exigencies of the military situation.

Although Articles of War 81 and 82 confer on courts-martial and military commissions concurrent jurisdiction over the offenders named therein, persons in the military service consistently have been tried for a violation of these articles by court-martial while those not in the military service have been tried by military commissions.

Provost Courts.--Provost courts are military commissions of limited jurisdiction. They are inferior courts for trial of offenders against the laws of war and violators of the proclamations, ordinances, or orders promulgated by the commanding general of the theater of operations. The court consists of one member, usually an officer in the military service. The procedure used in a summary court insofar as it is applicable is followed in a provost court. In comparison to civil courts the provost courts most closely resemble those of the justices of the peace or police courts. In Hawaii, after December 7, 1941, provost courts were given jurisdiction over military personnel as well as over civilians.[33] This jurisdictional feature was unusual in that only civilians are normally subjected to the jurisdiction of provost courts while military personnel are dealt with by courts-martial.

Milligan Case.--Trials by military tribunals of persons not in the military service outside the theater of operations have been few, and the body of case law with respect to such trials is small. Eliminating those cases growing out of martial law in connection with domestic disturbances, not amounting to war, very few court decisions on the jurisdiction and power of military tribunals remain. Of these, the leading case is Ex parte Milligan[34] decided in 1866. The facts of the Milligan case are simple; Lamdin P.

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33 G.O. 48, Mil. Gov., Territory of Hawaii, 1943 (Appendix II).

34 71 U.S. 2 (1866). See p. 63, infra, for further discussion of this case on the question of the proper circumstances for the use of martial law. See also digest and abstract, p. 152, infra.

Milligan had been a citizen of Indiana for twenty years before he was taken into custody by the military authorities. He had not been a resident of one of the States in secession during the period of the Civil War or a member of the military forces of the Union. He was charged with conspiracy against the United States, affording aid and comfort to rebels against the authority of the United States, inciting insurrection, disloyal practices and violations of the laws of war. He was tried before a military commission, found guilty, and was sentenced to be hanged. The sentence was duly approved and ordered executed.

On these facts, Milligan presented his petition for a writ of habeas corpus to the Federal Circuit Court, wherein he prayed that he either be turned over to the civil authorities or be discharged completely. The case went to the Supreme Court of the United States on a certificate of division of the circuit court judges. The court was unanimous in holding that the writ should be granted and that Milligan should be discharged under the terms of the statute involved.

Although it had long been argued that military commissions derived their jurisdiction from the laws and usages of civilized warfare,[35] the majority of the court in the Milligan case limited the application of this doctrine when they said:

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35 11 Op. Atty. Gen. 297 (1865).

> "It can serve no useful purpose to inquire what those laws and usages /of war/ 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 -- and no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in no wise connected with the military service."

The majority of the court then went on to state that Milligan's petition could be heard by the court because Milligan was not a prisoner of war having never resided in any of the States in rebellion. Summarized, the holding of the majority was as follows: No person who is a citizen of the United States who has not during war resided in enemy territory, who is not in the military service and who may not be considered a prisoner of war, may be tried by a military tribunal or denied the right to a jury trial for any crime or for any offense against the laws of war, in the United States, when the courts are open and functioning in their normal course of business without the aid or support of the military.

The minority, while agreeing that the writ of habeas corpus had not been suspended as to Milligan, went on to say:

> "* * * it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justified 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."[36]

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36 71 U.S. 2, 140 (1866).

Limitations on the Milligan Case.--In United States ex rel. Wessels v. McDonald,[37] a German spy arrested in New York by naval authorities sought a writ of habeas corpus on the ground that "the United States was a field without the 'theater of war'" and "that the courts of the United States were functioning". The court held that spying was a military offense against international law and said at page 763:

> "Military authorities should have power to try spies wherever found; otherwise they may not be subject to trial for that offense. In this great World War through which we have just passed, the field of operations which existed after the United States entered the war, and, especially in regard to naval operations, brought the port of New York within the field of active operations. * * * The term 'theater of war' as used in the Milligan Case, apparently was intended to mean the territory of activity of conflict. With the progress made in obtaining ways and means for devastation and destruction, the territory of the United States was certainly within the field of active operations."

The appeal to the Supreme Court in this case was dismissed pursuant to a stipulation to the effect that court-martial proceedings against Wessels had been dropped.[38]

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37 265 F. 754 (1920).

38 It is interesting to note that two years prior to the decision in United States ex rel. Wessels v. McDonald the Attorney General in a very broad opinion (31 Op. Atty. Gen. 356) stated that one Pablo Waberski, who was apprehended upon United States territory not under martial law, but who had not entered any camp, fortification, or other military premises of the United States and who had not come through the fighting lines or field of military operations, could not be tried as a spy by military tribunal. The Attorney General later discovered that he did not have all of the facts regarding Waberski's actions at the time this opinion was given, and he therefore advised the Secretary of War that the principles announced had no application to the actual case.

In a leading law review article published in 1920 it was forecast that:

> "The time may come, and may not be far distant, when this theory [that the zone of operations in truth and in fact comprehends the entire country] and none other will fit the facts, and necessity will compel its adoption. But it is believed that the term ['theater of operations'], reasonably construed in the light of present day conditions, should be confined to that area which comprehends the theater of actual hostilities, the lines of communication, and the reserves and service of supply under actual military control, and that it cannot properly be enlarged to cover the farms, factories and workshops under exclusively civilian control, even though engaged in the production of supplies to be used ultimately by the army."[39]

Quirin Case.--Further questions of military jurisdiction were raised in Ex parte Quirin[40] which was presented to the Supreme Court for decision. Eight saboteurs, one of whom claimed citizenship, entered this country from Germany. They were all apprehended and tried for an offense against the laws of war, aiding the enemy, spying, and conspiracy. On petition to the Supreme Court for a writ of habeas corpus the petition was denied on the ground that hostile and warlike acts, whether committed by citizen or alien, if they are offenses against the laws of war, historically have been triable by military tribunals. The court went on to lay down a test based on the historical construction of the terms to determine whether or

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39 Morgan, Court-Martial Jurisdiction over Nonmilitary Persons under the Articles of War (4 Minn. L. Rev. 79, 116).

40 317 U.S. 1 (1942). See digest and abstract, p. 160, infra.

not the accused was a belligerent and whether the acts which he performed fell within the category of belligerent acts.[41]

In sustaining the military jurisdiction the court reasoned that Congress, acting within its constitutional powers, had provided for the trial of offenses against the laws of war by military commission; that the President by his proclamation had invoked that law; that the acts alleged had constituted an offense against the laws of war, and finally, that such an offense was constitutionally triable by a military commission without a jury notwithstanding the alleged citizenship of one of the petitioners.

The doctrine of the Milligan case has not been weakened by Ex parte Quirin, if we understand that the Milligan case represented the principle that suspension of part of the Constitution can occur in war time as in peace only in accordance with the express limitations of the Constitution.

The Quirin case deals with belligerency and the Milligan case with nonbelligerency. The Supreme Court disposed of the Milligan case by remarking:

> "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 nonbelligerent, 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."[42]

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41 41 Mich. Law Rev. 481, 494.

42 Ex parte Quirin, 317 U.S. 1, 45 (1942). See digest and abstract, p. 160, infra.

From this line of cases, culminating in the Quirin case, we derive the doctrine that a military commission has jurisdiction to try any belligerent, whether a citizen of the United States or not, for an offense which was considered historically to be a violation of the laws of war. Of course, as we shall see, if a military commission operates under the authority of a military government or under the authority of martial rule it may try any person for an offense against the laws of war or for a crime against the laws of the nation, committed in the territory under such military government or martial rule.

Procedure.--Military commissions are included within Articles of War 15, 23, 24, 25, 26, 27, 32, 38, 46, 80, 81, 82 and 115, but in general these commissions are not governed by statute as to jurisdiction, composition or procedure. In the absence of any statute or regulation governing the proceedings of a military commission, such a commission will establish its own rules which normally will conform to the rules governing courts-martial.[43] A recent example of the latitude permitted in procedural matters is found in the order[44] of the President creating the military commission for the trial of the saboteurs, in which it was stated:

> "The Commission shall have power to and shall, as occasion requires, make such rules for the conduct of the proceeding, consistent with the powers of military

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43 P. 841, note 32, supra.

44 F.R. Doc. 42-6323, 7 Fed. Reg. 5103.

commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it. Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man. The concurrence of at least two-thirds of the members of the Commission present shall be necessary for a conviction or sentence. The record of the trial, including any judgment or sentence, shall be transmitted directly to me for my action thereon."

FEDERAL MARTIAL LAW

MARTIAL RULE.--There is no written or unwritten code of martial law. It is a term which often has been applied with various and conflicting meanings to the exercise by the military forces of control in whole or in part, over the civil population where disorder, riot, insurrection, invasion or other public calamity creates a temporary necessity for such control. Some authorities distinguish between absolute and qualified martial law. When this distinction is made, the term absolute martial law is applied to a situation where necessity requires the replacing of every civil instrumentality by a corresponding military agency;[1] the term qualified martial law is used to describe a situation where the necessity requires the military only to supplement the civil authorities.

A more accurate and descriptive term for so-called absolute martial law is martial rule.[2] In Ex parte Milligan[3] David Dudley Field, as counsel for Milligan, said in argument, discussing absolute control by the military forces:

> "* * * Strictly there is no such thing as martial law; it is martial rule.* * * Let us call the thing by its right name; it is not martial law, but martial rule."

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1 Wiener, A Practical Manual of Martial Law (1940), par. 16.

2 But compare: Charles Fairman (now Lt. Col., JAGD), Martial Law and the Suppression of Insurrection, 23 Ill. L. Rev. 766, 775, "Martial rule may be said to exist in a domestic community when the military rises superior to the civil power in the exercise of some or all of the functions of government". (underscoring supplied)

3 71 U.S. 2, 35 (1866). See digest and abstract, p. 152, infra.

The War Department Basic Field Manual on this subject in its definition states that martial law in its true sense "is more accurately termed 'martial rule' or 'government by martial law'" where temporary government of the civil population through the military forces is required by reason of necessity.[4]

Generally, hereafter in this text the term martial rule will be used to mean absolute or true martial law, the complete substitution of military control for civil control.

Whether in peace or war, martial rule can exist only in domestic territory as distinguished from occupied territory of an enemy. In the latter case the control exercised by occupying military forces is called military government.[5]

In a particular locality martial rule properly may exist only when and where the machinery of the civil government has broken down and the courts are no longer properly and without obstruction exercising their jurisdiction. In such a situation a substitute for the deposed civil authority is necessary and, inasmuch as it is the only authority remaining available to the government, the military may lawfully govern until the civil government is restored to the proper exercise of its functions.

During the Civil War there were numerous occasions on which the military forces exercised complete control. Many writers speak

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4 Military Law, Domestic Disturbances, (1941) FM 27-15, par. 11.

5 Note also that military government may be exercised in domestic territory recovered from enemy occupation, or from rebels treated as belligerents. See Military Government, p. 67, infra.

of these instances as examples of the exercise of martial law. Yet, inasmuch as the control was exercised in belligerent territory, it was, strictly speaking, military government and not martial law or martial rule. It is not likely that occasions will arise in the future where Federal martial rule will be necessary in this country. It is true that proclaimed "martial law" has existed in Hawaii since the Japanese attack on Pearl Harbor, December 7, 1941. The threatened invasion following the attack gave rise to the necessity which by the specific provision of the Organic Act of Hawaii[6] required the taking over of complete control by the military authorities. Examples of the proclamations and orders issued by the military authorities to carry out this martial rule are set forth in Appendix II, page 103 of this text.[7]

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6 Sec. 67, Organic Act of the Territory of Hawaii.

7 By subsequent proclamation of the Governor of Hawaii, the functions of civil courts were resumed. Thereafter a sharp conflict arose between the Federal court and the military forces in Hawaii on the question of whether two alien internees were entitled to the privilege of a writ of habeas corpus issued by the Federal court. The military commander contended that restoration of the functions of the Federal court did not restore the power to issue writs of habeas corpus as to persons held by order of military authority. The Federal court, on the other hand, held the view that restoration of the functions of civil courts, being unrestricted, included the restoration of the power to issue writs of habeas corpus. The cases were subsequently dismissed without final decision being reached, upon a showing that the internees in question had been released and sent to the continental United States.

Military Aid to Civil Authorities.--Although the exercise of martial rule is unusual, domestic disturbances frequently require that Federal troops aid the civil authorities in maintaining law and order. The extent to which the military forces are used depends upon the necessity of the situation. The use of troops merely to supplement the civil authorities is known as qualified martial law, qualified martial rule, or "military aid to civil authority".[8] Therefore, the distinguishing feature between military aid and martial rule is that in the case of military aid to the civil authorities the military is not in complete control, whereas in the case of martial rule the military force for the time being acts as the government. Notwithstanding this distinction the primary mission of troops carrying out either military aid or martial rule is fundamentally the same, to restore order and permit the normal functioning of the civil authorities at the earliest possible time.

Federal military forces employed in aid of State or Federal civil authorities derive their authority from the President, and the commanders of such troops take their orders from the President issued through military channels. Federal troops do not take orders from civil officers, but rather after being informed of the missions desired they render assistance according to military orders and directives. It is important to note that if Federal troops are

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8 Par. 15, note 4, supra.

employed to suppress domestic violence within a State, and Federal laws and property are not being endangered by the rioters, an application by the State legislature, or, when the legislature cannot be convened, by the governor, is an essential prerequisite to such use. (For complete discussion of statutory authorization for use of Federal troops see page 51.)

The use of troops in aid of the civil authorities goes back to our early history. Even prior to George Washington's inauguration, Shays' Rebellion, involving war debts, the military bonus, and demands for fiat money, was countered by armed action, although in that instance State troops were used. Massachusetts, however, called upon Congress for help. Later in 1794, the Whiskey insurrection, in western Pennsylvania, aroused by defiance against the tax on distilled liquors, resulted in the intervention of Federal troops.

In 1866 when the "Fenian Brotherhood" made trouble along the Canadian border, Federal troops intervened to put down the disorders.

An interesting incident was that of 1877 when Congress failed to pass a military appropriation bill and Federal troops had to go unpaid and at the same time suppress disorders brought about by railway employees who resented the action of the railways in cutting their salaries 10 percent.

Troops also were called in Utah in 1885 when the anti-polygamy laws resulted in trouble among the Mormons. Once General McCook had to supply a guard to insure safe transportation of the President of the Mormon Church to the United States District Court.

In 1892 troops were called to restore order when the silver miners in the Coeur d'Alene Mountains of Idaho blew up mine buildings.

The Pullman strikes in 1894 resulted in interference with the United States mails and so brought on the use of troops.

In May, 1932, Federal troops evicted the "Bonus Marchers" from their camps in Washington after the situation had gone beyond the control of local authorities.

A most recent incident (June, 1943) was the employment of military police and troops of the Second Infantry Division in Detroit, Michigan, to quell racial rioting.

Concerning its work in civil disturbances, Col. Oliver L. Spaulding, USA, in his book "The United States Army in Peace and War", says:

> "Such service is never sought by the Army. It is a regrettable necessity, a duty devolving upon the Army as one of the instrumentalities available to the Government in performing its Constitutional function 'to insure domestic tranquility'."

A more exhaustive historical narrative of Federal military aid may be found in an official publication, "Federal Aid in Domestic Disturbances".[9]

Federal Troops Used for Humanitarian Purposes.--In addition to the use of military forces in domestic disturbances by way of

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9 Sen. Doc. 263, 67th Congress, 2nd Sess.

martial rule and military aid, they may be used in a third manner commonly described as humanitarian aid.[10] This use of the military is sanctioned as being inherently rightful although it is not justified under any form of martial law or military aid. Such use of the military forces occurs in emergencies resulting from floods, fires, earthquakes, or other natural catastrophes where overruling demands of humanity compel immediate action to prevent starvation and extreme suffering. It is considered that the ends obtained justify the means and for that reason Federal troops and military supplies may be used.

If the rendering of such assistance in the nature of first aid is made so difficult by acts of lawlessness in the community as to necessitate the exercise by the military of greater authority, such authority may be employed then, in addition, as a matter of self-defense. Thus military aid or even martial rule may be used where the civil authorities are helpless. As an example, in connection with the San Francisco earthquake and fire of 1906, General Funston initially employed his troops to render first aid in the stricken city. Resistance to authority, coupled with looting and rioting developed, causing a partial breakdown of civil control. This in turn necessitated that the military forces under General Funston's command be used as a regulating force in a manner equivalent to military aid.

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10 See subpar. 1b, AR 500-60, 1 Dec. 1939.

While the rendering of humanitarian first aid by military forces is without statutory sanction, nevertheless commanding officers who have taken prompt and vigorous action to relieve suffering in such emergency situations have been supported by their superiors and public opinion. When other catastrophes arise in the future it is reasonable to anticipate that similar action on the part of the military will be likewise supported.[11]

Military Control Incidental to Military Operations.--The primary use of Federal troops is in military operations and, obviously, in carrying out those operations, control by the forces over the civilian populace may at times be necessary. The exigency of the occasion, and the helplessness of the civil authorities will determine the type and extent of the control to be exercised. In some situations it may be warranted in peace time as well as in time of war, and in the zone of the interior as well as in the theater of operations.[12]

Such control in a theater of operations is a responsibility of the military theater commander concerned, who is governed by the provisions of Army Field Service Regulations, and other War Department regulations and instructions. The theater of operations may be either in occupied territory (calling for military government) or

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11 AR 170-10, 24 Dec. 1942.

12 See W.D. Mobilization Regs. No. 1-11, dated 1 April 1940; see also AR 500-50, 5 April 1937, and AR 500-60, 1 December 1939.

in domestic territory (requiring martial rule, military aid, or merely assistance by the military in the nature of first aid).

In the zone of interior commanding generals of Service Commands and frontier commanders may be called upon to exercise control of civilians, and in some instances to evacuate civilians from areas under their command. Such a situation would arise, for instance, if active operations should extend into the zone of the interior and hostile aerial bombing or naval artillery should render such areas untenable. During the battle of France, in May and June of 1940, the failure to control refugees and the civilian population was a contributing factor to the military defeat which followed. Any military operation is, by its very nature, bound to impose restrictions on some civilians.

Restrictions on Citizens.--After December 7, 1941, the President by Executive Order No. 9066 authorized military commanders of designated areas to prescribe such regulations and restrictions as might be necessary.[13] Pursuant to this authorization, the Commanding General of the Western Defense Command imposed[14] restriction requirements, curfews, and civilian exclusion orders on all aliens and citizens of Japanese ancestry. Congress by the Act of

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13 7 Fed. Reg. 1407.

14 Public Proclamation No. 1, 7 Fed. Reg. 2320; Public Proclamation No. 3, 7 Fed. Reg. 2543; Civilian Exclusion Order No. 57, 7 Fed. Reg. 3825.

March 21, 1942,[15] made a violation of any restrictions imposed by a military commander a misdemeanor.

An American citizen of Japanese ancestry convicted of violating these restrictions challenged the constitutionality of these acts[16] on two grounds: first, that Congress could not delegate its legislative power to a military commander and, second, that the Fifth Amendment prohibits the discrimination made between citizens of Japanese descent and those of other ancestry.

Upon certification to the Supreme Court, it was held[17] that Congress had not delegated its legislative power by the Act of March 21, 1942, and further that:

> "The war power of the national government is 'the power to wage war successfully'. * * * Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger in the selection of the means for resisting it. * * * Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs."

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15 56 Stat. 173, 18 U.S.C. 97a.

16 Ex parte Kanai 46 F. Supp. 286 (1942); United States v. Hirabayashi, id. at 657; United States v. Yasui, 48 F. Supp. 40 (1942)

17 Hirabayashi v. United States, 87 L. ed. 1337 (1943). See also Yasui v. United States, id. at 1354.

The Court pointed out that the Fifth Amendment contains no equal protection clause and that it restrains only such discriminatory legislation by Congress as amounts to a denial of due process. The Court then said that while legislative discrimination based on race alone had often been held to be a denial of equal protection still:

> "* * * The adoption by Government, in the crisis of war and of threatened invasion, of measures of the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant."

LEGAL AUTHORITY FOR USE OF FEDERAL TROOPS.--Many abuses under the guise of martial law were inflicted on the colonists by the King's royal governors and other representatives in America prior to the formation of the Union.[18] Accordingly, at the very birth of the United States, opinion was against vesting any great amount of power where it might give rise to similar abuses. There are no express provisions in the Federal Constitution authorizing any form of martial law. Nevertheless, the legal power of Congress to legislate therefor, and the legal power and right of the President and of military commanders acting under his authority, to exercise either martial rule or military aid in an appropriate case are well established and judicially recognized as being derived by necessary

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18 Luther v. Borden, 48 U.S. 1, 65 (1849).

implication from various provisions of the Federal Constitution.[19]

Constitution.--By the Constitution, the United States guarantees to each State a "Republican form of government" and to "protect each of them against invasion" and under certain conditions against "domestic violence".[20] It further provides that the Federal Government will "suppress insurrections"[21] and that the President will protect the Constitution and execute the laws.[22] The constitutional provisions clearly envision the use of Federal troops for such purposes and this use is martial rule or military aid. However, the exercise of Federal martial rule or military aid must not interfere with States' rights guaranteed by the Constitution unless adequate necessity justifies such interference.[23]

Statutory Authority.--Congress has enacted enabling acts whereby Federal troops may be used (1) to suppress insurrection against a State when ordered by the President on application by the legislature of such State or of the executive when the legislature cannot be convened[24]; (2) to enforce the faithful execution of the laws of the United States[25]; (3) to prevent insurrection, domestic violence,

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19 Par. 12, note 4, supra.

20 Const., art. IV, sec. 4.

21 Const., art. I, sec. 8, cl. 15.

22 Const., art. II, sec. 1, cl. 8, and sec. 3.

23 Const., amend. I, and art. IV, sec. 4.

24 50 U.S.C. 201.

25 50 U.S.C. 202.

unlawful combinations or conspiracies which deprive any people of a State of the equal protection of the laws.[26]

General rules of procedure governing the use of the military in aid of the civil authorities and a comprehensive compilation of pertinent statutes, together with appropriate explanation of such laws, may be found in War Department documents.[27]

Proclamations.--Where the military forces are employed in accordance with the statutory authority above set forth, it is prescribed that the President shall issue a proclamation commanding "the insurgents to disperse and retire peaceably to their respective abodes".[28] Failure to issue such a proclamation, however, does not render illegal the exercise of martial rule, military aid, or the use of troops by the Federal Government as a matter of self-defense to protect its own property and agencies.[29]

A proclamation does not create the condition, but rather announces an already existing condition brought about by the breakdown of civil authority. However, a proclamation is generally

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26 50 U.S.C. 203.

27 FM 27-15 (1941) Military Law, - Domestic Disturbances; AR 500-50, 5 Apr. 1937; AR 500-60, 1 Dec. 1939; Federal Aid in Domestic Disturbances, Sen. Doc. 263, 67th Cong., 2nd Sess; W.D. Mobilization Reg. 1-11, 1 Apr. 1940.

28 50 U.S.C. 204.

29 P. 819, 820, Winthrop's Military Law & Precedents (2nd Ed., 1920 Reprint).

desirable as the most practical means of informing all concerned of the exercise of a state of military control, the boundaries of the area affected, and of the special regulations and restrictions that will be enforced by the troops. With present means of nearly instantaneous communication it is almost inconceivable that a situation could arise which would justify a local commander in proclaiming martial rule without the President's express direction.[30]

Posse Comitatus Act.--The Army is not a national police force and its employment to aid the civil power must be in strict accordance with the Constitution of the United States or some specific act of Congress. The more general situations in which such authority may be exercised have been discussed. A bar to other improper uses is specifically provided for in the "Posse Comitatus Act"[31] which reads in part as follows:

> "It shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said forces may be expressly authorized by the Constitution or by Act of Congress; and any person willfully violating the provisions of this section shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding $10,000 or imprisonment not exceeding two years or by both such fine and imprisonment."

The Latin term posse comitatus (power of the country) means, in fact, a summons to every male in the country between certain ages to

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30 Par. 13, note 4, supra.

31 Act of June 18, 1878; 20 Stat. 152; 10 U.S.C. 15. See also note 35, infra.

be ready and equipped, and at the command of the sheriff or marshal to assist in maintaining peace and pursuing felons. Accordingly, the law just quoted restricts the use of military forces in such manner.

Illustrating the practical application of this Posse Comitatus Act is the case of the commanding officer of a military post who was requested by a commonwealth attorney to assist in the capture of a suspicious character reported to have hidden himself in a section of woods near the military reservation. The commanding officer replied that he was forbidden by law to use troops to assist the civil authorities except under proper authority. As an act of comity, however, he agreed to send his troops through the woods in connection with a military training problem, with the explicit understanding that civilian agents would be present to make the arrest of any suspected person whose presence might be revealed by the troops. Upon consideration by The Judge Advocate General of the Army an opinion was rendered which held that since this employment of troops in the training problem was secondary to the principal purpose desired to be accomplished, and was merely doing something indirectly which the statute prohibited doing directly, it was not a lawful use of the military.[32]

In contrast to the above, military aid was properly used in the Angel Island disturbance in 1928. This island of 640 acres is

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32 M.S. Op. JAG, No. 44, June 4, 1930.

located in San Francisco Bay, about seven miles north of San Francisco and is owned exclusively by the United States. The entire island was used for Federal purposes. One side was used for the military post of Fort McDowell. The remaining area was used for an immigration station, a quarantine station and other establishments, all housing property of the United States Government. On Sunday, March 18, 1928, about one hundred and fifty Chinese, who were being detained at the immigration station by the civil immigration authorities, became infuriated, assaulted a matron, refused to obey their guards and assumed an attitude so threatening and mutinous that the immigration authorities appealed to the commanding officer of Fort McDowell for military assistance. The latter dispatched to the immigration station a lieutenant with a small detachment of troops. The mere appearance of the military force seems to have been sufficient to have restored order. However, at the request of the civil officials, and as a precaution against immediate recurrence of trouble, the lieutenant took temporary custody of five of the inmates who were pointed out by the guards as ringleaders and conducted them to Fort McDowell, where they were held in detention overnight. The next day they were returned to the custody of the immigration authorities. The question arose as to whether this use of troops was lawful.[33]

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33 Dig. Op. JAG, 1912-30, sec. 13.

The Judge Advocate General of the Army held that the situation constituted an emergency which rendered the action taken by the commanding officer of Fort McDowell and his military subordinates legally proper. It was observed in the opinion that the troubles arose suddenly and unexpectedly; that since the escape of so many Orientals involved great danger to important and valuable property of the United States, and the civil officials at hand were incapable of handling the situation, the action taken was not contrary to the provisions of the Posse Comitatus Act, as the laws recognize the right of the Government to protect itself, its agencies and property against violence.[34]

The removal and overnight confinement (preventive detention) by the military of the five ringleaders was upheld as lawful, as a reasonable precautionary measure contributing directly to the success of the military mission.

Here was not a situation involving the breakdown of a State's civil powers, and therefore, no request to the President from the State of California's legislature for the troops was needed. The insurrection occurred on Federal property and at the time the Federal civil authorities were unable adequately to cope with it.

In addition, though the disturbance did not occur on that part of the island normally under the control of the military, i.e.,

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34 Ibid.

on the military post located on the island, nevertheless, since time was the important factor the military commander acted properly as the representative of the President at the scene in taking the initiative. Had time permitted, the proper procedure would have been for him to have communicated with Washington first for instructions from the President.

It is manifest that different principles govern where law enforcement is needed on a military reservation itself, for in such case the military commander, not civil authority, is responsible for maintaining law and order. (See Military Reservations, p. 75.)

It should be noted that even under the Posse Comitatus Act the Federal Government always has had the power to protect Federal property. By Executive Order[35] filed December 12, 1941, the definition of the term "Federal property" was enlarged to include "National-defense material, National-defense premises, and National-defense utilities".

Legal Liabilities.--A military commander who violates the provisions of the Posse Comitatus Act or otherwise makes unlawful use of Federal troops will be subject to civil and criminal liability. However, military personnel when acting under martial rule or military aid should not hesitate in critical moments because of fear of consequences.

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35 F.R. Doc. 41-9380, 12 Dec. 1941; 6 Fed. Reg. 6420. Pursuant to 50 U.S.C. 105 the President by E.O. 8972 dated 1 December 1941, as modified by E.O. 9074 dated 25 February 1942, authorized the Secretary of War to establish and maintain military guards * * * to protect certain national defense material, premises, and utilities.

No more military power should be exerted than is reasonably required.[36] Nor should disorderly elements be treated as enemies of war, unless the emergency is such as to demand extreme measures.

If a military order or command be legal and proper and a subordinate acts in good faith, does not show ill will or vindictiveness, or exercise undue severity under the circumstances, he will not be held either criminally or civilly responsible for the consequences. Further, even though an order or command later turns out to be illegal, if at the time it was given and obeyed, it was apparently legal to a reasonable person of the military status or grade of the one acting under it, criminal liability will not result and civil liability will be the exception.[37]

At common law it was no defense in a civil suit that an unlawful act was done pursuant to an order of a superior officer.[38]

In Bates v. Clark[39] where an Army officer in reliance on orders seized the plaintiff's liquor on the assumption that they were in Indian country, but the place of seizure was actually not in Indian

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36 Par. 18, note 4, supra.

37 Par. 20, note 4, supra.

38 Dicey, Law of the Constitution (9th Ed.) 303 "/The Soldier/ may, as it has been well said, be liable to be shot by a court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it."

39 95 U.S. 204 (1877).

country, it was held that the orders defendant had received were no defense. Again in Milligan v. Hovey[40] the members of the military commission which had tried Milligan, the general officer appointing the same, and the arresting officers were held liable for compensatory damages for false imprisonment.

Summarizing, it may be said that where necessity for martial rule or military aid exists, military personnel engaged in restoring civil control are held not liable for acts done pursuant to orders[41] unless the acts done are the result of malice, bad faith or a use of palpably excessive force.[42]

Extent of Legal Authority.--Generally speaking, legal authority is exercised by the use of punitive measures and of preventive measures. Punitive measures are used as punishments against those who violate the legal authority, whereas preventive measures are those used to preserve the peace and to prevent offenses against the legal authority. When a man is sentenced to prison for violation of the law punitive measures have been taken against him. By contrast, when public places are protected by force, even to the extent of killing persons who resist, when an offender is removed to a place of restraint and is detained there, not as a punishment but as a

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40 17 F. Cas. 380 (1871).

41 Commonwealth v. Shortall, 206 Pa. St. 165 (1903).

42 Manley v. State, 69 Tex. Cr. 502 (1913).

safety measure, when a disorderly assembly has been broken up by force, preventive measures have been used.[43]

Where civil authorities are in control they may employ either preventive or punitive measures to enforce their authority. When the military governs under martial rule it completely supplants the civil government and consequently has recourse to both preventive and punitive measures also. Under martial rule punishment of civilians (punitive action), may be inflicted through the use of military tribunals.[44] But where the military is used merely as an aid to the civil authorities the municipal law is not replaced by military law, and in such instances, the military authorities are limited to preventive action only.[45]

Ordinarily, a person may not legally be held in detention without process issued out of a court. Without such process a writ of habeas corpus issued by a civil court could require the production of the prisoner together with a return showing the cause of his detention. Unless sufficient cause should then be shown (i.e., that the prisoner was being properly held for trial, or pursuant to the results of a trial, the court would direct a discharge from custody. The Constitution itself prohibits the suspension of the

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43 Moyer v. Peabody, 212 U.S. 78, 84, 85 (1909).

44 P. 836-838, Winthrop's Military Law and Precedents (2nd ed., 1920 Reprint).

45 Par. 7e, AR 500-50, 5 April 1937. "Punishment in such cases belongs to the courts of justice and not to the armed forces."

writ of habeas corpus except in cases of rebellion or invasion where the public safety may require it.[46] The exception made in cases of rebellion or invasion where the public safety may require suspension of the writ seems to mean that the privilege of the writ may be suspended as to persons reasonably suspected of aiding or promoting such rebellion or invasion who thereby endanger the public safety.[47] It does not authorize a general suspension of the privilege of the writ. When the privilege of the writ is suspended it does not authorize the arrest of any one nor affect the duty of the court to issue the writ, but rather, denies to the person arrested the right to gain his liberty by means thereof. The writ usually issues as a matter of course; and on the return made to the writ the court decides whether the party applying is denied the right of proceeding any further with it. But the court can elect to waive the issuing of the writ and consider whether upon the facts presented in the petition the prisoner who is brought before it should be discharged, or the court may not award the writ if satisfied that on his own showing the prisoner was rightfully detained.[48] Nevertheless, when the status of martial rule exists, from the standpoint of practical relief, an ipso facto suspension of the privilege of the writ takes

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46 Const., art. 1, sec. 9, cl. 2.

47 10 Op. Atty. Gen. 74.

48 Ex parte Milligan, 71 U.S. 2, 110-111 (1866), see digest and abstract, p. 152, infra; Ex parte Quirin, 317 U.S. 1, 24 (1942), see digest and abstract, p. 160, infra; p. 204, Fairman, "The Law of Martial Rule."

place. At such time the courts are closed, and it is impossible to administer justice according to civil law.

In the case of Luther v. Borden,[49] the action originated in the United States Circuit Court in Rhode Island. The Federal court took jurisdiction because of diversity of citizenship. The plaintiff, a citizen of Massachusetts sued the defendants, citizens of Rhode Island, for trespass, for entering his house. The defendants were members of an infantry company which was part of the Rhode Island militia. The decision in the case upheld the defendants in their contention that a declaration of martial law made by the State's legislature justified them in carrying out their military orders, which were to arrest the plaintiff, and if necessary, break into and enter his dwelling to do so. In this case, the court stated that although a permanent military government is not republican, when it is intended merely for a crisis "and to meet the peril in which the existing government is placed by the armed resistance to its authority" it is lawful. It further said that the test as to the legality of the use of the armed forces in such instances is whether the armed insurrection is too "powerful to be controlled by the civil authority". Note that this case involved the question of State authority, but it would seem that the right which existed in the State to protect its existence would also exist in the Federal government.

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49 48 U.S. 1 (1849).

The real issue here involved was simply whether or not, under such circumstances, the plaintiff could be arrested legally by the military without judicial process. Therefore, it would seem that this decision, in its relation to martial law, merely recognizes the authority of the military to take preventive measures.

During the Civil War, on March 3, 1863, Congress enacted a law[50] which gave the President authority "to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof." Implementing the enactment of this law a proclamation was issued which placed in a prescribed class (including others) all "aiders or abettors of the enemy," and persons committing any "offense against the military or naval service." The constitutionality of proceedings thereunder was raised in the Supreme Court in Ex parte Milligan.[51] The opinions in the case, both majority and minority, including dicta, have been often referred to in later opinions, pro and con on on questions involving the military. Until this decision was rendered, the constitutional limitations upon suspending the privilege of the writ of habeas corpus had never been considered by the Supreme Court.

In the majority opinion rendered by five of the justices, the views were expressed that Congress did not have the constitutional

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50 12 Stat. 755.

51 71 U.S. 2 (1866). See page 32, supra, for a discussion of this case on the question of the right of a military tribunal to try civilians. See also digest and abstract, p. 152, infra.

authority to suspend or authorize the suspension of the writ of habeas corpus and to provide for military jurisdiction over civilians outside the sphere of active military operations, where the civil courts are open and ready for the transaction of judicial business. Also, 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."

On the other hand, the four remaining justices in the minority opinion, expressed the view that, though it is correct to say the necessity must be actual and present, it is not correct to say that this necessity cannot be present except when the courts are closed and deposed from civil administration. The fact that the civil courts are open should not be controlling since they might be open and undisturbed in the execution of their function and yet wholly incompetent to avert threatened danger or to punish the guilty with adequate promptitude and certainty. (Such views -- the dicta of the minority -- have come to be regarded as correct, and the dicta of the majority as having been influenced by confusing martial law [martial rule] with military government which exists only at a time and in the theater of war, where our civil courts could not function.)[52]

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52 See p. 817 et seq., note 29, supra.

Although Milligan previously had been sentenced to death by a military tribunal the question as to whether military authority could take such punitive action if properly exercising some phase of martial law was not in issue and not ruled upon.

Nothwithstanding confusion as to the scope and legality of martial law resulting from the dicta of this case, as already pointed out in Luther v. Borden, prevention measures under martial rule or military aid (qualified martial rule), may be taken by the military when necessity may require. Furthermore, the determination of the necessity is an act of state which will not be judicially reviewed.[53] This latter rule was substantiated in a later case,[54] in which Holmes, J., speaking for the Supreme Court concerning the legality of preventive detention by military arrest stated:

> "Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power. . . . No doubt there are cases where the expert on the spot may be called upon to justify **his** conduct later in court, notwithstanding the fact **that** he had sole command at the time and acted to the best of his knowledge. That is the position of a captain of a ship. But even in that case great weight is given to his determination and the matter is to be judged on the facts as they appeared then and not merely in the light of the event. . . . 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 executive process for judicial process. . . ." (pp. 84-85)

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53 Luther v. Borden, note 49, supra.

54 Moyer v. Peabody, note 43, supra.

The question whether punitive phases of martial rule may be exercised constitutionally in time of peace, when the courts are functioning, has never been decided directly by the Supreme Court. Nevertheless, it seems well settled that when a domestic disturbance endangering the public is of such magnitude that the civil power cannot control (for which purpose the Federal Government does not maintain a large civil police force), the national safety requires protection by the only power left, the military. Therefore martial rule (and military aid as a qualified form of martial rule) may be regarded as a term comparable to the term self-defense, connoting the lawful right of a government to defend itself, just as the term self-defense connotes the lawful right of an individual to defend himself. This individual right of self-defense is recognized as innate and existing as a natural right without dependence upon grant from any authority. Similarly this governmental right of self-defense is recognized as inhering in every sovereign state without grant, for its protection against all enemies, whether foreign or domestic.[55] Accordingly, temporary control of the civil population by the military may be inaugurated in self-defense when emergency makes it necessary, and all adequate measures to insure success will be proper and legal. This authority of the military to protect the public is equal to the need for protection -- the necessity determines its extent and duration.[56]

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55 See p. 820 et seq., note 29, supra.

56 Id., at pp. 818, 820-821.

MILITARY GOVERNMENT

DEFINITION AND SCOPE.--Military government is the supreme authority exercised by an armed force over the lands, property, and the inhabitants of enemy territory, or allied, or domestic territory recovered from enemy occupation or from rebels tried as belligerents.

The military occupation of such territory suspends the operation of the enemy's civil government therein. It therefore becomes necessary for the occupying power to exercise the functions of civil government in the maintenance of public order. Military government is the organization through which it does so.[1] The military jurisdiction thus acquired is not unlike that acquired by the military authorities when they exercise martial rule at home over domestic territory.

Military governments have two lawful objects -- the one to promote military operations of the occupying army and the other to preserve the safety of society within the area occupied. The latter objective is an obligation imposed by international law.[2] The authority of such government is invoked by military necessity and not by constitutional mandate.

Under military government transfer of sovereignty is not effected, but simply the transfer of power, authority, and duty to exercise some of the rights of the deposed sovereign.

MILITARY TRIBUNALS AND CIVIL COURTS.--As soon as practicable after occupation of enemy or recaptured territory, the military will

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1 FM 27-5, par. 1, Military Government.

2 Id. par. 3.

establish necessary military tribunals and by appropriate methods notify the inhabitants thereof of the offenses for which they may be tried by such tribunals, and of the punishments which such tribunals may impose. This punitive application of the military government's jurisdiction is exercised through military commissions and provost courts, sometimes termed criminal war courts. Ordinarily, they exercise criminal jurisdiction over all acts or omissions made offenses by the laws of the country which are being enforced by the occupying army, over offenses against the laws of war, and over violations of the proclamations, ordinances, regulations, or orders promulgated by the occupying forces.

If the courts of the occupied country are open and functioning satisfactorily, they should be permitted to hear and determine civil suits, other than those brought against members of the occupying forces (of which they have no jurisdiction). If the occupation is likely to be brief, no provision need be made for trial of civil cases even if the courts of the occupied territory are not functioning. If, however, the courts of the occupied territory are not functioning satisfactorily, and the welfare of the people requires, the military authorities in control may confer jurisdiction even in civil cases upon military commissions and provost courts or may establish separate military tribunals for such cases. The military may also issue appropriate rules and regulations to govern these tribunals in the execution of their judgments. The law to be followed in civil cases will conform generally to that of the occupied territory.

AUTHORITY OF MILITARY GOVERNMENT.--In Coleman v. Tennessee,[3] the defendant, a soldier of the United States Army while in hostile occupation of Tennessee during the Civil War was tried by court-martial for murder. He was convicted and sentenced to suffer death but the sentence was not carried into effect because he escaped. After the constitutional relations of the State or Tennessee to the Union were restored, he was indicted by one of the courts of that State for the same murder. To this indictment he pleaded, in bar of trial, his prior conviction before the court-martial. The plea being overruled, the court proceeded to try, convict, and sentence him again to death. This judgment was affirmed by the highest court of the State and then went to the United States Supreme Court for its decision.

The court held that the defendant's plea of his previous conviction as a bar in trial was erroneous. Such a plea admitted concurrent jurisdiction in the Tennessee courts, whereas, they actually had no jurisdiction to try him. At the time he committed the offense Tennessee was enemy country, its courts had no jurisdiction of any military offense, and defendant was not amenable to its laws. Therefore the jurisdiction of the court-martial was exclusive.

The court, however, treated the case as though the defendant had pleaded properly, reversed the State court's judgment and

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3 97 U.S. 509 (1878).

directed his discharge under the indictment. In addition, the court stated that defendant should be delivered up to the military authorities to answer for his court-martial conviction, since it appeared that its judgment had been approved without action yet having been taken thereunder.

It may be interesting to note that Coleman was turned over to the military authorities, and that President Hayes on June 6, 1879, commuted his death sentence to imprisonment for life and designated the State Penitentiary at Albany, New York, to be the place of confinement.

In Dow v. Johnson,[4] the defendant, an officer of the United States Army in command of forces operating within occupied portions of Louisiana during the Civil War, seized for the use of his forces certain supplies belonging to the plaintiff. For this alleged tort the plaintiff sued in a local court which the occupying forces permitted to continue in existence in Louisiana and recovered judgment by default. After the war the plaintiff sued the defendant, on this judgment, in a Federal court sitting in Maine. The case was finally certified to the United States Supreme Court.

Here the court held for the defendant, saying that the plea of nul tiel record was sufficient because the provisional court had no jurisdiction in the premises. When the Northern Army marched into the country which acknowledged the authority of the Confederate

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4 100 U.S. 158 (1879)

Government, that is, into the enemy's country, the officers and soldiers of the invading army were not subject to that country's laws, nor amenable to its tribunals for their acts. They were subject to the Government of the United States, and only by its laws, administered by its authority, could they be called to account.

Respecting the authority of the government in occupied territory, the Supreme Court in its opinion in this case took occasion to delineate the responsibilities, obligations and powers of an occupying army as follows (page 165):

> "There would be something singularly absurd in permitting an officer or soldier of an invading army to be tried by his enemy, whose country it [the army] had invaded. The same reasons for this exemption from criminal prosecution apply to civil proceedings. There would be as much incongruity, and as little likelihood of freedom from the irritations of the war, in civil as in criminal proceedings prosecuted during its continuance. In both instances, from the very nature of war, the tribunals of the enemy must be without jurisdiction to sit in judgment upon the military conduct of the officers and soldiers of the invading army."

JURISDICTION IN FRIENDLY FOREIGN TERRITORY.--This is not strictly a question of military government. All members of the United States Army are subject to the jurisdiction of its courts-martial. Yet, as previously mentioned while the Army is within territorial limits of the United States the civil courts, both Federal and State, have certain concurrent jurisdiction over its members. However, the jurisdiction of military tribunals becomes exclusive when the Army leaves its own territorial limits, as for instance, when the Army marches through a friendly country or is stationed therein. In such

cases, consent of the friendly government for exemption from its civil or criminal jurisdiction is assumed as a matter of course; should it deny this consent and act otherwise, it would give rise to serious consequences.

In The Schooner Exchange v. McFaddon,[5] Chief Justice Marshall said:

> "3d. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.
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> "* * * The grant of a free passage therefor implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his Army may require."

The same principle is followed in the dicta of Dow v. Johnson,[6] and Coleman v. Tennessee.[7]

The exclusive jurisdiction of the United States over its own forces in Australia was admitted by an order in the Australian council.[8] This was not unexpected as the Australians had always demanded a similar right for their troops. The British on the other hand took the view that courts-martial of the armed forces of any visiting nation derive each and all their powers from the Allied

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5 11 U.S. 116, 139-140 (1812).

6 100 U.S. 158, 165 (1879).

7 97 U.S. 509, 515 (1878).

8 Statutory Rule No. 241, 1942.

Forces Act[9] which granted only concurrent jurisdiction as to most offenses and denied jurisdiction as to others and it was only by what they termed in the House of Commons as a "striking innovation"[10] that exclusive jurisdiction to try members of our armed forces was admitted.[11]

The right in this exclusive jurisdiction is based on international law and does not depend on any treaty or exchange of diplomatic notes.[12]

It must be recognized, however, that international law is effective only insofar as it is recognized by the country in which our troops are located, and that jurisdiction is essentially and primarily a question of physical power. The United States is faced with the difficulty of not being able to guarantee that the various States of the union will recognize the exclusive jurisdiction of a visiting foreign force and consequently some nations quartering our troops have denied our right to exclusive jurisdiction until we can grant reciprocal rights to them. Colonel King[13] is of the opinion

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9 3 and 4 Geo. 6, c. 51 (Aug. 22, 1940).

10 Parliamentary Debates, House of Commons, Official Report, Aug. 4, 1942, vol. 382, pp. 902, 910.

11 5 and 6 Geo. 6, c. 31 (Aug. 6, 1942).

12 King, Jurisdiction over Friendly Foreign Armed Forces, 36 Am. Journal of International Law, 539, 566.

13 Ibid.

that a judgment or sentence of any State court contrary to these principles of international law could be set aside in a Federal court.

MILITARY RESERVATIONS

The term "military reservation" is a phrase which has been coined to designate that portion of the public domain which has been withdrawn and appropriated to a military use of the Government.[1] It has been applied to every post, camp or station set apart for a military purpose. In strict legal parlance it is a term unknown to the law and has no special significance.[2]

ACQUISITION.--Upon the formation of the Union, the United States became the owner of large tracts of land. By cession and purchase from foreign countries still greater territory fell under the control and ownership of the Federal Government. In exercise of its power over Territories,[3] the Union governed these lands and established laws for their transfer and acquisition by individuals.

It was from this vast public domain that our new States sprang. At the times of the admission of these States the Federal Government still owned public lands within their several boundaries. Inasmuch as Congress was the source of the power of the States to exercise any jurisdiction, Congress had the undoubted authority to exclude from their jurisdiction such specified areas. When an act of Congress admits a State into the Union and stipulates that certain lands are excepted from the jurisdiction of that State's new

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1 40 C.J. 658, 659.

2 United States v. Tichenor, 12 F. 415, 424 (1882).

3 Const., art. IV, sec. 3, cl. 2.

government, the excepted lands constitute no part of the State, although they are included within its boundaries. The Federal Government in such case continues to exercise exclusive jurisdiction over such lands.[4]

If the United States makes no such exception of its public lands when it admits a new State to the Union, the Federal Government loses its dominion and exclusive jurisdiction thereover and continues to hold them as an ordinary proprietor.[5] Even so, the State cannot "affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal."[6] This latter exception is the only distinguishing feature of the United States as an ordinary proprietor.

Even though a State has been admitted to the Union, the land within its boundaries is subject to the right of the Federal Government to acquire it either with or without the State's consent. Such authority is inherent in its sovereignty so long as it is exercised for an essential function of government.[7]

Under the express terms of the Constitution if the Federal Government purchases land within a State, with the consent of that State's

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4 Harkness v. Hyde, 98 U.S. 476 (1878); Langford v. Monteith, 102 U.S. 145 (1880).

5 14 Op. Atty. Gen. 557 (1875).

6 Surplus Trading Co. v. Cook, 281 U.S. 647, 650 (1930).

7 Kohl v. United States, 91 U.S. 367 (1875).

legislature for the erection of forts, magazines, and arsenals,[8] Congress gains the power to exercise exclusive legislation thereover. The term exclusive legislation as thus used means exclusive jurisdiction.[9] The requisite consent may be given before or at time of purchase. When no consent is so provided the State may cede such jurisdiction later by a separate act of cession.[10]

Although the rule existed for many years that a State could not partially consent to purchase by the United States and thus detract from the exclusive jurisdiction of the Federal Government, the Supreme Court held even at that time that a reservation by a State of the right to serve civil and criminal process in such a territory was not to be construed as a partial consent.[11] As stated in an early case on the issue "it may well be doubted whether congress are, by the terms of the constitution, at liberty to purchase lands for forts, dockyards, etc., with the consent of a State Legislature, where such consent is so qualified that it will not justify 'exclusive legislation' of congress there."[12] Justice Story stated, however, that a reservation of the power to serve civil and criminal

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8 Const., art. I, sec. 8, cl. 17.

9 6 Op. Atty. Gen. 577 (1854).

10 Ft. Leavenworth R.R. Co. v. Lowe, 114 U.S. 525 (1885). See digest and abstract, p. 166, infra.

11 Ibid. See also Surplus Trading Co. v. Cook, 281 U.S. 647 (1930); People v. Hillman et al 246 N.Y. 467, 159 N.E. 400 (1927), rev'g 219 App. Div. 792, 220 N.Y.S. 899 (1927).

12 United States v. Cornell, 25 F. Cas. 646, 649 (1819).

process in any such area was not incompatible with exclusive jurisdiction; it operated "only as a condition" and "as an agreement of the new sovereign to permit its free exercise as quod hoc his own process."[13] The usual reservation of a right to serve civil and criminal process with regard to actions arising within the State but without the United States territory is considered a valid measure to prevent the territory from becoming an asylum for fugitives from justice.

In the case of James v. Dravo Contracting Co.,[14] decided in 1937 the Supreme Court finally held that as the Constitution contains no express stipulation that the consent of the State be without reservations, such a stipulation should not be read into the Constitution. Moreover, in 1940 the Court, citing the Dravo case and Collins v. Yosemite Park Co.,[15] stated: "It is now settled that the jurisdiction acquired from a State by the United States whether by consent to the purchase or by cession may be qualified in accordance with agreements reached by the respective governments."[16]

Reservations inconsistent with exclusive Federal jurisdiction as contemplated by the Constitution, such as a reservation by a

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13 Ibid.

14 302 U.S. 134, 148 (1937). See digest and abstract, p. 170, infra.

15 304 U.S. 518 (1938).

16 Stewart & Co. v. Sadrakula, 309 U.S. 94, 99 (1940).

State of concurrent criminal jurisdiction, while not inoperative as reservations, do not comply with congressional provisions respecting appropriations[17] except in case of special legislation.

Section 355, Revised Statutes, reads in part, as follows:

> "No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, * * * or other public building of any kind whatever, until the written opinion of the Attorney General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land or site may be, to such purchase, has been given."

This statute has been repeatedly interpreted as requiring unqualified consent[18] except that it has been held that there is nothing incompatible with exclusive jurisdiction in the reservation by a State of the right to serve civil and criminal processes on the land.[19]

This interpretation is not affected by the decision in the Dravo case,[20] for even though that case was the first to say that consent under the Constitution could be qualified, still the interpretation of the word "consent" in Section 355 of the Revised Statutes has been fixed by repeated reenactment of the statute,[21] and

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17 31 Op. Atty. Gen. 260 (1918); id. at 265 (1918).

18 31 Op. Atty. Gen. 260 (1918); id. at 265 (1918); id. at 294 (1918); 36 Op. Atty. Gen. 86 (1929).

19 38 Op. Atty. Gen. 341 (1935).

20 302 U.S. 134 (1937). See digest and abstract, p. 170, infra.

21 39 Op. Atty. Gen. 285 (1939).

thus the doctrine of the Dravo case does not apply with respect to land purchased for armories or other public buildings.

Prior to February 1, 1940, where consent to purchase was given the United States by a State, it was legally presumed that the United States accepted the jurisdiction so granted by the State. Since that date an express acceptance of jurisdiction is required.[22]

Article I, section 8, clause 17 of the Constitution is not considered as setting forth the only means of acquisition of land. It merely enumerates the type of jurisdiction acquired if consent to purchase is obtained.[23] The United States may acquire land within a State for Federal purposes by direct purchase from private owners without the knowledge or consent of the State,[24] or the United States may exercise eminent domain to acquire property owned by an individual or by the State.

If the Federal Government thus obtains its territory without the consent of the State and purchases land direct from private owners or acquires it through the exercise of eminent domain, the United States gains no political dominion or sovereignty over lands so acquired. In such instance the United States would hold as an ordinary

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22 R.S. 355, as amended by Act of Feb. 1, 1940 (54 Stat. 19), and the Act of Oct. 9, 1940 (54 Stat. 1083; 40 U.S.C. 255). See Adams v. United States, 63 S. Ct. 1122 (1943).

23 In re United States, 28 F. Supp. 758, 760, 761 (1939).

24 Kohl v. United States, 91 U.S. 367 (1875).

proprietor[25] and is subject to all the laws and regulations that would affect an individual owner of land within that State except that the State can do nothing that will interfere with the effective use of the land for the purpose of the Federal Government.[26]

The Judge Advocate General's Office has published a series of pamphlets entitled "Military Reservations", which set out the general legislation affecting military reservations in the several States.

JURISDICTION.--We have seen that the circumstances surrounding the acquisition of Federal land within State boundaries determines the type of jurisdiction that will be exercised by the United States. Further, that this jurisdiction is of three general classes: (a) exclusive; (b) qualified, i.e., exclusive except for powers reserved by the State; (c) an ordinary proprietory interest.

When the United States acquires exclusive jurisdiction, complete sovereignty is thereby vested in the Federal Government and control by the State is terminated. In such case, however, there continues in effect until abrogated, those rules existing at the time the State surrenders jurisdiction, which rules govern the rights of the occupants of the territory transferred. Under the rule of international law, applicable when territory passes from one sovereign to another, the local law regarding private rights existing at

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25 14 Op. Atty. Gen. 557.

26 Fort Leavenworth R.R. v. Lowe, 114 U.S. 525, 539 (1885). See digest and abstract, p. 166, infra.

the time of the transfer, so far as not inconsistent with the law of the United States, has been held to continue until superseded by Federal legislation.[27]

In the case of Arlington Hotel Company v. Fant[28] the State of Arkansas ceded to the United States exclusive jurisdiction over lands including an Army and Navy Hospital, and a contiguous parcel upon which a hotel was operated under lease from the United States. The hotel was destroyed by fire and property of the hotel guests was consumed. The question was the liability of the hotel landlord to the guests for their losses; whether he was liable as an insurer under the law of Arkansas in effect at the time of the cession by that State of exclusive jurisdiction, or only for negligence, according to the statute law of Arkansas at the time of the fire. The court held that the United States having been ceded exclusive jurisdiction over the territory, the State law (in effect at the time of the fire) could have no operation therein, and therefore could not change the common law rule (in effect at the time of cession) of liability of innkeepers located therein.

In a recent case[29] it was held that upon the transfer of State lands to the exclusive jurisdiction of the United States, the State labor laws in effect at the time of transfer continue in force as

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27 Chic. R.I. and P. Ry. v. McGlinn, 114 U.S. 542 (1885).

28 278 U.S. 439 (1929).

29 James Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940).

Federal laws, save as they may be inappropriate to the changed situation or inconsistent with the national purpose, and save as Congress may have provided otherwise.

Crimes committed within the territory can be punished[30] and real actions brought[31] only in the local Federal courts. The Federal Criminal Code[32] provides for the punishment of all Federal statutory crimes on any lands under the exclusive or concurrent jurisdiction of the United States.[33] This section designates the area in which the criminal laws of the United States shall be effective. It follows therefore that the criminal laws of the United States are in effect in areas where the United States has concurrent or exclusive jurisdiction. Furthermore, with respect to such areas where there is no Federal criminal law applicable to a particular matter, the law of the State applicable and in force on February 1, 1940, is effective, and a violator thereof will be deemed guilty of a like offense and subject to a like punishment.[34] This Federal statute has adopted by reference the criminal laws of the State for all offenses not made penal by the Federal code.[35]

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30 United States v. Holt, 218 U.S. 245 (1910).

31 Palmer v. Barrett, 162 U.S. 399 (1896).

32 Section 272, as amended (18 U.S.C. 451).

33 Bowen v. Johnston, 306 U.S. 19 (1939).

34 54 Stat. 234; 18 U.S.C. 468.

35 See Puerto Rico v. Shell Co., 302 U.S. 253 (1937).

While Congress had kept the penal law of territory under its exclusive jurisdiction reasonably up to date by reenactment of the assimilation crime statute, private rights are in general determined only by such law as existed at the time of cession, in many cases fifty or one hundred years ago.[36]

An act of October 9, 1940,[37] provides that any United States Commissioner specially designated by the court for the purpose may try persons charged with petty offenses, as defined by section 335 of the Criminal Code,[38] if they are committed on Federal reservations under the exclusive or concurrent jurisdiction of the United States. Although the Department of Justice is primarily responsible for the prosecution of offenses against laws of the United States, prosecution of these petty offenses committed by civilians on military reservations may in certain cases be conducted by qualified army officers. In many instances post judge advocates are assigned by commanding officers to such duties in addition to their other tasks. Rules of procedure and practice for such trials, as promulgated by the Supreme Court, are found in W.D. Circular No. 215. 11 Oct. 1941, and W.D. Circular No. 37, 5 Feb. 1942.

Curtailment of Federal Jurisdiction.--Jurisdiction over public lands in a State, having been accepted by the United States, may be

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36 Selected Essays on Const. Law, Vol. 3, p. 1170.

37 54 Stat. 1058; 18 U.S.C. 576; W.D. Bull. No. 39, 1940.

38 18 U.S.C. 541.

ceded back to that State by Congress.[39] Where the United States has obtained exclusive jurisdiction from a State, and jurisdiction has not been qualified by conditions attached thereto, the State alone may not take any action which would diminish or curtail such Federal jurisdiction.[40] The United States, however, by its own act can curtail its own jurisdiction in such cases, and has done so in several instances which are discussed in the following paragraph.

Taxation.--Until the decision in the Dravo case, supra, as a State could not qualify its consent to purchase and its laws therefore could have no effect over the territory within its boundaries under the exclusive legislative authority of the Federal Government, the State had no power to tax within such area. The rule was different as to territory not under exclusive legislative authority of the Federal Government, i.e., territory over which the United States occupied a position similar to that of a private owner. There, although the land itself and governmental property thereon could not be taxed, as this would have burdened the use thereof, nevertheless, private property within the reservation was held to be taxable by the State.[41]

Today Federal salaries are no longer exempt from State taxation on the theory of incidental burden to the Federal Government

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39 Ohio v. Thomas, 173 U.S. 276, 281 (1899).

40 United States v. Unzeuta, 281 U.S. 138, 143 (1930).

41 For former rule see United States v. Cornell, 25 F. Cas. 646 (1819); Surplus Trading Co. v. Cook, 281 U.S. 647, 651 (1930).

occasioned thereby. No longer do Federal and State employees enjoy the reciprocal immunity in this respect which they possessed in the past. Any Federal officer or employee (including army personnel) whose residence or domicile is within a State can be taxed on his Federal salary equally with his other private income, as now authorized by Congress under Section 4, Public Salary Tax Act of 1939.[42]

Formerly, a person was within the State for taxable purposes if he resided on a military reservation (or on other public land) over which the State had not surrendered its jurisdiction to the Federal Government. In such case the salary of such person (not paid by the United States) was taxable by the State as private property having a situs in the reservation. On the other hand, if the Federal Government had exclusive jurisdiction over the area, the rule was otherwise, and the salary of such person was not taxable by the State merely because of his residence or domicile within the area.

Following the Public Salary Tax Act previously mentioned whereby military personnel were deprived of their immunity to State taxation, the question was raised whether such persons would have to pay this tax to the State wherein they resided on a military reservation under the exclusive jurisdiction of the Federal Government. In such case were they in the State for the purpose of such taxation, where the State's income taxes were based upon domicile or

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42 53 Stat. 575; 5 U.S.C. 84a.

residence within the State? This question provided one of the reasons for the passage of the Buck Act of 1940[43] which gave congressional consent to the several States to extend their income tax laws (as well as certain other taxes) into Federal military reservations under the exclusive jurisdiction of the United States. As a result, effective January 1, 1941, all persons, whether living on such a reservation, or a reservation under State jurisdiction, became taxable by the State upon proper legislative action by the State in extending its tax laws to cover the reservation.

No person is relieved from liability from an income tax levied by any State by reason either of residing in or of receiving income from transactions occurring or service performed in such Federal areas. The State is permitted to levy and collect this type of tax to the same extent and effect as though the area was not under Federal jurisdiction.

The provisions of the act which permit the taxation provide in addition that no person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, on the ground that the sale or use, with respect to such tax levied, occurred in whole or in part within a Federal area.

Another instance wherein the United States has curtailed its own exclusive jurisdiction with respect to Federal property is found

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43 54 Stat. 1059.

in the Federal Highway Act of 1936,[44] which permitted the States and Territories to tax the sales of gasoline and other motor vehicle fuels sold by or through post exchanges, ships stores, commissaries, filling stations, licensed traders, and other similar agencies located on Federal military or other reservations, when such fuels were not for the exclusive use of the United States; such sales taxes to be levied in the same manner and to the same extent as levied generally in the several States or Territories. Under a later act[45] this law was amended to enlarge the authority of the States and Territories so that, effective January 1, 1941, they were permitted to extend the scope of their gasoline and motor vehicle fuel taxes to include purchase, storage, or use, in addition to sales within the reservation.

It is important to note that the Buck Act[46] specifically excepts from State authority the right to tax the United States, or any instrumentality thereof, and also excepts the right to levy or collect any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof (such as a commissary, post exchange, etc.). Thus is preserved the constitutional immunity of the Federal Government and its instrumentalities from taxation by the States. Army post

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44 Act of June 16, 1936; 49 Stat. 1521, sec. 10(a); 4 U.S.C. 12a.

45 Note 43, supra.

46 Ibid.

exchanges, laundries, and unit funds, for example, remain exempt from State taxation even though their situs is on a military reservation where the State tax laws are otherwise applicable.

Even though by the statutes above discussed Congress has yielded part of its exclusive jurisdiction in Federal areas, the Buck Act expressly provides "that this act shall not for the purposes of any other provision of law be deemed to deprive the United States of exclusive jurisdiction or to limit the jurisdiction of the United States over any Federal area".

APPENDIX

I

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INCLUDING

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APPENDIX

II

PROCLAMATIONS AND ORDERS OF THE MILITARY GOVERNOR OF THE TERRITORY OF HAWAII

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TERRITORY OF HAWAII

A PROCLAMATION

WHEREAS, it is provided by Section 67 of the Organic Act of the Territory of Hawaii, approved April 30, 1900, that, whenever it becomes necessary, the Governor of that territory may call upon the commander of the military forces of the United States in that territory to prevent invasion; and

WHEREAS, it is further provided by the said section that the governor may in case of invasion or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus and place the territory under martial law; and

WHEREAS, the armed forces of the Empire of Japan have this day attacked and invaded the shores of the Hawaiian Islands; and

WHEREAS, it has become necessary to repel such attack and invasion; and

WHEREAS, the public safety requires;

NOW, THEREFORE, I, J. B. POINDEXTER, Governor of the Territory of Hawaii, do hereby announce that, pursuant to said section, I have called upon the Commanding General, Hawaiian Department, to prevent such invasion;

And, pursuant to the same action, I do hereby suspend the privilege of the writ of habeas corpus until further notice;

And, pursuant to the same section, I do hereby place the said territory under martial law;

And, I do hereby authorize and request the Commanding General, Hawaiian Department, during the present emergency and until the danger of invasion is removed, to exercise all the powers normally exercised by me as Governor:

And, I do further authorize and request the said Commanding General, Hawaiian Department, and those subordinate military personnel to whom he may delegate such authority, during the present emergency and until the danger of invasion is removed, to exercise the powers normally exercised by judicial officers and employees of this territory and of the counties and cities therein, and such other and further powers as the emergency may require;

And, I do require all good citizens of the United States and all other persons within the Territory of Hawaii to obey promptly and fully, in letter and in spirit, such proclamations, rules, regulations and orders, as the Commanding General, Hawaiian Department, or his subordinates, may issue during the present emergency.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the Territory of Hawaii to be affixed.

DONE at Honolulu, Territory of Hawaii.
This 7th day of December, 1941.

(S E A L)

J. B. POINDEXTER (S)
Governor of the Territory of Hawaii.

By the Governor:

CHAS. M. HITE
Secretary of Hawaii

A true and correct copy:

3:30 P.M.

James F. Hanley (S)
JAMES F. HANLEY,
Major, J.A.G.D.

PROCLAMATION

UNITED STATES ARMY

Headquarters, Hawaiian Department
Fort Shafter, 7 December 1941

To the People of Hawaii:

The military and naval forces of the Empire of Japan have attacked and attempted to invade these islands.

Pursuant to section 67 of the Organic Act of the Territory of Hawaii, approved April 30, 1900, the Governor of Hawaii has called upon me, as commander of the military forces of the United States in Hawaii, to prevent such invasion; has suspended the privilege of the writ of habeas corpus; has placed the Territory under martial law; has authorized and requested me and my subordinates to exercise the powers normally exercised by the governor and by subordinate civil officers; and has required all persons within the Territory to obey such proclamations, orders, and regulations as I may issue during the present emergency.

I announce to the people of Hawaii, that, in compliance with the above requests of the Governor of Hawaii, I have this day assumed the position of military governor of Hawaii, and have taken charge of the government of the Territory, of the preservation of order therein, and of putting these islands in a proper state of defense.

All persons within the Territory of Hawaii, whether residents thereof or not, whether citizens of the United States or not, of no matter what race or nationality, are warned that by reason of their presence here they owe during their stay at least a temporary duty of obedience to the United States, and they are bound to refrain from giving, by word or deed, any aid or comfort to the enemies of the United States. Any violation of this duty is treason, and will be punished by the severest penalties.

The troops under my command, in putting down any disorder or rebellion and in preventing any aid to the invader, will act with such firmness and vigor and will use such arms as the

accomplishment of their task may require.

The imminence of attack by the enemy and the possibility of invasion make necessary a stricter control of your actions than would be necessary or proper at other times. I shall therefore shortly publish ordinances governing the conduct of the people of the Territory with respect to the showing of lights, circulation, meetings, censorship, possession of arms, ammunition, and explosives, the sale of intoxicating liquors and other subjects.

In order to assist in repelling the threatened invasion of our island home, good citizens will cheerfully obey this proclamation and the ordinances to be published; others will be required to do so. Offenders will be severely punished by military tribunals or will be held in custody until such time as the civil courts are able to function.

Pending further instructions from this headquarters the Hawaii Defense Act and the Proclamation of the Governor of Hawaii heretofore issued thereunder shall continue in full force and effect.

(Signed) Walter C. Short
Lieutenant General, U. S. Army,
Commanding,
Military Governor of Hawaii.

A TRUE COPY:

James F. Hanley (Signed)
JAMES F. HANLEY,
Major, J.A.G.D.

PROCLAMATION
UNITED STATES ARMY

To the people of the Territory of Hawaii:

WHEREAS, the Governor of the Territory of Hawaii, J. B. POINDEXTER, by a proclamation dated December 7, 1941, and made pursuant to the authority of Section 67 of the Organic Act of the Territory of Hawaii, approved April 30, 1900, called upon me, as

commander of the military forces of the United States in this Territory, to prevent invasion; suspended the writ of habeas corpus; placed the Territory under martial law; authorized and requested me and my subordinates to exercise the powers normally exercised by the Governor and by subordinate civil officers; and required all persons within the said Territory to obey such proclamations, orders, and regulations as I, or my subordinates, might issue during the present emergency;

WHEREAS, I, by proclamation dated December 7, 1941, announced to the people of the Territory of Hawaii that, in compliance with the above recited requests of the Governor of the Territory of Hawaii, I had that day assumed the position of Military Governor of the Territory of Hawaii and had taken charge of the government of the Territory, of the preservation of order therein, and of putting these islands in a proper state of defense;

AND WHEREAS, I have this day relinquished command of the Hawaiian Department in accordance with War Department radiogram dated 17 December 1941;

NOW, THEREFORE, I, WALTER C. SHORT, do hereby relinquish my position as Military Governor of the Territory of Hawaii.

DONE at Headquarters, Hawaiian Department, Fort Shafter, Territory of Hawaii, this 17th day of December, 1941.

Walter C. Short (Signed)

WALTER C. SHORT,
Lieutenant General, U. S. Army,
Commanding,
Military Governor of Hawaii.

A TRUE COPY:

James F. Hanley (Signed)
James F. Hanley,
Major, J.A.G.D.

PROCLAMATION

UNITED STATES ARMY

To the people of the Territory of Hawaii:

WHEREAS, the Governor of the Territory of Hawaii, J. B. POINDEXTER, by a proclamation dated December 7, 1941, and made pursuant to the authority of Section 67 of the Organic Act of the Territory of Hawaii, approved April 30, 1900, called upon the Commanding General, Hawaiian Department, as commander of the military forces of the United States in this Territory, to prevent invasion; suspended the writ of habeas corpus; placed the Territory under martial law; authorized and requested the Commanding General, Hawaiian Department, and his subordinates, to exercise the powers normally exercised by the Governor and by subordinate civil officers; and required all persons within the said Territory to obey such proclamations, orders, and regulations as the Commanding General, Hawaiian Department, or his subordinates, might issue during the present emergency;

WHEREAS, Lieutenant General WALTER C. SHORT, U. S. Army, Commanding the Hawaiian Department, by proclamation dated December 7, 1941, announced to the people of the Territory of Hawaii that, in compliance with the above recited requests of the Governor of the Territory of Hawaii, he had that day assumed the position of Military Governor of the Territory of Hawaii and had taken charge of the government of the Territory, of the preservation of order therein, and of putting these islands in a proper state of defense;

WHEREAS, Lieutenant General WALTER C. SHORT, U. S. Army, Commanding the Hawaiian Department, has this day relinquished command of the Hawaiian Department in accordance with War Department radiogram dated December 17, 1941;

WHEREAS, Lieutenant General WALTER C. SHORT, U. S. Army, Commanding the Hawaiian Department, has this day relinquished his position as Military Governor of the Territory of Hawaii;

AND WHEREAS, I have this date assumed command of the Hawaiian Department in accordance with War Department radiogram dated December 17, 1941;

NOW, THEREFORE, I, DELOS C. EMMONS, announce to the people of the Territory of Hawaii that I have this day assumed the position

of the Military Governor of the Territory of Hawaii, and as such Military Governor I adopt and confirm the instructions contained in the fifth to ninth paragraphs, inclusive, of the proclamation of the Military Governor of the Territory of Hawaii dated December 7, 1941, and the general orders and other actions taken pursuant thereto.

DONE at Headquarters, Hawaiian Department, Fort Shafter, Territory of Hawaii, this 17th day of December, 1941.

DELOS C. EMMONS (Signed)
DELOS C. EMMONS,
Lieutenant General, U. S. Army.

A TRUE COPY:

James F. Hanley (S)
JAMES F. HANLEY,
Major, J.A.G.D.

TERRITORY OF HAWAII
OFFICE OF THE MILITARY GOVERNOR
FORT SHAFTER, T. H.

7 December 1941

GENERAL ORDERS)
No 3)

1. By virtue of the power vested in me as Military Governor, a Military Commission is appointed to meet at Honolulu, Territory of Hawaii, to meet at the call of the president thereof, for the trial of such persons as may be properly brought before it:

James L. Coke, President and Law Member.
Alva E. Steadman.
Lieutenant Colonel E. F. Ely, F.D.
Lieutenant Colonel Hyatt F. Newell, I.G.D.
Lieutenant Colonel V. G. Allen, A.G.D.
Angus Taylor, Trial Judge Advocate.
Major H. M. Coppin, A.G.D., Defense Counsel.

2. By virtue of the power vested in me as Military Governor, Major Henry De Pree, A.G.D., is appointed as a Provost Court to meet at Schofield Barracks, Territory of Hawaii, for the trial of such persons as may be properly brought before it.

3. By virtue of the power vested in me as Military Governor Lieutenant Colonel Neal D. Franklin, J.A.G.D., is appointed as a Provost Court to meet at Honolulu, Territory of Hawaii, for the trial of such persons as may be properly brought before it.

By order of the Military Governor:

(Signed) Thomas H. Green
THOMAS H. GREEN
Lt. Col., J.A.G.D.,
Executive.

A TRUE COPY:

James F. Hanley (S)
JAMES F. HANLEY,
Major, J.A.G.D.

TERRITORY OF HAWAII
OFFICE OF THE MILITARY GOVERNOR
FORT SHAFTER, T. H.

8 December 1941

GENERAL ORDERS)
No. 4)

By virtue of the power vested in me as Military Governor, the following policy governing the trial of civilians by Military Commission and Provost Courts is announced for the information and guidance of all concerned:

1. Military commissions and provost courts shall have power to try and determine any case involving an offense committed against the laws of the United States, the laws of the Territory of Hawaii or of the rules, regulations, orders or policies of the military authorities. The jurisdiction thus given does not include the right to try commissioned and enlisted personnel of the United States Army and Navy. Such persons shall be turned over to their respective services for disposition.

2. Military commissions and provost courts will adjudge sentences commensurate with the offenses committed. Ordinarily, the sentence will not exceed the limit of punishment prescribed for similar offenses by the laws of the United States or the Territory of Hawaii. However, the courts may adjudge an appropriate sentence.

3. The record of trial in cases before military commissions will be substantially similar to that required in a special court-martial. The record of trial in cases before provost courts will be substantially similar to that in the case of a Summary Court-Martial.

4. The procedure in trials before military commissions and provost courts will follow, so far as it is applicable, the procedure required for Special and Summary Courts-Martial respectively.

5. The records of trial in all cases will be forwarded to the Department Judge Advocate. The sentence adjudged by provost courts shall become effective immediately. The sentence adjudged by a military commission shall not become effective until it shall

have been approved by the Military Governor.

6. All charges against civilian prisoners shall be preferred by the Department Provost Marshal or one of his assistants.

7. The Provost Marshal is responsible for the prompt trial of all civilian prisoners and for carrying out the sentence adjudged by the court.

8. Charges involving all major offenses shall be referred to a military commission for trial. Other cases of lesser degree shall be referred to provost courts. The maximum punishment which a provost court may adjudge is confinement for a period of 5 years, and a fine of not to exceed $5,000.00. Military commissions may adjudge punishment commensurate with the offense committed and may adjudge the death penalty in appropriate cases.

9. In adjudging sentences, provost courts and military commissions will be guided by, but not limited to the penalties authorized by the courts-martial manual, the laws of the United States, the Territory of Hawaii, the District of Columbia, and the customs of war in like cases.

By order of the Military Governor:

(Signed) Thomas H. Green
THOMAS H. GREEN,
Lt. Col., J.A.G.D.,
Executive Officer.

A TRUE COPY:

James F. Hanley (S)
JAMES F. HANLEY,
Major, J.A.G.D.

TERRITORY OF HAWAII
OFFICE OF THE MILITARY GOVERNOR
FORT SHAFTER, T. H.

8 December 1941

GENERAL ORDERS)
No. 5)

1. Pursuant to authority vested in me as Military Governor of the Territory of Hawaii, I do hereby proclaim and direct that the policy to be observed in this Territory toward all alien Japanese of the age of fourteen years and upwards shall be as follows:

a. All such persons are enjoined to preserve the peace towards the United States and to refrain from crime against the public safety, and from violating the laws of the United States and Territory of Hawaii, and to refrain from actual hostility or giving information, aid, or comfort to the enemies of the United States, and to comply strictly with the regulations which are hereby or which may be from time to time promulgated by the President of the United States or the Military Governor of the Territory of Hawaii; and so long as they shall conduct themselves in accordance with law, they shall be undisturbed in the peaceful pursuit of their lives and occupations and be accorded the consideration due to all peaceful and law-abiding persons, except so far as restrictions may be necessary for their own protection and for the safety of the United States. All citizens of the United States are enjoined to preserve the peace and to treat them with all such friendliness as may be compatible with loyalty and allegiance to the United States.

b. All alien Japanese who fail to conduct themselves as so enjoined, in addition to being liable to restraint shall be liable to all other penalties prescribed by law.

2. And pursuant to the authority vested in me, I hereby declare and establish the following regulations which I find as necessary in the premises and for the public safety:

a. No alien Japanese shall have in his possession at any time or place or use or operate any of the following enumerated articles:

(1) Firearms.
(2) Weapons or implements of war or component parts thereof.
(3) Ammunition.
(4) Bombs.
(5) Explosives or material used in the manufacture of explosives.
(6) Short-wave radio receiving sets.
(7) Transmitting sets.
(8) Signal devices.
(9) Codes or ciphers.
(10) Cameras
(11) Papers, documents or books in which there may be invisible writing: photograph, sketch, picture. drawing, map or graphical representation of any military or naval installation or equipment or of any arms, ammunition, implements of war, device or thing used or intended to be used in the combat equipment of the land or naval forces of the United States or of any military or naval post, camp or station.

Any alien Japanese having in his possession any such articles enumerated above will forthwith report the possession of such articles to the nearest police station where he will receive instructions for the disposition of such articles.

b. All such property found in the possession of an alien Japanese after five o'clock P.M., December 8, 1941, shall be subject to seizure and the possessor shall be subject to severe punishment.

c. No alien Japanese shall undertake an air flight or ascend into the air in any aircraft, balloon, or flying machine of any sort, whether owned governmentally or commercially, except upon written authority of the Provost Marshal.

d. No alien Japanese shall change his place of abode or occupation or otherwise travel or move from place to place without first having obtained the approval of the Provost Marshal therefor.

e. No alien Japanese shall write, print, or publish any attack or threats against the government or Congress of the United States, or any branch thereof, or against the measures or policy of the United States, or against the measures or policy of the

United States, or against the person or property of any person in the military, naval, or civil service of the United States or of the Territory of Hawaii.

f. No Japanese shall commit, aid, or abet any hostile act against the United States, or give information, aid, or comfort to its enemies.

(Signed) Walter C. Short
WALTER C. SHORT,
Lieutenant General, U. S. Army,
Military Governor.

A TRUE COPY:

James F. Hanley (S)
JAMES F. HANLEY,
Major, J.A.G.D.

TERRITORY OF HAWAII
OFFICE OF THE MILITARY GOVERNOR
FORT SHAFTER, T. H.

14 December 1941

GENERAL ORDERS)
No. 25)

1. Paragraph 1, General Orders No. 3, Office of the Military Governor, Fort Shafter, T.H., dated 7 December 1941, is revoked.

2. A Military Commission is hereby appointed to meet at Honolulu, Territory of Hawaii, at 9:00 A.M., 17 December 1941, or as soon thereafter as practicable for the trial of such persons as may be properly brought before it:

Major General James A. Woodruff, U.S.A.,
President and Law Member.
Colonel John S. Pratt, C.A.C.
Lieutenant Colonel Leighton N. Smith, F.D.
Lieutenant Colonel Virgil G. Allen, Inf.

Lieutenant Colonel Hyatt F. Newell, Inf.
Major Ray O. Welch, Q.M.C.
Lieutenant Colonel Neal D. Franklin, J.A.G.D.,
Trial Judge Advocate.
Major Harrison M. Coppin, A.G.D.,
Defense Counsel.

By order of the Military Governor:

Thomas H. Green (S)
THOMAS H. GREEN,
Lt. Col., J.A.G.D.,
Executive.

A TRUE COPY:

James F. Hanley (S)
JAMES F. HANLEY,
Major, J.A.G.D.

TERRITORY OF HAWAII
OFFICE OF THE MILITARY GOVERNOR
FORT SHAFTER, T. H.

14 December 1941

GENERAL ORDERS)
No. 26)

1. Dealers, handlers, brokers, and others having large quantities of fireworks, roman candles, flares, torpedoes, pyrotechnics or any powder operated signalling devices of similar nature in their possession will report that fact to the closest police station, not later than noon, Tuesday, December 16, 1941, with an inventory, where instructions for disposition will be issued.

2. All persons, regardless of whether citizens or aliens, having in their possession any quantity of fireworks, roman candles, flares, torpedoes, pyrotechnics, or powder operated signalling devices of similar nature will turn the same in at the closest police station at once.

3. The use, explosion, etc., of any fireworks, roman candles, flares, torpedoes, pyrotechnics, or powder operated signalling devices of similar nature is strictly forbidden and violators will be severely punished.

By order of the Military Governor:

Thomas H. Green (S)
THOMAS H. GREEN,
Lt. Col., J.A.G.D.,
Executive.

A TRUE COPY:

James F. Hanley (S)
JAMES F. HANLEY,
Major, J.A.G.D.

TERRITORY OF HAWAII
OFFICE OF THE MILITARY GOVERNOR
FORT SHAFTER, T. H.

16 December 1941

GENERAL ORDERS)
No. 29)

WHEREAS, pursuant to the proclamation of Martial Law in the Territory of Hawaii the operation of the civil courts in the Territory of Hawaii has been suspended,

NOW, THEREFORE, by virtue of the authority vested in me as Military Governor, and for the purpose of more effectively carrying out the duties of such Military Governor, IT IS HEREBY ORDERED that all courts in the Territory of Hawaii are hereby authorized to exercise the following powers normally exercised by them during the existence of civil government:

1. The United States District Court for the Territory of Hawaii is hereby authorized to receive and file all petitions for the condemnation of land in the Territory of Hawaii, under any statutes and laws of the United States authorizing condemnation, needed by

the Army or Navy of the United States; to receive and file deposits of checks into the Registry of said court, certificates of the clerk of said court and the Declarations of Taking; to make and enter orders on the Declaration of Taking, and orders of Immediate Possession; and to file and enter notices of pendency of action, with reference to such condemnations.

2. The Supreme Court of the Territory of Hawaii may make and enter all orders necessary for the preservation of the rights of litigants in all pending appeal or appeals which may be perfected to said court, and may hear and determine all such appeals, and make such further orders as may be necessary to carry out or enforce said orders, or any of them.

3. The circuit courts of the Territory of Hawaii and the several divisions thereof are hereby authorized to exercise the following of their normal powers under the civil laws applicable thereto:

PROBATE: To hear and determine all probate matters, provided, however, that no contested matter may be heard or entertained save by consent of the parties and which does not involve the subpoenaing of witnesses.

EQUITY: To hear and determine all matters involving trusts, trust accounts, bills of instructions and similar matters, provided, however, that no writs of habeas corpus, prohibition, mandamus, injunction or specific performance shall be issued or granted by any circuit judge, and further provided that no matter shall be heard or entertained which involves the subpoenaing of witnesses.

ACTIONS AT LAW: To hear and determine all pending matters not involving jury trials where the subpoenaing of witnesses is not required; to hear and determine all appeals heretofore or hereafter perfected from the district courts; to make and enter all orders or judgments necessary to facilitate the immediate taking of land under condemnation proceedings by the Territorial, City and County, or county officers, orders of possession and details required therewith which do not involve the subpoenaing of witnesses or compulsory process.

DIVISION OF DOMESTIC RELATIONS AND JUVENILE COURT: To hear and determine all matters either pending or to be brought for the support and maintenance of women and minor children or other

dependents; to hear and determine all probate, guardianship and adoption matters as are exclusively under the jurisdiction of the Division of Domestic Relations; to hear all matters properly coming before the Juvenile Court.

CRIMINAL CASES ON APPEAL: To hear and determine all pending appeals in criminal cases to the circuit courts of the Territory from district magistrates which do not involve jury trials.

LAND COURT: To hear and determine all pending matters not requiring the subpoenaing of witnesses; all formal matters connected with subdivisions; all normal minor petitions for the purpose of notation of marriage, death, divorce, and other matters required to be noted on transfer certificates of title; proceedings for substitution of lost certificates of title; recording of conveyances; issuance of transfer certificates of title; notations of encumbrances; ex parte petitions not involving the subpoenaing of witnesses; and the maintaining of the Office of the Registrar of the Land Court for the purpose of facilitating searching of records and certificates of transfers.

DISTRICT COURTS: Finish all pending matters where the subpoenaing of witnesses is not required.

ALL COURTS: All courts authorized under the civil law to do so may perpetuate testimony or take depositions of witnesses and may make and enter all necessary orders to enable litigants to perfect appeals.

By order of the Military Governor:

Thomas H. Green (S)
THOMAS H. GREEN,
Lt. Col., J.A.G.D.,
Executive.

A TRUE COPY:

William R. C. Morrison (S)
WILLIAM R. C. MORRISON,
Major, J.A.G.D.

TERRITORY OF HAWAII
OFFICE OF THE MILITARY GOVERNOR
FORT SHAFTER, T. H.

17 December 1941

GENERAL ORDERS)
No. 31)

1. The attention of all persons residing in the Territory of Hawaii is invited to the following extract of the Revised Laws of Hawaii, 1935:

"Chapter 178. DISLOYALTY AND DESECRATION OF U. S. FLAG.

Sec. 5790. Defined: penalty. Any person who shall, at any time or place within the Territory, use any language in the presence or hearing of another of or concerning the government of the United States, or of and concerning the army, navy, or marine corps of the United States, which language shall be contemptuous or disloyal to the United States, or abusive in its character or calculated to bring into disrepute or contempt the United States, the army, navy, or marine corps of the United States, or shall commit any act or use any language of such disloyal nature as shall be reasonably calculated to cause a breach of the peace, or who shall use such contemptuous or disloyal language of or concerning any flag, standard, color, or ensign of the United States, or concerning the uniform of the army, navy, or marine corps of the United States, or who shall either individually, jointly with another or others, or as part of a general propaganda make or publish or circulate any book, pamphlet, paper, letter, writing, print, or other publication calculated to bring into disrepute or contempt the United States, the army, navy, or marine corps of the United States, or any flag, standard, color, or ensign of the United States, or who shall publicly or privately mutilate, deface, defile, insult, or tramp upon any flag, standard, color, or ensign of the United States, or any representation thereof, shall be guilty of a felony and shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment at hard labor for not more than ten years, or by both fine and imprisonment.

Sec. 5791. Pacificism during war. Any person who shall, at any time or place within the Territory during the existence of war between the United States and any other nation, use language in the

presence or hearing of another calculated or tending to discourage or prevent the vigorous prosecution of the war by the United States, whether the language is used individually or as part of a general propaganda; or who shall, either individually, jointly with another or others, or as part of a general propaganda, make, publish, or circulate any book, pamphlet, picture, paper, letter, writing, printing, or other publication calculated or tending to discourage or prevent the vigorous prosecution of the war by the United States, shall be guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars or by imprisonment of not more than one year, or by both fine and imprisonment.

Sec. 5792. Unlawful possession of flag, etc. Any person who, during the existence of war between the United States and any other nation, shall have unlawfully in his possession any flag, standard, color, ensign, or coat-of-arms of any nation with which the United States is at war, or that of any state, sub-division, city, or municipality of any such nation, shall be deemed guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars or by imprisonment of not more than one year, or by both fine and imprisonment. The governor shall promulgate rules and regulations relating to the possession of any flag, standard, color, ensign, or coat-of-arms of any nation with which the United States is at war, or that of any state, sub-division, city, or municipality of any such nation, which rules and regulations when published three times in a newspaper of general circulation in the Territory shall have the force and effect of law.

Sec. 5793. Disrespect to flag. Any person who shall knowingly show disrespect to any flag, standard, color, or ensign of the United States, otherwise than as defined in section 5790, shall be guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or by both fine and imprisonment.

Sec. 5794. Contempt or abuse of allies. Any person who shall during the existence of war between the United States and any other nation, use language in the presence or hearing of another, which language shall be contemptuous to or abusive in its character, of any nation with which the United States is allied in the prosecution of the war, or who shall use contemptuous or abusive language of or concerning any flag, standard, color, or ensign of any nation so allied with the United States, or concerning the uniform of the army or navy or marine corps of such allied nation, or who shall,

either, individually, jointly with another or others, or as a part of a general propaganda, make, publish, or circulate any book, pamphlet, picture, letter, writing, print, or other publication calculated to bring into disrepute or contempt any nation so allied with the United States, or any flag, standard, color, or ensign of any allied nation, or who shall publicly or privately mutilate, deface, defile, insult, or tramp upon any flag, standard, color, or ensign of any nation allied with the United States, or any representation thereof, shall be guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars or by imprisonment of not more than one year or by both fine and imprisonment.

Sec. 5797. Subtitle not applicable, when. This subtitle shall not apply to any act permitted by the statutes of the United States or by the United States army and navy regulations, nor shall it be construed to apply to a newspaper, periodical, book, pamphlet, circular, certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, or stationery for use in correspondence, on any of which shall be printed, painted, or placed, the flag, disconnected from any advertisement."

* * * * * *

TERRITORY OF HAWAII
OFFICE OF THE MILITARY GOVERNOR
FORT SHAFTER, T. H.

18 December 1941

GENERAL ORDERS)
No. 32)

SECTION I. General Orders No. 5, Office of the Military Governor, Territory of Hawaii, 8 December 1941, is rescinded.

SECTION II POLICY. The following policy to be observed in this territory toward all enemy aliens of the age of fourteen years and upwards is published for the information and guidance of all concerned.

1. All such persons are enjoined to preserve the peace towards the United States and to refrain from crime against the public safety, and from violating the laws of the United States and Territory of

Hawaii, and to refrain from actual hostility or giving information, aid, or comfort to the enemies of the United States, and to comply strictly with the regulations which are hereby or which may be from time to time promulgated by the President of the United States or the Military Governor of the Territory of Hawaii; and so long as they shall conduct themselves in accordance with law, they shall be undisturbed in the peaceful pursuit of their lives and occupations and be accorded the consideration due to all peaceful and law-abiding persons, except so far as restrictions may be necessary for their own protection and for the safety of the United States. All citizens of the United States are enjoined to preserve the peace and to treat them with all such friendliness as may be compatible with loyalty and allegiance to the United States.

2. All enemy aliens who fail to conduct themselves as so enjoined, in addition to being liable to restraint shall be liable to all other penalties prescribed by law.

SECTION III. REGULATIONS. The following regulations are published for the guidance of enemy aliens:

1. No enemy alien shall have in his possession at any time or place or use or operate any of the following enumerated articles:

a. Firearms.
b. Weapons or implement of war or component parts thereof.
c. Ammunition.
d. Bombs.
e. Explosives or material used in the manufacture of explosives.
f. Short-wave radio receiving sets.
g. Transmitting sets.
h. Signal devices.
i. Codes or ciphers.
j. Cameras.
k. Papers, documents, or books in which there may be invisible writing; photographs; sketches; pictures; drawings, maps, or graphical representations of any military or naval installation or equipment or any arms, ammunition, implements of war, device or thing used or intended to be used in the combat equipment of the land or naval forces of the United States or of any military or naval post, camp, or station.

1. Binoculars, field glasses, telescopes, or any other device used or designed for use for making observations at distances

Any enemy alien having in his possession any such articles enumerated above will forthwith report the possession of such articles to the nearest police station where he will receive instructions for the disposition of such articles. This applies to dealers, handlers, brokers, etc., having quantities as well as to individuals having a single item. Dealers, handlers, brokers, etc., having quantities of any of the articles enumerated above will submit a complete inventory of such items and await instructions.

2. All articles of the classes enumerated in paragraph 1, above, found in the possession of an enemy alien after the date set for reporting such articles to the police, shall be subject to seizure and the possessor shall be subject to severe punishment.

3. No enemy alien shall change his place of residence or occupation without first having obtained the approval of the Provost Marshal therefor. This requirement does not eliminate the requirements of Section 35 of the Act of June 28, 1940 (54 Stat. 675).

4. No enemy alien shall undertake an air flight or ascent into the air in any aircraft, balloon, or flying machine of any sort, whether owned governmentally or commercially, except upon written authority of the Provost Marshal.

5. All enemy aliens MUST carry on their person the alien registration card or certificate issued to them at the time of their registration under Section III of the Act of June 28, 1940.

6. Enemy aliens may go about their business and visit friends and relatives during daylight hours without special permits or passes, except in so far as limited by special regulations.

7. No enemy alien shall write, print, or publish any attack or threats against the Government or Congress of the United States, or any branch thereof, or against the measures or policy of the United States, or against the person or property of any person in the military, naval, or civil service of the United States or the Territory of Hawaii.

8. No enemy alien shall commit, aid, or abet any hostile act against the United States, or give information, aid, or comfort to its enemies.

SECTION IV. JAPAN. The foregoing policy (Sec. II) and regulations (Sec. III) were effective as to alien Japanese on 8 December 1941 (General Orders No. 5, this office) and are continued in force with respect to them.

General Orders No. 5, this office, required all articles enumerated in paragraph 1 of Section III, above, to be reported not later than 5:00 P.M., 8 December 1941.

SECTION V. GERMANY, ITALY, BULGARIA, AND CROATIA. The nations of Germany, Italy, Bulgaria, and Croatia, having declared war against the United States of America, the citizens of those countries and persons showing allegiance to those countries will comply with the requirements of Sections II and III of this order.

All items of the classes of property enumerated in paragraph 1 of Section III, above, will be reported to the nearest police station not later than 12:00 o'clock noon, 20 December 1941.

By order of the Military Governor:

(Signed) Thomas H. Green
THOMAS H. GREEN,
Lt. Col., J.A.G.D.,
Executive.

A TRUE COPY:

James F. Hanley (S)
JAMES F. HANLEY.
Major, J.A.G.D.

TERRITORY OF HAWAII
OFFICE OF THE MILITARY GOVERNOR
FORT SHAFTER, T. H.

20 December 1941

GENERAL ORDERS)
No. 38)

The following policy governing the employment and use of labor in the Territory of Hawaii is announced for the information and guidance of all concerned:

1. All wage rates to be frozen as of December 7, 1941, for all employees on the Island of Oahu, so long as they remain in the same classification.

2. All employees of Federal Government and its contractors now actively deriving support from Federal funds, to be frozen to their respective employer as of December 7, 1941. This is to include the City and County of Honolulu, Territorial agencies, their contractors and subcontractors and utilities and sources of supply controlled by the Army and Navy. All the above workers who have separated from their employment since December 7, 1941, are to return to the job held as of that date.

3. Army and Navy will continue their established agencies for recruiting directly the workers required for their respective activities.

4. The normal working day shall be 8 hours, and all hours worked in excess of 8 hours will be paid at the rate of $1\frac{1}{2}$ times the regular rate.

5. Terms of labor contracts between individuals and contractors, and other agencies of the Federal Government, which restrict or specify the nature of work to be performed are hereby suspended.

6. Men employed hereafter must report to the job for which they are ordered by the Military Governor.

By order of the Military Governor:

Thomas H. Green (S)
THOMAS H. GREEN,
Lt. Col., J.A.G.D.,
Executive.

A TRUE COPY:
William R. C. Morrison (S)
WILLIAM R. C. MORRISON,
Major, J.A.G.D.

TERRITORY OF HAWAII
OFFICE OF THE MILITARY GOVERNOR
FORT SHAFTER, T. H.

20 December 1941

GENERAL ORDERS)
No. 39)

1. Mr. Alfred E. Tree of the Treasury Department, is appointed as Temporary Military Alien Property Controller for the Territory of Hawaii, to act until such time as an Alien Property Custodian or similar agent shall be designated by the Congress or the President of the United States or by their authority.

2. All civilian and military components which have taken possession of, commandeered, confiscated, or otherwise received or shall hereafter take possession of, commandeer, confiscate, or otherwise receive the property, of any kind or nature, of any alien, either by authority of the General Orders issued by the Office of the Military Governor or otherwise, shall give receipt therefor in the following form:

_____
(Issuing Agency)
Honolulu, T.H.

No. _____

Date _____

This certifies that the undersigned has received from

_____
(Name of Individual) (Address)

the following articles which were surrendered in accordance with Military Orders:

_____
(Signature of Agent Receiving)

3. The receipt shall contain an adequate description of each item of property it covers, be made in duplicate, numbered, dated, and signed by the Receiving Agent. The original of the receipt shall be issued to the owner of the property described thereon or the person from whom the property was received; the duplicate of the receipt shall contain the following additional statement which shall be signed by the owner or person surrendering the property:

"I hereby certify that the above is a complete list of articles which I have surrendered to the Agency indicated on this date."

_____
(Signature of Owner)

4. Each civilian or military component which has received or shall receive property described in paragraph 2 above, shall prepare in triplicate a list of all such property showing each item received and the number of the receipt issued therefor. One copy of such list shall be delivered to the Ordnance Department, Signal Corps, or other Military Depository having or to have actual possession of the property along with the property or as soon as possible thereafter if the property has already been delivered. One copy of such list shall be delivered together with the duplicates of all receipts issued by the Agency concerned to the Temporary Military Alien Property Controller. The Temporary Military Alien Property Controller shall forward all duplicate receipts to the Military Depository having actual possession of the property. Each item of property shall have attached thereto a tag or other identification mark showing the name of the owner and the number of the receipt issued therefor.

5. Receipts shall be issued and lists made for all property taken since 7 December 1941. Where the owner is not known, such fact shall be certified by a Responsible Authority of the issuing agency on the original and duplicate of the receipt. Every effort shall be made by agencies receiving property in the first instance to locate the owner thereof and obtain his verification.

6. After the property has been properly tagged, the duplicates of the receipts representing property in possession of the Ordnance Department, Signal Corps, or other Military Depository shall be filed in numerical order and held to each. Each such Military Depository shall prepare and keep on file a complete inventory of all alien property held by it, in addition to the above mentioned list, and shall note on said inventory its estimate of the present value of each item thereon.

7. It is the purpose of this procedure to establish accountability so that there will be available complete records for the settlement of all claims in connection with the property of aliens.

By order of the Military Governor:

(Signed) Thomas H. Green
THOMAS H. GREEN,
Lt. Col., J.A.G.D.,
Executive.

A TRUE COPY:

James F. Hanley (S)
JAMES F. HANLEY,
Major, J.A.G.D.

TERRITORY OF HAWAII
OFFICE OF THE MILITARY GOVERNOR
FORT SHAFTER, T. H.

2 January 1942

GENERAL ORDERS)
No. 48)

Section I. PROVOST COURTS.--1. All provost courts heretofore or hereafter appointed by the Military Governor of the Territory of Hawaii shall have power, and hereby are authorized and empowered, to try and punish commissioned or enlisted personnel of the Army of the United States or of the United States Navy, for violations, whether heretofore or hereafter committed, of any statute of the Territory of Hawaii, or of any ordinance, resolution, by-law, regulation, or rule of any city, town, or other municipal corporation of the Territory of Hawaii, or of any order, rule, or regulation of the Military Governor of the Territory of Hawaii, regulating or relating to vehicular or pedestrian traffic.

2. The concurrent jurisdiction of the Army of the United States or of the United States Navy to court-martial or otherwise discipline commissioned or enlisted personnel of their respective

services for such offenses is not withdrawn by anything herein contained.

3. Any and all parts, portions, or provisions of any General Order of the Military Governor heretofore made, in conflict with the provisions of this Section, hereby are revoked and rescinded to the extent of any such conflict herewith but to the extent of such conflict only and no more.

Section II. AMENDING GENERAL ORDERS NO. 16.--Paragraph 10 of General Orders No. 16, this office, 11 December 1941, is amended to add to the list of streets upon which no parking will be permitted day or night, the following streets:

"Sumner Street
Iwilei Street
Pacific Street
Prison Road"

By order of the Military Governor:

(Signed) Thomas H. Green
THOMAS H. GREEN,
Colonel, J.A.G.D.,
Executive.

A TRUE COPY:

James F. Hanley (S)
JAMES F. HANLEY,
Major, J.A.G.D.

POLICE DEPARTMENT, COUNTY OF HAWAII

Copy 1
ARREST AND DISPOSITION RECORD

F.P., Yes__ No__
By_____
Ident. No._____

Report No. 29177
Booking No._____
County District No._____

1

COMPLAINANT RAGSDALE, Wm. Date of Offense 12/25/41 Hour 12:30 PM

Address Hilo Police Department Phone_____

DEFENDANT CRISTOBAL, Liborio Date of Arrest 12/25/41 Hour 12:30 PM

Address Camp 3 Piihonua or South Point Phone_____

Where offense committed Waianuenue Ave.

Where arrested Waianuenue Ave. District 1/2 3 4 Watch 1 2/3 Beat___

Original Charge Speeding Felony_____ Misd / Census_____

Final Charge_____ Felony_____ Misd_____

Arrested by Officer Wm. Ragsdale Badge No. 4 No. of persons arrested_____

Assisted by Officers 1____ 2____ 3____ Bkg. Officer_____

How arrested: Pickup/ Warrant__ Self__ Letter__ Telegram__ For Outside only__ Outside tried here__ Enroute__.

2

SUMMARY OF OFFENSE AND CIRCUMSTANCES OF ARREST:

The defendant, Liborio Cristobal, was traveling from the Piihonua and Kaumana Junction down to Laimana St., a distance of over one-fourth of a mile at a speed greater than fifty miles per hour. He overtook two cars traveling in the same direction and about three cars were coming from the opposite direction. The road

is bumpy where the defendant was arrested and his car would sway to the right and to the left when he overtook these cars. Cristobal's license number is 19135. Car No. B2374.

Report typewritten by Wm. Ragsdale Date 12/25/41 Hour 1:07 PM

Signature of Arresting Officer Wm. Ragsdale (S) Date 12/25/41

Hour 1:07 PM

Witnesses of Arrest	Age	Sex	Home Address	Business Address
1.				
2.				
3.				
4.				

3

Age 32 Sex Male Descent Father Filipino Mother Filipino
(Race and nationality of both parents)

Father: Where born Philippine Is. Citizen Yes__ No/ ; Mother: Where born Philippine Is. Citizen Yes__ No/ .

Employed Yes/ No__ Regular occupation Laborer Last occupation

Piihonua, as laborer .

Date last employed to date Dependents Yes__ No/ No. of dependents None

Place of birth Lawag, Philippine Is. Citizen Yes__ No/ How long in the U.S., Years 14 Years in Territory 14

Years in Country 14 Years in City 14 Single / Married

Separated Divorced Widowed

Drunk Drinking Drug addict Name of school attending

Education: (Numbers of years attended) Grammar School NONE

High School_____College_____.

Previous arrests_____
(Indicate number of times, charges, and convictions, if any; to be entered by Identification Bureau.)

DEPARTMENT DISPOSITION

4

Hold for Complaint Yes__No__Hold for bail Yes__No__Cash $_____

Bond $_____

Hold for investigation by Detectives_____Vice Squad_____

(Other Officers (Name and division))_____

Release when sober_____Other disposition_____

Received by_____Date_____Hour_____A.P.M.

Released by_____Date_____Hour_____A.P.M.

How released: Bail___Bond___No complaintant___Not sufficient evidence___.

Release after investigation_____Writ_____Or_____

Authority for release_____Cause of release_____

_____

Bail furnished by_____Address_____

Date this report transmitted_____Transmitted to_____

DISTRICT COURT DISPOSITION

5

District of_____

Date complaint filed_____Charge_____

Preliminary hearing: Demanded_____Waived_____Committed to Grand Jury _____Discharged_____Date_____

Plea: Guilty_____Not Guilty_____Demand Jury Trial or_____

Date_____Continuances_____

_____

Found guilty of_____Acquitted_____Date_____

Sentence: (If modified, note)_____Date_____

Other disposition: Nolle Prosequi_____Stricken_____Appealed to

Circuit Court_____Or_____Date_____

Reason for disposition noted:_____

Name of: Magistrate_____Prosecuting Officer_____

Defense Attorney_____Assisting Prosecuting Officer_____

_____Date this report transmitted _____

Transmitted to_____Signature: Judge or Prosecuting Officer_____Date_____

GRAND JURY DISPOSITION

6

_____Judicial Circuit

Indictment_____Returned: True Bill_____

No Bill_____Date_____

CIRCUIT COURT DISPOSITION

7

_____Judicial Circuit

Date arraigned_____Plea: Guilty_____Not Guilty_____

Or_____ Continuances: _____

_____

Trial by: Court____ Jury____ Convicted____ Acquitted____ Date____

Sentence_____

Other disposition: Nolle Prosequi____ Stricken____ Or_____

_____ Date_____

Reason for disposition noted: _____

Name of Judge_____ Prosecuting Attorney_____

_____ Defense Attorney_____

Date this report transmitted to Sheriff_____

Signature of Prosecuting Attorney_____

_____

use this space for additional facts when required

C H A R G E 'S H E E T

ARMY OF THE UNITED STATES

Military Government of HEADQUARTERS Hawaii District

Hilo, Hawaii, T. H.
(Place)

26 December 1941
(Date)

Name of defendant Cristobal, Liborio
(Last name followed by first and middle name)

Occupation Laborer Address Camp 3, Piihonua

or South Point

Age 32 Sex Male Marital status Single

Number of minor children or dependents other than wife None

Witnesses: Officer William Ragsdale (Witness for Prosecution)
(State name and addresses and whether for prosecution or defense)

List articles or documents to be introduced in evidence, and state where each may be found Officer's Arrest and Disposition Record filed with the Provost Court.

Previous conviction attached None
(Number)

Information as to restraint of accused Recognized by Sheriff
(State whether or not in confinement, and if so, since what date)
Henry K. Martin, to appear at 1:00 P.M.

Headquarters Hawaii District
(Name of command or office)

Hilo, Hawaii, T.H. 26 December 1941
(Place) (Date)

The charges on the reverse side of this sheet are referred for trial to Lieut. Col. V. S. Burton, 35th Infantry
(Grade, name, and organization)

Provost Court
(Trial judge advocate of military commission, superior or inferior provost court).

Hilo, Hawaii, T.H.
(Place)

By Command of Military Governor
(Command or order) (Grade and name of officer

Fred L. Hartman (S)
referring charges) (Signature)

Capt., 299th Inf., Hawaii Dis. Adjutant
(Grade and Organization)

Guilty Guilty
(Plea) (Finding)

Charge: Violation of Section 49, Paragraph B-3, Article 6, Ordi-104 County of Hawaii.

Specification: In that Liborio Cristobal did at Hilo, District of South Hilo, County and Territory of Hawaii, on or about the 25th day of December, A.D. 1941, violate the provisions of Section 49, Paragraph B-3, Article 6, Ordinance 104, County of Hawaii, in that he did then and there while being the operator and in charge of a motor vehicle on a public street, to wit: Waianuenue Avenue, operate the same at a speed in excess of 50 miles per hour, the said portion of Waianuenue Avenue on which the said Liborio Cristobal operated his motor vehicle being a residential district as defined by said Ordinance, contrary to said Ordinance.

Specification:

I certify that *I have personal knowledge of the matters set forth in specifications Specification of the charge and
(Give specification and charge numbers)
*have investigated the matter set forth in
(Give specification and charge numbers)
and the same are true in fact to the best of my knowledge and belief.

Subscribed and sworn to before me this 26th day of December, A.D. 1941

L. D. Adams (S)
(Name)
Capt. F.A. Bn. Accuser
(Grade and organization)

Fred L. Hartman (S)
Captain, 299th Infantry, Adjutant

*Strike out words not applicable. If the accuser has personal knowledge of the facts stated in one or more specifications or parts

thereof and his knowledge as to other specifications or parts thereof is derived from investigation of the facts, the form of the certificate will be varied accordingly. In no case will he be permitted to state alternatively as to any particular charge or specification that he either has personal knowledge or has investigated.

Sentence To be fined $15.00 or to be confined at hard labor for 15 days

Date of trial December 30th, 1941 Was fine paid Yes
(Yes or No)

Remarks Defendant given until 5:00 P.M. December 31st, 1941, to pay his fine

V. W. Kerson (S)

Lt. Col., 35th Inf., Hawaii District
(Grade and organization)

Provost Court

Headquarters,)
Office of Civil Affairs) (Name of command or office)

(Place) (Date)

(Action of reviewing authority, if any)

(Signature)

Commanding
(Grade and organization)

IN THE PROVOST COURT, HEADQUARTERS
HAWAII DISTRICT

Before Lt. Col. V. S. Burton, 35th Inf., Hawaii District

3:42 P.M. Tuesday, December 30, 1941

CASE NO. 9

MILITARY GOVERNMENT OF HEADQUARTERS, HAWAII DISTRICT	)	VIOLATION OF SECTION 49, PARAGRAPH B-3, ARTICLE 6, ORDINANCE 104, COUNTY OF HAWAII.
vs.	)	
LIBORIO CRISTOBAL, Defendant	)	

QUESTIONS BY LT. COL. V. S. BURTON
ANSWERS BY DEFENDANT LIBORIO CRISTOBAL, THROUGH
ALFRED PADAYALO, PHILIPINO INTERPRETER.

Q. You are Liborio Cristobal?

A. Yes.

Q. You are charged with exceeding the speed limit down Waianuenue Avenue at 50 miles per hour. You are guilty or not guilty?

A. Only 50 miles because after the hill I roll the car.

Q. Very, very dangerous, isn't it? Are you guilty or not guilty?

A. I plead guilty.

Q. What is your business? What do you do?

A. Defense job.

BY THE COURT: To be fined $15.00 or to be confined at hard labor for 15 days.

Defendant: All this time I have been in jail and I don't know if I

was paid down there for the defense job.

The Court: Give him reasonable time to come in with the money or to be confined at hard labor for 15 days.

Defendant: How much time can I have to get the money?

The Court: When can you get it? Tomorrow night?

I will give you till 5:00 o'clock tomorrow afternoon.

Defendant: I will do that, Sir.

The Court: That is all.

Natsuyo Laketa (S)
Reporter

APPENDIX

III

ABSTRACTS OF SELECTED CASES

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GRAFTON v. UNITED STATES
Supreme Court of the United States, 1907.
206 U.S. 333.

* * *

Mr. Justice HARLAN delivered the opinion of the court.

The writ of error brings up for review a judgment of the Supreme Court of the Philippine Islands, affirming a judgment of the Court of First Instance in the Province of Iloilo, by which the plaintiff in error, Grafton, was adjudged guilty of homicide as defined by the Penal Code of the Philippines, and sentenced to imprisonment for twelve years and one day.

The history of this criminal prosecution, as disclosed by the record, is as follows:

Homer E. Grafton, a private in the Army of the United States, was tried before a general court-martial convened in 1904 by Brigadier General Carter, commanding the Department of the Visayas, Philippine Islands, upon the following charge and specifications: "Charge: Violation of the 62nd Article of War: Specification I. In that Private Homer E. Grafton, Company G, 12th Infantry, being a sentry on post, did unlawfully, willfully, and feloniously kill Florentino Castro, a Philippino, [sic.] by shooting him with a U.S. magazine rifle, caliber .30. This at Buena Vista Landing, Guimaras, P.I., July 24th, 1904. Specification II. In that Private Homer E. Grafton, Company G, 12th Infantry, being a sentry on post, did unlawfully, willfully, and feloniously kill Felix Villaneuva, a Philippino [sic.] by shooting him with a U.S. magazine rifle, caliber .30. This at Buena Vista Landing, Guimaras, P.I., July 24th, 1904."

* * *

The court found the soldier not guilty as to each specification and not guilty of the charge. His acquittal was approved by the Department Commander on August 25th, 1904, and he was released from confinement and restored to duty. * * *

On the twenty-eighth day of November, 1904, the prosecuting attorney of the Province of Iloilo, Philippine Islands, filed a criminal information or complaint in the name of the United States, in the Court of First Instance of that Province, as follows: "The subscriber accuses Homer E. Grafton of the crime of assassination,

committed in the manner following: That on the 24th of July, 1904, and in the barrio of Santo Rosario, within the jurisdiction of the municipality of Buena Vista, Guimaras Island, province of Iloilo, Philippine Islands, the said accused, with illegal intention and maliciously and without justification and with treachery and deliberate premeditation killed Felix Villanueva in the manner following: That on said day and in said barrio the said accused, Homer E. Grafton, with the rifle that he carried at the time, known as the United States magazine rifle, c. .30, fired a shot directly at Felix Villanueva, causing with said shot a serious and necessarily fatal wound, and in consequence of said wound the aforesaid Felix Villanueva died immediately after the infliction thereof, in violation of the law."

/The Philippine Penal Code denounced the offenses of "assassination" and of "homicide", corresponding, roughly, to murder in the first degree and to murder in the second degree and manslaughter, respectively. At the trial in the Court of First Instance accused demurred to the jurisdiction, and also pleaded the acquittal by court-martial in bar. Demurrer and plea were both overruled, and Grafton was convicted of "homicide" and sentenced to the minimum term of the minimum degree of "reclusion temporal", the punishment prescribed by law. The judgment was affirmed in the Supreme Court of the Philippines. An act of Congress of July 1, 1902 (32 Stat. 691), relating to the Philippines, forbade double jeopardy, as did the Constitution of the United States and the Articles of War./

* * *

We assume as indisputable, on principle and authority, that before a person can be said to have been put in jeopardy of life or limb the court in which he was acquitted or convicted must have had jurisdiction to try him for the offense charged. It is alike indisputable that if a court-martial has jurisdiction to try an officer or soldier for a crime, its judgment will be accorded the finality and conclusiveness as to the issues involved which attend the judgments of a civil court in a case of which it may legally take cognizance. * * *

It thus appears to be settled that the civil tribunals cannot disregard the judgments of a general court-martial against an accused officer or soldier, if such court had jurisdiction to try the offense set forth in the charge and specifications; this, notwithstanding the civil court, if it had first taken hold of the case, might have tried the accused for the same offense or even one of higher grade arising out of the same facts.

We are now to inquire whether the court-martial in the Philippines had jurisdiction to try Grafton for the offenses charged against him. It is unnecessary to enter upon an extended discussion of that question; for it is entirely clear that the court-martial had jurisdiction to try the accused upon the charges preferred against him. The 62nd Article of War, in express words, confers upon a general, or a regimental, garrison, or field officers' court-martial, according to the nature and degree of the offense, jurisdiction to try "all crimes" not capital, committed in time of peace by an officer or soldier of the Army. The crimes referred to in that article manifestly embrace those not capital, committed by officers or soldiers of the Army in violation of public law as enforced by the civil power. No crimes committed by officers or soldiers of the Army are excepted by the above article from the jurisdiction thus conferred upon courts-martial, except those that are capital in their nature. While, however, the jurisdiction of general courts-martial extends to all crimes, not capital, committed against public law by an officer or soldier of the Army within the limits of the territory in which he is serving, this jurisdiction is not exclusive, but only concurrent with that of the civil courts. Of such offenses courts-martial may take cognizance under the 62nd Article of War, and, if they first acquire jurisdiction, their judgments cannot be disregarded by the civil courts for mere error or for any reason not affecting the jurisdiction of the military court.

We are next to inquire whether having been acquitted by a court-martial of the crime of homicide as defined by the Penal Code of the Philippines, could Grafton be subjected thereafter to trial for the same offense in a civil tribunal deriving its authority, as did the court-martial, from the same government, namely, that of the United States? That he will be punished for the identical offense of which he has been acquitted, if the judgment of the civil court, now before us, be affirmed, is beyond question, because, as appears from the record, the civil court adjudged him guilty and sentenced him to imprisonment specifically for "an infraction of Article 404 of said Penal Code and of the crime of homicide".

It was said by the trial judge that the offense charged against Grafton in the civil court was "assassination", which offense, he said, was punishable under section 403 of the Philippines Penal Code by death, and of which crime the military court could not, under the Articles of War, have taken cognizance; whereas, the offense for which he was tried by court-martial was only homicide as defined by section 404 of the Penal Code. But

if not guilty of homicide as defined in the latter section of the Penal Code -- and such was the finding of the court-martial -- he could not, for the same acts and under the same evidence, be guilty of assassination as defined in the former section of the Code. Looking at the matter in another way, the above suggestion by the trial judge could only mean that simply because, speaking generally, the civil court has jurisdiction to try an officer or soldier of the Army for the crime of assassination, it may yet render a judgment by which he could be subjected to punishment for an offense included in the charge of assassination, although of such lesser offense he had been previously acquitted by another court of competent jurisdiction. This view is wholly inadmissible. Upon this general point the Supreme Court of the Philippines, referring to the defense of former jeopardy, said: "The circumstances that the civil trial was for murder, a crime of which courts-martial in time of peace have no jurisdiction, while the prior military trial was for manslaughter only, does not defeat the defense on this theory. The identity of the offenses is determined, not by their grade, but by their nature. One crime may be a constituent part of the other. The criterion is, Does the result of the first prosecution negative the facts charged in the second? It is apparent that it does. The acquittal of the defendant of the charge of manslaughter pronounces him guiltless of facts necessary to constitute murder and admits the plea of jeopardy." The offense, homicide or manslaughter, charged against Grafton was the unlawful killing of a named person. The facts which attended that killing would show the degree of such offense, whether assassination of which the civil court might take cognizance if it acquired jurisdiction before the military court acted, or homicide of which the military court could take cognizance if it acted before the civil court did. If tried by the military court for homicide as defined in the Penal Code, and acquitted on that charge, the guaranty of exemption from being twice put in jeopardy of punishment for the same offense, would be of no value to the accused, if on a trial for assassination, arising out of the same acts, he could be again punished for the identical offense of which he had been previously acquitted.

* * *

It must, then, be taken on the present record that an affirmance of the judgment of the civil court will subject the accused to punishment for the same acts, constituting the same offense as that of which he had been previously acquitted by a military court having complete jurisdiction to try and punish him for such offense. It is attempted to meet this view by the suggestion that Grafton committed two distinct offenses -- one against military law and discipline, the other against the civil law which may prescribe the punishment for

crimes against organized society by whomsoever those crimes are committed -- and that a trial for either offense, whatever its result, whether acquittal or conviction, and even if the first trial was in a court of competent jurisdiction, is no bar to a trial in another court of the same government for the other offense. We cannot assent to this view. It is, we think, inconsistent with the principle, already announced, that a general court-martial has, under existing statutes, in time of peace, jurisdiction to try an officer or soldier of the Army for any offense, not capital, which the civil law declares to be a crime against the public. The express prohibition of double jeopardy for the same offense means that wherever such prohibition is applicable, either by operation of the Constitution or by action of Congress, no person shall be twice put in jeopardy of life or limb for the same offense. Consequently, a civil court proceeding under the authority of the United States cannot withhold from an officer or soldier of the Army the full benefit of that guaranty, after he has been once tried in a military court of competent jurisdiction. Congress, by express constitutional provision, has the power to prescribe rules for the government and regulation of the Army, but those rules must be interpreted in connection with the prohibition against a man's being put twice in jeopardy for the same offense. The former provision must not be so interpreted as to nullify the latter. If, therefore, a person be tried for an offense in a tribunal deriving its jurisdiction and authority from the United States and is acquitted or convicted, he cannot again be tried for the same offense in another tribunal deriving its jurisdiction and authority from the United States. A different interpretation finds no sanction in the Articles of War; for the 102nd Article of War (which is the same as Article 87, adopted in 1806, 2 Stat. 369) declares that "no person" -- referring, we take it, to persons in the Army -- "shall be tried a second time for the same offense". But we rest our decision of this question upon the broad ground that the same acts constituting a crime against the United States cannot, after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in the same or in another court, civil or military, of the same government. Congress has chosen, in its discretion, to confer upon general courts-martial authority to try an officers or soldier for any crime, not capital, committed by him in the territory in which he is serving. When that was done the judgment of such military court was placed upon the same level as the judgments of other tribunals when the inquiry arises whether an accused was, in virtue of that judgment, put in jeopardy of life or limb. Any possible conflict in these matters, between civil and military courts, can be obviated either by withholding from

courts-martial all authority to try officers or soldiers for crimes prescribed by the civil power, leaving the civil tribunals to try such offenses, or by investing courts-martial with exclusive jurisdiction to try such officers and soldiers for all crimes, not capital.

* * *

* * * the cases holding that the same acts committed in a State of the Union may constitute an offense against the United States and also a distinct offense against the State, do not apply here, where the two tribunals that tried the accused exert all their powers under and by authority of the same government -- that of the United States.

* * * But passing by all other questions discussed by counsel or which might arise on the record, and restricting our decision to the above question of double jeopardy, we adjudge that, consistently with the above act of 1902, and for the reasons stated, the plaintiff in error, a soldier in the Army, having been acquitted of the crime of homicide, alleged to have been committed by him in the Philippines, by a military court of competent jurisdiction, proceeding under the authority of the United States, could not be subsequently tried for the same offense in a civil court exercising authority in that Territory. This is sufficient to dispose of the present case.

The judgment must be reversed, and the case remanded with directions to the Supreme Court of the Philippines to order the complaint or information in the Court of First Instance to be dismissed and the plaintiff discharged from custody.

It is so ordered.

/Published also in 27 Sup. Ct. Rep. 749; 51 L. Ed. 1084; 11 Ann. Cas. 640./

FRANK DYNES, Plaintiff in Error, v. JONAH D. HOOVER
Supreme Court of the United States, 1857
61 U.S. (20 How.) 65.

* * *

/Dynes, an enlisted man in the Navy, was tried by a naval court-martial, convened under an Act of Congress of April 23, 1800, on a charge of desertion, and was convicted of an attempt to desert and sentenced to be confined in the penitentiary of the District of Columbia, at hard labor, without pay, for six months. The sentence was duly approved by the Secretary of the Navy. The President directed Hoover, a United States marshal, to receive Dynes and commit him to the penitentiary. Dynes sued Hoover for false imprisonment. Hoover pleaded the above facts. Dynes demurred on the ground that the court-martial had no jurisdiction to sentence him as above stated. On a joinder in demurrer, the court below gave judgment for the defendant, Hoover. The case came to the Supreme Court on a writ of error./

Mr. Justice WAYNE delivered the opinion of the court.

* * * Among the powers conferred upon Congress by the 8th section of the first article of the Constitution, are the following: "to provide and maintain a navy;" "to make rules for the government of the land and naval forces". And the 8th (sic.) amendment, which requires a presentment of a grand jury in cases of capital or otherwise infamous crime, expressly excepts from its operation "cases arising in the land or naval forces". And by the 2nd section of the 2nd article of the Constitution it is declared that "The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States".

These provisions show that Congress had the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3rd Article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other.

In pursuance of the power just recited from the 8th section of the first article of the Constitution, Congress passed the act of the 23rd, April, 1800, (2 Stat. at Large, 45) providing rules for the government of the navy. The 17th article of that act is: "And if any person in the navy shall desert or entice others to desert, he shall

suffer death, or such other punishment as a court-martial shall adjudge" The 32nd article is: "All crimes committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea". The 35th article provides for the appointment of courts-martial to try all offenses which may arise in the naval service. The 38th article provides that charges shall be made in writing, which was done in this case. The court was lawfully constituted, the charge made in writing, and Dynes appeared and pleaded to the charge. Now, the demurrer admits, if Dynes had been found guilty of desertion, that no complaint would have been made against the conviction for want of jurisdiction in the court. But as it appears that the court, instead of finding Dynes guilty of the high offense of desertion, which authorizes the punishment of death, convicted him of attempting to desert, and sentenced him to imprisonment for six months at hard labor in the penitentiary of the District of Columbia, it is argued that the court had no jurisdiction or authority to pass such a sentence; in other words, in the language of the counsel of the plaintiff in error, that "the finding was coram non judice, it being for an offense of which the plaintiff was never charged, and of which the court had no cognizance. That the subject matter of the sentence, the punishment inflicted, was not within their jurisdiction, and is a punishment which they had no sort of permission or authority of law to inflict."

But the finding of the court against the prisoner was what is known in the administration of criminal law as a partial verdict, in which the accused is acquitted of a part of the accusation against him, and found guilty of the residue. As when there is an acquittal on one count, and a verdict of guilty on another. Or when the charge is of a higher degree, including one of a lesser, there may be a finding by a partial verdict of the latter. As upon a charge of burglary, there may be a conviction for a larceny, and an acquittal of the nocturnal entry. So, upon an indictment for murder, there may be a verdict of manslaughter, and robbery may be reduced to simple larceny, and a battery into an assault.

The objection is ingeniously worded, was very ably argued, and, we may add, with a clear view and knowledge of what the law is upon such a subject, and how the plaintiff's case must be brought under it, to make the defendant responsible on this action for false imprisonment. But it substitutes an imputed error in the finding of the court for the original subject matter of its jurisdiction, seeking to make the marshal answerable for his mere ministerial execution of a sentence, which the court passed, the Secretary of the

Navy approved, and which the President of the United States, as constitutional commander-in-chief of the army and navy of the United States, directed the marshal to execute, by receiving the prisoner and convict, Dynes, from the naval officer then having him in custody, to transfer him to the penitentiary, in accordance with the sentence which the court had passed upon him. And this upon the principle, that where a court has no jurisdiction over the subject matter, it tries and assumes it; or where an inferior court has jurisdiction over the subject matter, but is bound to adopt certain rules in its proceedings, from which it deviates, whereby the proceedings are rendered coram non judice, that trespass for false imprisonment is the proper remedy, where the liberty of the citizen has been restrained by process of the court, or by the execution of its judgment. Such is the law in either case, in respect to the court, which acts without having jurisdiction over the subject matter; or which, having jurisdiction, disregards the rules of proceedings enjoined by the law for its exercise, so as to render the case coram non judice. * * *

Courts-martial derive their jurisdiction and are regulated with us by an act of Congress, in which the crimes which may be committed, the manner of charging the accused, and of trial, and the punishments which may be inflicted, are expressed in terms; or they may get jurisdiction by a fair deduction from the definition of the crime that it comprehends, and that the Legislature meant to subject to punishment one of a minor degree of a kindred character, which has already been recognized to be such by the practice of courts-martial in the army and navy services of nations, and by those functionaries in different nations to whom has been confided a revising power over the sentences of courts-martial. And when offenses and crimes are not given in terms or by definition, the want of it may be supplied by a comprehensive enactment, such as the 32nd article of the rules for the government of the navy, which means that courts-martial have jurisdiction of such crimes as are not specified, but which have been recognized to be crimes and offenses by the usages in the navy of all nations, and that they shall be punished according to the laws and customs of the sea. Notwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for what those crimes are, and how they are to be punished, is well known by practical men in the navy and army, and by those who have studied the law of courts-martial, and the offenses of which the different courts-martial have cognizance. With the sentences of courts-martial which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any

way alterable by them. If it were otherwise, the civil courts would virtually administer the rules and articles of war, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts. But we repeat, if a court-martial has no jurisdiction over the subject matter of the charge it has been convened to try, or shall inflict a punishment forbidden by the law, though its sentence shall be approved by the officers having a revisory power of it, civil courts may, on an action by a party aggrieved by it, inquire into the want of the court's jurisdiction, and give him redress. * * *

* * *

In this case, all of us think that the court which tried Dynes had jurisdiction over the subject matter of the charge against him; that the sentence of the court against him was not forbidden by law; and that having been approved by the Secretary of the Navy as a fair deduction from the 17th article of the act of April 23rd, 1800, and that Dynes having been brought to Washington as a prisoner by the direction of the Secretary, that the President of the United States, as constitutional commander-in-chief of the army and navy, and in virtue of his constitutional obligation, that "He shall take care that the laws be faithfully executed", violated no law in directing the marshal to receive the prisoner Dynes from the officer commanding the United States steamer Engineer, for the purpose of transferring him to the penitentiary of the District of Columbia; and, consequently, that the marshal is not answerable in this action of trespass and false imprisonment.

We affirm the judgment of the Circuit Court.

* * *

/Published also in 15 L. Ed. 838./

/In Anderson v. Crawford, 265 Fed. 504, accused had been tried by court-martial on charge alleging assault and battery with intent to kill under A.W. 58 of 1874, supported by a specification alleging assault with intent to kill, and convicted. He was released on habeas corpus on the ground that the specification did not allege an offense under A.W. 58. The court did not discuss the question whether the conviction could be sustained as an offense under A.W. 62 of 1874 (crime not capital)./

EX PARTE MILLIGAN

Supreme Court of the United States, 1866.
71 U.S. (4 Wall.) 2.

* * *

This case came before the court upon a certificate of division from the judges of the Circuit Court for Indiana, on a petition for discharge from unlawful imprisonment.

* * *

* * *Lambdin P. Milligan, a citizen of the United States, and a resident and citizen of the State of Indiana, was arrested on the 5th day of October, 1864, at his home in the said State, by the order of Brevet Major-General Hovey, military commandant of the District of Indiana, and by the same authority confined in a military prison, at or near Indianapolis, the capital of the State. On the 21st day of the same month, he was placed on trial before a "military commission", convened at Indianapolis, by order of the said General, upon the following charges; preferred by Major Burnett, Judge Advocate of the Northwestern Military Department, namely:

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 practices;" and

5. "Violation of the laws of war."

Under each of these charges there were various specifications. The substance of them was, joining and aiding, at different times, between October, 1863, and August, 1864, a secret society known as the Order of American Knights or Sons of Liberty, for the purpose of overthrowing the Government and duly constituted authorities of the United States; holding communication with the enemy; conspiring to seize munitions of war stored in the arsenals; to liberate prisoners of war, &c.; resisting the draft, &c.; . . . "at a period of war and armed rebellion against the authority of the United States, at or

near Indianapolis, [and various other places specified] in Indiana, a State within the military lines of the army of the United States, and the theater of military operations, and which had been and was constantly threatened to be invaded by the enemy." These were amplified and stated with various circumstances.

An objection by him to the authority of the commission to try him being overruled, Milligan was found guilty on all the charges, and sentenced to suffer death by hanging; and this sentence, having been approved, he was ordered to be executed on Friday, the 19th of May, 1865.

* * *

At the close of the last term the CHIEF JUSTICE announced the order of the court in this and in two other similar cases (those of Bowles and Horsey) as follows:

1. That on the facts stated in said petition and exhibits a writ of habeas corpus ought to be issued, according to the prayer of the said petitioner.

2. That on the facts stated in the said petition and exhibits the said Milligan ought to be discharged from custody as in said petition is prayed, according to the act of Congress passed March 3rd, 1863, entitled, "An act relating to habeas corpus and regulating judicial proceedings in certain cases".

3. That on the facts stated in said petition and exhibits, the military commission mentioned therein had no jurisdiction legally to try and sentence said Milligan in the manner and form as in said petition and exhibits are stated.

At the opening of the present term, opinions were delivered.

Mr. Justice DAVIS delivered the opinion of the court.

On the 10th day of May, 1865, Lambdin P. Milligan presented a petition to the Circuit Court of the United States for the District of Indiana, to be discharged from an alleged unlawful imprisonment. The case made by the petition is this: Milligan is a citizen of the United States; has lived for twenty years in Indiana; and, at the time of the grievances complained of, was not, and never had been in the military or naval service of the United States. On the 5th day of October, 1864, while at home, he was arrested by order of

General Alvin P. Hovey, commanding the military district of Indiana; and has ever since been kept in close confinement.

On the 21st day of October, 1864, he was brought before a military commission, convened at Indianapolis, by order of General Hovey, tried on certain charges and specifications; found guilty, and sentenced to be hanged; and the sentence ordered to be executed on Friday, the 19th of May, 1865.

* * *

* * * The opinions of the judges of the Circuit Court were opposed on three questions, which are certified to the Supreme Court:

1st. "On the facts stated in said petition and exhibits, ought a writ of habeas corpus to be issued?"

2nd. "On the facts stated in said petition and exhibits, ought the said Lambdin P. Milligan to be discharged from custody as in said petition prayed?"

3rd. "Whether, upon the facts stated in said petition and exhibits, the military commission mentioned therein had jurisdiction legally to try and sentence said Milligan in manner and form as in said petition and exhibits is stated?"

* * *

/The court held that the authority in the Act of March 3, 1863 (12 Stat. 755), for suspension of the privilege of the writ of habeas corpus, had expired as to this case and remarked, "The suspension of the writ does not authorize the arrest of any one, but simply denies to one arrested the privilege of this writ in order to obtain his liberty"./

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? Milligan, not a resident of one of the rebellious states, or a prisoner or 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. Has this tribunal the legal power and

authority to try and punish this man?

* * *

* * * The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle; and secured in a written constitution every right which the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it this question must be determined. The provisions of that instrument on the administration of criminal justice are too plain and direct to leave room for misconstruction or doubt of their true meaning. Those applicable to this case are found in that clause of the original Constitution which says, "That the trial of all crimes, except in case of impeachment, shall be by jury;" and in the fourth, fifth, and sixth articles of the amendments. The fourth proclaims the right to be secure in person and effects against unreasonable search and seizure; and directs that a judicial warrant shall not issue "without proof of probable cause supported by oath or affirmation." The fifth declares "that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor be deprived of life, liberty, or property, without due process of law." And the sixth guarantees the right of trial by jury in such manner and with such regulations that with upright judges, impartial juries, and an able bar, the innocent will be saved and the guilty punished. It is in these words: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense". These securities for personal liberty thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. * * *

Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when

rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. 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. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

Have any of the rights guaranteed by the Constitution been violated in the case of Milligan? And if so, what are they?

Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it "in one supreme court and such inferior courts as the Congress may from time to time ordain and establish", and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is "no unwritten criminal code to which resort can be had as a source of jurisdiction".

But it is said that the jurisdiction is complete under the "laws and usages of war".

It can serve no useful purpose 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. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.

* * *

Another guarantee of freedom was broken when Milligan was denied a trial by jury. The great minds of the country have differed on the correct interpretation to be given to various provisions of the Federal Constitution; and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is now assailed; but if ideas can be expressed in words, and the language has any meaning, this right -- one of the most valuable in a free country -- is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service. The sixth amendment affirms that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury", language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment, or presentment, before any one can be held to answer for high crimes, "excepts cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger"; and the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.

* * *

It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: that in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.

If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity,

with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.

* * * The Constitution * * * does not say after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of the common law; if it had intended this result, it was easy by the use of direct words to have accomplished it. * * *

It will be borne in mind that this is not a question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander, at the head of his army, can impose on states in rebellion to cripple their resources and quell the insurrection. The jurisdiction claimed is much more extensive. The necessities of the service, during the late Rebellion, required that the loyal states should be placed within the limits of certain military districts and commanders appointed in them; and, it is urged, that this, in a military sense, constituted them the theater of military operations; and, as in this case, Indiana had been and was again threatened with invasion by the enemy, the occasion was furnished to establish martial law. The conclusion does not follow from the premises. If armies were collected in Indiana, they were to be employed in another locality, where the laws were obstructed and the national authority disputed. On her soil there was no hostile foot; if once invaded, that invasion was at an end, and with it all pretext for martial law. 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.

* * *

* * * Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because, during the late Rebellion it could have been enforced in Virginia, where the national authority was overturned, and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered. And so in the case of a foreign invasion, martial rule may become a necessity in one state, when, in another, it would be "mere lawless violence".

* * *

To the third question, then, on which the judges below were opposed in opinion, an answer in the negative must be returned.

* * *

The two remaining questions in this case must be answered in the affirmative. The suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it.

* * *

If the military trial of Milligan was contrary to law, then he was entitled, on the facts stated in his petition, to be discharged from custody by the terms of the act of Congress of March 3rd, 1863. * * *

But it is insisted that Milligan was a prisoner of war, and, therefore, excluded from the privileges of the statute. It is not easy to see how he can be treated as a prisoner of war, when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the states in rebellion. If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offense, he cannot plead the right of war; for he was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?

This case, as well as the kindred cases of Bowles and Horsey, were disposed of at the last term, and the proper orders were entered of record. There is, therefore, no additional entry required.

* * *

/Published also in 18 L. Ed. 281./

/Ex p. Vallandingham, 1 Wall. 243, refusing to review by certiorari the proceedings of a military commission, turned on the jurisdiction of the Supreme Court to issue the writ, and not on the validity of the military trial./

EX PARTE QUIRIN ET AL.

Supreme Court of the United States, 1942.
317 U.S. 1.

/The seven petitioners, one of whom claims to be a citizen of the United States, were trained in sabotage by the Germain Reich. They were transported to this country by submarine and in June of 1942, clandestinely landed on our East coast, wearing parts of German uniforms and carrying explosives. They immediately buried their instruments of destruction and such military habiliments as they had been wearing. In civilian clothing they proceeded to nearby cities and thereafter to various points throughout the United States.

While thus in the employ of the German government, they were apprehended and placed on trial before a military commission appointed by the President./

On July 3, 1942, the Judge Advocate General's Department of the Army prepared and lodged with the Commission the following charges against petitioners, supported by specifications:

1. Violation of the law of war.
2. Violation of Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy.
3. Violation of Article 82, defining the offense of spying.
4. Conspiracy to commit the offenses alleged in charges 1, 2 and 3.

Mr. Chief Justice STONE delivered the opinion of the court.

Petitioners' main contention is that the President is without any statutory or constitutional authority to order the petitioners to be tried by military tribunal for offenses with which they are charged; that in consequence they are entitled to be tried in the civil courts with the safeguards, including trial by jury, which the Fifth and Sixth Amendments guarantee to all persons charged in such courts with criminal offenses.

The Articles of War recognize the "military commission" appointed by military command as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court-martial. * * * Article 2 includes among those persons subject to military law the personnel of our own

military establishment. But this, as Article 12 provides, does not exclude from that class "any other person who by the law of war is subject to trial by military tribunals" and who under Article 12 may be tried by court-martial or under Article 15 by military commission.

* * * 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. By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons and offenses which, according to the rules and precepts of the law of nations and more particularly the law of war, are cognizable by such tribunals.

* * * We are concerned only with the question whether it is within the constitutional power of the national government to place petitioners upon trial before a military commission for the offenses with which they are charged. We must therefore first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial.

* * * 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), and which may constitutionally be included within that jurisdiction.

* * * Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. 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 an 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.

* * * Our Government, by thus defining (in Art. 1, Annex to Hague Convention No. IV, 1907) lawful belligerents entitled to be treated as prisoners of war, has recognized that there is a class of unlawful belligerents not entitled to that privilege, including those who though combatants do not wear "fixed and distinctive emblems". And by Article 15 of the Articles of War Congress has made provision for their trial and punishment by military commission, according to "the law of war".

By a long course of practical administrative construction by its military authorities, our Government has likewise recognized that those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission.

* * * Specification 1 states that petitioners "being enemies of the United States and acting for . . . the German Reich, a belligerent enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war, through the military and naval lines and defenses of the United States . . . and went behind such lines, contrary to the law of war, in civilian dress . . . for the purpose of committing . . . hostile acts, and, in particular, to destroy certain war industries, war utilities and war materials within the United States".

* * * By passing our boundaries for such purposes without uniform or other emblem signifying their belligerent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment.

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the

Hague Convention and the law of war. Cf. Gates v. Goodloe, 101 U.S. 612, 615, 617-18. It is as an enemy belligerent that petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused.

* * * The offense was complete when with that purpose they entered -- or, having so entered, they remained upon -- our territory in time of war without uniform or other appropriate means of identification.

* * *

* * * As this Court has often recognized, it was not the purpose or effect of sec. 2 of Article III, read in the light of the common law, to enlarge the then existing right to a jury trial.

* * * The Fifth and Sixth Amendments, while guaranteeing the continuance of certain incidents of trial by jury which Article III, sec. 2, had left unmentioned, did not enlarge the right to jury trial as it had been established by that Article. Callan v. Wilson, 127 U.S. 540, 549. Hence petty offenses triable at common law without a jury may be tried without a jury in the Federal courts, notwithstanding Article III, sec. 2, and the Fifth and Sixth Amendments. (citing cases)

* * * All these are instances of offenses committed against the United States, for which a penalty is imposed, but they are not deemed to be within Article III, sec. 2, or the provisions of the Fifth and Sixth Amendments relating to "crimes" and "criminal prosecutions". In the light of this long-continued and consistent interpretation we must conclude that sec. 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts

* * * The fact that "cases arising in the land or naval forces" are excepted from the operation of the Amendments does not militate against this conclusion.

* * * the exception cannot be taken to affect those trials before military commissions which are neither within the exception nor within the provisions of Article III, sec. 2, whose guaranty the Amendments did not enlarge. No exception is necessary to exclude from the operation of these provisions cases never deemed to be within their terms. An express exception from Article III, sec. 2,

and from the Fifth and Sixth Amendments, of trials of petty offenses and of criminal contempts has not been found necessary in order to preserve the traditional practice of trying those offenses without a jury. It is no more so in order to continue the practice of trying, before military tribunals without a jury, offenses committed by enemy belligerents against the law of war.

* * * The exception from the Amendments of "cases arising in the land or naval forces" was not aimed at trials by military tribunals, without a jury, of such offenses against the law of war. Its objective was quite different -- to authorize the trial by court-martial of the members of our Armed Forces for all that class of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in the civil courts.

* * * We conclude that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission, and that petitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the Commission without a jury.

* * *

Petitioners, and especially petitioner Haupt, stress the pronouncement of this Court in the Milligan case, p. 121, that the law of war "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". Elsewhere in its opinion, at pp. 118, 121-22, and 131, the Court was at pains to point out that Milligan, a citizen twenty years resident in Indiana, who had never been a resident of any of the states in rebellion, was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents. 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.

* * *

* * * Since the first specification of Charge I set forth a violation of the law of war, we have no occasion to pass on the adequacy of the second specification of Charge I, or to construe the 81st and 82nd Articles of War for the purpose of ascertaining whether the specifications under Charges II and III allege violations of those Articles or whether if so construed they are constitutional. McNally v. Hill, 293 U.S. 131.

There remains the contention that the President's Order of July 2, 1942, so far as it lays down the procedure to be followed on the trial before the Commission and on the review of its findings and sentence, and the procedure in fact followed by the Commission, are in conflict with Articles of War 38, 43, 46, 50½, and 70.

* * * We need not inquire whether Congress may restrict the power of the Commander-in-Chief to deal with enemy belligerents. For the Court is unanimous in its conclusion that the Articles in question could not at any stage of the proceedings afford any basis for issuing the writ.

* * * Accordingly, we conclude that Charge I, on which petitioners were detained for trial by the Military Commission, alleged an offense which the President is authorized to order tried by military commission; that his Order convening the Commission was a lawful order and that the Commission was lawfully constituted; that the petitioners were held in lawful custody and did not show cause for their discharge. It follows that the orders of the District Court should be affirmed, and that leave to file petitions for habeas corpus in this Court should be denied.

FORT LEAVENWORTH RAILROAD COMPANY v. LOWE

Supreme Court of the United States, 1885.
(114 U.S. 525.)

* * *

In error to the Supreme Court of Kansas. This action was brought in the District Court of Leavenworth, Kansas, by the plaintiff to recover certain taxes paid under an alleged illegal assessment upon property situated within the Fort Leavenworth Military Reservation. The court rendered judgment on demurrer for the defendant. This judgment having been affirmed by the Supreme Court of the State of Kansas, the plaintiff sued out this writ of error to the Supreme Court of the United States.

The judgment of the Supreme Court of Kansas affirmed.

/Plaintiff, a Kansas corporation, was in 1880 and has ever since been the owner of a railroad in the Reservation of the United States in that state, known as the Fort Leavenworth Military Reservation. In that year its physical properties and franchises upon the Reservation were assessed and taxed by the State of Kansas. The plaintiff paid the tax and then brought this action to recover back the money thus paid on the theory that the property, being entirely within the Reservation, was exempt from assessment and taxation by the State.

The land constituting the Reservation was part of the territory acquired in 1803 by the United States by cession from France, and until the admission of Kansas into the Union, the United States possessed proprietary rights and political dominion and sovereignty over it. During this period the lands of this post were occupied by the Army for military purposes. In 1861, however, Kansas was admitted into the Union upon an equal footing with the original states, with the same political rights and sovereignty, subject only to the Constitution. Congress failed to stipulate with Kansas for the retention by the United States of the political authority and jurisdiction over the reservation. In 1875, undoubtedly upon request, the Kansas Legislature ceded to the United States exclusive jurisdiction over the Fort Leavenworth Military Reservation, saving, however, to the State "the right to serve civil or criminal process within said Reservation * * *; and saving further to said State the right to tax railroad, bridge, and other corporations, their franchises and property, on said Reservation".

The question as to the right of the plaintiff to recover back the taxes paid depends upon the validity and effect of the last saving clause of the Act.7

Mr. Justice FIELD delivered the opinion of the court.

The contention of the plaintiff is that the act of cession operated under the Constitution to vest in the United States exclusive jurisdiction over the Reservation, and that the last saving clause, being inconsistent with that result, is to be rejected. The Constitution provides that "Congress shall have power to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings". Art. 1, sec. 8.

* * *

Upon the second part of the clause in question, giving power to "exercise like authority", that is, of exclusive legislation "over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings", the Federalist observes that the necessity of this authority is not less evident. "The public money expended on such places," it adds, "and the public property deposited in them, require that they should be exempt from the authority of the particular State. Nor would it be proper for the places on which the security of the entire Union may depend to be in any degree dependent on a particular member of it. All objections and scruples are here also obviated by requiring the concurrence of the States concerned in every such establishment." "The power," says Mr. Justice Store, repeating the substance of Mr. Madison's language, "is wholly unexceptionable, since it can only be exercised at the will of the State, and therefore it is placed beyond all reasonable scruple."

* * *

But not only by direct purchase have the United States been able to acquire lands they needed without the consent of the States, but it has been held that they possess the right of eminent domain within the States, using those terms, not as expressing the ultimate

dominion or title to property, but as indicating the right to take private property for public uses when needed to execute the powers conferred by the Constitution; and that the general government is not dependent upon the caprice of individuals or the will of State Legislatures in the acquisition of such lands as may be required for the full and effective exercise of its powers. * * * The right to acquire property in this way, by condemnation, may be exerted either through tribunals expressly designated by Congress, or by resort to tribunals of the State in which the property is situated, with her consent for that purpose. Such consent will always be presumed in the absence of express prohibition.

* * *

Besides these modes of acquisition, the United States possessed, on the adoption of the Constitution, an immense domain lying north and west of the Ohio River, acquired as the result of the Revolutionary War from Great Britain, or by cessions from Virginia, Massachusetts, and Connecticut; and, since the adoption of the Constitution, they have by cession from foreign countries, come into the ownership of a territory still larger, lying between the Mississippi River and the Pacific Ocean, and out of these territories several States have been formed and admitted into the Union. The proprietorship of the United States in large tracts of land within these States has remained after their admission. There has been, therefore, no necessity for them to purchase or to condemn lands within those States, for forts, arsenals, and other public buildings, unless they had disposed of what they afterwards needed. Having the title, they have usually reserved certain portions of their lands from sale or other disposition, for the uses of the government.

* * *

These authorities are sufficient to support the proposition which follows naturally from the language of the Constitution, that no other legislative power than that of Congress can be exercised over lands within a State purchased by the United States with her consent for one of the purposes designated; and that such consent under the Constitution operates to exclude all other legislative authority.

But with reference to lands owned by the United States, acquired by purchase without the consent of the State, or by cessions from other governments, the case is different.

* * * Where, therefore, lands are acquired in any other way by the United States within the limits of a State than by purchase with her consent, they will hold the lands subject to this qualification; that if upon them forts, arsenals, or other public buildings are erected for the uses of the general government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the general government. Their exemption from State control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers. But, when not used as such instrumentalities, the legislative power of the State over the places acquired will be as full and complete as over any other places within her limits

As already stated, the land constituting the Fort Leavenworth Military Reservation was not purchased, but was owned by the United States by cession from France many years before Kansas became a State; and whatever political sovereignty and dominion the United States had over the place comes from the cession of the State since her admission into the Union. It not being a case where exclusive legislative authority is vested by the Constitution of the United States, that cession could be accompanied with such conditions as the State might see fit to annex not inconsistent with the free and effective use of the fort as a military post.

* * * The Military Reservation of Fort Leavenworth was not, as already said, acquired by purchase with the consent of Kansas. And her cession of jurisdiction is not of exclusive legislative authority over the land, except as far as that may be necessary for its use as a military post; and it is not contended that the saving clause in the act of cession interferes with such use. There is, therefore, no constitutional prohibition against the enforcement of that clause. The right of the State to subject the railroad property to taxation exists as before the cession. The invalidity of the tax levied not being asserted on any other ground than the supposed exclusive jurisdiction of the United States over the reservation notwithstanding the saving clause, the judgment of the court below must be

Affirmed.

JAMES v. DRAVO CONTRACTING CO.

Supreme Court of the United States, 1937.
(302 U.S. 134.)

Mr. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

This case presents the question of the constitutional validity of a tax imposed by the State of West Virginia upon the gross receipts of respondent under contracts with the United States.

Respondent, the Dravo Contracting Company, is a Pennsylvania corporation engaged in the general contracting business, with its principal office and plant at Pittsburgh in that State, and is admitted to do business in the State of West Virginia. In the years 1932 and 1933, respondent entered into four contracts with the United States for the construction of locks and dams in the Kanawha River and locks in the Ohio River, both navigable streams. The State Tax Commissioner assessed respondent for the years 1933 and 1934 in the sum of $135,761.51 (taxes and penalties) upon the gross amounts received from the United States under these contracts.

Respondent brought suit in the District Court of the United States for the Southern District of West Virginia to restrain the collection of the tax. The case was heard by three judges (28 U.S.C. 380) and upon findings the court entered final decree granting a permanent injunction. 16 F. Supp. 527. The case comes here on appeal.

* * * The questions presented are (1) whether the State had territorial jurisdiction to impose the tax, and (2) whether the tax was invalid as laying a burden upon the operations of the Federal Government.

* * * First. As to territorial jurisdiction.--Unless the activities which are the subject of the tax were carried on within the territorial limits of West Virginia, the State had no jurisdiction to impose the tax. Hans Rees' Sons v. North Carolina, 283 U.S. 123, 133, 134; Shaffer v. Carter, 252 U.S. 37, 57; Surplus Trading Co. v. Cook, 281 U.S. 647. The question has two aspects (1) as to work alleged to have been done outside the exterior limits of West Virginia and (2) as to work done within those limits but (a) in the bed of the rivers, (b) on property acquired by the Federal Government on the banks of the rivers, and (c) on property leased by respondent and used for the accommodation of his equipment.

* * * It is clear that West Virginia had no jurisdiction to lay a tax upon respondent with respect to this work done in Pennsylvania As to the material and equipment there fabricated, the business and activities of respondent in West Virginia consisted of the installation at the respective sites within that State and an apportionment would in any event be necessary to limit the tax accordingly. Hans Rees' Sons v. North Carolina, supra.

* * *

As to work done within the exterior limits of West Virginia, the question is whether the United States has acquired exclusive jurisdiction over the respective sites. Wherever the United States has such jurisdiction the State would have no authority to lay the tax. Surplus Trading Co. v. Cook, supra.

* * * As to lands acquired by the United States by purchase or condemnation for the purposes of the improvements. Lands were thus acquired on the banks of the rivers from individual owners and the United States obtained title in fee simple. Respondent contends that by virtue of Article I, Section 8, Clause 17, of the Federal Constitution the United States acquired exclusive jurisdiction.

Clause 17 provides that Congress shall have power "to exercise exclusive legislation" over "all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings". "Exclusive legislation" is consistent only with exclusive jurisdiction. Surplus Trading Co. v. Cook, supra, p. 652. As we said in that case, it is not unusual for the United States to own within a State lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the State. The lands "remain part of her territory and within the operation of her laws, save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal". Id., p. 650. Clause 17 governs those cases where the United States acquires lands with the consent of the legislature of the State for the purposes there described. If lands are otherwise acquired, and jurisdiction is ceded by the State to the United States, the terms of the cession, to the extent that they may lawfully be prescribed, that is, consistently with the carrying out of the purpose of the acquisition, determine the extent of the Federal jurisdiction. Fort Leavenworth R. Co. v. Lowe, 114 U.S. 526, 538, 539; Palmer v. Barrett, 162 U.S. 399, 402, 403; Arlington Hotel Co. v. Fant, 278 U.S. 439, 451; United States v. Unzeuta, 281 U.S. 138, 142; Surplus Trading Co. v. Cook, supra.

/ * The legislature of West Virginia by general statute had given its consent to the acquisition by the United States, but questions are presented as to the construction and effect of the consent. The provision is found in sec. 3 of Chapter I, Article 1, of the Code of West Virginia of 1931. The full text is set out in the margin. By the first paragraph the consent of the State is given "to the acquisition by the United States, or under its authority, by purchase, lease, condemnation, or otherwise, of any land acquired, or to be acquired in this State by the United States, from any individual, body politic or corporate, for sites for . . . locks, dams, . . . or any needful buildings or structures or proving grounds, or works for the improvement of the navigation of any watercourse . . . or for any other purpose for which the same may be needed or required by the government of the United States". By the second paragraph provision is made for gifts by municipalities to the United States of land for any of the purposes described in the first paragraph. The third paragraph cedes to the United States "concurrent jurisdiction with this State in and over any land so acquired . . . for all purposes". The jurisdiction so ceded is to continue only during the ownership of the United States and is to cease if the United States fails for five consecutive years to use any such land for the purposes of the grant.

By a further provision in sec. 4 the State reserves the right to execute process within the limits of the land acquired "and such other jurisdiction and authority over the same as is not inconsistent with the jurisdiction ceded to the United States by virtue of such acquisition".

* * * The third paragraph of sec. 3 carefully defines the jurisdiction ceded by the State and there is no permissible construction which would ignore this definite expression of intention in considering the effect upon jurisdiction of the consent given by the first paragraph.

But it is urged that if the paragraph be construed as seeking to qualify the consent of the State, it must be treated as inoperative. That is, that the State cannot qualify its consent, which must be taken as carrying with it exclusive jurisdiction by virtue of Clause 17. The point was suggested by Justice Story in United States v. Cornell, Fed. Cas. No. 14, 867; 2 Mason 60, 65, 66, but the construction placed upon the consent in that case made decision of the point unnecessary. There the place (Fort Adams in Newport Harbor) had been purchased with the consent of the State, to which was added a reservation for the service of civil and criminal process. Justice Story held that such a reservation was not incompatible

with a cession of exclusive jurisdiction to the United States, as the reservation operated "only as a condition" and "as an agreement of the new sovereign to permit its free exercise as quoad hoc his own process". Reservations of that sort were found to be frequent in grants made by the States to the United States in order to avoid the granted places being made a sanctuary for fugitives from justice. Story on the Constitution, Vol. 2, sec. 1225. Reference is made to statements in the general discussion in the opinion in Fort Leavenworth R. Co. v. Lowe, supra, but these are not decisive of the present question. The decision in that case was that the State retained its jurisdiction to tax the property of a railroad company within the Fort Leavenworth Military Reservation, as Federal jurisdiction had not been reserved when Kansas was admitted as a State and, when the State subsequently ceded jurisdiction to the United States, there was saved to the State the right "to tax railroad, bridge, and other corporations, their franchises and property, on said Reservation". The terms of the cession in this respect governed the extent of the federal jurisdiction. See Surplus Trading Co. v. Cook, supra. There are obiter dicta in other cases but the point now raised does not appear to have been definitely determined.

It is not questioned that the State may refuse its consent and retain jurisdiction consistent with the governmental purposes for which the property was acquired. The right of eminent domain inheres in the Federal Government by virtue of its sovereignty and thus it may, regardless of the wishes either of the owners or of the States, acquire the lands which it needs within their borders. Kohl v. United States, 91 U.S. 367, 371, 372. In that event, as in cases of acquisition by purchase without consent of the State, jurisdiction is dependent upon cession by the State and the State may qualify its cession by reservations not inconsistent with the governmental uses. Story on the Constitution, Vol. 2, sec. 1227; Kohl v. United States, supra, p. 374; Fort Leavenworth R. Co. v. Lowe, supra; Surplus Trading Co. v. Cook, supra; United States v. Unzeuta, supra. The result to the Federal Government is the same whether consent is refused and cession is qualified by a reservation of concurrent jurisdiction, or consent to the acquisition is granted with a like qualification. As the Solicitor General has pointed out, a transfer of legislative jurisdiction carries with it not only benefits but obligations, and it may be highly desirable, in the interest both of the national government and of the State, that the latter should not be entirely ousted of its jurisdiction. The possible importance of reserving to the State jurisdiction for local purposes which involve no interference with the performance of governmental functions is becoming more and more clear as the

activities of the Government expand and large areas within the States are acquired. There appears to be no reason why the United States should be compelled to grant it in giving its consent to purchases.

* * *

Clause 17 contains no express stipulation that the consent of the State must be without reservations. We think that such a stipulation should not be implied. We are unable to reconcile such an implication with the freedom of the State and its admitted authority to refuse or qualify cessions of jurisdiction when purchases have been made without consent or property has been acquired by condemnation. In the present case the reservation by West Virginia of concurrent jurisdiction did not operate to deprive the United States of the enjoyment of the property for the purposes for which it was acquired, and we are of the opinion that the reservation was applicable and effective.

* * *

We hold that the West Virginia tax so far as it is laid upon the gross receipts of respondent derived from its activities within the borders of the State does not interfere in any substantial way with the performance of Federal functions and is a valid exaction. The decree of the District Court is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Reversed.

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