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THE SILENCE OF THE LAWS*

During the last few months I have heard quite a few—lawyers as well as laymen—whisper that, in the course of our preparation for this great war, measures have been taken and are under consideration which are subversive of the Constitution.

On the other hand, we have the spectacle of Governors, Senators and many others, who glibly prate of dictatorships, and the silence of the laws in the midst of arms.

Under these circumstances, it has seemed to me necessary for us to consider how far we have a Constitution for time of war, as well as for time of peace; and to what extent, if at all, any of the provisions of our great Charter are eclipsed or superseded by the necessities of the last recourse of kings and sovereign peoples.

In indicating the question, I can do no better than call upon two great men, belonging to past history, to state their apparently opposite convictions.

The first is John Quincy Adams, "the stormy petrel of American politics." In a debate in the Senate, in 1836, he expressed himself as follows:

"Sir, in the authority given to Congress by the Constitution, *to declare war,* all the powers incidental to war are, by necessary implication, conferred upon the Government of the United States. Now the powers incidental to war are derived, not from any internal municipal source, but from the laws and usages of nations.

"There are then, Mr. Chairman, in the authority of Congress and the Executive, two classes of powers, altogether different in nature and

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often incompatible with each other—the war power and the peace power. The peace power is limited by regulations and restricted by provisions prescribed within the Constitution itself. The war power is limited only by the laws and the usages of nations. This power is tremendous; it is strictly constitutional, but it breaks down every barrier so anxiously erected for the protection of liberty, of property and of life."

Against this, I call Justice Davis, speaking for the majority of a tribunal which has been called the most powerful and majestic on this earth. His language has been criticised as unnecessary to the decision of the case; but it is an eloquent expression of the view contrary to that enunciated by Mr. Adams.

"The Constitution of the United States," he said, "is a law for rulers and people, equally in war and 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, upon 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. * * * * * This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, may fill the place once occupied by Washington and Lincoln and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to free men. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain by incorporating in a written Constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President or Congress or the Judiciary disturb, except the one concerning the writ of habeas corpus." (Ex parte, Milligan, 4 Wall. 1.)

Addressing ourselves to the Constitution, we have six express powers to Congress, usually designated as war powers:

"To declare war, grant letters of morgue and reprisal, and make rules concerning captures on land and water."

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

"To provide and maintain a navy."

"To make rules for the government and regulation of the land and naval forces."

"To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions."

"To provide for organizing, arming and disciplining the 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." (Art. 1, Sec. 8.)

The executive powers vested in the President are the following:

"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 * * * * *." (Art. 2, Sec. 2.)

"He shall take care that the laws be faithfully executed." (Art. 2, Sec. 3.)

It is further provided that

"The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion and, on application of the legislature, or of the Executive (when the legislature cannot be convened) against domestic violence." (Art. 4, Sec. 4.)

The power *to declare war* has been held to involve the power in Congress "to prosecute it by all means and in any manner in which war may be legitimately prosecuted." (Miller vs. U. S., 11 Wall. l. c. 305.)

It was certainly not contemplated that, after issuing a declaration of war, we should fold our hands in utter passivity, and do nothing toward vindicating the purposes for which that declaration was made.

The power to make war was vested in terms exclusively in the original confederation. The Constitution expressly prohibited to any State the right to enter into any treaty, alliance or confederation; the right to grant letters of marque and reprisal; the right, without the consent of Congress, to keep troops or ships of war in time of peace; the right to enter into any agreement or compact with a foreign power;

and the right to engage in war, unless actually invaded or in such imminent danger as would not admit of delay.

Outside of cases where a State is actually invaded, or is in imminent danger thereof, I think it may be fairly said that the whole power of declaring and prosecuting war is vested as completely in the Federal Government as if there were no States whatsoever and the Federal Government stood alone. (Cf. Insurance Co. vs. Carter, 1 Peters, l. c. 542; Prize Cases, 2 Black l. c. 668.)

It was certainly never intended by the framers of the Constitution that in such a supreme crisis as a war threatening the existence of the country, the Federal Government should ever be put, directly or indirectly, into the position of appealing for assistance to the individual States and of endeavoring to induce them to pass any measure which might be necessary to the successful conduct of that war. To impute any such intention to the framers of the Constitution, after their experience with the individual States during the war of the Revolution, is to impute to them a degree of blindness and folly which they do not deserve. In the same way the power to raise and support armies as distinguished from a mere state militia, is a power vested so completely in the United States, as to be beyond state control or interference. (Tarble's Case, 13 Wall. 397.)

Now the measures that may be required to successfully prosecute a great war to a successful conclusion; the measures necessary to raise and support vast armies, and keep them supplied with subsistence, munitions and equipment, are certainly not easy of precise limitation or definition. No such definition or limitation was undertaken to be imposed upon these powers by the framers of the Constitution.

They realized and realized shrewdly that it was impossible to calculate the degree of danger to which the nation might be exposed, and they were conscious that the feeling of nationality, under the spur of apparent necessity, would override any quantitative limitation upon the extent of such powers.

This is perfectly manifest from the expressions of both Hamilton and Madison in the Federalist. Hamilton expresses himself strongly upon this point in the Twenty-third Number; and Madison is even more emphatic in the Fortieth Number.

These expressions have been seized upon to demonstrate that the war-power was understood by the writers to override the rest of the Constitution. It may be observed that the language was employed when there were no amendments; and to my mind there is no fair

suggestion therein that this power of defence was understood as destroying any of the other provisions or limitations in the Constitution.

No one doubts that the grant of a power involves in itself the right to make use of the necessary means for the exercise of that power; but out of excessive caution, the Constitution expressly conferred power upon Congress to make all laws which should 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 any department or officer thereof.

The meaning of "necessary and proper" has been settled for a great many years. It was settled by the decision of Chief Justice Marshall one hundred years ago in the great case of McCulloch v. Maryland. (4 Wheat, 316.)

The test there laid down was, in short, as follows:

"Let the *end* be legitimate; let it be within the scope of the Constitution; and all *means* which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." (*l. c.* 421.)

As a matter of fact, I think we would be justified, under existing decisions, in stating the rule even more strongly than it was stated there; and in saying that, inasmuch as every law enacted by a coordinate branch of the Government is presumed to be valid and constitutional, in order to condemn any particular means chosen to execute a plain power, the Courts must be able to say, beyond a reasonable doubt, that the law is plainly not adapted or calculated to the execution of the particular power. This same doctrine must apply to the power to declare and carry on war and to raise and support armies.

Unless, therefore, we can say, that a particular law professedly passed in the execution of the war power or the power to raise and support armies, is plainly not adapted, in reasonably direct degree, to support our armies or to carry on the war to a successful conclusion, then that particular law must be regarded as valid and within the legislative powers of Congress; *unless, at least, its passage be prohibited to the legislature by some applicable provision of the Constitution*. To say, therefore, in any event, as has sometimes been done, that the powers of Congress remain quite the same for time of war as for time of peace, is saying something that cannot be true; because the war power is incident to a state of war and springs into effectiveness only upon the occurrence of war; although it is conceivable that Congress might enact, in times of peace, a code of laws which would become effective only during time of war.

It certainly can make no difference that such laws, passed in the exercise of the war power, bite deeply into what was, during times of peace, the exclusive province of the States. The Constitution and the laws passed in pursuance thereof are the supreme law of the land, and in the exercise of its rightful powers, the United States is unqualifiedly a sovereign.

While some of his language goes beyond my conclusion, I cannot refrain from quoting the language of an Australian judge, who was dealing with a Constitution quite similar to our own:

"The problem of national defense is not confined to operations on the battlefield, or the deck of a man-of-war; its factors enter into every phase of life, and embrace the co-operation of every individual with all that he possesses—his property, his energy, his life itself; and in this supreme crisis we can no more sever the requirements and efforts of the civil population, whose liberties and possessions are at stake, from the movements of our soldiers and sailors who are defending them, than we can cut away the roots of a living tree and bid it live and bear fruit." Farey v. Burvett, 21 Commonwealth Law Reports 453.)

These are strong words; and, *so far as any question of state right or state power is concerned,* they are equally applicable to our own situation.

We have a striking illustration of federal control over the state in the cases arising under the limitation law passed by Congress in 1864. That law provided that "wherever, during the existence of the present rebellion, any action, civil or criminal, shall accrue against any person who, by reason of resistance to the execution of the laws of the United States or the interruption of the ordinary course of judicial proceedings, cannot be served with process for the commencement of such action or for the arrest of such person; or wherever after such action, civil or criminal, shall have accrued, such person cannot, by reason of such resistance to the laws or such interruption of judicial proceedings, be arrested or served with process, the time during which such persons shall be beyond the reach of legal process shall not be deemed or taken as any part of the time limited by law for the commencement of such action."

It was held by the Supreme Court that this statute was retrospective as well as prospective; that it controlled and overrode state statutes of limitation and governed state courts; and that, so construed, it was plainly constitutional. The power to pass the act was declared to be necessarily implied from the power to make war and suppress

insurrections. (Stewart vs. Kahn, 11 Wall., 493; U. S. vs. Wily, 11 Wall. 508; Mayfield vs. Richards, 115 U. S. 137.)

It will further be recalled that during the Civil War, at a time when the financial fortunes of the Union were at their lowest ebb, the Government resorted to the use of paper money which was made a legal tender for debts. This paper money was worth very much less than the corresponding denomination in specie. Nevertheless, in what are known as the Legal Tender Cases, the Supreme Court upheld the law as valid even when applied to contracts made before the passage of the law.

The indirect result was to enable debtors to pay their debts in depreciated currency and, to that extent, to defeat creditors of their just claims and to impair the obligation of their contracts. Yet the Courts sustained the law; and the majority opinion is put squarely upon the ground that it was an appropriate means for the successful prosecution of the war. (Legel Tender Cases, 12 Wallace, 457.)

In the same fashion, the Supreme Court has very recently overruled the argument that unlimited conscription cannot be within the power of Congress because its effect would be to destroy the militia of the state.

The Supreme Court of Indiana once declared that "when Congress has declared war, by that declaration, it puts into effect the laws of war, and the war-powers of the government, which cannot be exercised under the Constitution, in time of peace, now come into full force by virtue of the Constitution, and are to be exerted by the President and Congress. * * * * Every measure of Congress and every executive act performed by the President, intended and calculated to carry the war to a successful conclusion, are acts done under the Constitution; * * * * and the validity of such acts must be determined by the Constitution." (McCormack vs. Humphry, 27 Ind. l. c. 154.)

It is manifest, at any rate, that the power thus vested in Congress is of tremendous, almost incalculable, extent; and the burden rests heavily upon him who, from any motive whatsoever, undertakes to resist the execution of laws professing to be enacted under that power.

This is peculiarly true because of the delicacy of the subject matter. A court naturally shrinks and hesitates, upon occasions which may involve the existence of the nation, from reversing measures which have been undertaken by the departments of the Government charged with its preservation. Courts, after all, are in the last analysis a sort of representative bodies.

It is, however, plainly the duty of the Court to annul the attempted exercise of any power which is contrary to the Constitution, which is the supreme law and which the Court is sworn and commissioned to uphold and maintain; no matter how great may be the popular interest or clamor.

Nevertheless, there is a considerable tendency manifested at the present time to maintain that the war-power is precisely what John Quincy Adams declared it to be; and that it becomes, for the time, the pivot—practically the sole content—of the Constitution. To some extent this is the work of the demagogue, whom democracies always have with them; but similar expressions are being used by some men to whom the people have a right to look for wise leadership.

So far as it has any intelligible basis or argument among intelligent men, this position seems to be founded on two propositions.

These propositions are: First, every nation has, like every individual, the absolute and inherent right of self-preservation: second, necessity knows no law; and a war for its existence is the supreme necessity of a nation.

Taking up, in the first place, the theory of self-preservation: It argues that the national Government is expressly designed to be eternal; that it was intended to be, in all its necessities, absolutely independent of the states; that there results, or must be implied, from the formation of such a government, a supreme power of self-preservation which not only overrides, under the plea of necessity, all the negations of the Constitution, but is independent of any specific grants of power.

The fullest and most careful statement of the principle is laid down by Wheaton in the following language:

"Of the absolute international rights of states, one of the most essential and important and that which lies at the foundation of all the rest, is the right of self-preservation. It is not only a right with respect to other states, but a duty with respect to its own members, and the most solemn and important which the state owes to them. This right necessarily involves all other incidental rights to give effect to the principal end." (Wheat. Int. Law, 8th Am. Ed., Sec. 61.)

There is certain language in the majority opinion in the Legal Tender Cases which may be said to lean in this direction and the opinion of Justice Bradley, after pointing out that the federal government is the only one in this country, having the characteristics of nationality, vested with the sole power of war and peace and the regulation of our foreign affairs, proceeds to assert:

"Such being the character of the general government, it seems to be a self-evident proposition that it is vested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered as belonging to every government as such and as being essential to its functions."

So far as I can ascertain, however, the Supreme Court has never squarely rested any decision upon the right of self-preservation as a substantive source of power. Strong objections have been urged against the application of any such principle to our federal government. It is said that such a principle is based upon the law of nature as applied to nations. It postulates a complete sovereignty, and has reference to its rights as against other sovereignties. Furthermore, if we use the term state as meaning a particular government or governmental establishment, and the statement as having reference to its relations with its own citizens, the principle is predicable of the harshest despotism and can be made the justification for every act of arbitrary power professing to protect and preserve the existing establishment as against any danger, external or internal, real or apparent. Furthermore, it is objected that such a principle ignores the distinction between an absolute sovereignty and a qualified sovereignty that exercises delegated powers; that if anything can be settled by repeated judicial iteration, it is settled and established by the language of Marshall and Story and practically all their successors, that this government is one of delegated, limited and enumerated powers and that it can claim no powers of any sort not granted to it in the Constitution, either expressly or by necessary implication.

It is further objected on the ground that a supreme power of self-preservation, which overrides all negations and is independent of any and all specific grants of power, ignores utterly the theory which excepts certain things out of the rightful power of government; that it destroys the essential character (as generally understood) of that government which it is invented to preserve. Who, it is asked, is to be the judge of the occasion when this dormant and irresistable power of self-preservation shall be called into active exertion? Is it to be the Executive, the Legislature, or the Judiciary? Why one rather than the other? If its invocation is to be discretionary, who shall revise and correct that discretion? On the other hand, the advocates of the theory assert that the power is vested in Congress, but that being in its nature a resulting or implied power, it cannot be a specific power; and that we are long since committed to the doctrine of resulting or implied powers; that such a power to preserve itself in great crises vests in every organized society; and that it belongs, under our

system, to the Legislature, in whose hands it may be safely reposed until the spirit of liberty has fled from our people forever.

Now with all deference to those who assert it, I feel bound to reject this principle of self-preservation as applied to the United States. It was undoubtedly intended by our political fathers to vest this nation, by the grants in the Constitution, with all the powers they deemed essential to its preservation. If unlimited power in war be essential, why not derive it from the power to make war? If transcendent force be occasionally requisite to preserve organized society from internal anarchy, why not derive it from the power to execute the laws and to suppress insurrection? What do we gain by resorting to the supreme power of self-preservation? If it be impliedly contained in the Constitution, is it not as subject to the negations of that instrument as if it had been an express power? If it be an extra-constitutional power and so unlimited by the Constitution, what becomes of the theory of a limited delegation and the reservation to the states and to the people?

We come then to the theory of the war power—the power of defense—as being, on the ground of necessity, unlimited by any of the prohibitions of the Constitution.

Let it be understood that we are speaking here, as elsewhere, of the power to make war, in its internal, not in its external aspect. I am willing to admit, that as against enemies, the power to make war is absolutely unlimited, except so far as it may be limited by the plainest principles of the law of nations. It has even been held by the Supreme Court that the law of nations may be modified as against enemies by peculiar conditions. (Miller vs. U. S., 11 Wallace 268.)

I am willing to admit further that the war power may be unlimited, except as just stated, against enemy subjects, even though they be within the boundaries of our own country. There would seem too little doubt that a law may be passed providing for the absolute confiscation of all the property of enemies and enemy subjects, so far as such property is subject to our jurisdiction. (Brown vs. U. S., 8 Cranch 110; Miller vs. U. S., 11 Wallace 268.)

I admit further that in accordance with the general rules of international law, on grounds of prudence and necessity, enemy subjects may be segregated or interned; and such a law was enacted as early as 1798 in this country, and, to some extent, enforced in the war of 1812.

I am speaking here rather of the internal aspect of the war power —its relationship toward the lives, the liberty and property of our own citizens. May it be an unlimited power as to them?

The proponents of such a power assert, in the first place, that we recognize in the state governments the existence of the police power, which is the supreme and reserved power of the state to guard the health, safety, peace and morals of the community; that the police power, to the extent to which its existence is recognized, is understood to be an exception to and operates, within its fair limits, in spite of, general constitutional restraints: that while the United States has no police power as such, yet it may exercise its granted powers for police ends Thus it may employ the power to regulate commerce to absolutely prohibit certain kinds of commerce. That the war power not only embraces a vast and undefined police power, but is in itself a supreme species of police power; and as such may and must, within the fair limits of necessity, override constitutional restraints upon the ordinary power of Government.

In the second place, they say, it is admitted that the degree of national force and energy to be directed against an enemy is unlimited; it is such as the occasion may demand. Therefore, the greater must include the less; there must reside in the government, charged with the duty of defense, the incidental power to mass and bring to bear every internal resource against the external enemy and without any restrictions or limitations at all. It is another instance of the sort manifested by the cases dealing with interstate commerce where the Supreme Court has recognized a power in the federal government, and its agencies, to deal with and regulate intrastate commerce, so far as necessary to the full and complete regulation of interstate commerce.

They say further than conscription was practiced by the Colonies during the war for independence; during the Civil War, by both sides; that its exercise in this war, to any extent within the discretion of Congress, has just been sanctioned, and correctly sanctioned by the Supreme Court; that every person in this country may be called, at the will of Congress, to the colors, to make the supreme sacrifice of his life for his country; that there is no constitutional provision that inhibits the impairment of the obligation of contracts by the federal government in the exercise of a power granted to it; that no contract could be made in advance which could in any wise hamper or limit such powers; that neither conscription into the army would violate nor was ever intended to be restrained by any of the personal guarantees in the Constitution; and that the right to so command one's life and liberty for the direct prosecution of the war, is sufficient to demonstrate an intention that property and all lesser rights should be equally included. In all these respects, they say, the extent of the

power to be actually exercised is, and can be, measured only by existing necessity; and that of that necessity, Congress is the final judge.

The proponents of this supreme quality in the war power go further and assert that the law of necessity is not only well known to the common law with respect to public and private rights, but that it has a recognized operation in relation to war and military affairs; that war is the mortal disease of nations, and is the supreme necessity of national life; and in this connection they lay especial stress upon what is called martial law. This insistence is a source of considerable confusion to most persons.

Martial law is not the same thing as military law, although formerly confounded with it. Military law means that body of rules and regulations which governs the soldier as a soldier. It is, so to speak, the municipal law of the army and its component elements regarded as an independent community. For a long time there has been recognized, upon the express ground of necessity, a right in the commander of an army to deal in drastic and executive fashion with the shortcomings of his soldiers, entirely independent of the general civil authorities, especially in time of war. This was so in Europe much earlier than in England. In the latter country, it gradually became the practice for the King, with the consent of his council, to issue sets of rules to govern the conduct of his troops in time of war. Most, if not all, of these troops would be civilians called to the colors. In 1642, during a time of civil war, the commander of the parliamentary army promulgated for the first time, with the sanction of parliament, a military code of ninety-six articles for the government of his soldiers. The English military law assumed a regular statutory form in 1689; subject to the right of the King (and his commanders) as Commander-in-Chief to make consistent and supplemental regulations. The Americans became familiar with this military code in the Colonial Wars. The Second Continental Congress adopted articles of war largely compiled from the British regulations. These were amended in 1776 and 1786 and were expressly recognized by our first Congress. These articles of war have been revised from time to time by Congress, but the President, or his subordinate agencies, still have the right to issue supplemental and administrative orders for army government.

Now military law, in the sense we are talking of, was plainly contemplated and provided for by the Constitution; it was in mind when Congress was granted power to make rules for the government of the land and naval forces. Nevertheless, it is asserted that it was never intended that any of the provisions of our bill of rights should in any wise affect or control this military law.

This assertion is based upon the following observations: It is expressly provided by the Fifth Amendment that the requirement of indictment or presentment should not apply to soldiers and sailors, as such; they are not entitled to trial by jury; the tribunals to which they are subject are not courts, but mere agencies of the executive, and their proceedings are never subject to review by the judiciary, save for want of jurisdiction; the Supreme Court has expressly held that for those in the military service, the military law is due process of law; the provisions for taking depositions by either side, for use in Courts Martial, show that the requirement of confrontation by witnesses has no application; for a very long time the Articles of War conferred no right of representation by counsel, although it was usually permitted; the provision for reasonable bail was never intended to release the soldier from the guard-house, pending trial; and it is hard to believe that the soldier, as such, was in mind when the first amendment prohibited Congress from passing any law abridging the freedom of speech.

It is further pointed out that four judges of the Supreme Court, in the case of Milligan, (4 Wall. 1), declared the power of Congress, in the government of the land and naval forces, was not at all affected by the Fifth or any other Amendment; and that this statement was not in terms controverted by the majority judges, nor is it opposed by any other actual decision.

Therefore, the proponents of the unlimited scope of the war power assert that here is one phase of that power which was plainly never intended to be controlled by all the provisions of the Constitution; but upon the ground of necessity was to stand independent thereof.

These advocates of the unrestricted scope of the war power bear down still more strongly upon military government. Military government, in the proper sense, differs in two important respects from military law. Military law governs the soldier as such; at most, the individual units that go to make up a completed army. Military government reaches out and embraces civilians. Military law governs the army at home and abroad. Military government is always erected over territory captured from an enemy, or from those regarded as enemies. Properly speaking there can be no such thing as military government over domestic territory.

Military government finds its basis also in necessity—the necessity of preserving the army and its lines of communication upon hostile soil; and the necessity for some sort of government to replace the overthrown authority of the enemy.

Military government is thus incident to war; and is plainly founded upon the power of the President as Commander-in-Chief and the power to make war. The provisions of the Constitution guaranteeing certain civil rights have never been supposed to control military government. The Supreme Court of the United States has expressed itself very clearly on this proposition.

"Although the City of New Orleans was conquered and taken possession of in a civil war waged * * * * * * * to restore the supremacy of the national government * * * * * * * that government had the same rights and power in the territory held by conquest as if the territory had belonged to a foreign country and had been subjugated in a foreign war. In such cases the conquering power has a right to displace the pre-existing authority and to assume, to such an extent as it may deem proper, the exercise by itself of all the powers and functions of government. * * * It may do anything necessary to strengthen itself or weaken the enemy. There is no limit to the powers that may be executed in such cases, save those which are found in the law and usages of war. * * * * * * * * In such cases the laws of war take the place of the Constitution and laws of the United States as applied in times of peace." (New Orleans vs. Steamship Co., 20 Wallace 387.)

If these doctrines apply to the territory of states in insurrection, regarded as that of a foreign enemy, a fortiori they apply to the territory of purely foreign states.

It thus appears that there exists under the United States, created by the Constitution, a power of military government fundamentally based on necessity to which the ordinary safe guards of the Constitution, as a source of municipal law, have absolutely no application.

Taking up martial law, by this term is meant the rule of the military authorities over domestic territory or territory regarded as domestic. It is a temporary supersession, in whole or in part, on the ground of necessity, of the ordinary civil laws, by the rule and sometimes by the tribunals erected by the military commander. It applies to all the civil inhabitants of the territory subject to it.

If it has any existence in the United States as a federal power (and I have no doubt of such existence) it must be deduced from the power to make war, the power to suppress insurrection, the power to execute the laws or from the means clause in the Federal Constitution. It may be conveniently regarded from two aspects; the aspect of the war power and the aspect of the power to execute the laws of the United States, although to some extent these run into each other. Martial law was declared, for example, in St. Louis and its environs

in 1861; in Baltimore in 1863 and in Kentucky in 1864. Regulations were promulgated, military commissions erected and offenders tried. In determining the rightfulness and extent of martial law, upon such occasions, the proponents of an unlimited war power are confronted with the case of Milligan decided by the Supreme Court of the United States to which reference has heretofore been made. In that case a Military Commission, appointed by the commanding general in the District of Indiana, acting as a military court, condemned to death one Milligan, who was not a prisoner of war, had never been in the military or naval service and had resided in the state and district where the commission was held for upwards of twenty years. The Supreme Court took judicial notice that in Indiana the federal authority was always un-opposed; that its courts were always open and their process unobstructed. It held that inasmuch as a federal statute provided for the discharge of all such prisoners who were not indicted within a limited time after their arrest, and Milligan had not been so indicted, he must be discharged. The majority of the Court went much further and held that the sentence of the Military Commission was in direct violation of the Constitution; and that it made no difference that it was a time of war.

The majority of the Court resolved as follows: The laws of war can never be applied to citizens in civil life in loyal states, where the Courts are open and unobstructed. In such a case no necessity can be urged which would prevent the trial of an offender by the federal courts. Under such circumstances Milligan was deprived of his right to be tried before a constitutional court and was denied the right of trial by jury.

In the course of their opinion they used the language which has heretofore been quoted.

There are, however, important concessions in the opinion of the majority:

"It will be borne in mind that this is not a question," they say, "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. * * * * * * * It is difficult to see how the safety of the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for them and the courts were open and ready to try them. Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion

real and such as effectually closes the courts and deposes the civil administration. * * * * * * * It follows from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice, according to law, then, on the scene of active military operations, where war actually prevails, there is a *necessity* to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society, and as no power is left but the military, it is allowed to govern by martial rule, until the laws can have their free course. As *necessity* creates the rule, so it limits its duration; for if this government is continued after the courts are reinstated, it is a gross usurpation of power."

The minority of the Court held that Congress indeed had no power to apply the laws of war in time of peace; but there where war existed, and some portions of the country were invaded, and all were exposed to invasion, it was within the power of Congress to determine what states or districts were the seat of such imminent public danger as justified the authorization of military tribunals for the trial of offenses against the safety of the army or the public; that it might well happen that the courts were technically open, but utterly ineffective to the emergency; and that under such circumstances Congress, under the power to declare war, and the power to raise and support armies, might validly provide for military trials.

The minority of the court held further, that martial law is impliedly recognized by and exists under the Constitution; that it may be called into action by Congress, or, when there is sudden peril and Congress cannot be invoked, by the President; and be made applicable in times of insurrection or invasion, or in civil or foreign war, in districts or localities where ordinary law no longer adequately secures public safety and private rights.

The proponents of the power of Congress to provide for martial law, point out that all the judges agreed that where *necessity* actually exists, martial law may be properly resorted to.

But they gloss over, or fail to observe, that the essential holding of the majority is, that whether or not there exists any possible occasion for martial law is in itself a judicial question; and unless the circumstances indicated in the majority opinion are present, its proclamation is illegal, because contrary to the Constitution.

They criticise, moreover, very strongly the majority holding. They assert that to admit the rightful existence of martial law when the enemy has crossed our boundary, but to deny its possible existence

when he is approaching it, is weak and foolish; and that to limit its existence to cases where the courts have actually ceased to sit is to substitute shadow for substance; the real necessity arising when the courts, for any reason, are unable to cope with a situation fraught with immediate danger to the safety of army and public. In such a position, they are powerfully supported by the English Privy Council, in a case growing out of the South African war. (Ex parte Marais, 1902 (A. C.) 109.)

They say further, that whether martial law, total or qualified, is a method necessary to the prosecution of war, under particular conditions, is involved in the power to carry on the war, which is vested in Congress; and that the decision of Congress, as to such necessity, ought to be binding upon the courts, as being political in nature.

They declare, finally, that the minority opinion in Milligan's case is now quite generally regarded by the better authorities, as being the sounder law; although the case has never been overruled.

There are thus two phases of *necessity*: the general phase, and the phase having particularly to do with martial law.

Taking up the latter phase first, it seems to me to demand too much.

I admit that there are many instances at common law, where necessity may be relied upon by individuals as a justification for conduct otherwise tortious; and to that extent, necessity is unquestionably a part of the common law.

Thus a man might justify in time of war for making fortifications on another's land. (1 Dyer, 36b.)

So he might dig for gravel to erect a fort. (12 Rep. 12.)

He might tear down houses for the defense of the realm. (4 T. R., l. c. 797.)

Buildings might be blown up to stop a conflagration. (1 Dyer, 36b; 12 Rep. 13; Bowditch vs. Boston, 101 U. S. 16.)

Provisions might be destroyed to prevent their falling into the hands of the enemy. (Republica vs. Sparhawk, 1 Dallas 357.)

Goods necessary for the immediate exigencies of the army might be seized. (Mitchell vs. Harmony, 13 How. l. c. 133; Wellman vs. Dickerman, 44 Mo. 484.)

And many other instances might be cited.

Nevertheless, I understand the true rule in such cases to be that an apparently reasonable necessity must have been present. Otherwise it was trespass.

This is the rule laid down by the United States Supreme Court, which held liable a military commander, for unreasonable seizure of

property belonging to a citizen of the United States. (Mitchell vs. Harmony, supra.)

This same rule, with respect to the person, is what I consider the essential holding in the Milligan case.

In the absence of a statute, at least, every act committed against the person or property of a citizen by a military commander or his subordinates, may be re-examined by a court to ascertain whether there was present a reasonable supposition of *necessity,* under all the circumstances.

"It is an unbending rule of law, that the exercise of military power, where the rights of citizens are concerned, shall never be pushed beyond what the exigency requires." (Raymond vs. Thomas, 91 U. S. 712.)

The question whether that apparent exigency existed, in each and every individual case, is a *judicial* question, to be passed upon by a civil court and a civil jury; and this is what I understand to be meant by the supremacy of the civil over the military power in this country; concerning which, I believe, some mention was made in the Declaration of Independence.

Now, our friends on the other side will say, that here there is no statute; and that the rule would be quite different if a statute existed. What sort of a statute? A statute foreclosing the question of reasonable necessity for every act that might be committed under a proclamation of martial law?

This means, I suppose, that Congress has power to pass a statute, in time of war, declaring that the whole United States is in a state of grave, public danger: that in view of such fact, all constitutional and statutory provisions are suspended for the duration of the war, and made subject and inferior to martial law, promulgated and administered by the army and its tribunals; that no matter what was done, under such a statute, in any particular case, that case could never be subjected to scrutiny and review by the civil tribunals, upon the ground of reasonable necessity. This would be tantamount to establishing, for the duration of the war, which might be ten or even twenty years, a mere military despotism.

If that is what is meant by our Constitution, I think we had better abolish it altogether, and try to elect more responsible and capable men to a supreme legislature.

Of course, the illustration is extreme; but the situation would be just as bad, if the territory affected were the eastern one hundred miles of our Atlantic seaboard.

If our friends who speak of the power of Congress to establish martial law do not mean this, what do they mean? If they simply mean that Congress may find the fact of actual or threatened invasion, and proclaim martial law in the territory invaded or threatened, but that it still remains a judicial question in each instance, whether the particular act done under martail law was done under reasonable apprehension of necessity, there is not so much objection to the statement. Unnecessary martial law, under such circumstances, could not exist very long without deliberately crushing the courts.

The advantage of a Congressional declaration in such a case would be merely evidentiary; there could be no binding Congressional determination, in advance, of the necessity of acts, nor could Congress determine, in advance, the duration of the future necessity.

The power of the President would be even less than that of Congress; because the President cannot *legislate* at all.

The civil tribunals, in the presence of overwhelming temporary force, or while the public danger appeared acute, would doubtless be slow to act; and there may be a question whether honest belief in necessity or reasonable ground for supposing the necessity, be the test of non-liability. (Moyer vs. Peabody, 212 U. S. 78.)

Entertaining these views, I really cannot understand the claim that Congress may emancipate itself and those acting under its orders, from the authority of the Constitution, by a statute proclaiming martial law, total or qualified.

I am not unmindful of the period of Reconstruction but that seems to me a mere anomalous appurtenance of military government.

The true theory of martial law presupposes the temporary death of civil authorities. It is, in essence, a somewhat enlarged and more powerful application of the principle of the *posse comitatus*.

So far as the suspension of the Constitution is concerned by *military government*, the Constitution was never intended to follow the flags of our victorious armies into foreign territory. Such a suspension of the Constitution is not proven by the argument of necessity based upon *military law*. The Supreme Court has yet to decide that such provisions as those against double punishment, or cruel and unusual punishment, are not applicable to the soldier, as such. On the contrary, the Supreme Court has entertained cases, as involving the Constitution, where such immunities were invoked. No one has ever supposed the provisions of the Constitution, relative to the procedure of Courts, had anything to do with non-judicial bodies.

Turning now to the other phase of necessity, the *Supreme Necessity of War*, it may be admitted frankly, as has been indicated hereto-

fore, that at the common law a state of war constituted an occasion which modified in some respects the ordinary rules of civil life. This was just as well-known, perhaps better known, to the framers of the Constitution, than it is to us.

I can find no evidence that they ever contemplated a dictatorship in America, where the will of the dictator should be the supreme and only law. They never contemplated a continental state of siege as a constitutional status in this country.

They undoubtedly intended the war-power to be a very wide one. They intended to give Congress the power to pass statutes extending and changing rules of conduct, because of war conditions, and conferring upon public officers (under the war-power) the right to do a great many things, as against individual rights, which as individuals, or in the absence of such a statute, they could not do at all.

In passing every statute, under any of its powers, Congress presumably has in view the *necessities* of the public.

Whatever may be their opinion as to public necessities, it has never been supposed that in exercising any other power, Congress was not restrained by the applicable negations of the Constitution. They ought to be equally restrained, in the exercise of the war-power.

The theory of unlimited power anywhere was hateful to our forefathers. Doctrinally, the Revolution was a phase of the long fight against prerogative. It is well-known that many of the states were opposed to the Constitution, unless it should be amended. Undoubtedly, amendments and original Constitution should be read together as one instrument; but the Supreme Court has repeatedly held that where there is any necessary conflict, the amendments, being later laws, should control. They qualified the whole existing Constitution, and every part thereof; and it seems difficult to maintain that, *prima facie,* at least, they do not qualify the war-power.

It seems to me plain, beyond all controversy, that no fundamental alterations of the structure of our federal government were ever contemplated upon any occasion, save by the process of amendment. I cannot believe that it was intended to vest Congress with the power to pass a law creating an actual, or effective, dictatorship, and providing that the President should have and exercise, during the term of the war, sole and absolute legislative power. Neither in peace nor war can the President be given power to pass laws. The most that he, or any other executive officer, can be given in this regard, is power to find the *facts* upon which the existing *law* operates, or is to operate, and to frame administrative regulations for the orderly and convenient execution of the existing law. Congress could not pass a law

abrogating the Courts for the term of the war and erecting themselves, or their appointees, into the only national tribunals. Congress could not pass a law doing away with elections for President and Senators and providing that the present incumbents should hold their seats so long as the war should last. I cannot imagine the validity of a law enacted by Congress abolishing during the war the veto power of the President. It could not pass a law providing that duties, imposts and excises should not exist in one state and be piled mountain high in another. It could not, even to spur their efforts, grant the title of Duke to its successful generals. It could not lay taxes or duties on articles exported from a state.

These things seem to me so fundamentally a part of our governmental structure, as to be intended to be beyond the power of congressional change under any excuse or emergency whatsoever. In the same fashion I cannot imagine the validity of a war measure which would violate fundamental notions of equality before the law, such as a draft law conscripting only red-headed men. Nevertheless, we have certain enthusiastic patriots among us, upon whom I have tried out some of the foregoing questions, and who have assured me that, in case of necessity, all these things undoubtedly could be done.

If the war-power be limited by such plain provisions as those respecting the election of Senators, or the levying of direct taxes, or the definition of treason, it ought to be limited by every other plain provision. So far as this country itself is concerned, we have yet to establish a distinction between essential and non-essential provisions of the Constitution.

I am aware that some of the advocates of an unlimited war-power cite decisions of the Supreme Court, as sustaining their theory.

The chief authority relied on is Miller vs. U. S. (11 Wall. 268.)

One act of Congress provided for the seizure and confiscation by proceedings *in rem*, of property used or intended to be used, to promote the rebellion. Upon proof of such unlawful destination or use, the property itself was regarded as an enemy. Another statute provided for the seizure and confiscation of all property, no matter what its use or destination, belonging to *enemies*.

Both statutes were sustained, as a legitimate exercise of the war power, against the objection that they violated the provisions for indictment and jury trial for crime and for due process of law.

The Supreme Court said:

"But if the assumption of the plaintiff in error is not well made; if the statutes were not enacted under the municipal power of Congress to legislate for the punishment of crimes against the sovereignty of the

United States; if, on the contrary, they are an exercise of the war-powers of the government, it is clear they are not affected by th erestrictions imposed by the fifth and sixth amendments. * * * The question, therefore, is whether the action of Congress was a legitimate exercise of the war-power. The Constitution confers upon Congress, expressly, power to make war, grant letters of marque and reprisal, and make rules concerning captures on land and water. Upon the exercise of these powers no restrictions are imposed. The power to make war * * * includes the right to seize and confiscate all property of an enemy and to dispose of it, at the will of the captor. This is, and always has been, an undoubtedly belligerent right. * * * The confiscation is not because of crime, but because of the relation of the property to the opposing belligerent." * * *

To infer from this decision, and the facts to which its language is applicable, that the United States may treat its own citizens precisely like belligerents: that as against its own citizens the government is absolutely unfettered, in the passage of any law referable to the war-power, the Constitution to the contrary notwithstanding: is to surpass my wildest notions of expansive interpretation.

As a matter of fact, there *is* no decision of the Supreme Court known to me, which fairly holds that, under the aegis of the war-power, Congress may invade any provision of the Constitution.

The true rule is, that the Constitution binds in war, as well as in peace.

Nevertheless, there *is* very great difficulty in dealing with the interpretation of some provisions in the amendments. Where a provision is plain and categorical, obvious in meaning, there can be no difficulty. Where the provision has a historical reference and significance or is expressed in vague or common-law terms, reference must be had, as a matter of interpretation, to the history which brought the provision into existence, and to its historical understanding. When we have ascertained its historical meaning, as applied to a particular situation, we must at all times, in Congress and elsewhere, give to the principle its full effect under a like or analogous situation.

Such provisions as those relating to freedom of speech, unreasonable search and seizure, deprivation of life, liberty or property, without due process of law, double jeopardy, and confrontation by witnesses,

> "were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well recognized exceptions arising from the *necessities* of the case. In

> incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions which continued to be recognized as if they had been formally expressed." (Robertson vs. Baldwin, 165 U. S., *l. c.* 281.)

The right of free speech was always understood, for example, to be subject to the implied exception that no man should have the right with impunity to preach blasphemy, or incite others to the commission of crime. As a matter of fact, some twelve years ago, the Supreme Court even expressed the opinion that

> "the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments' and they do not prevent the *subsequent* punishment of such as may be deemed contrary to public welfare." (Patterson vs. Colorado, 205 U. S., *l. c.* 462.)

The only difference that war could make, would be the temporary enlargement of the power of Congress over that portion of the public welfare which has direct relation to the raising of armies and the conduct of war.

A compulsory censorship in advance is invalid, in war as in peace.

Due process of law is a very vague term which the Courts have never exactly defined. As applied to legislative acts, it probably always involves the idea of distributive justice—fair equality of treatment between persons standing in the same general relation. It would prevent the confiscation by the legislature of vested property; but it leaves open a wide field of regulation, short of confiscation, the limits of which are bounded in a general way by consideration of public health, safety and welfare. The effect of war would be to temporarily enlarge the field of Congress, by including within its regulatory power, for public safety, all property having reasonably direct relationship to war necessities.

The right to life and liberty, under the due process of law clause, was impliedly subject to the historical right of the State to call upon every man to join the armed forces of the nation to repel an enemy.

It has been suggested that it is within the power of Congress, in time of war, to compulsorily mobilize every citizen, and compel him to devote his time and labor to particular industries, with a fixed, or without any, compensation. Laws relating to idleness and vagrancy, and to compulsory work on public roads, have been cited in this connection. My own conviction is against the existence of such a war-power, under our system.

Undoubtedly the making of contracts plainly contrary to public safety or necessity, such as trading or commercial intercourse with

the enemy may be restrained and prevented even though such intercourse be carried on through neutral countries.

The scope of the power of eminent domain possessed by the federal government is greatly enlarged, because the government during the war has power to acquire all property necessary to carry that war to a successful conclusion. Of course compensation must be made for every *taking,* as that word is interpreted; but the compensation need not be in advance.

A full discussion of all the Amendments is beyond our time, and I have said enough to indicate my views.

The difficulty with some of the vaguer ones is, as you have perceived, that in a state of war, the scope of public *necessity* is very greatly enlarged; and there is, in that sense, merit in the arguments made with reference to *necessity,* as understood at the common-law, and as it ought to be applied to analogous situations.

In what cases, under the Amendments, ought *general* language to be restricted in interpretation, by the implied public necessity of war? This is the problem before the courts; and it is a most difficult and delicate problem.

In any event, let us not be too prompt to toss away the Constitution. It has guided our faltering steps, when the storm was wilder and more turbulent than it is today. Let us resolve to win, to be sure; but not to win, by ruthlessly sacrificing those limitations upon the awful power of government, which we were the first to raise in the name of liberty. Let us use the concededly great national powers, with which we were wisely provided, for such a season; but let us not destroy, or impair, under any specious plea of temporary necessity, the greatest heritage of our fathers.

CHARLES P. WILLIAMS.