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MILITARY LAW FROM PEARL

HARBOR TO KOREA

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22 Fordham Law Review, June, 1953, pp. 155-182

"...While the general picture is tinged with shadows which make analysis difficult, it seems that the Supreme Court is taking a narrow view of its habeas corpus jurisdiction where servicemen are concerned. (See, for example, Humphrey v. Smith, 336 U. S. 695 (1949).) This is in contrast with the broad view it takes in civilian cases. The lower federal courts, on the other hand, are applying the broad "due process" approach of the Supreme Court civilian decisions to military cases. (See, for example, Schita v. King, 133 F. (2d) 283 (CCA-8, 1943); Romero v. Squier, 133 F. (2d) 528 (CCA-9, 1943), certiorari denied, 318 U. S. 785 (1943); Innes v. Hiatt, 141 F..(2d) 664 (CCA-3, 1944); and Hiatt v. Brown, 175 F. (2d) 273 (CA-5, 1949), reversed, 339 U. S. 103 (1950).) The attitude of the lower federal courts seems preferable. Especially in an era such as this, when large standing armies will be with us for many years to come, the constitutional protections of the serviceman should not be watered down by a niggardly application of habeas corpus jurisdiction.

The Supreme Court has also tended to limit sharply the review of judgments of military commissions (see, for example, Ex Parte Quirin, 317 U. S. 1 (1942); and In re Yamashita, 327 U. S. 1 (1946)), and has refused entirely to review the actions of such bodies where the tribunal is international in character or where the accused persons are aliens who have never come within American territory. (Hirota v. MacArthur et al., 338 U. S. 197 (1948); and Johnson v. Eisentrager, 339 U. S. 763 (1950).) This seems unfortunate. American political-military control seems destined to continue for a number of years in many areas of the globe, and at least the basic notions of American justice should follow the flag. When Americans, whether military men or civilians, administer justice abroad, civil courts of the United States should assert the power to see to it that this justice is in accordance with our country's ideals and traditions. Our system of law is one great mark of our democracy, and it should not be labeled "for domestic use only.""

WINTHROP'S MILITARY LAW AND PRECEDENTS

"1. UNDER ART. 63. This Article, which is the most important and comprehensive of the statutes indicated, provides as follows:--'All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war.' This provision, which, with some slight modifications, has come down from our original code of 1775, which derived it from a corresponding British article, has always been interpreted as subjecting the descriptions of persons specified, not only to the orders made for the government and discipline of the command to which they may be attached, but also to trial by court-martial for violations of the military code. Protected as they are by the military arm, they owe to it the correlative obligation of obedience; and a due consideration for the morale and discipline of the troops, and for the security of the government against the consequences of unauthorized dealing and communication with the enemy, requires that these persons shall be governed much as are those with whom they are commorant. Owing indeed to the policy of our laws relating to the army, which has aimed to impress, in general, a distinctive military character--as officers and enlisted men--upon the persons employed in the military service proper, the classes of attaches mentioned in the Article have been less varied and numerous in our armies than in those of foreign nations. In our late war, however, they were necessarily more considerable than at any previous period.

"'Retainers to the camp.' This term may be deemed to include: -1. Officers' servants; 2. Camp-followers attending the army but not in the public service. Of the former, there have been but few trials by court-martial, their breaches of discipline having been in general summarily punished by expulsion from the station or beyond the lines. Of followers of the camp--sutlers, sutlers' employees, newspaper correspondents, telegraph operators, and some others, were from time to time during the late war brought to trial by court-martial, or otherwise summarily disciplined. The post-traders who succeeded sutlers would, in time of war, have been of the class of camp-followers if their posts had been within the theatre of the war. Camp-followers are generally restricted to the least number, on the eve of an important movement by the army to which they are attached.

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"'Persons serving with the armies in the field.' While this might perhaps be viewed as a general designation including all persons serving in the field with the army in any capacity whether public or private, yet inasmuch as the terms 'service' and 'serving', as used in the Articles of war, have reference to public service--the service of soldiers and the like--it is preferred to treat these words as intended to describe civilians in the employment and service of the government. This class, during the late war, was considerably more numberous than that of the camp-followers or private retainers. It consisted mostly of civilian clerks, teamsters,

laborers and other employees of the different staff departments, hospital officials and attendants, veterinaries, interpreters, guides, scouts and spies, and men employed on transports and military railroads and as telegraph operators, etc. Of these persons those who appear from the General Orders to have been most frequently subjected to trial by court-martial were--Inspectors, Teamsters, and other employees of the Quartermaster's Department; Officials and employees of the Provost Marshal General's Department, Contract surgeons and nurses, Paymasters' clerks, Officials of boards of enrollment, Officers and men employed on steam transports, Military telegraph operators, etc.

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"The Article to be strictly construed. This Article, in creating an exceptional jurisdiction over civilians, is to be strictly construed and confined to the classes specified. A civil offender who is not certainly within its terms cannot be subjected under it to a military trial in time of war with any more legality than he could be subjected to such a trial in time of peace. As held by the Judge Advocate General, the mere fact of employment by the Government within the theatre of war does not bring the person within the application of the Article. In several cases of public employees brought to trial by court-martial during the late war the convictions were disapproved on the ground that it did not appear that at the time of their offences they were 'serving with the army' in the sense of this Article."(page 98)

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"CONSTITUTIONALITY OF THE STATUTES. These laws, however, remain on the statute book, and under Sec. 1361 discharged soldiers have not unfrequently been brought to trial, while under Art. 60 discharged officers and soldiers are always liable to be tried. It is proper therefore to consider the question of the constitutionality of such laws, and that they are constitutional cannot, in the opinion of the author, be maintained upon sound legal principles. They are certainly not so as being forms of exercise of the power to 'govern and regulate the land forces,' because the term 'land forces' does not embrace discharged officers and soldiers or any other civilians. They must be so therefore under and by virtue of a combination of the two powers, to 'raise armies' and 'govern the land forces.' That is to say, they must be regarded as placing or retaining these persons, notwithstanding that they have become civilians, in the army for a temporary or special purpose, and, by the same act, providing for their government while so placed or retained, so that their offences shall be punishable as 'cases arising in the land forces.' But does the power to 'raise armies' extend to the inclusion of such civilians in the land forces? What are 'armies' in the sense in which this term is used in the Constitution? Its interpretation is to be found in the series of statutes dating from the period of the adoption of that instrument, and of which the constitutionality has not been questioned, by which the constituents of our armies or Army have been repeatedly defined. These constituents are a certain number of officers commissioned or appointed, and of soldiers enlisted, into the military service as such, bound to obey military orders and to perform military duty in peace or war, entitled to military pay, and remaining under military discipline and government till discharged in due form, or otherwise legally separated from the military state. Such are the 'armies' or 'land forces' which the Constitution authorizes Congress to raise, support and govern. Can

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this authority be held to include the raising or constituting, and the governing nolens volens, in time of peace, as a part of the army, of a class of persons who are under no contract for military service, but on the contrary have been formally discharged from all such contract, who render no military service, perform no military duty, receive no military pay, but are and remain civilians in every sense and for every capacity except the special one for which the statutes under consideration propose to reserve them? Can the authority to govern be extended to the disciplining of soldiers after they have been legally separated from the army? In the opinion of the author, such a range of control is certainly beyond the power of Congress under the provisions of the Constitution referred to. That instrument, in a further provision also,--the Vth Amendment,-- clearly distinguishes the military from the civil class as separate communities. It recognizes no third class which is part civil and part military--military for a particular purpose or in a particular situation, and civil for all other purposes and in all other situations--and it cannot be perceived how Congress can create such a class, without a disregard of the letter and spirit of the organic law.

"In 1866, the Circuit Court of the United States for the district of Kentucky passed upon the constitutionality of the section of the Act of Congress (no longer in force,) of July, 1862, which, in subjecting contractors for supplies for the army and navy to trial by court-martial for certain misconduct, provided in express terms that they should be 'deemed and taken to be a part of the land forces or naval forces for which they contracted to furnish the supplies.' This statute the court, in an elaborate opinion, pronounced unconstitutional, holding that Congress could not 'by its mere declaration' place or include civilians in the army, and that the provision cited was 'idle and nugatory;' and it was well observed that if Congress could so dispose of one class of civilians, it could of another, or of all classes, and thus establish a 'military despotism.'

"As to the particular existing statutes under consideration, however, the present weight of authority is in favor of their constitutionality. In the U.S. Circuit Court for the Dist. of California, the concluding clause of Art. 63 has been viewed as constitutional, and a similar view has been taken of Sec. 1361, Rev. Sts., as including prisoners who have been discharged as soldiers, by the U.S. Dist. Court for the Dist. of Kansas and by the Attorney General. Such opinions, whether or not satisfactory to the military student, are to be deferred to till over-ruled by subsequent or higher authority. The opinion of the author-- that this class of statutes, which in terms or inferentially subject persons formerly in the army, but become finally and legally separated from it, to trial by court-martial, are all necessarily and alike un-constitutional--remains unmodified. In his judgment, a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace." (page ~~105~~)

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"V. PRISONERS OF WAR. Modern sentiment and usage have induced in the practice of war few changes so marked as that which affects the status of prisoners of war. The time has long passed when 'no quarter' was the rule on the battlefield, or when a prisoner could be put to death by virtue simply of his capture. It is now recognized that captivity is

neither a punishment nor an act of vengeance,' but 'merely a temporary detention which is devoid of all penal character.' Or, as Lieber states it,--'A prisoner of war is no convict; his imprisonment is a simple war measure.' As it is concisely expressed in the Appel of 1877--'Le but de leur capitivite ne doit pas etre de les punir, mais de les garder.'

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"In regard to the custody and disposition of such prisoners the following principles and rules may be said to be established.

"1. Persons entitled to rights of prisoners of war. The class of persons entitled upon capture to the privileges of prisoners of war comprises members of the enemy's armies, embracing both combatants and non-combatants, and the wounded and sick taken on the field and in hospital. It should comprise also civil persons engaged in military duty or in immediate connection with an army, such as clerks, telegraphists, aeronauts, teamsters, laborers, messengers, guides, scouts, and men employed on transports and military railways--the class indeed of civilians in the employment and service of the government such as are specified in our 63d Article of War as 'Persons serving with the armies in the field.' Camp-followers, including members of soldiers' families, sutlers, contractors, newspaper correspondents, and other allowed with the army but not in the public employment, should, when taken, be treated similarly as prisoners of war, but should be held only so long as may be necessary. In the words of the Institute,--'Persons who follow an army, without forming part of it, can only be detained for so long a time as may be required by military necessity.' Of the non-combatants of an army, those composing the staff of the hospitals and ambulances--viz. medical officers, hospital stewards and attendants, employed in the care and transport of the wounded and sick, with chaplains or priests, are considered, under the Geneva Convention, as entitled to the benefit of neutrality, while in the exercise of their functions. For so long, therefore, they are not to be disposed of as are the mass of prisoners of war, but are to be left for the time to the performance of these duties. In our late civil war neither medical officers nor chaplains were held as prisoners of war, but on capture were forthwith 'unconditionally' discharged." (page ~~788~~)

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"* * * It was further stipulated that 'if citizens held by either party, on charges, are exchanged, it shall only be for citizens,' adding--'captured sutlers, teamsters, and all civilians in the actual service of either party, to be exchanged for persons in similar positions.'" (page ~~793~~)

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"MAGNITUDE OF THE POWER--ITS LIMITATION. The power of military government thus vested in the President or his military subordinates is a large and extraordinary one, being subject only to such conditions and restrictions as the law of war, in defining the particulars to which it may extend, imposes upon the scope of its exercise. As it is expressed by the Supreme Court, the governing authority 'may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases save those which are found in the laws 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 time of peace.' The

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nature and extent of these powers will be illustrated in considering the details of their exercise." (page 801)

"ITS LIMITATIONS. The employment of martial law has been likened to the exercise of the right of self-defence by an individual. Its occasion and justification thus is necessity. But though in general without other limit than the discretion of the commander upon whom its execution is devolved, it is not an absolute power, but one to be exercised with such stringency only as circumstances may require. The often-quoted remark that martial law is simply 'the will of the general who commands the army' is a description much less apposite in practice to martial law proper, or domestic martial law, than to that military government of enemies heretofore considered, and with reference to which in fact the observation was originally employed by Wellington. Martial law is indeed resorted to as much for the protection of the lives and property of peaceable individuals as for the repression of hostile or violent elements. It may become requisite that it supersede for the time the existing civil institutions, but, in general, except in so far as relates to persons violating military orders or regulations, or otherwise interfering with the exercise of military authority, martial law does not in effect suspend the local law or jurisdiction or materially restrict the liberty of the citizen: it may call upon him to perform special service or labor for the public defence, but otherwise usually leaves him to his ordinary avocations.

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"It is a principle of the exercise of martial law that even when required to be executed with exceptional stringency and for a protracted period, it shall not be permitted to serve as a pretext for license or disorder on the part of the military; and acts of undue violence and oppression committed in its name will by the laws of war be visited with extreme punishment.

"It is a further principle that, while martial law is not to be inaugurated precipitately or inconsiderately, so it is to be continued only so long as the public exigency on account of which it was declared shall prevail. It is not indeed essential to the discontinuance of such state that the original declaration of the same be formally revoked: when the emergency has ceased, or within a reasonable interval thereafter, the status may be deemed to have lapsed, and cannot lawfully be further continued or enforced." (page ~~820~~)

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"Thus, as a general principle of law, it may be deemed to be settled by the rulings of the courts and weight of legal authority, as well as by the action of Congress and practice of the Executive, that the President is not empowered of his own authority to suspend the privilege of the writ of habeas corpus, and that a declaration of martial law made by him or a military commander, in a district not within the theatre of war, will not justify such suspension in the absence of the sanction of Congress. The result must be that martial law proper will in the future rarely be initiated in the United States where Congress has omitted to provide the means for rendering its exercise effectual. But, in the event of a practical exercise of the same in an adequate emergency, and of the consequent arrest and holding by military authority, in good faith and what is believed to be the full and proper performance of duty, of undoubted public enemies or other

criminals, in temporary disregard of judicial process sued out for their release, it can scarcely be questioned that Congress, if it does not expressly ratify the act, will at least protect or indemnify the officers and soldiers concerned, by legislation corresponding to that enacted for a similar purpose at the close of active hostilities in the late civil war, while--as then--authorizing the removal to a court of the United States of actions for damages commenced against such persons in State courts." (page 830) /

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"VI. TRIAL AND PUNISHMENT OF OFFENCES UNDER THE LAW OF WAR--THE MILITARY COMMISSION.

"Authority and Occasion for the Military Commission.

"The Constitution confers upon Congress the power 'to define and punish offences against the law of nations,' and in the instances of the legislation of Congress during the late war by which it was enacted that spies and guerillas should be punishable by sentence of military commission, such commission may be regarded as deriving its authority from this constitutional power. But, in general, it is those provisions of the Constitution which empower Congress to 'declare war' and 'raise armies,' and which, in authorizing the initiation of war, authorize the employment of all necessary and proper agencies for its due prosecution, from which this tribunal derives its original sanction. Its authority is thus the same as the authority for the making and waging of war and for the exercise of military government and martial law. 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. In some instances, as will presently be noted, Congress has specifically recognized the military commission as the proper war-court, and in terms provided for the trial thereby of certain offences. In general, however, it has left it to the President, and the military commanders representing him, to employ the commission, as occasion may require, for the investigation and punishment of violations of the laws of war and other offences not cognizable by court-martial.

"The occasion for the military commission arises principally from the fact that the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the military force and to certain specific offences defined in a written code. It does not extend to many criminal acts, especially of civilians, peculiar to time of war; and for the trial of these a different tribunal is required. A commander indeed, where authorized to constitute a purely war-court, may designate it by any convenient name; he may style it a 'court-martial,' and, though not a court-martial proper, it will still be a legal body under the laws of war. But to employ the same name for the two kinds of court could scarcely but result in confusion and in questions as to jurisdiction and power of punishment. Hence, in our military law, the distinctive name of military commission has been adopted for the exclusively war-court, which also, as will hereafter be illustrated, is essentially a distinct tribunal from the court-martial of the Articles of war.

"Abroad, the court-martial is employed for the cognizance of offences 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. A late English writer, in approving the distinction established in this country between the court-martial and the military commission, observes: --'In England both descriptions of courts are called courts-martial, and the general public are consequently not able to discriminate between the two.'" (page 831)

Paragraph (10) is taken from AW 2(d). The phrase "in the field" has been construed to refer to any place, whether on land or water, apart from permanent cantonments or fortifications, where military operations are being conducted. (See in re Berue, 54 F. Supp. 252, 255 (S. D. Ohio 1944).)

Paragraphs (11) and (12) are adapted from 34 U.S.C., section 1201, but are applicable in time of peace as well as war. Both paragraphs, however, have been made subject to the provisions of any treaty or agreement to which the United States is a party or to an accepted rule of international law. Paragraph (11) is somewhat broader in scope than AW 2 (d) in that the code is made applicable to persons employed by or accompanying the armed forces as well as those serving with or accompanying the armed forces, and the territorial limitations during peacetime have been reduced to include territories where a civil court system is not readily available.

US Military Jurisdiction over Civilians

Constitution
Uniform Code of Military Justice - 50 USC 551 et. seq.
Opinions of the Attorney General - 6 - 506 (1854)
Opinions of the Attorney General - 28 - 590 (8 May 1893)
Ex parte Weitz - DC Mass. 256 F. 58 (1919)
Blackmer v. U.S. - 284 US 421, 76 L. ed. 375, 52 S. Ct. 252 (1932)
Coleman v. Tenn. - 97 U.S. 509, 24 L. ed. 1118 (1879)
Colepaugh v. Looney - CA Kan. 235 F. 2d 429 (1956)
In re Di Bartolo - DC NY - 50 F. Supp. 929 (1943)
Duncan v. Kahanamoku - 327 US 304, 90 L. ed 688 (1946)
Ex parte Falks - 251 Fed. 415 (1918)
U.S. v. Flores - 289 U.S. 421, 77 L. ed. 1086 (1933)
Ex parte Gerlach - NY 247 Fed. 616 (1917)
Grisham v. Taylor (District Court - Md. Pa.) (1958)
U.S. v. McElroy (Guagliardo) - 158 F. Supp. 171 (DC District) (1958)
U.S. v. Hudson (and Goodwin) - 7 Cranch 29, 3 L. ed. 289 (1812)
Ex parte Jochen - Texas - 257 Fed. 200 (1919)
Ex parte Johnson - District Court, Kansas - 3 F. 2d 705 (1925)
Johnson v. Sayre - 15 S. Ct. 773, 158 US 114, 39 L. ed. 914 (1895)
Kahn v. Anderson - 255 US 1, 65 L. ed. 469, 41 S. Ct. 224 (1920)
U.S. ex rel. Roberson v. Keating - District Court, Illinois - 121 F. Supp. 477 (1949)
Lee v. Madigan - District Court, California - 148 F. Supp. 23 (1957)
McCulloch v. Maryland - 4 L. ed. 579, 4 Wheat. 316 (1819)
McKune v. Kilpatrick - District Court, Virginia - 53 F. Supp. 80 (1943)
Government v. McGregory - 14 Mass. 499
Madsen v. Kinsella - 343 US 341, 96 L. ed. 988, 72 S. Ct. 699 (1952)
Ex parte Milligan - 18 L. ed. 281, 303 (1866)
Perlstein v. U.S. - 151 F 2d 167 (1945)
Perry v. Harper - (1957) Okl. Cr., 307 P. 2 168
Ex parte Guirin - 317 US 1, 43, 44 (1942)
Rines v. Mikell - 259 Fed. 28 (1919)
Re. Ross - 140 US 453, 35 L. ed 581, 11 S. Ct. 897 (1891)
U.S. ex rel. Toth v. Quarles - 350 US 11, 76 S. Ct. 1 (1955)
Ex parte Vallandigham - 1 Wall. 243, 68 US 243, 17 L. ed. 589 (1864)
Petition of Varney - District Court, California - 141 F. Supp. 190 (1956)
US ex rel. Guagliardo v. McElroy (D.C. App.) 259 F. 2d 927 (12 September 1958)
US ex rel. Wilson v. Boblander (Colorado) 10 November 1958

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Vanderbilt Law Review 11:202 December 1957
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