Relation of Military to Civil and Administrative Tribunals
In Time of War

THEODORE MILLER†

FOREWORD* 

In our American common law we inherited a profound mistrust of military rule. England did not have a standing army of consequence until the eighteenth century. The attempts of the Stuart kings to maintain one created a suspicion that the purpose of such an army was to enable a ruler to gain and hold absolute power. Moreover, the common-law doctrine of the supremacy of the law, which subjected officials and governmental agencies to the liabilities of everyday men and scrutinized all official action to hold it within its legally appointed limits, applied also to the armed forces of the crown and denied to them any special status differing from the legal position of any one else. In America, the faith in a militia, in the ability of the men of the neighborhood, with their hunting weapons, to turn out upon an alarm and repel invasion, or to obey a summons and volunteer and with the officers of their own choosing form themselves into an effective army for the defense of their country, was strong down to the end of the last century and is testified to by the provisions as to the right to bear arms in both federal and state constitutions. Hence to our law an army has seemed something anomalous and the historical reasons which have led to a bad adjustment between law and administration have led to an equally bad adjustment between law and exercise of military authority.

Another source of difficulty has been the jealousy of agencies of the federal government on the part of states which

† Harvard Law School, class of 1941; Second Lieutenant, Infantry-Reserve, U. S. A.
existed in parts of the country after the Civil War and led to indictment of officers of the United States army more than once in state courts for matters of discipline legitimately done which for some reason roused animosities in a neighborhood. Extreme insistence on the subjection of the military to the ordinary law of the land was often the cause of needless friction until the last war, in which sectional and local lines were not drawn, made the civil authorities less captious and the military authorities less sensitive. With the passing of pioneer habits of non-cooperation and the rise of ideas of general government and local government working together toward common ends instead of working independently each toward its own ends, the strained relations between the law and the military are not likely to recur. But the frame of mind behind them, to the extent that it represents a received tradition of common-law thinking, is by no means wholly bad. As part of the general attitude of the common law toward arbitrary and unreasonable exercise of powers of any sort by any one, it has a real place in the Anglo-American system.

On the other hand, the rise of new methods of warfare, the replacing of volunteer armies by nations in arms, the effect of economic unification, of modern methods of large scale manufacture and rapid transportation, and of wars as economic struggles in which whole peoples, not merely their standing armies, are engaged, have so altered the conditions in which our inherited ideas as to the relations of the civil and the military authorities must function that legislation or judicial adjustment or both are likely to become necessary, exactly as we are having to learn to adjust our inherited common-law ideas to the rise of administrative agencies.

But before this work of legislation and adjustment can go on we must know exactly what it is with which we must deal. We need to know precisely the old law and the mischief before we essay the remedy. Mr. Miller’s sketch shows us what we know and what is still vague as to the existing law. Such studies
must be the foundation of any program of making our agencies of defense more efficient by freeing them from unnecessarily hampering interference from over-zealous local legal authorities.

RELATION OF MILITARY TO CIVIL AND ADMINISTRATIVE TRIBUNALS IN TIME OF WAR

At the moment of this writing, the United States of America is perilously close to Armageddon, and the cross-roads leading to War and Peace. An examination of what is, or what should be, the relation of military to civil and administrative tribunals in this country in time of war is not inapropos at this time.

This paper considers some of the problems raised when there is impairment or obliteration of the normal functions of civil and administrative tribunals by the carrying on of insurrection or warfare in or near the territories normally served. Cases arising under such conditions involve questions of the conflict between the constitutional rights of indictment, trial by jury, freedom from summary arrest, etc., on the one hand, and on the other, the military power of the federal government, especially as it involves the arrest and imprisonment of civilians by the military in the course of carrying on war or suppressing insurrection.

There is little authority on the problem, since happily the domestic territory of this nation has not often been a theatre of war or insurrection. Such federal authority as exists is confined almost exclusively to cases arising during and immediately following the Civil War. Cases in state courts have arisen more often under declarations of martial rule in connection with violent strikes and local insurrections. While the latter source of case authority is far more abundant than the former, several reasons (apart from the fact that one is state and the other federal domain) may be advanced why these latter cases are not binding precedent, why they are not "on all fours," or oftentimes, not even in point; and these same reasons may be
advanced as justification for making a distinction between “martial rule” and “martial law.”

In time of war the will of the entire nation is bent on producing a successful conclusion of the conflict, and the interests of all citizens transcend state lines—aliter, however, in time of peace. The declaration of war is an indication of a genuine national emergency; the proclamation of martial rule by a governor has often been nothing more than local political intrigue. When a governor declares martial rule the civil courts are usually functioning in some part of the state; this is not so likely to be the case in time of war where martial law has been established. Finally, the constitutional problems may be different: thus, the Constitution of the United States, Art. I, sec. 9 provides that “The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public safety may require it.” Some state constitutions have copied the clause bodily; others say habeas corpus shall never be suspended; still others are entirely silent on this score. Again, some state constitutions give the Executive the power to declare martial rule; but only Congress can constitutionally declare war.

As Mr. Justice Sanner observed in Ex parte McDonald, a case involving martial rule:

There is a very great distinction between insurrection and war. It is this: War is an act of sovereignty, real or assumed; insurrection is not. War makes enemies of the inhabitants of the contending states; but insurrection does not put beyond the pale of friendship the innocent in the affected district. War creates the rights and duties of belligerency which to insurrection are unknown. Doubtless an insurrection may

---

1 See section on “Types of Military Rule,” p. 192 infra.
2 See CHAFFEE, STATE HOUSE VERSUS PENT HOUSE (1937), passim. (Hereinafter cited as CHAFFEE).
3 FAIRMAN, LAW OF MARTIAL RULE (1930) p. 81. (Hereinafter cited as FAIRMAN.)
4 CONST., Art. I, sec. 8. See WIENER, A PRACTICAL MANUAL OF MARTIAL LAW (1940) Chap. III. (Hereinafter cited as WIENER). Who has the right to declare martial law is considered in the concluding installment of this article.
5 49 Mont. 454, 474 (1914).
become a war, as was the case with the great Rebellion; but it does not become so in the legal sense until the rebellious party assumes political form.

**Types of Military Rule**

Several quite different situations must be distinguished, although they are often confused under the name, "martial law":

1. The use of soldiers to aid the civil authorities in applying ordinary law to civilians. This is a mild form of *martial rule*. The soldiers are merely a special kind of police, with very effective arms; and they possess only the powers of regular policemen. A stricter form of martial rule, differing only in degree from the foregoing, is the peacetime government of civilians by soldiers—with the ordinary civil courts to try civilians violating military orders. The soldiers occupy private property, exclude or limit the lawful owners, and restrict the movements and acts of civilians within the occupied territory; but a disobedient civilian is not tried by a military tribunal. Martial rule is local, intra-state, and a peacetime measure.\(^6\)

2. The government of soldiers by soldiers. Many rules and regulations are applicable to members of the U. S. Army and Navy and of the National Guard, which do not affect civilians (except insofar as they may come within the terms of the 2nd Article of War.\(^7\)) This code is properly called *military law*. Military law, or the legal system that regulates the government of the military establishment, is exercised both in peace and war. The agencies through which this jurisdiction is exercised include: Courts-martial—General, Special, and Summary;

---
\(^6\) For a full discussion of the nature of martial rule; the difference between martial rule, martial law, military law, and military government, see CHAFEE, pp. 134-135; FAIRMAN, Chap. III; WIENER, Chap. I. See also Carbaugh, *Martial Law* (1913) 7 ILL. L. Rev. 479, *passim*.

\(^7\) A.W. 2: "(d) All retainers to the camp and all persons accompanying or serving with the Armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the Armies of the United States in the field..." 41 Stat. 787; 10 U.S.C.A. sec. 1473. See also 14 Ops. Att'y Gen. 22 (1872).
Commanding Officers exercising disciplinary powers under the 104th Article of War; and Courts of Inquiry.

3. The government of civilians by soldiers in time of war in hostile territory. This is *military government*; the dominion exercised in war (foreign or civil) over the territory and inhabitants of an enemy’s country upon its conquest or occupation; such a government existed in many parts of the South during the Civil War and Reconstruction, and also in the region around Coblenz after the Armistice with Germany. Military government also refers to the jurisdiction of military commanders over territory under military occupation because of the threat of invasion, in such domestic territory as may reasonably be considered within the Combat Zone, Communications Zone, or Theatre of Operations. Military government is regulated by the rules of international law, and may only be exercised in time of war.

---

8 Manual for Courts-Martial (1928) p. 1. A Court of Inquiry is not truly a court, because, although it may make an inquiry and report as to accusations or imputations against officers or soldiers, it has no power to try anyone. Scott, *Handbook of Military Law* (1918) p. 9.


10 "Note, 15 Harv. L. Rev. 850, 851 (1902). The agencies through which military government is exercised is commonly said to depend upon “the will of the commander.” Birkhimer, *Military Government and Martial Law* (3rd ed. 1914) p. 54. (Hereinafter cited as Birkhimer.) Fairman, p. 20, n. 3. These agencies have usually been Provost Courts and Courts-Martial. Winthrop, p. 836, speaks of Military Commissions ordered by commanders exercising military government. It must be kept in mind that though the tribunal exercising control is dubbed “commission,” it is in such situation merely an agency for administering international law. The term “military commission” should be reserved for the situation where martial law (not military government) is exerted domestically, supplanting municipal law. The indiscriminate appellation of military commission to both situations by the courts as well as legal writers and military commanders, has resulted in tremendous confusion in the cases and texts. Thus, the 1921 edition of the Manual for Courts-Martial, par. 3a, lists military government as part of the jurisdiction of military commissions. The mistake has been corrected in the 1928 edition—see p. 1. There is a similar lack of clarity in the 46th Article of War, 41 Stat. 10 U.S.C.A. sec. 1517, which provides for review by the military of general courts-martial and military commissions. A study of the history of this legislation indicates that the “commissions” meant are those which administer military government. See: *Hearings before Senate Committee on Military Affairs*, (1919), particularly pp. 51-295, and 1320.
4. The government of civilians by soldiers in time of war or in an emergency justifying it in non-hostile, domestic territory. This is martial law. The agency through which this jurisdiction has been, and should be exercised, is the military commission. Martial law has been well defined by Professor Joel Parker:

Martial law is that military rule and authority which exists in relation to persons and things under and within the scope of active military operations, and which extinguishes or suspends civil rights and the remedies founded upon them, for the time being, so far as may appear to be necessary in order to the full accomplishment of the purposes of war—the party who exercises it being liable in an action for the abuse of the authority thus conferred. It is the instituting over our own people the government of force, extending to persons and property, according to the laws and usages of war, to the exclusion of the municipal government, in all respects where the latter would impair the efficiency of military rule and military action. Founded upon the necessities of war, and limited by them, its existence does not necessarily suspend all civil proceedings. Contracts may still be made and be valid so long as they do not interfere with or affect military operations. The civil courts are not necessarily closed, for all actions relating merely to the private affairs of individuals may still be entertained without detriment to the public service; but it closes the consideration there of any action, suit, or proceeding in which the civil process would impair the efficiency of the military force.\(^\text{11}\)

**Martial law distinguished from martial rule:** From what has already been said it will be seen that martial rule is a situation where the law is administered by soldiers *qua* policemen for civilians—it recognizes that peace exists elsewhere in the nation. Martial law is a situation where military commissions in time of actual or imminent war administer law as soldiers *qua* soldiers for civilians. The designation “martial rule” should be reserved for situations where governors proclaim a “domestic war,” “insurrection,” or “uprising” to exist within the confines of their state because of local unrest.\(^\text{12}\)


\(^{12}\) The terms “preventive martial law” and “punitive martial law” have been suggested to distinguish martial rule from martial law. Corwin, *Martial
Martial law distinguished from military government: Military government is a government exercised over the belligerent inhabitants of an enemy’s country in the case of a foreign war, and over all inhabitants of a “danger zone” of hostile territory within our own country in the case of a domestic war. Martial law is a government exercised over our immediate fellow citizens in the larger “zone of the interior,” and even in the “theatre of war” until the military commander finds it necessary to make a part of that area a field of operations or even a combat zone. That is to say, in case of a rebellion, invasion, or other domestic war, a military commander has power to make a tactical decision which may result in martial law becoming military government. The occasion of military government is war; the occasion of martial law is simply public exigency which, though more commonly growing out of pending war, may yet present itself in time of peace.

Martial law distinguished from military law: Abroad, the court-martial is employed for the cognizance of offenses not only of the officers and soldiers of the army, but also of non-military persons subjected to military authority in time of war or rebellion. Possibly it is due to this fact that the English common law authorities and commentators generally confounded martial with military law, and, consequently, throw very little light upon the subject, considered as a domestic fact; further, in parliamentary debates, it has usually been discussed

Law, Yesterday and Today, 47 Pol. Sci. Q. 95, 96, 103-104 (1932). And Fairman, p. 25, says: “On some occasions the courts have upheld punitive martial law, where breach of military regulations may lead to punishment by military commission. This phase bristles with difficulties.” This does more to confuse than to clarify. If a new term is needed, I suggest the more accurate and descriptive phrase “military administrative law” as a synonym for martial law as I have defined it.

Winthrop, p. 799.

Winthrop, p. 831. And although differences in substance are observed, both descriptions of court-martial and the military commission are termed “courts-martial.” Jones, Notes on Military Law, p. 3.
as a fact, rather than as forming any part of their system of jurisprudence.\textsuperscript{15}

The best judicial exposition of the foregoing forms part of the opinion of Chief Justice Chase in *Ex parte Milligan*:

There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under \textit{Military Law}, and is found in the acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as \textit{Military Government}, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated \textit{Martial Law Proper}, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited,\textsuperscript{17} and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.

\textbf{History of the Military Commission}

The history of the "military commission" in our law is placed by Colonel Winthrop,\textsuperscript{18} the "Blackstone of the Army," as beginning in 1847 in the Mexican War. This tribunal, utilizing the name "military commission" for the first time, was originated by General Scott for the purpose of punishing serious


\textsuperscript{16} 4 Wall. 2, 141-142 (U.S. 1866).

\textsuperscript{17} Compare with the Chief Justice's far-seeing language the experience of the French government in World War II in fleeing from Paris to Tours to Bordeaux.

\textsuperscript{18} \textit{Winthrop}, p. 832.
crimes "committed by Mexicans or other civilians in Mexico"not then triable by courts-martial.

Two things are to be noted: the jurisdiction was confined to the territory and inhabitants of the enemy's country upon its conquest and occupation; it was proclaimed by the will of the commanding general in the field (the order was published in Tampico, Mexico) to meet the emergency. It has been said that this tribunal arose as the result of shortcomings in the Articles of War. Even though the writer believes General Scott's military "commission" was not the true genesis of military administrative law, or rule by military commissions in areas of martial law, it is to be noted that by paragraph 11 of Scott's General Order 20, it was provided that "... the proceedings of such commissions will be duly recorded in writing, reviewed, revised, disapproved, or approved..." as in the case of the proceedings and sentences of courts-martial. This means review by the

---

21 Therefore this was military government according to the rules of international law. See MUNSON, MILITARY LAW (1923), p. 19; GLENN, INTERNATIONAL LAW, par. 172. See note 55, infra, p. 206.
22 Necessity was the mother of this invention—not Congress, nor even, so far as it appears, the President. The acts made punishable by General Scott's military "commissions" were mainly criminal offenses of the class cognizable by the civil courts in time of peace. WINTHROP, pp. 832. For offenses against the laws of war, the "wartime base" of jurisdiction (see p. 204, infra), General Scott inaugurated a separate tribunal designated as the "council of war." This term, as a designation for a court, has not since reappeared in our law or practice.
23 CONSTITUTIONAL AND HISTORICAL BASIS OF MILITARY JURISDICTION (1938 ed.) Army Extension Courses, Special Text No. 173 (prepared by the Judge Advocate General) par. 112: "The Articles did not, in general, until a comparatively late date, confer jurisdiction on courts-martial over the population of hostile territory. Hence General Scott found it necessary, in occupied Mexico, to create, by order, a new tribunal, the Military Commission." Here again is evidence that the military "commissions" mentioned in the Articles of War (15, 46, 80-82) refer to the agencies administering military government. See note 10, p. 193, supra.
24 This is the forerunner of A.W. 46, which existed, before being made statutory, in Army Regulations. See MANUAL FOR COURTS-MARTIAL (1921), Introduction, p. IX. Never in our Army has military government been solely "the will of the commander."
military, not the civil authorities; such is, of course, proper in the case of jurisdiction in hostile territory, but not in the case of military "government" of civilians domestically in non-belligerent territory, in the "zone of the interior," in an emergency justifying martial law.

The true military commission arose at the beginning of the Civil War in general orders issued by commanders of various military departments. Insofar as the jurisdiction of these military commissions extended over civilian citizens in non-hostile territory, they were true military commissions; insofar as they were set up over conquered territory, or hostile territory in which fighting was imminent or actual, they were the military government—first cousins to General Scott's progeny, domiciled within our shores instead of abroad. Winthrop says:

The military commission and council of war of the Mexican war were together the originals of the Military Commission as so extensively employed during the (Civil) war, and as recognized in our existing statute law; the two jurisdictions of the earlier commission and council respectively being united in the later war-court, for which the general designation of "military commission" was retained as the preferable one.

These military commissions were recognized as legal courts, and their jurisdiction in some cases added to, by express statute. A pointed contemporaneous recognition of such tribunal is that of the provisions of the Act of March 2, 1867, c. 155, legalizing proceedings under martial law, trials by military commission, etc., had during the Civil War. The military commission was also recognized as an authorized provisional tribunal

---

24 See, e.g., those cited in Winthrop, p. 833, notes 69 and 70. See also Underhill, supra, n. 15, at 163.
25 Winthrop, p. 833.
26 See, e.g., Act of Mar. 3, 1863, c. 75, sec. 30, 38. For other examples of statutory recognition and provision, see Winthrop, pp. 833-834. See in particular the Act of June 20, 1864, c. 145, sec. 5, 6—which, in establishing the Bureau of Military Justice, provided for the revision and recording thereby of the proceedings of military commissions equally as of those of other military courts.
27 14 Stat. 432.
in proclamations and orders of the President,\textsuperscript{28} and in rulings and opinions of the courts,\textsuperscript{29} and law officers of the government.\textsuperscript{30} Thus sanctioned, these tribunals, pending the Civil War, and down to the termination of the operation of the Reconstruction Laws, must have tried and given judgment in upwards of two thousand cases, promulgated in General Orders of the War Department, and of the various military departments and armies.\textsuperscript{31}

**Jurisdiction of Military Commissions as to Place, Time, Persons, and Offences**

It was formerly held by English authorities that, to give jurisdiction to the war court, the *trial* must be had within the theatre of war, military government, or martial law; that if held elsewhere, and where the civil courts are open and available, the proceedings and sentences will be *coram non judice*.\textsuperscript{32} The ruling in the leading American case of *Ex parte Milligan*\textsuperscript{33} is to the same effect. It was held, in a 5-4 decision, that a military commission, functioning during the Civil War, which had assumed jurisdiction of offenses committed in Indiana, where the civil courts were open, had exceeded its power. Granted that martial law is proper only in territories within a "field of actual conflict" or "danger zone," a standard impossible of further delimitation, the standard set down in *Milligan* is too severe. It was there said that martial law cannot arise

\textsuperscript{28} E.g., Lincoln’s proclamation of Sept. 24, 1862.

\textsuperscript{29} E.g., *Ex parte Milligan*, 4 Wall. 2 (U.S. 1866); *In re Murphy*, Fed. Cas. No. 9, 947, 17 Fed Cas. 1030 (C.C., D. Mo. 1867).

\textsuperscript{30} E.g., 11 Ops. Att’y Gen. 297.

\textsuperscript{31} WINTHROP, p. 834.

\textsuperscript{32} CLODE, *Administration of Justice under Military or Martial Law*, p. 189; FINLASON, *Commentaries upon Martial Law*, pp. 4-5, 129. This rule was changed by *In re Marais*, (1902) A.C. 109; discussed *infra*. The rule, having its origin in the fact that war, being an exceptional status, can authorize the exercise of military power and jurisdiction only within the limits— as to place, time and subjects— of its actual existence and operation, has not always been strictly regarded in American practice. See G.O. 52, Dept. of the Pacific, 1865.

\textsuperscript{33} 4 Wall 2 (U.S. 1866).
from mere threatened invasion. The necessity must be actual and present; the invasion real such as closes the courts and deposes the civil administration.

A dissenting minority of judges, concurring in result, differed, however, on this point. Speaking through Chief Justice Chase, they felt that when the nation is involved in war, and some portions of the country are invaded, and all exposed to invasion, it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for trial of civilians for offenses against the army, or to the detriment of public safety. This would furnish a legislative rather than a judicial definition of "unsafe area" or "danger zone" in the particular case; the matter being out of the hands of the Executive alone, exercising an irreviewable discretion, except in case of dire urgency.

The current English doctrine is expressed in In re Marais, which arose out of the South African warfare at the turn of the century. Marais, a civilian, was imprisoned by the military authorities for a violation of a martial law regulation in a district under martial law several hundred miles from the scene of the actual fighting. The courts of Cape Colony denied habeas corpus. The Privy Council affirmed, saying that where actual war is raging, acts done by the military authorities are not justiciable by ordinary tribunals in the first instance. In effect this is a decision that a district may be a "field of actual conflict" although the shooting is going on some distance away, and overruled Marais' contention that the very fact that the Cape Colony courts were open proved this was not a war area.

Ex parte Milligan must be read with one eye on history. In re Marais may well be the result of a judicial recognition of
the difference between war in 1865 and in 1900. The tremen-
dously enlarged scope of modern warfare calls for an even
broader attitude. The fact that courts are open cannot be taken
too seriously when recent events have tragically demonstrated
that courts may be open today and closed by a “blitzkrieg”
tomorrow. There was a suggestion of this just after World
War I, in United States ex rel. Wessels v. McDonald.7 The tremen-
dously enlarged scope of modern warfare calls for an even
broader attitude. The fact that courts are open cannot be taken
too seriously when recent events have tragically demonstrated
that courts may be open today and closed by a “blitzkrieg”
tomorrow. There was a suggestion of this just after World
War I, in United States ex rel. Wessels v. McDonald. There was a suggestion of this just after World
War I, in United States ex rel. Wessels v. McDonald. Wessels,
a spy, was being held by McDonald, Commandant of the Brook-
lyn Navy Yard, for trial by court-martial. Since the fighting
was going on at a front over three thousand miles away, Wessels
contended that the United States was a field without the “theatre
of war” at the time of his activities during which it was said
that he was a spy, and that as he was charged with crime, and
the courts of the United States were functioning, he was
entitled to habeas corpus and such other protection as the
Constitution bestows upon a defendant. In dismissing the writ
and remanding the prisoner, the Court said:8

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 implements of
warfare and the plan of carrying it on in the last gigantic struggle placed
the United States fully within the field of active operations. The term
“theatre 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 terri-
tory of the United States was certainly within the field of active opera-
tions. Great numbers of troops were being sent abroad, and, in larger
numbers, sailing from the port of New York. . . . German sub-
marines were landing unheralded and unaware in our ports, before the
United States entered the war. Ships were being destroyed within easy
distance of the Atlantic coast; there was constant threat of and fear
for airships above the harbor and city of New York on missions of
destruction. . . . One of the lessons taught by this war is that the
ocean is no longer a barrier for safety or an insurance against America’s
being involved in European wars.9

9 On appeal to the Supreme Court, the appeal was dismissed, per stipula-
tion. 256 U.S. 705. Wessels was never tried by court-martial.
How much more true is this today!

What should be the jurisdiction of the military commission as to place? This is the same question as, How large should the area of martial law be; in case this country becomes embroiled in another war, where should the line be drawn as to military administration and dominion? The answer rests with Congress and the enemy; the line is there, and where it will be drawn depends upon the exigencies of the situation then existing. At all events, it is certain that the "open courts" test of Ex parte Milligan is as adaptable to that future situation as the pea-shooter or sling-shot is to modern warfare, and authorities are agreed that on this point the case "can never become a lasting precedent."  

What is the jurisdiction of the military commission as to time? An offense, to be brought within the cognizance of a military commission, must have been committed within the period of the war or of the exercise of martial law. Winthrop states:

A military commission cannot (in the absence of specific statutory authority) legally assume jurisdiction of, or impose a punishment for, an offense committed either before or after the war or other exigency authorizing the exercise of military power. . . . While the jurisdiction may be continued after active hostilities have ceased, it cannot be

---

40 See Wiener, 120-121, 137-140 (highly illuminating); Winthrop, pp. 817-818, and authorities there collected; contra Underhill, supra, n. 15, at 173.

41 Winthrop, p. 837.

42 This would be for the protection of the country or the punishment of crimes growing out of the war. See Stewart v. Kahn, 11 Wall. 493 (U.S. 1870). How long martial law may be continued after active hostilities have ceased is again a question of degree. See discussion, infra. The restoration of peace does not automatically terminate a military government. It remains until Congress has provided a substitute. Fairman, pp. 42-43. However, the return of peace will restrict the commander's authority; he will exercise administrative power limited by the general and constitutional laws of the country under whose authority he acts. See discussion, infra. As to when military government should cease, see Mississippi v. Johnson, 4 Wall. 475 (U.S. 1866), wherein the Supreme Court refused the request of Mississippi for an injunction against President Johnson to end the military occupation of a sovereign state during Reconstruction. In In re Egan, 5 Blatchford, 319 (N.D. N.Y. 1866), Fed.
maintained after the date of a peace or other form of absolute discontinuance, by the competent authority, of the war status.

The classes of persons who in our law may become subject to the jurisdiction of military law are fully listed in the Second Article of War. They include all officers and soldiers of the regular army; cadets; members of the Army Nurse Corps; and "all retainers to the camp and all persons accompanying or serving with the Armies of the United States."

Those who may become subject to military government include inhabitants of the enemy's country occupied and held by the right of conquest, and inhabitants of our own country who become amenable to trial by courts-martial or provost courts or other agencies of military government established by a commander within the theatre of operations, if he reasonably deems such necessary to carry out his mission.

Those who may become subject to martial law or trial by military commission include officers and soldiers of our own army who, in time of war, become chargeable with crimes or offenses not cognizable, or triable, by the criminal courts or under the Articles of War, and (what is even more important) inhabitants of places or districts in the zone of the interior which

Cas. No. 4303, 8 Fed. Cas. 367, the Circuit Court held that a military "commission" administering military government in South Carolina seven months after the President permitted sovereignty to be resumed, had no jurisdiction to try a civilian for murder. See also Leitensdorfer v. Webb, 20 Howard 176 (U.S. 1857).

See note 7, supra.

E.g., newspaper correspondents.

"Provost courts are military courts having a well-known jurisdiction, which is limited exclusively to minor offenses, tending to disorder and breaches of the peace, by soldiers and citizens within the lines of an army, and occupy with reference to such offenses a similar position with that of police courts in our cities." Field, J., dissenting in Mechanics, etc. Bank v. Union Bank, 22 Wall. 276, 301 (U.S. 1874). In the exercise of military government, the commander may appoint courts to determine civil causes. The Grapeshot, 9 Wall. 129 (U.S. 1869). Or he may allow his provost courts so to function. Mechanics, etc. Bank v. Union Bank, supra. And see Birkenhimer, pp. 93-94. But the commander of a region under martial law could not change the domestic court system for the trial of civil causes.
Congress has ordered the President to place under martial law for the security of the nation.46

The offenses cognizable by military commissions may be classed as follows:47

(1) The "peacetime base" of jurisdiction—crimes or statutory offenses cognizable by the state or U. S. courts, and which would be properly triable by such courts in time of peace;

(2) The "wartime base" of jurisdiction—violations of the laws and usages of war cognizable by military tribunals only; e.g., breaches of law of non-intercourse with the enemy; publishing or broadcasting items giving information to the enemy; running or attempting to run a blockade; aiding the enemy by harboring his spies, emissaries, etc.; assisting his people or friends to cross the lines into his country; aiding the escape of his soldiers held as prisoners of war; hostile or disloyal acts, or publications or declarations calculated to incite opposition to the federal government or sympathy with the enemy; discouraging volunteer enlistment; counselling resistance to the draft; etc. In short, all that is popularly termed "Fifth Column activities."48

(3) Breaches of military orders or regulations for which offenders are not legally triable by courts-martial under the Articles of War—e.g., acts prohibited by express order, or in breach of military discipline, such as selling citizens' clothing to soldiers, furnishing them with liquor or other forbidden articles into the camps, etc.; violating police, sanitary, or quarantine regulations, etc.

It will be noticed that military commissions are properly criminal courts, having no jurisdiction of private controversies between individuals relating to pecuniary obligations,49 the title

46 See note 60, p. 209, infra.
47 See WINTHROP, pp. 839-841; Dig. of Ops. J.A.G. (to 1901, McClure ed.) p. 464.
48 Ex parte Milligan, 4 Wall. 2 (U.S. 1866) was of this class. See WINTHROP, p. 840, n. 13; and Underhill, supra, n. 15, at 160-161.
49 Cf. n. 45, p. 203, supra.
to property, etc. It will be noticed, too, that the military commission has jurisdiction of offenses not cognizable by civil courts handling criminal cases in time of peace. The relation of the military to our civil tribunals in time of war can best be seen here. What should this relation be in the future? Where Congress has deemed it expedient to establish martial law, the military commission should become the sole criminal court. Its jurisdiction should transcend state boundary lines, even as does the bounds of a corps area. Civil courts not dealing with criminal matters may function, in the zone of the interior, as in peacetime—even though martial law has been declared; but the activities of the ordinary criminal courts should be suspended to allow the military commission with its wider base of jurisdiction to reign alone. A national emergency justifies measures, in danger zones, unknown to civil authorities, as for example “precautionary arrest”; that which is in peacetime within the law, may in time of war become criminal because it endangers the safety of the nation.

It is interesting to compare, in this regard, the operations of “military commissions” in an area under martial rule during a West Virginia coal strike, when the governor declared “domestic war” to exist. By General Orders No. 23 of Nov. 16, 1912:

1. The military commission is substituted for the criminal courts of the district covered by the martial-law proclamations, and all offenses against the civil laws as they existed prior to the proclamation of Nov. 15, 1912, shall be regarded as offenses under the military law, and as a punishment therefor the military commission can impose such sentence,

50 In time of war the threat to public safety is so great that we cannot always wait for the commission of an overt criminal act before proceeding against it—all those must be taken into custody upon whom suspicion rests. But see Underhill, supra, n. 15, at 177-178. Cf. the following quotations from Newsweek Magazine, Jan. 27, 1941, Col. 3: “Army Chief of Staff Marshall will soon seek funds to train army provost marshall, who’d keep order among civilians in wartime—to avoid such unintentional civilian interference with military operations as occurred in France.” The relation of martial law to the suspension of habeas corpus is considered in the concluding installment of this article.

51 Fairman, p. 75-76.
either lighter or heavier than those imposed under the civil law, as in their judgment the offender may merit.

2. Cognizance of offenses against the civil law as they existed prior to Nov. 15, 1912, committed prior to the declaration of martial law and unpunished, will be taken by the military commission.

The existing framework of civil courts handling criminal cases need not necessarily be swept away within the area placed under martial law, for members of a military commission need not necessarily be composed solely of army officers—they may be composed of civilians. However, judges of local courts when commissioned by the President, will become a federal administrative agency.

Speaking of the constitution of the military commission, Winthrop says:

In the absence of any statute prescribing by whom military commissions shall be constituted, they have been constituted in practice by the same commanders as are empowered by Articles (of War) 72 and 73 to order general courts-martial, to wit, commanders of departments, armies, divisions, and separate brigades. The President, as Commander-in-Chief, may of course assemble military commissions as he may assemble courts-martial.

The general rule that military commissions are constituted and composed and their proceedings conducted similarly to general courts-martial is probably due to the erroneous view that G.O. 20 of 1847 of General Scott is the genesis of the true military commission. From its power to establish courts

52 Winthrop, p. 835.
53 "The commission is simply an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-Chief in war." Winthrop, p. 831.
54 Winthrop, p. 835.
55 See p. 197, and n. 20, p. 197, supra. Cf.: "Martial law must be distinguished according as it is a foreign or international fact, or as it is a domestic or municipal fact. As exercised in any country by the commander of a foreign army, it is an element of the jus belli. It is incidental to the state of solemn war, and appertains to the law of nations. . . . This does not enlighten us as to martial law in one's own country and as administered by military commanders. That is a case which the law of nations does not reach." 8 Ops. Att'y Gen. p. 369 (1857).
inferior to the Supreme Court,\textsuperscript{56} it would seem clear that Congress could constitute military commissions to be the proper tribunals—and Winthrop appears to recognize this by his use of the phrase: “In the absence of any statute prescribing by whom military commissions shall be constituted...”\textsuperscript{57}

Several objections to the proposal above can be seen arising in the mind of the reader, and an attempt is herewith made to meet some of them.

Why should all the criminal law of the country be administered by Federal courts in time of war? Answer: It would only be within the areas declared by Congress to be under martial law that this would come about. Why not just expand the jurisdiction of the ordinary courts to encompass such offenses as are deemed against the security of the nation; or why not let state courts continue to handle the peacetime base of criminal jurisdiction, as before, and set up military commissions to handle the wartime base—why one court for both? Answer: To eliminate overlapping; to coordinate the administration of criminal justice; and to keep courts open all the time for this purpose.\textsuperscript{58}

Wartime is no time for the “law’s delays”; the speedier procedure of military commissions makes it the most desirable tribunal for an area under martial law.\textsuperscript{59} But even granting that unity is desirable under the circumstances, what about state sovereignty; doesn’t the crossing of state lines violate the republican form of government? Answer: The proposal sug-

\textsuperscript{56} CONST., Art. III, sec. 1.

\textsuperscript{57} The technique employed would probably be for Congress to authorize the President to appoint military commissions. The questions of where the power to appoint military commissions, and to declare martial law, is vested, are more fully considered in the concluding installment of this article.

\textsuperscript{58} Cf. the argument of counsel in \textit{Ex parte Vallandigham}, Fed. Cas. No. 16,816, 28 Fed. Cas. 874, at 897 (C.C. S.D. Ohio 1863), pointing out how the records of the civil court had been removed in order to save them from the contingencies of an invasion by insurrectionary forces.

\textsuperscript{59} E.g., oral argument is substituted for briefs. It is beyond the scope of this paper to deal with the \textit{procedure} of military tribunals. Material on the procedure of military commissions may be found in \textsc{Winthrop}, pp. 841-845, and authorities there cited.
gested is to guarantee that form of government! Article IV, sec. 4, of the Constitution says:

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

The Preamble to the Constitution states that the people of the United States, "in order to form a more perfect union," created a national government for national purposes in order "to provide for the common defense." The national government has constitutional authority to eliminate common danger that the national emergency brings forth which jeopardizes all government. Military government cuts across state lines; the same necessity for unity and coordination may be offered as a reason for having martial law cut across state lines, and the administration of criminal justice in that area being federal rather than hemmed in by state boundary lines.⁶⁶⁸

If the war is to be successfully prosecuted, the wartime base of jurisdiction is needed all over the country. Would not this mean that the civil courts all over would be displaced by military commissions? Answer: No. Suppose the Monroe Doctrine were violated in Brazil, and Congress placed the eastern seaboard states under martial law; in those states only would military commissions be the appropriate tribunal—that area would be dictated by necessity. Martial law means more than just rule by military commissions; it is military administrative law—the commander of that area under martial law could

---

⁶⁶⁸ The proposal herein advanced has the affirmative advantage of relieving against a defect in the present relation of military to civil tribunals—to wit, double jeopardy. That is, the same act may be an offense against both military law and a State or foreign law, and the offender may thereafter be brought to trial by a civil court notwithstanding his conviction or acquittal by a court-martial, and vice versa. (See Moore v. Illinois, 14 How. 20; Coleman v. Tennessee, 97 U.S. 509). But when an act, prohibited both by military law and the civil law of the Federal government, is committed within Federal jurisdiction, and the offender is tried by either a court-martial or a Federal civil court, then the same act constitutes but one offense, and trial by either is a bar to the other, because the jurisdiction of both is derived from the same source, the same sovereign, the Federal government. (See Grafton v. United States, 206 U.S. 333).
order (and enforce) curfews, blackouts, air-raid protection measures, evacuation, internment camps, etc. These administrative measures and regulations, such as England imposed for home defense, would be superfluous, in my hypothetical example, in the west coast and northwest states; the wartime base of jurisdiction could (and no doubt would) be made law there, and its enforcement be left to the ordinary federal courts there—but where danger prevails or is imminent, in the area under martial law, the more summary justice meted out by the military commission is called for.

Finally, it might be argued that my proposal involves a destruction of democratic institutions and safeguards in time of war, and is not in keeping with the American tradition. This may be answered: Recent events in Europe indicate that it is “best for all the passengers in the boat to trust the Captain during the storm,” best to reassert the democratic ideal after the war is won, rather than to lose the war and Democracy. The pitiful fate of France, entirely subjected to the dictatorial will in just five weeks, indicates that we must qualify Mr. Justice Davis’ statement in Ex parte Milligan, that “a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation,” lest we, like France, lose not only our immediate liberty, but our homes, our lives, and our nation as well!

The author does not intend to give the impression that if the United States entered a war abroad, or in this hemisphere, the entire country would necessarily be subject to martial law . . . but such could eventually be the case.

(To be concluded in the June issue)