

War Powers Under the Constitution

Charles E. Hughes

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EDITORIAL

The *Marquette Law Review* starts its second year as a legal publication with a great deal more confidence than it did the previous year. This is by reason of the hearty support it received throughout the State, by the standard of the articles of its contributors, and the general interest taken by the bench and bar.

In this issue we are publishing the Honor Roll of the Law School. If there are any doubts as to the lawyers' patriotism or capabilities for a soldier, one glance will dispel these.

The *Law Review* has heard and heeded the call to the colors. Most of the editorial staff is now in service while our business manager is now Lieutenant Kelley in the U. S. Field Artillery, and Mr. Lindsay, our circulation manager, is in the U. S. Radio Corps. We miss them. We can't help but do so. But we also know that Uncle Sam need never doubt them. For the same personal sacrifice and effort which they rendered the *Review* will be given to him in a thousandfold.

At the present time we hear much relative to the constitutional power to send troops to France, the constitutionality of the Draft Act and the powers of the President under existing circumstances. In fact, every emergency act in the eyes of the pacifist, the milk and water patriot and the traitor within the house, is an encroachment upon our fundamental rights. These noble citizens forget that one of the purposes for the establishment of the constitution was to "secure the blessings of Liberty to our-

selves and our posterity". To secure these there must be drastic action as the emergency presents itself. Can it be said that a constitution, which has for one hundred and thirty years held together and guided a nation from thirteen insignificant states to the mightiest power on the face of the globe, has failed to provide for an emergency such as the present day? The thought repels itself. Still there are some whose patriotism and loyalty cannot be doubted, think that the constitution is being strained to its limits. To these we answer in the words of Mr. Hughes that the framers of our constitution made a "fighting constitution" and the "power to wage war is the power to wage it successfully."

We are grateful to Mr. Hughes for the permission to publish his address and are proud of the opportunity to be a means of spreading this kind of doctrine.

THE LEGAL CLINIC

Much of late has been written regarding the legal clinic. Recent articles have dealt with it from the viewpoint of the practicing attorney, the professor, and the student. The reasons for this are obvious. In all probability there is no profession which allowed the student to leave its classroom so unprepared to meet the practical requirements of a successful practitioner as the law. Not only was this a detriment to the young lawyer, but to the practicing attorney and the client as well. A change was needed and demanded. The radical changes in the conditions and methods of legal practice and professional office work have now made the adequate provision for clinical training and experience the most essential part of legal education.

This will be effectively supplied by association and co-operation between the Marquette College of Law and the Legal Aid Society. Clinical service will be required as part of the fourth year's work for a degree.

Marquette University College of Law will make earnest clinical work through the Legal Aid Society a part of its curriculum for its full course and thus bring the law office with its "direct atmosphere of daily professional life" to the law school and the student. In learning in this way how to practice and how to deal with clients as the principal object, the student learns the technical practice and procedure as the machinery and the mere incident of his work.

WAR POWERS UNDER THE CONSTITUTION.

BY CHARLES E. HUGHES, OF NEW YORK.

Address delivered before the American Bar Association.

I.

In the unusual circumstances of war, it is natural that there should be some confusion with respect to the constitutional warrant for extraordinary action taken or contemplated. Some altogether misconceive the constitution. Others vaguely fear that we are serving temporary exigency at the expense of our fundamental law, and that we are thus breeding a lawless constitution-ignoring spirit which is a serious menace to our future. Others seek to raise doubts of power in order to embarrass the prosecution of the war. And there seem to be still others who in their zeal impatiently and without thought put the constitution aside as having no relation to these times.

CONSTITUTIONAL GOVERNMENT IN WAR.

While we are at war, we are not in revolution. We are making war as a Nation organized under the constitution, from which the established national authorities derive all their powers either in war or in peace. The constitution is as effective today as it ever was and the oath to support it is just as binding. But the framers of the constitution did not contrive an imposing spectacle of impotency. One of the objects of "a more perfect Union" was "to provide for the common defence". A nation which could not fight would be powerless to secure "the Blessings of Liberty to Ourselves and our Posterity". Self-preservation is the first law of national life and the constitution itself provides the necessary powers in order to defend and preserve the United States. Otherwise, as Mr. Justice Story said, "the country would be in danger of losing both its liberty and its sovereignty from its dread of investing the public councils with the power of defending it. It would be more willing to submit to foreign conquest than to domestic rule."

DISTRIBUTION OF POWERS.

The war powers under the constitution are carefully distributed. To Congress is given the power "to declare war". The proposal to add "to make peace" found no favor, as this was deemed to belong to the treaty-making power vested in the President and the Senate. To the President was given the direction of

war as the Commander-in-Chief of the Army and Navy. It was not in the contemplation of the constitution that the command of forces and the conduct of campaigns should be in charge of a council or that as to this there should be division of authority or responsibility. The prosecution of war demands in the highest degree the promptness, directness and unity of action in military operations which alone can proceed from the Executive. This exclusive power to command the army and navy and thus to direct and control campaigns exhibits not autocracy, but democracy fighting effectively through its chosen instruments and in accordance with the established organic law.

PLENARY POWER TO WAGE WAR.

While the President is Commander-in-Chief, in the Congress resides the authority "to raise and support Armies" and "to provide and maintain a Navy"; and "to make Rules for the Government and Regulation of the land and naval Forces"; and as a safeguard against military domination the power to raise and support armies is qualified by the provision that "no appropriation of Money to that Use shall be for a longer term than two Years". Otherwise this power is unlimited. The Congress is to prescribe the military organization and provide the military establishment, fix numbers, regulate equipment, afford maintenance, and for these purposes appropriate such amounts of money as it thinks necessary.

POWER TO PASS CONSCRIPTION LAWS.

Upon every citizen lies the duty of aiding in the common defence. In exercising its constitutional power to raise armies, the Congress may enforce this duty. The Congress may call anyone to service who is able to serve. The question who may be called, or in what order, is simply one for the judgment of the National Legislature. The power vested in Congress is not to raise armies simply by calling for volunteers, but to raise armies by whatever method Congress deems best, and hence must be deemed to embrace conscription. To the framers of the constitution, the draft was a familiar mode of raising armies, as it had been resorted to by the Colonies to fill up their quotas in the Revolutionary War. It is true that the proposal, in 1814, of Monroe as Secretary of War to resort to conscription was vigorously opposed as unconstitutional. But the draft was put in force both by the Union and by the Confederacy during the Civil War and its validity was

sustained by the courts in both North and South.¹ "The power of coercing the citizen", said Judge Robertson, of Virginia, in *Burroughs v. Peyton*, 16 Gratt. 470 (1864), "to render military service, is indeed a transcendent power, in the hands of any government; but so far from being inconsistent with liberty, it is essential to its preservation."

LINCOLN'S OPINION.

Permit me to quote upon this question the opinion prepared (although not published) by President Lincoln, which sets forth admirably the grounds for sustaining the power of Congress to pass a Conscription Act.

"In this case, those who desire the rebellion to succeed, and others who seek reward in a different way, are very active in accommodating us with this class of arguments. They tell us the law is unconstitutional. It is the first instance, I believe, in which the power of Congress to do a thing has ever been questioned in a case when the power is given by the Constitution in express terms. Whether a power can be implied when it is not expressed has often been the subject of controversy; but this is the first case in which the degree of effrontery has been ventured upon of denying a power which is plainly and distinctly written down in the Constitution. The Constitution declares that 'The Congress shall have power . . . to raise and support armies; but no appropriation of money to that use shall be for a longer term than two years.' The whole scope of the conscription act is 'to raise and support armies.' There is nothing else in it. . . . Do you admit that the power is given to raise and support armies, and yet insist that by this act Congress has not exercised the power in a constitutional mode? has not done the thing in the right way? Who is to judge of this? The Constitution gives Congress the power, but it does not prescribe the mode, or expressly declare who shall prescribe it. In such case Congress must prescribe the mode, or relinquish the power. There is no alternative. . . . The power is given fully, completely, unconditionally. It is not a power to raise armies if State authorities consent;

¹ See *Kneedler vs. Lane*, 5 Phila. 485; 45 Pa. St. 238; *McCall's Case*, Fed. Cas. No. 8669; *Ex parte Hill*, 38 Ala. 429; *Ex parte Bolling*, 39 Ala. 609; *Jeffers vs. Fair*, 33 Ga. 347; *Barber vs. Irwin*, 34 Ga. 28; *Parker vs. Kaughman*, 34 Ga. 136; *Gatlin vs. Walton*, 60 N. C. 333; *Ex parte Coupland*, 26 Tex. 386; *Burroughs vs. Peyton*, 57 Va. (16 Gratt.) 470; also, *Lanahan vs. Birge*, 30 Conn. 438, 443; *Matter of Spangler*, 11 Mich. 298; *Allen vs. Colby*, 47 N. H. 544; *In re Griner*, 16 Wis. 423; *Druecker vs. Salomon*, 21 Wis. 621.

nor if the men to compose the armies are entirely willing; but it is a power to raise and support armies given to Congress by the Constitution without an 'if.' . . . The principle of the draft, which simply is involuntary or enforced service, is not new. It has been practiced in all ages of the world. It was well known to the framers of our Constitution as one of the modes of raising armies, at the time they placed in that instrument the provision that 'the Congress shall have power to raise and support armies.' . . . Wherein is the peculiar hardship now? Shall we shrink from the necessary means to maintain our free government, which our grandfathers employed to establish it and our own fathers have already employed once to maintain it? Are we degenerate? Has the manhood of the race run out?"²

These are the words of Lincoln, penned in the midst of the Civil War, in which conscription was enforced, and his reasoning is conclusive. And while the question was not presented to the United States Supreme Court, the power of Congress was explicitly recognized in *Tarble's case*³ and in later opinions.⁴

CONSCIENTIOUS OBJECTORS.

The constitutional authority thus vested in Congress is not limited by any qualification arising from religious beliefs or conscientious objections. These are matters not affecting power, but policy. As Mr. Justice Harlan said in delivering the opinion of the Supreme Court in *Jacobson v. Massachusetts*,⁵ one "may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defence". It is, however, in my judgment, a sound policy on the part of Congress to provide for the discharge from the draft of conscientious objectors. Nothing, I believe, is gained for the country by over-riding the claims of conscience in such cases; but it is obviously necessary that there should be such definitions and restrictions as will prevent imposture and evasion by those who have as little conscience as they have stomach for war.

² Lincoln's Works, Vol. II, p. 388.

³ 13 Wall. 397, 408.

⁴ See *In re Grimley*, 137 U. S. 147, 153; *Jacobson vs. Massachusetts*, 197 U. S. 11, 29.

⁵ 197 U. S., p. 29.

THIRTEENTH AMENDMENT.

It is now contended in some quarters that this power, which undoubtedly Congress had, has been restricted or abolished by the Thirteenth Amendment, which was adopted after the close of the Civil War. This amendment provides that "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction." It has been said by the United States Supreme Court that the plain intention "was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude." It hits not only slavery, but peonage. But the language of the amendment was not new. It reproduced the historic words of the Ordinance of 1787 for the Government of the Northwest Territory, and its terms, construed in the light of its history and plain purpose, afford no basis whatever for the conclusion that it interfered in the slightest degree with the power of Congress to raise and support armies.

In the case of *Robertson v. Baldwin*,⁶ it was argued that the Thirteenth Amendment invalidated certain provisions of the Revised Statutes authorizing justices of the peace to issue warrants for deserting seamen. In denying the claim, the Court said: "It is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptions, such as military and naval enlistments." The soldier drafted under Act of Congress is performing the duty which he owes of aiding in the common defence, and the constitutional amendment contemplates no escape from the duty to defend and preserve the United States.

POWER OVER THE MILITIA.

The power to "raise and support armies" should not be confused with the power given to Congress "to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"; and "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

⁶ 165 U. S. 275.

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." The President is Commander-in-Chief not only of "the Army and Navy of the United States", but also "of the Militia of the several States, when called into the actual Service of the United States".

The militia, within the meaning of these provisions of the constitution, is distinct from the army of the United States. "Remember always", said Daniel Webster, "that the great principle of the Constitution on that subject is that the militia is the militia of the states, and not of the general government; and being thus the militia of the states, there is no part of the Constitution worded with greater care, and with a more scrupulous jealousy, than that which grants and limits the power of Congress over it."

In order to execute the laws of the Union, to suppress insurrection and to repel invasions, it would be necessary either to employ regular troops or to employ the militia. And the power given to Congress with respect to the militia was manifestly to make a large standing army unnecessary. But as the service of the organized militia can only be required by the National Government for the limited purposes specified in the constitution, it follows (as Attorney-General Wickersham advised President Taft⁷) that the organized militia, as such, cannot be employed for offensive warfare outside the limits of the United States.

MAY SEND ARMY ABROAD.

This, however, is apart from the power of Congress to raise and support a federal army. Congress may be content with a small standing army in ordinary times, but Congress may create and equip such army as it pleases, subject to the qualification with respect to appropriations. It can equip an army in preparation for war, and of course it may furnish whatever army is required for the prosecution of war. The organization and service of an army raised by Congress are not subject to the limitations governing its control of the militia. The power to use an army is co-extensive with the power to make war; and the army may be used wherever the war is carried on, here or elsewhere. There is no limitation upon the authority of Congress to create an army and it is for the President as Commander-in-Chief to direct the campaigns of that army wherever he may think they should be

⁷ 29 ops. Attorney-General, 322; see *Martin vs. Mott*, 12 Wheat. 19.

carried on. As Chief Justice Taney, speaking for the Supreme Court in *Fleming v. Page*,⁸ said: "As Commander-in-Chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States."

We employed our arms in Canada in the War of 1812; our troops were again sent to foreign soil in the Mexican War and in the war with Spain, and more recently have been employed in China and Mexico. There is no doubt of the constitutional authority to employ our forces on the battlefields of Europe in the war that we are now waging for the safety of the United States and to conquer an enduring peace that the liberties of free peoples throughout the world may forever be secured from the aggressions of unscrupulous military power.

POWER TO WAGE WAR SUCCESSFULLY.

The power to wage war is the power to wage war successfully. The framers of the constitution were under no illusions as to war. They had emerged from a long struggle which had taught them the weakness of a mere confederation, and they had no hope that they could hold what they had won save as they established a Union which could fight with the strength of one people under one government entrusted with the common defence. In equipping the National Government with the needed authority in war, they tolerated no limitations inconsistent with that object, as they realized that the very existence of the Nation might be at stake and that every resource of the people must be at command. Said Madison in the *Federalist*: "Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union. The powers requisite for attaining it must be effectually confided to the federal councils."⁹ And Hamilton said: "The idea of restraining the legislative authority, in the means of providing for the national defence, is one of those refinements which owe their origin to a zeal for liberty more ardent than enlightened."¹⁰ He again emphasizes the same idea in these words: "The circumstances that endanger the safety of nations are infinite, and for

⁸ 9 How., 603, 615.

⁹ *Federalist*, No. XLI. ¹⁰ *Id.*, No. XXVI.

this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defence." ¹¹

It was in this view that plenary power was given to Congress to wage war and to raise armies. It is also in the light of this conception of national exigencies that we must read subdivision 18 of Section 8 of Article I of the Constitution (following the enumeration of powers), which gives Congress the authority "to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof". It must also be remembered that it is of the essence of national power that where it exists it dominates. There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of federal power. The power of the National Government to carry on war is explicit and supreme, and the authority thus resides in Congress to make all laws which are needed for that purpose; that is, to Congress in the event of war is confided the power to enact whatever legislation is necessary to prosecute the war with vigor and success, and this power is to be exercised without impairment of the authority committed to the President as Commander-in-Chief to direct military operations.

POWER OF THE PRESIDENT.

Each of these powers, that of Congress and of the President, is the subject of a distinct grant, each is the complement of the other, and together they furnish the adequate equipment of authority for war. There is no more impressive spectacle than that of the President of the Republic in time of war when in addition to the other great powers of his office he acts in supreme command of the armed forces of the Nation and conducts its military campaigns. It was under this power that President Lincoln defended the Proclamation of Emancipation. It related to those held as slaves in the States in rebellion, and he regarded it, as it recited, as a necessary act of war within his authority as

¹¹ *Id.*, No. XXIII.

WAR POWERS UNDER THE CONSTITUTION

Commander-in-Chief. He thus expressed this point of view: "You say it is unconstitutional. I think differently. I think the Constitution invests its Commander-in-Chief with the law of war in time of war. The most that can be said — if so much — is that slaves are property. Is there — has there ever been — any question that by the law of war, property, both of enemies and friends, may be taken when needed? And is it not needed when ever taking it helps us, or hurts the enemy? Armies, the world over, destroy enemies' property when they cannot use it; and even destroy their own to keep it from the enemy."¹²

It is also to be observed that the power exercised by the President in time of war is greatly augmented, outside of his functions as Commander-in-Chief, through legislation of Congress increasing his administrative authority. War demands the highest degree of efficient organization, and Congress in the nature of things cannot prescribe many important details as it legislates for the purpose of meeting the exigencies of war. Never is adaptation of legislation to practical ends so urgently required, and hence Congress naturally in very large measure confers upon the President the authority to ascertain and determine various states of fact to which legislative measures are addressed. Further, a wide range of provisions relating to the organization and government of the army and navy which Congress might enact if it saw fit, it authorizes the President to prescribe. The principles governing the delegation of legislative power are clear, and while they are of the utmost importance when properly applied, they are not such as to make the appropriate exercise of legislative power impracticable. "The Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation."¹³ Congress cannot be permitted to abandon to others its proper legislative functions; but in time of war when legislation must be adapted to many situations of the utmost complexity, which must be dealt with effectively and promptly, there

¹² Lincoln's Works, Vol. II, p. 397.

¹³ See *Field vs. Clark*, 143 U. S. 649, 694.

is special need for flexibility and for every resource of practicality; and, of course, whether the limits of permissible delegation are in any case over-stepped always remains a judicial question. We thus not only find these great war powers conferred upon the Congress and the President, respectively, but also a vast increase of administrative authority through legislative action springing from the necessities of war.

*OTHER PROVISIONS OF THE CONSTITUTION—
TAXING POWER.*

The question remains: What may be deemed to be the force and effect in time of war of the restrictive provisions contained in the constitution with respect to the exercise of federal authority? It is manifest, at once, that the great organs of the National Government retain and perform their functions as the constitution prescribes. Senators and Representatives are qualified and chosen as provided in the constitution and the legislative power vested in the Congress must be exercised in the required manner. The President is still the constitutional Executive, elected in the manner provided and subject to the restraints imposed upon his office. The judicial power of the United States continues to be vested in one Supreme Court and such inferior courts as Congress has ordained. Again, apart from the provisions fixing the framework of the Government, there are limitations which by reason of their express terms or by necessary implication must be regarded as applicable as well in war as in peace. Thus one of the expressed objects of the power granted to Congress "to lay and collect Taxes, Duties, Imposts, and Excises" is to "provide for the common defence," and it cannot be doubted that taxes laid for this purpose, that is, to support the army and navy and to provide the means for military operations, must be laid subject to the constitutional restrictions. That is, all duties, impost and excises must be uniform throughout the United States, and direct taxes must be apportioned among the States according to population. And by the Sixteenth Amendment providing that income taxes, from whatever source derived, may be laid without apportionment among the States, these taxes fall into the great class of excise, duties and impost and are alike subject to the rule requiring geographical uniformity, a requirement operative in war as well as in peace.

TREASON.

The provisions as to treason are also clearly applicable in war: "Treason against the United States, shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort"; and "The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."

FIFTH AND SIXTH AMENDMENTS.

But what shall be said of the efficacy in time of war of the great guarantees of personal and property rights? It would be impossible on this occasion to discuss comprehensively this important subject, or even to refer to all these guarantees, but we may briefly touch upon the question in its relation to the Fifth and Sixth Amendments, viz.:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Clearly, these amendments, normally and perfectly adapted to conditions of peace, do not have the same complete and universal application in time of war. Thus the Fifth Amendment normally gives its protection to "any person". But, in war, this must yield to the undoubted national power to capture and confiscate the property of enemies. This was distinctly ruled by the Supreme Court in *Miller vs. United States*,¹⁴ a proceeding brought under the Confiscation Acts of 1861 and 1862 to confiscate shares

¹⁴ 11 Wall. 268, 304-305.

of stock owned by Miller, a Virginian, in a Michigan corporation. The court said:

"if the act of 1861, and the fifth, sixth, and seventh sections of the act of July 17, 1862, were municipal regulations only, there would be force in the objection that Congress has disregarded the restrictions of the fifth and sixth amendments of the Constitution. . . . if, on the contrary, they are an exercise of the war powers of the government, it is clear that they are not affected by the restrictions imposed by the fifth and sixth amendments. This we understand to have been conceded in the argument. 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 declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore 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 undoubted belligerent right."

MARTIAL LAW.

Again, in the place where actual military operations are being conducted, the ordinary rights of citizens must yield to paramount military necessity. This was conceded in *Milligan's* case,¹⁵ where it was said in the prevailing opinion:

"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 theatre of actual military operations, where war really 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."

A different question, however, is presented with respect to the rights of citizens, and others not enemies, in places which are outside the actual theatre of war. It was upon the question of the power of Congress to provide for the trial of citizens by military commission in such places that the justices sharply divided in the noted case of *Milligan*.¹⁶ He was a citizen of Indiana, who had been tried by a military commission at Indianapolis on a charge of aiding the enemy and conspiring against

¹⁵ 4 Wall. 2, 127. ¹⁶ 4 Wall. 2.

the Government, and had been sentenced to be hung. He was not a resident of one of the rebellious States, nor a prisoner of war, and he had not been in the military or naval service. The court was unanimous in the opinion that under the terms of the Act of Congress creating the commission it had no jurisdiction. But the majority of the Court went further and declared that Congress was without power to provide for the trial of citizens by military commissions save in the locality of actual war and when there was no access to the courts. Maintaining with eloquent emphasis the guarantees of freedom contained in the Fifth and Sixth Amendments, the majority of the Court asserted that "Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration. . . . Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war."

The minority of four Justices, led by Chief Justice Chase, while agreeing that there was no jurisdiction in *Milligan's* case under the Act of Congress, strongly insisted that Congress in time of war had the power to provide for the punishment of citizens, charged with conspiracy against the United States, by military tribunals, if it was deemed necessary for the public safety. Deducing this view from the war powers conferred by the constitution, the Chief Justice said:

"Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine to what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or security of the army or against the public safety. . . . The fact that the federal courts were open was regarded by Congress as a sufficient reason for not exercising the power; but that fact could not deprive Congress of the right to exercise it. Those courts might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avoid threatened danger, or to punish, with adequate promptitude and certainty the guilty conspirators. . . . In times of rebellion and civil war it may often happen, indeed, that judges and marshals will be in active sympathy with the rebels, and courts their most efficient allies. . . . It was for Congress to determine the question of expediency."

Professor Willoughby, in a careful review of the *Milligan* case,¹⁷ regards the doctrine of the majority as essentially sound, that the necessity justifying martial law may not be created by legislative fiat. But he suggests that the majority went too far in the absolute declaration that martial law cannot arise from "a threatened invasion," and that the mere fact that the courts are open, regardless of all other conditions, is a conclusive test. "The better doctrine," says Willoughby, "is not for the courts to attempt to determine in advance with respect to any one element what does, what does not, create a necessity for martial law, but, as in all other cases of the exercise of official authority, to test the legality of an act by its special circumstances."

Certainly, the test should not be a mere physical one, nor should substance be sacrificed to form. The majority recognized "a necessity to furnish a substitute for the civil authority," when overthrown, in order "to preserve the safety of the army and society." If this necessity actually exists it cannot be doubted that the power of the Nation is adequate to meet it, but the rights of the citizen may not be impaired by an arbitrary legislative declaration. Outside the actual theatre of war, and if, in a true sense, the administration of justice remains unobstructed, the right of the citizen to normal judicial procedure is secure.

CITIZEN'S RIGHTS OF PROPERTY.

Further, with respect to the citizen's rights of property, a distinction may be taken between the unavoidable deprivations which take place where the conflict rages, and those takings, although for military purposes, which are deliberate appropriations for which compensation must be made. As was said by the Supreme Court in *United States vs. Russell*:¹⁸

"Private property, the Constitution provides, shall not be taken for public use without just compensation. . . . Extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized or appropriated to the public use, or may even be destroyed without the consent of the owner. . . . Where such an extraordinary and unforeseen emergency occurs in the public service in time of war no doubt is entertained that the power of the government is ample to supply for the moment

¹⁷ 2 Willoughby on the Constitution, p. 1251.

¹⁸ 13 Wall. 623, 627-628.

WAR POWERS UNDER THE CONSTITUTION

the public wants in that way to the extent of the immediate public exigency, but the public danger must be immediate, imminent, and impending, and the emergency in the public service must be extreme and imperative, and such as will not admit of delay or a resort to any other source of supply. . . Such a justification may be shown, and when shown the rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the government is bound to make full compensation to the owner."

REASONABLE REGULATIONS TO INSURE SUCCESS IN WAR.

Distinct from such requisitions from individuals is the necessary regulation of the use of property to secure the successful prosecution of the war. We are witnessing a new phase of the exercise of war powers. But the applicable principle to determine the validity of such action is not new. Even in times of peace we are familiar with the principle of regulation which extends to callings "affected with a public interest". The Supreme Court, after reviewing the decisions, recently said:

"They demonstrate that a business, by circumstances and its nature, may rise from private to be a public concern and be subject, in consequence, to governmental regulation. And they demonstrate . . . that the attempts made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege conferred by the public on those affected cannot be supported. "The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation.'" ¹⁹

The extraordinary circumstances of war may bring particular business and enterprises clearly into the category of those which are affected with a public interest and which demand immediate and thorough-going public regulation. The production and distribution of foodstuffs, articles of prime necessity, those which have direct relation to military efficiency, those which are absolutely required for the support of the people during the stress of conflict, are plainly of this sort. Reasonable regulations to safeguard the resources upon which we depend for military success must be regarded as being within the powers confided to Congress to enable it to prosecute a successful war.

¹⁹ *German Alliance Insurance Co. vs. Kansas*, 233 U. S., 389, 411.

In the words of the Supreme Court: "It is also settled beyond dispute that the Constitution is not self-destructive. In other words, that the power which it confers on the one hand it does not immediately take away on the other. . . ." ²⁰ This was said in relation to the taxing power. Having been granted in express terms, the Court held it had not been taken away by the due process clause of the Fifth Amendment. As the Supreme Court put it in another case: "the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause." ²¹

Similarly, it may be said that the power has been expressly given to Congress to prosecute war, and to pass all laws which shall be necessary and proper for carrying that power into execution. That power explicitly conferred and absolutely essential to the safety of the Nation is not destroyed or impaired by any later provision of the constitution or by any one of the amendments. These may all be construed so as to avoid making the constitution self-destructive, so as to preserve the rights of the citizens from unwarrantable attack, while assuring beyond all hazard the common defence and the perpetuity of our liberties. These rest upon the preservation of the nation.

It has been said that the constitution marches. That is, there are constantly new applications of unchanged powers, and it is ascertained that in novel and complex situations, the old grants contain, in their general words and true significance, needed and adequate authority. So, also, we have a *fighting* constitution. We cannot at this time fail to appreciate the wisdom of the fathers, as under this charter, one hundred and thirty years old — the constitution of Washington — the people of the United States fight with the power of unity, — as we fight for the freedom of our children and that hereafter the sword of autocrats may never threaten the world.

²⁰ *Billings vs. United States*, 232 U. S., 261, 282.

²¹ *Brushaber vs. United States*, 240 U. S. 1, 24.