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Robert Cardon
University of Michigan Law School

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CONSTITUTIONAL LAW—MARTIAL LAW—TRIAL OF CIVILIANS BY MILITARY TRIBUNALS IN HAWAII—On the day of the attack on Pearl Harbor, the Governor of Hawaii suspended the writ of habeas corpus and declared martial law in that territory, acting under authority of the Organic Act of Hawaii.¹ At the Governor's request, the Commanding General of the Hawaiian Department of the Army proclaimed himself Military Governor of the Islands, and established military tribunals to try all violations of existing federal laws and military regulations thereafter to be promulgated. The following day all civil courts were closed, and the next day the President approved the Governor's action. One week later, the law courts were permitted to resume jurisdiction of non-jury civil suits; this jurisdiction was gradually widened in the ensuing months to include all cases except those involving violation of military regulations. Martial law was terminated in October of 1944.

These measures brought squarely before the Supreme Court for the first time in its history² the question of whether the supplanting of civil courts by military tribunals had been authorized by a federal statute. In an opinion narrowly confined to that issue, the Supreme Court held in the *Duncan* and *White* cases³ that the Organic Act did

¹ Section 67 of the act provided that "... the governor ... may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory or any part thereof, under martial law until communication can be had with the President and his decision thereon made known."

² While the question was discussed in *Ex parte Milligan*, 4 Wall. (71 U.S.) 2 (1866), the statute involved in that case authorized only the suspension of the writ of habeas corpus, and, in the words of Chief Justice Chase, seemed "to have been framed on purpose to secure the trial of all offences of citizens by civil tribunals, in states where these tribunals were not interrupted in the regular exercise of their functions." *Id.* at 136.

³ *Duncan v. Kahanamoku*, *White v. Steer*, (U.S. 1946) 66 S. Ct. 606.

not authorize the trial by military tribunals of citizens not directly connected with the armed forces nor charged with violations of the laws of war. Asserting that "martial law" has no precise meaning, the Court, speaking through Justice Black, concluded that Congress did not intend by using that term to provide that courts of law could be supplanted by military tribunals.

Military jurisdiction has been classified under three headings: military law, applicable to members of the armed forces and enemy belligerents; military government, exercised over occupied enemy territory; and martial law, applicable to domestic areas when needed to preserve public order and safety. Authority for the Hawaiian trials was claimed under the third type of jurisdiction, distinguishing them from trials of enemy belligerents under the laws of war, as in the *Quirin*⁴ and *Yamashita*⁵ cases, or trials of American citizens in civil courts for violation of military regulations, as in the *Hirabayashi* case.⁶

The conclusion that martial law is not a term of precision accurately reflects a state of considerable confusion among the authorities on the subject. Aside from the indiscriminate use of the term to include military law and military government, there is sharp divergence of views as to what martial law proper means and what it includes.⁷ It is held by some to be absolute, and by others to be qualified; it has been classified into punitive and preventive categories, although there is conflict as to whether it can ever be the former; it has been characterized as constitutional, unconstitutional, and extraconstitutional.⁸

Despite the established supremacy of civil over military power in England and the United States, which has led to occasional assertions that martial law has no place in our society, it is now generally recognized as being justified by necessity.⁹ Without analyzing the numerous theories on which martial law has been based, two conflicting theories which have played a prominent part in its development in this country may profitably be examined.¹⁰

One theory, developed out of the common law,¹¹ is based on the

⁴ Ex parte *Quirin*, 317 U.S. 1, 63 S. Ct. 1 (1942).

⁵ In the Matter of General Tomoyuki Yamashita, 326 U.S. 693, 694, 66 S. Ct. 340 (1946).

⁶ *Hirabayashi v. United States*, 320 U.S. 81, 63 S. Ct. 1375 (1943).

⁷ WIENER, A PRACTICAL MANUAL OF MARTIAL LAW 6-15, (1940).

⁸ RANKIN, WHEN CIVIL LAW FAILS 174-177 (1939).

⁹ "Martial law is the public law of necessity. Necessity calls it forth, necessity justifies its existence, and necessity measures the extent and degree to which it may be employed." WIENER, A PRACTICAL MANUAL OF MARTIAL LAW 16 (1940).

¹⁰ Corwin, "Martial Law, Yesterday and Today," 47 POL. SCI. Q. 95 at 99 (1932).

¹¹ DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, 8th ed., ch. 8, and appendix, note 10 (1915).

privilege of resisting illegal force with force, coupled with the duty imposed upon public officers to suppress disturbance of the peace. Since the duty exists, some defense must be permitted for officers using what would normally be illegal force in restricting personal liberties in the discharge of such duty.¹² This defense is necessity, and is available to military officers only when the orderly processes of civil government are unable to cope with violence, so that a choice is presented between martial law and no law at all, or, more accurately, between martial rule and the rule of lawless force.¹³ Martial rule in this sense does not supplant civil law, but fills a void created by the failure of civil law. The duty of maintaining order falls to the military by default, and the powers exercised by the military are defined by the extent to which their normal superiors are unable to meet the exigencies of the situation.

One test of the existence of necessity justifying martial rule under this theory is that expressed in *Ex parte Milligan*: Martial rule can never exist when the courts are open, and in the proper and unobstructed exercise of their jurisdiction.¹⁴ This test, too, is rooted in English tradition.¹⁴ It has, however, been subjected to considerable criticism, both in England¹⁵ and in this country,¹⁶ and was invoked in the *Duncan* and *White* cases only in Justice Murphy's concurring opinion. The qualifications, "proper and unobstructed" may be construed to mean that the courts are capable of enforcing their orders through their own officers; under these conditions there is obviously no need for martial rule if the common law approach is adopted. Even if the assistance of the military is required to enforce these orders, this does not necessitate trying offenders in military courts.¹⁷

Under this theory, an act of Congress providing that the President may declare martial law may be construed as authorizing nothing. It may be simply declarative of the recognized rule that martial rule is justified under certain conditions. If it purports to authorize it under

¹² Fairman, "The Law of Martial Rule and the National Emergency," 55 HARV. L. REV. 1253 at 1256 (1942).

¹³ FAIRMAN, THE LAW OF MARTIAL RULE, 2d ed., 28-30 (1943).

¹⁴ In the Fourteenth Century, the English Parliament recognized: "1. That in time of peace no man ought to be adjudged to death for treason, or any other offense without being arraigned and put to answer. 2. That regularly, when the king's courts are open, it is a time of peace in judgment of law." 1 HALE, THE HISTORY OF THE PLEAS OF THE CROWN, 1st Am. edition, 346 (1847).

¹⁵ *Ex parte Marais*, 27 A.C. 109 at 114, 115 (1901).

¹⁶ FAIRMAN, THE LAW OF MARTIAL RULE, 2d ed., 163-167 (1943).

¹⁷ Distinctions have been made between martial rule and military aid to the civil authorities. FAIRMAN, *id.* 30; WIENER, A PRACTICAL MANUAL OF MARTIAL LAW 8 (1940).

any other conditions, it is unconstitutional.¹⁸ Authorization comes from factual necessity, not legislation; power resides in the executive by default of normal civil process, and must be exercised by the military forces as the sole remaining executive agency capable of maintaining public order. The courts must ultimately determine whether this factual necessity existed.¹⁹ In fulfilling his duty, the military officer must judge for the moment the extent of his authority, but this decision is subject to being overruled by a law court subsequently permitted to resume its normal functions. In such an event, the officer may look to the legislature for indemnification, but not for authorization.²⁰

One rather curious result seems to follow: although the arrest and detention, and even killing, of persons defying the military authorities may be justified by necessity, their trial by military tribunals can never be lawful.²¹ It may be necessary to detain a person in order to maintain public safety and to restore the normal functioning of the courts, but the determination of his guilt or innocence is still one of those normal functions which must await the restoration of the courts. While this may be small consolation to one languishing in a detention barracks, it does at least assure him that he will live for the day of reckoning.

The common law theory of martial law, with its attendant "open court" test, is better adapted to rebellion or riot, where illegal force is applied from within the confines of the territory subjected to martial law, than to war, where armed force is applied from without those confines. It focuses attention upon the territory itself to determine

¹⁸ "Just as martial law may not be declared when no necessity exists, so the declaration of martial law is not necessary to the validity of measures of military rule when the necessity is actually present." WIENER, *id.* 19.

¹⁹ DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION*, 8th ed., 286 (1915): "... the question whether the force employed was necessary or excessive will, especially where death has ensued, be ultimately determined by a judge and jury"

²⁰ An example is the fining of General Jackson for contempt of court during his exercise of martial rule at New Orleans, with subsequent indemnification by Congress.

²¹ "Soldiers may suppress a riot as they may resist an invasion, they may fight rebels just as they may fight foreign enemies, but they have no right under the law to inflict punishment for riot or rebellion." DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION*, 8th ed., 289 (1915). For arguments pro and con, see RANKIN, *WHEN CIVIL LAW FAILS* 177-181 (1939). One explanation for the apparent conflict between *Moyer v. Peabody*, 212 U.S. 78, 29 S. Ct. 235 (1909), holding that a state governor's determination that a state of insurrection exists is conclusive, and *Sterling v. Constantin*, 287 U.S. 378, 53 S. Ct. 190 (1932), holding that the question whether he has exceeded the limits of military discretion in instituting martial rule will be considered by the courts, is that the latter case involved punitive measures while the former did not.

whether a state of facts exists requiring the use of military force to insure the public safety. Logically, the approach of an enemy fleet or even the actual arrival of incendiary bombs need not interrupt the normal, orderly processes of civil courts, and may therefore create no necessity for instituting martial rule.

A second theory, more suited to the emergency of war, is that martial law may be used to implement the war powers vested by the Constitution in Congress and the President. The question under this view is not whether military force is needed to meet an internal disturbance which has rendered civil government impotent, but whether martial law is required to repel an external force which threatens its overthrow. Carried to its logical extreme, this argument might justify dispensing with jury trials if they necessitated workers' absents themselves from war plants to serve on juries; under the common law theory, jury trials could never be replaced so long as they were capable of administering justice. The war power approach to the use of martial law underlies the dissenting opinion in the *Duncan* and *White* cases.²²

The President's powers as Commander-in-Chief may be sufficiently great to warrant his imposition of martial law without Congressional authority.²³ Although at one time there was authority for the view that his determination of the necessity for its imposition was conclusive,²⁴ it is now established that the courts will consider whether he has abused his discretion. It also seems well settled that he cannot provide for punitive martial law without Congressional authority.²⁵

It remains an open question whether martial law invoked under an act of Congress expressly authorizing the substitution of military for civil courts would be upheld. A strong dissent in the *Milligan* case indicates that it would be. In the *Duncan* and *White* cases, only Justice Murphy's opinion denies that Congress has this power, although some of the language in the majority opinion also indicates that the

²² "That conditions of war and the means of meeting its emergencies were within the contemplation of the Constitution of the United States is shown by the broad authority vested in the President of the United States as Chief Executive and as Commander in Chief of the Army and Navy and in the war powers of the Congress and the Chief Executive to preserve the safety of the nation in time of war." 66 S. Ct. 606 at 625 (1946).

²³ Prize Cases, 2 Black (67 U.S.) 635 (1862).

²⁴ WIENER, A PRACTICAL MANUAL OF MARTIAL LAW 24 (1940). "While, even in the conduct of war, there are many lines of jurisdiction to draw between the proper spheres of legislative, executive and judicial action, it seems clear that at least on an active battle field, the executive discretion to determine policy is there intended by the Constitution to be supreme." 66 S. Ct. 606 at 624 (1946).

²⁵ While this conclusion does not necessarily follow from *Sterling v. Constantin*, it seems implicit in the majority opinion in the *Duncan* and *White* cases.

power does not exist.²⁶ Decisions arising out of the defense measures taken on the Pacific Coast²⁷ indicate that civil liberties may be considerably restricted under the war power, and that military commanders will be allowed a wide range of discretion in determining what measures are required for the national defense. It is possible that military tribunals might be established by federal statute under the war power without using the term, "martial law."²⁸ Certainly the "open court" doctrine of the *Milligan* case has been undermined, and the way at least remains open under the war power to extend military jurisdiction beyond the limits contemplated by the common law theory of martial law.

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²⁶ "Congress prior to the time of the enactment of the Organic Act had only once authorized the supplanting of the courts by military tribunals. Legislation to that effect was enacted immediately after the South's unsuccessful attempt to secede from the Union. Insofar as that legislation applied to the Southern States after the war was at an end it was challenged by a series of Presidential vetoes as vigorous as any in the country's history. And in order to prevent this Court from passing on the constitutionality of this legislation Congress found it necessary to curtail our appellate jurisdiction." 66 S. Ct. 606 at 615 (1946).

²⁷ *Hirabayashi v. United States*, 320 U.S. 81, 63 S. Ct. 1375 (1943); *Korematsu v. United States*, 323 U.S. 214, 65 S. Ct. 193 (1944).

²⁸ "Yet it may be asked what use martial law henceforward will have if the Supreme Court holds that without it such extreme measures as a discriminatory curfew and evacuation were permissible? If under a theory of war power such regulation is constitutional, then the very concept of martial law is outmoded and unnecessary." Wolfson, "Legal Doctrine, War Power, and Japanese Evacuation," 32 Kx. L.J. 328 at 337 (1944).